St. John's Law Review

Volume 94, 2020, Number 2 Article 3

Property as Rent

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INTRODUCTION

What is property? Over the course of the past two decades, legal scholars have reopened this question in a highly visible and often fractious way. On one side of the renewed debate are those who have sought to restore an object-centered model of property as an *in rem* right to exclude; on the other are those who have sought to reorient the old adage that property is a "bundle of sticks" toward a new emphasis on property's role in forging social relations and democratic community. Sometimes known as a split between the "ownership" versus "progressive property" models,[1] as fruitful as the renewed debate between the exponents of these two views has been, it has been equally paradoxical. This is especially so today, after the epochal events of the 2007 financial crisis and the ensuing Great Recession, the most profound since the Great Depression of the 1930s, which only widened the gap between our theories of property in law and its actuality in real world financial practice. Indeed, central to the 2007 crisis was the vast expansion of mortgage securitization, a practice involving the assemblage of

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[1] *See* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 731–33 (1996); Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009). Object-centered theorists, especially, have characterized the model they oppose in such terms, usually also distinguishing between "substantive" or "ad hoc" versus "conceptual" versions of the so-called bundle thesis. *See* Penner, *supra*, at 723–24, 733; Eric R. Claeys*, Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 617–18 (2009) (reviewing THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2007)). Of course, the division that has been articulated between the ownership and progressive property models in the last two decades can also be linked—as Penner explicitly does—to earlier (skepticism about) concerns over the disintegraiton of property famously expressed by Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980).

homeowner debt into complex new forms of financial asset property in which the individual right to exclude is, at best, of clearly secondary importance.[2] Suffice to say, amidst the rise of securitization, it was never the ordinary homeowner who decided whether to grant access to her property for the purposes of making it part of the other kinds of debt-based assets being sold to distant investors on the world's financial markets.

Now in 2021, though barely a decade removed from the last time the capitalist world economy was in crisis, a new breakdown of world-historical proportions has again materialized, having been touched off by the global Coronavirus pandemic. Yet in a thoroughly transformed political context that has seen the United States visited by what many have called the rise of a quasi-fascist form of right wing ultra-nationalism,[3] the likelihood that we will once again eschew the opportunity to treat the crisis as a basis for pursuing a deeper structural transformation of the American economy paints to a more ominous picture than the parallel decision did after 2007. This is because if on the eve of the mortgage crash, economic life in the United States was already clearly overbalanced in favor of financial speculators, corporate welfare recipients, and the rich, the cure put in place after 2007 was, in key ways, built on intensifying the very tendencies that led to the catastrophe in the first place. Yet with the Coronavirus pandemic, especially before the Biden adminstration's first round of new relief in early 2021, the initial phase of the bailout under the March 2020 Coronavirus Aid, Relief, and Economic Security Act found the United States once more responding to a crisis of global capitalism by prioritizing the feeding of ever-larger quantities of

[2] THE FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 42 (2011), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf [https://perma.cc/2FCH-NLD9].

[3] *See, e.g.*, JOHN BELLAMY FOSTER, TRUMP IN THE WHITE HOUSE: TRAGEDY AND FARCE 19–20 (2017); Matthew N. Lyons, *Foreword* to SHANE BURLEY, FASCISM TODAY: WHAT IT IS AND HOW TO END IT (2017); JASON STANLEY, HOW FASCISM WORKS: THE POLITICS OF US AND THEM, at xxviii (2018); TRUMPING DEMOCRACY: FROM REAGAN TO THE ALT-RIGHT 73 (Chip Berlet ed., 2020); FEDERICO FINCHELSTEIN, FROM FASCISM TO POPULISM IN HISTORY, at xxxi–xxxii (1st paperback ed. 2019). *But see* Samuel Moyn, *The Trouble with Comparisons*, N.Y. REV. BOOKS (May 19, 2020, 7:00 AM), https://www.nybooks.com/daily/2020/05/19/the-trouble-with-comparisons/ [https://perma.cc/CDG5-ZWAR] (striking a somewhat contrary note based on the fascism analogy's tendency to "abnormalize" the administration it is applied to relative to the political history of the United States more generally).

low- or no-cost money to the wealthy and superrich.[4] The reluctance of the unprecedented stock market boom enabled by that earlier bonanza of free money should thus continue to give us reason to worry about the possiblity that we have hard-wired into our political economy an expectation of an endless willingness to redistribute resources into the hands of the corporate and investor class for the purposes of amassing speculative financial asset property of one kind or another.[5]

