Adam Smith’s Constitutional Theory

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“Smith’s lectures on Jurisprudence were a tour de force. His clear views on liberty made clear the impartiality of justice and contributed to 18th century constitutional theory” (Gavin Kennedy 2005:83).

Abstract

To become an engine of sustained economic growth, markets require various market-supporting infrastructure from the government, such as justice (including property rights and contract enforcement), security, public goods, and, importantly, liberty or the freedom from government predation. Adam Smith’s developed his constitutional theory as part of his Lectures on Jurisprudence. This theory answers a critical question. If liberty, commerce, and security provide the road to opulence, what incentives do political officials have to sustain them? Smith’s constitutional theory provides the answer.

Despite several excellent treatments (see, e.g., Evensky 2005, Haakonssen 1981; Hont 2015; Kennedy 2005, and Winch 1978), Smith's constitutional theory remains relatively unknown, especially outside of the literature on Smith. Smith’s impressive contributions to this theory parallel those of Locke in his Second Treatise (1689), Montesquieu in his Spirit of the Law (1748), and Madison in the Federalist Papers (1787-88). In many ways, Smith’s focus on institutions and incentives is superior to that of the other political theorists who are far more well-known for work on this topic. Topics include Smith’s theory of sovereignty, the separation of powers as a system of mutual monitors, the right of resistance, and, generally, the incentives facing political officials to adhere to the constitutional rules.

1. Introduction

Adam Smith’s constitutional theory has long been overlooked, topics overshadowed by his economics and moral theory. Despite excellent treatments, no one has applied the modern tools used to study constitutions. Moreover, because Smith’s

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treatment appears in the *Lectures on Jurisprudence*, it is relatively unknown. Better known for his work on economics and moral theory, Adam Smith’s constitutional theory is often overlooked. A substantial portion of this theory appears in Smith’s work on jurisprudence or government, law, and politics. Despite promising in 1759 to produce a book on this topic, Smith never published this work, and it may well have been among the manuscripts he had burned just before he died over three decades later in 1790.²

We nonetheless know something of his ideas from two sets of student notes on his *Lectures on Jurisprudence* given at the University of Glasgow (which Smith delivered from the early 1750s through the mid-1760s). The *Lectures* – in combination with elements from the *Wealth of Nations* – provide us with evidence that Smith had a rich constitutional theory, as two of the classic studies of Smith’s jurisprudence attest (Winch 1983:255; 1978:ch4 and Haakonsen 1981:127-33). Both studies argue that the *Lectures* remain under-examined, an observation that still holds today.

The central elements of Smith’s constitutional theory help us understand the importance of his contribution in political economy. Too often Smith’s views are reduced to an argument supporting minimal government (Friedman 1977, Stigler 1975; see Liu 2017:ch4).

Modern day economists often give lip-service to the enforcement of contracts and property rights, but economics possesses no theory explaining how the government provides this essential market infrastructure (despite the best efforts of North 1981, 1990). Instead most economic approaches to markets implicitly assume a government that simply does so. This common view suffers from the neoclassical fallacy (Weingast 2016); namely, that free markets can exist without government. Most economic models

² Cite last paragraph of *TMS*. 
implicitly assume all the elements of what Smith labeled, “liberty”: security from violence; property rights and contract enforcement, and protection from government predation. Universally in today's developed world, governments provide this market infrastructure; and no market economy exists without it (see Besley and Persson 2009, 2012, who call this market infrastructure “state-capacity”).

One of Smith's principal concerns in his jurisprudence is the “wealth of nations”: why are some countries rich while most remain poor? Smith mentions again and again that people subject to predation and violence have little incentive to produce (cites/quotes). For example:

In the infancy of society, as has been often observed, government must be weak and feeble, and it is long before it’s authority can protect the industry of individuals from the rapacity of their neighbours. When people find themselves every moment in danger of being robbed of all they possess, they have no motive to be industrious. There could be little accumulation of stock, because the indolent, which would be the greatest number, would live upon the industrious, and spend whatever they produced. Nothing can be more an obstacle to the progress of opulence (LJ(B) 522).

In discussing the violent feudal era, Smith says:

[M]en in this defenceless state naturally content themselves with their necessary subsistence; because to acquire more might only tempt the injustice of their oppressors (WN III.iii.12:405; see also II.i:31:285).

Smith's characterization of the no-growth feudal era in which most people lived at subsistence shows the importance of liberty, especially freedom from violence, secure property rights to capture the returns on investment, and the absence of government predation. “Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law” (WN V.iii.7:910). Smith sought to understand how these elements
of market infrastructure could be sustained. He addresses this question in several
different ways in his corpus; for example, explaining in Book III, the least read and least
understood portion of the *Wealth of Nations*, how feudalism was a long-term, no-growth
equilibrium and how commerce and the growth of long-distance trade emerged out of
this equilibrium (see Weingast 2017a). In this paper, I focus on Smith's relatively
unknown constitutional theory which provides another component of his answer.

Modern political-economic theorists of development have recently begun to catch
up with Smith in the sense that they study pieces of Smith's emphasis on liberty. Hont
and Ignatief (1983:12) epitomize this view: “The 'system of natural liberty' which Smith
advocated … had the normative purpose of guaranteeing the economic conditions of
competition necessary for the enforcement of common rules of propriety in market
relations” (citing *WN* IV.iii.c.9; I.x.c.27; I.x.p.10). Besley and Persson (2011) emphasize
the importance of state-capacity to tax, enforce property rights, and provide public
goods (see also Acemoglu and Robinson 2012). Weingast (1995) highlights the
“economic role of political institutions” in the prevention of government predation.
McCloskey (2016a,b) summarizes what’s needed by the ideas of liberty and equality.
While Dixit (2004) and North, Wallis, and Weingast (2016) emphasize that markets
require the control of violence, a topic about which we know too little.

