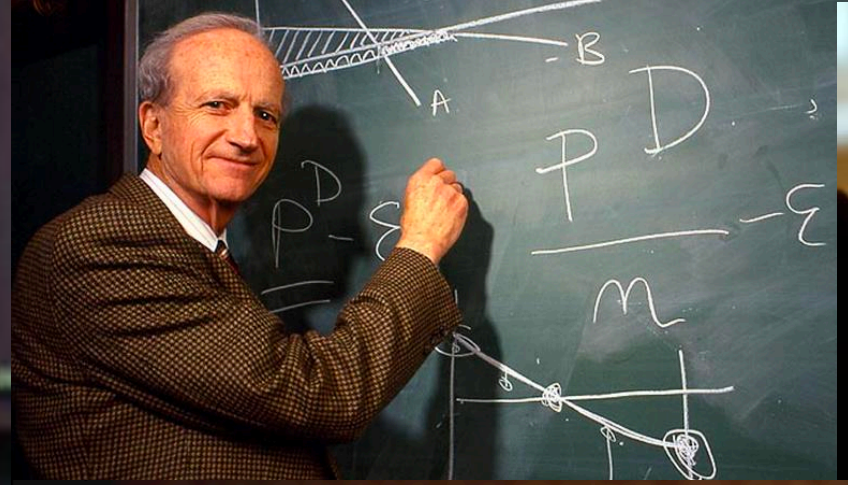
Donald Kalff & Andrea Renda

Hidden Treasures

Launch event, 12 September 2019

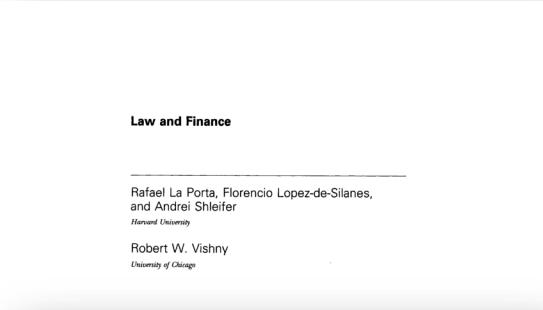

B
A

Corporate governance

- The “Law and Finance” movement (end of the 1990s) conquered academia and international organisations: US corporate governance is on a pedestal

- Jensen and Meckling (1976) and Hansmann and Kraakman (2000) were instrumental in emphasising the primacy of the shareholder model

- The financial crisis put these theories under strain, but academia has responded very timidly, and today business schools are still dominated by the same ideas



Law and Finance

Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer
Harvard University

Robert W. Vishny
University of Chicago

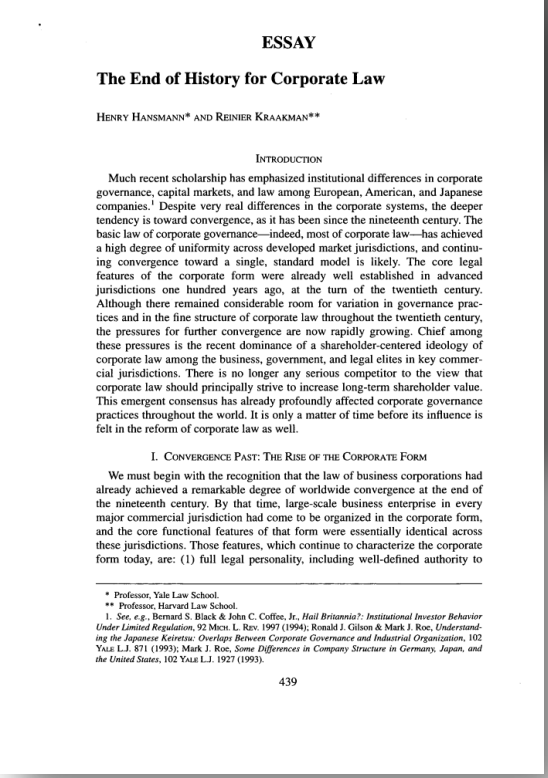
Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure

