

**From Judicial Sovereignty to Collective Democracy: The Development
of J.R. Commons' Perspective on Progressive Institutional Change**

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This paper clarifies the significance of “collective democracy” in the works of J.R. Commons by comparing it with “judicial sovereignty” in terms of its contribution to “progress” (Commons 1934; 1935). We can thus answer two issues that Bush (1987; 1989) does not clearly address: (i) what setup for policy formation contributes to progress and (ii) what is the role of economists within a collective democracy? Based on the comparison, the answer to the first question is collective democracy, and regarding the second question, the roles of economists as both economists and “institutional” economists are extrapolated.

Keywords: judicial sovereignty; collective democracy; progressive change; role of economists

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1. Introduction

Bush (1987, p. 1101) defines progress as “the displacement of ceremonial patterns by instrumental patterns of behavior,” while “progressive” institutional change “entails an increased reliance on instrumental values in the correlation of behavior within the community, thereby lowering the index of ceremonial dominance” (Bush 1987, p. 1101). Based on the works of J.R. Commons, the purpose of this paper is to consider the following two issues that Bush does not consider in detail and in line with the conference theme of AFEE at ASSA 2020.

First, what policy formation setup best contributes to progress? Although Bush (1989, p. 455) affirms that “the idea of ‘progressive’ institutional change provides a conceptual bridge between the theory of institutional change and the theory of social policy formation,” he only noted briefly that “the process by which majorities of a democracy are formed” makes the best contribution to progress (Bush 1987, p. 1109). Further, “democracy is the political process most likely to nurture the conscious exercise of human discretion over the evolution of the society,” that is, “the process of inquiry upon which instrumental valuing depends” (Bush 1987, p. 1109). Second, what is the role of economists in this process?

While Bush mainly focuses on the works after those of Veblen, that is, those of C.E. Ayres and his successors, he also pays superficial attention to Commons. Commons’ works may become useful materials for answering the above two questions because he participated in the policy formation in the state of Wisconsin during a progressive era and adapted this experience to create his institutional theory.

To answer the above questions, the next section confirms that in his latter works (1934; 1935), Commons changed the evaluation of institutional setups (i.e., judicial sovereignty and collective democracy) that he had offered in his earlier works (1924; 1925; 1928–1929). The third section shows that coupled with this change in his evaluation of judicial sovereignty and collective democracy, he also developed his

meaning of “progress.” The first question can be answered by comparing two setups.

The fourth section discusses the role of economists within an institutional setup, namely collective democracy, on which Commons has placed great value since his 1934 work.

2. From judicial sovereignty to collective democracy

Commons identifies two institutional setups that trigger progressive institutional change. The first, “judicial sovereignty,” is discussed in detail in Commons (1924). The significance of the second setup, “collective democracy,” has been clarified in Commons (1934).

2.1. Judicial sovereignty

The method Commons (1924) focuses on is that of institutional selection by “judicial decision,” where a superior selects an institution (a custom) from several competitive institutions (customs) in the process of solving a dispute. The term that captures this process is “artificial selection” (Commons 1924, p. 376), and the Supreme Court stands at the pinnacle of this process.

The Supreme Court is based on the “public purpose”: justice; the increase in the public interest; and the achievement of ethical principles, namely security of expectations, freedom, and equal treatment (Commons 1924, pp. 327, 345, 351–352).

The public purpose is not an a priori one (Commons 1924, p. 321), and the meaning of

public purpose has changed historically, especially by virtue of the Supreme Court itself. For example, the Court expanded the meaning of freedom from the freedom of the human body, to the property of an individual, to the property of a corporation (Commons 1924, p. 325).

The Supreme Court makes decisions based on the advantages and disadvantages to the public purpose resulting from its decision (Commons 1924, p. 356). As such, while also being strongly affected by its internalized customs, the Court classifies facts, attributes different weights to them, and finally, makes decisions that solve the issue of conflicting customs (Commons 1924, pp. 349–351). The internalized customs are significantly affected by the dominant customs in terms of time and place. Consequently, the Supreme Court is affected by the evolving customs in society.

Commons' "Marx Today" (1925) considers not only the Supreme Court but also the commissions widely used for resolving the frequent conflicts of collective action and demonstrates the roles and limitations of the various government branches in making progressive change. A commission is a negotiation body between interest groups and the government. It is the "fourth branch" of government and has quasi-judicial and quasi-legislative power and the function of "investigation."