Smith's constitutional theory demonstrates both the reasons why this market
infrastructure is necessary for thriving markets of the commercial economy; and how to
design a government capable of sustaining this market infrastructure. Smith also

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3 Smith also studies the question of how liberty emerged in the feudal world, both through the rise of towns
(which escaped the no-growth, feudal equilibrium) and the demise of the Catholic Church’s monopoly on religious
services. I study Smith's ideas on these topics in Weingast (2017a, 2017b) respectively. This paper focuses on the
constitutional institutions necessary to sustain liberty in a polity that has established it.
explained why politics—specifically, constitutional government capable of sustaining liberty—had to develop in parallel with the market society.

The purpose of this paper is to demonstrate that Smith’s constitutional theory provides a normative theory of citizen rights embedded in a positive approach to political institutions. Smith’s theory addresses the question of how to structure the institutions of public decisionmaking sufficiently strong and capable of providing market infrastructure while protecting citizens against state predation. Smith’s jurisprudence, *inter alia*, integrates his understanding of the political and legal foundations of markets. Many different discussions across Smith’s work bear directly on this topic.  

In this paper, I focus on the component of Smith’s jurisprudence reflected in constitutional theory or public law; that is, his theory explaining the institutions that sustain liberty, commerce, and security. I follow Winch (1983:257) who argues that the main oversight among economic studies of Smith “lies in the failure to appreciate the complex reciprocal relationship which Smith established between economy and polity, between commerce and liberty... Even when imperfectly realized, liberty defined as personal security under the rule of law was a precondition for commercial advance.”

Smith’s constitutional theory is less well-known than that of Locke, Montesquieu, and Madison. Nonetheless, as I argue below, Smith’s contributions to this tradition equal that of these other more well-known theorists, especially with respect to explaining constitutional sources of incentives of public opinion to provide market infrastructure, 4

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4 Other topics include (i) Smith’s four-stages theory about the nature of government and legal system associated with each of the four stages of the means of subsistence – hunter-gatherer, pastoral, agricultural, and commercial; (ii) the violent, low-growth, but stable feudal system and the escape from this system by the towns; and (iii) explanation for the market-hindering role of the medieval Catholic Church. In two companion papers, I study Smith’s discussions on (ii) and (iii) in Weingast (2017a) and Weingast (2017b) respectively.

5 Hont makes the same point: A “distinctive feature of Smith’s history is that he clearly made a determined effort to relate the development of both law and government to economic development” Hont (2009:148).
such as secure property rights and barriers to tyranny, predation, and arbitrary power

This paper proceeds as follows. Section 2 introduces Smith’s approach to public law, including a discussion of Smith’s views on the problems that a constitution must solve. Section 3 summarizes aspects of Smith’s prescriptive aspects of a constitution, while section 4 discusses the intimate connection between the separation of powers and other constitutional devices. In section 5-6, I study Smith’s argument about how constitutions are enforced. Section 7 discusses how the many components of Smith's constitutional theory add up to a coherent whole, while section 8 compares Smith’s ideas with those of Locke, Montesquieu, and Madison. My conclusions follow.

2. Adam Smith’s Constitutional Theory: the Problems Constitutions Must Solve

Smith divides his constitutional theory or “public law” into two parts, the rights of the sovereign relative to the citizens; and the rights of citizens relative to the sovereign.\(^6\) Under the former, Smith includes treason and tyrannicide, and his analysis is brief.

I focus on Smith’s analysis of the rights of citizens and how they are sustained. Smith’s consideration of these topics is elaborate and consequential. A major question for Smith concerned how limited government could be sustained — limited in the sense that political officials could honor limits on their power, such as citizen rights, or adhere to the prescribed procedures for producing sovereign commands. This notion of limited government differs from the modern American vernacular where it often means small government.

\(^6\) Smith treats the former in \textit{LJA} v.54-86 and \textit{LJB} 78-86; and the latter in \textit{LJA} v.102-48 and \textit{LJB} 91-99.
Why are Constitutions Needed? – Or, the Problems Constitutions Must Solve

To understand the problem of constitutional survival, I begin with the question of the problems that constitutions are designed to solve. Why are constitutions necessary? Although Smith did not ask this question explicitly, he raises a series of problems that threaten a constitution’s survival. He then presents his constitutional theory to suggest how each problem can be solved.

A central problem to be solved is violence. The passages from Smith quoted in the introduction on the problem of violence and predation show why integrated markets with a deep division of labor cannot be sustained in the face of regular violence. Attempts to save and invest risk confiscation in a violent environment: “[M]en in this defenceless state naturally content themselves with their necessary subsistence; because to acquire more might only tempt the injustice of their oppressors” (WN III.iii.12:405). Smith also observes that, historically, most disputes over the constitution are settled by violence (LJ (A) v.103-04:311). Because it rules out the possibility of continuity, settling constitutional disputes by violence rules out the possibility of the rule of law. Therefore, a major step in political development, as legal historian, Peter Stein (1984), emphasizes, is transforming dispute-resolution from the realm of violence to the realm of law (see also North, Wallis, and Weingast 2009 ch 1-3 on violence and development).  

