

ADAM SMITH IN THE COURTS OF THE UNITED STATES

*Robin Paul Malloy**

I. INTRODUCTION

Jurisprudence in the United States often invokes economic thinking in providing a rationale for legal outcomes.¹ In so doing, economics is commonly used to offer a scientific gloss to the various standards and rules employed by legal actors.² It provides an important means for suggesting a reasonable and warranted belief in the rationality of a given legal decision because it employs a scientific-looking cost-benefit calculus to advance a

* Robin Paul Malloy is the E.I. White Chair and Distinguished Professor of Law, College of Law, Syracuse University. The author retains all rights to use this Article without further permission from the Law Review. This Article is based on a paper delivered as the Brendan Brown Endowed Lecture on Natural Law for 2010, as part of the Brendan Brown Natural Law Institute at Loyola University of New Orleans Law School. I am grateful for having been invited to be a part of such a distinguished program and I thank all of the organizers and participants, most particularly the members of Law Review for their work in helping to bring this Article to print. I also wish to thank participants at the “Smith in Glasgow” Conference, held March 31-April 2, 2009, at Glasgow University, for their comments and feedback on an earlier version of this paper.

While I have previously written several scholarly pieces on Adam Smith and have frequently referenced his work in my books on law and market economy (which have been translated into Japanese, Chinese, and Spanish), this paper reflects the first effort that I am aware of to examine and report on the citations to Adam Smith in the opinions of the judges and justices of the Federal Courts of the United States.

I wish to thank Professor Jerry Evensky for helpful comments on an early draft of this paper. I also thank Kristin Urbach and Carlos Andres Padua for their excellent research assistance.

1. *See generally* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (5th ed. 2007); ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING (2004) [hereinafter LAW IN A MARKET CONTEXT]; ROBIN PAUL MALLOY, LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS (2000) [hereinafter LAW AND MARKET ECONOMY]; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed., 2007); BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE (1997).

2. *See* JAMES R. HACKNEY, JR., UNDER THE COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THEORY AND THE QUEST FOR OBJECTIVITY (2006). *See generally* sources cited *supra* note 1.

given interpretation of the “best,” “most efficient” legal rules and outcomes.³ Many current day lawyers may assume that the application of market thinking to law evolved from the law and economics movement that started some thirty to forty years ago. This movement had its origins in neoclassical economics and grew out of the so-called Chicago School approach to deregulation and free markets.⁴ In reality, however, the judges and justices of the federal courts have integrated market considerations into their legal analysis since the earliest days of the courts.⁵

An intriguing aspect of this cross referential relationship between law and economics is that both the foundation for what came to be known as economics and the formation of a national legal system in what came to be the United States share a common period of origin in the middle and late eighteenth century. This time period is significant because it sets a context for understanding the natural law foundations both of law and of economics. A belief in natural law and order was very much accepted at the time; yet, it was also a time period in which advances in science were giving rise to a more universal sense that both law and economics were logically informed by human action and agency, and not simply the subjects of a divine or natural order.⁶

One highly influential person writing on law and market theory during this time was Adam Smith, a leader in the Scottish Enlightenment.⁷ Smith’s work not only framed an inquiry into the natural origins of markets, but it also helped to shape debates on the appropriate relationship between law and economics. Adam Smith is best remembered for writing two very famous books, *A Theory of Moral Sentiments* and *An Inquiry Into the Nature and Causes of The Wealth of Nations*. The most well-known of

3. See DANIEL W. BROMLEY, *SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS* (2006).

4. See Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 65-66 (2009). Well-known names of leaders of the so-called “Chicago School” include: Frank Knight, Ronald Coase, George Stigler, and Milton Friedman.

5. See, e.g., *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796); *Searight v. Calbraith*, 21 F. Cas. 927 (C.C.D. Pa.1796) (No. 12,585). For example, these two cases decided all the way back in 1796 included cites to Adam Smith.

6. See MARGARET SCHABAS, *THE NATURAL ORIGINS OF ECONOMICS* 1-101 (2005); KNUD HAAKONSSON, *THE SCIENCE OF A LEGISLATOR: THE NATURAL JURISPRUDENCE OF DAVID HUME & ADAM SMITH* (1981).

7. For some background on Smith and his life, see JERRY Z. MULLER, *ADAM SMITH IN HIS TIME AND OURS* (1993); IAN SIMPSON ROSS, *THE LIFE OF ADAM SMITH* (1995); E.G. WEST, *ADAM SMITH: THE MAN AND HIS WORKS* (1976); *ADAM SMITH REVIEWED* (Peter Jones & Andrew S. Skinner eds., 1992); *THE ORIGINS AND NATURE OF THE SCOTTISH ENLIGHTENMENT IN SCOTLAND* (R.H. Campbell & Andrew S. Skinner eds., 1982).

these being *The Wealth of Nations*, which was first published in 1776.⁸ *The Wealth of Nations* had an immediate and profound effect on many important thinkers of the day, and it is generally considered to be a foundational text for what was then an emergent field of study in political economy (now known as economics). Importantly, by the time of publication of *The Wealth of Nations*, Smith had already achieved fame and recognition for his earlier book, *The Theory of Moral Sentiments*, first published in 1759.⁹ Thus, by 1776 and the American Revolution, Adam Smith was already known as a man of considerable academic influence, and his work was well-known to the educated leaders of both Europe and North America.

Adam Smith's work continues, to this day, to enjoy popularity and is highly regarded as a significant contribution to thinking about markets and human exchange relationships. He remains a frequent point of reference in many conversations about free markets, capitalism, and deregulation. Smith was, and continues to be, a towering figure in the minds of many. This is the case even as he has become, in the modern world, more of an iconic symbol than a thoroughly studied scholar of the Scottish Enlightenment.¹⁰ His ideas on economics and trade were innovative, to say the least, and his work reflected the tension of his times as he seemed to struggle with defining an appropriate boundary between theories of natural order and the implications of the emergent scientific theories of the 18th century.¹¹ He was, one might say, struggling with the then existing tension between the theories of natural law and human agency. This intellectual struggle between the theories of natural law and human agency, and the coincidental publication of *The Wealth of Nations* in the same year as the American Revolution, make Smith an intriguing subject for American jurisprudence; particularly for those of us with an interest in the relationship between law and market theory.

In this context, one of the more interesting aspects of Smith's work involves his idea of the *invisible hand*. While actual references to the idea of an invisible hand guiding human action are scarce and brief in Smith's works, the metaphorical power of its central concept has made it one of the

8. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., Chicago 1976) (1776) [hereinafter WEALTH OF NATIONS].

9. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (E.G. West ed., Liberty Classic edition, 1969) (1759) [hereinafter THE THEORY OF MORAL SENTIMENTS].

10. See, e.g., Robin Paul Malloy, *Of Icons, Metaphors, And Private Property: The Recognition of Welfare Claims in the Philosophy of Adam Smith*, in 3 LAW AND SEMIOTICS 241, 241-53 (Roberta Kevelson ed., 1990).

11. See SCHABAS, *supra* note 6, at 79-101.

most famous “sound bites” in the history of economics.¹² To paraphrase the oft quoted invocation of the invisible hand, Adam Smith is credited with suggesting that individuals pursuing their own self-interest are led by an invisible hand to promote the interest of the public, even though promotion of the public interest was no part of their original intention.¹³ People have used Smith’s idea to promote a basic simplifying assumption in economics. This assumption is one that I identify as the “invariance premise.” The invariance premise promotes the idea that private marginal costs and benefits are generally equivalent to public marginal costs and benefits.¹⁴ Under such conditions, there are no externalities, and individuals are capable of coordinating their own private and self-interested actions in ways that simultaneously promote the public interest.¹⁵ Consequently, one conclusion is that law should facilitate and incentivize individual action and

12. The first reference by Smith to an invisible hand is in his essay on astronomy. *See generally* Adam Smith, *History of Astronomy*, in ADAM SMITH: ESSAYS ON PHILOSOPHICAL SUBJECTS 33 (W.P.D. Wightman & J.C. Bryce eds., Liberty Classic ed. 1982). This first reference is in terms of the “invisible hand” of Jupiter. *Id.* at 49-50. Smith writes: “[N]or was the invisible hand of Jupiter ever apprehended to be employed in those matters. But thunder and lightning, storms and sunshine, those more irregular events, were ascribed to his favour, or his anger.” *Id.* The second reference made by Smith to an invisible hand appears in *The Theory of Moral Sentiments*:

The rich only select from the heap what is most precious and agreeable. . . . [I]n spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands, whom they employ be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same distribution of the necessaries of life which would have been made had the earth been divided into equal portions among all its inhabitants; and thus, without intending it, without knowing it, advance the interest of the society.

THE THEORY OF MORAL SENTIMENTS, *supra* note 9, at 304.

13. *See* discussion *supra* note 12 concerning the first two references that Smith makes to an invisible hand. The third time that Smith makes reference to an invisible hand is in *The Wealth of Nations*, as referenced here. Smith observed with respect to the actions of a person following his own self-interest:

He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it [B]y directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of society more effectively than when he really intends to promote it.

WEALTH OF NATIONS, *supra* note 8, at Vol. I, Book IV, at 477-78. It is interesting to note that in this quote Smith does not say that is as if people pursuing their own self interest are led by an invisible hand; he uses the more directive phrasing to assert that they are led by an invisible hand. In this way Smith situates his idea of the invisible hand as a natural ordering force or mechanism. This links it to ideas of natural law that were accepted at the time.

14. LAW IN A MARKET CONTEXT, *supra* note 1, at 27-30; Robin Paul Malloy, *Mortgage Market Reform and the Fallacy of Self-Correcting Markets*, 30 PACE L. REV. 79, 83-84 (2009) [hereinafter *Mortgage Market Reform*].

15. *See* LAW IN A MARKET CONTEXT, *supra* note 1, at 27, 117-18, 123, 177, 193 (discussing externalities).

little need exists for so-called “big government,” or for government intervention into the free market. Iteration on the idea of the invisible hand is expressed in the complimentary idea of “self-correcting markets,” a belief underlying much of the thinking leading up to the recent global financial crisis triggered by the collapse of mortgage markets in the United States.¹⁶ We know from experience and modern economics, of course, that the invariance premise is often violated as demonstrated by the presence of transactions costs,¹⁷ the wealth effect,¹⁸ the endowment effect,¹⁹ the tragedy of the commons,²⁰ and the prisoner’s dilemma,²¹ to name but a few examples.²²

Significantly, Smith never tells us if his metaphorical image of an invisible hand is the hand of God, of the deity, or of some sort of impartial spectator.²³ It is safe to say, however, that the invisible hand, for Smith, was evident in the form of some natural law of social organization. For Smith, there was a natural organizing principle behind, and somewhat distinct from, human agency. In other words, humans act, but in some sense this action responds to natural forces independent of individual human intention.²⁴

16. *Mortgage Market Reform*, *supra* note 14.

17. LAW IN A MARKET CONTEXT, *supra* note 1, at 28, 117, 177, 184-85.

18. *Id.* at 180-81.

19. *Id.* at 107.

20. *Id.* at 21, 106.

21. *Id.* at 130-32, 174, 203.

22. *See generally* BEHAVIORAL LAW AND ECONOMICS, *supra* note 1 (presenting several essays concerning different violations of the invariance premise).

23. SCHABAS, *supra* note 6, at 94-100 (discussion focuses on the fact that the invisible hand is never actually located by Smith). I believe that the fact that Smith did not locate the invisible hand has worked to his advantage (without regard to his intent). As the law has developed there is a dislike for legal arguments that ultimately rest on the word (or hand) of God or a deity. Such arguments are deemed unscientific and are not part of a liberal discourse. By not locating the invisible hand, Smith can be interpreted dynamically over time. It is possible, for instance, to suggest that Smith, in his day, did not have the vocabulary to fully describe what he was observing in the operation of the market. Now we can understand that Smith was attempting to describe something scientific, the natural force of the invisible hand can be understood as a crude attempt at explaining the process of equilibration in economics. This means that Smith is not necessarily discredited in the minds of those who might otherwise reject a theory based on natural law, as resting ultimately on the word or hand of God, or some other supernatural source. Smith can be seen as a man of system and science; breaking new ground with limited tools and vocabulary at his disposal.

24. At the time of Smith there was probably no similar concept or understanding of “market” in the way we currently think of it. *See* SCHABAS, *supra* note 6, at 14-17. With this in mind, however, I suggest that while there may be some natural impulse for people to exchange and interact with each other, markets are not natural but rather volitional expressions of incentivized networks and patterns of exchange, wherein the sustainability of market relationships depends on the goals to be achieved and the values to be promoted by the given incentive structure.

There are, of course, multiple ways of understanding Smith's metaphor of the invisible hand in our more modern context.²⁵ One approach is to suggest that Smith was simply asserting that people are capable of understanding and interpreting signals, signs, and information embedded in the process of social interaction, and that they can make choices and adjust their social interactions without the need for constant commands and directions from a centralized or institutionalized authority.²⁶ Guided by certain ethical and philosophical criteria, individuals can take cues from the incentivized structure of the market and thus can pursue their own self-interest while advancing a public interest.²⁷ The public interest advanced, however, is largely defined and shaped by the institutions in place. In other words, there is no absolute "end game" or natural understanding of the meaning of the public interest, nor, for that matter, of self-interest. The world is dynamic and ever-changing, the meanings of self-interest and public interest co-evolve in a communicative process of social interaction over time. We can shape and reshape market outcomes through our own volitional actions. We can adjust and respond to changes in the incentive structures of exchange. We can understand Smith's metaphor of the invisible hand as one addressed to the human process of exchange and to our ability to continuously make and remake signs and meaning in the world.²⁸

Therefore, markets are not self-correcting but rather the product of human action, and consequently shaped by formal and informal socio-legal rules and norms.

For the sake of clarity, I am not saying that the economic idea of self-correcting prices is incorrect. My claim is much narrower. The economic idea of self-correcting prices is quite distinct from the idea of self-correcting markets. Price, after all, is simply an interpretation of value, not value itself, and any given set of prices reflect value differences among and between available items of exchange within a given institutional market framework. As relative value changes within a given system, prices adjust to signal these relative changes. People can interpret these signals, adjust their beliefs about the underlying values, and take actions to adjust to relative changes in the market relationships.

25. For examples of some different ways to interpret the idea of the invisible hand, see SCHABAS, *supra* note 6, at 94-100; Gavin Kennedy, *Adam Smith and the Invisible Hand: From Metaphor to Myth*, 6 *ECON. J. WATCH* 239 (2009), available at http://www.aier.org/aier/publications/ejw_wat_may09_kennedy.pdf. As a further note, Warren Samuels is currently working on a book addressing the numerous ways in which the invisible hand metaphor has been referenced over the years. For information on Samuels' project, see Adam Smith's Lost Legacy, <http://adamsmithslostlegacy.com/2009/09/news-of-warren-samuels-imminent-account.html> (Sept. 12, 2009, 13:41 BST).

26. See *LAW IN A MARKET CONTEXT*, *supra* note 1, at 62-111; *LAW AND MARKET ECONOMY*, *supra* note 1.

27. See generally JERRY EVENSKY, *ADAM SMITH'S MORAL PHILOSOPHY: A HISTORICAL AND CONTEMPORARY PERSPECTIVE ON MARKETS, LAW, ETHICS, AND CULTURE* (2005) (explaining the moral, ethical, and philosophical foundations of Smith's work).

28. See generally *LAW IN A MARKET CONTEXT*, *supra* note 1; *LAW AND MARKET ECONOMY*, *supra* note 1.

Therefore, Smith is not so much equating self-interest with public interest as he is pointing out the natural tendency for human beings to identify and shape behavior in a social context. In this sense, Smith is not saying that natural order is grounded solely in his metaphorical image of the invisible hand; nor is it grounded in a strictly utilitarian world of economic calculus stripped of serious considerations of ethics and morality. Smith, I suggest, perceives of natural order as a system of relationships in which the self-interested motivations of the invisible hand, and the ethical constraints of the socially situated impartial spectator, are mediated through the agency of the Deity; or to put it in a more modern context—mediated through adherence to a “Rule of Law.”

Given this background and the prominence of Adam Smith’s ideas at the time of the formation of the United States, one may well inquire as to the potential influence that Smith and his ideas might have had on the formation and evolution of the American legal system. Admittedly, this is a potentially immense task riddled with the risk of undue speculation, but one way in which this may be usefully pursued is by focusing on a discrete set of materials with clear and direct references to Smith, such as in identifying and reviewing references to Smith in the opinions issued by the judges and justices of the courts of the United States.

This Article pursues such a line of inquiry. It reports on a review of all citations to Adam Smith in the opinions of judges and justices of the federal courts (the courts of the United States), and in the legal briefs filed in those courts. What follows in this Article is, thus, a report on the “appearances” of Adam Smith in the courts of the United States, with citations, covering a time span of approximately 215 years. The goal of the Article is two-fold: first, to establish a searchable record of citations to Adam Smith in the federal courts; and second, to identify the ways in which Smith and his work are referenced in legal decisions over time.

