# Advanced Capitalism and Advanced Democracy: Of Modules, Marshmallows, and (maybe) Monarchs

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*This article is a modest response to George Priest's lament that academics should pay more attention to capitalism as an institution. Fundamental to contract and property, which George described as forming the bedrock of capitalism, is the counterintuitive ability of participants to exercise a modicum of self-restraint, in what Tocqueville called "self-interest rightly understood" (SIRU). The article tracks permutations of the SIRU puzzle in various guises, including the famous Marshmallow Test of young children, as well as in other theoretical work on property. The upshot is that SIRU is explicable in close-knit groups, but much less so in the stranger relationships of advanced, large-scale capitalism. Moreover, the SIRU mystery is replicated in the kinds of advanced democratic institutions that arguably enable large-scale capitalism. Hence the development of both advanced capitalism and advanced democracy may owe their origins to accidental historical circumstances.*

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## Introduction

When I learned that there was to be a conference celebrating the work of George Priest, I wanted to sign up immediately. I thought that I could most usefully contribute to the panel on "Capitalism," given my long ruminations on the subject of property. I did want to know what George meant by capitalism, and that led me to a brief article that he wrote in the journal *Society* in 2012,[1] discussing what he thought was the odd inattention in American law schools to capitalism as an institution. The article was somewhat elusive on the meaning of capitalism until the later pages. But there, in a discussion of the work of Ronald Coase, it identified market transactions as "the heart of capitalism," in contrast to socialism and governmental interventions more generally.[2]

George's article also identified property and contract as the main building blocks of capitalism (with tort and criminal law to protect them).[3] This gave me an opportunity to muse once again on a puzzle that I have run across many times in my own work on property: why do people recognize the property claims of others, and why do owners think that others will recognize their claims? A similar issue of recognition on the one side and confidence on the other appears in many if not most contractual relations, where each party might be vulnerable to the self-seeking of the other. Basically, each party must behave with restraint—a modicum of self-sacrifice—and the other party has to believe that she will. We know this works, at least sometimes and in some places, and with great benefits too. But *why* does it work?

The question why it works is not a new one. Tocqueville famously discussed how the Americans of the 1830s followed a widespread ethos of accepting small sacrifices in the expectation of larger gains, which they described to him as "self-interest rightly understood."[4] But Tocqueville did not really dig into that notion of "rightly understood"—where the expectation of gain came from and why even a small self-sacrifice would seem to be self-interested rather than foolish. I designate this as the SIRU puzzle—SIRU for self-interest rightly understood. And as Tocqueville implied, there is no necessary logic to SIRU; as he said, Europeans of his time were much more likely to "want to save everything, and often we lose it all."[5] But "losing it all" would mean foregoing the give and take of markets, with all their mutual advantages.

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1. George L. Priest, *The Curious Treatment of Capitalism in Legal Education*, 49 SOCIETY 216 (2012).
2. *Id.* at 220.
3. *Id.* at 217, 222.
4. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 129-32 (Phillipa Bradley ed., 1945).
5. *Id.* at 131.

SIRU, then, is a puzzle, and a solution is not to be taken for granted. The SIRU puzzle is implicated down to the scale of individual dealings in those on-the ground essentials of capitalism, property and contract. But the puzzle becomes even more salient in the wider-scale complex market relations of modern commerce; far-flung impersonal markets can only function in an environment in which most parties avoid the temptation to rob and cheat one another, and where participants can assume that other parties follow SIRU in the same way that they themselves do.

The centrality of the SIRU puzzle in complex market transactions became all the clearer to me when by coincidence, at about the same time as I read George's 2012 article, I also read a new article by Naomi Lamoreaux and John Joseph Wallis (hereinafter L&W), entitled Democracy, Capitalism, and Equality: The Importance of Impersonal Rules.[6] To my great interest, I saw that their article took up George's challenge of considering capitalism as an institution, and in particular L&W focus on capitalism on a large and complex scale, to which they refer as "advanced capitalism." At the outset, they echo George's comment on the general inattention to capitalism as an institution, with no agreed-upon definition,[7] but their own description of capitalism is not dissimilar to George's cryptic comment that capitalism is a market economy rather than a governmentally run one.[8]

Nevertheless, government is important in L&W's approach: their thesis is that advanced capitalism depends on what they call "advanced democracy," in which democratic political actors govern through even-handed rules and eschew favoritism. It occurred to me, however, that L&W's advanced democracy poses another version of the SIRU problem. Why should politicians hold themselves to a level playing field when favoritism might promise rich payoffs?

The SIRU puzzle thus runs the scale: from small-scale property and contract, through the complex commercial relations of advanced capitalism, and if L&W are right, to the advanced democracy on which advanced capitalism depends.

In the remainder of this essay, I will explore the pervasiveness of the SIRU puzzle within market activities, beginning with two scholarly topics that touch on the basics, contract and property. Part I takes up contract, but in a somewhat idiosyncratic form: that is, the Marshmallow Test, the set of Stanford psychology studies of children who were promised a reward of marshmallows for exercising self-control. This is not strictly speaking a contractual matter, although from the perspective of the very youthful

6. NAOMI LAMOREAUX AND JOHN JOSEPH WALLIS, *Democracy, Capitalism and Equality: The Importance of Impersonal Rules* (NBER, Working Paper No. w32930, 2024), https://ssrn.com/abstract=4950581 [https://perma.cc/75JB-4B3Z] [hereinafter, L&W].

7. *See id.* at 4-5 (arguing that the concept of democracy has received much more attention than capitalism).

8. *See id.* at 4-5 (describing societies as more capitalist the more freely capital, labor, and property may be invested by entrepreneurs, workers, and owners respectively).

experimental subjects, it appeared to be, however much the experimenters fiddled with the circumstances. Next, Part II turns to property, and in particular the modular theory of property as elaborated by Henry Smith and Thomas Merrill, where it can be assumed that non-owners practice self-control with respect to the things that belong to others. Those two topics yield some ideas about the necessary conditions for solving the SIRU puzzle at the basic levels.

