

ARTICLES

ADAM SMITH'S HISTORICAL JURISPRUDENCE AND THE "METHOD OF THE CIVILIANS"

*Ernest Metzger**

Adam Smith is not well known as a writer on law. Whether his projected work on the "general principles of law and government"¹ would have given him that reputation we can only guess. Those who study his surviving works will know, even so, that he devoted a great deal of attention to law.² This is a legacy, unfortunately, that his ambitions as a

* A.B., University of Illinois; J.D., Southern Methodist University School of Law; D.Phil., Oxford University. Douglas Professor of Civil Law, University of Glasgow.

1. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* VII.iv.37 (D. D. Raphael & A. L. MacFie eds., 1984) (1759) [hereinafter *THEORY OF MORAL SENTIMENTS*].

I shall in another discourse endeavour to give an account of the general principles of law and government, and of the different revolutions they have undergone in the different ages and periods of society, not only in what concerns justice, but in what concerns police, revenue, and arms, and whatever else is the object of law.

Id. at VII.iv.37.

The advertisement accompanying the sixth edition reads as follows:

In the *Enquiry concerning the Nature and Causes of the Wealth of Nations*, I have partly executed this promise; at least so far as concerns police, revenue, and arms. What remains, the theory of jurisprudence, which I have long projected, I have hitherto been hindered from executing

Id. at 3. See also *THE CORRESPONDENCE OF ADAM SMITH* no. 116 (Ernest Campbell Mossner & Ian Simpson Ross eds., 1977) (reprint 1987) (to Lord Hailes; 5 March 1769) ("I have read law entirely with a view to form some general notion of the great outlines of the plan according to which justice has [been] administered in different ages and nations"). The character and viability of this projected work is discussed in CHARLES L. GRISWOLD, *ADAM SMITH AND THE VIRTUES OF ENLIGHTENMENT* 256-58 (1999); DONALD WINCH, *ADAM SMITH'S POLITICS: AN ESSAY IN HISTORIOGRAPHIC REVISION* 9-27 (1978); Donald Winch, *Adam Smith's "enduring particular result": A Political and Cosmopolitan Perspective*, in *WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT* 253-69 (Istvan Hont & Michael Ignatieff eds., 1983).

2. For a discussion of Adam Smith and law within a brief compass, see David Lieberman, *Adam Smith on Justice, Rights, and Law*, in *THE CAMBRIDGE COMPANION TO ADAM SMITH* 214-45 (Knud Haakonssen ed., 2006); Neil MacCormick, *Adam Smith on Law*, 15 *VAL. U. L. REV.* 243 (1981), reprinted in *ADAM SMITH* 189 (Knud Haakonssen ed., 1998). Arguably, Smith's most profound contribution to law is his exposition of the concept of justice. For discussions of Smith's moral theory generally and justice specifically, see JAMES R. OTTESON, *ADAM SMITH'S*

philosopher and scholar tended to obscure. Historically, Smith was flanked by natural law and positivist systematizers, and systematizers tend to leave conspicuous monuments behind.³ Smith, instead, treated law as part of a larger enterprise: the study of mankind and the communities that mankind creates. Other subjects treated by Smith as part of this larger enterprise—political economy and moral decision-making—famously received his most careful attention and elucidation. Law, sadly, did not. Thus, we miss his projected work on law very keenly.

Smith lectured on jurisprudence at the University of Glasgow from 1751 to 1764, and various records of these lectures survive.⁴ The lectures reflect the university curriculum at Glasgow and are no substitute for the lost projected work. Yet they do reveal one of Smith's key ambitions: a desire to explain what prompted a given law to be recognized, i.e., to explain "the causes of laws." It was Smith's desire to apply his theory of moral decision-making to law, and to add into the causal mix some

MARKETPLACE OF LIFE 13-100 (2002); Griswold, *supra* note 1, at 231-44; D.D. Raphael, *Adam Smith, in CONCEPTS OF JUSTICE* 113-25 (D. D. Raphael ed., 2001). See also KNUD HAAKONSEN, *THE SCIENCE OF THE LEGISLATOR: THE NATURAL JURISPRUDENCE OF DAVID HUME AND ADAM SMITH* 93-98 (1989) (contrasting the laws of justice and the laws of police). See also the remarks of John Millar, related at secondhand in Dugald Stewart, *Account of the Life and Writings of Adam Smith, LL.D., in ADAM SMITH, ESSAYS ON PHILOSOPHICAL SUBJECTS* 263, 274-75 (photo. reprint 1982) (W. P. D. Wightman, J. C. Bryce & I. S. Ross eds., 1980) (1794) (describing the relations among the different components of Smith's jurisprudence lectures and their connections to *The Theory of Moral Sentiments*). Smith's moral theory, founded on the ability of human beings to assess the propriety of human conduct and assign merit to it, is an important component of all of Smith's writings on law. It affects considerably the question whether, to Smith, the legislature or the courts is the better law-making organ. See John W. Cairns, *Adam Smith and the Role of the Courts in Securing Justice and Liberty, in ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS* 31 (Robin Paul Malloy & Jerry Evensky eds., 1995) [hereinafter *Role of the Courts*]; John W. Cairns, *Ethics and the Science of Legislation: Legislators, Philosophers, and Courts in Eighteenth-Century Scotland*, 8 *JAHRBUCH FÜR RECHT UND ETHIK* 159 (2000) [hereinafter *Ethics and the Science of Legislation*]; John W. Cairns, *Attitudes to Codification and the Scottish Science of Legislation, 1600-1830*, 22 *TUL. EUR. & CIV. L.F.* 1, 45-47 (2007). It is also the engine for historical development in law. See HAAKONSEN, *supra*, at 99-177; PETER STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* 29-46 (1980).

3. See, e.g., HUGO GROTIUS, *DE IURE BELLI AC PACIS LIBRI TRES* (B. J. A. de Kanter-van Hettinga Tromp ed., Scientia Verlag 1993) (1625); FRIEDRICH CARL VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* (Berlin, 1840-1861).

4. The critical edition, containing the two principal sets of notes, is ADAM SMITH, *LECTURES ON JURISPRUDENCE* (photo. reprint 1982) (R. L. Meek, D. D. Raphael & P. G. Stein eds., 1978). By common convention the earlier of the notes is cited LJ(A) and the latter LJ(B), and they are cited in this way below. Citations to the extensive introduction to the critical edition are given below as LJ(INTRODUCTION). In addition to these two sets of notes, some brief extracts of a student's notes to an earlier course of these lectures, perhaps from the mid 1750s, is given in R. L. Meek, *New Light on Adam Smith's Glasgow Lectures on Jurisprudence*, 8 *HIST. POL. ECON.* 439, 466-77 (1976), *reprinted in* R. L. MEEK, SMITH, MARX AND AFTER 81-91 (1977) [hereinafter ANDERSON NOTES].

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proportion of history, government, mode of subsistence—indeed anything that might help to explain the existence of any law he brought within his sights. As such, the records of these lectures help us to understand at least some portion of Smith’s thinking on law, otherwise denied to us.

In his final year at Glasgow, Smith undertook to reorganize his jurisprudence lectures. He had formerly begun the lectures on justice⁵ by speaking on the central institutions of private law (property and obligations), then on domestic law (matters that civilians would treat under the law of persons), and last on forms of government. In his final year of lectures, however, he began with forms of government, and then passed onto domestic and private law. As we lack a full account of Smith’s views on law, we naturally ask whether the changes are significant in any way. Smith himself explained briefly his decision to reorder the lectures. His explanation falls near the beginning of the revised course of lectures.

The origin of natural rights is quite evident. . . . But acquired rights such as property require more explanation. Property and civil government very much depend on one another. The preservation of property and the inequality of possession first formed it, and the state of property must always vary with the form of government. The civilians begin with considering government and then treat of property and other rights. Others who have written on this subject begin with the latter and then consider family and civil government. There are several advantages peculiar to each of these methods, tho’ that of the civil law seems on the whole preferable.⁶

Smith does not give a great deal away. He does not explain what civilian model he is following, nor what advantage he finds in the so-called method of the civil law. Most importantly, he leaves open the question whether his thoughts on law and the “causes of laws” had changed before he gave his final course of lectures.

This Article discusses Smith’s decision to reorganize his lectures and makes a modest argument, which for convenience may be summarized as follows. Smith wanted to describe how certain laws came about—what caused them to be. He occasionally explained how certain laws came about by reference to the “ages of society.”⁷ His notion was that societies tend to

5. “Justice” forms the first part of the lectures on jurisprudence, and is followed by “police, revenue and arms.” See discussion *infra* note 10. See LJ(A), *supra* note 4, at i.1-2; HAAKONSSON, *supra* note 2, 95-96; Lieberman, *supra* note 2, at 234-39 (on the foundations of the division, and its shortcomings).

6. LJ(B), *supra* note 4, at 11.

7. Judging by the earlier, verbatim record of the lectures, Smith favored the word “age” over “stage” in this context. He introduces the subject with the word “state” and follows with the

present themselves under the model of one of four ages, each age identifiable by a certain mode of subsistence. This “stadial theory” alone, however, was inadequate to explain the genesis of most laws, and to explain a given law Smith often turned to a more immediate cause: form of government. Certain forms of government tended to produce certain laws. Properly speaking, these latter arguments were not independent of the stadial theory, but were related to it in ways that Smith had not yet fully worked out. Scientific rigor, however, was a less urgent problem than exposition; in postponing his introduction to forms of government, Smith was handicapped in presenting his arguments. He cured the problem by reorganizing the lectures and discussing form of government at the beginning. In doing so he selected a civilian model founded on the institutional literature of his time.

THE GLASGOW LECTURES ON JURISPRUDENCE

Smith’s lectures on jurisprudence at Glasgow are well known and it is necessary here only to relate a few important points.⁸ The full course of lectures comprised natural theology, ethics,⁹ and jurisprudence.¹⁰ Ethics

appositional “or age.” LJ(A), *supra* note 4, at i.27. He then uses “age” repeatedly in the principal discussion. *Id.* at i.27-65. “Age(s) of society” appears at LJ(A), *supra* note 4, at i.27, 32, 33, 64, vi.100. *See also* LJ(A), *supra* note 4, at iv.28 (“ages before government is established”). “Stages of society” appears at LJ(A), *supra* note 3, at ii.152, iii.116. *See also* LJ(A), *supra* note 4, at ii.53 (“stages of commerce”), ii.75 (“stages of a civill government”).

