John R. Commons was a progressive devoted to the gradual improvement of the economic system of his times. He was concerned with issues of public policy in the development, stabilization and humanization of an economic system which honored and depended upon the self-directed activities of businessman, laborers and farmers both as participants in the economy and as citizens. Much of his life was devoted to understanding the predicament of laborers in the burgeoning American industrialization. Out of this concern came not only significant contributions to the study of the history of industrial society, trade unionism and labor legislation but social inventions in public administration, especially those relevant to programs for industrial relations, accident prevention and insurance and unemployment compensation. Although he worked creatively on public utilities, monetary policy, economic stabilization, and taxation, his most persistent interests were in the labor field, and his major works in economic theory all carry the imprint of this interest. As he commented in the opening chapter of Institutional Economics, "The problem now is not to create a different kind of economics - \"institutional\' economics - divorced from preceding schools, but how to give to collective action, in all its varieties, its due place throughout economic theory."  

In considering the intellectual and moral commitments which gave direction to Professor Commons' point of view, it is well to remember that he was born in 1862, during the Civil War. He was to witness as a student and young man the far-reaching political and social convulsions that followed this war. The era was characterized not only by reconstruction, panics, and depression but also by the completion of the railway system, the end of the frontier of free land, the granger movement, the antimonopoly campaigns, the rise of industrialism, and the emergence of a stable unionism in the American Federation of Labor. Commons responded to the issues of his time by his concern with poverty and with what came later to be known as business cycles, as well as with problems of monopoly power.

His first major publications treated the problem of monopoly. An essay on "Protection and Natural Monopolies" appeared in 1892 in the Quarterly Journal of Economics,\(^2\) and in 1893 his first book, The Distribution of Wealth, was published.\(^2\) Although Commons' analysis of monopoly was along lines which were to be followed up by economists of later decades, the review criticism of the book centered almost wholly upon his radicalism,\(^3\) which was epitomized in his proposal that "the right to employment" should have the status of a property right,\(^4\) with compensation for unemployment and loss of jobs.

In 1899 Commons had a fairly long essay in the Arena, entitled "The Right to Work." Here he restated his basic thesis, this time supported by the doctrine of natural rights. He noted that the "lack of employment" was attributable to

\(^{*}\text{For a recent comment on this point see L. G. Harter, Jr., John R. Commons - His Assault on Laissez Faire (Eugene, Oregon State Univ. Press, 1962), pp. 35-37.}\)
one of three circumstances: "arbitrary discharge . . . loss of employment through improved machinery and trusts . . . or loss of employment through improved machinery and trusts . . . or loss of employment through depression of trade."

Free industry is the right to leave the ranks of wage earners, without let or hinderance from one's employer, or lord, and to enter the ranks of capitalists and employers, if one is able. Monopoly now has antiquated this right, since the small capitalist, to say nothing of the quandam laborer, cannot compete with the large and established industry. Instead of starting anew as a capitalist, the laborer can only hope to get promotion or to invest his savings within the industrial organization where he finds himself . . . The successor and substitute for the rights to free industry and free employment, must, under new conditions, be the right to a definite and right standing, within the existing industrial enterprises. This is the Right to Work. 5/

Commons never abandoned his thesis that the worker deserved and should somehow be given rightful status as a worker. The Wisconsin Compensation Act of 1932 was the culmination of his long persistence in this cause.

Commons' outlook and approach seem to have been deeply influenced by a few major events in his career. First there was what he called "my Five Big Years" between his dismissal at Syracuse University in 1899 and his appointment at the University of Wisconsin in 1904. During these years he became acquainted with American industry, business and government; he constructed the first index of wholesale prices (for the Democratic Party campaign of 1900, and was summarily dismissed when the index rose); he made a study of immigration for the U. S. Industrial Commission; he worked as a labor conciliator for the National Civil Federation with Ralph Easley and learned the art from a master; and he made the study of the Restriction and Regulation of Output by Capital and Labor. But he was "born again," as he said, when he "entered Wisconsin, after five years of incubation." 6/