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7 In Smith’s well-known discussion of the three duties of the sovereign in WN Book IV, two involve violence: “first, the duty of protecting the society from the violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice” (WN IV.ix.51:687). Smith’s third duty is to provide market-enhancing public goods, such as infrastructure.

8 Craig Smith develops this theme in the context of Adam Smith’s jurisprudence: Error! Main Document Only. “The rules of property, in order to stabilize expectations, must be such that ownership can be determined... From this ... disputes over the validity of claims made to property by appeal to these principles would arise. As a
The second problem constitutions must solve concerns sovereignty. Sovereignty is the highest authority, and no other authority can constrain it. How, then, can a constitution create limited government? Hobbes answered in *Leviathan* (1651) that it can’t; that sovereignty was unlimited and unlimitable. In his view, the monarch as sovereign could not be challenged or limited. Most of Hobbes’s successors held different views, including Locke, Montesquieu, Smith, and the American founders.

A third problem to be solved can be posed in several ways, namely, the problem of the arbitrary abuse of power, or – in modern terms – of executive moral hazard (Besley 2006) and government predation (Shleifer and Vishny 1998). Referring to this problem, Smith observed that, “When people find themselves every moment in danger of being robbed of all they possess, they have no motive to be industrious. There could be little accumulation of stock... Nothing can be more an obstacle to the progress of opulence” (*LJ*(B) 522). Smith analyzes an example of executive moral hazard in detail, among others. When the executive also serves as judge, he is unlikely to take an impartial view of cases in which he has a direct interest:

> When the judicial is united to the executive power, it is scarce possible that justice should not frequently be sacrificed to, what is vulgarly called, politics. The persons entrusted with the great interests of the state may, even without any corrupt views, sometimes imagine it necessary to sacrifice to those interests the rights of a private man. But upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power, but that it should be rendered as much as possible independent of that power (*WN* V.i.b.25:722-23).

result societies would have to develop some conflict resolution mechanism if such disputes were not to tear the society apart” (Smith 2006:55, citing *LJ*(A) iv.9-11:203).
A necessary condition, therefore, for the rule of law is that the judiciary be independent of the executive.\textsuperscript{9}

A fourth problem raised by Smith involves a concept made famous by Madison in *Federalist* 10, the problem of “faction.” Smith devoted a great deal of the *Wealth of Nations*, especially in Book IV, to discussing the problem of influence of interest groups over public policy. “Sometimes … the interest of particular orders of men who tyrannize the government, warp the positive laws of the country from what natural justice would prescribe” (*TMS* vii.iv.36:340-41).\textsuperscript{10}

Fifth, how was a standing army to be controlled? If loyal to the monarch, a standing army would allow the monarch to compromise the law and liberty by forcing citizens to acquiesce in the face of constitutional transgressions.

A final problem raised by Smith concerns stability of the overall constitutional system. To be sustained, a constitution must provide the means and incentives for political officials and citizens to honor its provisions. In today’s world, most new constitutions fail, and in short order (Elkins, Ginsburg, and Melton 2009; Mittal and Weingast 2011). The ever-present conflicts in early modern Europe suggest that the failure of new regimes is not just a recent problem. In the mid-18\textsuperscript{th} century, few states had a constitution in the sense of a stable set of rules governing public institutions and citizen rights. Smith attended this problem in several ways.

\textsuperscript{9} Smith specifies some institutional details of judicial independence: “The judge should not be liable to be removed from his office according to the caprice of that power. The regular payment of his salary should not depend upon the good–will, or even upon the good economy of that power” (*WN* V.i.b.25:723). The king may choose the judges, but after their appointment, they must be independent of him (*LJ* (B) 92-93,434).

\textsuperscript{10} “The merchants knew perfectly in what manner it enriched themselves. It was their business to know it. But to know in what manner it enriched the country, was no part of their business” (*WN* IV.i.10:434); see also *WN* V.i.b.12:715.
3. Prescriptive Elements of Smith’s Constitutional Theory

I begin with Kennedy’s (2005:81-83) discussion of Smith's emphasis on the role of the “courts of justice [for securing the] liberty of the people.” Smith detailed his confidence in the courts in “six characteristics” or prescriptions for constitutional liberty:

- An independent judiciary holding office for life
- Laws made exclusively by the legislature, not judges or the Executive
- Habeas Corpus to ensure timely due process
- Juries of the defendant’s peers to hear the evidence and decide on the facts.
- The legislature to have powers to impeach the Executive
- Regular and frequent elections to the Legislature” Kennedy (2005:81-82).

Each of these prescriptive characteristics seeks to protect citizen liberty by reducing the scope of arbitrary power and executive moral hazard. For example, in the previous section, I explained Smith's views about how an independent judiciary with office for life prevents the monarch from threatening to fire judges if they fail to provide a desired ruling. Before the Habeas Corpus Act, “the Privy Councill could put any one they pleased into prison and detain him at pleasure without bringing him to trial” LJ(A) v.7:272). This power allowed the king to jail his opponents without charge, cause, evidence, or specified sentence. The legislature’s power to impeach executive ministers forces them to adhere to the law and to attend not just to the king’s interests, but to those of the legislature.