The task here was not as simple as it may seem. After selecting the federal court system as the most manageable set of case decisions to work with, I set out to do a search using the key words “Adam Smith”, “invisible hand”, “Wealth of Nations”, “Theory of Moral Sentiments”, and “Lectures on Jurisprudence”.²⁹ Cases, and briefs submitted in cases, were searched, identified, and then cross-checked between the two major legal search

29. These are key phrases and book titles associated with Adam Smith. The *Lectures on Jurisprudence* is an additional book of Smith’s work based on the discovery of student notes that were transcribed during lectures given by Smith. The notes were found years later and, although they are not an actual manuscript written by Smith, they do provide us with some useful insight into Smith’s thinking on the subject. ADAM SMITH, LECTURES ON JURISPRUDENCE (R.L. Meek, D.D. Rafael, and P.G. Stein eds., 1982, Liberty Classics Edition, 1982).

engines: Westlaw and LexisNexis. It became clear almost immediately that many cases cited people by the name of Smith and A. Smith who had nothing to do with the Adam Smith I was pursuing. Likewise, not all references to invisible hands included the one made famous by Adam Smith. As I soon discovered, a number of cases brought up God and how the invisible hand of God is at work in the world. In a similar vein, I discovered that some court decisions mentioned Smith even if he was not identified in a brief submitted for the case, and some briefs mentioned Smith even if the citation did not find its way into the opinion. This made checking both cases and briefs more difficult. Equally frustrating was the fact that not all briefs are available in the Lexis or Westlaw databases. Thus, some case opinions refer to discussions of Smith in the briefs filed in that case but no brief is available. Similarly, some cases will have many briefs submitted to the court but sometimes none or only a few are available online. Given such constraints in the reviewable records it is much more difficult to assemble a complete picture of Smith from the records contained in the briefs, as opposed to the ability to work with the actual case opinions. For this reason the Article emphasizes the case opinions while providing information on briefs at the end. The end result of all this sorting out was that I was able to identify 162 cases with direct references to Adam Smith, and 213 cases where legal briefs were filed that cited to Smith. The first of these cases citing to Smith appeared in 1796, and the last case in my study was decided in early 2009. The resulting Article, I hope, will prove valuable to others in terms of the record of citations gathered and included herein.

In examining the references to Adam Smith in the United States' federal courts, this Article proceeds in several steps. First, it sets out the interpretive approach used in writing this Article. Second, it sets the stage for understanding details of the citations to Smith by providing a brief overview. Third, it reports on and discusses, in more detail, the transcendent references to Smith as they occur with reference to critical moments in American jurisprudential history. Fourth, it offers some parting thoughts on the references to Adam Smith in the courts of the United States, and finally, it presents a detailed record of citations of his many "appearances."

II. INTERPRETING SMITH

Adam Smith was a complex thinker, and his writings have evoked discussion and debate over the many years since they were first published. The tendency in economics and in law and economics, however, has been to offer a one dimensional and iconic representation of Smith as a free market, anti-regulatory promoter of self-interested action in pursuit of wealth

maximization. In contrast, others understand Smith as having been concerned with moral philosophy, ethics, duty, loyalty, and society as part of his broader exposition on the nature of markets.³⁰ A difficulty arises, therefore, in determining how best to approach a suitable interpretation of Smith and his work. Thus, this section of the article first explains a basic tension in the understanding of Smith, and second, outlines the interpretive approach taken in this paper. The approach being not so much to construct a new interpretation of Smith by reference to court opinions, but rather to identify and catalog these references as sources of the historical context in which Smith has been understood in the courts of the United States.

In considering the appearance of Adam Smith in the courts of the United States one must appreciate the so-called “Adam Smith problem.”³¹ The long-standing academic dispute concerning the Adam Smith problem is one of determining the relationship between Smith’s two greatest works, *The Theory of Moral Sentiments* and *The Wealth of Nations*.³² In the *Theory of Moral Sentiments*, Smith is concerned with moral philosophy and social relationships and in *The Wealth of Nation* his focus is on trade, exchange, and political economy. The resulting problem is one of figuring out the extent to which his ideas on self-interest and the “invisible hand,” as expressed in *The Wealth of Nations*, need to be read in light of his earlier ideas on morality, ethics and the role of the “impartial spectator” as developed in *The Theory of Moral Sentiments*.³³ Many economists tend to embrace a conception of Smith as embodied in *The Wealth of Nations* and thus focus on the “need” to promote the amoral and self-interested pursuit of wealth in a self-organizing environment free of government intervention. They tend to suggest that the *Theory of Moral Sentiments* is a nice book on moral philosophy and ethics but is more or less completely independent of the insight and significance of the market theory developed in *The Wealth of Nations*. Others disagree and suggest that the later work must be

30. See generally EVENSKY, *supra* note 27; D.D. RAPHAEL, *THE IMPARTIAL SPECTATOR: ADAM SMITH’S MORAL PHILOSOPHY* (2007).

31. EVENSKY, *supra* note 27, at 19-23.

32. For some excellent books on Smith and this tension regarding the Smith problem, see EVENSKY, *supra* note 27; CHARLES L. GRISWOLD, JR., *ADAM SMITH AND THE VIRTUES OF THE ENLIGHTENMENT* (1995); MULLER, *supra* note 7; RAPHAEL, *supra* note 30; PATRICIA H. WERHANE, *ADAM SMITH AND HIS LEGACY FOR MODERN CAPITALISM* (1991); EDWIN G. WEST, *ADAM SMITH AND MODERN ECONOMICS: FROM MARKET BEHAVIOR TO PUBLIC CHOICE* (1992). See also ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS (Robin Paul Malloy & Jerry Evensky eds. 1994); *LAW IN A MARKET CONTEXT*, *supra* note 1 (containing useful references to Smith); *LAW AND MARKET ECONOMY*, *supra* note 1 (containing useful references to Smith).

33. See sources cited *supra* note 32; see also Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 IOWA L. REV. 1427, 1442-45 (1997) (discussing the way in which Smith’s work on moral philosophy fits into legal thought).

understood in light of the earlier work. When one does this it becomes clear that Smith understood that there was a need to restrain and control self-interest, and that government had an important role to play in protecting liberty; a role that would be inconsistent with the generally accepted understanding of Smith as a staunch supporter of laissez-faire.³⁴

A simplified way of understanding the underlying problem with interpreting Smith is one of noting that economists typically privilege the invisible hand metaphor of self-interest over the restraining and socially based ethics of the impartial spectator; they do this even though the invisible hand reference appeared in the *Theory of Moral Sentiments* prior to its use in *The Wealth of Nations*.³⁵ A better view is to understand that the two concepts are complimentary and reciprocal rather than in opposition. In other words, a strong and healthy market economy needs elements of both the invisible hand and the impartial spectator.³⁶

While much can be said about this conflict, the important point for this Article is to understand that there is a tension in the professional scholarship as to the extent to which Adam Smith is properly understood as a promoter of self-interested, wealth maximizing behavior, in a setting of

34. See *supra* note 33.

35. See *supra* notes 12-13 for references to the “invisible hand” in Smith’s works.

36. See LAW AND MARKET ECONOMY, *supra* note 1, at 64-67. Below, I provide a few sample quotes from *The Theory of Moral Sentiments* that illustrate the balancing of the invisible hand of self-interest with a concern for a socially situated ethic of exchange.

And hence it is, that to feel much for others, and little for ourselves, that to restrain our selfish, and to indulge our benevolent[] affections, constitutes the perfection of human nature; and can alone produce among mankind that harmony of sentiments and passions in which consists their whole grace and propriety.

THE THEORY OF MORAL SENTIMENTS, *supra* note 9, at 71-72.

Though every man may, according to the proverb, be the whole world to himself, to the rest of mankind he is a most insignificant part of it. Though his own happiness may be of more importance to him than that of all the world besides, to every other person it is of no more consequence than that of any other man. . . . When he views himself in the light in which he is conscious that others will view him, he sees that to them he is but one of the multitude in no respect better than any other in it. . . . [H]e must, upon this, as upon all other occasions, humble the arrogance of his self-love, and bring it down to something which other men can go along with.

Id. at 162.

Man, it has been said, has a natural love for society, and desires that the union of mankind should be preserved for its own sake, and though he himself was to derive no benefit from it.

Id. at 169. Note that this implies that we act, at least in part, without a motivation for wealth maximization or economic gain.

One individual must never prefer himself so much even to any other individual as to hurt or injure that other in order to benefit himself, though the benefit to the one should be much greater than the hurt or injury to the other.

Id. at 236. Note that this quote implies a conflicting calculus relative to that of Kaldor-Hicks efficiency test as used by Posner.

laissez-faire.³⁷ In this study of Adam Smith in the courts of the United States, however, Smith is overwhelmingly present in judicial opinions as an authoritative reference for the invisible hand of self-interest, unfettered competition, and minimal government regulation. This, of course, favors a utilitarian sense of natural law and natural order arising out of an economic calculus devoid of concerns for ethical and moral philosophy. Likewise, it favors a hands-off approach to market operations since it seemingly validates the idea of naturally self-correcting markets.³⁸ Perhaps in the future, as a consequence of the financial crisis and market collapse of 2007-2008, legal jurists will spend more time thinking about the Adam Smith of the *Theory of Moral Sentiments* and discuss ideas of morality, ethics, duty, and community when addressing matters of trade, exchange, and markets. For now, however, the record is clearly dominated by references to Smith's work in *The Wealth of Nations*; there is, in fact, only one reference to the *Theory of Moral Sentiments* among the 162 case opinions reviewed for this Article.

Having briefly described some of the underlying tensions in the interpretation of Smith's work, I turn now to an explanation of the interpretive approach used in the Article. There are, of course, multiple theories of interpretation that one might apply to the process of finding the "truest" interpretation of Smith and his work. One way to proceed involves a careful review of Smith's life and his writings. Such a focus is centered on seeking an understanding of Smith in context. This kind of approach can help establish a sound basis for reconstructing what Smith might have meant by the words he used. Another way to examine Smith and his work is to take a pragmatic view of examining what Smith has meant to a particular set of actors that have referenced him and his work; in other words, to examine Smith through the work of others.

This Article identifies and catalogues the meanings of Smith's work by uncovering the references to it in the judicial opinions of the courts of the United States. I call this a pragmatic legal interpretation of Smith. It is pragmatic in the Peircean sense of focusing on meaning arising from evidence of how legal actors actually use and refer to Smith's work.³⁹ This

37. See *supra* note 33.

38. See LAW IN A MARKET CONTEXT, *supra* note 1, at 27-30; *Mortgage Market Reform*, *supra* note 14, at 83-84.

39. Charles Sanders Peirce was perhaps the greatest of American philosophers and was a founder of American Pragmatism. In essence, I suggest that we learn pragmatically about the legal meaning of Smith's work by identifying how it is used by significant legal actors. I have written extensively on Peirce in relation to understanding law and market theory. See generally LAW AND MARKET ECONOMY, *supra* note 1 (containing significant discussion of Peirce and numerous note references to books by and about Peirce); LAW IN A MARKET CONTEXT, *supra*

is important because the opinions of the judges and justices of the federal courts are significant to the lives of the people that come before them, and because their opinions can potentially influence the lives of socio-legal communities more broadly. Moreover, the opinions of judges express a formal understanding of Smith as an authoritative interpretive reference within a unique socio-legal narrative across time.

To further clarify this interpretive approach, I should explain what I am not doing. I am not looking at Smith's original texts for this project, nor am I examining Smith's relationships with contemporaries writing about similar issues. I am not reconstructing the mindset of legal actors in America who might have known of, read about, or otherwise have been potentially influenced by Smith and his work. Much excellent work has and continues to be written from these perspectives.⁴⁰ Similarly, I am not looking at judicial opinions that discuss ideas that may be compatible with a Smithian view, unless the opinion in fact cites to him. I am also excluding opinions that do not reference Smith even if there was a reference to Smith in a brief submitted to the deciding tribunal. Likewise, I am not looking at the works of law and economic practitioners who have cited to Smith in making their own arguments concerning the application of economic analysis to law. Consequently, this Article is concerned with identifying those opinions in the courts of the United States that reference Smith and leave no doubt that Smith was "present" in the rhetorical discussion of the matter under consideration.

None of this is to say that the sources excluded from this inquiry are not important. All of these sources have potential for making significant contributions to our understanding of Adam Smith and his work. Nonetheless, in the interest of time and space, my focus is limited to Smith's appearances in the courts of the United States, as this is a subject of little or no previous study. Using this approach, the paper undertakes to explore and report on the meanings of Smith over time.

III. SETTING THE STAGE

This section of the Article sets the stage for understanding the scope and range of references to Adam Smith in the federal courts. The first references to Adam Smith appear in two different court decisions rendered in the year 1796: one at the circuit court level⁴¹ and one in the Supreme

note 1 (containing significant discussion of Peirce and numerous note references to books by and about Peirce).

40. See, e.g., Iain McClean & Scot M. Peterson, *Adam Smith at The Constitutional Convention*, 56 LOY. L. REV. 95 (Spring 2010).

41. *Searight v. Calbraith*, 21 F. Cas. 927 (C.C.D. Pa.1796) (No. 12,585).

2010]

Adam Smith in the U.S. Courts

45

Court of the United States.⁴² In total, Smith is directly cited in 162 case opinions, and in identifiable briefs submitted in 213 cases.⁴³

In all but one of the case opinions citing to Smith the references are to *The Wealth of Nations*. The exception is the case of *Lane v. United States*,⁴⁴ which cited to the *Theory of Moral Sentiments* to characterize a transfer of \$798,250 by a wealthy man to his secretary as a gift rather than as a payment for services.⁴⁵ While the payment was made in his lifetime, litigation took place after his death.⁴⁶ Basically, the argument to treat the payment as one for services would result in placing the obligation on the employee to pay taxes on the income, whereas if it is treated as a gift, the tax would fall upon the person making the gift. One side to the argument insisted that all such payments between an employer and his employee were payments for services. The court, however, offered a reference to Smith for the contrary conclusion.⁴⁷ The court offered the reference to Smith to lend some legitimacy to the idea of supposing that even diehard capitalists can sometimes be moved to make a gift without expecting a quid-pro-quo in return. And, if a market driven man such as Adam Smith was able to acknowledge that some relationships were based on values other than those of pure monetary gain, then so could the court.

Consequently, the court upheld the donor's characterization of the payment as a gift, stating that:

Not every relationship in life may properly be characterized as involving "a mercenary exchange of good offices according to an agreed valuation". . . Not every human interaction is animated by a desire to secure an advantage, obtain compensation for services, or receive a quid pro quo.⁴⁸

In other words, some people just make gifts without an expectation that every payment has to be made in exchange for goods or services rendered; even men as economically rational and calculating as Adam Smith. Thus, if Adam Smith could recognize such an element in human nature, then this court might also logically hold that a gift was intended in the case before it.

42. *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

43. See discussion *infra* Part IV, and citations *infra* Part VI.

44. *Lane v. United States*, 286 F.3d 723 (4th Cir. 2002).

45. *Id.* at 725, 733.

46. *Id.* at 726-27.

47. See *id.* at 733.

48. *Id.* (internal citation omitted) (quoting ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* pt.II, § II, ch. III, P 2 (1759). This citation, given in the court opinion, can also be found at *THE THEORY OF MORAL SENTIMENTS*, *supra* note 9, at 166).

As to the various references to Adam Smith and the *Wealth of Nations*, the earliest, as I have indicated, occurred in two cases that both date back to 1796. The first is *Searight v. Calbraith*,⁴⁹ a case involving a currency exchange agreement in which Smith is simply cited along with other supporting sources; and the second is *Hylton v. United States*,⁵⁰ a case involving a tax matter. The *Hylton* case has been cited in later tax cases respecting the power of government to tax.⁵¹ In *Hylton*, the Court was confronted with the question of the power of the federal government to tax ownership of horse drawn carriages—an early version of placing a tax on buying an automobile—of which Mr. *Hylton* owned 125.⁵² The constitutional question turned on the nature of this tax. If the tax was considered a direct tax it was unconstitutional and if it was an indirect tax it had to be in the nature of a duty or excise tax.⁵³ Justice Paterson quoted a couple of paragraphs from Smith to make the point that the tax in question was not direct but rather an indirect tax on consumption and therefore in the nature of a duty on consumable goods.⁵⁴ This helped him reach the conclusion that the tax on carriages was constitutional.⁵⁵ In other words, Paterson made his mind up, in part, by finding useful clarity on the matter in Smith's work, and thus, Smith's work had some authoritative value in the holding of the case.

At the other end of the timeline, the most recent case in my study is from 2009: *Ellis v. Mississippi Department of Health*.⁵⁶ This case involved a dispute as to the application of the Fourth Amendment to the expectation of privacy at a day care center.⁵⁷ The court referred to Plaintiff's argument in the following terms.

In a forty-five page brief, the Plaintiffs outline the history of this country's concern with protecting citizens' property from interference by the government. Citing the *Magna Carta*, **Adam Smith**, Alexis de Tocqueville, and Sherlock Holmes, Plaintiffs argue that the United States Supreme Court's interpretation of the Fourth Amendment is not

49. *Searight v. Calbraith*, 21 F. Cas. 927 (C.C.D. Pa.1796) (No. 12,585).

50. *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

51. *Id.* For example, *Hylton* is later cited in *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869); and in *Smedberg v. Bentley*, 22 Cas. 368 (C.C.D.N.J. 1874).

52. *Hylton*, 3 U.S. (3 Dall.) at 171.

53. *Id.* at 172-73 (Chase, J.).

54. *Id.* at 180-81 (Paterson, J.).

55. *Id.* at 181 (Paterson, J.).