The renaissance in Commons came from a combination of circumstances most fortunate for him. The State of Wisconsin was then a great laboratory for experiments in the progressive reconstruction of the economy, and the University provided him with an opportunity to do fundamental research. He became an adviser to officials and administrators in devising new procedures for economic, social and political adjustment. In this experience we sense three or four crucial episodes. He found in the writings of Charles Peirce, especially, a philosophical formulation which put his thinking on a more solid footing; his study of the American shoemakers enabled him to work out the foundations of a non-Marxian, and even anti-Marxian, theory of industrial evolution; and his sharing in the design and administration of the Wisconsin Accident Compensation Act of 1911 confirmed his thesis that conflicts of interests in industry could be resolved constructively and used as a tool of economic progress. All of these experiences were influenced by and in turn enriched his program of fundamental research. In his great research treatises, Legal Foundations of Capitalism 1924, and Institutional Economics 1934, he reconsidered as an investigator many of the issues with which he had been concerned as a young man; but the context was different. He now had a mastery of economic and legal history which enabled him to understand how property, markets, trade unionism, industrialism, and capitalism itself had evolved in the experience of Western man.
In order to understand what Commons did, we need to see what he was trying to do. He was first of all concerned with social and public issues, with the ways in which private purposes are made consistent with public purposes. He assumed that private persons and concerns pursue self-interest; and held that the private and individual have their significance within going concerns which restrain, liberate, and expand individual action through working rules, enforced by various sanctions.

As regards the value problem, Commons was concerned primarily with what he called public value; one of his major courses in the last years of his teaching was so entitled. In his consideration of public value, the major point may well have been that he was really at peace with the fundamentals of the inherited system. Although he was a great innovator, and was considered a radical and reformer by some people throughout his life, the key to his constructive contributions in public affairs, it now seems, is that as he came to understand deeply the development of the Anglo-American political and economic system he was able to accept the system and the fundamental precepts and principles upon which it is based. As an analyst he worked within the basic premises of the main tradition of Western economics, except that he attempted to broaden the analysis sufficiently to embrace conflicts of interest, collective action, and the remarkable structure of property relations which has developed in Western capitalism. But the principal point to be emphasized here is that Commons accepted as worthy public purposes the emphasis upon liberty, equality of opportunity, and the dignity and self-direction of the individual to which the democratic system was intentionally dedicated — to be assured and experienced through order, security of expectations, and reconciliation of conflicts. Willing participation was for him the leading principle of social organization.

No one has summarized the issues of public value more succinctly than G. H. Mead in his essay on "Scientific Method and the Individual Thinker": "This modern conception" of freedom of action, observes Mead, "the cult of increasing knowledge and of continually reconstructing the world . . . proceeds from the standpoint not of formulating values, but giving society at the moment the largest possible number of alternatives of conduct, i.e. undertaking to fix from moment to moment the widest possible field of conduct. The purposes of conduct are to be determined in the presence of alternative possibilities of action." Working within this interpretation, Commons concentrated his attention upon the range of alternatives open to participants within the social organization, of which the economic system is a major part. Commons' position on public value is closely related to his faith in experience as the source of the elements of working rules; the derivation of the common law out of customs is a conspicuous example.

Since an evaluation of Commons' philosophical views is not possible here, we shall limit this aspect of our comment to noting a few relevant remarks by Commons in his Institutional Economics. In reviewing the influence of John Locke upon economic thought he remarked:

Locke's mechanistic idea of the mind was that of a passive receptacle of ideas. . . . This too was characteristic of the physical economists, culminating in Karl Marx, who reduced the individual consciousness to a mere copy of the production and acquisition of wealth. In order to unite in the idea of an expected repetition
of transactions, Locke's corpuscular sensations, reflections, and volitions, it required a still further notion of the mind as the whole body in action, . . . with this whole body as a creative agency looking toward the future and manipulating the external world and other people in view of expected consequences. This remained for the most recent psychology and economics to accomplish.

He added in a footnote: "Pragmatism, Gestalt psychology, institutional economics."8/

Among the significant premises of Commons' formulation we should also note his determination to work out a volitional economics - a formulation of economics which would recognize that human beings were persons with wills of their own. Closely related is his thesis that "economics deals with the individual as a citizen endowed with rights, duties, liberties, and exposures, in varying degrees imposed by various concerns. . . . Peirce's pragmatism, applied to institutional economics, is the scientific investigation of these economic relations of citizens to citizens."9/

Commons' acceptance of the instrumentalist viewpoint in philosophy provided him with a theory of mind, as a creative interaction in events, consistent with his formulation of willing participation as the leading principle of social organization. He resolved early in life to formulate a volitional economics.10/