Michael C. Jensen
Harvard Business School

And

William H. Meckling
University of Rochester

Abstract



ESSAY

The End of History for Corporate Law

HENRY HANSMANN* AND REINIER KRAAKMAN**

INTRODUCTION

Much recent scholarship has emphasized institutional differences in corporate governance, capital markets, and law among European, American, and Japanese companies.[1] Despite very real differences in the corporate systems, the deeper tendency is toward convergence, as it has been since the nineteenth century. The basic law of corporate governance—indeed, most of corporate law—has achieved a high degree of uniformity across developed market jurisdictions, and continuing convergence toward a single, standard model is likely. The core legal features of the corporate form were already well established in advanced jurisdictions one hundred years ago, at the turn of the twentieth century. Although there remained considerable room for variation in governance practices and in the fine structure of corporate law throughout the twentieth century, the pressures for further convergence are now rapidly growing. Chief among these pressures is the recent dominance of a shareholder-centered ideology of corporate law among the business, government, and legal elites in key commercial jurisdictions. There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value. This emergent consensus has already profoundly affected corporate governance practices throughout the world. It is only a matter of time before its influence is felt in the reform of corporate law as well.

I. CONVERGENCE PAST: THE RISE OF THE CORPORATE FORM

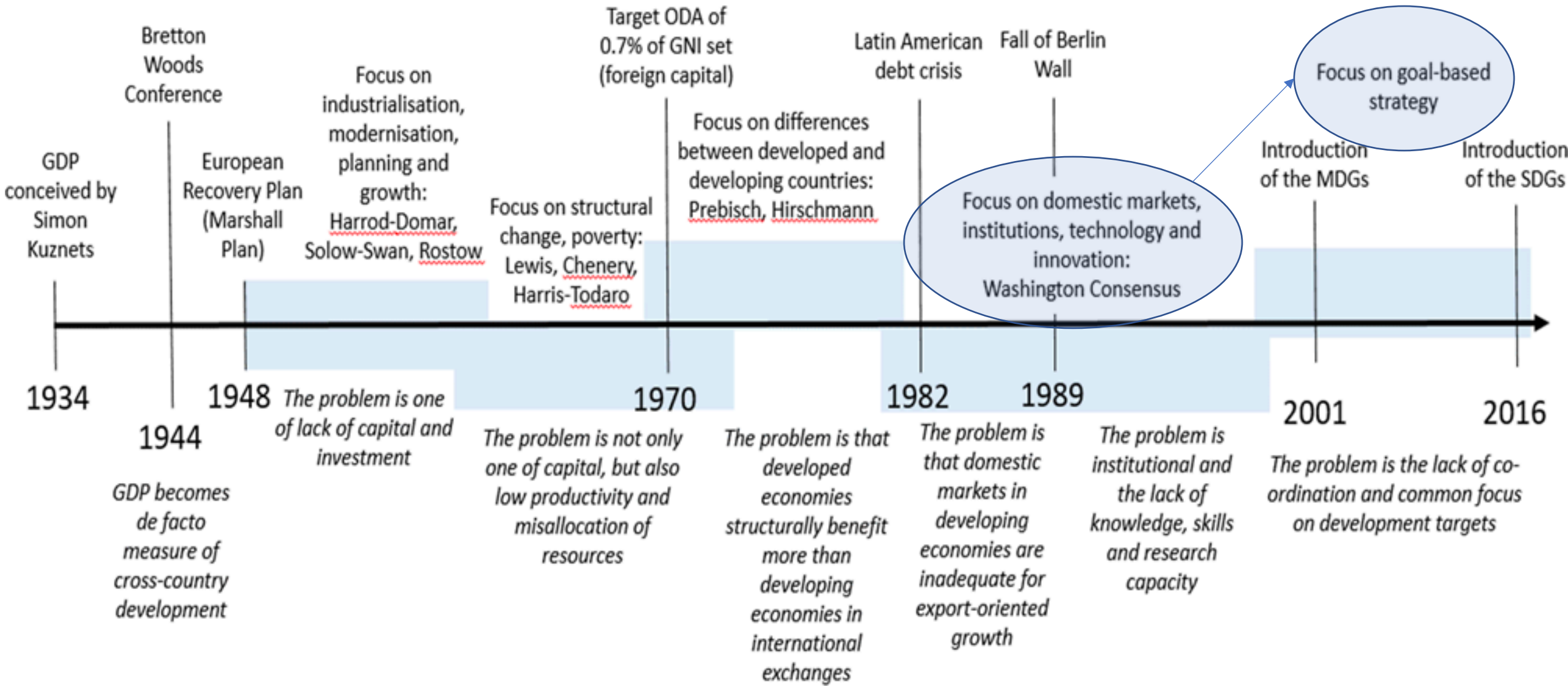
We must begin with the recognition that the law of business corporations had already achieved a remarkable degree of worldwide convergence at the end of the nineteenth century. By that time, large-scale business enterprise in every major commercial jurisdiction had come to be organized in the corporate form, and the core functional features of that form were essentially identical across these jurisdictions. Those features, which continue to characterize the corporate form today, are: (1) full legal personality, including well-defined authority to

