

This electronic thesis or dissertation has been downloaded from the King's Research Portal at <https://kclpure.kcl.ac.uk/portal/>



## **The Obscure Origins of Modern Liberty: Smith, Hayek and Theories of Spontaneous Order**

Zhu, Huahui

*Awarding institution:*  
King's College London

The copyright of this thesis rests with the author and no quotation from it or information derived from it may be published without proper acknowledgement.

### **END USER LICENCE AGREEMENT**



**Unless another licence is stated on the immediately following page** this work is licensed

under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International

licence. <https://creativecommons.org/licenses/by-nc-nd/4.0/>

You are free to copy, distribute and transmit the work

Under the following conditions:

- Attribution: You must attribute the work in the manner specified by the author (but not in any way that suggests that they endorse you or your use of the work).
- Non Commercial: You may not use this work for commercial purposes.
- No Derivative Works - You may not alter, transform, or build upon this work.

Any of these conditions can be waived if you receive permission from the author. Your fair dealings and other rights are in no way affected by the above.

### **Take down policy**

If you believe that this document breaches copyright please contact [librarypure@kcl.ac.uk](mailto:librarypure@kcl.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.

**The Obscure Origins of Modern Liberty:  
Smith, Hayek and Theories of Spontaneous Order**

**Huahui Zhu**



**A Dissertation Submitted in Fulfilment of the Requirements for the Degree  
of Doctor of Philosophy in Politics**

**Department of Political Economy  
King's College London**

**December 2022**

**Word Count: 77,663**

## ABSTRACT

This dissertation is focused on Adam Smith's history of laws, government, economic progress and slavery in order to examine his theoretical disagreement with Hayek's social theory. Smith was celebrated by Hayek as a systematic proponent of the idea of spontaneous order. However, although Hayek's interpretation of Smith's thought is not without merit and is rightly very influential – for example his astute awareness of Smith's attention to unintended consequences of human actions, and Smith's scepticism about systematic designs – he downplayed his own theoretical originality while highlighting his agreement with Smith's thought, thereby missing Smith's insights on the formation of various institutions that buttress free modern European societies.

I argue that although Smith shared with Hayek's philosophical concerns about the origin of modern society, their respective findings about how it was formulated diverge in important aspects. Smith's history does not conform with Hayekian models of spontaneous order, which emphasise our rule-following dispositions, the limited scope of human reason in selecting social practices, and an identifiable continuity of customary convention in history. Instead, Smith lays great stress on ruptures, revolutions, violence and clear evidence of human deliberate intervention.

This thesis turns to Smith's historical account of institutions both in England and more broadly in Europe, including the origins of the English common law, the changes to the English constitution, the foundation of the Revolution Settlement, and the enduring economic growth that characterised early modern Europe. Hayek saw these institutions as key examples of spontaneous order. But Smith believed that their formation cannot be regarded as entirely unintended or spontaneous without human (re)direction. Through careful historical investigations, Smith found that the development of English laws and politics were redirected by many revolutions, of which the violent effects altered, and even overthrew, old

conventions. Furthermore, he acknowledged the role of prudential design and sovereign interference in the creation of modern English liberty, whose recent origin should not be traced to an immemorial past. Smith's engaged study of European economies is also highly important in these regards. His famous reconstruction of the "unnatural and retrograde order" suggests the great significance of historical contingencies and political calculations in inducing economic prosperity in early modern Europe. This important historical lesson was further applied by Smith to Scotland, which was still troubled by economic backwardness and uneven development in the eighteenth century. Finally, Smith not only pointed out that many key institutions congenial to liberty and progress did not evolve without political displacement and violent change, but, in the case of slavery, he also found this to be a perversity spontaneously generated from human nature and social progress, the long and robust existence of which poses a direct challenge to Hayekian spontaneous order theory. For Smith, slavery as an unjust practice incompatible to human freedom was abrogated by a combination of intentional reforms and historical contingencies. Only under a special political framework slavery was abolished in "a small corner of Europe". Smith's historical research reveals Europe's crooked path to liberty and prosperity, which, however, was not on his analysis a spontaneous order.

## ACKNOWLEDGEMENTS

I could not have completed this doctoral thesis without the unwavering support of my supervisors and mentors. Paul Sagar has been immensely encouraging and always required me to sharpen my ideas. He also reminded me to get organised when I vacillated between my broader philosophical interest and the serious task of writing the PhD thesis. Not only did his knowledge of Adam Smith offer tremendous help to my research, Paul's great passions dedicated to teaching, research and life have incessantly inspired me throughout these difficult four years, more than half of which were spent during the pandemic. Robin Douglass has always been an incisive commentator on my ideas. His superb ability to probe into the most crucial points, his professionalism and gracious support have been immensely helpful. Many of my former mentors have also generously supported my research. Li Qiang, Duan Demin and Cheng Nong have all read parts of this thesis. Their suggestions and constant encouragement are an ample source of inspiration for my writing.

My special thanks goes to a number of friends who have been supporting me throughout these years. My old friend and roommate Ren Shuhuai offered me much help in both my life and research. I cannot imagine how difficult it would be to get through the PhD study without his companionship. Zhang Shuai and I shared much interest in Hume and Smith. Talking with him about philosophy, history and sports is always a great pleasure. I could not have finished this research project without those frequent discussions with him. Wang Yuanxin read many of my unfinished drafts and exchanged useful materials. It's such a regret that we have no opportunity to talk to each other face to face ever since the pandemic. I'm also particularly grateful to my dearest friends Fang Yin, Liu Jiangmei, Lu Di, Wang Xiaohan, Wu Di, Zhou Kangwei, Zhu Chengyong, without whom my life would be incomplete.

Finally, my parents and brother have been my strongest support. The thesis is dedicated to their unconditional love.

## CONTENTS

ABSTRACT	2
ACKNOWLEDGEMENTS	4
ABBREVIATIONS	8
INTRODUCTION	9
1. Smith, Hayek and the Problem of Social Explanation	9
2. Hayek's Motif: Spontaneous Order and Selective Evolution as Twin Conceptions	18
3. Hayek's Motif and Smith's History	25
4. Overview of Chapters	33
CHAPTER 1: F. A. HAYEK'S THEORY OF SPONTANEOUS ORDER AND CULTURAL EVOLUTION	39
1. Why Unintended? Hayek's Debate	39
2. Spontaneous Order: Rule-following, Cooperation and Self-Regulation	45
3. Spontaneous Order: Its Beneficial Nature and General Welfare	50
4. Spontaneous Order and Cultural Evolution	60
5. The Problems of Cultural Evolution	66
CHAPTER 2: SMITH, HAYEK, AND THE EVOLUTION OF ENGLISH COMMON LAW	75
1. Hayek's Spontaneous Order Theory and the Common Law Tradition	78
2. The Discontinuity of English Constitution, Feudalism and the Origin of the Common Law	86
3. The Institutionalisation of Jurisdiction, Royal Authority and Centralised Sovereignty	92
4. The Flaws of the Common Law System and the Remedies Invented	99
5. Conclusion	103
CHAPTER 3: SMITH'S CRITIQUE OF FUNDAMENTAL LAW AND SOCIAL CONTRACT: SOVEREIGNTY, PRESCRIPTIVE RIGHT AND THE NEW MODE OF ENGLISH LIBERTY	106
1. Hayek's Critique of Social Contract Theory: History, Spontaneous Order and Fundamental Principles	108

2.	Smith’s Critique of the Fundamental Law Doctrine: Absolutism and English Political Development	118
3.	The Foundation of Modern English Liberty: Sovereignty and Parliamentary Actions	123
4.	Smith on the Foundation of Politics: The Destabilising Fundamental Law vs. the Prescriptive Right of Sovereignty	130
5.	Sovereignty Unfettered: Reassessing Smith’s Critique of the Original Contract	136
6.	Conclusion	144
	CHAPTER 4: THE VISIBLE HAND: SMITH ON ECONOMIC BACKWARDNESS, AGRICULTURAL IMPROVEMENT AND THE CASE OF SCOTLAND	148
1.	Feudalism Self-Reinforcing: The Economic Backwardness of Europe	153
2.	The Lessons of Western Europe and England: The Unnatural and Retrograde Order, Centralised Government and Policy Encouragement	161
3.	Civilising Scotland: State Action in the Scottish Case	171
4.	Conclusion	180
	CHAPTER 5: TAMING THE LOVE OF DOMINATION: SMITH ON THE PERSISTENCE AND DECLINE OF SLAVERY	182
1.	The Mysterious Decline of Slavery: Does Smith’s Historical Account Conform to the Spontaneous Order Approach?	185
2.	The Historical Origin of Personalised Domination: Moral Sentiments, Wealth Distinction and Weak Government	192
3.	Commerce and the Persistence of Slavery in Rich Society	198
a)	How Commercial Opulence Mitigates Slavery: The “Gradual Descent of Fortune”	198
b)	The Spontaneity of <i>Libido Dominandi</i> and the Recurring Wealth Monopoly in Rich Society	203
4.	The “Peculiar” Case of Europe: Sovereignty, Church and the Collapse of the Feudal Nobility	208
5.	Conclusion	215
	CONCLUSION	218
	BIBLIOGRAPHY	225



## ABBREVIATIONS

Citations to Adam Smith's works are to the Glasgow Edition of The Works and Correspondence of Adam Smith identified by the following abbreviations:

*WN* = 1981. *An Inquiry Into the Nature and Causes of the Wealth of Nations*, eds. R. H. Campbell and A. S. Skinner and W. B. Todd. Indianapolis: Liberty Fund. References give book, chapter, section and paragraph number in the form *WN*, I.i.2.

*LJ* = 1982a. *Lectures on Jurisprudence*, eds. R. L. Meek, D. D. Raphael and P. G. Stein. Indianapolis: Liberty Fund.

*LJ(A)* = 1982a. "Lectures on Jurisprudence," report of 1762-1763. In *LJ*. References give chapter, section and paragraph number in the form *LJ(A)*, i.2.

*LJ(B)* = 1982a. "Jurisprudence or Notes from the Lectures on Justice, Police, Revenue, and Arms delivered in the University of Glasgow by Adam Smith, Professor of Moral Philosophy, report dated 1766." In *LJ*. References give paragraph number in the form *LJ(B)*, 1.

*ED* = 1982a. "'Early Draft' of Part of *The Wealth of Nations*." In *LJ*. References give paragraph number.

*TMS* = 1982b. *The Theory of Moral Sentiments*, eds. D. D. Raphael and A. L. Macfie. Indianapolis: Liberty Fund. References give part, section, chapter and paragraph number in the form *TMS*, I.i.1.2.

*EPS* = 1982c. *Essays on Philosophical Subjects*, eds. W. P. D. Wightman and J. C. Bryce. Indianapolis: Liberty Fund. References give page number from this edition.

*LRBL* = 1985. *Lectures on Rhetoric and Belles Lettres*, ed. J. C. Bryce. Indianapolis: Liberty Fund. References give chapter, section and paragraph number in the form *LRBL*, i.2.

*Corr* = 1987. *The Correspondence of Adam Smith*, eds. E. C. Mossner and I. S. Ross. Indianapolis: Liberty Fund. References give page number.

## INTRODUCTION

### *1. Smith, Hayek and the Problem of Social Explanation*

Since Friedrich Hayek's influential analysis of the phenomenon of spontaneous order and his tracing this theory to eighteenth century Scottish thought,<sup>1</sup> much ink has been spent on the social theory of the Scottish Enlightenment as an alternative to the rival approach of European rationalism which attributed the formation of social institutions to a "Great Legislator" or social contract. According to Ronald Hamowy, the notion of spontaneously generated social orders can be seen as "the single most significant sociological contribution" of the Scottish Enlightenment (Hamowy 1987). Adam Ferguson's idea that social order is "the result of human action, but not the execution of any human design" well illustrates this notion of spontaneous order (Ferguson 1995, 119), namely that social order results from myriad actions that do not deliberately calculate the formation of the social whole. Such actions are not necessarily purposive or rational. They are often tradition-bound, customary and ceremonial (Schneider 1967). Hayek's choice of the term, "spontaneity", is intended to be contrasted with the "authoritarian connotation" of the idea that order is created from outside by a top-down imposition (exogenously) (Hayek 1973, 36). It signifies an order that emerges "from within" (endogenously) (Hayek 1973, 36), an equilibrium formed by "the mutual adjustment of individual 'particles'" (C. Smith 2006, 11).

---

<sup>1</sup> Michael Polanyi developed this concept and clearly influenced Hayek. See Polanyi 1948; Jacobs 2000. Jacobs finds that Hayek was even more ambitious than Michael Polanyi as he applies this idea to the explanation of the operational logic of the society as a whole rather than some subunits within the society. It has also been recognised that the nineteenth century positivist social theorist Auguste Comte might be the first one to use the term *ordre spontané*. However, Hayek seems not to have acknowledged this fact (Bourdeau 2016). For Comte's theory of spontaneous order and social statics, see Comte 2009. For Hayek's criticism on Saint-Simon and Auguste Comte, see Hayek 1973, 53.

While many eighteenth-century Scottish philosophers noticed this unintended character of social complexity, Hayek argued that it was Adam Smith who first made “systematic use” of the spontaneous evolutionary approach inspired by Bernard Mandeville and David Hume (Hayek 1988, 146).<sup>2</sup> Smith’s free market model is a good example of spontaneous order. He insisted that every individual, in pursuit of economic certainty, would employ their capital in their own countries, thus prompting social development. In this case, although individuals never intend to create public prosperity, self-interest promotes public flourishing more effectively than the mercantile prudential design, which leads to economic inefficiency and unjust monopolies. It was in this context that Smith deployed the “invisible hand” metaphor in *Wealth of Nations* (henceforth *WN*) to signify the paradoxical nature of the formation of public utility (*WN*, IV.ii.9). For Smith, it is not by consciously designing the economic system, but by leaving matters to free individuals’ private prudence and judgement, that economic prosperity can spontaneously emerge.

In line with Hayek, James Otteson claims that Smith took up what was left unfinished by Hume and further showed the possibility of applying the spontaneous order model to “all walks of human life and interaction” (Otteson 2002, 122). Many scholars have also explored Smith’s application of the invisible-hand explanation to a wide range of human institutions including language, morality, law and economics (Campbell 1971; Ullman-Margalit 1978; Keller 1994; Alvey 2004; Evensky 2005; C. Smith 2006), which is close to Hayek’s social

---

<sup>2</sup> Despite Hayek’s recognition of the Scots’ contributions to spontaneous order approaches, some also express reservation in reading this paradigm into the Scottish thought. For example, in his analysis of David Hume’s and Adam Smith’s theory of justice, Knud Haakonssen claims that “[t]o see justice...as an unintended consequence of individual human actions, must be one of the boldest moves in the history of the philosophy of law. And it is as ingenious as it is bold” (Haakonssen 1981, 20), which salvages Hume’s philosophy from Hobbesian rationalism and legal positivism (i.e. that the positive law is a contrivance of sovereignty), and by arguing that the composite particles of justice are human nature and human actions, Hume rejected the idea of divine interference to understand the origin of social order. Still, Haakonssen observes that Hume never explicitly pointed to Hayek’s idea of spontaneous order, i.e., that society is neither an artificial design, nor a result of purely natural causes – as the elements of social order is *human* actions. Hume did not put forward the concept of *spontaneity* as a third category other than *nature* and *artifice*, instead noted that justice is an artificial virtue (Haakonssen 1981, 24). Also, it is doubtful whether developing a theory of spontaneous order was Hume’s primary interest in his *Essays* and *History of England* (Haakonssen 1981, 37).

theorizing of the whole “Great Society” as a spontaneous order. Early in the eighteenth-century, Smith’s friend, Dugald Stewart, had already noticed that Smith’s essay on the origin of language was an example of the gradual and cumulative institution (*EPS*, 292). Recently, there has been much attention to Smith’s *Theory of Moral Sentiments* (henceforth *TMS*) as a key text which shows the spontaneous growth of moral rules. Otteson finds that Smith’s vision of moral life is very similar to the free-market model, which he calls the “marketplace mechanism” (Otteson 2007, 22). In the Smithian market order, price mechanisms serve as signals for individuals with contextual and imperfect knowledge for economic decisions, serving others’ needs without forecasting the entire map of the free market. Similarly in moral life, our moral evaluations also serve to form the social norms without relying on top-down imposition, and it is by making reference to general rules, traditions and customs that we make further moral judgements and decisions. For Otteson, Smith showed that our past experience of mutual sympathy and sentimental pleasure helps us to learn how to behave in the future. These “precedents” are gradually incorporated into habits and norms, and eventually “come to constitute a system of rules or principles” (Otteson 2007, 28). Otteson’s exposition of Smith’s social theory recalls Hayek’s spontaneous order model, stressing that social order is by its essence a trial-and-error discovery of new information, preferences, knowledge and rules (Otteson 2007), and our rule-following behaviour promotes general welfare. In other words, rules of social order are spontaneously formed, and our submission to rules make us better off, e.g., better adjust our economic decisions and better win mutual sympathy.

It is undeniable that Hayek’s interpretation of Smith’s social theory, and more broadly the British evolutionary tradition, portrayed Smith’s thought in the vein of the “New Right” (Berry 1997; C. Smith 2013a; Otteson 2016). In contrast, many scholars have tried to highlight Smith’s deviation from the “invisible-hand explanation”. Even though not many go

as far as Emma Rothschild in suggesting that Smith's use of the Invisible Hand is an ironic joke (Rothschild 2001, 116-156),<sup>3</sup> many still question Smith's commitment to this idea, arguing that there was much space for legislators' intervention in Smith's thought. For example, many have noted Smith's concern about how the division of labour stultified labourers, thus he recommended legislators' interventions and public education programme (Winch 1978; Muller 1993; Griswold 1999; Rothschild 2001; Fleischacker 2004; McLean 2006; Rasmussen 2008; Hanley 2009; Oprea 2021; Frame and Schwarze 2022). Furthermore, there is also much scholarly interest in portraying Smith as an eighteenth-century forebearer of modern notions of egalitarianism, social justice and state-sponsored programmes to ease poverty by redistributive taxation (Himmelfarb 1985; Fleischacker 2004; McLean 2006; Kennedy 2008; Sen 2009; Boucoyannis 2013; Herzog 2015; Anderson 2016; Schliesser 2017). It has also been pointed out that Smith was quite sceptical of *laissez-faire*. Jacob Viner argued that Smith was aware of the importance of institutional designs and state regulations to make the market work smoothly and to ensure that private interest can eventually amount to social harmony (Viner 1927; cf. Rosenberg 1960; Rockoff 2013).

Still, just as Jacob Viner concedes, "there is no possible room for doubt...that Smith in general believed that there was, to say the least, a strong presumption against government activity beyond its fundamental duties of protection against its foreign foes and maintenance of justice" (Viner 1927, 219; cf. Stigler 1975; C. Smith 2013b). Importantly, while many have noticed Smith's analysis of "human frailty" as the possible space for external intervention

---

<sup>3</sup> Emma Rothschild contends that as the several "invisible hand" passages in Smith's works suggest human blindness, which contradicts Smith's enlightening spirit, he must have used this trope as a joke. Rothschild further argues that Dugald Stewart's biography of Smith was intended to distance Smith's thought from the radical-egalitarian legacy of the French Revolution. See Rothschild 2001. But as Eric Schliesser later suggested, we can reconcile Smith's invisible hand and his Enlightenment project to salvage social science from the "indolent philosophy" (*EPS*, 293) and the "lowest and pusillanimous superstition" (*EPS*, 50) to attribute the social order to a divine and miraculous being, "who produced it for some private and particular purpose" (*EPS*, 112-113). See Schliesser 2017, esp. chap. 10. For Stewart, Smith's naturalistic explanation and process tracing of social phenomenon is a way to mitigate the harmful effects of the indolent philosophy and enlighten the mind. Still the problem is how we should understand the nature of Smith's social explanation.

(Evensky 2005, 8; Brubaker 2006a), which countered the principle of *laissez-faire*, Hayek also saw his theory of spontaneous order as based on the assumption of human frailty, the urgent need of institutional shackles and thus a rejection of the *laissez-faire* principle to “leave things as they are” (Hayek 1948, 17). For Hayek, Smith did not accept the naïve idea of the “natural harmony of interest” and “natural liberty” (Hayek 2011, 118, 135) – if being natural means breaking the bonds of social institutions and so depriving our nature as a “social animal” (Hayek 1978, 59).<sup>4</sup>

In contrast to those who argued that Smith’s discovery of cases where private interest cannot be reconciled with public interest connected him to the subsequent Benthamite-Utilitarian tradition, which left much room for legislation in view of public utility, Hayek’s core contention was that the Scots believed that the institutional framework to encase social cooperation is unintended and evolutionary, without being designed directly and externally, thereby distancing Smith from the later utilitarian school. For Hayek, the Scots’ were conscious of the necessity to tame “man’s more primitive and ferocious instincts” by institutions to achieve social harmony, but such institutions are not designed, and cannot be controlled (Hayek 2011, 118). Revealingly, Hayek’s contention was reminiscent of Smith’s wry comments on the “man of system” (Hayek 1991, 121), who “is very apt to be very wise in his own conceit” and “so enamoured with the supposed beauty of his own ideal plan of government” (*TMS*, VI.ii.2.17). According to Smith, a man of system disregards every social member’s own “principle of motion” that can deviate from his legislative ambitions (*TMS*, VI.ii.2.17), but wants exclusively to satisfy his own demand to implement the ideal plan completely. For a man as such, society is merely a chessboard and the social operation is a game. Failing to accommodate the “great interests” and “strong prejudices” that countered the

---

<sup>4</sup> Hayek was well aware that the term “the system of natural liberty” was used by the Scots. But he wanted to correct the common misunderstanding of what *nature* means for the Scots, which is much closer to his idea of spontaneity than the hypothesis of men as unsocial being. See Hayek 2011, 118.

move of his design, the man of system would introduce the “highest degree of disorder” (*TMS*, VI.ii.2.17).

However, it should be noted that Hayek’s interpretation of the Scottish tradition is far from undisputed.<sup>5</sup> Scholars note that Hayek might have downplayed his own theoretical radicalness compared to the Scots (Gray 1988a, 59-61; Muller 1993, 116, 186, 259; Angner 2002; Beck 2018, 69, 87-88, 102-103, 126-130). For instance, John Gray pointed out that “Hayek’s thought diverges from that of the Scottish philosophers as often as it converges with it” (Gray 1988a, 53). Indeed, there exist principles raised by the Scottish thinkers that are incompatible with Hayek’s theory. A frequently mentioned example is the Scottish school’s endorsement of the objectivist labour theory of value and utility, which was much closer to the early modern mercantilist thought that saw political economy as a science of wealth allocation. Hayek (and the Austrian school in general), however, rejected this objectivism, replacing the subject matter of political economy with research on catallaxical social network with no hierarchy of values – or in Hayek’s term, “spontaneous order” (Gray 1988a, 61; Haakonssen and Winch 2006). Moreover, there were numerous disputes within what Hayek viewed as the British evolutionary tradition, raising doubts whether we can label all of these thinkers as belonging to the same camp. As an example, some have noted that Hume never shared Burke’s idea of the social fabric as a depository of tacit wisdom, or Burke’s agitation for arousing our deference to the extant social order as a sacred contract between individuals and their ancestors (Gray 1988a, 61-65; Haakonssen and Winch 2006).<sup>6</sup>

More relevant to our present concern is whether Hayek’s idea of spontaneous evolution really conforms with the Scots’ intellectual temperament and agenda. Hayek

---

<sup>5</sup> Even within the “New Right” circle, interpretations of Smith’s work have diverse ramifications. See Evensky 2005; Liu 2020.

<sup>6</sup> A particularly important debate is between Burke’s reverence to the prescriptive constitution and Hume’s denigration of the notion of an ancient constitution. Hayek seemed to believe that ancient constitutionalism was a lynchpin of Anglophone liberty. However, it has been proven that Hume rejected this idea (Forbes 1975). I will show that Smith was more aligned with Hume than Burke on this point. See Chapter 2 and Chapter 3.

insisted that the Scottish thinkers foreshadowed his evolutionary theory of social order. In *The Constitution of Liberty* in which Hayek spent much time on the theoretical legacy of classical liberals, he maintained that “[t]hose British philosophers have given us an interpretation of the growth of civilization that is still the indispensable foundation of the argument for liberty. They find the origin of institutions, not in contrivance or design, but in the survival of the successful” (Hayek 2011, 112). Note that Hayek explicitly phrased the conception of selective evolution, i.e., “the survival of the successful”, to refer to the legacy of British liberalism. However, scholars have already pointed out that Hayek’s theory of evolution, which invokes many biological terms, sits quite oddly with Smith’s thought (Gray 1988a; Petsoulas 2001; Beck 2018).<sup>7</sup> Christina Petsoulas, for example, pointed out that while Hayek’s theory put severe limits on human reason and deliberation, Smith stressed the role of conscious judgement and reflection in the formation of social rules, which is not incompatible with his view that the free market needs active political nurturing.

In fact, Hayek admitted that his study was more inclined to discovering something valuable for his own research programme than uncovering the original intentions of the theorists in question. Regarding his orientation in studying intellectual history, Hayek candidly said, “what I told my students was essentially what I had learnt from those writers and not what they chiefly thought, which may have been something quite different” (Hayek 1978, 52n2). As Peter Boettke noted, Hayek was an “opportunistic reader” of the history of economic thought and “pure accuracy” was not his central concern (Boettke 2001, 117). Such opportunism might have extended to a wider range of topics covered by Hayek, including his research on legal, constitutional and political theory. Indeed, Hayek showed much favour towards Adam Ferguson’s statement that “nations stumble upon establishments which are

---

<sup>7</sup> Naomi Beck raised a provocative question: How could Smith, as such an original thinker of free-market and commercial society, be regarded as an unreflective organ of Hayekian social evolution (Beck 2018, 102)? This question in fact relates to a more general problem for Hayek’s evolutionism, i.e., what is the role of scientific reasoning in social evolution (Witt 1994, 185)?



indeed the result of human action but not the execution of any human design”, which was meant to explain the unintended origin of “nations” and civil constitution. As Craig Smith contends, Hayek’s interpretive strategy was not entirely unproblematic: in order to find things useful to support his own claim without equal conscientiousness to examine what “[those writers] chiefly thought”, Hayek risks being tempted by a Whig interpretation of history, thereby misapprehending the authentic state of the available history of ideas (C. Smith 2013a, 551).

The purpose of this doctoral thesis is to re-evaluate Hayek’s presentation of his accounts of spontaneous order and selective evolution as continuations of ideas found in Adam Smith. I will contend that despite their apparent similarities, Smith and Hayek’s ideas in fact diverge in important ways. The main contribution of this thesis is two-fold. First, it contributes to Hayek scholarship in terms of his use and abuse of intellectual history, particularly Smith’s ideas of social progress. Hayek held a Manichean view: he focused on unintended consequences of human actions that form orderly social structures (Hamowy 1987), and also maintained that direct planning, controlling and revolutionary actions tend to produce perversity. In light of Smith’s historical account, this Manichean view significantly restricts the role of human actions and the prospects of how progress can be made other than relying on myriad rule-following actions, such as revolutions, violence and deliberate redirection. As we shall see in Smith’s historical account, although such designs might not unfold as planned, they amount to more than perversity and sometimes are critical steps that pave the way for new variations and progress.

Second, this thesis also offers an intervention in terms of understanding Smith’s history of laws, government, and economic growth. In so doing, it in turn facilitates a clearer understanding of Smith’s science of man, and how this was applied to his wider social-historical investigations. I will not only treat Smith as a political economist or moral

philosopher, but also as a historian, one who took great pains to understand the path to modern liberty and what Hayek later dubbed the “Great Society”.<sup>8</sup> Whilst previous scholars have noticed Smith’s historical concerns, many of Smith’s crucial historical narratives regarding legal, constitutional, political and economic progress remain underexamined.<sup>9</sup> For example, there are few scholars focusing on Smith’s explanations of the English Revolution and the common law tradition,<sup>10</sup> which were not only intimately related to Hayek’s theoretical programme, but were hotly debated issues in Smith’s own time (Dickinson 1976). Moreover, while Hayek often invoked Scottish conjectural history as the central component of spontaneous evolution – the famous “four stages” stadial theory illustrating the movement of societal order from pre-commercial society (hunter-gatherer, shepherding, and agricultural society) to commercial society made up for the lack of direct historical proofs of how early society evolves to the modern Great Society,<sup>11</sup> this thesis pays close attention to Smith’s narratives of the “unnatural and retrograde order”, the strikingly unpredicted and crooked path to modern European civilization that moved through barbarism, economic stagnation, social collapse, and the uniquely oppressive feudal structure in both England and Europe, that essentially deviated from the conjectured order of ‘natural’ socio-economic progress. By looking into Smith’s historical account of European economic growth and the decline of

---

<sup>8</sup> Hayek explicitly noted that the term, “Great Society”, comes from Smith. See Hayek 1973, 2. Smith used this term in *TMS*, VI.ii.2.17; *ED*, 5.

<sup>9</sup> Following Edward Gibbon, J. G. A. Pocock claims that Smith was not as much of a historian as Hume, William Robertson or Adam Ferguson, “because nothing he has written is a history of anyone or anything” (Pocock 2006, 271; cf. Pocock 1999). This dissertation does not aim to dispute Pocock’s argument. Instead, I urge that we should take Smith’s own claim in *TMS* more seriously, that he planned to “give an account of the different revolutions they have undergone in the different ages and periods of society” (*TMS*, VII.iv.37), in order to appreciate his philosophy as an account of social change and human progress.

<sup>10</sup> Until now the most comprehensive study of Smith’s account of the common law is Haakonssen 1981.

<sup>11</sup> As Dugald Stewart noted, to reconstruct the growth of human society, from the rudest state to the civilised state, without recourse to human design, a conjecture of the natural and ordinary course of social development based on some ever-present aspects of human nature and particular social circumstances should be formulated, to make up for the loss of historical proofs (*EPS*, 293). Hayek’s argument was very similar to Stewart’s (Hayek 1988, 69; cf. Hayek 1967, 75). Indeed, The four stages theory has received much scholarly attention, see, e.g., Skinner 1975; Meek 1976; Berry 1997; 2013; Hont 2005; Robertson 2005; Phillipson 2010; Sebastiani 2013; Hanley 2014; Palmeri 2016. However, the stadial theory meets embarrassment in explaining the rise of modern liberty. Smith saw that the age of allodialism-feudalism can hardly be subsumed into this four-stages model. See, e.g., Skinner 1975; Hont 2005.

slavery, this thesis reflects on whether this unique path to modern civilised society can fit the model of spontaneous order. As we shall see, Smith's careful historical investigation actually suggests that the road to the unprecedented growth of civilisation in modern Europe deviated from the conjectural route, in which violent revolutions, intentional designs and state interference played an indispensable part. Smith's account thus diverges from Hayek's spontaneous order theory. This observation reaffirms my central contention that Smith and Hayek do not in fact agree on their social theories and historiography.

## *2. Hayek's Motif: Spontaneous Order and Selective Evolution as Twin Conceptions*

According to Hayek, the notion of evolution and the idea of the spontaneous formation of order are "twin ideas" (Hayek 1978, 250; Hayek 1984, 177). A spontaneous order bears an unintended origin, and it adjusts itself through a process of evolution. As we have pointed out, defending the evolutionary origin is crucial for Hayek's goal of repudiating the design theory. Many scholars also believe that the evolutionary outlook is "central to Hayek's thought" (Ebenstein 2001, 14), and that it "gives coherence to [Hayek's] entire work" (Vanberg 1994, 315).<sup>12</sup> Moreover, as abovementioned, Hayek argued that his ideas drew upon those British philosophers, who "find the origin of institutions, not in contrivance or design, but in the survival of the successful" (Hayek 2011, 112). His sources of inspiration, of course, include not just eighteenth-century Scottish philosophy, but also later biological theories such as those of Charles Darwin. In fact, Hayek once conceded that Smith did not work out a systematic theory of selective evolution.<sup>13</sup> But importantly, he still maintained that Smith's social theory

---

<sup>12</sup> See also Caldwell 2004; C. Smith 2013a, 553; Beck 2018; Luban 2020. More details about the nature of Hayek's evolutionism and its significance to the consistency of his social theory will be provided in Chapter 1.

<sup>13</sup> In the related passage, Hayek referred to Josiah Tucker as the one who more clearly argued that "institutions had developed by a process of the elimination of the less effective which did bring about a reconciliation of the divergent interests" (Hayek 1967, 100).

prefigured this notion, and even that Darwin had relied heavily upon Smith in articulating his later idea of natural selection via evolution (Hayek 1988, 23–25).<sup>14</sup>

Given the importance of evolutionary theory to Hayek and his own claim that this theory was indebted to Smith, this section discusses some of Hayek’s key points in linking the idea of cultural evolution and spontaneous order. Although I will provide a more engaged analysis in Chapter 1, a sketch of some of Hayek’s key implications will help clarify my ultimate contention that by focusing on the problem of social evolution, we can better understand how Smith’s uses of history in fact *differ* from Hayek’s spontaneous order model.

To illustrate the idea of spontaneous order, Hayek made an analogy between natural order and social order. In the natural world, individual atoms “arrange themselves” in a certain manner – i.e., according to some rules – into a crystal or organic compound (Hayek 1973, 40). The rules that formulate different substances “determine the general character of the resulting order but not all the detail of its particular manifestation” (Hayek 1973, 40). Such an observation by Hayek has two implications. First, rules ensure the stability and predictability of individual particles. Second, without directing “particular manifestation”, rules only determine the abstract pattern, while leaving open the possibility of how the particulars would be shaped in concrete situations.

Likewise in a spontaneous social order, general rules manifest themselves in the day-to-day behavioural regularities of individuals. And in rejecting utilitarianism, Hayek explained the nature and origin of social rules. For Hayek, the utilitarian school failed to acknowledge our “necessary ignorance” (Hayek 1976, 20). Human beings are not omniscient. They do not grasp all the effects of their particular actions. And due especially to our “partial

---

<sup>14</sup> Hayek’s primary source of inspiration of the group selection theory may be the British biologist Alexander M. Carr-Saunders rather than the eighteenth century Scots. See Angner 2002; Beck 2018. Darwin’s biology was certainly important to Hayek. But it has also been suggested that Hayek’s evolutionary theory is very different from Darwin’s. Especially noticeable are their divergent opinions on the role of human reason and artificial selection in the evolutionary process. See Beck 2011.

awareness of a regularity of the world, of the difference between a known and predictable and an unknown and unpredictable part of the events in the environment” (Hayek 1967, 79), human beings “must create a preference for the kinds of actions whose consequences are predictable and a fear of the kinds of actions whose consequences are unpredictable” (Hayek 1967, 79). This is why men develop rules that determine the *kinds* of actions that should be allowed in social life – rules and regularities help reduce uncertainty, increase predictability and guarantee the mutual correspondence of numerous expectations, thereby forming social equilibrium, “on which the plans of the individuals depend for their success” (Hayek 1973, 98).

As Hayek observed, men are rule-following animals (Hayek 1973, 11). Social rules refer to our “propensity or disposition to act or not to act in a certain manner” (Hayek 1973, 75). They encompass many aspects of social life, including laws, traditions, culturally transmitted norms, religious beliefs, taboos and superstitions, which shape the ways, manners and dispositions of human actions. For Hayek, “[m]ost of the beneficial opinions held by individuals are held by them without their having any known reasons for them except that they are the traditions of the society in which they have grown up” (Hayek 1978, 85). As repeated affirmations of rules and social interactions help to shape people’s general dispositions, which gradually become the “permanent properties of the acting person” (Hayek 1978, 86), individuals who observe social rules do not usually understand how these rules serve their own benefits. Rather, they are often guided to act according to such rules only tacitly, instinctually, habitually and unreflectively. Hayek contended that human beings are rule-governed *before* precise rules are articulated. “Even when they have acquired the power of conscious abstraction, their conscious thinking and acting are probably still guided by a great many abstract rules which they obey without being able to formulate them” (Hayek 2011, 217).

Hayek argued that since rules are developed because of our inescapable ignorance, they are products of various human actions without human design. Rules are not set up by a particular purposive action of some human agency. Instead, we are drawn to follow rules in order to alleviate uncertainty, while no agency commands our submission and sets a common goal for our actions. For Hayek, as the rule-seeking propensity and necessary ignorance are fundamental to our nature, our rule-following tendency is older and more basic than the “anthropomorphic” idea that social rules must be derived from human design (Hayek 1967, 66n1). As such the resultant order induced by our adherence to the general rules is a spontaneous order.

In contrast to a command system targeted to particular persons and derived from a particular end, a spontaneous order is not derived from a purposive human design. Hayek recalled Smith’s account of the division of labour from time to time (Hayek 1988, 120), which is a good example of the non-deliberative origin of social rules. For Smith, “[I]n a nation of hunters, if any one has a talent for making bows and arrows better than his neighbours he will at first make presents of them, and in return get presents of their game. (*LJ(B)*, 220)” Further, via frequent social communication people would become inured to their businesses, and learn about the advantages of bartering and the division of labour to help themselves live better than before. As such, the division of labour accords with individuals’ partial knowledge of their own circumstances. It emerges to alleviate uncertainty and ensure the matching of expectations, whilst no legislator designs this system as a whole.

A spontaneous order is also purpose-free. It forbids some kinds of actions such as the violations of other people’s private property, while leaving open the possibility of people’s application of these rules in various problem situations to serve their own purposes. For example, the market order upheld by the rules of justice and private property is purpose-free. It inhibits the violation of private property and facilitates economic transactions. People in the

market system can deal with diverse businesses without being assigned to a particular one by coercive commands. For Hayek, as social rules are end-free and only determine the formal structure of the social order, the particular contexts that individuals face are infinite and unpredictable. That is to say, the particular manifestation of social order pertains to the particular environment that it is put in, i.e., people's particular and diversified dealings with their ambient contexts according to general rules will result in different social orders.

As such, for Hayek, rules serve as “tools” and “equipment” for men to survive (Hayek 1976, 23; Hayek 1984, 320). Hayek employed the metaphor of a knife to explain the formation of rules and order.

Just as a man, setting out on a walking tour, will take his pocket knife with him, not for a particular foreseen use but in order to be equipped for various possible contingencies, or to be able to cope with kinds of situations likely to occur, so the rules of conduct developed by a group are not means for known particular purposes but adaptations to kinds of situations which past experience has shown to recur in the kind of world we live in (Hayek 1976, 5).

While we follow social rules without articulating them and understanding their utility, rules do have social functions. In a spontaneous order, the generalised rules that serve multiple ends help individuals adapt their behaviour to new changes. By reconciling and serving individual plans in contingent and countless new situations, rules would be adapted to new environments so that the group will continuously succeed. As we have pointed out, Hayek viewed spontaneous order and cultural evolution as “twin” conceptions. Though we are rule-following and lack apprehension of the utility of social rules, rules are not changeless. Put simply, those rules that help a group to succeed and expand will be selected, while those that bring about group degeneration and depopulation will eventually die out. In general, the more effective a job the rules can do for “extracting and communicating information”, thereby raising the “size of the stock of capital of people”, the more the latter is able to maintain large numbers of population (Hayek 1988, 124).

As an example, Hayek observed a “chain reaction” between the increasing sophistication of the division of labour and population growth, which is the driving force of economic and civilisational advancement (Hayek 1988, 40-41). For Hayek, the development of the division of labour helped promote trade, new settlements, and new specialisation, which further increased the group capacity (e.g., per capita income) to afford more social members, thereby inducing greater density of population. In turn, population growth brought more opportunities for specialisation and division of labour, so that the group continuously expanded. In this case, the rules of private property and the division of labour triggered social prosperity and group success. Furthermore, Hayek embraced what British biologist Alexander Carr-Saunders expressed in *The Population Problem*, i.e., “[t]hose groups practising the most advantageous customs will have an advantage in the constant struggle with adjacent groups” (Hayek 1978, 67n3). As the group continuously grows, not only will the rules prevail over those of other less successful groups in which the market mechanism is less advanced and sophisticated, but furthermore the successful group also tends to integrate outsiders so that its demographic scale continues to be enlarged (Hayek 1979, 159).

The evolution of market rules and the division of labour is only one of the many examples of the selective evolution of social rules in Hayek’s theory. Hayek believed that “[o]ur habits and skills, our emotional attitudes, our tools, and our institutions—all are...adaptations to past experience which have grown up by selective elimination of less suitable conduct” (Hayek 2011, 77). As such, social rules contain much knowledge accumulated by past generations’ adaptations to contingent circumstances and transmitted as social tradition (Hayek 1984, 320). Rules are shaped by past experience, extemporaneous and recurrent “problem situations”, and serviceable to a multiplicity of individual purposes so that the social group as a whole would obtain a comparative advantage vis-à-vis other groups, thus securing the transmission and inheritance of the successful rules.



On Hayek's account, crucial here is that the evolutionary process of social order is beyond people's purposive intelligence and intentions. Not only are we unable to understand the tacit wisdom and experiential knowledge cumulated in existing rules that prove to be successful for the entire group, Hayek maintained that the "selective evolution of rules and practices" is also a non-deliberative process (Hayek 1979, 154). Central to Hayek's idea of spontaneous evolution is that it is group selection, rather than individual calculations and experimentations, that determines which rules can be kept and spread (Hayek 1979, 155). This is also what makes an order "spontaneous". A spontaneous order is self-regenerative, self-maintaining and self-reinforcing, and no human design can guide its direction of evolution. Indeed, as Hayek consistently claimed, human beings follow rules without knowing their utility, and human reason plays a minimal role in the process of selective evolution. Again for Hayek, in daily life we are called upon to obey general rules, including moral rules, custom and tradition, without considering the "consequences" (Hayek 1967, 243), the "utility" (Hayek 1976, 22) or "even our knowing why it is desirable that we should act in one particular way and in no other" (Hayek 1967, 243). The only reason why social rules exist is not owing to human intentions, but because they serve group success and they are so "selected". As Hayek maintained, "[t]he only 'utility' which can be said to have determined the rules of conduct is thus not a utility known to the acting persons, or to any one person, but only a hypostatized 'utility' to society as a whole" (Hayek 1976, 22).

It has now been made clear what Hayek meant by presenting the idea of spontaneous order and the selective evolution as twin concepts. A spontaneous social order, which is defined by generalised rules to serve multiple ends, is a product of evolution. The emergent rules are reactions to our innate ignorance and local-mindedness in order to reduce uncertainty and promote the mutual correspondence of expectations. Furthermore, existing rules are the result of an adaptative process and cumulative growth. They contain much

information and knowledge of the past generations' adaptation to their particular environment. And those rules that serve group success would be kept and prevail, the process of which falls beyond individual horizons. For Hayek, the key index of group success is population growth, which is induced usually by the attraction of outsiders, thereby the less successful groups would gradually decline and the successful ones would survive and prosper. In general, Hayek maintained that human reason cannot grasp the process of adaptive evolution that is based on a "non-deliberative functionalism" (C. Smith 2006, 125) in that human beings do not understand the utility of the rules that they observe and why some such rules help their group succeed. In turn, the formation of social order is spontaneous – it is a result of human actions without direct human design.

### *3. Hayek's Motif and Smith's History*

In proposing that selective evolution is the 'twin idea' of spontaneous order, Hayek made it clear that the formation and origins of social order are unintended and that group selection is the central tenet of this evolutionary process: spontaneous order is a "self-maintaining whole" (Hayek 2011, 131), and human reason plays little role in the evolutionary process. After clarifying this point, this section draws upon some critical evaluations of Hayek's evolutionism. In so doing, we shall see that Hayek's idea of cultural evolution encounters difficulties in explaining the history of human civilisation. Particularly important for this thesis is that such difficulties, as we shall see, become more easily identified in the light of Smith's historical accounts.

Hayek's notion of selective evolution as the key mechanism of the formation of social institutions that uphold the "Great Society" stimulated much controversy. Despite many scholars having acknowledged the importance of the conception of selective evolution to

Hayek's theory, several have raised doubts about whether the evolutionary aspect is an essential part of the theory of spontaneous order, for it seems "sketchy", "unfinished" and "bizarre" (Steele 1987, 172; Hodgson 1993, 153; Witt 1994, 187; cf. Barry 1982, 35; Gray 1988a, 57–58; Petsoulas 2001, 32–33). One of the key confusions was actually showcased by Hayek himself. According to Hayek, the evolution of rules of conduct works through a group-level selection in accordance with their effects on the maintenance of the social order and collective survival. However, the transmission of rules "takes place from *individual to individual*" (Hayek 1967, 67). New rules evolve by individuals' adoption and learning, even though, as Hayek contended, it is group selection that decides which rules to be kept in use. As Ulrich Witt noted, if the criterion of selective evolution is group success, there remains in Hayek's theory a "missing link between the population-orientated perspective and the individualistic approach" (Witt 1994, 185). Viktor Vanberg more explicitly contends that "[w]hatever the between-group advantages may be, group-beneficial behavioral regularities cannot be expected to spread and to be maintained, unless conditions prevail within the group that make it advantageous to the individuals themselves to act accordingly" (Vanberg 1986, 88). For Vanberg, Hayek's theory seems quite unfinished in terms of individuals' motives, intentions, and psychology to adopt new practices that could be congenial to group survival.

Vanberg is especially concerned with the free-riding problem in Hayek's theoretical framework i.e., that when our private interest contradicts public benefits, we would not adopt the practices that promote collective prosperity, which raises doubt as to how those practices congenial to group success would prevail (Vanberg 1986). However, as Craig Smith has noted, this problem can be resolved within Hayek's theory. As human rationality is rule-bounded, it does not exist in a vacuum, but is *already* bound by human sociability before new practices arise. In such cases, if rules are not chosen according to the abstract rational self-interest and that the groups are supported by rules that limit free-riding, then the free-riding

problem seems easily solved. Indeed as Craig Smith argued, in Hayek's theory, "[s]ociability itself, as well as being the basis for the generation of cultural rules, is the glue that allows group advantages to exist" (C. Smith 2006, 128). In this perspective the free-riding problem seems not to be an obstacle that can inhibit the entire social system, since for Hayek human reason mostly works *together with* the evolutionary process, rather than against it.

Indeed, Craig Smith is right that Hayek's theory of evolution has highlighted the working scope of human deliberation bound by social rules. It is noteworthy that Hayek repeatedly defended that the *origin* of social institutions as unintended. But he admitted that we could deliberately "assist" and "supplement" the operation of spontaneous order (Hayek 2007, 71; cf. Jacobs 2000, 53).<sup>15</sup> Such deliberative interventions are "consistently adhering to certain principles through a process of evolution" (Hayek 1973, 60), and "all our efforts to improve things must operate within a working whole" (Hayek 2011, 131). In such cases, Hayek envisaged that the task of our reason is to get to know the overriding principle and spontaneous forces that support the "self-maintaining whole" as completely as possible, and then working with it rather than against it (Hayek 2011, 131). Just like a gardener, a reformer will try to understand the "structure" of society and how it functions (Hayek 2007, 71), and he reforms by improving the internal consistency of rules, without knowing the social utility they serve, not to mention disrupting their operation (Hayek 1973, 118-119). This is what Hayek referred to as the approach of "immanent criticism" (Hayek 1973, 118; 1976, 24-27).

Thus for Hayek the reformer as such is an organic part of evolution (Hayek 1973, 119). In this respect, Hayek often took the constitutional and legal history of Anglo-American society as an example for the spontaneous growth of human institutions. By reviewing

---

<sup>15</sup> Though some scholars thus contend that we should not wrongly presume that human reason plays no role in Hayek's theory of spontaneous order (Boettke 1990), for others, Hayek's permission of artificial alteration of rules constitutes a serious inconsistency of Hayek's spontaneous order theory (Sandefur 2009). Many others even contend that the scope of reason and cognition prescribed by Hayek is too minimal, timid, and thereby unrealistic (Posner 2005). This is discussed further in Chapters 1 and 2.

Edward Coke's and Matthew Hale's legal history, Hayek contended that the English common law system is a spontaneous order. In this particular case, "law was...regarded as something given independently of human will, something to be discovered, not made" (Hayek, 1973, 83). Hayek quoted Hale's point that "long experience" is far superior to the wisdom of the "wisest council of men" (Hayek 2011, 114). The common law precedents were accumulated by people's "fumbling efforts" to deal with unforeseen inconveniences in the past (Hayek 2011, 115). Just as the early customary law, common law judges never make new laws. When facing unforeseen challenges, they judge according to the principle of *stare decisis*, that is, a rigid obedience to the old rules in the archaic precedents. Laws did change over time. But the evolution of common law was based on judges' application of the existing principles to the new world, while the whole body of laws was not a product of deliberate design. Hayek maintained that it was exactly such a legal theory that gave rise to the social theory that "purposive institutions might grow up which owed little to design, which were not invented but arose from the separate actions of many men who did not know what they were doing" (Hayek 2011, 115). This rigorous attachment to some given principles and the spontaneous growth of institutions further extended to the evolution of the Anglo-American constitutional framework. Hayek proposed that the major contribution made by Anglophone liberalism to the idea of the rule of law was the stance that people are tradition-bound and that the sovereign prerogative cannot intrude upon the long-standing fundamental prescriptions such as Magna Carta in England and the Mayflower Compact in America. In this case, the fundamental constitutions were often in unwritten form. They were constellations of conventions constantly affirmed and adapted to the newly arising problem situations (Hayek 2011, 273), while no drastic revolution ever destroyed the constitution structure and built a new one out of nothing.

Apart from Hayek's reliance on Scottish philosophy and biological theory, his attitude to law-making and his explanation of legal evolution come close to a Whiggish account of English laws: that the English constitution and common law system are insular and seamless conventions, and their origins can be traced back to customary ways of living since time immemorial. Accordingly, this Whiggish idea suggests that the English constitution had never been displaced by sovereign prerogative and violent political shocks – such as the Norman Conquest. However, this idea now has been proven to be more ideological than factually true (Goldie 2019).<sup>16</sup> It is thus questionable whether Hayek's explanation of English legal-constitutional history as a spontaneous growth, and his downplaying the role of individual rationality and kingly power in shaping the growth of the common law accurately reflects the historical record (Hamowy 2003; Luban 2020). Indeed, as Witt noted, “evolution presupposes some kind of continuity” (Witt 1994, 184; cf. Berry 1997, 198). What Witt noted as Hayek's explanatory feature is explicit in the abovementioned legal-constitutional history. Social evolution works by passing on rules that prove beneficial to group prosperity from generations to generations. Although Hayek did allow the changeability of rules of conduct, since rules *evolve* as new situations arise and new experience is absorbed, the problem is that the evolutionary account does not easily fit into history, in which drastic revolutions and violent displacements clearly occur.

Geoffrey Hodgson thus keenly noted that “[i]f variety was unconstrained, new occurrences, recombinations or ‘mutations’ could lead to a disruption of the spontaneous order” (Hodgson 2004, 296). Hayek may have sacrificed too many capacities of human deliberations, such as utility calculations and systematic modifications, other than those that aim only to apply and repair the existing rules to secure the *continuity, spontaneity* and

---

<sup>16</sup> Hayek saw himself a “Burkean Whig” and “unrepentant Old Whig” (Hayek 1994, 125; 2011, 531). More details on the Whig interpretation of English history as well as the common law mind, which Hayek in fact relied upon, will be presented in Chapter 2.

*evolution* of social order. Even though he was probably right that such systematic plannings often fail, such deliberations are not unworthy of being seriously treated in social evolution, or that they must be something exogenous and antithetical to the evolution itself. As Witt contends, the fact that it is at the group level that changes and modifications are winnowed does not mean that “deliberate change founded on reason and reflection” can be “rejected *per se*” in Hayek’s theory of selective evolution (Witt 1994, 186).

Furthermore, scholars have also noted that it is not just the scope of human reason that has been severely restrained by Hayek, but many other aspects of human nature have also been insufficiently analysed in his theory. A frequently mentioned problem is that violence, which has been so widespread in human history, cannot be easily incorporated into Hayek’s evolutionism. Hayek’s delineation of the general path of the emergence of market society was especially noticeable here. Indeed, for Hayek the rise of market order was derived from “relaxation of prohibitions”. Social rules only negatively delimit people’s behavioural scope, and some infringement of the custom would happen to make sure new practices emerge. As Hayek noted,

There can be little doubt that from the toleration of bartering with the outsider, the recognition of delimited private property, especially in land, the enforcement of contractual obligations, the competition with fellow craftsmen in the same trade, the variability of initially customary prices, the lending of money, particularly at interest, were all initially infringements of customary rules – so many falls from grace (Hayek 1979, 161).

However, it is hard to explain the constant violence in destroying the civilised nations in the past, and military-political violence as the precondition of European overseas commercial empire, for example. For Hayek,

Although the displacement of one group by another, and of one set of practices by another, has often been bloody, it does not need always to be so...In some places invaded, as it were, by the extended order, those following new practices, who could extract more from the given land, would often be able to offer other occupants, in return for access to their land (without the occupants having to do any work at all, and without the ‘invaders’ having to use force),

nearly as much as, and sometimes even more than, these occupants had obtained by hard toil (Hayek 1988, 121).

As Beck noted, Hayek tended to relegate constant international warfare as mere “momentary disputes” (Hayek 1988, 138) in historical sequences and insisted that the evolution of the market largely worked in a peaceful manner, which is difficult to reconcile with the actual historical record (Beck 2018, 108-109). However, not only did Hayek fail to adequately focus on the role of many individual calculations as well as the impact of violent exogenous shocks, in terms of the idea of group selection (which proposed that the selection was determined by what social functions rules can serve rather than individual preferences) others have further noted that there are many practices that tend to be economically inefficient, thereby serving poor social functions, and yet which persist in human history. For instance, Timothy Sandefur argues that slavery is such an example of an intransigent economically inefficient practice, and should be regarded as a “spontaneous generated injustice” (Sandefur 2009; cf. Martin and Storr 2008, Schwarze and Scott 2015): people come up with different ways to defend the practices of slavery, to eliminate the internal inconsistency of slave laws, in order to treat slaves more like private property. Therefore, not only is it the case that spontaneous evolution cannot guarantee that a free society emerges, Hayek’s idea of group selection meets difficulties in understanding the survival of some institutions that have survived for a long time, even though they are not beneficial to population expansion.

It is in exactly this respect that Smith’s analysis significantly diverges from Hayek’s approach. Smith’s analysis of the evolution of slavery will be treated at length in Chapter 5. Here it suffices to note that, in general, as Daniel Luban also points out, Smith observed that even though slavery is economically unattractive, people’s deeply rooted natural love of domination motivates them to invent, adopt and refine this inhumane practices incessantly (Luban 2012; 2020). While Hayek’s “non-deliberative functionalism” in his spontaneous



order approach suggests that practices such as slavery and infanticide become extinct because they do not well serve social functions anymore, and that individual calculations play little part in their extinction (C. Smith 2006, 129), Smith by contrast noted that even in a commercial nation where markets prevail and prosper, slavery never withers away *spontaneously*. For Smith, “[w]herever the law allows it, and the nature of the work can afford it...[a man] will generally prefer the service of slaves to that of freemen” (*WN*, III.ii.10). Thus he saw that there have been many rich societies in the past that treated slaves even more severely than primitive societies without being able to or willing to dispense with this institution. The problem of slavery showed, for Smith, that individual calculations do make a difference in the development of social rules, and the collective-level group selection cannot easily explain the disappearance of some social rules.

As we have seen, Hayek’s spontaneous order prescribes that no human wisdom could actually trump the endogenous direction of social progress, and that the development of civilisation was a spontaneous, and thus self-regenerative process. For him, the origin of social order must thus be unarticulated and undesigned. Just as Beck noticed, Hayek wanted to correct the long-standing bias that gives more priority to human government as the central agency of historical progress (Hayek 1988, 33), and it was clear that Hayek had genuine historical concerns (Beck 2018, 108). Likewise, Smith also attempted to delineate the origin of modern society. Throughout his published works and lectures, he painstakingly explored the formation of the key institutions of “modern liberty” that upheld freedom, civility and prosperity. Such a society is of immense complexity riveted by sophisticated constitutional balance, state institutions to enforce civil liberty, and a vast network of the division of labour and economic exchange. In *Lectures on Jurisprudence* (henceforth *LJ*), Smith expressed his deep concern about the nature and origins of modern liberty, which was exemplified by the British political system. Smith also composed an original analysis of the decay of ancient

civilisation and the emergence of modern commercial society, the latter of which developed into an “unnatural and retrograde order” (*WN*, III.i.9). Undoubtedly, Smith was very attentive to the complex historical process in which unintended consequences contributed to the formation of social order.