III

Commons' early years at Wisconsin were devoted to the study of the history of labor and industrial society in which he and his associates first collected and then interpreted basic documents in the industrial evolution of America.11/ In this extensive effort, his article on the "American Shoemakers, 1648-1895"12/ was a strategic achievement, both in terms of his own ideas and for the interpretation of the labor movement.13/

The selection of the shoe industry for the intensive study of industrial evolution was not a random choice. Enough of the records of the "Company of Shoemakers" of Boston, founded in 1648, were preserved to enable Commons to analyze the functioning of a guild and all successive industrial stages in this new country. As he says in the opening sentence of "American Shoemakers": "The boot and shoe makers, either as shoemakers or as 'cordwainers,' have been the earliest and most strenuous of American industrialists in their economic struggles." Furthermore, there were advantages in studying industrial evolution in America: "certain considerations in European history . . . have obliterated or confused the pure economic facts. Industrial evolution, considered on a mere economic process, had to work up through superimposed racial, military, tribal, feudal, ecclesiastical, and guild regulations and restrictions. . . . It is this

*Professor Commons referred frequently in class to his intellectual debt to Peirce's essay on "How to Make Our Ideas Clear" (Popular Science Monthly, Jan. 1878). Also he once remarked privately how grateful he was when he found that Peirce had in this essay "worked out many of the problems I had been thinking about."
bald simplicity of American individualism, without much covering of races, armies, guilds, or prelates, that permits us to trace out all of the economic sutures in their evolution from infancy to manhood.\textsuperscript{14}

Here then was a historical record which could serve as a laboratory for the investigation of the economic facts of industrialization. Out of his study of the evolution of shoemaking from custom, or "bespoke," work through the retail and wholesale order stage, he concluded: "It was the widening out of these markets with their lower levels of competition and quality, but without any changes in the instruments of production, that destroyed the primitive identity of master and journeyman cordwainers and split their community of interest into the modern alignment of employers' association and trade union. The struggle occurred, not as a result of changes in tools or methods of production, but directly as a result of changes in markets." The conflict of labor and capital resulted from the changing economic functions integral to the widening of the market. These he termed "revolutionizing facts" - because, one infers, they provided the clues to a theory of the labor movement altogether different from that propounded by Marx.\textsuperscript{15}

Karl Marx [he noted] was the first to challenge the world with a keen analysis of economic evolution, but his standpoint is that of the mode of production and not the extension of the market. His two assumptions of a given "use value" and a given "average social labor" serve to obliterate the one the part played by the price-bargain, the other the part played by the wage-bargain. With these assumptions, the way he is able to concern himself with the production of "surplus value" by his theory of the working day and the cost of living. But these are secondary factors, results not causes. The primary factors are on the side of the market, where competition is carried on at different levels. Instead of "exploitation," growing out of the nature of production, our industrial evolution shows certain evils of competition imposed by an "unfair" menace. Instead, therefore, of an idealistic remedy sought for in common ownership, the practical remedy always actually sought out has been the elimination of the competitive menace through a protective organization or protective legislation.\textsuperscript{16}

The insights from the shoemaker investigation served as a foundation for Commons' later work on labor theory, labor history, and industrial government. In the introduction to the History of Labour in the United States Commons adds to his thesis regarding the significance of market structure for industrial conflict recognition of the crucial importance for unionism of citizenship in the face of economic instability. In all of this he was investigating the "rightful" place of labor in the American economy.

Commons' idea of "protective organizations" matured in policy as fair competition buttressed by equality of bargaining power. The conception of "protective legislation" expanded in public policy from hour and wage legislation to unemployment compensation and eventually into the social security system. The general principle was that of a stabilized humanized capitalism.

Participation in the "agitation, enactment, and, for the first two years, in the administration of the accident compensation and safety laws"\textsuperscript{17} adopted
in Wisconsin in 1911 rounded out and probably confirmed in a definite way his progressive approach to public policy. Only two or three issues can be noted here. Commons' approach to accident insurance and prevention had the effect of changing the whole "possible field of conduct" (to use Mead's phrase), especially that of employers, regarding industrial accidents. In place of reliance upon the common law rule of negligence, the Wisconsin law of 1911 was based upon the triple idea of (a) making industrial accidents an economic liability of industry, which was (b) to be covered by insurance, with the expectation (c) that the costs of accident insurance could be covered by "efficiency in accident prevention," to be achieved by a new interest in safety; each establishment would have a separate liability rating for insurance purposes according to its own accident record.