* Professor, Yale Law School.
** Professor, Harvard Law School.
1. *See, e.g.*, Bernard S. Black & John C. Coffee, Jr., *Hail Britannia?: Institutional Investor Behavior Under Limited Regulation*, 92 MICH. L. REV. 1997 (1994); Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L.J. 871 (1993); Mark J. Roe, *Some Differences in Company Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927 (1993).

439

Widespread impact on several policy areas

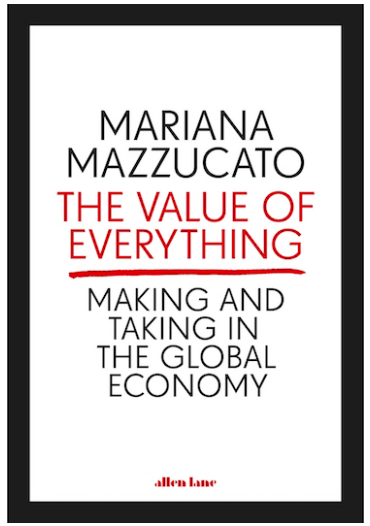
- Innovation, venture capital and the “Silicon Valley” model
- Better regulation and the widespread use of Cost-Benefit Analysis
- Corporate governance and primacy of Shareholder Capitalism
- A push for stronger property rights in IP (at the cost of patent quality)
- Loose control of tax evasion and corruption
- Competitiveness over sustainability in trade relations
- *Laissez faire* in the digital economy since the rise of the Internet
- …

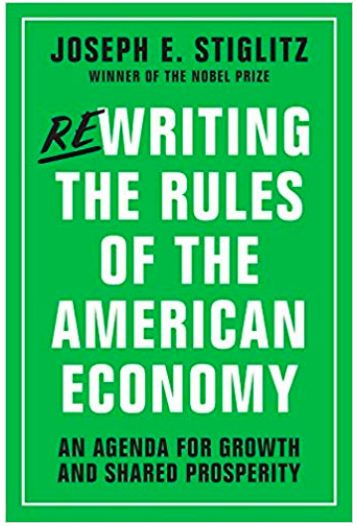


Source: OECD (2019)

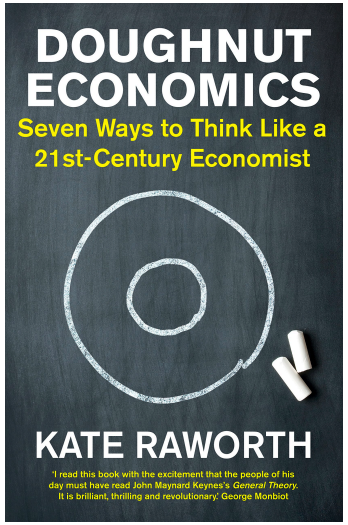
The issue of "value"

- **Financialisation** and **digitalisation** have led to the emergence of new ways of doing business, in which value creation and value extraction are increasingly separated (Mazzucato 2018)
- These trends have brought important benefits, but also **dilute corporate responsibility** for the sustainability of the economy, society and the environment
- EU industrial policy today is timidly seeking to re-allocate entitlements **as close as possible to where value is generated**


MARIANA
MAZZUCATO
THE VALUE OF
EVERYTHING
MAKING AND
TAKING IN
THE GLOBAL
ECONOMY
allen lane


JOSEPH E. STIGLITZ
WINNER OF THE NOBEL PRIZE
REWRITING
THE RULES
OF THE
AMERICAN
ECONOMY
AN AGENDA FOR GROWTH
AND SHARED PROSPERITY


