

ARTICLES

CAPITALISM FOR LAW STUDENTS

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I. INTRODUCTION

Americans today live free and amazingly prosperous lives, thanks primarily to the fact that our day-to-day existence takes place within a vast system of *private property* ownership and freedom to *contract* we call *capitalism*. Although our federal, state, and local governments possess tremendous powers, the power of government pales in comparison to the truly awesome engine of capitalism, which delivers the vast array of goods and services Americans demand daily. But despite the phenomenal performance of American capitalism, most Americans pay little attention to it and know very little about it. Capitalism is the air we breathe, but most of us tend to take it for granted.

Law students are not very different from their fellow Americans on this point—or so it seems to me. Many students come to law school with little or no exposure to the basics of capitalism—including some business majors. Once in law school, students must navigate a demanding curriculum where the focus on the skills used in the practice of law necessarily limits the time available to think more broadly about the world in which they will practice. When a law school discussion of capitalism does take place, it often focuses on its flaws and shortcomings. Combine this with the fact that a large majority of law professors hold left-of-center views,¹ and it should perhaps not be surprising that the average law student is unlikely to hear much in a positive vein about

¹ One widely cited study estimated that only “[fifteen] percent of law professors, compared with [thirty-five] percent of lawyers, are conservative.” Adam Bonica et al., *The Legal Academy’s Ideological Uniformity*, 47 J. LEGAL STUD. 1, 1 (2018), <https://scholar.harvard.edu/files/msen/files/law-prof-ideology.pdf> [<https://perma.cc/G75W-DH7A>]. A more recent survey of professors at the top 50 law schools found only 12% identified themselves as conservative, compared with 72.3% liberal, and 13.8% middle of the road. Eric Martinez & Kevin Tobia, *What Do Law Professors Believe About Law and the Legal Academy?*, 112 GEO. L.J. 111, 141 (2023), <https://www.law.georgetown.edu/georgetown-law-journal/in-print/volume-112/volume-112-issue-1-october-2023/what-do-law-professors-believe-about-law-and-the-legal-academy/> [<https://perma.cc/6VY8-GLKJ>]. For evidence that college faculties in general are rapidly becoming increasingly left-wing in outlook, see Phillip W. Magness & David Waugh, *The Hyperpoliticization of Higher Ed: Trends in Faculty Political Ideology, 1969–Present*, 27 INDEP. REV. 359, 361 (2022–23), https://www.independent.org/pdf/tir/tir_27_3_05_magness.pdf [<https://perma.cc/64UK-8XJK>].

capitalism.² In short, law school fails to explain how capitalism works (specifically, how well it has worked in the past two centuries or so) and tends to focus on and over-emphasize the shortcomings of capitalism.

In 2012, Yale law professor George Priest wrote an article lamenting the neglect of capitalism in legal education. Priest concluded that American law schools pay “little attention to capitalism as an institution or as a mechanism of social ordering. The subject is not taught.”³ Although all law schools require first year students to take courses in property and contract law, while offering a wide range of advanced courses on other aspects of business law, in Priest’s view, “none [of these courses] focuses upon capitalism as an institution.”⁴ To my knowledge there have been no changes in legal education that address Priest’s criticism in the twelve years since his article appeared.

The present article is my response to Priest’s *cri de coeur*. During many years on the Cumberland faculty, I have taught our required courses in property and business organizations, and in both classes, I have tried to explain the larger capitalist framework that these areas of law help to support. This Article collects a number of illustrations and explanations I have used in my classes and expands upon them to offer law students what I hope is a useful orientation to capitalism as an institution. While there are many fine books that convey “business fundamentals” to law students,⁵ this Article takes a different approach by

² I would like to be wrong in thinking that most law professors have scant curiosity about, and show little appreciation of, the strengths of American capitalism. But, based on my long years in this business, I would be very surprised if I am.

³ George L. Priest, *The Curious Treatment of Capitalism in Legal Education*, 49 Soc’y 216, 222 (2012), <https://link.springer.com/article/10.1007/s12115-012-9534-z> [<https://perma.cc/K7ZY-VYE3>]. It is worth noting that capitalism now appears to be a controversial proposition in American business schools, as well. See Emma Goldberg, *Have the Anticapitalists Reached Harvard Business School?*, N.Y. TIMES (Nov. 28, 2022), <https://www.nytimes.com/2022/11/28/business/business-school-social-justice.html> [<https://perma.cc/5VXZ-BDWD>]; Glenn Hubbard, *Even My Business-School Students Have Doubts About Capitalism*, THE ATLANTIC (Jan. 2, 2022), <https://www.theatlantic.com/ideas/archive/2022/01/mba-students-against-capitalism/621117/> [<https://perma.cc/VHX7-BRQB>] (explaining the pushback that Hubbard, a professor at the graduate business school at Columbia University, received from several students when lecturing on the benefits of capitalism); see also Fergus Hodgson, *How the Woke Mob Captured Business Schools*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Jan. 5, 2022), <https://www.jamesgmartin.center/2022/01/how-the-woke-mob-captured-business-schools/> [<https://perma.cc/69ZY-98G7>]; Matthew G. Andersson, *The Last Holdouts Are Crumbling*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Nov. 3, 2023), <https://www.jamesgmartin.center/2023/11/the-last-holdouts-are-crumbling/> [<https://perma.cc/K6TJ-ZMRQ>].

⁴ Priest, *supra* note 3, at 217.

⁵ See, e.g., DWIGHT DRAKE, BUSINESS AND FINANCIAL LITERACY FOR LAW STUDENTS (2014); ROBERT W. HAMILTON & RICHARD A. BOOTH, BUSINESS BASICS FOR LAW

presenting: (1) the historical evidence of the astonishing performance of capitalism over the last two hundred years, and (2) the problems associated with government interventions in the capitalist marketplace.⁶

A basic familiarity with the material presented in this Article will make the student a more effective lawyer for his or her clients—consisting of entrepreneurs, managers, employees, investors, suppliers, customers, and so on—all of whom are deeply involved in American capitalism. In addition to this practical payoff to reading this Article, I hope to convince the reader that: (1) being a “business lawyer” is in fact a noble calling, and (2) capitalism is well worth defending against its critics and enemies.

II. AMERICAN CAPITALISM: BASIC DEFINITIONS

The term “capitalism” was coined by European critics of mid-nineteenth century bourgeois society and used by them as a pejorative term.⁷ But over time, capitalism morphed into “a term of appreciation of the motley historical process that is delivering achievements in human well-being that even the blindest dogmatist must recognise.”⁸ Although capitalism has been defined in many ways, we will use a simple definition: Capitalism is an economic framework that depends *predominantly* upon: (1) private ownership of *property* and private decisions as to the proper use of it and (2) largely unrestricted freedom to *contract* with others. From this definition, it follows that in a capitalist economy, most decisions about the *allocation of resources* will be made by private actors, privately—as opposed to being made by public (governmental) officials through political or other collectivist procedures.

Our definition of capitalism is qualified with the word “predominantly” because no real-world society depends entirely upon private property and freedom of contract. That is, every society includes some communal ownership and some state ownership of property,⁹ and every

STUDENTS (4th ed. 2006); JULIE D. LAWTON, BUSINESS FUNDAMENTALS FOR LAW STUDENTS (2023); ROBERT J. RHEE, ESSENTIAL CONCEPTS OF BUSINESS FOR LAWYERS (3d ed. 2020).

⁶ I have heard quite a few students say something along the lines of “this is the first time I’ve ever heard anything about this” after I presented a piece of this story.

⁷ See Pedro Schwartz, *Capitalism and Its Names*, ECONLIB (Nov. 7, 2016), <https://www.econlib.org/library/Columns/y2016/Schwartzcapitalism.html> [<https://perma.cc/2VU2-HZCU>].

⁸ *Id.* For a n-gram showing usage of the term over time, see *Capitalism*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/capitalism> [<https://perma.cc/L4CN-MLTQ>] (Nov. 4, 2022), or *Capitalism*, GOOGLE, <https://books.google.com/ngrams/> [<https://perma.cc/YWR8-X66B>] (last visited Oct. 22, 2023).

⁹ We will use Harold Demsetz’s definition of three “idealized forms of ownership”: “By communal ownership, I shall mean a right which can be exercised by all members of the community. Frequently the rights to till and to hunt the land have been communally owned.

society outlaws certain kinds of contracts (contracts to commit crimes, for example). In this sense, there are no “purely” capitalist societies out there. But comparisons can still be made among countries in terms of whether they rely more (or less) upon private property and freedom of contract.

Our definition focuses on the “allocation of resources” in a capitalist economy because the primary job of any economic system is to determine how we “should” use scarce resources such as land, labor, and capital (both physical and financial) to create the goods and services that people wish to buy.¹⁰ These resources are scarce in the sense that while human wants are unlimited, at any given time we have finite amounts of land, labor, and capital—the “factors of production”¹¹—with which to respond to human demands. Capitalism deals with the hard fact of this scarcity by recognizing private ownership of the factors of production and allowing the owners to decide to which uses they will be put. This simple idea is the essence of capitalism.

The critical importance of private property and freedom of contract was clearly seen by the eighteenth-century Scottish philosopher David Hume. Writing in 1740, he asserted that the “three fundamental laws of nature” are:

the laws of the *stability of ownership*, its *transference by consent*, and the *keeping of promises*. The peace and security of human society entirely depend on strict obedience to those three laws; there is no chance of establishing good relations among men when they are neglected.

The right to walk a city sidewalk is communally owned. Communal ownership means that the community denies to the state or to individual citizens the right to interfere with any person’s exercise of communally owned rights. *Private ownership* implies that the community recognizes the right of the owner to exclude others from exercising the owner’s private rights. *State ownership* implies that the state may exclude anyone from the use of a right as long as the state follows accepted political procedures for determining who may not use state-owned property.” Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347, 354 (1967), https://econ.ucsb.edu/~tedb/Courses/Ec100C/Readings/Demsetz_Property_Rights.pdf [<https://perma.cc/3TTX-XQF3>] (emphasis added).

¹⁰ The term “capital” typically comprises both physical capital (such as buildings and machinery) and investment capital (funds committed by both individual and institutional investors in such of a return on their investment). Labor can be understood as “human capital,” including personal investments in education, training, and experience. Although some economics textbooks treat “entrepreneurial ability” as a fourth, scarce “factor of production,” to simplify things, we will include entrepreneurial ability under the heading of labor or human capital. Finally, land can be thought of as “natural capital,” including land and the renewable and nonrenewable resources it supports (arable soil, timber, oil and gas, useful minerals, etc.). See Jason Fernando, *4 Factors of Production Explained With Examples*, INVESTOPEDIA, <https://www.investopedia.com/terms/f/factors-production.asp> [<https://perma.cc/VC8C-M8EL>] (July 26, 2024).

¹¹ See *id.*

Society is absolutely necessary for the well-being of men, and these laws are equally necessary for the support of society.¹²

It is important to see that capitalism was (and remains) a product of *human action*, not *human design*.¹³ No one invented or discovered capitalism; no one is “in charge” of it. As with the development of language, there is no single directing intelligence present in capitalism. It is a radically decentralized “system.”

For an unplanned, undesigned social institution, American capitalism—private property¹⁴ and freedom to contract—has performed phenomenally well! American capitalism’s uninfringed performance is probably the most important take-away from this Article, and numerous illustrations of the point will be provided below. Here’s the first one¹⁵:

Table 1

Year	Real (inflation adjusted) United States GDP per Capita (in 2012 dollars)
1790	\$1,163
2021	\$58,478

That’s right: the 2021 U.S. economy produced more than fifty times the wealth (goods and services) *per person* as compared with the 1790 economy. And, of course, no matter your wealth or income in 1790, you could not buy a smart phone, pickup truck, or blood pressure medication at any price.

How did this astonishing performance come about? It came about primarily through the actions of private persons and private businesses trading for their own benefit. The government’s most important contribution to this performance was in providing a legal system that

¹² DAVID HUME, A TREATISE OF HUMAN NATURE BOOK III: MORALS 272 (Jonathan Bennett ed. 2017) (1740) (emphasis added).

¹³ The eighteenth century Scottish philosopher Adam Ferguson first made this distinction in 1767, according to 15 FRIEDRICH A. HAYEK, *The Results of Human Action but Not of Human Design*, in THE COLLECTED WORKS OF F.A. HAYEK 293, 293 n.2, 294 (Bruce Caldwell ed., 2014) (1967).

¹⁴ For a fascinating historical overview of private property rights in America, see Gary D. Libecap, *Property Rights to Frontier Land and Minerals: US Exceptionalism* (Nat’l Bureau of Econ. Rsch., Working Paper No. 24544, 2018), <https://www.nber.org/papers/w24544> [<https://perma.cc/HE2Q-4FUV>].

¹⁵ Louis Johnston & Samuel H. Williamson, *What Was the U.S. GDP Then?*, MEASURINGWORTH (2023), <https://www.measuringworth.com/datasets/usgdp/> [<https://perma.cc/6S57-LDP2>].

supported private property and voluntary contracts. In this sense, America has a “mixed economy.” A mixed economy is not strictly *laissez faire*, but it does not involve so much government involvement that it approaches anything like actual socialism.¹⁶ But beyond providing property and contract law in support of capitalism, the American government’s role in our prosperity has been quite secondary to the productivity unleashed by private property and freedom to contract. In fact, recent high levels of government regulation and taxation may well have impeded American economic performance.

At the outset, it is important to appreciate the central importance of private property and freedom of contract to the Founding generation. As Bernard Siegan explains:

The United States Constitution was framed in large measure to overcome [the] problems [experienced under the Articles of Confederation] by providing substantial protection for the material liberties, including property, economic, and contractual rights. The Framers sought to create a commercial republic based on ownership, investment, and entrepreneurship.¹⁷

To the same effect is James Ely:

the movement to establish a new government in 1787 was fueled in large part by the desire for a central authority capable of protecting private property, encouraging trade, restoring public credit, and defending American interests abroad. According to one scholar, Alexander Hamilton and James Madison “agreed on the Constitution as necessary to provide the essential framework for commercial development through the creation of a national market, public credit, uniform currency, and the protection of contract.” In the words of two prominent historians, Federalists proposed . . . to place the new land in the mainstream of acquisitive capitalism.”¹⁸

Similar quotations on the connection between the idea of America and the institution of private property are offered in Appendix I of this Article.¹⁹

Before we leave this topic, it is important to acknowledge that the Founding’s tragic accommodation of chattel slavery was a gross violation of the most elemental property right humans possess—the right to

¹⁶ See Robert L. Kuttner, *Development, Globalization, and Law*, 26 MICH. J. INT’L L. 19, 19–20 (2004).

¹⁷ BERNARD H. SIEGAN, *PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND USE REGULATION* 13 (1997).

¹⁸ James W. Ely, Jr., *The Constitution and Economic Liberty*, 35 HARV. J. L. & PUB. POL’Y 27, 29 (2012) (footnotes omitted). Ely cites Gordon Wood at the end of the first sentence, Isaac Kramnick at the end of the second, and Kermit Hall and Peter Karsten at the end of the third. *Id.* at 29 nn.15–17.

¹⁹ See *infra* Appendix I.

one's own body and the value each person creates through their own body and labor. Until the institution of slavery was eliminated through disunion, civil war, and constitutional amendment, the full promise of economic freedom could not be realized in the United States.

A. Private Property

Under American law, a person who holds a property right in something is conventionally understood to own a “bundle” of rights with respect to the thing—the right to possess, the right to use, the right to exclude [others from the property], the right to transfer, etc.”²⁰ Notice that this definition fits ownership of both land (real property) and other kinds of assets (personal property or intellectual property).

Why is private property so important to economic growth and development?²¹ There are many aspects to consider, but perhaps most important is that private ownership provides the strongest available *link between effort and reward*. In a society where property ownership is secured by law, individuals have stronger *incentives* to work hard and invest. As a result, the productive resources available in a society at any given time—land, labor, and capital—if privately owned, will be used in the most effective ways possible.

A.1. Illustrations

The idea that rewarding effort will incentivize more of it is, or should be, a familiar one. It forms the basis for American intellectual property law, to mention just one obvious example.²² Through the Patents and Copyrights Clause, the U.S. Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²³ Federalist No. 43 treats the clause as self-evidently sensible.²⁴ Thus, the clause occasioned

²⁰ According to the leading casebook, JESSE DUKEMINIER ET AL., PROPERTY 186 (10th ed. 2024), the “bundle of sticks” metaphor is not without controversy, but that will not detain us here. The interested reader should consult Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869 (2013).

²¹ Capitalism’s nemesis certainly understood how it was built upon private property. “[T]he theory of the Communists may be summed up in the single sentence: Abolition of private property.” KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO ch. 2 (Samuel Moore trans., 1888) (1848), <https://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch02.htm> [<https://perma.cc/84CZ-R8AD>].

²² See Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1746 (2012).

²³ U.S. CONST. art. I, § 8, cl. 8.

²⁴ THE FEDERALIST No. 43 (James Madison) (“The utility of this power will scarcely be questioned.”).

little debate during the Constitutional Convention or during the ratification process.²⁵ Today, there is a great deal of policy debate surrounding intellectual property law, including the question of whether the amount of time granted to authors and inventors under current law is too generous.²⁶ But there is no serious debate on the point with which we are interested: the link between protecting property rights and giving incentives to people to be productive.

Agriculture has long provided clear and sobering illustrations of the wisdom of private property ownership. Simply put, a farmer is more likely to plant and cultivate a crop if he is (reasonably) certain that he will be able to harvest the crop and sell it.²⁷ If the legal system effectively protects the farmer from trespassers and bandits, it provides a greater incentive for the farmer to work the property effectively and make improvements on it.²⁸ Essentially, private property rights promote greater productivity and innovation by securing the profits from improvements to the property owners responsible for bringing them to fruition.

The first two British colonies in America—Jamestown and Plymouth—furnish historical illustrations of the increased productivity that results from private property.²⁹ In both colonies the land dedicated to cultivation was initially held and worked collectively.³⁰

When the Jamestown colony was established in present-day Virginia in 1607, “the settlers did not have even a modified interest in the soil, or a partial ownership in the returns of their labor. Everything produced by them went into the store, in which they had no proprietorship”³¹ The results of this arrangement were disappointing, to say

²⁵ Thomas Nachbar, *Patent and Copyright Clause*, THE HERITAGE FOUND., <https://www.heritage.org/constitution/#!/articles/1/essays/46/patent-and-copyright-clause> [https://perma.cc/S4WU-5QA2] (last visited Oct. 19, 2023). For the fascinating English law background of intellectual property, see Professor Nachbar’s article, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313 (2005).

²⁶ Joseph A. Lavigne, Comment, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996*, 73 U. DET. MERCY L. REV. 311, 316 (1996). The reader interested in IP policy debates should visit the website of the Center for Intellectual Property & Innovation Policy at George Mason University, <https://cip2.gmu.edu/> [https://perma.cc/N8SK-9LPR].

²⁷ See WORLD BANK GROUP, WORLD DEVELOPMENT REPORT 2017: GOVERNANCE AND THE LAW 139 (2017).

²⁸ See *id.* Cinematic treatments of this idea include SEVEN SAMURAI (Toho Co., Ltd. 1954) and THE MAGNIFICENT SEVEN (The Mirisch Company 1960).

²⁹ See TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 34–35, 39, 41 (1998).