The administrative procedures adopted under the law provided that (a) safety standards were to be drafted by committees consisting of the representatives of the employers and employees directly concerned, with a deputy of the Industrial Commission acting as secretary; and (b) these formulated rules and regulations were given the force of law by being issued as orders by the Industrial Commission. By these means the safety regulations adopted were assured of being reasonable. This procedure brought the orders "within the legal doctrine of reasonableness, and avoided the constitutional prohibition against taking the property of employers without due process of law; that is, in this case, without their consent."18/ Also adoption of safety practices with the greatest promise of practical effectiveness made reasonableness in effect the "upper practical limit of idealism,"19/ under the circumstances.

Among the principal inferences which Commons seems to have drawn from this experience with accident prevention and insurance, two deserve special note. First, the interpretations of reasonableness were gradually elaborated into his theory of reasonable value, especially on public issues, which underlay much of his faith that capitalism could become a reasonable capitalism. Secondly, his insights from experience with the responsible participation of representative but immediately conflicting interests became generalized in his view as the possibility of achieving order and mutuality of interest out of conflicts, through negotiation, conciliation, and compromise.

IV

Professor Commons was invited by the governor of Wisconsin to draft a public utility law that would regulate rates and yet meet the judicial tests of due process. Out of this experience came, after seventeen years of study and writing, Commons' greatest research achievement, Legal Foundations of Capitalism. In searching legal and economic history for principles of valuation, he "found eventually that what we were really working upon was not merely a theory of Reasonable Value but the Legal Foundations of Capitalism itself."20/

Although this book of Commons reports comprehensive investigation, we can note only a few issues central to a progressive approach to public policy suggested by the terms developments, power, property, and custom. These issues are of major concern today, particularly in considering the possibilities of a gradual or progressive approach to development policy in the less developed areas of the world.
Legal Foundations is a study of the way in which the form, or structure, of an economy changes as development moves from feudalism and the guilds to a modern market, opportunity-oriented economy. This transformation centered, in the Anglo-American experience, upon the changing nature of property rights and relations. Understanding the development of the system of property relations provides in turn a key to understanding both how political power is controlled and how private economic power came to emerge. A brief review of a few points in Commons' analysis may indicate how he formulated the central issues.

The rule of the British monarchs in the centuries following the Norman invasion was as absolute as that of a modern dictator. The British people gradually achieved both individual liberty and secure zones of economic opportunity through reduction of the unlimited prerogatives of the king to the sovereign powers of a constitutional monarch. The landlords were the first class to have their liberty implemented with property.

Among the strategic points of this development of property and liberty were the commutations of feudal dues to fixed money liabilities, which eventually became taxes upon the land levied by parliamentary procedures. Through rules restricting the zones of arbitrary acts by the monarch, the exercise of power of the monarch and his agents was eventually reduced to predictable and controlled limits; a "compromise set of working rules" established the rudiments of representative government and the independent judiciary, with public officials subject to trial by the same laws and courts of the realm as private persons. The essence of the achievement, from the perspective of economic development, was that the curbing of the powers of unlimited prerogative created a zone of freedom and discretionary action - what Commons called the "indefinite residuum," an "orbit where the will is free."

The "indefinite residuum" beyond the power of the monarch is the basis of what we now call opportunity; secure occupation and exploitation of opportunities became the rights of property. In a parallel manner, the liberty of persons assured by this same curbing of the arbitrary powers of rulers is the basis of personal liberties; these liberties became citizenship when made secure by the "compromise set of working rules."

Thus Commons' analysis shows not only the integral and reciprocal relationship among limited sovereignty, opportunity, and individual liberty but also how these assured working rules permitted rightful opportunity to develop into property and rightful liberty into citizenship.

The common law method of developing law is essentially that of choosing customs deemed beneficial and making these customs into generalized working rules sanctioned by the power of sovereignty. In this way the customs of landlords and tenants became the basis of the common law of landlord and tenant; similarly the customary trade practices of the guilds were selectively generalized into the common law of business.