The problem is that there is something in Smith’s writings that sits oddly with the conception of spontaneous order. And such oddity, as I will later suggest, does not simply exist in his disagreement with Hayek about the curious disappearance of some practices such as slavery. Smith stressed that something deeply abnormal transpired before the formation of the modern social order. While both the natural path of progress and the “unnatural and retrograde order” can be seen as a kind of evolution, full of unintended consequences beyond the preconceptions of human agency, Smith clearly distinguished the unnaturalness of modern liberty from the ordinary course of social progress, which suggested that modern liberty was a highly contingent composite, and cannot be simply regarded as a result of spontaneous growth. Human actions not only help form an order from within, but even destroyed the natural growth of human civilisation and set in motion a whole new trajectory from outside, which is the crucial backdrop of modern European civilisation. This thesis aims to uncover Smith’s historical account of the emergence of modern liberal society. In so doing, it also compares Smith’s social explanation with the Hayekian spontaneous order theory, in order to show that Smith provided different insights on the nature of social progress than those that Hayek suggested.

#### *4. Overview of Chapters*

In providing an account that deals with many aspects of institutional evolution that both Hayek and Smith shared, including the English constitution, the common law system, and the

mechanism of economic progress, this thesis aims to uncover Smith's insights about the growth of modern European civilisation, which differed from Hayek's spontaneous evolutionism, especially on their divergent opinions of the role of reason and designing ambitions in human history.

Chapter 1 elaborates how and why Hayek developed the idea of spontaneous order and social evolution and some problems it faced in explaining societal changes. I start from Hayek's attempt to counter central planning systems and his discovery that unintended consequences can induce an aggregate result far better than would be expected in advance, and that it is owing to our essential epistemological limits that we must rely on rules to generate an overall social order. For Hayek, spontaneous order thus induced, and epitomised by the market order, ultimately promotes general welfare. However, Hayek also flirted with state intervention and government coercion to ensure that the social order could function well. In so doing Hayek blurred the very distinction between spontaneous order and made order, which urged him to articulate the unintended origin of social order. I thus turn to Hayek's evolutionary account of social institutions. Importantly, while society incessantly evolves regardless of individual motives, social members remain ignorant of the utility of social rules. The scope of social mutations, in Hayek's eyes, were also quite limited, which encapsulated people's tentative experimentations and imitative learning without much deliberation. Only group survival can decide which practices can be preserved and prevail. Although Hayek claimed Scottish Enlightenment historiography as an ally of his spontaneous evolutionism, such a non-deliberative functionalism, while undercutting the role of many forces in human nature such as such as rational deliberation, violent displacement, and drastic ambition, does not coincide with Smith's original insight on social progress. I thus conclude that by focusing on Smith's thought, we can shed light upon how Hayek's evolutionary account is more

unique than he claimed, and has less in common with Smith's writings than Hayek himself seemed to believe and certainly claimed.

As Hayek took the common law system and growth of English constitution as examples of spontaneous order, Chapter 2 and Chapter 3 examine Smith's historical account of English liberty to reveal Smith's divergence from Hayek's thought. In Chapter 2, I show that Hayek appealed to a Whiggish historiography to highlight the non-revolutionary character of the English constitution, but argue that he failed to acknowledge Smith's sceptical views regarding precisely such a Whiggish standpoint. Notably, Smith identified several revolutions of political principles throughout English history, thus denying the continuity of the English constitution. Regarding the growth of the common law, Smith contended that as feudalism was transplanted by the Norman Conquest from the European continent, the common law system was designed from the top to regulate the disputes around feudal tenure, which was institutionalised later under the supervision of sovereignty. Finally, Smith saw that the common law system was in need of remedies, which could hardly be provided simply by "immanent criticism" such as the use of legal fictions. Although Hayek often defended the immemorial wisdom within the system, Smith posed serious challenges to this stance and pointed to the limits of spontaneous adaptation in coping with newly arising cases, especially many unforeseen disputes around the performance of contract. The Chancery Court thus played an important role in deciding these new cases, and the reform of the Chancery was also indebted to sovereignty's intentional manoeuvring – facts of history that do now square well with Hayek's spontaneous order account but which Smith makes primary.

In Chapter 3, I show that Smith's contention further extended to the nature of the Revolution Settlement of 1688, which was taken as the keystone of modern English liberty and an example of spontaneous order. In stark opposition to Hayek's Whiggish account of the Glorious Revolution as a restoration of a fundamental convention without creating something

meaningfully unprecedented, Smith believed that the Revolution Settlement was based on entirely new principles and parliament's intentional and prudential alteration of the line of royal succession played an important role in settling political disputes. Chapter 3 also sheds new light on Smith's critique of social contract theory. Whilst Smith and Hayek both built their analyses upon their opposition to contract theory, their respective diagnoses of the problems of social contract theory diverged from each other. I argue that such different evaluations of contract theory are rooted in their different historical expositions. Especially important is that Smith identified the importance of law-making and sovereign interventions in the formation of English liberty. For Hayek, the danger of contract theory consisted in its revolutionary urge to intentionally change old laws as the key to liberty. Conversely, for Smith, as the Glorious Revolution was owing to explicit alteration, the idea of fundamental law is close to the Lockean-Whiggish contract theory, which denied the legitimacy of parliamentary alteration and thus inflamed the spirit to resist established government.

Chapter 4 turns to Smith's analysis of economic development in modern Europe, which highlighted the crucial role of artificial political designs. For Hayek, the growth of civilisation is unintended, based on a concomitant and spontaneous evolution between the division of labour and the expansion of the market and demographic scale. Notably, although Smith is known for his observation of the unintended benign consequence of commercial luxury insofar as this eventually helped to dismantle the feudal structure so as to induce social changes, this chapter suggests that the collapse of feudalism and the rise of the middling ranks in modern Europe was not a spontaneous process, in that overall political designs were crucial to understanding the unanticipated growth of modern Europe. Smith noticed the great instability of the urban economy under the feudal institutions, because of the precarity of capital investment to lands, which had already been enclosed by feudal lords. The reason why commerce could break the recalcitrant feudal equilibrium was related to the particular

political structure in the late Middle Ages, when European princes became increasingly powerful allies with the burghers, in order to subdue the landed gentry. Therefore, Smith did not evade the fact that state actions to reform legal protections and encourage the commercialisation of agriculture made a difference in social progress. The fact that Smith actually embraced flexible state actions and artificial designs to overcome social stagnation and trigger social progress can be further vindicated by his analysis of the economic status of Highland society.

Chapter 5 turns to the problem of slavery. According to Smith, the human love of domination is natural and unrepentant, as a result of which slavery was universally established in human society. This observation challenges Hayek's spontaneous order theory in that a perverse institution spontaneously grows and becomes entrenched rather than being outcompeted and fading away. In turn, Smith argued that the abrogation of slavery in the "small corner of Europe" did not result from the spontaneous growth of human institution, but should be seen as a curious event that involved many unforeseen social forces reversing the ordinary course of social development. To understand why this is so, I will focus on Smith's account of the evolution of slavery since the beginning of human society, why it tended to be strengthened in commercial societies and how both republican and monarchical government failed to abolish this system. By contrast, the case of modern Europe is very unusual. In the particularly fragmented political landscape of medieval Europe, princes, unlike those legislators in ancient democracies, were ambitiously trying to destroy feudal lordship by emancipating the slave-like tenants and burghers. In addition, the kingly power found allies in the church, who also aimed to degrade the political authority of the landed nobility. This particular historical circumstance rendered the European legislators both intentional and able to free slave labour - but on Smith's telling this occurrence was far from spontaneous or free of purposive rational design.

Based on the reconstruction of Smith's historical account, the concluding chapter explains how Hayek's argument that Smith pre-empted the kernel of his own approach of spontaneous order and selective evolution is misleading. There is no doubt that Smith provided an engaged analysis of the growth of modern liberty. But for him, the evolution of some key institutions that uphold modern liberty is not as spontaneous as Hayek maintains. On the one hand, although both Smith and Hayek noticed the great importance of unintended consequences in the unfolding of human history, Hayek maintained that civilisation grows by our rule-following behaviour, which collectively formed an orderly equilibrium. But what Smith points out is that there were undeniable political interventions and revolutions that uprooted existing socio-political principles and further paved the way for progress, especially in the case of English laws and constitutions. In this case Smith suggests there are hardly any intact "foundations", i.e., custom, tradition and fundamental practices, that can be regarded as the "bases of a free civilisation". On the other hand, Smith's history also uncovered some deeply unnerving problems, in that violent institutions such as slavery rooted in human nature grow almost without remedy everywhere, thus becoming a highly spontaneous product. In Smith's account, human agency can do more than merely refining old rules, applying the old rules to new cases, or waiting for "relaxations of prohibitions". Rather, it can change the essence of the rules, abandon and topple the old rules, and design new rules which were non-existent without considering anything about whether their consistency with the old institutional context has been ensured. As such, Smith provided a more balanced historical account of modern civilisation than Hayek did by incorporating our rule-following behaviour as well as conquest, violence, rational design, and truly unpredictable shocks, in order to explain the crooked path that European civilisation took to arrive at modernity.

## CHAPTER 1: F. A. HAYEK'S THEORY OF SPONTANEOUS ORDER AND CULTURAL EVOLUTION

This chapter examines how Hayek's attempt to use spontaneous order as a conceptual device in the service of social theorisation plays out. Hayek started with a polemical debate with those who, as he saw it, promoted a consciously designed central planning system. Therefore, he appealed to the unintended aggregate consequences of myriad individual actions, which constitute the spontaneous order. To further combat the doctrine of central planning and constructivist rationalism, Hayek emphasised our essential epistemological limits and the beneficial nature of spontaneous order. Particularly noteworthy is that we gradually identify some theoretical ambiguities in Hayek's work - especially in terms of his flirting with the idea of state interventions and institutional mechanisms to make the spontaneous social order function well. This chapter further argues that this is why Hayek's spontaneous order theory must amount to a social theory, focusing on *factually* describing the mechanism and origin of social order. Hayek, accordingly, developed his theory of cultural evolution to explain how social order emerges and evolves without human design. Finally, I will explain in what ways the Scottish thinkers, especially Smith, differ from Hayek's theory of spontaneous order. What is particularly important is that in order to maintain the unintended and purpose-free origin of social rules, Hayek's evolutionary model of social progress downplayed many important forces of human nature, which were by contrast keenly noted by Smith in particular as the important constitutive elements of social order. Although Hayek and Smith would both agree that some important social institutions are key to human freedom, their expositions of the origin of such institutions mark their major theoretical divergence.

### 1. *Why Unintended? Hayek's Debate*



Hayek was impressed by the aggregate unintended consequences of human actions. Correspondingly, he doubted the power of human reason to consciously design a social system. This epistemological suspicion that our intentional design often results in perversity leads to his recommendation of humility. Hayek has been considered as “restating” the principle of classical liberalism and fending off socialism (Gray 1984; Kukathas 1990), particularly in terms of its “great pride and ambition” or the “colossal presumption” of contemporary socialists to consciously, intentionally, rationally and exogenously impose a system of collectivist economic planning (Hayek 2011, 56; 1967, 90).<sup>17</sup> He was deeply involved in a contemporary debate with socialist economists such as Oscar Lange. For Hayek, socialist economic planning is characterised by a philosophical conceit which falsely believes that human beings can consciously and successfully design and introduce order to a large-scale social milieu. While criticising the almost inexorable perversity that can be generated by a top-down central planning authority, Hayek thought that we should reflect on the spontaneous forces of individuals and their resultant order. In developing this argument, Hayek criticised doctrines including socialist calculations, central planning, “constructivist rationalism” and “false individualism”. Hayek observed that

For more than half a century the belief that deliberate regulation of all social affairs must necessarily be more successful than the apparent haphazard interplay of independent individuals has continuously gained ground until today there is hardly a political group anywhere in the world which does not want central direction of most human activities in the service of one aim or another. It seemed so easy to improve upon the institutions of a free society which had come more and more to be considered as the result of mere accident, the product of a peculiar historical growth which might as well have taken a different direction. To bring order to such a chaos, to apply reason to the organization of society, and to shape it deliberately in every detail according to human wishes and the common ideas of justice seemed the only course of action worthy of a rational being (Hayek 1948, 119).

---

<sup>17</sup> For an account of the socialist calculation debate involving the Austrian, neo-classical and the socialist economists, see Lavoie 1985; O’Neill 1996, 431-442.

Hayek was unequivocally against the belief that a deliberate design of social order can successfully introduce order to disorder, coordination to disarray, cooperation to disharmony. For him, the central planning system is unworkable in principle as it excludes the price system and the “spontaneous forces” (Hayek 1948, 120), or the spontaneous “tendency towards equilibrium” (Hayek 1948, 45), and ignores the fact that the knowledge necessary for the operation of society is that of “the particular, of the fleeting circumstances of the moment and of local conditions, which will never exist otherwise than dispersed among many people” (Hayek 1964, 98). The highly dispersed, innumerable and particular circumstances only allow ordinary people’s individual adjustment in their day-to-day practical activities in order to sustain a complex society. In its essence, the dispersed knowledge which individuals accumulate and develop within their local situations is practically impossible to be centralised not only due to its large volume, but also due to the fact that the dispersed knowledge is momentary, temporary and only effective within the local circumstances. It can, as a matter of necessity, never be collected and generalised.

Due to the fact that a large-scale society is so complex that its operation is beyond men’s mental capacity, therefore the commander of a central planning system with equally limited knowledge can never be knowledgeable enough to direct everyone’s interests and needs. The factual social complexity indicates that we should rely on a spontaneous market order to let individuals utilise their dispersed local knowledge rather than exclusively rely on the central authority. The superiority of a spontaneous social order to a centrally constructed one lies in the former’s capacity to accommodate and utilise the local knowledge of individuals. Hayek obviously had the market order in mind, which, according to him, operates with a price mechanism. A market order allows human agents to constantly judge their situation and adjust their actions for their own purposes with the free flow of price information. Thus market competition is in fact a process of discovery. By virtue of their

localised knowledge and imperfect information, individuals' adjustments are ever-changing and ever-dynamic. In this constant trial-and-error process, individuals with their entrepreneurial spirit must be alert to, and adapt to, the real situations, and change their strategies for profit by reference to price signals.

Hayek's debates were not confined to contemporary economic and social issues. He also made efforts to link his political and social thought with the great minds of history. Hayek famously divided the genealogy of individualism and liberalism into two traditions, Anglophone and Continental, only the former of which he admired. The Anglophone tradition includes thinkers such as John Locke, Bernard Mandeville, David Hume, Josiah Tucker, Adam Smith, Adam Ferguson, Edmund Burke, Lord Acton, and those whom Hayek designates Anglophiles, such as Montesquieu and Alexis de Tocqueville. Meanwhile, he reproached Descartes, Hobbes, the Encyclopaedists, Rousseau, the Physiocrats, Jeremy Bentham, John Stuart Mill, socialists, and German thinkers such as Goethe and Wilhelm von Humboldt, whose thoughts are seen as belonging to the Continental tradition. Hayek discovered in the Anglophone tradition the idea that the complex social order is not consciously designed by any human agent, but is unintentionally constituted by myriad individuals' participations with divergent ends. For Hayek, Hume's idea of tacit convention, Smith's renowned trope of the "invisible hand", and Ferguson's statement that "nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design" are precise depictions of spontaneous orders (Ferguson 1995, 119). By contrast, Hayek's attitude towards continental liberalism is unambivalently negative. He viewed this strand as a philosophical conceit to rationally devise the social order, one that usually brings about perversity and unanticipated disasters, eventually culminating in the twentieth century totalitarian regimes.

Hayek also referred to the division between anglophone and continental intellectual traditions as a division between “true individualism” and “false individualism”. In his essay, “Individualism: True and False”, Hayek made it explicit that the extreme pride of false individualism leads to its wrong exaggeration of the capacity of human reason to design the social whole. He proposed that the complex society should not be taken as “entities *sui generis* which exist independently of the individuals which compose them” (Hayek 1948, 6). He insisted on theorising society through “our understanding of individual actions directed toward other people and guided by their expected behavior” (Hayek 1948, 6). This methodological subjectivism corresponds to his adumbration of spontaneous order as a process of discovery and constant dynamic adjustment. If this description is correct, in no way can any single individual design and control the social process without utilising the highly dispersed knowledge and the people’s pragmatic strategies facing particular ever-changing circumstances. The design theory must, therefore, be flawed. Hayek even denounced thinkers like Goethe and Humboldt as examples of “false individualism”. According to Hayek, true individualism accepts the “spontaneous and uncontrolled”, and tends to support a decentralised open society, while German thinkers like Goethe, Humboldt, and even English political theorists such as John Stuart Mill, endorse a false version of individualism as they are much too immersed in a “cult” of the “original personality” (Hayek 1948, 26), which Hayek believed is responsible for the ensuing development of German totalitarianism.<sup>18</sup>

Obviously, Hayek’s concept of spontaneous order consists of two elements, “spontaneity” and “order”. After revisiting Hayek’s standpoint in his philosophical debate, we

---

<sup>18</sup> Hayek’s attack on the “original personality” and emphasis on submission and rule-following is relevant to his suspicion of democracy. See Hayek 1979, 1-19. This suspicion of democracy and his attempt to dethrone politics, as Jessica Whyte points out, are detached from Adam Ferguson’s republicanism. See Whyte 2019. Jan-Werner Müller thinks that this suspicion, which can be identified in many intellectuals in the 20<sup>th</sup> century, is probably due to the influence of J. L. Talmon’s renowned book *The Origins of Totalitarian Democracy*. See Müller 2015.

can now understand what Hayek means by the concept of spontaneity. Spontaneity stands as a third category different than the “natural” and the “artificial”. A spontaneous social order is not a natural product as it is by the engagement of human actions that such an order is formed. But neither can the spontaneous social order be seen as a purely artificial project as it is not a result of conscious human design and planning. What deeply concerned Hayek was the improper confidence of human reason founded in continental liberalism, collective planning, and totalitarianism. Hayek made a distinction between spontaneous order and made order, *cosmos* and *taxis*, *nomos* and *thesis*, unintended and conscious, and reproaches rational planning and exogenous construction. For him, the constructed order is consciously made while the spontaneous order is unintended. Those “spontaneous” and “uncontrolled” forces run against our urge to control and our intentions to design.

As we shall see, Hayek insisted that the broader customary and moral context are the result of cumulative growth, which eventually formed a large knowledge stock which is ungraspable to anyone. Social norms are abstract and impersonal. We know them only partially, and we can count on them “only if we observe those norms” (Hayek 1967, 80). On Hayek’s account, even those improvements seemingly guided by human reason should be indebted to traditional rules, for our rationality is always cultivated by existing customary conventions.

If modern man finds that his inborn instincts do not always lead him in the right direction, he at least flatters himself that it was his reason which made him recognize that a different kind of conduct will serve his innate values better. The conception that man has, in the service of his innate desires, consciously constructed an order of society is, however, erroneous, because without the cultural evolution which lies between instinct and the capacity of rational design he would not have possessed the reason which now makes him try to do so (Hayek 1979, 162).

Thus, countering the socialist collectivist ambition to rationally design the social order, Hayek recommended “humility toward the processes by which mankind has achieved things which

have not been designed or understood by any individual and are indeed greater than individual minds” (Hayek 1948, 32). For him, our rational and purposeful design is often misleading and leads to perverse effects. If our conscious efforts often fail and distort themselves, it is recommendable that we rely on the spontaneous forces of our social actions to ensure the beneficial result. However, it is necessary for Hayek to prove that the spontaneous order can actually bring about advantages intended by no one. The questions that arises are therefore: How could one use Hayek’s theory to understand the hidden order behind highly complicated social phenomena? And how is this order more advantageous than a constructed one?

## *2. Spontaneous Order: Rule-following, Cooperation and Self-Regulation*

Hayek anchored his social theory in “the discovery that there exist orderly structures which are the product of the action of many men but are not the result of human design” (Hayek 1973, 37). Indeed, if the orderliness of human society is merely a deliberately designed product, there is no point in social scientists exploring how they operate and evolve, as they are an immediate outcome of a given blueprint. Therefore the idea of spontaneous order is first and foremost based on the observation that there exists a gap between human intentions and the aggregate consequences of their activities. Social orderliness, which to the layman seems to be an artefact of some all-encompassing omniscient projector’s plan, is misleading in this regard. Hayek further drew upon studies on numerous human institutions, including language, morality, markets, money, and the overall social order, which are not intended by a legislator nor the result of a conscious, contractual agreement by, nor some planned project of, social members, but are instead spontaneous products formed by countless human actions. But how can we understand the orderliness behind the diverse and complicated social phenomena? Above all, what is an order in Hayek’s sense?

As many interpreters have noticed, in defining the term, “order”, Hayek flirted with at least two meanings — regularity and cooperation (cf. Elster 1989, 1; Petsoulas 2001; Luban 2020). According to Hayek, an order is a “state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correct” (Hayek 1973, 36). Hayek went on to suggest that in every society there must exist such an order, “consistency” or “constancy”. He further referred to a natural phenomenon to unpack this idea as he took the example of the physics experiment of iron filings on a sheet of paper with a magnet placed below. The iron filings can “arrange themselves” with the help of the magnetic force and we can predict the “general shape of the chains” of those filings. Another example is the chemical compound which has a predictable and recognisable structure (Hayek 1973, 39-40). These natural orders discovered from the seemingly chaotic elements, such as numerous iron filings and atoms, are highly regularised and predictable. And in such cases an order mainly signifies a certain pattern or predictability.

In terms of a spontaneous social order, Hayek also described this as a behavioural pattern that follows “certain rules of conduct” (Hayek 1973, 43). With numerous individuals’ expectations at hand, a society can only sustain itself by a “matching” or a “correspondence” of the intentions and expectations. For Hayek, “...regularity... means simply that the elements behave according to rules” (Hayek 1973, 43). So far Hayek focused on the dimension of order as a sort of regularity and predictability. And something that presents itself as an order simply means that it is rule-following. As we saw, Hayek characterised large-scale modern society as full of complexities and unpredictability. The general rules of just conduct enable myriad human expectations and actions to coordinate, thereby substantively reducing unpredictability if their behaviours are rule-guided. The very definition

of order as a state of multiple social actors behaving according to some rules, and thus representing some regularity and a recognisable pattern, also indicates that it is exactly from the obedience to rules of conduct that the spontaneous order is derived. And the spontaneous social order, as a theoretically identifiable pattern, is characterised by what kind of rules it adheres to just as market society is characterised by the rules of “private property, tort and contract”. From the fact that “people acting within the rules of the law of property, tort and contract” derives the spontaneous economic order (Hayek 1976, 109).

According to Hayek, there are several characteristics of the rules in a spontaneous social order. First, they are negative. By “negative”, Hayek means that the general rules “prohibit rather than enjoin particular kinds of actions” (Hayek 1976, 36). Rules do not assign specific actions to each individual, but only delimit the boundaries of the realms of their actions, thereby allowing free choices and the possibility of individuals to utilise their dispersed knowledge as much as possible. In this sense, rules stand in stark contrast to commands, which assign the social members specific courses of action and impose particular duties to individuals. Second, the rules are purpose-free. To obey some general social rules does not lead us to act for a specific end. This is again based on Hayek’s critique of the purpose-oriented and rational feature of central planning systems. Hayek believes that an organisation, originally designed and planned by some agent, is thus in service of some specific goal. Social rules, however, never propose specific aims for their participants. Entrepreneurs, for example, can pursue multiple ends within the bounds set by the rules issued by the state. And the rules can “never fully determine a particular action but only limit the range of permitted kinds of action and leave the decision on the particular action to be taken by the actor in the light of his ends” (Hayek 1973, 37).<sup>19</sup> Finally, rules are abstract. As

---

<sup>19</sup> Roland Kley has noticed that the negativity and end-independence of rules are deduced mainly from the rules of private property. However, for Hayek, the rules of just conduct in a market society also include the rules of tort and contract, which not only disallows certain actions but also institute some standardised ways of transacting (Kley 1994, 76-77). In this sense they are not negative on Hayek’s account. Hayek’s idea of rules is



with the laws we find in physics, the overall pattern of iron filings can be theoretically reconstructed, but the specific positions of each piece cannot be foreseen. The abstractness of rules indicates that this does not apply merely to a particular and concrete situation, but “apply to an unknown number of future instances” (Hayek 1973, 35). The abstract rules also determine the abstract character of the spontaneous order formed by such rules, and the details — the specific positions and circumstances of each individual element — are left unknown (Hayek 1967, 92).

However, the idea of a behavioural pattern for Hayek is much broader than the idea of social order as found in common usage. Many human actions represent some regularity and structure in political struggles and social disharmony. For instance, Niccolò Machiavelli in his *Discourses on Livy* depicts the frequent conflicts between the patricians’ disposition to dominate and the plebeians’ pursuit of equality, which is also a recurring theme in political history. Indeed, we can repeatedly identify the same regularity from political power struggles, but in general this regularity is not regarded as a social order. No wonder, therefore, that Hayek also presented a narrower definition of order than a rule-following regularity. He observed that “not every regularity in the behaviour of the elements does secure an overall order. Some rules governing individual behaviour might clearly make altogether impossible the formation of an overall order” (Hayek 1973, 44). Hayek again started from an example of physical science, in this case the second law of thermodynamics, which signifies perfect disorder and chaos. And Hayek also saw the possibility that certain rule-following regularity only leads to disorder. He wrote, “If the rule were that any individual should try to kill any

---

also slightly different than Smith’s, who divided the right to property and the right from contract into two categories, *ius in re* and *iura personalia*. *Ius in re* also refers to the real rights, the right to a particular thing, the right to “whatever vindicari potest a quocunque possessore” or whatever a man “has a claim to and can take possession of in whatever place or condition he finds it”. For Smith, the right to property, or *dominium*, belongs to this category of *ius in re*. What proceeds from contract, tort or restitution is the personal right, which is claimed against a particular person and thus requests a specific course of action of that particular agent. Apparently, Smithian personal rights are not negative in Hayek’s sense. While people can still make different kinds of contracts concerning different goods, the right of contract does not merely prohibit some actions, but also demand specific actions and re-actions. See *LJ(A)*, i.14-23.

other he encountered, or flee as soon as he saw another, the result would clearly be the complete impossibility of an order in which the activities of the individuals were based on collaboration with others” (Hayek 1973, 44). What Hayek noticed here about disorderly regularity indicates that social order should not be theorised in the same way as a law of physics. It also refers to social collaboration and common interest. Both the rules to kill whoever you meet and to avoid whoever you encounter would lead to the complete collapse of social integration, even though in essence they still represent a structure of social actions and a predictable social pattern. A social agent in this case will predict how the other agent can act according to the rules, just as a man in a Hobbesian state of nature can expect that other people will try to destroy him. But this state can hardly be seen as an “order”. Here, order refers to social cooperation.

Hayek also used the concept of order to specify the idea of equilibrium, which, as we have mentioned, is a dynamic process based on individual adjustment facing particular circumstances within the delimitations of social rules. This dynamism is visible in a spontaneous market order in which individuals adjust their strategies to seek profit based on their local knowledge of the price of commodities. In other words, spontaneous economic order is not a static pattern but a changing process. After multiple rounds of economic activities and mutual exchange, the abstract character of the social order has not been changed since the rules that determine the feature of such an order remain unaltered. In a market society, the rules of property, tort and contract do not determine the specific details, i.e., individuals’ rewards and losses in market transactions, but still prescribe in general how the exchange and transactions can operate.

Consequently, for Hayek, the orderliness of market society resides in our “tendency toward equilibrium” and our spontaneous forces to cooperate, exchange, seek for profit and constantly learn to adapt to the specific situations according to the laws of property, tort and

contract. The rules determine the general working principles of the order and the elements of such an order adjust their ends and actions based on their adherence to the rules. Thus a spontaneous order is self-regulating. The constant adjustments of each individual facing particular situations render the coordination of expectations and social cooperation without external interventions. It is now easier to understand why a spontaneous order is different from a planning system. Hayek criticised the command mechanism of socialist planning, which purposefully imposes duties to individuals and disallows their subjective adjustments. However, to utilise diffuse knowledge and facilitate the individual free choices, they must abide by certain rules, which determine the characters of spontaneous order. The spontaneous forces of individual can induce an “order” since they are accommodated by the general, abstract and universal rules of conduct, which mainly refer to the law of property, tort and contract in spontaneous economic order, so that such dynamism can render a matching and coordination of people’s expectations in daily interaction and mutual feedback. Hayek thereby rejected (what he understood to be) Hobbes’s legal theory that laws are prohibitions of liberty. For him, the rules of spontaneous order coordinate rather than restrain human liberty (Hayek 1973, 52). In general, spontaneous order is characterised by the rules of conduct, and works by the active adaptations of social members, rather than via the giving of conscious and specific commands to each individual.<sup>20</sup>

### *3. Spontaneous Order: Its Beneficial Nature and General Welfare*

---

<sup>20</sup> Hayek also argued that a society is composed of both individuals and organisations, which does not cohere with his claim that the Great Society as a whole should be understood as a spontaneous order. If a Great Society also works with multiple subunits based on commands and conscious coercion, the operating condition of the spontaneous order, i.e., each individual only obeys rules rather than commands, is completely changed. Later we will also see that Hayek even allowed an active role to the state to shape, change and enforce the rules of just conduct in society, which also makes his spontaneous order theory seem incoherent. See Hayek 1973, 46-48.

After reviewing the definition of spontaneous order, its character and the rules of conduct, we should turn our focus to how such an order can be superior to a central planning system. Hayek made a stronger point by contending that “if *left free*, men will often achieve more than individual human reason could design or foresee” (Hayek 1948, 10-11. Italics added). This claim indicates that the aggregate consequences of myriad individual actions can be better than any they intend, rather than merely stating that there is usually a gap between human intentions and the consequences of their behaviours. Elsewhere Hayek also proclaimed that “the spontaneous collaboration of free men often creates things which are greater than their individual minds can ever fully comprehend” and attributes such a theory to Josiah Tucker and Adam Smith (Hayek 1948, 7). Hayek must clarify in what way the “spontaneous collaboration”, the spontaneous order, or the unintended aggregate consequences of individual actions when *left free* can be advantageous and better than we think. For Hayek, compared with spontaneous order, the major flaw of collectivist economic planning resides in its rejection of the possibility of constant adjustments by individuals, which means that localised practical knowledge cannot be utilised to allow the spontaneous forces (i.e., individual entrepreneurship, their profit-seeking motives, and spontaneous adaptations to micro circumstances) to form a social order. Hayek furthermore pointed to the superiority of a spontaneous market order by arguing that a spontaneous order is beneficial to the individuals involved (Kley 1994, 96-110; Petsoulas 2001, 57-60). In general, Hayek agrees that the spontaneous economic order, which is often equivalent with the market order, is even more advantageous than socialist planning to the “general welfare of its members” (Hayek 1976, 6). Indeed, “...those who did act in certain ways had within the resulting order a better chance of survival than those who did not” (Hayek 1973, 39).

As Hayek noted, market exchange can help all parties involved to get benefits through economic transactions to take advantage of things they themselves do not produce but are in

need of. This is very similar to the idea of the division of labour. According to Hayek, “[e]conomic activity provides the material means for all our ends. At the same time, most of our individual efforts are directed to providing means for the ends of others in order that they, in turn, may provide us with the means for our ends” (Hayek 1967, 229). The division of labour and market exchange help people involved in the free market economic web to obtain more goods than they would enjoy without a market mechanism since they can take advantage of products that are produced by other agents. Human needs are more easily gratified since the resources available have been increased in the spontaneous economic order.

But a closer look at this beneficial nature suggests that it did not dovetail entirely with the definition of spontaneous order. According to Hayek, spontaneous order is a dynamic process of the interactions of individuals with their imperfect knowledge and “tendency towards equilibrium”, which necessitates the communication of price signals to help them adjust their strategies in market transactions. In this case, the spontaneous market model can be compared to a “game” and there must be someone losing the “game” of market transactions. After all, the trial-and-error process, as an essential aspect of spontaneous order, indicates that there must be some “errors” in individual actions so that a necessary result of the spontaneous order will be gratifications of some expectations and frustrations of some others. This dynamic procedure is described as the “game of catallaxy” (Hayek 1976, 71), the game of exchange and transaction. Specifically, “[i]t proceeds, like all games, according to rules guiding the actions of individual participants whose aims, skills, and knowledge are different, with the consequence that the outcome will be unpredictable and that there will regularly be winners and losers” (Hayek 1976, 128). This innate unpredictability within spontaneous economic order can also be seen as the influence of luck. Hayek maintained that only people’s conduct following the rules of the game of market competition can be judged as

just or unjust. The particular allocations and the results of the games cannot be so evaluated “because the results are not intended or foreseen, and depend on a multitude of circumstances not known in the totality to anybody” (Hayek 1976, 70).

Indeed, Hayek wanted to defend his stance that the market game is beneficial to all. Yet importantly, in every game of market transaction there must exist both winners and losers. Thus some further definitions of “general welfare” were made to defend the salutary effects of market society to secure collective flourishing. Specifically, Hayek excluded distributive justice from the concept of general welfare (Hayek 1976, 1-5). For him, the rules of private property universally delimit the private domain of all the social members but do not promise particular gains for them. In terms of the “classical formula that the aims of rule of just conduct is to assign to each his due (*suum cuique tribuere*)”, Hayek held that instead it should be indifferent to individuals’ particular gains or assigning to everyone in reference to their moral desert, i.e., the idea of “distributive justice” (Hayek 1973, 108). The interest and ends of individuals are often in conflict with each other, leading to confusions and quarrels. Hayek was impressed by David Hume’s point made in *A Treatise of Human Nature*,

The private interest of everyone is different; and though the public interest in itself be always one and the same, yet it becomes the source of great dissensions, by reason of the different opinions of particular persons concerning it. . . Were we to follow the same advantage, in assigning particular possessions to particular persons, we should disappoint our end, and perpetuate the confusion, which that rule is intended to prevent. We must, therefore, proceed by general rules, and regulate ourselves by general interests, in modifying the law of nature concerning the stability of possessions (Hume 1978, 555-556).

For Hayek, to prevent such disagreements and promote “general welfare”, it is vital to maintain the general social rules negatively demarcating the boundaries of human conduct and thus defining the general features of a social order. The distributive urge, which was regarded by Hayek as an atavistic and primordial emotion (Hayek 1979, 165-169), would only induce more wild scrambles as we simply cannot agree who should get what in particular

situations, whilst the idea of distributing goods according to moral desert is almost impossible to implement.

The distributive task is also inapt given that the Great Society is full of unpredictability. Hayek understood that distributive justice is concerned with “who the particular persons shall be to whom particular things belong” (Hayek 1973, 108), which is practically unfeasible because of the entrenched unpredictability of the social process. The agent expected to distribute goods can hardly effectively satisfy the needs of each individual in such complicated circumstances. Therefore, general welfare should only be understood as the strict enforcement and application of the general rules of just conduct, rather than the final gains for every particular individual. And it is based on this particular understanding of general welfare that Hayek was able to defend the desirability of spontaneous order. For him, in order to promote general welfare, we should guarantee the maintenance of general rules of just conduct, even though such rules do not strictly dovetail with the prospect of universal gains. And if some people lose in certain rounds of market competition, they can still adjust their strategies and economic program to win in the next round.

Yet what kind of game was Hayek proposing as analogous to the market? The answer is not always clear-cut. For instance, as Roland Kley has pointed out, the market process is different from those games in which every round will automatically reshuffle the cards for each player. In a real-life market, individuals do not synchronically restart their transactions after relinquishing what they have already earned (Kley 1994, 100-101). Therefore, the social members do not always participate in the market competition on an equal footing. Unsurprisingly, Hayek admitted the existence of “great inequality” in market society (Hayek 1976, 83).<sup>21</sup> And this inequality can well persist without a reshuffling process in market

---

<sup>21</sup> Inequality is an irreversible feature of market society. See for example, Hirsch 1977. See also Hont, 2005, 403-404.

competition.<sup>22</sup> Besides, even though Hayek once asserted that a liberal market society “is likely fairly soon to reach an overall level of wealth which makes it possible for this minimum to be at an adequate level” (Hayek 1978, 92), if the market society provides no social safety net, some agents might be excluded from the wealth distribution process of the market. Therefore, “...outside the market government may use distinct means placed at its disposal for the purpose of assisting people who, for one reason or another, cannot through the market earn a minimum income” (Hayek 1978, 92). Hayek’s observation is similar to, for example, what Amartya Sen found out in the case of famine. For Sen, famine does not often occur because there is a sudden decline of the output of food. Instead, it often happens that the market can exclude poor people with no “entitlement” to purchase food from the market exchange web due to the rising level of food prices (Sen 1981; cf. Thompson 1971; Polanyi 2001). In this case, the minimum standard of living is not provided by the market alone.

In fact, Hayek noted such difficulties. The *prima facie* inconsistency of the factual description of the beneficial nature and the self-regulating capacity of spontaneous order leads him to embrace a normative program of government activities. Now the economist Hayek must start from where the sociologist Hayek has floundered. It is noteworthy that Hayek was never content with the doctrine of *laissez-faire*, despite, as we have mentioned earlier, his confidence of the spontaneous forces of human cooperation and a rather strong supposition that when *left free* our actions collectively result in something better than we can anticipate or bring about through purposeful planning. He lamented that the phrase “laissez-faire” was “much abused and much misunderstood” since it suggests no more than to “leave things as they are” and it does not tell us “what are and what are not desirable or necessary fields of government activity” (Hayek 1948, 17). In other words, Hayek hoped that spontaneous order

---

<sup>22</sup> As Kley keenly noted, if there are always only part of the social members who actually benefit from the spontaneous market order by reaping a vested interest, it should be put in doubt whether the market is necessarily a better choice compared to many other types of social order (Kley 1994, 109). At least in this respect there should be room left for outside agency to constantly reform the market.



theory could instead be a normative guide for governmental action *in the right contexts*.<sup>23</sup>

Hence, spontaneous order theory is distinct from the idea of simply leaving things alone.

Instead, it is a philosophical proposition to demarcate the limits and responsibility of

government. Hayek appealed to a minimum standard of living for market participants (Hayek

2011, 285-305). Furthermore, Hayek assigned even more duties to the government. For him,

the government should create conditions for the operation of spontaneous order and its major

duty is the enforcement and maintenance of the rules of just conduct, or the rules of private

property, contract and tort to sustain the games of market competition. Thus it is noteworthy

that Hayek not only appealed to the government to offer a minimum safety net for overall

survival, but even required it to enforce the general rules of justice:

Although it is conceivable that the spontaneous order which we call society may exist without government, if the minimum of rules required for the formation of such an order is observed without an organized apparatus for their enforcement, in most circumstances the organization which we call government becomes indispensable in order to assure that those rules are obeyed (Hayek 1973, 47).

Equally important, some deliberate force is also requisite other than the day-to-day operation of the market game. In criticising *laissez-faire*, Hayek already noted how important it is to establish institutions such as laws, rules of justice and customs before a spontaneous order works. In terms of the game metaphor, it seems necessary that some coercion preconditions our obedience to the rules of the social game. Indeed, according to Hume's abovementioned passage, public interest is the source of disagreement because of our disparate private interests. Many scholars have noted that Hayek must deal with free-riding as well (Vanberg 1986). As Hayek duly suggested, with respect to public amenities such as roads, parks and other public goods, "wholly rational considerations will lead each individual, while wishing that all the others would contribute, to refuse himself to do so" (Hayek 1979,

---

<sup>23</sup> On the role of state and governmentality in neoliberal thought see also Foucault 2008, 121; Mirowski 2009; Slobodian 2018; Stahl 2019.

44). The seeming necessity of some coercion is, however, not confined to such areas as public expediency, but also applies to the rule of law as the overarching guiding principle of a liberal society. The dilemma of free-riding is not some novel challenge to the social order. It cannot only be traced to Hume's idea of a sensible knave, who is said to procure advantages by stealthily breaking the rules of justice while everybody else follows them, but can already be seen in Plato's famous fable of the "Ring of Gyges" in *The Republic*. On Hayek's account, unlike some other superficially more spontaneous orders such as culture and custom, common people "may have to be made to obey" the rule of law (Hayek 1973, 45). In this case, "although it would be in the interest of each to disregard them, the overall order on which the success of their actions depends will arise only if these rules are generally followed" (Hayek 1973, 45).

Hayek therefore claimed that it is likely, and sometimes necessary, for the government to "coerce", to "design" and "improve" an abstract, negative and impartial set of rules as long as it is not a discriminatory command.<sup>24</sup> In *The Road to Serfdom*, Hayek developed the metaphor of a gardener to this effect:

The attitude of the liberal toward society is like that of the gardener who tends a plant and, in order to create the conditions most favorable to its growth, must know as much as possible about its structure and the way it functions" (Hayek 1991, 71).

In principle, a spontaneous order should fend off outside interference as it is a result of unintended consequences. And it seems only for pragmatic reasons to introduce some mechanisms such as a social safety net simply to make the system operate smoothly, without envisaging every little detail of the order. But Hayek was deeply suspicious of such displacements out of practical concern. Indeed, for him, "freedom is almost certain to be

---

<sup>24</sup> Hayek wanted to downplay the coercive nature of government. He argued that such coercions should be decentralised and localised. But it does not help with the problem that the spontaneous order looks awfully like a constructed one. See e.g, Hayek 1973, 45-46.

destroyed by piecemeal encroachments” if we do not take the spontaneous rules as *the* overriding systematic principle to guide our behaviour (Hayek 2011, 130). If some extra remedies must be provided by the state, the spontaneous social order is eventually not so “spontaneous” and self-regulating. Indeed, if the rules can be created and changed, how should the resulting order still be seen as a result of unintended consequences, the “invisible hand”, or human actions without human design?

Now we have been clear that although Hayek asserted that “those who did act in certain ways had within the resulting order a better chance of survival than those who did not” (Hayek 1973, 39), this is not always the case. The maintenance of rules does not ensure overall survival and that is why even Hayek himself appeals to the state, an “outside agency”, to facilitate a successful operation of the spontaneous economic order by introducing some minimum distributive tasks. Moreover, the general rules of just conduct which define the characters of spontaneous order should also be maintained with the government’s support facing the problem of the “sensible knave”, or the dilemma of free riding. But when Hayek redefines the duty of the state to ensure the minimum standard of living and to maintain the universal rules of private property according to which social members can pursue their own ends, he blurs the very distinction between a spontaneous order and a constructed one, which, however, is the foundation of his proclaimed disagreement with the doctrine of constructivist rationalism. Hayek notices this problem and reminds his reader that “[t]he spontaneous character of the resulting order must...be distinguished from the spontaneous origin of the rules on which it rests, and it is possible that an order which would still have to be described as spontaneous rests on rules which are entirely the result of deliberate design” (Hayek 1973, 45-46), but he rarely explained why this should be so and how this claim can be compatible with his fervent opposition of rationalism.<sup>25</sup> Being deliberate, as Hayek oftentimes states, at

---

<sup>25</sup> For the elusiveness of the boundary between spontaneous order and constructed order, see also Sandefur 2009. Although Hayek tried to distinguish different levels of rules based on their origins – “only some of the rules

least implies that some innovative agents make some sense of the end and utility of those rules to be prescribed. Such rules, even though they might only be negative as to ban some options while allowing much room for free choices, still need some commanding capacity in order to force people to play the game accordingly.

Scholars have noted that by acquiescing the deliberate enforcement of general rules, Hayek challenged his own binary of spontaneous order and made order. For example, Daniel Luban has argued that such a rules-enforcing character of the government can hardly be viewed as distinctly diverging from legal positivism, which Hayek saw as the antithesis of his social theory (Luban 2020). And according to Quinn Slobodian's recent findings, Hayek's theory actually allowed an active implementation of rules as the condition of spontaneous order, although the moment of implementation is not clear-cut (Slobodian 2018). Whether Hayek ever really solved this apparent dilemma is not our present concern. But it suffices to say that Hayek did want to tone down such a deliberative orientation as much as possible, and he further turned to the idea of cultural evolution to explain the *origin* of general rules. As Luban has pointed out, the spontaneous order theory tells a two-tiered story, one with a forward-looking perspective explicating the formal features of spontaneous order, and the other with a backward-looking standpoint to explain its inception (Luban 2020). As a result, it seems necessary for Hayek to adumbrate how spontaneous order as a whole characterised by the rules of just conduct and people's liberty to cooperate is by nature "spontaneous" rather than deliberative. Accordingly, we now turn to Hayek's conception of cultural evolution, which explains how social orders are spontaneously formed.

---

which people in fact observe, namely some of the rules of law (but never all, even of these) will be the product of deliberate design, while most of the rules of morals and custom will be spontaneous growths" (Hayek 1973, 46), he certainly hoped to circumscribe the role of deliberation in the formation of social rules. And his historical account of English rule of law, as we shall see, is clearly centred around the restoration of traditional convention, which indicates positive institutions such as the rule of law cannot be distinguished from custom in a completely straightforward manner. These different levels of rules are intertwined in a large measure.

#### 4. *Spontaneous Order and Cultural Evolution*

Hayek did not espouse the doctrine of *laissez-faire*, which, on his account, was much closer to constructive rationalism than to spontaneous order theory. For him, the principle of *laissez-faire* indicates that human beings can be unshackled from social bonds and rebuild society. Confronting such optimism regarding human nature and human capacity, Hayek argued that the Anglo-Scottish-American liberal tradition more willingly acknowledged the natural defects of human nature, including our natural indolence and improvident wastefulness, which requires prescriptive and institutional constraints (Hayek 2011, 121). As a result, Hayek's theory of spontaneous order does not propose to leave people completely free from rules and institutions. In fact, it appeals to institutional prescriptions, cultural norms and social customs to cultivate our reason, not the other way around. So far, we have already seen that spontaneous order pertains to our tendency towards unconscious rule-following. And it should be noted that the necessary frustrations of some expectations within the market game, as mentioned above, make perfect sense in Hayek's theory. Some people would lose in the prescribed game and may launch "revolt against the discipline of abstract rules" due to their discontent and atavistic urge for distributive justice (Hayek 1976, 143). Therefore, the spontaneous order is not to leave people absolutely free, but to ensure individuals obey abstract rules to facilitate certain regularities and unpredictable distributive results.<sup>26</sup> Such rules facilitate the Great Society, but must "repress some of the innate rules which were adapted to the hunting and gathering life of the small bands of fifteen to forty persons, led by a headman and defending a territory against all outsiders. From that stage practically all advance had to be achieved by infringing or repressing some of the innate rules and replacing

---

<sup>26</sup> For Hayek, "modern man is torn by conflicts which torment him and force him into ever-accelerating further changes" whilst "the morals which maintain the open society do not serve to gratify human emotions" (Hayek 1979, 159-160).

them by new ones which made the co-ordination of activities of larger groups possible” (Hayek 1979, 160-161). What then is the difference between Hayek’s theory of spontaneous order as a discipline of human beings and the idea of social engineering to forcibly command individual conducts? And how is Hayek’s theory of institution formation detached from the rational design of social rules?

For Hayek, while social institutions and prescriptions are not something natural, they are not artificial, either. He further developed an evolutionary account of social institutions, in contrast to the rational approach of human society. Apart from sketching out how spontaneous order regulates itself with its structure, paradigm, and via abstract rules, Hayek also presented another perspective to articulate how spontaneous order emerges. His concept of cultural evolution was to explain how the complex spontaneous social order emerges by self-regeneration. The very definition of spontaneous order, which Hayek often explained by citing Adam Ferguson’s statement that it is a “result of human actions” without being “the execution of human design”, alludes to the unintended origin of spontaneous order. In other words, spontaneous order can not only be seen as a synchronistic phenomenon, a self-regulating system in which there appears a certain regularised structure of multiple elements, but it is also a diachronic phenomenon. Hayek took the concept of cultural evolution as the “twin idea” of spontaneous order. A spontaneous order should evolve without the external interventions of any individuals.

Clearly, Hayek attempted to develop an evolutionary account of a wide range of social conventions. For him, “[o]ur habits and skills, our emotional attitudes, our tools, and our institutions—all are... adaptations to past experience which have grown up by selective elimination of less suitable conduct” (Hayek 2011, 26). Hayek attempted to restrict the role played by human agency in the process of cultural evolution as much as possible, which is in line with his suspicion of our capability to comprehend the rules which we pay submission to.

This is not at odds with Hayek's idea of the un-intendedness and spontaneity of the emergence of social order.<sup>27</sup> For him, we reaffirm over and again the existing conventions of justice without judging their usefulness, benefits and purposes. It is by reducing apparent conflicts within the complicated texture of social rules that we maintain and improve them. In other words, within evolution, "[t]he same principles" must be applied consistently.

[I]t is only by constantly holding up the guiding conception of an internally consistent model which could be realized by the consistent application of the same principles, that anything like an effective framework for a functioning spontaneous order will be achieved (Hayek 1976, 23).

The fact that man has undesignedly brought about the self-maintaining factual order of the social cosmos by pursuing an ideal which he called justice, and which did not specifically designate as just particular acts, but merely required him to discover such rules as could be consistently applied to all, and persistently to revise the system of traditional rules so as to eliminate all conflicts between the several rules that would emerge as the result of their generalization, means that this system can be understood, interpreted, improved, and even its particular content ascertained, only with reference to this ideal of justice (Hayek 1976, 55).

Hayek applied his theory to particular historical events to demonstrate the evolutionary process in western liberal society. For example, he argued that the Anglo-American liberal tradition was to constantly refurbish the existing positive legal framework prescribed by documents such as Magna Carta, which already demarcated the boundaries of royal prerogative (Hayek 2011, 235-236).<sup>28</sup> Again, this model of cultural evolution coheres with his emphasis on tacit rule-following behaviour. His interpretation of the history of English common law shows how much the theory of cultural evolution relies on this tacit rule-following behavioural pattern. Hayek obviously subscribed to what Edward Coke and Matthew Hale said about the common law as a judge-made law, defending it against the

---

<sup>27</sup> Although Darwin never denied the practicability of artificial selection, Hayek often appealed to Darwin as a canon of his evolutionism. See Beck 2018, 7.

<sup>28</sup> Contrary to Eugene Heath's argument that "Hayek does not intend his account to be historical", I contend that there are a great many passages in Hayek's works focusing on historical narratives. For Heath's opinion, see Heath 1989.

English kings' arbitrariness. The common law is constituted by complicated and ancient precedents, which have been taking effect in people's lives, only waiting to be codified by judges. In other words, the judges do not invent something completely new but only record the extant practices. Thus the laws are not a wilful product of individual magistrates and can bind both the rulers and the ruled. The entire society, in this case, is governed by the rule-following regularity. This is precisely the ideal of *Rule of Law* that Hayek had in mind.

Not only are individuals incapable of comprehending the rules observed by themselves, in Hayek's view, the prevalence of such rules depends on their effects on group success rather than individual calculations. For him, group survival, instead of our knowledge of the rules' effect on ourselves or the collective body, is the overriding guiding force of the evolution of social rules. In other words, rules are preserved because they make the group prosper as a whole, regardless of people's individual calculations (Hayek 1979, 161). Here, Hayek's idea of cultural evolution evinces the influence of the theory of biological evolution and natural selection on his social theory.<sup>29</sup> He appropriated the idea of natural selection to explain the group selection process. For him, selective evolution works at the social level and there seems no escape for individuals from this meta-individual mechanism, let alone scope for interfering with the selection process of social rules. Indeed for Hayek, human beings tend to follow rules and habits, with almost no rational insight and consciousness of why they obey such rules (Hayek 1973, 43). In this sense, Hayek's account of cultural evolution becomes more or less functionalist—rules are selected by virtue of their function in group success, which is primarily about demographic scale and population growth (Hayek 1973, 18).<sup>30</sup> For him, cultural evolution

---

<sup>29</sup> Hayek obviously accepted many Lamarckian elements such as the inheritance of acquired characteristics. The genetic-oriented evolutionism, according to him, fails to reflect the quick mutations of social rules. See Hayek 1988, 25. See also Beck 2011; 2018, 70.

<sup>30</sup> Some critics have also pointed out that Hayek's functionalism is little different than a holistic account of society as if individuals are fatalistic, which was attributed by Hayek, with a distinctly derogatory connotation, to continental theorists such as Comte, Hegel and Marx. See Hayek 1973, 24; Buchanan, 1986; Steele 1987;



...is a process not primarily of reasoning but of the observance, spreading, transmission and development of practices which have prevailed because they were successful — often not because they conferred any recognizable benefit on the acting individual but because they increased the chances of survival of the group to which he belonged (Hayek 1973, 18).

And,

The cultural heritage into which man is born consists of a complex of practices or rules of conduct which have prevailed because they made a group of men successful but which were not adopted because it was known that they would bring about desired effects (Hayek 1973, 18).

The evolutionary process, therefore, works regardless of our particular motives, interests and gains. On Hayek's account, people are habitually rule-following and tradition-bound without foreseeing the utility of their obedience so that the overall cultural evolution is also a meta-individual process. However, if human beings simply follow inherited rules, how to explain those mutations that occur in the first place? Apparently, group selection has to begin from some individuals who facilitated new mutations to be "winnowed" and "sifted" later on (Hayek 1979, 155). In fact, Hayek did allow the rule-breakers to practice something originally non-existent. The problem that remains to be sorted out is how to accommodate such an innovator of variation in the context of cultural evolution (Hayek 2011, 63), and for what reasons such rule-breakers can be seen as still constituting the "spontaneous" order rather than intervening based on a constructive rationalism.<sup>31</sup>

For Hayek, within cultural evolution the transmission and prevalence of rules is done by individuals experimenting and their imitative learning, rather than contractual judgement to deliberately establish such practices. Hayek often illustrated this process with the example

---

Miller 1989; Petsoulas 2001. Petsoulas believes that the collectivist account of social evolution should be taken less seriously, for it runs counter to Hayek's methodological subjectivism (Petsoulas 2001). Kley, however, places stress on the collectivist account (Kley 1994, 162-164). For some other critics, Hayek's insistence on methodological subjectivism needs more theoretical defences. See, for example, Hodgson 1994.

<sup>31</sup> Paul Cliteur contended that Hayek's argument here is very close to conservatism, even though Hayek tried to detach himself from this stance. See Cliteur 1990.

of merchants doing business with outside groups. This can be seen as innovation or an experimenting procedure which brings benefits to the group, and this new behaviour will then gradually be imitated by other individuals. Hayek explained this evolutionary process as a process of liberation for more space for experiments and new practices,

It would be interesting...to account for the succession of the different economic orders through which civilization has passed in terms of changes in the rules of conduct. They made that evolution possible mostly by relaxations of prohibitions: an evolution of individual freedom and a development of rules which protected the individual rather than commanded it to do particular things. There can be little doubt that from the toleration of bartering with the outsider, the recognition of delimited private property, especially in land, the enforcement of contractual obligations, the competition with fellow craftsmen in the same trade, the variability of initially customary prices, the lending of money, particularly at interest, were all initially infringements of customary rules -- so many falls from grace (Hayek 1979, 161).

Indeed, since human reason and behaviour are normally and normatively guided by the extant social rules, the evolution, accordingly, seems to occur when some such inhibitions are loosened to allow more choices. Such “law-breakers”, according to Hayek, “certainly did not introduce the new rules because they recognized that they were beneficial to the community, but they simply started some practices advantageous to them which then did prove beneficial to the group in which they prevailed” (Hayek 1979, 161). In fact, Hayek also said that at the individual level, the entrepreneurs actually appreciate the advantages brought about by their new practices, which will be learned and imitated by other social members and thus prevail. Subsequently, the new practices should prevail as more outsiders were attracted to following such rules. For Hayek, the group success is more often induced by the “attraction of outsiders” than by “more rapid procreation” (Hayek 1979, 159). What motivates our rule-breaking behaviour is our narrow self-interest, regardless of what it would bring to the group. Neither do we sift the rules *for the sake of* group interest. The selection process is still, in principle, working at the group, not the individual level. As Hayek often reminded us,

“practices which had first been adopted...were preserved because they enabled the group in which they have arisen to prevail over others” (Hayek 1973, 9).

This evolutionary model now appears self-regenerating and self-maintaining – there is no outside agency in this process. Every innovator is still entangled with and prescribed by traditions, customs, rules of law, their own lack of knowledge and foresight. There are certainly countless purposes that constitute this great structure, but none of them have been imposed at the top on other agents by altering the overall rules of law. By constricting the role of individual agency, the agency of the entire social order is preserved and promoted. Cultural evolution again becomes purpose-free, without the burden of teleology. It is, as Hayek demanded, open-ended and *spontaneous*.

##### 5. *The Problems of Cultural Evolution*

Hayek, as we have now seen, insisted that human beings have little control over the process of social evolution, and that such evolution will happen regardless of our attitudes to it. Crucially, he did admit that variations are induced by some individuals who see particular gains to break the rules and who are then imitated by other members – but he limited the sphere of new varieties rather severely. Most of the variations Hayek admits consist merely in relaxations of prohibitions and our bartering with outsiders. Indeed, as Geoffrey Hodgson has emphasised, for Hayek, “[i]f variety was unconstrained, new occurrences, recombinations or ‘mutations’ could lead to a disruption of the spontaneous order” (Hodgson 2004, 296). Ultimately, Hayek did not offer adequate explanations of such things as our motives, cognitions, intentions and basic psychological traits when dealing with social evolution, despite the fact that he encouraged social scientists to study human subjective belief and opinion as the data of social science and the starting point of their research. He reiterated that

human beings are generally tradition-bound and timidly reform social institutions, whilst the group-level selection will deal with the rest according to what kind of functions the new variations serve to collective success. Indeed, given that Hayek focused on the knowledge problem and that there is almost no escape for us but to submit to conventional forces, his evolutionism might have provided inadequate analysis of our micro-motives and cognitions (Hayek 1973, 17).