Smith’s Approach to Sovereignty

Both practice in early modern Europe and the prescriptions of early modern political theorists indicate an absence of consensus about sovereignty. Historically, in the English system, many monarchs had claimed sovereignty. Hobbes argued

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11 Evensky (2005**) provides a somewhat different scheme.
emphatically in *Leviathan* (1651) that sovereignty must be a single entity (typically an absolute monarchy, but possibly an assembly). John Locke in his *Second Treatise* (1679-82), likely borrowing from George Lawson (see Franklin 1978,**), argued that the people were sovereign. Unwilling to adopt Locke’s radical view, the leaders of the Glorious Revolution of 1688-89 instantiated the king-in-parliament as the sovereign, implying that sovereign actions required both to agree to the action. A century later, Americans at independence adopted Locke’s view: the people represent the active agent in the Declaration of Independence; and the new U.S. Constitution of 1789 opens with “We the people … do ordain and establish this Constitution for the United States of America.”

In Smith’s view, the three parts of government – the king, the parliament, and the judiciary – acting as one was sovereign. As with Hobbes, Smith held that sovereignty was absolute. No entity stood above the sovereign, could judge the sovereign’s actions as legitimate, or could impose limits on the sovereign. But an absolute sovereign posed a problem for establishing limited government, as Hobbes acknowledged. Limits on government in Smith’s constitutional theory arose in another manner.

**Further Elements**

Following accepted practice, Smith distinguishes between *private law* (e.g., property or contract law) and *public law* (e.g., structure of the constitution, the allocation of various powers to specific entities, such as the judiciary, and a set of citizen rights). He observes that private law is logically developed, precise, and characterized by well-
established precedents. In contrast, public law is unclear, lacking in precedents and attended by force and violence (LJ(A) v 103-04:311).

Haakonssen (1981:128), one of the premier students of Smith’s public law, comments that there is “No clearly established idea of what constitutes injury in this relationship.” Too often, constitutional disputes were decided by violence, in which the winners of the conflict unilaterally imposed their judgment. Consequently, the same issue could be fought over at different times; if one side won the first contest and the other side the second, then their respective judgments invariably conflict. Violence and power trumped precedent.

Smith argues that sovereign power grew over time as the state developed. He accounts for this growth in power by two different principles (Hont 2009:139). The first principle is authority, which arises from natural deference to one’s superiors. Smith likens this source of sovereign power to habitual obedience, as a son to a father. He also associated this principle with Toryism in British politics (Haakonssen 1981:128). Smith’s second principle is utility: the idea that people support the sovereign in part because the sovereign produces value, such as security and independence for each individual. Smith associated this principle with Whiggism in British politics (Haakonssen 1981:128). The first principle predominates in monarchies; the second, in republics. The politics of late 17th and early to mid-18th century Britain separated the two principles. David Hume, one of Smith’s dearest friends and a major political theorist of the era, “loathed” even mild forms of authority.

Yet Smith was preoccupied with authority (see, e.g., Hont 2009:146). First, authority was necessary to secure justice; but to work as part of a developed
commercial society, authority had to be constrained, especially executive moral hazard by which rulers abused the trust invested in them by the people. Securing justice, therefore, required institutions that provided the monarch with incentives to honor the law. A necessary step toward this goal involved disassociating the principle of authority from the Tory doctrine of passive obedience to the monarch and from Filmer’s ideas about divine right of kings (Hont 2009:142). Following Hume, Smith rejected the idea that authority emerged through a social contract.\textsuperscript{12}

Winch (1983:257) observes that an important strand in the economic literature on Smith involves the “naively economistic position” that economic liberalism was merely an instrumental argument to favor economic efficiency and long-term growth. “Whatever modern economists may say about such matters, Smith cannot be treated as a mere economic instrumentalist; he was advancing far more ambitious claims” (Winch 1983:257). Winch advocates that Smith understood the relationship between economy and polity, but also between commerce and liberty as complex and reciprocal (see also Winch 1978, ch 4). According to Winch, “Smith provided us with an historical and economic analysis of this relationship, and used it as the basis for his recommendations for bringing economic and political institutions into harmony with one another.” As quoted above, Winch adds that even imperfect “liberty defined as personal security under the rule of law was a precondition for commercial advance.” Economists studying Smith tend to ignore or dismiss Smith’s historical and jurisprudential arguments\textsuperscript{13}; and

\textsuperscript{12} Smith also provides several reasons for rejecting the idea of a social contract (Haakonsen 1981:129, citing \textit{LJ}(A) v, 114-19, 127-28; \textit{LJ}(B) 15-18, 93-96). Such a contract had never happened. And even if it did, it would not bind successor generations. Further, Smith observed that this idea is peculiarly British. Were such a contract to have occurred, Smith argued, political theorists from other countries would have written about it as well.

\textsuperscript{13} For example, most economists studying the history of economic thought dismiss \textit{WN} Book III (as Winch observes 1983,258). See, e.g., Blaug (1978), Brue and Grant (2007:**), and Robbins (1998:**). Although
yet Smith elaborated many of his theoretical ideas about jurisprudence as part of his historical narratives.

4. The Separation of Powers and Other Constitutional Devices

Winch (1979:96) makes an important Smithian observation about the separation of powers system; namely, that it extends the division of labor to the public sphere. “[V]iewed in long historical perspective, ... commercial civilization, with all its inequalities and opportunities for oppression, is capable of generating an improved system of administering justice in which the benefits of the division of labor are extended to the separation of the judiciary and executive powers of government. Given the importance which Smith attached to this innovation as a guarantee for personal liberty under the rule of law, it must be firmly incorporated into the commerce and liberty theme.”

