

Index

- abductive logic, 8, 84–85, 89
- acquired rights, 49, 148
- “Adam Smith problem”
 - conflation of “impartial spectator” and *Homo economicus*, 122, 124–25
 - contemporary scholars rejecting, 125
 - “invisible hand,” inaccurate tropes regarding, 125
 - the wealth of nations and the theory of moral sentiments, failure to read as integrated system of thought, 122–24
- Adam Smith tie, 126
- administrative state, 131
- aesthetics
 - judgment and, 78–79
 - in justice, 92, 152
 - in law, 78–79
- affinity communities, 99
- affirmability, 146–53
- Africa, economic freedom in, 153–54
- African Americans. *See* race
- agricultural stage of development, 41–42, 104–5
- airbnb, 110–11
- alcohol regulation, judicial opinion citations of Smith regarding, 138
- alienation
 - division of labor and, 47–48
 - education, government providing as counteracting alienation, 47–48
- antitrust law, judicial opinion citations of Smith, 134–35
- articles of confederation, 127–28
- asset accumulation
 - division of labor and, 118
 - government arising to protect, 11–13, 41, 61
 - law arising to protect, 11–13, 41, 61
 - property and, 42
 - unequal distribution of, 148–49 (*See also* unequal accumulation and distribution)
- Australia
 - economic freedom in, 153–54
 - well-being in, 152–53
- authority. *See also* Government
 - communication and interpretation, norms and rules of, 67–68
 - justice as mediating between authority and utility, 18
 - “man in the mirror” metaphor, corresponding with, 40
 - origins of, 45
 - overview, 5
 - Papacy and, 57
 - in political realm of social organization, 57
 - relationship among pillars, 18, 57, 61–62
 - social contract versus, 17–18, 44–45
 - utility, interplay with, 42–43, 45
- automobile leasing, 112
- Ayers v. Robinson* (N.D. Ill. 1995), 135–37
- banishment, 61
- Bankowski, Zenon, 10
- barter. *See* “truck, barter, and exchange”
- beauty, 71–72
- beneficence, 35, 59–60
- Berry, Christopher J., 17
- bias
 - “impartial spectator” and, 31
 - “reasonable person” and, 31–32
- “black lives matter,” 56
- Blackstone, William, 137
- blameworthiness, 17, 66, 77
- “blue lives matter,” 56

- books, Smith in, 119–21, 143
 Brown, Michael, 43–44
- “calculus of choice”
homo economicus and, 92
 justice not reducible to, 92, 154
 non-economic judgment factors and, 95
 price and, 94–95
- Canada
 economic freedom in, 153–54
 well-being in, 152–53
- capital, markets versus, 3–4
- capitalism
 evolution of thinking regarding, 2
 importance of Smith to, 2
 judicial opinion citations of Smith regarding, 142
 laissez-faire capitalism (See Laissez-faire capitalism)
 non-judicial citations of Smith regarding, 120–21
- Carlisle Tire & Rubber Co. v. United States* (Ct. Int'l Trade 1983), 134
- China, economic freedom in, 153–54
- civil law
 common law compared, 8–9, 85
 origins of, 8
 in Scotland, 8–9, 120
- class struggle
 critical legal theory and, 2–3
Homo identicus and, 99
 identity politics, evolution into, 2–3
- commentaries on the laws of England* (Blackstone), 137
- commerce stage of development, 41–42, 104–5
- common interest
 advanced by “impartial spectator,” 66
 conflation of self-interest and common interest by *Homo economicus*, 95
 in conjunction with self-interest, 1–2, 4, 79, 124, 143
 ideal justice advanced by merging of self-interest and common interest, 79, 147–48
 “impartial spectator” as mediating between self-interest and common interest, 36–37, 59, 66, 103
 “invisible hand” metaphor and, 13–14
 jurisprudence theory of Smith, centrality to, 3
 justice as based in, 19, 83
 justice as mediating between self-interest and common interest, 61
 limitation of self-interest by, 38
 market expansion and, 83
 maturation of, 83
 mutual sympathy and, 147
 progress advanced by merging of self-interest and common interest, 82–83
 progress and, 105
 promotion of as essential for well-being, 147–48
 protection of public interest (See protection of public interest)
 redressing past wrongs, problems with, 84
 sentiment of, 83, 86
 shared core values and moral sentiments and, 147
 social organization theory of Smith, centrality to, 3
- common law
 civil law compared, 8–9, 85
 history compared, 80
 “impartial spectator,” common law judge compared, 32
 origins of, 8
- communication and interpretation, norms and rules of
 authority and, 67–68
 beauty and, 71–72
 cooperation and, 67–68
 cultural situating of, 88
 division of labor and, 75
 gender and, 73
 “impartial spectator” metaphor and, 65–66
 inner impartial spectator and, 76
 jurisprudence theory of Smith and, 75, 144
 justice and, 67–68
 in law, 70
 markets and, 75
 race and, 72–74
 triadic theory of interpretation, 70–71, 87
 “truck, barter, and exchange” and, 151–52
 utility and, 67–68
- communities of inquirers, 71–72, 88–89
- community
 self-interest in context of, 27–28
 shared core values and moral sentiments, 28–29
- competition, judicial opinion citations of Smith regarding, 127
- concrete reasonableness, 79, 152
- conscience, “impartial spectator” and, 30
- conservatism, 139
- considerations concerning the first formation of languages* (Smith), 68
- constitution
 fifth amendment, 140–41
 fourth amendment, judicial opinion citations of Smith regarding, 137
 twenty-first amendment, 138