However, to many scholars, even the individual gains that seem to have initiated social evolution on Hayek's account sit quite oddly with the claims he makes regarding cultural group selection, especially when individual benefits and collective success cannot proceed *pari passu*. For instance, it can happen that individual gains bring social losses in cases when public concern is required yet people choose to free ride in order that they can enjoy the public goods without necessarily making contributions. And the aggregate result of free-riding might eventually lead to a total collapse of the group (Petsoulas 2001, 64-66). As Viktor Vanberg helpfully comments, Hayek must deal with the possibility that "group-beneficial behavioral regularities cannot be expected to spread and to be maintained, unless conditions prevail within the group that make it advantageous to the individuals themselves to act accordingly" (Vanberg 1986, 88). The dovetailing process of cultural evolution breaks down when individual success diverges from group success. Indeed, either it is hard to explain why an entrepreneur should practice something new and be unconscious of what it would bring to himself and of whether it can benefit his community, or his ignorance of the experiments' effects on group success simply inflict damage to their society.<sup>32</sup>

---

<sup>32</sup> Hayek also noticed the entrenched problem of free riding (Hayek 1979, 44). But he rarely dealt with these matters systematically, only promoting some more deliberate design to coerce people's obedience to rules. Aside from the problem that this answer poses a challenge to the spontaneous nature of the social order, it is hard to see how artificial design can constantly force people to obey the rules of law in evolutionary process – the rules themselves should also be evolved without being fixed and controlled by human agency.

Furthermore, as the key mechanism of the transmission of new practices is ultimately collective prosperity, it often happens that spontaneous evolution would bring disadvantages and losses to certain individuals. Some individuals may well be excluded and sacrificed in this meta-individual process. This prospect also corresponds to the fact that our desire for distributive justice and the atavistic urge for equalisation tends to cause us to reject the evolutionary process. Nevertheless, Hayek was adamant that despite their unwillingness to accept the particular results of distribution in the Great Society, individuals cannot determine this selection process centred around group survival rather than individual prosperity.

The fruitless attempt to render a situation just whose outcome, by its nature cannot be determined by what anyone does or knows, only damages the functioning of the process itself. Such demands for justice are simply inappropriate to a naturalistic evolutionary process. . . . Evolution cannot be just. To insist that all future change be just is to demand that evolution come to a halt. Evolution leads us ahead precisely by bringing about much that we could not intend or foresee, let alone prejudge its moral properties (Hayek 1988, 74).

As Vanberg points out, given the fact that the rules of a capitalist market system cannot satisfy everyone's needs, and that individual gains within the small tribe cannot be procured anymore, it is not clear how a person who happens to discover the market exchanging rules should actually adopt this practice (Vanberg 1986). For example, for a premodern social member, to become a merchant who lives in the strangers' society would necessarily lose the social intimacy that he enjoyed before (e.g., the society in the Scottish Highlands to be analysed later). Even if commercial relations would indeed benefit society as a whole, Hayek still needed to explain why the path-breakers would imitate such practices spontaneously without any outside forces, when their own interest would not be fulfilled in this process.

In this respect, Hayek faced a dilemma. Since he maintained that individual path-breakers cannot make sense of the end served by social rules, it's hard to see the connection between individual entrepreneurship and group evolution. On the one hand, when individual

advantages conflict with group survival, the practices that eventually amount to collective collapse are more likely to spread and grow, instead of those that are salutary to the society (see also Vanberg 1986). On the other hand, it is quite unclear how those rules that facilitate group survival should be adopted by individuals if they are meant to be displaced in this evolutionary process. Some commentators pointed out that there is thus no need for Hayek to put so much stress on group success, which plays no substantial explanatory role in this whole winnowing process (Kley 1994, 164). The cultural selection could work on the individual level, say, the rules that are selected are those that promote individual gains, regardless of group survival. However, it seems that Hayek was more willing to stick to the idea of group selection, instead of taking seriously the individualist account of social mutations. After all, such an individualist theory would render the individuals much more rational, ambitious and powerful than Hayek allowed, as if they could choose what rules to sustain by themselves (cf. Steele 1987).<sup>33</sup> It seems that only by maintaining the principle of group success, that any attempt by the outside agency to change the social fabrics can be prevented, which is one of Hayek's primary concerns.

The problem does not simply consist in whether narrow self-interest is the primary motive of social evolution, nor whether the free-riding dilemma is the primary challenge to

---

<sup>33</sup> Hayek occasionally required cultural evolution to unfold within an already existing abstract institutional framework so that the spirit of reform would not overthrow the entire structure. Hayek often hinted at the stratification of rules. He was prone to point out that the "development of custom and morals is an experimental process" within the enforcement of rules of law. The day-to-day custom and morals are mostly unintended and evolved rules, but the rule of law runs as the overarching framework defining the legitimate sphere of individual behaviour and experimenting. See e.g., Hayek 1973, 45-46; 1976, 57; Kley 1994, 167. Nevertheless, this answer seems far from satisfying. It requires us to distinguish moral rules from legal rules as the overarching formal structure. But in reality they are often intertwined. Indeed, Hayek again shied away from such a stratification of different rules. He remarked, "...the difference between moral and legal rules is not one between rules which have spontaneously grown and rules which have been deliberately made; for most of the rules of law also have not been deliberately made in the first instance. (Hayek 1976, 58)" For Hayek, there are many rules of law, just as is shown in the example of the English judge-made law, that bear evolutionary origins. The common law judges' enforcement of those rules of law acts only to systemise some already existing conventions rather than creating something new. As Kley points out, on Hayek's account, at least those rules of private property, tort and contract, which are probably the lynchpin of the social rules, are not a result of deliberate design, but the interaction between human nature, human actions and external circumstances. And if such rules that are compatible with the liberal-capitalist Great Society can hardly be attributed to human creation, it is then indeed implausible that the legal framework is "not itself subject to selective pressures" (Kley 1994, 169-170).

evolution. Many commentators have viewed Hayek's theory of cultural evolution as simply undercutting too many *spontaneous forces* of human nature and actions, other than imitative learning, unreflective acceptance, and blind submission to the principle of the "survival of the fittest", in order to accommodate the *spontaneity* of group selection.<sup>34</sup> To name but a few criticisms, how should the cultural evolution theory evaluate the oft-seen violence, conquests, warfare, ambition and domination found in the historical record? As formerly noted, Hayek rather embraced the view that group success is marked by the expansion of the group through "attraction of outsiders" rather than "more rapid procreation", which is, however, hardly the most common historical scenario. As Adam Smith stressed in his *Lectures on Jurisprudence*, there are many examples of the Great Society being conquered by shepherds, the civilised and prosperous subdued by uncivilised and barbarian, without peacefully waiting to "attract" more outsiders into their own group to make it prevail.<sup>35</sup> Indeed, it is not easy to incorporate such external and violent shocks within the model of cultural evolution, which constrains human agency to alter or overthrow the existing rules (cf. Luban 2020).<sup>36</sup>

As David Steele contends, it is unclear when and where Hayek's cultural group selection takes place in the real world, and what signifies group success or failure (Steele

---

<sup>34</sup> Perhaps one of the most striking problems is that animals and insects would thus be regarded as moral beings if morality simply refers to a kind of behavioural regularity within a group. For Robert Richards, the distinction between human beings and animals can be maintained only if human reason is regarded as indispensable to help "invent" and instrumentalise rules – and Darwin thus rightly defended this distinction. See Richards 1987; Beck 2018, 114. For Steele, contrary to Hayek's account, the evolution of social institutions often "proceeds by a process in which design and insight play an indispensable role, though the process as a whole is undesigned" (Steele 1987, 188).

<sup>35</sup> In such cases, human history exhibits a vicious cycle such that commercial society almost always fails to last long after its initial rise on the world stage, which is also a result of human actions without human design. More analysis of this will be provided in Chapters 4 and 5.

<sup>36</sup> Hayek did notice that a civilised society can be displaced by a constructed military state. But he never developed this point more generally so as to revise his theory substantially. See Hayek 1979, 202n39, "It is very likely that in the course of this development a wealthier urban and commercial population often imposed upon larger rural populations a law which was still contrary to the mores of the latter, just as after the conquest by a military band a military land-owning aristocracy imposed in feudal ages upon the urban population a law which had survived from a more primitive stage of economic evolution. This is also one form of the process by which the more powerfully structured society, which can attract individuals by the lures it has to offer in the form of spoils, may displace a more highly civilized one." I argue that if Hayek really took seriously this observation, his theory would be much closer to Smith's. See also Gray 1984, 138; Beck 2013, 109.

1987, 174-175). Steele has summarised several different answers to these questions in Hayek's works. For instance, Hayek indicated that cultural evolution still occurred during the present. This, however, invites serious criticism, primarily because of the abovementioned facts – human history has been inundated with conducts that hardly fit the Hayekian evolutionary model. Hayek also remarked that cultural evolution seems to have taken place in some immemorial era, especially in the transition from primordial tribal societies to the Great Society – which is not necessarily modern, as ancient Greece is certainly a Great Society according to Hayek (Hayek 1988, 29-38). Since there are no “recognizable fossils” to convey to us enough information about the actual progress (Hayek 1979, 156), Hayek invoked the Scottish “natural-historical investigation” of social evolution (Hayek 1988, 69), which is appealed to in order to bridge the gap between the unknown past and the present. Hayek frequently resorted to British philosophers' accounts of the formation of social order. For him, many of them argued that human reason is unable to design or lead the development of institutions and it is precisely “with and within” the cumulative and spontaneous growth of social conventions “that human reason has grown and can successfully operate” (Hayek 2011, 112). Apart from the principle of the “survival of the successful” to achieve the adaptive selection process, the elemental units that form different rules waiting to be selected are the multiple human actions of men “who did not know what they were doing” (Hayek 2011, 115). Hayek more willingly accepted that it is from the principles of human nature that different social institutions such as morals and languages arise. As Hayek noted, it is the Mandeville-Scottish school that has revealed this maxim. The Scottish school's focus on the connection between human nature and social institutions deeply intrigued him. It was seen as a counterargument against the view that institutions are rationally and consciously designed. Adam Ferguson, whose works Hayek frequently made recourse to, argued that “[t]he seeds of every form of government are lodged in human nature; they spring up and ripen with the



season. The prevalence of a particular species is often derived from an imperceptible ingredient mingled in the soil” (Ferguson 1995, 120). Likewise, for Hayek, “what Adam Smith and his contemporaries did” was – quoting Francis Jeffrey’s review essay in 1806 as a comment on the Scottish evolutionary principle – “to resolve almost all that has been ascribed to positive institution into the spontaneous and irresistible development of certain obvious principles, – and to show with how little contrivance or political wisdom the most complicated and apparently artificial schemes of policy might have been erected” (Hayek 2011, 112). Indeed, as Dugald Stewart summarised in his biographical account of Smith, Smith endeavoured “to trace the gradual progress of refined ages, and to point out the effects of those arts which contribute to subsistence, and to the accumulation of property, in producing correspondent improvements or alterations in law and government” (Stewart 1982, 274-275). Understandably, Hayek claimed that the Scottish school’s conjectural history as such, which expounded how institutions such as private property evolve based on some forces of human nature in response to the changes of environment without being designed by a single legislator, some human preconceptions or rational design, foreshadows the principle of spontaneous order (Hayek 1979, 156; 1988, 69-70, 145).<sup>37</sup>

However, does Hayek’s interpretation of the Scottish thinkers really conform to their social theories’ original insights? Although Hayek understood the Scottish thought as a great source of spontaneous evolutionism, many have suspected that such a connection is exaggerated by Hayek (See, e.g., Angner 2002). It is indeed undeniable that the Scottish Enlightenment thinkers developed a kind of social theory to make sense of human progress (See esp. Berry 1997). The problem is whether such a social theory fits into a spontaneous order model as envisaged by Hayek. In this chapter we have discussed Hayek’s unique

---

<sup>37</sup> For Hayek, both capitalism and socialism should be evaluated “under the given condition of human nature and external circumstances”, rather than in their ideal forms. See Hayek 1948, 147n21. However, it is doubtful whether he offered equally intensive explanations of socialism in this vein.

genealogy of social theory, that is, his conception of a tradition of spontaneous order. He argued that society develops in the ways that human agency cannot make perfect sense of; that reason plays a very limited part in the unfolding of spontaneous social order; that exactly because of our epistemological limitations and our rule-following tendency, social order is preserved and regenerated; and that the evolutionary process is primarily forwarded by group selection regardless of individual goals. The ongoing chapters will show, however, that one of Hayek's most important putative intellectual heroes and forbearers – Adam Smith – in fact offered crucially different views on these and related key matters. Smith's science of man allowed a much greater role to other aspects of human nature than those emphasised by Hayek, such as natural insolence, violence, and domination, in shaping social institutions. In particular, the prevalence of social subordination enacted via slavery, rooted in our natural tendency of domination, was marked by Smith as a perennial challenge to liberty. Noting the recalcitrance of social domination, Smith clearly saw the *spontaneous* nature of some human institutions, but further pointed to their violent and inhumane characters that disrupted freedom and social harmony. In this case, freedom from slavery is not a result of timid gradual evolution, the selection of group survival or "relaxation of prohibitions". Rather, it owed its origin to some genuinely unpredictable historical contingencies and power struggles. The elimination of slavery, albeit precipitated by unintended consequences, is much less spontaneous and self-reinforcing than slavery itself. Equally important, Smith also acknowledged the contributions of artificial-rational design to the cause of English and Scottish liberty. As subsequent chapters will show, his historical account of the English common law and the English Revolution again deviate from Hayek's spontaneous order theory. Although Hayek reputedly claimed that the Anglophone political institutions and revolutionary cause were exemplars of his spontaneous order tradition, for Smith, there were several identifiable alterations to the English constitution, and which were key to the progress

of English liberty. Smith's own judgement about the improvement of Scotland also suggests his activist attitude to the creation of modern Scottish commercial society. When commenting on the economic backwardness of the Scottish region, especially the Highlands, Smith identified the necessity of artificial engineering and institutional design to elbow aside the feudal remnants. While Smith and Hayek both recognised the importance of institutional frameworks to the operation of liberal society, their explanations of the origins of such institutions exhibit major differences in their theoretical frameworks and commitments – for Smith, human beings can not only intentionally create something entirely new without following given rules, they can also violently displace the old conventions to pave the way to new mutations and developments.

## CHAPTER 2: SMITH, HAYEK AND THE EVOLUTION OF ENGLISH COMMON

### LAW

This chapter analyses Smith's account of English liberty, and in turn explains how characterising it as a species of spontaneous order theory leads to misunderstanding. Hayek took the common law as a perfect example of spontaneous order (Hayek 1973, 94). Specifically, Hayek developed a crucial distinction between *thesis* and *nomos*. In contrast with *thesis*, which means the top-down imposition of legislation from the sovereign, the law of liberty, or *nomos*, is attributed to the bottom-up generation of repeated practices in individuals' iteration and coordination. The common law is an example of the latter insofar as the principle of *stare decisis* bound the judges to follow the old precedents and the common rules of conduct in judgement without enforcing the laws as the police and legislators usually do. For Hayek, the common law judges "declare or find the existing law, or modify abuses that had crept in, and *not* create law" (Hayek 2011, 235). The common law system, therefore, is a result of the evolution of the common people's repeated practices. Again, when tracing the intellectual progress of the rule of law, Hayek's self-identified recourse to the Scottish intellectual legacy was unequivocal, which, he believed, citing Duncan Forbes and Francis Jeffrey, featured "anti-rationalist insight" (Forbes 1954, 654) and the endeavour to "resolve almost all that has been ascribed to positive institution into the *spontaneous* and irresistible development of certain obvious principles" (Jeffrey 1806, 84, quoted in Hayek 2011, 122. Italics added).

According to Hayek, it was the major contribution of Scottish Enlightenment thinkers that they discovered the social reality that many institutions are not purposively contrived, but evolve through unplanned practices and innumerable human actions. When historicising political theorists into the "French" and the "British" tradition, he argued that Scottish

theorists such as David Hume and Adam Smith are very close to the common law tradition (Hayek 2011, 110). Smith, to be sure, was also aware that the common law is a major pillar of British liberty (*LJ(A)*, v.12; *LJ(B)*, 64). In addition to the stadial theory and the unintended consequences of commercial opulence in explaining the rise of modern liberty, Smith also underscored the institutional backcloth of individual freedom in England. For him, judicial development is an essential step in European political modernisation. Just as the French *parlements* once ran as an institutional obstacle against the crown in the *Ancien Régime*, the common law courts are also an important part of the “regular administration of justice” and thereby the creation of Britain as a civilised nation.<sup>38</sup> In particular, Smith affirmed that the common law courts were older than many European counterparts, including the Scottish courts. He seems therefore to anticipate Hayek’s view that the ideal legal evolution, as is shown in the case of common law, is characterised by long-term trial and error without intentional design. As time yields people’s repeated practices, the common law system could provide regular and ascertained legal remedies to protect individual rights thanks to the large quantities of precedents (*LJ(A)*, v.42-43). Smith was fascinated by the success of English courts, which he believed were “well worth the study of a speculative man” (*LJ(A)*, v.43. See also *LJ(A)*, ii.75). Apart from his attention to natural law theorists such as Grotius, Hobbes, Pufendorf, Locke and Cocceius (See e.g., *LJ(A)*, i.12-14; *LJ(B)*, 1-4; See also Stein 1980; Forbes 1982; Haakonssen 1981; 1985; Moore and Silverthorne 1985; Hont 2005, 159-184), he was also familiar with the work that shaped the common law tradition more specially, including Matthew Hale’s *Historia Placitorum Coronæ*, Henry Spelman’s works on feudalism and tenures, James Dalrymple, Lord Stair’s *Institutions of the Laws of Scotland*,

---

<sup>38</sup> On the role of judicial development in the process of European modernisation, see Droz 1860; Strayer 1970; Baker 1990; Swann 1995; Elster 2020. David Lieberman shows that Montesquieu’s division is influential and pioneering as most contemporary jurists saw judicial power as only affiliated to executive power. The independence of the power of judging thereafter gradually became an important dictum of modern political theory. See Lieberman 2006, 333-335.

Thomas Craig's *Jus Feudale* and Hume's *History of England*. Smith was also an acute commentator on contemporary political debates between Tories and Whigs, who purposively constructed their own partisan versions of legal history for political reasons (*LJ(A)*, v.119-120; *LJ(B)*, 14-15).

The abovementioned facts indicate that Smith's treatment of the common law is a theme worth exploring. Not only can it reveal how much Smith might have aligned himself with a Hayekian spontaneous order theory, but it is also important as it reflects his position in relation to contemporary party politics, his attitude toward central sovereignty, and his general theorising of English political development. To my knowledge, however, there is not yet a comprehensive study of Smith's treatment of the common law in the light of his relations with the spontaneous order theory of the common law.<sup>39</sup> The rest of the chapter will unpack Hayek's account of the common law as a spontaneous order, and then compare it to Smith's account of the common law. Further by considering Smith's jurisprudential and political history, I argue that Smith's understanding of the common law differs from Hayek's spontaneous order theory in at least three ways: First, the origin of common law is not as much unintended as, in fact, designed following the Norman Conquest. Second, compared to Smith, Hayek underestimated the significance of sovereign power as the background of the evolution of common law. To be more specific, the principle of *stare decisis* is not, according to Smith, as ancient as the customary legal practices that can be traced back to early human society. Rather, it was owing to the later growth of the centralisation of kingly authority. Third, Smith showed that the common law was far from flawless in its development. In many

---

<sup>39</sup> Haakonssen offers us many insights in Smith's theory of laws and government, including Smith's idea of legal evolution (Haakonssen 1981). See also Sagar 2022. Importantly, despite recent work on David Hume's polemics against his alleged "common law conventionalism", many scholars had connected this strand of Hayek's ideas with Hume's thought. On Hume's "common law conventionalism", see Postema 2019, 107-139. Recent Hume scholarship has already suggested that Hume is a severe critic of the "common law mind". See e.g., Forbes 1975a, 233-307; Spencer 2005; McArthur 2007. I will show that Smith's stance is close to Hume's in this regard.

cases it was, accordingly, remedied by introducing exogenous legal elements, such as civil law and canon law, which were purposeful interventions rather than unintended or spontaneous developments independent of individual intention.

### *1. Hayek's Spontaneous Order Theory and the Common Law Tradition*

This section sets out Hayek's spontaneous order theory of common law. As we shall see, in attempts to counter the "overrationalistic, nationalistic, and socialistic influence" of the Continental militant rationalism upon liberalism, Hayek drew on many English historical resources. He developed two main arguments. First, the common law was the declaratory manifestation of people's local custom. Its origin, if any, cannot be imputed to human intentions. Second, this institution was built on the common lawyers' defence of the "Common Custom" of England against the sovereign's powerful imposition.

Hayek castigated constructivist rationalism as altogether detrimental to free society. And he suggests that the view that "all law is, can be, and ought to be, the product of the free invention of a legislator...is *factually false*" (Hayek 1973, 73. Italics added). By locating the development of English common law in legal history, Hayek contends that, like early law and medieval law, common law evolves with the discovery of law instead of by deliberate human design. Hayek stressed that "law is older than law-making" (Hayek 1973, 73). Here, his account of law encompasses the common rules of men's behaviour and conduct, as well as the "propensity or disposition to act or not to act in a certain manner, which will manifest itself in what we call a practice or custom" (Hayek 1973, 75). Such rules of conduct and social conventions exist long before our attempt to articulate them or to make sense of the purpose they serve.

According to Hayek, the English common law conforms to the spirit of the early laws

and medieval laws. In every early society, there is hardly any conception of the purposive design of laws. The early lawgivers including Ur-Nammu, Hammurabi, Solon, Lycurgus and the authors of the Roman Twelve Tables “did not intend to create new law but merely to state what law was and had always been” (Hayek 1973, 81). In fact, Hayek believed that early law-makers were also bound by existing rules and the divine law, which was presumed to be independent of anyone’s particular will and intentions (Hayek 1973, 81). Such laws are by nature inarticulable and thus often take the form of uncodified behavioural conventions.

As such, human creation plays a minimal role in legal development. Hayek believed that, in its essence, the English common law is the quintessential judge-made law. In fact, Edward Coke, whose *Institutes of the Lawes of England* later became the textbook for many generations of English lawyers, already famously contended that only learned judges trained through the Inns of Court and judicial dealings with precedents can acquire the artificial reason to be entitled to judge, in contrast with the natural reason of laymen – including the king (Caenegem 1987, 48; Cromartie 1995, 21). Putatively, the evolution of the common law is not attributed to kings, sovereigns or other forms of legislative ambition. Even judges simply enforce the existing practices without foreseeing their consequences. For Hayek, the power of judges was also constricted within the scope of custom, local knowledge and daily social practice that had been formed through trial and error in the spontaneous progress of human society. The major commitment for judges within the evolution of law rested on “immanent criticism”, or “piecemeal tinkering”, which refers to such acts that simply make the existing system more consistent (Hayek 1973, 118). Although Hayek tried to get away from the infamous label of “conservatism”, in part by claiming that the common law is not something unchanged, he often juxtaposed “custom” with “precedent”, while agreeing that the “old law is the true law, and the true law is the old law”,<sup>40</sup> he still contended that the scope

---

<sup>40</sup> This is Fritz Kern’s argument made in his *Kingship and Law in the Middle Ages* published in 1939, quoted in Hayek 1973, 83-84.



of judicial reasonings is quite limited in the common law system (cf. Posner 2005). Since the judiciary stuck to narrow, loyal and professional interpretations of the laws, the development of the English rule of law looked like a “placid career” (Kirchheimer 1968, 290).

For Hayek, the common law is preferable primarily because it conforms to the ideal of the rule of law, in which every particular party, including the sovereign, is governed by a seamless web of rules of justice. As a spontaneous order, the common law is characterised exactly by a non-utilitarian mentality in the sense that the judges obey the tacit and impersonal rationality formed in the history of laws, without knowing anything concerning the nature and the social ends that the laws are supposed to serve (Hayek 1973, 119).

According to Hayek, such a legal order reflects the real provenance of English law, preserves the liberties under the aegis of ancient conventions and tacit wisdom, and evolves without human design, only with the emergence of unforeseen new circumstance urging people to adapt the spirit of the old precedents to the new world (Hamowy 2003, 241-242n1).

It was in the late Middle Ages, according to Hayek, that the history of legal development witnessed sudden – perhaps unfortunate – divergence, when such an archetype of justice marked by “law-finding” rather than “law-creating” behaviour was expelled by continental monarchies introducing the conception of legislation – the “deliberate creation of new law” – and further toppled the original reverence for a divine being as the sole lawmaker in the medieval intellectual milieu (Hayek 2011, 236).<sup>41</sup> Clearly, in Hayek’s articulation of legal history, the contrasts between spontaneous order and intentional commands, between the judge-made law and legislative reasonings, between the conscientious discovery of custom,

---

<sup>41</sup> Hayek believed that due to the rediscovery of Aristotle’s *Politics* and the influence of Justinian’s code in the late Middle Ages, that the legislative reasoning elbowed aside the law-finding mentality on the European continent. See Hayek 1973, 83. This description elides the fact that Aristotelian philosophy was also highly influential upon common lawyers’ mindsets. Many common lawyers also appealed to the idea of *jus naturae* and *jus gentium*. And note that Aristotle is also one of the intellectual sources of conventionalism as he highlighted judgement, praxis and habituation instead of abstract reasonings in the art of moral and political conduct. See I. Campbell 2010.

i.e., customary law, and the attempts to overhaul the “whole sections of the established system of case law” are quite conspicuous (Hayek 1973, 89). And he further situated them in the Anglophone/continental duality as if the former stands for the idealised form of liberty and spontaneous order. It should not be neglected that such contrasts are also widely seen in history.

Hayek delved more deeply into the history of the common law early in his 1960 magnum opus *The Constitution of Liberty*. For him, crucially, under the pressure of the centralisation of kingly power with the aggressive expansion of the national state, the common law armed by medieval canons such as Magna Carta as the “*Constitutio Libertatis*” was weaponised by jurists to debar the monarchy’s claims for legislative power and its entitlement to enact a rationalist legislative project (Hayek 2011, 236). This struggle saved England from being further mired in constructive rationalism while preserving its medieval liberties. Hayek maintained that the English common lawyers should be praised for their struggles with the arbitrary legislation that could destroy the vivacity of the tacit wisdom embodied in ancient custom. Such weaponization of common law not only manifested itself in Sir Edward Coke’s and Matthew Hale’s intellectual clash with Francis Bacon, then as King James I’s Chancellor, and the notorious absolutist theorist Thomas Hobbes, but also became an insurmountable institutional bulwark against royal prerogatives and the despotic exercise of the mighty Stuarts (Hayek 1973, 84-85).

Hayek intentionally traced matters to the intellectual milieu in the seventeenth and eighteenth century, with which Smith was also quite familiar. Indeed, as Ronald Hamowy has noticed, Hayek’s favourable opinion of the common law resembles many common lawyers’ own arguments, which J. G. A. Pocock famously termed as the “common law mind”, or ancient constitutionalism (Hamowy 2003).<sup>42</sup> There is perhaps no better illustration of the

---

<sup>42</sup> Drawing on legal historians such as Frederic Maitland and William Holdsworth, Hamowy proposes a revisionist account of common law, which indicates that Hayek’s argument is misleading. Some key studies on

similitude between Hayek's mindset and the common lawyers' arguments than Sir John Davies's account. Davies was then James I's attorney general for Ireland. In his *Irish Reports* dedicated to Lord Chancellor Ellesmere in 1612, he commented in the preface dedicatory,

...the Common Law of England is nothing else but the Common Custome of the Realm: and a Custome which hath obtained the force of a Law is always said to be *jus non scriptum*; for it cannot be made or created either by Charter, or by Parliament... And this Customary Law is the most perfect and most excellent... to make and preserve a Commonwealth. For the written Laws which are made either by the Edicts of Princes, or by Councils of Estates, are imposed upon the Subject before any Triall or Probation made, whether the same be fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or no. But a Custome doth never become a Law to bind the people, untill it hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience (Preface dedicatory to *Irish Reports*, quoted in Pocock 1987, 32-33).

The several characteristics of the common law teased out by Davies are also frequently mentioned by Hayek. First, Davies held that the common law is equivalent to the "Common Custome" as the uncodified laws governing English people. This is a typical expression of what Pocock referred to as the "common-law concept of custom" (Pocock 1960, 134).<sup>43</sup> Second, Davies also made the case that the common law is not forged arbitrarily by any party or any Charter. The parliament only made records of these unwritten laws in people's quotidian practice without creating them. As such, the common law is older than any single individual's design, and has long existed since time out of memory. Third, the social convention practiced today is believed to be the most preferable since only those rules that fit into a community's flourishing can be preserved and prevail. Davies contended that the top-down imposition of regulations, which have not passed the test of human expectancies and

---

Whiggish historiography and the common law mind include Skinner 1965; Robbins 1968; Kramnick 1967; Forbes 1975a; Pocock 1985; 1987; 1989; Sommerville 1986; 1996; 2014; Weston 1991; Burgess 1992; Postema 2019.

<sup>43</sup> John Hasnas argues that Hayek wrongly confounded common law and customary law for the principle of *stare decisis* is actually much younger than the practice of customary law (Hasnas 2004). As the common law minds often equate the common custom of English people with the common law, Hayek's conflation, if any, can be seen as proof of his reliance on the common law tradition.

spontaneous adjustment, do not enjoy such merits.

Such political discourses were very popular in English intellectual history. For instance, in his *Commentaries on the Laws of England* which was also cited by Hayek from time to time, William Blackstone refers to the common law as the “ancient collection of unwritten maxims and customs”, which is “handed down by tradition, use, and experience” (Blackstone 2016a, 17). Hayek’s description of the history of common law relied heavily on the opinion of the jurists, Whigs and common lawyers, who were themselves not free of political motives. Among them Edward Coke was definitely a canonical source for Hayek, since he highlighted the common law tradition by evoking the spirit of Magna Carta, even though it actually received little attention under the Tudors.<sup>44</sup> Apart from his explicit commendation bestowed to Coke and Matthew Hale,<sup>45</sup> Hayek’s depiction of common law was also very close to Edmund Burke’s, whose old Whiggish viewpoint is similarly anti-rationalist and deeply influenced by the “common-law mind”, or the country party including Old Whigs and Tories like Bolingbroke under the Walpole ministry. Some of them incessantly resorted to the myth of ancient customs to attack establishment Whigs’ claim for oligarchical power (See Kramnick 1968; Dickinson 1973; Colley 1982; Rogers 1989). Interestingly, Hayek also extolled Bolingbroke and claimed himself to be an Old Whig (Hayek 2011, 531).<sup>46</sup> Meanwhile, Hayek’s contempt for the rationalist scheme and continental

---

<sup>44</sup> The rediscovery of Magna Carta is particularly related to the constitutional controversies surfacing in early modern England. Especially important is the Puritan barrister Robert Snagge’s lecture delivered in the Middle Temple in 1581. See Cromartie 2006, 80-114; J. Baker 2017, 249-275. Notably, an early critique of Coke’s distorting invention was offered by Edward Jenks’s 1904 paper “The Myth of Magna Carta”. John Baker pitches down Jenks’s unwavering criticism. His re-examination indicates that Coke did not come up with the significance of Magna Carta from thin air. But Baker still revealed that Coke’s “reinvention” is a sign of many common lawyers’ agreement that there exists ancient constitution predating the Norman Conquest, which could well support their legal and political stances, especially their defence of English liberty and *habeas corpus*, even though such contentions did not reflect the original spirit of Magna Carta. See J. Baker 2017, 442ff.

<sup>45</sup> For Hayek’s scattered comments on both figures, see Hayek 1973, 22, 74, 85.

<sup>46</sup> Herbert Butterfield, whose work many studies on English liberty were eminently indebted to, passionately defended the English national character and Englishmen’s prowess to “have maintained the threads between past and present” (Butterfield 1944, 114). Butterfield supervised Pocock’s 1952 Cambridge doctoral thesis which was later developed into the book *The Ancient Constitution and the Feudal Law*. Hayek obviously admired both Butterfield and Lord Acton. See Hayek 1992, 208; 2011, 122n36. While Butterfield claimed that “while men think that freedom is worth singing songs about, from New York to Cape Town, from London to Canberra, it

absolutism to overhaul the existing custom and laws also echoes the English common lawyers' associating of English freedom with the archaic Anglo-Saxon *witenagemot* as the symbol of Englishmen's national practice inimical to Roman Law, canon law and assorted continental doctrines of sovereignty. As an example, in his 1647 dissertation on the medieval law book *Fleta*, John Selden commented that his contemporary common lawyers have "unconcealed aversion" to civil law "as it concerns principles of government (*regimen publicum*)", whilst paying homage to the common law as "something immemorially fitted to the genius of the nation" (*gentis hujus genio ab intima antiquitate adaptata*) (Ogg 1925, 165, quoted in Caenegem 1987, 122-123).<sup>47</sup>

---

will always be true that...we are all exultant and unrepentant whigs" (Butterfield 1944, 3). Hayek reaffirmed Butterfield's remarks in a very similar tone, "...I am simply an unrepentant Old Whig – with the stress on the 'old'. (Hayek 2011, 531)" Seeing himself recuperate the value of old Whiggism, of which the rightful status in history and politics was unfortunately usurped by a strand of liberalism tainted by constructive rationalism in the nineteenth century, Hayek unambivalently adopted the Continental/Anglophone binary in articulating the character of modern liberalism and insisted that the evolutionary paradigm is pervasive in British history but distinct from the continental counterparts. Hayek understood that Bolingbroke's leaning toward the Old Whigs' opinion implies that the idea of rule of law in opposition to the government by will has transcended partisanship, thereby becoming a consensus in the eighteenth-century English politics. See Hayek 2011, 255. Heedless of whether Bolingbroke's advocacy of the idea of rule of law is only a partisan act, in both *The Constitution of Liberty and Law, Legislation and Liberty*, Hayek said nothing about the English Prime Minister Robert Walpole – Bolingbroke's greatest adversary, and how the Scottish thinkers such as Hume, Lord Kames and John Millar expressed sympathy with Walpole's notion of the modernism of British liberty and his hostility towards ancient constitutionalism. For Hume's defence of Walpole against ancient constitutionalism, see Hume 1987, 28. See also Forbes 1975a, chap. 8; Harris 2015, chap. 7-8. The common law tradition is profoundly protean in practice and even stealthily misrepresents the real case of English political development. For example, John Davies's real attempt was not so timid as it appeared. A closer examination of Davies's statement indicates that it was affected by legislative reasonings - the context in which Davies made the above assertions was that he attempted to impose the English law on the Irish people conquered by the Tudors. Hume also lauded John Davies and James I based not on an admiration for common law as the common custom *per se*, but in that this transplantation of English institutions could promote the civilising process in Ireland. Hume analysed the state of Ireland and Davies's act in *The History of England*. According to Hume, "[a]fter the subjection of Ireland by Elizabeth, the more difficult task still remained; to civilize the inhabitants, to reconcile them to laws and industry, and to render their subjection durable and useful to the crown of England. James proceeded in this work by a steady, regular, and well-concerted plan, and in the space of nine years, according to Sir John Davis, he made greater advances towards the reformation of that kingdom, than had been made in the 440 years, which had elapsed since the conquest was first attempted. It was previously necessary to abolish the Irish customs, which supplied the place of laws, and which were calculated to keep that people for ever in a state of barbarism and disorder" (Hume 1983, vol. 5, 47). Obviously Hume took a pejorative tone with the Irish custom. On the common law as a form of *imperium* see Ludington 2000. For the imperialistic urge behind the ancient constitution ideology, see e.g., Hulsebosch 2003. Davies's intention becomes, paradoxically, an instance that the common law system can be transplanted and created. He attempted to exclude the tradition of the conquered land while introducing the English tradition such that the English royal authority could be corroborated. In other words, Davies's action was immensely "legislative".

<sup>47</sup> To be sure, the concept of Englishness is often associated with political moderation, traditionalism, gradual and continuous change, and a preference for mild evolution over drastic revolution. Studies on this theme include Forbes 1952; Burrow 1981; Kidd 1999. However, Sommerville argues that the principles of political moderation and traditionalism were not exclusive to England but could also be observed in continental Europe.

Did Smith, like Hayek, follow these common lawyers' contentions or adopt their Whiggish stances in articulating English legal evolution? As the eighteenth-century Tories and Whigs both conjured up different stories of the legal and political development in England in support of their politics, Smith was keenly aware of contemporary party politics and intentionally moulded the partisan disputes into his own political theory – especially on how people were induced into civil society and the duty of allegiance was conceived. On one hand, Smith did not favour Toryism, which regarded the civil government as a divinely ordained institution, or supposed that the king has absolute *dominium* over his subjects. On the other, he also shared with Hume the deep suspicion of vulgar Whiggish ideology centred on the idea of an original contract, which became fashionable through the dissemination of Lockean political theory (*LJ(A)*, v.114-116). Without a doubt Smith wanted to develop a more impartial and scientific account of English history to transcend the contemporary party disputes. This aspect of Smith's politics has already been well documented (Hont 2009; Sagar 2018). But as we shall see, Smith's estimation of the common law is also importantly distinct from Hayek's spontaneous evolutionary paradigm.<sup>48</sup> Despite Hayek's self-asserted closeness to the Scottish intellectual legacy, Smith acknowledged the identifiable, even violent origin of the common law and the great "legislative capacity" of English kings to close the sticky loopholes of this system (*LJ(A)*, v.34). These observations repudiate the notion of a spontaneous order interpretation of the common law system, without deliberate design or revolutionary changes. Smith, it turns out, did not share Hayek's view of the spontaneous and undersigned origin of the English common law.

---

See esp. Sommerville 1996. In *Pensées*, Blaise Pascal noted that custom is the "safest" basis of justice and authority. In the long-term history, the established custom renders the "fundamental and original laws of the State" carpeted in the mist of time (Pascal 1995, 24). On ancient constitutionalism in the French case, see Keohane 1980, 25-53.

<sup>48</sup> It's notable that Hume's *History of England* had already combined the analysis of ancient constitutionalism with his political concerns to repudiate Whigs' defence of the Saxon past and their enmity with royal interference. See Hume 1983, vol. 2, 525; vol. 4, 355; Spencer 2005, 133.

## 2. *The Discontinuity of English Constitution, Feudalism and the Origin of the Common Law*

Can we trace the origin of the common law to some human artifice? For Hayek, there is no recognisable juncture for human creation in the evolution of the common law since judges do not “create” but only “discover” laws from existing custom. However, it is widely acknowledged that the common law system arose in order to regulate feudal land tenures, of which the significance of Norman Conquest was highly contestable. In order to maintain the self-regeneration of the English laws, the common law minds either denied the effect of the Norman Conquest on the construction of feudal society altogether, or insisted that there had emerged feudalistic institutions before William the Conqueror’s invasion (Pocock 1987, 65-68). Apparently, if feudalism was introduced by the Norman Conquest, the common law, whose main body was to legalise feudal tenures, must also have arisen thereafter, which would undermine the proposition that the common law and the English constitution were not shaped by dint of human artifice or external reforms, thereby being continuous and seamless.

To avoid anachronism when comparing Smith’s legal history and Hayek’s spontaneous order theory, this section focuses on Smith’s account of the discontinuity of the English constitution, the role of the Norman conquest, and the origin of feudalism. Although Hayek rarely touched upon the historical issue of the Norman Conquest – partly because for Hayek continental rationalism seems to be a more malicious threat to the spontaneous order – those thinkers regarded by him as his intellectual predecessors frequently did comment on whether the Norman Conquest had really imposed societal bridles upon the English people and excluded the original ways of life so as to generate historical ruptures. Sir John Fortescue asserted in *De laudibus legum Angliæ* (c. 1470) that the English laws are the best because they are the oldest, even older than the Romans’ arrival. Matthew Hale’s *History of the*

*Common Law of England*, completed in the seventeenth century, also decried the notion that William I really imposed laws on English people by conquest or via the rights of war. In any case, if the English constitution was discontinuous, it means that we can identify certain moments when this institution was led by human will.<sup>49</sup> In fact, Smith not only identified the discontinuity of the English constitution, but also insisted on the coercive and revolutionary character of the Norman Conquest, which became the prerequisite of the growth of common law.

Notably, as a Scottish philosopher, and unlike Fortescue, Smith did not single out the localised and continuous development of the English polity directly in contrast with the tyranny of ancient Rome. Instead, what he was more concerned about was using a stadial theory to explain the rise and decline of European liberty in general. Modern liberty is, for Smith, unique. It resides in large-scale civilised monarchies characterised by universal enforcement of justice rather than *vivere civile*, a recent development of which ancient peoples did not know. Indeed, Smith noticed the existence of a barbaric phase in European history, separating ancient from modern liberty. Based on his stadial account of human history, he located a progressing route from rudeness to civility. Along these crooked paths, there were fundamental political and social changes, often referred to as “revolutions” or “commotions” with dramatic refashionings of people’s ways of living (*LJ(A)*, iv.54).

Specifically, ancient liberty eventually ended with the collapse of the *Pax Romana*. Modern liberty, therefore, emerged in a different phase as a result of the “unnatural and retrograde order” marching through allodial, feudal, and then to modern government. Smith made it clear that soon after the demise of Rome, it was not feudal government but allodial

---

<sup>49</sup> Some German political theorists including Ernest Brandes (1768–1810), August Wilhelm Rehberg (1757–1836), and Frederick C. Dahlmann (1785–1860) whose work, for Hayek, contributed to the idea of *Rechtsstaat*, also contended that English liberty should be traced to and indebted to Anglo-Saxon institutions rather than the Normans. So close were they to the English tradition among the Germans that they were known as the “Hanoverian Whigs”. See Hayek 2011, 299n26.



government that was first established. It was a commonplace experience in Europe that the shepherd-like barbarians occupied the vast tracts of land yet to be possessed. For a legal historian who defended the robustness of English common custom, Smith's argument posed quite a challenge. Crucially, Smith thought that the Saxons tried vehemently to eliminate the extant insular tradition. As such, the Saxon past is not even an English product, since the barbarians came from the continent and then swept away the more ancient customs of the British Isles, which also vindicated the existence of multiple English constitutions (*LJ(A)*, iv.115-6).

For Smith, the allodial period is clearly not the happiest time in history. Allodial lords held vast territories and property, raised a large number of dependents, tenants and slaves for their own use. The lack of discipline, arts and commerce, the frequency of wars and robberies all led to massive disorders and convulsions. Importantly, this precariousness of politics was also seen in the lack of regularity of jurisdictions. The kings could not prevail over the influence of allodial lords within his realm without holding the most wealth and a standing army. They thus had to admit the lords' power of judging. The national council, or the *witenagemot* was thereby established as the intermediary structure between the king and the lords, which was composed of the king, the lords, bishops, abbots and wise men, and run as a judiciary. In the grave disorder within this period, its balance was dismantled eventually since the lords' power and property rendered their judicial power independent from the county courts and national council. Although Smith affirmed that the Saxon institutions are not without rationality considering the generally backward situation in Europe, he pointed out the serious flaws of their institutions. In fact, the jurisdiction was barely able to provide regular legal services. It was a frequent practice that the king's delegates were murdered in those areas away from his power centre (*LJ(A)*, i.128). Apparently, the balance of power was also fragile in that the lords were not overwhelmed by either kings or other allodial lords. Saxon

politics, therefore, was far from the ideal of liberty.

But the Saxon conquest was not the only rupture in English history. Since feudalism replaced allodial government, Smith further reinforced the discontinuity of the English constitution. In *LJ*, Smith drew on many historical proofs to highlight the revolutionary effects of the Norman Conquest. For instance, the word, *feodum* [perpetual tenure], only occurred in English law after the Conquest, which suggests that feudalism was not, as many antiquaries mistakenly held, introduced immediately after the Roman's decline and the Saxon's settlement, so that its inception is not immemorial (*LJ(A)*, i.122; iv.132. See also *WN*, III.iv.8). In essence, the "tyranny of feudal government" endeavoured to appropriate land and game within their realm (*LJ(A)*, i.54-55). But in almost all barbaric societies, including the Saxon society, wild animals were rarely claimed as the kings' property. This revolution of social conventions was, unsurprisingly, due to the aggrandisement of kingly power and thereby the changes of the forms of property rights. The allodial institution was eventually replaced by feudal tenures. In feudal society, almost all the lands in the entire realm were integrated into a hierarchical social structure and thus supervised by kings and nobility, which facilitated a new political environment and the rise of the common law to regulate the legal disputes under tenures. Crucially, Smith would rather endorse the view of the French legal historian Pierre Bouquet that the feudal tenure was introduced by kings (*LJ(A)*, iv.132).<sup>50</sup> Instead of a localised societal structure in England, feudalism was a result of the transplantation of European practices since the German emperor Conrad II's dissemination of this principle and the Norman's remodelling of Anglo-Saxon society. He extolled William the Conqueror and Malcolm Canmore's sagacity in imposing feudal burdens on the former allodial lords (*LJ(A)*, iv.133). The intended establishment of feudalism is not only a sign of

---

<sup>50</sup> In this respect, Smith was clearly in line with many thinkers in the eighteenth century, such as Montesquieu, Lord Kames, William Robertson, Edward Gibbon, Sir John Dalrymple, David Hume, who "transform feudalism from a system of laws to a stage of society", and argued that this institution was widely seen in Europe, although the moment when different countries surpassed this stage could be varied (R. J. Smith 1987, 72).

the expansion of kingly power, but also consolidated the political order. Compared to the Saxon past, feudal society after the conquest was “clear and enlightened” (*LJ(A)*, iv.133).

Both Hayek’s spontaneous order theory of the common law and many common lawyers themselves, as we have seen above, claim an identifiable continuity of English laws – that no human artifice or revolutionary actions have forcefully toppled the original conventions and customs. Yet already we see that Smith’s exegesis of the provenance of Saxon politics and feudalism departs from that of the common lawyers. Smith contended that before being modernised, England experienced several revolutions, of which the direct causes were often the deliberate design of outside invaders. What is more, Smith did not rely on reverence for English common custom as the keystone of English liberty. If we look further into Smith’s account, we can see that modern liberty was also induced by a series of revolutions in English society. This story of English political development in general is already very familiar to Smith scholars – by virtue of commercial opulence modern liberty was created in the milieu of feudal military-political domination. On Smith’s account, the powerful landlords who were obsessed with luxury soon broke their own estates and went into bankruptcy, in that they expended their rents which should have been used to maintain feudal obligations, military power and slaves, on personal luxury and extravagance (*WN*, III.iv.4-10). After sweeping away the feudal lordship, due to their wealth shrinking and the strategic alliance formed between sovereign and the church, the large-scale monarchical states characterised by regular government and jurisdiction were forged. As to the House of Commons, Smith was rarely concerned about its connection with the medieval intermediary ranks. Instead, he affirmed the importance of Tudor absolutism, which was clearly a mark of progress on his view, via the dismantling of old-fashioned medieval political agency. The parliament was invigorated under the Tudors when the royal family appealed to the burgeoning landed and commercial class for taxation and rulership.

On Smith's view, modern liberty embodied in "Crown-in-Parliament" owed little to the spontaneous vigour of "medieval liberties" impervious to the absolutist regime, as Hayek held. To some extent, Hayek's history of English liberty is not dissimilar to Montesquieu's account. Montesquieu also contended that the "ancients had no clear idea of monarchy" for they had no life experience of the feudalistic representative monarchies, "founded on a body of nobility", "a legislative body formed of the representatives of nation" (Montesquieu, 1989, 167; See also Courtney 2001; Hont 2005, 105-108; Tomaselli 2006; Sonenscher 2007, 131-149; McDaniel 2013, 25-32). But Smith disagreed with Montesquieu in terms of the role of Germanic tradition in modern Europe. Montesquieu, indeed, believed that the contemporary European monarchies were mainly indebted to Germanic barbarian political life in the forests. Conversely, Smith denied the connection between the modern English constitution and the Saxon-Gothic institutions. For Smith, Montesquieu's anxiety about the unsustainability of English liberty due to the friability of the post-Glorious Revolution's sophisticated political balancing without the support of medieval intermediary structure was not a problem. Although the English polities of the past – German, Saxon or Norman – were all destroyed by wars, conquests, or irresistible social forces such as commercial progress, modern English liberty has already been consolidated by the empowering of the commercial class and the collapse of the senatorial ranks in the archaic polities (cf. Sagar 2022).

For present purpose, it is important to note that Smith situated the common law system in the enterprise of the Norman and Angevin kings to implement regular remedies of justice, in order to promote political stability after the Norman Conquest. Smith was especially concerned with the progress of legal institutions and the government, such that England eventually became "enlightened" and civilised. It is from this perspective that Smith affirmed that feudalism was a period of rising central sovereignty and the refashioning of the social structure. Since feudal tenure is not so much a customary institution in England as a common

feature in Europe, the common law courts, including its writs system and the principle of *stare decisis*, as well as the precedents to handle land tenures, were established thereafter as an attempt to purposefully reintroduce order in the feudal period. Against this background, the common law system was gradually established in England.

### 3. *The Institutionalisation of Jurisdiction, Royal Authority and Centralised Sovereignty*

Based on the above analysis, Smith made further arguments that set his own views in opposition to the claims of the common lawyers, and thus also of Hayek's spontaneous order account. As the common law system was introduced due to the expansion of feudalism, it excluded the customary legal practices in barbarous society, which were full of weaknesses, to offer justice to local people. In other words, contrary to Hayek's position, Smith argued that the principle of *stare decisis* is not a result of the bottom-up emergence of quotidian social custom. Since its beginning, the common law system was immensely indebted to the expansion of central authority and the legislative capacity of several English kings countering the former irregular jurisdictions.

In *LJ*, Smith traced the history of the common law courts to the judicial office established after the Norman Conquest, which indicated that the common law practices were different from those customs in early society. Indeed, in the hunting-gathering and pastoral societies, the civil government did not grow into as strong a political body as in agricultural or commercial societies. In such cases, the judicial power was accordingly very weak. Public cases such as treason, and cowardice in military conducts, were given much more attention than private cases. Due to the great burden and cost to assemble the whole people when judging cases, such rude democratic assemblies dealt mainly with cases relating to public affairs, peace and social order, with only some private cases judged, such as robbery and

theft. Correspondingly, most cases were also bestowed to men of wealth and influence to decide. After reading Tacitus's *Germania*, Smith assumed that this situation prevailed in the Germanic tribes (*LJ(A)*, iv.26). Compared with the common law system, which emerged only later, the early legal practices generated many problems. First, due to the inefficiency of civil government in providing justice, there emerged many customary modes of legal judgement. People chose several other forms of trials, including judicial combat, which effectively determined cases by people's strength, or the trial by ordeal (involving use of boiling water or hot iron). Although such methods were little better than committing legal judgement to mere chance, Smith understood that they were not entirely irrational considering their greater efficiency than that of the central government. These legal practices were developed through people's repeated interactions of facing the precariousness of central jurisdictions. This is also why they were "very long kept" (*LJ(A)*, iv.29). Smith reminded us that even in Queen Elizabeth's time similar practices were still appealed to. Furthermore, it was also customary that plaintiffs and defendants bribed the influential in the democratic assemblies in order to get disputes settled favourably. Such unjust conduct was directly opposed to modern practices, but was widespread in every early society including Saxon and early Norman societies (*LJ(A)*, iv.32). Indeed, all these legal practices were customary and sometimes useful ways of offering justice. Nevertheless, Smith contended that they were far from ideal and not even close to the spirit of the English common law.

Smith seemed to believe that the legal structure in the early Norman societies was still very irregular and uncivilised. Many practices remained that had originated in barbarous times. Among these, the most intractable was the intimidating combination of judicial, executive and fiscal power in the hands of the judges. In particular, judges in the king's courts were often constituted by sheriffs and county officers responsible for collecting rents and judging disputes, for in the feudal society, the kings' power has ascended so that they

demanded revenue by offering judicial services to facilitate issues such as property transference and succession. Within this period, the judicial power was as awful as that in many primitive societies because it was combined with some financial and executive power, which was grasped by the Chief Justiciary and later aroused royal jealousy and suspicion (*LJ(A)*, v.13-14). Contrary to Hayek's contention, the judges in a rude society, as Bonnie Honig once said, tend to be "brutal, ambitious and overreaching", a verdict Smith anticipated (Honig 2009, 84). In all rude societies, the power of judgement, according to Smith, was trusted to personal authority, which yielded more discretionary power and resulted in more abuse. Clearly, the chief justiciary's knowledge of laws was very imperfect, which cannot ensure that exact justice be delivered when judging cases. This was common in medieval Europe. In France, the *Mayer de Palais* was also very formidable, in some ways even more so than the king. The powerful judicial-fiscal ranks usurped the throne from time to time, endangering the political order, as was seen in the deeds of Charles Martel and Hugh Capet. To counter these dangerous personalised dominions and the intimidating arbitrary regulations, the establishment of some regularised, tamed, and professional law courts became an urgent step to introduce security for both the subjects and the sovereign. Smith clearly saw the common law system as an integral part of this civilising and enlightening process in England.

Smith showed that the common law courts were established due to the consolidation of central authority in the feudal society. Unlike customary ways of judging, common law was originally designed in a top-down manner. For Smith, the index of liberty is the regularisation of government accomplished with the rise of sovereignty. It was by virtue of the kings' prowess that the once powerful Chief Justiciary was abolished, paving the way for the creation of regular common law courts. After King John's efforts to reduce the overmighty power of the Chief Justiciary, Edward I, whom Smith hailed as "one of the most prudent of our kings" and "who seems to have known what he did as well as any one",

divided the Chief Justiciary into four separate courts, i.e., Court of Common Pleas, Court of King's Bench, Court of Exchequer and the Court of Chancery as the office of writs and records (*LJ(A)*, v.16).<sup>51</sup> Now that the trials of disputes must follow the itinerant King's Court, which incurred delays and inconsistency in judgement, the civil disputes, which were more common and ordinary, were assigned to the Court of Common Pleas settled in Westminster. Further, the fiscal and criminal causes were also separated into two channels, the Exchequer and King's Bench. This legal structure thus became much more effective and won popularity among the common people.

In general, the common law courts were all supported by the sovereign to provide efficient legal remedies. Now arose the principle of *stare decisis* under the supervision of sovereignty. Accordingly, the limited power of judges in "explaining, altering, or extending or correcting" the laws was not something pre-given, but a result of the long-term wrestling between kings' tactics and the judicial branch's cunning (*LJ(A)*, v.15). Owing to the king's dominance over the judicial power, most of the judges appointed since then came from the lower ranks of lesser fortune and were bred in the Inns of Court to the law, which vouched for their caution and professionalism in judgement (*LJ(A)*, v.21). Normally the writs would be sent out from the Court of Chancery to the sheriffs in the county in order to commence a lawsuit. No remedy could be provided if there were no applicable writs available. The common law system was thus implemented. It featured in strict adherence to the writs recorded in Chancery in that the judges were all watched with the greatest care to determine whether their proceedings accorded with the exact regulations. In such cases judges gradually accumulated a large number of records and precedents for future cases. The Chancery then became the office where people got writs and brieves to comprehend the particular cases. More crucially, the emulation of these several courts tried to enclose more cases to be tried by

---

<sup>51</sup> Note that Hume also praised Edward I as the "English Justinian" (Hume 1983, vol. 2, 141).



themselves to earn more revenue, thereby promoting their own efficiency and impartiality (*LJ(A)*, v.25-26; *LJ(B)*, 67-68; *WN*, V.i.b.21).