8. For an exhaustive discussion of the lectures and the character and provenance of the notes, see LJ(INTRODUCTION), *supra* note 4, at 2-42. On the ways in which the lectures reflect Smith’s ideas on the origins of moral decision-making, see Lieberman, *supra* note 2, at 216-21; STEIN, *supra* note 2, at 29-46; Peter Stein, *Adam Smith’s Jurisprudence—Between Morality and Economics*, in JUBILEE LECTURES CELEBRATING THE FOUNDATION OF THE FACULTY OF LAW UNIVERSITY OF BIRMINGHAM 137 (1981) [hereinafter *Adam Smith’s Jurisprudence*]; MacCormick, *supra* note 2, at 246-57; Knud Haakonssen, *What Might Properly Be Called Natural Jurisprudence?*, in THE ORIGINS AND NATURE OF THE SCOTTISH ENLIGHTENMENT 205-25 (R. H. Campbell and A. S. Skinner eds., 1982), reprinted in ADAM SMITH 167-87 (Knud Haakonssen ed., 1998). For a broad introduction to the lectures, with special attention to the evolution from natural to historical jurisprudence, and the contribution of Roman law, see GLORIA VIVENZA, ADAM SMITH AND THE CLASSICS: THE CLASSICAL HERITAGE IN ADAM SMITH’S THOUGHT 84-125 (2001). On the history of teaching moral philosophy at Glasgow, and Smith’s entrance on the scene, see IAN SIMPSON ROSS, THE LIFE OF ADAM SMITH 111-27 (1995). On the influence of the lectures on the entrance qualifications of aspiring advocates in Scotland, see John Cairns, *Adam Smith’s Lectures on Jurisprudence: Their Influence on Legal Education*, in ADAM SMITH: INTERNATIONAL PERSPECTIVES 63-83 (Hiroshi Mizuta & Chuhei Sugiyama eds., 1993).

9. Smith’s ethics lectures were strongly informed by his own moral philosophy. *See* Stewart, *supra* note 2, at 274. This is an important point, as Smith was to rely on his moral philosophy in the jurisprudence lectures that follow.

10. Jurisprudence itself was divided into two: justice, and police, revenue, and arms. This was a division observed by Smith’s predecessors, combined by Smith under a single head. *See* LJ(INTRODUCTION), *supra* note 4, at 4-5. To Smith, all of these subjects are the “design of every government,” LJ(A), *supra* note 4, at i.1, or the “objects of law,” LJ(B), *supra* note 4, at 5, but the

and jurisprudence (“moral philosophy”) at Glasgow was founded on Pufendorf’s *De officio hominis et civis*¹¹ at the instigation of Gershom Carmichael (1672-1729), one of Smith’s Glasgow predecessors, in the 1690s.¹² Carmichael and his successors, up to and including Smith, had presented moral philosophy in the same broad order of subjects as Pufendorf, though Carmichael had famously inverted Pufendorf’s scheme of duties into a scheme of rights.¹³ Smith inherited this scheme of rights and initially preserved the order of subjects. The specific scheme Smith inherited was that of Francis Hutcheson, the predecessor to Smith’s immediate predecessor in the Glasgow chair, and the author of the textbook on which the moral philosophy portion of the course was then based: *Philosophiae Moralis Institutio Compendiaria*.¹⁴

The two principal sets of lecture notes relate to the lectures on jurisprudence given by Smith in 1762-1763 and (probably) 1763-1764.¹⁵ As Smith left Glasgow in January of 1764,¹⁶ it seems likely that at least some portion of the latter course of lectures was given by another with the aid of Smith’s own materials.¹⁷ The notes differ from one another in character; the earlier set is virtually a verbatim record by, apparently, at least two different students, while the latter is a summary, somewhat redacted after being prepared. The notes also differ in the extent of their coverage. The latter set gives a full account of the second component of

two components appear to be distinguished by nothing more nuanced than *urgency*. See LJ(A), *supra* note 3, at i.1-2; HAAKONSSON, *supra* note 2, at 95-96. On the foundations of the division, and its shortcomings, see Lieberman, *supra* note 2, at 234-39.

11. The new critical edition in English: SAMUEL PUFENDORF, *THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE* (Ian Hunter & David Saunders eds., 2003).

12. See James Moore & Michael Silverthorne, *Gershom Carmichael and the Natural Jurisprudence Tradition in Eighteenth-Century Scotland*, in *WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT* 73-87 (Istvan Hont & Michael Ignatieff eds., 1983). For translated excerpts of Carmichael’s works, see JAMES MOORE & MICHAEL SILVERTHORNE, *NATURAL RIGHTS ON THE THRESHOLD OF THE SCOTTISH ENLIGHTENMENT: THE WRITINGS OF GERSHOM CARMICHAEL* (2002).

13. James Moore & Michael Silverthorne, *Natural Sociability and Natural Rights in the Moral Philosophy of Gershom Carmichael*, in *PHILOSOPHERS OF THE SCOTTISH ENLIGHTENMENT* 6-8 (V. Hope ed., 1984).

14. See ROSS, *supra* note 8, at 112. The modern critical edition is FRANCIS HUTCHESON, *PHILOSOPHIAE MORALIS INSTITUTIO COMPENDIARIA, WITH A SHORT INTRODUCTION TO MORAL PHILOSOPHY* (Luigi Turco ed., 2007) (1742).

15. The earlier set of lecture notes contains a sufficient number of date references to make the chronology clear, but the latter set of notes indicates only its date of preparation (1766), and hence the date of these lectures is an inference, though a fairly secure one. LJ(INTRODUCTION), *supra* note 4, at 7-9.

16. See ROSS, *supra* note 8, at 195-219 (relating Smith’s travels with the Duke of Buccleugh from January).

17. LJ(INTRODUCTION), *supra* note 4, at 8-9.

jurisprudence (police, revenue, and arms), while the earlier set closes well before the second component is complete. The first component (justice) is treated to an equal extent in both sets of notes, with due allowance for the more abbreviated presentation of the latter set, and allowance also for Smith's decision to follow the method of the civil law in the latter lectures, the subject of this Article.

THE RIGHTS FRAMEWORK; NATURAL AND ADVENTITIOUS RIGHTS

In the scheme Smith inherited from Hutcheson, justice was treated as an analysis of the rights that belonged to man.¹⁸ Rights were assembled in a careful taxonomy based on the context in which the right arose.¹⁹ For example, rights that related to citizenship or servile status were of a different quality from rights that related to marriage, and both of these were of a different quality from ownership rights. Smith and his predecessors, taking account of these different contexts, observed a broad three-fold division. A man may have a right—

- (1) as a man;
- (2) as a member of a family;
- (3) as a citizen or a member of a state.

The first of these subdivided further, so that a man—

- (1) as a man,
 - (a) may have a right in his person;
 - (b) may have a right in his reputation;
 - (c) may have a right in his estate.

Each of these various divisions gave the writers the opportunity to discuss

18. The evolution of the scheme up to Smith is outlined within a brief compass in Peter Stein, *From Pufendorf to Adam Smith: The Natural Law Tradition in Scotland*, in *EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART: FESTSCHRIFT FÜR HELMUT COING 667-79* (N. Horn, et al. eds., 1982), reprinted in *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS 381-93* (1988).

19. The word "context" is too vanilla to describe the basis of the rights-framework before Smith; the framework was founded ultimately on the nature of the different duties owed by man. To Smith, however, it is fair to say that the framework was largely serviceable as a way to discuss laws and institutions by subject-matter, except where it fortuitously reflected his distinction between natural and adventitious rights, discussed below.

The three schemata which immediately follow are described by Smith in LJ(A), *supra* note 4, at i.9-12; LJ(B), *supra* note 4, at 6-7. For an extensive discussion of this rights structure, of which a brief summary is given here, see HAAKONSEN, *supra* note 2, at 99-134.

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kindred rights collectively. A good deal of public law, for example, fell within the ambit of a right “as a citizen or a member of a state”; various liberty rights fell within the ambit of the right of a man “in his person”; and much of private law—property, contract, and delict—fell within the ambit of the right of a man “in his estate.” Context, however, was not the only organizing principle for rights. A right was also distinguished by *origin*, though here Smith’s treatment of origins must be sharply distinguished from that of his predecessors.

In the traditional scheme, some rights belonged to a man under natural law, while others were “man-made,” the so-called acquired, or adventitious, rights.²⁰ This mode of classification does not “cut across” the taxonomy just given, but informs it. In other words, certain categories in the scheme contained natural rights, others, adventitious rights:

- (1) As a man
 - (a) in his person (natural)
 - (b) in his reputation (natural)
 - (c) in his estate (adventitious)
- (2) As a member of a family (adventitious)
- (3) As a citizen or a member of a state (adventitious)

Thus, liberty rights, e.g., as they belong to a man “in his person,” are natural in origin, while property rights, as they belong to a man “in his estate,” are adventitious in origin.

When Smith took up the lectures, he embarked on an enterprise quite different from that of his predecessors, and it is remarkable that he was able to use their model, preserving even a shadowy outline of natural and adventitious rights.

Smith recognized that a scientific understanding of man’s relations

20. “Private rights of individuals according to their different originals are either *natural* or *adventitious*. The *natural* are such as each one has from the constitution of nature itself without the intervention of any human contrivance, institution, compact, or deed. The *adventitious* arise from some human institution, compact, or action.” FRANCIS HUTCHESON, 1 A SYSTEM OF MORAL PHILOSOPHY 293 (1755). “Nature herself has endowed each man with natural rights; adventitious rights arise from some human action or other event.” Gershom Carmichael, *Supplements and Observations upon Samuel Pufendorf’s On the Duty of Man and Citizen according to the Law of Nature*, in MOORE & SILVERTHORNE, *supra* note 12, at 77. “Some of these [duties] proceed from that *common Obligation* which it hath pleas’d the Creator to lay upon all Men in general; others take their Original from some certain *Human Institutions*, or some *peculiar, adventitious* or accidental *State* of Men.” SAMUEL PUFENDORF, THE WHOLE DUTY OF MAN, ACCORDING TO THE LAW OF NATURE (Andrew Tooke trans., 2003).

with his fellows could only be developed by the experimental method used by Newton in the physical sciences. Such an understanding must be based on observation of how men actually behave in different situations. He also accepted that, although the conditions of society vary considerably in different places and different ages, human nature remains constant²¹

Smith, unlike his Glasgow predecessors, was an enthusiastic gatherer of data, specifically data about laws as they were observed in human communities over a vast span of time.²² In a scientific spirit, he set out to explain the genesis of these laws causally.²³ The task was possible only because he saw laws as ultimately the product of the moral decision-making of human beings. The constancy and predictability of human moral decision-making in the face of different underlying conditions made causal explanations possible. These laws, moreover, could be organized in the traditional framework without doing violence to the causal explanations; pedagogy, after all, would have made it sensible, in any event, to discuss slavery, ownership, promises, etc., separately.