Against the backdrop of possible "déjà vu all over again," therefore, it would be even more unacceptable than it was after 2007 to allow the gap between property's lives in legal theory versus real world financial practice to remain intact. Indeed, paving the way toward the Coronavirus shock was an aftermath of the Great Recession that already saw the rise of various new forms of debt-based assets for investors to take ownership over. While the most notable of these have been connected to the rise of exchange traded funds, the reemergence of junk bonds, and other

[4] *Compare, e.g.*, Mark Blyth & Eric Lonergan, *This Time, Can We Finally Turn a Financial Crisis into an Opportunity?*, FOREIGN POL'Y (Mar. 20, 2020, 4:41 PM), https://foreignpolicy.com/2020/03/20/this-time-can-we-finally-turn-a-financial-crisis-into-an-opportunity/ [https://perma.cc/VZR9-HAZD], *with* David Dayen, *Unsanitized: Bailouts, a Tradition Unlike Any Other*, AM. PROSPECT (Mar. 25, 2020), https://prospect.org/coronavirus/unsanitized-bailouts-tradition-unlike-any-other/ [https://perma.cc/QY3Y-DXR7], *and* Zach Carter, *Coronavirus Is a Defining Test and American Government Is Failing It*, HUFFINGTON POST (Apr. 02, 2020), https://www.huffpost.com/entry/coronavirus-test-american-government-failing_n_5e7e213fc5b6cb9dc19f199e [https://perma.cc/582P-5E7H].

[5] There is a variety of cost estimates of the bailouts with a shared perspective on the benefits remaining concentrated among the leading financial institutions. *See, e.g.*, JOSEPH E. STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY 108, 134 (2010); Viral V. Acharya, Deniz Anginer & A. Joseph Warburton, The End of Market Discipline? Investor Expectations of Implicit Government Guarantees, 2, 3, 33, 35 (May 1, 2016) (unpublished manuscript), https://ssrn.com/abstract=1961656 [https://perma.cc/65W2-ZSZV]; Deborah Lucas, *Measuring the Costs of Bailouts*, 11 ANN. REV. FIN. ECON. 85, 105–07 (2019); s*ee also infra* note 158. The account of the former Special Inspector General for the United States' Troubled Asset Relief Program ("TARP") presents a more general view of how the response to the 2007 crisis was deficient in dealing with the proverbial residents of Main Street. *See* NEIL BAROFSKY, BAILOUT: HOW WASHINGTON ABANDONED MAIN STREET WHILE RESCUING WALL STREET, at xv–xx (1st paperback ed. 2013).

kinds of highly leveraged loan products,[6] new forms of real estate securitization also quietly emerged.[7]

Drawing on one such new form—involving the securitization of residential rental payments from single-family homes and their ultimate transformation into bond holder claims on interest—in this Article I consider why our existing legal theories have been so ill-equipped to account for the vast expansion of debt-based financial asset property, not only after 2007 but really since the 1970s. Given the related increase in economic inequality over these same periods, as wealth and income have been steadily redistributed upward to society's narrow band of capital owners, it is all the more curious that legal theory has paid such scant attention to property's "financialization."[8] After all, debt-based forms of financial asset property do not just represent straightforward mechanisms for excluding others from what their respective holders deem

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[6] While they are technically *funds* bringing together some array of assets (like stocks, junk bonds, gold, etc.), exchange traded funds ("ETFs") offer investors indirect ownership over those assets through shareholding. While in some ways similar to mutual funds, ETFs allow for share-based financial asset property that can be continuously bought and sold throughout the course of the trading day, including by automated mechanisms. ETFs have been on the rise over the last quarter-century, especially since 2007. *See* Itzhak Ben-David, Francesco Franzoni & Rabih Moussawi, *Exchange-Traded Funds*, 9 ANN. REV. FIN. ECON. 169, 170, 174–75 (2017).

[7] Neil Fligstein & Adam Goldstein, *The Transformation of Mortgage Finance and the Industrial Roots of the Mortgage Meltdown* 23–24, 26 (Inst. for Rsch. on Lab. & Emp., Working Paper No. 133-12, 2012); *see also, e.g.*, U.N. Conference on Trade and Development, *Trade and Development Report 2020: From Global Pandemic to Proesperity for All: Avoiding Another Lost Decade*, at IV–V, UNCTAD/TDR/2020 (discussing the precarious state of the global economy leading into the Coronavirus crisis); *The Age of Disorder—The New Era for Economics, Politics and Our Way of Life*, DEUTSCHE BANK: NEWS (Sept. 9, 2020) [hereinafter *The Age of Disorder*], https://www.db.com/newsroom_news/2020/the-age-of-disorder-the-new-era-for-economics-politics-and-our-way-of-life-en-11670.htm [https://perma.cc/X3VE-U3TM].

