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John R. Commons and the Democratic State

John Dennis Chasse

John R. Commons supported his reformist activities with a conception of the state that remains largely unexamined. General surveys of his work have treated some aspects of it; a few authors have remarked on the similarity between his interests and those of the public choice theorists [Ostrom 1976, pp. 850,853; Rutherford 1983, pp. 735–36].¹ Others have stressed differences in methodology [Field 1979, pp. 53, 61; Atkinson 1983, pp. 1060–64]. No one, however, has shown how the different methods imply different conceptions of the state, nor has anyone isolated, for specific examination and appraisal, the conception that Commons developed, even though he devoted two of his earliest major works to the problems of the democratic state.

This article examines his conception of the state and suggests a preliminary appraisal. The examination and appraisal can be facilitated by a division of his conception into an evolutionary interaction of three related processes: first, a collective effort to control the use of violence as an incentive creates the state—a hierarchy of officials, each subject to some earthly authority; second, these officials control violence by enforcing rights and duties, necessarily “liberating and expanding” the

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powers of the citizen, and enforcing a particular distribution of liberty and property; third, an evolving public purpose determines the working rules that guide the officials, and hence the distribution of liberty and property. The first three sections of this article consider these three processes. A final section asks whether Commons made a contribution here, and concludes that, on this subject as on others, there are reasons to support his modest claim to having created a valid complement to standard economic analysis.

The Control of Violence

When he defined the state as the institution that controls violence, Commons appeared to be following a tradition that runs from Thomas Hobbes and David Hume to James Buchanan and Robert Nozick [Commons 1919, p. 38; 1934a, pp. 702–3; 1950, p. 74]. In accordance with that tradition, he found the root problem that the state must solve in the paradox of violence. Violence is necessary because the scarcity of resources engenders conflicts of interest which “Malthusian” men, biased by passion, tend to resolve by violence [Commons 1919, p. 38; 1934a, pp. 702–3]. But violence as an incentive is destructive because it strikes at the most fundamental of human desires, the desire for “security of expectations” [Commons 1934a, p. 703]. It breeds arrogance and capriciousness in the master and obsequiousness in the subject [Commons 1899–1900, p. 24]; it stunts innovation and creativity [Commons 1893, p. 73; 1899–1900, p. 42]. Persuasion, on the other hand, “educates the qualities of . . . eloquence, reasoning, politeness . . . devotion, love, heroism, ambition” [Commons 1899–1900, p. 25]. Violence, therefore, must be harnessed and made protective so that persuasion as an incentive may be encouraged. In this reasoning, focusing not on violence itself as an evil, but on its evil effects as an incentive, hints at a departure from tradition in this seemingly traditional conclusion.

Commons thought that traditional deductive methods falsified the relation between the customs of institutions and the habits of the “institutionalized personality” [Commons 1934a, p. 874]. He agreed that the only purpose for the state’s activities must be the self-realization of the free person [Commons 1899–1900, p. 18; 1924, pp. 38,39; Gonce 1976, pp. 768–70]. But, following John Dewey, and later C.S. Peirce, he held that free rational behavior results largely from habits and that habits are learned largely from customs [Commons 1919, p. 38; 1934a, pp. 702–3; Harter 1965, p. 64; Dewey 1922, pp. 58–74]. Moreover, customs

are constantly changing, making certain types of behavior unique to particular times and places [Commons 1934a, pp. 22, 74; Harter 1962, p. 232]. In his search for a structure that would control the threat of violence, Commons could not, therefore, deduce such a structure from a mental utopia like Buchanan's "methodological anarchy" or Nozick's "first position" [Buchanan 1975, pp. 2–6; Nozick 1974 pp. 150–53]. Such methods, by beginning with isolated rational and ethical individuals, leave out the institutions in which the individual becomes a reasonable and ethical person. His methodological convictions demanded that Commons look for a learning process in which "institutionalized personalities" and free institutions grow up together.

He defined two tasks that must be performed if the threat of violence is to be harnessed: first, the use of violence by one citizen against another must be controlled; second, violence against citizens by the officials of the state must be controlled. In British history, he found two processes corresponding to these two tasks.

In the first process, the state gradually deprives other institutions of the right to use violence, leaving to each a persuasive incentive appropriate to its nature and goals. For example, child labor, compulsory education, and child abuse laws deprive the family of the right to use undue violence against children, at the same time, leaving it the persuasive incentive of love. A similar process deprives the church of the right to use civil sanctions, while leaving it the powers of "preaching conversion and persuasion" [Commons 1899–1900, p. 74]. The firm is deprived of the right to use any incentive but the "love of work" or Adolph Wagner's love of activity [Commons 1899–1900, p. 86]. The state retains a monopoly on violence; this creates the second problem. How can the officials of the state be controlled so that they do not use this power in an arbitrary and capricious manner?

In the second process new groups force their way into the coalition controlling the state. Commons found this process continually repeated as England evolved from the despotism of William the Conqueror to the mass democracy of the late nineteenth century. First the nobles, then the townsmen, gained a voice in the decisions of the state. Commons specified three conditions for this process to work successfully. First, the group that gains a voice in the control of sovereignty must have organized voluntarily outside the structure of the state. This educates the group's members in the discipline needed to gain concessions from their collective strength and in the knowledge of governing to participate intelligently, once they have a voice in the affairs of the state [Commons 1899–1900, p. 50]. Second, there must be a shared set of

values providing those in control some basis for considering as legitimate the demands of the interlopers and permitting cooperation with them once their demands have been met [Commons 1899–1900, p. 53]. Finally, the structure of government must change to accommodate the new groups. In England, for example, the legislative branch kept changing, with the addition first, of the House of Lords for the nobles, then of the House of Commons for the townsmen [Commons 1899–1900, p. 50].