What about natural and adventitious rights? This distinction would seem to be of no earthly use to Smith, who had embarked on what we would call a “sociological” project and ostensibly could not accept the existence of a natural right founded on the “constitution of nature.”²⁴ Yet this is where Smith could summon his theory of morals to explain natural

21. *Adam Smith's Jurisprudence*, *supra* note 8, at 139-40. Stein's reference to Newton is perhaps intended to recall the famous remark of John Millar: “The great Montesquieu pointed out the road. He was the Lord Bacon in this branch of philosophy [the history of civil society]. Dr. Smith is the Newton.” 2 JOHN MILLAR, AN HISTORICAL VIEW OF ENGLISH GOVERNMENT 404 n.(*) (Mark Salber Phillips & Dale R. Smith eds., 2006). Smith himself praises Newton's principles effusively in ADAM SMITH, *The History of Astronomy*, in ESSAYS ON PHILOSOPHICAL SUBJECTS 31, 98-105 (photo. reprint 1982) (W. P. D. Wightman & J. C. Bryce eds., 1980) and ADAM SMITH, LECTURES ON RHETORIC AND BELLES LETTRES 145-46 (photo. reprint 1985) (J.C. Bryce, ed., 1983). On Smith's adherence to a Newtonian system, see the authorities cited *infra* note 23.

22. It is worth stressing that Smith, though a gatherer of data, was not the first at Glasgow to reject rationalist natural law. Hutcheson, like Smith, examined how the thoughts and behaviour of human beings could form a foundation for moral judgment. See John Cairns, *Legal Theory*, in THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT 231, and the literature cited *id.* at 240-41 n.44 (Alexander Broadie ed., 2003).

23. See Christopher J. Berry, *Smith and Science*, in THE CAMBRIDGE COMPANION TO ADAM SMITH 112, 126-34 (Knud Haakonssen ed., 2006) (considering the question of whether Smith envisioned a single causal model for both the natural and social sciences) (with literature). Berry has described Smith's position as one of “soft determinism”: moral causes operate *predictably* but nevertheless accommodate changes in circumstance. *Id.* at 130-34. See ATHOL FITZGIBBONS, ADAM SMITH'S SYSTEM OF LIBERTY, WEALTH, AND VIRTUE 75-94 (1995) (on Smith's scientific aspirations generally, and contrasts with David Hume) (with literature).

24. See *supra* note 20.

and adventitious rights in a way that both united and distinguished them. Humans self-evidently make different moral judgments in different times and places, but the mechanism by which they make those judgments is the same.²⁵ The foundation of this mechanism is the psychological fact that humans spontaneously experience a fellow-feeling or “sympathy” with other people. When they see a person, for good or ill, acting upon another, they spontaneously imagine themselves doing the same, and spontaneously weigh the propriety of the act. At the same time they imagine themselves to be the object of the act and, again spontaneously, weigh their feelings. This produces a judgment on whether the act should be answered by punishment or reward. The judgment, however, is not the product of accident, caprice, or reason. It is instead the slow consequence of the accumulated experiences of one’s having lived in a human community and having been the object of others’ sympathetic observations.²⁶ This, at its briefest, is how Smith understood the mechanism of moral decision-making, and it is this process of decision-making that ultimately causes human communities to recognize rights of every kind—natural and adventitious.

The thesis, however, is not so simple as “moral judgments give rise to rights.” Some rights are in fact more determined, and their content more certain, than others.²⁷ This is because man’s psychology, for whatever reason, reacts with special revulsion to certain injuries, in particular certain injuries against the person. In these cases the injury is especially vivid to the spectator; the process of moral decision-making is unaffected by events surrounding the injury; and the community—indeed *every* community—is unanimous in its condemnation. Other kinds of injuries might sometimes excite equal or greater revulsion, and equal or greater condemnation, but they do not belong in the special class because the spectator’s response,

25. Among the many excellent summaries of Smith’s moral theory are these: ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* vii-xxi (Knud Haakonssen ed., 2002) (1759); OTTESON, *supra* note 2, at 13-100; ROSS, *supra* note 8, at 157-76; T. D. CAMPBELL, *ADAM SMITH’S SCIENCE OF MORALS* (1971).

26. See *THEORY OF MORAL SENTIMENTS*, *supra* note 1, at III.i.3 (describing the impossibility of formulating, in solitude, notions of propriety or demerit). See Berry, *supra* note 23, at 133-34 (discussing the passage and stressing that morals, though acquired by learning and explicable by the social scientist, are nevertheless well within one’s power to criticize and condemn); Knud Haakonssen, *Natural Jurisprudence and the Theory of Justice*, in *THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT* 205, 212 (Alexander Broadie ed., 2003).

[I]f the activity of a person is to be seen—by others and by the person herself—as belonging to that person in more than the sense of being physically caused by her, then the activity in question has to be seen from a standpoint that is common to both spectators and the person who is active.

Id.

27. The explanation of natural and adventitious rights that follows owes a great deal to the works of Knud Haakonssen. See HAAKONSEN, *supra* note 2, at 100-03. See also *infra* note 29 for a minor qualification.

even when heightened, owes some portion of its intensity to the particular circumstances in which the injury was committed. Thus this sort of injury is *less determined* and the attendant right to be free from that injury is *contingent*, while the other sort of injury is *determined* and the attendant right to be free from that injury is *non-contingent*.²⁸ Smith adopted the term *adventitious* to describe the contingent rights, and *natural* to describe the non-contingent ones.²⁹

HISTORICAL JURISPRUDENCE

It is not cynical to suggest that the principal reason why Smith troubled to keep alive the distinction between natural and adventitious rights is that it gave him the opportunity to isolate the class of rights that most interested him: rights that could be explained causally. An overwhelming proportion of the lectures is indeed devoted to explaining laws that required explaining, and not to laws that could be explained with a footnote to *The Theory of Moral Sentiments*. Among the causes he proposed to consider in depth, one has already been mentioned: form of government. Another cause, also closely identified with his historical jurisprudence, is mode of subsistence; this requires a brief introduction.

This branch of Smith's historical jurisprudence is based on the idea that a society provides for its subsistence in a certain way, and that different modes of subsistence prompt the creation of certain rights, or more mildly, that they leave their mark on those rights. Each mode of subsistence delineates a certain so-called "age" —four in number—and one can locate, historically, the genesis of certain rights in certain ages.³⁰ There is a

28. It is not usual to describe adventitious rights as "contingent," but the alternatives ("historical" and "governmental") slightly miss the mark. The important point is that adventitious rights are partly determined by the circumstances that gave rise to them and, properly speaking, any circumstance at all can be a causal factor: climate, topology, rank, etc. See HAAKONSSSEN, *supra* note 2, at 101.

29. See, e.g., LJ(A), *supra* note 4, at ii.93.

Crimes are of two sorts, either 1st, such as are an infringement of our natural rights, and affect either our person in killing, maiming, beating, or mutilating our body, or restraining our liberty, as by wrongous imprisonment, or by hurting our reputation and good name. Or 2^{dly}, they affect our acquired [adventitious] rights, and are an attack upon our property, by robbery, theft, larceny, etc.

Id.

30. One or another age makes its appearance singly in places, but for discussions of the four ages together, see LJ(A), *supra* note 4, at i.26-35, iv.1-40; LJ(B), *supra* note 4, at 19-30, 149-51; ANDERSON NOTES, *supra* note 4, at 467-68; ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS V.i.a-b.17 (R. H. Campbell, et al. eds., 1976) [hereinafter WN]; see also Adam Smith, *First Fragment on the Division of Labour*, in LJ, *supra* note 4, at 583-84 (brief remarks on the ages of civilization and division of labour). For extended treatments on the subject, see also R. L. MEEK, SOCIAL SCIENCE AND THE IGNOBLE SAVAGE (1976); PETER STEIN, *The Four Stage Theory of the Development of Societies*, in THE CHARACTER AND

chronological order to the ages, but there is no suggestion that a civilization necessarily progresses through every age, or that laws were utterly determined by materialist concerns.³¹ Nor is there any suggestion that certain ages necessarily produce certain laws, or that laws undergo a certain evolution. Smith’s use of the four ages is best understood as a genetic theory which attempts to explain some of the origins of a selection of rights by reference to mode of subsistence. Smith’s theory of morals, of course, undergirds the whole: what members of a community regard as an injury depends on how spectator-sympathy directs them, and spectator-sympathy may vary with mode of subsistence.

The four ages of civilization are: (1) the Age of Hunters, (2) the Age of Shepherds, (3) the Age of Agriculture, and (4) the Age of Commerce. Below is a brief description of the first three of these ages. The Age of Commerce evades any simple summary and is unrelated to the arguments here.³²

(1) The Age of Hunters. Subsistence is by collecting wild fruit, catching wild animals, and fishing.³³ The idea of property in any exclusive

INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS 395-409 (1988) [hereinafter *Four Stage Theory*]; A. S. SKINNER, *Historical Theory*, in A SYSTEM OF SOCIAL SCIENCE: PAPERS RELATING TO ADAM SMITH 76-105 (1996).

31. See HAAKONSSON, *supra* note 2, at 185-89; SKINNER, *supra* note 30, at 82-83; *Ethics and the Science of Legislation*, *supra* note 2, at 172; J. Salter, *Adam Smith on Feudalism, Commerce and Slavery*, 13 HIST. POL. THOUGHT 219, 219-24 (1992); Cf. J. CROSEY, POLITY AND ECONOMY 68-69 (2001) (“[T]he element of rational choice in the process of social evolution is precisely what Smith denies.”). On the materialist interpretation, see Winch, *supra* note 1, at 257-62 (taking Smith at his word that the four ages were introduced to explain how law and government, in Smith’s words, “grew up with society”).