Overall, the respect for old cases was a far more sophisticated practice needing to be nurtured by political development. Smith extolled the great exactness of the justice of the common law and the fact that the judges were restricted in altering and creating new laws, which concurred with Hayek's opinion. In fact, Smith hailed this as a major advantage of English common law courts over many European courts. For a long time, many legal historians were amazed at the unique rigidity of the common law. My analysis has showed that Hayek's spontaneous order theory of common law was particularly indebted to the polemics of late medieval and early modern common lawyers, who associated the English "common custom" and the common law to defend the immemorial, insular, natural and spontaneous nature of English legal development. However, Smith diverged from this line of thinking when explaining the mechanism behind the regularity of common law, emphasising instead that it was the broader political development that had guided the growth of the common law. Smith also noticed the oldness of common law courts compared to European courts. Although the principle of *stare decisis* was introduced in a late stage of society, differentiated from the irregular judgement in customary laws, in Smith's account, the exertion of common law courts was still earlier than the Parliament of Paris in France and the Court of Session in Scotland. With insufficient jurisprudential resources available such as from the canon law and civil law in this early stage of legal development, the common lawyers accumulated many unique precedents unknown to their European peers (*LJ(A)*, ii.75). This point certainly sounds like a spontaneous order theory, as Smith also argued the old age of English courts can produce many unanticipated legal practices through trial and error. However, at stake here is that while Hayek believed that it was thanks to the common lawyers' reverence for custom and little reflection of the utility and original intentions of

laws, Smith went deeper into the power bases of the common law courts, which disputed the spontaneous order theory by identifying sovereign interference and direction as crucial to their emergence. On Smith's account, the limited role of judges in explaining the laws, which was taken by Hayek as a sign of their humble respect for the given custom self-evolving without top-down legislation, was actually achieved by the kings' political tactics in a conscious effort to develop a regular system of justice. For Smith, we must understand the feat of English common law's emergence as bound up with legislators' prudence in attempting to establish the regular administration of justice. Smith finds that the case-binding character of the common law is hardly a natural regeneration of the earliest human practices – quite the opposite. Instead, the consolidation of *summa potestas* and the meanness of the judicial branch compared to royal power should be seen as the foundation of the great regularity of the common law system, which was itself a revolutionary break with earlier legal practices, not (as Hayek thought) a veneration and continuation of them. The origin of common law is not free from political tactics and intentional manoeuvring. As Smith noted, only when the power of judging “was in the hands of mean persons...being all low men who depended on the will of the king, they would be very unwilling and afraid in any shape to go beyond the meaning of the law or any ways to alter it” (*LJ(A)*, v.22). Evidently, the professionalism and moderation of judges were not a given fact later tainted by absolutism; they were, instead, gradually tamed by the rise of sovereignty (cf. Sagar 2022).

Similar to Hayek, Smith realised the great evil of new courts and the arbitrariness of kings to establish new courts and new statutes. Nevertheless, Smith located the historical mechanism behind the curbs on the king's prerogative in the political struggles between the parliament and the Crown in the seventeenth century – a particular political situation in England, rather than a straightforward evolutionary continuation of common law *per se*. Smith looked upon the Parliament of Paris, the Scottish Court of Session and the Court of Star

Chamber established in England quite suspiciously. Their short histories rendered their practices arbitrary, unpredictable and easily malleated by the sovereign power. Compared to the common law courts, “[n]ew courts and new laws are...great evils. Every court is bound only by its own practise. It takes time and repeated practise to ascertain the precise meaning of a law or to have precedents enough to determine the practise of a court” (*LJ(A)*, v.43). Modern English sovereignty successfully asserted judicial power over ecclesiastic affairs. There thus existed the High Commission for ecclesiastic causes. The English kings also established the Court of Star Chamber for criminal cases and the Court of Wardship. These were later abolished, primarily because parliament vied for justice and regularity throughout the seventeenth century, as well as due to Charles II’s willingness to exchange his prerogatives for funds. From then on, the kings were never again allowed to create new courts without parliamentary consent (*LJ(A)*, v.41-42).

Smith’s focus on the wider political framework thus provided insights rarely seen in Hayek’s spontaneous order theory of the common law’s emergence. Despite the existence of unintended consequences throughout history, Smith was more concerned about the changes of political authority and government, leaving aside the Hayekian dichotomy of spontaneity and artificiality. Since the common law courts should be seen as a part of English political development, the fact that it has been changed and reformed does not suggest that the freedom of English society was lost, so long as more predictability was introduced into English politics. Smith noticed the stability and independence of common law courts from the kingly prerogative in his time. But, crucially, he further investigated why the aggrandisement of sovereign power did not introduce the same result as in France, where new courts were ceaselessly created by kings. Without the consolidation of “Crown in Parliament”, the common law courts could hardly resist the encroachment by kingly authority. The longevity of the common law was largely indebted to the overall politics of England. In this case, the

institutionalisation of English courts was hardly *spontaneous*, even if it was deeply contingent, insofar as it was a product of the vagaries of English political history.

Moreover, although Smith praised the long history of the common law courts, which had allowed sufficient time to form stable practices, he further made the case that longevity does not signify perfection. The idea that the common law was characterised by a piecemeal and mild evolution without being overhauled was historically unrealistic. The Court of Chancery, for its strong equitable power to repair the old common law system, was deeply suspected by common lawyers but explicitly lauded by Smith. In this term, Hayek's adoption of many common lawyers' enmity with laymen's rationality and external intervention was opposed to Smith's positive attitude toward this reformation. The evolution of common law was not a self-regenerating process – at least if “self-generation” refers to common lawyers' resistance to external remedies.

#### *4. The Flaws of the Common Law System and the Remedies Invented*

The strictness in explaining the meanings of laws is one of the major features of the common law. But such an addiction to precedents would bring about loopholes that could hardly be filled by the common lawyers themselves when new circumstances arose. In fact, this ingrained suspicion of external intervention such as legislation and equity was very noticeable among the common lawyers. Understandably, the adherence to precedents in the common law courts also motivated the common lawyers to suspect the Chancellor's discretion in legal judgement and writs-creation, even though there existed many injuries which the old common law could not effectively redress. Hayek's condemnation of legislative power is widely seen in the earlier common law minds. Sir Edward Coke, for example, looked at the Court of Chancery (the court of equity) as a dangerous menace to the integrity of common law

(Cromartie 1995, 21-22). Sir William Blackstone also held that “...law, without equity, tho’ hard and disagreeable, is much more desirable for the public good than equity without law” (Blackstone 2016a, 62).

In *LJ*, Smith noted that the common law was not the only source of justice since medieval England. Although the common law was a genuine English product, there were many cases concerning affairs such as marriage, succession and the performance of contracts that were dealt with by ecclesiastic courts (*LJ(A)*, ii.64). This was especially the case in Scotland, where due to the backwardness of civil courts and the high-handedness of the nobles, the clergy were paid great veneration in legal judgements (*LJ(A)*, ii.50). Accordingly, as Frederic Maitland pointed out, the common law courts, as the extension of royal justice, faced fierce competition from the feudal and ecclesiastical courts (Maitland 1971, 42). The rigid legal actions, writs and legal procedures, however, made the common lawyers especially antagonistic towards reforms and innovations. In line with Maitland, Smith also noticed that such a case-binding system was not flawless. Many of its weaknesses cannot be overcome simply by continuing its immanent principle of *stare decisis*. Note further that for Smith the loopholes of the English common law were not repaired by continuing “immanent criticism”, as Hayek suggested. Instead of being a “piecemeal tinkering”, the erection and correction of the Chancery Court was to overhaul the common law by introducing foreign jurisprudential elements such as from the civil law and canon law.

Smith understood that to evade the apparent weakness of the common-law principle of *stare decisis* was insufficient for making sense of the success of English laws. The growth of commercial society required many more forms of actions and writs to deal with new cases. But the common law courts, which relied on the writs issued by the Chancery for judgement, could not handle the increasing new issues concerning the performance of contracts, testaments, and fiduciary trusts. Like Hayek, Smith also noted that, since the common law

courts were introduced before the discovery of Justinian's Pandect, they had formed many precedents before the study of Roman law and canon law became fashionable, which made them closer to the "naturall sentiments of mankind" (*LJ(A)*, ii.75). By contrast, the canon law was codified under its deep concern with Christian duty, so that it treated rude people's natural sense of equity and behavioural freedom less meticulously (*LJ(A)*, ii.74). But this does not mean that the common law must have provided the most effective legal remedies. As a "speculative man", Smith was deeply interested in the uniqueness of the common law. But as a political theorist, Smith still concerned himself with the capacity of the common law system to deal with numerous legal relations and disputes. Accordingly, he was aware that English laws appeared inadequate when new situations arose, especially in cases where commerce was boosted, for its lack of notice of the civil law and canon law since its outset. In fact, common lawyers' conservatism in explaining the meanings of laws prevented them from going beyond their legal expertise, and the existing writs, to find new remedies.

According to Smith, these failings of the common law were especially palpable in the specific performance of contracts. In rude society, the government and laws took little notice of contracts. The jurisdiction became aware of its legal urgency only when the contractual relations involved the damages and loss of greater value. The legal remedies of common law, for its insular development and strict adherence to old practices, were still circumscribed in this respect, which led to the dilemma that people cannot find remedies for assorted breaches of many forms of contracts. In particular, the common law did not assign specific performance of contracts, which was trusted to the fidelity of individuals, but only requested that the damages incurred be restored. This practice is not inappropriate in the situation of early society, due to the lack of governmental ability to settle many private disputes. However, the increasing importance of commercial transactions gradually forced the common law to change. Here, Smith noticed the complicated practices relating to the forms of actions

of the common law. In cases when a contract was broken, the plaintiffs could make use of the action of trover and conversion, which, through a legal fiction, feigned that the thing has been converted to the defendants' use but the defendants were not aware of it. Indeed, legal fictions were frequently seen in the common law, especially because of the lack of flexibility in legal interpretation and writ applications. To some extent, the legal fiction within the common law is a result of the immanent criticism within the common law. But Smith further noted that this fiction of law is, nevertheless, not always useful for bringing about restitution. The defendant in this case could choose to wage his law. By taking an oath to declare his honesty, he could be discharged from the lawsuit. Also, those contracts that were not performed by both parties were also left untouched by the common law. Despite the apparent confusions in the relevant lecture notes, Smith reaffirmed that, by contrast, no such complexity was seen in the Scottish laws, which were much more influenced by the civil law and canon law (*LJ(A)*, ii.75-78). The common law was also insufficiently capable of resolving cases of land tenure. Smith observed that the common law's exclusive attention to the damages rather than the implementation of contractual regulations *per se* proved to be very ineffective in land tenures and leases, especially in legal disputes when a tenant was unjustly ousted by his landlord. The mere restitution of damages was not equivalent to restoring the original possession of land, which, however, could not be recovered under the common law (*WN*, III.ii.14; V.i.b.21).

Smith did not point out the exact date when the Chancery was reformed to make up for the common law courts. But he did notice that the limitation of common law became increasingly troublesome in Edward III's time. Smith recorded the process by which the Chancery changed from the *officina brevium* to an equitable jurisdiction as a remedy for the common law. At first, the Chancery Court was a royal secretariat to record writs of common law. It was then bestowed with more power to create new writs to provide remedies when the archaic common law courts could not effectively do so. Smith welcomed the fact that the

Chancellor became the “the judge of the *point of law*”, according to the sense of equity in order to decide whether the existing law can be applied, while the common law courts dealt only with matters of fact (*LJ(A)*, v.28). Mostly the facts were already examined closely by the courts. Such cases would be directly sent to the Chancery to determine. When no single writ can be perceived as applicable to a dispute, the Chancellor had the discretion to invent new writs. In this way, the Chancery became much more powerful than a mere warehouse of writs, thereby becoming an equitable jurisdiction. Furthermore, this equitable court was also a result of the influx of canon law. Smith noticed that the Chancellor was equipped with legal expertise on civil law and canon law.<sup>52</sup> In fact, the Chancery itself was taken as a court of conscience, which facilitated the judgement concerning the performance of contract. As we have seen, the common law courts regarded the performance of contracts as a matter of honour, honesty and fidelity, so that it left contractual disputes almost completely undetermined. On the contrary, a court of conscience like the Chancery would force their performance. Likewise, the Chancellor further extended himself to treat cases such as trusts, frauds, property transference, succession, leases, wills and testaments (*LJ(A)*, v.29-31). The Court of Chancery, consequently, became an important exogenous equitable remedy to the common law system. Smith saw this as an indispensable component of English liberty – but one that was hardly spontaneous or unplanned in its emergence, but again the direct result of governmental intervention.

## 5. Conclusion

The historical characteristics of English common law have long been debated by legal historians (Maitland 2003, 53). Smith was also deeply intrigued by the history of the common

---

<sup>52</sup> Hume also approved of the import of the more rational Roman law into the English common law culture. See Hume 1983, vol. 2, 520-523.



law, and, unlike Hayek, he did not take at face value the common lawyers' own proclamations about the history of their practice. He tried to figure out the real causes of the impressive professionalism, the sheer maintenance of *stare decisis*, and the regularity of common law, in contrast with other systems of laws – e.g., those of Scotland and France. A historical exploration of common law is, of course, no easy task. As Ronald Hamowy noted, the medieval and early modern common lawyers such as Sir Edward Coke, who was regarded by Hayek as the “great fountain of Whig principles”, had very imperfect knowledge of the early development of common law (Hamowy 2003, 260; Hayek 2011, 248). But their political concern, theoretical phraseology and legal techniques nonetheless inspired Hayek's account of this institution.

To be sure, though it diverges from Hayek's ideas, Smith's account of the English common law does not necessarily deny the validity of spontaneous order theory. But Smith's version of the history of common law can hardly be understood as an example of spontaneous order theory – on his account, the history of the common law was far more ambiguous and featured a great deal of unspontaneous direction by rational agency. Indeed, Smith repeatedly highlighted that, compared to the Scottish and French laws courts, the English courts were strongly characterised by their longevity, such that many regulations and precedents were invented in this process. Nevertheless, although the common law was older than French and Scottish laws, it was, after all, not the oldest legal practices. In this case, Smith never traced the common law to the earliest customary law, as Hayek did. He believed that such institutions were greatly indebted to the Norman Conquest, which the Saxon society did not know about. Understandably, Smith also interrogated the political preconditions that helped establish the meanness and caution of judges, which was not a spontaneous fact but the outcome of purposefully political choices. As we have seen, Smith's account suggests that the common law neither dovetails with the existing social custom of Englishmen, nor was it a

pure bottom-up product without designs from above. From its beginning, the English laws were entangled with various political forces, pressure and legislative reasonings. Without several English king's legislative capacities and political techniques, the development of English common law could have occurred in a very different manner. Smith examined the significance of legal institutions under the aegis of his history of government and political authority. The regularisation of government and jurisdiction is central to English liberty, whether it was designed or unintended. Smith's acute sense of the high-level institutional-political environment diverged from a spontaneous order account. While Hayek would rather attribute the rise of English liberty to the common lawyers' courage to appeal to the old practices to defy legislation, Smith's analysis was more complicated, to the point where it cannot be regarded as a spontaneous order account. The English common law framework was at its beginning imposed by several political tactics. This is not to conclude that Smith was less fascinated by the traits of the common law system than Hayek was – only that he took its history to be much more untidy than Hayek's claim of spontaneous order suggests.

**CHAPTER 3: SMITH'S CRITIQUE OF FUNDAMENTAL LAW AND SOCIAL  
CONTRACT: SOVEREIGNTY, PRESCRIPTIVE RIGHT AND THE NEW MODE OF  
ENGLISH LIBERTY**

Hayek maintained that tradition must be improved rather than subverted, at least if liberty is to be protected. He thus condemned the social contract theory characterised by the ambition to break off social bonds and instead design an entire society merely by virtue of rational plans. In this regard, English liberty was precisely a consequence of spontaneous evolution and countless refurbishment of the traditional conventions. The Glorious Revolution, accordingly, served to restore the fundamental practices of the English people. Hayek's account echoed counter-revolutionary narratives in eighteenth-century Britain. For him, English politics is indeed characterised by its unwritten constitution, of which the fundamental principle is composed of many archaic documents, institutions and social beliefs. By contrast, the horrific radicalism unleashed by the French Revolution was lambasted by Edmund Burke for being imprudent, hubristic, shockingly chaotic and violently destructive. Following Burke, for Hayek, rationalism was effectively restrained in British history, which indicated that the spirit of several British revolutions, including the American Revolution, was to appeal to the fundamental convention extant without designing something new.

In particular, Hayek saw Smith as espousing exactly this form of spontaneous order theory. Smith was often portrayed by Hayek as an intellectual ally of Hume and Burke, who urged submission to the existing customs and established government.<sup>53</sup> Although it is hard to

---

<sup>53</sup> Apart from the influential readings of Burke as a conservative, many scholars also view Hume as a conservative. See Wolin 1954; Miller 1981; Whelan 1985; Livingston 1995; McArthur 2007, chap. 6. Quite notoriously, Hume was regarded by some as a Tory historian and Jacobite. See e.g., Mackintosh 2006, 90. Note John Stuart Mill's contempt of Hume as "the prince of *dilettanti*", for his alleged "absolute scepticism" and "Toryism in practice" (Mill 1969, 80nq-q38). See also Mossner 1941; Skjónsborg 2021b. For more details about the reception of Hume's thought and the broad intellectual context, see Dickinson 1977, chap. 8; Clark 1985; Susato 2015, chap. 8. On Smith's conservatism and political moderation, see Stewart 1982; Viner 1965; Hill

tell whether he concerned himself with the French Revolution before his death, Smith was undoubtedly a supporter of the English system of liberty anchored in the Glorious Revolution. More importantly, Smith also accused contract theory of being excessively philosophical and artificial. He further developed a more plausible understanding of the “opinion of mankind” to comprehend the real foundation of politics as resting in human psychology (Hont 1994; Sagar 2018), just as Hayek believed that social science must start from belief, custom and opinion as the “data of social sciences” (Hayek 1964, 25-35).

However, this chapter argues that regarding the history of English liberty Smith differed from the Whig interpretation centred around the idea of fundamental convention, which was the foundation of Hayek’s spontaneous order theory of the English constitution. No doubt Smith can be seen as engaged with a kind of social science. And like many great minds in the eighteenth century, Smith was also intrigued by the nature of English liberty. As *LJ* shows us, he always completed his analysis of public jurisprudence with British politics, which in his view was probably the superlative form of human freedom at his time. But as a peculiar strand of social theorising, Hayek’s theory posed a stronger claim than mere sociology – he probed into the history and defended the validity of the fundamental law in comprehending the cause of English liberty. The rest of this chapter will show that based on his impartial inquiry, Smith decided to discard the idea of fundamental law as a proper method to understanding the growth of English liberty, which is in contrast to Hayekian spontaneous order theory, even though Smith also began with a critique of contract theory. For Smith, the idea of fundamental law misapprehends the progress of English liberty characterised by the changeability, rather than inalterability of political principles. Smith’s critique also led to a distinctive exposition of the essence of the Revolution Settlement. Contrary to Hayek, Smith identified parliament’s intentional actions to detach the English

---

2016. Hayek’s account belongs to this line of thought. See also L. Robbins 1961. For critiques of these interpretations, see Winch 1978; 1983; Rothschild 1992; 2001; Brubaker 2006b.

people from their old political principles such as their loyalty to the Stuarts' reign without making recourse to fundamental constitution – the Hanoverian establishment is thus founded on the newly modelled system of liberty, instead of a restoration of the fundamental constitution.

Based on his reconstruction of the history of English liberty and the Glorious Revolution, I further argue that Hayek's spontaneous order theory fails to match Smith's historical account and his way to defend the Revolution Settlement. Contrary to Hayek's account that the idea of fundamental law characterizes the English Revolution, Smith argued that it would render the legitimacy of the Revolution Settlement highly dubious, primarily due to the evident political designs to consolidate the new mode of English liberty in actual history. Importantly, although both Smith and Hayek built their social theories on a critique of contract theory, their respective diagnoses diverged from each other in important ways. Thus while Hayek maintained that the continuation of the fundamental law is key to English liberty, and condemned the artificial designs suggested by contract theories, for Smith, the fundamental law doctrine not only fails to decode the history of English liberty, but by questioning sovereign's alteration of laws, conspires to destabilise the established government, thereby becoming a philosophical variant of contract theory – and to be rejected accordingly.

*1. Hayek's Critique of Social Contract Theory: History, Spontaneous Order and Fundamental Principles*

This section articulates Hayek's argument in the context of his criticisms of social contract theory. It shows that Hayek's spontaneous order theory includes at least two points opposed to the idea of a social contract. On the one hand, society is not established by a concerted

plan, as the social contract model often suggests. Rather, it was a result of the accumulated experience of individuals dealing with their local situations. The conjecture of an original state of nature where people are unshackled from social bonds is invalid as there is no such state existent at all. On the other hand, Hayek argued that the unfolding of the English constitution is an example of the growth of spontaneous order. He contended that English laws as the embodiment of the fundamental conventions managed to resist the rational design of sovereigns. Hayek further clarified how this explanation was vindicated by many Whig literati and intellectuals, who insisted that the English constitution can be taken as a foundational fabric, venerated and improved by the English people over many generations. Its main spirit, however, was never swept away by some deliberate revolutionary force.

Hayek thought that ‘social contract’ theory and ‘rationalism’ were continental European traditions, whereas his preferred spontaneous order approach is allegedly a more Anglo-American tradition. On Hayek’s view, the idea that social rules and their enforcement stem from a social contract is entirely misleading, due to a failure to notice the real foundation of human society, which is far more unplanned and less concerted than contract theory suggests. According to Hayek, contract theory is founded on an impudent presumption to “make the world anew” via “intelligent men coming together for deliberation” (Hayek 2011, 113). More fundamentally, it envisages a very optimistic view of human nature. It is said that human beings are endowed with “natural intelligence and goodness” so that they are capable of designing society from scratch (Hayek 2011, 120). As Hayek proclaimed, the Cartesian conception prevalent in the European continent held that human reason can be considered as independent from social contexts and can invent our institutions solely by its power, which further leads to the idea that “civil society was formed by some wise original legislator or an original ‘social contract’” (Hayek 2011, 112).<sup>54</sup> Accordingly, social contract theorists

---

<sup>54</sup> Hayek was indebted to J. L. Talmon’s arguments in *The Origins of Totalitarian Democracy*. In order to reinforce the contrast between the Anglophone tradition and the French tradition, he followed many of Talmon’s

conjured up a false assumption of a state of nature as if human reason can break from its institutional and social shackles to re-establish the entire civil society, something criticised by Hayek for being excessively rationalist.<sup>55</sup>

Contrary to this rationalist account, Hayek suggested an evolutionist one. As the “twin concept” of cultural evolution, spontaneous order refers to the reality that social conventions are not a result of human design, but are immensely indebted to the constant interactions between human beings and their ambient contexts. Hayek also traced the theoretical history of the spontaneous order back to the British intellectual tradition. In Hayek’s opinion, many British philosophers would rather endorse a gradualist and evolutionist model, which reveals that the origin of our constitution is not designed by a legislator or a wilful contract in a state of nature. Whereas the natural lawyers often started from an exposition of the state of nature to construct their philosophical system, the British political philosophers in the eighteenth century tended to dispense with this theoretical device. Smith also laid much stress on the point that the state of nature is non-existent. For him, contrary to what Hobbes maintained, human beings had not “emerged from the earth like mushrooms” (Hobbes 1998, 102), and the *civitas* cannot be created *ex nihilo* by a contractual action, which was supposed to artificially extract us out of the status where there is no government at all (Hobbes 1928, 84). This is also why he contended that Pufendorf’s jurisprudence built on the state of nature still needed to be reworked (*LJ(A)*, i.12-14; *LJ(B)*, 1-4).

Moreover, Hayek found that many British thinkers were convinced that human nature

---

claims, e.g., that the continental thinkers (Descartes, Rousseau, Robespierre, Saint-Just, etc.) admired Sparta as the ideal regime designed by a single legislator, while the British thinkers were more receptive to Athens and republican Rome which were closer to Karl Popper’s concept of the “open society”. Hayek lambasted Thomas Jefferson for embracing Francophone liberalism after visiting France. See Hayek 2011, 111-114. Hayek may have exaggerated the exemplar role of Athenian democracy in England, as some defenders of Elizabethan mixed constitution also appealed to Sparta as a model. See Cromartie 2006, 97. In the eighteenth century, the Cartesian system indeed suffered severe diatribes after the invention of Newtonian science. Smith wrote that the Cartesian philosophy was “fanciful” but “fallacious”, and had “almost universally exploded” (See *EPS*, 244; see also *EPS*, 92; *TMS*, VII.ii.4.14; *LRBL*, ii.133-134).

<sup>55</sup> Hayek took the Abbé Sieyès as the example. See Hayek 2011, 113.

is very imperfect. Thus they counted on time and repeated practices to unclog social progress, rather than rationally-designed deliberate reforms. In general, progress was not preconceived by anyone. It is our long experience that records the large stock of knowledge accumulated by myriad experiments and thereby results in the perfection of human institutions, or the “survival of the successful” (Hayek 2011, 112). According to Hayek, the Scottish thinkers, in particular, revive some old accounts of the unintended development of social institutions such as morals, laws and language, and refurbished these theories with their “social anthropology”, or the “science of man”, which helped indicate that society is neither designed by human beings nor ordained by some supernatural intelligence.<sup>56</sup>

Hayek is not anti-statist. Instead, he accused the “rationalist laissez faire doctrine” of being “antistate” and “anarchistic” – in the sense that the rationalists are always ready to break off the bonds of civil society (Hayek 2011, 120). Since human nature is defective, it must rely on some prescriptive institutions to channel the contending interests and values.<sup>57</sup>

---

<sup>56</sup> Hayek found this acknowledgement of the Scots’ contributions to anthropology in Edward Evan Evans-Pritchard’s *Social Anthropology*. See Hayek 2011, 112n16.

<sup>57</sup> Hayek was acutely aware of the British political economists’ depictions of our natural indolence and improvident wastefulness which he saw as the reasons for requisite institutional restraints. Notably, he thus concluded that Smith was not a supporter of *laissez-faire* or the doctrine of “natural harmony of interests”. See Hayek 1967, 100-101; 2011, 121-122. Smith’s intentional violations of the *laissez-faire* principle are especially noticeable in his discussions of money, banking and usury law. Many commentators opined that it was probably due to the shock induced by the financial panic after the Seven Years’ War and the Ayr Banking Crisis in 1772 that Smith became more cautious about *laissez-faire*. See Murphy 2009, 180-185; Rockoff 2013. In late June 1772, Hume wrote to Smith asking if he would make any theoretical revisions inspired by the calamitous banking crisis. See *Corr*, 162. On Smith’s attitude toward usury law, see Levy 1987; Paganelli 2003. Remarkably, it is in fact Jeremy Bentham who lamented that Smith had insufficient faith in the free market when it came to usury laws in his *Defence of Usury* as a letter to Smith in 1787. See Bentham 1987, 386-404. Dugald Stewart also criticised Smith’s negative evaluation of the free fluctuation of interest rate. In this case he sided with Bentham and Physiocrats rather than Smith. See Stewart 1815; Weber 2021. However, many scholars have long been intrigued by Smith’s and Hayek’s faith in the “natural harmony of interests”. For instance, John Gray thinks that Smith dismissed Hume’s articulation of “political morality” while suggesting that “[t]he coincidence of private and public interest...has...the status of natural law whose guarantor is in the end a beneficent providence”. See Gray 1988, 62. Such providentialism seems rather close to Hayek’s cultural evolutionary model, which is said to be a “secular metamorphosis” of this deistic viewpoint that history is characterised by human blindness to collective preservation and the ultimate end of history. Jacob Viner suggests that if Smith ever vouched for the ideal of *laissez-faire* political economy and the natural harmony of private interests, such a defence was still less adamant in *WN* first published in 1776. See Viner 1927; Stigler 1965. But Smith’s apparent religious commitment complicates the issue. In *TMS*, Smith delineated that just as the wheels of the watch serve well to show the time without self-consciousness, people do not usually intend for social utility but by virtue of the wisdom of God they are equipped with many sentiments and faculties in order to achieve collective preservation. See *TMS*, II.ii.3.5. For more interpretations about the theological background of Smith’s thought see Campbell 1971, 69-78; Viner 1972; Kleer 1995; Alvey 2004; Oslington 2011. But Dunn explicitly



At stake here is that such institutions cannot be intentionally contrived, which insinuates that even the state actions are limited by long-evolving rules, or rather, the tradition. Hayek maintained that it is owing to the “respective ideas about the role of traditions and the value of all the other products of unconscious growth proceeding throughout the ages” that Smithian – or more broadly, British – liberalism is distinguished from the rationalist approach of institutional design, the former of which emphasises that tradition gradually grows as a result of the accumulation of experience. This British evolutionary liberalism also argues that tradition is a depository of human knowledge and wisdom which no single person can ever fully grasp. In daily social life, the rules, habits and conventions are followed by ordinary people without being much questioned and reflected upon.

The spontaneous social order, diachronically as an evolutionary product, thereby becomes the embodiment of human freedom according to Hayek. It fends off irresponsible human designs, including the sovereign’s legislating to alter the existing norms at its pleasure, which would thwart the habits and liberty of the common people. The operation of society, indeed, requires necessary coercions. But sovereignty must also be circumscribed by the conventional custom, rules and institutions that originate in our spontaneous formation, rather than gradually intruding upon the conventions in the name of, say, “emergency”. This is also

---

claims that Smith’s thought is not “theocentric” (Dunn 1983, 119; cf. Sagar 2021b). In fact, Smith withdrew from the final edition of *TMS* the passages on divine justice and atonement, which had, perhaps unsurprisingly, aroused many diatribes for it seemed a major proof of his moving away from orthodox theology and his acceptance of Hume’s scepticism on religious doctrines. Some comments directed at Smith are recorded in Raphael 1969. Smith was obviously aware of the searing reactions to his close friendship with Hume. See e.g., *Corr*, 251. As for Hayek, it is obvious that his idea of cultural evolution is no longer based on any deistic argumentation on the natural order. In *The Road to Serfdom*, Hayek argued that the ancients attribute human blindness to the deity, whilst his analysis of the impersonality of the mechanisms such as competition and justice does not rely on an appeal to theological concepts. See Hayek 2007, 134; 1976, 59-60; see also Foucault 2008, 278-282; Mirowski 2007, 336; Vatter 2014, 210; Whyte 2019. Hayek’s spontaneous order theory of the origin of human institutions might be related to his particular understanding of human nature. Adam Ferguson’s notice of the destructive tendency of human beings to “occupy themselves in forming projects and schemes” was underestimated by Hayek (Ferguson 1995, 119). Hayek insisted that such qualities are rooted in the uncommon “pride and ambition” of rationalism, which is opposed to the more universal rule-following, custom-binding and order-seeking disposition. See Dale 2018; Luban 2020. Due to such account of human nature, he argued that human institutions must unintentionally and gradually emerge instead of being ambitiously and hubristically designed.

why Hayek maintained that in a free society, “the judge...not the administrator may order coercion” under the aegis of the separation of powers and the juridical independence (Hayek 2011, 129, 257-258).<sup>58</sup> Judges apply the “common principles” represented in the old precedents to make sure that actions with particular ends conform to the general rules, which also trumped the legislation. Such a structure warranted the implementation of the rule of law throughout English history – no single agent can ravage the “regulation of long prescription and ancient ways”, not even the sovereignty (Hayek 2011, 122). Hayek believed that his observation was pre-empted by Benjamin Constant’s conception of *système de principes*, that

Not only is liberty a system under which all government action is guided by principles, but it is an ideal that will not be preserved unless it is itself accepted as an overriding principle governing all particular acts of legislation. Where no such *fundamental rule* is stubbornly adhered to as an ultimate ideal about which there must be no compromise for the sake of material advantages—as an ideal which, even though it may have to be temporarily infringed during a passing emergency, must form the basis of all permanent arrangements—freedom is almost certain to be destroyed by piecemeal encroachments (Hayek 2011, 130. Italics added).

Hayek’s theory of spontaneous order is thus presented by him as being in opposition to contract theories of social institutions. To reinforce his argument of spontaneous institutional evolution, Hayek demonstrated the regeneration of the English constitution as an example. In *The Constitution of Liberty*, he argued that thanks to the common lawyers and jurists’ incessant claim for the efficacy of existing practices and Magna Carta as the “*Constitutio Libertatis*”, the English constitution was not changed by the sovereignty, even if it was once in danger of being undermined by absolutism (Hayek 2011, 236). The previous chapter has shown that Hayek was also inspired by the Whig tradition, which held that the English constitution was never violently altered, either top-down or bottom-up. In the eighteenth-century Whiggish ideology, the English unwritten

---

<sup>58</sup> Hayek singled out Smith, Blackstone, Jean-Louis Delolme, Edmund Burke, and William Paley as the exponents of this strand of liberty, which he saw as a common sense in the 18<sup>th</sup> century. See Hayek 2011, 257-259.

constitution is presumably upheld by a series of documents and conventions such as Magna Carta, the rules of royal succession, the balanced constitution, *habeas corpus* and the archaic common law system (See also Dickinson 1977, chap. 5; Sabl 2012, chap. 4).<sup>59</sup> According to Blackstone, the Norman Conquest had an undeniable impact on English society, but we should attribute the preservation and reinvigoration of English liberty to the relentless efforts to restore the ancient constitution under the pressure of arbitrary interventions (Blackstone 2016b, 412-443). Such efforts to corroborate the fundamental convention finally amounted to the Revolution Settlement in 1688. For Blackstone, the Glorious Revolution was not a choice *de novo*. Its purpose was not to depose the king by making recourse to the right of resistance, but only to refill the vacancy of throne engendered by James II's voluntary abdication, in order to recover the archaic constitutional balance (Blackstone 2016a, 212). Burke, to whom Hayek paid fulsome tribute, compared the *Ancien Régime* to a "noble and valuable castle". He requested that people should repair its walls and build on the "old foundations" without revolutionising it (Burke 2014, 36). Like Hayek, Burke also found the "tumultuary and giddy choices" or some "sudden and temporary arrangement" particularly deleterious to the established constitution, which is "made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil and social habitudes of the people, which disclose themselves only in a long space of time" (Burke 2000, 274). For Burke, the choice of a nation should be left to the "ages" and "generations", rather than any small group of individuals. In such cases, Burke defended even the "blindest prejudice", whose defects can only be unveiled "with due caution" (Burke 2014, 100). He claimed that such

---

<sup>59</sup> Duncan Forbes notes that the vulgar Whig ideology was largely comprised of a theory of original contract, the defense of ancient constitution and a contrast between British liberty and continental despotism. See Forbes 1975a, chap. 3, 5. This chapter will show that while Smith was sceptical of this ideology, Hayek's stance was much closer to it. In this sense, Smith should be regarded as what Forbes terms a "sceptical Whig" in contrast Hayek's alignment with vulgar Whiggism.

prejudices would not be sustained forever, since time could help reveal various rights and wrongs, even though the multitude is generally “foolish” (Burke 2000, 274). As an opponent of natural right doctrine and social contract theory, Burke still conceded that “[s]ociety is indeed a contract” – but only metaphorically. The Burkean social contract is not one regarding so low a concern as provisional commercial transactions that are revocable, but a consecrated partnership between the living and the dead, which common people are not born with discretion to enter into or not (Burke 2014, 100-101).<sup>60</sup> Hayek felt much sympathy for Burke’s defence of the English constitution and his accusation of those rational programmes to disrupt the spontaneous development of English politics.

Furthermore, Hayek took himself to have uncovered a particular Whiggish intellectual strand in the eighteenth century centred around the idea of “fundamental law” or a “fixed constitution” of England. It referred to the English government as a self-consistent, “self-maintaining”, and “self-corrective” organism, which made great contributions to the spontaneous order tradition. Hayek paid much heed to Smith’s disciple, Dugald Stewart, and his *Edinburgh Review* circle. In the 1958 paper “Freedom, Reason and Tradition” which was later incorporated into *The Constitution of Liberty*, Hayek cited Dugald Stewart’s account of the English constitution at length, in which Stewart, as another representative of the Whigs,

---

<sup>60</sup> Burke regarded the conception of nation as “an idea of continuity, which extends in time as well as in numbers and in space” (Burke 2000, 274). For Burke’s debates with Richard Price as the backdrop against which this nuanced judgement of contract theory was made, see Hampsher-Monk 2014, xx-xxi. Thomas Paine pointed out that the Burkean contract was no different than tyranny, “governing beyond the grave” (Paine 1995, 92). Hayek realised that Burke had similar ideas to Matthew Hale’s common law conception after reading William Holdsworth’s *History of English Law*. See Hayek 2011, 114-115n22. On Burke’s intellectual affinity with Hale, see also Pocock 1960. But it is notable that Burke dismissed the continuity of ancient constitution in his early writings. See Bourke 2015, esp. Part II; cf. Lucas 1968. Notably, facing the unsettling corruption of East India Company, Burke appealed to the conception of popular consent and artificial agreement between subjects and sovereign as the criterion of the imperial justice in India. See Bourke 2016, 219-220. It is likely that Smith’s politics disagreed with Burke’s in some important respects. Smith did not share Burke’s admiration of the prescriptive constitution. And he held a favourable view on William Pitt the Younger’s conduct in the English Regency Crisis in 1788-1789 caused by George III’s unbalanced mental conditions. Burke, however, was known to be Pitt’s opponent. See Smith’s letter to Henry Dundas on 25 March 1789, in *Corr*, 318-319. In addition, Paine deeply sympathised with Smith’s political economy while attacking Burke’s politics. But of course, Smith’s attitude toward contemporary politicians including Burke is not very clear-cut, and the personal and intellectual relationship between Smith and Burke is a topic hotly debated. See W. Dunn 1941; Winch 1996, 125; Ross 2010, 416; Frazer 2015.

opined that the English Constitution was a thing of “systematic beauty” and its several components were of the “same congenial spirit”, even though it was “the gradual result of circumstances which may be regarded as accidental and irregular”. He intended to safeguard the “fundamental or essential principles”, which tended to be obscured by the superficial vicissitudes rendered by time, accidental occasions, emergency legislations, and the older customs in history. But the truth is that only those innovations agreeable to the “spirit and analogy of the laws which we have been accustomed to obey” would not be unconstitutional and fall into disuse. Our everyday discourse surrounding the “constitutional” and the “unconstitutional” implies that there is a “general spirit and tendency of our established laws and usages”, according to which ordinary people judge the constitutionality of new practices (Stewart 1856; cf. Hayek 1958; 2011, 116-117, 253-257). Hayek further noted that such reverence for fundamental principles extended itself across the Atlantic when it was gradually forgotten by the English in the wake of the emerging parliamentary sovereignty in the late eighteenth century. It is said that the American Revolution was to recover the neglected “fixed constitution” that was composed of many extant charters including the Mayflower compact. Such conventions prescribed individual freedom. Similar to the spontaneous order, the fixed constitution was not simply a codified positive document. It operated higher than ordinary laws, insofar as it was the ever-present “agreement” or “common belief” as the “permanent means of restricting the powers of government”, though they might never be expressly stated (Hayek 2011, 263, 269). The gist of American independence, for Hayek, was not the rationalism which ran amok in the French Revolution, but, again, the restoration of the ancient tradition of British liberty. In essence, the American Constitution was not a product of human design or a deduction from abstract maxims, but, just like a spontaneous order, an outcome of unforeseen accidents, tentative discoveries and more importantly, an “application of traditional principles to particular problems” (Hayek 2011, 273).

To put it more succinctly, Hayek's spontaneous order theory of civil society is undergirded by his rediscoveries of the idea of fundamental law. Hayek keenly pointed out that it was propagated by several Whig circles – Thomas Babington Macaulay's historical account of the English revolution was still reminiscent of this Whig interpretation of history in the nineteenth century (Hayek 2011, 259-260). To defend the lost intellectual legacy of those Whig "gentlemen-scholars" (Hayek 2011, 194), he labelled himself an Old Whig and departed from what he saw as the later Whigs, whom he took to be tainted by French liberalism. Hayek's emphatic attack on a constructive rationalism that takes itself to be capable of changing the tack of civil society at will made him receptive to certain fundamental and traditional rules of government to secure freedom and restrain designs.

Hayek's visions of spontaneous order theory, therefore, should not be understood as a denial of the dynamic nature of tradition or stubborn conservation of the oldest rules *tout court* (cf. Livingston 1990, 134). Hayek was aware that the observance of rules should also be variable to facilitate "spontaneous growth", "modifications" and "improvements" (Hayek 2011, 124). What he found disconcerting was the hubris of presuming to establish the world anew, to hastily demolish the antiquate fabric of social order instead of conscientiously building on its ruins. In Hayek's view, the "fundamental law" is not stagnant, either. It was upheld by institutions such as the precedent-binding common law, the professionalism and independence of judges, the constitutional reins on royal prerogative, and perhaps more crucially, the customary opinion of ordinary people. This is why it was evoked every time deliberate displacement was intended. The lynchpin of the fundamental law, however, lies in the fact that even though modifications were constantly made, its nucleus was hardly changed – the ageing fortress was never torn down, only refurbished with new bricks. Precisely in this respect, however, Smith disagreed with Hayek. For Smith, there was hardly any immutable fundamental law to be found in England.

## *2. Smith's Critique of the Fundamental Law Doctrine: Absolutism and English Political Development*

As analysed in the previous chapter, unlike many ancient constitutionalists who defended the continuity and immutability of the English constitution, Smith argued that Anglo-Saxon allodialism purged the earliest customs from the British Isles, and the Norman Conquest also constituted a rupture in English history, as feudal tenure was transplanted after William I's arrival. For Smith, the cause of English liberty was not anchored in any fundamental law precisely because there was hardly any intact body of laws existent in the past. Smith clearly identified several revolutions of political principles in English history, each of which had introduced some novel practices that were later accepted and confirmed. This section reconstructs Smith's account of the new stage of English political development; namely the later development of English absolutism after the feudal stage. As we shall see, Smith argued that the collapse of the nobility made the fundamental law an obsolete political claim to bind sovereignty, which once again confirms the alterability of the English constitution, and was also regarded by Smith as a significant progress that paved the way for a new system of liberty in modern Britain. Both points contradict Hayek's explanation of English liberty as being a result of the spontaneous evolution, which emphasised the regeneration of archaic medieval liberties to counter absolute monarchy as the crux of English liberty (Hayek 2011, 236).

As Smith noted, in England it was the Tudors who substituted absolutism for the aristocratic monarchy founded on Magna Carta. To explain the nature of the English government,<sup>61</sup> Smith mapped out the political landscape in Europe to see how English politics

---

<sup>61</sup> The fact that this question concerning the nature of English government, in the eighteenth century, had no straightforward answer was underappreciated by Hayek. In fact, it was even unclear which of the two principles

played out in history. After the collapse of the Roman Empire, most lands fell under the power of the allodial lords. As we have already noted, in Smith's view, the construction of feudal government was a result of the further centralisation of kingly power in the allodial government. Feudalism, accordingly, should be taken as a particular type of aristocratic monarchy. Compared to the Grecian republics, the realms of the medieval European countries were much larger, which facilitated the establishment of representative systems rather than popular government (*LJ(A)*, iv.150). Accordingly, just as France and Germany, England had long been governed under a monarchy. Within this period, the European republics were only distributed sparsely in some regions such as Italy, which was located in the marginal area of the internally unstable Holy Roman Empire, thus imperial suppression there was less severe (*LJ(A)*, v.46-47).

Importantly, Smith repeatedly argued that the senatorial vestiges prescribed in Magna Carta, oft seen as constituting the fundamental law by his contemporaries, were essentially repressive, which curtailed the power of county courts as the democratic part of the English polity (*LJ(A)*, iv.150), and as such was also not the key component of modern English liberty. For Smith, the eradication of noble power was a universal premise of individual security and liberty. As he observed, “[t]he power of the nobles has always been brought to ruin before a system of liberty has been established, and this indeed must always be the case. For the nobility are the greatest opposers and oppressors of liberty that we can imagine” (*LJ(A)*, iv.165). The feudal nobility raised a large number of subordinates, waged wars with each other, thereby threatening political order, civil peace, individual security and freedom. In

---

(authority or utility) was dominant in England. Montesquieu famously argued that England was a republic camouflaged as monarchy. Smith seemed to have shown some sympathy with Montesquieu's account. He said in *LJ(A)*, v.122-123, “In Britain the sovereign power is partly entrusted to the king, partly to the people, and partly to the nobles. As it is therefore partly monarchicall, the principle of authority takes place in a considerable degree, as also because there is some small part of the government aristocraticall. But as the government is in great part democraticall, by the influence of the House of Commons, the principle of utility is also found in it.” But Smith obviously believed that the democratic appeal of the House of Commons to popular consent was metaphorical. See also Goldie 2006; Lieberman 2006; Richter 2006; Tomaselli 2006; McDaniel 2012; 2013; Plassart 2015; Whatmore 2019; Sagar 2022.



comparison, the absolute monarchy's rulership was less harsh than the unruly noble lords, which held decentralised domination in the kingdom and intimidating military-political power. As Smith argued,

[The nobility] hurt the liberty of the people even more than an absolute monarch. In an absolute government, as that of the Tudors, the greatest part of the nation, who were in the remote parts of the kingdom, had nothing to fear, nor were in any great danger of being oppressed by the sovereign, who was terrible to those only who were near at hand to the seat of his court. Whereas every one is in danger from a petty lords, who had the chief power in the whole kingdom. The people therefore never can have security in person or estate till the nobility have been greatly crushed. Thus therefore the government became absolute, in France, Spain, Portugal, and in England after the fall of the great nobility (*LJ(A)*, iv.165-166).

Therefore, while denouncing the noble regime as oppressive, Smith denied that the fundamental foundation of the modern English government could be located in the medieval polities. Hence, although absolutism is not the endpoint of modern English liberty, it was regarded as a necessary condition of the exertion of a system that could safeguard freedom.

Smith recorded that the aristocratic monarchies were replaced by absolutism, especially under the Tudors, owing to the growth of central sovereignty in the wake of commercial progress. The rise of arts and luxury precipitated the corruption and bankruptcy of the nobility, while the much wealthier royal family was able to afford the extravagance so that the monarchical government was soon strengthened and became absolute. At this time, the aristocratic elements crystallised by Magna Carta were dismantled. The absolute monarchy subsequently excised this aristocratic system altogether in England. Afterwards the collapse of the nobility due to luxury and their defeat in battles against the kingly power produced a very servile and obsequious parliament. The Act of Henry VII that allowed the nobility to dispose of their landed estates further accelerated their bankruptcy, placing them "entirely on the level with the Commons" (*LJ(B)*, 61). This made the royal family capable of establishing an absolute government, which also became an urgent political issue since the

papacy was widely believed to be an ominous threat to sovereignty by secretly inflaming religious unrest and encouraging political cabals (*LJ(B)*, 187-188; *WN*, V.i.g.24). To firmly secure the government, the court party in the Elizabethan period began to disseminate the doctrine that the English people were only servants of the sovereign and had no role in the constitutional government, let alone to resist the *summa potestas* (*LJ(A)*, v.68-69). Thus from Henry VII to Elizabeth I, monarchical authority was widely accepted as powerful and absolute (*LJ(A)*, iv.164; iv.159-160).<sup>62</sup>

What is particularly related to our present concern is how this political development affected the fundamental law doctrine. Crucially, Smith observed that in an absolute government where nobility is destroyed, such as that in Britain, the sovereignty can be effectively bound by no positive laws.

It is said that the sovereign can not alter the *fundamentall laws* of the country: but these depend merely on the constitution of the state at that time. Thus it is said that the French king can not alter the succession in allowing it to pass by female heirs prohibited by the Salic law. But this depends merely on the circumstances of the affairs. The vast number of princes of the blood in France who are possessed of great estates, these will always oppose such a dissadvantageous alteration...if it should happen that there were no princes of the blood nor any very great nobility, as was the case in Britain...[the sovereign] might no doubt alter [the fundamental laws] as he pleases, as easily as with the succession of private persons (*LJ(A)*, v.137-138. Italics added).<sup>63</sup>

Indeed, Smith found that in European history, the idea of fundamental law was often invoked when facing the weakness of sovereign power, especially when the feudal lordship was still

---

<sup>62</sup> For Hume, the Elizabethan absolutism was the best litmus test of the validity of the idea of an ancient constitution. It was in this period that the monarchical sovereignty became so indisputable that even its imperious actions were taken as the “ordinary course of administration”, which did not “infringe any *established* liberties of the people” according to the prevailing opinion. See Hume 1983, vol. 4, 355.

<sup>63</sup> According to the editors of the Glasgow Edition of *LJ*, Smith here hinted at the 1701 Act of Settlement, which virtually deposed the Catholic descendants of Charles I, thereby acknowledging the right of succession of the line of Electress Sophia of Hanover. See *LJ(A)*, v.137n83. In *A Treatise of Human Nature*, Hume also used the Salic laws as an example of the idea of fundamental law. He noticed that the recalcitrance of some long-standing positive laws discouraged new legislations. But how far these laws can be armoured to check the legislative motives to innovate the constitution is the “work more of imagination and passion than reason” (Hume 1978, 561-562). Smith agreed and took up the example of Salic law again. For him, such indeterminacy is, in a large measure, due to the specific socio-political circumstances.

powerful enough to resist the sovereign.<sup>64</sup> In particular, he observed that in France, when the nobles were still powerful, they were able to thwart the princely authority's attempts to alter ancient laws. In this perspective, the claim that there exists an immutable and unalterable fundamental law suggests that the sovereign's interventions should be resisted and the successful attempt to thwart sovereignty's changes of laws made the sovereignty precarious and unstable. Smith believed that to be a sovereign means holding supreme authority in the dominion, thereby being regulated by no other secular power. That is to say, the sovereign power, being stable and firmly settled, can change laws at will without constraints, if it is indeed the supreme power, and provided the circumstances allow. And as Smith suggested, in the wake of absolutism in England (Britain), this doctrine of fundamental law became entirely anachronistic.

Smith's explanation, therefore, conflicts with Hayek's spontaneous order theory, which argues that the long-standing custom to hinder wilful actions by absolute monarchs is the crux of English liberty (Hayek 2011, 109, 236). As Smith noticed, the rise of English absolutism after the collapse of feudal lordship is one step closer to modern liberty, contrary to Hayek's negative view of absolutism. For Smith, the medieval intermediary ranks had to be destroyed before a system of liberty could be exerted. And due especially to the fall of the nobility, sovereignty had become absolute, without being legally bounded by existing positive laws. Importantly, as I will later suggest, the ensuing development of Crown-in-Parliament in England was also built on the incontestability of English sovereignty. Smith went on to reconstruct a historical account of the government after the Glorious Revolution. According to Smith, the feat of the Glorious Revolution was largely owing to the mutability of positive

---

<sup>64</sup> Smith noticed that such political languages as the fundamental law were often deployed in some unstable ancient republics. In ancient Rome, the tribunes motivated the infuriated poor to call for the restoration of ancient distribution of land under the provisions of the agrarian law, which was purported to be a fundamental law of the republic (*WN*, IV.vii.a.3). Furthermore, based on Cicero's *De Officiis*, Smith summarised some negative effects of agrarian laws upon the price level of corn and the economic wellbeing of ancient Rome. See *WN*, I.xi.b.12.

conventions induced by the sovereign power, especially in the case of royal succession rules. And it was precisely due to the parliamentary interventions that the present political system, as the new mode of English liberty, was settled, which importantly differs from Hayek's evaluation of the Glorious Revolution as a reinvigoration of medieval liberties as the fundamental convention (Hayek 2011, 236).

### *3. The Foundation of Modern English Liberty: Sovereignty and Parliamentary Actions*

After revisiting Smith's attitude to absolutism, this section further traces the later development of Crown-in-Parliament and the Glorious Revolution in Smith's work, in order to understand how Smith diverged from the Hayekian spontaneous order theory of fundamental law. As we shall see, there are at least two points Smith raised against the fundamental law doctrine as a proper historical account of the Revolution Settlement. First, for Smith, modern English liberty was not founded in a regeneration of old rules such as medieval political principles or any other ancient prescriptions. Its institutional principles (separation and checks of powers) and social foundation (mercantile groups) were indebted to the development of sovereignty and the decline of feudal principles. Second, as Smith dismissed the fundamental law account to trace the Revolution Settlement to past generations, he held that the case of modern liberty was supported by a series of parliamentary actions to loosen people's habitual loyalty to the earlier practices (the Stuarts' reign), i.e., to alter the succession rules and to introduce several laws of treason. For Smith, the royal succession, oft seen as constituting the fundamental convention of the English, was undoubtedly altered by parliament. In this case, Smith's history suggests the Glorious Revolution can hardly be seen as a spontaneous regeneration of fundamental principles, but was consolidated by important institutional innovations and political alterations.

As Smith declined to take Magna Carta as inaugurating a fundamental constitution of liberty, he took pains to explain that the parliament that procured sovereign power in the early modern period was not built on the relic of the feudal lords, but on new groups whose influence and power lay in mercantile activities. In the feudal period, the boroughs gradually expanded their influence in the parliament for making supplies to the king's revenue. Subsequently, English absolutism began to exhibit some deficiencies. Unlike the continental monarchies, there was no proper standing army in England, because one was simply not needed – that Scotland had been subdued allayed the geopolitical pressure faced by the English (*LJ(A)*, iv.168-170), an island nation. In addition, Elizabeth I alienated a large part of the royal demesne and promised to extract no new taxes in order to court the favour of the common people. James I and Charles I, therefore, were troubled by severe fiscal and military shortages to defend their prerogatives. Such conditions made possible the increasingly powerful parliament. The House of Commons was then comprised of the commercial class, who were more parsimonious and more wealthy than the nobility (*LJ(A)*, iv.172). They were also determined to check the extravagances of royal power. Thus parliament encroached upon the sovereign power, took over the power to take new loans, and secured freedom of speech. Smith noticed that parliament within this period was universally puritan and republican in its spirit. Feeling sympathy with the Scottish rebellion, the Commons refused to support Charles I and finally beheaded him (*LJ(A)*, iv.172-173). As for Charles II, he also failed to restore the absolute monarchy: his indulgence in luxury led him to rely heavily on parliamentary consent for taxation, which further strengthened the independence of parliament (*LJ(A)*, iv.173).

The fact that the new House of Commons gave rise to the mechanism of King-in-Parliament to check royal prerogative was made possible by its institutional stability. It gained much more authority and trust than the House of Lords, whose attachment to their private family fortunes was then suspected to be potentially unfavourable to the public good.

On the contrary, the Commons were elected as representatives from their constituents, so they were supposed to be more inclined to listen to the voice of the common people (*LJ(A)*, v.3-4). This made the power bases of the modern English political system completely different than what it had been in feudal times. As the noble lords were inferior to the Commons with respect to their wealth and political influence, the power of parliament shifted to the hands of the middling ranks in England. As Smith reported,

The number of voices in that [House of Commons] was much greater; they consist of about 500 members, whereas the Lords are not much above 200; and of these 500 there are perhaps 200 possessed of as great property or greater than the Lords. But besides this personall influence, they had a still greater one as being the representatives of the whole body (of) the people both in the burrows and the country, and in this light as it were the weight of the whole people (*LJ(A)*, v.3).

Moreover, the Commons invented more fiscal institutions to superintend the king's revenue by the new Civil List programme to support the royal budget, which was then supervised by parliament and beyond the control of the king (*LJ(A)*, iv.174-179). Accordingly, a checks-and-balances mechanism of the different branches of sovereign power was created before James II's accession to the throne. After the Glorious Revolution, this system was firmly exerted in England.

For Smith, the liberty of the English resided in this internal separation of different branches of sovereign power, which put clear limits on royal prerogative (*LJ(A)*, v.113-114; *LJ(B)*, 91). He made the case that "[i]n England the exact boundaries of the kings power have been pretty well known since the Revolution; one can tell exactly what he can do" (*LJ(A)*, v.103). In line with Hayek, Smith also defended the institutional controls placed on the prerogative in support of individual liberty from arbitrary power (Hayek 2011, 236). However, Smith repeatedly affirmed that the new mode of English liberty should not be confused with the archaic aristocratic monarchy, since, as we have pointed out, it was founded neither on Magna Carta nor on the feudal aristocrats, but on the new mercantile

groups and middling ranks in England, who aspired to check the arbitrary executive power originally grasped by the Stuart family since the formation of absolutism. Therefore, although in this respect both Hayek and Smith agreed on what the lynchpin of English liberty consisted in – namely the sophisticated demarcation of sovereign power – their ideas of the origins of such a system are different, as Smith did not appeal to the reinvigoration and self-evolution of medieval liberties as the foundation of modern liberty, but regarded the Commons empowered by the burgeoning commercial class as the new foundation of the modern English political system. In fact, Smith argued that this newly modelled institution served not to reverse, but to further develop the principle of absolute sovereignty.

In England the exact boundaries of the kings power have been pretty well known since the Revolution; one can tell exactly what he can do. But then we are to consider that the king is not here the sovereign. The sovereign power is lodged in the king and Parliament together, and no one can tell what they can not do (*LJ(A)*, v.103).

Thus it is clear that for Smith, after the rise of absolute monarchy and the decline of feudal ranks, the Crown-in-Parliament was a further progress of the supremacy of sovereignty out of a precarious “feudal anarchy” (*WN*, III.ii.7). In fact, Smith insisted that different branches of the sovereignty, i.e., federal/ executive, judicial and legislative powers were precarious in rude societies, while they all must grow to the absolute status in defence of incessant revolutions and political instability in a civilised society (*LJ(A)*, v.104-111, v.112). On Smith’s account, the parliament’s countervailing actions against the monarchy did not render the Crown-in-Parliament any less sovereign than the once formidable absolutist monarchical government (*LJ(A)*, v.134) – as we have mentioned, it was an internal balance of power within the sovereignty (king and parliament). Indeed, “none can say how far the supreme power of king and Parliament may go” (*LJ(B)*, 91). The legislative, executive and judicial powers were then securely settled in the Crown-in-Parliament as the body of sovereignty, – only the division within made different departments’ breaches of rules easily traceable, which

safeguarded modern liberty.