The despotism ceases to be a perverse form, and the nation becomes a true state when all, even the highest, officials are made responsible to an earthly authority for their acts [Commons 1924, pp. 105–6]. But since new groups can always be formed, the process of controlling the power of the state never ends, and the democratic state at any time is never perfect. The state is “not an ideal superimposed on society, but is an accumulated series of compromises between social classes, each seeking to secure for itself control over the coercive elements which exist implicitly in society with the institution of private property” [Commons 1899–1900, p. 45]. This means that the power of violence is never perfectly controlled and can erupt at any time against groups that have not gained a voice in the control of the sovereign power. Commons, in his own time, was thinking of the working class when he wrote that “the state seems to be coercive because it does not represent all the people; . . . Many who are not truly anti-social are crushed by it” [Commons 1896, p. 228].

In his search for a way to reduce the violence unleashed against the working classes, Commons modified and changed many of his ideas, but he retained the fundamental vision outlined in *A Sociological View of Sovereignty* [Commons 1899–1900]. Thus, it is true, in a sense, that *A Sociological View of Sovereignty* contains in embryo much that Commons later wrote [Gonce 1976, p. 766; Rutherford 1983, p. 739]. But it is also true that a full understanding of his mature conception demands an exploration of the changes and modifications he made on the basis of his later studies and “experiments in collective action.” The extent of the changes can be seen by examining how he abandoned or modified many of the positions he held when he wrote *Proportional Representation* [Commons 1896].

Commons felt that the government of his day failed to respond properly to working class needs because territorial representation favored bland candidates over real leaders [Commons 1896, pp. 29–31, 228; 1899, pp. 57–60; 1907, p. 358]. The candidate representing a territorial constituency is necessarily a compromise candidate with few

enemies—a different sort of person from a leader chosen and trusted by the members of an identifiable interest group. The latter type of leader will more adequately represent the interests of his constituents because his own interests parallel theirs. The problem is that such a leader makes too many enemies to be elected by the heterogeneous population of a particular geographic area. To solve this problem, Commons first proposed electoral reform and an expanded role for the newly elected legislature. In *Proportional Representation*, he warned against judges usurping legislative functions and amassing power in an arrogant and dangerous manner [Commons 1896, pp. 6–8, 194], and he complained that the proliferation of commissions complicated the government and weakened the legislature [Commons 1896, pp. 4–5, 223–24]. At that time, he considered “log-rolling” an aberration to be replaced by statesmanlike compromise, with the advent of proportional representation [Commons 1899, p. 60]. This position stands in sharp contrast to his subsequent emphasis on collective bargaining by groups organized outside the formal structure of the state; and to his endorsement of the judiciary, of commissions, and of “log-rolling” [Commons 1934a, pp. 848–50, 685, 755].

This change in emphasis resulted both from his historical studies and from his life experiences. Significant among the life experiences was his presence in 1902 at the national conference of bituminous coal miners and their employees.

I was struck by the resemblance to the origins of the British Parliament. On one side of the great hall were nearly a thousand delegates from local unions, an elected representative body. On the other side were about seventy employers appearing directly, as owners of the coal mines. It was evidently an industrial House of Commons and House of Lords but without a King. . . . I dropped much of what I had been arguing for in my book *Proportional Representation* as applied to legislatures and Congress; for here was, in actual operation, the main argument of my book, namely the Representation of Conflicting Interests instead of representation of artificial localities drawn on a map [Commons 1934b, p. 72].

In that same year, Commons went to work for the National Civic Federation, an organization that mediated between capital and labor, and that initiated reforms by presenting model bills to representatives who sponsored them either in Congress or in the State legislature. He was exposed there, for the first time, to the idea of a paid research staff that was responsible to an advisory board composed of representatives of business, labor, and consumers [Weinstein 1968, pp. 3–39]. While gaining experience as a mediator, he developed an admiration for Sam-

uel Gompers and a sympathy for the latter's suspicion of direct government intervention in the affairs of labor [Commons 1935, pp. ix-x], and he learned how new groups that organize outside the state's formal structure can affect its operation without a massive reorganization of the legislative branch. In short, he learned the flexibility and value of the "device of collective bargaining." Because they are elected from a particular economic class whose concerns they share, the representatives fulfill Commons's criteria for valid representation. They will not "sell out" their followers, and they will in turn be trusted [Commons 1934b, pp. 72-73; 1950, pp. 23-24]. Even before he reached the University of Wisconsin, therefore, Commons had begun to modify his conclusions about reforms needed in the structure of the state.

His research and experience at Wisconsin suggested further modifications. In "The American Shoemakers," the major theoretical result of his historical research, he showed how changing exogenous forces, like the extension of markets, could affect economic organization, the emergence of interest groups, and the nature of the threat to "security of expectations" [Commons 1909]. His later discussions of "banker capitalism" and its attendant cyclical instability underlined the changing nature of this threat [Commons 1934a, pp. 763-73; Harter 1962, pp. 176-82, 232-35]. In the changing nature and functions of the shoemakers' organization, Commons witnessed again the flexibility of the "device of collective bargaining." In his theory of economic evolution he established the need for a flexible government structure that could respond more readily to the challenges created by an evolving industrial society with its ever-new threats of violence and insecurity. Neither the legislature nor the judiciary possessed such flexibility, and this led Commons eventually to change his opinion of commissions.

He reversed his condemnation of them when he worked on the Wisconsin Industrial Commission. While he had expressed mistrust of the commission in *Proportional Representation*, he now praised it as a "fourth branch of government" compensating for both legislative and judicial deficiencies [Commons 1913, p. 396]. In a rapidly changing technological society, the slow process of deliberation and debate is a deficiency that the legislature can remedy by passing a general rule and leaving particular applications to a commission able to respond more rapidly to changing circumstances. When technical questions are at issue, the knowledgeable litigant, usually the employer, has an unfair advantage in court because of deficiencies in the judge's background. The commission's technically trained staff can remedy this deficiency because the court takes up such questions only on appeal of the commis-

sion's decision, thus assuring that the judge receives a commission report that counterbalances the superior technical knowledge of some litigants. Consequently the commission renders both branches more adequate by its "constructive research . . . [which] reduces the coercive functions of government and increases the part played by persuasion" [Commons 1913, p. 12].