32. WN, *supra* note 30, at Book III (discussing the emergence of a commercial society from the final stages of the age of agriculture, characterized by feudal land tenure and personal dependency). See Andrew S. Skinner, *Adam Smith: An Economic Interpretation of History*, in ESSAYS ON ADAM SMITH 154, 162-68 (Andrew S. Skinner & Thomas Wilson eds., 1975) (summary). A commercial society is marked by a high degree of division of labor, inequality of conditions, and relative opulence. See Istvan Hont & Michael Ignatieff, *Needs and Justice in the Wealth of Nations: An Introductory Essay*, in WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT 1, 2-8 (Istvan Hont & Michael Ignatieff eds., 1983) (discussing the paradox between inequality and opulence). The addition of an “Age of Commerce,” in this intellectual tradition, precedes Smith. *Four Stage Theory*, *supra* note 30, at 401-05. Stein argues that the addition of this age reflects the decision by certain Scottish writers to shift attention from property to contract. *Id.* So long as contract was rooted in natural law, there was no occasion to explain it historically. *Id.* Stein singles out Henry Home, Lord Kames, for special mention. *Id.* Kames had argued that a society recognized the seriousness of contractual undertakings only when, in its history, it had passed beyond the use of simple cash sales and came to rely on merchants, who by the nature of their business rely on the power of covenants. HENRY HOME, LORD KAMES, HISTORICAL LAW-TRACTS 60 (2nd ed. 1761) (Tract II: “History of Promises and Covenants”); *Four Stage Theory*, *supra* note 30, at 403-05.

33. LJ(A), *supra* note 4, at i.27-28; LJ(B), *supra* note 4, at 149.

sense is almost unknown.³⁴ One's right to a piece of property is essentially coterminous with possession.³⁵ There is no proper government.³⁶

(2) The Age of Shepherds. The step between the Age of Hunters and this age is the "greatest in the progress of society"³⁷ because the notion of property is no longer limited to possession: property in movables is recognized for the first time.³⁸ This step comes about because the inhabitants of this age need to provide carefully for their sustenance, leading them to store goods and eventually to keep and tame animals.³⁹ Since these cannot always be in one's immediate possession, the inhabitants come to regard it as an "injury" for a person to take something to which another has established some connection.⁴⁰ The recognition of property in movables—and the disputes this provokes—is accompanied by the first appearance of what may be called government.⁴¹ There is little or no legislative power,⁴² but judicial organs make their first appearance, first via an assembly, then through the authority of individuals.⁴³

(3) The Age of Agriculture. Agriculture as a mode of subsistence is introduced when inhabitants find it difficult to sustain themselves by animals alone, and when they observe that seeds produce plants similar to the plants that bore them.⁴⁴ This observation spurs a realization in the value of land, and by degrees, property in land is recognized for the first time.⁴⁵

The ages of society are therefore models that seek to provide modest causal explanations for the recognition of adventitious rights. Natural rights continue to be observed in all ages, needing no such explanations. It is important to point out that, even though natural rights are determined by their received share of spectator-sympathy and emphatically not by their historical context, nevertheless the very source of these rights makes it possible for them to arise and be recognized in an early historical period. In

34. LJ(A), *supra* note 4, at i.44; LJ(B), *supra* note 4, at 150; WN, *supra* note 30, at Book V.i.b.2.

35. LJ(A), *supra* note 4, at i.41-44, iv.19, 22; LJ(B), *supra* note 4, at 149-50.

36. LJ(A), *supra* note 4, at iv.4, 6-7, 19; LJ(B), *supra* note 4, at 19-20; *see also infra* notes 67-75 and accompanying text.

37. LJ(A), *supra* note 4, at ii.97.

38. LJ(A), *supra* note 4, at i.45-46, iv.43; LJ(B), *supra* note 4, at 150-51; ANDERSON NOTES, *supra* note 4, at 467.

39. LJ(A), *supra* note 4, at i.28, 44-45; LJ(B), *supra* note 4, at 20, 149.

40. LJ(A), *supra* note 4, at i.45.

41. *Id.* at iv.21; LJ(B), *supra* note 4, at 20.

42. LJ(A), *supra* note 4, at iv.14-15, 18; LJ(B), *supra* note 4, at 22-23.

43. LJ(A), *supra* note 4, at iv.9-10, 15-16, 30-31; LJ(B), *supra* note 4, at 22, 26.

44. LJ(A), *supra* note 4, at i.30-31; LJ(B), *supra* note 4, at 149.

45. LJ(A), *supra* note 4, at i.50-53; LJ(B), *supra* note 4, at 151.

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The Theory of Moral Sentiments, Smith explains that “[a]mong equals each individual is naturally, *and antecedent to the institution of civil government*, regarded as having a right both to defend himself from injuries, and to exact a certain degree of punishment for those which have been done to him.”⁴⁶ The point is important, because Smith sometimes finds it useful to “locate” a particular natural right in an early historical period. An example of this is given in the discussion below.⁴⁷

THE REORGANIZATION OF THE LECTURES

It will be useful to outline Smith’s reorganization at its highest level.⁴⁸ The table below presents the order of subjects as given in the latter course of lectures (second column). It associates those subjects with the corresponding subjects in the Pufendorf/Carmichael/Hutcheson rights framework (first column). One notices that the rights framework is now somewhat scrambled.⁴⁹ The third column shows the order Smith followed in the earlier course of lectures. One preliminary point worth noting: the discussion of the rights of a man in his person and reputation remained in the same position over the two courses of lectures.

Rights framework	Lectures 1763-1764 (LJ(B))	Lectures 1762-1763 (LJ(A))
as a man, —in his person —in his reputation	11	i.24-25
as a citizen or a member of a state	11-99 ⁵⁰	iv.1 - v.149
as a member of a family	101-148	iii.1-147
as a man, —in his estate	149	i.25 - ii.180

46. THEORY OF MORAL SENTIMENTS, *supra* note 1, at II.ii.1.7 (emphasis added). This is the obverse of his statement: “But acquired rights such as property require more explanation. Property and civil government very much depend on one another.” See LJ(B), *supra* note 4, at 11.

47. See *infra* note 109.

48. Within these divisions Smith has made other, less obvious changes in the order of subjects. Perhaps the most conspicuous of these is his decision to begin the treatment of rights “as a citizen or a member of a state” with a discussion of the principles of utility and authority, and the doctrine of original contract. See LJ(B), *supra* note 4, at 12-18; LJ(INTRODUCTION), *supra* note 4, at 27.

49. For the rights framework presented in its traditional order, see *supra* text accompanying note 20.

50. The manuscript here leaves a page blank; hence the discontinuity with the next section.

Knud Haakonssen addresses at length Smith's decision to reorganize his lectures and offers conclusions on both the reasons for Smith's decision and the origins of the new mode of presentation.⁵¹ Haakonssen's conclusions turn strongly on the notion of authority, and its role in Smith's natural jurisprudence. Smith, Haakonssen notes, rejected the idea that man had ever existed in a "state of nature."⁵² Haakonssen glosses this as follows: "The individual would always be living in some kind of social grouping *with systems of governance*, even if only the most rudimentary ones, as among bands of hunters and gatherers."⁵³ Thus, the stadial theory describes not only progress in different modes of subsistence, but progress in the development of government.⁵⁴ This, according to Haakonssen, serves Smith's theory of rights, because rights presuppose government: "[A]n explanation of government seemed a necessary presupposition for Smith's theory of natural justice or natural law, meaning his theory of rights."⁵⁵ This is not something that Smith was late to appreciate; what Haakonssen appears to suggest is that when Smith reorganized his lectures, he was attempting to make manifest, in the very order of the lectures, a point about the nature and origin of rights that was perhaps unnecessarily obscured in the earlier lectures.

In what respect does Smith's reorganization—placing government first—reflect the method of the "civil law"? Haakonssen:

At first it is puzzling that Smith should suggest that the "civilians" put political jurisprudence, or "government," first. Plainly, no writer on the civil law, by which Smith meant *corpus iuris civilis*, began with a discussion of the principles of political governance (with a partial exception, to be considered later on). What Smith must have meant—and, one may hope, explained to his students—was that the civil law always *presupposed* the existence of political society, *civitas*, as a precondition for the law of the *civitas*.⁵⁶

The "partial exception" to which Haakonssen refers is Samuel von Cocceji (1679–1755),⁵⁷ whom Smith praises as a writer "of note"⁵⁸ near the

51. KNUD HAAKONSEN, *Adam Smith Out of Context: His Theory of Rights in Prussian Perspective*, in NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT 129-53 (1996) [hereinafter *Adam Smith Out of Context*].

52. LJ(B), *supra* note 4, at 3 ("[I]t in reality serves no purpose to treat of the laws which would take place in a state of nature, or by what means succession to property was carried on, as there is no such state existing.").

53. *Adam Smith Out of Context*, *supra* note 51, at 130 (emphasis added).

54. *Id.* at 134.

55. *Id.* at 135.

56. *Id.* at 130.

57. For purposes of the following discussion, see Erich Döhring, *Cocceji, Samuel*, in 3 NEUE

opening of the latter course of lectures. Cocceji was chancellor to Frederick the Great and famously the author of a successful treatise on natural law. Originally published in 1740 under the title *Elementa jurisprudentiae naturalis et romanae*, the treatise, now under the title *Novum systema jurisprudentiae naturalis et Romanae*, was appended to an extended commentary on Cocceji’s father’s work on Grotius,⁵⁹ and then republished in many editions under the title *Justitiae naturalis, et romanae novum systema*.⁶⁰ Smith’s debt to this work, as evidenced in the jurisprudence lectures, is very great.⁶¹ Though regarded as a writer on natural law, Haakonssen brings Cocceji into the civil law fold by noting that he presented his discussion of rights in the order of the Roman civil law: persons, property, and personal rights (i.e., obligations).⁶² Haakonssen thus identifies Cocceji as a possible inspiration for Smith’s reorganization: “[T]he new need for a socio-psychological and historical account of the intertwining of rights and the rest of social living would have tempted him to follow Cocceji’s Romanizing and put the account of social authority first.”⁶³

DEUTSCHE BIOGRAPHIE 301-02 (Historische Kommission bei der Bayerischen Akademie der Wissenschaften ed., 1957) (career); Roderich von Stintzing, *Cocceji, Samuel*, in 4 ALLGEMEINE DEUTSCHE BIOGRAPHIE 373-76 (Historische Kommission bei der Bayerischen Akademie der Wissenschaften ed., 1876) (works).

