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# **Legal Concepts in John R. Commons' Legal Foundations of Capitalism: Influences, Appropriations and Context**

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## **Abstract**

Commons has a special position in institutionalism for his commitment to understanding the legal embedding of American capitalism and the relationship between the legal and economic orders. The article analyzes Commons' approach to law and characterizes his levels of analysis. Commons, notably in “Legal Foundations of Capitalism”, read certain legal writings from which he drew lessons for his own analysis, in a double movement of influence and appropriation. He drew on Hohfeld's theory of legal rights and some of his critics to develop his theory of transactions. He also carefully studied the jurisprudence of the US Supreme Court, to develop certain key concepts (going concern, futurity, intangible property, goodwill). Finally, Commons' institutionalist political economy has affinities with the Legal Realist movement.

**Keywords:** Commons – Institutionalism – Law – Hohfeld – Case-Law – Legal Realism

Commons occupies a special position in institutionalism because of his commitment to understanding the legal embeddedness of American capitalism and the relationship between the legal and the economic orders. He claimed that the Supreme Court should be regarded as ‘the highest authority in American political economy’. The backbone of his work is based on the search of a connexion between law and economics, the unity of which he sought in a theory of scarcity. Above all, however, his aim was to understand the legal forces driving American capitalism and, from a pragmatic standpoint, to move towards ‘reasonable’ regulation, i.e. regulation acceptable to the Supreme Court that was reluctant at the time to accept the constitutionality of laws prefiguring the interventionist state of the New Deal (da COSTA 2010, DUXBURY 1995, RUTHERFORD 2006).

The place of law in *Legal Foundations of Capitalism* (henceforth LFC) is therefore essential: Commons “depicts the place of law, and the role of courts, in the political economy” (FRERICHS 2024, 39). Beyond LFC, Commons continued to devote a great deal of attention to the law: he devoted an article to it entitled ‘Law and Economics’ in 1925, and legal aspects, although less important than in LFC, were nevertheless present in *Institutional Economics* (henceforth IE), published in 1934.

The article aims to clarify the way in which Commons took hold of law and legal theories and, more specifically, to characterize three levels of analysis at which he situated himself:

- a) Commons drew lessons from legal scholars for his own analysis, in a twofold process of influence and appropriation (1).
- b) Commons studied the jurisprudence of the Supreme Court, to identify the practical meanings of legal concepts and, on this basis, to construct certain key concepts of his institutionalist political economy (2).
- c) Finally, there are affinities between Commons’ institutionalism with the Legal Realist movement (3).

# **1. Readings and appropriations of Wesley Hohfeld's conceptions of legal rights: from legal analysis to economic analysis.**

Commons' analytical project is neatly summed up in the foreword to LFC: « ... we tried to reconcile the economists from Quesnay to Cassel with the lawyers from Coke to Taft » ; Commons also thanks two law professors for their comments on the work in progress. The first, Arthur L. Corbin (of the Yale Law Faculty) was a major legal scholar of the time, close to the Legal Realism and author of legal treatises that are still a reference today; the second is a minor legal scholar: William H. Page, of the Wisconsin School of Law.

## **1.1. The place of legal scholars in LFC**

Commons' approach was not the one of a legal theorist. His ambition was not to contribute to legal science, but rather to characterize the legal foundations of the economic order. Particularly in Chapter IV - Transactions of LFC, he consulted several legal analysis and concepts, some of which he appropriated and then reformulated in his own theoretical and analytical system. In other words, as Coutu and Kirat (2011) have shown for the Weberian concept of ideal-type, Commons appropriates concepts that he then “digests” in his own system.

Wesley Hohfeld, a professor of law who had a brief career because he did not reach the age of 40, published a fundamental article (in two parts, 1913 and 1917) which Commons used to produce his original analysis of authorized and authoritative transactions in chapter IV; Commons did not cease to rework Hohfeld's conceptions, since we also find a trace of them in IE ten years later.

Before delving into this subject, it is worth measuring the extent of the references to jurists in LFC, particularly in chapter IV (Table 1).

	<b>Frequency of occurrences in LFC; in chapter IV-Transactions</b>
<b>Wesley N. Hohfeld (1879-1918)</b> , Yale Law School Author of " <i>Some Fundamental Legal Conceptions as Applied in Judicial Reasoning</i> ", Yale L. J. 1913 & 1917 The Realists consider him a precursor	Author mainly discussed by JRC
<b>Albert Kocourek (1875-1952)</b> , Northwestern University School of Law. Author of: " <i>Jural relations</i> " (1927) ; " <i>Introduction to the science of law</i> " (1930) and a critique of Hohfeld: <i>The Hohfeld System of Fundamental Legal Concepts</i> (1920)	Strong presence in Chapter IV but less weight than Hohfeld
<b>Arthur L. Corbin (1874-1967)</b> , Yale Law School Author of the famous <i>Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contracts Law</i> , 1950, 8 vol. One of the founders of the American Law Institute; rapporteur of the Restatement (Second) of Contracts. Karl Llewellyn was his student. Prominent figure of Legal Realism	1 occurrence in LFC, chapter IV
<b>John W. Salmond (Sir) (1862-1924)</b> , Victoria University College à Wellington (N.Z.) ; King's Council ; New Zeland Supreme Court Associate Justice (1920) Author of de: <i>Jurisprudence or the Theory of the Law</i> (1902) ; <i>The Law of Torts</i> (1907) ; <i>Principles of the Law of Contracts</i> (1927, with P. H. Winfield)	5 occurrences in LFC, 4 in chapter IV
<b>Oliver W. Holmes (1841-1935)</b> , juge à la Cour suprême des Etats-Unis (1902-1932) Major figure of Legal Realism Citation par JRC d'un passage de « Privilege, Malice, and Intent » Harvard L. R. 1894 (page 73)	7 occurrences in LFC of which 2 in lchapter IV
<b>Henry Taylor Terry (1847-1936)</b> , Université impériale de Tokyo. Author of de: <i>Principles of Anglo-American Law</i> (1884); <i>The First Principles of Law</i>	4 occurrences, all in chapter IV
<b>Roscoe Pound (1870-1964)</b> , Dean, Harvard Law School Promoter of Sociological Jurisprudence.	5 occurrences in LFC, of which 2 in chapter IV.