³⁰ *Id.*

³¹ *Id.* at 34 (internal quotation marks omitted) (quoting 1 PHILIP BRUCE, ECONOMIC HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY 212–13 (1907)).

the least. Concerned with the low level of agricultural output, a new governor of the colony changed things radically in 1612 or 1613:

“he hath allotted to every man in the colonie, three English acres of cleere Corne ground, which every man is to mature and tend, being in the nature of farmers . . . and they are not called unto any service or labour belonging to the Colonie, more than one month in the yeere, which shall neither be in Seed time, or in Harvest, for which, doing no other dutie to the Colonie, they are yeerely to pay into the store two barrels and a halfe of Corne”³²

The result: “As soon as the settlers were thrown upon their own resources, and each freeman had acquired the right of owning property, the colonists quickly developed what became the distinguishing characteristic of Americans—an aptitude for all kinds of craftsmanship coupled with an innate genius for experimentation and invention.”³³

A very similar story played out later in the Plymouth colony. Despite the experience of commonly held property in Jamestown, the investors who backed the Mayflower’s voyage and the establishment of Plymouth in 1620 insisted that the land be held and worked in common in the first years of the colony’s existence.³⁴ “The Pilgrims went along [with this property regime] because they had little choice.”³⁵ The poor agricultural output that resulted contributed to a high death rate among the early colonists from “scurvy, pneumonia, and malnutrition.”³⁶ The colony “was barely able to feed itself” by the spring of 1623.³⁷ At that point, the governor of the colony, William Bradford, led a brainstorming session “to think how they might raise as much corn as they could, and obtain a better crop than they had done, that they might not still thus languish in misery.”³⁸ Under Bradford’s direction, they turned to private property. As explained in Bradford’s (modernized) words, every family was assigned:

a parcel of land, according to the proportion of their number, for [cultivation], only for present use (but made no division for inheritance) and ranged all boys and youth under some family. This had very good success, for it made all hands very industrious, so as much more corn was planted than otherwise would have been by any means the

³² *Id.* at 34–35 (quoting RALPH HAMOR, *THE TRUE DISCOURSE OF THE PRESENT ESTATE OF VIRGINIA* 17 (1615)).

³³ *Id.* at 35 (internal quotation marks omitted) (quoting 1 MATTHEW PAGE ANDREWS, *VIRGINIA: THE OLD DOMINION* 61 (Dietz Press 1949) (1937)).

³⁴ *Id.* at 37–39.

³⁵ BETHELL, *supra* note 29, at 39.

³⁶ *Id.* at 39–40.

³⁷ *Id.* at 40.

³⁸ William Bradford, *Of Plymouth Plantation*, in 1 *THE FOUNDERS’ CONSTITUTION* 579, 579 (Samuel Eliot Morison ed., 1967).

Governor or any other could use, and saved him a great deal of trouble, and gave far better content. The women now went willingly into the field, and took their little ones with them to set corn; which before would allege weakness and inability; whom to have compelled would have been thought great tyranny and oppression.³⁹

Bradford discerned a deep lesson from the poor results under communal ownership:

The experience that was had in this common course and condition, tried sundry years and that amongst godly and sober men, may well evince the vanity of that conceit of Plato's and other ancients applauded by some of later times; that the taking away of property and bringing in community into a commonwealth would make them happy and flourishing; as if they were wiser than God. . . . Upon the point all being to have alike, and all to do alike, they thought themselves in the like condition, and one as good as another; and so, if it did not cut off those relations that God hath set amongst men, yet it did at least much diminish and take off the mutual respects that should be preserved amongst them. And would have been worse if they had been men of another condition [i.e., non-believers]. Let none object this is men's corruption, and nothing to the course itself. I answer, seeing all men have this corruption in them, God in His wisdom saw another course fitter for them.⁴⁰

The fitter course was private property, even for "godly and sober men."⁴¹

For things to move in the opposite direction, with the government seizing (or "taking") private property from its owner, there would be difficulty in America by the constitutional requirement (at both the federal and state levels) that the government pay the owner "just compensation" for the land (or other property) taken.⁴² This has been a feature of American law since the Founding and traces well back into the history of the English common law.⁴³

³⁹ *Id.*

⁴⁰ *Id.* at 579–80.

⁴¹ *Id.* at 579.

⁴² U.S. CONST. amend. V; *see Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 233–34 (1897) (declaring the "just compensation" requirements effective against state governments as well).

⁴³ *See Chi., Burlington*, 166 U.S. at 233–34. The governments of the original thirteen states protected private property owners in cases of takings by their state government, either by state constitutional provisions or by statute. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 31–32 (2d ed. 1997). In doing so, the states were following well-established norms borrowed from English common law. *See id.* at 32. The Fifth Amendment to the U.S. Constitution, which includes the so-called "Takings Clause," was adopted with the rest of the Bill of Rights in 1791. *Bill of Rights (1791)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/bill-of-rights> [<https://perma.cc/M5SX-KLJZ>] (Sep. 20, 2022). Initially, it applied

The actual experience of countries that moved away from private property in agriculture has been horrendous. Josef Stalin's forced collectivization of farms took place during the late 1920s to the mid-1930s, and "was in effect a war declared by the Soviet state on a nation of smallholders."⁴⁴ As a result, "[m]ore than [two] million peasants were deported (1.8 million in 1930–31 alone), [six] million died of hunger, and hundreds of thousands died as a direct result of deportation."⁴⁵ The Chinese collectivization of 1955–56 resulted in severe decreases in agricultural productivity which were a major cause of the 1959–61 famine, the most severe in human history.⁴⁶ Estimates of this death toll vary widely.⁴⁷ One scholar estimated it is likely in the range of thirty million souls.⁴⁸ In both countries, stupid⁴⁹ and/or murderously repressive⁵⁰ government policies worsened the impact of collectivization, and its negative effects on individuals' incentives to work were obvious and significant.

In 1935, the Soviet leadership decreed that farmers could tend small plots of land for their own use and for resale.⁵¹ What would you

only to the Federal government but was declared effective against state governments as well by the decision in *Chicago, Burlington*, 166 U.S. at 233–34.

⁴⁴ Nicolas Werth, *A State against Its People: Violence, Repression, and Terror in the Soviet Union*, in *THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION* 146, 146 (Stéphane Courtois ed., Jonathan Murphy & Mark Kramer trans., 1999).

⁴⁵ *Id.*

⁴⁶ See Vaclav Smil, *China's Great Famine: 40 Years Later*, 319 *THE BMJ* 1619, 1619 (1999).

⁴⁷ The Wikipedia entry for Great Chinese Famine lists eighteen estimates of Chinese famine death tolls. *Great Chinese Famine*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Great_Chinese_Famine [<https://perma.cc/3KQP-L7UU>] (last visited Oct. 7, 2023) (explaining that the grain harvest fell "by 15% in 1959 compared to 1958, and by 1960, it was at 70% of its 1958 level").

⁴⁸ Smil, *supra* note 46, at 1619.

⁴⁹ See, e.g., K. Lee Lerner, *The Disastrous Effects of Lysenkoism on Soviet Agriculture*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/disastrous-effects-lysenkoism-soviet-agriculture> [<https://perma.cc/82M3-UDDC>] (last visited Oct. 22, 2023); Harry Bikul, *China's Smash Sparrows Campaign and Nature's Revenge!*, *THOUGHT MIGHT* (Mar. 19, 2022), <https://thought-might.com/technology/china-smash-sparrows-campaign-nature-revenge/> [<https://perma.cc/M9LU-R5DY>].

⁵⁰ See, e.g., ROBERT CONQUEST, *THE HARVEST OF SORROW: SOVIET COLLECTIVIZATION AND THE TERROR-FAMINE* 225–26 (1986); *Holodomor Basic Facts*, HOLODOMOR RSCH. AND EDUC. CONSORTIUM, <https://holodomor.ca/get-started/holodomor-basic-facts/> [<https://perma.cc/XJN9-DVY2>] (last visited Oct. 22, 2023).

⁵¹ RICHARD PIPES, *COMMUNISM: A HISTORY* 61 (2001).

predict to have been the result of this decision (answer in the footnote)?⁵²

A.2. Thought Experiment

Imagine your Constitutional Law professor announces that she would like to adopt communal ownership in grading the course. She proposes to collectivize grading by, first, grading all the final exams and adding up all the points earned and then dividing the total number of points by the number of students in the class. Each student would then receive the average grade, the same as everyone else in the class. In this way, equality would be achieved, but at the cost of denying the better-than-average students any “property right” in the points they received above the class average. Would you support this idea if it were presented to you? If the idea were adopted, how would you respond? Would you study as hard in this class as you would in other classes that did not follow a communal grading scheme? Do you see that the lesson here about ownership, effort, and reward can easily be applied in other situations?

A.3. Positive and Normative Statements

At this point I am willing to make the claim that humans work harder when they have the legal right to what they produce through their labors. I am willing to say this based on the historical record—on *facts*—some of which have been presented here. In principle, this claim is subject to factual testing. If someone produces evidence which cuts against the claim, the claim is undermined. Did agricultural production go up after the Castro revolution in Cuba in 1959? In Venezuela under Hugo Chavez? A statement that is based on observable facts and is capable of being disproved by factual evidence is called a *positive* statement.⁵³

Notice that the statement “humans work harder when they are working for their own account” says nothing about the moral rightness or wrongness of this apparent fact. Perhaps people *should* work harder for the common good, or perhaps they *ought* not to be so strongly motivated by self-interest. But “should” and “ought” take us away from facts and launch us into a discussion of moral values—a much different

⁵² In 1966, the “private” plots covered “*only slightly more than 3 percent* of the USSR’s total sown land” but accounted for 64% of total Soviet production of potatoes, 43% of vegetable production, 40% of meat production, 39% of milk production, and 66% of egg production. John W. de Pauw, *The Private Sector in Soviet Agriculture*, 28 SLAVIC REV. 63, 63 (1969) (emphasis added).

⁵³ See Kenneth G. Dau-Schmidt, *The Whole is Greater than the Sum of the Parts: Analyzing Legal Problems in an Endogenous World*, 91 B.U. L. REV. 385, 387 (2011).

discussion. A statement about how the world should or ought to be is called a *normative* statement.⁵⁴

For a lawyer, it is useful to keep this distinction in mind and to be able to recognize when two people are talking past one another—with one person in positive mode, and the other in normative mode. This happens fairly often.

B. Freedom of Contract

Why is freedom of contract so important to economic growth and development? The answer seems to be the “propensity in human nature,” noted by Adam Smith, “to truck, barter, and exchange one thing for another.”⁵⁵ Once property rights are clearly established, it becomes possible for third parties to place different values on the property owned by others and to offer to purchase properties from the present owners where the potential buyer’s valuation of the property in question exceeds the value the current owner places on it. Again, Smith illustrates his point by stating:

Whoever offers to another a bargain of any kind, proposes to do this. Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.⁵⁶

If a current owner freely accepts an offer from a potential purchaser, the resulting transaction will be *mutually beneficial*. The original owner places a greater value on what he receives for giving up the property in question, while the purchaser places a greater value on the property he receives than the price he pays to the seller. This fact about voluntary transactions is of the utmost importance. Every time you see a market transaction, you see a win-win outcome voluntarily and mutually agreed upon.⁵⁷

Another way to refer to the mutually beneficial aspect of all voluntary contracts is to say that they are *positive-sum* events.⁵⁸ To see this point clearly, let’s take a simple hypothetical. Sam is willing to

⁵⁴ *Id.*

⁵⁵ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 41 (1776).

⁵⁶ *Id.* at 43.

⁵⁷ You cannot assume the same holds true of government actions for the simple reason that governments do not operate within the constraints of the profit-and-loss framework.

⁵⁸ Terry L. Anderson & Donald R. Leal, *Free Market Environmentalism: Hindsight and Foresight*, 8 CORNELL J.L. & PUB. POL’Y 111, 113 (1998).

sell his old car if he can get at least \$7,000 for it, and Betty is shopping for a used car with features similar to Sam's car, if she can find one for \$8,000 or less. If Betty and Sam become aware of one another, they should be able to negotiate a deal somewhere in their *bargaining range*, between \$7,000 and \$8,000.⁵⁹ Where will they end up, assuming that they do manage to come to an agreement? We can't really predict that. Depending on their relative bargaining skills and other factors (how many other similar used cars are available and so forth), they might end up anywhere within the range.

Let's say they settle on a price of \$7,600. Is Sam made better off by the trade? Of course; he wouldn't part with his car if he weren't made better off by the deal. Plus, his minimum acceptable price was \$7,000—and \$7,600 is \$600 better than that. How about Betty—is she made better off by the trade? Of course; she wouldn't part with her money if she weren't made better off by the deal. Plus, her maximum acceptable price was \$8,000—and \$7,600 is \$400 better than that. But wouldn't Betty have preferred to pay less than \$7,600? Of course—and Sam would have preferred to have received more than \$7,600. But both are better off than before, once the trade is made! The possibility of such *gains from trade* catalyzes all commercial activity.

That contracts benefit both sides of every deal is a happy fact about human life. And yet, there is much indirect evidence that most people don't see the mutually beneficial nature of a contract because they have a strong tendency to view life as a *zero-sum* proposition, as with a poker game.⁶⁰ Such observers will be inclined to think that the "winner" from a contract has somehow extracted his gain from the other, "loser" side of the contract. It is unfortunate that so many people assume that freely agreed-upon contracts are routinely oppressive. This is not the case. As Milton Friedman noted, "[t]he most important single central fact

⁵⁹ The bargaining range is the set of prices that is higher than the lowest price a seller would be willing to take, and lower than the highest price a buyer would be willing to pay. See Dwight G. Newman, *Negotiated Rights Enforcement*, 69 SASK. L. REV. 119, 120 (2006). Obviously, if there is no bargaining range, there will be no bargain. If the minimum price acceptable to Sam is \$8,000, and the maximum price Betty is willing to pay for Sam's car is \$7,500, there will be no deal between them. Even in situations where a bargaining range exists, the parties may be unable to reach an agreement since either one or both of them might overplay their hand and ask too much or offer too little.

⁶⁰ Paul H. Rubin, *Folk Economics*, 70 S. ECON. J. 157, 158–60 (2003). Rubin proposes an interesting evolutionary hypothesis to explain the human tendency to view the world as zero-sum. See *id.* at 160–63. For much more on this phenomenon, see Sahil Chinoy et al., *Zero-Sum Thinking and the Roots of U.S. Political Divides* (Nat'l Bureau of Econ. Rsch., Working Paper No. 31688, 2023), <https://www.nber.org/papers/w31688> [<https://perma.cc/AR2R-EBD9>].

about a free market is that no exchange takes place unless both parties benefit.”⁶¹

Mutual benefit is not the only beneficial result of private contracts. The result of every voluntary trade is the transfer of a property right to a buyer that assigns a higher value to it than the previous owner did.⁶² Property is thus traded to successive owners so that it is eventually owned by the party who will put it to its *highest and best use*, economically speaking.⁶³ In this way the productive resources present in American society are used most effectively to serve human wants and desires as expressed in the marketplace.

B.1. A Real Estate Transaction

In 2007, Bayer HealthCare wished to sell a 136-acre tract of land it owned in West Haven, Connecticut, together with the seventeen buildings on the property.⁶⁴ Bayer conducted an auction for this purpose, which attracted fifteen bidders.⁶⁵ After three rounds of bidding, Bayer accepted Yale University’s bid of \$109 million.⁶⁶ For this amount, which it paid in cash, Yale gained “550,000 square feet of new laboratory space, 275,000 square feet of office space and 600,000 square feet of warehouse and manufacturing space.”⁶⁷ After the auction, the student newspaper cited Yale’s president for the proposition that it would have cost \$650 to \$700 per square foot to build new laboratory buildings on the existing campus in New Haven, so that the cost for a comparable amount of new lab space would have been “at least \$360 million.”⁶⁸ This transaction looks like a great deal from Yale’s point of view. It paid \$109 million for lab space that would have

⁶¹ *Interview with Milton Friedman*, COMMANDING HEIGHTS, https://www.pbs.org/wgbh/commandingheights/press_site/people/friedman_intv.html [https://perma.cc/8S7S-BRGZ] (last visited Oct. 15, 2023).

⁶² See SMITH, *supra* note 55, at 43.

⁶³ See *Highest and Best Use*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁶⁴ Mark Alden Branch, *Yale Buys a Second Campus*, YALE ALUMNI MAG., http://archives.yalealumnimagazine.com/issues/2007_07/1_v.html [https://perma.cc/YR5AG2EM] (last visited Oct. 15, 2023).

⁶⁵ *Id.*

⁶⁶ Raymond Carlson & Thomas Kaplan, *In a Whirlwind, Yale Goes West*, YALE DAILY NEWS (Apr. 22, 2008), <https://yaledailynews.com/blog/2008/04/22/in-a-whirlwind-yale-goes-west/> [https://perma.cc/8DS9-L48C]. For our purposes, it is irrelevant that Yale is a non-profit corporation, legally speaking. See *id.*

⁶⁷ *Yale Announces Purchase of 136-acre Bayer Campus*, YALE MED. MAG., <https://medicine.yale.edu/news/yale-medicine-magazine/article/yale-announces-purchase-of-136acre-bayer-campus/> [https://perma.cc/K5ZB-CL3M] (last visited Oct. 15, 2023).

⁶⁸ Tyler Hill, *Yale Buys Bayer Labs in West Haven*, YALE DAILY NEWS (June 13, 2007), <https://yaledailynews.com/blog/2007/06/13/yale-buys-bayer-labs-in-west-haven/> [https://perma.cc/AJ7S-JK7C].

cost \$360 million to build—and received the land and the office, warehouse, and manufacturing buildings to boot.⁶⁹

What does the transaction look like from Bayer's point of view? Once Bayer executives learned what it would have cost Yale to build new labs, it would certainly be understandable if some of them regretted selling the property at the price they accepted. Obviously, Bayer would have preferred Yale to make a bid closer to \$360 million, and Yale would have been willing to pay a higher price than it did. Nevertheless, was Bayer better off with the cash from Yale as compared with keeping the property? Yes, by definition. Bayer had a minimum price in mind before putting the property up for bid.⁷⁰ We don't know exactly what the number was, but we can be sure that it was below \$109 million because Bayer chose to accept Yale's bid of \$109 million.

This was a voluntary transaction. It benefited both sides and it moved property to a higher-valued use (Yale's). Is Yale's use the "highest and best use" of the property? As far as we can tell, it is. The other fourteen bidders—all of whom planned to convert the existing buildings to office space or demolish them in order to build big-box retail stores⁷¹—did not value the property as highly as Yale did. It is possible, of course, that there was a potential bidder somewhere in the world who would have paid more than \$109 million, but no such party appeared at the auction. We don't know what would have happened in a bidding war between Yale and this imaginary additional bidder, but unless the imaginary bidder had been willing to bid more than \$360 million, Yale's use is the highest and best use possible for this property, for now.

The law's contribution to the Yale-Bayer Health Care transaction was to make the deal go as smoothly and securely as possible and to involve relatively small "transaction costs." It was not the province of contract or property law to second-guess the deal the parties had agreed upon. As explained by Judge Frank Easterbrook in a 1996 opinion, "[p]arties to contracts are entitled to seek, and retain, personal advantage; striving for that advantage is the source of much economic progress. Contract law does not require parties to be fair, or kind, or reasonable, or to share gains or losses equitably."⁷² That is, the aim of

⁶⁹ To see how Yale developed the property, visit *Photo Gallery Tour*, YALE WEST CAMPUS, <https://westcampus.yale.edu/> [<https://perma.cc/MCF2-RRYW>] (last visited June 2, 2024).