[8] Literature on financialization from disciplines outside of law is vast. *See, e.g.*, DOUG HENWOOD, WALL STREET: HOW IT WORKS AND FOR WHOM 66–67 (rev. ed. 1998); ROBERT BRENNER, THE ECONOMICS OF GLOBAL TURBULENCE: THE ADVANCED CAPITALIST ECONOMIES FROM LONG BOOM TO LONG DOWNTURN, 1945–2005, at 13 (rev. ed. 2006); GERALD F. DAVIS, MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA 1, 5, 26–27 (2009); Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV., July–Aug. 2012, at 51–52; Robert M. Solow, *How to Save American Finance from Itself*, NEW REPUBLIC (Apr. 8, 2013) (reviewing BEN S. BERNANKE, THE FEDERAL RESERVE AND THE FINANCIAL CRISIS (2013)), https://newrepublic.com/article/112679/how-save-american-finance-itself [https://perma.cc/H3WT-3UKD]; THOMAS I. PALLEY, FINANCIALIZATION: THE ECONOMICS OF FINANCE CAPITAL DOMINATION 1, 4–5 (2013); Natascha van der Zwan, *Making Sense of Financialization*, 12 SOCIO-ECON. REV. 99, 101–03 (2014); L. RANDALL WRAY, WHY MINSKY MATTERS: AN INTRODUCTION TO THE WORK OF A MAVERICK ECONOMIST 141 (2016); Bonnie G. Buchanan, *The Way We Live Now: Financialization and Securitization*, 39 RES. INT'L BUS. & FIN. 663, 664–65 (2017).

valuable. Rather, they clearly also comprise claims on the disposal of society's productive resources, both in the present and the future.

Accordingly, in this Article I make a normative case against continuing to stake the fate of our economy on the creation of exotic varieties of financial asset property, including through ever-multiplying forms of securitized real estate debt, for those with seemingly endless supplies of money capital to take ownership of. To do so, I work analytically, historically, and empirically to mobilize an alternative conception in law and economics of what I call property-as-rent. Dating to the very origins of classical economics, this conception drew on ideas very different from the notions of consumer preference satisfaction and rent-seeking that have come to be associated with modern economics ever since the discipline's neoclassical revolution after 1870.[9] From the vantage point of property-as-rent, the securitization of real estate debt cannot simply be justified in terms of promoting liquidity in the financial markets or democratizing access to mortgage lending. Instead, the conception of property-as-rent requires asking whether securitized financial asset property rooted in real estate value is a deleterious means of redirecting resources from productive to speculative use by extracting premiums from land's scarcity.

In pursuing this aim, the Article highlights a new species of post–Great Recession financial asset property that is known appropriately enough as the single-family rental-backed security ("SFRBS").[10] Birthed amidst uncertainty about the potential of its kind for survival, the first SFRBS became available to investors only in 2013. As a variation of the mortgage-backed security ("MBS"), as with securitized assets more generally, the SFRBS allows yield-seeking institutional investors like pension and hedge funds to take ownership over bond debt supported by large assemblages of real estate assets. At the same time, the SFRBS varies

[9] A blanket term, "neoclassical," has come to denote the ensemble of ideas that began emerging in earnest only after the "discovery" of the principle of marginal utility during the 1860s, which is typically credited to William Stanley Jevons, Léon Walras, and Carl Menger. *See generally* JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 825 (Elizabeth Boody Schumpeter ed., 1954); MARK BLAUG, ECONOMIC THEORY IN RETROSPECT 294, 297 (4th ed. 1985); E.K. HUNT & MARK LAUTZENHEISER, HISTORY OF ECONOMIC THOUGHT: A CRITICAL PERSPECTIVE 249 (3d ed. 2011).