**Table 1 - Legal scholars cited by Commons in LFC (source: author)**

Of the seven jurists cited by Commons, excluding the Supreme Court justices cited in other chapters (notably the chapter III), two are of major importance: Hohfeld, who developed a model on which Commons would base his own understanding, drawing in part on Kocourek's critique of Hohfeld's model. It should be noted that jurists who were critical of legal formalism and actors in a critical revival of legal science on bases with which Commons could not but agree, are relatively rarely cited: Holmes is cited twice but only once in extenso, Pound twice in chapter IV, and Corbin is cited only once but *in extenso*. The jurists most often cited are classic law professors: Salmond and Terry. They are cited for their technical concepts, not for their theoretical orientation, even though they too referred to Hohfeld's framework.

## 1.2. Hohfeld's interpretation of legal rights

Hohfeld published a fundamental article in two parts, the first in 1913 and the second in 1917, in the Yale Law Review: 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning'. He developed an original approach to the understanding of rights in private law situations. The methodology he used is that of analytical jurisprudence, along the lines opened up by Bentham and Austin.

It is important to stress at the outset that Hohfeld's conceptions had a very wide reach among critical legal scholars and institutionalist economists. Hohfeld himself did not claim a critical stance, but his analytical study has been interpreted by non-orthodox jurists (notably Duncan Kennedy and Critical Legal Studies) as a critique of the liberal and absolutist conception of the right to property giving its holder omnipotence. A similar interpretation was made, long before the Critical Legal Studies of the 1970s-80s, by the Legal Realism movement in the inter-war period, who made Hohfeld one of their own (Horwitz, 1992 : 151-156), even though he had no affinity with the Realists (FRYDRYCH 2018), contrary to Fiorito's (2010) assertion that he was a Realist insofar as he wrote about him: ‘.. an American legal realist such as Hohfeld.’ (FIORITO 2010, 278).

What the Realists have retained, because it echoed their own visions of property, is a social, relational conception, in which property is a matter of power and antagonistic interests. It brings into play social interdependencies and divergent interests, on the basis of which a balance of interests must be struck. What appealed to the Realists and then to Critical Legal Studies in Hohfeld's conception, in terms of a complex of dimensions of legal rights, with opposites and correlatives, was that law raises questions of equality, social justice and political preferences. To some extent, it could be said with Frydrych (2018) that while Hohfeld was a long way from Realism, the Realists were mostly ‘Hohfeldised’.

However, Hohfeld's affiliation with Realism is challenged by Nyquist (2017), who distinguishes between two movements that have in common a critique of the Classical Legal Thought but are clearly separate: the Progressives and the Realists. The former (Pound, Brandeis, Hohfeld, Cardozo) had challenged the individualism of private law and its failure to take account of social interest and public policy; they also argued that the rigidity of the classification of rules should be overcome using standards. The latter (Arnold, Cohen, Cook, Frank, Fuller, Green, Llewellyn, Moore, Oliphant, Yntema) were more radical, and Progressives critics: they were highly skeptical of rules and believed that the law is unpredictable.

To return to Hohfeld's method, contrary to a widespread opinion, his analysis is not a total abstraction, as Commons has explicitly acknowledged (see below, 1.3.4.). It is certainly analytical (WESTEN 2018), but it is not abstract from the outset. In fact, the basis on which

he constructed a framework for understanding rights are definitions of concepts given by American judges; Hohfeld started from these definitions, which therefore come from judicial practice, in order to abstract general forms of legal relations/situations with the aim of 'aiding in the understanding and in the solution of practical, every-day problems of the law', and it is thus not a matter of philosophical questioning (HOHFELD 1914, 20).

This observation is confirmed by Cook in an article published after Hohfeld's death, concerning his analytical jurisprudence: « fundamental legal conceptions not in the abstract, but used concretely in the solving of the practical problems which arise in the every-day work of lawyer and judge” (Cook, 1919: 723). Cook also points out that the concepts of Hohfeld matrixes are drawn from « many examples from the law of contracts, torts, agency, property, etc., showing how the courts are constantly confronted by the necessity of distinguishing between the eight concepts and are all too often confused by the lack of clear concepts and precise terminology” (COOK 1919, 729). Hohfeld's project was thus to provide greater clarity in judicial concepts.

Among the case law reviewed by Hohfeld, two examples of definitions in court rulings are worth noting (HOHFELD 1914, 30-31):

- “Mr. Justice Strong in *People v. Dikeman* (1852): “The word 'right' is defined by lexicographers to denote, among other things, property, interest, power, prerogative, immunity, privilege (Walker's Dict. word 'Right'). In law it is most frequently applied to property in its restricted sense, but it is often used to designate power, prerogative, and privilege.”
- Mr. Justice Jackson, in *United States v. Patrick* (1893): “The words 'right' or 'privilege' have, of course, a variety of meanings, according to the connection or context in which they are used. Their definition, as given by standard lexicographers, include 'that which one has a legal claim to do,' 'legal power,' authority, 'immunity granted by authority,' 'the investiture with special or peculiar rights.’”

