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ON LEGAL
STRATEGY

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Contract Governance as Coding Capital

- Introduction to the “Code of Capital”
- 400 years of legal coding
- Rise of Contract Governance
 - Information Technology
 - Globalization



THE CODE

OF CAPITAL

HOW THE
LAW CREATES
WEALTH AND
INEQUALITY

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Capital?

- Asset with specific attributes

- **Priority**

- Ranking



- **Durability**

- Extension in time



- **Universality**

- Extension in space



- **Convertibility**

- Protecting past gains



Legal Modules

- Contract Law
- Property Law
- Collateral Law
- Trust Law
- Corporate Law
- Bankruptcy Law

Why Law?

- Attributes of capital depend on (threat of) coercion
- State's law enforcement institutions
- Invoked by private parties to protect their legally coded interests

Assets slated for coding

- Land
- Firms
- Debt
- Know-how
- Data*

Assets &
Legal Modules
= Capital

Assets

- Land
- Firms
- Debt
- Know-how

Legal Modules

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- Property Law
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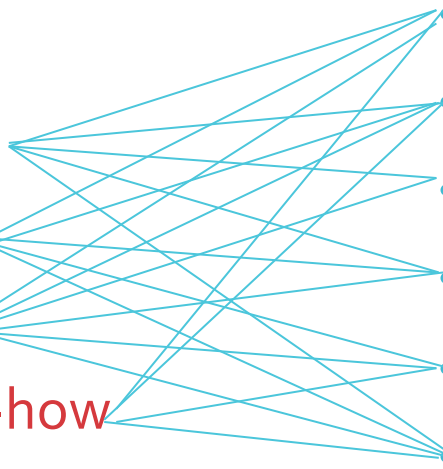
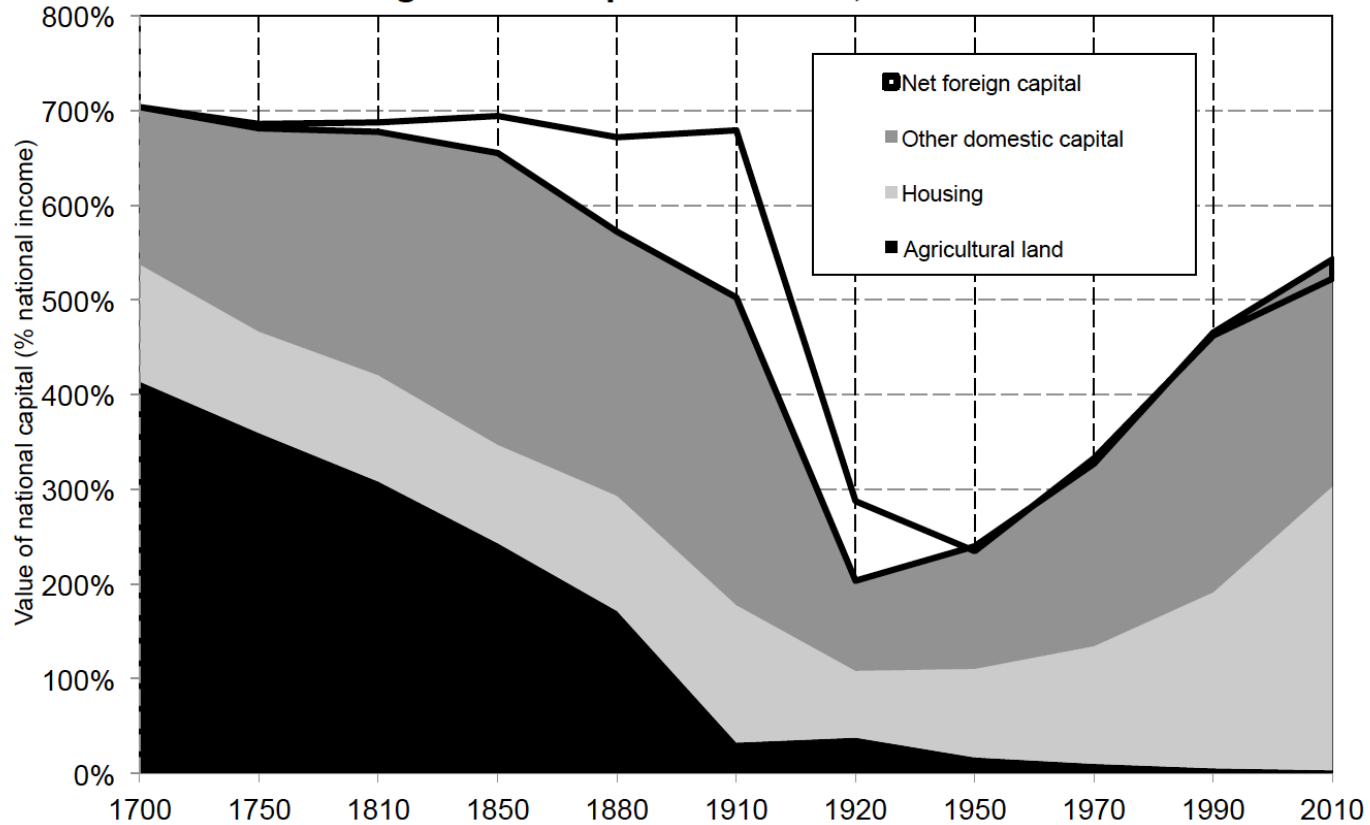