56. *Ellis v. Miss. Dept. of Health*, No. 4:07CV81-SA, 2009 WL 279105 (N.D. Miss. Feb. 5, 2009).

57. *Id.* at *1.

in line with the intentions of our [c]onstitutional forefathers.⁵⁸

In rejecting the Plaintiff's presentation of potential authorities to be consulted for determining the intentions of our constitutional forefathers, the court asserted the need to be bound by prior case law on the matter and not by the ancillary considerations to be found in the writings of a broadly defined set of other materials.⁵⁹ Thus, while Smith appears in a lineup of weighty references and a fictional detective, it is not enough to distract the court from the long and established records and traditions of the federal courts. If nothing else, however, the federal courts in 2009 find themselves in a very different position and context than they were when Adam Smith first made his appearance in the *Hylton* decision of 1796. In 2009, Smith may no longer be as persuasive on matters of government interference with private property rights as he was back in 1796. Nonetheless, he continues to transcend time and place by drawing continuing references to himself and his work in the opinions and briefs of the federal courts.

While Smith is cited in a variety of cases, one of the more interesting uses of a reference to Smith appears in the 2002 case *United States v. Taubman*.⁶⁰ This case involved an antitrust violation under the Sherman Act wherein Mr. Taubman was found guilty at trial of conspiracy to fix prices in violation of the Act.⁶¹ At the trial, the prosecuting attorneys read a quote from Smith to the jury.⁶² Specifically, the quote was the famous line, "People in the same trade seldom meet together even for merriment or diversion, but the conversation ends in a conspiracy against the public and in some contrivance to raise prices."⁶³ The reading of the quote to the jury led to the appeal, wherein Taubman argued that the government's closing argument, including the Adam Smith quote, tainted the jury's deliberation, and, as a consequence, the conviction should be overturned.⁶⁴ Finding ample evidence on the record to support the conviction independent of the quote, the Second Circuit held that the reference to Smith was, in this particular case, harmless error and that the conviction should stand.⁶⁵ The court was, however, concerned about the potential for bias in using a

58. *Ellis v. Miss. Dept. of Health*, No. 4:07CV81-SA, 2009 WL 279105 at *2 (N.D. Miss. Feb. 5, 2009) (emphasis added).

59. *Id.*

60. *United States v. Taubman*, 297 F.3d 161 (2d Cir. 2002) (per curiam).

61. *Id.* at 163.

62. *Id.* at 164.

63. *Id.* (citing ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 55 (Great Books 1952) (1776)).

64. *Id.*; see also Daniel Crane, *Lochnerian Antitrust*, 1 N.Y.U. J.L. & LIBERTY 496, 502-03 (2005) (discussing Adam Smith link to *Lochner* and the use of quoting Smith to juries).

65. *Taubman*, 297 F.3d at 166.

quotation from Smith to jurors, stating:

The Adam Smith quotation is . . . problematic. We agree with Taubman that the statement that competitors “seldom meet together . . . but the conversation ends in a conspiracy against the public . . . to raise prices” suggests that knowledge of and participation in an antitrust conspiracy can be inferred merely from the fact of meetings between persons engaged in competing businesses, which is not the law. . . . Moreover, the impermissible suggestion is strengthened by its attribution to the Enlightenment thinker Adam Smith, “the father of modern economics.”

. . . .

If, as the Government told the District Court, it “frequently use[s]” the quotation in antitrust cases, . . . then it should reevaluate the practice, and district courts should carefully consider the tendency of any such quotation to taint the jury’s understanding of the law. Indeed, were this a case where the Government asked the jury to infer the existence of or a defendant’s participation in a price-fixing conspiracy, we might well have vacated the conviction and remanded for a new trial. We now consider the Government to be on notice that future uses of a quotation such as the one used in this case might well prove fatal to its case.

In the instant case, however, the Government relied on the overwhelming direct evidence of Taubman’s knowledge of and participation in the conspiracy, as noted above. Accordingly, we conclude that, in the particular circumstances of this case, the inclusion of the Adam Smith quotation in the Government’s summation was harmless.⁶⁶

It is interesting that in 2002 the court feared that a reference to Smith, in itself, may be cause for potential bias in a legal proceeding that demands fairness and objectivity. This is a concern expressed in other cases as well.⁶⁷ Clearly, Smith holds a special place in the iconography of American jurisprudence when the mere speaking of his name in a courtroom hundreds of years after his demise remains cause for such concern.

Over the years Smith has been cited in cases involving taxes, trade, tort liability, insurance, contract, property, and other topics. Thus, the range of subjects for which Smith is cited varies even though they seem generally

66. *United States v. Taubman*, 297 F.3d 161, 166 (2d Cir. 2002) (per curiam) (citations omitted) (alteration in original).

67. *See, e.g., Ayers v. Robinson* 887 F. Supp. 1049 (N.D. Ill. 1995).

to concern particular aspects of markets and of regulation. Perhaps of more interest is the distribution of cites to Smith. During the time period from 1796–2009—a span of 213 years—of the 162 cases making direct reference to Smith, 104 of those cases were reported between the years of 1980 and 2009, meaning that 64% of all the references to Smith and his work occurred during the past thirty years; and if one starts at the year 1970, we find that 70% of references to Smith appear within the last forty years.⁶⁸ This dramatic increase in citations to Smith coincidentally corresponds to the time period of the so-called “Reagan Revolution” in American politics.

An important objective of this essay involves the recording, across the decades, of Smith’s appearance and re-appearance at key moments in history. This Article therefore identifies and examines the way in which Adam Smith “appears” and is made visible in the opinions of the federal courts in America. Given time and space limitations, this Article does not elaborate on each and every case in which Smith is referenced. Discussion is focused on providing a “flavor” for the way in which Smith appears in the federal courts while providing detailed citations on all cases in the last section.

IV. THE TRANSCENDENT APPEARANCE OF ADAM SMITH OVER TIME

This part of the Article takes us from a general overview of Smith in the courts of the United States to a closer look at references to Adam Smith during discrete and identifiable time periods in legal history. These time periods extend from the first references to Smith in 1796 to the present. They demonstrate, by the continuing vitality of references to Smith, that his idea of the invisible hand has cast a long shadow over American jurisprudence. On some topics, such as competition and markets, Smith is considered to be a foundational reference, as illustrated by the words of Judge Frank who declared in one of his judicial opinions that *The Wealth of*

68. See citation information *infra* Part VI. It is interesting to note that around the same time (1968), the famous Adam Smith tie went into production, and it quickly became popular with people such as Nobel Prize winning economist Milton Friedman. A Time magazine article in the July 6, 1981 issue noted that the Adam Smith tie had become the club tie of the conservative movement and that it was the most popular neckpiece to be observed around the Reagan White House. See <http://www.leadershipinstitute.org/adamsmith/>. I believe this is significant as it is all part of a narrative concerning the transcendence of Adam Smith from significant historical figure to iconic image. Smith, unlike other important figures of his day, remains relevant to modern discourse because he iconically represents a vision, a political outlook; a commitment to small government, free markets, private property, and individual liberty. Adam Smith is no longer just a man who wrote a very important set of books, he is a transcendent idea, and this idea is central to ongoing debates concerning the proper relationship among individuals, the community, and the state. This is why he is still of interest to lawyers and judges hundreds of years after his death.

Nations was the “[t]he Magna Carta of competition.”⁶⁹ Given in a legal context, Judge Frank’s comparison of Smith’s book to the Magna Carta demonstrates a considerably high regard for Smith’s work. Interestingly, as powerful and as enduring as references to Smith seem to be, they are not evenly dispersed across time, and they are not always favorable.

This part of the Article addresses four time periods when clusters of references to Smith’s work seem to appear and function as significant reference points in the opinions of some jurists. The time periods include: (1) 1796 through the early post Civil War era; (2) the later part of the 19th and early part of the 20th Centuries; (3) mid-20th Century; and (4) late 20th Century, including the first decade of the New Millennium. Of particular note is the fact that 70% of all the cited opinions with references to Smith occur in the last of these time periods or stages. This is peculiar, since it means that the more distant we get from the “real” Adam Smith and his work, the more he gets cited in judicial opinions. Similarly, as public knowledge of details of Smith’s work fades, his image becomes more clearly defined; in recent years becoming a one dimensional and iconic caricature trotted out as a prop to lend support to free markets and laissez-faire values.

A. 1796 THROUGH THE EARLY POST CIVIL WAR YEARS

In the early years of the Constitution and just following the Civil War, the federal courts were concerned with a number of issues, but the ones that made the strongest references to Smith were regarding the proper interpretation of the government’s power to tax.⁷⁰ This issue had been contentious under the Articles of Confederation, and the inability of the federal government to adequately tax was a major consideration in the replacing of the Articles. The question was considered in the *Hylton* case mentioned earlier.⁷¹

Likewise, at the end of the Civil War and the years shortly thereafter, tax issues were once again a matter of concern in the federal courts. The conduct of the War had been costly, and the government was developing new types of taxation. In this context, a couple of cases arose with Smith being referenced in the opinions. Although the setting and time period had changed, the basic tax issue was similar to that raised in the earlier *Hylton*

69. *Triangle Publ’ns v. Rohrlich*, 167 F.2d 969, 980 n.13 (2d Cir. 1948) (Frank, J., dissenting), *overruled by Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co.*, 349 F.2d 389 (2d Cir. 1965).

70. See generally Manuel Cachán, *Justice Stephen Field and “Free Soil, Free Labor Constitutionalism”*: *Reconsidering Revisionism*, 20 LAW & HIST. REV. 541, 569-74 (2002) (discussing Smith being cited in cases dealing with direct and indirect taxation).

71. See discussion *supra* notes 50-55 and accompanying text.

case. The courts continued to confront questions about the legality of certain taxes with reference to the distinction between direct and indirect taxes. Two additional cases, each citing to *Hylton* as precedent, also make the same point with respect to Smith. In *Veazie Bank v. Fenno*,⁷² and, subsequently in *Smedberg v. Bentley*,⁷³ the court concluded as follows:

Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words "direct taxes" in the Constitution.

We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority.⁷⁴

As indicated above, reference is made to Smith on the question of direct and indirect taxes but, unlike the opinion in *Hylton*, the court here does not find Smith's work persuasive in the effort to resolve the question.⁷⁵ Instead, the court looks at the legal history of the drafting of the Constitution and of the legislation, and it cites to *Hylton* as an authoritative source for their decision to uphold the tax.⁷⁶ In other words, even though *Hylton* seems to accept or imply that Smith provides some useful and authoritative value for its decision, Smith is not followed here and seems to be identified as not providing an authoritative reference for legal decision making. The decision in this case is based on the legal precedent of *Hylton*,

72. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869).

73. *Smedberg v. Bentley*, 22 F. Cas. 368 (C.C. D. N.J. 1874).

74. *Veazie Bank*, 75 U.S. (8 Wall.) at 541-42; *see also Smedberg*, 22 F. Cas. at 369 (quoting *Veazie Bank*, 75 U.S. (8 Wall.) at 541-42). The *Smedberg* case repeats, with the exception of the last paragraph in the quote above, the same quote included in the text above.

75. *Veazie Bank*, 75 U.S. (8 Wall.) at 541-42; *see also Smedberg*, 22 F. Cas. at 369.

76. *Veazie Bank*, 75 U.S. (8 Wall.) at 541-42; *see also Smedberg*, 22 F. Cas. at 369. In a dissenting opinion in *Pollock v. Farmer's Loan & Trust*, 157 U.S. 429 (1895), Justice White complained about the tendency to put too much emphasis on what detached political economists had to say about the distinction between direct and indirect taxes. *Id.* at 614-15. *See also Cachán*, *supra* note 70, at 572-74 (discussing the *Pollock* decision).

and it is the *Hylton* decision (as a legal source) which stands as legal precedent, not the references to Smith which aided in the original conclusion.

B. LATER PART OF THE 19TH AND EARLY PART OF THE 20TH CENTURIES

During the later part of the 19th and early part of the 20th centuries, America was in the midst of industrial and ideological change. It was a high point for the chorus of freedom of contract and the defense of private property. It was an age in which the courts were asked to struggle with the values of *laissez-faire*. Labor regulation, minimum hours of work, and basic food safety standards were considered infringements upon the rights of business, and Adam Smith was there to provide a foil for both sides of the judicial debate.⁷⁷

An example of the type of reference to Smith made during this time period is demonstrated in the famous *Slaughter-House Cases*.⁷⁸ The cases arose out of a dispute regarding legislation enacted by the state of Louisiana to regulate the stock landings and slaughter-houses in the city of New Orleans.⁷⁹ In part, the cases address a concern that the legislation violated the rights of free labor.⁸⁰ Smith is cited in the dissenting opinion of Justice Field.⁸¹ Justice Field opposed the upholding of the Louisiana legislation and declared:

[I]t is to me a matter of profound regret that its validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated.⁸²

In support of this view, Justice Field cited directly to Adam Smith for the following proposition:

“The property which every man has in his own labor,” says Adam Smith, “as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred

77. See generally William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WISC. L. REV. 767 (1985) (discussing references to Smith in the *Slaughter House* cases).

78. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); see also Forbath, *supra* note 77 (discussing references to Smith in the *Slaughter House* cases).

79. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 38.

80. *Id.*

81. *Id.* at 110 n.39 (Field, J., dissenting).

82. *Id.* at 110 (Field, J., dissenting).

property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.”⁸³

C. MID-20TH CENTURY

In the 1930s and 40s the country was once again in the midst of major social and political change. From a legal perspective it was a time of a dramatic increase in the growth and extent of the administrative state. Numerous administrative agencies were developed, and the growth in federal regulation was increasing dramatically. The rhetoric of laissez-faire was still around, and Smith was drawn on as a source of reference for support of self-regulation and the intuitive value of the “invisible hand.”⁸⁴ The courts, however, tended to find the arguments based on Smith to be out of touch with the realities of the day and generally unpersuasive.⁸⁵ Excellent examples are found in the opinions, *Hume v. Moore-McCormack*

83. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 110 n.39 (1872) (Field, J., dissenting) (internal citation omitted) (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, at book 1, ch. 10, pt. 2 (1759)). The Adam Smith quote can also be found in THE WEALTH OF NATIONS, *supra* note 8, at Vol. I p.136. See also Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988) [hereinafter *Political Economy of Substantive Due Process*]. Hovenkamp explains:

Smith believed that an individual’s property in his own labor was the sacred, inviolate foundation of all property. As a result, he was opposed, on moral as well as economic grounds, to most legislation that interfered with a person’s power to bargain freely. The importance of Smith’s moral commitment cannot be underestimated: Even if someone proved that laissez faire is not socially optimal on purely economic grounds, the moral arguments would nevertheless remain.

Political Economy of Substantive Due Process, *supra*, at 407. Moreover, Hovenkamp noted that “Adam Smith was an orthodox Scottish Realist Protestant whose theory of welfare was derived as much from morals as from economics.” *Id.* at 403.

84. See *Political Economy of Substantive Due Process*, *supra* note 83, at 421 (“For the most part, . . . treatise writers followed an etiquette that forbade them from quoting nonlegal sources, the only common exception being Adam Smith.”).

85. See *id.* at 402. Hovenkamp explains that:

Modern political economy was invented by Adam Smith in the 1770s. Before political economy would turn into modern economics, however, it would undergo a utilitarian revolution in the late eighteenth and early nineteenth centuries, and a marginalist revolution in the 1870 and 1880s. Both revolutions substantially undermined support for the laissez-faire theory that dominated Adam Smith’s thinking.

Id. Additionally, Hovenkamp notes that:

As Smith’s followers deviated from his thought, the economic component of laissez-faire theory began to deteriorate. . . . By the middle of the nineteenth century the moral content of Smith’s position had been undermined in English political economy, particularly by utilitarianism. Not so, however, in America, where Scottish Realism remained the ruling philosophy until after the Civil War. American substantive due process was built on the political economy of an unreconstructed Adam Smith.

Id. at 404.

*Lines Inc.*⁸⁶ and *Standard Brands, Inc. v. Smidler*.⁸⁷

Hume involved an action in damages by a seaman who developed tuberculosis as a result of the alleged negligence of the shipping corporation with whom he was employed.⁸⁸ In its opinion the court recited a history of social relations from the Middle Ages forward to set the context for understanding the law of employment applicable to the situation.⁸⁹ The court explained:

Slowly, however, there evolved a belief that, if men were let alone, each to follow his own selfish aims, the social welfare would be best promoted, a belief in the supreme desirability of the freedom of the individual, in all walks of life, from all restraints in matters of industry and trade. This belief had its beginnings at least as early as the 17th century and grew stronger in the 18th. It flowered in the 19th. The theory of unmitigated laissez-faire then found its secular bible in Adam Smith's *Wealth of Nations*, published in 1776. That secular bible, to be sure, was somewhat misinterpreted; the exegesis led sometimes to an ignoring of the actual text; for Adam Smith, unlike many of his disciples, had remained a believer in some aspects of mercantilism, as the very title of his great book indicates. But Adam Smith's central thesis—that each man, when seeking only his selfish advantage, “is led by an invisible hand to promote an end which is no part of his intention,” so that individual selfishness is the best means of fostering social welfare—as later revised by Ricardo & Co., and still later by Herbert Spencer, came to dominate the thinking of American legislatures and courts⁹⁰

The court went on to explain that this view is no longer in favor and that any manner of government interference with contracts of employment are now acceptable when exercised on behalf of the public interest.⁹¹ This view, it seems, implicitly recognizes that the public and private interest are not one in the same and, thus, individuals pursuing their own self-interest are not led, as if by an invisible hand, to promote the public interest. The days of a belief in the invariance premise between private and public interest had passed.