Nyquist (2017) summarizes the meanings of the word 'right' according to Hohfeld as follows: « the word “right” is used in four different ways. At times it means a person has an effective claim against another. At other times, it means a person is not subject to an effective claim by

another. A third possible meaning is that “right” means a person has an ability to change a legal relation of another. At other times, the word “right” means a person not subject to having a legal relation changed by the sole act of another. » (NYQUIST 2017, 792). In Hohfeld's language, these four meanings correspond to ‘right’, ‘privilege’, ‘power’, ‘Immunity’.

Hohfeld takes up these various terms from judicial practice (right, privilege, power, immunity) and sets out to rationalize them in a reading grid that emphasizes the fact that the concept of right is not a simple concept, that it is far more complex than the absolutist conception of property (in Blackstone's sense) envisages, and that it refers to a number of dimensions. He organizes these different dimensions, which make up what will later be referred to as a ‘bundle of rights’ (Orsi, 2014), according to two criteria: legal opposites (jural opposites) and legal correlatives (jural correlative). (table 2).

Jural opposites	right	privilege	power	immunity
	no-right	duty	disability	liability
Jural correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability

**Table 2 - Hohfeld's analytical framework**

This framework can be illustrated by the legal relationship between two private individuals: X and Y.

The opposites express the fact that X's right is the opposite of Y's absence of right; that X's privilege to enjoy the right is the opposite of Y's duty; that X's power is the opposite of Y's incapacity; finally, when X's right is recognized by the State, Y is constrained, subject to the exercise of X's right.

The correlatives show two sides of the relationship between X and Y. X's right has as its corollary an obligation weighing on Y; X's privilege, i.e. the prerogative of the X's right, has as its corollary the absence of a right for Y; X's power submits Y to its exercise; X's immunity is also Y's disability.

### 1.3. Interpretation and integration into the Commons analytical system

Commons carefully studied Hohfeld's proposals and reconstructed, through numerous variations, his own system for Authorized transactions and Authoritative transactions, drawing on part of the critical analysis that Albert Kocourek (1920), had formulated towards Hohfeld's proposals.

It is *a priori* surprising that Commons relied on Hohfeld to analyze transactions, insofar as their methodological orientations are radically different. Commons thus had an ambivalent relationship with Hohfeld's proposals: at once a source of inspiration and a source of criticism. What may seem paradoxical at first glance is that Commons, marked by pragmatism and a desire to understand the economic functions of law, appropriated a strictly analytical approach as developed by Hohfeld. However, as we shall see below, Commons was careful to separate 'analytical jurisprudence' from 'functional jurisprudence', the latter being defended by Commons whereas Hohfeld can undoubtedly be classified in the former.

Furthermore, Hohfeld did not consider economic relations, nor the state and sovereignty, which are at the heart of the Commonsian analysis of transactions. It should be noted that Commons uses Hohfeld's approach in chapter IV of *Legal Foundations of Capitalism*, which is devoted to 'transactions'. Although in IE Commons further extends his interpretations of Hohfeld, the analysis that follows focuses exclusively on chapter IV. It should be said at the outset that Commons proceeded to partition Hohfeld's table, the left-hand side being applied to authorized transactions and the right-hand side to authoritative transactions (table 3).

Jural opposites	right	privilege	power	immunity
	no-right	duty	disability	liability
Jural correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability
<i>J.R. Commons</i>	<i>Usage/adaptation for authorized transactions</i>		<i>Usage/adaptation for authoritative transactions</i>	

**Table 3 - The Hohfeld framework and the Commonsian partition**

Commons presents the Hohfeld model, reaffirming that it is based on the trial court's point of view (see sub-section 1.4, below).

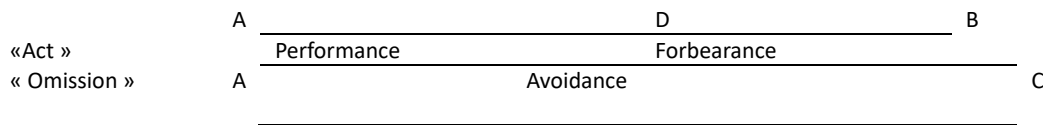
We shall consider Commons' interpretation/appropriation of Hohfeld's analytical framework first for authorised transactions (3.1.) and then for authoritative transactions (3.2.). We will then examine Commons' proposals on analytical and functional methods and their relationship with Hohfeld's conceptions (3.3.) before pointing out some ambivalences (3.4.).

### **1.3.1. Authorized Transactions**

As with the Authoritative Transactions, Commons adapts Hohfeld's model while historicizing the major phases of institutional development in England and the United States. This historical dimension is very present in chapter IV, even if it may be considered a somewhat rudimentary one.

Before considering his interpretation of Hohfeld, it is worth contextualizing it in the light of the analysis that precedes the reference to this jurist. In chapter IV, Commons begins with a general discussion of the theory of action and behavior. He rejects the binary terms derived from Locke, such as: to act/not to act; to choose/not to choose... For Commons, action, choices and transactions are volitional. They involve will, and more or less significant degrees of volition. It is therefore appropriate to understand them in terms of quantity rather than quality, and thus to gauge the extent of the limiting factors in transactions.