58. LJ(B) *supra* note 4, at 4. The passage in full: “The next who wrote on this subject was Baron de Cocceii, a Prussian. There are five volumes in folio of his works published, many of which are very ingenious and distinct, especially those which treat of laws.” *Id.* It is quite possible that the final remark is a joke, in which case he perhaps esteems Cocceji less.

59. SAMUEL L. B. VON COCCEJI, INTRODUCTIO AD HENRICI L. B. COCCEII . . . GROTIUM ILLUSTRATUM, CONTINENS DISSERTATIONES PROOEMIALES XII (1748) (Dissertatio XII). This was the edition in Smith’s library. HIROSHI MIZUTA, ADAM SMITH’S LIBRARY: A CATALOGUE No. 377 (2000).

60. Edition consulted: SAMUEL L. B. VON COCCEJI, JUSTITIAE NATURALIS, ET ROMANAE NOVUM SYSTEMA (1762) (published in Lausanne by Marcus-Michael Bousquet). See also *Adam Smith Out of Context*, *supra* note 51, at 136-37 & nn.19, 21 (citing a different publication history).

61. The editors of the lectures have noted various passages in which Cocceji is mentioned, or his influence is present. See LJ(A), *supra* note 4, at 28 n.45, 36 & n.75, 39 n.82, 324 n.82; LJ(B), *supra* note 4, at 398 (eliding father and son); see also Ernest Metzger, *Adam Smith and Roman Servitudes*, 72 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 327 (2004) (studying extensively Smith’s use of Cocceji in one area of private law).

62. *Adam Smith Out of Context*, *supra* note 51, at 143-44.

63. *Id.* at 147-48. Precisely how Cocceji served as a civilian model, and justified putting “the account of social authority first,” is not clear in Haakonssen’s account. Haakonssen appears to discover some inspiration in Cocceji’s discussion of the law of persons (see COCCEJI, *supra* note 60, at 48-127), and in particular the observation by Cocceji that certain matters of status are actionable quite apart from any rights granted under the main body of private law. *Adam Smith Out of Context*, *supra* note 51, at 143-44. It is true that among the conditions discussed by Cocceji in this passage is status determined *de civitate* (“according to statehood”). COCCEJI, *supra* note 60, at 125-27. However, a modern civilian would take the discussion as simply that of citizenship, not very different in substance from J. INST. 1.4, which it closely tracks. Whether Haakonssen’s

The main difficulty with Haakonssen's argument is the significance he assigns to the role of government in Smith's system of rights. That government (or more accurately, form of government) shapes the nature of adventitious rights is quite true, but that Smith viewed the whole of the adventitious rights structure as, to some degree, the product of government, is far less certain. Man always lived in some sort of social grouping,⁶⁴ but Haakonssen has somewhat conflated social grouping with systems of governance in an attempt to bring Smith's system of rights—indeed all of it—under the umbrella of government.⁶⁵

In Smith's historical account, government and authority, though not slow to arrive, do not properly make their appearance until the Age of Shepherds. Smith's discussion of the matter is careful and nuanced.⁶⁶ In the earliest age, the Age of Hunters, "there can be very little government of any sort, but what there is will be of the democraticall kind."⁶⁷ By "democraticall" Smith means that the community as a whole exacts punishment for individual transgressions, and that matters of peace and war are matters for the whole people to decide.⁶⁸ Smith is at pains to make clear that he does not regard this as "government," and that he does not see government as coming into existence until the subsequent age: "The age of shepherds is that where government properly first commences."⁶⁹ Similarly, in the latter course of lectures: "The appropriation of herds and flocks, which introduced an inequality of fortune, was that which first gave rise to regular government. Till there be property there can be no government, the very end of which is to secure wealth, and to defend the rich from the poor."⁷⁰ The latter passage makes Smith's intentions clear: the notion of property does not arrive until the Age of Shepherds,⁷¹ and it is property that prompts the creation of government by making government necessary. This is not, of course, a detail in Smith's jurisprudence, but one of its most essential points of departure. We therefore cannot, with

remark, that "civil law always *presupposed* the existence of political society, *civitas*," quoted in full *supra* text accompanying note 56, was intended to evoke the words *de civitate*, is not clear from his discussion.

64. Or to be more accurate, the man who lived utterly on his own, and who thus lacked the ability to develop within himself any moral apparatus, was not worth remarking on. *See supra* note 26.

65. *See supra* note 53 for the accompanying quotation.

66. LJ(A), *supra* note 4, at iv.3-7; LJ(B), *supra* note 4, at 19-20.

67. LJ(A), *supra* note 4, at iv.4; *see also* LJ(A), *supra* note 4, at iv.6 ("The whole of the government in this state, as far as there is any, is democraticall.")

68. LJ(A), *supra* note 4, at iv.4-7.

69. *Id.* at iv.7, 74.

70. LJ(B), *supra* note 4, at 20.

71. Specifically, property in movables. *See* LJ(A), *supra* note 4, at i.45-46; LJ(B), *supra* note 4, at 150-51; ANDERSON NOTES, *supra* note 4, at 467.

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Haakonssen, accept that Smith regarded systems of governance as a broad precondition to rights.⁷² When, moreover, we consider Smith’s discussion of government in the Age of Hunters, it is a fair inference that in allowing for so-called “democratical” governance during that age, Smith was attempting to accommodate and subdue a handful of details gathered from Lafitau and Charlevoix,⁷³ details that might strike an undiscerning reader as evidence of government.⁷⁴

David Lieberman also attempts to explain why Smith reorganized his lectures and, like Haakonssen, attributes the change to something profound in Smith’s natural jurisprudence.⁷⁵ To Lieberman, however, Smith made the decision in order to remedy a problem that had affected his lectures to that point.

[I]t must be acknowledged that the combining of natural jurisprudence and historical jurisprudence was never entirely seamless. One important fault line concerned the manner in which Smith’s lectures accommodated two distinct organizing schemes for the analysis of a legal system. The first, supplied by natural jurisprudence, distributed the legal materials into three distinct categories according to the legal status of an individual legal subject: rights as “a man,” rights as “a member of a family,” and rights as “a member of a state.” The second, supplied by the taxonomy of the four-stages theory, order the legal materials according to the relevant “stage” of society, but in a manner that emphasized the interdependence of those legal rights and legal practices which the classification of natural jurisprudence separated. As heuristic devices, the two schemes pointed in different directions.⁷⁶

Lieberman goes on to argue that, by reorganizing the lectures, Smith

72. Or to put the matter plainly: adventitious rights must have existed in the pre-governmental age of hunters. To conclude differently is to accept that the only injuries recognized as such among the inhabitants of this age were injuries that would invite spectator sympathy and condemnation in any time or place. This is tantamount to saying that this particular mode of subsistence—hunting and fishing—is utterly redundant in Smith’s scheme of causal explanation. Cairns says that this pre-governmental age “only had natural rights.” Cairns, *supra* note 8, at 70. He is perhaps taking his cue from statements by Smith like the following: “Thus among hunters there is no regular government; they live according to the laws of nature.” LJ(B), *supra* note 4, at 19. Smith’s statement, of course, is broadly true when one compares the age of hunters with the ages that follow—which is surely his point.

73. Smith and other writers in the Scottish Enlightenment drew on comparative historical and ethnographic accounts of two Jesuits, Joseph-François Lafitau and Pierre François Xavier de Charlevoix. ROSS, *supra* note 8, at 169; Aaron Garrett, *Anthropology: The “Original” of Human Nature*, in THE CAMBRIDGE COMPANION TO ADAM SMITH 79-83 (Knud Haakonssen ed., 2006).

74. LJ(A), *supra* note 4, at iv.5-6.

75. Lieberman, *supra* note 2, at 230-32.

76. *Id.* at 231.

was able to bring together the two interdependent elements of property and government.

One major result of this reordering of materials was that it enabled Smith to reach far more quickly, and thus give greater prominence to, one of the most original and powerful elements of his historical jurisprudence: his account of the emergence of the modern European system of public justice and regular government.⁷⁷

Much in Lieberman's account is very well observed. Few readers should disagree with the suggestion that the rights framework inherited from Hutcheson did not suit Smith's historical jurisprudence; or the suggestion that the last of the four ages served as the foundation for Smith's most powerful ideas; or—most importantly—the suggestion that the new organization permitted Smith more effectively to ally property and government. Lieberman's account falls short, however, as an explanation for Smith's decision to reorganize his lectures. Briefly, the stadial theory makes somewhat disconnected appearances in the lectures, and though no one would deny the significance of the latter of the four ages in Smith's enterprise, it is difficult to make the case that the four ages collectively provided an immanent organizing principle which Smith's reorganization helped to realize. The real "tension" between Smith's enterprise and the lectures he inherited lies in the significance of "natural" and "adventitious" rights, and even this tension seems not to have troubled Smith a great deal; the reorganization certainly did not cure it. These points are treated in detail below.

THE EXPLANATORY FORCE OF THE FOUR AGES

Smith occasionally refers to one or another of the four ages when discussing specific antique rules in domestic and private law,⁷⁸ but his proper discussions of the four ages occur in two passages in each of the two sets of lecture notes.⁷⁹ In the earlier lectures, the four ages first appear as an introduction to the acquisition of property, and second as an introduction to forms of government.⁸⁰ In the first of these passages it appears to have been

77. Lieberman, *supra* note 2, at 232.

78. *See, e.g.* LJ(A), *supra* note 4, at i.92 (succession in the ages of hunters and shepherds), i.149 (testamentary succession in the age of hunters).

79. LJ(A), *supra* note 4, at i.26-35, iv.1-40; LJ(B), *supra* note 4, at 19-30, 149-51.

80. LJ(A), *supra* note 4, at i.26-35, iv.1-40, respectively. The latter section is introduced with this explanation:

But before I enter on these [forms of government] particularly, it will be proper to explain the origins of government, what I take to be the originall form of it, and how the severall governments which now subsist have sprung from it, and how this original government arose and at what period of society.

Id. at iv.3-4.