⁷⁰ The minimum price a seller is willing to accept from a buyer is called a "reserve price." See *Reserve Price*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁷¹ Branch, *supra* note 64.

⁷² *Indus. Representatives, Inc. v. CP Clare Corp.*, 74 F.3d 128, 132 (7th Cir. 1996) (citing *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 438–39 (7th Cir. 1987)). Yale "went to

property and contract law is to facilitate transactions such as this, not to rewrite their terms. In this mode of operation, law is enabling, not regulatory. This is a very important concept, to which we will return in Part IV.

B.2. Living Inside the Capitalist Matrix

Every day in America, there are uncountable billions of voluntary transactions. All of them make both sides of the transaction better off. Each day, you benefit directly from a number of such transactions and indirectly from a much larger number of such transactions. Whatever you had (or will have) for lunch today will be worth more to you than the money you give up to acquire and consume it. That's easy enough to see. The not-so-obvious transactions that benefit you are in the myriad of supply chains that must function smoothly in order to deliver the final goods and services you purchase. Your lunchtime turkey sandwich (or tofu stir-fry) requires the cooperation of an uncountable multitude of businesses and their employees to appear on your plate. Such cooperation takes place through the self-interested actions of property owners, dealing with one another through contractual exchange. It is this universe of transactions that accounts for the very high standard of living we enjoy.⁷³

The French politician and thinker Frederic Bastiat wrote a famous essay in 1845 to illustrate the vital role of freedom of contract:

On coming to Paris for a visit, I said to myself: Here are a million human beings who would all die in a few days if supplies of all sorts did not flow into this great metropolis. It staggers the imagination to try to comprehend the vast multiplicity of objects that must pass through its gates tomorrow, if its inhabitants are to be preserved from the horrors of famine, insurrection, and pillage. And yet all are sleeping peacefully at this moment, without being disturbed for a single instant by the idea of so frightful a prospect. On the other hand, eighty departments have worked today, without co-operative planning or mutual arrangements, to keep Paris supplied. How does each succeeding day manage to bring to this gigantic market just what is necessary—

lengths to ensure word of its interest in the [Bayer] complex did not leak out to the media, for fear that it would raise the bidding for the property, [President] Levin acknowledged.” Carlson & Kaplan, *supra* note 66.

⁷³ Another famous illustration of the worldwide network of markets used to deliver products to consumers is Leonard E. Read's essay, *I, Pencil* (1958), <https://fee.org/resources/i-pencil/> [<https://perma.cc/LA5W-8CM9>]. Americans today may have a clearer sense of this network because of the “supply chain” disruptions we all experienced as the economy came out of COVID lockdown. See Yossi Sheffi, *What Bananas Can Tell Us About Supply Chains*, IDEAS MADE TO MATTER (May 22, 2023), <https://mitsloan.mit.edu/ideas-made-to-matter/what-bananas-can-tell-us-about-supply-chains> [<https://perma.cc/D64W-C73D>].

neither too much nor too little? What, then, is the resourceful and secret power that governs the amazing regularity of such complicated movements, a regularity in which everyone has such implicit faith, although his prosperity and his very life depend upon it? That power is an *absolute principle*, the principle of free exchange. We put our faith in that inner light which Providence has placed in the hearts of all men, and to which has been entrusted the preservation and the unlimited improvement of our species, a light we term *self-interest*, which is so illuminating, so constant, and so penetrating, when it is left free of every hindrance.⁷⁴

C. Put Another Way

There are four metaphors for capitalism that highlight additional features of the idea. First, the people and institutions that “do” capitalism are the *private sector*.⁷⁵ The people and institutions that generate law and public policy are the *public sector*.⁷⁶ The result of capitalism is *private ordering*,⁷⁷ the result of politics and government is *public ordering*.⁷⁸ The relative performance of the private sector versus the public sector is a perennial question for discussion. Which sector is “better” at promoting the public’s interest in any given situation? This question is beyond the scope of the present Article, but I will address it at length in a later article in this Review (spoiler alert: the private sector is more efficient than the public sector).⁷⁹

Second, Friedrich Hayek called capitalism the *extended order*.⁸⁰ We are all bound up in it, as potential buyers and sellers. So, congratulations! You are a member of the extended order and have enjoyed

⁷⁴ FRÉDÉRIC BASTIAT, ECONOMIC SOPHISMS 74 (1845), https://www.econlib.org/library/Bastiat/basSoph.html?chapter_num=22#book-reader [<https://perma.cc/7478-L422>]. For a thoughtful short essay inspired by Bastiat, see Sandy Ikeda, *How Does Paris Get Fed?*, FOUND. FOR ECON. EDUC. (Apr. 2, 2015), <https://fee.org/articles/how-does-paris-get-fed/> [<https://perma.cc/XXM8-7JHR>].

⁷⁵ See *Private Sector*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The part of the economy . . . that is free from direct governmental control.”).

⁷⁶ See *Public Sector*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁷⁷ See Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIMONIAL LAWS. 249, 251 (2010) (“The basic idea behind private ordering—whether under the rubric of contract, capitalism or family—is that individuals know better than do other people (including those in government) what is in their own best interests.”).

⁷⁸ See J. Gregory Sidak, *Capitalism, Socialism, and the Constitution*, 4 CRITERION J. ON INNOVATION 801, 805–06 (2019).

⁷⁹ Michael DeBow, *Public Policy for Law Students*, 55 CUMB. L. REV. (forthcoming 2025).

⁸⁰ FRIEDRICH HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM (1988), *reprinted in* 1 THE COLLECTED WORKS OF F.A. HAYEK 6 (W.W. Bartley, III ed., 1989).

the benefits of it from the day you were born—all the while, knowing little or nothing about it!⁸¹

A third insight developed by Hayek is that capitalism is, as a *spontaneous order*, generated in a bottom-up fashion through the voluntary interactions of a vast multitude of self-interested individuals.⁸² It is spontaneous in the sense that it is not imposed top-down by any kind of central (especially governmental) authority but instead is the result of billions of voluntary decisions to trade with one another.⁸³

Fourth, capitalism can best be understood as grounded in the institutions of *economic freedom*—most notably, of course, private property and contractual freedom.⁸⁴ It is no accident that the courses in property and contract form the substantive core of the first-year curricula of American law schools. These two areas of “common law” were initially imported from the English legal system but have undergone extensive further development in American courts and legislatures.⁸⁵ If our property and contract law regimes promote voluntary transactions, then they will promote American growth and prosperity. The historical record provides strong evidence that this has been the case

⁸¹ Not fully convinced yet? Try comparing your daily life to that of a typical American laborer in 1915 by reading Carol Boyd Leon, *The Life of American Workers in 1915*, MONTHLY LAB. REV. (Feb. 2016), <https://www.bls.gov/opub/mlr/2016/article/the-life-of-american-workers-in-1915.htm> [<https://perma.cc/X3YK-8562>]. In the same vein are Don Boudreaux, *Most Ordinary Americans in 2016 Are Richer Than Was John D. Rockefeller in 1916*, CAFÉ HAYEK (Feb. 20, 2016), <https://cafehayek.com/2016/02/40405.html> [<https://perma.cc/D6YZ-9QHJ>]; THEODORE CAPLOW ET AL., *THE FIRST MEASURED CENTURY: AN ILLUSTRATED GUIDE TO TRENDS IN AMERICA, 1900-2000* (2001), <http://www.pbs.org/fmc/book.htm> [<https://perma.cc/FZ4L-XRG6>]; STEPHEN MOORE & JULIAN L. SIMON, *IT'S GETTING BETTER ALL THE TIME: GREATEST TRENDS OF THE LAST 100 YEARS* (2000) (excerpted in Gus Lubin & Jana Kasperkevic, *The 100 Greatest Trends of the Twentieth Century*, BUS. INSIDER (Mar. 27, 2012, 8:50 AM), <https://www.businessinsider.com/the-100-greatest-trends-of-the-twentieth-century-2012-3> [<https://perma.cc/F6QT-V9KB>]); and STANLEY LEBERGOTT, *PURSuing HAPPINESS: AMERICAN CONSUMERS IN THE TWENTIETH CENTURY* (1993).

⁸² See HAYEK, *supra* note 80, at 6–7.

⁸³ See *id.*

⁸⁴ According to two of the foremost scholars in the area, “[t]he key ingredients of economic freedom are personal choice, voluntary exchange, freedom to compete, and protections of persons and property.” James Gwartney & Robert Lawson, *The Concept and Measurement of Economic Freedom*, 19 EUR. J. PUB. POL’Y 405, 406 (2003).

⁸⁵ See, e.g., Jim Harper, *Remember the Common Law*, CATO INST. (2016), <https://www.cato.org/policy-report/march/april-2016/remember-common-law> [<https://perma.cc/G879-PPG7>]. On the very close kinship between English and American law, consider the claim by a noted historian that “[a] London barrister of 1540, quick-frozen and revived in New York today, would only need a year’s brush-up course at NYU School of Law to begin civil practice as a partner in a midtown or Wall Street corporate-law firm.” NORMAN F. CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* 192 (1997).

thus far.⁸⁶ Our modern lives are entirely dependent on the unimaginably vast and interrelated network of voluntary transactions made possible by economic freedom.⁸⁷ It would seem to follow that we should make every effort to understand the nature of economic freedom, and make every effort to defend it from harm, either deliberate or inadvertent.

D. Compared to What?

Notice what I am not saying. I am not claiming that capitalism is perfect, in any sense of the word. With the benefit of hindsight, we observe that private owners of resources make mistakes.⁸⁸ They overlook what turn out to be relevant facts, they fail to assess risk and potential reward properly, they are too optimistic (or pessimistic). Plans fail, and businesses incur losses rather than earn profits. Businesses fail to notice important changes in consumer desires and fail to cater to them, leaving the door open for new competitors to flourish. American business generates failures all the way across the size spectrum—from the 2008 bankruptcy of the Lehman Brothers investment bank, to the closure of your favorite college-town pizzeria. A 2022 study by the Bureau of Labor Statistics found that 20.8% of private sector businesses fail in their first year, 48.4% fail within five years, and 65.1% have failed within ten years.⁸⁹ Of course, such losses are borne primarily by the investors who made the risky decision to invest in what turned out to be unsuccessful enterprises.⁹⁰

What should we make of this? Pointing out that capitalism generates failure as well as success is only helpful if there is an alternative

⁸⁶ See, e.g., Daniella Markheim, *Free Trade and American Prosperity*, THE HERITAGE FOUND. (Apr. 18, 2006), <https://www.heritage.org/trade/report/free-trade-and-american-prosperity> [https://perma.cc/F639-7KNE] (discussing how the United States has enjoyed the “benefits of open trade” and how “freer trade policies” have led to “innovation and better products, higher-paying jobs, new markets, and increased savings and investment”).

⁸⁷ See, e.g., *Economic Freedom Basics*, FRASER INST., <https://www.fraserinstitute.org/economic-freedom/economic-freedom-basics> [https://perma.cc/ZTK7-2F4J] (last visited Oct. 20, 2023) (discussing that “voluntary exchange” is a cornerstone of economic freedom and permits individuals to “use, exchange, or give their property” freely and may “choose, trade, and cooperate with others, and compete as they see fit”).

⁸⁸ Sid Mohasseb, *Capitalism—Equal Opportunity to Fail!*, LINKEDIN (Nov. 24, 2021), <https://www.linkedin.com/pulse/capitalism-equal-opportunity-fail-sid-mohasseb/> [https://perma.cc/C9UR-QJ6H] (discussing that capitalism is both “risk and return packaged together”).

⁸⁹ Devon Delfino, *The Percentage of Businesses That Fail—And How to Boost Your Chances of Success*, LENDINGTREE (May 8, 2023), <https://www.lendingtree.com/business/small/failure-rate/> [https://perma.cc/5HG8-CGHG].

⁹⁰ That is, provided government does not bail out the unsuccessful business. See, e.g., Mohasseb, *supra* note 88.

system available that will perform better. Put differently, the proper response to criticism of capitalism is to ask, “compared to what?”

So, is there a workable alternative to capitalism? Alternatively, communism—which is, government ownership of all the factors of production and exclusive decision-making authority about their use⁹¹—has received a real-world field test lasting more than a century and marring the lives of more than a billion people,⁹² and it has proven to be far less productive and dynamic than capitalism.⁹³ In spite of public opinion polls that show that many Americans, especially young adults, have positive feelings about “socialism,”⁹⁴ it is hard to believe that many people are thinking about government ownership and management of the means of production when they answer the pollsters. It simply is not a practical alternative for America in the twenty-first century.

Is there some “middle way” between capitalism and communism that will perform better than capitalism? While that is possible, it does not seem likely, given the historical record. When considering any proposed middle way, we should try to avoid what Harold Demsetz calls the “nirvana approach” to public policy, which “implicitly presents the

⁹¹ See *Communism*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁹² See Dan Mitchell, *An Anniversary of Evil: 100 Years of Communism, 100 Million Deaths*, INT’L LIBERTY (Oct. 30, 2017), <https://danieljmitchell.wordpress.com/2017/10/30/an-anniversary-of-evil-100-years-of-communism-100-million-deaths/> [<https://perma.cc/L5F8-WZLH>] (discussing the decades-long communist regimes in Cambodia, Cuba, North Korea, and Russia).

⁹³ See, e.g., Markheim, *supra* note 86.

⁹⁴ For example, a 2020 YouGov poll showed increased favorability of the term “socialism” (49%) among Generation Z compared to 2019 (40%). Opinions of capitalism declined slightly from 2019 to 2020 among all Americans (58% to 55%), with Generation Z (ages 16 to 23) slightly up (49% to 52%) and Millennials (ages 24 to 39) down (50% to 43%). 35% of Millennials and 31% of Gen Z support the gradual elimination of the capitalist system in favor of a more socialist system. YOUGOV, U.S. ATTITUDES TOWARD SOCIALISM, COMMUNISM, AND COLLECTIVISM (2020), <https://victimsofcommunism.org/wp-content/uploads/2020/10/10.19.20-VOC-YouGov-Survey-on-U.S.-Attitudes-Toward-Socialism-Communism-and-Collectivism.pdf> [<https://perma.cc/EP3D-SCTE>]. A research group at Wake Forest University is conducting interesting survey research on “Confidence in Capitalism” to “identif[y] how and why capitalism and democracy may be in conflict among Millennials and Gen Z.” Christina Elson & Kylie King, *Confidence in Capitalism*, CTR. FOR THE STUDY OF CAPITALISM, <https://capitalism.wfu.edu/what-we-do/research/> [<https://perma.cc/6CJ8-XDGF>] (last visited Oct. 22, 2023). Further understanding of what is in the minds of present-day American “socialists” might be gleaned from the recent book by their tribune. See BERNIE SANDERS, IT’S OK TO BE ANGRY ABOUT CAPITALISM 13 (Crown, 2023). For a thoughtful reflection on this state of affairs, see generally Edward L. Glaeser, *How to Talk to Millennials About Capitalism*, THE SOCIAL ORDER (2019), <https://www.city-journal.org/article/how-to-talk-to-millennials-about-capitalism> [<https://perma.cc/JV2A-49U9>].

relevant choice as between an ideal norm [here, the middle way] and an existing ‘imperfect’ institutional arrangement [here, existing capitalism].”⁹⁵ Instead of committing the nirvana fallacy, Demsetz argues for “a *comparative institution* approach in which the relevant choice is between alternative real [as distinguished from idealized] institutional arrangements.”⁹⁶ In short, avoid comparing the messy real world with a pristine but imaginary alternative. At a minimum, the proponent of reform should be pressed for details about exactly what she is proposing, as well as for any evidence she has that the proposal (or something like it) has actually worked in the real world.

III. THE GREAT ENRICHMENT

In terms of material well-being, the modern era that we enjoy today began around the turn of the nineteenth century in Great Britain.⁹⁷ Deirdre McCloskey sets the story this way:

[W]hen we economic historians lecture to undergraduates we emphasize an anti-Malthusian message of hope—that average human welfare has shot up startlingly since 1800. A graph of average income overtime resembles an ice-hockey stick, with tens of thousands of years spent tracing the long, horizontal handle. Then, finally, after 1800, history reached the business end of the hockey stick and shot up the blade. A video by Rosling, “200 Countries, 200 Years, 4 Minutes,” makes the optimistic point, illustrating the transition from misery to hope.⁹⁸

McCloskey sees this “Great Enrichment” as “the most important secular event” in recorded human history.⁹⁹ It “has been and will continue to be more important historically than the rise and fall of empires or the class struggle in all hitherto existing societies.”¹⁰⁰ We will use

⁹⁵ Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969).

⁹⁶ *Id.*

⁹⁷ See DEIRDRE NANSEN MCCLOSKEY, *BOURGEOIS EQUALITY: HOW IDEAS, NOT CAPITAL OR INSTITUTIONS, ENRICHED THE WORLD* 59 (2016) (stating that material well-being increased dramatically beginning around 1800).

⁹⁸ *Id.* (referencing Hans Rosling, *200 Countries, 200 Years, 4 Minutes*, YOUTUBE (Nov. 26, 2010), <https://www.youtube.com/watch?v=jbkSRLYSojo> [<https://perma.cc/BVM8-9AZV>]). Other discussions of the hockey stick of human progress include JONAH GOLDBERG, *THE SUICIDE OF THE WEST: HOW THE REBIRTH OF TRIBALISM, POPULISM, NATIONALISM, AND IDENTITY POLITICS IS DESTROYING AMERICAN DEMOCRACY* 7–9 (2018) and EDD S. NOEL ET AL., *ECONOMIC GROWTH: UNLEASHING THE POTENTIAL OF HUMAN FLOURISHING* 2–8 (2013) (including a graph of GDP per capita from A.D. 1000 to A.D. 2000).

⁹⁹ MCCLOSKEY, *supra* note 97, at 56.

¹⁰⁰ *Id.*

her term to refer to the post-1800 record of capitalism's roaring successes

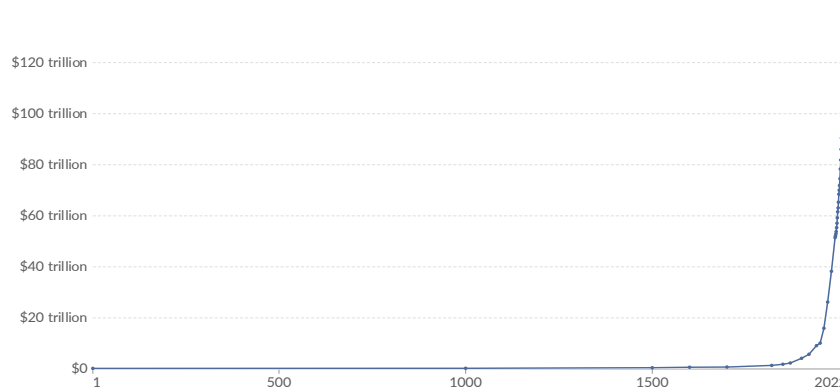
A. Graphically Speaking

It is one thing to read about the Great Enrichment but seeing it graphically may make a stronger impression. This famous hockey-stick graph, generated by Angus Maddison and other researchers at Oxford University,¹⁰¹ shows total worldwide gross domestic product ("GDP"), the standard measure of economic output, over the past two thousand years:¹⁰²

Global GDP over the long run

Total output of the world economy. These historical estimates of GDP are adjusted for inflation. We combine three sources to create this time series: the Maddison Database (before 1820), the Maddison Project Database (1820–1989), and the World Bank (1990 onward).