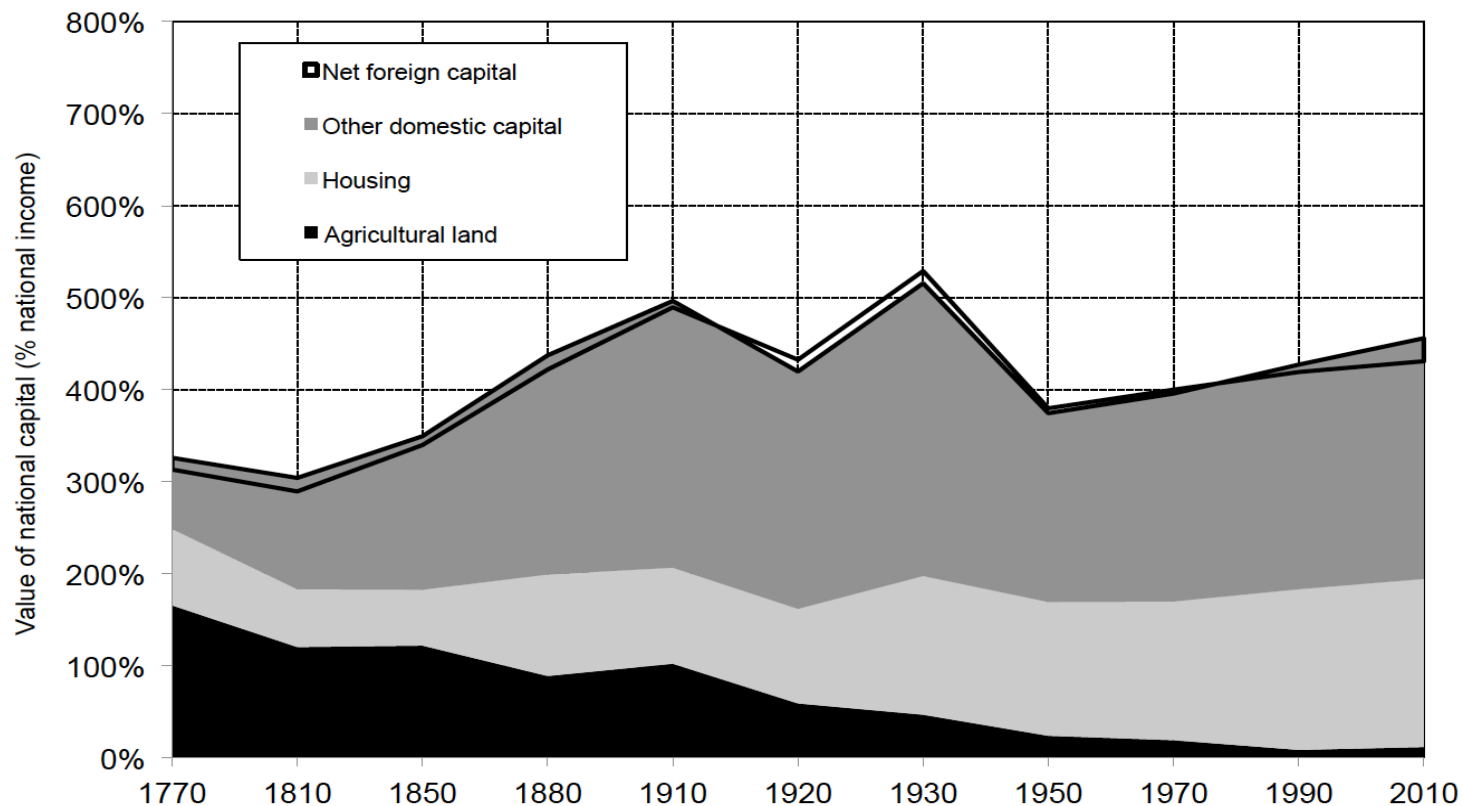
Figure 3.1. Capital in Britain, 1700-2010