Like Montesquieu, Smith advocated the separation of powers – especially the judiciary from the executive (Winch 1978:95). According to Smith, “This Separation of the province of distributing Justice between man and man from that of conducting publick affairs and leading Armies is the great advantage of which modern times have over ancient, and the foundation of that great security which we now enjoy, both with regards to liberty, property, and life” (LRBL ii.203:176).

Dividing governmental powers into separate parts addresses the moral hazard problem. A judiciary independent of the executive reduces the problem of executive and judicial moral hazard. Granting the parliament exclusive control over legislation and especially taxation also reduces executive moral hazard. In particular, the monarch is

Schumpeter (1954,187) observed that “This third Book did not attract the attention it seems to merit,” he devotes only two other sentences to it. Skinner (1975, 1996) is an obvious exception.
far less likely to initiate unpopular wars when parliament holds the purse strings (Rosenthal 1998). Moreover, the economic principle of “willingness-to-pay” from public finance (cites) applies here; the people and their parliamentary representatives are more willing to finance wars and other public goods from which they perceive benefits than wars and expenditures that they view as harmful.

Smith views the separation of powers as a system of mutual restraints. These ideas are familiar given the immense influence of the *Federalist Papers*; but we need remember that Smith’s discussion antedates these papers by a quarter-century. The Monarch in Smith’s prescriptive system has no legislative or judicial powers. Nonetheless, the monarch holds powers that can constrain parliament; namely, it may veto legislation and prorogue parliament.\(^{14}\) Parliament may pass laws (for example, limiting judicial discretion by announcing rules of conduct deemed illegal); it holds the power to grant or withhold taxes to the monarch; and it may impeach the monarch’s ministers (for example, for failing to execute the laws). Finally, the Judiciary may constrain the monarch (for example, by ruling that the monarch possesses – or fails to possess – particular powers). Taken together, these components represent a system of mutual and interlocking constraints.

**Fiscal aspects of constitutional stability**

I have already indicated an aspect of fiscal dependence of the crown on Parliament in Smith’s constitutional theory. The king may not raise taxes unilaterally;
and he depends on Parliament for his expenditures. Failing to abide by these provisions signals a constitutional violation.

Smith pursues the theme of fiscal incentives on constitutional stability in the *Lectures*. He argued that Elizabeth I, "always affected popularity [and] was continually unwilling to impose taxes on her subjects. In order to supply her exigences she sold the royal demesnes, as she knew that none of her offspring was to succeed her. Her successors therefore standing in need of frequent supplies were obliged to make application to Parliaments" *(LJ(B) 61:420-21).* As North and Weingast (1989) observe, selling off major portions of revenue-producing assets to meet current spending obligation is akin to a firm going bankrupt. Following Elizabeth’s death, the new Stuart kings faced difficult fiscal deficit problems; these difficulties gave Parliament a bargaining advantage with which to constrain the king. In the late seventeenth century, fiscal problems were worse for James II, and “forced [him] to quit the throne and the kingdom altogether” during the Glorious Revolution *(LJ(B) 62:421).*

As part of the revolution, Parliament granted the new monarchs of William and Mary considerably more revenue than it had to the Stuarts, but it also imposed greater constraints. After noting that previous monarchs had alienated the royal demesnes so that these lands no longer served as a source of revenue, Smith reports that the crown’s revenue fell into three categories, each subject to constitutional constraints. First, the Civil List maintained the royal family and therefore afforded little opportunity to “endanger the liberty of the nation.” Second the malt and land taxes, granted annually “depend entirely on the Parliament.” Third, various funds serve to mortgage the public debt, including taxes on salt, beer, and malt. This revenue flows to the Court of
Exchequer and is entirely out of reach by the crown; the Exchequer can pay only to those sources appointed by Parliament (*LJ*(B) 62-63:421). Smith concludes that, since the revolution:

[T]he nation is quite secure in the management of the public revenue, and in this manner a rational system of liberty has been introduced into Brittain. The Parliament consists of about 200 peers and 500 commoners. The Commons in a great measure manage all public affairs, as no money bill can take its rise except in that House. Here is a happy mixture of all the different forms of government properly restrained and a perfect security to liberty and property (*LJ*(B) 63:421).


But how are these constitutional prescriptions to be enforced? The division of powers is of no consequence if political openness ignore it. As with his predecessors – notably, Locke and Montesquieu – and his successor, James Madison, Smith advocated the right of resistance as a central element in policing executive moral hazard and, more generally, the institutional rules underlying the component parts of the government (see *LJ*(A) v 124-27, 132-34; *LJ*(B) 93-94). Haakonsen (1981:129) summarizes: “There are some things which it is unlawful for the sovereign to attempt and entitle the subjects to make resistance.”

Both principles of obedience and support for the sovereign – authority and utility – support the right of resistance. With respect to authority, Smith argues, everyone agrees that insanity (“lunacy,” and “iteotism”) and nonage are reasons to withhold obedience (*LJ*(A) v 126:320). So too are absurdity and outrage, and actions that threaten the country: “No one but must enter into the designs of the people, go along with them in all their plots and conspiracys to turn them out, is rejoiced at their success, and grieves when they fail” (*LJ*(A) v 125-26:320). With respect to the principle of utility,
Smith says that “obedience is no longer due than it is usefull” (LJ(A) v 126, 320). In short, “Absurdity and impropriety of conduct and great perverseness destroy obedience, whether it be due from authority or the sense of the common good” (LJ(A) v 127, 321).