Smith’s ambition to subject various modes of acquisition (occupation, tradition, accession, usucapion, and succession) to a stadial analysis.⁸¹ Had he been able to achieve this, and bring what amounts to the whole of the private law of property into a four-ages framework, it would be easier to conclude with Lieberman that Smith was trying broadly to accommodate the law within the stadial theory. In the execution, however, he subjected only one mode of acquisition (occupation) to a stadial analysis,⁸² and though his analysis can only be described as brilliant, this represents a significant retreat in his ambitions. The retreat is made explicit in the latter, “reorganized” lectures where, in the passage corresponding to the one under discussion,⁸³ Smith offered the four ages as an introduction, not to the acquisition of property generally, but to occupation alone.⁸⁴

Why has Smith retreated on the four ages? In a separate study⁸⁵ this author suggested that, for the lectures on private law, Smith relied heavily on Roman law, but that the Roman sources ultimately frustrated his use of the stadial theory. Traces of rights that belonged particularly to one of the earlier ages were difficult to find in the literature of a legal system that, however simple its origins, was highly refined at the time it was written down and discussed. The principal example given in that study was servitudes—rights in immovable property—whose origins Smith, by circuitous and unpersuasive means, was forced to locate in the Age of Shepherds, an age in which immovable property did not exist.⁸⁶ This is an example of the stadial theory not simply “failing to explain,” but actively getting in Smith’s way.

The stadial theory, at least to the extent Smith had developed it in the lectures, was perhaps less capable of explaining the “causes of laws” than he would have wished. One can take Smith’s treatment of intestate succession as an example.⁸⁷ Smith devoted a great deal of lecture time to

81. LJ(A), *supra* note 4, at i.26-27.

82. Metzger, *supra* note 61, at 341-42 (describing the stadial analysis in detail).

83. LJ(B), *supra* note 4, at 149-50.

84. LJ(INTRODUCTION), *supra* note 4, at 30.

85. Metzger, *supra* note 61, at 351-52.

86. *Id.* at 346-51.

87. One can view Smith’s treatment of intestate succession as an extended refutation of the natural lawyers, who had founded the law of intestate succession on the supposed inclination of the decedent to favor those whom, in life, he held most dear. See PUFENDORF, *supra* note 11, at 133-34; HUTCHESON, *supra* note 14, at 152-54. To Smith, this was contrary to the example of history; if the natural lawyers were correct, then the practice of making wills would have arisen before the practice of intestate succession, and this was clearly not the case. LJ(A), *supra* note 4, at i.91-92, 103-04, 149-55; LJ(B), *supra* note 4, at 155-56, 164; STEIN, *supra* note 2, at 41-42. Thus, Smith sets out on a vigorous and exacting discussion of the historical origins of intestate succession.

this subject: though it is only one of several modes of acquisition, and acquisition occupies a relatively small proportion of the notes as a whole, the notes on succession occupy nearly one-half of a volume (of the six total).⁸⁸ The stadal theory makes a brief appearance:

In the age of hunters there could be no room for succession as there was no property. Any small things as bows, quiver, etc. were buried along with the deceased; they were too inconsiderable to be left to an heir.—In the age of shepherds, when property was greatly extended, the goods the deceased had been possessed of were too valuable to be all buried along with him. Some of those which he might be supposed to have the greatest attachment to would be buried, as a horse, and ox, etc.; the rest would go to the other members of the family as is hereafter explain'd. Some traces of the custom of burying goods are found long after.⁸⁹

In Smith's extended and detailed treatment of succession, this fragment is a trifle. In the manuscript, moreover, the fragment is written on the reverse of the page, probably indicating either (1) the principal note-taker missed it, or (2) it was not included when the lecture was first given.⁹⁰ Either possibility diminishes its importance.

The contrast between this fragment and the remainder of Smith's discussion could not be greater. Smith appeals to "form of government" again and again to explain details in the law of succession that the stadal theory would have no hope of explaining. The following is a selection:

LJ(A) i.98. [Succession by representation was recognized early in Rome, but relatively late in Scotland:] This proceeded from the nature of the governments.

LJ(A) i.111. Another considerable odds [between Scots law and the civil law on right of representation] arose from the difference of the constitution of the two states.

LJ(A) i.116. As this method of succession [i.e., primogeniture], so contrary to nature, to reason, and to justice, was occasioned by the

88. LJ(A), *supra* note 4, at i.90 - ii.1.

89. LJ(A), *supra* note 4, at i.92 *verso*.

90. See LJ(INTRODUCTION), *supra* note 4, at 12-13 (discussing various explanations of the material on the *verso* pages). The fragment appears to have no counterpart in the latter set of lecture notes. This could be evidence that Smith did not mention the four ages at this point in his lectures. Cf. LJ(B), *supra* note 4, at 156 ("In a rude period a man had scarce the full property of his goods during his lifetime, and therefore it cannot be supposed that then he should have had a power to dispose of them after his death."). This is not the counterpart to the quoted fragment, but was included as part of a discussion of testamentary succession, somewhat earlier in the lecture.

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nature of feudall government, it will be proper to explain the nature and temper of this constitution or form of government, that the foundation of this right may be more evident.

LJ(A) i.125. It is to be observed that this form of government required that the possessors of estates should attend their lords in war, or in council in peace, so it was requisite that every estate should be filled by one who was able to perform those duties. . . . By this means the burthen of ward was introduced.

LJ(A) i.127. It is to be observed that this government [i.e., feudal] was not <at> all cut out for maintaining civill government, or police.

LJ(A) i.130. The law at that time (as we shall explain when we consider the origin of government) did not provide, nor indeed could it, for the safety of the subjects.

LJ(A) i.147. All these varieties betwixt the Scots and English law with regard to succession, as well as severall differences in the order of succession betwixt them and the civil law, have been already considered, and the causes which brought them about explained from the nature of the severall constitutions.

Each of these excerpts marks a serious excursus into the genesis of the laws being explored. To take the first excerpt (LJ(A) i.98) as an example: the right of a child to “represent” his deceased father in the succession to the estate of his grandfather was, as Smith notes, late to arrive in Scotland relative to Rome.⁹¹ In the passage quoted, Smith attributes this to “the nature of the governments.”⁹² In the subsequent passage⁹³ where he explains the point at length, he narrows the source of the discrepancy to one feature: primogeniture.⁹⁴

If it was hard that the eldest son should exclude his brothers, they would think it hard that their nephew should exclude them after his death. That he who should naturally owe his safety and depend on them for his protection should be not only not dependent on them but, on the other hand, that they who were men should be subjected and dependent on one who might often be a minor or an infant. . . . By these and such like motives the younger brother would be prompted to deprive their elder brothers children of the right of inheritance, and by this means it was long after the introduction of primogeniture ere the

91. LJ(A), *supra* note 4, at i.98.

92. *Id.*

93. *Id.* at i.135-40.

94. *Id.* at i.135-36.

right of representation took place.⁹⁵

This is the Age of Agriculture, but there is no reason to mention that fact here. The hallmarks of this age, numerous as they are, are unequal to the task of explaining the “causes” of the law of succession in a satisfactory way. We recognize, without perhaps quite knowing the reason, that without the intermediate aid of “form of government” or something equally powerful, Smith would have no hope of explaining such a developed legal institution as the right of representation.

John Cairns, however, points to the reason in a single sentence. After recounting some of the principal features of each age, he says “[t]his [stadial] development does not explain how the *rights* recognised by the spectators became *laws*.”⁹⁶ The stadial theory explains the existence of a handful of rights, for example the right to possession and the right to the ownership of movables. To advance further and explain why certain rights were *enforced* (i.e., became laws) requires, not the abandonment of the stadial theory, but a more precise means of causal explanation, including some recourse to law-making institutions. Cairns’ own concern is to examine the evolution of different organs of government in Smith’s account, and then consider from which of these organs Smith preferred to see the law issue.⁹⁷ Cairns accordingly undertakes to trace the evolution of judicial and legislative power in Smith’s account. Judicial power arises in the Age of Shepherds, proceeding through subtle stages, but the stadial theory is quickly lost to view as Smith resorts to historical examples. Cairns:

*Smith only loosely mapped the development of government onto his device of the four stages. No doubt this was because he did not have a crudely deterministic theory of social change. It means, however, that he never directly addressed the development of certain institutions of government in a detailed or precise way. This certainly applies to his account of the growth of legislative and judicial powers.*⁹⁸

This raises a quite profound question about Smith’s long-term ambitions: whether he intended in the fullness of time to discuss law-making institutions more analytically and less historically, or whether, as Cairns suggests, there was a deterministic Rubicon Smith had resolved not

95. LJ(A), *supra* note 4, at i.135-36.

96. *Ethics and the Science of Legislation*, *supra* note 2, at 173 (emphasis added).

97. *Id.* at 173-75; see also *Role of the Courts*, *supra* note 2, at 42-45 (giving a fuller account).

98. *Ethics and the Science of Legislation*, *supra* note 2, at 173 (emphasis added); see also SKINNER, *supra* note 30, at 84 (“[I]t is noteworthy that his treatment of public jurisprudence, with its attendant use of the ‘four stages,’ in fact unfolded within the framework of a *historical* account of the origins and nature of the present ‘establishments’ in Europe.”).

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to cross. A closer examination of Smith’s *materialism* and its role in the genesis of law-making institutions would help to answer this question.

Far more clear is the fact that mode of subsistence, without the intermediary aid of “form of government,” cannot properly explain the genesis of laws. Each mode of subsistence produces, for its associated age, a limited number of rights, whose most concrete contribution to the development of laws is to provide a series of *termini post quem*, e.g.,

- (1) The advent of the Age of Shepherds is the *terminus post quem* for the recognition of the right of accession.⁹⁹
- (2) The advent of the Age of Shepherds is the *terminus post quem* for the recognition of acquisition by prescription.¹⁰⁰
- (3) The advent of the Age of Agriculture is the *terminus post quem* for the recognition of rights in land.¹⁰¹

These are valuable insights, though without the intermediary of “forms of government,” tautology is an ever-present danger.

- “Accession of crops was unknown until the age of agriculture, being the first age to recognize ownership in land.”
- “What is the age of agriculture?”
- “It is the age characterized by its recognition of ownership in land.”

It seems inconceivable that Smith did not appreciate this danger. It is a strong inducement to play the stronger hand: form of government.

As part of his lifelong enterprise, Smith may have hoped to link more clearly mode of subsistence to government, and government to law.¹⁰² Whether this ambition was capable of success is not part of this discussion, which is concerned solely with his decision to reorganize his lectures. We take as our starting point his own explanation: “the state of property must always vary with the form of government.”¹⁰³ We recognize that the relationships he might have hoped to establish between government and mode of subsistence were not yet fully developed when he delivered his lectures. In this state of affairs, it is understandable how, for the sake of exposition, he would wish to elevate and promote a signally important

99. LJ(A), *supra* note 4, at i.64.

100. *Id.* at i.77.