Commons then presents his analysis of the three constituent dimensions of transactions. From what he calls a 'physical' point of view, a transaction is a conjunction of three dimensions: performance, avoidance and forbearance. The combination of these three dimensions means that when party X enters a transaction with Y, each party expects the other to perform. As soon as X and Y enter into a relationship, they forgo alternative transactions with X' and Y'. This dimension of opportunity cost is expressed by the term 'avoidance'. Finally, the capacities of X and Y are not without limits: the State, the law, the sovereign, in short a public authority, places limits on the power of at least one transactor, whether it be a creditor, an employer, a lessor, etc. Such a limit on the will in action is called forbearance (Figure 1). We shall see later how important this notion of a limit on the 'quantity' of will in action in authorized transactions is.



**Figure 1 – The three dimensions des transactions according to Commons (*in LFC, 1924, p. 78*)**

This means that in absolute terms the power of a transactor is AB, but his power is limited to AD. DB is then a forbearance. Transactors abstain from an alternative transaction AC (avoidance).

As Kröner (1930) points out, the boundary between performance and forbearance is a question of delimiting rights. In effect, the Law limiting the right of one party (AD rather than AB) imposes on him a ‘non-right’ corresponding to forbearance, which in correlation gives the other party a right equivalent to it, and an exposure in reciprocal of the right of the first party. It is in the systematization of these reciprocal and correlative dimensions of transactions that Commons operates, starting from Hohfeld's framework.

In Hohfeld's framework, the upper part (opposites) proposes binary oppositions. Commons, on the other hand, proposes an approach based on quantities, on dosages, between the different dimensions (right/ duty, privilege, etc.), hence on limits rather than opposites. In this respect, Commons takes up one of Kocourek's critical arguments against Hohfeld's system, which, in his view, was not very rigorous in terms of terminology: Hohfeld's ‘opposites’ are more like contraries, yet ‘the scope of “contraries” as applied to jural concepts is very limited’ (KOCOUREK 1920, 8).

Going further than Hohfeld, Commons argues that transactions must be placed in a complex social world, with an authority that correlates rights, duties, etc. and at the same time renders them equivalent. Otherwise, we have a state of nature, as in Figure 3 of LFC, where the absolute rights of the dominant are not correlated with the duties/non-rights of the dominated. Throughout history, authority has emanated from natural law and religion, and then in modern societies from the authorities of the various going concerns: the state, the manager.

Commons amends Hohfeld's grid by integrating what he presents as ‘external limits’ and ‘internal limits’ in the course of transactions (Figures VI and following): ‘external limits to

the transaction' (opportunity and power) and 'internal limits' where right-duty ends and no-right--no duty begins (LFC : 93).

-----Correlatives -----

Limits	Right	Opportunity		Duty	
		Power	B		B'
	No-Right -> <b>Exposure</b> , fig 9 (in LFC)		S	S'	No-duty -> <b>Privilege</b> , fig. 7 (in LFC)
					-> <b>Liberty</b> , fig. 8 (in LFC)

**Table 4 - Lexical evolution, from figures VI to IX in JRC's analysis of authorized transactions** (changes introduced by JRC are shown in bold). Source: author, based on Commons, LFC, 1924.

Table 4 highlights the lexical changes made by Commons:

- a) "No-duty" is first replaced by "privilege". For Commons, "privilege" is equivalent to "immunity" in the sense given to it by Hohfeld: a limit placed by authority on constraint, it is therefore 'authorized behavior', in other words a liberty. Commons gives it the two meanings of the post-Slaughterhouse jurisprudence: liberty does not consist in unconstrained choice, rather it is the liberty of choice of opportunities within a given socio-economic framework with working rules of the State or other going concern that tells individuals what they can do with the protection of the concern against other persons.
- b) "No-right" is replaced by "exposure". Commons then discussed the "no-right" case. Hohfeld takes the view that it refers to an absence of rights. Commons, with Kocourek, replied: it could be a right denied, not admitted, or a limit on the amount of behavior claimed as a right. The first case is admissible in a structure of absolute rights and in a state of nature. The second meaning (in terms of limits) concerns the

situation where a right that exists positively in real transactions is limited to a certain point.

Figure 9 of LFC (not reproduced here) summarizes Commons' own analysis. For him, the notion of exposure means that as soon as a party to a transaction receives legal recognition of a right that he claims, this attribution is not without a limit. It is this restriction that is conveyed by exposure, which is thus the cause of non-compensable damage. Correlatively, it is a liberty for the other party.

### **1.3.2. *Authoritative Transactions***

To analyze these transactions, Commons relies on the right-hand side of Hohfeld's model: the concepts of power, disability, liability and immunity, which he rearranges. This raises the question of authority, sovereignty (or collective power) and the relationship between public and private law.

As with authorized transactions, Commons is proceeding in a step-by-step approach with reference to political and institutional history. In the beginning was the absolute power of William the Conqueror, king and owner of the kingdom, while the dominated subjects had only limited rights over the land, in a relationship between subjects and tenants.

The *Magna Carta* of 1215 was imposed by the Barons on King John. For Commons, it embodied the beginnings of constitutional government, placing limits on royal power (disability and, this time, immunity for the Barons). Commons then referred to the Act of Settlement of 1700, which introduced several new aspects into the conditions for exercising power and government: firstly, the Act established the two persons of the King: as a sovereign on the one hand (the Crown), and as a citizen on the other. Secondly, it established the separation between property and sovereignty. Thirdly, it was an important step in the development of parliamentarianism. Finally, according to Commons, it established a delegation of power from the King to judges and civil servants. Ultimately, the Act of Settlement instituted a system of checks and balances that placed limits on the powers of officials and strengthened the rights of citizens.