Our World
in Data



Data source: World Bank (2023); Bolt and van Zanden - Maddison Project Database 2023; Maddison Database 2010

Note: This data is expressed in international-\$ at 2017 prices.

OurWorldinData.org/economic-growth | CC BY

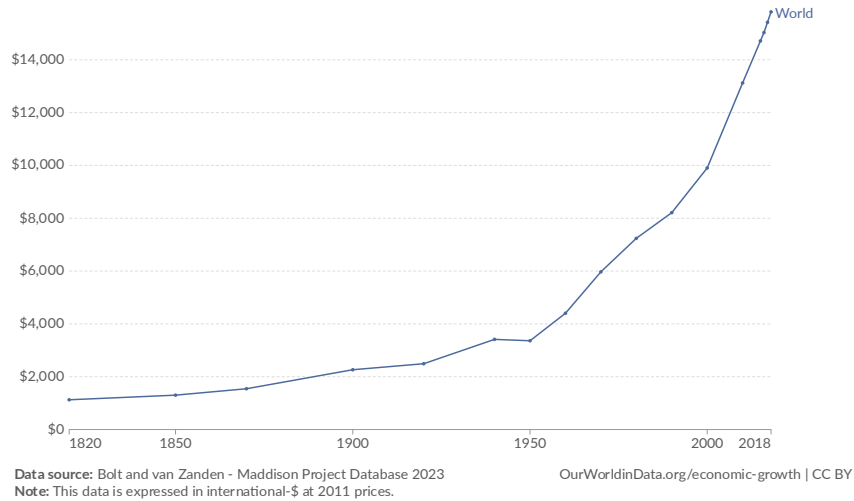
¹⁰¹ For a brief explanation on Angus Maddison's work and the creation of the Maddison Project, see Marian L. Tupy, *Humanity's Remarkable Economic Progress Revealed in One Chart*, FOUND. FOR ECON. EDUC. (Apr. 17, 2018), <https://fee.org/articles/the-maddison-project-reveals-humanitys-remarkable-economic-progress-in-a-single-chart/> [<https://perma.cc/PY28-895Y>]. The website of this research group, Our World in Data, offers a huge array of data and visual representations thereof. The graphs shown below were drawn from the site's "Interactive charts on Economic Growth," available at <https://ourworldindata.org/economic-growth>. The interactive feature is easy to use; I encourage readers to explore this resource on their own. *Graph of World GDP Over the Last Two Millennia*, OUR WORLD IN DATA, <https://ourworldindata.org/grapher/world-gdp-over-the-last-two-millennia> [<https://perma.cc/PH7U-NY3E>] (last visited Oct. 15, 2023).

¹⁰² This graph is provided by the following under a Creative Commons BY license: "Data Page: Global GDP over the long run", part of the following publication: Max Roser, Pablo Arriagada, Joe Hasell, Hannah Ritchie and Esteban Ortiz-Ospina (2023) - "Economic Growth". Data adapted from World Bank, Bolt and van Zanden, Angus Maddison. Retrieved from <https://ourworldindata.org/grapher/global-gdp-over-the-long-run> [online

This next graph shows the growth in GDP per person worldwide, over the time of the Great Enrichment (that is, since 1820):¹⁰³

GDP per capita, 1820 to 2018

This data is adjusted for inflation and for differences in the cost of living between countries.



resource] [<https://perma.cc/LS5N-S4DK>]. The graph and its contents are not owned, created, or modified by the Cumberland Law Review.

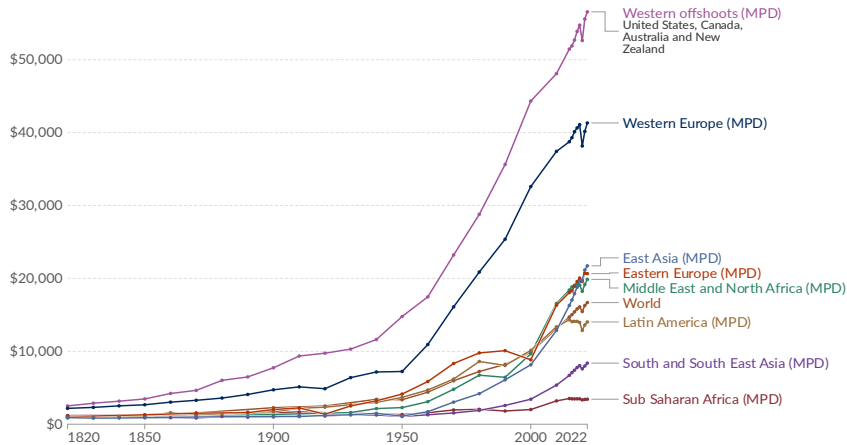
¹⁰³ This graph is provided by the following under a Creative Commons BY license: “Data Page: GDP per capita”, part of the following publication: Max Roser, Pablo Arriagada, Joe Hasell, Hannah Ritchie and Esteban Ortiz-Ospina (2023) - “Economic Growth”. Data adapted from Bolt and van Zanden. Retrieved from <https://ourworldindata.org/grapher/gdp-per-capita-maddison> [online resource] [<https://perma.cc/WTL4-FEPA>]. The graph and its contents are not owned, created, or modified by the Cumberland Law Review.

The next graph expresses this data in terms of continental and other regional groupings of nations:¹⁰⁴

GDP per capita, 1820 to 2022

This data is adjusted for inflation and for differences in the cost of living between countries.

Our World
in Data



Data source: Bolt and van Zanden - Maddison Project Database 2023
Note: This data is expressed in international-\$ at 2011 prices.

OurWorldinData.org/economic-growth | CC BY

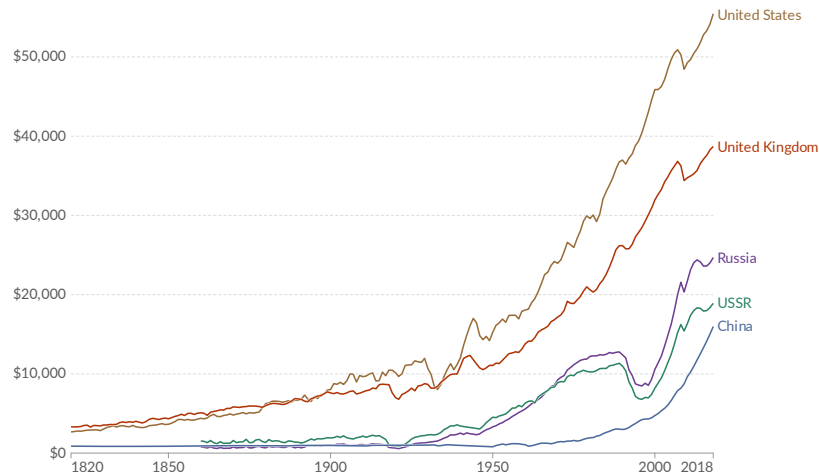
The much higher incomes earned in the countries of western Europe and their “offshoots” (such as the United States) leaps off the page.

¹⁰⁴ This graph is provided by the following under a Creative Commons BY license: “Data Page: GDP per capita”, part of the following publication: Max Roser, Pablo Arriagada, Joe Hasell, Hannah Ritchie and Esteban Ortiz-Ospina (2023) - “Economic Growth”. Data adapted from Bolt and van Zanden. Retrieved from <https://ourworldindata.org/grapher/gdp-per-capita-maddison> [online resource] [<https://perma.cc/WH45-P6JR>]. The graph and its contents are not owned, created, or modified by the Cumberland Law Review.

Finally, we see per capita income in four countries since 1820:¹⁰⁵

GDP per capita, 1820 to 2018

This data is adjusted for inflation and for differences in the cost of living between countries.



Data source: Bolt and van Zanden - Maddison Project Database 2023
Note: This data is expressed in international-\$ at 2011 prices.

OurWorldinData.org/economic-growth | CC BY

The United Kingdom was slightly more productive than the U.S. until 1880, at which time U.S. growth outstripped that of the U.K., with just a couple of years as exceptions down to 2018. The data shows that the superpowers of centralized government planning of economic activity—the USSR and China—dramatically underperformed the U.S. and the U.K. over the entire period.¹⁰⁶

¹⁰⁵ This graph is provided by the following under a Creative Commons BY license: “Data Page: GDP per capita”, part of the following publication: Max Roser, Pablo Arriagada, Joe Hasell, Hannah Ritchie and Esteban Ortiz-Ospina (2023) - “Economic Growth”. Data adapted from Bolt and van Zanden. Retrieved from <https://ourworldindata.org/grapher/gdp-per-capita-maddison> [online resource] [<https://perma.cc/V9VF-MXA4>]. The graph and its contents are not owned, created, or modified by the Cumberland Law Review.

¹⁰⁶ A recent article showed that in 1991, its last year of existence, the Soviet Union’s GDP per capita “was \$7,846, compared to a US poverty level (individual) of \$6,932, and US GDP per capita of \$24,342. Seven decades of socialism resulted in a living standard just 13% above the US poverty level and 68% below . . . the US middle-class living standard.” Peter Mladina, *The Economic Performance of Socialism*, APPLIED ECON. LETTERS 2–3 (Dec. 7, 2020), <https://ssrn.com/abstract=3522297> [<https://perma.cc/6LBK-9NUT>]. In central and eastern European countries dominated by the USSR, “[f]ive decades of socialism resulted in a living standard just 7% above the US poverty level.” *Id.* at 3. And in 2000-Communist China, following “five decades of predominately socialist economic policy” the living standard was “67% below the US poverty level, and 92% below . . . the US middle-class living standard.” *Id.* at 4. There is a huge literature bearing out this judgment. For a recent example, see Peter J. Boettke et al., *The Road to Socialism and Back: An*

B. *The Sources of the Great Enrichment*

The question of why the Great Enrichment began when and where it did—in the early nineteenth century in Great Britain—has preoccupied economic historians for generations. In 2022, Mark Koyama and Jared Rubin provided the most recent survey of the extensive scholarship on the question.¹⁰⁷ They do an excellent job summarizing the most important factors put forth for Britain’s industrial revolution, including “relatively limited and representative governance, a large domestic economy, access to the Atlantic economies, and a large base of highly skilled mechanical workers”;¹⁰⁸ “high wages and relatively cheap energy”; and the institutional framework for an “Industrial Enlightenment” that facilitated the propagation of new scientific ideas and their translation into usable technologies.¹⁰⁹ This multicausal view appears to be the conventional wisdom in the field. Koyama and Rubin also outline the multiple factors said to explain the Enrichment in U.S. economic history. Those factors include sharing “a common language and culture with Great Britain,” “high wages, abundant land, and natural resources,” “a huge domestic market,” and an expanding population that moved west along improved “internal transport networks,” particularly railroads.¹¹⁰

Rejecting the standard multicausal accounts, Professor McCloskey offers a striking monocausal explanation for the Great Enrichment. In a series of three books,¹¹¹ McCloskey argues that, prior to the

Economic History of Poland, 1939–2019, FRASER INST. (June 15, 2023), <https://www.fraserinstitute.org/studies/the-road-to-socialism-and-back-an-economic-history-of-poland1939-2019> [https://perma.cc/M4Q4-RUWD]. Updating the GDP numbers for China does not come close to putting it on the same level of economic performance as the much freer Taiwan. According to the 2023 estimates of the International Monetary Fund, Taiwan’s GDP per capita is \$73,344 (within \$7,000 of the USA), while mainland China—even after its remarkable growth since 2000—manages GDP per capita of only \$23,382. *GDP Per Capita, Correct Prices*, INT’L MONETARY FUND, <https://www.imf.org/external/datamapper/NGDPDPC@WEO/ADVEC/WEOWORLD/TWN/CHN> [https://perma.cc/6FZL-47DK] (last visited Oct. 29, 2023). For a short discussion of China’s recent experience, see Dan Mitchell, *China’s Statism=Autocratic Incompetence*, INT’L LIBERTY (Sept. 16, 2023), <https://danieljmitchell.wordpress.com/2023/09/16/chinas-statism-autocratic-incompetence/> [https://perma.cc/XSY5-WCBD].

¹⁰⁷ See MARK KOYAMA & JARED RUBIN, *HOW THE WORLD BECAME RICH: THE HISTORICAL ORIGINS OF ECONOMIC GROWTH* (2022).

¹⁰⁸ *Id.* at 174.

¹⁰⁹ *Id.* at 175.

¹¹⁰ *Id.* at 197.

¹¹¹ DEIRDRE NANSEN MCCLOSKEY, *THE BOURGEOIS VIRTUES: ETHICS FOR AN AGE OF COMMERCE* (2006); DEIRDRE NANSEN MCCLOSKEY, *BOURGEOIS DIGNITY: WHY ECONOMICS CAN’T EXPLAIN THE MODERN WORLD* (2010); MCCLOSKEY, *supra* note 97. There is also a very readable, compressed restatement of these books. See DEIRDRE

industrial revolution, there was a revolution in “ethics concerned with other people’s behavior.”¹¹²

Humans as individuals didn’t get better, or worse; not much. But they did radically change, in the conversation of humankind, the attitudes toward other humans. What began to characterize northwestern Europe in the seventeenth and eighteenth centuries was not so much new ethics at the level of individual responsibility Much more important was a change at the social and rhetorical level: “You made a fortune trading with the East. Good.” Or: “That fellow invented a new plastic cooling fan for automobiles. Good.” In other words, the new liberty and dignity for commoners was a sociological event, not a psychological one, and originated in a changing conversation in the society, not at first in psychological self-monitoring by the individual. People in Holland and then England didn’t suddenly start alertly attending to profit. They suddenly started admiring such alertness, and stopped calling it sinful greed.¹¹³

This ethical revolution led to what McCloskey calls “the Bourgeois Deal,” which forms the engine of the Great Enrichment.¹¹⁴ The Deal, proposed by an innovator or other sort of entrepreneur, is this:

“You accord to me . . . the liberty and dignity to try out my schemes in voluntary trade, and let me keep the profits, if I get any, in the first act—though I accept, reluctantly, that others will compete with me in the second act. In exchange, in the third act of a new, positive-sum drama, the bourgeois betterment provided by me (and by those pesky, low-quality, price-spoiling competitors) will make *you* all rich.” And it did.¹¹⁵

The debate over the origins of the Great Enrichment likely will not end any time soon. For our purposes, that is not a problem because both the standard view and McCloskey’s view presuppose the existence of the English common law of property and contract.¹¹⁶ McCloskey is quite right to point out that there were no major changes to the law that preceded or coincided with the onset of the industrial revolution.¹¹⁷ But both her explanation and the more standard multi-causal stories depend upon stable rules of property and contract—not as first

NANSEN MCCLOSKEY & ART CARDEN, *LEAVE ME ALONE AND I’LL MAKE YOU RICH: HOW THE BOURGEOIS DEAL ENRICHED THE WORLD* (2020).

¹¹² MCCLOSKEY, *supra* note 97, at 20.

¹¹³ *Id.* at 20–21.

¹¹⁴ *Id.* at 31, 56.

¹¹⁵ *Id.* at 56.

¹¹⁶ The core of the English common law of real property was hundreds of years old by the time of the Industrial Revolution. *Id.* at 489. For the most part, contract and other types of commercial law had developed outside the royal courts through the law merchant and other types of “private law.” *See id.* at 150.

¹¹⁷ MCCLOSKEY, *supra* note 97, at 489.

causes, but as providing the framework for all the interactions necessary for the Enrichment to blossom. It would be exceedingly difficult to quantify the importance of the law of property and contract across the entire two centuries of the Great Enrichment. Luckily, there is another way to approach the question of law's importance to our material well-being.

C. *Research on Economic Freedom*

Rather than trying to understand the preconditions for the Enrichment, or its entire 200-year history, let's focus in this section on what we know about the relationship between economic well-being and the laws of property and contract in our time. There are multiple studies that clearly demonstrate that stable and secure property rights directly correlate with material well-being.¹¹⁸ And while "correlation is not causation," it is hard to imagine how higher incomes come into existence without private property rights, or why income growth appearing somehow without strong private property rights would in turn result in new property law more protective of private owners.

The Private Property Alliance ("PPA") publishes an annual report that rates countries in terms of the amount of protection their legal systems provide to private property owners.¹¹⁹ The PPA's *International Property Rights Index 2020* ("IPRI") looked at a number of factors, including each country's "Legal and Political Environment."¹²⁰ That section of the report evaluates a country's commitment to judicial independence, "the strength of the rule of law,"¹²¹ the stability of its

¹¹⁸ See Johan Graafland, *When Does Economic Freedom Promote Well Being? On the Moderating Role of Long-Term Orientation*, SOC. INDICATOR RSCH. (Nov. 30, 2019), <https://doi.org/10.1007/s11205-019-02230-9> [<https://perma.cc/FTC9-4YDR>].

¹¹⁹ See *International Property Rights Index*, PROP. RTS. ALL., <https://www.international-propertyrightsindex.org/> [<https://perma.cc/X8GM-KRSL>].

¹²⁰ SARY LEVY-CARCIENTE, INTERNATIONAL PROPERTY RIGHTS INDEX 4 (2020), <https://atripri2017.s3.amazonaws.com/uploads/IPRI+2020+Full+Report.pdf> [<https://perma.cc/E8Q-Q-9MBV>].

¹²¹ Law students will encounter the term "rule of law" from time to time but may notice that there is no agreed-upon definition of what it means. In the lingo of this branch of jurisprudence, the definition is "contested." One noted legal philosopher explains that the term is generally understood to include "a number of principles of a formal and procedural character," including procedural features such as "generality, clarity, publicity, stability, and prospectivity" Jeremy Waldon, *The Rule of Law*, STAN. ENCYC. OF PHIL. (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law/> [<https://perma.cc/8ZXK-Q9GS>]. Beyond such procedural aspects, some argue that the rule of law "also comprises certain substantive ideals like a presumption of liberty and respect for private property rights. But these are much more controversial" than the procedural ideals. *Id.* In particular, "[s]ome jurists believe that there is a special affinity between the Rule of Law and the vindication and support of private property." *Id.* Koyama and Rubin make the same point in slightly

political system, and the control of corruption.”¹²² The results from a survey of 129 nations are dramatic.

Table 2¹²³

Relationship between per capita income and the degree to which a country’s legal system protects private property rights, 2020	
Country’s legal protection of private property rights* (n = 129)	Average GDP per Capita (in 2010 USD)
Highest level of protection (18 countries, 1st quintile) ¹²⁴	\$57,908
Next 21 countries (2nd quintile)	\$30,027
Next 25 countries (3rd quintile)	\$12,365
Next 29 countries (4th quintile)	\$6,254
Lowest level of protection (36 countries, 5th quintile) ¹²⁵	\$3,608

Note well that each step down the ladder of quintiles cuts GDP roughly in half!

There are many studies in the same vein as the IPRI, the vast majority of which confirms the importance of private property rights—and other elements of economic freedom—to economic growth and development, as well as many other aspects of human flourishing. The remainder of this section presents just a few of these studies.

After reviewing data for the period 1975 through 1995, James Gwartney and co-authors concluded:

Clearly, these data indicate that during the last two decades there has been a strong relationship between economic freedom and economic growth. Without exception, countries with either a high level or a substantial increase in economic freedom achieved positive growth. Correspondingly, the overwhelming majority of countries with low and/or

different terms: “[w]hen a society follows the rule of law, laws are applied equally and all types of rights are protected. This of course includes economic rights. Economic freedom is strongly correlated with per capita income.” KOYAMA & RUBIN, *supra* note 107, at 39. The most influential American treatment of the rule of law is probably LON FULLER, *THE MORALITY OF LAW* (1964). For an insightful recent treatment, see Daniel B. Rodriguez et al., *The Rule of Law Unplugged*, 59 EMORY L.J. 1455 (2010), <https://scholarlycommons.law.emory.edu/elj/vol59/iss6/2/> [<https://perma.cc/N7F4-H5HE>].