- contract law
 employment contracts, judicial opinion
 citations of Smith regarding, 131–32
 judicial opinion citations of Smith regarding,
 126
 reasonable expectations in, 33–34,
 54
 Cooke, C.A., 45
 cooperation
 communication and interpretation, norms and
 rules of, 67–68
 progress and, 105
 self-interest, as byproduct of, 67–68
 “truck, barter, and exchange” and, 67–68
 core values. *See* shared core values and moral
 sentiments
 cost-benefit analysis
 distribution and, 94
Homo economicus and, 92–94
 innovation, insufficiency for, 108–9, 112–13
 preferences and, 94
 price and, 93–94
 COVID-19 pandemic
 as disruption, 116–17
 as exogenous natural force, 116–17
 creativity. *See* innovation
 criminal law
 civil law versus, 8
 revenge in, 43–44
 shared core values and moral sentiments and,
 43–44
 utility and, 43–44
 critical legal theory
 class struggle and, 2–3
Homo identicus and, 89–90, 97 (*See also* *Homo
 identicus*)
 “impartial spectator” versus, 20
 Marxism and, 2–3
 overview, 97
 Smith and, 20
 “social justice” and, 100–1
 Cuba, lack of well-being in, 152–53
 culture
 beauty and, 71
 cross-cultural exchanges as disruption,
 116
 economic analysis of law and, 96
 law and, 18
 curiosity. *See* innovation
 Dahl, Gary, 94
 “dead hand,” 140
 decision-making. *See* reasonable and rational
 decision-making
 deregulation
 judicial opinion citations of Smith regarding,
 127
 non-judicial citations of Smith regarding, 120–21
 discovery. *See* innovation
 discrimination, 149–50
 irrational discrimination, 149–50
 systemic racism, 74
 disruption
 COVID-19 pandemic as, 116–17
 cross-cultural exchanges as, 116
 exogenous natural forces as, 116–17
 innovation and, 114–17
 in market process theory, 114–17
 distribution
 cost-benefit analysis and, 94
 efficiency and, 92–93
 price and, 94
 redistribution, 46, 84, 99–101
 redressing past wrongs, problems with, 84
 distributive justice, 49
*district of Columbia and state of Maryland
 v. Trump* (D. Md. 2018), 137–38
 division of labor
 alienation and, 47–48
 asset accumulation and, 118
 communication and interpretation, norms and
 rules of, 75
 as driving mechanism for innovation, 14, 42
 education, government providing as
 counteracting alienation, 47–48
 law and, 14
 limitations of, 14, 42
 market expansion and, 6, 105–6, 118
 pin factory example, 14
 production and, 14, 42
 “truck, barter, and exchange” and, 118, 152
 unequal accumulation and distribution and, 14
 wealth accumulation and, 14
Dolan v. Tigard (1994), 139
 Driesen, David M., 94
 due process, 53. *See also* natural justice
 duty, 45, 59–60
 Economic analysis of law
 culture and, 96
 efficiency and, 92
 emotion and, 96
Homo economicus and, 90 (*See also* *Homo
 economicus*)
 judicial opinion citations of Smith and, 121
 jurisprudence theory of Smith distinguished,
 144–45
 market jurisprudence as alternative to, 146–47

- Economic analysis of law (cont.)
 problems with, 154
 Smith and, 19
 wealth maximization and, 92
- economic freedom, 153–54
- economics education in universities, 145–53
- education
 as acquired right, 49
 economics education in universities, 145–53
 government providing, 15, 46–48
 importance of, 48
 markets, effect of, 48
 shared core values and moral sentiments and, 44
 utility and, 44
- efficiency
 absence of unique results in efficiency analysis, 92
 distribution and, 92–93
 economic analysis of law and, 92
Homo economicus and, 92–93
 judicial opinion citations of Smith regarding, 142
 justice distinguished, 4
 Kaldor–Hicks efficiency, 124
 law and, 43
 Pareto efficiency, 43
 shared core values and moral sentiments versus, 43, 96
 Smith on, 3
- Ellis v. Mississippi dept. of health* (N.D. Miss. 2009), 137
- emotion
 economic analysis of law and, 96
Homo identicus and, 99–100
- employment contracts, judicial opinion citations of Smith regarding, 131–32
- entrepreneurism
 information gaps and, 114–15
 innovation and, 114–15
 market process theory and, 114–15
 risk taking and, 114
- Epstein, Richard A., 140
- equality
 of opportunity, 20, 98, 100, 149–50
 of outcome, 56, 98, 100–1, 148
- equal justice under law, 144, 147
- equity, 100, 148
- ethics
 judgment and, 78
 in *the theory of moral sentiments*, 123
- ethnicity
 discrimination, 149–50
 justice and, 95
- Evensky, Jerry, 1, 10–12, 32, 42, 51, 122–23
- exchange networks
 automobile leasing and, 112
 information economy and, 110–12
 innovation and, 108–9, 112
 socially transformative nature of, 110–12
 wealth formation and, 109
 wireless communication and, 111–12
- exogenous natural forces as disruption, 116–17
- expectancy, 146
- expectation of privacy, judicial opinion citations of Smith regarding, 137
- externalities, 22–23, 53, 151
- factionalism
Homo identicus and, 98
 problems of, 147
 redressing past wrongs, problems with, 84
- fair market value
 in natural justice, 54–55
 overview, 19–20
- fairness problems with redressing past wrongs, 84
- farming stage of development, 41–42, 104–5
- federal rule of evidence 136
- Fehr, Ernst, 91
- Field, Stephen J., 130
- fifth amendment, 140–41
- Fleischacker, Samuel, 13, 15, 33
- Floyd, George, 43–44
- foreign and domestic emoluments clause,
 judicial opinion citations of Smith regarding, 137–38
- formal realm of social organization
 authority (*See* authority)
 dynamic nature of, 61–64
 evolution of, 59
 informal social organization, relation to, 61–64, 147–48
 justice (*See* Justice)
 law in, 19
 outer impartial spectator in, 40–41
 overview, 5, 18
 relationship among pillars, 18, 57, 61–62
 utility (*See* Utility)
- Founders, Smith and, 2, 120–21
- fourth amendment, judicial opinion citations of Smith regarding, 137
- France, economic freedom in, 153–54
- Frank, Jerome, 127, 132–33
- Franklin, Benjamin, 137
- Frazier Institute, 153–54
- Fricke, Christel, 29–31
- Friedman, Milton, 126