Commons, it is important to realize, advocated only a particular type of commission—with its staff insulated from politics by civil service status and its policies established by an advisory board composed of interest group representatives. It was essential in his view that the members of the board be appointed, not by the chief executive or any other politicians, but directly by the various outside interest groups, thus preventing direct control by the party in power [Commons 1934a, p. 848, 1950, pp. 256–57]. Commons wanted the commission controlled, not by politically acceptable leaders, but by "real leaders" who would make sure their constituents received a fair hearing. This would result, Commons hoped, in a decision based on all relevant facts and accepted as "reasonable" by all interested parties. The right to appeal the decision in the courts would act as a further brake on the arbitrary exercise of power.

His experience on the Wisconsin Industrial Commission also led Commons to reverse another early position—his mistrust of the judiciary. In order to write a workers' compensation law that would not be ruled unconstitutional, he had to study law and the concept of reasonable value. As a result of this study, he developed a respect for the common law process that reaches decisions based on customary principles of fairness. Such decisions, to gain acceptance, must be recognized by the parties to the dispute as resulting from some standards of reasonableness. A set of such standards, evolving over time, brings to bear the brake of custom on the arbitrary and capricious exercise of power. A system that stresses intellectual inquiry into these standards approaches "Plato's ideal" of a state governed by the idea of justice [Commons 1924, p. 360].

In his mature thought, Commons conceived of a society approaching this ideal with a set of "devices" [Commons 1924, pp. 104–5]. The device of "delegation of power" takes power from the hands of the sovereign and delegates it to agents who the sovereign cannot remove. The device of "official responsibility" subjects all officials to the possibility of removal. The device of "representation" means that citizens need not assemble in arms to exercise a veto on the actions of the officials of the state. Finally, there is the device of "collective bargaining" by

which the exercise of the collective power of the concern is subject to the veto of any of the constituent groups.

Though he never abandoned his support for proportional representation as a solution to what he considered the unrepresentative nature of territorial representation, Commons did develop some misgivings about it [Commons 1934a, pp. 898–900]. In place of sweeping legislative reform, he turned to ingenious applications of the device of collective bargaining. Going far beyond the labor-management paradigm, he cited instances in which representatives of farmers and consumers set prices during World War I [Commons 1919, p. 39]; he used outside advisory boards to direct the work of his Industrial Commission of Wisconsin [Commons 1913, p. 408]; he suggested that farmer and consumer organizations appoint representatives to the Board of Governors of the Federal Reserve Bank [Commons 1950, pp. 256–57]. This flexible tool, to be developed by later “experiments in collective action,” took precedence over reform of the bulky legislative process in Commons’s agenda for social action.

That agenda, at the end of his career, as at the beginning, assumed a state in which every official is subject to some earthly authority and in which freedom of assembly is protected [Commons 1924, p. 106; 1934a, p. 901]. These he considered the necessary conditions for increasing control over the abuses of power by the officials of the state. In other aspects, however, his “experiments in collective action,” and his research induced a change of emphasis. From sweeping legislative changes, he turned to more flexible devices—commissions with insulated staffs, the courts, and independent outside interest groups affecting the state through the “device of collective bargaining.” He turned to these “devices” because of his conviction that the state needed the flexibility to respond to the rapid changes of an evolving industrial society in which coalitions shift and organizations change in response to continually changing threats to “security of expectations.”

This results, at any time, in an organization of legislators, executives, judges, policemen, commission members and others—a “going concern,” that exists before the citizens of the state are born and that will survive the death of any particular person. Behaviorally, the state is the actions of its officials [Commons 1924, pp. 112, 364]. As representatives of the sovereign power they can decide disputes between citizens and issue commands that citizens must obey. The citizens, on the other hand, can order state officials to protect their rights, even against other state officials. Commons was interested in two necessary results of this relationship: first, the state controls individual activity and simulta-

neously liberates and expands it; and second, in controlling the threat of violence, the state officials necessarily determine the distribution of income.

State Officials Enforce Rights and Duties

Following Bohm Bawerk, Commons defined a right as the power to command state officials to enforce one's will on others [Commons 1891, p. 62; 1924, p. 112]. This makes the state a party to every transaction, even the "bargaining" and "managerial" transactions conducted between citizens who are not officials. It is true that most transactions are conducted on an ethical level of mutual trust above the legal minimum [Commons 1924, p. 124]; but they must still be "authorized" by the state because the parties to an unauthorized transaction cannot call upon the officials of the state to enforce the terms of a contract. Consequently, although individuals can exchange commodities, only the state can transfer legal control [Commons 1934a, p. 60]. As a necessary consequence of its monopoly over violence, therefore, the state is a party to every transaction. This necessary consequence entails three further consequences: first, the state controls individual behavior; second, it liberates and expands the powers of the person; third, it determines the distribution of income.

Because it controls the incentive of violence, the state's typical transaction is what Commons termed the "authoritative" or "rationing" transaction. The term "authoritative" indicates that there is no bargaining that in this type of transaction, would be illegal. Rather all the instruments for the collective control of sovereignty come into play—negotiation, pleading, log-rolling, collective bargaining, judicial decision, and dictatorial decree [Commons 1934a, p. 754]. When the decision is made, the state official compels obedience from the citizen. Commons contested the "fiction" that citizens have given their consent to, say, compulsory education laws [Commons 1950, p. 5]. In fact, they have no choice in the matter. They must obey or face the police power of the state.

By enforcing the law, therefore, state officials control behavior. But paradoxically, they also "liberate" and "expand" the personality. They liberate the personality by enforcing "remedial rights," and they "expand" its effectiveness by enforcing "substantive rights." A "remedial" right corresponds to what Commons called "liberty," a relation between equals; it is the right to the "powers and means of self-expression, self-development, and self-realization" [Commons 1924, pp. 12, 38,

156]. Remedial rights include the power of a citizen to call upon the officials of a state to prevent another citizen from taking his or her property without due process of law. Without remedial rights, a human being is “not a person, but a thing that can be captured, bred, owned, and killed without violating any duty towards him” [Commons 1924, p. 143]. Thus, in a behavioral sense, the state creates all persons, both human and corporate [Commons 1924, pp. 143, 112, 145, 365; 1934a, p. 76]. Remedial rights thus liberate “individual action from coercion, duress, discrimination, or unfair competition by means of restraints placed on other individuals” [Commons 1934a, p. 73]. Substantive rights correspond to what Commons called “freedom,” the sharing in the prerogatives of the sovereign. Substantive rights include the power to order officials to enforce one’s last will and testament after one’s death, to enter into contracts with foreigners, and to buy property in other countries [Commons 1924, pp. 50, 111, 118–119; 1934a, p. 695]. Substantive rights expand the effective range of the person’s will over space and time.