REWRITING
THE RULES
OF THE EUROPEAN ECONOMY
A REPORT BY JOSEPH E. STIGLITZ
NOBEL LAUREATE IN ECONOMICS

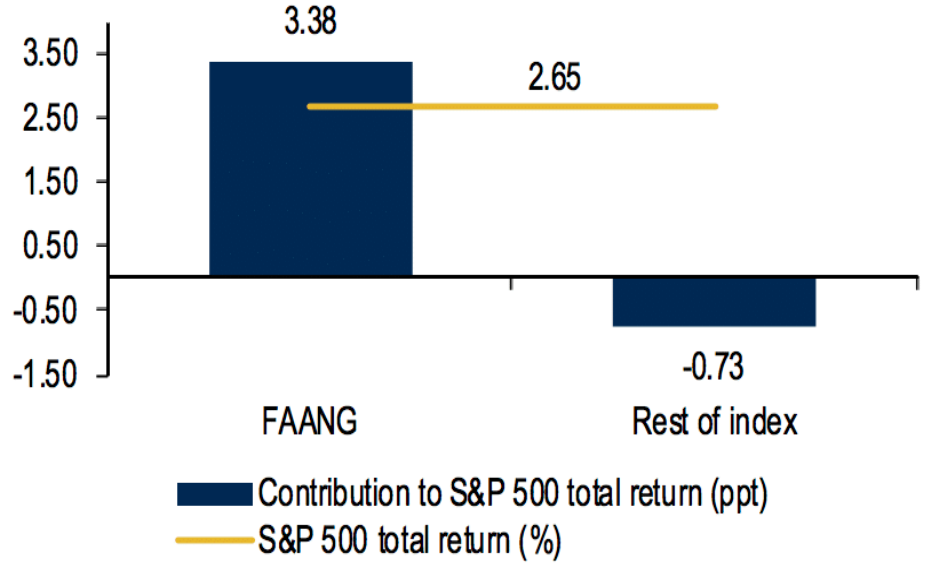

DOUGHNUT
ECONOMICS
Seven Ways to Think Like a
21st-Century Economist
KATE RAWORTH
'I read this book with the excitement that the people of his
day must have read John Maynard Keynes's General Theory.
It is brilliant, thrilling and revolutionary.' George Monbiot


The
Economist
Not NAFTA, but dafter
Farewell to John McCain
Lessons from Singapore's schools
Cryptocurrencies: a spent force
Peak Valley
Why startups are going elsewhere
SILICON
VALLEY


The
Economist
How recessions begin
China bullies Cathay Pacific
Who should run Italy now?
Gravity waves and nuclear pasta
What are companies for?
Big business, shareholders and society

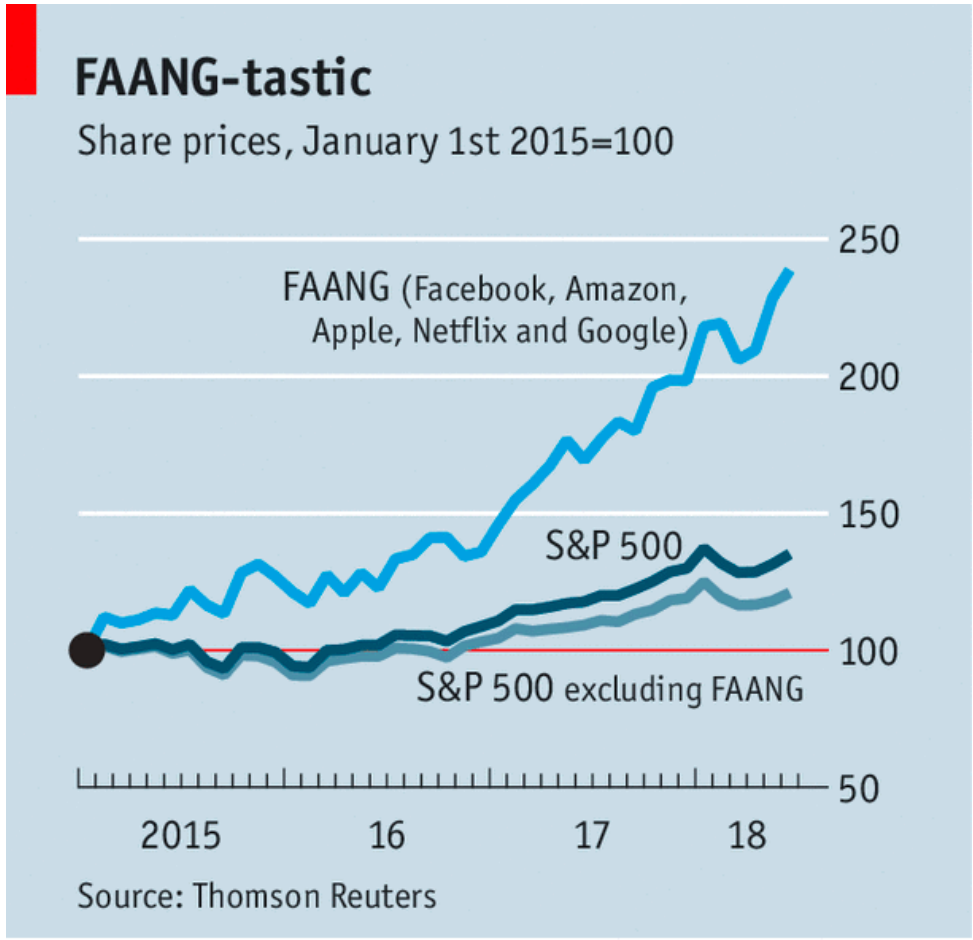
1H 2018: Excluding FAANG stocks, index returns would have been negative