A similar view was expressed in the *Standard Brands* case involving a

86. *Hume v. Moore-McCormack Lines, Inc.*, 121 F.2d 336 (2d Cir. 1941).

87. *Standard Brands, Inc. v. Smidler*, 151 F.2d 34 (2d Cir. 1945).

88. *Hume*, 121 F.2d at 336.

89. *Id.* at 338-40.

90. *Id.* at 339 (internal citations omitted).

91. *Id.* at 340-47.

question of trademark law related to the symbol “V-8.”⁹² The court confirmed an ability to regulate competition and Judge Frank, concurring, went into considerable detail to reject laissez-faire while reciting elements of it as part of the history of the then legal context for the case.⁹³ In so rejecting, the court stated:

“Economic liberalism” revolted against certain traditional restraints on “free enterprise,” feudal and “mercantilist” restraints, many of which were or purported to be founded on notions of ethics. The revolt centered in a belief—which in the early 19th century became a dogma—that competition, if wholly unhampered by government, would invariably promote the general welfare, and that all monopolies were socially disservicable. This dogma stemmed from Adam Smith’s teachings, although he never stated it in an unqualified absolutistic manner. Nor did even those who most enthusiastically endorsed ultra laissez-faire—the policy of complete government neutrality—ever seek to carry it out to its logical extreme—which is anarchism, i.e., the elimination of all property rights in anything other than personal belongings. In practice, the system of let-alone-ism continued to contain many “monopolistic” factors (exclusive privileges) and numerous sorts of governmental “interference” and protective devices. Notable was the protection of property rights, since the legally-protected power of an owner of property to refuse its use to others gives the owner the equivalent of a monopoly, the essence of a monopoly being the legal power (other than as specially limited by government) to exclude others from its use except upon the owner’s terms. Yet unrestrained competition became an article of political-economic faith; and without doubt the courts in the 19th century often, in many ways, gave it practical allegiance.

....

Fundamental in laissez-faire theory were these assumptions, which were generally accepted by the courts: (1) The economic well-being of consumers is the paramount end of economic activity. (2) Competition will further that end far better than governmental protection. Because of those assumptions, the courts held, as Mr. Justice Holmes pointed out, that “a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already.” (Significantly, such a man would be held liable if his purpose was not even partially to engage in business competition but solely to damage

92. *Standard Brands, Inc. v. Smidler*, 151 F.2d 34, 35 (2d Cir. 1945).

93. *Id.* at 38-43 (Frank, J., concurring).

his rival.) In other words, usually where the economic interest of consumers conflicted with the economic interest of the competitor, only the consumer interest was judicially considered.⁹⁴

There is in this opinion a further reference, in note eight, to Smith's views on the weaknesses of mercantilism. The court explains:

Adam Smith said that the principal vice of the "mercantile system," which he opposed, was that, under it, "the interest of the consumer is almost constantly sacrificed to that of the producer, and it seems to consider production . . . as the ultimate end of all industry and commerce." He asserted that "consumption is the sole end and purpose of production; and the interest of the producer ought to be attended to, only so far as may be necessary for promoting that of the consumer." . . .⁹⁵

D. LATE 20TH CENTURY THROUGH THE FIRST DECADE OF THE NEW MILLENNIUM

In the political drift from New Deal regulation to Reaganomics, Adam Smith once again appeared in the federal courts, and this time the appearances were much more frequent. In fact, 70% of all cites to Smith occurred during this time period. Smith was once again riding the judicial circuit in an effort to legitimize deregulation and the use of an economic calculus to resolve legal disputes.⁹⁶ While his appearances were many, Smith was often just a character in a lineup of string citations, or a toss-in reference at the end of a statement about free trade, limited government, and the like. And, while the Reagan Revolution made a real impact on life in America, the going for Adam Smith in the courts was not always easy; as is evidenced by the words of Judge Maletz who dismissed an argument based on Smith in a 1983 opinion, stating: "In the wake of the Great Depression

94. *Standard Brands, Inc. v. Smidler*, 151 F.2d 34, 38-39 (2d Cir. 1945).

95. *Id.* at 39 n.8 (alteration in original) (internal citation omitted).

96. The Reagan Revolution was a political movement that used economic analysis to advance a more conservative and libertarian political agenda. The use of neo-classical economics, and references to Smith were normative tools to advance the agenda. For an interesting discussion of Smith, see Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987).

Adam Smith's philosophy was rooted in a conception of political economy. The starting point for this conception was not only a labor theory of value but, more importantly, a self-consciously normative political culture that subordinated economic to political ideas.

....

... Smith's Lectures on Jurisprudence . . . underline . . . the late-eighteenth-century republican theory of law as constitutive and creative political culture. Smith explains the shift from feudal to liberal ideas of property not as a result of economic necessity, but rather as the self-conscious use of law to perfect and improve society and human nature.

Id. at 65.

government after government in the West relegated Adam Smith and his ‘invisible hand’ to the history books in favor of Keynesian and other interventionist economic policies.”⁹⁷ Interestingly, even after Judge Maletz summarily relegated Smith to the dust bin of history, Smith was nonetheless referenced in ninety-one subsequent case opinions.

A typical reference to Smith during this time period is often one of simply seeking to establish pedigree and a sense of long-standing continuity and legitimacy for a particular view. An interesting example of this is demonstrated in the case of *Ayers v. Robinson*.⁹⁸ In this case, Ms. Ayers sued to collect hedonic damages as the survivor of her son who had been shot and killed by a police officer.⁹⁹ Her claim for damages was supported by the testimony of an economist, named Stan Smith, who valued the son’s life at around two and a half million dollars using a method of hedonic damage calculations.¹⁰⁰ When providing his testimony, Stan Smith asserted that his theory of hedonic damages in the valuation of a human life was as tried and true as the ages, having first been articulated by Adam Smith in *The Wealth of Nations*.¹⁰¹ The court expressed doubt about the alleged ancient origins of hedonic damages and addressed its concerns in its opinion:¹⁰²

Another troubling aspect of Smith’s testimony is his use of Adam Smith’s 1776 work *An Inquiry into the Nature and Causes of the Wealth of Nations* (Edwin Cannan ed., University of Chicago Press 1976) to lend pedigree to his theory. Adam Smith is of course the undisputed godfather of modern economics and *The Wealth of Nations* his crowning achievement. Unfortunately for Stan Smith, the surname Smith seems to be about the only thing they have in common.

Very little in the classic *Wealth of Nations* supports the *Hedonic Damages* method of valuing life, and much counsels against it. Adam Smith was a skeptic when it came to the ability of people to perceive risk . . . and he also observed that in certain contexts the “fear of misfortune” is overbalanced by “the hope of good luck” and the fancied “occasions of acquiring honour and distinction,” particularly on the part of the young who thus do not make rational economic judgments about wages and risk. . . . Both of those observations

97. *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834, 839 (Ct. Int’l Trade 1983).

98. *Ayers v. Robinson*, 887 F. Supp. 1049 (N.D. Ill. 1995).

99. *Id.* at 1050-51. For a discussion of hedonic valuation, see LAW IN A MARKET CONTEXT, *supra* note 1, at 167.

100. *Ayers*, 887 F. Supp. at 1051.

101. *Id.* at 1056.

102. *Id.*

remain perceptive today: As to the former, its continued accuracy is evident in the exceedingly poor odds and enormous popularity of state lotteries, while as to the latter, one need only view many of our armed forces' television commercials that portray the physical challenges of serving and are also designed to appeal to a young person's sense of adventure.

Adam Smith did comment that certain laborers . . . demand higher pay as a result of employment risks and incorporated that into a general theory of *wages*. But the leap from that observation to a theory for valuing *life* was not taken for almost 200 years: It is recognized that the genesis of the willingness-to-pay method of valuing human life is T.C. Schelling's *The Life You Save May Be Your Own* (reprinted in the Brookings Institution's study *Problems in Public Expenditure Analysis* (Samuel Chase, Jr. ed., 1966)). In that piece Schelling set out the model's basic framework, and nothing has really changed in that respect since. Schelling's purpose was to suggest a method for conducting cost-benefit analyses in the context of proposed safety regulations. It was another 20 years before the further leap into the courtroom was first taken, and this time the economist was Stan Smith.

. . .

As a method for measuring statistical life in a regulatory context, then, the theory's genealogy traces back only to Schelling, while as a method of calculating damages in court Stan Smith is (or hopes to be) the father of what is really an infant industry. By seeking to portray as a genealogical credential the exceedingly tenuous connection between his willingness-to-pay methodology and Adam Smith's *Wealth of Nations*, Stan Smith coats his novel use of a quite recent economic theory with a vintage veneer that it does not deserve. Because the sample testimony involving Adam Smith's classic work thus provides little support for Stan Smith's theory and much unfair prejudice when used to influence a lay jury, it too is inadmissible under Rule 403.¹⁰³

It is interesting that the court here, as in *Taubman*, expressed concern over the potential undue influence that references to Adam Smith might have on a jury.¹⁰⁴ Thus, even as his substantive influence seems diminished in recent years, there remains a fear that the mere mention of Adam Smith's name continues to be powerfully persuasive with juries. Such a concern is fascinating in as much as it must presume, given the diverse nature of jury pools, that almost everyone in America grows up with a knowledge of and reverence for Adam Smith. My own experience, however, is that many

103. *Ayers v. Robinson*, 887 F. Supp. 1049, 1062-63 (N.D. Ill. 1995).

104. *Id.* at 1063.

highly educated graduate and professional students have little knowledge of Smith or only the very foggiest of notions about him, his work, or actual importance to the modern and post-modern world. I highly doubt that the average jury member is more informed about Smith than a typical graduate and professional student attending a major American university, but this conclusion is, of course, merely one of personal speculation.

As interesting as the references are to Smith during this time period it is also instructive to note his conspicuous absence in some of the most controversial cases of the day related to private property rights and the effort to restrict government regulation of land. For instance, Smith is absent in such big cases as *Nolan*,¹⁰⁵ *Dolan*,¹⁰⁶ *Lucas*,¹⁰⁷ and *Kelo*,¹⁰⁸ to name but a few. These were cases of a type near and dear to the Reagan Revolution and to the conservative and libertarian leaning judges and justices on the courts, yet the opinions refrain from direct references to the man who wrote the Magna Carta of competition¹⁰⁹ and the “secular bible” on laissez-faire.¹¹⁰

Perhaps one reason for this absence has to do with concerns regarding the so-called “ghost of *Lochner*,” referring to the famous *Lochner* case.¹¹¹

105. *Nollan v. Cal. Coastal Comm'n.*, 483 U.S. 825 (1987).

106. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

107. *Lucas v S.C. Coastal Council*, 505 U.S. 1003 (1992).

108. *Kelo v. City of New London*, 545 U.S. 469 (2005); *see also* ROBIN PAUL MALLOY, PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN (2008) (taking a multiple set of perspectives on *Kelo* and its aftermath).

109. *Triangle Publ'ns v. Rohrlich*, 167 F.2d 969, 980 n.13 (2d Cir. 1948) (Frank, J., dissenting), *overruled by* *Monsanto Chem. Co. v. Perfect Fit Products Mfg. Co.*, 349 F.2d 389 (2d Cir. 1965).

110. *Hume v. Moore-McCormack Lines, Inc.*, 121 F.2d 336, 339 (2d Cir. 1941).

111. *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952). *Lochner* is the case that was central to the famous court packing attempt in the U.S. and the oft-cited quote of the “switch in time that saved nine.”

Indeed the ghost of *Lochner* continues to haunt American Constitutional law. Supreme Court Justices consistently use *Lochner* as an epithet to hurl at their colleagues when they disapprove of a decision declaring a law unconstitutional. Conservative justices accuse their colleagues of *Lochnerizing* when abortion restrictions are curtailed, while liberal justices return the fire when property regulations are declared unconstitutional under the takings clause. . . .

David E. Bernstein, *Review of Michael J. Phillips, The Lochner Court, Myth and Reality: Substantive Due Process From the 1890s to the 1930s*, 21 LAW & HIST. REV. 231, 231 (2003) (book review).

Concern over the so called ghost of *Lochner* continues in both American and Canadian jurisprudence. *See generally* Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1 (2004). The concern regarding the ghost of *Lochner* is that liberal government will be severally constrained by an activist conservative judiciary focused on arguments about substantive due process; as is sometimes a concern raised about arguments based on law and economics. The fear runs so deep that when Canada was adopting its Charter of Rights it did not include a right to property. *Id.* at 21. In the debates on the subject of a right to

This case represented a turning point in the struggle to validate the rise of the administrative state and the ability of government to regulate private interests on behalf of the public.¹¹² As the above referenced takings cases were being decided, many constitutional law scholars became concerned that these private property rights cases would provide a backdoor for the re-entry of substantive due process and the dismantling of the regulatory apparatus of the state.¹¹³ The dead hand of Adam Smith was seen lurking in the background, with its fingerprints on the *Slaughter-House cases*, and its design on re-animating the ghost of *Lochner* in the name of the right to private property under the Fifth Amendment.¹¹⁴ In this context, avoiding overt references to Smith may have been strategically prudent for those lawyers and jurists hoping to deregulate land use while seeking to promote the idea that self-interested property owners can best coordinate land controls through the convergence of private and public interest in the free marketplace.¹¹⁵

V. SOME PARTING THOUGHTS

In undertaking this project I made a number of interesting discoveries. First and foremost, the project proved rewarding as it answered the questions of when, where, and how Smith has “appeared” in the courts of the United States. To be honest, I found that he appeared more often and over a much longer period of time than I had expected; enjoying citation from 1796 to the present. It is also of great note that references to Smith are highly skewed to more recent years. Going into the project I expected that

property, concern was raised about the *Lochner* case in the United States and the way in which substantive due process, relative to the protection of property rights in the United States had allowed conservative Justices to curtail legislation passed by a more liberal legislature. *Id.* In Canada this was to be avoided. *Id.*

112. See generally Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003); Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV. 859 (2005); Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435 (2000); Johnathan Sullivan, *Eastern Enterprises v. Apfed: How Lochner Got it Right*, 60 OHIO ST. L. J. 1103 (1999).

113. For example, consider the words of libertarian/conservative property law scholar Richard A. Epstein: “It will be said that my position invalidates much of the twentieth-century legislation, and so it does. . . . The New Deal is inconsistent with the principles of limited government and with the constitutional provisions designed to secure that end.” RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 281 (1985).

114. As a background point consider this comment from Herbert Hovenkamp:

Holmes was right in *Lochner* when he accused the majority of basing its decision on “an economic theory which a large part of the country does not entertain.” *Lochner* was supported by the economic theories of the American classical economists, although by 1905 classical economics was rapidly losing ground to institutional economics and welfare economics.

Political Economy of Substantive Due Process, *supra* note 83, at 393-94.

115. See generally Crane, *supra* note 64 (linking Smith to *Lochner*).

2010]

Adam Smith in the U.S. Courts

61

there would be more references in the early years of the federal courts but in fact it turns out that 70% of the cites to Smith occur in the years after 1970. One must keep in mind, of course, that in recent years we have seen a dramatic increase in the volume of cases and case reports, yet it is still amazing that Smith has remained so popular and has been cited so much in recent years, relative to the earlier years.

The primary clusters of citations to Smith seem to occur at critical moments when tension arises as to the proper relationship between the government and the citizenry; in particular it arises in contexts when the balance between property rights and regulation are in question. Thus, in stage one the tension is played out in terms of early cases on the power of the federal government to tax private property, and in later stages it arises in terms of regulation of employment relationships and the expansion of the administrative state (The *Slaughter-House cases*, cases arising to challenge the New Deal, and in cases during the so called Reagan Revolution). In the first stage Smith appears as a reference on substantive questions concerning the nature of certain categories of tax. In the second stage Smith is no longer treated as an authoritative source for judicial interpretation but is still cited as a respected source for putting disputes over property rights into historical context. In each of the later two stages he is invoked primarily for ideological purposes in support of private property, market mechanisms, and various appeals to one form or another of *laissez-faire*.

While there are potentially several explanations for the increase in Smith citations after 1970, I have a hypothesis based on my work on law and market economy. In my view there are two important considerations that might help explain the continuing and increasing references to Smith in recent years. First, the rise of interest in and the persuasiveness of law and economics may contribute to this observation. More and more lawyers and judges have become familiar with using economic tools to think about legal problems and to shape law reform. In this context a reference to Smith to establish the lineage of an economic argument seems useful, and thus can be expected to produce continuing citations. Second, after the *Slaughter-House cases* and the cases of the New Deal era, it became established that regulation of economic rights was permissible and involved a lower level of Constitutional scrutiny than the interference with property rights. Basically, the highly protected right of property under the U.S. Constitution was decoupled from economic regulation such that property could be regulated in economic terms even if it could not be taken to accomplish certain public goals. In this environment the Reagan Revolution involved, in part, an effort to re-link economic rights and property rights by arguing that economic regulation could amount to an indirect taking of property, and in the alternative arguing that sound economic regulation was itself based on

providing minimal intrusion into private relationships. The later point was grounded in references to Smith because Smith was easily presented as a promoter of self-correcting, efficient, and wealth maximizing markets. It was an argument suggesting, with reference to Smith, that private markets are best because they function as if being lead by an invisible hand, such that people following their own self-interest end up promoting the public interest even though it was not part of their original intention. Thus, protection of private property, reliance on private contractual arrangements, and minimal government regulation are presented as the best policy to promote the public welfare; and all of this is linked back to Adam Smith as evidence of its allegedly fundamental and enduring truth value.