By enforcing contracts, the officers of the state increase the probability that business will be conducted in the future as it is today [Commons 1924, pp. 1925–26]. This increased probability, in turn, enhances the present value of personal abilities and physical capital. [Commons 1924, pp. 23–24, 205–6; 1934a, pp. 645–46]. By universalizing the right of limited liability and incorporation, the state enables the creation and functioning of multinational corporations that organize individuals in productive enterprises of vast powers [Commons 1930, p. 13]. The officers of the state, by enforcing a wide array of remedial and substantive rights, make capitalism possible [Commons 1893, p. 60; 1924, pp. 100, 106; 1934a, pp. 412, 696].

Thus the anomaly—by enforcing duties that seemingly restrict action, the officers of the state “liberate” and “expand” the powers of the individual. In the first place, by enforcing duties, they automatically enforce rights that provide “security of expectations,” satisfying the necessary condition for free rational activity, making contracts more secure, and increasing the expected return from enhanced personal abilities. In the second place, the protection of one man’s liberty “exposes” others, denying them the right to use coercion, leaving only persuasion and bargaining—activities that exercise the freedom and rationality of the institutionalized personality. Finally, the state, through the grant of “substantive rights,” puts its officials at the disposal of the citizens, extending their power of acting over space and time, protecting their corporations, increasing the range of choices available to the will of the

individual, and, hence, expanding the consciousness of individual freedom. Thus, by controlling behavior, the state liberates and expands the personality.

But opportunities for such liberation and expansion are not equally available to all. The public officials, in providing the service of security, automatically enforce a distribution of property, liberty, and rights of association [Commons 1924, p. 367]. Commons coined the term, "rationing transaction," to emphasize this necessary distributional result of the enforcement of rights and liberties. One person's right is another person's duty; and one person's liberty, another's exposure. For instance, the slave has no right to share in what he or she produces [Commons 1893, p. 66]. The freeing of the slave "exposed" the employer to the worker's "liberty" to quit. When the state spends for "social needs" or levies taxes, it is "rationing" the national wealth [Commons 1934a, pp. 807, 831]. Commons did not say that the state is the only institution engaged in rationing transactions, but that anything a state official does, in some way, determines the distribution of wealth. There is no way to avoid it. The official who follows a *laissez-faire* policy is actually applying the police power of the state in the interests of those who currently own property, and against the interests of those who do not [Commons 1950, p. 82].

Every transaction of a state official, therefore, affects the distribution of wealth and liberty. The incompleteness of the democratic state implies that this distribution always falls short of any abstract notion of justice. At any particular time the state is an organization of short-sighted "Malthusian" personalities acting according to "persuasive, coercive, corrupt, misleading, deceptive and violent inducements. . . which the public and private participants deem to be, at the time, probably conducive to private, public or world benefit" [Commons 1924, p. 388]. The concept of public benefit, or public purpose, however twisted and perverted, always constrains, in some manner, the action of officials as they enforce a particular distribution of income. But the public purpose changes, and in the changing public purpose, Commons found hope that the democratic state might evolve in a progressive direction.

The Public Purpose

The public purpose, as Commons conceived of it, exists as an empirical reality in the justifications given by public officials for their decisions [Commons 1934a, pp. 761–62]. These justifications appeal to official working rules or customary notions of right and wrong. Official

working rules include formally written laws and specific rules of procedure—like majority rule for legislators or the legal process for judges [Commons 1924, pp. 364–66]. Within the boundaries of these rules, the public officials may exercise discretion. Discretionary decisions will depend on the mental habits and habitual assumptions of the officials. But an official must justify even these decisions, either by the citizen's need for security from violence, or by customary notions of right and wrong; else the official risks the passive resistance of the citizens [Commons 1934a, p. 762]. For any time and place, therefore, the practices of the officials will appear "reasonable" in light of the ethical customs of that culture, though they may appear repulsive to later generations or to people from some other place [Commons 1934a, p. 763].

Working rules and habitual ethical beliefs result from the settlement of disputes. They change when new conflicts of interest result in new settlements that change the content of the public purpose. In these changes, Commons discerned the possibility for increasing reasonableness and humanity in the determination of the public purpose and hence in the conduct of the state's representatives.

The major characteristics of such settlements are: a mutual dependence between the parties in keeping the concern "agoing"; a conflict of interest over the distribution of rights and liberties; and order, a resolution which, if not perfect, avoids the chaos of continuing open conflict so that the parties can continue to act together in the "going concern" [Commons 1934a, p. 4]. These characteristics are all present in the disputes that determine the public purpose of the state.

Mutual dependence arises from the benefits that all parties to the dispute receive if the state continues to function. The fundamental benefit is "security of expectations," freedom from the arbitrary and capricious threat of physical violence, or material deprivation. In Commons's view of human nature, people prefer this to freedom from poverty or injustice [Commons 1924, p. 364; 1934a, p. 705]. Another common benefit is the growth of the commonwealth. Commons sometimes used the term as a synonym for the national product [Commons 1924, p. 361; 1934a, p. 819]. But, he also gave it a much larger meaning [Commons 1934a, pp. 807–8]. When, for example, he cited Sir Thomas Smith who wrote that England as a "commonwealth" was more than a "host of men," Commons was thinking broadly of a *kultur*, an organized unity that inspires loyalty and affection [Commons 1934a, p. 725; 1924, p. 222; 1913, p. 54]. The commonwealth is defined by the diverse hopes of the members born into and socialized by a "going concern" that will probably outlive them.

But the economy theory of the state is the theory of the going concern with its going business, having its roots in the past, its behavior in the present, held together by the hopes of peace, wealth, virtue and the fears of violence, poverty, vice, through control of which collective action proportions inducements to individuals to participate in the benefits and burdens of collective power [Commons 1924, p. 361].