Therefore, contrary to Hayek's recourse to some fundamental laws and a process of spontaneous order, for Smith, the modern English system of liberty was newly modelled, unknown in the past. This fact becomes more visible if we look further into the historical details about how this system was consolidated by parliament. As Smith noted, such political innovations were not only embodied in the particular institutions such as the Crown-in-Parliament, but also the intentional maintenance of parliament to affirm the new constitution. Among such political attempts, the most controversial was the alteration of the line of royal succession, whose effects took decades to be generally accepted by the British people and was a decisive act in the construction of English liberty and its settled constitution that can hardly be characterised as 'spontaneous'.

In Smith's perspective, the turbulent late seventeenth century was especially worth noting, for then the legitimacy of Crown-in-Parliament had not yet been fully imprinted on people's minds. In fact, such turbulence should also be traced to Elizabethan absolutism. Smith saw the partisan divide between the court and anti-court splinter groups as gradually emerging in the absolutism stage. To confront the court party, the other side embraced the principle of utility and insisted that the government was a mere magistrate whose authority was derived from the meanest folks. Such republican fervour peaked during the 1640s to 1660, before Charles II claimed the restoration of the Stuart line and the Puritans, as well as Presbyterians, were repressed again. For Smith, the Glorious Revolution should also be understood as belonging to this barrage of fluctuations of political principles. After the restoration of the Stuart family, the court party ascended once again (*LJ(B)*, 82). The parliament, therefore, never ceased to pursue the consolidation and normalisation of the King-in-Parliament. There were, for example, several test acts enacted in Charles II's time to curtail the entitlement of Catholics, Nonconformists and Dissenters to hold offices and posts in



parliament, which were intended to secure the authority of the parliament and the Anglican church (*LJ(A)*, v.143). Unfortunately, such efforts did not successfully prevent James II's high-handedness. James, quite notoriously, aimed to recruit Roman Catholics into the office and even to reintroduce Popery. His encouragement of Catholicism and breach of the separation of powers menaced the public interest of England.

Crucially, Smith declared that resistance against James II was in many ways led by parliament. The new succession line of James's Protestant heirs was determined by an action which was "intirely a parliamentary one" (*LJ(A)*, v.70-71). As earlier pointed out, Smith believed that the British sovereignty was able to alter the succession rules at will, without being constrained by any fundamental law. As opposed to Blackstone's Whiggish "convenient fiction" (Dickinson 1977, 131) that James II voluntarily abdicated so that parliament was only acting to restore the succession line as a fundamental convention by introducing William and Mary, Smith insisted that parliamentary resistance against the king was undeniable. Parliament purposefully and deliberately altered the rules of succession. As a result, the Revolution Settlement was founded on political designs that altered the old principles.

Consequently, Smith's account of modern English liberty again departed from Hayek's spontaneous order theory. Smith questioned the certitude and continuity of any fundamental law, in that he viewed English history as constituted by several alterations of different constitutions. To be sure, Hayek also borrowed similar terminology to Smith's such as that of "long prescription and ancient ways" (a phrase derived from Joseph Butler). Nevertheless, despite apparent affinities, in Smith's opinion, the appeal to some older practices cannot be taken as the reliable knowledge of the past as if there had existed a truly seamless body of laws with no identifiable ruptures. This is what Hayek failed to entertain. Indeed, as Smith noted, in the quotidian opinion of mankind, "...it will but seldom happen

that one will be very sensible of the constitution he has been born and bred under” (*LJ(A)*, v.132). Smith also testified to the enormous effects of custom on our particular usages. The “uniform continuance of the custom” may even hinder us from reflecting on the ugliness of certain behaviours that happen to prevail in society (*TMS*, V.2.15). In general, common people are unreflective, for they have been used to the customary ways of living and acting. Therefore, “everything by custom appears to be right or at least one is but very little shocked at it” (*LJ(A)*, v.132). Such comments sound very close to Hayekian spontaneous order theory, which highlights common people’s disposition to follow old conventional rules without much reflection. However, Smith was not claiming that the present custom must be unintended, as Hayek’s spontaneous order theory suggested, or fundamental enough that it was not altered by any agency. Hayek’s spontaneous order theory and his insistence on the existence of intact fundamental laws missed Smith’s other incisive observation that “[w]hat shocks at first will soon become easy from custom, which sanctifies every thing” (*LJ(B)*, 321). For Smith, underneath the memories of prescriptive custom can be drastic innovations at its origin, which suggests that the opinion of mankind does not always grasp the authentic historical truth – i.e., the fact that many people habitually obey the existing convention does not mean that such a convention must be inherited from time immemorial, thereby being a proper fundamental principle. There were many prescriptive practices created by sovereignty, as the monarchs “set the fashion and give the tone to the custom of all the others” (*LJ(A)*, v.57). Furthermore, for Smith, the Glorious Revolution was not built on the restoration of fundamental laws, which was manifested by conspicuous alteration of the monarchical succession line. If we take into consideration the several Jacobite uprisings later on, the fact that such innovations led by parliament were designed precisely to reject the conventional allegiance and practices of the English people, this becomes evident enough.

4. *Smith on the Foundation of Politics: The Destabilising Fundamental Law vs. the Prescriptive Right of Sovereignty*

So far it has been made clear that Smith provided a different historical account of the cause of English liberty than that offered by Hayek. He did not adopt the Whiggish interpretation of the Revolution Settlement as a recovery of ancient custom, which is consistent with his denial of the immutability of the English constitution. On Smith's view, as the concept of fundamental law fails to account for the drastic revolutions and human creations in the cause of English liberty, it also lacks sufficient grounds to defend the Revolution Settlement as legitimate for being consistent with old practices. To be sure, the Revolution Settlement was not found universally beyond dispute upon its inception. After all, eighteenth-century British politics was, in a large measure, characterised by partisanship, of which a recurring theme within this period was the Glorious Revolution and the Hanoverian establishment (Skjönsberg 2021a).<sup>65</sup> Smith also intended to defend the Revolution Settlement. However, he was determined to keep a distance from the Whiggish narratives, as it was difficult to settle those political disputes around the Revolution by the fundamental law doctrine, which was both theoretically confounding and also historically distorting. Although the idea of fundamental law was unremittingly resorted to in the eighteenth century, for Smith, it was a dangerous doctrine questioning, instead of defending, the established sovereignty. Contrary to Hayek's spontaneous order theory of fundamental principle as the foundation of English liberty, the fundamental law doctrine is, from Smith's point of view, far more destabilising.

---

<sup>65</sup> Both the Whigs and Tories resorted to ancient constitutionalism, contract theory and the fundamental law in order to defend the legitimacy of the Glorious Revolution. See Dickinson 1977; Colley 1982; Skjönsberg 2019. Although we can identify a superficial "consensus" between Whigs and Tories regarding the use of the same set of political discourses (Hayek 2011, 255), their ramifications are actually very diverse, something underappreciated by Hayek. The idea of fundamental law can be used by both political radicals who attempted to change the established government, or to defend the convenient fiction that there was no explicit alteration of constitution in the Revolution. See e.g., Dickinson 1976; 1977; 1994. Smith was probably aware of this fact, which is why, as we shall see in the next section, he believed that the fundamental law doctrine, a seemingly conservative theory, bore similarities to the radical original contract theory.

Indeed, the fact that the parliamentary alteration of the laws of succession was intentional and innovative could be easily confirmed by the controversies it stirred up, which indicated that such practices were hardly customary and long-standing. The parliament's alteration was, in fact, not universally admitted as legitimate, due to the common attachment to the Stuarts. Smith was a keen observer of “[o]ur obsequiousness to our superiors” (*TMS*, I.iii.2.3), which is a natural and recurring phenomenon in our moral sentiments. He was clear that common people were so deeply influenced by their “habitual state of deference” that any attempt to implant new institutions proved no simple task (*TMS*, I.iii.2.3). So impressive was James II's popular esteem that, in *TMS*, Smith took it as an idiosyncratic example of our sense of authority,

All the innocent blood that was shed in the civil wars, provoked less indignation than the death of Charles I... They [common people] cannot stand the mortification of their monarch. Compassion soon takes the place of resentment, they forget all past provocations, their old principles of loyalty revive, and they run to re-establish the ruined authority of their old masters, with the same violence with which they had opposed it. The death of Charles I. brought about the Restoration of the royal family. Compassion for James II. when he was seized by the populace in making his escape on ship-board, had almost prevented the Revolution, and made it go on more heavily than before (*TMS*, I.iii.2.2-3).

Again Smith rejected the claim that the new system of liberty was indebted to the reinvigoration of the fundamental law. According to Smith, the appeal to fundamental laws often destabilised, rather than consolidated the present government, since the doctrine of fundamental law, focusing on the *original* rather than the *present*, essentially runs counter to the general course of opinion, particularly our regard to the prescriptive right of sovereignty. Indeed, if we cannot accept the new government without its systematic conformity to the existing practices, there would be no new government that can ever be firmly erected. In reality, as we shall see, even though the original constitution has been removed, we still take the established government as a justifiable authority precisely by the idea of prescription: It is

by being attached to the present government, rather than to the old ones, that our political allegiance is thus bound and anchored.

Smith drew an analogy between the king's dominions and his private property to support the supremacy of sovereign power. In particular, Smith singled out the right of prescription as key to understanding the foundation of stable modern politics. Prescription, as one of the four major ways to occasion private property (occupation, prescription, accession, succession), is a right that derives from the attachment between the possessor and his possession. This attachment correspondingly detaches the former possessor from this property. For Smith, the psychological basis of the right of prescription is our disinterested regard to the present possession of the proprietors, who have been occupying and taking advantage of this property for some time. For an impartial spectator, to curtail the right of the present possessor would inflict great injury to him, as the original possessor has abstained from controlling and supervising the property a long time ago (*LJ(A)*, i.77). In *LJ*, Smith suggested that acknowledging the prescriptive right of the present sovereignty is an important way to solidify its legitimacy. Such acknowledgement is rooted in our moral sentiments. In an established government,

[l]ong possession...forms an attachment betwixt the possessing king and his subjects and an expectation that he shall govern them; and at the same time detaches the former king from the affection and expectations of his people. Immemorial possession cuts off all claims (*LJ(A)*, i.88).

When judging the rightful status of the government, our focus, as Smith observed, is placed upon the *present* government, instead of the *original*, which is in diametrical opposition to the idea of fundamental law. For Smith, prescription warrants the certainty of proprietorship. To disregard the claim of the current possessor would bestow the original possessor a permanent title to reclaim the property at any time, which will generate massive confusion. Moreover, Smith found that within private laws, legal

prescriptions often require the present possessor's *bona fide*, say, he who owns the property should be ignorant of its original status as another's possession, which is, however, rarely applied in public jurisprudence concerning the legitimate establishment of government (*LJ(A)*, i.77-87).<sup>66</sup> Instead, many established regimes result from violent conquests and usurpations. And these conducts were usually forgotten with the passage of time. This is also why Smith contended that restoring the Saxon past is absurd, even though it was very old and conquered, violently and perhaps unjustly, by the Normans. Notably, after introducing the concept of prescription, Smith immediately criticised the propagandistic advocates who urged the restoration of an original fundamental constitution: "...should the lineal descendent of the Saxon kings whom William the Conq. expelled prove their descent, no one would imagine they would exclude the present family" (*LJ(A)*, i.88). For Smith, such appeals to the forgotten past, of which the imprint on people's mind almost completely withers away, were no less ridiculous than if the descendants of Charlemagne or the Greek emperors asserted their right to the French or the Turkish throne, or were even seditious enough to inflame wrongheaded resistance (*LJ(A)*, i.88).<sup>67</sup>

In Smith's view, considering the mutability of the constitution, tracing the fundamental rules eventually amounts to a constant regression in our reasoning – what is the fundamental law? Isn't there something more fundamental than Magna Carta, say, the historical practices in the Anglo-Saxon allodial period? Indeed, Smith contended that

---

<sup>66</sup> Lucas duly noted how the account of prescriptive right such as Burke's marks a radical yet neglected rupture with the medieval natural law theory in that Burke argued that just title and good faith are not necessitated to activate the prescriptive right of a sovereign (Lucas 1968, 44). And in that case, Smith was much less revolutionary than Burke. I argue, contrary to Lucas, that Smith's theory does not dispute Burke on that account.

<sup>67</sup> Smith also astutely observed that the violation of the prescriptive right in the international arena was a major catalyser of a great many unnecessary disputes. It happened that the sovereigns capriciously declared some fanciful titles of those estates that were said to be inherited from their ancestors but now occupied by other princes. As Smith pointed out, the several wars of succession and the Seven Years' War were all ignited by sovereigns who hankered for territories from other powers, heedless of ordinary people's suffering in warfare and the expediency of international peace. See *LJ(A)*, i.89-90.

“[i]f no land especially could be possessed that could not shew an originall title, there would be none that could be secure, for then we would be obliged to trace our right back as far as the flood” (*LJ(A)*, i.87). To compute which government bears the original title to rule would invite an inevitable regression to the very beginning of the world. Smith thus made it clear that the attempt to retrieve the fundamental law would engender confusions, for there must always exist something more *fundamental* than the purported fundamental conventions, eventually leading us back to the Biblical flood myth. This proved its absurdity, and making the dogmatic appeal to fundamental law ultimately self-defeating.

The confusing and destabilising nature of the fundamental law doctrine was not only expressed by the absurd assumption to reintroduce the Anglo-Saxon past, but also, perhaps more crucially, in the case of Revolution Settlement. As we have already mentioned, considering people’s deference to the monarchical government, in terms of the Glorious Revolution, Smith actually raised a pressing issue to the fundamental law account: which government was more fundamental, the Stuart regime or the newly modelled King-in-Parliament? Public opinion provided quite an ambiguous, even unfavourable answer – it sometimes directly contravened the Whiggish arguments by paying tribute to the Stuarts. Neither does the Hayekian account help, for habitual allegiance paid to the Stuart kings, in this regard, becomes spontaneous. The Jacobite rebellions in the first half of the eighteenth century proved how resilient such allegiance could be. Indeed, Smith was conscious of the fact that “[i]n the reigns of King William, Q. Ann, and in the beginning of that of K. George the 1st...there was still some risk of a revolution” to change the established government (*LJ(B)*, 322). For Smith, resorting to some old and fundamental law incurred many confusions, even political disorder. For common people living under the Stuarts’ reign for a long time, the succession and

authority of the old royal family should be regarded as no less “fundamental” and “spontaneous” – perhaps even more so – than the new system created after 1688.

From this perspective, it is understandable that Smith approvingly noted the introduction of laws of treason by parliament after the Glorious Revolution. He thereby ascribed the consolidation of modern English liberty to at least some degree of intentional political action by parliament to eclipse the “old principles of loyalty”. Smith was well aware that political manoeuvring can influence people’s dispositions. After the Glorious Revolution, a more visible hand of the parliament to stabilise the new constitution was introduced, i.e., to create new laws of treason, including regulations to penalise anyone who, by printing or writing, disseminated the opinion that the king and parliament together cannot alter the succession line at pleasure, and those who similarly announced that the Stuart-Catholic family still had the right to reclaim the throne (*LJ(A)*, v.71). No doubt Smith attached great significance to these laws, as they were necessary to secure the Revolution Settlement. Such laws were, in effect, employed to deflate people’s loyalty to the Stuarts, and redirect public favour to the present government. In the 1760s, almost two decades after the 1745 Jacobite rising, Smith observed that people had become accustomed to the present government, which meant that the prescriptive right of the present government was already well confirmed. Only on such occasions could these laws of treason be gradually lifted (*LJ(A)*, v.71).<sup>68</sup>

In Smith’s view, instead of appeasing contestation over the Glorious Revolution, the idea of fundamental law tended to exacerbate it. In this case, to dogmatically resort to old

---

<sup>68</sup> Hume also tried to make sense of the legitimacy of government by dint of prescriptive right, which resembles the right of conquest. For example, Hume argued that since the title of the family of Lancaster was not preferable to the House of York, Henry VII also placed emphasis on the claim that his present possession of the crown should justify his authority. See Hume 1983, vol. 3, 6, “...Henry was sensible, that there remained another foundation of power, somewhat resembling the right of conquest, namely, present possession, and that this title, guarded by vigour and abilities, would be sufficient to secure perpetual possession of the throne...Henry was determined to put himself in possession of regal authority, and to show all opponents, that nothing but force of arms and a successful war should be able to expel him. His claim as heir to the house of Lancaster he was resolved to advance, and never allow to be discussed: And he hoped that this right, favoured by the partizans of that family, and seconded by present power, would secure him a perpetual and independent party.”



practices would pose quite a challenge to the present regime. Aside from his historical explanation exposing the doctrine of fundamental law as a distortion of historical facts, Smith further pointed out how dangerous this doctrine could be, which renders it an unsuitable theoretical device to defend the Glorious Revolution. Smith's criticism of the fundamental law doctrine stands in stark contrast to Hayek's approval of this notion. Their divergent attitudes to the idea of fundamental law are rooted in their different historical observations. For Hayek, the English Revolution served to continue the spontaneous and fundamental principles of the English constitution, so that to appeal to the idea of fundamental law is simply to confirm the Revolution Settlement. But for Smith, in the context that the Glorious Revolution was a major political event that changed old rules such as the royal succession, the idea of fundamental law was not helpful to adjudicate political controversies without acknowledging the legitimacy of the new Hanoverian regime.

##### *5. Sovereignty Unfettered: Reassessing Smith's Critique of the Original Contract*

There still remains one question to answer. How then should we assess Smith's critique of contract theory? Both Hayek and Smith keenly noted the radical and violent implications of social contract theory. Importantly, in *LJ*, Smith's critique of the term, "fundamental law", is presented within his comments on Lockean contract theory. Why then did Hayek and Smith come to form such different attitudes to the fundamental law, given their shared suspicions of social contract theory? This section shows that while Hayek believed that the spontaneous order theory of fundamental law is an alternative to the rationalist social contract theory, Smith conceived of a key commonality between them: that both theories questioned the established sovereignty induced by clear political displacement. In particular, Smith viewed contract theory as aiming to circumscribe the *summa potestas* via some predetermined

procedure, but which would render the sovereign – the supreme power – in practice no such thing. Smith insisted that sovereignty, in its essence, could not be bound by any existing conventions, including the fundamental law – which is precisely what Hayek wanted to reject. In other words, their disagreement lies in their divergent accounts of English liberty and the role of sovereignty in constituting this liberty.

Indeed, Smith’s vigilance about the revolutionary character of contract theory is very noticeable, and in this he is closer to Hayek’s and Hume’s viewpoint. As Hume noted, the original contract theory’s demand to give multitudes the freedom to choose a new polity was to induce “total dissolution of government”, which is the “most terrible event” (Hume 1987, 472). In practice, contract theory is very dangerous in the political arena, for it tends to encourage popular resistance, as if, in Hume’s term, “[t]he wild state of nature is renewed, in one of the most civilized societies of mankind” (Hume 1987, 376). As Smith noticed, the original contract theory was popularised by John Locke’s and Algernon Sidney’s readers. It was thus, he thought, an insular and radicalised doctrine, unique to Britain, which was (revealingly) unknown elsewhere (*LJ(A)*, v.115-116).<sup>69</sup> For Smith, social contract theory set out to conceive the origin of civil government and the extent of political allegiance. It contended that there was an original contract that bestowed sovereign power to another body as the instituted sovereignty. And our civil duty to submit should be repealed when the sovereignty has abused its trusted power and intruded upon our happiness. Like Hayek, Smith turned instead to the opinion of mankind as the “data” to deconstruct the real foundation of political duty. He did so by recasting the Tory and Whig stances into two cardinal principles of civil government: that of authority and of utility.

---

<sup>69</sup> Hayek took Locke’s idea of the rule of law as an exponent of the spontaneous order tradition. Nevertheless, Hayek’s reading of Locke obviously sat uneasily with the latter’s defence of the state of nature as opposed to the common objections that almost all historical records began with the existence of government. See Locke 1988, §100. The tremendous influence of Lockean revolutionary politics on the eighteenth century radicals is of course widely known. See, for example, Tucker 1781; Shelton 1981, esp. chap. 9, 10; Pocock 1985, 157-192; Hont 2009.

On Smith's account, the principle of authority refers to our natural disposition to respect individuals of superiority, including the superiority of personal strength, characters, wisdom, age, fortune, and ancestry (*LJ(A)*, v.129; *LJ(B)*, 12; *WN*, V.i.b.4-8). Indeed, it is frequently seen that the weak admire the powerful, the young respect the old, the poor esteem the rich, and the antiquated family is also considered to be nobler than others. Smith found that our respect is not only bestowed to particular people, but also the institutions and jurisdictions. And those institutions that appear to be old were especially admirable. In this regard, the idea of "time immemorial" is very forceful in our mind (*LJ(A)*, v.129). An ancient office adds to the authority of the person who holds it. Similarly, the office that can be held for life is also more respectable than one with only temporary terms. That is why a hereditary monarch is also much more formidable than an elective one (*LJ(A)*, v.130). Apart from the authority endowed by its antiquity, the hereditary royal family often raised a great many dependents, which increased its power and glory more extensively. For Smith, this principle of authority is easily identified in those people that are inclined to be conservative, modest and peace-seeking. It could be called, in Smith's theory, the Tory principle (*LJ(A)*, v.124).

The other principle on which our allegiance is founded is the principle of utility. This is rooted in our opinion that government is set up for particular ends, i.e., for the sake of security and prosperity. In this perspective, we submit to civil magistrates due to some necessity, since in the absence of the administration of justice provided by civil government, our right of property, for example, can barely be protected. Compared to the principle of authority, this principle allows much more space for the right of resistance. It maintains that the administration should be sufficiently salutary, otherwise our submission serves no purpose. Such is what Smith saw as the Whig principle, which is often invoked by those spirited, ambitious and radical folks who endeavour to advance themselves amongst others (*LJ(A)*, v.124).

In turn, Smith held that contract theory failed to represent the real foundation of political allegiance as being rooted in opinion. For him, the mechanism to enter into society is not an avowed submission to the government as contract theory indicates, since though no such promise of obedience is delivered, common people still perceive themselves as obligated to obey. Smith also rebutted the “tacit consent” theory promoted by some contract theorists. He argued that people are not born in a country of their choosing, which means that they can have no such notions of voluntary consent (*LJ(A)*, v.117-118). Contract theory fails therefore to do particular justice to the principle of authority.

According to Smith, contract theory incorrectly indicates that the sovereign government is bound by popular consent when dealing with public affairs such as levying taxes. As Locke insisted, arbitrary encroachment upon property without popular consent is a justifiable cause of resistance. Smith rejected such political enthusiasm, which asserted that since the established government was for the sake of people’s flourishing, it had no authority other than what was derived directly from the consent of the common people.<sup>70</sup> Smith was concerned with the radical implications of contract theory, which dangerously undermined civilised society’s stability. In Smith’s political theory, popular resistance *must* occur when the governance becomes intolerable. What he wanted to deny was that there can be an *a priori* philosophy to define the moments when resistance should happen. The reason why contract theory is misguided is that it intends to regularise and legalise such moments, which would only render the established government irregular. Thus Smith and Hayek both criticised contract theory as overtly revolutionary. For Hayek, advocating a social contract was to

---

<sup>70</sup> Smith reported that some Tories also touted an ill-founded contract theory, which claimed that the kingly authority is instituted by God as a divine contract binding on subjects to piously and passively obey the patriarchal sovereign, so that any motive of resistance was sinful. See *LJ(A)*, v.124. Smith consciously diverged from their more reactionary position, which, in contrast to the Whiggish enthusiasm, abused the principle of authority and demanded a government extending from antiquity. In addition, the original contract of the ancestors, if any, cannot determine the will of the posterity, for the contemporaries are never involved in such a promise. See *LJ(A)*, v.116-117. Smith was concerned about the emergence of such polarisation, which often portends disastrous political disorder. See *TMS*, VI.ii.2.12; cf. Hume 1987, 73-79.

assume that people can withdraw from society and rebuild anew solely by dint of their rationality. Smith, in the meantime, focused on the radical implications that contract theory carried in terms of the right of resistance against the established government, which is likewise essentially destabilising.

Smith argued that contract theorists such as Pufendorf and Locke wrongly assumed that a contract must be forged howsoever as an instituted body before we enter into society, such that the sovereign should also withdraw its status and leave the dominion as an independent collective body when the bondage between subjects and the magistracy ended (*LJ(A)*, v.135-136). And in Grotius's words, in such cases, the "Sovereignty reverts to the People" (Grotius 2005, 672).<sup>71</sup> Although Grotius and Pufendorf can hardly be seen as resistance theorists, Smith saw some major flaws in their theories as contributing to radical political theories. Smith tried to deny the existence of some originally contracted body politic, which is appealed to by contract theories in whatever form they happen to take. In refuting them, Smith observed that people are used to the arbitrary discretion of sovereignty, which confirms the prevailing opinion that the sovereignty should be unbound, not limited by the terms of a prior agreement.

Smith's point, however, is precisely what Hayek tried to circumvent, as sovereignty was regarded by the latter as an outside agency that always menaces spontaneous conventions, themselves the embodiment of human liberty. According to Hayek, English

---

<sup>71</sup> Grotius, as another contract theorist, took pains to tease out the intactness of the *Spirit* of people's unity despite the natural deaths of individuals. In the related passages, he said, "For the Romans were the same People under Kings, Consuls, and Emperors. Nay, tho' the Government be never so absolute, yet the People are the same they were, as when they were free, whilst he who rules, rules as the Head of that People, and not as the Head of another. For that sovereign Power which is in the King as Head, rests still in the People as in the Whole, whereof the Head is a Part: So that if the King, being elective, should die; or if the Royal Family be extinct, the Sovereignty reverts to the People...Neither can that of *Aristotle* be objected against me, who denies that to be the same State, where the Form of Government is changed, no more than the Musick is the same, when it is altered from a *Doric* to a *Phrygian Air*" (Grotius 2005, 671-672). By contrast, for Smith, it is nonsensical to presume double sovereignty in one body politic, which was what he saw as the radical theory was proposing as if the government owned part of the supreme power while the contracting popular community also held supreme authority. On the problem of dualism of people and ruler as separate personalities in the natural law tradition, see Gierke 1957, 44-61; Tuck 2016.

liberty was lost after the rise of parliamentary sovereignty, such that the American Constitution was required to regenerate the old principles of liberty (Hayek 2011, 262). By contrast, Smith proposed no such point of view. For him, sovereign power must be absolute, and it is a constitutive institution of liberty by safeguarding social stability. For Smith, the formation of civilised society is preconditioned by the regularisation of sovereign power, including legislative, executive, and judicial power, which requires the exertion of incontestable agencies to hold the supreme power. Although our sense of natural authority is easily identified even in the rudest society, Smith argued that political authority cannot be firmly settled simply by our natural reverence paid to individuals perceived to be superior. The authority of the superiors, to whom the supreme power was given, would very soon be put into question for assorted reasons such as their violence, stupidity, unbalanced mental conditions, and minority. Thus, Smith believed it largely due to such innate precariousness of personalised authority that societies such as that of the Turks witnessed inexorable irregularity and ceaseless revolutions (*LJ(A)*, v.133). In a civilised society such as that in modern England, however,

The sovereign power is...absolute, and as soon as the govt. is firmly established becomes liable to be controuled by no regular force. In the state of hunters and shepherds it is far otherwise; but now the summa potestas is not liable to be controuled by any regular power. For if what we called the summa potestas was liable to be called to account by any man, any body of the people or the whole people, this person or body would be the summa potestas, and if this again was under the authority of another, this would be the summa potestas (*LJ(A)*, v.140).

The sovereignty, indeed, had been absolute – in Britain it even changed the laws of royal succession at its pleasure. For Smith, the contract theorists' efforts to regularise the right of resistance, either by the popular consent or a contracted body politic prior to the established sovereignty, would inevitably reduce society to a state of precarity. As Smith saw it, making resistance against the government is a *de facto* ineradicable power

of citizens, rather than a *de jure* proviso of right that can ever be codified in the legal system. In other words, resistance is “no regular force”. Just as Smith remarked, “tho the sovereign may be resisted, it cant be said that there is any regular authority for so doing” (*LJ(A)*, v.138).

Thus, it becomes clear that Smith maintained that the sovereign power, once “firmly established”, could not be constrained by legal mechanism whatsoever (*LJ(A)*, v.136). Indeed, “[t]o suppose a sovereign subject to judgement, supposes another sovereign” (*LJ(B)*, 91), so that “[n]o laws, no judges, have or can ascertain this matter [resistance], nor formed any precedents whereby we may judge” (*LJ(A)*, v.137-138). As he observed, the established government often disposed of its dominions and negotiated with other sovereigns as if dealing with their private property, without asking for their subjects’ consent (*LJ(A)*, v.136). There were many examples of such discretionary practices of the sovereigns, especially in early modern Europe when wars were constantly launched and multiple negotiations were made back and forth to decide the possession of territories. In actual fact, the European people were inured to such arbitrary practices. During the Seven Years’ War, for instance, the British government possessed the conquered land, which was acquiesced by the French and the Spanish monarchs. Smith observed that such institutions of popular consent were rarely activated in any civilised countries including Spain, France and Britain – the British parliament only figuratively represented the public (*LJ(A)*, v.134-135). As early as feudal times when the central sovereignty expanded, it was frequently seen that the lands were regarded by the government as dowry or heritage, divided up or arranged as gifts (*LJ(A)*, v.137).<sup>72</sup> As for England, it was also governed by a hereditary monarchy for a long time. Ordinary people

---

<sup>72</sup> Apart from the examples of international relations in Smith’s lectures, there are some other possible sources of the analogy between offices and property right (Day 1965; Whelan 2015). Smith discussed the unjustly exclusive privilege of the landed nobility to the public offices and honours shored up by some feudal institutional remnants, especially entails (*WN*, III.ii.6).

often find no difficulty in accepting the sovereignty's alterations of laws. In Smith's view, the idea of a fundamental law contradicts the supremacy of sovereignty. It was, contrary to Hayek's opinion, therefore a variant of contract theory, i.e. a theory which questions the perfect absoluteness of the *summa potestas* in an attempt to bind the posterity with some hypothetical original practices.

Thus Smith rejected the idea of fundamental law as in practice amounting to the same thing as contract theory, and thus he did not agree with Hayek that fundamental law marked an alternative tradition of liberty that could properly be said to oppose contract theories. Similarly, in articulating the history of modern liberty, Smith did offer an account that corresponded to anything like Hayek's binary of Anglophone spontaneous order vs. Continental rationalist contract theory. For Hayek, as what truly guarded English liberty was the long evolved intact local customs and fundamental conventions, the rise of English absolutism, as well as the contract theory to change existing social practices at will, became an unsettling rationalistic threat to freedom. He believed that the revolutionary character of contract theory is rooted in its constructive rationalism so that any sovereign's imperious artificial alterations of old customs must be checked if freedom is to be shored up. But in tracing English liberty in the European context, Smith observed that England had shared many political experiences with the Continental countries, especially the emergence of feudalism and absolutism. Accordingly, the uniqueness of modern English liberty founded on the regular government of King-in-Parliament did not consist in its insular and immemorial ties with the spontaneous convention of an ancient constitution, but in a new *revolution* itself built out of the experience of absolutism. In turn, Smith found that the radical nature of contract theory is also not about its implication to rationally create entirely novel practices, but to legally bind the established sovereignty by excessive appeal to the



principle of utility and resistance. Exactly in this respect, the fundamental law doctrine shared key commonality with contract theory – and hence Smith rejected both.

Smith's and Hayek's different perspectives also led to the different attitudes to sovereignty – and correspondingly, to the desirability of the fundamental law doctrine. On Smith's account, compared to the early societies, civilised society is characterised by the ascendancy of sovereignty to protect citizens from incessant revolutions, which is an actual index of liberty. He thus objected to the contract theory's unrealistic implication that “[people] agree to be subject to him [the sovereign] but not to be at his disposal” (*LJ(A)*, v.136). Since sovereignty, perfect and full-blown, is not systematically checked by positive laws, normal regulations, and precedents, it should be able to alter the laws and render his subjects at its disposal in principle. Therefore, as Hayek presented the Anglophone liberal camp, which was to restrain sovereignty by fundamental system of principles, as the right way to lead to liberty, Smith averred that the sovereignty must be firmly situated if a civilised society is to be expected to emerge. For Smith, the suggestion to introduce some purported fundamental principles of state, as made by Hayek, is to make recourse to the particular theoretical strand of contract theory of resistance - liberating revolutionary force to overthrow the established politics – that he saw as unacceptable.

## 6. *Conclusion*

Smith was clear that the political landscape in Europe changed so drastically that the idea of a fundamental constitution became historically distorting and politically undesirable. As Smith's history shows, England had experienced fluctuations of political principles. Such a

historical route was also a commonplace trajectory of many European nations.<sup>73</sup> Accordingly, it is unlikely he would have been much impressed with the later Hayekian Continental/Anglophone binarity regarding the path to modern liberty. Smith's unfavourable opinion of the fundamental constitution significantly differs from Hayek's spontaneous order theory of English liberty.<sup>74</sup> Smith maintained that modern English liberty, which was characterised by the indisputable *summa potestas* residing in the Crown-in-Parliament, was also indebted to the absolute government's subjugation of the nobles, the purposeful political intervention of parliament and the intentional enactment of new law designed to overturn, not continue, political states of affairs. Smith approved of the supremacy of established sovereignty; such supremacy, for him, was not upheld by some umbilical ties with the past.

Hayek's spontaneous order theory, which downplayed the mutability of the English constitution and the visible hands of sovereignty to change English political tacks, by contrast thus does not correspond with Smith's historical account, despite the fact that Smith was claimed as part of the genealogy of spontaneous order theory by Hayek. For Smith,

---

<sup>73</sup> We have mentioned that Montesquieu argued that representative monarchy is a modern institution. For many early modern writers' similarly sceptical attitudes to the practicality of ancient democracy in Europe, see Bourke 2008; Tuck 2016.

<sup>74</sup> As an example, Hume's scepticism regarding the immutability of English constitution provoked many hostile diatribes from his contemporaries. In his *Moral and Political Dialogues*, Richard Hurd commented upon Hume's *History of England*. Hurd intransigently maintained that the "supreme legislative power" was always lodged in the prince and people, and the parliament had secured this "style" "for several ages" no later than the feudal era. Accordingly to Hurd, to argue that "the regal or popular influence has at different times been more or less predominant" as Hume did "is only playing with a word, and confounding *constitution* with *administration*" (Hurd 2002, 180). Hurd's opinion was much closer to Hayek's idea of the spontaneous and inalterable convention inimical to arbitrary administrations in English history. And Smith knew about Hurd's reactions against Hume's history – Hume once wrote to Smith to complain about Hurd's abusive review of his works. He told Smith that Hurd was as "insolent" and "scurrilous" as many partisan Whigs, who denigrated Hume as a Jacobite questioning the reformed religion and the cause of civil liberty, partly based on his sceptical attitude toward the immutability of English constitution and some of his benign comments on the Stuarts. See *Corr.*, 43-44. For Hurd, the Humean idea of the competing trends of political practices only rendered the constitution an oxymoron (Susato 2015). While Hurd indicted that Hume's acknowledgement of the "regal or popular influence" on the English polity had overturned the existence of a fundamental ancient constitution, Smith was sympathetic towards Hume regarding the "fluctuating nature of the constitution" (Hume 1983, vol. 5, 236), oscillating between the monarchical, aristocratic and democratic principles, which corresponds to his account of the discontinuity of the English constitution. In addition, Smith viewed a constitution as the "particular distribution" of the "powers", "privileges", "immunities" of different social orders (*TMS*, VI.ii.2.8). Smith, therefore, refused to resort to any kind of *restoration* of the fundamental laws, let alone Magna Carta, to decode the nature of contemporary English government, as the aristocratic principle anchored in this charter had already been swept away by the Tudors.

parliament's alteration of the succession line could hardly be seen as a *restoration* of old practices on Smith's view, but again as a sovereign action to change extant laws at will, which was later confirmed as prescriptive by a series of political actions. While Hayek passionately embraced the Old Whigs' idea of a fundamental constitution, our analysis vindicates what Duncan Forbes has earlier indicated, that Smith was as much a "sceptical Whig" as Hume (Forbes 1975b), who was, as Richard Sher concluded, "the sort of friend that conservative Whigs would have been glad to be without" (Sher 2015, 190). He questioned the long-standing tradition of English liberty, while attributing the modern English government to the political interventions of parliament, which only contained a small number of politicians among the large number of general public.

As a result, Smith also disagrees with Hayek's approval of the fundamental law doctrine. He found this principle politically dangerous. In hindsight, facing the superficially chaotic radicalism in French Revolution in the late eighteenth century, to depict the English constitution as of "systematic beauty" might as well generate common reverence and devout patriotism paid to the local established constitution. Many Whigs in the late eighteenth century such as Blackstone, Burke and Dugald Stewart, whose works Hayek relied so much upon, found little trouble in describing the cause of English liberty as being to restore some fundamental conventions. But we should note that the British Empire itself encountered no less partisan disputes concerning the legitimacy of Whig supremacy and Hanoverian establishment throughout the eighteenth century (Skjõnsberg 2021a). It seems that Hayek failed to acknowledge how such disputes concerning the Revolution Settlement troubled English politics for a long period of time, and did not notice Smith's distinctive account of English liberty. In this historical context, for Smith, as the idea of fundamental law falls short of historical authenticity, it was not only unable to settle partisan disputes, but precisely the reflection of such unsettling factionalism to challenge the established sovereignty, which

make it a dangerous theory.<sup>75</sup> Smith understood that to appeal to the idea of fundamental law would fatally undercut sovereignty and render it something other than what it purported (and needed) to be. The idea of fundamental law failed to safeguard liberty, but conspired with contract theory to risk introducing political anarchy. In fact, Smith speculated that the idea of fundamental law shared with the fallacious contract theory an unrealistic claim to bind posterity with an original convention. Contrary to Hayek's opinion, Smith argued that a theory of spontaneous conventions inimical to sovereign interventions – as they clearly occur – would be no less confounding than Lockean contract theory. Whatever the respective merits of their two accounts, then, at the very least we can say that Hayek was mistaken to present Smith as a forerunner of his own views – on the contrary, they differed on some fundamental points both of history and political theory.

---

<sup>75</sup> cf. Hume 1987, 29-30, "If our constitution be really that noble fabric, the pride of BRITAIN, the envy of our neighbours, raised by the labour of so many centuries, repaired at the expence of so many millions, and cemented by such a profusion of blood; I say, if our constitution does in any degree deserve these eulogies, it would never have suffered a wicked and weak minister to govern triumphantly for a course of twenty years, when opposed by the greatest geniuses in the nation, who exercised the utmost liberty of tongue and pen, in parliament, and in their frequent appeals to the people. But, if the minister be wicked and weak, to the degree so strenuously insisted on, the constitution must be faulty in its original principles, and he cannot consistently be charged with undermining the best form of government in the world. A constitution is only so far good, as it provides a remedy against mal-administration; and if the British, when in its greatest vigour, and repaired by two such remarkable events, as the *Revolution* and *Accession*, by which our ancient royal family was sacrificed to it; if our constitution, I say, with so great advantages, does not, in fact, provide any such remedy, we are rather beholden to any minister who undermines it, and affords us an opportunity of erecting a better in its place."

## CHAPTER 4: THE VISIBLE HAND: SMITH ON ECONOMIC BACKWARDNESS, AGRICULTURAL IMPROVEMENT AND THE CASE OF SCOTLAND

Smith is often associated with the trope of the “invisible hand”, signifying the intriguing phenomenon that the individual is led to “promote an end which was no part of his intention”, which seems to be a perfect demonstration of spontaneous order (*WN*, IV.ii.9). In *TMS*, the “invisible hand” is used to illustrate that the landlords, out of “natural selfishness and rapacity”, engross vast estates and distribute the leftover that they themselves cannot consume, thereby unintentionally accomplishing collective prosperity (*TMS*, IV.1.10).<sup>76</sup> And in *WN*, it portrays how every individual, who aims at his own security and gain, ends up promoting domestic industry (*WN*, IV.ii.9). In both instances, Smith evokes the idea that some self-regarding behaviour ironically serves public utility. In addition to these explicit applications of this metaphor to the illustrations of social phenomena, Smith also notices myriad unintended consequences in the history of European liberty. Perhaps the most famous example is that along with David Hume, he affirms that commerce liberated people from the “state of war” and “servile dependency” because the extravagance of the feudal landlords unintentionally led to their own collapse (*WN*, III.iv.4). While contemporary republican writers often condemned the vicious role of prodigality and lavish lifestyle in the body politic, Smith shows that the positive effects of luxury in European history were quite ironical and unforeseeable.<sup>77</sup> Moreover, Smith’s conjectural history, as an important aspect of his historical account, also resembles the formation of spontaneous order as Craig Smith points out, showing that there is an evolutionary process of the institutions of private property and laws deduced from the interaction between human nature and the contexts, environment and

---

<sup>76</sup> For some illuminating discussions of the “invisible hand” as a historical approach see Funkenstein 1986, 202-212.

<sup>77</sup> Smith’s tone of irony scattered throughout his works is analysed in Fleischacker 2004, chap. 1. See also Haakonssen 1981, 91.

particular circumstances which nobody predicts (C. Smith 2006, 19-24, 48-64).<sup>78</sup> This “four stages” narrative indicates the social progression of human beings from savages to civilised social beings with the changes of modes of subsistence (i.e., hunter-gathering, shepherding, agriculture, commerce).

While repeatedly claiming his consistency with Smith’s social thought, Hayek used the “invisible hand” metaphor to delineate the evolutionary process of markets, capitalism and the progress of civilisation. No doubt Hayek treated Smith as a great theorist of progress. The fact that Smith’s comments on the progress of society deeply impressed Hayek can be confirmed by Hayek’s approvingly quoting *WN* in *The Constitution of Liberty*,

It is in the progressive state, while the society is advancing to the further acquisition, rather than when it has acquired its full complement of riches, that the condition of the labouring poor, of the great body of people, seems to be happiest and the most comfortable. It is hard in the stationary, and miserable in the declining state. The progressive state is in reality the cheerful and hearty state to all the different orders of the society. The stationary is dull; the declining melancholy (*WN*, I.viii.43).

Then how can progress be triggered? As Hayek pointed to the imperfection of our knowledge and foresight, he rejected the notion that social institutions in general are actually designed by human reason. Instead, he established a strong connection between the expansion

---

<sup>78</sup> Dugald Stewart thought that Smith’s historical approach was similar to Hume’s “Natural History”, or what the French called, “Histoire Raisonnée”. He further described Smith’s historical exploration as based on a mode of “Theoretical or Conjectural History”, “tracing from the principles of human nature, or from the circumstances of society, the origin of the opinions and the institutions” (Stewart 1982, 295). While Hume’s natural history was mainly applied in his religious texts, the context of Dugald Stewart’s comment is Smith’s essay, “Considerations Concerning the First Formation of Languages”. And in terms of the “circumstances of society”, natural history disregards the external shocks and historical incidents that can interrupt the general and conjectural course. See especially Denis Diderot’s description of his methodology to study the “origin of society and the laws of nature/history” in his essays for the Abbé Raynal’s *Histoire des Deux Indes*, “All the foundations of current society are lost in the ruins of some catastrophe or physical revolution. Everywhere we see men driven by the flames of the earth or the fires of war, by floods or water or devouring insects, by scarcity or famine, to come together in some corner of the uninhabited world or to disperse and spread out in already populated regions. Everywhere civilisation begins with pillage, and order with anarchy. But to arrive at some result which would satisfy reason we must neglect these momentary shocks and consider nations in a stationary and peaceful condition, which allows a free course to the production of phenomena” (Diderot 1992, 206). Haakonssen notes that Stewart’s natural law thus tends to downplay the influence of historical circumstances on individual moral judgement and conduct, which presents something unlike Smith’s much more contingent and ambivalent history. See Haakonssen 1996, 258-259.

of the division of labour, market processes and population growth, which was regarded by him as the key standard of social progress. For him, the advancement of human civilisation is principally measured demographically. He further rejected Malthus's idea of the self-limits of population growth, arguing that over much of human history, demographical expansion proves to be "self-stimulating" (Hayek 1988, 126). Indeed, Hayek pointed out that there is a "chain reaction" between the refining of the division of labour, the market scale, and the increase of population (Hayek 1988, 40). He affirmed that it is mainly owing to the differentiation induced by the increasingly sophisticated division of labour that cumulative growth is achieved – as the division of labour increases the number of opportunities for new specialisation, new employments and new settlements, which enables the society in question to support larger population. Meanwhile, the increasing density of population tends to "produce new opportunities for specialisation and thus leads to an increase of individual productivity and in turn to a further increase of numbers" (Hayek 1988, 126). In general, the density of population and the development of the division of labour are concomitant. Thus for Hayek, the core mechanism of social progress is generally self-accelerating, self-cumulative and spontaneous.

Furthermore, according to Hayek's group selection theory, the societies where "competitive market practices" prevail, "as they grew in numbers", would "displace others who followed different customs" (Hayek 1988, 120). The market practices that provide more opportunities would "absorb" the peripheral nation to learn and imitate. Even though there were also cases when such displacement appears much bloodier, Hayek maintained that it was not necessarily so. For Hayek, the mutually reinforcing process of the division of labour and population growth amounts to spontaneous social progress, which is in conformity to the principle of the "survival of the successful". For Hayek, a group supported by a larger scale of market activities and the division of labour would attract more outsiders in less developed

groups – this process largely falls out of individuals’ calculations. Importantly, Hayek denied that this spontaneous evolution is a particular result of purposeful design, unlike socialism that is characterised by planning. He argued that human reason is restrained in “piecemeal engineering”, while social progress in general is a result of the competition in terms of population scale. And market society, based on an extensive division of labour, would spontaneously triumph over other types of social arrangement.

Hayek certainly had Smith in mind when he talked about the accelerating social progress induced by the division of labour. He singled out Smith’s theory of progress as overshadowing his evolutionary theory of social progress and population growth.

The close connection between population size and the presence of, and benefits of, certain evolved practices, institutions, and forms of human interaction is hardly a new discovery. That ‘as it is the power of exchanging that gives occasion to the division of labour, so the extent of this division must always be limited by the extent of this power, or, in other words, by the extent of the market’ was one of Adam Smith's profoundest insights... That those following competitive market practices would, as they grew in numbers, displace others who followed different customs, was also seen early (Hayek 1988, 120).

In *WN*, Smith argued that “[a]s it is the power of exchanging that gives occasion to the division of labour, so the extent of this division must always be limited by the extent of that power, or, in other words, by the extent of the market” (*WN*, I.iii.1). According to him, the division of labour grows together with the expanding scale of the market, and the latter determines the extent of the former. This is why, as Smith pointed out, “[i]n the lone houses and very small villages which are scattered about in so desert a country as the Highlands of Scotland, every farmer must be butcher, baker and brewer for his own family” (*WN*, I.iii.2). In contrast, after the establishment of overseas colonies in the new world, the division of labour in Europe had been increasingly complicated, which facilitated economic growth in both Europe and the American colonies. As Smith observed,

The discovery of America, and that of a passage to the East Indies by the Cape of Good Hope, are the two greatest and most important events recorded in the



history of mankind... By uniting, in some measure, the most distant parts of the world, by enabling them to relieve one another's wants, to increase one another's enjoyments, and to encourage one another's industry, their general tendency would seem to be beneficial (*WN*, IV.vii.c.80).

For Smith, "...the populousness of every country must be in proportion to the degree of its improvement and cultivation" (*WN*, IV.vii.b.7), indicating that market scale and the level of the division of labour determines the extent to which the population grows. Indeed, Smith anticipated Hayek in comprehending the mechanism of economic progress, which is founded on the concomitant progress of the division of labour, specialisation, exchange and demographic expansion.

While appealing to Smith as a forerunner of the theory of spontaneous social development, Hayek pointed to the general unintended character of social progress. But crucially, he seemed to have missed Smith's other historical concerns and explanations. In Smith's words, "[w]hen one considers the effects of the division of labour what an immediate tendency [sic] it has to improve the arts, it appears somewhat surprizing that every nation should continue so long in a poor and indigent state as we find it does" (*LJ(B)*, 285). For him, one of the mysteries in history is that there had been no society that achieved such a high level of progress in Europe, even though Europe had also experienced a barbarous and backward stage. Indeed, after studying the process of economic advancement in modern Europe, he famously summarised it as an "unnatural and retrograde order" (*WN*, III.i.9). This process is of course full of unintended consequences. However, the fact that Smith argued that it was "unnatural" suggests that, for him, European development was not induced via the ordinary course of human affairs. All these observations suggest that the spontaneously generated incremental growth between the division of labour and social prosperity was not capable to explain the diversified path to economic growth in different regions, the intriguing problem that there were many regions trapped in economic backwardness, and the fact that there was

something deeply unnatural in European history. This chapter challenges Hayek's reading by casting attention to Smith's theorising of the economic backwardness of Europe and the Scottish Highlands. As we shall see, in this path with many contingencies, Smith singled out some important political backgrounds and state actions available to trigger it, which is hardly spontaneous as Hayek suggested.

This chapter also shows that Smith further applied his historical lessons and advocated political artifices in the development of Scotland. For Smith, Highland society was a relic of feudal institutions. Even though Lowland society had experienced unprecedented growth by the eighteenth century, Highland society seemed to be trapped in serious backwardness. In this case, to trigger social progress in the Scottish Highlands, Smith suggested deliberative programmes to overcome the political and social conditions of the Highlands. To understand why Smith recommended deliberate intervention in the progress of Scottish society, we should first return to Smith's analysis of the European case in general. As we shall see, while locating the backwardness of medieval Europe in the feudal structure, Smith believed that the feudal remnants needed to be toppled before social progress could be induced, which was preconditioned by agricultural improvement. By examining the uneven development of post-feudal Europe, Smith noticed important policy implications in England. As a consequence, he also welcomed more systematic proposal to bring Scottish society out of a subsistence economy, particularly by dividing the landed estates and extending the market scale of the Scottish economy. All these recommendations of state intervention suggest that Smith essentially differs from Hayek vis-à-vis the successful capacity of governmental agencies to interfere and intervene, which, for Smith, can prove vital to delivering backward regions from poverty and low-level equilibrium.

### *1. Feudalism Self-Reinforcing: The Economic Backwardness of Europe*

This section begins by articulating Smith's analysis of the reasons why medieval Europe failed to overcome the subsistence economy and to spontaneously proceed to the commercial stage. As we shall see, the feudal landscape characterised by the militarisation of landed estates, violent political domination, perpetual wars and political anarchy was an inhospitable environment for social progress and economic growth. For Smith, the successful procession of natural opulence must be preconditioned by security of private property, surplus of stock and perhaps most importantly, the regular administration of justice. Unfortunately, none of these conditions were realised in medieval Europe, which rendered its social development deeply unnatural.

In his works, Smith famously presented a stadial model of progress, which he called the "natural progress of opulence". On Smith's view, human society progresses with the changes of "modes of subsistence", from the hunting-gathering, shepherding, agricultural stages, to commercial society. On Smith's account, of crucial importance is the transition from the age of agriculture to that of commerce. As he noted, the first three stages are induced by necessity and subsistence, while the commercial stage is prompted by the emergence of economic surpluses - things that are not consumed would be exchanged to satisfy our wants. Smith observed that "...subsistence is, in the nature of things, prior to conveniency and luxury" (*WN*, III.i.2). Hence the natural path of economic improvement should also follow this order. After agriculture grows to the extent that it can maintain surplus, the towns can then be supported by the surplus produce from the country and continue to grow. Accordingly, urban refinement tends to be proportional to rural prosperity - "the towns could no-where have increased beyond what the improvement and cultivation of the territory in which they were situated could support" (*WN*, III.i.3). For Smith, in the natural model of progress, the improvement of agriculture is a necessary precondition of economic

development.

While this natural route can largely occur without deliberate design, Smith observed that medieval Europe deviated from this model - the agricultural stage became much too protracted, making Europe much more backwards and stationary than the natural order prescribes. Indeed, the natural progress of opulence from mere subsistence to “conveniencies and elegances” is not an easy process (*WN*, III.iii.12). Specifically, some “natural impediments” would have to be overcome (*ED*, 42), especially the lack of stock. Smith found that “it is easier for a nation, in the same manner as for an individual, to raise itself from a moderate degree of wealth to the highest opulence, than to acquire this moderate degree of wealth” (*ED*, 42). The establishment of cities and the exchange between rural and urban economies thus becomes essential. In general, many artificers would gradually learn to reside together to allow each other’s needs to be met, and more stock would thus be invested into land when economic exchange between the country and towns were constructed. For Smith, his conjectural order of economic accumulation largely conforms to our “natural inclinations” (*WN*, III.i.3). He argued that on the same level of profitability, people are more prone to the improvement of land since their capitals invested in land can be put under close supervision. By contrast, manufactures and trade activities are much more uncertain due to the unknown natural conditions, human frailty and unfamiliar social circumstances in the distant places where our capitals are to be employed. Our concern about certainty, security and independence naturally recommends to us the cultivation of land. This is exactly what occurred in the North American colonies, where surplus stock, once it was accumulated, was constantly invested into uncultivated, often uninhabited, territory, rather than manufactures and distant sale (*WN*, II.v.21, III.i.5, III.iv.19, IV.vii.b.17).

However, there existed some highly unfavourable institutions for agricultural improvement in premodern Europe. For Smith, the “injudicious government” in the feudal

period rendered the natural progress of opulence, already of “slowness and difficulty” by nature (*ED*, 42), much more crooked and warped. It is worth emphasising that within the natural model, “moveables”, such as herds and flocks, and immovables such as land are both considered as a means of “subsistence and enjoyment” (*WN*, III.ii.3). In other words, they are conceived as economic goods. However, as Smith noticed, feudalism featured in a different use of immovables. Under the feudal structure, landed estates were conceived as a means of military-political power. The uninhabited land was procured for “power and protection” (*WN*, III.ii.3), rather than for mere economic use. Smith traced this injudicious government to allodialism, an earlier period before the introduction of feudalism. As he noted, the collapse of the Roman Empire left Europe chaotic and backwards. Here, the first founded governments were allodial governments by the German and Scythian nations trampling on the areas where ancient civilisation once peaked. Within this period, cities and markets were deserted due to the prevalence of violence and the impossibility of free communication. Crucially, these Germanic nations had retained a more civilised idea of private property than mere nomads who were mainly concerned with moveable goods, so they soon engrossed vast tracts of uninhabited lands out of greediness (*ED*, 43). It is at this point that landed estates were militarised in Europe. The political disorder in Europe urged landlords to accumulate greater territories for defence and power.

Smith took the prevailing militarisation of landed estates in Europe as an intransigent impediment to economic growth. In the “disorderly times”, feudal landlords were not incentivised to accumulate capitals due to their predominant attention to political acquisition and military defence, without leisure to manage and improve their landed estates (*WN*, III.ii.7). Being so much engaged in war-making, it is inevitable that feudal lords lacked essential knowledge and experience aiming at prudential economic production. In essence, great proprietors, for Smith, were ill-qualified improvers of the economy, for they lack the

necessary characters such as a tendency to economic prudence, frugality and moderation.

After all, “[t]o improve land with profit, like all other commercial projects, requires an exact attention to small savings and small gains, of which a man born to a great fortune, even though naturally frugal, is very seldom capable” (*WN*, III.ii.7).

Furthermore, feudal landlords were accustomed to their prodigal lifestyle. Smith noted the “rustick hospitality” of the great proprietors (*WN*, III.iv.5). When Europe was generally uncivilised and luxurious goods had not been invented, lords could only spend the surplus produce recruiting and maintaining more dependents, which facilitated the preservation of their power. Great nobles such as William Rufus, Thomas Becket, and the Earl of Warwick, for example, all kept a large number of retainers - the large size of Westminster hall was needed to accommodate William Rufus’s company (*WN*, III.iv.5; *LJ(A)*, i.120, iv.158; *LJ(B)*, 59; cf. Hume 1983, vol. 1, 384). As a result, the extravagance of feudal lords was necessary to maintain the loyalty of their servants and the maintenance of their status. By contrast, as Smith pointed out, “[c]apitals are increased by parsimony, and diminished by prodigality and misconduct” (*WN*, II.iii.14). The feudal lordship characterised by such customary behaviour as to squander the wealth on political loyalty, rather than economic improvement, must have been extremely unfavourable to capital accumulation.

Finally, the engrossing of vast tracts of land may be necessary to maintain political power, but it was economically disadvantageous. As landlords owned such vast territories, most of their landed estates must be left uncultivated. Still worse, it was unlikely that landlords could change their customary way of living - to voluntarily divide the landed estates so that it could be supervised more closely. To be sure, in the wake of prevalent violence and constant warfare, it was impolitic for a landlord to divide his estates - “to divide it was to ruin it, and to expose every part of it to be oppressed and swallowed up by the incursions of its neighbours” (*WN*, III.ii.3). Throughout the feudal period, every landlord was akin to a “petty

prince” (*WN*, III.ii.3), who marshalled juridical, military and political authority within their realms. Their power consisted in the number of tenants, dependents and lands. And it was widely believed that the political authority and dignity could only be maintained by the indivisibility of landed property and lineal succession. Smith lamented that some deeply unnatural laws were then invented for the sake of political dominance, i.e., the law of primogeniture, which commanded that landed property should be inherited by only the eldest child within the family. What followed the law of primogeniture was the law of entail, which further restrained the division of lands. Such a customary way of dealing with the estates was unnecessarily kept for a long time, making the improvement of agriculture altogether unlikely to take place.