The sovereign may be resisted, but great difficulties hinder this mechanism since there exists no regular authority for doing so. Worse, no laws, precedents, or judges exist that can make authoritative pronouncements so that a sovereign who violates the constitution may be resisted. It is worth quoting Smith at length on this mechanism:

“tho the sovereign may be resisted, it cant be said that there is any regular authority for so doing. The property, life, and liberty of the subject are in some measure in his power… No laws, no judges, have or can ascertain this matter, nor formed any precedents whereby we may judge” (LJ(A) v 138:325).

[T]here is no court which can try the sovereigns themselves, no authority sovereign to the sovereign, and which has examind and ascertained how far the actions of the sovereigns to the subject or of one sovereign to another are justifiable and how far their power extends. The precise limits have been little considered and are very difficult to ascertain to which the power of the sovereign extends.

Historically,

[all disputes of this sort have been decided by force and violence. If the sovereign got the better of the subjects, then they were condemned as traitors and rebells; and if the subjects have got the better of the sovereign, he is declared to be a tyrant and oppressor not to be endured. Sometimes the decision has been right and sometimes wrong, but they can never be of such weight as the decisions of a cool and impartial court” (LJ(A) v 103-04).

The circumstances under which the sovereign can be judged as having violated the constitution are vague and difficult to use. By itself, the right of resistance on the sovereign is unlikely to be effective. Smith solves this problem in an ingenious manner.
The Right of Resistance as an Incentive System

As observed, Smith agreed with Hobbes that sovereignty is absolute. Unlike Hobbes, Smith applied this logic solely to the sovereign as a whole; that is, to the king, legislature, and judiciary acting in concert. In contrast to Hobbes – and presaging Madison in *Federalist* 51 – Smith asserts that the component parts of the sovereign can be held to rules and regular law. Specifically, the executive, legislative, and judicial branches can each be held accountable for violating the prescribed limits on its powers. “If one branch trespasses on the area entrusted to one of the others, this will constitute an infringement of the right of the latter, which can therefore ‘with all justice and equity’ defend its right, even by force” (Haakonssen, 1981:130; citing *LJ*(B) 98). Smith explains: “When the sovereign power is divided amongst different hands, tho it is impossible to say how far the whole sovereign power conjoined may go, it is easy to ascertain when any of those amongst whom it is divided go beyond their lawfull bounds” (*LJ*(A) v 141-42:326-27).

Smith illustrates how of the components of sovereignty may go beyond their lawful limits. For example: if parliament, the courts, or the king attempted to create legislation unilaterally; if parliament sought to make war without the king’s support; or if the king sought to raise taxes unilaterally. “If therefore the severall parts of the government have a perfect right to their severall provinces, it must be supposed that they are intitled to defend themselves in them by force.—If therefore the king levies taxes which are not imposed by Parliament, he breaks the rules of the government.” To the last instance, Smith adds, “This was what James 2d did” (*LJ*(A) v 141-42:326-27), allowing Parliament to act against the monarch and replace him with another.
Smith emphasizes the incentives created by this system, echoing Montesquieu and, again, presaging Madison in *Federalist* 51. If the different branches of government are held to rules and restrictions on their power, then a regular law can be applied to the sovereign by focusing on the individual components. Each component has incentives to monitor the others, to guard its prerogatives and powers from trespass by another, and to resist such trespass with force if necessary. In Smith’s words,

> it is easy to ascertain when any of those amongst whom [sovereignty] is divided go beyond their lawfull bounds; for this is the case whenever any one of them attempts to exercise the power which belongs to another, as if the Parliament or king should act in the legislative way without the consent of the other, if the Parliament should make war or the king endeavour to raise taxes. The king can indeed remedy any unjust proceedings of the Parliament by proroguing them.— The very definition of a perfect right opposed to the offices of humanity, etc., which are by some called imperfect rights, is one which we may compell others to perform to us by violence (*LJ*(A) v 141-42, 326-27; see also *LJ*(B) 96,435).

As Madison would later say in F51, Smith’s logic here is that “ambition must be made to counter ambition.”

### 6. Facilitating the Right of Resistance: The Consensus Condition

Citizen coordination is central to understanding both the right of resistance in practice but also how constitutions are sustained. The *consensus condition* holds that if citizens act in concert to oppose transgressions by political development, they can either force officials to back down or drive them from office (Mittal and Weingast 2011; Weingast 1997). How is this coordination achieved?

The fundamental citizen coordination problem emphasizes the dilemma facing citizens. People typically have varying experiences, different occupations, and live in different regions. They are likely, therefore, to place different weights on the importance
of various rights and government procedures. Absent a mechanism to facilitate coordination, people’s varying views on transgressions imply that they will fail to act in concert. That failure, in turn, allows political officials to abuse the rights of some citizens and survive; hence the phrase, the fundamental citizen coordination problem.

To facilitate the consensus condition, successful constitutions rely on two related mechanisms. First, they construct focal solutions (Schelling 1960) to the fundamental citizen coordination dilemma that create agreement – indeed, consensus – among the people about the nature of transgressions. By defining the rules and ensuring that most people are better off under the rules, focal solutions to the coordination dilemma facilitate the ability of citizens to act in concert. A major purpose of constitutions is to construct these focal solutions (Hardin 1989 and Mittal and Weingast 2011).