[10] Throughout the Article I use the term *rental* payments to distinguish the revenue streams paid by ordinary consumers on housing leases that SFRBS securitize from the *economic* rent that I argue debt-based financial asset property like the SFRBS allows its owners to extract from land. While the terms are not unrelated, it remains important to keep the distinction in mind.

from the MBS in two key ways. First, most of the assets securitized to date have been single-family homes purchased by private equity firms, often at fire-sale prices in the wake of the bursting of the last housing bubble. Second, because these homes are leased rather than owner-occupied, the interest that is ultimately transferred to institutional investors is intermediated primarily through the monthly rental payments of their tenant-occupants. I say *primarily* because the rapid way the market has evolved has meant that some SFRBS offerings have gone on to include in their securitized asset pools traditional owner-occupied mortgage payments as well.

Before discussing the Article's organization, a note of preemptive clarification is necessary, given that real estate-backed securities, like all forms of debt-based financial asset property, are made quasi-tangible only through their denomination in money. Accordingly, it may be tempting for the critical reader to refuse this Article's price of admission, perhaps by insisting that legally protected financial claims belong to the realms of securities law and contractually secured transactions law more than that of "property" law. Beyond the question-begging nature of so insisting and the fact that debate in private law theory has never rigorously confined itself to a concern only with tangible property, I believe such an objection is unwarranted. As this Article will show, debt-based financial assets do not float free of any tether. Not only do such assets ultimately make for claims on what are clearly the "property" resources underpinning production—and, more indirectly, society's means of consumption—they also repeatedly take form as claims on capital redirected into property's quintessential variety—namely, real estate.[11] Therefore, as with the explosion of the MBS before, it is no coincidence that the SFRBS is a legal form linking investment bank and institutional investor control to value that can ultimately be extracted from the ability of the quintessential form of property to command a premium due to land's nonproducibility. Indeed, as I show, such premiums still comprise an enormous share of the market value of real estate

[11] This point has been widely discussed by historians, geographers, and sociologists. *See, e.g.*, DAVID HARVEY, SPACES OF CAPITAL: TOWARDS A CRITICAL GEOGRAPHY 147–48 (2001); Giovanni Arrighi, *Spatial and Other Fixes of Historical Capitalism*, 10 J. WORLD-SYS. RSCH. 527, 531 (2004); Neil Crosby & John Henneberry, *Financialisation, the Valuation of Investment Property and the Urban Built Environment in the UK*, 53 URB. STUD. 1424, 1427 (2016).

even today.[12] And, of course, it was precisely their capture through the possibility of legal control over land rather than any cost associated with its production that led the classical economists to the now largely forgotten preoccupation with distinguishing *unearned* rent from other *earned* incomes in the first place.

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As for the organization of this Article, it proceeds in four Parts. Part I delves more deeply into why it is necessary to close the gap that is further widening between our competing legal theories of property and the reality of property in real world financial practice. Here, I canvass the limits of both object-centered views, as well as the countervailing resurgence of a focus on property's communitarian dimension to demonstrate why the neglected conception of property-as-rent serves as such a vital corrective.

Part II then turns to property-as-rent in earnest. It begins with a first Section that discusses some key differences between the classical and neoclassical traditions in economics to flesh out the notion of consumer preference satisfaction undergirding what is usually described as *the* economic conception of property. Doing so helps to clarify the importance of my own argument that the control of rent has long undergirded an altogether distinct *economic* conception of property's nature. The remainder of Part II then turns to the genesis of the concept of economic rent—a cornerstone of classical economic thought going back at least to the eighteenth century—and the way it informed thinking about landed property in particular. Here, the Article takes pains to distinguish this idea of economic rent both from the diluted version that lived on in neoclassical economics after 1900, as well as the idea of rent-seeking that has dominated law and political science since the rise of public choice theory after the 1960s.

In Part III, I then provide a contextualizing discussion to set the stage for Part IV by drawing out the importance of the conception of property-as-rent in our own post-1970s world. Part III lays out three key aspects of the relevant context: a first concerning the linked growth of inequality and new forms of debt-based financial asset property, including real estate-backed securities; a second concerning the rise of the Finance, Insurance, and Real Estate ("FIRE") sector of the economy; and a third concerning the phenomenon of financial asset-price inflation.

[12] *See infra* Part IV.A.