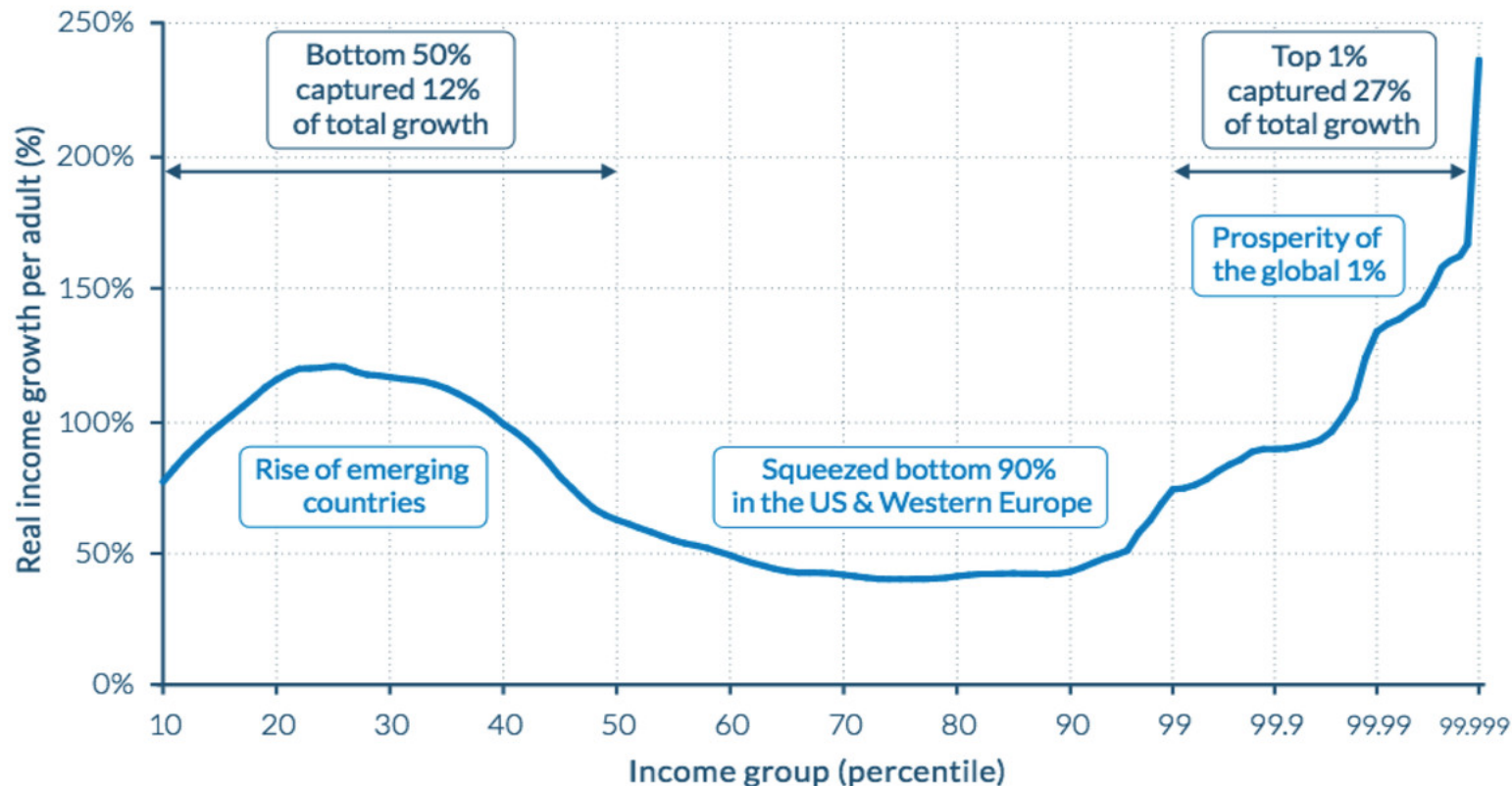
National capital is worth about 7 years of national income in Britain in 1700 (including 4 in agricultural land).