101. *Id.* at i.66.

102. This is the obvious inference from his lengthy introduction to government, introduced by the four ages. LJ(A), *supra* note 4, at iv.1-40; LJ(B), *supra* note 4, at 19-30.

103. LJ(B), *supra* note 4, at 11.

factor in lawmaking—form of government—even if the full causal chain, from stadial theory to law, was still a work in progress.

This discussion began with Lieberman's suggestion that Smith wished to accommodate the stadial theory within the uncomfortable environs of the Pufendorf/Carmichael/Hutcheson framework. The argument here, to the contrary, is that the stadial theory was not yet ready to assume the burden of explaining the genesis of laws. The framework, moreover, though clearly at odds with Smith's jurisprudence, had in fact *always* been at odds with Smith's jurisprudence, without Smith himself giving any sign of a desire to escape it. This is the subject of the next section.

FRAMEWORK RIGHTS VERSUS NATURAL JURISPRUDENTIAL RIGHTS

The Pufendorf/Carmichael/Hutcheson framework was at odds with Smith's jurisprudence in this respect: the framework "front-loaded" the natural rights, and if Smith had adhered to this practice, he would have found himself beginning his lectures on family and private law with a disconnected stream of natural rights drawn from different areas of the law.¹⁰⁴ This is because, as previously noted, his own notion of natural and adventitious rights differed greatly from the notion on which the framework was founded. Smith had set himself the task of examining adventitious rights more closely than his predecessors. He sought to explain causally what his predecessors might have dismissed with "this is the product of human action" or "a jurist invented this." He was therefore able, from time to time, to locate a natural right secreted among a mass of adventitious rights. One example of this, not secreted but in full view, is in his treatment of delinquency (or delict).¹⁰⁵ Severe delicts directed against the body of another are self-evidently a violation of *natural* rights. That they happen to fall deep within a discussion of *adventitious* rights is of no moment. Cairns: "Given the *schema* into which he fitted his analysis of rights this is correct, though at first sight odd."¹⁰⁶ A more subtle example is acquisition by occupation: though occupation falls squarely within the right of a man "in his estate," and was therefore adventitious to Smith's predecessors, nevertheless the specific right to hunt game that one is pursuing (a part of the law of occupation) is, to Smith, a natural right.¹⁰⁷ A third example, modeled on the one previous, concerns the right of a person, named as heir

104. For a more in-depth discussion, see Metzger, *supra* note 61, at 338-42.

105. See LJ(A), *supra* note 4, at ii.93 (quoted *supra* note 29); *Role of the Courts*, *supra* note 2, at 41.

106. *Role of the Courts*, *supra* note 2, at 41.

107. LJ(A), *supra* note 4, at i.20, 37-38, ii.28-29; LJ(B), *supra* note 4, at 9-10, 150, 174.

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in a will, to accept or decline the inheritance.¹⁰⁸ Inheritance, like occupation, is an adventitious right, and yet to Smith the right of the heir *to choose to accept* the inheritance was a natural right, in the same manner as one who hunts game has a natural right to have what he pursues.¹⁰⁹ He gave the name “exclusive privilege” to this type of right, and—stirring the pot even more—offered both natural and adventitious examples.¹¹⁰

Thus, Smith’s system of rights clashed openly and repeatedly with the identically named, but utterly different rights set out in the Pufendorf/Carmichael/Hutcheson framework. Yet the clashes seem hardly to matter. They certainly have no bearing on Smith’s decision to reorder his lectures: to say that Smith found himself increasingly at odds with the framework is tantamount to saying that Smith, until his final year of lectures, did not fully understand his own notion of rights. The clashes, in any event, are equally evident in the latter course of lectures. More generally, the fact that Smith was content, year upon year, to intrude natural rights into all the “wrong places” suggests he never had any great reverence for the framework.

108. To accept an inheritance (*hereditas*) was a significant step, because the inheritance comprised a bundle of other rights (property, and debts owed and owing), and obviously some inheritances were best avoided. See generally William M. Gordon, *Succession, in A COMPANION TO JUSTINIAN’S INSTITUTES* 80-82 (Ernest Metzger ed., 1998); J. A. C. THOMAS, *TEXTBOOK OF ROMAN LAW* 497-98 (1976).

109. LJ(A), *supra* note 4, at i.19-20, ii.26-41; LJ(B), *supra* note 4, at 9-10, 174-75. See LJ(A), *supra* note 4, at ii.27-28.

It is plain that [inheritance] can not be considered as a different species of real right after the heir has entered to the inheritance, for then he has the same right that the defunct had and is considered as the same person, having full property in every respect. It can be in no other case than during the time betwixt the death of the last proprietor and the entrance of the heir that the inheritance can be considered as giving a new species of a real right. Now what right is it that the heir has before his entrance? No other but that of excluding all others from the possession until he determine in whether he will enter heir or not. . . . This [exclusive privilege] of inheritance is evidently founded on natural reason and equity.

Id.

Why does Smith take so much trouble to isolate this natural right? The answer perhaps is that he wished to locate the origins of inheritance at an early age of civilization, perhaps the Age of Shepherds. The Age of Hunters had no property, and succession would be unknown to those communities, but the Age of Shepherds did recognize property—and succession, though in a rudimentary form. LJ(A), *supra* note 4, at i.92 *verso*. The Age of Shepherds, however, lacking virtually every legal refinement needed to effect a succession of goods, would find this right of the heir essential. By identifying the right as *natural*, Smith is able to locate the origins of this important device in the community that needs it. See *THEORY OF MORAL SENTIMENTS*, *supra* note 1, at II.ii.1.7; see also *supra* note 47 and accompanying text (describing “natural rights” as “early rights”).

110. LJ(A), *supra* note 4, at i.92 *verso*. MacCormick commends the category of exclusive privileges as an able characterization of incorporeal property. MacCormick, *supra* note 2, at 249.

THE METHOD OF THE CIVILIANS

In adopting a new order for his lectures, Smith expressed a preference for the method of the civilians, who “beg[an] with considering government.”¹¹¹ To review: the new order differed from the old in two respects.¹¹² First, the so-called public jurisprudence, setting out and describing the evolution of forms of government, was moved from the end to the beginning (after a brief introduction).¹¹³ Second, the so-called domestic law, setting out rights relating to husband and wife, parent and child, etc., was placed immediately following public jurisprudence, but before the main body of private law (property, contract, delinquency) which, in the earlier lectures, it had followed.¹¹⁴

When Smith refers to the method of the civilians, we know from context that he is referring to the order in which civilian works present their subject matter, and not to the character of the underlying scholarship. Method, in the sense Smith means it, is not difficult to locate. After the rediscovery of Justinian’s Digest in the eleventh century, civilian scholarship was dominated by the gloss and steadfastly followed the order of the *Corpus iuris civilis*.¹¹⁵ Thereafter works became more diverse: a preference for commentary over gloss freed the writer to some degree from the traditional order.¹¹⁶ Greater freedom was won when the humanist jurists of the sixteenth century lost their reverence for the text of the *Corpus iuris civilis* and their successors sought a deeper principle of legal organization in Justinian’s Institutes. This latter stage is the important one: it brings a centuries-long ascendancy in the scheme of the Institutes, a work that helped to organize and inspire many works of scholarship as well as legislation,¹¹⁷ ultimately giving Smith his “method of the civilians.”

The Institutes, broadly speaking, presents itself as a series of events

111. LJ(B), *supra* note 4, at 401. Smith is quoted in full above in the text accompanying note 6.

112. *See supra* note 50. The accompanying table compares the order of the two lectures.

113. *Id.*

114. *Id.*

115. On the rediscovery of the Digest and civilian scholarship to the advent of humanism, see ANTONIO PADOA SCHIOPPA, *STORIA DEL DIRITTO IN EUROPA: DAL MEDIOEVO ALL’ETÀ CONTEMPORANEA* 79-98, 149-63, 188-204 (2007); RANDALL LESAFFER, *EUROPEAN LEGAL HISTORY: A CULTURAL AND POLITICAL PERSPECTIVE* 252-61 (2009); PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 43-49, 52-74 (1999) [hereinafter *ROMAN LAW*].

116. “Whereas commentaries ultimately followed the sequence of the *Corpus [iuris civilis]*, this no longer applied to treatises. These were monographs dealing exhaustively with a well-defined subject in a systematic order selected by the author.” LESAFFER, *supra* note 115, at 260.

117. *See generally* JUSTINIAN’S INSTITUTES 18-26 (Peter Birks & Grant McLeod trans., 1987) (for a discussion of the influence of the Institutes within a brief compass). *See also infra* note 118 (for a more extensive treatment).

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entitling a person to a particular form of redress.¹¹⁸ The humanist jurists, however, saw something deeper: a scheme of *rights*. A particular species of “advantage” attached to one who could claim ownership in a thing, or one to whom something was owed, and these advantages (i.e., abstract subjective rights) could be discussed without reference to means of redress. For present purposes what is significant is the new-found freedom to discuss, criticize, and arrange these rights. It was a freedom that allowed the creation of a system of rights inspired by the Institutes but not dependent on the text. It also allowed a *divergence of approaches* in presenting Roman and territorial law. Stein:

In the middle of the seventeenth century, a division can be discerned among writers offering a systematic presentation of the civil law or of national laws based on the civil law. One group continued to follow essentially the institutional arrangement, but with certain refinements. The other preferred to base their systems on the so-called geometrical method of argument from the general to the particular. The problem for those who wished to proceed in this way was to identify the general principles of law, equivalent to the axioms of mathematics, from which detailed rules could be logically deduced. Such principles were normally presented as arising from the nature of man in society, the implication being that anyone who denied their validity would be denying the rationality of nature itself. Eventually these systems became ideal systems of natural law, although the detailed rules apparently deduced from the general principles often bore a strong similarity to the rules of Roman law, but stripped of what could be regarded as antiquarian details.¹¹⁹

The result was two roughly parallel bodies of romanistic literature in the latter seventeenth and eighteenth centuries: works on natural or territorial law which showed in places a strong Roman footprint, and more traditional civilian works which expounded Roman law in the older humanistic tradition.¹²⁰

118. The treatment here is indebted to ROMAN LAW, *supra* note 115, at 79-82; Peter Stein, *The Fate of the Institutional System*, in HULDIGINGSBUNDEL PAUL VAN WARMELO 218 (Johann van der Westhuizen, et al. eds., 1984), *reprinted in* THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS 73 (1988) [hereinafter *Fate of the Institutional System*]; Klaus Luig, *The Institutes of National Law in the Seventeenth and Eighteenth Centuries*, JUR. REV. 193 (1972).