In Part IV, I end by further grounding the Article's intervention into property theory in the reality of our actual post-1970s economy. Picking up on elements of Parts I to III, Part IV opens by drawing on several unique data sets that economist Morris Davis has made available in order to isolate the share of land or what we can also call site price values in the composition of home price values in the residential real estate market at the national, state, and metro area levels in the United States. Here, I graph important long-term trends to demonstrate how dependent home price values are still on scarcity premiums associated with land and hence how property-in-land rent is transmuted, through inflated real estate prices, into interest payments to mortgage and investment bankers and bondholders. This, importantly, is the case regardless of whether the payment first takes shape through a tenant's monthly rental check to some private equity landlord that has bought up single-family homes with leverage or as a traditional mortgage payment by an owner-occupier. In the second Section of Part IV, I then put these trends into dialogue with the SFRBS as one example of what both the classical and early American legal economists would just as well have seen as a proprietary claim in the pure overhead charge of land's economic rent. Part IV concludes by providing a several-pronged normative alternative, both to practical reliance on securitization and to its traditional justification as rooted in the idea of promoting liquidity in the financial markets and democratizing access to credit. Doing so should be particularly timely given the moment of evident transition we now find ourselves in as we attempt to move away from an initial round of Coronavirus pandemic relief measures that concentrated on subsidizing the bailout of Wall Street at the expense of a much-needed focus on the mass of society who reside on Main Street. Now more than ever such an exercise in envisioning alternatives is thus necessary if we are to facilitate what Roberto Unger calls the "democratic experimentalism" and "institutional innovation" necessary to meet both the ongoing—as well as the inevitable next—crisis with more effective proposals for structural change.[13]

[13] ROBERTO MANGABEIRA UNGER, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE 5, 16 (1998).

I. WHY RECKON WITH THE GAP BETWEEN PROPERTY IN LEGAL THEORY VERSUS REAL WORLD FINANCIAL PRACTICE?

While the so-called ownership model of property never fully went away in the civil law world, in that of the common law world, the idea that property comprises a direct connection between persons and things is usually seen as the vestige of an untutored past. Even so, over the last twenty-plus years the latter intuition has clearly become untenable. At least since the turn of the millennium, property's supposed dissolution during the twentieth century has come under increasing attack. Even before the object-centered or *in rem* model started to be reimagined in terms of the economics of information and the limited forms the common law has allowed landed estates to take through the so-called *numerus clausus* principle,[14] the questioning of property's disintegration had begun.[15] James E. Penner was the first to call for a definitional return to the twin criteria of the right to property's "thinghood," on the one hand, and the "duty of non-interference" it imposed on the world at large, on the other.[16] From this standpoint, the corresponding right to exclude has once again become the key stick in property's bundle—so much so, in fact, that talk of "sticks" and "bundles" has been made to seem like little more than a pernicious metaphor.

Yet these several lines of attack did not simply turn the old common sense upside down. They elicited a corresponding florescence in defense of property's social or communitarian and relational dimension.[17] Importantly, however, this defense was not primarily staked on refuting the object-centered model—say, by denying the potential information efficiencies of the *numerus clauses* doctrine. Nor was it based primarily on reemphasizing the *jural* relationality of bundle logic.[18] Instead, focus shifted to property's role as a source of "plural . . . values" extending beyond the

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[14] *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 13 (2000).

[15] *See* Grey, *supra* note 1, at 69–85, 70.

[16] *See* Penner, *supra* note 1, at 713, 802–13; *see also* JAMES E. PENNER, THE IDEA OF PROPERTY IN LAW 68–74 (1997) [hereinafter PENNER, THE IDEA OF PROPERTY IN LAW] (making an even more expansive case). Much literature exists from this early moment in the resurgence. *See* J.W. HARRIS, PROPERTY AND JUSTICE 157 (1996); Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 734–35 (1998).

[17] This has most prominently taken place through the idea of "progressive property." *See* Alexander et al., *supra* note 1.

[18] Wesley Hohfeld was the key originator of the focus on property as a jural relation. *See infra* note 25.

"promot[ion] [of] individual interests" or the "satisf[action] [of] personal preferences," like "just *social* relationships, just [*social*] distribution, and democracy."[19] In fact, even before Penner, Gregory Alexander was picking up on earlier work by Carol Rose[20] to strike a key contrast between property's reduction to "commodity"[21] and its more fuller role as "propriety."[22]

When set off against property-as-commodity in this way, property-as-propriety served as a ready way of contesting the resurgence of the object-centered model based on a highly intuitive anti-economism. Emphasizing propriety thus served as a corrective to the "widely shared misconception" reducing property's historical meaning in "American law" to "*market alienability*."[23]

Ultimately, this resurgence of debate has been more than just polarizing. Aside from its inherent fruitfulness, it also has generated new efforts at finding a middle ground. In a recent pair of articles, for example, Anna di Robilant uses a legal historian's eye to bring the so-called ownership model into chronologically deeper dialogue with the view from property's relationality. In the first, she highlights a third-way "tree"[24] model of property that Italian legal thinkers were developing at the very same time that Wesley N. Hohfeld is said to have inaugurated property's great unbundling in the United States in the 1910s.[25] In the second, she highlights a half-century of new legal forms for controlling real estate such as the community land trust and common interest

[19] Alexander, et al., *supra* note 1 (emphasis added).