Second, successful constitutions create brightlines that facilitate the ability of a large and decentralized community of citizens to act in concert by making it easy for people to realize when a transgression has occurred (see Jacobi, Mittal, and Weingast 2015). Brightlines are constitutional provisions written in a manner so that diverse citizens can come to the same judgment about a constitutional violation independently. Haakonssen summarizes Smith’s logic: “a clear division of power makes it possible for all the actual (and partial) spectators to form a clearer, a more impartial judgement about right and wrong in the exercise of power, than they otherwise would. In other words, the division of power is an institutional device which will tend to make people’s opinion of the sovereign power more enlightened” (Haakonssen 1981:131, emphasis in original).
For example, the right of *Habeas Corpus* embodies a brightline. It requires that to be held in jail a person must be accused of a crime within forty days of arrest. An official accusation is a public – indeed, common knowledge – signal. A person in a gaol either has or has not been accused within forty days. No middle ground exists. In contrast, this provision would fail to be a brightline if it read that a prisoner be charged within 40 days, subject to “emergencies” declared by the king. Rational people can disagree as to the circumstances that constitute an “emergency,” but not about 40 days. Prior to the *Habeas Corpus* Act, “the Privy Councill could put any one they pleased into prison and detain him at pleasure without bringing him to trial” *LJ*(A) v.7:272).

Smith continues, suggesting the logic of the incentives underlying the consensus condition about how *Habeas Corpus* is enforced: “No judge can oppose the Habeas Corpus Act; infamy and a high penalty are the punishment which attend it. No influence of the king could ever induce them to make any such attempt... it will never be allowed to be repealed, as that would destroy in a great measure the liberty of the subject” (*LJ*(A) v.8:272-73). Similarly, the independent judiciary came to be sustained by the consensus condition. King James’s I fired Chief Justices in the early 17th century because they would not produce the rulings he desired; these firings were public events. Such predatory mischief induced the participants in the Glorious Revolution to instantiate the independent judiciary as a constitutional provision. Forcing a judge from office thereby became a brightline, common knowledge signal that the king has violated the rules.

The importance of brightlines can be seen by contrasting the above constitutional provision about the independent judiciary with a similar provision that lacks a brightline.
For example, suppose the provision said that “judges hold their positions for life, but the king may remove them during times of crises and extreme duress.” The qualification clause raises obvious ambiguities. Because citizens can disagree about whether a particular set of circumstances constitutes sufficient crisis or extreme duress, monarchs can potentially exploit the ambiguity to fire a judge and survive by retaining the support of a sufficient portion of the population who do not believe a transgression has occurred.

Smith’s constitutional theory encompasses both the consensus condition and brightlines. For example, suggesting the consensus condition, Smith says: “These laws and established customs render it very difficult and almost impossible to introduce absolute power of the king without meeting with the strongest opposition imaginable” (*LJ*(A) v.11-12:274). And, again: “Liberty thus established has been since confirmed by many Acts of Parliament and clauses of Acts. The system of government now supposes a system of liberty as a foundation. Every one would be shocked at any attempt to alter this system, and such a change would be attended with the greatest difficulties” (*LJ*(A) V.5;271ea). Smith again suggests the logic of brightlines: “With regard to governments where the supreme power is divided amongst different persons, there is no great difficulty in ascertaining when any one transgresses the limits of his power. There could be no doubt at the Revolution that the king had exceeded the limits of his power. The 1st step he took in the exercise of government, after he had engaged to do nothing without the consent of his Parliament, was to raise the customs and excise without acquainting or consulting them” *LJ*(A) v 138:325). These passages from Smith suggest that he understood and relied on the logic of the consensus condition along with that of brightlines.
7. Integrating the Elements of Smith’s Constitutional Theory

Sovereignty, as noted, is a central feature of Smith’s jurisprudence. Acting in concert, the components of sovereign power are unlimited and illimitable. But when sovereignty is divided into several components – an executive, legislature, and judiciary, for example – each component and its powers can be limited. Further, each component of government can be legally resisted for violating those limits. Both officials in other components and the people have the right to resist violations of the rules by any of the components. Moreover, as would later hold in the Madisonian system, institutional components of the government have both the right and incentive to police one another. In Federalist 46, Madison explains how officials in the American states will actively police the national government. Both Madison and Smith facilitate this policing by clarifying the circumstances under which resistance is justified.15 This system of the division of powers in which the components monitor and police one another is necessary for individual liberty, including the security of property (Haakonssen 1981:132).

To see how this logic unfolds in practice, consider how the legislature serves as a curb on the judiciary. As Haakonssen summarizes, “a completely regular administration of justice is only achieved when the judges’ independence of the executive is counterbalanced by their dependence upon rules of law laid down by a legislative power, a tripartite sovereign is necessary to achieve ‘perfect security to liberty and property’” (Haakonssen 1981:132, citing LJ(A) v 15, 108-11,313-14; LJ(B)

15 Along with coauthors, I study Madison’s use of brightlines and other means of facilitating citizen coordination in the American Constitutional context (see, e.g., Mittal and Weingast 2011 and Jacobi, Mittal, and Weingast 2016).
92-93). Or, in Smith’s words, “Here is a happy mixture of all the different forms of government properly restrained and a perfect security to liberty and property” (LJ(B) 63:421-22).

Another important power is that the House of Commons may impeach the king’s ministers, for example, for failing to execute a law or for “maladministration”; and the king cannot pardon them (LJ(B) 63:422; see also LJ(B) 92-93,434). This power gives the ministers incentives to attend to the Commons’ interests rather than exclusively serving the king. In particular, ministers who thwart specific laws risk being punished by parliament.