The harmony of interests in the commonwealth inspires mutual dependence and social cohesion, and it creates an incentive for settling the disputes arising from conflicts of interest. Because of this pressure for settlement, Commons, following Hume, made scarcity and the resulting conflict of interests the source of ethics and justice [Commons 1924, p. 361; 1934a, pp. 141–42, 231]. The pattern of rights and duties imposed by an acceptable settlement must seem fair to the “institutionalized minds,” of the parties, but it must also call for some altruism [Commons 1934a, pp. 698–99]. Once a settlement has been reached, it can guide future decisions the way habits guide the ordinary activities of the individual. When circumstances change, however, and new or different conflicts arise, habitual standards are found wanting, and the process of conflict resolution begins again.

In his search for a way to improve the process, Commons rejected Hume’s skepticism for the fallibilism of Peirce [Commons 1934a, pp. 150–57]. Like Peirce, he defined the “real as that whose characters are independent of what anybody may think them to be” [Commons 1934a, p. 152]. Like Peirce, he also believed that scientific inquiry could only reduce uncertainty about propositions that can never be definitively proved. This occurs when a large number of experiments, separated in time and space, and disciplined by a common method, all converge to support a particular belief. The entire series becomes “a single collective experiment” [Peirce 1931–1935, vol. 5, p. 283]. Peirce’s solution to the “metaphysical problem of the ultimate and fundamental reality, is, consequently, not individual bias but a social consensus of opinion” [Commons 1934a, p. 152]. Commons, like Peirce, thought that exactly the same type of inquiry could be applied to ethical questions [Commons 1934a, p. 743]. By following a method that controls individual bias, an inquiring community could expand its understanding of the ultimate aim that determines the legitimacy of any enterprise. “We can see ground for hope,” wrote Peirce, “that debate will ultimately cause one party or both to modify their sentiments up to complete accord” [Peirce 1931–1935, vol. 2, p. 82].

Commons believed that the traditional procedures of the common law courts fulfilled the conditions laid down by Peirce for such an in-

quiry. Each case is an “experiment.” The method demands that all the facts of the case be weighed and that the final decision be based on logic and historical precedent. As in the physical sciences, the criterion for belief is the agreement of all competent investigators—the legal profession and the community, including the historical community whose opinions exist in customs and precedent [Commons 1934a, pp. 224, 743]. Over time a set of decisions becomes an experiment in justice or fairness. Admitting the fallibility of any particular decision or series of decisions, the entire history constitutes the only inquiry of which a given community is capable into the nature of a just society [Commons 1934a, pp. 741–42].

This inquiry is related to the process by which new groups gain a voice in the affairs of the state. Different groups develop different assumptions and methods for settling disputes, and thus different perspectives on the nature of justice. Each group retains its traditions when it gains a share in the control of the state, and these traditions enter the body of common law precedents. Thus, in Britain, first the landlords, then the guilds, then the merchants, introduced their ideas of justice into the common law tradition [Commons 1924, pp. 220–30]. Commons thought that it was time to enrich this tradition further with working class conceptions of justice [Commons 1950, pp. 266–70].

The inquiry becomes part of a social evolution as conflicts arise, are settled and are reflected upon. Leaders, the “progressive minority,” interact with the evolution of the law by showing concretely what is possible in a particular situation [Commons 1934a, pp. 844, 860–62, 874]. For example, the right of the state to limit hours of labor began with legislation based partially on the successful experience of humane employers, but it could not be accepted as constitutional until the Supreme Court reached the decision that workers needed protection for the same reason that women and children needed it—because of a weak bargaining position [Commons 1919, pp. 29–32].

Commons was under no delusions about the operations of the courts. He emphasized, in fact, that the biases of the “institutionalized mind” exist on the bench of the Supreme Court [Commons 1934a, pp. 699–701]. What impressed him was the common law method that places any particular decision into a historical process of examination and scrutiny on the basis of facts, circumstances and logic. In this way, a minority opinion of the court can, over a number of years become a majority opinion, as in the definition of property which Commons traced in the *Legal Foundations of Capitalism* [Commons 1924, pp. 6,

12, 16]. Since it was the method that impressed him, he applied it to other contexts, as in his method of “constructive research,” or policy analysis [Commons 1913, pp. 7–14; 1934a, p. 707].

This view of ethical evolution had several unique elements. It is doubtful that Peirce would have agreed that the common law process satisfied his requirements for scientific inquiry—given his harsh comments about the legal process in general [Peirce, 1931–1935, vol. 2, p. 380]. Thorstein Veblen also considered training in law “alien . . . to the scientific spirit and subversive of it” [Veblen 1919, p. 20]. Commons, on the other hand, maintained that Veblen erred by eliminating purpose, including public purpose, from the scope of science [Commons 1934a, p. 654].² In addition, Commons’s benign view of custom differed from that of Veblen and Clarence Ayres. They both seemed to look on custom as something that holds back progress and on technology as the source of social progress [Copeland 1936, p. 337; Ayres 1961, p. 29]. For Commons, on the other hand, the customary settlement of disputes was the origin of ethical growth and hence social progress.

Nor were his ideas totally without intellectual support; they rested on an honorable tradition of intellectual inquiry reaching back through Sir Edward Coke and Sir William Blackstone to Cicero’s writings on the *Jus Gentium* [Lowry 1973, p. 610]. It may be that contact with this tradition through his legal studies accounted both for his benign view of custom and for his lifelong synthesis of legal method with Peirce’s philosophy, though his lifelong identification with the common man probably affected his attitude toward the common man’s customs.