In Part III, I will turn to the meta scale—that is, to L&W's theories on advanced capitalism as supported by advanced democracy, in order to explore further whether state institutions are capable of overcoming the SIRU problem presented by large-scale market relations. Of particular interest is L&W's historical argument on the way that at least some advanced democracies have arrived at the impersonal rules that enable advanced capitalism. L&W ably support their argument with an extensive historical background, primarily from the nineteenth century experiences of the United States, England, and Germany.

There is, however, an alternative theory of these evolutionary movements dating from the Enlightenment era—one that looks for capitalist origins not in democracies at least initially, but rather in the so-called absolutist rulers of that time. This theory was never so thoroughly developed as L&W's, but it gives an interesting contrast when one plays it out with an admittedly rather fanciful speculation on the evolution of the absolutist states to a more democratic order.

That Enlightenment theory resembles L&W's in giving priority to politics in explaining the evolution of complex modern capitalism. But in the final section, I will briefly explore still another theory with Enlightenment roots, one that turns the explanation around. This theory asserts that the practices basic to capitalism come first and might enable democracies to evolve and in turn enable advanced capitalism. I will also consider, however, whether this sort of evolution extends beyond small-scale market institutions, or instead might falter at the scale of advanced capitalism.

But first, for what must be one of the most famous examinations of SIRU at the individual level, I turn to the Marshmallow Test.

## I. The Marshmallow Test as a Miniature Mystery of Contract

Just in case any readers have been hiding away in a cave recently, here is an explanation of the Marshmallow Test. The name refers to experiments beginning in the late 1960s and early 1970s led by Stanford psychologist Walter Mischel.[9] The idea was to test small children's capacity for

9. *See* Dee Gill, *New Study Disavows Marshmallow Test's Predictive Powers*, UCLA ANDERSON REV. (Feb. 24, 2021), https://anderson-review.ucla.edu/new-study-disavows-marshmallow-tests-predictive-powers [https://perma.cc/2M6U-XT6N] (describing original experiments and later follow-ups) [hereinafter, Gill, *New Study*].

delayed gratification—their ability to withstand current temptation for the sake of a later payoff. There were several variations in the test of the four- and five-year-old children, but the basic test was recognizably contractual, of the form "if you do X I will grant you Y." It involved leaving the child with a marshmallow (or a pretzel, if preferred), telling him or her that s/he could have the marshmallow at any time, but that if s/he waited 15 minutes s/he could have two marshmallows. Michel's team later conducted follow-up tests that correlated children's ability to delay gratification to their relative success in other areas: better grades, higher SAT scores, better health, possibly better behavior, and so forth.[10] The original experimenters had a variety of questions in mind, for example how children could distract themselves or how they would respond to different kinds of exterior distractions, but the marshmallow test has now entered popular culture as a metaphor to show that self-control is a matter of character and intelligence.[11] At what might have been the experiment's extreme extension, a marshmallow test for cuttlefish found that the creatures that could delay gratification longer showed superior cognitive abilities.[12]

But other researchers' later studies cast some doubts on this smug interpretation, and even the original Michel team repudiated it in a much later longitudinal study of the original kids, by then in their forties.[13] But the phenomenon of *why* these kids could delay gratification is still a matter of considerable interest, as it was to Michel. Other researchers associated the ability—or perhaps better said, the willingness—to delay gratification to other factors such as social class, cultural differences or specific experiences affecting the children's expectations about rewards.[14] Indeed, some tests illustrated one reason why a child would flunk the marshmallow test: in one type of experimental variation, the tester played a role that showed that she was unreliable.[15] She might say that she would come back in fifteen minutes with another marshmallow, but prior to this part of the test, she had already failed to show up with some promised toys. Why, then, not eat

10. *Id.*

11. *Id.*

12. Sara Tabin, *Cuttlefish Can Pass The Famed Marshmallow Test, Study Finds*, FORBES MAGAZINE (March 9, 2021) (reporting on experiment by Royal Society), https://www.forbes.com/sites/saratabin/2021/03/09/cuttlefish-can-pass-the-famed-marshmallow-test-study-finds/, [https://perma.cc/6NDY-53FG].

13. Gill, *New Study*, *supra* note 9.

14. *See* Tyler W. Watts, Greg J. Duncan & Haonan Quan, *Revisiting the Marshmallow Test: A Conceptual Replication Investigating Links Between Early Delay of Gratification and Later Outcomes*, 29 PSYCH. SCI. 1159 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6050075 [https://perma.cc/39Q7-U6KW] (critiquing study finding correlation); *see also* Jessica McCrory Calarco, *Why Rich Kids Are So Good at the Marshmallow Test*, THE ATLANTIC (June 1, 2018) https://www.theatlantic.com/family/archive/2018/06/marshmallow-test/561779 [https://perma.cc/39Q7-U6KW] (commenting on Watts et al investigation).

15. *See* Celeste Kidd, Holly Palmeri, and Richard N. Aslin, *Rational Snacking: Young Children's Decision-Making on the Marshmallow Task Is Moderated by Beliefs About Environmental Reliability*, 126 COGNITION 109 (2013) (describing much shorter waiting time for children where experimenter had shown unreliability).

the marshmallow right now? Even more pointedly, researcher Celeste Kidd, a critic of the Marshmallow Test experiments, told of seeing a child in a family emergency shelter who was unfazed when another kid grabbed a lollipop out of her hand. Kidd realized that this child was accustomed to surroundings in which other kids often simply grabbed anything they could. A child like that was entirely rational in thinking that she had better eat that marshmallow in a hurry.[16] Going beyond that, maybe she had better grab a marshmallow from her little brother, before her big brother does.