FAANG stocks' contribution to the S&P 500 1H18 total return



Note: FAANG = FB, AAPL, AMZN, NFLX, GOOG/GOOGL

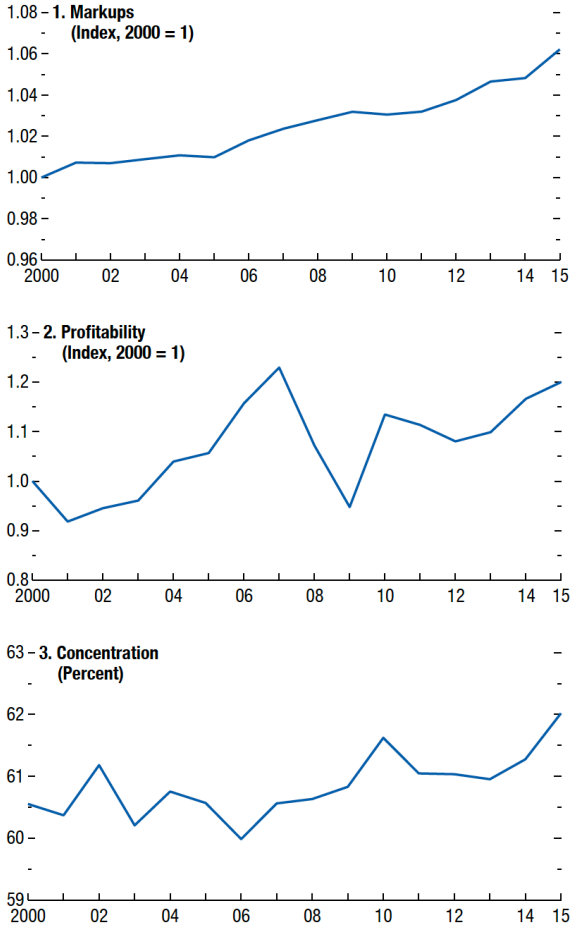
Source: S&P, BofA Merrill Lynch US Equity & US Quant Strategy