Smith raises another element relevant to the question of constitutional stability. A standing army represents a potential threat to liberty, for example, were it to collaborate with the monarch against the people. Yet, Smith observes, this is not likely to be a problem in Britain. “The standing army might also without doubt be turned against the nation if the king had attained great influence with it. But there is one security here also. Many of the persons of chief rank and station in the army have also large estates of their own and are members of the House of Commons. They have in this manner an influence and power altogether independent of the king. It would never be their interest to join with the king in any design to enslave the nation, as no consideration he could bestow on them will be able to turn their interest to his side. So that however mercenary we should suppose them, those at least may be depended on who have a seat in the Parliament or offices depending on it” (LJ(A) IV.179-V.1;269-270). Put simply, a standing army whose leaders are part of the legislature is much less likely to side with the king in a dispute with the legislature.
By way of illustrating these principles in operation, Smith explains the actions of King James II that triggered the exercise of the right of resistance in the Glorious Revolution. According to Smith, James’s willful violation of constitutional rules occurred in many different areas. James attempted to obtain revenue without Parliament’s approval. He also “assumed a power of dispensing with the laws in cases where he himself was no way concerned” (LJ(B) 96-97:436). The king broke legal privileges of universities. James appealed to the Army for support, but found little sympathy (LJ(B) 98:436). At the same time, James’s actions concerning religion raised a range of problems and constitutional violations. A Catholic, James flagrantly ignored many rules concerning the Church of England. He failed to take the required sacraments of the Church of England. He “employed Roman Catholics in both the army and Privy Council”; and “[s]ome of the bishops, merely for doing what every British subject has a right to do, to wit, remonstrating against such proceedings, were sent to the Tower.” For example, in a move reminiscent of modern Latin American dictators, James ordered the Bishop of London to suspend Bishop Sharp who had “preached against popery.” The Bishop of London refused. In reaction, the king, not “pleased with this, recreated a Court of High Commission, which had been long abrogated and discharged ever after to be erected, and summoned both the Bishop and Sharp to appear before it.” Smith concludes that “Nothing could more alarm the nation than this attack upon the bishops.” Smith reports that the people, convinced that the king sought to change the country’s religion to Catholicism, became alarmed (LJ(B) 97:436).

Smith concludes that: “It was no wonder that by such practices the Revolution was brought about, and the family sett aside, for the whole nation was disposed to
favour the Prince of Orange... Thus K. James, on account of his encroachments on the body politic, was with all justice and equity in the world opposed and rejected” (LJ(B) 98-99:436). Smith’s account thus emphasizes the importance of the both the right of resistance and the consensus condition. The right of resistance alone is insufficient to coordinate the citizenry in the context of constitutional transgressions. In emphasizing both the right of resistance and the consensus condition, Smith’s logic goes beyond Locke’s in the Second Treatise, and presages Madison’s in the Federalist Papers.

8. Conclusions

Smith argued for the importance of liberty for underpinning political-economics of development, where he understood liberty as security from violence, the enforcement of contracts and property rights, and protection from government predation. Liberty in his view was essential for a market economy. The absence of any of the elements of liberty would significantly jeopardize markets. But this discussion raises two questions: How was liberty to be established and how was it sustained?

Smith’s answered the first question by providing a theory explaining the vicissitudes of parliament and liberty in England in the period from the 11th century and William the Conqueror to the Glorious Revolution in 1688 (I discuss Smith’s logic of England’s long and winding road to liberty in Weingast 2017c). Smith’s constitutional theory answers the second question, and the topic of this paper. Smith’s approach involves institutions that provide political officials with incentives to honor the constitutional rules. These rules and incentives, in turn, protect citizen liberty and prevent the exercise of arbitrary power by the monarch. As explained at the outset, the
establishment of liberty is a necessary component of the market infrastructure necessary to sustain property rights, enforce contracts, and prevent predation.

Smith’s constitutional approach has much in common with that of the more well-known 17th and 18th century political theorists. Although Smith's views are virtually unknown outside of the literature on Smith, Smith's approach rivals that of Locke, Montesquieu, and Madison and the American founders. Each of these theorists proposed multiple lines of defense against tyranny and constitutional transgressions; including the separation of powers, federalism, elections, and the ability to impeach the executive or his ministers. Although Locke, Montesquieu, Smith, and Madison combined the various constitutional mechanisms in different ways, their approaches all belong to the same family.

Smith dealt with another important issue: Is limited government necessarily weak government? Recall: limited government is a government that can respect citizen rights and, generally, adhere to limits on its powers. Haakonsen (1981:131-32) summarizes Smith's answer, "The central thesis in [Smith's] history of law and government is that wide individual liberty is not even a possibility without strong government." In particular, the government must be sufficiently strong to police itself from initiating constitutional transgressions.

By way of summary, Smith's constitutional theory focuses on two interlocking features; a set of prescriptions centered on the separation of powers system; and a set of incentives to monitor and police those prescriptions. Each of the components of the separation of powers has incentives to monitor and police each other. The consensus condition underlies this mechanism in combination with citizens' right of resistance in
the face of constitutional violations. In focusing on these problems, Smith’s approach fits comfortably in the modern literature of the political-economics of development.

References

R.1 Abbreviations for Smith’s work


R.2. Other references