¹²² LEVY-CARCIENTE, *supra* note 120, at 5.

¹²³ *Id.* at 1, 20, 48.

¹²⁴ *Id.* at 20. The top-ranked countries were Finland (1st), Switzerland (2nd), Singapore (3rd), New Zealand (4th), and Japan (5th). *Id.* The USA was ranked thirteenth. *Id.*

¹²⁵ *Id.* at 20. The lowest-ranked countries were Angola (125th), Bangladesh (126th), Venezuela (127th), Yemen (128th), Haiti (129th). LEVY-CARCIENTE, *supra* note 120, at 20.

contracting levels of economic freedom experienced declines in per capita GDP.

These findings are buttressed by the linkage between a persistently high freedom rating over a lengthy time period and level of income. Without exception, countries with a persistently high level of economic freedom during the last two decades also achieved high per capita income levels. On the other hand, no country with a persistently low level of economic freedom during the last two decades was able to achieve even middle income status¹²⁶

Eight years later, James Gwartney and Robert Lawson updated their analysis using data from 1980-2000 and found, once again, that:

Almost everything that households in North America, Europe, and other parts of the developed world consume is the result of gains from depersonalized exchange and extension of the market. Without these gains, high levels of per capita income and modern living standards would be impossible. But these gains from depersonalized trade cannot be realized without a legal system that protects property rights and enforces contracts in an evenhanded manner. The failure of a country's legal system to perform these functions places a tight constraint on its prosperity.¹²⁷

And in 2004, Bernhard Heitger addressed the issues of causation (do strong property rights lead to economic growth or, somehow, vice versa?) and simultaneity (are feedback loops present such that higher incomes and stronger property protections are simultaneously determined?).¹²⁸ Using data from 1975 through 1995, Heitger found evidence that significantly supported the proposition that:

[R]ising income levels lead to further improvement in the quality of property rights, which implies that property rights and economic development are determined simultaneously. . . . The overall impact of property rights on economic development is considerable: A doubling of the property rights index more than doubles per capita income.¹²⁹

Note that this last proposition is consistent with the data shown in Table 2, above. Heitger also found that more secure property rights resulted in people investing more in both physical and human capital and

¹²⁶ JAMES D. GWARTNEY ET AL., *ECONOMIC FREEDOM OF THE WORLD: 1975-1995* 104-05 (1996).

¹²⁷ James Gwartney & Robert Lawson, *What Have We Learned from the Measurement of Economic Freedom?*, in *THE LEGACY OF MILTON AND ROSE FRIEDMAN'S FREE TO CHOOSE: ECONOMIC LIBERALISM AT THE TURN OF THE 21ST CENTURY* 217, 229-31 (Mark A. Wynne et al., eds, 2004), <https://www.dallasfed.org/-/media/Documents/research/pubs/ftc/ftc.pdf> [<https://perma.cc/MT9Q-4S44>].

¹²⁸ Bernhard Heitger, *Property Rights and the Wealth of Nations: A Cross-Country Study*, 23 *CATO J.* 381, 399 (2004).

¹²⁹ *Id.*

decreased population growth rates.¹³⁰ He concluded that, “[g]iven this additional area of influence, it seems reasonable to classify property rights among the *ultimate* sources of economic growth. In contrast, the more traditional determinants (physical and human capital accumulation as well as population growth) should be classified as proximate sources.”¹³¹

Skipping ahead to 2015, an article by Ceyhun Haydaroglu is based on data from the Organisation for Economic Co-operation and Development (“OECD”) and European Union countries during 2007–2014. Haydaroglu finds strong evidence that “an increase in property rights . . . increase[s] economic growth. So, in those economies where the guarantee of property rights is greater, the findings also show that there is a positive effect on economic growth.”¹³²

We will end our incomplete survey of this research literature with a 2022 article by Robert Lawson, in which he reviewed “[h]undreds of studies in top-ranked academic journals show[ing] that economic freedom leads to positive outcomes for people, whether in increased prosperity, reduced conflict, or stronger human rights.”¹³³ The 721 articles were published between 1996 and early 2022 and “undertook fact-based studies of the impact of economic freedom.”¹³⁴ His conclusion:

Just over half [of the articles], 50.6%, found economic freedom was related to “positive” out-comes while only 4.6% found “negative” out-comes; 44.8% did not find a clear relationship between economic freedom and either “positive” or “negative” outcomes. Economic benefits were particularly pronounced. Two thirds of the relevant studies found that economic freedom was positively related to economic growth, 72.5% to increased incomes and productivity, and 62.9% to increased entrepreneurship.¹³⁵

¹³⁰ *Id.*

¹³¹ *Id.* at 399–400.

¹³² Ceyhun Haydaroglu, *The Relationship Between Property Rights and Economic Growth: An Analysis of OECD and EU Countries*, 6 DANUBE: L. & ECON. REV. 217, 233 (2015).

¹³³ Robert Lawson, *Economic Freedom in the Literature: What Is It Good (Bad) For?*, in ECONOMIC FREEDOM OF THE WORLD: 2022 ANNUAL REPORT iii (2022), https://res.cloudinary.com/atlas-network/image/upload/s--V3uUD0rP--/v1661966122/grant_progress_reports/xiodscxa9ptj5yjdvyj5.pdf [<https://perma.cc/ZSA7-GLYJ>]. In a later article, Lawson and his colleagues used a different approach to the data but found once again that “economic freedom is positively related to growth, income, and investment.” Robert Lawson et al., *Economic Freedom and Growth, Income, Investment, and Inequality: A Quantitative Summary of the Literature*, 90 S. ECON. J. 1099 (2024), <https://onlinelibrary.wiley.com/doi/10.1002/soej.12680> [<https://perma.cc/D676-4GUT>].

¹³⁴ *Id.*

¹³⁵ *Id.*

Although we have only skimmed the surface of the literature on economic freedom and human well-being, it should be adequate to convince the reader of the fundamental importance of private property and freedom of contract to the Great Enrichment and, by extension, to our way of life. I encourage you to explore this literature further, on your own.¹³⁶

IV. WHAT'S LAW GOT TO DO WITH IT?

At the end of our consideration of Yale's major property acquisition, we—with an assist from Judge Easterbrook—introduced the idea that the legal rules that helped facilitate the Great Enrichment operated as facilitating, rather than regulatory.¹³⁷ For some law students, this idea may not be familiar or intuitively appealing. Isn't the very purpose of the law to force people to do things they would not otherwise wish to do, or to prohibit them from doing things they wish to do?

A. *Default Rules and the Role of Business Lawyers*

Of course, many areas of law pronounce rules that are “mandatory” on the population.¹³⁸ But other areas of law do not operate in this mandatory/prohibitory fashion, and these areas are very closely connected with the Great Enrichment. These areas—contract and commercial law, including the law of business organizations—provide a wide array of optional, rather than mandatory, legal rules that may, but need not, be used by private parties in their business agreements. Such optional legal rules are usually referred to as *default rules*, a term borrowed from computer programming lingo.¹³⁹ If the parties to an

¹³⁶ The standard references are two annual surveys: JAMES GWARTNEY ET AL., *ECONOMIC FREEDOM OF THE WORLD: 2023 ANNUAL REPORT* (2023) and Anthony B. Kim, *2023 Index of Economic Freedom*, HERITAGE, <http://www.heritage.org/index> [<https://perma.cc/2LUX-XSCV>]. Also recommended are: *Exploring Economic Freedom*, METRO. STATE UNIV. OF DENVER, <https://www.msudenver.edu/economics/exploring-economic-freedom/> [<https://perma.cc/CCJ2-34T6>] (last visited Oct. 19, 2023); IAN VASQUEZ ET AL., *THE HUMAN FREEDOM INDEX 2022* (2022); *2023 WJP Rule of Law Index*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/rule-of-law-index/> [<https://perma.cc/QQN2-NVEQ>]; and *Worldwide Governance Indicators*, WORLD BANK GROUP, <https://info.worldbank.org/governance/wgi/> [<https://perma.cc/7HNB-6MT2>] (last visited Oct. 19, 2023).

¹³⁷ See *supra* Part II, Section B.1.

¹³⁸ A mandatory legal rule is not optional; it cannot be “contracted around” legally. For example, there is currently a legal prohibition on the sale of heroin. ALA. CODE § 13A-12-211 (1975). Two parties might nevertheless reach agreement as to such a purchase-and-sale, but it takes place outside the legal system (it is “outlawry”) and may expose the parties to criminal sanctions. The real question is whether the public interest in the behavior at issue is so strong that a mandatory rule is justified.

¹³⁹ See *Default*, BLACK'S LAW DICTIONARY (11th ed. 2019); see Katie Terrell Hanna, *Default*, TECHTARGET NETWORK, <https://www.techtarget.com/whatis/definition/default>

agreement wish to avail themselves of a government-provided default, they may do so expressly or through silence; if they wish to reject the default, they may “opt out” or “contract around” the default by specifying the different rule they prefer in their agreement.¹⁴⁰

Focus on two of the default rules created by the Uniform Limited Liability Company Act (2006) (“ULLCA”) for “member-managed” LLCs.¹⁴¹ Under Section 407(b)(2), “[e]ach member has equal rights in the management and conduct of the company’s activities and affairs.” Under Section 407(b)(3), “[a] difference arising among members as to a matter in the ordinary course of the activities and affairs of the company may be decided by a majority of the members.” Further, Section 105(b) allows any group of members to include a term in their LLC operating agreement that contracts around any of the Act’s default rules, subject to the list of exclusions in Section 105(c).

Imagine a situation where six investors have agreed to form a member-managed limited liability company in a state that has enacted the ULLCA. One member, Alex, plans to contribute fifty percent of the capital needed to start the business, and the five other members will each contribute ten percent. Alex will likely find the one-member, one-vote default unacceptable. His attorney will likely advise him to try to negotiate for more than one vote, to avoid being outvoted five-to-one or four-to-two by his lesser-invested fellow members.

Would the other five members be willing to accept an alternative voting arrangement that would assign one vote for each ten percent

[<https://perma.cc/ER7T-6EWJ>] (Dec. 2022). For example, the default settings in your word processing software almost certainly include a one-inch margin on the left side of the page. If you wish to change the setting, you may. If you like a one-inch margin, you are all set.

¹⁴⁰ See Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1524–25 (2016). “[T]he claim that the bulk of contract law is (and should be) comprised of legally created default rules and standards has organized contract law scholarship” since the late 1970s. *Id.* at 1525. There is a large body of research literature on default rules exploring a number of subtopics that are simply beyond the scope of this Article. For the curious reader, a classic introduction is by Ian Ayres and Robert Gertner. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). A landmark book on corporate law explains that “[t]he role of corporate law . . . is to adopt a [default] term that prevails unless varied by contract. And the background term should be the one that is either picked by contract expressly or is the operational assumption of successful firms.” FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 36 (1991).

¹⁴¹ UNIF. LTD. LIAB. CO. ACT § 407(a) (NAT’L CONF. COMM’RS UNIF. STATE L., amended 2013). As distinguished from “manager-managed” LLCs, Section 407(a) makes it clear that an LLC is “member-managed” unless the operating agreement makes clear that it is not. *Id.* In other words, the member-managed form is the default form, but can be contracted around.

share of the total capital contributed by a given member? In that case, Alex, by casting his five votes, could veto any proposal concerning the firm's ordinary course of business. This might not be a happy solution for the other five members. Can you think of a counterproposal they might make?

If members of this group of hypothetical investors are well-advised by their lawyers, they should address the question of voting rights and decision rules. If, for whatever reason, the members do not address these questions in their operating agreement, the default rules of the ULLCA will apply. This brings into focus the role of lawyers in commercial negotiations more generally. A lawyer must know the default rules that the law will provide to the agreement that her client is considering entering, recognize and communicate any problems the defaults might present to the client, and then identify and attempt to negotiate contractual terms that will replace the default rules in a fashion that is acceptable to all parties to the agreement.¹⁴²

The value created by business lawyers in identifying problems and proposing solutions in contract drafting and negotiation is recognized and explored in a large and growing literature, where business (or transactional) lawyers are described as “transaction cost engineers,” “enterprise architects,” and the like.¹⁴³ It stands to reason that business lawyers increase the value of their clients' deals by more than the fees they charge, or else the clients would dispense with, or minimize, their employment of lawyers.

B. Hypothetical Bargains

How should lawmakers—judges and legislators—approach the task of choosing default legal rules?¹⁴⁴ There does not seem to be any

¹⁴² At least one other problem would arise in this hypothetical from the default rule of one-member, one-vote—the problem of deadlock. If the six members with equal voting rights split evenly, three to three, a proposal would fail for want of a majority. Is this possibility acceptable to the group? It is not an easy problem to solve, in fact, and is present any time there is an even number of members, each with a single vote. If you have already taken a course in business organizations, you can doubtless identify other potential problems that should be addressed by the six investors in the hypothetical.

¹⁴³ See, e.g., Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984); Ronald J. Gilson & Robert H. Mnookin, *Foreword to Business Lawyering and Value Creation for Clients*, 74 OR. L. REV. 1 (1995); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J. L. BUS. & FIN. 486 (2007), https://scholarship.law.duke.edu/faculty_scholarship/1563/ [<https://perma.cc/EJ7T-JJYF>]; George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279 (2009); Elizabeth Pollman, *Value Creation by Business Lawyers: Where Are We and Where Are We Going?*, 15 U.C. DAVIS BUS. L.J. 13 (2014).

¹⁴⁴ Note that this is framed as a normative question, and the discussion that follows takes a normative approach.

public interest involved in our aforementioned ULLCA hypothetical.¹⁴⁵ What difference does it make to the public, or to the government, whether the members choose a simple majority or some supermajority (say sixty percent) decision rule? None appears. General indifference seems to be the case with legal questions that are addressed using default rules. There are no third-party effects, or they are so minimal that the government does not have a stake, so to speak, in the design of the legal rule in question. Even though the government has no reason to care (regulate) what the decision rule is for our hypothetical company, the state will want to promote economic activity by providing some default rule to cover situations where the parties have not agreed among themselves how the issue will be handled.

Perhaps the state should try to adopt those default rules that it thinks would be agreed upon by most parties, most of the time, if the question were answered via negotiation and drafting by contracting parties. In other words, a judge or legislator that is considering what default rule to adopt should try to imagine what most contracting parties would agree to do, in most situations. This *hypothetical bargain* approach to disputes in the commercial realm is not a new idea. Justice Holmes presented the idea as well-known in a 1903 decision saying:

[A]s people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and [thus] the common rules have been worked out by common sense, which has established *what the parties probably would have said if they had spoken about the matter*.¹⁴⁶

Advising judges and legislators to use common sense in order to “mimic” the contract provisions that most private parties would agree on is obviously much easier said than done. It is hard enough to imagine what the parties to a particular contract would have agreed on about a subject they did not consider.¹⁴⁷ It is obviously much more difficult to make this same judgement about what “typical” or “average” contracting parties would agree to do “most of the time.”¹⁴⁸ On the bright

¹⁴⁵ See *supra* Part IV, Section A.

¹⁴⁶ *Globe Refin. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543 (1903) (emphasis added).

¹⁴⁷ You can try your hand at reasoning with hypothetical bargains by thinking about almost any case you read in your business organizations or contracts classes. One great case for this purpose is *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928). Imagine that the parties had addressed the question whether Salmon would have any duty to disclose to Meinhard future business opportunities flowing from their joint venture. What do you think they would have agreed upon? Why? Which opinion—Cardozo’s or Andrews’s—comes closer to your answer to the hypothetical bargain question?

¹⁴⁸ See Schwartz & Scott, *supra* note 140, at 1546–47. In fact, two of the most important scholars in this area have concluded that non-judicial law reformers such as the American

side, so long as a legal rule is framed as a default, if it is poorly conceived it can be avoided by contracting parties through negotiation and drafting.

If available, judges and legislators often look to actual commercial practice for guidance and inspiration in setting defaults. This approach traces back at least to the judicial career of William Murray, the 1st Earl of Mansfield, who was the Chief Justice of the Court of King's Bench from 1756 to 1788.¹⁴⁹ Lord Mansfield is famous for his efforts to update and reform English commercial law.¹⁵⁰ "His concern at all times was to try to give effect to, and to reinforce, accepted commercial practice."¹⁵¹ Among other devices to acquaint himself with current commercial practice and expectations, Mansfield empaneled "special juries" composed of London merchants:

[I]n this new commercial age the Courts themselves—though better equipped than Parliament—often lacked the expert knowledge to develop principles of commercial law acceptable to the business community. It was to overcome this gap in their expertise that Mansfield called in aid the special juries. They were to decide the individual case in such a way that the judges would then be able to use that decision as a base for the erection of general rules of law. In this way the law could become at once more predictable, more regular, and more in accordance with commercial customs.¹⁵²

Merchants might expect the answer to a legal dispute to be the same solution they would have agreed upon if they had thought about the problem and presented it for negotiation. Thus, if the government attempts to provide default rules through case law or legislation, it makes sense for the rules it adopts to be those rules that come as close as possible to the set of rules that most parties would choose, if they addressed the issue on their own.¹⁵³ This will minimize the number of

Law Institute and the Uniform Law Commission have largely failed because they "could not access the information needed to create efficient rules." *Id.* at 1523.

¹⁴⁹ See John N. Adams, *Murray, William (Earl of Mansfield)*, in BIOGRAPHICAL DICTIONARY OF THE COMMON LAW 378, 382 (A.W.B. Simpson ed., 1984).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 123 (1979).

¹⁵³ A memorable, but perhaps apocryphal, story involving Dwight Eisenhower illustrates this concept. Ike was president of Columbia University from 1948 to 1953 (when he moved to the White House). While there, a question arose about the placement of some new sidewalks. Eisenhower (supposedly) said something like, "Do nothing for a year. See where the students walk, naturally. And where they have beaten a path, put a sidewalk." Jay Nordingler, *True Paths*, NAT'L REV. (Dec. 4, 2013, 3:39 PM), <https://www.nationalreview.com/corner/true-paths-jay-nordlinger/> [https://perma.cc/46SJ-EREK]. Nordingler reports that a similar story is told at the University of Kansas. If these stories are not true, they should be.

cases where: (1) the parties are “surprised” by a badly conceived default rule, and (2) the parties choose to go through the trouble and expense of contracting around such a rule.

If the government adopts a “bad” default, we should expect to see parties frequently contracting around the rule. There is a clear example of this regarding the majority rule governing damage to real property that occurs after a sales contract is signed, but before closing. The doctrine of equitable conversion developed to protect buyers from sellers who opportunistically breached their sales contracts, by declaring the buyer to be the equitable owner at the time the contract was signed and thus entitled to specific performance of the sales contract.¹⁵⁴ But even-handed treatment of the parties means that, in most states, if property is damaged prior to closing by fire, flood, and the like, the seller will be able to force the buyer to go to closing on the terms of the contract by arguing that the buyer was the equitable owner at the time of the loss—after signing the sales contract, but before closing.¹⁵⁵

Equitable conversion functions as a default rule, so the parties to a real estate transaction are free to include a contrary term in their sales contract—and that is in fact what normally happens. According to a leading property treatise, “[n]early all printed form sale contracts . . . impos[e] the risk on the vendor until closing of the sale.”¹⁵⁶ In situations like this, where the workarounds are observed in a high percentage of the contracts in question, then arguably the default rule is suboptimal and should be changed.¹⁵⁷

Think about which party—the buyer or the seller—is better positioned to deal with risk of loss prior to closing. In most cases, the seller will maintain possession of and insurance on the property until closing. If parties to a sales contract in a state that continues to follow the majority rule think about this issue—and it is the role of the buyer’s lawyer to bring it to his client’s attention—then we can predict that in most cases the seller is the “lower cost” party for dealing with the risk. Thus, the buyer would be willing to pay a higher price for the property if the seller agreed to bear the risk of loss until closing. This outcome seems to amount to a strong case against the current default rule, which places the risk on the buyer.