In Smith’s eyes, not only did the great proprietors fail to amplify agricultural productivity, the feudal tenants also fell short of the motivations and necessary stock required to improve their occupied estates. Above all, even in the natural path of opulence, agricultural improvement is no simple task. The sophistication of the division of labour in agriculture is naturally very limited. More importantly, the existing feudal system made the farmers’ improvement of lands even more difficult. Smith viewed the status of small farmers as not much better than slaves. Compared to those slaves in ancient republics and West Indian colonies, feudal tenants might have enjoyed more freedom. Nonetheless, they were not entitled to hold private property. In fact, all their produce was at the caprice of their masters, which was detrimental to any improvement of land. Smith insisted that slave labour was economically inefficient and expensive. Under the feudal structure, all the means of agricultural production were owned by the landlords. To be sure, “[a] person who can acquire no property, can have no other interest but to eat as much, and to labour as little as possible” (*WN*, III.ii.9). While the cost of economic production was on the lords, the tenants were also discouraged to labour, which amounted to the lack of productivity and profitability of

feudalised agriculture - a tenant would “conceal” any accumulation of his stock from his lord (*WN*, III.iii.12). It is, therefore, no wonder that the self-interested slave-like tenants as those in large parts of Europe were not motivated to labour more than their own daily maintenance required.

There was, however, some gradual progress within the feudal system with the passage of time. Under the French metayage system, a metayer was allowed to divide part of the produce with his master, which was certainly favourable to capital accumulation. Unfortunately, the tax system was a grave obstacle to improvement. Smith found that the feudal system also imposed unjust rent taxes upon the tenants, so that even though a certain degree of individual freedom to keep private property had been warranted, the improvement was still unlikely to occur. As Smith concluded, “[t]he tithe, which is but a tenth of the produce, is found to be a very great hindrance to improvement. A tax, therefore, which amounted to one half, must have been an effectual bar to it” (*WN*, III.ii.13). Since the landlord had equal right to claim the ownership of the produce, the metayers fell short of economic incentives to engage with agricultural improvement. They tended to waste landlords’ stock, becoming much less industrious than their masters expected.

The third type of tenants had much more freedom than the first two kinds. As Smith showed, once the steel-bow tenants, “by hard labour and great parsimony” (*LJ(A)*, iii.124), had accumulated some amount of stock to afford the improvement, they bargained with their lords for a fixed term of lease and regular gratuity (*LJ(A)*, iii.124-125). Such a proposal was salutary to the overall economic improvement of lands, serving both the interest of lords and that of the farmers. With their leases warranted by fixed contracts and the capacity to keep surplus above the rent as their own property, tenants became more incentivised to cultivate their farmlands while the rent payment also became more regularised. Nevertheless, the uncertainty of leases again obstructed further cultivation of landed property. Under the



medieval legal system, tenants could be ousted by their masters at pleasure. The early common law in England, for example, only redressed the damage caused by such violations of leases, without aiming at recovering tenants' possession of their lands (*WN*, III.ii.14). Still worse, the feudal lords, for the sake of short-term private interest and political domination, were unwilling to legally bind the term of leases. As they intentionally made tenants' possession unstable, they often arbitrarily rescinded the contracted leases.

As the landlords were involved in "perpetual wars" (*LJ(B)*, 282), they imposed harsh burdens and military services on their tenants, preventing them from consistently engaging in economic activities. All these military services were not bound by any predictable contracts, but a compulsory political obligation as a sign of personalised domination. It was also widely seen that the kings' troops demanded purveyance of carriages and provisions from the local habitants (*WN*, III.ii.18). These arbitrary military burdens greatly disrupted the common people's reward from labour. So oppressive and myopic were the feudal lords that they allowed the sovereign to extract subsidies from their peasants. In France, the system of *taille*, as a form of public taxation, was imposed on tenants' supposed profit. Under the pressure of so many "arbitrary and exorbitant" economic burdens (*ED*, 47), a tenant chose to "appear to have as little as possible, and consequently to employ as little as possible in its cultivation, and none in its improvement" (*WN*, III.ii.19). Personal independence, which is key to individuals' betterment and flourishing, was seriously restrained within the feudal structure. Furthermore, as the noble lords always kept a large number of retainers, it was necessary that a large proportion of produce must be consumed within the noble family to feed those servants, who were, however, but a bunch of "idle-gentlemen", only to "eat up the fruits" produced by tenants (*LJ(A)*, iv.118).

As a consequence, the economic backwardness of feudal Europe became self-reinforcing and self-maintaining. The military-political structure of feudal lordship, greatly

intensified the frequency of civil and international strife, making medieval Europe disadvantageous to economic development, which requires peace and security. As landlords focused primarily on military affairs and political domination, they were unable to expend much stock on the improvement of landed estates. The unjust political institution also diminished the security and freedom of feudal tenants, making them incapable of improving their farmlands. As Europe continued to be trapped in “the lowest state of poverty and barbarism” (*WN*, III.ii.1), the feudal government became increasingly oppressive - in order to exploit more crops in this precarious environment, foreign and inland trade of corns were altogether prohibited, which further reduced the profitability of farming, disrupted free communication of commerce, and made the subsistence economy even more resilient. To be sure, Smith saw some progress within the feudal rules - the conditions of tenants were improved gradually. However, Smith insisted that continuous capital investment in lands was vital to the transition from a subsistence economy to a commercialised one. Apparently, there was hardly any substantial accumulation within the feudal proprietor-tenant structure. In other words, without a complete revolution of the general rules of society anchored in militarisation, domination and severe oppression, there could be no considerable improvement and capital accumulation in Europe.

## *2. The Lessons of Western Europe and England: The Unnatural and Retrograde Order, Centralised Government and Policy Encouragement*

In the previous section, we have shown that Smith emphatically suggested that the feudal structure was the major obstacle to social progress in Europe. Feudalism discouraged the cultivation of lands and the accumulation of economic surplus due to the recurring violence, the insecurity of private property, the precariousness of tenants' living conditions and great

proprietors' lack of incentives for agricultural improvement. While Hayek usually ascribed the "growth of civilisation" to "blind submission" to either custom or market forces, Smith's examination of feudalism generates implications that diverge from Hayek. In particular, the equilibrium of feudalism must be subverted before improvement could take hold. As great proprietors were never ideal improvers and tenants fell short of stock, security and incentives to cultivate their lands, a complete transformation of social structure must be realised to create *homo economicus* and a context salutary to economic progress. While Smith would not disagree that the "invisible hand" of market rules can be self-regulating, such rules characterised by regular justice and the freedom of commerce must be created in place of the extant oppressive social structure. In this case, the role of a more centralised government to subdue the political domination of landlords is particularly important. This section suggests that, according to Smith, such a social transformation was a mixture of both unintended and intended consequences. In hindsight, the revolution of feudalism in Europe was largely undesigned - commerce brought about this revolution almost silently. But more importantly, and unlike Hayek's spontaneous order theory of progress, once Smith concluded that feudalism must be toppled before social transition could be achieved, he praised the related state actions to serve this purpose. Smith approvingly noted princes' protection of merchants, artisans, and traders, who constituted important cooperative forces to help resist the feudal nobility. For Smith, this cooperation prompted the famous "unnatural and retrograde order" in Europe, eventually leading to the emergence of modern commercial society.

Further, as economic advancement following "unnatural and retrograde order" was necessarily uncertain and insecure, Smith also recommended more direct schemes to activate social progress, which was indebted to his analysis of different regions in Europe, especially England. For Smith, the transition from feudalism to commercial society was not a universal phenomenon. He clearly saw the uneven development within Europe. At his time, the

improvement of Scotland was still an ongoing process. Spain and Portugal had already declined in the eighteenth century, notwithstanding their early establishment of distant sale and foreign trade routes. And those countries in central and eastern Europe such as Germany and Poland had not yet been unshackled from the backwardness of feudalism. It seemed that only in one small corner of Europe was commercial society fully-fledged. Among the European powers, England was perhaps the most advanced in the eighteenth century. Smith was thus deeply intrigued by the great success of the English economy. Indeed, he observed that “[i]t is now more than two hundred years since the beginning of the reign of Elizabeth, a period as long as the course of human prosperity usually endures” (*WN*, III.iv.20). Smith’s careful analysis of England suggested that some direct encouragements were particularly noticeable, which made England one of the most improved countries by the eighteenth century.

Indeed, given the persistence of feudal structures, there was little improvement of agriculture in Europe. While landlords kept suppressing the tenants, plundering their produce and squandering the rent, tenants were discouraged to cultivate the lands for lack of the stability of private property and sufficient stock for reproduction. Furthermore, it is worth emphasising that not only did the existing conventions fail to encourage progress from within, some exogenous forces such as the commercial and manufacturing capital accumulated in the urban areas also failed to be invested to lands. For Smith, the overall ruling framework of feudalism must first be dismantled before improvement could be triggered. To understand why this is so, we should review Smith’s famous account of the “unnatural and retrograde order” of European development, which followed this route,

The foreign commerce of some of their cities has introduced all their finer manufactures, or such as were fit for distant sale; and manufactures and foreign commerce together, have given birth to the principal improvements of agriculture. The manners and customs which the nature of their original government introduced, and which remained after that government was greatly altered, necessarily forced them into this unnatural and retrograde order (*WN*,

### III.i.9).

For Smith, since the feudal agricultural system could not be overcome from within, the capital accumulated by commerce was of particular importance to inducing social progress. Indeed, economic progress in Europe was based on an inverted order in which distant trade grew before agriculture was improved to the same level. Such an “unnatural and retrograde order”, in which the expansion of commerce and manufactures preceded agricultural improvement without being on the same footing with one another, was “necessarily both slow and uncertain” (*WN*, III.iv.19). As Smith noted, the natural course of opulence should extend from agriculture to manufactures, commerce, and foreign trade step by step. This natural path allows lands to be continually cultivated as new manufactures, markets and cities are established, which facilitate faster progress and enduring prosperity. For Smith, normally there are at least two ways for the urban economy to benefit rural areas. First, the development of the urban economy provides markets for commercial exchange of rude produce, which encourages the development of agriculture. Second, the profit-seeking city dwellers can employ their capital to purchase and improve the uncultivated lands. In essence, capital “may wander about from place to place, according as it can either buy cheap or sell dear” (*WN*, II.v.14). Smith attributed the complete disappearance of Hanseatic towns to the great liquidity and uncertainty of capital. But as long as capital was “secured and realized in the cultivation and improvement of its lands” (*WN*, III.iv.24), there would be more sustainable prosperity despite temporary shocks. Unfortunately, given that most lands were grabbed by the feudal landlords, the mercantile capital often failed to be invested in lands, thus dissipating inevitably, as the example of Hanseatic leagues demonstrated. As the regulations of primogeniture, entail, and perpetuities persisted in Europe, not only did the proprietors and tenants become unable to cultivate the lands, but the mercantile capital also failed to be employed to improve agriculture. A large scale of uncultivated lands were kept

out of the market and the monopoly price of lands thus became excessively high, which unnaturally prevented investment in landed estates. Therefore, quite the opposite to North America where no such unnecessary laws restricting the divisions and transactions of lands ever existed, “[t]o purchase land is every where in Europe a most unprofitable employment of a small capital” (*WN*, III.iv.19). Thus, the economic gap between cities and country continue to be enlarged. Whereas the city residents won more freedom, the feudal tenants’ social status was hardly changed, who would “naturally content themselves with their necessary subsistence” (*WN*, III.iii.12), or flee to cities once some accumulation of stock was made. As a result, the rural areas were still trapped in a subsistence economy.

In this case, capital was also in need of support to break the feudal equilibrium. Smith further attached great importance to the intervention of kingly authority. Since feudal lords despised the city residents as mere slaves and viewed their wealth jealously, the cities constructed mutual defence with their neighbouring cities, thereby forming federated republics to resist the noble authority. The sovereigns and cities thus converged in terms of mutual interest. For the king, city dwellers “were the enemies of his enemies, and it was his interest to render them as secure and independent of those enemies as he could” (*WN*, III.iii.8). Smith saw that the kingly authority to subdue lordship as an important catalyser of the great transformation of European society. Importantly, “[t]he princes who lived upon the worst terms with their barons, seem accordingly to have been the most liberal in grants of this kind to their burghs” (*WN*, III.iii.9). The kingly authority encouraged and protected the development of towns, in order to gain more military and financial support and to decrease the power of barons accordingly. As the kings also wanted economic and political support from burghers, in order to counterbalance the power of feudal nobility, they bestowed more independence to burghers to maintain their own jurisdiction, bailiff, councils and corporations, as well as individual freedom to decide their personal affairs such as marriage

and commercial transactions. Smith noticed that in terms of burghers, artisans and merchants, “the principal attributes of villanage and slavery being thus taken away from them, they now, at least, became really free in our present sense of the word Freedom” (*WN*, III.iii.5). These events not only allowed the city traders to contribute poll-taxes to kings’ exchequer more directly without being harnessed by the insolent royal officers, - which increased the financial power of kings (*WN*, III.iii.3), but also protected them from the violence of the landed nobility. This is how feudalism was eroded in the first place - cities “conquered all the nobility in their neighbourhood; obliging them to pull down their castles in the country, and to live, like other peaceable inhabitants, in the city”. The regular government and militias were gradually established in cities, especially in places where kingly authority was less able to subdue the feudal landlords. The Hanseatic league, for example, became a formidable military-political presence in Germany (*WN*, III.iii.9). Moreover, European cities, especially those situated near seas and rivers, were able to conduct commercial exchange with more distant regions. In this case, distant sale continued to develop prior to the advancement of the countryside. The princes in Europe also supported the importation of foreign luxuries, which their own subjects failed to supply to them (*WN*, I.xi.o.14). Such policies greatly encouraged the prosperity of urban economy in coastal or riverside areas (*WN*, III.iii.10; cf. *LJ(A)*, v.46-50; *LJ(B)*, 77).

Indeed, the cooperation between kingly authority and urban residents could not overthrow the power of the feudal lordship without a complete revolution in the balance of property. On Smith’s account, this is why the last effect of commerce on European society became so important. As Smith attributed universal economic backwardness in Europe to the persistence of feudalism, which restricted investment and agricultural improvement, he made the case that commerce must effectively destroy the feudal structure in order that progress could be induced. This effect was, in Smith’s eyes, “the least observed”, but “by far the most

important” (*WN*, III.iv.4). In general, there were two events leading to the collapse of feudalism. On the one hand, the kingly authority constantly sought to subdue the landlords. In fact, the feudal chains of duty could be regarded as the extension of sovereign power to elbow aside the dispersed landed nobility in its realm (*WN*, III.iv.9). (Smith also noted that ecclesiastic power attempted to compete with the feudal barons in order to increase its own influence.) On the other hand, through the unintended consequences of landlords’ extravagance and vainglory, commerce led to the collapse of feudal lordship. Smith found that the landlords cannot be extinguished simply by the “violence of the feudal institutions” (*WN*, III.iv.10), but commerce and manufactures accelerated their decline without designs. Feudal lords, being selfish and vain, spent their wealth on arts and luxury so that they could not raise as large a number of retainers as before. Furthermore, while landlords desired to raise the level of rents to the extent that the produce of their lands cannot support, feudal tenants began to demand longer and securer terms of leases, thus becoming more independent. All these events gradually diminished the formidable power of the feudal nobility. Then “[a] regular government was established in the country as well as in the city, nobody having sufficient power to disturb its operations in the one, any more than in the other” (*WN*, III.iv.15). The extension of the regular system of justice is thus the key to the emergence of modern commercial society by breaking the feudal shackles and personalised domination. This collapse of feudalism induced by foreign commerce was unintended - in that both great proprietors and merchants only acted according to their own selfish drives, either to “gratify the most childish vanity” or “from a view to their own interest” (*WN*, III.iv.17).

However, Smith noted that even when foreign commerce was encouraged, there seemed no guarantee that a full-blown commercial society must come into being, which often required that commerce grow to such an extent that the feudal lordship would indeed lose their entire fortune and dissolve the feudal social bonds. The importance of the great



revolution in social structure becomes more evident if we consider the fact not all regions in Europe had successfully surpassed the feudal stage in the eighteenth century. In fact, even though commerce had been introduced in Europe generally, Smith noticed that it was only in a “small corner of Europe” that feudalism had been overcome. Smith made the case that liberty cannot be introduced simply by the growth of commerce. In Germany, where the sheer size of the landed estates were large enough to support the landlords’ selfish prodigality, the effects of commerce were much less benign, for the nobles in turn extracted more produce from their tenants, making the existing feudal structure even more oppressive. This accords with the fact that Germany was still very backwards compared to England and France in Smith’s time.

In other words, it was not the unintended consequences *per se* that Smith regarded as the key to the origin of modern liberty, but the fact that feudalism had to be overthrown. As Smith repeatedly affirmed, feudalism was very difficult to remove from within. The landlords’ political power, vanity, selfishness and contempt for tenants and burghers were severe impediments to the growth of commercial society. On Smith’s view, feudalism could be self-sustaining, trapping vast regions in Europe in a subsistence economy without substantial improvement and accumulation for centuries. As a result, Smith did not think it possible to rely only on the “silent and insensible operation of foreign commerce and manufactures” (*WN*, III.iv.10), waiting for its benign effects on economic advancement to take place. To be sure, Smith was not at all a proponent of entirely state-directed development. But it is still noteworthy that he also favoured some beneficial policies made by the sovereign to induce more enduring economic growth. In fact, such deliberate policies of social engineering were particularly noticeable in England, where economic improvement had been amongst the fastest. On the one hand, just like many monarchs in Europe, the English

sovereigns continued to encourage commerce and manufactures. And Smith paid much heed to the salutary effects of related legislations.

From the beginning of the reign of Elizabeth too, the English legislature has been peculiarly attentive to the interests of commerce and manufactures, and in reality there is no country in Europe, Holland itself not excepted, of which the law is, upon the whole, more favourable to this sort of industry. Commerce and manufactures have accordingly been continually advancing during all this period (*WN*, III.iv.20).

Moreover, since the retrograde order must be precarious, Smith acknowledged the good intentions of English government to promote “direct encouragements” to agricultural improvement, “not only indirectly by the protection of commerce” (*WN*, III.iv.20).

Specifically, the English government encouraged the exportation of corns by a system of bounty while discouraging importation. As a severe critic of the related mercantilist policies to promote monopoly and unjust encouragement, Smith suspected that their effects were all “illusory” (*WN*, III.iv.20). But there were some policies that he acknowledged as having achieved real success. For Smith, of much more importance was that “the yeomanry of England are rendered as secure, as independent, and as respectable as law can make them” (*WN*, III.iv.20), which was related to some successful reforms of the English common law. As the writ of ejectment was invented in Henry VII’s time, the yeomanry’s right to recover his possession of lands could then be warranted. The great convenience of this writ was particularly notable, since many landlords in England also appealed to it when their right of possessions were violated. Smith thus concluded that “the security of the tenant is equal to that of the proprietor” (*WN*, III.ii.14). The tenants were also endowed with freeholds and a voting right for a member of parliament. In this case, the bargaining power and social status of peasantry was greatly improved, which was a primary cause of the fast improvement of English agriculture. This, however, was a direct result of deliberate governmental policy, not a purely unintended consequence of an entirely spontaneous order.

The great benefits of such legal and political encouragements were further clarified by Smith's comparison of the economic circumstances of different regions. Within Great Britain, the different legal and political environment in different regions for tenants also brought about uneven development. As leasehold could not bring the right to vote in Scotland, the Scottish yeomanry were less respected than their counterparts in England, which also resulted in the inferiority of agriculture in Scotland (*WN*, III.ii.15). In addition, compared to England, France was a similarly powerful state in terms of its commercial prosperity and foreign trade, but its agriculture was still inferior to that of England, which, for Smith, was exactly because of the unfavourable laws in France - "The law of the country has never given the same direct encouragement to agriculture" (*WN*, III.iv.21). As for Spain and Portugal, their governments never promoted the development of manufactures and agriculture, in spite of their early prosperity of colonial trade and the accumulation of gold and silver. Their power soon dissipated (*WN*, I.xi.n.1, III.iv.22, IV.vii.c.82). Obviously, England was by far the most advanced society in western Europe, where the feudal remnants and unnatural regulations which impede social progress were reformed much more thoroughly and systematically.

For Smith, it is undeniable that the European progress was generally unintended. But equally noteworthy is that the diversifying policies in different regions led to uneven economic performance. For Smith, the English case is especially important. He tried to figure out why some countries were still troubled by economic backwardness while commerce had already been introduced almost everywhere in Europe. Our analysis suggests that he put forward two important conditions for the growth of civilisation. By investigating the development of Germany, Smith made the case that the establishment of centralised sovereignty was a necessary condition of modern commercial society characterised by opulence and non-domination. Therefore, some institutional background other than the unintended effects of commerce was essential to modern commercial society, in order that it

could surpass the subsistence economy. In addition, Smith's closer analysis of the different countries in western Europe also indicated that sovereign action could be essential to the developmental conditions of commercial society. In this process he discovered some more direct encouragements that were particularly beneficial to English development. By extending the commercialisation of agriculture and improving the legal and political status of the peasantry, a much healthier environment for economic prosperity was created in England. For Smith, such a historical case could be applied to Scotland, where social progress had been much slower than in England. As we shall see, the remaining fragmented political structure, feudalistic entails, the uneven development of the Lowlands and Highlands, and the persistent subsistence economy, all seemed intractable obstacles to social progress. And Smith also applied his historical implications to the particular case of Scotland. As Smith attributed the economic backwardness and social stagnation of the Scottish Highlands to the stable equilibrium of feudalism, he advocated various measures in order to drive social transformation, including civilising proposals and state interventions, which diverged from Hayek's recommendation of spontaneous development.

### *3. Civilising Scotland: State Action in the Scottish Case*

Smith never fully engaged in an analysis of the improvement of the Scottish Highlands. Throughout his works, he made no systematic study of Highlands society. But for him, as well as many Scottish Enlightenment thinkers, the improvement of Scotland was undoubtedly of primary concern.<sup>79</sup> In Smith's works, the social and economic landscape of the Scottish Highlands was often taken as an existing example of feudalism. This section reconstructs

---

<sup>79</sup> For Hume's comments on the social stagnation and dearth of money currency in the Highlands, see Hume 1987, 291-292. Smith reported that "there is at this day a village in Scotland where it is not uncommon...for a workman to carry nails instead of money to the baker's shop or the alehouse" (*WN*, I.iv.3).

Smith's point of view of the Highlands society, and his policy recommendations to promote social transformation. Many of his recommended policies were based on his committed analysis of the socio-political reasons for the economic backwardness of feudal Europe. As we shall see, Smith acknowledged the importance of the Union of Great Britain to the subjugation of aristocratic order in Scotland. While noticing the isolation and backwardness of Highland society, Smith further appealed to some specific reforming proposal to introduce civilisation and improvement, including the reform of entail, the division of landed estates and depopulation. Smith's proposal to civilise Scotland should be understood in the context of many systematic reforms in eighteenth-century Britain, especially in the aftermath of the 1745 Jacobite rising.

Indeed for Smith, the Scottish Highlands were characterised by many feudalistic institutions, including the inveterate social dependence, lack of capital accumulation, and subsistence economy. Highlanders in general were inimical to progress and transition. Smith observed that the Highlanders led a rather "stationary life" (*WN*, V.i.a.26). His opinion was not alone. Thomas Douglas, the 5<sup>th</sup> Earl of Selkirk, a reformer who was greatly influenced by Smith's thought, described this stagnant lifestyle of Highlanders in his famous book on the Highlands. As Selkirk observed, for these Highlanders, "...no regular and continued industry was requisite for providing the simple necessities of life, to which their forefathers had been accustomed, and beyond which their ambition did not extend" (Douglas 1805, 16). For Selkirk, the Highlanders were not particularly keen on the "drudgery of agriculture" or raising living standards (Douglas 1805, 15). Instead, under the customary clan system, their day-to-day life was characterised by frequent war-making and primitive social bonds (Youngson 1973, 13). As Smith commented on the feudal landscape "[t]he occupiers of land were in every respect as dependent upon the great proprietor as his retainer", he took the Scottish Highlands as a typical example (*WN*, III.iv.6). The clan chieftains preserved the power to

revoke the tenant's leaseholds at pleasure to maintain their domination.<sup>80</sup> Moreover, the subsistence economy also helped to consolidate the lords' authority. After all, "[a] tenant at will, who possesses land sufficient to maintain his family for little more than a quit-rent, is as dependent upon the proprietor as any servant or retainer whatever, and must obey him with as little reserve" (*WN*, III.iv.6). This is why, as Smith observed, "A crown, half a crown, a sheep, a lamb, was some years ago in the highlands of Scotland a common rent for lands which maintained a family" (*WN*, III.iv.6). Thus the maintenance of social dependence and the subsistence economy were mutually reinforcing in Highland society. The division of labour within the subsistence economy of the Scottish Highlands was also inadequate. This low level of economic specialisation was not only related to the limited scale of the market, but also to the natural conditions of the Highlands. Villages and residences were generally scattered, which hindered free communication and commercial exchange. Thus, "in so desert a country as the Highlands of Scotland, every farmer must be butcher, baker and brewer for his own family" (*WN*, I.iii.2). While agriculture usually fell short of the sophistication of division of labour seen in commerce and manufactures, the natural and social environment of the Highland feudal society became a major impediment to its further agricultural progress.

More disconcertingly, poverty in the Highlands was worsened by the prodigality of landlords. Smith believed that the rustic hospitality of clan chieftains, which served to maintain a large number of followers, "was exercised not many years ago in many different parts of the highlands of Scotland" (*WN*, III.iv.5). Such extravagance diminished capital accumulation. Also crucially, as the birth rate was much higher in rude society than in a civilised one, any surplus of produce was very unlikely to be permitted. According to Smith, poverty "seems even to be favourable to generation", which is easily seen in Highland

---

<sup>80</sup> See *LJ(B)*, 159, "So lately as in the year 1745 this power remained in the Highlands of Scotland, and some gentlemen could bring several hundreds of men into the field. As these lords had no other way to dispose of their lands, they gave some of them as munera, which were revocable at their pleasure, and others they gave as beneficia, which continued during life and returned to the lord after their decease."

society. “A half-starved Highland woman frequently bears more than twenty children, while a pampered fine lady is often incapable of bearing any, and is generally exhausted by two or three” (*WN*, I.viii.36). While the standard of living was already kept at a low level, the high birth rate imposed a burden on economic improvement, resulting in the mortality of new-born infants. Given the subsistence economy in the Highlands, the death rate must also be very high. “It is not uncommon...in the Highlands of Scotland for a mother who has borne twenty children not to have two alive” (*WN*, I.viii.37). High birth rate and poverty thus constituted a vicious cycle which can hardly be broken without some external shocks.

Perhaps one of the most imperative problems was the militarisation of the Highlanders, which was also a sign of their isolation, backwardness and thus their potential threat to civilised regions. As Smith noted, the great military and judicial power of feudal chieftains still persisted in the Highlands. Specifically, the hereditary privileges of the feudal landlords endowed them with huge military and political domination, which not only induced feudal servitude, but also enabled landlords to lead a great number of followers for military services. Just as Smith observed, the Scottish lord Cameron of Lochiel, being only the vassal of the duke of Argyll, held great power of criminal justice. Not surprisingly, Smith held disdain for the military power of Lochiel, who “carried, in 1745, eight hundred of his own people into the rebellion with him” (*WN*, III.iv.8). While the martial spirit of rude society almost remained unscathed, Lowland society, being more advanced and civilised, was inferior in terms of the number of able soldiers (*WN*, V.i.a.11; *LJ(A)*, iv.78-80; *LJ(B)*, 38). The fact that a more civilised society can be “effeminate and dastardly” was especially noteworthy when “[i]n the year 1745 four or 5 thousand naked unarmed Highlanders took possession of the improved parts of this country without any opposition from the unwarlike inhabitants” (*LJ(B)*, 331).

Indeed, for many English politicians and Scottish improvers, the several Jacobite rebellions in 1715 and 1745 under the Hanoverians must have resulted from the pre-commercial social structure of Scottish Highlands. The rebellions unleashed by Jacobitism showed that the disputes concerning the legitimacy of the Hanoverian government still loomed large (MacKillop 2000, chap. 1). Therefore, the important need to “root out, once for all, any danger to the stability of government” (Cunningham 1932, 504) and to “integrate the Highlands with the rest of Great Britain” (Youngson 1973, 26) was widely acknowledged. After defeating the 1745 Jacobite rising, the British government introduced more systematic political and social programmes to engineer social transformation in the Highlands.<sup>81</sup> As a result, the formidable military and judicial power possessed by landlords was weakened with the “heritable jurisdictions” generally abolished by the year of 1747 (Devine 1994, 63). Moreover, several acts to disarm the Highlanders were also introduced in the eighteenth century to demilitarise the remaining feudal structure (Youngson 1973, 25ff). A great number of landed estates were subsequently forfeit to the Crown as the punishment of the Jacobite rising. Thereafter the Scottish Court of Exchequer was assigned to investigate the conditions and value of these estates. Subsequently, the 1752 Annexing Act further commanded the annexation of thirteen estates to the Crown. It was prescribed that the rent would be used “for the Purposes of civilizing the Inhabitants said Estates, and other Parts of the Highlands and Islands of Scotland, and promoting amongst them the Protestant Religion, good Government Industry and Manufactures, and the Principles of Duty and Loyalty to his Majesty, his Heirs and Successors” (Youngson 1973, 27). The Board of Annexed Estates was also set up to

---

<sup>81</sup> On the agrarian revolution in Scotland, see Devine 1994, 35ff. As Devine points out, in Scotland, the agrarian change was often “encouraged from above”. This is not only related to the hegemonic role of landowners in Scottish society and economic investment, but was also indebted to the Enlightenment intellectual culture. Devine thus labels the Scottish Enlightenment thinkers such as Smith, Lord Kames, James Anderson and Sir John Sinclair as belonging to the “rationalism of Enlightenment” (Devine 1994, 65). See also Hobsbawm 1981, 3-29; Berry 1997, 10, 12; 2013, 116; Robertson 2005; Jonsson 2013; C. Smith 2021. For Hume’s proposal to civilise the Highlands, see Caffentzis 2005. On agrarian patriotism in early modern Scotland, see Emerson 2003; Bonnyman 2012; Smout 2012.



supervise the social experimenting in Highland society, so as to promote agricultural and industrial modernisation (Youngson 1973, 26ff). Highland society, henceforth, became a “laboratory for experiment” (Halikias 2020, 636). Subsequently, many more systematic plans were introduced in order to deflate the Highlanders’ attachment to their ancient way of life.

Smith did not endorse every policy stimulated by such a spirit of projecting. But it is undeniable that he also promoted several proposals to reform Scottish society. His appeal to exogenous political action was especially noteworthy when it comes to the problems of landownership and feudal aristocracy. Smith expressed little sympathy with the customary tenurial bonds between small tenants and great proprietors. He approvingly noted that feudal power was weakened since the collapse of the Jacobite uprising in 1745 (*LJ(B)*, 159). What he saw in Highland society was the gravest social dependence. In economic terms, the tenants and feudal landlords in the Highlands were not able improvers of agriculture. The low level of division of labour in the backwards Highland society led to such a prevailing phenomenon in the countryside where “[a] country weaver who likewise cultivates a small farm must lose a good deal of time in passing from his loom to the field and from the field to his loom” (*ED*, 15). It was widely seen that he must “saunter and trifle”, not unlike “an idle fellow” (*ED*, 16).

This habit of sauntering and of indolent, careless application, which is naturally or rather necessarily contracted by every country workman, who is obliged to change his work and his tools every half hour, and to apply his hand in twenty different manners almost every day in his life, renders him almost always very slothful and lazy, and incapable, even upon the most pressing occasions, of any vigorous application. Independent therefore of his want of the most perfect dexterity this cause alone must always make the quantity of the work which he performs extremely inconsiderable (*ED*, 16).<sup>82</sup>

Apart from the torpor and hebetude of countrymen, Smith also criticised the institution of leasehold in Scotland. In Smith’s time, there was also a kind of tenants similar to the French metayers in Scotland - the steel-bow tenants. This institution, according to Smith, was

---

<sup>82</sup> Smith might have exaggerated the idleness of countryside cultivators (cf. Mill 2004, 51-52).

“one of the worst that have ever been in use” (*LJ(A)*, ii.25; cf. *LJ(A)*, iii.123). For him, the steel-bow tenants owned little means of production and subsistence, being at the mercy of the arbitrary will of landlords, which led to the fact that they were discouraged and unable to cultivate and improve the lands. In addition, the laws of entail were still in practice in Scotland, which prevented great landlords from dividing the landed estates according to the course of human nature and thus to cultivate and improve them. Indeed, “nothing can be more absurd than perpetual entails” (*LJ(B)*, 168). Smith observed that in Scotland there were “perhaps more than one-third part of the whole lands of the country, are at present supposed to be under strict entail” (*WN*, III.ii.6). While the steel bow tenants and great proprietors either lacked the means of agricultural improvement, or lacked incentives to cultivate the lands, Smith favoured the ownership of landed estates by small proprietors and profit-seeking merchants. In *LJ*, Smith made the case that entail reform was necessary in order that progress could be activated.<sup>83</sup> For Smith, the exposure of land to commerce would certainly conform to national interest and general improvement. When land “frequently changes hand”, it is much easier to find the best improvers, i.e., those “men of scheme and project”, who “have both the desire and the ability of improving” (*LJ(A)*, i.166). But the laws of entail and perpetuities, which excluded land out of the open market, were the “causes of the almost total bad husbandry that prevails in those countrys where they are in use” (*LJ(A)*, i.166-167).

Indeed, Smith affirmed that the introduction of luxury and commerce had diminished the great landlords’ fortunes. But in Scotland, this silent operation of luxury did not amount to completely benign effects. As the law of entail was not abolished, the old families, who were now short of money and capital to improve their lands, still inherited the landed estates without alienation (*LJ(A)*, iv.167). In this case, the customary manner of tenancy must be swept away by some intentional reforms. And the ancient families must loosen their ties to

---

<sup>83</sup> Entail reform was promoted by many other Scottish thinkers. See e.g., Dalrymple 1764; Swinton 1765.

their large estates. Smith thus suggested dividing the landed estates and exposing them to market competition. Although completely breaking up landed estates owned by the great proprietors was not feasible, the Duke of Buccleuch, who was tutored by Smith, adopted the proposal to invite better improvers and allow longer leaseholds to promote agricultural improvement (Bonnyman 2014, 69).

Clearly, since the feudal landlords were the “greatest opposers and oppressors of liberty that we can imagine” (*LJ(A)*, iv.165), subduing the landlords was key to the improvement of the Scottish Highlands. Smith, in this case, explicitly praised the Union of Great Britain for promoting the extension of centralised sovereignty. He remarked, “[b]y the union with England, the middling and inferior ranks of people in Scotland gained a complete deliverance from the power of an aristocracy which had always before oppressed them” (*WN*, V.iii.89). Smith’s approval of the Union was not simply out of political concern. To the backward regions of Scotland, the Union of Britain also facilitated the expansion of market scale by linking Scotland to the broader market in the British empire, which also brought about the increasing demand of Scottish cattle, thus raising its prices and profitability.

It is not more than a century ago that in many parts of the highlands of Scotland, butcher's-meat was as cheap or cheaper than even bread made of oatmeal. The union opened the market of England to the highland cattle. Their ordinary price is at present about three times greater than at the beginning of the century, and the rents of many highland estates have been tripled and quadrupled in the same time (*WN*, I.xi.b.8).

Smith argued that “[o]f all the commercial advantages...which Scotland has derived from the union with England, this rise in the price of cattle is, perhaps, the greatest. It has not only raised the value of all highland estates, but it has, perhaps, been the principal cause of the improvement of the low country” (*WN*, I.xi.1.3). The advantages induced by the broadening of the market and the establishment of Union were not only limited to the growth of the cattle industry. Equally important, the expansion of the beef industry helped promote another goal

of Smith's idea of reform, i.e., the depopulation of Scottish land. As we have pointed out earlier, Smith considered the vicious cycle between poverty and the high birth rate an intractable problem, trapping Highlands society in low rates of economic growth. The growth of the beef industry however further accelerated the process of emigration, getting rid of the "unnecessary mouths" in the Highlands (*WN*, III.iv.13). The case of the expansion of pasturage is particularly noteworthy in *WN*, as Smith hereby developed an engaged analysis of the Scottish context. On Smith's account, "[t]ill the price of cattle, indeed, has got to this height, it seems scarce possible that the greater part, even of those lands which are capable of the highest cultivation, can be completely cultivated" (*WN*, I.xi.1.3). In Scotland, there was vast land that remained uncultivated and the urban economy had not fully developed. As the distant unimproved regions must be manured before they could be further cultivated, Smith noticed the great benefits of the rising price of cattle to the improvement of agriculture. While the price of cattle meant cattle-owners could afford the rent and profit of cultivated land, farmers then had the motives and stock to expand the cattle industry and the cultivation of land yet further. As Halikias rightly notes, Smith intimated that the rising profitability of raising cattle thus led to the emigration of cottagers, who were all small subsistence farmers without means of production, thus gradually moving the Highlands out of a long-standing poverty trap (See Halikias 2020; see also *WN*, I.x.b.49).

Smith tried to apply the historical lesson of the advanced economy to the backwards regions in Scotland. Even though commerce had introduced order and liberty beyond the direct awareness of contemporaries, Smith noted that the lynchpin of such a transformation was the collapse of feudalism. In the case of the Highlands, he showed no hesitation in desiring to topple the feudal remnants in a more systematic and deliberate way via direct governmental intervention. He not only approved of the union, as an external political event, that diminished the Scottish feudal aristocracy, but also recommended institutional reforms

such as the division of landed estates, thus exposing land to the competition of the marketplace. All these reforms can hardly be seen as a submission to unintended consequences, waiting for the insensible forces of commerce to facilitate liberty and prosperity. Quite the contrary, Smith's proposal for Highland society shows that he believed state-directed programmes can indeed be useful regarding social progress and economic growth.

#### *4. Conclusion*

Although Hayek's reading of Smith's idea of social progress as a spontaneous evolution is not without merit, this chapter has pointed out that the spontaneous order theory cannot well explain how economic backwardness could be overcome, which was one of Smith's primary concerns. It is undeniable that Smith was the first to use the idea of an 'invisible hand' to explain the inner logic of the modern free market. But it is noteworthy that the origins of modern commercial society cannot be explained solely by an "invisible hand explanation". For Smith, the process in which commerce swept away feudalism must be understood against the background of European politics. The so-called "unnatural and retrograde order" means that the path of commercial society in Western Europe departed significantly from the natural tendencies of human affairs, as the unnatural economic system led to a prolonged stagnation of European society in the barbarous stage. Smith noticed that the medieval commercial cities were unable to make agrarian improvements due to the feudal lordship, and instead fell into decline again and again. In this case, he pointed out that governmental interference was necessary for the cities to overcome the feudal lords in the late Middle Ages and to overcome economic fluctuations and political dependence in Europe. Smith argued that the key to escaping the trap of economic backwardness does not lie in whether European history as a

whole was driven entirely unintentionally (as the theory of spontaneous order emphasises), but rather in whether the unnatural feudal system could be eliminated by whatever means. In Smith's view, even though modern market societies could function by unintended action, at least in Europe, their establishment often depended on strong external intervention. He was, therefore, advocating the need for state-guided action in driving development in the stagnant regions of Scotland, which meant he diverged in his account from Hayek's later theory of spontaneous order.

## CHAPTER 5: TAMING THE LOVE OF DOMINATION: SMITH ON THE PERSISTENCE AND DECLINE OF SLAVERY

Smith noted that his conjectural history did not fully play out in modern Europe, but that an “unnatural and retrograde order” was embedded in the history of modern commercial society, which, as we have shown, indicates the contingent nature of the growth of commercial liberty and that state action can be essential to social improvement, especially in backward regions trapped in a feudal subsistence economy such as Scotland. However, Smith’s anxiety about the creation of modern free society was not confined to the Scottish context. As Smith cast attention to the European/cosmopolitan context, he was deeply troubled by the persistence of slavery and the uncertain prospect of its abolition.

Indeed, Smith was anxious about the problem of slavery. As many scholars have pointed out, Smith’s philosophical principle implies a certain egalitarianism (Davis 1999; Fleischacker 2004; McLean 2006; Peart and Levy 2008; Anderson 2016). He once attributed the defence of innate human difference and distinction to the “vanity of the philosopher” (*WN*, I.ii.4; cf. *ED*, 26). As a form of personalised domination, slavery is exactly the antithesis of Smith’s concept of liberty. As Duncan Forbes noted, Smith’s historical account fixates on the “liberty and security of the individual guaranteed by regular government and the rule of law”, the freedom from being a property of some masters, from the “continual fear of the violence of their superiors”, and from the inhumane and economically unnecessary shackles of social dependence and domination (Forbes 1975b, 185-186; cf. *WN*, III.iii.5, V.i.b.25; Montesquieu 1989, 157; Cropsey 2001; Rasmussen 2008, 13, 131, 139, 144, 150). In particular Smith toned down the republican connotations of the word “Freedom”; he “restricts its requirements while extending its application” (Berry 2018, 334-335). For Smith, liberty includes the security of private property, the free flow of labour and almost everything to do

with the free use of our person and the freedom of actions that are not detrimental to wider society.<sup>84</sup> It does not usually include democracy, even though the rise of democracies could favour liberty in the sense that it breaks the monopoly of political power. Smith disavowed the ideological trend to attribute liberty to citizens' virtue and participations in political life, which, for him, is often enjoyed by only a few citizens since the great amount of leisure time needed for their frequent participations in political affairs can only be bolstered by enslaved labour and thus the misery of a great part of society.<sup>85</sup> Thus for Smith, the lynchpin of a free society becomes the exertion of the impartial administration of justice, rather than the Aristotelian *vivere civile* or the political personality usually appealed to by the English Commonwealthmen whose focus was, according to Istvan Hont, "maintaining equality among the political nation of franchise-holders, not between them and the unfranchised poor" (Hont 2005, 395). As Hont argues, Smith was concerned with the formation of a *res publica* in a broader sense, which is similar to the *Rechtsstaat*, or in a more popular term today, a state operating the rule of law (Hont 2015, 62, 81). In this perspective, the failure to explain the abrogation of slavery in Smith's history would mean that his enterprise is only a defaulted promise.

Nevertheless, Smith suggested that the emancipation of slaves in Western Europe, which is itself only a "small corner of the world" (*LJ(A)*, iii.114), was a peculiar case. In his Glasgow lectures, he reminded his students to focus not only on the history of Western Europe, but on the entire world, which reveals that slavery was still extant in almost every

---

<sup>84</sup> The idea of liberty has already been identified in Smith's discussion of natural rights in *LJ(A)*, i.13 including "[t]hose [rights] which affect his body...the right to free commerce, and the right to freedom in marriage, etc. when infringed are all evidently incroachments on the right one has to the free use of his person and in a word to do what he has a mind when it does not prove detrimental to any other person". Of course, the rights to property are more artificial than mere natural rights. But all these rights should be enjoyed by men, as men, and distinct from the rights enjoyed by them as family members or citizens. See *LJ(A)*, i.11-13.

<sup>85</sup> Indeed, if the intellectual divergence between civic humanism and natural jurisprudence still holds, Smith's account of liberty leans towards the latter. On the intellectual distinction between civic humanism and early modern natural law, see Pocock 1983. For Smith's intellectual connection with civic humanism and the idea of *raison d'État*, see esp. Hirschman 1977; Winch 1978; Hont 2005.



part of the earth.

We are apt to imagine that slavery is entirely abolished at this time, without considering that this is the case in only a small part of Europe; not remembering that all over Moscovy and all the eastern parts of Europe, and the whole of Asia, that is, from Bohemia to the Indian Ocean, all over Africa, and the greatest part of America, it is still in use. *It is indeed almost impossible that it should ever be totally or generally abolished (LJ(A), iii.101. Italics added).*

How then did slavery fall into disuse in Western Europe, paving the way for modern liberty as a peculiar case of human history? While there has been much attention to Smith's stadial and social theory, Smith's account of how slavery faded away in particular is not always clear-cut.<sup>86</sup> This chapter shows that regarding the abolition of slavery, Smith's social explanation cannot be taken as a theoretical commitment of the Hayekian spontaneous order approach. For Smith, our natural love of domination is an unailing psychological principle so that slavery becomes a universal institution established ever since the creation of human society. Slavery also becomes even more sophisticated, resilient and persistent as society grows. Given the *spontaneity* of our urge to dominate our peers, the decline of personalised domination is a rather curious event, which was induced by a mixture of both intended and unintended consequences. And Smith's account of the intended actions and political landscape of medieval Europe that precedes modernity remains underappreciated. Indeed, Smith's analysis of the deconstruction slavery is related to his public jurisprudential history centred around the formation, progress and decline of political authority, and which continuously evolves from the first establishment of government in the form of archaic politics activated by personalised arbitrary authority and prevalent servility, to modern regimes that are lawful and regular (cf. Kelly 2013; Herzog 2014). It is in this historical development full of contingencies that slavery was fortunately abolished in Western Europe,

---

<sup>86</sup> Spencer Pack lamented that Smith does not provide details about why slavery is persistent in market society. See Pack 1996. This chapter displays textual evidence to support that Smith has presented a detailed analysis of this problem.

the like of which was hardly seen in any other government. In what follows, I will show that Smith believed that slavery is not imposed by some external forces other than our very human nature, and this inhumane institution was actually corrected by exogenous means, i.e., the contingency-grounded historical conditions and human interventions.

1. *The Mysterious Decline of Slavery: Does Smith's Historical Account Conform to the Spontaneous Order Approach?*

If Smith is to be taken as a spontaneous order theorist, how would he envision the decline of slavery?<sup>87</sup> We have already mentioned that the spontaneous order approach can work either on the group or the individual level. On the group level, the slaveholding communities would be gradually diminished with the low rate of productivity and decrease of population.

However, while both Hayek and Smith noted the fact that slavery can damage the scale and growth of a society, Smith ascribed the collapse of ancient republics to the emergence of commerce and lack of military strength, rather than the persistence of slavery. In Smith's history, ancient civilisation did not collapse primarily *because of* slavery. Slavery, though it seems to be the major reason for depopulation (*LJ(A)*, iii.131), still slowed down the decline of ancient civilisation — as the citizens were free from carrying on trades and could thus continue to be engaged with military training (*LJ(A)*, iv.82). Besides, slavery is never diminished simply by the non-slaveholding society's "attraction of outsiders", or "more rapid procreation". As an example, ancient civilisation was destroyed by shepherding states, which

---

<sup>87</sup> Unfortunately, Hayek provided few explanations of the abolition of slavery in his works. As pointed out by Jacob Levy, *The Road to Serfdom* was not intended for an American audience or focused on the "decentralized domination" of manorial slaveholding system, although the word "serfdom" might convey some relevant implications. And it should be noted that many American libertarian-conservatives, to whom *The Road to Serfdom* is a canonical text, expressed sympathy to American slavery and Jim Crow laws. This might be an unfortunate and unintended legacy of Hayek's enterprise. See J. Levy 2017. Some scholars indeed noticed that the existence of slave-holding challenges Hayek's theory, in that this institution is a "spontaneous generated injustice" (Sandefur 2009).

no less featured in slave-holding than Greeks or Romans. And Highland society, as analysed in the last chapter, was not particularly drawn to Lowland commercial society. Instead, uncivilised polities were almost everywhere great menaces to sumptuous and industrious urban areas, seeking to resist and plunder the latter (See e.g., *LJ(A)*, iv.63, 81). Therefore, although slavery can be a cause of social decline, Smith's history suggested no definite answer such that non-slavery market society would necessarily triumph over slavery through population growth, economic boom, or its attraction of uncivilised slave-holding strangers.

Hayek's theory of spontaneous order, on the micro-level, sometimes also assumes that individuals could invent new practices without considering collective interest, thereafter these practices would gradually prevail to trigger social evolution while no agent overhauls the entire society. Following this logic, Smith could argue that a few path-breakers would somehow stop upholding slavery. In fact, Smith did point out the low productivity of slave economies. Some scholars thus presume that as Smith argued that slavery is extremely uneconomical, this institution must gradually be abandoned as people's awareness of this fact grew (C. Smith 2006, 78; cf. Viner 1965, 116).<sup>88</sup> In Hayekian terms, those slave-holding masters who are utility-minded and closer to rational economic man figure out the low profitability of slave economy so that they learn to abandon this old-fashioned system, which comes to be imitated by other individuals.

Yet this Hayekian account does not conform to the results of Smith's science of man. Despite his trenchant criticisms of the low economic efficiency of slavery, Smith expressed no confidence that slavery would gradually fall out of favour.<sup>89</sup> Quite the contrary, human

---

<sup>88</sup> The validity of Smith's argument on the economic efficiency of slavery was hotly debated in the nineteenth century. For more details see Groenewegen 2001; Levy 2001.

<sup>89</sup> Smith reported, "The late resolution of the Quakers in Pennsylvania to set at liberty all their negro slaves, may satisfy us that their number cannot be very great. Had they made any considerable part of their property, such a resolution could never have been agreed to" (*WN*, III.ii.10). Perhaps this is the only proof – however weak it is – that the calculations of utility can motivate abolitions of slavery. This report was based on some misleading information in a letter written by Benjamin Rush to the French physician Jacques Barbeau Dubourg. Some extracts of this letter were included in DuPont de Nemours' article "Affranchissement des Negres en Pennsylvanie" in *Éphémérides*. Voltaire, the Abbé Raynal and John Millar all used this message in their own

pride and the desire for domination are so staunch that economic self-interest is unable to motivate people to dispense with this institution:

The pride of man makes him love to domineer, and nothing mortifies him so much as to be obliged to condescend to persuade his inferiors. Wherever the law allows it, and the nature of the work can afford it, therefore, he will generally prefer the service of slaves to that of freemen (*WN*, III.ii.10).

Instead of arguing that the utility-oriented disposition can somehow overwhelm our pride, Smith's account emphasises that the natural love of domination is a persistent moral principle across time and space and, therefore, is never appeased simply by economic motivations becoming more prevalent (Forbes 1975b, 199). For him, our "natural love of domination" motivates us to adopt slave-holding. And however violent slavery appears to be, it is not an unnatural institution that would fade away *tout court* as society grows.

In this case, both the collective and the individual approaches of the spontaneous order theory meet some difficulties in making sense of Smith's historical account of slavery. Smith argued that "[s]lavery has been...universall in the beginning of society, and the love of dominion and authority over others will probably make it perpetuall" (*LJ(A)*, iii.117). This judgement poses a major challenge to the purported *spontaneous* disappearance of this institution. As we have mentioned earlier, Hayek saw close connections between social theory in the Scottish Enlightenment and the model of spontaneous order. Scholars also believe that the stadial progress envisaged by Smith points to the way in which social dependence could eventually be overcome by a system of liberty, sentimental exchange, legal equality, mutual persuasion and the division of labour. Indeed, within Smith scholarship, there has been some

---

work. But there was in fact no such event taking place in 1769. See Dimand 1996. Barry Weingast argues that Smith's account actually suggested that the persistence of slavery is attributed to the commitment problems that no long-term contracts could be ensured in insecure feudal Europe to compensate for the abolition of slavery (Weingast 2020). Weingast is not satisfied with Smith's blaming the persistence of *libido dominandi* for the intransigence of slave-holding. However, Smith did stress the tremendous influence of the love of domination over our choice of economic institutions. I decide to take Smith's claim more seriously, and further argue that Smith provided a consistent explanation of why slavery was persistent in human society due to the love of domination and was later abolished in modern Europe.

attention paid to the motif of *doux-commerce* and enlightened self-love, pointing to the ascendancy of the calm and docile passions in commercial society (Lovejoy 1961; Hirschman 1977; 1992; Phillipson 2000; Dickey 2004). Dennis Rasmussen, in his interpretation of Smith's thought, also believes that the rich and vain men who focus on wealth accumulation and showing off their fortune would concentrate less on dominating others. In commercial society, the human desire "to dominate their dependents can be transformed into the comparatively less harmful desire to show off their wealth" so that "domination can be replaced by ostentation" (Rasmussen 2008, 149). Thomas Lewis also provides an argument making reference to Smith's moral psychology, indicating that people in commercial society can enjoy the pleasure of social recognition and persuasion rather than dominating (Lewis 2000).<sup>90</sup> However, Smith's concern about large-scale slavery in ancient Greek and Roman societies, the Atlantic slave trade, and the colonial slave economy in his own time, suggest that the love of domination would not simply wither away along with the growth of commerce. In fact, although Smith clearly stated that our "principle to persuade which so much prevails in human nature" is the underlying foundation of our propensity to peacefully "truck, barter and exchange one thing for another" in a commercial society (*WN*, I.ii.1), he never suggested such "replacement" or "transformation" of human desires as argued by Rasmussen; instead, it is not entirely clear why our vanity must counterbalance our natural insolence without conniving with it to dominate our dependents. After all, isn't the ostentation to show off the quantities of dependents a common sentiment in slave-holding commercial republics as they are precisely a sign of social status and wealth? And isn't the Atlantic slave trade a precise combination of both our desire of tyrannising and trade activities? In this case,

---

<sup>90</sup> These interpretations make Smith's standpoint rather close to French Jansenists such as Pierre Nicole's neo-Augustinian argument that corrupted vain desire for superficial individual glory and economic utility can help tame the proud individuals, thereby stabilising the Hobbesian unitary sovereign state. For some discussions on Nicole see Hont 2005, 46-51; 2015, 53-54. For the debates in early modern political thought concerning the role of utility and pride in modern society see Hirschman 1977.

Smith's warning of the persistence of our love of domination is particularly striking, which suggests that the choice of persuasion and more gentle management are rarely the most attractive options as compared with tyranny and violence. In every occasion when the conditions are allowed, domination seems no less - if not more - desirable than using peaceful instruments.

For though management and persuasion are always the easiest and the safest instruments of government, as force and violence are the worst and the most dangerous, yet such, it seems, is the natural insolence of man, that he almost always disdains to use the good instrument, except when he cannot or dare not use the bad one (*LJ(B)*, 221; cf. *WN*, V.i.g.19).

Moreover, it is worth noting that the peaceful persuasion that seems to characterise commercial society is not only incapable of countering the powerful drive for domination, but even bear close affinities to it. The peaceful sentiment to exchange and persuade, for Smith, is not particularly "amiable" (*LJ(B)*, 301). He juxtaposed the "desire of persuading" with "[g]reat ambition", the "desire of real superiority", of "being believed" and "leading and directing the judgments and conduct of other people" (*TMS*, VII.iv.25). In other words, the desire to persuade does hold some important similitudes to the desire of domination - to seek superiority among our fellow beings. Indeed, the natural love of domination, or the "Desire of Dominion" in Mandeville's terminology, is closely related to vulgar vanity and pride (Mandeville 1988, vol. 2, 204). For Smith as well, it is the "pride" that makes us "love to domineer". It stands for our drive to compete with and rise above our fellow creatures (*TMS*, VI.iii.41-47).<sup>91</sup> In this case, a commercial society marked by social interdependence and free intercourse of moral sentiments, does not operate in natural sociability or some amiable principles.<sup>92</sup> The "ardent desire" to better our condition, as the impetus of economic opulence

---

<sup>91</sup> The connection between vanity and natural love of domination is often left unnoticed. Exceptions include Luban 2012; Griswold 2018, 243-247.

<sup>92</sup> For early modern moral scepticism challenging the idea of natural sociability see Hont 2005, 159-184; 2015, esp. chap. 1, 2. Governor Thomas Pownall, after reading *WN*, criticised that Smith's theory cannot do away with the idea of state of nature, since Smith denied that the division of labour and social stratification was rooted in

and civilisation, does not dispute what Mandeville had claimed in *The Fable of the Bees*, i.e., “[t]he restless Industry of Man to supply his Wants, and his constant Endeavours to meliorate his Condition upon Earth” (Mandeville 1988, vol. 2, 128).<sup>93</sup> Our urge to seek “[t]o be observed, to be attended to, to be taken notice of with sympathy, complacency, and approbation” — the great advantages and the essential aims procured by bettering our conditions — motivates human industry, dexterity and the cultivation of arts and civilisation (*TMS*, I.iii.2.1). This indicates that when it comes to the “great mob of mankind”, it is their vain desire to accumulate wealth, superficial reputation, approbation and power that runs as the ultimate source of the large-scale social advancement. And Smith is well aware of how this continual driving force of civilisation can be vulgar and corrupted in cases when vain people exclusively focus on the “augmentation of fortune” in private life and show contempt to poor people who do not deserve this insensibility (*WN*, II.iii.28; *TMS*, I.iii.3.1ff).