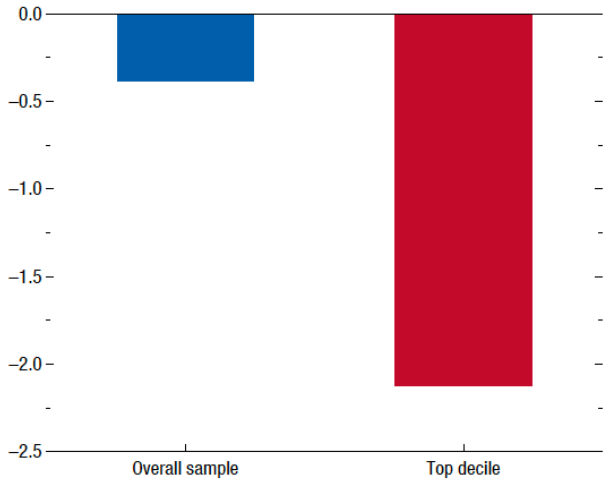
Economist.com

Figure 2.2. Evolution of Market Power

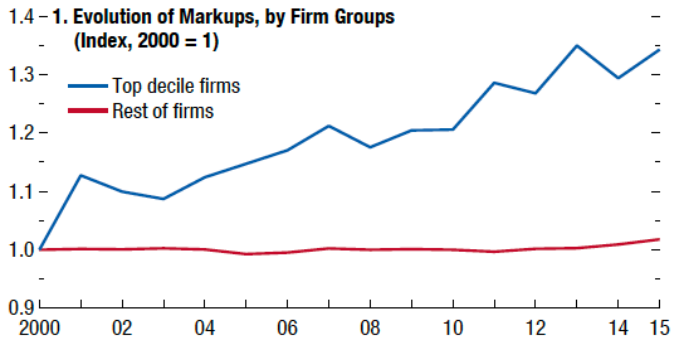
All measures point toward a moderate increase in market power over time: higher markups, higher profitability, and, to a lesser extent, higher concentration.

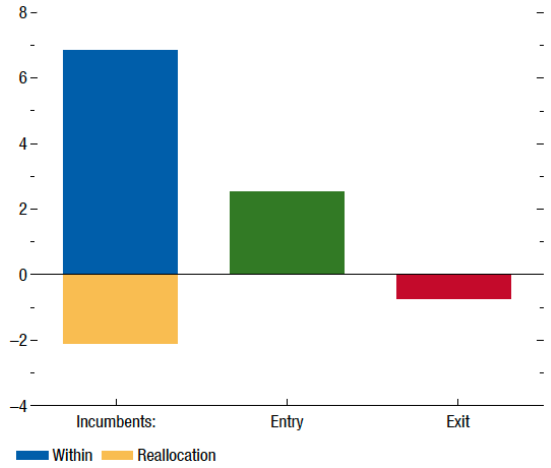


For the overall sample, the average increase in firms' markups is associated with a 0.4 percentage point decrease in the physical capital investment rate. For the firms in the top decile of the markup distribution, the (larger) average increase in firms' markups is associated with a decrease in the investment rate of 2 percentage points.



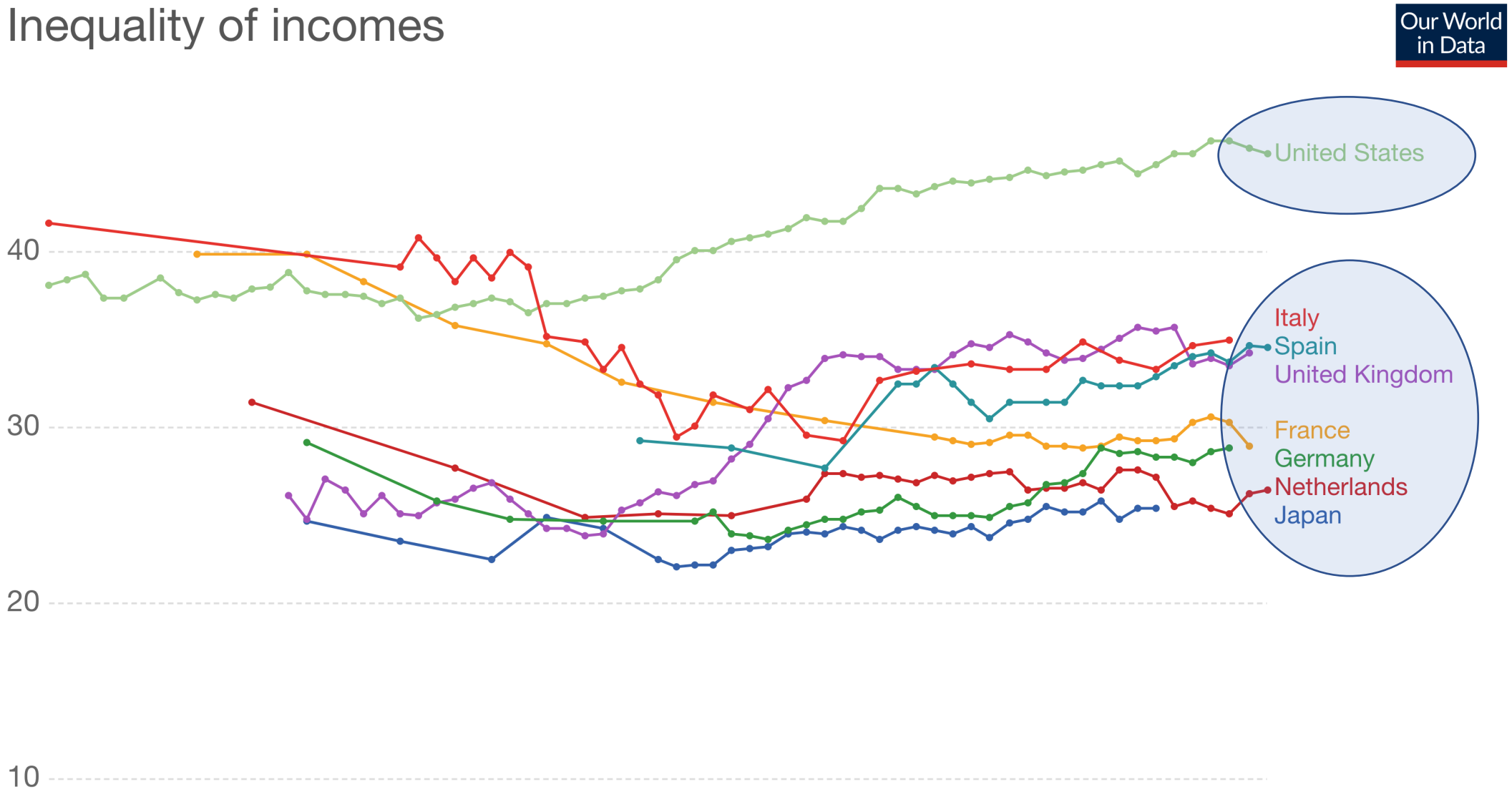
Sources: Orbis; and IMF staff calculations.
Note: Average changes in markups across firms are weighted by operating revenue.