In addition, his concept of the public purpose unified the elements he had first assembled in *A Sociological View of Sovereignty* [Commons 1899–1900]. Scarcity produces conflict and the threat of violence. Those who direct the state can use its monopoly on violence to exploit others. This abuse was controlled by new groups struggling to gain a voice in the direction of the state. A necessary condition for their success was a set of values shared by those who were already in control. Peirce’s analysis of habits and customs, applied to the public purpose, explained the growth of these shared values. Fusing Peirce’s principles of intellectual inquiry with the traditions of the common law, Commons conceived of a way to transform a “Malthusian” clash of opposed interests into an inquiry, however biased, into the nature of a just society. The resolution of such a conflict must produce, not only an end to exhausting conflict, but a new “working rule,” an “experiment in collective action” to be examined, and then preserved, rejected or mod-

ified by later generations. This “working rule,” in some way, incorporates the welfare of the previously disenfranchised class into the evolving public purpose.

Criticism from a Contemporary Perspective

Commons distinguished his position from that of the classical economists by asserting that he had started, not with “the ethical concept of the individual as a free man existing prior to the law,” but with a historical autocracy imposing a despot’s arbitrary and capricious will upon subjects without rights. When he looked at history, he saw in the expansion of the democratic state, not a threat to liberty, but a process by which, through the state, “liberty has been gradually taken away from the masters and bestowed on the subjects” [Commons 1924, p. 126].

Freedom for the individual was protected, not by curtailing the functions of the state, but by strengthening the checks upon the arbitrary and capricious use of power by the state’s representatives; foremost among these checks was the right of free assembly. This right, like all rights, is a creation of the state [Commons 1934a, p. 901]. Commons, therefore, departing from the methodology of the classical economists, reached different conclusions. He rejected their minimalism, turning to “the device of collective bargaining” and the evolving public purpose as the source and criterion, respectively, of progressive change in the state. One way to appraise his contribution, then, is to examine, from a contemporary perspective, first, his methodology, then, his “device of collective bargaining,” and finally, his concept of the public purpose.

By refusing to start with the assumption of “economic rationality,” Commons separated himself, methodologically, not only from the classical economic tradition, but also from the modes of theorizing most acceptable in economic circles today. He did not draw refutable conclusions from spare assumptions, and consequently he failed to produce a theory by contemporary falsificationist standards. After his first book, he avoided microeconomics, and his consequent errors in tax incidence undoubtedly flaw his policy conclusions [Copeland 1936, pp. 338, 345–46]. His refusal to abstract from the complexity of the “institutionalized personality,” dictated a historical beginning, and, as T.W. Hutchison has pointed out, an investigator who drops the simplifying assumption of “economic rationality,” arrives not at a manageable “second approximation,” but at “an almost unlimited variety of cases” “amenable only to historical examination” [Hutchison 1981, p. 292].

Commons proceeded, therefore, not with the tools of analytical economics, but with those of the historian, the participant observer, the grubber for facts. He produced, not a refutable theory, but a conceptual framework; although not explicitly falsifiable, it was not empirically irrelevant either [Commons 1934a, p. 722].

This makes Commons methodologically a fiscal sociologist in the tradition of E.R.A. Seligman and Joseph Schumpeter, and it places him today among the “Parsonian” theorists, as Brian Barry called them [Seligman 1926; Schumpeter 1954; Barry 1970, pp. 3–11, 165–80]. The argument by which Talcott Parsons supported his methods also validates, to some extent, Commons’s claim to have developed a supplement to standard economic analysis. Parsons, like Commons, never denied the usefulness of assuming given wants and rational self-interested behavior. But he questioned policy prescriptions based only on standard economic assumptions that omit group influences like Vilfredo Pareto’s residues or Max Weber’s ultimate values [Parsons 1932, pp. 316–45; Commons 1934a, pp. 725–26]. Since people act differently in groups than when alone, other methods must complement those based on the unrealistic assumption of completely self-determined individuals. Commons accounted for Pareto’s “residues” with his concept of the “institutionalized personality,” and for Weber’s values with his public purpose.³ Any validity in the Parsonian position validates, therefore, Commons’s claim, at least in the applied area of policy analysis, to have created a complement to standard economic methodology.⁴

Commons, following his methodology, came to emphasize the “device of collective bargaining.” Today, it might be called interest group politics, and it would surely draw fire from public choice theorists and political scientists. Public choice theorists question any system that allows the organized few to exploit the unorganized many [Buchanan and Tullock 1967, pp. 283–95]. And a political system responsive to interest group pressure allows such exploitation because small groups can organize more easily than large ones [Downs 1957, pp. 260–76; Olson 1971, pp. 114–21]. Political scientists like Theodore Lowi claim that interest group theories rest on fallacious assumptions and result in undesirable consequences [Lowi 1979, pp. 50–63]. The fallacious assumptions are that competition between interest groups is self-correcting and that interest groups are necessarily good [Lowi 1979, pp. 59–58]. The undesirable consequences include the tendency for the triad—interest group, government agency and congressional committee—to shut out the public, create a position of privilege, and

impose a conservative bias on government [Lowi 1979, pp. 59–61].

The “device of collective bargaining” would also draw fire from the left. The present alliance between monopoly capital and large unions, in the Marxist view, exploits the more competitive secondary sector, and this results, in large part, from the “device of collective bargaining” [O’Connor 1973, pp. 65–69]. Some radical historians consider the National Civic Federation nothing but a tool used by large corporations to prevent the growth of a socialist or labor party in the United States [Weinstein 1968, pp. 3–39; O’Connor 1973, pp. 67–69]. Commons, of course, worked for the National Civic Federation and shared its philosophy, and so he is indicted also—for basing his humanitarian concerns “on an elitist sense of corporate responsibility” [Isserman 1976, p. 311; Weinstein 1968, p. 202].

Commons would plead guilty to everything except the charge of elitism; he objected, not so much to the Marxist analysis of the problem, as to the Marxist solution. The Marxists, he objected, “fail to see that coercion is the basis of both private and government administration” [Commons 1899–1900, p. 84]. State ownership of the means of production would merely put the exploiting class in the government. Later he came to believe, with Gompers, that radical leaders tend to throw workers into unwinnable battles—with the workers paying the price for the utopianism of their leaders [Commons 1926; 1935, pp. ix, x].

There is a sense in which these criticisms reflect the perspective of the late twentieth-century, when minorities demand protection against white unions, when there is pressure to disband commissions that seem to have served mostly the interests of the regulated, and when interest group pressures hinder fiscal responsibility. As a result, the “device of collective bargaining” appears tarnished. These problems of a world that Commons never knew might support a *prime facie* case against some of his specific applications of the “device of collective bargaining.”