In an age of subsistence agriculture, handicrafts, and limited commerce, the first definite property rights developed by this method were essentially the exclusive right to use a physical thing. This led to a common-sense notion of property as physical objects held for personal use. Although this idea of property persisted for centuries, and persists even today, the development of a market economy gradually enlarged the idea of property to the rightful withholding
from others, and the value of property to the capitalized expected market earnings from the use of the object. This Commons calls intangible property, which follows the law of opportunity; and an economy characterized by intangible property is what Commons means by capitalism.24/

Through this analysis of the nature and evolution of property and property rights, Commons was able to reconsider the nature of property rights in the job, the issue which had brought such calumny upon him thirty years before. Through his analysis of the development of property rights in land and the law of business and credit, he was able to trace out the ways in which the customs of landlords and tenants, businessmen, and borrowers and lenders had gradually developed into the common law (as well as the ways in which the common law was supplemented by equity law and statute law). However, the customs of organized labor as late as 1924 had not been accepted in the United States as a similarly reasonable basis for a common law of industrial relations. This lack of acceptability by the courts, Commons argued, was based upon such considerations as the doctrine that, "for the purposes of the Fourteenth Amendment, a corporation is deemed to be a person and not an association of persons" "whereas the union appears as a conspiracy of individuals . . . ." The ideals and customs of laborers "are quite peculiar and differ in important respects from those of business. Primarily they spring from . . . insecurity of jobs and positions . . . ."25/ Subsequently, the law of collective bargaining in this country did accept many of the customs of laborers and developed very much along the evolutionary lines envisaged by Commons.

This meager sketch may suggest something of the way in which Commons formulated basic issues in the evolution of the structure of a modern exchange economy. Out of experience came customs in the struggle to survive and get ahead; and out of customs came ways of resolving disputes which could be strengthened and generalized into law. The achieved security of expectations together with limited government fostered the development of property. But private economic power was also a consequence, as liberty became implemented by property in an age of capitalism.

As Commons formulated the problem of power he distinguished political power from economic power and both from moral power or persuasion. Political power rests upon the legal use of physical violence to enforce sanctions; economic power upon the ability to withhold, sanctioned by collective action and property. Both are irreducible entities in an industrial economy which honors liberty and opportunity. But the method of arriving at "reasonableness" in the use of power is different in the two kinds of power. The power of governments is kept in check basically by the procedures of representative government, the independent judiciary, and the trying of public officials in the same courts as private persons. Private economic power can be destroyed by government, by Communist revolutions for example, but the stabilization and humanization of an economy characterized by economic power are a matter of bargaining, of balancing power with power - which Galbraith has called countervailing power. Thus Commons would permit private economic power - within wide limits - and keep such power reasonable through collective bargaining and the long-honored doctrine of reasonable restraints of trade.
Commons accepted as desirable a stabilized and humanized capitalism. In an essay published in 1925, he compared his views of a reasonable, stabilized capitalism with Marxism and socialism.

We need to remember, he noted, that Marx published the Manifesto in 1847, following ten years of the lowest degradation reached by the working people of England and Europe since the time of the Napoleonic Wars . . . There is much reason to conclude, had capitalism continued in the same direction after 1847 as it did during the 30 years after 1817 when Ricardo wrote his Political Economy, that Marx's revision of Ricardo would have proven to be correct, for Marx described, in fact, what had actually been happening . . . But there occurred after 1850, and increasingly since that time, what may be named, in part the Self-Recovery of Capitalism and in part its Forced Recovery, until today what may be named the Stabilization of Capitalism is apparently strengthening the system more than ever before.27/

The self-recovery of capitalism began, in Commons' interpretation, with the general incorporation laws of the 1850's, in both America and Europe. Prior to this time charters were granted by special acts of legislatures, which led to political corruption. But the universal right of incorporation counteracted Marx's prediction regarding the concentration of capital by permitting the concentration of capital along with the decentralization of ownership. Also, this self-recovery was aided by legislation.

It is by legislation, such as public utility laws, blue sky laws, watered-stock laws and similar measures, that well-meaning capitalists can be protected in the greatest of all safeguards of capitalism, the confidence of millions of investors. . . . The outcry of many capitalists against legislation on the ground that it interferes with business is quite one-sided. It is this very legislation which has helped to save capitalism in our western civilization, and it is the lack of this legislation that has left it, in Russia, unprotected against communism and agrarianism.