There is, however, a disconnect in the above storyline because modern day advocates of the invisible hand tend to extract the concept out of the system in which it originally operated. Stripped of its relation to the impartial spectator and to the Deity, the invisible hand metaphor has been reconstructed to fit the needs of a utilitarian cost-benefit approach to law and policy. Gone are the serious moral, ethical, and social values and constraints that also contributed to an understanding of Smith's system of natural order. In the place of long-standing values such as equity, justice, and fairness, we have been offered Smith as an iconic and one dimensional symbol of an amoral economic calculus. This it seems is simultaneously a disservice to Smith and to our legal tradition.

As to the role of natural law in contemporary jurisprudence, perhaps it is to reclaim the significance of the *human* aspects of legal-economic relationships; for while we benefit from understanding law in a market context, we must recognize that the market is not synonymous with the subject matter of economics. We must also understand that law serves a community and to be effective it must account for more than purely self-interested economic ends. Likewise, we ought to acknowledge that legal discourse rightly benefits from the inclusion of humanistic considerations of morality, ethics, justice, and fairness, even if these terms transcend and escape a ready economic calculus. Reclaiming a richer and deeper understanding of law in a market context would be a much more deserving legacy for Adam Smith in the Courts of the United States—a legacy befitting Adam Smith as the author of both *The Wealth of Nations* and *The Theory of Moral Sentiments*.

VI. CITATION RECORDS

Having presented the general contours of Adam Smith's appearances in the Courts of the United States, the remaining part of the Article presents a set of records and references related to my inquiry. This includes full cites to all of the federal court cases referencing Adam Smith and his work,

2010]

Adam Smith in the U.S. Courts

63

as well as references to cases in which briefs were filed containing cites to Smith. In addition, citation information is broken down by whether or not the reference appears in a majority, concurring, or dissenting opinion. This record of case information is gathered and reported with the hope that it will be useful to others seeking to pursue future projects related to Adam Smith and American law.

In the charts which follow, I provide references to Adam Smith in the courts of the United States.

Judicial Reference in Cases to Adam Smith over Time (in decades)

TIME (by decade)	NUMBER OF CASES CITING TO ADAM SMITH
1790-1799	2
1800-1809	2
1810-1819	1
1820-1829	1
1830-1839	0
1840-1849	0
1850-1859	0
1860-1869	3
1870-1879	6
1880-1889	3
1890-1899	3
1900-1909	5
1910-1919	1
1920-1929	1
1930-1939	5
1940-1949	12
1950-1959	0
1960-1969	3
1970-1979	9
1980-1989	32
1990-1999	39
2000-March 9, 2009	34

2010]

Adam Smith in the U.S. Courts

65

Judicial Reference in Cases to Adam Smith (by federal court)

FEDERAL COURT TYPE	NUMBER OF CASES CITING A. SMITH
United States District Courts	53
California, Central District of/Northern District of	4
Colorado, District of	1
Connecticut, District of	1
District of Columbia, District of	3
Georgia, Northern District of	1
Illinois, Northern District of	4
Indiana, District of/Northern District of/Southern District of	4
Iowa, District of	1
Kansas, District of	1
Louisiana, M. District of (Bankruptcy Court)/ Middle District of	2
Massachusetts, District of	2
Mississippi, Northern District of	1
Montana, District of	1
New Jersey, District of	3
New York, Northern District of/Southern District of	7
North Carolina, Middle District of	1
North Dakota, District of	1
Ohio, Northern District of	1
Pennsylvania, District of/Eastern District of	9
South Carolina, District of	1
Texas, Northern District of	2
Utah, District of (Bankruptcy Court)	1
Wisconsin, Eastern District of	1
United States Courts of Appeals	67
1 st Circuit	3
2 nd Circuit	9
3 rd Circuit	2
4 th Circuit	3
5 th Circuit	5
6 th Circuit	6
7 th Circuit	12
8 th Circuit	2
9 th Circuit	9

10 th Circuit	4
11 th Circuit	2
District of Columbia Circuit	9
Federal Circuit	1
United States Supreme Court	32
United States Court of Customs Appeals	1
United States Court of International Trade	2
United States Navy-Marine Corp. Court of Military Review	1
United States Court of Federal Claims	5
United States Tax Court	1
TOTAL NUMBER OF FEDERAL CASES	162

2010]

Adam Smith in the U.S. Courts

67

Location of Adam Smith Reference over Time

TIME (in decades)	MAJORITY OPINION	DISSENTING OPINION	CONCURRING OPINION
1790-1799	2	0	0
1800-1809	2	0	0
1810-1819	1	0	0
1820-1829	1	0	0
1830-1839	0	0	0
1840-1849	0	0	0
1850-1859	0	0	0
1860-1869	3	0	0
1870-1879	5	1	0
1880-1889	2	0	1
1890-1899	3	0	0
1900-1909	5	0	0
1910-1919	1	0	0
1920-1929	1	0	0
1930-1939	5	0	0
1940-1949	10	2*	1*
1950-1959	0	0	0
1960-1969	2	1	0
1970-1979	8	1	0
1980-1989	27	5*	1*
1990-1999	35	2*	3*
2000-March 9, 2009	32*	3*	0

* Note: Some cases were counted twice, depending on whether they had several references to Adam Smith whereby one was stated by the majority and the others were stated by the dissent and/or concurrence. In other words, where one case had both majority references and dissent and/or concurrence references to Adam Smith, the case was counted once in the “majority” column and once in the “dissent” and/or “concurrence” column.

Location of Adam Smith Reference by Federal Court

FEDERAL COURT TYPE	MAJORITY OPINION	DISSENTIN G OPINION	CONCURRING OPINION
United States District Courts (all)	53	0	0
U.S.C.C.O.A. 1 st Circuit	3	0	0
U.S.C.C.O.A. 2 nd Circuit	8	1	0
U.S.C.C.O.A. 3 rd Circuit	2	0	0
U.S.C.C.O.A. 4 th Circuit	3	0	0
U.S.C.C.O.A. 5 th Circuit	5	0	0
U.S.C.C.O.A. 6 th Circuit	6	0	0
U.S.C.C.O.A. 7 th Circuit	9	2	1
U.S.C.C.O.A. 8 th Circuit	2	0	0
U.S.C.C.O.A. 9 th Circuit	8	1	0
U.S.C.C.O.A. 10 th Circuit	3	0	1
U.S.C.C.O.A. 11 th Circuit	2	0	0
U.S.C.C.O.A. District of Columbia Circuit	7	2	0
U.S.C.C.O.A. Federal Circuit	0	1*	1*
United States Supreme Court	24*	8*	3*
United States Court of Customs Appeals	1	0	0
United States Court of International Trade	2	0	0
U.S. Navy-Marine Corp. Court of Military Rev.	1	0	0
United States Court of Federal Claims	5	0	0
United States Tax Court	1	0	0

* Note: Some cases were counted twice, depending on whether they had several references to Adam Smith whereby one was stated by the majority and the others were stated by the dissent and/or concurrence. In other words, where one case had both majority references and dissent and/or concurrence references to Adam Smith, the case was counted once in the “majority” column and once in the “dissent” and/or “concurrence” column.

2010]

Adam Smith in the U.S. Courts

69

Text Reference Versus Note Reference to Adam Smith Over Time

TIME (in decades)	TEXT	NOTES
1790-1799	2	0
1800-1809	2	0
1810-1819	1	0
1820-1829	0	1
1830-1839	0	0
1840-1849	0	0
1850-1859	0	0
1860-1869	3	0
1870-1879	3	3
1880-1889	3	0
1890-1899	3	0
1900-1909	5	0
1910-1919	1	0
1920-1929	1	0
1930-1939	4	1
1940-1949	8*	7*
1950-1959	0	0
1960-1969	2	1
1970-1979	9	0
1980-1989	29	3
1990-1999	33*	8*
2000-March 9, 2009	26*	11*

* Note: Some cases were counted twice, depending on whether they had several references to Adam Smith whereby one was located in the text and the other was located in the notes or both. In other words, where one case had both a direct and an indirect reference to Adam Smith, the case was counted once in the "text" column and once in the "notes" column.

Text Reference Versus Note Reference to Adam Smith by Federal Court

FEDERAL COURT TYPE	TEXT	NOTES
United States District Courts (all)	44*	10*
U.S.C.C.O.A. 1 st Circuit	3	0
U.S.C.C.O.A. 2 nd Circuit	5*	8*
U.S.C.C.O.A. 3 rd Circuit	2	0
U.S.C.C.O.A. 4 th Circuit	3	0
U.S.C.C.O.A. 5 th Circuit	4	1
U.S.C.C.O.A. 6 th Circuit	5	1
U.S.C.C.O.A. 7 th Circuit	9	3
U.S.C.C.O.A. 8 th Circuit	2	0
U.S.C.C.O.A. 9 th Circuit	8*	2*
U.S.C.C.O.A. 10 th Circuit	4	0
U.S.C.C.O.A. 11 th Circuit	2	0
U.S.C.C.O.A. District of Columbia Circuit	7	2
U.S.C.C.O.A. Federal Circuit	1	0
United States Supreme Court	28*	5*
United States Court of Customs Appeals	1	0
United States Court of International Trade	2	0
United States Navy-Marine Corp. Court of Military Review	1	0
United States Court of Federal Claims	3*	3*
United States Tax Court	1	0

* Note: Some cases were counted twice, depending on whether they had several references to Adam Smith whereby one was located in the text and the other was located in the notes or both. In other words, where one case had both a direct and an indirect reference to Adam Smith, the case was counted once in the "text" column and once in the "notes" column.

2010]

Adam Smith in the U.S. Courts

71

Cases in the Courts of the United States Citing to Adam Smith

YEAR	CASE NAME	CITATION	COURT
1796	Searight v. Calbraith et al.	21 F. Cas. 927	Circuit Court, District of PA
1796	Hylton v. United States	3 U.S. 171	U.S. Supreme Court
1800	Thurston v. Koch	23 F. Cas. 1183, 4 U.S. 348	Circuit Court, District of PA
1805	Thurston v. Koch	4 U.S. 32, 1805 U.S. LEXIS 273	Circuit Court, PA District
1810	Fletcher v. Peck	10 U.S. 87	U.S. Supreme Court
1823	Johnson v. McIntosh	21 U.S. 543	U.S. Supreme Court
1868	Pacific Ins. Co. v. Soule	74 U.S. 433	U.S. Supreme Court
1868	Paul v. State of Virginia	75 U.S. 168	U.S. Supreme Court
1869	Veazie Bank v. Fenno	75 U.S. 533	U.S. Supreme Court
1870	Legal Tender Cases	79 U.S. 457	U.S. Supreme Court
1872	The Slaughter-House Cases	83 U.S. 36	U.S. Supreme Court
1874	Smedberg v. Bentley	22 F. Cas. 368	Circuit Court, District of NJ
1876	United States v. Martin	94 U.S. 400	U.S. Supreme Court
1876	In re Ragsdale	7 Biss. 154, 20 F. Cas. 175	U.S.D.C., District of Indiana
1877	In re Rugsdale	20 F. Cas. 1334	U.S. District Court of Indiana
1880	Springer v. United States	102 U.S. 586	U.S. Supreme Court
1882	Melchert v. American Union Telegraph Co.	11 F. 193	Circuit Court, District of Iowa
1884	Butchers' Union Slaughter-House Co. v. Crescent City Live-Stock Co.	111 U.S. 746, 4 S.Ct. 652	United States Supreme Court
1895	United States ex rel. Kerr v. Ross	5 App. D.C. 241	Court of Appeals of D.C.
1895	Pollock v. Farmers' Loan & Trust Co.	15 S. Ct. 673, 157 U.S. 429	U.S. Supreme Court
1895	Pollock v. Farmers' Loan & Trust Co.	15 S. Ct. 912, 158 U.S. 601	U.S. Supreme Court
1900	Knowlton v. Moore	9 Pa. D. 301, 1900 WL 5700	U.S. Circuit Court, E.D. of Pennsylvania
1900	Knowlton v. Moore	20 S. Ct. 747, 178 U.S. 41	U.S. Supreme Court

1902	United States v. Thomas	115 F. 207	Circuit Court, Southern District NY
1905	Union Refrigerator Transit Co. v. Kentucky	26 S. Ct. 36, 199 U.S. 194	U.S. Supreme Court
1907	Ex parte Drayton	153 F. 986	U.S. District Court of South Carolina
1914	German Alliance Ins. Co. v. Lewis	34 S. Ct. 612, 233 U.S. 389	U.S. Supreme Court
1920	Wakem & McLaughlin v. United States	10 U.S. Cust. App. 24	U.S. Court of Customs Appeals
1931	Mendota Coal & Coke Co. v. Eastern Ry. & Lumber Co.	53 F.2d 77	C.C.O.A. 9th Circuit
1937	Davis v. Boston & M. R. Co.	89 F.2d 368	C.C.O.A. 1st Circuit
1939	Andrews v. Montgomery Ward & Co.	30 F. Supp. 380	U.S.D.C., Northern District of IL
1939	United States v. Miller	59 S. Ct. 816, 307 U.S. 174	U.S. Supreme Court
1939	United States v. Thomas	27 F. Supp. 433	U.S.D.C., Northern District of Texas
1940	Springfield Fire & Marine Ins. Co. v. Holmes	32 F.Supp. 964	U.S.D.C. of Montana
1940	Osborn v. Ozlin	60 S.Ct. 758, 310 U.S. 53	U.S. Supreme Court
1941	Hume v. Moore-McCormack Lines	121 F.2d 336	C.C.O.A. 2nd Circuit
1942	M. Witmark & Sons v. Fred Fisher Music Co.	125 F.2d 949	C.C.O.A. 2nd Circuit
1942	Kulukundis Shipping Co., S/A v. Amtorg Trading Corp.	126 F.2d 978	C.C.O.A. 2nd Circuit
1943	Eastern Wine Corp. v. Winslow-Warren, Ltd.	137 F.2d 955	C.C.O.A. 2nd Circuit
1944	Mercoid Corp. v. Mid-Continent Inv. Co.	64 S. Ct. 268, 320 U.S. 661	U.S. Supreme Court
1945	Doehler Metal Furniture Co. v. United States	149 F.2d 130	C.C.O.A. 2nd Circuit
1945	Standard Brands v. Smidler	151 F.2d 34	C.C.O.A. 2nd Circuit
1946	Ricketts v. Pennsylvania R.R. Co.	153 F.2d 757	U.S. Court of Appeals, 2nd Circuit
1948	Triangle Publications v. Rohrllich	167 F.2d 969	C.C.O.A. 2nd Circuit
1949	Am. Fed'n of Labor, AZ Fed'n of Labor v. Am. Sash & Door Co.	69 S. Ct. 260, 335 U.S. 538	U.S. Supreme Court
1962	Engel v. Vitale	82 S. Ct. 1261, 370 U.S. 421	U.S. Supreme Court

2010]

Adam Smith in the U.S. Courts

73

1963	Ferguson v. Skrupa	83 S. Ct. 1028, 372 U.S. 726	U.S. Supreme Court
1964	Bell v. Maryland	84 S. Ct. 1814, 378 U.S. 226	U.S. Supreme Court
1972	U.S. v. Combustion Eng'g, Inc.	364 F. Supp. 181	U.S.D.C. of Connecticut
1973	North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.	94 S. Ct. 407, 414 U.S. 156	U.S. Supreme Court
1974	I.C.C. v. Appleyard	371 F. Supp. 168	U.S.D.C., Middle District of North Carolina
1974	DeFunis v. Odegaard	94 S. Ct. 1704, 416 U.S. 312	U.S. Supreme Court
1975	Int'l Rys of Central America v. United Brands Co.	405 F. Supp. 884	U.S.D.C., Southern District of NY
1976	Brenner v. State Bd. of Motor Vehicle Mfrs., Dealers and Salesmen	413 F. Supp. 639	U.S.D.C., Eastern District of PA
1976	Virginia State Bd. of Pharmacy v. VA Citizens Consumer Council	96 S. Ct. 1817, 425 U.S. 748	U.S. Supreme Court
1978	Zenith Radio Corp. v. U.S.	98 S. Ct. 2441, 437 U.S. 443	U.S. Supreme Court
1978	Richmond Power & Light v. Federal Energy	574 F.2d 610	U.S.C.O.A., D.C. Circuit
1980	United States v. Realty Multi-List, Inc.	629 F.2d 1351	U.S.C.O.A. 5th Circuit
1980	Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.	505 F. Supp. 1313	U.S.D.C., Eastern District of PA
1980	United Gas Pipe Line Co. v. Federal Energy Regulatory Comm.	618 F.2d 1127	U.S.C.O.A. 5th Circuit
1980	Central Hudson Gas & Elect. Corp. v. Public Serv. Comm'n of N.Y.	100 S. Ct. 2343, 447 U.S. 557	U.S. Supreme Court
1981	Malcolm v. Marathon Oil Co.	642 F.2d 845	U.S.C.O.A. 5th Circuit
1981	Croker v. Boeing Corp. (Vertol Division)	662 F.2d 975	U.S.C.O.A. 3rd Circuit
1981	In re Pillow	8 B.R. 404	U.S.B.C., District of Utah
1982	Mid-South Grizzlies v. Nat'l Football League	550 F. Supp. 558	U.S.D.C., Eastern District of PA
1982	Xerox Corp. v. Harris Co., Tex.	103 S. Ct. 523, 459 U.S. 145	U.S. Supreme Court