- Galileo, 89
- gender
- communication and interpretation, norms and rules of, 73
 - discrimination, 149–50
 - justice and, 95
 - socially shared referent, effect of absence of, 73
- Germany, economic freedom in, 153–54
- gifts, judicial opinion citations of Smith regarding, 138–39
- Gintis, Herbert, 91
- “golden mean,” 85–86
- government
- basic role of, 46
 - commerce and, 45
 - education, providing, 15, 46–48
 - judicial opinion citations of Smith regarding, 120
 - necessaries, providing, 15, 46
 - origins of, 11–13, 41, 61
- gravity, 21
- “greed is good” as inaccurate representation of Smith, 1–2, 125, 142
- Griswold, Charles L., Jr., 10, 122–23
- Haakonssen, Knud, 17, 32, 40, 42, 45
- happiness
- in progress theory of Smith, 86
 - wealth not leading to, 26–27
- harms, 53, 151
- hate speech, 56
- health, 52–53, 151
- hedonic damages, judicial opinion citations of Smith regarding, 135–37
- herding stage of development, 41–42, 104–5
- history
- common law compared, 80
 - ideal justice and, 79–80
 - redressing past wrongs, problems with, 84
 - Smith and, 21, 79–80
- history of astronomy* (Smith), 23, 121, 124
- Holmes, Oliver Wendell, 140
- homeless. *See* necessaries
- Homo economicus*
- “Adam Smith problem” and, 122, 124–25
 - “calculus of choice” and, 92
 - characteristics of, 6, 89
 - conflation of self-interest and common interest, 95
 - cost-benefit analysis and, 92–94
 - economic analysis of law and, 90
 - efficiency and, 92–93
 - fact disputes versus value disputes, 95–96
 - “impartial spectator” as mediating between *Homo economicus* and *Homo identicus*, 102–3
 - “impartial spectator” versus, 6, 89, 97
 - lack of neutrality and objectivity, 101–2
 - markets and, 101
 - methodological individualism and, 95
 - necessaries and, 96–97
 - objective nature of, 91–92
 - origins of, 91
 - overview, 90–91
 - “point of viewlessness,” 91–92
 - referent of, 102
 - self-interest and, 92
 - shared core values and moral sentiments and, 96
 - slavery and, 96
 - wealth accumulation and, 101
 - wealth maximization and, 92, 95
- Homo identicus*
- characteristics of, 97
 - class struggle and, 99
 - critical legal theory and, 89–90, 97
 - emotion and, 99–100
 - equality versus affirmative rights to redress past wrongs, 99
 - factionalism and, 98
 - identity politics and, 97
 - “impartial spectator” as mediating between *Homo economicus* and *Homo identicus*, 102–3
 - “impartial spectator” versus, 6, 89, 101
 - interpretive point of view and, 97–99
 - lack of neutrality and objectivity, 101–2
 - law viewed as subjective and political, 99–100
 - Marxism and, 97–98, 100
 - mutual sympathy, rejection of, 99–100
 - overview, 90
 - personal narrative, centrality of, 100
 - political process and, 101
 - power relations and, 99
 - referent of, 102
 - social construction of identity and, 100
 - white heterosexual male paradigm and, 98–99
 - white privilege and, 98–99
- Hong Kong, economic freedom in, 153–54
- Hovenkamp, Herbert, 130–31, 140
- human behavior, search for mechanism of, 21
- Hume v. Moore–McCormack Lines Inc.* (2d Cir. 1941), 131–32
- hunting-gathering stage of development, 18–19, 41–42, 104–5
- Hylton v. United States* (1796), 127–29
- ideal justice, 79–80
- identity politics
- evolution of class struggle into, 2–3

- identity politics (cont.)
Homo identicus and, 97 (See also *Homo identicus*)
 “impartial spectator” versus, 20
 market jurisprudence as alternative to, 146–47
 overview, 97
 problems with, 154
 Smith and, 20
 social construction of identity and, 100
- ill. See *Necessaries*
- illegal trade, 106
- “impartial spectator” metaphor
 “Adam Smith problem” and, 122, 124–25
 beneficence and, 35
 bias and, 31
 church, moving vantage point away from, 65
 common interest advanced by, 66
 common law judge compared, 32
 communication and interpretation, norms and rules of, 65–66 (See also *Communication and interpretation, norms and rules of*)
 conscience and, 30
 development of concept, 17
 economics, not motivated by, 31
 everyday people, moving vantage point in, 65
Homo economicus versus, 6, 89, 97 (See also *Homo economicus*)
Homo identicus versus, 6, 89, 101 (See also *Homo identicus*)
 identity politics versus, 20
 impartiality contrasted with neutrality and objectivity, 102
 inner impartial spectator (See *Inner impartial spectator*)
 judgment, as mechanism for, 30–31, 65, 77
 justice, corresponding with, 40–41
 lack of neutrality and objectivity, 101–2
 as mediating between *Homo economicus* and *Homo identicus*, 102–3
 as mediating between self-interest and common interest, 36–37, 59, 66, 103
 mutual sympathy and, 37–38
 outer impartial spectator (See *Outer impartial spectator*)
 overview, 5, 65
 reasonable expectations and, 33–34
 “reasonable person” compared, 31–32
 relationship among metaphors, 18, 35
 rule of law and, 32
 shared core values and moral sentiments and, 31, 35, 75–76
 in *the theory of moral sentiments*, 21
 unequal accumulation and distribution, adjustments for, 34–35
 as universal referent, 87, 89
 values embedded in, 102
 “veil of ignorance” versus, 6
 voluntary adjustment of self-interest and, 37–38
- indeterminacy
 innovation and, 112–14, 117
 in market process theory, 112–14, 117
- induced variables (IVs), 113
- informal realm of social organization
 banishment and, 61
 diagrammatic presentation, 60
 dynamic nature of, 61–64
 formal social organization, relation to, 61–64, 147–48
 “impartial spectator” metaphor (See “*Impartial spectator*” metaphor)
 inner impartial spectator in, 40–41
 “invisible hand” metaphor (See “*Invisible hand*” metaphor)
 law in, 19
 “man in the mirror” metaphor (See “*Man in the mirror*” metaphor)
 overview, 5, 18
 shunning and, 61
 timeless nature of, 59
- information economy, 110–12
- information gaps, 114–15
- inner impartial spectator
 communication and interpretation, norms and rules of, 76
 in informal realm of social organization, 5
 judgment and, 59–60
 justice and, 40–41
 outer impartial spectator, relation to, 76, 147–48
 shared core values and moral sentiments and, 59–60
- innovation
 cost-benefit analysis, insufficiency of, 108–9, 112–13
 disruption and, 114–17
 division of labor as driving mechanism for, 14
 entrepreneurship and, 114–15
 exchange, importance of, 109
 exchange networks and, 108–9, 112
 fruit price example, 115
 indeterminacy and, 112–14, 117
 process of, 109
 self-interest, relation to, 108
 wealth formation and, 109–10
- institutional economics, 92, 140
- insurance, judicial opinion citations of Smith regarding, 126