The culminating oversight of Marx in his theory of socialism, and the one which comprehends all others, [was] the failure to see the importance of custom, and what, in Anglo-American jurisprudence is called the Common Law.28/

Commons then goes on to explain why the changing fact of custom and common law have "set up the principle of stabilization." What are later recognized as the "rights, duties, liberties and liabilities of private property" are in fact in existence as customs before being given the sanction of law. Common law arises out of customs as needed, when "disputes arise which must be decided promptly in order to keep the association, or community, or nation in a peaceable frame of cooperation."29/
Marx was not alone in failing to see the interconnections between custom and the common law, and between customary behavior and private property; neither did Ricardo nor Adam Smith. "For them there was no intervening principle of human behavior, between the compulsory edicts and the laws of sovereignty, on the one hand, and the individual bargains of private property on the other hand. Private property, for them, was actually created by the sovereign and it logically followed that the sovereign could abolish private property. For them there was nothing between the Individual and the State. Ricardo and the capitalistic economists would eliminate the state from business; Marx and the socialists would make the state supreme."30/

The stabilization of capitalism in Commons' interpretation is a complex of several major parts, as may be noted in a brief summary. One aspect of this was the stabilization of the price level and of the value of money. "The greatest and most fundamental stabilization [of modern capitalism] has been that of credit and prices through the cooperation of the banks organized in the Federal Reserve System."31/ A second was the stabilization of the structure of the economy through gradual modification of the nature of property rights, of which the most comprehensive is the "historic process of stabilization through custom and law."
A third aspect was stabilization through legislation such as that defining procedures for the issuance of stocks or the regulation of public utilities.
A fourth method of stabilization was by placing effective limits upon the exercise of economic power, through judicial support of fair competition, the value of good will, and the support of reasonable, but not unreasonable, "restraints of trade."

All of these aspects of stabilization are interrelated in public policy. For example, stabilization through placing reasonable limits upon the exercise of private power is an extension of the principle of stabilization through attention to customs. "This process of stabilization of capitalism through custom, has been passing through two stages, the first of which is the stage of conspiracy and anti-monopoly; the second, the stage of legalization and regulation. The conspiracy stage reached its climax in the Sherman anti-trust law of 1890, and the regulation stage can hardly be said to have had a beginning prior to the Twentieth Century."32/

The possibilities of this stabilization of capitalism occurred to neither Adam Smith nor Karl Marx because neither of them accepted the possibility of progress through the reconciliation of conflicts of interest. Smith, as Commons said, accepted the "principle of harmony of interests" and believed that people were injured by "such institutions as slavery, government monopoly, tariffs, bounties, navigation laws," etc., but that a "perfect freedom of action on all sides, in the pursuit of private property, could not injure anybody," "since in an age of Abundance the opportunities would be unlimited." Karl Marx held the view not only that history was ruled "by an impelling force that worked out its evolution regardless of the will of man," but also that the inevitable struggle between the owners and nonowners of property would be ended by a worldwide revolution, followed by a temporary dictatorship of the proletariat and "then a final harmony of interests . . . after everybody has accepted the principles of communism. . . . But this entire harmony of interests, whether under capitalism or under socialism, falls to the ground if once we recognize that social conflict has always been and always will be a fundamental fact in the progress of man-kind."33/
Parsons - Commons' Progressive Approach to Public Policy

Thus the idea of the stabilization of capitalism, in Commons' view, must rest fundamentally upon ways of resolving and reconciling conflicts of interest. This conflict is not merely a class struggle, it is a struggle of persons in many classifications, for "this conflict is as many sided as there are classifications of people according to their economic interests."[35] Thus not only is stabilization coming to be recognized, and should in Commons' view be recognized, as a major public purpose and a dominant issue of public policy, but the very nature of the "public" grows out of the resolution of conflicts of interest.

Commons develops his ideas of public and private purpose most fully in Legal Foundations of Capitalism. The public is not, he observed, something antithetical to the private. "The question always is, not, What is a private purpose over against a public purpose? but, Is the private purpose also a public purpose, or merely a private purpose?"[35] This position in turn rests upon the thesis that the public perspective is achieved through the resolution of disputes. Thus the public viewpoint is rooted in the judicial function and is found in all societies. "This judge, however, necessarily takes a public point of view, since his decisions must conform to what other judges have decided in similar disputes and to what the customs or laws of the community authorize and support. In applying the common rule he is conforming to public purpose. Hence the public point of view is inherent in every transaction, and just as much so in primitive society as in a credit economy."[36]