When applied to his general conception, however, the objections seem overdrawn. The conclusion that large latent groups are impossible to organize without coercion or specialized incentives does not really invalidate his conception of the “device of collective bargaining.” There is evidence, in the first place, that Commons understood the problem of organizing large latent groups; for this reason, he continued to support proportional representation in spite of his doubts about it [Commons 1900, pp. 362–63]. His support for the closed shop seems based on recognition of the free rider problem in large latent groups [Commons 1900, pp. 362–63]. His form of “interest group politics”

does not rest on a rejection of the free rider principle. He was, in fact, searching for principles of organization that would overcome it, and he did not rule out “reasonable” coercion. Some of the strength of the objection to his position arises from a well-known weakness of contemporary public choice theory: its exclusion of any meaningful political leadership [Bluhm 1978, p. 279; Barry 1970, pp. 37–40; Colm 1962, pp. 121–22]. When Commons conceived of progressive social change, he gave a key role to leaders who are trusted because they will not “sell out” their constituents. Unlike the “political entrepreneur” of the public choice model, such leaders can articulate goals, create selective incentives, or appeal to motives omitted in a theory that sees only “economic rationality” in the forces of history. In addition, the static models of contemporary public choice theorists implicitly hark back to some golden age of “one man, one vote” when interest groups were presumably less influential [Buchanan and Tullock 1967, p. 83]. Commons’s conception of the “rationing transaction” fits both the present clash of interest groups and the past, when aristocracies of landlords and businessmen used the state to exploit workers and enforce slavery [Commons 1896, pp. 28–31; Hutchison 1981, p. 24].

Finally, Commons never proposed any natural “balance of power.” His point is better grasped in negative form. Unless a group organizes and struggles to share in the sovereign power, it will be exploited. Thus, he predicted, rather prophetically, that, in spite of three amendments to the constitution, American blacks would continue as second-class citizens until they organized under black leaders they could trust [Commons 1920, p. 50]. However difficult it may be for large groups to organize, it is hard to deny that protection of their right to do so is a necessary condition for the peaceful evolution of a free society, and that a concept of personal freedom grounded in the right of free assembly is a valuable supplement to one derived from the indeterminacy of abstract individuals in an impersonal market system.

The use of the public purpose in a combined normative-positive sense is a second result of Commons’s methodology that differentiates his conception. The standard economic assumption is that only self-interest motivates people [Buchanan and Tullock 1967, p. 20]. Buchanan and Tullock argue that without an explicitly defined social welfare function, the concept of public purpose is ambiguous and perhaps meaningless [Buchanan and Tullock 1967, p. 284]. Commons would admit the ambiguity, but deny the meaninglessness, arguing that the public purpose, concretized in working rules, constrains state officials just as some common purpose controls the employees of any con-

cern. It is hard to argue with this. In fact, some contemporary empirical evidence supports Commons [Kalt and Zupan 1984; Frohlich and Oppenheimer 1984]. His position is also consistent with a considerable body of evidence that the behavior of citizens during elections is at variance with the predictions of the simple "rational voter" model [Barry 1971, pp. 13–23].

One can go further, and argue with Colm that public choice theory, by denying the public interest, denies also the value of participation in government, implicitly prescribing a paternalistic "bread and circuses" government rather than a democracy and that an explicit concept of the public purpose is needed to explain merit goods and government activity in foreign affairs [Colm 1962, p. 123]. Like Colm, Commons conceived of the public purpose as ambiguous and changing because different groups with different values are continually hammering out "a common understanding of what is accepted as constituting the public interest" [Colm 1962, p. 121]. Commons was original, however, in the detail with which he described the evolution of the public purposes, specifying a role for customary methods of conflict resolution and judicial decisions, as well as legislative debate.

Commons may well have been ahead of his time when he refused to admit a hard and fast distinction between positive and normative statements [Commons 1924, pp. 349–53; 1925, p. 92]. Since there are so many facts and so many ways of treating them, an investigator must choose both facts and methods on the basis of some objective or purpose which is, by definition, a value. The "value-free" investigator is often marshalling facts to support some unadmitted normative purpose.⁵ This objection is echoed in different ways by contemporary philosophers [Kaplan 1964]. For Commons, the only control to bias was confrontation with opposing points of view, both directly by hearing the arguments of the different interest groups and indirectly by consulting precedent.

When he criticized Commons for overlooking the role of a fixed constitution, V. Ostrom seems to have missed the point of the public purpose. The constitution of society, in the form of "working rules," was a dominant concern for Commons; but constitutions need not be written, and the meaning of constitutions can evolve because of changing historical circumstances or changing ethical convictions [Commons 1924, p. 298, 1934a, p. 654]. The correct distinction between Commons and the public choice theorists rests more properly on the difference between "strict" and "loose" interpretations of rigid univocal rules. Commons would trust more to the common law process of interpreta-

tion and evolving definitions of ideals like liberty and equality. Strict interpretation of a written constitution imposes the values of one generation on succeeding generations, without consideration for changing historical circumstances or new ethical insights. In Commons's "loose interpretation," past generations continue to influence policy through precedents that are, nevertheless, subject to inquiry and questioning.

His notion of a "rationing transaction" summarizes, to some extent, Commons's unique conceptualization of the democratic state. A method that treats such a transaction like a market exchange overlooks much that Commons understood. First, the outcome does not result from bargaining, but from the customs and working rules that affect the institutionalized personalities, of the citizen on one side, and of the state official on the other; second, these rules result from a history of log-rolling, interest group pressure, and legal debate, characterized by a uniqueness that defies deductive analysis; third, by coining the term, "rationing transaction," Commons emphasized that the working rules of the state necessarily affect the distribution of wealth and liberty; finally, the citizen, while helpless as a "single one" before the police power of the state, can, by organizing with others of like interests, affect the public purpose and hence the working rules that govern the behavior of the state's officials. Consequently, one is led back through the methodological presuppositions to the emphasis on the "device of collective bargaining," and the evolving public purpose. It is hard to deny the value of a conception that methodologically accounts for group influences in its explanation of human behavior, and that emphasizes freedom of assembly and disciplined intellectual inquiry as crucial to the evolution of the state in a progressive direction.