1982	Chock Full O'Nuts Corp. v. Finkelstein	548 F. Supp. 212	U.S.D.C., Southern District of NY
1983	Rudolph v. Steinhardt	721 F.2d 1324	U.S.C.O.A. 11th Circuit
1983	Selig v. United States	565 F. Supp. 524	U.S.D.C., Eastern District of WI
1983	Carlisle Tire and Rubber Co. v. U.S.	564 F. Supp. 834	U.S. Court of International Trade
1984	Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc.	592 F. Supp. 304	U.S.D.C., Northern District of NY
1984	Kreuzer v. American Acad. of Periodontology	735 F.2d 1479, 237 U.S. App. D.C. 43	U.S.C.O.A., D.C. Circuit
1984	Trans World Airlines, Inc. v. Franklin Mint Corp.	104 S. Ct. 1776, 466 U.S. 243	U.S. Supreme Court
1984	Laffey v. Northwest Airlines, Inc.	746 F.2d 4, 241 U.S. App. D.C. 11	U.S.C.O.A., D.C. Circuit
1985	Ctr. for Auto Safety v. Peck	751 F.2d 1336, 243 U.S. App. D.C. 117	U.S.C.O.A., D.C. Circuit
1985	Kumpf v. Steinhaus	779 F.2d 1323	U.S.C.O.A. 7th Circuit
1985	Park v. El Paso Bd. of Realtors	764 F.2d 1053	U.S.C.O.A. 5th Circuit
1985	American Fin. Servs. Ass'n v. F.T.C.	767 F.2d 957, 24 U.S. App. D.C. 167	U.S.C.O.A., D.C. Circuit
1985	Jersey Cent. Power & Light Co. v. F.E.R.C.	768 F.2d 1500, 248 U.S. App. D.C. 67	U.S.C.O.A., D.C. Circuit
1985	Central States Enters., Inc. v. I.C.C.	780 F.2d 664	U.S.C.O.A. 7th Circuit
1986	Cox v. Resilient Flooring Div. of Congoleum Corp.	638 F. Supp. 726	U.S.D.C., Central District of CA
1986	Deibler v. City of Rehoboth Beach	790 F.2d 328	U.S.C.O.A. 3rd Circuit
1986	Northwest Cent. Pipeline Corp. v. Mesa Petroleum Co.	643 F. Supp. 280	U.S.D.C., District of Colorado
1987	Parker v. Comm'n. of Ky., Bd. of Dentistry	818 F.2d 504	U.S.C.O.A. 6th Circuit
1988	United States v. Western Elec. Co., Inc.	673 F. Supp. 525	U.S.D.C., District of Columbia
1988	Graves v. Kemsco Group, Inc.	676 F. Supp. 1417	U.S.D.C., Northern District of Indiana

2010]

Adam Smith in the U.S. Courts

75

1988	Brown-Forman Corp. v. Tennessee Alcoholic Beverage Com'n	860 F.2d 1354	U.S.C.O.A. 6th Circuit
1988	Burlington Northern R. Co. v. United Transp. Union	848 F.2d 856	U.S.C.O.A. 8th Circuit
1989	Berel Co. v. Sencit F/G McKinley Assocs.	710 F. Supp. 530	U.S.D.C., District of New Jersey
1990	United States v. Syufy Enter.	903 F.2d 659	U.S.C.O.A. 9th Circuit
1990	Puppe by Puppe v. A.C. & S., Inc.	733 F. Supp. 1355	U.S.D.C., District of North Dakota
1990	United States v. McClain	30 M.J. 615	U.S. Navy-Marine Corp. C.O.M.R.
1991	U.S. v. Maddox	944 F.2d 1223	U.S.C.O.A. 6th Circuit
1991	City of St. Louis v. Dep't of Transp.	936 F.2d 1528	U.S.C.O.A. 8th Circuit
1991	Val-Land Farms, Inc. v. Third Nat'l Bank Knoxville	937 F.2d 1110	U.S.C.O.A. 6th Circuit
1991	Azul Pacifico, Inc. v. City of Los Angeles	948 F.2d 575	U.S.C.O.A. 9th Circuit
1992	Stamatakis Indus. v. King	965 F.2d 469	U.S.C.O.A. 7th Circuit
1992	Oscar v. Univ. Students Co-Op Ass'n	965 F.2d 783	U.S.C.O.A. 9th Circuit
1992	Composite Marine Propellers v. Van Der Woude	962 F.2d 1263	U.S.C.O.A. 7th Circuit
1992	Riverbend Farms, Inc. v. Madigan	958 F.2d 1479	U.S.C.O.A. 9th Circuit
1992	O.K. Sand & Gravel, Inc. v. Martin Marietta Corp.	819 F. Supp. 771	U.S.D.C., Southern District of Indiana
1992	Badger v. Grubb & Ellis Co.	1992 U.S. Dist. LEXIS 3648	U.S.D.C., Northern District of California
1993	Cooperstock v. Pennwalt Corp.	820 F. Supp. 921	U.S.D.C., Eastern District of PA
1993	United States v. Walters	997 F.2d 1219	U.S.C.O.A. 7th Circuit
1994	Crown Cork & Seal Co. v. N.L.R.B.	36 F.3d 1130	U.S.C.O.A., D.C. Circuit
1994	Mayer v. United States	32 Fed. Cl. 149	U.S. Court of Federal Claims
1995	August Storck KG v. Nabisco, Inc.	1995 WL 124262 / 195 U.S. Dist. LEXIS 3486	U.S.D.C., Northern District of Illinois

1995	Ayers v. Robinson	887 F. Supp. 1049	U.S.D.C., Northern District of Illinois
1995	Resolution Trust Corp. v. J.I. Sopher & Co.	1995 WL 489697 / 1995 U.S. Dist. LEXIS 11628	U.S.D.C., Southern District of NY
1995	Rite-Hite Corp. v. Kelley Co.	56 F.3d 1538	U.S.C.O.A., Federal Circuit
1996	S.E.C. v. Life Partners, Inc.	102 F.3d 587	U.S.C.O.A., D.C. Circuit
1996	Koopmans v. Farm Credit Servs. of Mid-America	102 F.3d 874	U.S.C.O.A. 7th Circuit
1996	Chicago Prof'l Sports L.P. v. Nat'l Basketball Ass'n	95 F.3d 593	U.S.C.O.A. 7th Circuit
1996	In re Brown	189 B.R. 653	U.S.B.C., Middle District of Louisiana
1997	Clay v. Riverwood Intern. Corp.	964 F. Supp. 1559	U.S.D.C., Northern District of Georgia
1997	Miller v. Illinois Dept. of Corr.	107 F.3d 483	U.S.C.O.A. 7th Circuit
1997	Eastern Enters. v. Chater	110 F.3d 150	U.S.C.O.A. 1st Circuit
1997	Zimomra v. Alamo Rent-A-Car, Inc.	111 F.3d 1495	U.S.C.O.A. 10th Circuit
1997	ATA Defense Industries, Inc. v. U.S.	38 Fed. Cl. 489	U.S. Court of Federal Claims
1997	Matter of Smithwick / Smithwick v. Smithwick	121 F.3d 211	U.S.C.O.A. 5th Circuit
1997	Matter of Lifschultz Fast Freight / In re . . .	132 F.3d 339	U.S.C.O.A. 7th Circuit
1998	Spectators' Commc'n Network, Inc. v. Anheuser-Busch Inc.	1998 WL 874848/1998 U.S. Dist. LEXIS 19868	U.S.D.C., Northern District of Texas
1998	Case v. Unified Sch. Dist. No. 233, Johnson Co., Kansas	157 F.3d 1243	U.S.C.O.A. 10th Circuit
1999	Appraisers Coal. v. Appraisal Inst.	1999 WL 89663/1999 U.S. Dist. LEXIS 1626	U.S.D.C., Northern District of Illinois
1999	Farmland Indus. v. C.I.R.	1999 WL 1073148	U.S. Tax Court
1999	Saia v. Sears Roebuck and Co.,	47 F. Supp. 2d 141	U.S.D.C., District of Massachusetts
1999	Bernstein v. U.S. Dep't of Justice	176 F.3d 1132	U.S.C.O.A. 9th Circuit

2010]

Adam Smith in the U.S. Courts

77

1999	Cubic Def. Sys., Inc. v. U.S.	45 Fed. Cl. 239	U.S. Court of Federal Claims
2000	Illinois Cent. R.R. v. Mayeux	178 F. Supp. 2d 663	U.S.D.C., Middle District of Louisiana
2000	E.E.O.C. v. Humiston-Keeling, Inc.	227 F.3d 1024	U.S.C.O.A. 7th Circuit
2001	Collopy v. City of Hobbs	27 F. App'x 980	U.S.C.O.A. 10th Circuit
2001	Tachiona v. Mugabe	169 F. Supp. 2d 259	U.S.D.C., Southern District of NY
2002	ID Sec. Systems Canada, Inc. v. Checkpoint Sys., Inc.	198 F. Supp.2d 598	U.S.D.C., Eastern District of PA
2002	Lane v. United States	286 F.3d 723	U.S.C.O.A. 4th Circuit
2002	Rochester Ford Sales, Inc. v. Ford Motor Co.	287 F.3d 32	U.S.C.O.A. 1st Circuit
2002	In re Broderbund/Learning Co. Sec. Litig.	294 F.3d 1201	U.S.C.O.A. 9th Circuit
2002	United States v. Taubman	2002 WL 548733/2002 U.S. Dist. LEXIS 6251	U.S.D.C., Southern District of New York
2002	United States v. Taubman	297 F.3d 161	U.S.C.O.A. 2nd Circuit
2002	Lane v. United States	286 F.3d 723	U.S.C.O.A. 4th Circuit
2003	Cavalier Tel., LLC v. Verizon Virginia, Inc.	330 F.3d 176	U.S.C.O.A. 4th Circuit
2003	Atlanta Journal and Constitution v. City of Atlanta Dep't of Aviation	322 F.3d 1298	U.S.C.O.A. 11th Circuit
2003	Shulman v. Voyou	251 F. Supp. 2d 166	U.S.D.C., District of Columbia
2003	Civil Liberties for Urban Believers v. City of Chicago	342 F.3d 752	U.S.C.O.A. 7th Circuit
2003	Silveira v. Lockyer	328 F.3d 567	U.S.C.O.A. 9th Circuit
2004	Seegars v. Ashcroft	297 F. Supp. 2d 201	U.S.D.C., District of Columbia
2005	Allegheny Ludlum Corp. v. United States	358 F. Supp. 2d 1334, 29 C.I.T. 157	U.S. Court of International Trade
2005	Wirtz v. Kansas Farm Bureau Servs., Inc.	355 F. Supp. 2d 1190	U.S.D.C., District Court of Kansas

2005	Granholm v. Heald	544 U.S. 460, 125 S. Ct. 1885	U.S. Supreme Court
2005	Standfacts Credit Servs., Inc. v. Experian Info. Solutions, Inc.	405 F. Supp. 2d 1141	U.S.D.C., Central District of California
2006	In re PDI Securities	2006 WL 3350461/2006 U.S. Dist. LEXIS 80142	U.S.D.C., District of New Jersey
2006	United States v. Patton	451 F.3d 615	U.S.C.O.A. 10th Circuit
2006	Yankee Atomic Elec. Co. v. United States	73 Fed. Cl. 249	U.S. Court of Federal Claims
2007	In re Welding Fume Prods. Liability Litigation	526 F. Supp. 2d 775	U.S.D.C., Northern District of Ohio
2007	Perfect 10, Inc. v. Visa Intern. Serv. Ass'n	494 F.3d 788	U.S.C.O.A. 9th Circuit
2007	Bell Atlantic Corp. v. Twombly	127 S. Ct. 1955, 550 U.S. 544	U.S. Supreme Court
2007	In re GenesisIntermedia, Inc. Securities Litigation	2007 WL 1953475	U.S.D.C., Central District of California
2007	NicSand, Inc. v. 3M Co.	507 F.3d 442, 2007 U.S. App. LEXIS 24270	U.S. Court of Appeals, 6th Circuit
2008	Adams v. Sec'y of Health and Human Servs.	2008 WL 2221852	U.S. Court of Federal Claims
2008	United Rentals Highway Tech., Inc. v. IN Constructors, Inc.	518 F.3d 526	U.S. Court of Appeals, 7th Circuit
2008	BellSouth Telecomms., Inc. v. Farris	542 F.3d 499	U.S. Court of Appeals, 6 th Circuit
2008	Amgen, Inc. v. F. Hoffman-La Roche, Ltd.	581 F. Supp. 2d 160	U.S.D.C., District of Massachusetts
2009	Ellis v. Mississippi Dep't of Health	Slip Copy, 2009 WL 279105	U.S.D.C., Northern District of Mississippi

2010]

Adam Smith in the U.S. Courts

79

Briefs Citing Adam Smith and Filed in Cases Before Courts of the United States

Date (of Brief)	Case Name (brief may have different name, depending on court it was filed in)	Citation (of Case)	Court (of Case)	Brief For
1871	The Slaughter-House Cases	83 U.S. 36	U.S. Supreme Court	Supp. Brief and Points of Plaintiffs in Error Butchers Benevolent Assoc.
1931	New York Title & Mortg. Co. v. Tarver	285 U.S. 524, 52 S. Ct. 313	U.S. Supreme Court	Brief for Appellant New York Title and Mortgage Company
1931	U.S. v. Macintosh	282 U.S. 832, 51 S. Ct. 90	U.S. Supreme Court	Brief in Behalf of American Friends Service Committee
1932	Harford Accident & Indem. Co. v. Bunn	285 U.S. 169, 52 S. Ct. 354	U.S. Supreme Court	Brief on the Merits for Appellees Bunn et al.
1932	Stewart Dry Goods Co. v. Lewis	287 U.S. 9, 53 S. Ct. 68	U.S. Supreme Court	Brief for Appellees Lewis
1933	Hartford Accident & Indem. Co. v. N.O. Nelson Mfg. Co.	291 U.S. 352, 54 S. Ct. 392	U.S. Supreme Court	Brief on the Merits for Appellee N.O. Nelson Manufacturing Company
1936	Morehead v. People (of the State of New York ex rel. Tipaldo)	298 U.S. 587, 56 S. Ct. 918	U.S. Supreme Court	Brief for Respondent People ex rel. Tipaldo
1936	Davis v. R.R. (Davis v. Boston and Maine R.R.)	1936 WL 40144	U.S. Supreme Court	Brief for Plaintiff-Appellant-Petitioner Davis
1937	Charles C. Steward Mach. Co. v. Davis	301 U.S. 548, 57 S. Ct. 883	U.S. Supreme Court	Brief Amicus Curiae in Support of Davis
1937	Helvering v. Davis	301 U.S. 619, 57 S. Ct. 904	U.S. Supreme Court	Brief for Plaintiff-Appellant-Respondent Davis
1937	Eubank v. Ohio	302 U.S. 646, 58 S. Ct. 147	U.S. Supreme Court	Brief for Appellant Eubank (Statement as to Jurisdiction on Appeal)
1937	Smyth v. United States	302 U.S. 329, 58 S. Ct. 248	U.S. Supreme Court	Brief for the U.S.