Source: WEO 2019

Inequality of incomes



Atkinson, Morelli, and Roser (2016) – Chartbook of Economic Inequality. (www.chartbookofeconomicinequality.com/)

Sustainable Development Report 2019

- no country in the world has achieved the 17 SDGs
- no country is on track to achieve the SDGs by 2030
- the US ranks 35th out of 162 countries

The SDG Index

Select a country to see its full profile

Search country...

Country	Region	SDGs	Rank	Score
Denmark	OECD members		1	85.2
Sweden	OECD members		2	85.0
Finland	OECD members		3	82.8
France	OECD members		4	81.5
Austria	OECD members		5	81.1
Germany	OECD members		6	81.1
Czech Republic	OECD members		7	80.7
Norway	OECD members		8	80.7
Netherlands	OECD members		9	80.4
Estonia	OECD members		10	80.2

Fairness
Quality
Sustainability
and Trust

- **Fairness** in contracts, in competition, in technology transfer, in addressing corruption, in taxation, in the digital economy
- **Quality** of institutions, of governance, of IPRs, of the judiciary, of the (tech) standards
- **Sustainability** as the North Star in crafting new policies, evaluating innovative ventures, regulating technologies, funding research and innovation, and engaging in trade relationships
- **Trust** in the courts, trust in the banks, trust in large companies, trust between large and small companies, and overall trust in EU institutions

Our treasure trove: selected action items

Promote	Promote civil law in EU contracts and trade relations
Access	Access to justice and a friendlier environment for SMEs when dealing with large companies
Promote	A diversity of banking models, including notably relationship banking (also in Fintech)
Revive	Revive the SE, and tailor it to smaller companies
Reconsider	Reconsider the “consumer harm” standard in antitrust and overall scope of competition rules
Protect	Protect the European patent as a real “quality seal”
Experiment	Experiment with more distributed forms of governance in Strategic Value Chains
Focus	Focus on digital tech “for good”, not on a digital arms’ race
Leverage	Leverage legal traditions and sustainability orientation in global relations and in trade agreements
Forge	Forge large coalitions for sustainable, socially relevant innovation

Hidden treasures as *modus operandi*

- Europe must play "solo": a new need for strategic autonomy in uncertain times
- Post-Brexit, Continental Europe may not only face challenges, but also opportunities
- Starting from Europe's strengths, not failures or weaknesses when developing policy
- A call for more agile, principles-based, outcome-based policymaking in the EU
- A new way of looking at subsidiarity and proportionality, also based on digital technology

Donald Kalff & Andrea Renda

Next hidden treasures?