Conclusions

Commons, therefore, based his reformist activity on a reasoned conception of the state, not in minimalist terms as necessarily a threat to liberty, but as a potentially liberating force. Both the reasoning and the conception support his claim to have developed a useful complement to standard economic analysis. Like Peirce, who rejected Cartesian doubt as intellectually dishonest, Commons refused to support his conclusions with a hypothetical "first position" like Nozick, or an original anarchy like Buchanan [Thayer 1968, pp. 83–86; Nozick 1974, pp. 150–53; Buchanan 1975, pp. 2–6]. He insisted on studying the simultaneous development of free people and free institutions. His methods

produced “fallible” conclusions, but avoided the faults for which contemporary economic analysis of the state has been criticized. Commons did not impose a normative concept of “economic rationality” on citizens, bureaucrats and politicians. He allowed for the influence of “real leaders,” of Pareto’s “residues” and of Weber’s social norms. His conception of the public purpose permitted him to explain phenomena that cannot be explained by economic models based on a denial of the public purpose. His method for dealing with values is more philosophically robust than the feigned skepticism of “positive” investigator. In the shifting and uncertain terrain of policy science, his pragmatic insistence on consideration of all the facts and of all points of view can only improve a process based solely on dogmatic minimalism.

His reasoning produced a conception of democracy as potentially liberating. By reducing the use of coercion, the state forces all parties to use persuasive incentives that appeal to rationality, freedom, and dignity. Public officials, in controlling the threat of violence, cannot avoid enforcing a pattern of rights to liberty and property. By increasing the certainty that contracts will be honored, they permit people to cooperate and increase the national wealth; wealth expands the range of choice, hence, the liberty of the citizens. The distribution of rights to that wealth will, at any particular time, reflect the ethical blindness, as well as the ethical insights, of the citizens. It will reflect a fallible public purpose. But Commons perceived, in the evolution of the democratic state, a pattern by which former serfs and slaves rose to the dignity of citizenship and enriched an evolving legal tradition with their unique insights into the nature of a just society. On this basis, he developed a conception of social evolution purged of Spencerian or Hegelian necessity. With proper discipline, citizens can, in time, transform a conflict of interest from a clash of “Malthusian” bigots into a reasoned search for a just society. Thus, the citizens, by dialogue, free themselves from their own biases. The conception of human freedom implied here differs from that based on the paradigm of the impersonal market. It includes the right to freedom of assembly, to the means of self-realization, and to freedom from “undue economic coercion.” These freedoms depend upon the protection of a well-ordered state.

Notes

1. There are a number of good introductions to Commons's theory of institutional economics. They include N.W. Chamberlain [1963], R.A. Gonce [1976], L.G. Harter [1962; 1965], K. Parsons [1950], M. Rutherford [1983], and one should not forget Commons [1931]. They all include aspects of Commons's view of government and the state (for example Harter [1962, pp. 236–37]). But their general focus is on other aspects of his thought.
2. I would tend to go further and claim that Commons thought in terms of “final cause,” while Veblen thought in terms of “efficient cause.” It is possible to disagree with this, however, as one reviewer did, on grounds that Commons's concept of the evolving public purpose is closer to Dewey's instrumentalism. Much that Commons wrote supports this conception, and so I hesitate to advance my interpretation as definitive. My reasons for sticking with the “final cause” interpretation are as follows: First, Commons made a point of following Peirce's philosophy of science rather than that of Dewey or William James. Peirce, coming from mathematics and chemistry, tended to hypostatize concepts. He was influenced by the medieval philosopher John Duns Scotus as well as by Immanuel Kant, and as a result he was more platonic than the other pragmatists, and his ethics included the concept of a *summum bonum*, incompletely comprehended, that legitimizes all activity. Dewey, coming from biology and medicine, and influenced more by G.W.F. Hegel, tended to look at things as more in flux and at ends themselves as continually evolving. My second reason is that this interpretation makes the most sense of the discussion of ethical ideal types in *Institutional Economics*, [Commons 1934a, pp. 741–43]. My third reason is that this is compatible with Commons's fundamentalist abolitionist background, which was probably always with him to some extent. In any case, what is important is that Commons was quite explicit about following Peirce's philosophy and about using the writings of Dewey and James to adapt it to the social sciences. He would not have been so careful to differentiate in such a manner if he did not follow Peirce where the latter diverged from Dewey and James. Attention to this could possibly improve interpretations of Commons. From an operational point of view, there is little difference between evolving goals and goals that are related to the true purpose as successive approximations are to the object of inquiry.
3. The argument here is similar to that advanced by A.M. Field [1979]. Field argued that the assumptions used in public choice theory do not yield predictions that are sufficiently restrictive. He also attributed the policy irrelevance of contemporary labor economics to its departure from institutionalist methodology. His first argument is considerably strengthened by R.A. Musgrave's demonstration that the assumptions of public choice theory can lead one to conclude either that government is too small or that it is too large [Musgrave 1981]. The only quibble with Field concerns his statement that “Commons . . . did not attempt to construct a general theory of institutions” [Field 1979, p. 53]. Rutherford has argued that he did [1983]. Such a theory is also implicit in the concept of evolution outlined by L.G. Harter [1965]. Of course, part of the quibble might arise

from the definition of theory. Commons did not develop a deductive theory, but he did develop a conceptual scheme.

4. G.W. Atkinson [1983] also notes the policy irrelevance of public choice theory. He implicitly brings in the public purpose when he criticizes public choice theorists for ignoring the influence of shared values, power, and uncertainty as elements in transactions.
5. In this context, Musgrave's objection to the Leviathan literature is interesting.

While claiming to offer a positive approach, this literature reflects the consequences (derived neatly, and on occasion, gleefully) from a pre-conceived model of behavior designed so that it cannot but result in a demonstration of government failure [Musgrave 1981, p. 88].

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