1937	New York ex rel. Cohn v. Graves	300 U.S. 308, 57 S. Ct. 466	U.S. Supreme Court	Brief for Appellee Graves
1938	Graves v. New York ex rel. O'Keefe	306 U.S. 466, 59 S. Ct. 595	U.S. Supreme Court	Brief for the U.S. as Amicus Curiae in Support of New York
1939	Deputy v. du Pont	308 U.S. 488, 60 S. Ct. 363	U.S. Supreme Court	Brief for Respondent du Pont
1943	United States v. South-Eastern Underwriters Ass'n	322 U.S. 533, 64 S. Ct. 1162	U.S. Supreme Court	Brief for the U.S.
1945	Int'l Shoe Co. v. Washington	326 U.S. 310, 66 S.Ct. 154	U.S. Supreme Court	Brief of Appellees State of Washington
1948	United States v. Cors	337 U.S. 325, 69 S. Ct. 1086	U.S. Supreme Court	Brief for the U.S.
1949	Puerto Rico v. Secretary of Agriculture (Sec. of Agr. v. Central Roig Refining Co.)	338 U.S. 604, 70 S. Ct. 403	U.S. Supreme Court	Brief for Government of Puerto Rico
1950	United States v. Commodities Trading Corp.	339 U.S. 121, 70 S. Ct. 547	U.S. Supreme Court	Brief for the U.S.
1952	Brotherhood of R. R. Trainmen v. Howard	343 U.S. 768, 72 S. Ct. 1022	U.S. Supreme Court	Brief for Respondent Howard
1954	Tee-Hit-Ton Indians v. United States	348 U.S. 272, 75 S. Ct. 313	U.S. Supreme Court	Brief for the U.S.
1958	Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.	360 U.S. 334, 79 S. Ct. 1196	U.S. Supreme Court	Brief Opposing Motion to Dismiss by Appellant Safeway Stores, Inc.
1960	Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.	364 U.S. 656, 81 S. Ct. 365	U.S. Supreme Court	Petitioner Radiant Burners' Brief on the Merits
1960	Federal Power Com'n v. Transcon. Gas Pipe Line Corp.	365 U.S. 1, 81 S. Ct. 435	U.S. Supreme Court	Brief for Petitioner Federal Power Commission
1962	Gray v. Sanders	372 U.S. 368, 83 S. Ct. 801	U.S. Supreme Court	Brief on Behalf of Appellants Gray, et al.
1963	General Motors Corp. v. Washington	377 U.S. 436, 84 S. Ct. 1564	U.S. Supreme Court	Brief for Appellant General Motors

2010]

Adam Smith in the U.S. Courts

81

1963	Roman v. Sincock	377 U.S. 695, 84 S. Ct. 1449	U.S. Supreme Court	Brief for Appellants Roman, et al.
1964	Whitney Nat. Bank v. Bank of New Orleans & Trust Co.	379 U.S. 411, 85 S. Ct. 551	U.S. Supreme Court	Brief for Amicus Curiae in Support of Respondent Bank of New Orleans
1965	Federal Trade Comm'n v. Consolidated Foods Corp.	380 U.S. 592, 85 S. Ct. 1220	U.S. Supreme Court	Brief Amicus Curiae of Trabon Engineering Corporation, et al.
1965	Federal Trade Commission v. Consol. Foods Corp.	380 U.S. 592, 85 S. Ct. 1220	U.S. Supreme Court	Brief Amicus Curiae of Eaton and Motion for Leave to File
1968	Bhd. of Locomotive Firemen and Enginemen v. Chicago, Rock Island and Pacific R.R.	393 U.S. 1045, 89 S. Ct. 610	U.S. Supreme Court	Reply Brief for Appellants Brotherhood of Locomotive
1968	Street v. New York (Gorham Mfg. Co. v. State Tax Comm. of NY)	266 U.S. 265, 45 S. Ct. 80	U.S. Supreme Court	Brief of Appellant Sidney Street
1970	Puerto Rico v. The Ridge Tool Co. (Fornaris v. Ridge Tool Co.)	400 U.S. 41, 91 S. Ct. 156	U.S. Supreme Court	Jurisdictional Statement
1973	North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores	94 S. Ct. 407	U.S. Supreme Court	Petitioner's Reply Appellate Brief
1975	United States v. United States Gypsum Co.	438 U.S. 422, 98 S. Ct. 2864	U.S. Supreme Court	Appellant U.S. Gypsum Co.'s Joint Brief
1975	Gordon v. New York Stock Exch.,	422 U.S. 659, 95 S. Ct. 2598	U.S. Supreme Court	Brief for the U.S. as Amicus Curiae
1976	Cantor v. Detroit Edison Co.	428 U.S. 579, 96 S. Ct. 3110	U.S. Supreme Court	Motion for Leave to File Brief as Amicus Curiae and Brief of MI Utilities Group
1978	Zenith Radio Corp. v. United States	98 S. Ct. 2441	U.S. Supreme Court	Appellate Brief for Respondent U.S.
1979	San Diego Gas & Elec. Co. v. City of San Diego	450 U.S. 621, 101 S. Ct. 1287	U.S. Supreme Court	Brief Amicus Curiae of the County of L.A. in Support of Appellee, City of San Diego

1980	Am. Medical Ass'n v. FTC	455 U.S. 676, 102 S. Ct. 1744	U.S. Supreme Court	Joint Appendix
1980	Nat. Gerimedical Hosp., v. Blue Cross of KS City (Wengler v. Druggists Mut. Ins. Co.)	446 U.S. 142, 100 S. Ct. 1540	U.S. Supreme Court	Brief of Respondent Blue Cross Assoc. in Opposition to Petition for Writ of Cert.
1981	Florida Dep't of State v. Treasure Salvors	458 U.S. 670, 102 S. Ct. 3304	U.S. Supreme Court	Brief of Respondents Treasure Salvors, Inc.
1981	Comty. Commc'n Co., v. City of Boulder	455 U.S. 40, 102 S. Ct. 835	U.S. Supreme Court	Brief for the Respondent City of Boulder
1981	Guardians Ass'n v. Civil Serv. Comm'n	463 U.S. 582, 103 S. Ct. 3221	U.S. Supreme Court	Brief for Petitioners The Guardians Association, et al.
1982	Xerox Corp. v. County of Harris	459 U.S. 145	U.S. Supreme Court	Appellant Xerox Corp.'s Brief
1982	U.S. v. Margiotta	688 F.2d 108	U.S.C.O.A. 2nd Circuit	Brief of Appellant Margiotta
1982	Monsanto Co. v. Spray- Right Serv. Corp.	465 U.S. 752, 104 S. Ct. 1464	U.S. Supreme Court	Brief of Nat. Assoc. of Manu. as Amicus Curiae in Support of Petitioner Monsanto
1983	Matsushita Elec. Indus. Co. v. Zenith Radio Corp.	475 U.S. 574, 106 S. Ct. 1348	U.S. Supreme Court	Appendix to a Petition for a Writ of Certiorari
1984	Aspen Skiing Co. v. Aspen Highlands Skiing	472 U.S. 585, 105 S. Ct. 2847	U.S. Supreme Court	Brief for Respondent Aspen Highlands Skiing Corporation
1984	Aspen Skiing Co. v. Aspen Highlands Skiing Corp.	472 U.S. 585, 105 S. Ct. 2847	U.S. Supreme Court	Petition for Writ of Certiorari
1985	Aspen Skiing Co. v. Aspen Highlands Skiing Corp.	472 U.S. 585, 105 S. Ct. 2847	U.S. Supreme Court	Brief for Petitioner Aspen Skiing Co.
1986	R. J. Reynolds Tobacco Co. v. Durham County	479 U.S. 130	U.S. Supreme Court	Brief for Appellant R.J. Reynolds Tobacco Co.
1986	Cargill, Inc. v. Monfort of Colorado, Inc.	479 U.S. 104, 107 S. Ct. 484	U.S. Supreme Court	Brief Amici Curiae in Support of Petitioners Cargill, Inc. and Excel Corp.

2010]

Adam Smith in the U.S. Courts

83

1986	Ryko Mfg Co. v. Eden Servs.	823 F.2d 1215	U.S.C.O.A. 8th Circuit	Reply Brief for Appellees/Cross-Appellants Eden Services
1987	Duquesne Light Co. v. Barasch	488 U.S. 299, 109 S. Ct. 609	U.S. Supreme Court	Brief of Amicus Curiae in Support of Appellees
1987	Bus. Elec. Corp. v. Sharp Elec. Corp.	485 U.S. 717, 108 S. Ct. 1515	U.S. Supreme Court	Brief of Amicus Curiae in Support of Respondent Sharp Electronics Corp.
1987	Brawer v. The Options Clearing Corp.	484 U.S. 819, 108 S. Ct. 76	U.S. Supreme Court	Petition for a Writ of Certiorari
1988	Healy v. The Beer Inst.	491 U.S. 324, 109 S. Ct. 2491	U.S. Supreme Court	Supplemental Brief for Appellant Healy
1988	The Jimmy Swaggart Ministries v. Bd. of Equalization of California	493 U.S. 378, 110 S. Ct. 688	U.S. Supreme Court	Brief Amicus Curiae in Support of Appellant The Jimmy Swaggart Ministries
1988	The Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Ass'n	491 U.S. 490, 109 S. Ct. 2584	U.S. Supreme Court	Petitioner's Supplemental Brief
1988	Ry. Labor Executives' Ass'n v. Chicago & North Western Trans. Co.	492 U.S. 901, 109 S. Ct. 3207	U.S. Supreme Court	Petition
1988	Alumax Inc. v. U.S. Aluminum Corp./Texas	488 U.S. 822, 109 S. Ct. 68	U.S. Supreme Court	Petition
1989	Webster v. Reproductive Health Servs.	492 U.S. 490, 109 S. Ct. 3040	U.S. Supreme Court	Brief Amicus Curiae in Support of Appellants
1989	Bd. of Educ. of Westside Cmty. Sch. v. Mergens	496 U.S. 226, 110 S. Ct. 2356	U.S. Supreme Court	Brief of Amicus Curiae in Support of Respondent Mergens
1990	Metro Broad., Inc. v. Federal Commc'n Comm'n	497 U.S. 547, 110 S. Ct. 2997	U.S. Supreme Court	Brief of Amicus Curiae in Support of Petitioner Metro Broad.
1990	FMC Corp. v. Holliday	498 U.S. 52, 111 S. Ct. 403	U.S. Supreme Court	Brief of Amicus Curiae in Support of Respondent Holliday

1991	Belcher Oil Co. v. Florida Fuels, Inc.	749 F. Supp. 1004	U.S.C.O.A. 11th Circuit	Reply Brief of Appellant and Brief of Cross-Appellee Belcher
1991	Sonnenburg v. Bayh	502 U.S. 1094, 112 S. Ct. 1170	U.S. Supreme Court	Petition for a Writ of Certiorari
1991	Aunyx Corp. v. Canon U.S.A.	978 F.2d 3	U.S.C.O.A. 1st Circuit	Brief for Plaintiffs-Appellants Aunyx Corporation
1991	MSM Farms, Inc. v. Spire	502 U.S. 814, 112 S. Ct. 65	U.S. Supreme Court	Petition for Writ of Certiorari
1991	Int'l Soc'y for Krishna Consciousness v. Lee	505 U.S. 672, 112 S. Ct. 2701	U.S. Supreme Court	Brief Amicus Curiae in Support of Cross-Respondents Int. Society, et al.
1992	Yee Yee v. City of Escondido	503 U.S. 519, 112 S. Ct. 1522	U.S. Supreme Court	Brief for Respondent City of Escondido
1992	Chemical Waste Management v. Hunt	504 U.S. 334, 112 S. Ct. 2009	U.S. Supreme Court	Brief of Respondents Hunt, et al.
1992	City of Burlington v. Dague	505 U.S. 557	U.S. Supreme Court	Brief of Respondents Dague, et al.
1992	Packard v. Provident Nat'l Bank	994 F.2d 1039	U.S.C.O.A. 3rd Circuit	Brief of Amicus Curiae in Support of Defendant-Appellant Provident Nat.
1992	Capital Imaging Assoc. v. Mohawk Valley Med. Assoc.,	996 F.2d 537	U.S.C.O.A. 2nd Circuit	Corrected Brief of Defendant-Appellee Mohawk Valley Medical Assoc.
1992	Riverbend Farms, Inc. v. Madigan	506 U.S. 999, 113 S. Ct. 598	U.S. Supreme Court	Petition for a Writ of Certiorari
1993	Seymour Sacks & Star Sacks v. Comm'r of Internal Revenue	69 F.3d 982	U.S.C.O.A. 9th Circuit	Brief of Appellants Seymour Sacks and Star Sacks
1993	Omnitech Intern., Inc. v. Clorox Co.	11 F.3d 1316	U.S.C.O.A. 5th Circuit	Appellee The Clorox Company's Brief
1993	Capital Imaging Assoc. v. Mohawk Valley Med. Assoc.	510 U.S. 947, 114 S. Ct. 388	U.S. Supreme Court	Respondents' Brief in Opposition to Petition for a Writ of Certiorari

2010]

Adam Smith in the U.S. Courts

85

1993	Capital Imaging Assoc. v. Mohawk Valley Med. Assoc.,	510 U.S. 947, 114 S. Ct. 388	U.S. Supreme Court	Petition
1994	Williamson v. Sacred Heart Hosp.	41 F.3d 667	U.S.C.O.A. 11th Circuit	Answer Brief of Appellee Sacred Heart Hospital of Pensacola
1994	Scopellite v. United States (Scopellite v. Commissioner of Internal Revenue)	45 F.3d 437	U.S.C.O.A. 9th Circuit	Appellant Scopellite's Opening Brief
1994	Anderson v. Green	513 U.S. 557, 115 S. Ct. 1059	U.S. Supreme Court	Brief for Respondents Green, et al.
1994	Liberty Mutual Ins. Co. v. The Louisiana Dep't of Ins.	62 F.3d 115	U.S.C.O.A. 5th Circuit	Brief of Plaintiffs-Appellees Liberty Mutual
1994	Stewart v. City and County of San Francisco	69 F.3d 545	U.S.C.O.A. 9th Circuit	Appellee City and County of San Francisco's Brief
1994	United States v. Lopez	514 U.S. 549, 115 S. Ct. 1624	U.S. Supreme Court	Brief for OH, NY, and D.C. as Amici Curiae in Support of Petitioner U.S.
1994	Federal-Mogul Corp. v. United States	63 F.3d 1572	U.S.C.O.A. Federal Circuit	Brief of Appellants-Defendants Koyo Seiko Co., Ltd., et al.
1994	LeBlanc v. Ward Lake Drilling, Inc.	513 U.S. 1080, 115 S. Ct. 729	U.S. Supreme Court	Petitioner LeBlanc's Supplemental Brief and Supplemental Appendix
1995	Nightengale v. Comm'r of Internal Revenue	65 F.3d 175	U.S.C.O.A. 9th Circuit	Appellant Nightengale's Opening Brief
1995	Kurnik v. Comm'r of Internal Revenue	70 F.3d 120	U.S.C.O.A. 9th Circuit	Appellant Kurnik's Opening Brief
1995	In the Matter of William C. Blankstyn v. United States	1995 WL 17163670	U.S.C.O.A. 9th Circuit	Appellant Blankstyn's Opening Corrected Brief
1995	Pressley v. Comm'r of Internal Revenue	70 F.3d 1279	U.S.C.O.A. 9th Circuit	Appellant Pressley's Opening Brief
1995	Kvasnikoff v. Allstate Ins. Co.	1995 WL 251164	U.S.C.O.A. 9th Circuit	Brief of Appellee Kvasnikoff

1995	McNeel v. Comm'r of Internal Revenue	76 F.3d 387	U.S.C.O.A. 9th Circuit	Appellant McNeel's Opening Brief
1995	44 Liquormart, Inc. v. Rhode Island	517 U.S. 484, 116 S. Ct. 1495	U.S. Supreme Court	Brief of Amici Curiae in Support of Respondents State of Rhode Island, et al.
1995	BMW of North Am. v. Gore	517 U.S. 559, 116 S. Ct. 1589	U.S. Supreme Court	Respondent: Ira Gore
1995	Porter v. Comm'r of Internal Revenue	516 U.S. 1011, 116 S. Ct. 570	U.S. Supreme Court	Petition for Writ of Certiorari
1995	F. Schumacher & Co. v. Alvord-Polk, Inc.	514 U.S. 1063, 115 S. Ct. 1691	U.S. Supreme Court	Brief of the National Association of Manufacturers as Amicus Curiae in Support of Petitioner
1996	Standifird v. Comm'r of Internal Revenue	87 F.3d 1322	U.S.C.O.A. 9th Circuit	Appellant Standifird's Reply Brief
1996	Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.	128 F.3d 59	U.S.C.O.A. 2nd Circuit	Brief of Plaintiffs-Appellants Hamilton Chapter, et al.
1996	Hilo v. BP Exploration and Oil	108 F.3d 337	U.S.C.O.A. 9th Circuit	Opening Brief of Appellants Hilo, et al.
1996	Hilo v. Exxon Corp.	108 F.3d 337	U.S.C.O.A. 9th Circuit	Rebuttal Brief of Appellants
1996	Zaidi v. Carrico	518 U.S. 1006, 116 S. Ct. 2527	U.S. Supreme Court	Petition for Writ of Certiorari
1996	McNeel v. Comm'r of Internal Revenue	517 U.S. 1222, 116 S. Ct. 1854	U.S. Supreme Court	Petition for Writ of Certiorari
1997	Am. Soc. Of Dermatology v. Shalala	116 F.3d 941	U.S.C.O.A., D.C. Circuit	Brief of Plaintiffs-Appellants American Soc. Of Dermatology
1997	Rebel Oil Co. v. Atlantic Richfield Co.	146 F.3d 1088	U.S.C.O.A. 9th Circuit	Reply Brief of Plaintiffs-Appellants Rebel Oil, et al.
1997	Astraea Aviation Servs., Inc. v. Dep't of Transp.	1997 WL 33628008	U.S.C.O.A. 5th Circuit	Reply Brief for Petitioner Astraea Aviation Services, Inc.
1997	U.S. v. Hoyle	122 F.3d 48	U.S.C.O.A. D.C. Circuit	Final Joint Reply Brief for Appellants

2010]

Adam Smith in the U.S. Courts

87

1998	Labor Relations Div. of Const. Indus. of Mass., Inc. v. Teamsters Local 379	156 F.3d 13	U.S.C.O.A. 1st Circuit	Reply Brief of Defendant-Appellant Teamsters
1998	Haddle v. Garrison	525 U.S. 121, 119 S. Ct. 489	U.S. Supreme Court	Brief of Amicus Curiae National Whistleblower Center in Support of Petitioner
1998	Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish	171 F.3d 231	U.S.C.O.A. 5th Circuit	Supplemental Brief of Amicus Curiae in Support of Appellant Surgical
1998	Surgical Care Ctr. of Hammond, v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish	171 F.3d 231	U.S.C.O.A. 5th Circuit	Brief for U.S. and FTC as Amici Curiae in Support of Suggestion of Rehearing En Banc
1998	Cal. Dental Ass'n v. Federal Trade Comm'n	526 U.S. 756, 119 S.Ct. 1604	U.S. Supreme Court	Motion for Leave to File Briefs of Amicus Curiae in Support of Respondent
1998	Novacor Chemicals, Inc. v. United States	171 F.3d 1376	U.S.C.O.A., Federal Circuit	Brief for Appellant United States
1998	Quarty v. United States	170 F.3d 961	U.S.C.O.A. 9th Circuit	Appellant Quarty's Opening Brief
1999	State of Illinois v. Wardlow	528 U.S. 119, 120 S.Ct. 673	U.S. Supreme Court	Brief of Amicus Curiae in Support of Petitioner State of Illinois
1999	Spectators' Commc'n Network, Inc. v. Colonial Country Club,	253 F.3d 215	U.S.C.O.A. 5th Circuit	Brief for Appellee Anheuser-Busch, Inc.
1999	EFCO Corp. v. Symons Corp.	219 F.3d 734	U.S.C.O.A. 8th Circuit	Brief of Appellant Symons Corp.
1999	In re SAI Soledad Energy, Inc. (SAI Soled AD Energy v. Axel Johnson Energy Development, Inc.)	5 F. App'x. 650	U.S.C.O.A. 9th Circuit	Brief of Appellee Axel Johnson Energy Development, Inc.