While these follow-up studies suggest a number of factors influencing the willingness to delay gratification, one stands out: the expectation that a reward really is likely to be forthcoming or at least has a chance. The unreliable tester undermines that expectation, and so does the grabby older brother. Over a longer run, so does the person who gives every sign of reliability but in fact is not; that kind of huckster can poison the reservoir of trust that others might have had otherwise.[17] The subject who has good reason to distrust the counterparty would be a fool to delay gratification. But as we all know from the famous Prisoner's Dilemma (PD), if the bargaining party is a rational actor, the counterparty can *never* be trusted when it comes to deferring a present good in the expectation of a promised greater future satisfaction. For rational actors, untrustworthiness is common knowledge; each party calculates her immediate self-interest in defecting and ascribes the same calculation to the other. And so, the contract never gets made, and for that matter, the field never gets plowed, and the wheat never gets sown.

But of course people do make contracts, just as they plow their fields—or repaint their rental properties for that matter; those are all actions that require postponing present pleasures for future apparent goods. Why do they? How did they get beyond the original rational distrust? At the mini-scale of individual deals, the marshmallow literature suggests that the answer lies in surrounding circumstances that induce trust. Then the question becomes, how to create a culture of trust? For individuals, there are minimal measures for fostering self-denial for the sake of future cooperative gains: keep your promises and don't take other people's stuff; encourage others to do the same; and register disapproval of people who fail those minimal tests. In other words, help to create a trustworthy culture. Alas, that prescription begs the question who will start, because it is yet another example of self-denial for a better future.

16. Shankar Vedantam, *When to Eat the Marshmallow*, HIDDEN BRAIN (June 19, 2023), https://hiddenbrain.org/podcast/when-to-eat-the-marshmallow [https://perma.cc/8DBV-ZEMH] (interviewing Celeste Kidd on the Marshmallow Test).

17. Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 BOSTON U. L. REV. 531 (1994) (describing variations on deception); George Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (describing how deceptive practices undermine trust in markets).

But then, one answer might be, so what? Readers might well think that all this attention to the SIRU puzzle is no more than academic theorizing, since however mysterious self-denial-for-larger-gains might be in theory, we are all aware that in practice, many social groups do exist and do succeed in maintaining a culture of trust that makes SIRU entirely plausible. Robert Ellickson describes how "close-knit groups" provide a context in which PD problems recede, supporting robust respect for property and contractual dealings.[18] We may not know how such groups originate,[19] but we do know that when people know their neighbors or co-workers and are in many repeated contacts with them, they generally may be expected to follow norms of fair dealing and proportionate contribution among themselves without much fuss, if for no other reason than to maintain standing within the group. The group can control its members, perhaps through the implicit threat of gossip to begin with and then through increasingly pointed retaliation.[20]

On the other hand, social norm-following does much less to explain behavior where the participants are not socially connected. The Marshmallow Test is ambiguous; adults presumably are supposed to be trustworthy, but the much-put-upon children did not know the experimenters. What makes them delay gratification, if they do? Or if they don't, what *would* make them do so?

It is important to know the answer to that question, because while the members of close-knit groups may have well-understood property claims and many contractual relationships among themselves, those relationships are not going to add up to capitalism—or at least not what L&W call advanced capitalism. The markets are too small. For advanced capitalism, with its possibility of big, fluid markets, strangers must be able to trust that their property will be respected and their agreements fulfilled, even in the absence of close social ties.[21]

## II. Modular Property and the Non-Owner's Role

Insofar as they are favorable to property, many (more or less) philosophical discussions focus on the benefits that the institution of property confers on owners, large and small. Thus property is variously said to

18. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167-83 (1991).

19. Robert Axelrod, The Evolution of Cooperation (1984), argued that cooperative behavior can begin and flourish where the parties play a game of "tit-for-tat," but others have pointed to weaknesses in this strategy. *See infra* text at notes 38-40.

20. ELLICKSON, ORDER WITHOUT LAW, *supra* note 18, at 207-219.

21. James Krier, who adheres to the hawk/dove explanation of property, thinks it does not work at the scale of modern capitalist markets. *See* James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139, 155-57 (2009).

support an owner's independence;[22] personal self-development;[23] autonomy;[24] and flourishing in general.[25] On the other hand, since the beginning of the twenty-first century, property scholars Henry Smith and Thomas Merrill have developed an influential line of analysis that departs from the focus on owners, and that at least implicitly brings out the critical role of *non-owners* in property as an institution. Their views have unfolded in a series of articles beginning in 2000 with the much-cited *Optimal Standardization in Property: the* Numerus Clausus *Principle*.[26] In that article they argued that property law divides property into a set of broad but distinct categories, including "fee simple," and various forms of leases and easements, along with several other categories. Ownership arrangements may mix and match items among these categories, so that, for example, a shopping center is owned in fee simple by one entity, subject to shop owners' leases and some special easements around the loading docks.

According to Smith and Merrill, the function of these legal categories is to diminish the cognitive load for all concerned, but particularly for third parties who may have an interest in the property later. If the properties were to carry more finely tuned arrangements into the future, third parties, e.g. potential future purchasers or lessees, would be saddled with impossible search costs in the attempt to figure out who was entitled to what.[27]

In drawing attention to third parties, Merrill and Smith showed that the basic concern of the Numerus Clausus is to make property comprehensible to the person who is not only a non-owner, but also a stranger to the situation. Their attention to the non-owner unfolded in various guises in subsequent articles. In *What Happened to Property in Law and Economics?*, Merrill and Smith chastised law and economics scholars for treating property relations as if they were contractual, whereas, the authors pointed out, property entitlements are *in rem*, good against the world, including total strangers, and not just valid against others who are parties to particularized agreements.[28]

Smith meanwhile extended this work in a series of articles describing the architecture of property law as "modular." On this theory, property

22. Carol M. Rose, *Property as the Keystone Right?* 71 NOTRE DAME L. REV. 329, 345-48 (1996) (describing older and modern association of property with independence).

23. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (arguing that property is necessary for self-development).

24. HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY (2021) (arguing that autonomy is a central concern of property).

25. Gregory Alexander, *Property, Dignity, and Human Flourishing*, 104 CORNELL L. REV. 991 (2019)

26. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000).

27. *Id.* at 29-34; *see also* Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1160-61 (2003) (elaborating on legibility of property to third parties).

28. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*, 111 YALE L.J. 357, 358-60 (2001).

consists of "things" in which activities and uses are relatively distinct from those of other things.[29] Within the bounds of her property, the owner can determine the disposition of assets and income streams, and she can make exchanges with other owners, subject to the standard forms of property law. All this occurs without the interference of outsiders. Indeed, outsiders need not even know anything about who owns any particular module of property, or what occurs within it. Smith uses the classic example given by property philosopher James Penner, describing someone who strolls through a parking lot and sees the automobiles there; the stroller need know nothing about the autos or their owners to understand that the vehicles do not belong to her, and her only obligation is to leave them alone.[30] The anonymous owner, on the other hand, can soup up the chassis, change the ignition system, alter the upholstery and in general decide for herself how to manage the auto she owns and how to alter it, enhance it, and use it, or alternatively lend or sell it.

In this model of property, however, the non-owning outsiders play a critical role. To return to the stroller in the parking lot: the non-owner does not interfere. In a properly functioning property regime, she walks on past the Lamborghini without keying the paint or hot-wiring the engine and driving the car off for herself. In short, she recognizes and respects the claims of the unknown owner. Moreover, on the other side of the equation, in a well-functioning property regime, the owner can rely on the unknown non-owner's recognition and respect, in some cases even to the point of leaving the keys in the ignition. In short, the entire system of unmolested property modules relies on non-owners (or as Smith calls them, duty holders) to behave in a manner that is at least modestly self-denying.[31]

But the major question is why any of these non-owning actors are self-denying at all. In the case of property, Rousseau thought it was a puzzle why anyone would be persuaded by the first claim by someone else to own something—and he thought it not a good idea at that, given what he saw as the disastrous evolution of property.[32] Even David Hume, who treated property as a very good idea, thought that recognizing the claims of others is not natural to human beings, even though, fortunately, they do recognize such claims a great deal of the time.[33] This widespread pattern of recognition is fairly easy to comprehend in the context of communities or groups

29. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693-94, 1700-1703 (2012) [hereinafter, Smith, *Law of Things*].

30. *Id.* at 1703 n.47 (citing J.E. PENNER, THE IDEA OF PROPERTY IN LAW 75-76 (1997)); *see also* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1746-47 (2007) (same).

31. Smith, *Law of Things*, *supra* note 29, at 1718.

32. JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN AND THE FOUNDATIONS OF INEQUALITY AMONG MEN: THE SECOND DISCOURSE 234-35 (trans G.D.H. Cole, 1950 [1750]).

33. DAVID HUME, OF THE ORIGIN OF JUSTICE AND PROPERTY, IN A TREATISE OF HUMAN NATURE 329-38 (1739) (describing respect for possessions of others as derived not from nature but from convention of justice).

whose members are aware of one another and can monitor one another's behavior. In such groups, as with contractual agreements, norm-following can be explained by the wish to keep in the good graces and esteem of the group,[34] as well as the group's ability to observe and admonish nonconforming behavior.[35] Where such norms of recognition are most problematic, however, is in the precise context where the in-rem/modular theory of property is most salient: in stranger relationships. What makes strangers, unknown persons, respect claims by others when they do not know anything about them or have reason to care what they think?

Varying explanations have been given for this phenomenon, often based on something like reciprocal deference, or in some cases the superior position of the first mover in a hawk/dove game.[36] But while these explanations might carry some weight within communities, none are very convincing as applied to relations among strangers. Elementary game theory gives some examples. On the property front, it is hard to see how the stroller in the parking lot expects any benefit from reciprocal deference from the unknown auto owner, especially, one might add, if the auto really is a Lamborghini and the stroller is homeless. As to the hawk/dove description of property, the hawk's physical possession does not give him much in the way of *property* if he has to guard constantly against opportunistic doves. He could sit in the parked car with a weapon to ward off thieving strollers, but the whole point of property is to go beyond simple physical possession, so that one does not have to waste time and effort guarding what one has, and instead one can invest labor and funds in one's things, knowing that one can take the reward.[37]

These property issues resemble those that can arise in contract, at least in dealings among strangers. The "Stag Hunt" or assurance game illustrates the advantages of contract over going it alone—agreeing to hunt the big stag together instead of hunting two little hares individually—but someone has to make the first move of figuring out the situation and making a proposition. Moreover, assurance games can easily slide into the dreaded Prisoners' Dilemma, as with the hunter who makes off with the whole carcass once the stag is slain. Neither hunter would be likely to do that to a fellow clansman or villager, but the problem is serious as between strangers. A well-known thesis is that PD problems may be solved by a

34. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355 (1997); ERIC A. POSNER, LAW AND SOCIAL NORMS 15-27 (2000); Philip Pettit, Virtus Normativa*: Rational Choice Perspectives*, 100 ETHICS 725 (1990).

35. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 42-45, 73-75 (1990) [hereinafter, OSTROM, GOVERNING THE COMMONS].

36. CAROL M. ROSE, PSYCHOLOGIES OF PROPERTY, IN PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 272, 283-88 (James Penner & Henry E. Smith eds., 2013) (discussing various explanations of respect for claims).