- interpretation
 norms and rules of (*See* Communication and interpretation, norms and rules of)
 triadic theory of interpretation, 70–71, 87
- “invisible hand” metaphor
 “Adam Smith problem” and, 125
 in astronomy, 13, 121, 124
 commerce, as promoting, 35–36
 common interest and, 13–14
 context of, 23–25
 dynamic relationship among people and, 25
 in economic realm of social organization, 35–36
 inaccurate tropes regarding, 125
 ironic element of, 13
 judicial opinion citations of Smith regarding, 125–26, 131, 142
 in law, 22
 in markets, 21–22
 non-judicial citations of Smith regarding, 121
 one-dimensional caricature of Smith and, 143
 overview, 5
 relationship among metaphors, 18, 35
 self-interest and, 23–26, 35–36, 66
 in *the theory of moral sentiments*, 21, 23–25, 121
 unequal accumulation and distribution and, 24–25
 utility, corresponding with, 40
 in *the wealth of nations*, 23–25
- iPad, 111
- irrational discrimination, 149–50
- Italy, economic freedom in, 153–54
- Jacobs, Jane, 109–10
- Japan
 economic freedom in, 153–54
 well-being in, 152–53
- judgment
 aesthetics and, 78–79
 “calculus of choice,” non-economic judgment factors and, 95
 defined, 77
 ethics and, 78
 “impartial spectator” as mechanism for, 30–31, 65, 77
 inner impartial spectator and, 59–60
 logic and, 78
 meaning as derived from consequences, 77–78
 normative sciences and, 77
 pragmatism and, 77–78
 “truck, barter, and exchange” and, 77
- judicial opinion citations of Smith. *See also specific case*
 absence in significant cases, 139
- “Adam Smith problem” and (*See* “Adam Smith problem”)
 alcohol regulation, regarding, 138
 antitrust law, regarding, 134–35
 capitalism, regarding, 142
 competition, regarding, 127
 contract law, regarding, 126
 deregulation, regarding, 127
 economic analysis of law and, 121
 efficiency, regarding, 142
 empirical evidence, 126
 employment contracts, regarding, 131–32
 expectation of privacy, regarding, 137
 foreign and domestic emoluments clause, regarding, 137–38
 fourth amendment, regarding, 137
 gifts, regarding, 138–39
 government, regarding, 120, 142
 hedonic damages, regarding, 135–37
 increase over time, 126–27, 141
 insurance, regarding, 126
 “invisible hand,” regarding, 125–26, 131, 142
 lack of compelling reasons for, 120
 laissez-faire capitalism, regarding, 122, 125–26, 129–30, 142
 late nineteenth century through early twentieth century, 129–30
 late twentieth century through new millennium, 133–42
lectures on jurisprudence, 122
 mercantilism, regarding, 130–33
 mid-twentieth century, 131–33
 one-dimensional view of Smith, based on, 142
 overview, 7, 119–20
 political nature of, 141–42
 prestige of Smith as reason for, 121–22
 price fixing, regarding, 134–35
 property, regarding, 120, 126, 142
 research methodology, 122
 self-interest, regarding, 120, 125–26
 1796 through early post–Civil War period, 127–29
 Sherman act, regarding, 134–35
 taxation, regarding, 126–29
the theory of moral sentiments, 122, 126, 138
 time periods of study, 127
 tort law, regarding, 126
 trademark law, regarding, 132–33
 types of cases, 126
 under-informed view of Smith, based on, 125–26
 utilitarianism in, 125–26
 wealth maximization, regarding, 142
the wealth of nations, 7, 120, 122, 126–28, 135–38