Commons emphasizes that officials now have reciprocal relationships with each other; citizens take advantage of these reciprocal relationships between officials to take part in sovereignty and thus involve ‘collective power’ in the realization of their rights and liberties (correlatives to the duties and exposures of others).

He also points out that, by having the possibility of taking legal action against officials (within the framework of constitutional law, which places citizens on the same level in the same process of law), citizens participate in sovereignty. Commons systematizes his historical analyses in a matrix of relations between the state and the citizen (Figure XIII). Citizens obtain either negative immunity against official acts, or positive power, which enables them to ask the authorities for assistance in carrying out their will: executing a contract, transferring title to property, executing a will, etc. Figure XIII of LFC shows that citizens have a certain amount of power vis-à-vis the authorities, whether they perform, abstain or avoid, and this power is greater or lesser in relation to the correlative liability of officials (see Table 5)

-----Correlatives -----

Reciprocals and limites	<b>Official</b>		<b>Citizen</b>
	Power		Liability
	Disability	B B'	Immunity
	Immunity		Disability
	Liability	S S'	Power

**Table 5 :-Figure XIII – Authoritative Transactions according to Commons (LFC :106)**

Finally, it should be stressed, as Commons does, that there is a major difference with authorized transactions: in authoritative transactions, there is no opportunity for alternative choice once the Superior has decided; there is no bargaining between citizens and officials, whose relationship is one of command and obedience. Commons points out that there is nevertheless a specific form of bargaining limited to the context of the due process of law.

### 1. 3. Ambivalences

Commons showed a certain ambivalence towards Hohfeld's ideas: he adopted his analytic model, his conception of legal situations, but distanced himself from Hohfeld while adapting his model and adopting some of Kocourek's criticisms of Hohfeld's conceptions. In Commons' mind, then, there is a subtle balance between adherence and rejection

Commons praise Hohfeld for launching the scientific discussion on the fundamental nature of legal concepts. He devotes a very long footnote to a listing of all the legal scholars who have analyzed and discussed Hohfeld's conceptions.<sup>1</sup>. According to Commons, these discussions can be summed up in three points of view concerning the analysis, terminology and classification of legal relationships (LFC: 91-92) :

1. *The point of view of the legal practitioner* in a position to give advice to the client before a trial court. This leads us to raise the following questions: Have the facts of the transaction been established? If so, do specific rights and duties apply? Have the parties reached an agreement? Will the court give the right to a party? This is how Commons characterizes Hohfeld's approach, which he associates with the 'point of view of the court' and ultimately with a specifically individualistic and pragmatic approach.
2. *A logical, mathematical or syllogistical approach to the relationships between legal concepts*, without any reference to concrete cases. This is the point of view of the abstract individualism or dialectic of a logician, attentive to the search for possible contradictions between legal concepts. This is how Commons describes Kocourek's approach in his critical discussion of Hohfeld. Kocourek considers that it is a mistake to oppose right (positive) to no-right (negative), i.e. to reason in a binary rather than a dialectical way. It is less a question of opposing a 'yes' **or** a 'no' than of considering the possibility of a simultaneity of 'yes' **and** 'no'.

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<sup>1</sup> This is note no. 1 on page 91 of LFC..

3. *The point of view of a supreme court, a legislature or an economist* who has to take into account questions of value and economics, with a series of questions such as: what will be the economic or social consequences of a particular legal relationship created by a particular rule of conduct? What is the public purpose underlying the legal rule? What are the quantitative limits to the powers and resources of the parties and the nation, etc.? This is the point of view of Commons, that of the working rules of the going concerns, and therefore of the socio-economic conceptions of the economist or the Supreme Court.

Commons paid a great deal of attention to Kocourek's criticism of Hohfeld; he even seemed to agree with it quite often. However, this does not mean that he rejects Hohfeld's conceptions. Rather, he seeks to establish a compromise between the two by developing his own point of view, which offers a way out of the dead ends to which Hohfeld's and Kocourek's systems lead. It is actually on the basis of the criticisms formulated by Kocourek that Commons saves Hohfeld, in a way, by replacing Hohfeld's 'indeterminate' 'opposites' with the 'limits' of a quantitative nature that we mentioned in relation to authorized transactions; Commons adds external limits (power and opportunities) and internal limits (on the degree of power and choice of opportunities permitted or required).

## **2. Study and interpretation of Supreme Court rulings**

Commons called the Supreme Court 'the first authoritative faculty of political economy' (LFC : 7). He carefully analyzed and proposed his interpretation of Supreme Court decisions in chapter II of LFC, entitled Property, Liberty and Value, particularly in section 1 devoted to Use-Value and Exchange Value.<sup>2</sup>

It was on the basis of the decisions and the evolving meaning of the concepts of liberty and, above all, property that Commons developed his concepts of futurity, going concern,

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<sup>2</sup> Note that Commons' analysis of the Supreme court rulings is disconnected from the hofeldian framework. KLAMMER and SCORSONE (2024) connect the two dimensions.

incorporeal property, intangible property and goodwill. So there is legal material at the source of the fundamental Commonsian concepts.

## 2. 1. Supreme Court Rulings

Before going into more detail on the analysis of case law, it is important to establish four notions that Commons evokes:

- a) *Eminent domain*, which broadly corresponds to expropriation in the public interest, with compensation offered to the person expropriated.
- b) *Police power*, which designates a power of general administration, the negative economic consequences of which for certain agents are not compensable.
- c) The 13th Amendment to the Constitution, enacted in 1865 at the end of the American Civil War, which prohibits slavery and involuntary servitude (except as a criminal sanction).<sup>3</sup>.
- d) The 14th Amendment, enacted in 1868, section 1 in which two provisions are essential: the first concerns the privileges or immunities of the citizens of the United States ('privileges and immunities clause'); the second concerns the need for a fair trial if a State deprives a person of his or her 'life, liberty or property' without due process ('due process clause').