37. *Id.* at 282-83, 285-86.

strategy of tit-for-tat,[38] but tit-for-tat presents an even sharper question about the risks of making the first move. At the outset, when players who are unknown to each other imagine future moves, they run up against the roll-back problem: each considers the payoff of a non-cooperative last move but realizes that the counterparty is likely to be thinking of it too. Fear of that non-cooperative last move rolls back to poison even a first cooperative move by either party. Self-interest would seem to induce both players to back off, or worse, to grab and run, leaving SIRU in the dust.[39]

But of course people do make deals with strangers all the time—consider buying an on-line airplane ticket—just as they routinely recognize one another's property, including the property of unknown others. Their recognition allows the unknown owner to carry out her various plans and projects without molestation in her Smithean property module. Given the non-owner's lopsided payoffs from grabbing and running, however, forbearance is still mysterious—and of course forbearance does not always ensue. Sometimes the mystery goes unsolved, and thugs, thieves, and fraudsters do take advantage of others.

What happens, then, to make the mystery work out among strangers? The usual answer to this is some version of Leviathan, that is, the state.[40] Leviathan comes to the rescue in the form of law,[41] and makes people keep their hands off the property of others and honor their promises. Leviathan probably does not make the experimenter come back with a second marshmallow, since the setting is an experiment with a child who is too young to contract; but in a contract among adults for a marshmallow (or the proverbial peppercorn), yes, Leviathan would enforce the deal. Because it does so, the promissee can trust that if she fulfils the condition of waiting, she can confidently await a larger gratification. On this story, then, the state, Leviathan, takes the place of social sanctions as a third-party enforcer of contract and property norms, and thus creates the context where SIRU makes sense even among strangers.

Needless to say, the Leviathan role is especially salient for what Lamoreaux and Wallis call "advanced capitalism," with its complex trades

38. *See* AXELROD, supra note 19 (arguing that Tit-for-Tat can solve PD problems). *But see* Jack Hirshleifer and Juan Carlos Martinez Coll, *What Strategies Can Support the Evolutionary Emergence of Cooperation?*, 32 J. CONFLICT RESOLUTION 367 (1988) (arguing that other strategies dominate in different game scenarios).

39. *See* DOUGLAS G. BAIRD, ROBERT H. GERTNER, RANDAL C. PICKER, GAME THEORY AND THE LAW 54-55 (1994) (giving example where lender's reasoning anticipates borrower's future uncooperative move, undermining loan at outset).

40. Thomas Hobbes (1651) used the memorable term "Leviathan" to designate an all-powerful sovereign state that can rescue human beings from a brutal war of all against all, and since then, other authors have borrowed his metaphor in their own works on the powers and characteristics of government. *See, e.g.*, ANNE M. KORNHAUSER, DEBATING THE AMERICAN STATE: LIBERAL ANXIETIES AND THE NEW LEVIATHAN, 1930-70 (2015) (exploring various intellectuals' concerns about the strengths and limitations of the then-new administrative state).

41. JEREMY BENTHAM, THEORY OF LEGISLATION 109-114 (Richard Hildreth trans., 2d ed., 1871).

and transactions that are replete with interactions among complete strangers—involving not just the marshmallow or the Smithean property module, but the reservation of that airline ticket over the internet. But L&W's version of Leviathan has a special twist: if must be what they call "advanced democracy." The next section give a brief description of the route that L&W take to that conclusion.

## III. Advanced Capitalism, Advanced Democracy.

In L&W's categories of market-based capitalist societies, the degree to which capitalism is "advanced" depends on the degree to which the society has curbed rent-seeking by privileged groups and instead operates under impersonal rules. Such rules permit market players to use and trade their assets widely and freely, and to form associations with different sizes and goals, all without biased governmental intrusion and limited only by the boundaries that govern all the players equally. By comparison, in less advanced capitalist societies, market transactions exist—and hence so do some efficient resource allocations—but they run up against the constraints that come with special privileges for ruling groups.[42]

From here it is just a step to L&W's main argument: that capitalism coalesces with democracy, but only in the cases of *advanced* capitalism and *advanced* democracy—that is, societies in which democratic institutions come to be dominated by a small number of durable consolidated parties that tolerate one another. This party structure, they argue, can overcome the factional coalitions that reserve special privileges to identity groups, and instead can institute impersonal rules in which markets can flourish. Autocratic societies may have some features of both democracy and capitalism, but rulers have to curry favor with rent-seeking factions, a pattern that may become even more unruly with the introduction of democratic political practices.[43] All this jostling for favor and position may not crush market activity, but it stifles its progress toward advanced capitalism. In this vein, a reader might imagine instances of underground capitalism in a sclerotic economy, something like black markets in the old Soviet Union.

Thus L&W's various grades of capitalism, whether advanced or not, would also appear to leave room for other property and market relations based on personal connections and extralegal networks, from the informal economy described by Hernando DeSoto[44] to the self-contained diamond trade that Lisa Bernstein explored.[45] But advanced capitalism requires a

42. *Id.* at 4-6, 10-13.

43. *Id.* at 7-8, 10-15, 35.

44. HERNANDO DESOTO, THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM (1989).

45. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUDS. 115 (1992); Barak D. Richman, *How Communities*

democratic order in which governing bodies can produce even-handed rules for all the players.

By now, of course, it may occur to readers that even this version of the Leviathan solution only kicks the SIRU problem upstairs to a meta level: if ground-level transactions are dogged by concerns for self-seeking and cheating counterparties, how can second-level lawmakers be different? Why do these people work and cooperate to create legal regimes for everyone else?[46] L&W's theory suggests that indeed, democratic lawmakers generally are *not* different from others, even if their close social relations can sometimes solve the SIRU problem on a limited scale. It is only a slight exaggeration to say that in L&W's description, most Leviathans, even those with democratic elements, consist of clubby cliques that only get to rule by jockeying among themselves for rent-seeking advantages and identity-based payoffs.

That kind of governance won't cut the mustard for L&W's *advanced* capitalism. On their theory, only a particular kind of Leviathan allows self-denial to ripen into advanced capitalism, with its generally recognized property and far-reaching trading relations among anonymous counterparties. *Advanced* capitalism, to repeat, occurs only in the sort of state that they identify as *advanced* democracy, whose politicians pass general rules.[47] If the rules of the economy apply unevenly, economic players will realize that the playing field is slanted, and that even or perhaps especially their best efforts can be thwarted or snatched away by those with the privilege to do so. But impartial rules can enable all non-owners and contractual negotiators to resist the immediate gratification of grabbing, and instead take risky first moves in order to initiate fruitful exchanges, even with anonymous others.