- jurisprudence theory of Smith
 common interest, centrality of, 3
 communication and interpretation, norms and rules of, 75, 144
 contemporary implications, 7
 economic analysis of law distinguished, 144–45
 economics in, 50
 jurisprudential point of view, 144
 lack of scholarship on, 143
 legal scholar, Smith as, 7–8
 major work on, failure of Smith to complete, 8, 10
 market jurisprudence (*See* Market jurisprudence)
 methods for understanding, 11
 scientific method and, 80–81
 self-interest in conjunction with common interest in, 4
 social organization theory of Smith, integration with, 143–44
- jury trials, 135–37
- justice
 aesthetics in, 92, 152
 affirmability in, 146–53
 “calculus of choice,” not reducible to, 92, 154
 common interest, as based in, 19, 83
 communication and interpretation, norms and rules of, 67–68
 competing referents and, 88
 discrimination and, 149–50
 efficiency distinguished, 92
 elements of, 49
 equal distribution of property, not requiring, 148–49
 equal justice under law, 144, 147
 ethnicity and, 95
 evolution of thinking regarding, 2–3
 expectancy in, 146
 in formal and informal realms of social organization, 57
 gender and, 95
 ideal justice, 79–80
 “impartial spectator” metaphor, corresponding with, 40–41
 inner impartial spectator and, 40–41
 in *Lectures on jurisprudence*, 50–51
 market jurisprudence and, 146
 mathematical equation, not reducible to, 145, 154
 maturation of, 63
 as mediating between authority and utility, 18
 as mediating between self-interest and common interest, 61
 natural justice (*See* Natural justice)
- outer impartial spectator and, 40–41, 61
 overview, 5
 perfect justice, 79–80
 as primary pillar in civil society, 2–3, 11, 18, 40, 49, 57, 146–47, 154
 profit versus, 18
 protection of public interest (*See* Protection of public interest)
 purpose of, 37
 race and, 95
 reasonable expectations and, 145
 reasonableness in, 145–53
 redressing past wrongs, problems with, 84
 relationship among pillars, 18, 57, 61–62
 religion and, 95
 security of person and property (*See* Security of person and property)
 shared core values and moral sentiments and, 37, 152
 “social justice,” 100–1, 148
 as subservient to economics, 2
 as subservient to politics, 2–3
the theory of moral sentiments and, 5–6
 wealth maximization distinguished, 92
- Kaldor–Hicks efficiency, 124
Kelo v. New London (2005), 139
 Keynesianism, 134
 Kirzner, Israel, 109, 113–15. *See also* market process theory
- Laissez-faire capitalism
 judicial opinion citations of Smith regarding, 122, 125–26, 129–30, 142
 non-judicial citations of Smith regarding, 120–22
 utilitarianism and, 131
- land planning, 151
Lane v. United States (4th Cir. 2002), 138–39
- language. *See also* Communication and interpretation, norms and rules of
 “cave” example, 68–69
 cultural situating of meaning in, 69
 evolution of, 68–69
 objects in, 69
 referents in, 69
 self-interest compared, 83
 signifiers in, 69
 Smith on, 68–69
 triadic relationship in, 69
- law
 aesthetics in, 78–79
 communication and interpretation, norms and rules of, 70
 competing referents in, 88

- culture and, 18
- division of labor and, 14
- efficiency and, 43
- in formal realm of social organization, 19
- historical evolution of, 15
- Homo identicus*, law viewed as subjective and
political by, 99–100
- illegal trade and, 106
- in informal realm of social organization, 19
- integration with other disciplines, 85
- “invisible hand” metaphor in, 22
- market expansion, role in, 106, 118
- natural law distinguished, 15–16
- origins of, 11–13, 41, 61
- in progress theory of Smith, 11
- property, role in describing, 106–7
- purposes of, 49
- race and, 73–74
- reasonable and rational decision-making in, 14,
107
- socially shared referent, need for, 70
- in social organization theory of Smith, 11
- standardization of, 107
- “truck, barter, and exchange” and, 14
- unequal accumulation and distribution, law
arising in response to, 12–13
- law and economics. *See* economic analysis of law
- law review articles, Smith in, 119–21, 143
- Lebamoff enterprises v. Whitmer* (6th Cir. 2020),
138
- lectures on jurisprudence* (Smith)
generally, 10–11
- history in, 79–80
- judicial opinion citations of Smith in, 122
- justice in, 50–51
- markets in, 48
- mastery of law in, 10
- stages of social development in, 41, 104–5
- liberalism, 6
- libertarianism, 139
- Lochner v. New York* (1905), 139–41
- Locke, John, 33
- logic
abductive logic, 8, 84–85, 89
- judgment and, 78
- “looking glass.” *See* “man in the mirror” metaphor,
27
- loyalty, 45, 59–60
- Lucas v. South Carolina Coastal Council* (1994),
139
- Lyft, 111
- MacCormick, Neil, 10, 22–23, 51, 105
- Macfie, A.L., 123
- Mackinnon, Kenneth A.B., 32
- Madison, James, 137
- Magna Carta, 127, 137, 139
- Maletz, Herbert N., 134
- Malloy, Robin Paul, 7, 10–12, 32, 43, 52, 70–71, 94,
107, 121, 123–24, 135, 139, 149
- “man in the mirror” metaphor
authority, corresponding with, 40
- man as social being and, 36
- as metaphor for society, 29
- mutual sympathy and, 27, 29, 56, 66
- overview, 5
- in political realm of social organization, 36
- relationship among metaphors, 18, 35
- scientific evidence, 35
- self-interest in context of community and, 27–28
- shared core values and moral sentiments and,
28–29
- in *the theory of moral sentiments*, 21
- “man of system,” 15, 107
- “man within the breast.” *See* “impartial spectator”
metaphor, 30
- market expansion
common interest and, 83
- division of labor and, 6, 105–6, 118
- law, role of, 106, 118
- self-interest and, 83
- “truck, barter, and exchange” and, 6
- market jurisprudence
affirmability in, 146–53
- economic analysis of law, as alternative to,
146–47
- examination of markets in, 145
- expectancy in, 146
- identity politics, as alternative to, 146–47
- justice and, 146
- overview, 145
- reasonableness in, 145–53
- social organization and, 146
- market process theory
disruption in, 114–17
- entrepreneurism and, 114–15
- equilibrium models and, 114–15
- fruit price example, 115
- indeterminacy in, 112–14, 117
- induced variables (IVs) in, 113
- information fragments and, 118
- overview, 6
- Smith compared, 107
- stages of social development and, 114, 117–18
- transaction costs in, 118
- underlying variables (UVs) in, 113
- markets
capital versus, 3–4