Generally, contracting parties would want a legal duty to fall on the side of the contract with the lower cost of dealing with it—if that

¹⁵⁴ Linda S. Hume, *Real Estate Contracts and the Doctrine of Equitable Conversion in Washington: Dispelling the Ashford Cloud*, 7 SEATTLE U. L. REV. 233, 239–43 (1984).

¹⁵⁵ See *id.* at 235–37.

¹⁵⁶ DALE A. WHITMAN ET AL., LAW OF PROPERTY 682 (4th ed. 2019).

¹⁵⁷ See *Bleckley v. Langston*, 143 S.E.2d 671, 672 (Ga. Ct. App. 1965).

can be determined. This is an extension of one of the most general principles of contract design, that the “contractual pie” should be as large as possible.¹⁵⁸ This is accomplished by including terms that increase the net value of the contract to the parties.¹⁵⁹ This insight can be used by judges and legislators in choosing default rules. The rule chosen should place the legal duty on the party with the lower cost of dealing with it, since that is the party most likely to have bargained for it had the parties addressed the issue.¹⁶⁰

C. *A Contract Law Application*

All first-year law students learn of the common law’s hostility towards liquidated damages clauses in contracts. At first glance this seems odd, given the law’s protection of freedom to contract in most other situations.¹⁶¹ In the event a court declines to enforce a liquidated damages clause, the plaintiff is entitled to common law damages—often referred to as “expectation damages.”¹⁶² This means that the successful plaintiff “may recover from the party in breach a dollar sum

¹⁵⁸ See Naveen Thomas, *Rational Contract Design*, 74 ALA. L. REV. 967, 975 (2023).

¹⁵⁹ See *id.* at 975–76. *Analytical Methods for Lawyers* by Howell Jackson illustrates the point with this hypothetical: Buyer wishes Seller to deliver the goods in question earlier than the Seller would typically deliver them. Early delivery would benefit Buyer in the amount of \$3,000, and would cost Seller \$1,000 more than standard (later) delivery. Early delivery would increase the net value of the contract by \$2,000 (that is, \$3,000 gain minus \$1,000 cost) and thus should be added to the contract. We encountered this idea earlier in our discussion of gains from trade. If Buyer offers to pay an additional \$2,000 for the contract with early delivery, the Seller should agree to these new terms because its gain exceeds the additional costs of performance. The text explains: “The lesson here is that, when you’re making a contract, if it lacks a term that [your client wants] or includes a term that [your client doesn’t] want, you may well be able to have the term included or excluded, respectively, by paying for it. By exploring the value of the term to your client and the cost of it to the other side, you can figure out whether your client will gain by paying the price it would take to induce the other side to acquiesce. Likewise, when the other party is offering enough to make it worthwhile for your client to agree. The principle is so central to contract design that overemphasizing it is virtually impossible.” HOWELL E. JACKSON ET AL., *ANALYTICAL METHODS FOR LAWYERS* 68–70 (2003). This is a clear and concise illustration of the business lawyer’s role in “value creation.”

¹⁶⁰ See Thomas, *supra* note 158, at 977. Do yourself a favor at this point and take just a minute to read a quite relevant two-page essay by one of my favorite professors, Marvin Chirelstein, *Teaching Contracts*, 63 J. LEGAL EDUC. 429 (2014).

¹⁶¹ The hostility may still seem puzzling, even after you have discussed the subject in class, but this is beyond the scope of this Article. Judge Posner provides an excellent overview in *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1288–91 (7th Cir. 1985).

¹⁶² MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 13 (7th ed., 2013).

sufficient to put him in as good a position as he would have occupied had the contract been performed in full.”¹⁶³

Use the hypothetical bargain technique¹⁶⁴ to evaluate the expectation damages default rule. Is this what most people would agree on, most of the time? Would most contracting parties prefer harsher penalties for breach—more generous damages (including punitive damages), or perhaps injunctive relief, such as specific performance? Or would most parties prefer to avoid generous damages provisions, since they would not wish to be liable for paying them were they to be the breaching party?

V. THE CAPITALIST MOTIVE: PROFIT MAXIMIZATION

“*Civilization and profits go hand in hand.*” Calvin Coolidge, 1920¹⁶⁵

Our consideration of default rules and hypothetical bargains proceeded under an unstated assumption: that business executives seek to maximize the profit earned by the firms they lead.¹⁶⁶ If you have taken an introductory economics course, you will recall that the textbook simply asserted that profit maximization is the single goal of business firms.¹⁶⁷

As it turns out, profit maximization seems to be a good assumption, as a positive matter.¹⁶⁸ That is, firms do seem to act as if they are trying to make as much money as possible, within the rules provided by the legal system, of course. This is fairly easy to see with regard to sole proprietorships, partnerships, and LLCs—where the individuals making the decisions will personally receive the profits from effective

¹⁶³ *Id.* Chirelstein calls the damages default rule “easily the most important single idea in the whole contracts field.” *Id.*

¹⁶⁴ See discussion *supra* Part IV, Section B.

¹⁶⁵ Calvin Coolidge, Vice President–Elect, Amherst College Alumni Dinner: The Supports of Civilization (Nov. 27, 1920), in CALVIN COOLIDGE, *THE PRICE OF FREEDOM* 5 (Charles Scribner’s Sons eds., 1924).

¹⁶⁶ See Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 637 (2009). If we didn’t assume profit maximization, it would be difficult if not impossible to create default rules for commercial transactions, since we would have no way of predicting what outcome contracting parties would agree upon if they took up a particular issue.

¹⁶⁷ See Herbert Hovenkamp, *Neoclassicism and the Separation of Ownership and Control*, 4 VA. L. & BUS. REV. 373, 383 (2009) (“[A] fundamental premise of both classical and neoclassical economics is that profit maximization is the goal of the firm.”).

¹⁶⁸ While profit maximization is the best explanation for business behavior, this does not keep many people from finding the profit motive to be downright unappealing, normatively speaking. We will later consider the normative case for profit maximization. See discussion *infra* pp. 290–95.

management. Imagine yourself a few years from now, as a partner or equivalent role in an LLP, say in a law firm. Would you honestly prefer your firm earn higher profits, or not?

The question is a bit harder to answer with reference to corporations. The essence of the corporate form is the separation of ownership from control—i.e., the shareholders own the corporation, but the directors (who are elected by the shareholders) control its operation.¹⁶⁹ This form of organization raises the possibility of an “agency problem,” where the shareholders hope for profit maximization, but the directors and officers seek to enrich themselves at the expense of the corporation—through lavish compensation, for example. Much of corporation law is directed at such agency problems and has some success in addressing the agency problem.¹⁷⁰ The individuals’ interest in their own reputations and careers also play a role in aligning their actions with the shareholders’ desire for higher profits.¹⁷¹

While noting the possibility that the agency problem may remain significant in any particular corporation, we will adopt Milton Friedman’s famous 1970 definition of the duty of corporate executives: “[T]o conduct the business in accordance with [the shareholders’] desires, which generally will be to make as much money as possible *while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.*”¹⁷² Please note the final phrase of his definition, which has been overlooked by many of Friedman’s critics.

Two further points in favor of profit-maximization: First, if a firm chooses not to maximize profits, then it leaves an opening for a competing firm to make the move that will maximize its profits and likely

¹⁶⁹ Michael E. Debow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 398 (1993) (“[D]irectors and officers are exclusively accountable to the shareholders for any breach of their duty to the corporation.”).

¹⁷⁰ See Choudhury, *supra* note 166, at 670–73.

¹⁷¹ See Norman D. Bishara & Cindy A. Schipani, *A Corporate Governance Perspective on the Franchisor-Franchisee Relationship*, 19 STAN. J. L. BUS. & FIN. 303, 316 (2014).

¹⁷² Milton Friedman, *A Friedman Doctrine: The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> [<https://perma.cc/2GNP-VUBW>] (emphasis added). For a recent extension of Friedman’s ideas, see James Pethokoukis, *The Best Way for Companies to Have a Big Social Impact Is to Generate Profits by Making and Selling Stuff That We Want to Buy*, AEI IDEAS (Oct. 26, 2023), <https://www.aei.org/pethokoukis/the-best-way-for-companies-to-have-a-big-social-impact-is-to-generate-profits-by-making-and-selling-stuff-that-we-want-to-buy/> [<https://perma.cc/62MC-MXL9>], and Hunt Allcott et al., *An Economic View of Corporate Social Impact* (Nat’l Bureau of Econ. Rsch., Working Paper No. 31803, 2023), <https://www.nber.org/papers/w31803> [<https://perma.cc/4X5Q-UDN3>].

take away customers from the first firm.¹⁷³ Pulling back on the profit motive is not a sustainable strategy if it is possible for other firms to compete with the non-maximizing firm.¹⁷⁴

Second, if business executives deny that they are maximizing profits, skepticism is warranted. Take this example from George Stigler's microeconomics textbook:

In one field study, when [business executives] were asked whether they maximized profits, they indignantly rejected the suggestion and pointed out that they were sincerely religious, public-spirited, and so on—as if these traits were inconsistent with profit maximizing. But when the question was reformulated as: would a higher or lower price of the product yield larger profits? the usual answer was no.¹⁷⁵

Why is it difficult for some business executives to embrace profit maximization? Fear of sounding greedy and grasping, Scrooge-like? Recently, Vernon Smith explored this idea using Adam Smith's Theory of Moral Sentiments:

[E]very individual, though preferential toward himself, cannot face humankind and avow that self-interest is his motivating principle of action. For to see himself as others see him, he is but one person, no better than any other, and thus does he “humble the arrogance of his self-love, and bring it down to something which other men can go along with.”¹⁷⁶

One American business titan who had real problems with admitting he was interested in profit was automotive genius Henry Ford.¹⁷⁷ If you've taken a business organizations course, you have probably read the Michigan Supreme Court's 1919 decision in *Dodge v. Ford Motor Co.*¹⁷⁸ *Dodge* contains the most famous passage in American case law concerning profit maximization: “A business corporation is organized and carried on primarily for the profit of the stockholders.

¹⁷³ See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1070 (2000).

¹⁷⁴ See *id.*

¹⁷⁵ GEORGE J. STIGLER, *THE THEORY OF PRICE* 179 n.1 (4th ed., 1987).

¹⁷⁶ Vernon L. Smith, *Adam Smith, Sociality, and Classical Liberalism*, 28 INDEP. REV. 117, 119 (2023) (quoting ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS AND ON THE ORIGINS OF LANGUAGES* 120 (Henry G. Bohn ed., 1853) (1759)).

¹⁷⁷ Two of Henry Ford's innovations deserve special mention. The Ford Model T debuted in 1909 and revolutionized the industry by serving purchasers of more modest means than those targeted by other manufacturers. M. Todd Henderson, *The Story of Dodge v. Ford Motor Company: Everything Old is New Again*, in *CORPORATE LAW STORIES* 37, 49 (J. Mark Ramseyer ed., 2009). Ford's “assembly line” was unveiled in 1913 and increased the company's “production by over 700% in two years.” *Id.*

¹⁷⁸ 170 N.W. 668 (Mich. 1919).

The powers of the directors are to be employed for that end.”¹⁷⁹ At times in the litigation, Mr. Ford (more or less) denied that he was trying to maximize profits—a stance harmful to his position vis-à-vis the plaintiffs, the Dodge brothers.¹⁸⁰ The Dodge brothers were disgruntled owners of ten percent of the common stock of Ford Motor.¹⁸¹ Mr. Ford owned fifty-eight percent of the stock and dominated the company as a result.¹⁸² The Dodge brothers disapproved of Ford’s decision to reduce the dividends paid out to shareholders in order to build an enormous new manufacturing facility in Detroit, the “River Rouge” plant.¹⁸³ The Dodge brothers wanted the dividends in order to finance their competing auto company, and they opposed the new plant because they thought it would allow Ford to shut out competitors, including themselves, from the lower-priced end of the auto market.¹⁸⁴ The Michigan Supreme Court ruled in the Dodges’ favor and ordered the payment of \$19.3 million in additional dividends, but ruled against them on Ford’s plans to build River Rouge.¹⁸⁵

According to Todd Henderson, “[Henry] Ford . . . desperately did not want to be viewed [by the car-buying public] as a robber baron. To blunt this perception, he made ridiculous comments to the media and at the trial that forced the trial court into overreaching.”¹⁸⁶ In particular, Ford gave a pre-trial interview to the *Detroit News* in which he said:

¹⁷⁹ *Id.* at 684. Although many academics contest the idea that corporate law is based on profit maximization, noted Delaware jurist Leo Strine makes an eloquent case for just this reading of Delaware corporate law. See Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 763 n.7 (2015); see also Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012); Robert T. Miller, *Delaware Law Requires Directors to Manage the Corporation for the Benefit of its Stockholders and the Absurdity of Denying It: Reflections on Professor Bainbridge’s Why We Should Keep Teaching Dodge v. Ford Motor Co.*, 48 J. CORP. L. 32 (2023), <https://jcl.law.uiowa.edu/articles/2023/11/delaware-law-requires-directors-manage-corporation-benefit-its-stockholders-and> [<https://perma.cc/6HKS-W35R>].

¹⁸⁰ *Dodge*, 170 N.W. at 683–84.

¹⁸¹ *Id.* at 670–71.

¹⁸² *Id.* at 671.

¹⁸³ Henderson, *supra* note 177, at 58.

¹⁸⁴ *Id.* at 60–61.

¹⁸⁵ *Dodge*, 170 N.W. at 684–85. Ford’s outsized presence in Dearborn, Michigan continues to this day. See *Ford Rouge Factory Tour*, THE HENRY FORD, <https://www.thehenryford.org/visit/ford-rouge-factory-tour/> [<https://perma.cc/KF3T-AL2R>] (providing information on how to visit the still-existing River Rouge Factory site).

¹⁸⁶ Henderson, *supra* note 177, at 61. As with John D. Rockefeller, for example. For a revisionist treatment of the rise of American big business, I strongly recommend BURTON W. FOLSOM, JR., *THE MYTH OF THE ROBBER BARONS* (6th ed. 2010).

I do not believe that we should make such an awful profit on our cars. A reasonable profit is right, but not too much. So it has been my policy to force the price of the car down as fast as production would permit, and give the benefits to users and laborers—with *resulting surprisingly enormous benefits to ourselves*.¹⁸⁷

Note the ambiguity of Ford's statement. It twists around itself, in the style of M.C. Escher, so that you are finally unsure of what Ford is saying about profits, exactly. His trial testimony had the same mobius strip quality:

[Counsel for Dodge]: [D]o you still think that those profits were awful profits?

Ford: Well, I guess I do, yes.

[Counsel]: And for that reason you were not satisfied to continue to make such awful profits?

Ford: We don't seem to be able to keep the profits down.

[Counsel]: Are you trying to keep them down? What is the Ford Motor Company organized for except profits, will you tell me, Mr. Ford?

Ford: Organized to do as much good as we can, everywhere, for everybody concerned. And incidentally to make money.

[Counsel]: Incidentally make money?

Ford: Yes, sir.

[Counsel]: But your controlling feature . . . is to employ a great army of men at high wages, to reduce the selling price of your car . . . and give everybody a car that wants one.

Ford: If you give all that, the money will fall into your hands; you can't get out of it.¹⁸⁸

Was the market "forcing" profits on the Ford Motor Co. despite Mr. Ford's wishes to the contrary? Was Mr. Ford's rejection of the profit maximization standard essentially a quibble over the idea of maximization?

In spite of Mr. Ford's claimed uneasiness about making large profits, the Ford Motor Company was certainly a profitable business. Its profit margin from the introduction of the Model T through the year of the Michigan Supreme Court decision looked like this¹⁸⁹:

¹⁸⁷ HENRY FORD, MY LIFE AND WORK 162 (1922) (emphasis added).

¹⁸⁸ ALLAN NEVINS & FRANK ERNEST HILL, FORD: EXPANSION AND CHALLENGE 1915–1933 99–100 (1957); Henderson, *supra* note 177, at 62.

¹⁸⁹ Henderson, *supra* note 177, at 58. Profit margins are calculated by dividing profits by revenues, using Table 2 on page 58 of Henderson.

Year	Gross Profit Percentage
1909	34.4
1910	26.9
1911	25.5
1912	30.8
1913	28.1
1914	25.4
1915	20.3
1916	29.0
1917	9.7
1918	9.8
1919	8.1

This is a very healthy record of firm performance (as you will be able to appreciate more fully once we look at some data on profit rates).¹⁹⁰ But was Ford Motor maximizing its profitability? Could it have made even greater profits if Henry Ford was not in charge? Perhaps. There is no way to divine the answer to this counterfactual, and litigation certainly seems a poor process through which to address it. And, as the Michigan court confessed in its decision, “judges are not business experts” and are, thus, ill-equipped to second-guess business decisions.¹⁹¹ This reasoning leads to the “business judgment rule” that insulates directors’ decisions on business matters from legal attack by dissatisfied shareholders, in the absence of fraud, illegality, or conflict of interest with respect to one or more of the individual defendants.¹⁹²

Additional light is shed on the question of Henry Ford and profit maximization by a famous episode in the growth of Ford Motor. The company, like other firms in the industry, had serious problems due to worker absenteeism and resignations.¹⁹³ In 1913, the company “had to

¹⁹⁰ See discussion *infra* Part V, Section B.

¹⁹¹ *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684. (Mich. 1919).

¹⁹² See *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 (Ill. App. Ct. 1968) (involving an unsuccessful challenge to directors’ decision not to install lights to accommodate night games at Wrigley Field, the home of the Chicago Cubs); *A.P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145 (N.J. 1953), *appeal dismissed*, 346 U.S. 861 (1953) (involving an unsuccessful challenge to directors’ decision to appropriate \$1,500 from corporate treasury as a gift to Princeton University). As many commentators have argued, had the Michigan court had followed the logic of its *Dodge v. Ford Motor Co.* opinion fully, it would have ruled against the Dodge brothers on the dividend issue as well as the River Rouge issue. See Mark J. Roe, *Dodge v. Ford: What Happened and Why?*, VAND. L. REV. 1755, 1758 (2021).