Therefore, Smith suggested that the seemingly docile ostentation, oratory and persuading is either entangled with our domineering motive or unable to counter it, which also explains the fact that a commercial society (e.g., Athens, Rome and modern imperial systems) can be established upon intensive slavery.<sup>94</sup> He condemned the phenomenon that the slaves suffer from the greatest rigour imposed by their masters in civilised societies (*LJ(A)*,

---

natural distinction, but in the faculty of oratory and speech. See Pownall 1987, 339. There was, however, no sign that Smith later revised his theory according to Pownall’s suggestions.

<sup>93</sup> Smith argued that such a desire “though generally calm and dispassionate, comes with us from the womb, and never leaves us till we go into the grave” (*WN*, II.iii.28). The proposition that Smith’s account of the psychological foundation of commercial opulence is indebted to Mandeville is originally inspired by Smith’s “Letter to the Authors of the *Edinburgh Review*” in 1756 where he reviewed Rousseau’s *Discourse on Inequality* and suggested that this work is influenced by Mandeville’s *The Fable of the Bees*. In both this letter and *TMS*, Smith quoted Rousseau’s passage from the *Discourse* describing how vanity prompted the progress of arts and civilisation. See *EPS*, 250-254; *TMS*, IV.1.10. Although Smith reproached Mandeville’s moral philosophy, which he took as a “licentious system”, his argument of the moral psychological basis of arts and civilisation is still closer to Mandeville’s account than is conceded by himself. Certainly, Smith contended that Mandeville ignores the crucial idea of praise- and blame-worthiness in our moral judgement. He also insisted that the virtues of probity, punctuality and prudence are more readily cultivated in commercial society than in savage society. See *LJ(B)*, 326-33; *WN*, II.ii.34; *TMS*, VII.ii.4.7-8. Still, Smith accepted that the progress of civilisation is a result of more vulgar — thus more common — attention to honour and approbation, while the desire for praiseworthiness does not explain much about the operation of commercial society. See Douglass 2017.

<sup>94</sup> On Smith’s account, slavery also seems to be a condition of the development of arts, science and philosophy in many parts of the world. See Schliesser 2017, 237.

iii.106). In *LJ*, Smith presented a rather gloomy narrative, one in which social oppression fails to be alleviated as society grows (cf. Heilbroner 1975; Alvey 2003; Muthu 2008).<sup>95</sup> An opulent commercialised society can maintain more slaves than a poor one. Accordingly, the masters must also be increasingly vigilant as to the threat of slaves rebellions, which become much more formidable as the number of slaves becomes larger. To some extent, this observation still conforms to the pattern of spontaneous order but produces very vicious effects — the rich society raise more slaves and oppress them more severely. Smith rarely suggested that there would ever be a revolution of human nature made from “coarse clay” (*TMS*, III.5.1). He once contended, “Are the people of our country at this time more honestly inclined than they were formerly? We can not pretend that they are” (*LJ(A)*, iii.141-142). In general, Smith agreed with many contemporary Scottish philosophers, who argued that there are some constant principles in human nature, in order to construct the science of man and the evolutionary process of social institutions.<sup>96</sup> He would agree with Hume that there is hardly a “miraculous transformation of mankind” insofar as people become essentially more rational, liberal and order-seeking at some point (Hume 1987, 280). And his disciple, Dugald Stewart, also summarised, “[T]he capacities of the human mind have been in all ages the same, and that the diversity of phenomena exhibited by our species is the result merely of the different circumstances in which men are placed” (Stewart 1854, vol. 1, 69-70).<sup>97</sup> So far Smith’s analysis amounts to a very disturbing result, i.e., that slavery seems no less - perhaps even

---

<sup>95</sup> My focus, different than Muthu’s, is less on the global perspective of Smith’s political economy than on the history of Europe, and I argue that commercial society for Smith is itself a two-tiered development with both the progress of humanity and dehumanising behaviour. Also I find it unnecessary to resort to a theological point of view to reconcile Smith’s optimistic and pessimistic narratives, as Alvey has done. Smith’s history has already explained this multi-levelled unfolding of commercialism.

<sup>96</sup> For Smith, as long as the corresponding objects and occasions still emerge, human passions will always be inspired. Paraphrasing Nicolas Malebranche’s judgement in *De la recherche de la vérité*, Smith made the case that “[t]he passions...all justify themselves, and seem reasonable and proportioned to their objects, as long as we continue to feel them.” See *TMS*, III.4.3. For Malebranche’s opinion, see Malebranche 1997, bk. 5, chap. 11. See also Hutcheson 2004, 110-111.

<sup>97</sup> Whether human nature is malleable is a particularly debatable “philosophical question” (Hume’s term) in the eighteenth century. Hume attributes the idea of the alterability of human nature to Plato and Mandeville. See Hume 1978, 402; 1987, 280; Jones 2004, 37; Susato 2015, 28, 195-196.



more – spontaneous, natural and perennial than free economic exchange and mutual persuasion amongst equals.

When giving his jurisprudence lectures Smith urged his class to look to the historical record in order to understand the peculiar nature of slave emancipation in “only a small part of Europe”. After revisiting Smith’s moral theory, this statement now makes more sense. Given the unfailing principle of pride and the love of domination, the abolition of slavery seems a rather curious event, of which the origin was not spontaneous, but diverged from ordinary course of human affairs. Smith reminded us that “[t]he circumstances which have made slavery be abolished in the corner of Europe in which it now is are peculiar to it, and which happening to concur at the same time have brought about that change” (*LJ(A)*, iii.117). We should take this claim seriously. Smith turned to history to puzzle out the ambivalent origin of modern liberal society free from the archaic problem of slavery. By consulting the specific historical conditions, Smith found out ways to abrogate entrenched enslavement, which, as we shall see, were induced by a mixture of unintended consequences and human intervention. While both Hayek and Smith emphasised the role of unintended consequences in the growth of free society, Smith’s account relies much more upon genuinely unpredictable events, in that slavery, in particular, is the truly spontaneous and recurrent problem and its eradication is the departure from the regular order of human affairs and therefore needs special explanation.

## *2. The Historical Origin of Personalised Domination: Moral Sentiments, Wealth Distinction and Weak Government*

On Smith’s account, social subordination enacted via slavery is rooted in human nature. As we have seen, even though Smith did suggest other principles that seem to counteract the

desire to dominate, he made no promise that such principles as economic rationality, vanity or desire to persuade could effectively triumph over our love of tyranny, violence and domination. After revisiting the psychological foundation of slavery, this section delineates Smith's historical account of this resilient institution. Importantly, Smith explained that it is precisely due to the interaction of human nature and particular socio-political circumstances that slavery is established in early society. In every poor society where the inferior cannot subsist without submitting to the superior, wealth distinction was directly translated into political domination. This is why, as Smith pointed out, "slavery...has been universall in the beginnings of society" (*LJ(A)*, iii.117). Furthermore, the irregular government, unlike fully-fledged sovereignty in civilised society, held no sufficient power to subdue the already existing social domination supported by powerful masters, which facilitated the persistence of slavery.

Though Smith rejected Thomas Hobbes's argument that wealth is power and commented that money, *per se*, is not political power, "either civil or military" (*WN*, I.v.3), this does not lead to a simple denial of the fact that wealth is the predominant source of political power and authority. Smith believed that "[p]roperty 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" (*LJ(B)*, 11). Subsequently, to show why property is important to the foundation of government, Smith identified four causes of natural authority, personal qualifications, old age, fortune and high birth (*WN*, V.i.b.4-8; *LJ(B)*,12). Personal abilities and superior age "naturally" create subordination prior to the actual rise of civil society (*WN*, V.i.b.3-4). He further points to the fact that among them, after the emergence of civil government, the authority of fortune is much greater than the superiority of either personal qualities or age (*WN*, V.i.b.7; *LJ(B)*,12). As for the superiority of birth, it is still based on the "antient

superiority of fortune in the family of the person who claims it” (*WN*, V.i.b.8). Wealth, therefore, seems the most outstanding source of authority. Smith’s history of government, then, starts by constructing a connection between wealth and power. Their particular combinations in different societies are regarded as the cardinal parameters demarcating the scope of individual liberty.

On Smith’s account, the first connection between wealth and authority still lies in our moral sentiments. In *LJ*, Smith reminded us that *TMS* has already touched upon this issue (*LJ(B)*, 12-13). In *TMS*, he presented our “disposition to admire, and almost to worship, the rich and the powerful” as the psychological foundation on which the superiority of wealth becomes the source of authority (*TMS*, I.iii.3.1). This propensity is an effect of sympathy. As an imagining process to change our positions with others, sympathy helps us to envisage what it would be like if we were put in a like situation and then build emotional correspondence — to feel for others or agree with their passions. Further, Smith found that in common life it is easier for a spectator to fully sympathise with another’s joy than with their sorrow. In fact, we rarely sense the same degree of painful emotions of the people principally concerned so that we even despise those who fail to restrain a violent sadness and easily praise those who succeed in doing this. By contrast, joyful emotions are easier to sympathise with (*TMS*, I.iii.2.1). Thus in the process of self-judgement, it is also important to exhibit our joy, richness and greatness to the public, and not to be viewed as poor, pathetic and mortified since it is expected that spectators would not so entirely agree with our sorry passions. Correspondingly, when we are judging others, because of our tendency to feel sympathy with joy, we find much pleasure in lifting ourselves to the rich man’s situation in our imagination because of all the dazzling colours of their superior positions, but by contrast we tend to neglect poor people. Also, we tend to feel disagreeableness if this seemingly delightful state is ruined. Smith observes that ordinary people often lament the calamities that fall upon the rich:

What pity...that any thing should spoil and corrupt so agreeable a situation! We could even wish them immortal; and it seems hard to us, that death should at last put an end to such perfect enjoyment. It is cruel, we think, in Nature to compel them from their exalted stations to that humble, but hospital home, which she has provided for all her children. Great King, live for ever! is the compliment, which, after the manner of eastern adulation, we should readily make them, if experience did not teach us its absurdity (*TMS*, I.iii.2.2).

Since this sympathising process is mainly built on the imagination, this “perfect and happy state” of the rich man is more or less “delusive” (*TMS*, I.iii.2.2). But however absurd this admiration is, it is upon the moral sentiment of mankind to sympathise with the rich that the authority, “the distinction of ranks, and the order of society” are formed (*TMS*, I.iii.2.3). The rich men’s “benefits can extend but to a few; but their fortunes interest almost every body” (*TMS*, I.iii.2.3). In this sense, ordinary people’s admiration of the rich and superior is presented “for their own sake” (*TMS*, I.iii.2.3).

Such analyses explain how, in almost every society, social distinction and authority are consolidated and operate by virtue of our moral judgement, mainly due to “our sympathy with our superiours being greater than that with our equals or inferiors” (*LJ(B)*, 12-13). How then did political authority emerge in the first place? Smith started with the supposition of “10 or 12 persons of different sexes settled in an uninhabited island” (*LJ(A)*, i.27). He conjectured that this situation must have urged the first inhabitants to hunt and gather natural produce. People can possess something simply by first occupation. For Smith, government is first established to secure private possessions and the immediate cause of government is the emergence of wealth inequality. In the hunting-gathering society, no distinct social hierarchy exists as there is still no appropriation of wealth, which is the precondition of wealth inequality. It is in the second age, the age of shepherds, that the notion of private property and inequality of fortune are introduced, which occasions government and social dependence. The appropriation of animals and the rise of private property results in a change of the ways of living:

Those who have not any possessions in flocks and herds can find no way of maintaining themselves but by procuring it from the rich. The rich, therefore, as they maintain and support those of the poorer sort out of the large possessions which they have in herds and flocks, require their service and dependance (*LJ(A)*, iv.7-8).

According to Smith, the introduction of the inequality of wealth in this society forces people who hold little property to subordinate themselves to the rich. This is not only an outcome of our propensity to naturally obey the rich as abovementioned, but in particular a result of the necessity to survive at this stage. Since people who own no property cannot subsist by means of hunting and gathering any more, they have to be dependent on the rich for necessaries and protection but they still attempt to reclaim their original equality. “[T]he affluence of the rich excites the indignation of the poor, who are often both driven by want, and prompted by envy, to invade his possessions” (*WN*, V.i.b.2). Private property becomes “the grand fund of all dispute” and the civil government is now necessitated to guarantee the security of private property (*LJ(A)*, iv.22). The rich persuade the poor men that “they must either continue poor or acquire wealth in the same manner as they [the rich] have done”, instead of openly and fiercely invading the property that has already been settled (*LJ(A)*, iv.23). Therefore, laws and regulations concerning private property were invented by the rich to dominate the poor. Furthermore, the rich pastors’ wealth cannot be spent elsewhere, i.e., on arts, manufactures, luxury but on raising dependents, since at such a rude social stage these “trinkets of frivolous utility” have not been invented yet. To manage such a huge amount of property, they are also in need of servants. At this stage the power of wealthy people lies in the number of dependents who follow them. Wealth distinction is thus directly translated into social domination. The authority of fortune further prompts the authority of familial genealogies and thus an entrenchment of social inequality. Smith finds that “[a]ntiquity of family means every where the antiquity of wealth, or of that greatness which is commonly either founded upon wealth, or accompanied with it” (*WN*, V.i.b.8). In fact, the distinction of

high birth is an ensuing effect of the inequality of fortune. The absence of luxury and arts in the shepherding society means that wealth can be kept up more effectively if inherited in a single family while a father's eminence will also naturally convey social respect and dignity to his heirs, thereby making the authority of the rich family hereditary and inveterate (*WN*, V.i.b.10; *LJ(A)*, iv.11-12; *LJ(A)*, iv.43). Thus, Smith summarised that the earliest government is characterised by social dependence and severe domination.

The great shepherd or herdsman, respected on account of his great wealth, and of the great number of those who depend upon him for subsistence, and revered on account of the nobleness of his birth, and of the immemorial antiquity of his illustrious family, has a natural authority over all the inferior shepherds or herdsmen of his horde or clan. He can command the united force of a great number of people than any of them. His military power is greater than that of any of them...He is the person, therefore, to whom all those who are too weak to defend themselves naturally look up for protection (*WN*, V.i.b.11).

Furthermore, not only does the distinction of fortune bring about subordination at this stage, the government takes advantage of patriarchal authority to maintain civil subjection. This is out of necessity as the sovereign power has not yet been fully fledged and extended to the entire state so that the judicial power must be bestowed in the respected ones who bear personalised authority. As Smith observed, social inequality is further entrenched in the rich people's monopoly of judicial power. While the government "in most early periods of society" is "in a very weakly condition" (*LJ(A)*, iii.88), the wealthy people "who have large possessions in flocks and herds would...have many dependents who would follow their council and direction, and in this manner they would have the greatest influence over the people" (*LJ(A)*, iv.11-12). The rich chiefs accordingly seize the judicial power in the local assembly. Chiefs then form councils to decide on disputed cases in order to maintain social order (*LJ(A)*, iii.117). Once the local masters grasp the juridical power, the government, in order to "establish jurisdictions in the different parts of the country" (*LJ(A)*, iii.88), must also rely on the head of the family in distant areas to "keep the subjects in due subjection and in

any tolerable order” without the institutionalised jurisdiction and regularised legislation (*LJ(A)*, iii.88), thereby leaving servant and slaves “under the absolute and arbitrary power of their master” (*LJ(A)*, iii.90).

Therefore Smith made it clear that in every poor society where wealth distinction already springs up, – which is the universal scenario in early human history – slavery is inevitable for at least two reasons. First, the rise of private property and economic backwardness forced individuals of no fortune to become subordinated to the rich, otherwise they could not support themselves. Second, the earliest and necessarily weak forms of government, which rest on personal authority, must also rely on local masters to maintain social order, thereby solidifying decentralised domination. Smith’s historical narratives seem to suggest that without further extension of social affluence, there is no hope that slavery could be abolished. However, Smith’s analysis exhibits more sophistication. As we shall see, even though an abundant society triggered by commercial progress has provided the opportunities for common people to break wealth monopolies and win independence through the mechanism of the “descent of fortune”, the process can also be stifled by the desire of the *nouveau riches* to maintain social domination. Smith keenly sensed the inveterate spontaneity of domination. Even in a rich society, the extant slavery often could not be eliminated *tout court*. Rather, as Smith observed, wealth and profit intensified the slave economies of the past, which was widespread in every government, and was especially noteworthy in ancient Greek and Roman societies.

### 3. *Commerce and the Persistence of Slavery in Rich Society*

#### a) *How Commercial Opulence Mitigates Slavery: The “Gradual Descent of Fortune”*

In analysing the cause of the universality of slavery in early societies, Smith made the case that it is the specific mode of subsistence (shepherding) that traps early society in poverty and savagery, and forces common people to become subordinates to the rich for survival. How then could this dominating social structure universally established be overcome in later history? Smith's answer to this question exhibits the social linkage between wealth and power, i.e., that the distribution of political power is the result of wealth distribution. This is probably owing to James Harrington's dictum that "the balance of power depends on that of property". This balance of power, on Smith's account, evolves with the changes of modes of subsistence, or the four archetypes of social stages (See for example, *LRBL*, ii.142-3; Hume 1987, 33, 47).<sup>98</sup> Smith's perspective as such indicates that the growth and distribution of wealth is an important source of power transition. The dominating social structure can only be surpassed after opulence is created. To free people from such harsh domination, the solution must lie in the breakup of wealth monopolies and the empowerment of the lower class, which is facilitated by the growth of commercial society. To see why this is so, we need to retrace how Smith formulates a theoretical connection between commerce and liberty backed by wealth and the redistribution of power.

In Smith's terminology, as the most advanced stage in the Smith's four conjectural social stages, commercial society signifies a specific "mode of subsistence".

When the division of labour has been once thoroughly established, it is but a very small part of a man's wants which the produce of his own labour can supply. He supplies the far greater part of them by exchanging that surplus part of the produce of his own labour, which is over and above his own consumption, for such parts of the produce of other men's labour as he has occasion for. Every man thus lives by exchanging, or becomes in some measure a merchant, and the society itself grows to be what is properly a commercial society (*WN*, I.iv.1).

Apparently, commercial society is undergirded by the development of the division of

---

<sup>98</sup> On Machiavelli's and Harrington's intellectual influence on Smith's historiography, see for instance, Stein 1980; McNally 1990; Hont 2015, 83; see also Wilsher 1983.



labour, which enables people to share each other's produce by trade and become more interdependent. "Living by exchange" indicates the surplus of private fortune, which each individual possesses and produces but does not consume all by themselves at once, and can be taken to market and exchanged for some other goods or services. What lies behind this way of living is the continuing progress of the institution of private property, which in turn results in wealth inequality. Now of particular importance is how poor people subsist in such cases, in which resides the main feature of commercial society. In the *Early Draft of The Wealth of Nations*, Smith provided an account of how people, especially the poor, support themselves in commercial society. To be sure, the labouring poor still enjoy a lot less of what they have produced than those who are the most indolent and luxurious. Smith castigated the phenomenon that the poor, while most arduously producing luxury for the entertainment of indolent wealthy classes in commercial society, are almost "pressed down below ground by the weight, and to be buried out of sight in the lowest foundations of the building" (*ED*, 5). The solution to this miserable situation still lies in the division of labour, as a form of social collaboration of ordinary people focusing on their own particular branches to collectively produce large quantities of goods for reproduction and consumption. The example of a watchmaker suffices to explain how social productivity is stimulated by the introduction of the division of labour. Since the responsibility of an intelligent and diligent watchmaker is shared by a good number of workers who only need to be proficient in producing a small part of the watch, the division of labour promotes the efficiency of manufacturing and facilitates the production of massive quantity of goods. A society based on a sophisticated division of labour, therefore, becomes "opulent". Further, the accumulation of profit can afford an increase of wages of labour and the produce is also sold at an immensely lower price than before, which is preconditioned by the introduction of manufacturing to serve the wealthy's vain desire and lavish lifestyle. Smith saw a "gradual descent of fortune" in this phenomenon

(*LJ(A)*, iii.139).<sup>99</sup> The wealthy's vainglory occasions manufacturing in order to support their exquisite life, thereby adding value to the originally rude produce (*LJ(A)*, iii.137-138). But they never consume more than ordinary people do so that the poor are not excluded from the salutary effects of the boost of social productivity. The poor are employed in the industries to support themselves and afford their humble yet secure life. In this sense, the fruits of the division of labour are not merely confined to the rich and superior, but extend to the poor as if guided by an "invisible hand", since the selfish rich men never intend this collective improvement. Under these circumstances, inequality counterintuitively avails collective preservation, multiplies natural fertility, and "rouses and keeps in continual motion the industry of mankind" (*TMS*, IV.1.10). This is an intriguing paradox of commercial society (Hont 2005, 92-93, 302-3, 390-7). The "overgrown fortunes" do not generate social unrest, but even become advantageous to social integration.

Specifically, commerce can mitigate social domination in at least three ways. Firstly, commercial society characterised by the division of labour helps people to live more independently for their ability to subsist without being a dependent or a slave for the rich. Although he "bears...upon his shoulders the whole fabric of human society", the poor man does not need to exchange his life from performing voluntary servitude to the chiefs anymore (*ED*, 5).<sup>100</sup> Secondly, the descent of wealth generates changes of power and social status. The formerly rich families often squander their wealth used to maintain dependents in the past on luxurious goods with little utility, insofar as the distinction of rich and poor is mitigated, if not

---

<sup>99</sup> On the augmented quantities of the "necessaries and conveniences of life" as the compensation of labour, see *WN*, I.viii.35-36.

<sup>100</sup> See also Governor Pownall's comments on *WN* in Pownall 1987, 340, "The labourer, and he who lives on rent, therefore, must always, though improving, be unable to improve so fast as to emerge from a continued distress: if this distinction, that a flowing encrease of wealth, although it is the forerunner of every advantage to the publick in general, and *in the end* to every individual, yet is the continuing cause to the continued distress of the labourer, and of him who lives by rent, is not carefully attended to." Pownall sensed some negative results of the "influx of riches" in commercial society. But Smith might have tried to show that the permanent distinction of private property and wealth inequality are necessary costs of collective flourishing, and that the mercantilist view that the "influx of riches", or economic advancement *per se*, would inevitably bring about inflation is wrong. See esp. Hueckel 2000; 2009.

completely obliterated. In this sense the Hobbesian link between wealth and power is effectively loosened as money cannot directly induce domination. Meanwhile, the lower class is able to bargain for political power due to their increase of fortune. The rich and superior's immense judicial and political power makes them suspected and feared. For instance, it was the strong hatred incensed by Quintilius Varus's attempt to establish courts in barbaric regions that led the fearful and jealous Germans to massacre his legions. In order to soften the natural feeling of suspicion, people demand legislative power to invent laws and appoint judges to ascertain the judicial power, which was commonly seen in the ancient republics (*LJ(A)*, v.110). But unlike John Locke claiming that the legislative power which inhibits previous arbitrary power results from a non-historical social contract, Smith attested that what truly smooths this power transition is the wealth redistribution after the rise of commerce and thereafter the pursuit of political power of the *nouveaux riches*.<sup>101</sup> It is by an enhanced balance of power based on the balance of wealth that the formal characteristic of a state becomes more equalised and legalised. Thirdly, the unprecedented enrichment of social wealth also eases the harsh living conditions in barbarous society, thereby facilitating the cultivation of sensibility and sociality. Thanks to commercial prosperity, the "general security and happiness...afford little exercise to the contempt of danger, to patience in enduring labour, hunger, and pain" usually seen in savage society (*TMS*, V.2.8; cf. *WN*, (1).4). While savages and barbarians cannot expect others to feel sympathy for themselves and enjoy the free flow of sensibility, a "polished and civilised" people become ready to "enter into an animated and passionate behaviour" of their fellow creatures (*TMS*, V.2.9-10; see also Phillipson 1975; Bee 2018; Bee and Paganelli 2019).

Therefore, Smith saw few essential changes of human nature in a commercial age. Instead, the solution to social domination hinges on the particular allocation of wealth and the

---

<sup>101</sup> For Smith's disagreement with Locke, see *LJ(A)*, iv.19; v.114.

historical development of people's living conditions, mainly by virtue of the "descent of fortune". This argument further indicates that the prospect of human liberty is an historical phenomenon – whether domination can be really overcome lies in the fact that the descent of fortune could be fully introduced without being disrupted. Unfortunately, given the persistence of the *libido dominandi* and the existence of a slave economy, the free allocation of wealth could not be extended to every individual in rich society. And this was what happened in ancient Europe, where social domination was not cured but worsened in the wake of commercial development in that the wealth monopoly was reintroduced via a slave economy of a larger scale. As Smith observed, the rise of ancient republics did not eliminate but consolidated the institution of slavery. Whereas the extension of social wealth in commercial society must be based on the poor's involvement in manufacturing and employment of labour to ensure their independence, in the ancient republics, a considerable number of people are not included in this redistribution process mainly because of the existence of a slave economy. As we shall see, the fact that a slave was not entitled to own private property in ancient society means that commercial opulence could not bring about their emancipation and prosperity.<sup>102</sup>

b) *The Spontaneity of Libido Dominandi and the Recurring Wealth Monopoly in Rich Society*

At first sight, the events in Athens and Rome, with the development of commerce and

---

<sup>102</sup> Consider also Smith's conclusion of his comparison of London and Paris, Glasgow and Edinburgh, in *LJ(A)*, vi.4-6, showing that wealth distribution is vital to liberty and order: "I took notice of the great disorders and confusion of the feudall governments, which in a great measur(e) proceeded from the numbers of retainers [retainers] and dependents amongst them, who, being accustomed to live in ease and luxury about their patrons house, had no way to support themselves but by rapine and violence... Upon the whole it is the custom of having many retainers and dependents which is the great source of all the disorders and confusion in some cities... Commerce is one great preventive of this custom."

manufactures, largely followed Smith's theoretical trajectory presented above. The settlement of a small region of ancient Greece because of the agricultural development required defence against the surrounding predatory barbarians so that people built fortifications and settled down in places such as Attica, which were easy to defend geopolitically. The security, land fertility and the easy access to oceans for foreign trade unclogged the development of commerce, and thereafter arts and luxury.<sup>103</sup> After the chiefs moved into cities, of which the small revenue cannot uphold the supreme authority of the chiefs, the nobles wrestled power and the Greek states thereby became aristocratic (*LJ(A)*, iv.66-67). This aristocracy would further become democracy as citizens struggled for liberty and obtained legislative power, with the expansion of wealth and the extension of fortune to citizens (*LJ(A)*, iv.71; *LJ(B)*, 33). The open access to political offices and general assembly for almost every free citizen in Athens also created an effective rein for the arbitrary power of the superior. Thus a regular government unknown to nomadic people emerged (*LJ(A)*, iv.55-74; *LJ(B)*, 30-36; *LRBL*, ii.143).<sup>104</sup>

However, the route by which commerce brings freedom is not unilinear on Smith's account, for the change of balance of power does not induce the abolition of slavery. When Smith cast his attention to the overall conditions of ancient polities, he keenly noticed that democracies can only be maintained via slavery. Citizens' collective identity in democracies often leads to stark unwillingness to share citizenship with foreigners and strangers. Slaves, who were often plundered as booty from battlefields or were citizens reduced to serfdom as a punishment of their crimes, were also unlikely to attain civil rights (*LJ(A)*, v.86-91). And in the ancient republics, most of the mechanics and manufactures were undertaken by slaves, and their presence was also crucial to free citizens' participation in republican politics since

---

<sup>103</sup> Land fertility and easy transportation are the two necessary conditions for the "improvement in the arts of life". See *LJ(A)*, iv.61.

<sup>104</sup> The rich still exerted influence in the assembly. See *LJ(A)*, iv.60.

enslaved labour left them sufficient leisure time to do so. Therefore, rather than abandoning the institution of slavery, the legislators continued to uphold it. Smith thus laments that “[i]n a republican government it will scarcely ever happen that it [slavery] should be abolished” since people who enjoyed legislative power were themselves slaveholders (*LJ(A)*, iii.101-2).

Subsequently, further economic development only intensified slavery. For the rich masters, to expand industries meant getting more slave labour. Under this condition the slaveholders also become increasingly fearful of the slaves, as their insurrections could now be very formidable. And the widened wealth gap also swept away the original familiarity between masters and slaves when they were both in a similar state of poverty. Smith writes, “[T]he freer the people the more miserable are the slaves...The greater (the) freedom of the free, the more intollerable is the slavery of the slaves” (*LJ(A)*, iii.110-111). In this case, commercial progress did not help overcome the existence of a slave economy. The rich further expanded their industry without employing ordinary people, but only allowed their estates to be cultivated by their own dependents. Not surprisingly, a large amount of the produce must also be used to feed the slaves. The wealth was thus monopolised and circulated within the rich’s own family while other free citizens were excluded from the advantages of economic growth. Further, this inequality infected the political arena. In order to gain more votes, the wealthy began exercising usurious loans to accrue their influence over the poor. Being reduced to debtors, poor people could hardly live independently anymore. Still worse, those who could not pay off their debts were often adjudicated to be slaves and taken into bondage by their creditors (*LJ(A)*, iii.146). Smith further condemned this vicious effect of slavery that the “poorer citizens were deprived of their only means of subsistence” once again and their political power, which undermined their independence and stimulated the inferior’s anger (*LJ(A)*, iii.143). In Athens, its small territorial size, the less considerable authority of the public offices open to citizens and the fact that it is defensive all rendered the wealthy

unable to procure exceedingly large fortune and thus become less prominent. But in Rome wealth inequality was much more identifiable due to the slaveholding economy and prolonged foreign conquest, which brought great fortune to the “Optimates” — men of riches and fashion — whilst leaving many others behind, who became “Populares” — populists and demagogues.<sup>105</sup> Such structural problems begat serious social conflicts, eventually leading to the demise of the Roman Republic and the commencement of military dictatorship (*LRBL*, ii.155-160; cf. Montesquieu 1968, 26-27). While Hont has incisively pointed out the development of regular government in ancient time in Smith’s history, the lawful regime was actually quite fragile and became almost non-existent when facing the instability of ancient politics (Hont 2015, 61-62, 81-82).<sup>106</sup> In such an “ill modelled government” (Hume 1987, 276), commerce became impotent to bring about order and liberty. Instead, slaveholders came to monopolise commercial wealth and raised more subordinators, generating misery for poor citizens who were reduced to the status of usury debtors.

This is indeed a natural – in a way spontaneous – but to Smith highly alarming endgame of social progress, yet it is presently underappreciated in the scholarship. In this perspective, human civilisation, which, albeit characterised by “opulence and refinement”, may not promote goodness for everyone (*LJ(A)*, iii.110).

Opulence and freedom, the two greatest blessings men can possess, tend greatly to the misery of this body of men [slaves], which in most countries where slavery is allowed makes by far the greatest part. A humane man would wish therefore if slavery has to be generally established that these greatest blessing(s), being incompatible with the happiness of the greatest part of mankind, were never to take place (*LJ(A)*, iii.111).

It is indeed one of Smith’s most striking judgements that “opulence and freedom”

---

<sup>105</sup> Smith focuses less on the Anacyclosis, or the gyration of ancient regimes. But their volatility and cyclical pattern of progress can still be detected in his account. See, e.g., Winch 1978, 63-64; Haakonssen 1981, 178-181.

<sup>106</sup> Hont believes that, for Smith, commerce could have eventually done away with slave economy if it had not been interrupted by the shepherds’ intrusion into ancient civilisation. Our analysis, however, shows that it is not quite the case.

became “incompatible with the happiness of the greatest part of mankind” in ancient commercial republics. However, Smith not only saw the dark side of participatory politics in ancient polities, but even argued that slavery would be maintained “[w]hatver form of government was established” – either absolute or republican – due to the “tyranic disposition which may almost be said to be natural to mankind” (*LJ(B)*, 134). Crucially, Smith reminded us that almost no government ever existent in human history succeeded in abolishing slavery. On one hand, a republican government is usually supported by immense slave labour so that the slave-holding legislators would not choose to emancipate the dependents, which would strip their own wealth and citizenship. On the other hand, even though the sovereign in monarchical government might be much superior to his subjects, the prevalent slave economy would not allow him to free slaves, either. Indeed, in a more absolute government, the princes are so powerful as to not be diminished by freeing the inferior so they are usually more predisposed to mitigate the rigour of enslavement. Still, to conduct such a vehement revolution as to curtail the powers and riches of intermediary ranks would arouse vociferous oppositions and thus undermine political order. This is why no government, either monarchical or republican, was able to destroy decentralised social oppression despite the progress of commercial opulence.

In all countries where slavery takes place[s] the greatest part of the riches of the subjects consists in slaves...To abolish slavery therefore would be to deprive the far greater part of the subjects, and the nobles in particular, of the chief and most valuable part of their substance. This they would never submit to, and a generall insurrection would ensue. For no single man ever had or possibly could have power sufficient to enable him to strip his subjects in that manner. If he set a slave at liberty this was robbing his master of the whole value of him. This therefore could never take place (*LJ(A)*, iii.115-116).

Given the naturalness of slavery and its continual existence in human society, Smith found no effective way to counter it simply by the natural progress of opulence and refinement operating spontaneously. In Smith’s history, slavery was not eliminated via stadial economic



progress. In fact, Smith did see some ineliminable *spontaneity* in social history, such that the commercialised *nouveaux riches* raised more slaves to facilitate the expansion of a slave economy, while the increasing profit of the slave industry in turn facilitated social oppression. Such social perversity, being spontaneous and self-reinforcing, thus poses a challenge to the Hayekian theory of the spontaneous origin of liberty. As we shall see next, the rise of modern liberty, which successfully destroyed slavery, is an event that is much more intended, and the result of conscious interference and direction, than is usually assumed in the current Smith scholarship, or that Hayekian presumptions of spontaneous order can account for.

#### 4. *The “Peculiar” Case of Europe: Sovereignty, Church and the Collapse of the Feudal Nobility*

Smith’s social analysis of ancient liberty suggests that slavery is so inveterate that even in rich societies, this inhumane institution tends to be strengthened. Such a disconcerting conclusion agrees with his deep worries about the prevalence of slavery in human society. How then was slavery abolished in modern Europe, given its apparent spontaneity and persistence in the rest of human history?

Scholarly attention has rightly focused on Smith’s analysis of the social effects of commerce on the rise of European liberty, which, however, overshadows the crucial fact that slavery was only abandoned in “the corner of Europe”, whilst commerce has been introduced in almost everywhere in this continent. In fact, even Smith’s audience for his Glasgow lectures seemed to have wrongly taken the abolition of slavery for granted. This section reconstructs Smith’s complicated analysis of the decline of dependence in the “corner” of modern Europe (*LJ(A)*, iii.117). I suggest that what has received much less attention is that such effects of commerce were framed by specific political actions of different agents in

feudal Europe, in which lies the true peculiarity of modern liberty and the reasons why commerce produced such different effects in Western Europe than in other parts of the world, generating liberty whilst eliminating slavery. For Smith, it was the monarchy and church that together broke the domination of feudal lords in medieval Europe, and under this power struggle commerce subsequently destroyed the domination of slavery. This however was a unique historical occurrence and rather than being evidence of the spontaneous emergence of liberty in human society, demonstrated the highly unusual nature of modern European institution and the extent to which it was forged by unique political interferences in the region's past.

In tracing the decline of slavery in Europe, Smith continued to apply to his historiography the politics of wealth, although the protagonists now were monarchies, churches, cities and landlords. After the collapse of Rome, with most of the European cities decimated, without arts and luxury to spend the wealth based on the extraction of rents, the allodial lords continued to accumulate dependents, slaves and, therefore, their authority. Kings, due to their lack of effective authority, again allowed the lords to take charge of local jurisdictions. The allodial government thus became extremely fractured, suffering from the same weaknesses as the Tartarian forms of government, i.e., the lack of regular administration of justice and the prevalence of slavery and social domination. Later, in about the ninth century, feudal society improved the allodial government in the sense that the kings' powers were expanded. Sovereigns such as William the Conqueror in England and Malcolm Canmore in Scotland strengthened their power by imposing new burdens on the allodial lords. They also endowed hereditary rights to their vassals and life-long leases to their tenants in order to secure rent, taxation, loyalty and military services. At this point, many legal ideas and practices such as primogeniture, wardship and leases were advanced and the kings, lords, vassals and peasants were embedded into hierarchical political chains of services and duties.

In this case, the popular democratic government was dismantled in European feudal areas and the monarchies espoused by representative systems unheard of by the ancients were created. However, this political structure was not centripetal and the sovereignty was still very unstable, because of the vast territories and the large amount of wealth possessed by the lords, whom the kings could not effectively subdue. And the kings' finances were also in need of contributions by and the consent of lords, barons, and burghers, as well as their representatives (*LJ(A)*, i.127-128). Due to this particular arrangement of wealth and property, the feudal age continued to be trapped in a "disorderly state" or an "anarchy".<sup>107</sup> For Smith, there is no doubting that the nobles, who were the "greatest opposers and oppressors of liberty that we can imagine" (*LJ(A)*, iv.165), had to be destroyed before any system of liberty could be established.

We can now more fully appreciate Smith's understanding of the "peculiar" nature of the origin of modern liberty. Indeed, Smith keenly noted the unintended operation of commerce when it came to the emergence of modern liberty. But if we recollect Smith's caveat of the intensification of slavery in affluent societies – which are necessarily commercialised – then we can see that commerce is clearly not a panacea to cure social domination as it does not necessarily eliminate slavery. In fact, it was the special political structure in medieval-modern Europe that framed the power transition, allowing it to evade the self-reinforcing of slave-holding. On Smith's account, in feudal Europe, "[t]he whole of the land at this time was...cultivated by villains or slaves in the same manner as by the slaves in the ancient governments of Rome and Greece" (*LJ(A)*, iii.118). It seemed that again the *libido dominandi* and the monopoly of wealth ought to have forced society to re-tread the gloomy route taken in the ancient world: slavery becoming more stable and sophisticated,

---

<sup>107</sup> Smith saw the reign of Plantagenets as convulsive, when the entire country often suffered from great famines because of constant wars between barons. See *WN*, I.xi.e.23; See also *WN*, III.i.3; III.ii.7; III.iv.9; V.i.g.22; V.ii.g.6; V.iii.1; *LJ(A)*, iv.119. He also compared such social circumstances to the "great scramble of human society" (*LJ(A)*, iv.163).

rather than being dismantled. In fact, this was exactly what happened in a large part of modern Europe. Smith found that in Germany, Austria, Poland and Bohemia, the estates of landed nobility were vast enough to support their luxurious lifestyle. Here “the arts and luxury have produced the very opposite effect, in establishing the aristocracy more firmly” (*LJ(A)*, iv.162; see also Salter 1992), as the nobility’s lavish lifestyle demanded a more oppressive exploitation of the husbandmen. In fact, such a negative effect of commercial opulence had already troubled Montesquieu. In *De l’esprit des lois*, Montesquieu observed that

A few lords possess whole provinces; they oppress the plowman in order to have a greater quantity of grain to send to foreigners and procure for themselves the things their luxury demands. If Poland had commerce with no nation, its people would be happier (Montesquieu 1989, 352).

Smith had no objection to Montesquieu’s arguments. Commercial opulence cannot immediately achieve the decline of slavery. In fact, the real case is often the opposite – masters come up with new ways to exploit their dependents and monopolise produce.

Germany is a large country, vastly larger than Britain and considerably larger than France...Large estates must therefore fall into the hands of single persons. In the great scramble of human society every (?one) scrambles to get as much as he can and keep what he has got...The introduction of luxury and arts affected the inferior people, but could not affect them, as their estates are worth some hundred thousand pound per annum. *They have therefore still a great number of dependents who follow them to battle, and their authority is often in their own dominions altogether absolute* (*LJ(A)*, iv.163-164. Italics added).

The reason why Western Europe in the post-feudal period succeeded in evading this path is that the sovereigns were both intentionally trying, and in the end able to, abolish slavery. In ancient Europe, legislators had no intention to do so, while in other absolute governments outside of western Europe (such as Germany), the sovereigns were simply not capable enough to pull it off. In Western Europe, the kings as the power-holders clearly had the incentive to abolish slavery, not out of a feeling of humanity as a counterpoise against the tyrannising urge, but due to their jealousy and resentment towards the lords and nobility as

the predominant slave-holders. The only problem was the ability of the kings to really secure individual freedom by emancipating the slaves held by the feudal lords. On the one hand, sovereignty must be powerful enough to bring this radical change about. Compared to hereditary monarchy whose power was much superior to that of landlords, an elective monarchy was unable to break the feudal lordship. Therefore, German monarchs still failed to conquer the nobles, while the hereditary ones in England and France managed to do so (*LJ(A)*, iii.122).

Furthermore, and crucially on Smith's story, the church and the clergy, who were "at that time a very powerfull set of men in all the countries of the west of Europe" (*LJ(A)*, iii.118), decided to cooperate with the princes to liberate the serfs and slaves, in order to expand their own influence among the lowest ranks.<sup>108</sup> For Smith, both the church and the kings had to be powerful, in order to bring down the considerable countervailing power of the lords. In the Russian Empire, the authority of the Greek orthodox church was not as powerful, so slavery persisted there in the eighteenth century.

tho zars of Moscovy have very great power, yet slavery is still in use, as the authority of the Greek church tho very considerable has never been nearly so great as that of the Romish church was in the other countries of Europe; as we see from the accounts of that country even before the time of Peter the Great (*LJ(A)*, iii.122).

In Western Europe, when the sovereigns were anxious to degrade the power of the nobility, they found allies in the Catholic Church. Hence, the kings' court assigned new regulations to extend peasants' leases, dealing with their bargaining asymmetry confronting their masters, and the Church encouraged the emancipation of slaves (*LJ(A)*, iii.118-122).<sup>109</sup> The kings also

---

<sup>108</sup> Smith thought that in its temper Christianity was not necessarily opposed to slavery, for many Christian masters held slaves. See *LJ(A)*, iii.127-128. Smith was unabashed that the love of domination is so persistent that even the ecclesiastic bodies usually have no motivation to prevent slave-holding in and of itself. The church's behaviour was rooted in its own self-interest, again was more peculiar than universal.

<sup>109</sup> See also *WN*, III.ii.14 on the invention of the writ of ejectment in England and the empowerment of tenants by endowing them voting rights in the parliament, which were "so favourable to the yeomanry, have perhaps contributed more to the present grandeur of England than all their boasted regulations of commerce taken together." See also *LJ(B)*, 294; *ED*, 47.

strengthened the boroughs to court their favour, by allowing them to form corporations, self-defence and possess more autonomy in their jurisdictions. All these policies damaged the authority of the nobles while increasing the power of the sovereigns.

In Smith's view, the peculiarity of modern Europe lies in the particularly fragmented political structure, especially the cooperation between ecclesiastical bodies and the sovereignty. It was in this particular context that commerce, the most forceful catalyser of power transitions, came onto the scene. When the nobles had no chance to indulge themselves in purchasing luxury goods, their large fortunes were employed in raising tenants and soldiers to provide rent and military services. This convention was undermined by the introduction of the "trinkets with frivolous utility", which channelled their selfish vainglory and lured them to ruin their entire fortune. The nobility's short-sighted and selfish deeds made their rustic hospitality no longer affordable. Thus the input of arts and luxury by way of foreign commerce conducted by merchants and manufacturers in the towns, diminished the power of the nobility. Subsequently, the tenants demanded longer leases otherwise they refused to pay rents to support their masters' extravagant lifestyles, while their retainers were also disbanded for lack of rewards. The noble power was in great peril and faded away. Importantly, unlike the legislators in the ancient republics, monarchs benefited from collaborating with the degraded and ignoble class (tenants, burghers). The more militaristic and ambitious the sovereign was to combat feudal lords, the easier it was to desire to liberate the dependents of the sovereign's chief political rivals (*LJ(A)*, iv.154). It was in this framework in Western Europe that commerce achieved what it could not achieve in other parts of the world, i.e., to further induce the bankruptcy of landed nobility whose personalised domination preserved slavery in Europe. Commerce developed to such a level that the feudal lordship was too weak to resist the central sovereignty, so that Henry VIII in England managed to destroy the feudal

ranks.<sup>110</sup> In the end, it was the emergence of the modern state characterised by uncontested absolute sovereignty to resist the military-political authority of the landed nobility that guaranteed the universal abolition of slavery in a commonwealth. In this case, we can more fully understand Smith's earlier diagnosis of the problem of slavery.

The pride of man makes him love to domineer, and nothing mortifies him so much as to be obliged to condescend to persuade his inferiors. *Wherever the law allows it, and the nature of the work can afford it, therefore, he will generally prefer the service of slaves to that of freemen* (WN, III.ii.10. Italics added).

Smith was serious when he claimed that slavery can only be wiped out in places where the law excludes and forbids this practice. Only in a state where the *summa potestas* is undisputedly situated with decentralised domination largely relinquished, can the incremental trickle-down of economic opulence gradually be fostered, owing to the legalised formal equality of inhabitants to be employed in arts and manufactures, which nurture the middling rank, who “can never be great enough to be above the law” and the laws can “overawe them into some sort of respect” (TMS, I.iii.3.5). As the modern sovereign state develops with the empowerment of slaves, villains, peasants and burghers, the law also grows to such a point that no decentralised military-political power would be tolerated within the realm. What Smith has argued, importantly, is that we should not ignore the particular political landscape of medieval Europe that contributed to the creation of such a delicate regime. Although the abolition of slavery in western Europe was the product of various unintended consequences, its peculiarity stood as a testament to the fact that delivery from such a system of domination was not a spontaneous outcome either of immanent criticism, piecemeal tinkering or unreflective experimenting, but rather a political achievement that was remarkable for how unusual, in world-historical terms, it really was. The abolition of slavery, on Smith's view,

---

<sup>110</sup> Smith would not disagree with Hume that what distinguished a civilised monarchy is its ability to “maintain itself in order and tranquillity” solely by “laws and institutions” (Hume 1983, vol. 3, 24). See also McArthur 2005.

was not itself an example of spontaneous order and selective evolution, but of the peculiarities of the artifices of Western European political history.

## *5. Conclusion*

Smith's scrupulous historical account shows that it is by combining the history of public authority and of the operation of the economy that we can probe the reasons why slavery came to an end in western Europe. Given the deepening of the slave economy and political domination in rich societies in the past, Smith did not count on the natural progress of opulence to induce the decline of slavery, but made it clear that it is necessary in order to create the legal-political condition where the law no longer permits slavery, and this law can be meaningfully – albeit not always successfully – enforced by centralised authority. This cause of human freedom, unfortunately, often proves almost impossible to achieve. For Smith, underneath the superficial civility of many commercial societies, such as those in the ancient world, slavery often becomes even more severe, as well as widespread. He warned that self-reinforcing social domination could arise in every form of society, due to the persistent human love of authority and tyranny, the recurring problem of wealth monopolies, and the incapacity or unwillingness of governments to sweep away the inhumane institution of slavery.

Thus contrary to Hayek's spontaneous order theory, Smith shows no confidence in the experimenting of the rational self-interested entrepreneurs, merely unintended social forces, or group selection without individual intentions, to abolish slavery. In fact, Smith did show a particular spontaneity of social institutions, which, however, consists in the unnerving persistence of slavery itself. He clearly saw how the love of domination motivates people to adopt new forms of slave economies as society grows, and how civil government often fails



to escape from the trap of slave-holding and social oppression. In this case, the elimination of slavery can only be fully appreciated by examining the particular socio-political framework in medieval Europe. Smith found that in the late Middle Ages, the hereditary monarchical government in Western Europe, allied with the church, intentionally and successfully subdued the feudal lordship and improved the conditions of subalterns. Commerce and luxury finally eroded the wealth of feudal landlords and broke the dominating structure, but this was the end rather than the beginning of a long-run social process. In Smith's perspective, the political actions of both the sovereign and the religious bodies were key to the collapse of slavery in Europe. For Smith, personal wealth can be used as a bargaining power for political status, a non-coercive employment, economic reproduction, or unproductive consumption. But the spontaneous force of human nature tends to lead us to use our wealth to procure personalised domination, which must be dealt with by a transformation of the social structure or the sovereign's close supervision. Compared to Smith, Hayek's spontaneous order theory did not stress the disturbing fact that people are spontaneously drawn to use wealth to dominate others. Contrary to Hayek, Smith believed that a society that dispensed with slavery does not originate in a given set of seamless rules, but constitutes a break from some almost universal flaws in existing conventions, such as the prevailing human desire for slaveholding.

Smith understood that human struggles against slavery still continued in modern society. In his time, the imperial projects, the Atlantic slave trade and the colonial system had begun to scar the entire globe. Smith's worries echoed his caveat again, – “[w]herever the law allows it, and the nature of the work can afford it”, slavery could be reawakened and return with vengeance if not properly contained. When Smith turned his perspective to the colonial empires of this time, he saw social domination imposed on the aboriginals. Indeed, Smith expressed unequivocal hostility to the imperial system. The government usurped by merchants, as had arisen in British India, was the “worst of all governments for any country

whatsoever” (*WN*, IV.vii.b.11). In ancient politics, the *nouveaux riches*, competing with the nobles to procure the legislative power, still adopted slave labour. Similarly, contemporary merchants who turned into sovereigns became suppressors of people’s liberty and welfare, as they used to regard the subject as resources rather than fellow-citizens, feeling indifferent to *salus populi*.<sup>111</sup> The high profit of sugar and tobacco colonies in America further helped solidify, rather than mitigate, the system of Black slavery (See esp. *WN*, I.xi.b.32).

Furthermore, while the laws that ensured formal equality of citizens had been created in Western Europe, such laws can hardly be introduced to the entire imperial system, which was over-extensive in its territories, and thus required the sovereign power to delegate governors as its representatives, conniving at the arbitrary government in colonies (*WN*, IV.vii.b.52).

Along with many Scottish thinkers in the eighteenth century, Smith was anxious about the prospect of human liberty and happiness. Whereas Smith celebrated that “[i]t is now more than two hundred years since the beginning of the reign of Elizabeth, a period as long as the course of human prosperity usually endures” (*WN*, III.iv.20), and there has clearly been a revival of arts and cultures in his time, which was characterised by “such success or reputation as to excite the attention of foreign nations” (*EPS*, 243), he was not sanguine about the permanent advancement of the human species. Whether Smith was an optimist or pessimist, he was dedicated to a meticulous examination of the conditions of human flourishing. What he truly proposed is that we must focus on how different factors including the introduction of commercial society play out in the political arena, so as to figure out the possibility of the lawful, regular and universal enforcement of justice.

---

<sup>111</sup> The more gentle governance in North America was merely an unintended consequence of the less known bloody genocide of the aboriginals – who were less capable of self-defence than African and East Indian natives – with the subsequent immigration of European settlers seen as the governors’ compatriots. See *WN*, IV.i.32, IV.vii.c.80, 100-106. See also Muthu 2008; Sagar 2021a. Smith reproached any attempt of the merchants to become sovereign, the protector and symbol of public good, as “[n]o two characters seem more inconsistent than those of trader and sovereign” (*WN*, V.ii.a.7). These negative effects of commercialism did not take place in modern Europe thanks to the unquestioned political power of monarchs having grown in the wake of the deconstruction of nobility, which prevented the merchants to reap sovereignty. See *LJ(A)*, iv.142-145. See also Salter 1996; Sagar 2021a.

## CONCLUSION

This thesis has presented Smith's historical explanations of laws, government, economic progress and social domination to examine their difference from Hayek's delineation of the spontaneous growth of liberal institutions. It is made clear that despite their apparent theoretical similarities, as noticed by many scholars, such similarities should not be overstated, nor be allowed to overshadow their divergent historical analyses. In fact, Hayek's spontaneous evolutionism as his key mechanism for the development of free human institutions sits uncomfortably with Smith's social explanations, which stressed critical ruptures, violent revolutions, intentional engineering, and historical contingencies in the formation of various institutions crucial to the ordering of modern society.

In Hayek's own account, a spontaneous order bears an unintended origin, and it is the twin idea of selective evolution. By selective evolution, Hayek insisted that individual plans cannot decide the direction of the growth of society, and that a society develops through group selection. It is at the collective level that practices are selected – those that are beneficial to group survival and prosperity will be kept in use. As Hayek argued, individuals are generally rule-following and unreflective. They endorse many practices without understanding their original purpose and reaffirm many customs without knowing their consequences. Instead they tend to use the old principles transmitted from the past to deal with new cases, such that social tradition gradually becomes a depository of much knowledge accumulated via the passage of time. In denying any substantial role played by individual calculations to determine the evolution of social rules, Hayek pointed out that human reason works on "immanent criticism" to refurbish the social fabric. In Hayek's theory, the self-evolution of a spontaneous order prescribes little space for human agency to change, invent and overthrow existing rules. By contrast, the hubris lying behind attempts to design something completely new only brings about disarray.

While sharing similar historical concerns with Hayek, Smith's account of the evolution of the various institutions that buttress modern liberty covers more aspects of human nature. It is true that Smith did not think these institutions are designed all at once by purposeful human agency. However, for Smith their formation should not be regarded as a result of human actions arising merely out of unconscious rule-following. In Smith's history, there rarely exists a seamless set of rules of law, being "self-maintaining" and "self-regenerative", that constantly furnishes itself. Instead, the formation of the common law system and the modern English constitution cannot be well understood without acknowledging several political revolutions and sovereign interference that paved the way for new historical possibilities, eventually giving rise to modern liberty. Smith emphasises those historical ruptures that changed the barbarous societal structure in Europe, as well as in England, which not only diverges from Hayek's spontaneous order theory, but also differs from the Whiggish account of English history highlighting the continuity of English constitution, which Hayek's theory relied heavily upon. Importantly, Smith noted that the common law system was a result of external shocks induced by the Norman Conquest. This violent event overthrew the Anglo-Saxon allodial government while transplanting the institutions of the feudal system. It was in this context that the common law system was established to regulate feudal tenure. Contrary to Hayek's interpretation of the evolution of common law as resulting from immanent criticism and the cumulative growth of local customs, Smith drew on many historical proofs to explain how this system was originally designed by sovereign power as a way to fend off the Chief Justiciary's abusive power of judging, thus breaking this power into several common law courts that dealt with separate cases, and cultivating the professionalism of common law judges from the lower ranks via the Inns of Court. While both Hayek and Smith noted the precedent-binding characters of common law judges, Smith believed that this was a result of the sovereign's supervision and

of deliberate political tactics, rather than spontaneous growth, further substantiated by later legal reforms in the Middle Ages, such the establishment of Chancery Court to make remedies for the rigid writs system that became increasingly inflexible in dealing with new cases.

Indeed, Smith saw no less uniqueness than Hayek did when it came to English liberty. The distinctiveness of the English political system was not simply showcased in the common law, but also in the sophisticated constitutional balance indebted to the Glorious Revolution. While both thinkers saw the core spirit of this system, i.e., the separation of powers, Smith did not take this institution as a continuation of some insular tradition spontaneously generated in the British Isles, or “fundamental laws”, as Hayek’s spontaneous order theory tends to suggest. For Smith, the backcloth of this institution was a commonplace experience of many European countries: by wiping out the feudal lordship, political absolutism helped consolidate the supremacy of sovereignty, thereby securing political stability. While this historical episode proved that a medieval political principle such as Magna Carta was elbowed aside, suggesting that there was no fundamental law that could bind political sovereignty in England anymore, Smith denied that modern liberty was a reinvigoration of old conventions. In fact, modern liberty was a result of the further ascendancy of the commercial middling ranks in the House of Commons, which replaced a feudal senatorial class and countervailed royal prerogative after the Revolution, such that an internal separation of powers within Crown-in-Parliament was established in England. As Smith pointed out, this system was hardly indebted to some medieval polities, in that both its social foundation and institutional design were of a recent origin. Also noticeable was parliament’s intentional changes of the royal rules of succession, which curtailed the right of succession of Charles I’s Catholic descendants. Smith’s historical explanation emphasised the changeability of the English constitution, which diverged from the fundamental law doctrine. According to him, tracing modern

English system of liberty to some fundamental laws would destabilise, rather than consolidate the post-Revolution Crown-in-Parliament and Hanoverian establishment. Equally important, although both Smith and Hayek built their social theory on a rejection of contract theory, by relocating Smith's critique in the context of his defence of the Glorious Revolution, it should be noted that what Smith saw as a major flaw of contract theory is not that it intends to design the society anew, as Hayek contends, but that it denied sovereignty's supremacy in changing old laws.