- markets (cont.)
 communication and interpretation, norms and rules of, 75
 education, effect on, 48
Homo economicus and, 101
 “invisible hand” metaphor in, 21–22
 in *lectures on jurisprudence*, 48
 non-judicial citations of Smith regarding, 120–21
 as self-coordinating and self-correcting, 21–22
 unequal accumulation and distribution and, 4
 in *the wealth of nations*, 48
- Marx, Karl, 3–4
- Marxism
 critical legal theory and, 2–3
Homo identicus and, 97–98, 100
- mathematics
 “calculus of choice” (See “calculus of choice”)
 justice not reducible to, 145, 154
- Medema, Stephen, 19, 92, 121
- mercantilism, judicial opinion citations of Smith regarding, 130–33
- Mercuro, Nicholas, 19, 92
- metaphor. See “impartial spectator” metaphor; “invisible hand” metaphor; “man in the mirror” metaphor
- methodological individualism, 95, 98
- Mexico, economic freedom in, 153–54
- military, 46, 53, 151
- Mill, John Stuart, 91
- moral philosophy
 Smith and, 10, 120
 in *the theory of moral sentiments*, 123
- morals, 52–53, 151
- moral sentiments. See shared core values and moral sentiments
- Morris, Robert, 137
- Muller, Jerry Z., 122–23
- mutual sympathy
 common interest and, 147
 critical legal theory versus, 20
Homo identicus, rejection by, 99–100
 “impartial spectator” metaphor and, 37–38
 man as social being and, 29
 “man in the mirror” metaphor and, 27, 29, 56, 66
 natural justice and, 56–57
 progress theory of Smith and, 16
- natural justice
 as essential for well-being, 151
 fair market value in, 54–55
 mutual sympathy and, 56–57
 “ordinary course of business” in, 55
 overview, 16–17, 53–54
- productivity and, 55
 reasonable accommodation in, 55
 reasonable and rational decision-making and, 54–56
 reasonable expectations and, 54
 “reasonable investment-backed expectations” in, 55
 “reasonable person” in, 54–55
 security of person and property, relation to, 54
 self-interest and, 54
 natural law, 15–16
- necessaries
 as acquired right, 49
 government providing, 15, 46
Homo economicus and, 96–97
 shared core values and moral sentiments and, 44, 96–97
 utility and, 44
- neoclassical economics, 90, 140
- networks of exchange. See Exchange networks
- new deal, 141
- newspapers, Smith in, 119–21, 143
- Newton, Isaac, 21, 84, 89
- New Zealand
 economic freedom in, 153–54
 well-being in, 152–53
 “no justice, no peace,” 92
Nollan v. California Coastal Comm’n (1987), 139
- North Korea, lack of well-being in, 152–53
- nuisance, 53, 151
- objectivity
Homo economicus and, 91–92, 101–2
 “impartial spectator” and, 101–2
- objects
 beauty and, 71
 in language, 69
 in triadic theory of interpretation, 70–71
- one-dimensional caricature of Smith, 3, 122, 142–43
- opportunity, 25–26
 “ordinary course of business,” 55
- outer impartial spectator
 anti-social persons and, 61
 in formal realm of social organization, 5
 inner impartial spectator, relation to, 76, 147–48
 justice and, 40–41, 61
- Paganelli, Maria Pia, 122
- Papacy, 57
- paradox of self-interest, 28, 38–39
- Pareto, Vilfredo, 91
- Pareto efficiency, 43
- Parisi, Francesco, 19

- Paterson, William, 128
 Peirce, Charles S.
 abductive logic and, 88–89
 judgment and, 77–79
 reasonableness and, 145–46
 scientific method and, 80
 triadic theory of interpretation, 70–71, 87
 perfect justice, 79–80
 “pet rock,” 94
 pillars. *See* authority; justice; utility
 “point of view.” *See* “impartial spectator”
 metaphor
 “point of viewlessness,” 91–92
 police, 46, 53, 151
 police power, 52
 political economy, 128–29, 131, 133–34
 poor. *See* necessities
 Pope, 57
 positive law, 9, 57
 pragmatism
 judgment and, 77–78
 pragmatic maxim, 29
 preferred referent, selection of, 88
 shared core values and moral sentiments and,
 28–29
 praiseworthiness, 17, 66, 77
 preferences
 cost-benefit analysis and, 94
 price and, 94
 price
 “calculus of choice” and, 94–95
 cost-benefit analysis and, 93–94
 distribution and, 94
 preferences and, 94
 price fixing, judicial opinion citations of Smith
 regarding, 134–35
 production
 division of labor and, 14, 42
 slavery and, 43, 96
 utility and, 57
 productivity
 natural justice and, 55
 self-interest and, 51
 “truck, barter, and exchange” and, 55
 profit
 justice versus, 18
 one-dimensional caricature of Smith and, 3
 “pure profit,” 114
 slavery and, 43, 96
 progress theory of Smith
 common interest and, 105
 cooperation and, 105
 division of labor and, 6
 dynamic nature of, 85–86
 happiness in, 86
 lack of mechanism for progress in, 104
 law in, 11
 market process theory, 6
 mutual sympathy and, 16
 process versus rules, 85–86
 progress advanced by merging of self-interest
 and common interest, 82–83
 scientific method and, 84–85
 self-interest and, 16, 82
 self-interest as force for progress, 22
 self-reflection and, 16
 stages of social development (*See* Stages of social
 development)
 “truck, barter, and exchange” and, 6
 “truck, barter, and exchange” as mechanism of
 progress, 105
 property
 as acquired right, 148
 asset accumulation and, 42
 equal distribution, justice not requiring, 148–49
 ex-ante positions, 148
 ex-post positions, 148
 government arising to protect, 11–13, 41, 61
 judicial opinion citations of Smith regarding,
 120, 126, 142
 law arising to protect, 11–13, 41, 61
 non-judicial citations of Smith regarding, 121
 regulation of, 141
 role of law in describing, 106–7
 security of person and property (*See* Security of
 person and property)
 social organization theory of Smith, importance
 in, 41–42
 takings of, 141
 property law
 Locke on, 33
 reasonable expectations in, 32–33, 54
 protection of public interest
 as essential for well-being, 150–51
 health, safety, welfare, and morals, 52–53, 151
 military, 46, 53, 151
 overview, 52
 police, 46, 53, 151
 police power, 52
 self-interest, regulation of, 52–53, 150–51
 prudence, 59–60
 public interest. *See* protection of public interest
 “pure profit,” 114
 race
 communication and interpretation, norms and
 rules of, 72–74
 discrimination, 149–50