But then the meta question remains: how do politicians ever arrive at this kind of Leviathan? In this scenario too, it is the political actors who must act in a self-denying pattern, denying themselves the special privileges that clog the development of advanced capitalism. They keep their fingers out of the rent-seeking cookie jar of monopolizing lucrative enterprises; instead, they keep the rules impartial, enabling capitalism to advance, to the great enhancement of total social wealth. But when and why? In L&W's view, the move to impartial rules is not fully possible in autocracies, even in semi-autocracies with democratic elements, because political authorities in such systems necessarily rely on smaller groups who

*Create Economic Advantage: Jewish Diamond Merchants in New York*," 31 L. AND SOC. INQ. 383 (2006). *But see* Barak D. Richman, *An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-Based Exchange*, 9 J LEGAL ANALYSIS 247 (2017) (describing and analyzing later breakdown of trust-based diamond trade).

46. This is the second-level problem that James Krier calls the "Tragedy of the Commons, Part Two." *See* James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325 (1992).

47. L&W, *supra* note 6, at 2-3, 10-11.

demand special privileges. Nor is it possible in all or even many democracies, since partisan players often take rent-seeking opportunities over the impartial rules that would enhance total wealth.

Some democracies, however, may be able to avoid these traps, at least where political parties are sufficiently large and diverse to negate internal factionalism.[48] Moreover, political players in these democracies may come to realize that they themselves have better electoral chances with the more stable politics of large parties and general rules for an even-handed market economy.[49] That move to impartial rules turns democracies to advanced democracies, with advanced capitalism to support them.

But there is a catch: in L&W's view, there is no systematic way in which these developments occur. To begin with, modern advanced democracies themselves evolve only from contingent circumstances.[50] Thus in countries like Britain and the United States in the eighteenth and nineteenth centuries, some set of events induced smaller political factions to coalesce into larger parties in which no smaller group could advantage itself without antagonizing the others.[51] Beyond that came a kind of accidental economic education: when politicians in these nations happened to pass general corporation laws, they learned that impartial rules, far more than grants of special privileges, could stabilize politics in such a way as to enlarge their longer-run electoral chances.[52] Thus these democratic politicians' experienced a dawning realization that through impartial rules, they could advance themselves while incidentally advancing capitalism. But if L&W's historical narrative is accurate, advanced democracy – and thus advanced capitalism too – depend on lucky chance.

But wait! Is it possible to tell a different historical story, one that puts some other kind of Leviathan in the role of instigating the development of advanced capitalism? Here is one possibility: one might see the historical background of capitalism –and impartial rules —as stemming from advances in the administrative state. Prior to the seventeenth century, European rulers had little capacity to govern many parts of their own realms in any centralized way, and by necessity farmed out governing authority to privileged persons and groups, notably rural aristocrats and town

48. *Id.* at 16-17.

49. The authors mention without emphasis that the parties do not attempt to destroy one another, *see id.* at 19, a point closely related to the important but difficult concept of recognizing a loyal opposition, *see id.* at 16-19.

50. *Id.* at 35-36.

51. There is an echo of Madison's famous Federalist X in this idea of larger institutions reducing factional rivalry, but in Madison's view, the object was not to foster what he called parties, but the reverse: to undermine them. However, L&W, *supra* note 6, at 25, argue that the parties of that time were only loose coalitions of factions. Madison's low view of parties may also have come from the example of partisan feuds in early eighteenth-century Britain. For these, see J.H. PLUMB, THE GROWTH OF POLITICAL STABILITY IN ENGLAND 1675-1725, 129-58 (1967).

52. L&W, *supra* note 6, at 18-19.

oligarchies, but also other monopolies as well.[53] In that pre-modern era, corporations, even those organized for commerce, were unlike our modern business organizations; instead, they were part of a system of privileges, in which designated groups effectively owned some governing authority through which they were to serve the public.[54]

Advances in centralized administration undercut that earlier system of privilege, as did liberalization of commercial activity. Those advances also enabled the understanding of the corporation to evolve from an entity granted quasi-governmental authority to a non-political business organization, an evolution necessary for the general incorporation rules that L&W see as a first step toward impartial rules. But at the outset, administrative advances and commercial liberalization were associated with the so-called absolutist rulers of European countries, notably France and especially Prussia.[55] Quite aside from undercutting the power of troublesome privileged groups, another royal motivation for freeing up commerce was international competition: military power entailed high expenses, which entailed expanded revenues, which in turn entailed unleashing commercial activity.[56] Important Enlightenment theorists saw this as a possibility: John Locke gave the prescription in the late 17th century, remarking that the "wise and godlike prince" who allowed free activity by his subjects "would soon be too hard for his neighbors."[57]

Here is one notable point: hereditary monarchy gives a convenient answer to the political SIRU puzzle, that is, political self-denial that institutes impartial rules to diminish privilege and enhance commerce. The so-called absolutists were such hereditary monarchs, and when they took measures to strengthen their nations, they were assuring the future of their descendants, potentially infinitely into the future. This was one of the theories justifying hereditary monarchy, a theory that resonates with crude sociobiological versions of the "selfish gene": the king would take care of the country because his offspring would inherit it.[58] Alexander Hamilton

53. Carol M. Rose, *A Glimpse of Early Modern Governance in Claire Priest's Credit Nation*, 33 YALE J.L. & HUMAN. 288, 290-93 (2022).

54. *Id.* at 292; Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105-11 (1888); *see also* JOHN P. DAVIS, CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND OF THEIR RELATION TO THE AUTHORITY OF THE STATE (1905) (volume devoted to pre-nineteenth century corporate bodies—ecclesiastical, municipal, guild, etc.).