Commons devoted a great deal of attention to the *Slaughterhouse* decision issued by the Supreme Court in 1872. His attention was drawn to this decision because the Court interpreted for the first time the words 'property' and 'liberty' which appeared in the 14th amendment published four years earlier. Factually, the case concerned an action by the butchers of the city of New Orleans against a decision taken by the State of Louisiana, for health reasons, to install a slaughterhouse outside the city, which had been given a monopoly

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<sup>3</sup> section 1 – "Neither slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction".

on the slaughter of animals (the Crescent City Livestock Landing and Slaughterhouse Company). Butchers were no longer allowed to slaughter animals in their shops; they had to pay for the monopoly slaughterhouse. The butchers took the case to the state courts before it reached the Supreme Court, which was seized on the basis of the butchers' claim that the Louisiana law deprived them of their property and liberty without due process, placed them in a situation of servitude prohibited by the 13th Amendment, infringed the “privileges and immunities” granted to citizens of the United States.

This decision was handed down by a majority of 5 judges out of 9. In legal terms, it interprets the Privileges and Immunities Clause, which according to the interpretation of the supreme court differentiates between two levels of citizenship: federal and state. The clause in question certainly protects the ‘privileges and immunities’ of American citizens against interference by state action. However, the majority of the Court considered that the clause did not prohibit the states from infringing the ‘privileges and immunities of citizens of the state. In short, the Slaughterhouse decision does not give the federal government the power to guarantee civil rights and affirms the prerogatives of the states.

Commons does not, of course, focus on legal analysis per se. He interprets the opinions of the judges, whether they belong to the majority or the minority, in explicit disagreement with the decision, as shown by their dissenting opinions. Justice Miller, writing for the five-judge majority, stated that the challenged statute:

- is not a deprivation of liberty within the meaning of the 14th Amendment, which protects the freedom not to be enslaved, and does not affect economic freedom, i.e. the freedom to buy and sell.
- This is not an infringement of property, because the 14th amendment must be understood in the common law sense: the possession of physical things for personal use. According to Commons' analysis, the concept here is one of property as use value.

Ultimately, the majority considers that the regulation put in place by the legislature of Louisiana by virtue of its police power is not a taking of property.

Commons then reviews the three dissenting opinions, which all agree that the monopoly imposed by the Louisiana law unlawfully deprives butchers of their property and liberty.

- Justice Bradley states that liberty must also be understood as the right to choose one's occupation, which is then itself property.
- Justice Field would have wished the Court to admit that economic coercion should be part of the concept of servitude.
- Justice Swayne considers that: "*Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection.*"

Commons concludes from Justice Swayne's position that he "defined property as the exchange-value of one's ability to work, and liberty as the right to realize that exchange-value on the labor market." (LFC:13).

Four years later, in 1876, in *Munn v. Illinois*, the majority of the Supreme Court reiterated the position adopted in *Slaughterhouse*. *Munn* involved a challenge to the reduction of rates charged by a warehouse company by the State of Illinois. When a state reduces the rates of a warehouse company, the subsequent reductions in the exchange value of the business are not a deprivation of property within the meaning of the 14th Amendment: the property has not been taken because the owner has not been deprived of his titles and possessions. According to Commons, *Munn* confirms the analysis of property as use value (LFC:14-15)

The *Minnesota Case Rate* decision in 1890 marked a reversal in economic conceptions of property. It was confirmed by a subsequent decision (*Allgeyer*). In *Minnesota Case Rate*, which concerned a challenge to the regulation of rail transport rates, the Supreme Court adopted the concept of property defended by the three dissenting judges in *Slaughterhouse*: property as exchange value. Commons believed that property became the 'expected earning power' of things owned and that liberty to access the market became essential. In 1897, the *Allgeyer* decision enshrined economic freedom as conceived by the dissenting judges at *Slaughterhouse*: "*acquiring, holding, and selling property is an essential part of liberty and property as guaranteed by the Fourteenth Amendment*".

Finally, the *National Telephone News* decision (1902) gives an explicit definition of property in terms of marketable assets.

## **2.2 The implications of the study of Supreme Court rulings for Commons' analytical system**

At the outset of his study of Supreme Court decisions, Commons reviewed judicial conceptions. They reveal that the concept of property can have two meanings: a) a classic common law meaning from the *Slaughterhouse and Munn* era: any tangible thing possessed; b) a new meaning: any activity anticipated with respect to the thing possessed, including the activities of selling, using and disposing of the thing (*Munn, Allgeyer*). In Commons' terms, these two conceptions boil down to a difference between:

- use-value property, i.e. physical things,
- property as exchange value, i.e. marketable assets.

The courts are henceforth interested in exchange value. Yet exchange value is not tangible, it is behavioristic and has a future dimension. It is the expected value that can be obtained in exchange for the goods on the market where the thing can be sold. It is therefore intangible, since it refers to debt, credit and mortgage relationships, i.e. 'promises of payment' (« encumbrances »). Over time, this exchange value has become an intangible property, a type of property whose value depends on the right of access to a market, to goods, to labor, to money, etc., but above all refers to notions of reputation and goodwill, all of which characterize modern transactions.<sup>4</sup> Intangible property also refers to property as an opportunity, i.e. accessibility to the market.