One thing to be noted about the evolution of good customs is that they do not advance equally with all capitalists, and this is the reason why courts, legislatures, and commissions are found necessary to assist the more progressive in bringing up

the laggards. [...] the State, either as legislature, executive, or judicial interpreter of the common law, might increasingly protect the good practices of capitalism and restrain the bad practices. It has required and is requiring the State [...] to perform this service, but in no case can either branch of government go very far ahead of what is customary and sanctioned by associations, though it may fail to go as far as better customs would already support. (Commons 1925, pp. 688–689)

Commons (1925) notes that the role of sovereignty is to select “better customs” and diffuse them. The limitation of progress by sovereignty is “the more progressive” state, which is compatible with the “better customs.”

Commons (1925, p. 693), in his comparison between government branches, shows the significance of commissions from the perspective of their adequacy in resolving a type of conflict:

The legislature does not accurately represent the parties to the dispute. It is the lobbies that are more truly representative of classes than the legislatures. The judiciary, on the other hand, while it is suited to decide individual conflicts where the rules of the game have previously been laid down, yet is unsuited to decide the conflicts of classes themselves where the rules themselves are developed. [...]

These commissions differ from courts in that they deal primarily with [conflicts of] classes, while courts deal primarily with [conflicts of] individuals.

Although the differences in adequacy between courts and commissions for resolving the different types of conflicts are identified, at the time of Commons (1925),

the differences between “progress” brought by court and “progress” brought by commissions were not clear.

2.2. Collective democracy

Commons (1934) retraces the deliberation process of the Wisconsin Workmen’s Compensation and Accident Prevention Law of 1911 and the Wisconsin Unemployment Prevention Law of 1932 and their administration after the passage and describes the “joint bargaining system between representatives of opposing organized interests” (Commons 1934, p. 858). Commons (1935) includes the New Deal NIRA in this setup and names it “collective democracy,” comparing it with Adam Smith’s “individual democracy.” He regards it as the “ethical ideal type,” which should be defended and pursued in American capitalism.

The following three characteristics of this setup are essential. First, the creation and amendments of working rules in the system are through negotiation between interest groups. Each interest group, set up voluntarily, selects its representative(s) and sends them to be part of the system. Second, through “investigation,” they find “the best practice,” which is attained and maintained by an actual “going concern” and, through negotiation, they find “the upper practicable limit of [consensual] idealism” and adopt idealism as their working rule (Commons 1934, pp. 742, 860). Third, the “administration” of the rule is voluntarily performed by interest groups. Fourth, the

workability of the system is supported by the “sovereign power” given by the government.

When we link the concept of collective democracy with the framework of Bush (1989, p. 456), it becomes a setup stressing and enhancing the change in the “grassroots” level, that is, “effective” change. According to Bush (1989, p. 456), progressive institutional change necessarily “involves altering the behavior of individuals widely dispersed throughout the affected institutional domain” because “the resistance of the community at large to changes to habitual modes of thought and behavior.” In Commons’ collective democracy, the endogenous changes of preferences (i.e., meaning and weighing of “interest”) of the involved persons (parties) through intra and inter-organizational communication include not only the state and local levels but also workplaces. In fact, Commons (1934) shows that mutual understanding and shared expectations were constructed through communication (i.e., negotiations for establishing the joint bargaining system and amending its rule and administration) between the conflicting interests in Wisconsin over 20 years. Therefore, collective democracy fits the requirement of Bush’s progressive institutional change, which requires modifying conventionalized thought and practice.

3. From better customs to best practicable

As noted above, Commons (1925) does not distinguish between the meaning of

“progressive” by a court or commission, lumping them together in the concept of “better” custom. Conversely, Commons (1934) distinguishes between the two meanings.

3.1. Meaning of progressive practice in a collective democracy

In the institutional economics of Commons, “progressive” institutional change means investigating, creating, and administrating an institution that elevates the practices of the persons and groups that are under the “reasonable” level to an adequate level. However, the meaning of “reasonableness” becomes the subject of discussion. Commons (1934) defines the meaning of reasonableness in a collective democracy for the first time as “the upper practicable limit” (Commons 1934, p. 860). The “progress” in a collective democracy means “investigating the working rules of collective action which bring reluctant individuals up to [...] a reasonable idealism,” which is “already demonstrated to be practicable by the progressive minority under existing conditions” (Commons 1934, p. 874).

3.2. Meaning of progressive custom in judicial sovereignty

Thus, Commons (1934, p. 860) identifies the meaning of progress in collective democracy and then redefines the “progress” by judicial sovereignty. The meaning of progress for a court is “ordinary.” For courts, “‘customary’ is *not the best practicable*, it

is something of a *mean* between the palpably inefficient or stupid and the exceptionally capable and efficient” (Commons 1934, p. 860, italics in original). While Commons (1925), evaluates a commission based on its functional differences from other government branches, Commons (1934) gives the collective democracy further significance by the different meaning of “progress” in a collective democracy compared to the one under judicial sovereignty.