VI

The work and thought of John R. Commons are now a part of our history; a full generation has passed since his last major writings. If one were to evaluate his gradual or progressive approach to public policy, therefore, one would need to look back over the history of this country and assess the influence of his ideas in those fields where he was particularly active; this is done in several essays in the symposium. But Commons strove also for generality, especially in the later decades of his career. In conclusion, therefore, we choose to consider the relevance of his thought to a few issues in the public policies of nations emerging from colonialism. It is here that Western thought faces the direct competition of revolutionary Marxism. Consequently, it is this arena which presents the greatest challenge to a gradualistic and progressive approach to policy. In translating Commons' ideas into concepts relevant to the analysis of issues of public policy in underdeveloped areas, one encounters major problems in semantics - particularly in the term capitalism. This word meant something quite different to Commons than to Marx, and the difference goes to the very core of their viewpoints. Marx studied the performance of capitalism in the early stages of industrialization, partly at least from parliamentary inquiries concerned with the poverty and misery of the working classes in the early decades of the nineteenth century. He elaborated his insights within an Hegelian system of ideas which emphasized property as exploitation and predicted the ultimate collapse of the system.

The major documents that Commons studied in his interpretation of the development of the Anglo-American economic system were also available to Marx as he wrote, had he chosen to study them. But Commons studied economic history constructively, one might say, as a participant-citizen trying to understand how the economic system had been transformed from a traditional feudal, guild, and handicraft economy into a modern market, opportunity-oriented system. In
his analysis, he traced out the changes in the nature of property and the meaning of property rights, as rightful access to opportunities and negotiability of contracts matured into the intangible property of market freedom, and the negotiability of debts grew into the incorporeal property of bonds and the impersonal liability for debts. Whereas Marxian doctrine leads to revolution and the subordination of economic affairs to the control of the state, Commons' analysis leads to what he called a reasonable and stabilized capitalism in which political and economic powers are kept within reasonable limits and in some sort of equilibrium with each other. The relevance of Commons' progressive approach to policy in the underdeveloped world may be explored somewhat more precisely by concentrating on two issues, that of power and the common law approach to deriving law from customs.

The American system of economy and politics was deeply influenced by the revolutions of the seventeenth and eighteenth centuries. These revolutions were turned against the restrictive practices of governments at a time when the productive powers of a market-industrial economy were beginning to be enjoyed. We inherit the doctrines of classical liberalism from this era; as Guido de Ruggiero writes in the Encyclopaedia of the Social Sciences: "At an early stage of its development therefore the forces of liberalism concentrated on the crucial problem of limiting the interference of the state and of transforming state policy into a vehicle for promoting the liberties of individuals and groups." Liberalism in economic policies of which laissez-faire is a logical expression, was a part of this liberal philosophy. These liberal ideas were deeply influential in Western Europe and America through the middle of the nineteenth century. In terms of the power issue, the problem of power was essentially that of holding the power of the state to a minimum. In this view it is not economic power but political power which is to be guarded against.

As the deficiencies and social consequences of a laissez-faire policy in industrial organization became evident, a major reaction was toward socialism, with reliance upon the state in the operation of the economy. Marxism is only the most powerful of the various versions of socialism.

We are again living through an age of revolution; this time, world-wide. The economic circumstances are vastly different from those of the revolutionary era of the seventeenth and eighteenth centuries. During the intervening centuries the market-oriented industrial system has penetrated the farthest reaches of the globe by trade, by colonial policies, and by the economies of empires. Marxian doctrines offer superficially plausible interpretations of the poverty and backwardness of the underdeveloped areas as economic "exploitation" by the imperial and propertied interests. Consequently, we are now witnessing a revolutionary era which "idealizes" the power of the state and considers private economic power the scourge to be avoided.

The major issue in development policy of the underdeveloped world is to find a middle ground between these two extreme views, one reacting against the participation of the state in the economy and the other against all forms of private economic power. Commons considered it essential to avoid unlimited power of any kind. However, the methods by which political power is kept within reasonable limits are different from those which so contain private economic power.
The exercise of arbitrary political power by the state is to be avoided or kept within bounds by representative government, the independent judiciary, and related institutions, as discussed above. Historically, the freedom assured to persons in the Anglo-American tradition by the reduction of royal prerogative to the constitutional exercise of power opened the way for the rise of economic power based upon the ownership of property and collective action. The problem of keeping economic power within bounds is partly a matter of government policies of taxation, inheritance, etc., but the day-to-day problem of economic power in the functioning of the economy is met in Commons' view mostly by balancing power with power. To this end he favored a policy of equalization of bargaining power between employers and employees, as well as the use of the sovereign powers of government to supplement the weak economic power position of farmers.