55. Michael W. Spicer, *Public Administration under 'Enlightened Despotism' in Prussia: An Examination of Frederick the Great's Administrative Practice*, 20 ADMIN THEORY & PRAXIS 23, 27-29 (1998).

56. *Id.*

57. JOHN LOCKE, SECOND TREATISE, IN TWO TREATISES OF GOVERNMENT 316 (Peter Laslett ed., 1967) (hereinafter LOCKE, SECOND TREATISE).

58. Mancur Olson, *Dictatorship, Democracy, and Development*, 87 POL.SCI. REV. 567, 571-72 (1993) [hereinafter, Olson, *Dictatorship*]. Olson's article also anticipates several though certainly not all of the arguments in L&W, *see* L&W, *supra* note 6, concerning the relationship of autocracy and stable democracy to economic development.

also hoped to enhance commerce for the sake of national strength,[59] but as with other ordinary politicians, his apparent public service had no such genetic motivational explanation, and hence, one might think it suspect. That is why we get histories like Charles Beard's famous (or infamous) accounts of the economic interests of the founding fathers.[60]

But there is more to the absolutism origin story, and it leads to advanced democracy. Some contemporaries of eighteenth-century Europe's so-called absolutist rulers observed that there were risks to monarchs in building strength by fostering commercial activity. According to James Steuart, a political commentator associated with the Scottish Enlightenment, absolute princes might rely on bankers and merchants to fill the treasury's coffers, but those commercial figures were becoming aware of their own importance and exerting pressure to reduce arbitrary rule, to diminish the influence of the "great lords," and generally to enhance "public liberty."[61]

If hereditary monarchs were motivated to take such chances out of concern for their genetic heirs, and if – a big if – hereditary succession were reliably stable,[62] then we might predict a modestly different correlation between advanced capitalism and advanced democracy. The correlation would now be strongest in nations that are constitutional monarchies, like Norway or Denmark, but also the United Kingdom and perhaps Japan and Spain. In modern constitutional monarchies, the now-much-weakened royalty affords an example of self-denial—a.k.a. statesmanship—for the sake of a larger good, a larger good that is personalized for the monarch in concern for the well-being of his or her descendants.[63]

The association of advanced capitalism with constitutional monarchy is admittedly a fanciful solution to the political SIRU puzzle, but it does have a modicum of intuitive resonance; the constitutional monarchies just

59. THE FEDERALIST No. 12 (Alexander Hamilton); *see also* Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on Monarchism to Modern Localism*, 84 NW. U. L. REV. 74, 86-89 (1990) (arguing for similarity between Federalists' and European monarchs' efforts to promote commerce).

60. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1935 [1913]). Beard largely exonerates Hamilton from charges of self-interest, however. *See id.* at 100-14.

61. JAMES STEUART, AN INQUIRY INTO THE PRINCIPLES OF POLITICAL ECONOMY 247-49 (1770). This depiction of benign absolutism was resoundingly rejected by a more liberal Enlightenment figure, Arthur Young, who was widely known for his travels to the Continent shortly before the outbreak of the French Revolution. *See* ARTHUR YOUNG, POLITICAL ESSAYS CONCERNING THE PRESENT STATE OF THE BRITISH EMPIRE 71-72 (1772) (quoting Steuart but interlineating sharply critical comments).

62. *See* Olson, *Dictatorship*, *supra* note 58, at 572 (arguing that hereditary monarchy has rarely been predictably stable over a long term).

63. Interestingly enough, the philosopher G.W.F. Hegel argued for hereditary constitutional monarchy, for which he was much ridiculed by Marx, but his reasons bear a slight resemblance to L&W's view of the role of large parties. *See* Mark Tunick, *Hegel's Justification of Hereditary Monarchy*, 12 HIST POLIT. THOUGHT 481 (1991) (describing controversies over Hegel's position, arguing that Hegel saw hereditary limited monarchy as essential method to decide impersonally among partisan policies when no one policy is obviously superior).

mentioned might do reasonably well in empirical correlations between advanced capitalism and advanced democracy. Moreover, it is worth noting that their brands of capitalism lean toward modest redistribution. Redistribution also entails a kind of collective self-denial, but it may lead to greater stability for both markets and democracy than the more gung-ho versions of capitalism of the United States, where inequality may threaten both democracy and a market economy.[64]

In the end, the monarchic route to advanced capitalism winds up where L&W's route does: to a mutual support between advanced capitalism and advanced democracy, albeit in the form of constitutional monarchy in one but not necessarily the other. But it is also just as accidental: it all depends on a pre-existing monarchy, preferably ruled by Locke's wise and godlike prince.

## IV. An Alternative Course: Commerce Enables Advanced Capitalism and Advanced Democracy Too

Both the appeals to history above—L&W's well-thought out one and my rather impressionistic one—are pessimistic about locating a way forward toward advanced democracy and advanced capitalism where they do not already exist. Both presume that the first moves towards advanced capitalism, with its large and impartially regulated markets, come from politics, where democratic players enact impartial rules that enable SIRU among ever-more-extensive market players – and thus enable small-scale community-based commerce to move forward to advanced capitalism.

What about starting from the other direction? Might experience with property and commerce promote the evolution of advanced democracy and its development of relatively even-handed rules for advanced capitalism? That view certainly has support in classic works of political economy, notably John Locke's view that property and a money economy preceded the construction of a democratic government that would support them.[65] It may have even had a distant echo in the so-called Washington Consensus for international trade, with the hope that commerce would support not only capital development but also democracy in less-developed parts of the world.[66] That is a hope that now appears to be fading, but it may still resonate with some.

64. JOSEPH STIGLITZ, THE PRICE OF INEQUALITY 92-145 (2012); *cf.* DANIEL MARKOVITS, THE MERITOCRACY TRAP 88 (2019) (emphasizing the role of meritocracy in fostering inequality).