Under the framework of Bush (1987), who values “persuasion” over “coercion,” collective democracy is a more progressive setup than judicial sovereignty for several reasons. A collective democracy targets “sensed awareness” (Bush 1987, p. 1102) of the involved parties through negotiation, education, “campaign,” and “agitation” in the workplace and local, district, and state levels (Commons 1934, pp. 854–857). It is thus recommended to create and operate an incentive mechanism through the negotiation between interest groups of the negotiation body to induce “reluctant” individuals to “willingly” adhere to the system (Commons 1934, p. 874) and to refrain from coercing a reluctant individual by “compulsory law” (Commons 1934, p. 857).

3.3. The reason Commons developed his meaning of progress

When we compare Commons (1934) and its draft (1928–1929), Commons distinguishes the meaning of reasonableness (i.e., progress) in the collective democracy from the one in judicial sovereignty and clarifies the significance of the former posterior

to the Great Depression. In the following sections, the reason he develops his meaning of progress from “better” custom to “the upper practicable limit” is analyzed.

To recover from the Great Depression, each advanced country embarked on a “managed recovery” (Commons 1934, p. 611). The reason Commons added a detailed explanation of collective democracy in his 1934 work is the concern not only with the rise of fascism in Germany and Italy and communism in Russia but also with the risk of the totalitarianization of the American political economy. While discussing the “managed recovery” methods, Commons (1934, pp. 346, 887–888) seems to evaluate the New Deal policies starting from 1933, and Commons (1934) raises the alarm over the American political economy that was moving toward totalitarianism. Commons wanted to demonstrate how a managed recovery in the US could hold the line against fascism and communism. According to Commons (1934), the defense against fascism was keeping legislature alive by solving its functional failures by using commissions. The role of the legislature is to approve and protect voluntary associations, and in some cases, give them authority, and the role of the voluntary associations is to send their representatives to the advisory committee to resolve complex conflicts.

The reason he actively evaluates collective democracy is to show that this American institutional setup is clearly different not only from the totalitarian regimes in other countries but also from the political movement gaining momentum inside the U.S.

This is in line with “Share Our Wealth” by Huey Long, who argues for radically redistributing the wealth of the nation to surpass the Great Depression (Commons 1935).

4. Role of (institutional) economists in the collective democracy

Considering the significances of Commons (1934), this section identifies the two roles of economists in collective democracy. First, they are not only outsiders who provide professional information, but they also participate in negotiations in the collective democracy as members of advisory committees, along with “employers, employees, physicians, engineers, architects” (Commons 1934, p. 717). Inferring from “Accidents and Unemployment” (Commons 1934, pp. 840–873) on the changes in the preferences of bargaining parties, economists may be expected not only to facilitate the “sensed awareness” of other parties by showing “effects” related to the “purpose” of the negotiating body, but should also change their own habitual assumptions flexibly through communication with other parties to contribute to consensus formation.

As in the previous section, to defend the “American way” from the threats of other systems emerging from the worldwide economic predicament, Commons, from the perspective of progress, demonstrates the significance of this American way, from which the role of institutional economists can be identified. Their role is to find an emerging and experimental setup through investigation, explaining it systematically,

and showing its signification from the perspective of socio-economic progress; in parallel, institutional economists consider the current meaning of “progress” to be in line with the current political economy through the collective investigation because progress is an “evolutionary concept” (Commons 1934, p. 766).

5. Conclusions

This paper clarified the significance of Commons’ “collective democracy” from the perspective of “progress” by comparing it with “judicial sovereignty.” Based on the comparison, we clarified two issues that Bush does not address clearly. First, regarding which institutional setup for policy formation contributes to progress, the collective democracy is identified based on Commons’ work. This setup helps reluctant individuals reach “the best practicable” through changes in the habitual assumptions of the concerned parties facilitated by on-site investigation and communication. Second, the role of economists in the investigation and negotiation is to identify the democratic community’s meaning of “progress” and the experimental setup that can advance this progress and show the significance of the setup from the standpoint of this progress. However, I have no intention of positing that a progressive setup in today’s socio-economic situation must be identical to Commons’ collective democracy. Based on the role of the institutional economists extracted from Commons (1934), the setup should be found by current institutional economists through on-site investigations and

participation in consensus formations.

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