1999	Jones v. United States	529 U.S. 848, 120 S. Ct. 1904	U.S. Supreme Court	Brief of the Cato Institute as Amicus Curiae in Support of Petitioner Jones
1999	Reiser v. Microsoft Corp.	215 F.3d 1333	U.S.C.O.A. 9th Circuit	Appellant Reiser's Opening Brief
1999	Reiser v. Microsoft Corp.	215 F.3d 1333	U.S.C.O.A. 9th Circuit	Appellant Reiser's Reply Brief
1999	Reiser v. Microsoft Corp.	215 F.3d 1333	U.S.C.O.A. 9th Circuit	Appellee Microsoft's Responding Brief
1999	Scott v. U.S.	528 U.S. 1160, 120 S. Ct. 1173	U.S. Supreme Court	Petition for Writ of Certiorari
2000	Johnson v. Comm'r of Internal Revenue	242 F.3d 382	U.S.C.O.A. 9th Circuit	Appellant Johnson's Opening Brief
2000	Loeb Industries v. Sumitomo Corp.	306 F.3d 469	U.S.C.O.A. 7th Circuit	Brief of Amicus Curiae in Support of Appellant Loeb Industries
2000	Gilchrist v. Arizona Supreme Court	10 F. App'x. 468	U.S.C.O.A. 9th Circuit	Appellant's Brief
2000	Moghadam v. U.S.	120 S. Ct. 1529	U.S. Supreme Court	Brief of Amicus Curiae Coalition for Preservation of Performed Music in Support of Pet. For Cert.
2001	Todd v. Exxon Corp.	275 F.3d 191	U.S.C.O.A. 2nd Circuit	Brief of Plaintiff-Appellant Todd
2001	Hart v. Comm'r of Internal Revenue	14 F. App'x. 990	U.S.C.O.A. 9th Circuit	Brief of Appellant Hart
2001	Hart v. Comm'r of Internal Revenue	14 F. App'x. 990	U.S.C.O.A. 9th Circuit	Reply Brief of Appellant Hart
2001	J.E.M. Ag Supply v. Pioneer Hi-Bred Int'l	534 U.S. 124, 122 S. Ct. 593	U.S. Supreme Court	Brief Amicus Curiae of Cargill, Inc. in Support of Respondent Pioneer
2001	Zelman v. Simmons-Harris	536 U.S. 639, 122 S. Ct. 2460	U.S. Supreme Court	Brief of Amici Curiae in Support of Petitioner Zelman
2001	Vitarelli v. Guiliani	29 F. App'x. 770	U.S.C.O.A. 2nd Circuit	Brief for Plaintiff-Appellant Vitarelli

2010]

Adam Smith in the U.S. Courts

89

2001	Hamm v. Waste Management Holdings, Inc.	122 S. Ct. 1203	U.S. Supreme Court	Petition for Writ of Certiorari
2001	Cayetano v. Chevron USA	121 S. Ct. 1403	U.S. Supreme Court	Brief of City and County of San Francisco as Amicus Curiae Supporting Petition for Writ of Cert.
2001	Cayetano v. Chevron USA	121 S. Ct. 1403	U.S. Supreme Court	Brief of the States of Vermont, Alaska, et al. as Amici Curiae in Support of Petitioners
2002	United States v. Taubman	297 F.3d 161	U.S.C.O.A. 2nd Circuit	Reply Brief for Defendant-Appellant Taubman
2002	United States v. Taubman	297 F.3d 161	U.S.C.O.A. 2nd Circuit	Appellate Brief for Appellee United States
2002	United States v. Taubman	297 F.3d 161	U.S.C.O.A. 2nd Circuit	Appellate Brief for Defendant-Appellant A. Alfred Taubman
2002	Howsam v. Dean Witter Reynolds, Inc.	534 U.S. 1161	U.S. Supreme Court	Brief Amicus Curiae in Support of Respondent Witter
2002	Gilchrist v. Karman	68 F. App'x. 59	U.S.C.O.A. 9th Circuit	Appellant Gilchrist's Brief
2002	State Farm Mut. Auto. Ins. Co. v. Campbell	123 S.Ct. 1513	U.S. Supreme Court	Brief Amici Curiae in Support of Petitioner State Farm
2002	FCC v. NextWave Pers. Commc'ns., Inc.	537 U.S. 293	U.S. Supreme Court	Brief Amicus Curiae in Support of Respondents NextWave
2002	Eldred v. Ashcroft	537 U.S. 186, 123 S. Ct. 769	U.S. Supreme Court	Brief Amici Curiae in Support of Petitioner Eldred
2002	Jamaica Ash & Rubbish Removal Co. v. Ferguson	275 F. App'x. 67	U.S.C.O.A. 2nd Circuit	Brief for Plaintiff-Appellant Jamaica Ash, et al.
2002	Single Moms, Inc. v. Montana Power Co.	331 F.3d 743	U.S.C.O.A. 9th Circuit	Brief for Appellants Single Moms, Inc., et al.
2002	Hart v. Comm'r of Internal Revenue	154 L. Ed. 2d 140	U.S. Supreme Court	Petition for Writ of Certiorari

2002	Eldred v. Ashcroft	123 S. Ct. 769	U.S. Supreme Court	Brief of Amici Curiae Eagle Forum Ed. Et al. in Support of Petitioners
2002	Eldred v. Ashcroft	123 S. Ct. 769	U.S. Supreme Court	Brief Amici Curiae of the Organization of Am. Historians and H-Law in Support of Petitioners
2003	McConnell v. Federal Election Comm'n	124 S. Ct. 619	U.S. Supreme Court	In favor of sustaining the Bipartisan Campaign Reform Act
2003	Paul v. Federal Election Comm'n	124 S. Ct. 32	U.S. Supreme Court	Appellants: Congressman Ron Paul et al.
2003	Inter-County Title Co. v. Data Trace Info. Servs.	105 F. App'x. 136	U.S.C.O.A. 9th Circuit	Joint Brief for Defendants-Appellants Data Trace Info. Services, et al.
2003	McFarlane v. Twist	124 S. Ct. 1058	U.S. Supreme Court	Brief of Amici Curiae in Support of Petitioner McFarlane
2003	United States v. Earle	375 F.3d 1159	Court of Appeals, D.C. Circuit	Brief for Appellant Earle
2003	United States v. Earle	375 F.3d 1159	Court of Appeals, D.C. Circuit	Brief for Appellee U.S.
2003	Nixon v. Missouri Mun. League	124 S.Ct. 1555	U.S. Supreme Court	Brief of Amicus Curiae in Support of Respondents Missouri Municipal League
2003	Union Elec. Co. v. United States	363 F.3d 1292	Court of Appeals, Federal Circuit	Brief for Appellant Union Electric Company
2003	United States v. Earle	375 F.3d 1159	U.S.C.O.A. D.C. Circuit	Brief
2003	In re Public & Private Pension Fund Group; In re Worldcom, Inc. Sec. Litigation	2003 WL 22340483	U.S.C.O.A. 2nd Circuit	Petition for Writ of Mandamus Re Consolidation Order
2003	Lawrence (and Garner) v. Texas	123 S. Ct. 2472	U.S. Supreme Court	Brief of the Institute for Justice as Amicus Curiae in Support of Petitioners
2003	Powers v. Harris	379 F.3d 1208	U.S.C.O.A. 10th Circuit	Appellee Harris' Response Brief

2010]

Adam Smith in the U.S. Courts

91

2003	Swedenburg v. Kelly	544 U.S. 460, 125 S. Ct. 1885	U.S. Supreme Court	Joint Appendix
2004	Pruett v. Harris County Bail Bond Bd.	104 F. App'x. 995	U.S.C.O.A. 5th Circuit	Appellate Brief for Plaintiff-Appellee Pruet
2004	KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.	125 S. Ct. 542	U.S. Supreme Court	Amicus Brief in Support of Petitioner KP Permanent Make-Up
2004	Nemitz v. United States	2004 WL 1948976	U.S.C.O.A. 9th Circuit	Appellant's Informal Brief
2004	Jackson, TN Hospital Company v. West TN Healthcare	414 F.3d 608	U.S.C.O.A. 6th Circuit	Brief of Amici Curiae Urging Reversal in Support of Appellant (Corrected)
2004	Cleveland v. Viacom	124 S. Ct. 1508	U.S. Supreme Court	Reply in Support of Petition for Writ of Certiorari
2005	Bautista v. Star Cruises	396 F.3d 1289	U.S.C.O.A. 11th Circuit	Brief of Amicus Curiae in Support of Appellant Bautista
2005	Lingle v. Chevron U.S.A.	125 S. Ct. 2074	U.S. Supreme Court	Brief of Amicus Curiae in Support of Petitioner Lingle, et al.
2005	TFWS, Inc. v. Schaefer	147 F. App'x. 330	U.S.C.O.A. 4th Circuit	Brief of Amicus Curiae in Support of Appellant Schaefer
2005	Estate of Lurie v. Comm'r of Internal Revenue	425 F.3d 1021	U.S.C.O.A. 7th Circuit	Brief of Appellant Estate of Lurie
2005	McCreary County, Ky. v. ACLU	125 S. Ct. 2722	U.S. Supreme Court	Brief of Amicus Curiae in Support of Respondent Am. Civil
2005	United States v. 191.07 Acres of Land	482 F.3d 1132	U.S.C.O.A. 9th Circuit	Appellant 191.07 Acres of Land's Opening Brief
2005	Jews for Jesus, Inc. v. Port of Portland	172 F. App'x. 760	U.S.C.O.A. 9th Circuit	Brief of Appellants Jews for Jesus, Inc.
2005	New Hampshire Motor Transport Ass'n v. Rowe	448 F.3d 66	U.S.C.O.A. 1st Circuit	Brief of Amicus Curiae in Support of Defendant-Appellant Rowe
2005	Laboratory Corp. of Am. Holdings v. Metabolite Labs., Inc.	126 S. Ct. 2921	U.S. Supreme Court	Brief of Amicus Curiae in Support of Neither Party

2005	United States v. Smith	451 F.3d 209	U.S.C.O.A. 4th Circuit	Brief of Appellant Smith
2005	Carabell v. Army Corps. Of Engineers (Rapanos v. United States)	547 U.S. 715, 126 S. Ct. 2208	U.S. Supreme Court	Amicus Curiae Brief in Support of Respondents Army Corps.
2005	Metro. Milwaukee Assoc. of Commerce v. Milwaukee County	431 F.3d 277	U.S.C.O.A. 7th Circuit	Reply Brief of Plaintiff-Appellant Metropolitan Milwaukee Assoc. of Commerce
2005	Metro. Milwaukee Assoc. of Commerce v. Milwaukee County	431 F.3d 277	U.S.C.O.A. 7th Circuit	Brief and Required Short Appendix of Plaintiff-Appellant
2005	Barnes-Wallace v. City of San Diego	551 F.3d 891	U.S.C.O.A. 9th Circuit	Plaintiffs-Appellants/Cross-Appellees' Consolidated Reply/Answering Brief
2005	United States v. 191.07 Acres of Land	482 F.3d 1132	U.S.C.O.A. 9th Circuit	Appellee United States' Answering Brief
2005	Tachiona v. U.S.	547 U.S. 1143, 126 S. Ct. 2020	U.S. Supreme Court	Petition for Writ of Certiorari
2005	Seegars v. Gonzales	546 U.S. 1157, 126 S. Ct. 1187	U.S. Supreme Court	Petition for Writ of Certiorari
2006	Randall v. Sorrell	126 S. Ct. 2479	U.S. Supreme Court	Brief of Amicus Curiae in Support of Respondent Sorrell
2006	Burlington Northern and Santa Fe Ry. Co. v. White	126 S. Ct. 2405	U.S. Supreme Court	Brief for Respondent White
2006	Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.	127 S. Ct. 1069	U.S. Supreme Court	Brief of Amici Curiae in Support of Petitioner Weyerhaeuser Co.
2006	Beuter v. Canyon State Prof'l Servs.	261 F. App'x. 14	U.S.C.O.A. 9th Circuit	Brief for Appellee Beuter
2006	Given v. United States	549 U.S. 1073, 127 S. Ct. 717	U.S. Supreme Court	Petition for Rehearing for Petitioners
2006	Woodard v. United States	549 U.S. 956, 127 S. Ct. 417	U.S. Supreme Court	Petition for Writ of Certiorari

2010]

Adam Smith in the U.S. Courts

93

2006	Parker v. District of Columbia	478 F.3d 370	U.S.C.O.A. D.C. Circuit	Brief of Amicus Curiae in Support of Appellees
2007	Yankee Atomic Elec. Co. v. United States	536 F.3d 1268	U.S.C.O.A., Federal Circuit	Brief for Appellees / Cross-Appellants Yankee Atomic Elec. Co.
2007	Murphy v. Internal Revenue Service	493 F.3d 170	U.S.C.O.A., D.C. Circuit	Reply Brief for Appellant Murphy
2007	Lopez v. Astrue	236 F. App'x. 106	U.S.C.O.A. 5th Circuit	Reply Brief for Appellant Lopez
2007	Bell Atlantic Corp. v. Twombly	127 S. Ct. 1955	U.S. Supreme Court	Brief of Amici Curiae Economists in Support of Bell Atlantic
2007	Watson and Lawson v. Philip Morris Cos.	127 S. Ct. 2301	U.S. Supreme Court	Brief for Petitioners Watson and Lawson, et al.
2007	Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County	128 S. Ct. 2733	U.S. Supreme Court	Appellate Brief of Amici Curiae in Support of Petitioners
2007	Pacific Gas and Elec. Co. v. United States	536 F.3d 1282	U.S.C.O.A., Federal Circuit	Reply Brief for Appellant Pacific Gas and Electric Company
2007	Pacific Gas and Elec. Co. v. United States	536 F.3d 1282	U.S.C.O.A., Federal Circuit	Brief of Appellant Pacific Gas and Electric Company
2007	Dep't of Revenue of Kentucky, et al. v. Davis	128 S. Ct. 1801	U.S. Supreme Court	Brief for Petitioners Department of Revenue of Kentucky, et al.
2007	United States v. Williams	128 S. Ct. 1830	U.S. Supreme Court	Brief Amicus Curiae in Support of Petitioner United States
2007	Heath v. Baude	538 F.3d 608	U.S.C.O.A. 7th Circuit	Brief Amicus Curiae in Support of Appellees Baude
2007	In re Ferguson	2009 WL 565074	U.S.C.O.A. Federal Circuit	Brief and Supplemental Appendix for Appellee Director of the U.S. Patent and Trademark Office

2007	United States v. Capoccia	503 F.3d 103	U.S.C.O.A. 2nd Circuit	Supplemental Reply Brief for the United States
2008	DIRECTV, Inc. v. Treesh	128 S. Ct. 1876	U.S. Supreme Court	Brief of Amici Curiae in Support of Petitioner DIRECTV, Inc.
2008	In re Ins. Brokerage Antitrust Litigation (MDL 1663)	2008 WL 4005068	U.S.C.O.A. 3rd Circuit	Brief of Appellees
2008	FedEx Home Delivery v. Nat'l Labor Relations Bd.	2008 WL 4425825	U.S.C.O.A. D.C. Circuit	Brief of Amici Curiae Am. Trucking Assoc. and Chamber of Commerce in Support of Petitioner
2008	Am. Farm Bureau Fed'n v. U.S. EPA	2009 WL 437050	U.S.C.O.A. D.C. Circuit	Final Joint Brief of Industry Petitioners
2008	Comm. Sci. & Indust. Research v. Buffalo Tech. (USA), Inc.	542 F.3d 1363	U.S.C.O.A. Federal Circuit	Brief for Amicus Curiae Tech. Prop. Ltd. in Support of Plaintiff-Appellee Commonwealth
2009	Empress Casino Joliet Corp. v. Giannoulis	2009 WL 564640	U.S. Supreme Court	Brief of Amicus Curiae U.S. Chamber of Commerce in Support of Petitioners