65. LOCKE, SECOND TREATISE, *supra* note 57, at 341-44.; *see also* NATHAN B. OMAN, THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW 40-66 (2017) (citing seventeenth and eighteenth century thinkers as well as moderns to argue that commerce inculcates habits and practices that support liberal democracy).

66. *See* John Williamson, *Democracy and the "Washington Consensus,"* 21 WORLD DEV. 1329, 1330-31 (1993) (author of phrase "Washington Consensus" arguing that consensus on correct liberal economic principles will improve democratic politics as well as economy).

Small-scale and even mid-scale commerce and informal property relations can and do exist without the state's creation and enforcement of uniform rules. Instead, as discussed earlier in this essay, the potential disapproval of the community can cabin individual cheating, slacking, or overreach, and permit the spread of a culture of SIRU among the participants. Community-based rules may be uniform within a community—as for example the timing of gate opening from the head to the tail of ancient irrigation ditches in Spain.[67] But they may also admit of the relaxation and special circumstances that Lisa Bernstein has called "relationship-preserving norms."[68] Indeed, informal norms dominate many commercial relationships even in wide-scale advanced capitalism.[69]

But even—or rather especially— informal commercial dealings create a certain culture, and it is a culture that supports democratic institutions. Commercial relationships depend on participants who recognize and respect entitlements of others. Those participants act on the basis of voluntary transactions rather than force or fraud. They are likely to put aside disagreements over matters that are irrelevant to the business at hand. They are less likely to be swayed by fanatical beliefs because the lure of profit dampens such passions – or at least the *Federalist* authors thought so.[70] Commercial relationships can broaden horizons and turn strangers into associates, and associates into friends.

In short, commerce creates a culture that is a kind of seedbed of democratic attitudes. Democratic political players reflect that culture, as seen in legislative horse-trading, respect for one another's constituency demands, friendships across party lines, compromise, rather vague statements about fundamental commitments, and perhaps most difficult of democratic requirements, the recognition of opponents as a loyal opposition rather than zero-sum enemies. None of these patterns may appear to be very elegant or noble, but legislatures with these traits can get things done.

But a looming question is whether impartial rules are among the things that get done in such a legislature. This kind of legislature looks more like a kind of back-slapping old-boy and now old-girl network, in which a modicum of rent-seeking is understood and winked at. Efforts to limit rent-seeking, such as prohibitions on "earmarks" for particular legislators, may only serve to make the legislature dysfunctional. Such legislatures leave open the question whether political SIRU can scale up to the impartial rules of advanced democracy in any systematic way, as opposed to lucky accident.

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67. OSTROM, GOVERNING THE COMMONS, *supra* note 35, at 72-74.

68. Lisa Bernstein, *Merchant Law in a Merchant Court, Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1796 (1996).

69. *Id.* at 1787-88.

70. LEO STRAUSS & JOSEPH CROPSEY, HISTORY OF POLITICAL PHILOSOPHY 659, 677 (3d ed. 1987).

Moreover, a similar scaling-up problem may dog advanced capitalism itself. While there are many personal and informal business relationships within advanced capitalism, there are also many very large-scale, impersonal dealings. Some portion of these appear to be one-sided and unfair to those who are involved with them. This is an especially noticeable concern in consumer relations. Shrink-wrap contracts and form-contract arbitration clauses can be efficient at scale, but they can also undermine the sense of fair dealing.[71]

These impersonal arrangements treat the relevant participants under uniform rules, and they undoubtedly create economic value for the large numbers of consumers who sign on.[72] But they may represent a kind of worrisome tradeoff between value and virtue. If economic value appears to reduce fair dealing —and also reduce the occasional rule relaxation that marks informal commercial dealings—then the value/virtue tradeoff can undermine individual attitudes about commerce. And it can do so in a way that undermines relationships with large institutions. Your neighbors would chastise you severely for stealing an Amazon package from your neighbor's porch, but they might well ignore your wearing a new coat from Amazon before sending it back as defective. This is a loss for Amazon, and if many others follow, it could turn into a serious economic loss. But it is also a kind of generalized moral loss, an attitudinal shift about commerce that undermines a culture of trust. Indeed, insofar as commerce and democracy are linked, that distrust could affect politics as well.

Timothy Wu raises similar concerns in his revival of Louis Brandeis's conception of the "curse of bigness."[73] His emphasis lands on the influence of large companies on politics, but a collateral issue is the disaffection among the voting public. Pay your taxes? don't be a fool, the big guys all get out of them. Vote this time? why bother, they are all crooks anyway. If capitalism writ large breeds such attitudes, it can undermine democracy writ large along with it.

## Conclusion

George Priest complained some years ago that American law schools did not concern themselves with the institution of capitalism. Perhaps this is because at an advanced level, it's just too complicated. L&W imply that argument: advanced capitalism can only be understood in the context of advanced democracy, and advanced democracy's origins are more or less

71. *See, e.g.*, Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 139-42 (2012) (likening modern mass form contracts to unfair feudal contracts between lords and serfs, calling for better balance between economic efficiency and fairness).

72. *See* Carnival Cruise Lines v. Shute, 499 U.S. 585, 594 (1991) (upholding forum clause in standardized contract, observing that uniform rule under form contract probably reduced customers' costs).

73. TIM WU, THE CURSE OF BIGNESS 54-58 (2018).

coincidental. A basic confounding issue is that if property and contract are at the heart of capitalism, as George asserts, then any investigation into capitalism is confronted with the SIRU puzzle, which is particularly intractable at complex levels. Moreover, whether one derives advanced capitalism from advanced democracy, or sees both capitalism and democracy as evolving from enlightenment-era monarchy, or switches the roles to make capitalism the basis of democracy—whichever way one goes, advanced capitalism looks suspiciously like a set of lucky accidents—and not something that can be easily planned and constructed. Perhaps that is why legal academics stick with the building blocks, contract and property, with a leavening of torts and criminal law and a dash of law-ands.