Sources and series: see piketty.pse.ens.fr/capital21c.

Figure 4.6. Capital in the United States, 1770-2010



National capital is worth 3 years of national income in the United States in 1770 (incl. 1.5 years in agricultural land). Sources and series: see piketty.pse.ens.fr/capital21c.

Figure 2.1.4**Total income growth by percentile across all world regions, 1980–2016**

Source: WID.world (2017). See wir2018.wid.world for more details.

On the horizontal axis, the world population is divided into a hundred groups of equal population size and sorted in ascending order from left to right, according to each group's income level. The Top 1% group is divided into ten groups, the richest of these groups is also divided into ten groups, and the very top group is again divided into ten groups of equal population size. The vertical axis shows the total income growth of an average individual in each group between 1980 and 2016. For percentile group p99p99.1 (the poorest 10% among the world's richest 1%), growth was 74% between 1980 and 2016. The Top 1% captured 27% of total growth over this period. Income estimates account for differences in the cost of living between countries. Values are net of inflation.

Puzzle: Global Capital

- Capital is global
- The code's modules are made of *domestic* law
- There is no global state or global law

Globalization of domestic law

- Recognition and Enforcement of Foreign Law
 - Conflict of Law Rules (domestic)
 - Expansion of private autonomy
 - “contract governance”
 - Mutual Recognition (bilateral)
 - Harmonization (international)

Legal Code of Global Capital

- A single legal system could sustain global capitalism
- In practice, two do most of the work
 - English common law
 - New York state law
 - Delaware state law (corporate law)
- Why?
 - Pro-business features of common law
 - Network effects

Top Global Financial Centers



The 2018 Global 20

| Rank | Firm |
|------|--|
| 1 | White & Case |
| 2 | Allen & Overy |
| 3 | DLA Piper |
| 4 | Freshfields |
| 5 | Herbert Smith Norton Rose |
| 7 | Latham & Watkins |
| 8 | Linklaters |
| 9 | Hogan Lovells |
| 10 | Squire Patton |
| 11 | Cleary Gottlieb |
| 12 | Baker McKenzie Eversheds Sutherland |
| 14 | Reed Smith |
| 15 | Dentons |
| 16 | Dechert |
| 17 | Orrick Shearman & Sterling |
| 19 | Mayer Brown |
| 20 | Sidley Austin |

Law Firms

@Law360

The Masters of the Code

- Lawyers/Private attorneys
- Globalization is largely the globalization of Anglo-American legal practice
 - Common law fosters legal innovation
 - US federalism testing ground for legal & regulatory arbitrage
- Legal education
 - LLM programs

Towards digital coding

- Digital code
- Coding without borders
- Primacy of Contract as a Coding Device
 - Technology transforms bilateral relations into universal effect
 - Entry barriers to use of products, services, platforms
 - “Contract governance” without the state?
- Most likely outcome in short-term:
 - Legal enclosure of the digital code

Self- Governance



The Democratic Challenge

- Coding capital is oblivious to democracy
- Yet, law is the tool by which democracies govern themselves
- Private autonomy vs. collective governance
- Globalization increases tension between
 - collective governance and
 - individual wealth maximization
- Do does digitization

Need for Rebalancing

- Impossible to unwind centuries of legal coding
- Ex post corrections (taxes): insufficient
- Rebalancing the freedom to code with quest for collective self-governance:
 - Targets:
 - Scope of legal privileges off-the-shelf
 - Unconditioned enforceability
 - Unconditioned recognition of foreign law
 - Of international arbitral awards
 - “public policy exceptions”