In the remainder of his analysis, Commons connects law, futurity and going concern. The new case law, subsequent to *Slaughterhouse and Munn*, conveys the idea of expected future

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<sup>4</sup> LFC:19 "...in short, intangible property is anything that enables one to obtain from others an income in the process of buying and selling, borrowing and lending, hiring and hiring out, renting and leasing, in any of the transactions of modern business". p. 27: "Intangible property is opportunity. Incorporeal property is debt".

behavior. It therefore incorporates a notion of futurity, of ‘liberty of expected activity in acquiring, using and disposing of things’ and ultimately of property understood in terms of ‘behavior expected with regard to the thing’. (LFC:21-22). Ultimately, Commons extends his analysis on the question of value: “value resides in the expected will-in-action, and the expected will-in-action is its expected actions and transactions” (LFC: 22) and leads to the concept of going concern. The latter has two dimensions: that of a productive organization that produces use value, and that of a going business articulated around exchange values (LFC: 22).

### **3. The context: affinities between the institutional economics of Commons and legal realism**

Developments in critical legal thought from the 1890s to the 1940s testify to the acuteness of critical debates on legal science. It is important to clarify the contours and content of this critical legal thought.

#### **3.1. Critical legal thought in the USA: a brief overview**

American legal thought in the first decades of the 20th century was marked by the vitality of the American version of the 19th-century French ‘method of exegesis’. Critics of this ‘classical legal thought’ set out to deconstruct the dominant formalism and conceptualism typical of what Roscoe Pound called a ‘mechanical jurisprudence’: an attachment to deduction and the assimilation of law to rules and principles. Criticism was directed at both the method of legal science and the substance of law (Kennedy and Belleau, 2000). Criticism of method led to the denunciation of the abuse of deduction in legal reasoning, whereas criticism of substance contained the idea that, by taking account of social realities “we would succeed in finding a unity, an organic element that could constitute the basis for the reconstruction [of the substance of law], ... a foundation that lay in the transformation of the ‘nature’ of modern societies through industrialization, urbanization, bureaucratization, marketisation and globalization” (KENNEDY and BELLEAU 2000, 299-300).

Critical legal thought encompasses two movements: Sociological Jurisprudence<sup>5</sup> and Legal Realism. They have a number of features in common but differ in some respects. According to DUPRET (2006), sociological jurisprudence refers to a sociological theory of law and Legal Realism to a theory of law ‘in context and in action’. The former, advocated by Pound, is based on the idea that common law must respond to economic, social and cultural changes and therefore to changing social needs. These changes generate conflicts of interest, which the courts must balance, i.e. adjust the content of the law to the new economic and social conditions.

As to the Legal Realism movement, it is difficult to give a precise definition, but it is possible to identify its common features. First, it is a sensitivity to the way in which judges actually make their decisions. Justice Holmes' adage that “we decide, then we deduce” expresses this sensitivity: the judge, before making and giving reasons for his decision, knows very early on how he will settle the case. Legal reasoning is therefore an apparently rational way of presenting a decision that involves extra-legal factors (personal preferences, sense of justice, morality, etc.). From this point of view, realism focused above all on the study of the judge's reasons.

Realists were highly skeptical about legal normativism, the substantializing of law and the supposed axiological neutrality of judicial reason. The Supreme Court's vetoes, in the name of the Constitution, of state laws designed to regulate labor relations or rail fares were seen as not axiologically neutral, as the Court's resistance to the challenges to freedom of contract and laissez-faire on the part of interventionist states (FRIEDMAN 2002).

Realism has been influenced by the philosophy of pragmatism, which assigns to the method of legal science the task of extracting, from experience, the practical meaning of legal statements and their economic and social consequences. Pragmatist logic "is not a deduction of certainties from theoretical principles such as the syllogism, but a study of probabilities. Logic is a theory of inquiry into probable consequences..." (FRIEDMANN 1960, 248).

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<sup>5</sup> Which Nyquist (2017) associates with the ideas of the Progressive Era. See *supra*, section 1.

### 3.2. Affinities and proximities between Legal Realists and Commons

Commons's intellectual links with the Realists can be identified by several indicators: firstly, the sharing of pragmatism with certain major Legal Realists, such as Holmes; secondly, the analytical and theoretical similarities between Commons and Realism, which legal theorists such as TREVES (1995), STONE (2008) and FRERICHS (2024) highlight. The latter considers that “Commons visibly builds on American legal realism” (FRERICHS 2024, 41).

The method of pragmatism involves paying attention to the empirical effects of law and the practical meaning of legal utterances and concepts. This is a focus common to realists and institutionalists, which DUXBURY (1995) has noted in the following terms: realists were in fact applying institutional economics to the law when they insisted that ‘economic freedom is determined not by natural laws of the market but by the manner in which legal institutions function’ (DUXBURY 1995, 325).

For the Realists, as for Commons, while the law obviously comprises rules and norms, it also embraces something more: practices, both judicial and extrajudicial, on the part of the professionals and users of the law. This conception echoes the importance that Commons attached to administration (TAKAHASHI 2015; BAZZOLI & DUTRAIVE, 2024): « “Administration” (...) [as] the meeting place of the social philosophies and daily life of the people is the experimental and constructive field of the social sciences ». (COMMONS 1996 [1939], 502)

It should be noted that Commons and Llewellyn engaged in substantial intellectual exchanges.