¹⁹³ See PETER COLLIER & DAVID HOROWITZ, *THE FORDS: AN AMERICAN EPIC* 65–67 (1987).

hire 963 workers for every 100 it wanted to remain permanently on the payroll.”¹⁹⁴ At that time, the going wage rate in the auto industry in Detroit was \$2.50 per day.¹⁹⁵ James Couzens, Ford’s general manager, vice president, and owner of 11% of the stock,¹⁹⁶ urged Mr. Ford to double the wage offered by the company, with an eye toward purchasing the workers’ conscientiousness and loyalty.¹⁹⁷ A day or so after their first discussion, Mr. Ford suggested to Couzens a wage rate of \$3.50.¹⁹⁸ “‘No, it’s five or nothing,’ Couzens responded tenaciously, restating his position when Ford raised his ante to four dollars: ‘A straight five-dollar wage will be the greatest advertising any automobile concern ever had.’”¹⁹⁹ Apparently this was the argument that convinced Ford, and he approved the raise.²⁰⁰

In this instance, Mr. Ford certainly seemed to be concerned with his company’s profitability. In addition, the results of the pay raise were consistent with profit maximization. “The new system worked for the company Absenteeism dropped from some 10 percent a day to less than one half of one percent.”²⁰¹ Henry Ford bragged that if he announced that jobseekers should report to “the northeast corner of the building at four a.m.,” a thousand men would be there at four a.m.²⁰²

Henry Ford obviously wished to project a populist image for himself and his company, but Todd Henderson’s explanation of Ford’s rhetoric seems entirely fair: “This tactic—putting competitive strategy in the guise of benevolence—[was] something Ford would do successfully over and over, with tremendous benefits for the Ford brand.”²⁰³ Henry Ford appeared to confirm Adam Smith’s celebrated quip, “I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from

¹⁹⁴ *Id.* at 65.

¹⁹⁵ *Id.* at 66.

¹⁹⁶ *James J. Couzens*, AUTOMOTIVE HALL OF FAME, <https://www.automotivehalloffame.org/honoree/james-j-couzens/> [<https://perma.cc/H2BP-GHQU>] (last visited Oct. 18, 2023); see HARRY BARNARD & DAVID L. LEWIS, *INDEPENDENT MAN: THE LIFE OF SENATOR JAMES COUZENS* 74 (2002).

¹⁹⁷ COLLIER & HOROWITZ, *supra* note 193, at 66.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 66–67.

²⁰² GARY J. MILLER, *MANAGERIAL DILEMMAS: THE POLITICAL ECONOMY OF HIERARCHY* 70–71 (1992).

²⁰³ Henderson, *supra* note 177, at 53.

it.”²⁰⁴ This is a fitting final judgment on the idea that corporations do not seek to maximize profits.²⁰⁵

A. Mechanics

Once a business firm has paid all the bills due for the inputs necessary for its operations—to employees, managers, landlords, suppliers, lenders, and so on—what is left over is the firm’s gross profit. Deduct the taxes owed by the firm, if any,²⁰⁶ and the firm is left with its net income (or loss). It is important to remember that businesses enjoy no guarantees as to profitability! If a firm earns a net profit, the firm’s decisionmakers must choose between just two uses of it: (1) pay out some or all of the profit to its owners, and/or (2) retain some or all of the profit in the firm’s accounts, primarily for reinvestment in the firm’s future growth.²⁰⁷

Let us now focus on firms that are incorporated. In the standard model, the owners of the corporation’s equity securities (common and preferred stock) are the owners of the corporation, the board of directors are elected by the shareholders to manage the corporation’s affairs at the level of strategic planning and agenda setting, and the officers—who are hired by the directors and are accountable to them—manage the corporation’s day-to-day affairs.²⁰⁸ The board will decide the question of how much of the corporation’s profits will be paid to shareholders in dividends, and how much will be retained (reinvested) in the corporation’s growth.²⁰⁹

To make these ideas a bit more concrete, let’s look at some numbers. According to the Federal Reserve, in 2022, American

²⁰⁴ SMITH, *supra* note 55, at 421.

²⁰⁵ *Dodge v. Ford Motor Co.* is a wonderful platform for thinking about corporations and their operation. Cf. Stephen M. Bainbridge, *Why We Should Keep Teaching Dodge v. Ford Motor Co.*, 48 J. CORP. L. 77, 79–80, 98, 119 (2022); Henderson, *supra* note 177, at 39, 73–75. To round out the story: Henry Ford became so frustrated with having to deal with the minority shareholders that in 1919, he assembled \$105 million to buy them out. *Id.* at 69. The Dodge brothers received a total of \$25 million for their shares; Couzens received \$30 million. *Id.* at 89. Couzens thereafter was mayor of Detroit from 1919 to 1922 and a U.S. Senator from Michigan from 1922 to his death in 1936. *James J. Couzens*, *supra* note 196. Ford Motor remained a private, family-owned corporation from 1920 to 1956, when it again sold shares to the public. Henderson, *supra* note 177, at 72. You might want to consult the website MeasuringWorth.com, <https://www.measuringworth.com/>, to convert these 1919 amounts to their equivalents in inflation-adjusted 2024 dollars.

²⁰⁶ You will recall that general partnerships and most limited liability companies are not “taxable entities” for federal income tax purposes. See I.R.C. § 701.

²⁰⁷ See William Lazonick, *Profits Without Prosperity*, HARV. BUS. REV. (Sept. 2014), <https://hbr.org/2014/09/profits-without-prosperity> [<https://perma.cc/45WS-W4B8>].

²⁰⁸ See MBCA §§ 1.40, 8.01(b), 8.03(c).

²⁰⁹ See *id.* § 8.01(b).

nonfinancial corporations earned pretax profits of \$2.342 trillion.²¹⁰ Out of this amount, corporations paid \$377 billion (16.1%) in income taxes, leaving corporate net income at \$1.965 trillion.²¹¹ Also in 2022, U.S. corporations paid out dividends amounting to \$902 billion.²¹² So the remaining \$1.063 trillion (known as retained earnings) was reinvested by corporate boards in a vast array of investment opportunities, including stock buybacks.²¹³ Retained earnings normally comprise the second largest source of funds for U.S. corporations.²¹⁴ In 2021, the sale of corporate bonds to investors totaled approximately \$2 trillion, while equity financing (the sale of initial public offerings of stock to investors) of \$436 billion in 2021.²¹⁵ Other sources of funds, including bank loans and trade credit, are less significant than retained earnings, debt financing, and equity financing.²¹⁶

B. Evidence on Profits

Americans tend to overestimate the profitability of American corporations by a wide margin. Polls show consistently that this is the case. One 2013 poll asked respondents to guess “what percent profit on each dollar of sales do you think the average company makes after taxes?”²¹⁷ The average response was 36%, very close to the responses in nine earlier polls taken between 1971 and 1987, which “ranged from 28% to 37% and averaged 31.6%.”²¹⁸ The reality is quite different.

Aswath Damodaran, a finance professor at New York University, reports that as of January 2023, the average net margin for the 5,649

²¹⁰ *Financial Accounts of the United States – Z.1, Table F.103 Nonfinancial Corporate Business*, BD. OF GOVERNORS OF THE FED. RESRV. SYS., <https://www.federalreserve.gov/releases/z1/20230608/html/default.htm> (June 8, 2023) [<https://perma.cc/7NNT-P7NN>].

²¹¹ *Id.*

²¹² *Id.*

²¹³ “‘In 2021, buybacks amounted to nearly \$950 billion and reportedly reached more than \$1.25 trillion in 2022,’ said SEC Chair Gary Gensler.” *SEC Adopts Amendments to Modernize Share Repurchase Disclosure*, U.S. SEC & EXCH. COMM’N (May 3, 2023), <https://www.sec.gov/news/press-release/2023-85> [<https://perma.cc/W7EU-LPKA>].

²¹⁴ *What Are the Sources of Funding Available for Companies?*, INVESTOPEDIA (Jun. 27, 2023), <https://www.investopedia.com/ask/answers/03/062003.asp> [<https://perma.cc/PW66-4CHE>].

²¹⁵ Katie Kolchin et al., *2022 Capital Markets Fact Book*, SEC. INDUS. & FIN. MKTS. ASS’N 8 (2022), <https://www.sifma.org/resources/research/fact-book/> [<https://perma.cc/D7B9-B58L>].

²¹⁶ *What Are the Sources of Funding Available for Companies?*, *supra* note 214.

²¹⁷ Mark J. Perry, *The Public Thinks the Average Company Makes a 36% Profit Margin, Which Is About 5X Too High*, AM. ENTER. INST. (Apr. 2, 2015), <https://www.aei.org/carpe-diem/the-public-thinks-the-average-company-makes-a-36-profit-margin-which-is-about-5x-too-high/> [<https://perma.cc/MS5B-326H>].

²¹⁸ *Id.*

non-financial firms he surveyed was 7.77%.²¹⁹ So Americans tend to overestimate the average profitability of American businesses by a factor of (almost) five.

It is well worth spending a few minutes looking at Damodaran's table. Pick an industry you suspect might be making lavish profits. How about "Oil/Gas (Integrated)"? Well, it turns out that the four "Big Oil" firms earned an average net margin of 15.17%.²²⁰ Thus, for every dollar of sales, these companies made a profit of a little more than fifteen cents. While I cannot speak for "Profits Before People" t-shirt-wearing activists, this doesn't seem like an overly generous reward for going to all the trouble of finding and extracting crude oil, then transporting, refining, and marketing it to consumers. Your mileage may vary.

Consider another controversial industry. The 281 firms in the Drugs (Pharmaceutical) industry earned an average of 18.35%.²²¹ Eighteen cents on the dollar does not seem likely to send large numbers of Marxist revolutionaries to the barricades, does it?

Maybe you think I might be cherry-picking from the list. The largest net margin among the eighty-four non-financial industries included is Transportation (Railroads) which earned 27.65%.²²² Only two more industries earned more than 25%: the 16 firms of the Utility (Water) industry at 25.12% and the 174 firms of the Oil/Gas (Production and Exploration) firms at 26.01%.²²³ Only six industries earned between 20-25% including: Tobacco (15 firms) at 23.46%, Semiconductor (Equipment) (30 firms) at 22.27%, Semiconductor (68 firms) at 22.74%, Shipbuilding & Marine (8 firms) at 21.55%, Software (Entertainment) (91 firms) at 20.91%, and Coal and Related Energy (19 firms) at 20.44%.²²⁴

Most industries earned smaller net profit margins, of course. Three industry groups lost money: 33 firms in Software (Internet) earned a net margin loss of 19.07%, Air Transport (21 firms) lost 1.71%, and 138 firms in Health Information and Technology lost 0.33%.²²⁵ The average net margin for thirteen firms in the Retail (Grocery and Food) industry was 1.96%, and the average for fifteen firms

²¹⁹ Aswath Damodaran, *Margins by Sector (US)*, NYU STERN (Jan. 2023), https://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html [<https://perma.cc/893R-75Y4>].

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Damodaran, *supra* note 219.

in Retail (General) was 2.35%.²²⁶ These statistics make politicians who blame retailers for high rates of inflation look ridiculous.²²⁷ Ditto for the relentless critics of Wal-Mart, which reported a net margin as of July 31, 2023, of 2.23%.²²⁸

Finally, the thirty-one Auto & Truck firms earned an average net margin of 5.02%.²²⁹ Compare this to the Ford Motor Company's gross margins during 1909 to 1919, shown on page 294 above.

C. *A Defense of Profits In Three Parts*

Recall that net profits have only two possible uses: (1) being reinvested to grow the corporation and (2) being paid to shareholders as dividends. Both uses are vital for the functioning of a remarkably productive economy, for at least three reasons.

First: *Reinvesting profits in corporate growth makes it possible for a firm to expand its existing facilities, develop and introduce new goods and services, acquire other firms, and so on.* In short, reinvesting profits is a key contributor to the dynamism and growth of the American economy.²³⁰ As shown in Part III of this Article, profit-fueled growth has generated enormous benefits to all Americans over the last century and a half. Looking to the future, all Americans have a stake in the continued growth of our economy. Obviously, more goods and services will mean a higher standard of living on average.²³¹ Joseph Schumpeter's memorable description of capitalism as "creative destruction" captures this history vividly.²³² Furthermore, looking to the future, robust economic growth will be necessary for any hope we have to maintain existing federal entitlement programs—including Social Security, Medicare, and Medicaid.²³³ It should be obvious that any political program that calls for raising tax rates paid by businesses and

²²⁶ *Id.*

²²⁷ See Joe Lancaster, *Elizabeth Warren Blames High Food Prices on Grocery Chains' "Record" 1 Percent Profit Margins*, REASON (Jan. 12, 2022), <https://reason.com/2022/01/12/elizabeth-warren-blames-high-food-prices-on-grocery-chains-record-1-percent-profit-margins/> [<https://perma.cc/9BH6-TPH3>].

²²⁸ *Walmart Net Profit Margin 2010-2023*, MACROTRENDS, <https://www.macrotrends.net/stocks/charts/WMT/Walmart/net-profit-margin> [<https://perma.cc/ML5W-G5Z7>].

²²⁹ Damodaran, *supra* note 219.

²³⁰ Lazonick, *supra* note 207.

²³¹ See NOELL ET AL., *supra* note 98, at 3.

²³² JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83 (1942) ("Th[e] process of Creative Destruction is the essential fact about capitalism.").

²³³ See NOELL ET AL., *supra* note 98, at 10. For a sobering look at congressional forecasts of federal deficit spending over the coming thirty years, see Dwight R. Lee & Michael DeBow, *Fiscal Recklessness, Path Dependence, and Expressive Voting*, 28 INDEP. REV. 123 (2023).

their owners would reduce economic growth, in direct proportion to the size of the tax increase.²³⁴

Second: *The quest for profits requires businesses to at least attempt allocating scarce resources in the optimal fashion.*²³⁵ It is this resource allocation function that even non-shareholders should be grateful for. If corporations (and other businesses) did not maximize resource allocation as an indispensable component of profit maximization, the prices that consumers pay for everything would be higher, and some of the products we now enjoy would not be available, even for a higher price.²³⁶ Further, resources would be improperly allocated in such a way that the prices of other products would rise as well, and the availability of other products would be curtailed.²³⁷

Imagine that the board of directors of Ajax Corporation (“Ajax”) adopts a policy of supporting small businesses by paying twenty percent above market price to its smaller suppliers. Let’s say Ajax could buy an input for its widget manufacturing process—call it a gizmo—from any one of three large suppliers for fifty dollars each, but it agrees to pay a smaller supplier sixty dollars for the same gizmo. Let’s also assume the Ajax directors do not claim to be maximizing profits by making this decision. Instead, the directors claim their decision serves as a contribution for the public good, because it supports small businesses. What result?

The increased input costs will be translated into higher prices charged by Ajax for its widgets.²³⁸ The company will likely sell fewer widgets at the higher price, thereby losing market share to competitors who do not follow Ajax’s example of paying more for its inputs than the market requires.²³⁹ Employees may be laid off, future expansion stymied, and so on. Ajax’s profits would decline (on purpose!) leading to lower dividends for shareholders and a decline in the market value of Ajax’s common stock.²⁴⁰

²³⁴ GWARTNEY ET AL., *supra* note 126, at 30.

²³⁵ See Anderson & Leal, *supra* note 58, at 115, 124.

²³⁶ See *id.* at 120.

²³⁷ See *id.*

²³⁸ See Jan Hatzius, *Who Pays for Input Cost Increases? Evaluating the Impact on Prices and Profit Margin (Briggs)*, GOLDMAN SACHS (Nov. 29, 2021), <https://www.gspublishing.com/content/research/en/reports/2021/11/29/f0dc0655-05af-41be-8b4d-5259ab9aebd9.html> [<https://perma.cc/H2ZP-PV69>].

²³⁹ See Robert D. Buzzell et al., *Market Share—a Key to Profitability*, HARV. BUS. REV. (Jan. 1975), <https://hbr.org/1975/01/market-share-a-key-to-profitability?registration=success> [<https://perma.cc/S2AL-84LU>].

²⁴⁰ See *id.*

Another misallocation is possible: the small supplier may have the incentive to direct its resources into supplying Ajax, even if the best alternative use of the supplier's resources would result in the small supplier earning fifty-five dollars in revenue. That is, the alternative generates more value than the true value of the supplier's sale to Ajax for fifty dollars each, the price Ajax could pay the larger supplier. Ajax's decision not to maximize profits by minimizing costs would thus have disruptive effects in multiple markets and negatively affect customers, employees, and shareholders.

Misallocation of resources makes the entire economy less productive, and all of us less prosperous. The quest for profits disciplines businesses to make the best resource allocation decisions possible under the circumstances, which always includes uncertainty about the future. In this way, profit maximization serves not only shareholders, but also consumers! I would argue that defenders of corporate profit-making often fail to emphasize this fact clearly. For example, Milton Friedman's 1970 article titled *The Social Responsibility of Business Is to Increase Its Profits* fails to connect profit-maximization with resource allocation.²⁴¹ A better title would have been, "*The Social Responsibility of Business Is to Allocate Resources Effectively*." The only way a business can maximize its profits is to allocate resources optimally.²⁴² In other words, the hard work of resource allocation is exactly what profit maximization requires businesses to attempt.²⁴³ Emphasizing the resource allocation side of the capitalist coin (and downplaying the profit maximization side) would, I submit, respond to Adam Smith's advice to "humble the arrogance of [our] self-love" noted above.²⁴⁴

Third: *The quest for profits will lead to new firms entering a market to offer better products at lower prices, such that high profit margins are in a sense self-correcting.* The fact that one firm is earning unusually high profits in a particular market sends an unmistakable signal to other firms to consider entering that market.²⁴⁵ The ensuing entry of new firms will obviously involve the reallocation of productive resources, which will generate market competition between the first

²⁴¹ Friedman, *supra* note 172.

²⁴² See Anderson & Leal, *supra* note 58, at 124.

²⁴³ *Id.* For diverse assessments of Friedman's contribution, see PROMARKET WRITERS, MILTON FRIEDMAN 50 YEARS LATER, A REEVALUATION (2020) (ebook).

²⁴⁴ Smith, *supra* note 176, at 120; see *supra* text accompanying note 176.

²⁴⁵ See Heather Boushey & Helen Knudsen, *The Importance of Competition for the American Economy*, THE WHITE HOUSE (July 9, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy/> [https://perma.cc/45LL-77MF].

entrant and subsequent entrants that will benefit consumers in terms of both price and product quality.²⁴⁶

It is important to understand that the forces driving businesses to compete with one another for consumers' dollars are quite powerful, and the effect of such competition is dramatically better service of consumers' preferences.²⁴⁷ There are, of course, many quite familiar examples of this in American economic history. To mention just a few: Ford Motor's dominance of the U.S. market was successfully challenged in the 1930s by the Chevrolet division of General Motors and by Chrysler,²⁴⁸ and American automakers lost significant market share to foreign competitors in the 1970s and beyond.²⁴⁹ In 1945, New York's Gimbels department store introduced a retractable ball-point pen at the price of \$12.50—or roughly \$160 to \$200 in 2022 dollars.²⁵⁰ Today, Office Depot currently offers a dozen Paper Mate ballpoint pens for \$13.79.²⁵¹ The first four-function pocket calculator was offered for sale in February 1971 at a price of \$395—the equivalent of \$2,200 to \$2,800 in 2022 dollars.²⁵² In a pattern repeated throughout the consumer electronics industry, new entrants in the calculator market resulted in drastically lower prices and vastly improved product quality.²⁵³ When patent protection for pharmaceutical drugs expire, generic

²⁴⁶ *Id.*

²⁴⁷ *See id.*

²⁴⁸ *See* DOUGLAS BRINKLEY, *WHEELS FOR THE WORLD: HENRY FORD, HIS COMPANY, AND A CENTURY OF PROGRESS* 394–95 (2003) (“Domestically, advanced cars from Chrysler and Chevrolet were making the Ford [Model A] look like just exactly what it was: one of the nicest cars of the 1920s. By 1932, it was sadly outdated.”).

²⁴⁹ *See* Adina Achim, *The True Story Of How Japanese Car Manufacturers Invaded North America*, *HOTCARS* (Nov. 19, 2022), <https://www.hotcars.com/how-japanese-car-manufacturers-invaded-north-america/> [<https://perma.cc/W8MJ-W4YZ>].