- race (cont.)
 justice and, 95
 law and, 73–74
 socially shared referent, effect of absence of, 72–74
 systemic racism, 74
- Raphael, D.D., 31–32, 122–23
- rationality, 99, 103
- Rawls, John, 31–32
- Reagan, Ronald, 126–27, 133–34, 139, 141
- reasonable accommodation, 55
- reasonable and rational decision-making
 in law, 14, 107
 natural justice and, 54–56
- reasonable expectations
 in contract law, 33–34, 54
 “impartial spectator” metaphor and, 33–34
 justice and, 145
 natural justice and, 54
 in property law, 32–33, 54
- “reasonable investment-backed expectations,” 55
- reasonable market expectations, 19–20
- reasonableness, 145–53
- “reasonable person”
 “impartial spectator” compared, 31–32
 in natural justice, 54–55
- reciprocity. *See* Mutual sympathy
- redistribution, 46, 84, 99–101
- referents
 beauty and, 71–72
 gender, effect of absence of socially shared referent, 73
 of *Homo economicus*, 102
 of *Homo identicus*, 102
 “impartial spectator” as universal referent, 87, 89
 justice, competing referents and, 88
 in language, 69
 law, competing referents in, 88
 necessity for socially shared referents, 74–75
 preferred referent, selection of, 88
 race, effect of absence of socially shared referent, 72–74
 theories as, 87
 in triadic theory of interpretation, 70–71
 United States politics, shared referents in, 74–75
- regulation
 alcohol regulation, judicial opinion citations of Smith regarding, 138
 of property, 141
 of self-interest, 52–53, 150–51
the wealth of nations and, 4
- religion
 discrimination, 149–50
 justice and, 95
- reputation, 49
- resentment, 37
- rhetoric, 8
- risk taking, 114
- Rothschild, Emma, 22–23
- rule of law
 “impartial spectator” and, 32
 importance of, 154
 natural justice (*See* Natural justice)
 promotion of as essential for well-being, 147–51
 protection of public interest (*See* Protection of public interest)
 security of person and property (*See* Security of person and property)
 “truck, barter, and exchange” and, 105
- Russia, economic freedom in, 153–54
- safety, 52–53, 151
- Samuels, Warren J., 51, 121
- Saussure, Ferdinand de, 70–71
- scarcity, 99
- Schelling, T.C., 136
- Schliesser, Eric, 10, 61, 123
- scientific method, 80–81, 84–85, 88–89
- Scotland, civil law in, 8–9, 120
- Scottish Enlightenment, 10, 120–21
- Searight v. Calbraith* (1796), 127–28
- security of person and property
 as essential for well-being, 148–50
 law and, 50–51
 natural justice, relation to, 54
 overview, 49–50
 self-interest and, 50–51
 unequal accumulation and distribution and, 51–52
- self-command, 45, 59–60, 66–67
- self-interest
 as anti-elitist, 1
 “butcher, brewer, and baker” example, 36, 108
 community, in context of, 27–28
 conflation of self-interest and common interest by *Homo economicus*, 95
 in conjunction with common interest, 1–2, 4, 79, 124, 143
 cooperation as byproduct of, 67–68
 as force for progress, 22
Homo economicus and, 92
 ideal justice advanced by merging of self-interest and common interest, 79, 147–48
 “impartial spectator” as mediating between self-interest and common interest, 36–37, 59, 66, 103
 innovation, relation to, 108
 “invisible hand” metaphor and, 23–26, 35–36, 66

- judicial opinion citations of Smith regarding, 120, 125–26
- justice as mediating between self-interest and common interest, 61
- language compared, 83
- limitation by common interest, 38
- market expansion and, 83
- misconceptions regarding Smith and, 1–2
- natural justice and, 54
- one-dimensional caricature of Smith and, 143
- paradox of self-interest, 28, 38–39
- productivity and, 51
- progress advanced by merging of self-interest and common interest, 82–83
- progress theory of Smith and, 16, 82
- protection of public interest, regulation in furtherance of, 52–53
- regulation of, 52–53, 150–51
- security of person and property and, 50–51
- selfishness distinguished, 27
- in *the theory of moral sentiments*, 27–28
- “truck, barter, and exchange” and, 16, 83
- unintended consequences of, 22–23
- utility and, 57
- voluntary adjustment of, 37–38
- wealth accumulation contrasted, 26
- in *the wealth of nations*, 23–25
- selfishness
 - problems of, 147
 - self-interest distinguished, 27
- self-reflection, 16
- sentiment of common interest, 83, 86
- shared core values and moral sentiments
 - common interest and, 147
 - criminal law and, 43–44
 - education and, 44
 - efficiency versus, 43, 96
 - Homo economicus* and, 96
 - “impartial spectator” and, 31, 35
 - “impartial spectator” metaphor and, 75–76
 - individual behavior adjusted to conform to, 66–67
 - inner impartial spectator and, 59–60
 - justice and, 37, 152
 - “man in the mirror” metaphor and, 28–29
 - necessaries and, 44, 96–97
 - pragmatism and, 28–29
 - self-command and, 66–67
 - slavery and, 43, 96
 - in *the theory of moral sentiments*, 28–29
 - timeless nature of, 80
- Sherman act, judicial opinion citations of Smith, 134–35
- shunning, 61
- signifiers
 - beauty and, 71
 - in language, 69
 - in triadic theory of interpretation, 70–71
- slaughter-house cases* (1872), 129–30, 140–41
- slavery
 - Homo economicus* and, 96
 - production and, 43, 96
 - profit and, 43, 96
 - shared core values and moral sentiments and, 43, 96
 - utility and, 43
- smart phones, 111
- Smedberg v. Bentley* (C.C.D. N.J. 1874), 128–29
- Smith, Adam. *See specific topic*
- Smith, Stan, 136
- social construction of identity, 100
- social contract
 - authority versus, 17–18, 44–45
 - rejection by Smith, 17–18, 40, 44–45
 - utility versus, 17–18, 42–43
- social I.Q., 59
- “social justice,” 100–1, 148
- social organization theory of Smith
 - common interest, centrality of, 3
 - formal realm of social organization (*See* formal realm of social organization)
 - informal realm of social organization (*See* informal realm of social organization)
 - inner and outer realms in, 5
- jurisprudence theory of Smith, integration with, 143–44
- law in, 11
- market jurisprudence and, 146
- property, importance of, 41–42
- scientific method and, 84–85
- stages of social development (*See* Stages of social development)
- social welfare. *See* Necessaries
- South America, economic freedom in, 153–54
- Sovereign. *See* Government
- spectator. *See* “Impartial spectator” metaphor
- spillover effects, 22–23, 53, 151
- stages of social development
 - advancement through, 83
 - commerce stage, 41–42, 104–5
 - evolution of, 105
 - farming stage, 41–42, 104–5
 - herding stage, 41–42, 104–5
 - hunting-gathering stage, 18–19, 41–42, 104–5
 - informal and formal realms of social organization, 18–19
 - in *lectures on jurisprudence*, 41, 104–5
 - market process theory and, 114, 117–18