119. *Fate of the Institutional System*, *supra* note 118, at 78.

120. For further discussion of the parallel traditions, see G. C. J. J. VAN DEN BERGH, THE LIFE AND WORK OF GERARD NOODT 124-32 (1988); Luig, *supra* note 118, at 197-200; Peter Stein, *Legal Humanism and Legal Science*, 54 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 297 (1986), *reprinted in* THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS 91 (1988).

Smith, in the passage explaining his reorganization, contrasts “civilians” with “others.”¹²¹ He had undertaken to weigh the merits of the two bodies of literature just discussed. The method of organization attributed to the “others,” being Smith’s own method to that point, is that of Pufendorf’s *De officio hominis et civis* (the foundation work at Glasgow), and of Pufendorf’s natural law followers, such as Christian Wolff, whose *Ius naturae methodo scientifica pertractatum* (1740-1748) mirrors Pufendorf’s work. The civilian model is less obvious but nevertheless plain. That Smith should attribute a single method of organization to “civilians” is at first surprising, as writers on the civil law had, to that time, produced varieties of works almost beyond counting. Yet this very inaccuracy betrays his meaning. He can only be referring to civilian works founded on the *Corpus iuris civilis*, and of these, works founded on Justinian’s Institutes are the only plausible models. This is because, in proposing to adopt a civilian method, he is comparing the method of “others” who observe the institutional divisions of persons, property, and obligations, but in a different order.

Smith’s library held the following civilian works:¹²²

(1) “Heinecci Antiquitatum 2 Toms.”¹²³ This is probably a reference to: Johann Gottlieb Heineccius, *Antiquitatum Romanarum jurisprudentiam illustrantium syntagma secundum ordinem Institutionum Iustiniani digestum*.¹²⁴ It is a commentary on Justinian’s Institutes, following the order of the Institutes.

(2) Johann Gottlieb Heineccius, *Elementa juris civilis, secundum ordinem pandectarum* (1740).¹²⁵ It is a commentary on Justinian’s Digest, following the order of the Digest.

(3) “Heineccius Ad Institutionum.”¹²⁶ This may be a reference to the popular work Johann Gottlieb Heineccius, *Elementa iuris civilis secundum*

121. LJ(B), *supra* note 4, at 11.

122. These books are selected on the basis that they were written following the order of works in the *Corpus iuris civilis*. References to books with uncertain titles are taken from entries in a catalogue prepared at Smith’s direction in 1781; the catalogue is reproduced in TADAO YANAIHARA, A FULL AND DETAILED CATALOGUE OF BOOKS WHICH BELONGED TO ADAM SMITH app. II (reprint 1966) (1951).

123. MIZUTA, *supra* note 59, at no. 764.

124. The identification is the suggestion of Mizuta. *Id.* Edition consulted: JOHANN GOTTLIEB HEINECCIUS, *Antiquitatum Romanarum jurisprudentiam illustrantium syntagma secundum ordinem Institutionum Justiniani digestum* (C. G. Haubold & C. F. Mühlenbruch eds., 1841).

125. MIZUTA, *supra* note 59, no. 765. Edition consulted: JOHANN GOTTLIEB HEINECCIUS, *Elementa juris civilis, secundum ordinem pandectarum* (Venice, 1791).

126. MIZUTA, *supra* note 59, no. 1726.

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ordinem institutionum.¹²⁷ It is a brief commentary on Justinian’s Institutes, following the order of the Institutes.

(4) “Arnoldi Vinnii in Institutionum Imperialium Commentarius.”¹²⁸ This is probably a reference to: *Arnold Vinnius, In quatuor libros institutionum imperialium commentarius academicus et forensis*.¹²⁹ It is an extensive commentary on Justinian’s Institutes, following the order of the Institutes.

These are examples of works that openly follow the order of the ancient works for which they provide commentary. They are indeed civilian works, though not free from the influence of natural law. Vinnius, who taught at the University of Leiden in the middle seventeenth century, relies on humanist and even pre-humanist authority, but at the same time shows the influence of Grotius.¹³⁰ Heineccius deserves special mention because, though properly classed among writers on natural law, he achieved enormous success with a work that served both disciplines. Schioppa explains how he straddled the two worlds.¹³¹

Without doubt the prize for the most prolific author, and particularly the one most widely known and read, goes to Johann Gottlieb Heinecke (Heineccius) (1681-1741), professor at various German and Dutch universities, whose *Elementa iuris civilis secundum ordinem Institutionum* (1725) claimed no fewer than 150 editions in the course of the century. Equally successful was a parallel work that followed instead the systematic order of the Digest, in 50 books. These works owe their enormous success to a concise structure based on short, clear definitions of each institute followed by a sequence of well-deduced corollaries, set out in axiomatic fashion. The “pure” principles of Roman private law, with no lingering over *subtilitates*, are thus inserted within a systematic and deductive framework far removed from the ancient law, notwithstanding the adoption of the traditional scheme of Justinian’s Institutes or Digest. In this form the text

127. Edition consulted: JOHANN GOTTLIEB HEINECCIUS, *Elementa iuris civilis secundum ordinem institutionum* (Vienna, 1763); cf. MIZUTA, *supra* note 59, no. 1726 (attributing to Arnold Vinnius, and explaining that “[i]dentification is doubtful but there seems to be no work of Heineccius on the Institutiones”).

128. MIZUTA, *supra* note 59, no. 1727.

129. The identification is the suggestion of Mizuta. *Id.* Editions consulted: ARNOLD VINNIUS, *In quatuor libros institutionum imperialium commentarius academicus et forensis* (Amsterdam, 1655); ARNOLD VINNIUS, *IN QUATUOR LIBROS INSTITUTIONUM IMPERIALIUM COMMENTARIUS ACADEMICUS ET FORENSIS* (Amsterdam, 1665).

130. R. FEENSTRA & C. J. D. WAAL, *SEVENTEENTH-CENTURY LEYDEN LAW PROFESSORS AND THEIR INFLUENCE ON THE DEVELOPMENT OF THE CIVIL LAW 28-30* (1975).

131. SCHIOPPA, *supra* note 115, at 349 (E. Metzger trans.).

becomes a working institutional introduction to the system of “modern” Roman private law, anchored directly to the ancient sources, with few references to the doctrine of the *ius commune* but instead precise remarks on contemporary judicial practice, in particular where that practice departs from the rules of Roman law. The direct recourse to [Justinian’s] ancient legislation, without doctrinal mediation, is particularly significant: the need for simplification has now clearly won out.¹³²

The works of Vinnius and Heineccius on the Institutes are not necessarily Smith’s models. They are simply examples of a common literature which appear to have influenced Smith’s understanding of the civilian method. The following table maps the order of Smith’s reorganized lectures against the corresponding order of subjects in the Institutes. As above, the Pufendorf/Carmichael/Hutcheson rights framework is shown in the first column.

Rights framework	Lectures 1763-1764 (LJ(B))	Justinian’s Institutes
as a man, —in his person —in his reputation	11	—
as a citizen or a member of a state	11-99	1.2
as a member of a family	101-148	1.3-26
as a man, —in his estate	149	2.1-4.5

One of the notable changes is the relocation of the rights “as a member of a family.” This now precedes the discussion of rights “as a man in his estate” (property, contract, delinquency). Family rights are the direct counterpart to what civilian works discuss under the head of “the law of persons,” and they now rest where the institutional order would place them. Smith, so far as one can see, does not explain why he made this change.

The principal question, of course, is whether Smith would describe with the word “government” the subject matter of the two opening titles¹³³—or more accurately, whether he would describe in this way the literature founded on them. Haakonssen sets the bar very high: “At first it is puzzling that Smith should suggest that the ‘civilians’ put political

132. SCHIOPPA, *supra* note 115, at 349 (E. Metzger trans.).

133. J. INST. 1.1 (*De iustitia et iure*), 1.2 (*De iure naturali et gentium*).

jurisprudence, or ‘government,’ first. Plainly, no writer on the civil law, by which Smith meant *corpus iuris civilis*, began with a discussion of the principles of political governance.”¹³⁴ The Institutes, to be sure, does not begin with “the principles of political governance” and nor, for that matter, do Heineccius and Vinnius. Smith, however, did not claim to have found any such civilian work, but simply civilian works that “begin with considering government.”¹³⁵

The Institutes does indeed begin with “government,” though the reader must get past the first of the opening titles, which briefly praises justice and contains a handful of inspiring words for new law students.¹³⁶ The second of the opening titles begins with the nature of law (the difference between a people’s own law and the *ius gentium*)¹³⁷ and then gives an account of lawmaking. It describes the various sources of law; the written sources of law are an opportunity to discuss the individual organs of lawmaking: the emperor, the magistracies, the jurists, and so on.¹³⁸ It is a kind of “potted constitutional law.” Aside from a few fast references to the practices of other peoples,¹³⁹ it is not a discussion of “comparative government.” Nor is it a discussion of “form of government,” and even less “the principles of government.” It is, however, a discussion of *Roman* government. In short, there is little mystery in Smith’s statement that civilians “begin with considering government,” as this would be true of all contemporary literature that followed the order of the Institutes.

Smith’s decision to adopt the method of the civilians was not a sign of admiration for Roman law, but a means of escaping a difficulty. The difficulty was practical rather than profound. It was awkward to lecture on the “causes of laws” without having first introduced one of the principal causes. The suitability of the civilian model is a matter of accident; no civilian writer, ancient or modern, could anticipate Smith’s ingenious use of “forms of government.”

134. *Adam Smith Out of Context*, *supra* note 51, at 130.

135. LJ(B), *supra* note 4, at 11.

136. J. INST. 1.1. Thomas says that the title “is devoted to generalities of a banal character.” THE INSTITUTES OF JUSTINIAN: TEXT, TRANSLATION AND COMMENTARY 3 (J. A. C. Thomas ed., 1975).

137. J. INST. 1.2 pr.

138. J. INST. 1.2.2-12.

139. J. INST. 1.2.3, 10.