²⁵⁰ Stephen Dowling, *The Cheap Pen That Changed Writing Forever*, *BBC FUTURE* (Oct. 29, 2020), <https://www.bbc.com/future/article/20201028-history-of-the-ballpoint-pen> [<https://perma.cc/F2H9-XZ36>]; *see* U.S. INFLATION CALCULATOR, <https://www.usinflationcalculator.com> (last visited Oct. 19, 2023).

²⁵¹ *Paper Mate Ballpoint Pen, Profile Retractable Pen, Medium Point (1.0mm), Blue, 12 Count*, OFFICE DEPOT, <https://www.officedepot.com/a/products/8009925/Paper-Mate-Ballpoint-Pen-Profile-Retractable/> [<https://perma.cc/RDJ6-GQHU>] (last visited Oct. 19, 2023).

²⁵² Nigel Tout, *Busicom LE-120A “HANDY-LE,” Busicom “HANDY-LC,” and Busicom LE-120S “handy”*, *VINTAGE CALCULATORS*, http://www.vintagecalculators.com/html/busicom_le-120a_-_le-120s.html [<https://perma.cc/C9ND-J4PU>] (last visited Oct. 19, 2023); *see* U.S. INFLATION CALCULATOR, *supra* note 250.

²⁵³ *See Consumer Price Index for All Urban Consumers: Computers, Peripherals, and Smart Home Assistants in U.S. City Average*, FED. RES. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/CUUR0000SEEE01> [<https://perma.cc/KR58-K8ZC>] (Oct. 12, 2023). The graph showing the price index for “computers, peripherals, and smart home assistants” from 1998 onward is jaw-dropping. *Id.*

drug manufacturers rush lower-priced copies onto the market.²⁵⁴ And so forth.

Our lives are enriched by business firms that introduce new products and earn temporary high profits, which triggers entry by new competitors, which lowers price and improves quality. Capitalism's virtuous circle of innovation and competition is in many ways the most important social process in your life, even if you rarely think about it. Once you grasp its importance, the wisdom of the Calvin Coolidge aphorism which opened this section should be clear: "[c]ivilization and profits go hand in hand."²⁵⁵ Without profits to guide them, business leaders would not know what they should do with any resources made available to them, and poor economic performance—that is, relative poverty—would inevitably follow.

D. Capitalists in Action: A Closing Case Study

The J.M. Smucker Company ("Smucker") is a very large food processor with total assets of just over \$16 billion in 2022, and sales of almost \$8 billion.²⁵⁶ Smucker's net income was \$631.7 million, for a

²⁵⁴ See Rena M. Conti & Ernst R. Berndt, *Specialty Drug Prices and Utilization After Loss of U.S. Patent Exclusivity, 2001-2007*, NAT'L BUREAU OF ECON. RSCH (Mar. 2014), <https://www.nber.org/papers/w20016> [<https://perma.cc/DQA7-X6YD>]. A study of 41 cancer drugs that lost patent protection during 2001 to 2007 found that generic competitors lowered the price of physician-administered drugs by an average of 38% to 46% and the price of oral medications by an average of 25%. *Id.*

²⁵⁵ COOLIDGE, *supra* note 165, at 5. For readers interested in reading more about the role of profit in our lives, I strongly recommend STEPHEN M. BAINBRIDGE, *THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION* (2023). For a precis by the author, see Stephen Bainbridge, *The Profit Motive: In Defense of Shareholder Value Maximization*, CORP. FIN. LAB (Feb. 7, 2023), <https://corporatefinancelab.org/2023/02/07/the-profit-motive-in-defense-of-shareholder-value-maximization/> [<https://perma.cc/3FY5-9KH3>]. You can listen to Bainbridge discuss his book on the *Business Scholarship Podcast*, ANDREW K. JENNINGS (Apr. 10, 2023) (downloaded using Apple Podcasts) <https://podcasts.apple.com/us/podcast/stephen-bainbridge-on-the-profit-motive/id1470002641?i=1000608172071> [<https://perma.cc/8M3M-U8NH>] and on the *Bite-Sized Business Law Podcast*, FORDHAM CORP. LAW CTR (May 9, 2023) (downloaded using Apple Podcasts) <https://podcasts.apple.com/us/podcast/stephen-bainbridge-on-the-profit-motive/id1671246836?i=1000612292804> [<https://perma.cc/K4WV-H4XC>]. Thoughtful reviews include Samuel Gregg, *A Stake Through the Heart of Stakeholder Capitalism*, LAW & LIBERTY (March 14, 2023), <https://lawliberty.org/book-review/a-stake-through-the-heart-of-stakeholder-capitalism/> [<https://perma.cc/6KNL-MLSR>], Michael Woronoff, *Put a Stake in Stakeholder Capitalism*, COMMENTARY (May 2023), <https://www.commentary.org/articles/mworonof/profit-motive-stakeholder-capitalism/> [<https://perma.cc/Q2FH-89LA>], and William J. Moon, *Beyond Profit Motives*, 122 MICH. L. REV. 1059 (2024), <https://repository.law.umich.edu/mlr/vol122/iss6/5> [<https://perma.cc/YWK8-9GBK>].

²⁵⁶ ANNUAL REPORT FISCAL YEAR 2022, THE J.M. SMUCKER CO. 50–51 (2022), https://investors.jmsmucker.com/files/doc_financials/2022/ar/FY22_AnnualReport_FULL.pdf [<https://perma.cc/WLF4-S2NM>].

net profit margin of 7.9%.²⁵⁷ Out of this net profit, Smucker paid its shareholders dividends amounting to \$418 million (or 66.2% of its net profits).²⁵⁸ In addition, Smucker bought back shares in the amount of \$262 million,²⁵⁹ thereby putting additional dollars in shareholders' pockets.

Smucker made a large resource allocation decision recently, building a new factory in Jefferson County, Alabama, at a cost of \$1.1 billion.²⁶⁰ The facility opened in November 2024, and will make "Uncrustables," Smucker's line of frozen crustless peanut butter and jelly ("PB&J") sandwiches. The plant is the "largest single-line bakery in the country" and "the largest capital investment [Smucker has] ever made."²⁶¹

Uncrustables is a very popular item for homemade school lunches, but its appeal is not limited to children. Smucker projects its sales "in the current fiscal year . . . to grow around 20% to over \$800 million."²⁶² Smucker describes the product this way: "[s]ay hello to the perfect lunchbox solution for crazy mornings. Just add Uncrustables® frozen sandwiches to your kids' lunchboxes in the morning and they'll be thawed by lunchtime. It's a deliciously simple way to make their day."²⁶³

If this is your first encounter with Uncrustables, you might wonder if this product is, strictly speaking, really necessary. After all, it's not that difficult to make a PB&J sandwich from scratch. Does it really make sense for Smucker to spend a billion dollars to build a plant to make frozen PB&J sandwiches? I am not hesitant at all to say that I do not know the answer to this question. I am merely a disinterested observer who has no stake in Smucker's decision. On the other hand, the Smucker executives who made the decision know more than anyone about their product and their customers, and have every personal

²⁵⁷ *Id.* at 50.

²⁵⁸ *Id.* at 50, 52.

²⁵⁹ *Id.* at 85.

²⁶⁰ Valerie Bell, *Jam-Packed With Opportunities: Smucker Company Celebrates Grand Opening of McCalla Plant*, ABC 33/40 NEWS (Nov. 7, 2024, 11:13 AM), <https://abc3340.com/news/local/smuckers-jefferson-county-mccalla-jm-smuckers-company-plant-ribbon-cutting-jobs-development-growth-new-facility-uncrustables> [<https://perma.cc/3QTR-6KFF>].

²⁶¹ *Id.*

²⁶² Jennifer Williams-Alvarez, *The Grown-Ups Who Can't Quit Uncrustables*, WALL ST. J. (Sept. 1, 2023), <https://www.wsj.com/arts-culture/food-cooking/uncrustables-smucker-pbj-snacks-9a95ff19> [<https://perma.cc/6HEY-P72B>].

²⁶³ *Smucker's Uncrustables*, THE J.M. SMUCKER CO., <https://www.smuckersuncrustables.com/frozen-sandwiches> [<https://perma.cc/8QBS-SED8>] (last visited Oct. 20, 2023).

incentive (income, reputation, etc.) to get the decision “right.” These are the people who should have the responsibility to make the decision.²⁶⁴

Only time—and accounting for profit and loss—will tell. If Smucker does earn a profit on this new facility, that will mean that the costs of all the resources allocated to the project—both to build and to operate—will have been more than covered by the revenue the company received from sales of the product. The great Uncrustable project will have more than paid for itself and accordingly can be chalked up as an economic success. The risk that the project may not work out—that the plant will prove to be a net loser—will be borne only by private parties, not by taxpayers.

All the investment decisions made by American businesses in any given year follow the cost-benefit analysis performed by the Smucker executives here, and the results of all these decisions will be evaluated using the same accounting tools. By this method, American capitalism has already enriched all of us immensely and should continue to do so every day of our lives.

VI. CAPITALISM, OPTIMISM, AND THE PRACTICE OF BUSINESS LAW

This Article has tried to sketch out the basic features of capitalism as an institution, and to explain just how well it has worked in America for more than two centuries now. In these pages, I have attempted to convey a sense of gratitude for the past and optimism for the future. This tone may seem a bit out of place in law school—an experience that for many students encourages the adoption of a pessimistic mindset. Much of law school is dictated by the case method’s focus on past disasters—accidents, crimes, breaches of contract, and so on.

Businesspeople, on the other hand, are constantly looking forward and for possible gains from trading with others via voluntary contracts. Lawyers who advise business clients in their pursuit of profitable opportunities are thus able to participate in the optimism that fuels a capitalist economy. The result of business lawyers’ work facilitates

²⁶⁴ Furthermore, it is appropriate to invoke the old Latin maxim, *De gustibus non est disputandum*, roughly “[i]n matters of taste there can be no disputes.” See *de gustibus non est disputandum*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/de%20gustibus%20non%20est%20disputandum> [<https://perma.cc/884T-NCSL>] (last visited Oct. 20, 2023). Whatever you or I think about mass-produced frozen PB&J sandwiches, “yet there are those who love” Uncrustables. See Hannah Silverstein, *Arguing the Dartmouth College Case, 200 Years On*, DARTMOUTH (Feb. 12, 2019), <https://home.dartmouth.edu/news/2019/02/arguing-dartmouth-college-case-200-years> [<https://perma.cc/2STCCGS2>]. Capitalism tends to respond quickly to consumer preferences when there is a profit to be made. See Anderson & Leal, *supra* note 58, at 120.

cooperation via contract, which in turn raises the nation's economic welfare, as it also benefits both sides of the contract.

At the risk of sounding a bit too earnest, I urge you to consider that you might find your most satisfying legal career in advising businesses and thus helping capitalism to run more smoothly. Business lawyers anticipate problems, explore solutions, and negotiate and draft contract provisions that promote cooperation between contracting parties and thereby add value to the world²⁶⁵ Business lawyers are agents for social change in this sense: They aid businesses in the efficient allocation of scarce resources to the service of consumer welfare. If you need a reminder of how optimism might be warranted in our current situation, you should revisit the four graphs in Part III, Section A, and then consult Appendix II for "Recommended Reading Along Optimistic Lines."

²⁶⁵ Thomas, *supra* note 158, at 975 (discussing the "contractual pie" doctrine).

APPENDIX I

AMERICA AND PRIVATE PROPERTY²⁶⁶

“The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If ‘Thou shalt not covet,’ and ‘Thou shalt not steal,’ were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free.”²⁶⁷

John Adams, 1787

“The diversity in the faculties of men, from which the rights of property originate, is . . . an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government.”²⁶⁸

James Madison, 1787

“Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which *impartially* secures to every man, whatever is his *own*.”²⁶⁹

James Madison, 1792

“I know of no country, indeed, where the love of money has taken stronger hold on the affections of men and where a profounder contempt is expressed for the theory of the permanent equality of property.”²⁷⁰

Alexis de Tocqueville, 1835

“In no country in the world is the love of property more active and more anxious than in the United States; nowhere does the majority display

²⁶⁶ Quotations from Professors Siegan and Ely on page 255 and President Coolidge on page 289 are incorporated by reference.

²⁶⁷ JOHN ADAMS, DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES (1787), *reprinted in* 1 THE FOUNDER’S CONSTITUTION, ch. 16, doc. 15 (Philip B. Kurland & Ralph Lerner eds., 1987), <https://press-pubs.uchicago.edu/founders/documents/v1ch16s15.html> [<https://perma.cc/QHS7-WA6D>].

²⁶⁸ THE FEDERALIST No. 10 (James Madison), https://avalon.law.yale.edu/18th_century/fed10.asp [<https://perma.cc/PXR9-CZEP>].

²⁶⁹ JAMES MADISON, PROPERTY (1792), *reprinted in* 1 THE FOUNDER’S CONSTITUTION, ch. 16, doc. 23, (Philip B. Kurland & Ralph Lerner eds., 1987), <https://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html> [<https://perma.cc/5GG6-B4E2>].

²⁷⁰ 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Henry Reeve trans., Adlard & Saunders eds., 1838), sec. 1, ch. 3 (1835), <https://www.gutenberg.org/files/815/815-h/815-h.htm#link2HCH0005> [<https://perma.cc/PX82-V2Q9>].

less inclination for those principles which threaten to alter, in whatever manner, the laws of property.”²⁷¹

Alexis de Tocqueville, 1840

“[N]ext to the right of liberty, the right of property is the most important individual right guaranteed by the Constitution and the one which, united with that of personal liberty, has contributed more to the growth of civilization than any other institution established by the human race.”²⁷²

William Howard Taft, 1913

“Man is born into the universe with a personality that is his own. He has a right that is founded upon the constitution of the universe to have property that is his own. Ultimately, property rights and personal rights are the same thing. The one cannot be preserved if the other be violated.”²⁷³

Calvin Coolidge, 1914

“It would be difficult, if not impossible, to estimate the contribution which government makes to business. It is notorious that where the government is bad, business is bad. The mere fundamental precepts of the administration of justice, the providing of order and security, are priceless. The prime element in the value of all property is the knowledge that its peaceful enjoyment will be publicly defended. If disorder should break out in your city, if there should be a conviction extending over any length of time that the rights of persons and property could no longer be protected by law, the value of your tall buildings would shrink to about the price of what are now water fronts of old Carthage or what are now corner lots in ancient Babylon.”²⁷⁴

Calvin Coolidge, 1925

“[T]he dichotomy [found in some judicial opinions] between personal liberties and property rights is a false one. Property does not have rights. People have rights.”²⁷⁵

Justice Potter Stewart, 1972

²⁷¹ 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., 1864), sec. 3, ch. 21 (1840), <https://www.gutenberg.org/files/816/816-h/816-h.htm#link2HCH0021> [<https://perma.cc/TLE7-YHRA>].

²⁷² WILLIAM HOWARD TAFT, *POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE AND ITS PERILS* 90 (Yale Univ. Press et al. eds., 1994) (1913).

²⁷³ President Calvin Coolidge, Senate Acceptance Speech: Have Faith in Massachusetts (Jan. 7, 1914), <https://coolidgefoundation.org/resources/wallaces-dozen-most-notable-speeches-3/> [<https://perma.cc/TB8D-QPQA>].

²⁷⁴ President Calvin Coolidge, Address Before the Chamber of Commerce of the State of New York: Government and Business (Nov. 19, 1925), <https://coolidgefoundation.org/resources/government-and-business/> [<https://perma.cc/4G3S-7FRQ>].

²⁷⁵ *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

“Despite their differences over particular economic issues, the right to acquire and own property was undoubtedly a paramount value for the framers of the Constitution. Following the Lockean philosophy, John Rutledge of South Carolina advised the Philadelphia convention that ‘Property was certainly the principal object of Society.’ Similarly, Alexander Hamilton declared: ‘One great objt. of Govt. is personal protection and the security of Property.’ These sentiments were widely shared by other delegates. Consistent with the Whig tradition, the framers did not distinguish between personal and property rights. On the contrary, in their minds, property rights were indispensable because property ownership was closely associated with liberty. ‘Property must be secured,’ John Adams proclaimed in 1790, ‘or liberty cannot exist.’ Indeed, the framers saw property ownership as a buffer protecting individuals from government coercion. Arbitrary redistributions of property destroyed liberty, and thus the framers hoped to restrain attacks on property rights.”²⁷⁶

Professor James W. Ely, Jr., 1998

²⁷⁶ ELY, JR., *supra* note 43, at 43. Ely’s title comes from a 1775 statement by Arthur Lee of Virginia: “The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.” *See id.* at 26.

APPENDIX II

RECOMMENDED READING ALONG OPTIMISTIC LINES

I. THE BIG PICTURE

A. Books, in Chronological Order, with Authors' Websites

MATT RIDLEY, *THE RATIONAL OPTIMIST: HOW PROSPERITY EVOLVES* (2010).

<http://www.mattridley.co.uk/>

JOHAN NORBERG, *PROGRESS: TEN REASONS TO LOOK FORWARD TO THE FUTURE* (2016).

<http://www.johannorberg.net/>

HANS ROSLING, *FACTFULNESS: TEN REASONS WE'RE WRONG ABOUT THE WORLD – AND WHY THINGS ARE BETTER THAN YOU THINK* (2018).

<https://www.gapminder.org/>

JOHAN NORBERG, *THE CAPITALIST MANIFESTO: WHY THE GLOBAL FREE MARKET WILL SAVE THE WORLD* (2023).

<http://www.johannorberg.net/>

B. Other Websites

For website containing economic data in support of capitalism, see Human Progress, (<https://humanprogress.org/>), Our World in Data (<https://ourworldindata.org/economic-growth>), Groningen Growth and Development Centre, which includes the Maddison Project, (<https://www.rug.nl/ggdc/historicaldevelopment/maddison/>), and the Copenhagen Consensus Center (<https://www.copenhagenconsensus.com/>).

II. FIRMS AND CAPITALISM

R.H. Coase, *The Nature of the Firm*, Wiley (Nov. 1937), <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1468-0335.1937.tb00002.x>.²⁷⁷

JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* (2003).

TYLER COWEN, *BIG BUSINESS: A LOVE LETTER TO AN AMERICAN ANTI-HERO* (2019).

²⁷⁷ The Nobel Prize winner asks, "Why do firms exist?"

ALAN GREENSPAN & ADRIAN WOOLDRIDGE, *CAPITALISM IN AMERICA: AN ECONOMIC HISTORY OF THE UNITED STATES* (2018).

MICHAEL NOVAK, *BUSINESS AS A CALLING: WORK AND THE EXAMINED LIFE* (1996).

III. BASIC ECONOMICS

DWIGHT R. LEE, *FREE ENTERPRISE: THE ECONOMICS OF COOPERATION* (2003), <https://www.dallasfed.org/~media/documents/educate/free/econprimer.pdf>.²⁷⁸

JAMES D. GWARTNEY ET AL., *COMMON SENSE ECONOMICS: WHAT EVERYONE SHOULD KNOW ABOUT WEALTH AND PROSPERITY* (4th ed. 2024).²⁷⁹

DAVID L. BAHNSEN, *THERE'S NO FREE LUNCH: 250 ECONOMIC TRUTHS* (2021).²⁸⁰

²⁷⁸ A 34-page primer.

²⁷⁹ Concise and straightforward; not mathematical.

²⁸⁰ One truth per (small) page; very clever.