- stages of social development (cont.)
 in *the wealth of nations*, 41, 104–5
Standard Brands, Inc. v. Smidler (2d Cir. 1945),
 131–33
 status quo, 84
 subjectivity of law, *Homo identicus* and, 99–100
 sympathy, 37. *See also* Mutual sympathy
 systemic racism, 74
- takings of property, 141
United States v. Taubman (2d Cir. 2002),
 134–35
- taxation, judicial opinion citations of Smith
 regarding, 126–29
- Thatcher, Margaret, 127
- the theory of moral sentiments* (Smith)
 “Adam Smith problem” and, 122–24
 beauty in, 71
 ethics in, 123
 history in, 79–80
 “impartial spectator” metaphor in, 21 (*See also*
 “Impartial spectator” metaphor)
 influence of, 120
 “invisible hand” metaphor in, 21, 23–25, 121 (*See also*
 “Invisible hand” metaphor)
 judicial opinion citations of Smith in, 122, 126,
 138
 jurisprudence in, 10–11
 justice and, 5–6
 “man in the mirror” metaphor in, 21 (*See also*
 “Man in the mirror” metaphor)
 moral philosophy in, 123
 overview, 5
 relationship among metaphors, 18, 35
 self-interest in, 27–28
 self-interest in conjunction with common
 interest in, 122–24
 shared core values and moral sentiments in,
 28–29
the wealth of nations, failure to read with as
 integrated system of thought, 122–24
 writing of, 8
- Tocqueville, Alexis de, 137
- Tort law, judicial opinion citations of Smith
 regarding, 126
- trademark law, judicial opinion citations of Smith
 regarding, 132–33
- transaction costs in market process theory, 118
- trespass, 53, 151
- triadic theory of interpretation, 70–71,
 87
- “tribunal of our own conscience.” *See* “impartial
 spectator” metaphor
- “trinkets of frivolous utility,” 26–27, 86
- “truck, barter, and exchange”
 communication and interpretation, norms and
 rules of, 151–52
 cooperation and, 67–68
 division of labor and, 118, 152
 judgment and, 77
 law and, 14
 market expansion and, 6
 as mechanism of progress, 105
 productivity and, 55
 in progress theory of Smith, 6
 promotion of as essential for well-being, 147,
 151–52
 rule of law and, 105
 self-interest and, 16, 83
 twenty-first amendment, 138
- Uber, 110–11
- underlying variables (UVs), 113
- unequal accumulation and distribution
 commerce as remedy for, 34
 division of labor and, 14
 “impartial spectator,” adjustments by, 34–35
 “invisible hand” metaphor and, 24–25
 law arising in response to, 12–13
 markets and, 4
 opportunity versus remedying inequality, 25–26
 security of person and property and, 51–52
- United Kingdom
 economic freedom in, 153–54
 well-being in, 152–53
- United States. *See also specific topic*
 economic freedom in, 153–54
 well-being in, 152–53
- utilitarianism
 in judicial opinion citations of Smith, 125–26
 laissez-faire capitalism and, 131
 political economy and, 131
 Smith not deemed utilitarian, 31
- utility
 authority, interplay with, 42–43, 45
 communication and interpretation, norms and
 rules of, 67–68
 criminal law and, 43–44
 education and, 44
 “invisible hand” metaphor, corresponding with,
 40
 justice as mediating between authority and
 utility, 18
 necessaries and, 44
 overview, 5
 production and, 57
 relationship among pillars, 18, 57, 61–62
 self-interest and, 57

- slavery and, 43
- social contract versus, 17–18, 42–43
- Veazie Bank v. Fenno* (1869), 128–29
- “veil of ignorance,” 6
- Venezuela, lack of well-being in, 152–53
- wealth accumulation
 - division of labor and, 14
 - Homo economicus* and, 101
 - self-interest contrasted, 26
- wealth formation
 - exchange networks and, 109
 - innovation and, 109–10
- wealth maximization
 - economic analysis of law and, 92
 - Homo economicus* and, 92, 95
 - judicial opinion citations of Smith regarding, 142
 - justice distinguished, 4
 - Smith on, 3
- the wealth of nations* (Smith)
 - “Adam Smith problem” and, 122–24
 - commerce, “invisible hand” as promoting, 36
 - education, government providing, 47–48
 - history in, 79–80
 - “invisible hand” metaphor in, 23–25
 - judicial opinion citations of Smith in, 7, 120, 122, 126–28, 135–38
 - jurisprudence in, 10–11
 - Magna Carta compared, 127
 - markets in, 48
 - necessaries, government providing, 46
 - regulation and, 4
 - self-interest in, 23–25
 - stages of social development in, 41, 104–5
 - the theory of moral sentiments*, failure to read
 - with as integrated system of thought, 122–24
 - time of writing, 120
 - “truck, barter, and exchange” in, 6
 - writing of, 8
- welfare, 52–53, 151
- welfare economics, 140
- well-being
 - common interest and, 147–48
 - comparison of countries, 152–53
 - natural justice and, 151
 - protection of public interest and, 150–51
 - rule of law and, 147–51
 - security of person and property and, 148–50
 - “truck, barter, and exchange” and, 147, 151–52
- Werhane, Patricia H., 33–34, 56, 122–23
- West, Edwin G., 122–23
- Western Europe, well-being in, 152–53
- White privilege, 98–99
- Wilson, James, 137
- wireless communication, 111–12
- Zimbabwe, lack of well-being in, 152–53
- Zoning, 151