Firstly, Llewellyn has published a review of LFC, in which his comments are very positive: When Llewellyn wrote that “legal institutions fix and guarantee the pre-suppositions on which the economic order rests” (LLEWELLYN 1925, 678), he was expressing the idea that the institutional economics of Commons and legal realism share the same aim of going beyond formal legal fictions (such as the equality of the parties to a contract) to uncover economic and social realities (relations of economic power and coercion) through experience and empirical research.

Secondly, Commons and Llewellyn carried on a written correspondence in which they engaged in scientific discussion<sup>6</sup>. The letters they exchanged show that their objectives and conceptions of law diverged. Indeed, Llewellyn set out to convince Commons that a typology of organs was the only valid way of differentiating between rules of law and the other types of working rules proposed by Commons (custom, trade practices, usage).<sup>7</sup>

Llewellyn identifies two enforcement authorities: formally defined constituencies and those that are not. Among the former, in addition to the courts, he mentions groups where there is a grievance board and company regulations providing for an arbitration procedure. From his point of view, the latter are not associated with any form of organization for their implementation. Commons (letter of 21 December 1925) responded with an attempt to synthesize their points of view, which he set out in the form of a table with, in the left-hand column, his understanding of Llewellyn's proposal and, in the right-hand column, his own typology (which was not used as such in IE).

<u>Constituencies</u>	<u>Sanctions</u>
Definite	Physical
Common law	Custom
By law)	Common law
Statute Law	Statute law
Indefinite	Economic
Custom	Custom (trade practices,
Trade practices	usages)
Usages	Arbitration decisions
	(common law)
	Règlement (By law)
	Moral
	Custom
	Decisions of disputes
	(common law)
	By law

(Source : J.R. Commons, Letter to Karl N. Llewellyn, December 21, 1925 Wisconsin Historical Society Library, J. R. Commons Papers, 1887-1945, box 3 - folder 5).

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<sup>6</sup> The J.R. Commons collection in the archives of the Wisconsin Historical Society Library in Madison includes two letters from Llewellyn to Commons (dated 23 November 1925 and 24 December 1925) and one addressed to a former student and collaborator of Commons, Edward E. Morehouse, then Managing Editor of the Journal of Land & Public Utility Economics. This letter to Morehouse concerns Commons' concepts. The archive also includes a letter from Commons to Llewellyn, dated 21 December 1925 [Wisconsin Historical Society Library, J. R. Commons Papers, 1887-1945, box 3].

<sup>7</sup> Letter to Commons, December 15, 1925, WHSL, J. R. Commons Papers, 1887-1945, Box 3 – folder 5.

Commons' classification indicates that he was still keen to incorporate norms of conduct other than those of state law. For him, Llewellyn's organic classification did not allow for the introduction into the political economy of other types of sanction than the physical sanction monopolized by the state. In other words, this classification would not allow Commons to include trade unions, companies, etc., which use other types of sanctions than physical ones. Furthermore, Commons considers it necessary to introduce in the same perspective “the merchant law as well as the labor law which is being developed in the arbitration courts under the general head of common law and the historical study of the guilds, mercantile and manufacturing associations, trade unions, would show the evolution of common law out of moral sanctions into economic sanctions and finally physical sanctions” (Letter to Llewellyn, december 21, 1925).

### **3.3. A divergence between Commons and Realists radicalism**

Commons's emphasis on reformism based on the idea of reasonable capitalism leads to the search for institutional means of ensuring, through dialogue and management of the economic and social spheres by committees that can ensure a balancing of interests and guarantee social peace and economic prosperity (BAZZOLI 1999; GISLAIN & THÉRET 2024, 306-308). From this point of view, Commonsian concern for the balancing of interests and social compromise brings it closer to Pound's sociological jurisprudence than to Legal Realism.

To define the essence of the sociological jurisprudence program, jurists (and judges in particular) need to understand how the law serves practical social engineering ends, in other words how it actively contributes to the ordering of human relationships and the harmonization of opposing claims. These ends must be understood not only in terms of legal rules, principles and doctrines, but also in terms of individual, public and social interests.

As for the Legal Realists, overall, they were more radical than Pound and Commons: behind the formal neutrality of judicial reasoning lie the preferences, values and worldviews of judges. They attacked what in Marxist terms might be called the fetishism of judicial law, the first step in this direction having been taken by US Supreme Court Justice Oliver Wendell Holmes in his famous dissent in *Lochner v. New York City* (1905).

## Conclusion

By way of conclusion, I wish to make two observations.

The first observation is that Commons' institutionalism can be seen as an important component of what HOVENKAMP (1990) has described as the “first great Law and Economics movement”, of which *Legal Foundations of Capitalism* is a major contribution. There is an essential difference between this first Law and Economics movement and the one that emerged in the 1970s in Chicago, which, under the impetus of Richard Posner, made law an object for the application of microeconomic theory rather than an essential institution of the economic system or, in the words of MERCURO and MEDEMA (1997), a legal-economic nexus.

The second insists on the fact that Commons, like Max Weber, applied empirical sociology of law that focused on the problem of the relationship between the legal order and the economic order (COUTU & KIRAT 2011). However, the presence of central analytical concerns about the place of law in the economy, coupled with a desire to grasp the empirical rather than dogmatic legal order, was curiously subsequently sacrificed on the altar of the division of labour between political economy and economic sociology, drawn up by Talcott Parsons, who promoted a break with institutionalism, in order to establish a division of labor between clearly identified disciplines: economics deals with the relationship between means and ends (efficiency), and sociology with the ends, values and attitudes that underlie the motives for action, with regard to the different ways in which actions are expressed in social life (VELTHUIS 1999, 633).

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