Smith's exploration of the evolution of social institutions was not confined to English politics. He also cast attention to the wider European context. Indeed, England shared with many European countries a barbarous and backward stage – a feudal age which trapped Europe in serious economic stagnation and political precarity, and which was overcome in an “unnatural and retrograde” fashion according to Smith. Like Hayek, Smith keenly noted the spontaneity of economic progress in theory; namely that the division of labour and population growth reinforce each other. However, Smith also noticed the widely-seen economic backwardness in many regions, especially in feudal Europe, and he can find no straightforward answer to how economic backwardness could be overcome simply by this model of spontaneous order. Smith further pointed out that despite being shaped by many unintended events, European feudalism was overcome by political calculations of the sovereignty to subdue feudal lords. Their immense political power, violent deeds and encirclement of large tracts of lands prevented the agricultural improvement and the great instability of urban economy. Though it is undeniable that it was commerce that silently and unintentionally broke the feudal lordship by inducing their bankruptcy, Smith keenly noted the political conditions under which such an unintended benign consequence could occur, i.e., that the kingly power supported the cities to overcome the feudal remnants so that the urban economy could be secured and expanded to the extent that it finally dismantled the oppressive

structure of feudalism. For Smith, this contingent event also became the political background of the unnatural path of economic growth in Europe, such that commerce grew faster than agriculture. Smith thus made clear that feudalism must be overthrown before progress could be triggered, and he noted how legislation that directly encourage commercial and agricultural progress brought about an economic boom in England. Drawing on these historical lessons, Smith further advocated direct policy encouragement and institutional reforms in the Scottish Highlands, highlighting the necessity of artificial designs and direct encouragement in breaking economic stagnation and creating modern commercial society.

My final chapter is devoted to Smith's historical account of the decline of slavery, which, being universally established and maintained in almost every society, was an intractable problem, the overcoming of which required special explanation for Smith. Yet it is in explaining the disappearance of slavery that Hayekian spontaneous order theory meets challenges, for as Smith suggested, slavery could hardly have been eliminated spontaneously, precisely because it constantly grows out of our natural love of domination and becomes only more refined and deeply entrenched following the expansion of social wealth. Slave economies became increasingly sophisticated in rich societies, and legislators were in general either unwilling or unable to abolish this institution. The unprecedented elimination of slavery in Western Europe, however, was induced by a series of historical conditions and a special political framework. The kingly authority found allies in the church, which facilitated the European legislators to overthrow the intermediary lordship that raised a large number of slaves. Although it was commerce and luxury that finally broke the dominating slave-holding structure, this historical sequence was framed within the wider political struggles in Western Europe. Smith's account thus disagreed with Hayek's spontaneous order theory, in that he pointed out that some spontaneously generated perversities such as slavery were rooted in human nature, and that such perversity was cured by many intended designs and contingency-

grounded historical conditions, which means that the historical elimination of slavery in Western Europe could hardly be described as a spontaneous process.

This is not to deny that Hayek's interpretations of Smith's social theory do have merit. He was keenly aware of Smith's rejection of the theory of the state of nature, indicating that in essence men are social animals. Furthermore, Hayek also rightly noted that, in Smith's social theory, many institutions are not directly designed by a single agency all at once, but have experienced long-term development. However, we should not downplay the originality of Hayek's thought, even though he always located himself in what he described as the long-standing tradition of spontaneous order theory, in which Smith was regarded by him as an important representative. In fact, Smith did not share Hayek's central concern to discover the way various social institutions evolve spontaneously in history. Undoubtedly, Smith had serious historical concerns. And in *TMS*, he advertised that he would "give an account of the different revolutions they have undergone in the different ages and periods of society" (*TMS*, VII.iv.37). Smith noted the obscure origins of modern European government and the intriguing constitutional balance of England. He was also curious about economic fluctuation in Europe and how an "entirely inverted" order of economic structure became a hard reality in modern Europe even after feudal government had gradually fallen into disuse (*WN*, III.i.9). However, through his painstaking historical investigations, Smith did not discover a spontaneous evolution of those key institutions that helped create modernity, but instead emphasised their real uniqueness in England and in a small corner of Europe, such that they had forged something unprecedented in human history but the emergence of which was not accurately understood as spontaneous. For Smith, the long-term process of the formation of early modern Europe was very crooked, in that it went through several revolutions and innovations, to which both political designs and unanticipated events made great contributions. Smith's historical explorations remind us that the rise of modern Western



Europe, and the liberty it gave rise to and which Smith prized, was not an easy process. And we can still learn from these historical lessons regarding the creation of human institutions that can truly safeguard freedom, justice and prosperity. But the central lesson will not be the Hayekian one that freedom is best created and maintained by spontaneous forces absent the direction of purposeful rational agency. On the contrary, Smith encourages us to see that it was all more complex, and theoretically messier, than Hayek would have us believe.

## BIBLIOGRAPHY

- Alvey, James. 2003. *Adam Smith: Optimist or Pessimist? A New Problem Concerning the Teleological Basis of Commercial Society*. Aldershot: Ashgate.
- Alvey, James. 2004. "The Secret, Natural Theological Foundation of Adam Smith's Work." *Journal of Markets & Morality* 7 (2): 335–61.
- Anderson, Elizabeth. 2016. "Adam Smith on Equality." In *Adam Smith, His Life, Thought, and Legacy*, ed. Ryan Patrick Hanley. Princeton and Oxford: Princeton University Press, 157-72.
- Angner, Erik. 2002. "The History of Hayek's Theory of Cultural Evolution." *Studies in History and Philosophy of Biological and Biomedical Sciences* 33: 695-718.
- Baker, John. 2017. *The Reinvention of Magna Carta, 1216–1616*. Cambridge: Cambridge University Press.
- Baker, Keith Michael. 1990. *Inventing the French Revolution: Essays on French Political Culture in the Eighteenth Century*. New York: Cambridge University Press.
- Barry, Norman. 1982. "The Tradition of Spontaneous Order." *Literature of Liberty* 5 (2): 7–58.
- Beck, Naomi. 2011. "Be Fruitful and Multiply: Growth, Reason, and Cultural Group Selection in Hayek and Darwin." *Biological Theory* 6: 413-23.
- Beck, Naomi. 2018. *Hayek and the Evolution of Capitalism*. Chicago: University of Chicago Press.
- Bee, Michele, 2018. "Wealth and Sensibility: The Historical Outcome of Better Living Conditions for All According to Adam Smith." *The European Journal of the History of Economic Thought* 25 (3): 473-92;
- Bee, Michelle, and Maria Pia Paganelli, 2019. "Adam Smith, Anti-Stoic." *History of European Ideas* 45 (4): 572-84.
- Bentham, Jeremy. 1987 [1787, 1790]. "Jeremy Bentham's 'Letters' to Adam Smith." In *The Correspondence of Adam Smith*, eds. E. C. Mossner and I. S. Ross. Indianapolis: Liberty Fund, 386-404.
- Berry, Christopher J. 1997. *Social Theory of the Scottish Enlightenment*. Edinburgh: Edinburgh University Press.
- Berry, Christopher J. 2013. *The Idea of Commercial Society in the Scottish Enlightenment*. Edinburgh: Edinburgh University Press.
- Berry, Christopher J. 2018. *Essays on Hume, Smith and the Scottish Enlightenment*. Edinburgh: Edinburgh University Press.
- Blackstone, William. 2016a. *Commentaries on the Laws of England: Book I: Of the Rights of Persons*. New York: Oxford University Press.
- Blackstone, William. 2016b. *Commentaries on the Laws of England: Book IV: Of Public Wrongs*. New York: Oxford University Press.
- Boettke, Peter J. 1990. "The Theory of Spontaneous Order and Cultural Evolution in the Social Theory of F. A. Hayek." *Cultural Dynamics* 3: 61-83.
- Boettke, Peter J. 2001. "F.A. Hayek as an Intellectual Historian of Economics." In *Historians of Economics and Economic Thought: The Construction of Disciplinary Memory*, eds. Steven G. Medema and Warren J. Samuels. London: Routledge, 117–28.
- Bonnyman, Brian. 2012. "Agrarian Patriotism and the Landed Interest: The Scottish 'Society of Improvers in the Knowledge of Agriculture', 1723–1746." In *The Rise of Economic Societies in the Eighteenth Century: Patriotic Reform in Europe and North America*, eds. Koen Stapelbroek and Jani Marjanen. Basingstoke: Palgrave MacMillan, 26–51.

- Bonnyman, Brian. 2014. *The Third Duke of Buccleuch and Adam Smith: Estate Management and Improvement in Enlightenment Scotland*. Edinburgh: Edinburgh University Press.
- Boucoyannis, Deborah. 2013. "The Equalizing Hand: Why Adam Smith Thought the Market Should Produce Wealth Without Steep Inequality." *Perspectives on Politics* 11 (4): 1051-70.
- Bourdeau, Michel. 2016. "Fallait-il oublier Comte?" *Revue Européenne des Sciences Sociales* 54 (2): 89-111.
- Bourke, Richard. 2008. "Enlightenment, Revolution and Democracy." *Constellations* 15 (1): 10-32.
- Bourke, Richard. 2015. *Empire and Revolution: The Political Life of Edmund Burke*. Princeton and Oxford: Princeton University Press.
- Bourke, Richard. 2016. "Popular Sovereignty and Political Representation: Edmund Burke in the Context of Eighteenth-Century Thought." In *Popular Sovereignty in Historical Perspectives*, eds. Richard Bourke and Quentin Skinner. Cambridge: Cambridge University Press, 212-35.
- Brubaker, Lauren. 2006a. "Does the 'Wisdom of Nature' Need Help?" In *New Voices on Adam Smith*, eds. Leonidas Montes and Eric Schliesser. London and New York; Routledge, 168-92.
- Brubaker, Lauren. 2006b. "Why Adam Smith Is Neither a Conservative Nor a Libertarian?" In *Adam Smith Review, Vol. 2*, ed. Vivienne Brown. London and New York: Routledge, 197-202.
- Buchanan, James. 1986. *Liberty, Market and State*. New York: New York University Press.
- Burgess, Glenn. 1992. *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642*. Basingstoke: Palgrave MacMillan.
- Burke, Edmund. 2000. *On Empire, Liberty and Reform: Speeches and Letters*, ed. David Bromwich. New Haven and London: Yale University Press.
- Burke, Edmund. 2014. *Reflections on the Revolution in France* in *Revolutionary Writings: Reflections on the Revolution in France and the first Letter on a Regicide Peace*, ed. Iain Hampsher-Monk. Cambridge: Cambridge University Press.
- Burrow, J. W. 1981. *A Liberal Dissent: Victorian Historians and the English Past* Cambridge and New York: Cambridge University Press.
- Butterfield, Herbert. 1944. *The Englishman and His History*. Cambridge: Cambridge University Press.
- Caffentzis, C. George. 2005. "Civilizing the Highlands: Hume, Money and the Annexing Act." *Historical Reflections/Reflexions Historique* 31 (1): 169-94.
- Caldwell, Bruce. 2004. *Hayek's Challenge: An Intellectual Biography of F. A. Hayek*. Chicago: University of Chicago Press.
- Campbell, Ian. 2010. "Aristotelian Ancient Constitution and Anti-Aristotelian Sovereignty in Stuart Ireland." *Historical Journal* 53 (3): 573-91.
- Campbell, Tom. 1971. *Adam Smith's Science of Morals*. Totowa, NJ: Rowman & Littlefield.
- Clark, J. C. D. 1985. *English Society, 1688-1832: Ideology, Social Structure and Political Practice during the Ancien Regime*. Cambridge: Cambridge University Press.
- Cliteur, Paul B. 1990. "Why Hayek is a Conservative?" *Archiv für Rechts- und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy* 76 (4): 467-78.
- Colley, Linda. 1982. *In Defiance of Oligarchy: The Tory Party, 1714-60*. Cambridge: Cambridge University Press.
- Comte, Auguste. 2009. *The Positive Philosophy of Auguste Comte, Vol. 2*. New York: Cambridge University Press.

- Courtney, C. P. 2001. "Montesquieu and English Liberty." In *Montesquieu's Science of Politics: Essays on The Spirit of Laws*, eds. David W. Carrithers, Michael A. Mosher and Paul A. Rahe. Lanham: Rowman & Littlefield, 273–90.
- Cromartie, Alan. 1995. *Sir Matthew Hale 1609-1676: Law, Religion and Natural Philosophy*. Cambridge: Cambridge University Press.
- Cromartie, Alan. 2006. *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642*. Cambridge and New York: Cambridge University Press.
- Cropsey, Joseph. 2001. *Polity and Economy: An Interpretation of the Principles of Adam Smith*. South Bend: St. Augustine's Press.
- Cunningham, Audrey. 1932. *The Loyal Clans*. Cambridge: University Press.
- Dale, Gareth. 2018. "'Our World Was Made by Nature': Constructions of Spontaneous Order." *Globalizations* 15 (7): 924–40.
- Dalrymple, James. 1764. *Considerations Upon the Policy of Entails in Great Britain*. Edinburgh: Printed for A. Kincaid & J. Bell.
- Davis, David Brion. 1999. *The Problem of Slavery in the Age of Revolution, 1770-1823*. New York and Oxford: Oxford University Press.
- Day, John. 1965. "Hume on Justice and Allegiance." *Philosophy* 40 (151): 35-56.
- Devine, T. M. 1994. *The Transformation of the Rural Scotland: Social Change and the Agrarian Economy 1660–1815*. Edinburgh: Edinburgh University Press.
- Dickey, Laurence W. 2004. "Doux-Commerce and Humanitarian Values: Free Trade, Sociability and Universal Benevolence in Eighteenth-Century Thinking." In *Grotius and the Stoa*, eds. Hans W. Blom and Laurence C. Winkel. Assen: Van Gorcum, 271–318.
- Dickinson, H. T. 1973. *Walpole and the Whig Supremacy*. London: English Universities Press.
- Dickinson, H. T. 1976. "The Eighteenth-Century Debate on the 'Glorious Revolution'." *History* 61 (201): 28-45.
- Dickinson, H. T. 1977. *Liberty and Property: Political Ideology in Eighteenth-Century Britain*. New York: Holmes & Meier.
- Dickinson, H. T. 1994. *The Politics of the People in Eighteenth-Century Britain*. London: MacMillan Press.
- Diderot, Denis. 1992. *Diderot: Political Writings*, eds. J. H. Mason and Robert Wokler. Cambridge: Cambridge University Press.
- Dimand, Robert W. 1996. "Appendix: Adam Smith and the Late Resolution of the Quakers in Pennsylvania: A Response to a False Report." *History of Economic Ideas* 4: 266-69.
- Douglass, Thomas, the Earl of Selkirk. 1805. *Observations on the Present State of the Highlands of Scotland: With a View of the Causes and Probable Consequences of Emigration*. London: Printed for A. Kincaid & J. Bell.
- Douglass, Robin. 2017. "Morality and Sociability in Commercial Society: Smith, Rousseau—and Mandeville." *The Review of Politics* 79: 579-620.
- Droz, Joseph. 1860. *Histoire du règne de Louis XIV pendant les années où l'on pouvait prévenir ou diriger la Révolution française*. Paris: Renouard.
- Dunn, John. 1983. "From Applied Theology to Social Analysis: The Break between John Locke and the Scottish Enlightenment." In *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, eds. Istvan Hont and Michael Ignatieff. Cambridge: Cambridge University Press, 119-36.
- Dunn, W.C. 1941. "Adam Smith and Edmund Burke: Complementary Contemporaries." *Southern Economic Journal* 7 (3): 330–46.
- Ebenstein, Alan. 2001. *Friedrich Hayek: A Biography*. New York: Palgrave.
- Elster, Jon. 1989. *The Cement of Society: A Study of Social Order*. Cambridge: Cambridge University Press.

- Elster, Jon. 2020. *France before 1789: The Unraveling of an Absolutist Regime*. Princeton and Oxford: Princeton University Press.
- Emerson, Roger. 2003. "The Contexts of the Scottish Enlightenment." In *The Cambridge Companion to the Scottish Enlightenment*, ed. Alexander Broadie. Cambridge: Cambridge University Press, 9-30.
- Evensky, Jerry. 2005. *Adam Smith's Moral Philosophy: A Historical and Contemporary Perspective on Markets, Law, Ethics, and Culture*. Cambridge and New York: Cambridge University Press.
- Ferguson, Adam. 1995 [1767]. *An Essay on the History of Civil Society*, ed. Fania Oz-Salzberger. Cambridge: Cambridge University Press.
- Fleischacker, Samuel. 2004. *On Adam Smith's The Wealth of Nations: A Philosophical Companion*. Princeton: Princeton University Press.
- Forbes, Duncan. 1952. *The Liberal Anglican Idea of History*. Cambridge: Cambridge University Press.
- Forbes, Duncan. 1954. "Scientific Whiggism: Adam Smith and John Millar," *Cambridge Journal* 7: 643-70.
- Forbes, Duncan. 1975a. *Hume's Philosophical Politics*. Cambridge: Cambridge University Press.
- Forbes, Duncan. 1975b. "Sceptical Whiggism, Commerce and Liberty." In *Essays on Adam Smith*, eds. Andrew S. Skinner and Thomas Wilson. Oxford: Clarendon Press, 179-201.
- Forbes, Duncan. 1982. "Natural Law and the Scottish Enlightenment." In *The Origins and Nature of the Scottish Enlightenment*, eds. R. H. Campbell and A. S. Skinner. Edinburgh: John Donald, 186-204.
- Force, Pierre. 2003. *Self-Interest before Adam Smith: A Genealogy of Economic Science*. Cambridge: Cambridge University Press.
- Foucault, Michel. 2008. *The Birth of Biopolitics*, trans. Graham Burchell. Basingstoke: Palgrave Macmillan.
- Frame and Schwarze. 2022. "Adam Smith on Education as a Means to Political Judgment." *Political Research Quarterly*. Advance online publication. <https://doi.org/10.1177/10659129221101909>
- Frazer, Michael L. 2015. "Seduced by System: Edmund Burke's Aesthetic Embrace of Adam Smith's Philosophy." *Intellectual History Review* 25 (3): 357-72.
- Funkenstein, Amos. 1986. *Theology and the Scientific Imagination: From the Middle Ages to the Seventeenth Century*. Princeton: Princeton University Press.
- Gierke, Otto. 1957. *Natural Law and the Theory of Society 1500-1800*. Boston: Beacon Press.
- Goldie, Mark. 2008. "The English System of Liberty." In *The Cambridge History of Eighteenth-Century Political Thought*, eds. Mark Goldie and Robert Wokler. Cambridge: Cambridge University Press, 40-78.
- Goldie, Mark. 2019. "Retrospect: The Ancient Constitution and the Languages of Political Thought." *The Historical Journal* 62 (1): 3-34.
- Gray, John. 1984. *Hayek on Liberty*. Oxford: Blackwell.
- Gray, John. 1988a. "Hayek, the Scottish School, and Contemporary Economics." In *The Boundaries of Economics*, eds. Gordon C. Winston and Richard F. Teichgraeber III. Cambridge: Cambridge University Press, 53-70.
- Gray, John. 1988b. "Mill's and Other Liberalisms." *Critical Review* 2 (2-3): 12-35.
- Griswold, Charles L, Jr. 1999. *Adam Smith and the Virtues of Enlightenment*. New York: Cambridge University Press.
- Griswold, Charles L, Jr. 2018. *Jean-Jacques Rousseau and Adam Smith: A Philosophical Encounter*. Abingdon and New York: Routledge.

- Groenewegen, Peter. 2001. "Thomas Carlyle, 'The Dismal Science', and the Contemporary Political Economy of Slavery," *History of Economics Review* 34 (1): 74-94.
- Grotius, Hugo. 2005. *The Rights of War and Peace*, ed. Richard Tuck. Indianapolis: Liberty Fund.
- Haakonssen, Knud. 1981. *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith*. Cambridge: Cambridge University Press.
- Haakonssen, Knud. 1985. "Hugo Grotius and the History of Political Thought." *Political Theory* 13 (2): 239-265.
- Haakonssen, Knud. 1996. *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment*. Cambridge: Cambridge University Press.
- Haakonssen, Knud, and Donald Winch. 2006. "The Legacy of Adam Smith." In *The Cambridge Companion to Adam Smith*, ed. Knud Haakonssen. New York: Cambridge University Press, 366-94.
- Halikias, Dimitrios Ioannis. 2020. "Adam Smith on the Scottish Highlands and the Origins of Commercial Society." *History of Political Thought* 41 (4): 622-47.
- Hamowy, Ronald. 1987. *The Scottish Enlightenment and the Theory of Spontaneous Order*. Carbondale: Southern Illinois University Press.
- Hamowy, Ronald. 2003. "F. A. Hayek and the Common Law." *Cato Journal* 32 (2): 241-64.
- Hampsher-Monk, Iain. 2014. "Editor's Introduction." In Edmund Burke, *Revolutionary Writings: Reflections on the Revolution in France and the first Letter on a Regicide Peace*, ed. Iain Hampsher-Monk. Cambridge: Cambridge University Press. xi-xxx.
- Hanley, Ryan Patrick. 2009. *Adam Smith the Character of Virtue*. New York: Cambridge University Press.
- Hanley, Ryan Patrick. 2014. "The 'Wisdom of the State': Adam Smith on China and Tartary." *American Political Science Review* 108 (2): 371-82.
- Harris, James. 2015. *Hume: An Intellectual Biography*. Cambridge: Cambridge University Press.
- Hasnas, John. 2004. "Hayek, the Common Law, and Fluid Drive." *New York University Journal of Law and Liberty* 1: 79-110.
- Hayek, F. A. 1948. *Individualism and Economic Order*. Chicago: University of Chicago Press.
- Hayek, F. A. 1958. "Freedom, Reason, and Tradition." *Ethics* 68 (4), 229-45.
- Hayek, F. A. 1963. *Collectivist Economic Planning*. London: Routledge & Kegan Paul.
- Hayek, F. A. 1964. *The Counter-Revolution of Science: Studies on the Abuse of Reason*, London: Free Press.
- Hayek, F. A. 1967. *Studies in Politics, Philosophy and Economics*. Chicago: The University of Chicago Press.
- Hayek, F. A. 1973. *Law, Legislation and Liberty, Vol. 1: Rules and Order*. Chicago: University of Chicago Press.
- Hayek, F. A. 1976. *Law, Legislation and Liberty, Vol. 2: The Mirage of Social Justice*. Chicago: University of Chicago Press.
- Hayek, F. A. 1978. *New Studies in Philosophy, Politics, Economics and the History of Ideas*. Chicago: University of Chicago Press.
- Hayek, F. A. 1979. *Law, Legislation and Liberty, Vol.3: The Political Order of a Free People*. Chicago: University of Chicago Press.
- Hayek, F. A. 1984. *The Essence of Hayek*, eds. Chiaki Nishiyama and Kurt R. Leube, Stanford: Hoover Press.
- Hayek, F. A. 1988. *The Fatal Conceit: The Errors of Socialism*. Chicago: University of Chicago Press.

- Hayek, F. A. 1991. "Adam Smith (1723–1790): His Message in Today's Language." In *The Trend of Economic Thinking: Essays on Political Economists and Economic History*, ed. W.W. Bartley III. Indianapolis: Liberty Fund, 119–24.
- Hayek, F. A. 1992. "Historians and the Future of Europe." In *The Fortunes of Liberalism*, ed. Peter Klein. Chicago: University of Chicago Press.
- Hayek, F. A. 1994. *Hayek on Hayek: An Autobiographical Dialogue*, eds. Stephen Kresge and Leif Wenar. London: Routledge.
- Hayek, F. A. 2007 [1944]. *The Road to Serfdom*, London: Routledge.
- Hayek, F. A. 2011 [1960]. *The Constitution of Liberty*. Chicago: The University of Chicago Press.
- Heath, Eugene. 1989. "How to Understand Liberalism as Gardening: Galeotti vs. Hayek." *Political Theory* 17 (1): 107-13.
- Herzog, Lisa. 2014. "Adam Smith's Account of Justice Between Naturalness and Historicity." *Journal of the History of Philosophy* 52 (4): 703–26.
- Herzog, Lisa. 2015. "The Normative Stakes of Economic Growth; Or, Why Adam Smith Does Not Rely on 'Trickle Down'." *Journal of Politics* 78 (1): 50-62.
- Hill, Lisa. 2016. "Adam Smith and Political Theory." In *Adam Smith, His Life, Thought, and Legacy*, ed. Ryan Patrick Hanley. Princeton and Oxford: Princeton University Press. 321-39.
- Himmelfarb, Gertrude. 1985. *The Idea of Poverty*. New York: Vintage Books.
- Hirsch, Fred. 1977. *Social Limits to Growth*. London: Routledge & Kegan Paul.
- Hirschman, Albert. 1977. *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph*. Princeton: Princeton University Press.
- Hirschman, Albert. 1992. *Rival Views of Market Society and Other Recent Essays*. Cambridge: Cambridge University Press.
- Hobbes, Thomas. 1928. *Elements of Law: Natural and Politic*, ed. Ferdinand Tönnies. London: Cambridge University Press.
- Hobbes, Thomas. 1998. *On the Citizen*, eds. Richard Tuck and Michael Silverthorne. Cambridge: Cambridge University Press.
- Hobsbawm, E. J. 1981. "Scottish Reformers of the Eighteenth Century and Capitalist Agriculture." In *Peasants in History: Essays in Honour of Daniel Thorner*, ed. E. J. Hobsbawm. Calcutta: Oxford University Press, 3–29.
- Hodgson, Geoffrey M. 1993. *Economics and Evolution: Bringing Life Back into Economics*. Cambridge: Polity Press.
- Hodgson, Geoffrey M. 1994. "Hayek, Evolution, and Spontaneous Order." In *Natural Images in Economic Thought: "Markets Read in Tooth and Claw"*, ed. Philip Mirowski. New York: Cambridge University Press, 408-447.
- Hodgson, Geoffrey M. 2004. "Hayekian Evolution Reconsidered: A Response to Caldwell." *Cambridge Journal of Economics* 28: 291-300.
- Honig, Bonig. 2009. *Emergency Politics: Paradox, Law, Democracy*. Princeton and Oxford: Princeton University Press.
- Hont, Istvan. 1994. "Commercial Society and Political Theory in the Eighteenth Century: The Problem of Authority in David Hume and Adam Smith." In *Main Trends in Cultural History: Ten Essays*, eds. Willem Melching and Wyger Velema. Amsterdam: Rodopi, 54–94.
- Hont, Istvan. 2005. *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective*. Cambridge: Harvard Belknap Press.
- Hont, Istvan. 2009. "Adam Smith's History of Laws and Government as Political Theory." In *Political Judgement: Essays for John Dunn*, eds. Richard Bourke and Raymond Geuss, Cambridge: Cambridge University Press, 131-71.

- Hont, Istvan. 2015. *Politics in Commercial Society: Jean-Jacques Rousseau and Adam Smith*, edited by Béla Kapossy and Michael Sonenscher. Cambridge: Harvard University Press.
- Hueckel, Glenn. 2000. "On the "Insurmountable Difficulties, Obscurity, and Embarrassment" of Smith's Fifth Chapter." *History of Political Economy* 32 (2): 317-45.
- Hueckel, Glenn. 2009. "'In the Heat of Writing': Polemics and the 'Error of Smith' in the Matter of the Corn Bounty." In *The Elgar Companion to Adam Smith*, ed. Jeffrey Young. Cheltenham: Edward Elgar.
- Hulsebosch, Daniel. 2003. "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence." *Law and History Review* 21 (3): 439-82.
- Hume, David. 1978 [1739]. *A Treatise of Human Nature*, eds. L. A. Selby-Bigge and P. H. Niddich. Oxford: Oxford University Press.
- Hume, David. 1983 [1754-61]. *The History of England*. 6 vols. Indianapolis: Liberty Fund.
- Hume, David. 1987 [1758]. *Essays, Moral, Political, and Literary*, ed. Eugene F. Miller. Indianapolis: Liberty Fund.
- Hurd, Richard. 2002 [1759]. *Moral and Political Dialogues*, reprinted in *Early Responses to Hume's History of England, Vol. 1*, ed. J. Fieser. Bristol: Thoemmes Press.
- Hutcheson, Francis. 2004. *An Inquiry into the Original of Our Ideas of Beauty and Virtue in Two Treatises*. Indianapolis: Liberty Fund.
- Jacobs, Struan. 2000. "Spontaneous Order: Michael Polanyi and Friedrich Hayek." *Critical Review of International Social and Political Philosophy* 3 (4): 49-67.
- Jeffrey, Francis. 1806. "Review of *The Origin of the Distinction of Ranks*, by John Millar and *Account of the Life and Writings of the Author*, by John Craig." *Edinburgh Review* 9 (17): 83-92.
- Jenks, Edward. 1904. "The Myth of Magna Carta." *Independent Review* 4: 260-73.
- Jones, Gareth Stedman. 2004. *An End to Poverty? A Historical Debate*. New York: Columbia University Press.
- Jonsson, Fredrik Albritton. 2013. *Enlightenment's Frontier: The Scottish Highlands and the Origins of Environmentalism*. New Haven: Yale University Press.
- Keller, Rudi. 1994. *On Language Change: The Invisible Hand in Language*. London and New York: Routledge.
- Kelly, Duncan. 2013. "Adam Smith and the Limits of Sympathy." In *The Oxford Handbook of Adam Smith*, eds. Christopher J. Berry, Maria Pia Paganelli and Craig Smith. Oxford: Oxford University Press, 201-18.
- Kennedy, Gavin. 2008. *Adam Smith: A Moral Philosopher and His Political Economy*. New York: Palgrave MacMillan.
- Keohane, Nannerl O. 1980. *Philosophy and the State in France: The Renaissance to the Enlightenment*. Princeton: Princeton University Press.
- Kidd, Colin. 1999. *British Identities before Nationalism: Ethnicity and Nationhood in the Atlantic World, 1600-1800*. Cambridge: Cambridge University Press.
- Kirchheimer, Otto. 1968. "The *Rechtsstaat* as Magic Wall." In *The Critical Spirit: Essays in Honor of Herbert Marcuse*, eds. Kurt H. Wolff and Barrington Moore, Jr. Boston: Beacon Press, 287-312.
- Kleer, Richard. 1995. "Final Causes in Adam Smith's *Theory of Moral Sentiments*." *Journal of the History of Philosophy* 33 (2): 275-300.
- Kley, Roland. 1994. *Hayek's Social and Political Thought*. Oxford: Clarendon Press.
- Kramnick, Isaac. 1967. "Augustan Politics and English Historiography: The Debate on the English Past, 1730-35." *History and Theory* 6 (1): 33-56.
- Kramnick, Isaac. 1968. *Bolingbroke and His Circle: The Politics of Nostalgia in the Age of Walpole*. Ithaca and London: Cornell University Press.
- Kukathas, Chandran. 1990. *Hayek and Modern Liberalism*. Oxford: Clarendon Press.



- Lavoie, Don. 1985. *Rivalry and Central Planning: The Socialist Calculation Debate Reconsidered*. New York: Cambridge University Press.
- Levy, David M. 1987. "Adam Smith's Case for Usury Laws." *History of Political Economy* 19 (3): 387-400.
- Levy, David M. 2001. *How the Dismal Science Got Its Name: Classical Economics and the Ur-Text of Racial Politics*. Ann Arbor: The University of Michigan Press.
- Levy, Jacob T. 2017. "The Shortcut to Serfdom." <<https://www.niskanencenter.org/the-shortcut-to-serfdom/>>. Accessed: Oct 20, 2020.
- Lewis, Thomas J. 2000. "Persuasion, Domination and Exchange: Adam Smith on the Political Consequences of Markets." *Canadian Journal of Political Science* 33 (2): 273-289.
- Lieberman, David. 2006. "The Mixed Constitution and the Common Law." In *The Cambridge History of Eighteenth-Century Political Thought*, eds. Mark Goldie and Robert Wokler. Cambridge: Cambridge University Press, 317-46.
- Liu Glory. 2020. "Rethinking the 'Chicago Smith' Problem: Adam Smith and the Chicago School, 1929-1980." *Modern Intellectual History* 17 (4): 1041-68.
- Livingston, Donald W. 1990. "Hume's Historical Conception of Liberty." In *Liberty in Hume's History of England*, eds. Nicholas Capaldi and Donald W. Livingston. Dordrecht: Kluwer.
- Livingston, Donald W. 1995. "On Hume's Conservatism." *Hume Studies* 21 (2): 151-64.
- Locke, John. 1988. *Two Treatises of Government*, ed. Peter Laslett. Cambridge: Cambridge University Press.
- Lovejoy, Arthur O. 1961. *Reflections on Human Nature*. Baltimore, MD: Johns Hopkins University Press.
- Luban, Daniel. 2012. "Adam Smith on Vanity, Domination, and History." *Modern Intellectual History* 9 (2): 275-302.
- Luban, Daniel. 2020. "What Is Spontaneous Order?" *American Political Science Review* 114 (1): 68-80.
- Lucas, Paul. 1968. "On Edmund Burke's Doctrine of Prescription; Or, An Appeal from the New to the Old Lawyers." *Historical Journal* 11 (1): 35-63.
- Ludington, C. C. 2000. "From Ancient Constitution to British Empire: William Atwood and the Imperial Crown of England." In *Political Thought in Seventeenth-Century Ireland: Kingdom or Colony*, ed. J. H. Ohlmeyer. Cambridge: Cambridge University Press, 244-70.
- MacKillop, A. 2000. *"More Fruitful than the Soil": Army, Empire and the Scottish Highlands, 1715-1815*. East Linton: Tuckwell Press.
- Mackintosh, James. 2006 [1791]. *Vindiciae Gallicae and Other Writings on the French Revolution*, ed. Donald Winch. Indianapolis: Liberty Fund.
- Maitland, F. W. 1971. *The Forms of Action at Common Law*. Cambridge: Cambridge University Press.
- Maitland, F. W. 2003. *State, Trust and Corporation*, eds. David Runciman and Magnus Ryan. Cambridge: Cambridge University Press.
- Malebranche, Nicolas. 1997. *The Search after Truth*, trans and eds. Thomas M. Lennon and Paul J. Olscamp. Cambridge: Cambridge University Press.
- Mandeville, Bernard. 1988. *The Fable of the Bees*. ed. F. B. Kaye. Indianapolis: Liberty Fund.
- Martin, Nona P, and Virgil Henry Storr. 2008. "On Emergent Perverse Orders." *Studies in Emergent Order* 1: 73-91.
- McArthur, Neil. 2005. "Laws not Men: Hume's Distinction between Barbarous and Civilised Government." *Hume Studies* 31 (1): 123-44.
- McArthur, Neil. 2007. *David Hume's Political Theory: Law, Commerce, and the Constitution of Government*. Toronto: University of Toronto Press.

- McDaniel, Iain. 2012. "Jean-Louis DeLolme and the Political Science of the English Empire." *The Historical Journal* 55: 21-44.
- McDaniel, Iain. 2013. *Adam Ferguson in the Scottish Enlightenment: The Roman Past and Europe's Future*. Cambridge, MA: Harvard University Press.
- McLean, Iain. 2006. *Adam Smith, Radical and Egalitarian: An Interpretation for the 21<sup>st</sup> Century*. Edinburgh: Edinburgh University Press.
- McNally, David. 1990. *Political Economy and the Rise of Capitalism: A Reinterpretation*. Berkeley and Los Angeles: University of California Press.
- Meek, Ronald. 1976. *Social Science and the Ignoble Savage*. Cambridge: Cambridge University Press.
- Mill, John Stuart. 1969. *Essays on Ethics, Religion and Society*, ed. John M. Robson. Toronto: University of Toronto Press.
- Mill, John Stuart. 2004. *Principles of Political Economy*. Indianapolis and Cambridge: Hackett.
- Miller, David. 1981. *Philosophy and Ideology in Hume's Political Philosophy*. Oxford: Oxford University Press.
- Miller, David. 1989. "The Fatalistic Conceit." *Critical Review* 3: 310-23.
- Mirowski, Philip. 2007. "Naturalizing the Market on the Road to Revisionism: Bruce Caldwell's Hayek's Challenge and the Challenge of Hayek Interpretation." *Journal of Institutional Economics* 3 (3): 351-72.
- Mirowski, Philip. 2009. "Defining Neoliberalism." In *The Road From Mont Pèlerin: The Making of the Neoliberal Thought Collective*, eds. Philip Mirowski and Dieter Plehwe. Cambridge: Harvard University Press, 417-56.
- Montesquieu, Charles Louis de Secondat. 1968. *The Greatness of the Romans and Their Decline*, trans. David Lowenthal. Ithaca and New York: Cornell University Press.
- Montesquieu, Charles Louis de Secondat. 1989. *The Spirit of the Laws*, trans. and eds. Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone. Cambridge: Cambridge University Press.
- Moore, James, and Michael Silverthorne. 1983. "Gershom Carmichael and the Natural Jurisprudence Tradition in Eighteenth-Century Scotland." In *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, eds. Istvan Hont and Michael Ignatieff. Cambridge: Cambridge University Press, 73-88.
- Mossner, E. C. 1941. "Was Hume a Tory Historian? Facts and Reconsiderations." *Journal of the History of Ideas* 2: 225-36.
- Muller, Jerry Z. 1993. *Adam Smith in His Time and Ours: Designing a Decent Society*. New York: The Free Press.
- Murphy, Antoin E. 2009. *The Genesis of Macroeconomics: New Ideas from Sir William Petty to Henry Thornton*. Oxford: Oxford University Press.
- Muthu, Sankar. 2008. "Adam Smith's Critique of International Trading Companies: Theorizing 'Globalization' in the Age of Enlightenment." *Political Theory* 36 (2): 185-212.
- Müller, Jan-Werner. 2015. "What, If Anything, Is Wrong with Hayek's Model Constitution." In *Law, Liberty and State: Oakshott, Hayek, and Schmitt on the Rule of Law*, eds. David Dyzenhaus and Thomas Poole. Cambridge: Cambridge University Press, 261-80.
- Ogg, David. 1925. *Johannis Seldeni Ad Fletam Dissertatio*. Cambridge: Cambridge University Press.
- O' Neill, John. 1996. "Who Won the Socialist Calculation Debate?" *History of Political Thought* 17 (3): 431-42.
- Oprea, Alexandra. 2022. "Adam Smith on Political Judgment: Revisiting the Political Theory of the *Wealth of Nations*." *Journal of Politics* 84 (1): 18-32.
- Oslington, Paul. 2011. *Adam Smith as Theologian*. London: Routledge.

- Otteson, James R.. 2002. *Adam Smith's Marketplace of Life*. New York: Cambridge University Press.
- Otteson, James R. 2007. "Unintended Order Explanations in Adam Smith and the Scottish Enlightenment." In *Liberalism, Conservatism, and Hayek's Idea of Spontaneous Order*, eds. Louis Hunt and Peter McNamara. New York and Basingstoke: Palgrave MacMillan.
- Otteson, James R. 2016. "Adam Smith and the Right." In *Adam Smith, His Life, Thought, and Legacy*, ed. Ryan Patrick Hanley. Princeton and Oxford: Princeton University Press, 494-511.
- Pack, Spencer J. 1996. "Slavery, Adam Smith's Economic Vision and the Invisible Hand." *History of Economic Ideas* 4: 253-69.
- Paganelli, Maria Pia. 2003. "In Medio Stat Virtus: an Alternative View of Usury Law in Adam Smith's Thinking." *History of Political Economy* 35 (1): 21-48.
- Paine, Thomas. 1995. *Rights of Man, Common Sense and Other Political Writings*, ed. Mark Philp. New York: Oxford University Press.
- Palmeri, Frank. 2016. *State of Nature, Stages of Society: Enlightenment Conjectural History and Modern Social Discourse*. New York: Columbia University Press.
- Pascal, Blaise. 1995. *Pensées and Other Writings*, trans. Honor Levi, ed. Anthony Levi. New York: Oxford University Press.
- Peart, Sandra J, and David M. Levy. 2008. "Attitudes toward Race, Hierarchy, and Transformation in the Nineteenth Century: The Role of the Expert." In *The Street Porter and the Philosopher: Conversations on Analytical Egalitarianism*, eds. Sandra J. Peart and David M. Levy. Ann Arbor: The University of Michigan Press, 239-58.
- Petsoulas, Christina. 2001. *Hayek's Liberalism and Its Origins: The Idea of Spontaneous Order and the Scottish Enlightenment*. Abingdon: Routledge.
- Phillipson, Nicholas. 1983. "Adam Smith as Civic Moralist." In *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, eds. Istvan Hont and Michael Ignatieff. Cambridge: Cambridge University Press, 179-202.
- Phillipson, Nicholas. 2000. "Language, Sociability and History: Some Reflections on the Foundations of Adam Smith's Science of Man." In *Economy, Polity, and Society: British Intellectual History, 1750-1950*, eds. Stefan Collini, Richard Whatmore, and Brian Young. Cambridge: Cambridge University Press, 70-84.
- Phillipson, Nicholas. 2010. *Adam Smith: An Enlightened Life*. London: Allen Lane.
- Plassart, Anna. 2015. *The Scottish Enlightenment and the French Revolution*. Cambridge: Cambridge University Press.
- Pocock, J. G. A. 1960. "Burke and the Ancient Constitution – A Problem in the History of Ideas." *Historical Journal* 3 (2): 125-43.
- Pocock, J. G. A. 1983. "Cambridge Paradigms and Scotch Philosophers: A Study of the Relations Between the Civic Humanist and the Civil Jurisprudential Interpretation of Eighteenth-Century Social Thought." In *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, eds. Istvan Hont and Michael Ignatieff. Cambridge: Cambridge University Press, 235-52.
- Pocock, J. G. A. 1985. *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century*. Cambridge: Cambridge University Press.
- Pocock, J. G. A. 1987. *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century; a Reissue with a Retrospect*. Cambridge: Cambridge University Press.
- Pocock, J. G. A. 1989. *Politics, Language and Time: Essays on Political Thought and History*. Chicago, London: University of Chicago Press.
- Pocock, J. G. A. 1999. *Barbarism and Religion, Vol. 2: Narratives of Civil Government*. Cambridge: Cambridge University Press.

- Pocock, J. G. A. 2006. "Adam Smith and History." In *The Cambridge Companion to Adam Smith*, ed. Knud Haakonssen. New York: Cambridge University Press, 270-87.
- Polanyi, Karl. 2001. *The Great Transformation: The Political and Economic Origins of Our Time*. Boston: Beacon Press.
- Polanyi, Michael. 1948. "Planning and Spontaneous Order." *The Manchester School of Economic and Social Studies* 16: 237-68.
- Posner, Richard A. 2005. "Hayek, Law, and Cognition." *New York University Journal of Law and Liberty* 1: 147-66.
- Postema, Gerald J. 2019 [1986]. *Bentham and the Common Law Tradition*. Oxford: Oxford University Press.
- Pownall, Thomas. 1987 [1776]. "A Letter from Governor Pownall to Adam Smith." In *The Correspondence of Adam Smith*, eds. E. C. Mossner and I. S. Ross. Indianapolis: Liberty Fund, 337-76.
- Rae, John. 1965. *Life of Adam Smith*. New York: Augustus M. Kelley.
- Raphael, D. D. 1969. "Adam Smith and 'The Infection of David Hume's Society': New Light on an Old Controversy, Together with the Text of a Hitherto Unpublished Manuscript." *Journal of the History of Ideas* 30: 225-48.
- Rasmussen, Dennis. 2008. *The Problems and Promise of Commercial Society: Adam Smith's Response to Rousseau*. Pennsylvania State University Press.
- Richards, Robert J. 1987. *Darwin and the Emergence of Evolutionary Theories of Mind and Behaviour*. Chicago: University of Chicago Press.
- Richter, Melvin. "The Comparative Study of Regimes and Societies." In *The Cambridge History of Eighteenth-Century Political Thought*, eds. Mark Goldie and Robert Wokler. Cambridge: Cambridge University Press, 147-71.
- Robertson, John. 2005. *The Case for the Enlightenment: Scotland and Naples, 1680–1760*. Cambridge: Cambridge University Press.
- Robbins, Caroline. 1968. *The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies*. New York: Atheneum.
- Robbins, Lionel. 1961. "Hayek on Liberty." *Economica* 28: 66-81.
- Rockoff, Hugh. 2013. "Adam Smith on Money, Banking and the Price Level." In *The Oxford Handbook of Adam Smith*, eds. Christopher J. Berry, Maria Pia Paganelli and Craig Smith. Oxford: Oxford University Press, 307-30.
- Rogers, Nicholas. 1989. *Whigs and Cities: Popular Politics in the Age of Walpole and Pitt*. Oxford: Clarendon Press.
- Rosenberg, Nathan. 1960. "Some Institutional Aspects of the *Wealth of Nations*." *Journal of Political Economy* 68 (6): 557-70.
- Ross, Ian Simpson. 2010. *The Life of Adam Smith*. New York: Oxford University Press.
- Rothschild, Emma. 1992. "Adam Smith and Conservative Economics." *The Economic History Review* 45 (1): 74-96.
- Rothschild, Emma. 2001. *Economic Sentiments: Adam Smith, Condorcet, and the Enlightenment*. Cambridge and London: Harvard University Press.
- Sabl, Andrew. 2012. *Hume's Politics: Coordination and Crisis in the History of England*. Princeton and Oxford: Princeton University Press.
- Sagar, Paul. 2018. *The Opinion of Mankind: Sociability and Theory of the State from Hobbes to Smith*. Princeton, Oxford: Princeton University Press.
- Sagar, Paul. 2021a. "Adam Smith and the Conspiracy of the Merchants." *Global Intellectual History* 6 (4): 463-83.
- Sagar, Paul. 2021b. "Adam Smith's Genealogy of Religion." *History of European Ideas* 47 (7): 1061-78.

- Sagar, Paul. 2022. "On the Liberty of the English: Adam Smith's Reply to Montesquieu and Hume." *Political Theory* 50 (3): 381-404.
- Salter, John. 1992. "Adam Smith on Feudalism, Commerce and Slavery." *History of Political Thought* 13: 219-41.
- Salter, John. 1996. "Adam Smith on Slavery." *History of Economic Ideas* 4 (1/2): 225-51.
- Sandefur, Timothy. 2009. "Some Problems with Spontaneous Order." *The Independent Review* 14: 5-25.
- Schliesser, Eric. 2017. *Adam Smith: Systematic Philosopher and Public Thinker*. Oxford: Oxford University Press.
- Schneider, Louis. 1967. "Introduction." In *The Scottish Moralists on Human Nature and Society*, ed. Louis Schneider. Chicago: University of Chicago Press.
- Schwarze, Michelle A, and John T. Scott. 2015. "Spontaneous Disorder in Adam Smith's *Theory of Moral Sentiments*: Resentment, Injustice, and the Appeal to Providence." *Journal of Politics* 77 (2): 463-76.
- Sebastiani, Silvia. 2013. *The Scottish Enlightenment: Gender, Race, and the Limits of Progress*, trans. J. Carden. New York: Palgrave MacMillan.
- Sen, Amartya. 1981. *Poverty and Famines: An Essay on Entitlement and Deprivation*. New York: Oxford University Press.
- Sen, Amartya. 2009. *The Idea of Justice*. Cambridge: Harvard University Press.
- Shelton, George. 1981. *Dean Tucker and Eighteenth-Century Economic and Political Thought*. London & Basingstoke: MacMillan.
- Sher, Richard B. 2015. *Church and University in the Scottish Enlightenment: The Moderate Literati of Edinburgh*. Edinburgh: Edinburgh University Press.
- Skinner, Andrew S. 1975. "Adam Smith: an Economic Interpretation of History." In *Essays on Adam Smith*, eds. Andrew S. Skinner and Thomas Wilson. Oxford: Clarendon Press, 154-78.
- Skinner, Quentin. 1965. "History and Ideology in the English Revolution." *Historical Journal* 8: 151-78.
- Skjönsberg, Max. 2019. "Ancient Constitutionalism, Fundamental Law and Eighteenth-Century Toryism in the Septennial Act (1716) Debates." *History of Political Thought* 40: 270-301.
- Skjönsberg, Max. 2021a. *The Persistence of Party: Ideas of Harmonious Discord in Eighteenth-Century Britain*. Cambridge: Cambridge University Press.
- Skjönsberg, Max. 2021b. "David Hume and the Jacobites." *Scottish Historical Review* C1 (252): 25-56.
- Slobodian, Quinn. 2018. *Globalists: The End of Empire and the Birth of Neoliberalism*. Cambridge: Harvard University Press.
- Smith, Adam. 1981. *An Inquiry Into the Nature and Causes of the Wealth of Nations*, eds. R. H. Campbell and A. S. Skinner and W. B. Todd. Indianapolis: Liberty Fund.
- Smith, Adam. 1982a. *Lectures on Jurisprudence*, eds. R. L. Meek, D. D. Raphael and P. G. Stein. Indianapolis: Liberty Fund.
- Smith, Adam. 1982b. *The Theory of Moral Sentiments*, eds. D. D. Raphael and A. L. Macfie. Indianapolis: Liberty Fund.
- Smith, Adam. 1982c. *Essays on Philosophical Subjects*, eds. W. P. D. Wightman and J. C. Bryce. Indianapolis: Liberty Fund.
- Smith, Adam. 1985. *Lectures on Rhetoric and Belles Lettres*, ed. J. C. Bryce. Indianapolis: Liberty Fund.
- Smith, Adam. 1987. *The Correspondence of Adam Smith*, eds. E. C. Mossner and I. S. Ross. Indianapolis: Liberty Fund.

- Smith, Craig. 2006. *Adam Smith's Political Philosophy: The Invisible Hand and Spontaneous Order*. Abingdon: Routledge.
- Smith, Craig. 2013a. "Adam Smith and the New Right." In *The Oxford Handbook of Adam Smith*, eds. Christopher J. Berry, Maria Pia Paganelli and Craig Smith. Oxford: Oxford University Press, 539-58.
- Smith, Craig. 2013b. "Adam Smith: Left or Right?" *Political Studies* 61: 784-98.
- Smith, Craig. 2021. "The Rough Edges of Civilisation in the Scottish Enlightenment." In *The Scottish Enlightenment: Human Nature, Social Theory and Moral Philosophy: Essays in Honour of Christopher J. Berry*, eds. R. J. W. Mills and Craig Smith. Edinburgh: Edinburgh University Press. 71-97.
- Smith, R. J. 1987. *The Gothic Bequest: Medieval Institutions in British Thought*. Cambridge: Cambridge University Press.
- Smout, T. C. 2012. "A New Look at the Scottish Improvers." *The Scottish Historical Review* 91 (231): 125-149.
- Sommerville, J. P. 1986. "History and Theory: the Norman Conquest in Early Stuart Political Thought." *Political Studies* 34: 249-61.
- Sommerville, J. P. 1996. "The Ancient Constitution Reassessed: the Common Law, the Court, and the Languages of Politics in Early Modern England." In *The Stuart Court and Europe: Essays in Politics and Political Culture*, ed. R. Malcolm Smuts. Cambridge: Cambridge University Press, 39-64.
- Sommerville, J. P. 2014. *Royalists and Patriots: Politics and Ideology in England 1603-1640*. Oxon and New York: Routledge.
- Sonenscher, Michael. 2007. *Before the Deluge: Public Debt, Inequality and the Intellectual Origins of the French Revolution*. Princeton, Oxford: Princeton University Press, 2007.
- Spencer, Mark. 2005. *David Hume and Eighteenth-Century America*. New York: University of Rochester Press.
- Stahl, Rune Møller. 2019. "Economic Liberalism and the State: Dismantling the Myth of Naïve Laissez-Faire." *New Political Economy* 24: 473-86.
- Steele, David Ramsey. 1987. "Hayek's Theory of Cultural Group Selection." *Journal of Libertarian Studies* 8: 171-95.
- Stein, Peter. 1980. *Legal Evolution: The Story of an Idea*. Cambridge: Cambridge University Press.
- Stewart, Dugald. 1815. "Recollections of the Unpublished Lectures of an Eminent Professor." *New Monthly Magazine* 3 (17): 406-8.
- Stewart, Dugald. 1854. "Dissertation: Exhibiting the Progress of Metaphysical, Ethical, and Political Philosophy, since the Revival of Letters in Europe (I part 1815, II part 1821)." In *The Collected Works of Dugald Stewart*, ed. William Hamilton, 11 vols. Edinburgh: T. & T. Clarck.
- Stewart, Dugald. 1856. *The Collected Works of Dugald Stewart: Lectures on Political Economy. Now first published. Vol. II. To which is Prefixed, Part Third of the Outlines of Moral Philosophy*, ed. William Hamilton. Edinburgh: Thomas Constable.
- Stewart Dugald. 1982. "Account of the Life and Writings of Adam Smith, L L. D." In *Adam Smith, Essays on Philosophical Subjects*, eds. W. P. D. Wightman and J. C. Bryce. Indianapolis: Liberty Fund, 269-351.
- Stigler, George J. 1965. "The Economist and the State." *The American Economic Review* 55 (2): 1-18.
- Stigler, George J. 1975. "Smith's Travels on the Ship of State." in *Essays on Adam Smith*, eds. Andrew S. Skinner and Thomas Wilson. Oxford: Clarendon Press, 237-46.
- Strayer, Joseph. 1970. *On the Medieval Origins of the Modern State*. Princeton and Oxford: Princeton University Press.

- Susato, Ryu. 2015. *Hume's Sceptical Enlightenment*. Edinburgh: Edinburgh University Press.
- Swann, Julian. 1995. *Politics and the Parlement of Paris under Louis XV, 1754-1774*. New York: Cambridge University Press.
- Swinton, J. 1765. *A Free Disquisition Concerning the Law of Entails*. Edinburgh: Printed for A. Kincaid & J. Bell.
- Thompson, E. P. 1971. "The Moral Economy of the English Crowd in the Eighteenth Century." *Past and Present* 50: 76-136.
- Tomaselli, Sylvana. "The Spirit of Nations." In *The Cambridge History of Eighteenth-Century Political Thought*, eds. Mark Goldie and Robert Wokler. Cambridge: Cambridge University Press, 9–39.
- Tuck, Richard. 2016. *The Sleeping Sovereign: The Invention of Modern Democracy*. Cambridge: Cambridge University Press.
- Tucker, Josiah. 1781. *A Treatise Concerning Civil Government*. London: Printed for T. Cadell.
- Ullmann-Margalit, Edna. 1978. "Invisible-Hand Explanations." *Synthese* 39: 263–91.
- van Caenegem, R. C. 1987. *Judges, Legislators and Professors: Chapters in European Legal History*. New York: Cambridge University Press.
- Vanberg, Viktor. 1986. "Spontaneous Market Order and Social Rules: A Critical Examination of F. A. Hayek's Theory of Cultural Evolution." *Economics and Philosophy* 2: 75-100.
- Vanberg Viktor. 1994. *Rules and Choice in Economics*. London: Routledge.
- Vatter, Miguel. *The Republic of the Living: Biopolitics and the Critique of Civil Society*. New York: Fordham University Press.
- Viner, Jacob. 1927. "Adam Smith and Laissez Faire." *Journal of Political Economy* 35 (2): 198-232.
- Viner, Jacob. 1965. "Guide to John Rae's *Life of Adam Smith*." In John Rae, *Life of Adam Smith*. New York: Augustus M. Kelley.
- Viner, Jacob. 1972. *The Role of Providence in the Social Order: An Essay in Intellectual History*. Princeton: Princeton University Press.
- Weber, Lina. 2021. "The First Publication of Dugald Stewart's Lectures on Political Economy." *History of Political Economy* 53 (4): 721-44.
- Weingast, Barry R. 2020. "Persistent Inefficiency: Adam Smith's Theory of Slavery and Its Abolition in Western Europe." in *Adam Smith Review, Vol. 12*, ed. Fonna Forman. London and New York: Routledge.
- Weston, Corinne C. 1991. "England: Ancient Constitution and Common Law." In *The Cambridge History of Political Thought, 1450-1700*, eds. J. H. Burns and Mark Goldie. Cambridge: Cambridge University Press, 374-411.
- Whatmore, Richard. 2019. *Terrorists, Anarchists and Republicans: The Genevans and the Irish in Times of Revolution*. Princeton and Oxford: Princeton University Press.
- Whelan, Frederick G. 1985. *Order and Artifice in Hume's Political Thought*. Princeton: Princeton University Press.
- Whelan, Frederick G. 2015. "Time, Revolution, and Prescriptive Right in Hume's Theory of Government." In *The Political Thought of Hume and His Contemporaries: Enlightenment Project Volume I*. Oxon and New York: Routledge, 137-161.
- Whyte, Jessica. 2019. "The Invisible Hand of Friedrich Hayek: Submission and Spontaneous Order." *Political Theory* 47 (2): 156–184.
- Wilsher, J. C. 1983. "'Power Follows Property': Social and Economic Interpretations in British Historical Writing in the Eighteenth and Early Nineteenth Centuries." *Journal of Social History* 16 (3): 7-26.
- Winch, Donald. 1978. *Adam Smith's Politics: An Essay in Historiographic Revision*. Cambridge: Cambridge University Press.

- Winch, Donald. 1996. *Riches and Poverty: An Intellectual History of Political Economy in Britain, 1750–1834*. Cambridge: Cambridge University Press.
- Witt, Ulrich. 1994. “The Theory of Societal Evolution: Hayek’s Unfinished Legacy.” In *Hayek, Co-ordination, and Evolution: His Legacy in Philosophy, Politics, Economics and the History of Ideas*, eds. Jack Birner and Rudy van Zijp. London: Routledge, 178–89.
- Wolin, Sheldon. 1954. “Hume and Conservatism.” *American Political Science Review* 48 (4): 999–1016.
- Youngson, A. J. 1973. *After the Forty-Five: The Economic Impact on the Scottish Highlands*. Edinburgh: Edinburgh University Press.