Thus Commons' analysis faces both ways on the power problem. Both economic and political power must be recognized and kept within bounds.

Once it is realized that there is no such thing as an automatic harmony of economic interests, either under capitalism or future socialism, and that economic conflicts are not merely conflicts between individuals, which can be decided in court after the damage is done or is imminent but are conflicts between classifications and even classes of individuals, which might be adjusted before a break occurs, then some progress can be made toward approaching not an ultimate ideal of harmony, but merely that series of next steps which will keep the concern improving from day to day - the Reasonable Stabilization of Capitalism.

Commons' genetic approach to the development of the economy as a social organization rests upon his views regarding the constructive function of customs. The neglect of custom he termed "the culminating oversight of Karl Marx ... the failure to see the importance of Custom, and what, in Anglo-American jurisprudence, is named the Common Law." In this constructive interpretation of customs, Commons may well have the major key to gradualism in economic development, due to the primacy of order in making both freedom and efficiency possible. The use of customs can be a way of developing tough controlling and stabilizing institutions out of the experience of a people. But the selection of customs to be generalized and strengthened is a process of deliberate selection, not natural selection in the Darwinian sense - and the selection in Commons' view is a judicial function. Every society worthy of the name has a vast complex of customs by which members of the group come to have security of expectations regarding the behavior of the other members of the group. In this way the customary laws of land use and occupancy, inheritance, marriage and contracts, among other laws, come into operation. The constructive selection and development of customs into law is a part of the process of self-government.

This explains in part why colonialism had such a disorganizing effect upon traditional societies; where government is by prerogative, the working rules are likely to be imposed from above. Where the superimposed laws and edicts conflict with customs the latter must give way, being discredited in the process. Now, with the emergence of independent states in Africa and Asia, the way would seem to be opened for an unprecedented use of customary patterns of activity as the source of public laws or working rules sanctioned by the people. Starting from the customs and experience of the people, there is, of
course, a major problem of systematization of rules. The genius of the common law method is that it provides for both a system and for gradual change in the rules before conflict reaches revolutionary proportions.

Notes


2 Quart. Jour. Econ., 6 (July 1892): 479-84.

3 Macmillan.

4 Distribution of Wealth, pp. 79-85.


8 Institutional Economics, 1: 16-17. See also pp. 152-53.

9 Ibid., p. 157.


11 Their work culminated in the eleven-volume Documentary History of American Industrial Society (1910-11) and the History of Labour in the United States (1918; eventually four volumes, 1926-39).


13 See Commons' Introduction to History of Labour in the United States, Vol. 1; and Selig Perlman, History of Trade Unionism in the United States (Macmillan, 1922), espec. chap. 12, "An Economic Interpretation."


15 Ibid., pp. 50, 59.

16 Ibid., p. 76.

17 In Institutional Economics, p. 854, Professor Commons has written extensively on this experience; no attempt will be made here to review it in detail. See ibid., Accidents and Unemployment - Insurance and Prevention, pp. 840 ff.; and The Economics of Collective Action, chap. 16, "Capital-Labor Administration."
Institutional Economics, p. 857.

Ibid., p. 860.


Ibid., pp. 104-5.

Ibid., chap. 6, "The Rent Bargain - Feudalism and Use-Value," at p. 221. This brief comment can only suggest the kind of distinction made.

Ibid., chap. 2, "Property, Liberty and Value."

Ibid., chap. 7, "The Price Bargain - Capitalism and Exchange-Value."


"Capitalism and Socialism," Proceedings of the Wisconsin State Bar Association, Vol. 15 (Madison, 1925), Reports of the State Bar Association of Wisconsin. A somewhat abbreviated version of this essay was also published in the Atlantic Monthly (Nov. 1925) under the title "Marx Today: Capitalism and Socialism." All citations here are to the essay as published by the Bar Association.


Ibid., pp. 65, 71.

Ibid., pp. 73, 72.

Ibid., p. 71.

Ibid., p. 76.

Ibid., p. 74.

Ibid., pp. 79, 77, 80.

Ibid., p. 81.


Ibid., p. 242.


"Capitalism and Socialism," p. 82.

Ibid., p. 71.