[20] *See, e.g.*, Carol M. Rose, *Property as Wealth, Property as Propriety*, *in* 33 NOMOS: COMPENSATORY JUSTICE 223 (John W. Chapman ed., 1991).

[21] GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 1 (1997). Other compatible work is abundant. *See, e.g.*, JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION 2 (2010).

[22] ALEXANDER, *supra* note 21.

[23] *See id.*

[24] Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 871–72 (2013).

[25] Given his premature death, Hohfeld's insights were confined to two main articles. In the first, he decomposed ostensibly unitary rights—like that to property—into a series of "jural correlatives" comprising the four pairs of privilege: no-rights, right-duties, powers-liabilities, and immunities-disabilities. *See* Wesley Newcomb Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913). In the second, he argued for doing away with the distinction between *in rem* and *in personam* when characterizing the elemental jural entitlements belonging to the actors on either side of those correlatives. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 712–16 (1917).

community that seem to fly in the face of the ostensible strictures of the *numerus clausus* doctrine.[26]

In calling attention to the neglected conception of property-as-rent, this Article also works in part historically. It does so, however, through pushing in a new direction more than toward a middle ground between existing extremes, each of which can be limiting. With their focus on refuting bundle thinking as a common missense, for example, object-centered perspectives have carried the risk of striking down a straw man, even while offering a contrary view too highly abstracted to offer much purchase on the world of the real political economy and the still-proliferating forms that property has clearly taken therein.[27] Indeed, in pursuit of reclaiming property as an *in rem* right, object-centered theory has often become bogged down in hair-splitting and difficult-to-maintain distinctions—for example, between the right "to use," "to exclude," and "to exclusively determine use"—or in circularly invoking the *numerus clausus* principle as a way out.[28] On the other hand, even as they have eschewed a full-throated defense of the Hohfeldian view from jural relationality, progressive property perspectives have tended to draw on the notion of propriety to question the reduction of property to its strictly economic conception, only to then end up paradoxically reinforcing that very conception. That is, much of the force of the propriety versus commodity distinction depends on assuming that there has been only a single way of conceptualizing property economically and even that economic conceptualization itself means offering an account based on the paradigm of neoclassical economics.[29]

[26] *See generally* Anna di Robilant, *Property and Democratic Deliberation: The* Numerus Clausus *Principle and Democratic Experimentation in Property Law*, 62 AM. J. COMPAR. L. 367 (2014).

[27] Consider the fleeting way such theories have handled proprietorship over money and, especially, monetarily denominated debt. *See, e.g.*, Merrill & Smith, *supra* note 14, at 50 (on security interests); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 833–43 (2001) [hereinafter Merrill & Smith, *The Property/Contract Interface*] (same). Penner touches on money but says little about more complex forms of debt. *See, e.g.*, PENNER, THE IDEA OF PROPERTY IN LAW, *supra* note 16, at 164–66.

[28] *See* Merrill & Smith, *The Property/Contract Interface*, *supra* note 27, at 792–96; Penner, *supra* note 1, at 819 (conceding that our baseline verbal conventions may have, already long ago, outstripped any seeming impropriety of envisioning such legal entitlements to the exchange value of commodities and assets as "property").

[29] *See generally supra* note 9. Utility perspectives did, of course, previously exist, even being strongly associated with well-known figures like Nassau William Senior. The idea of marginal utility, however, allowed the unworkable tabulation of total utility to be set aside and for exchange value to be conceived of as proportionate, not

Accordingly, in its next Part, this Article looks back to a long pre-Coasian tradition of law and economics to draw out a competing view of the right to property as a means of appropriating economic rent—understood more specifically as a stream of unearned income—from scarce or monopolized resources. Alongside property-as-commodity and property-as-propriety, this third conception of property-*as*-rent or property-*in*-rent traces the work of the classical economists. Importantly, it also remained crucial for early institutionalist or legal economists and their legal realist inheritors in the United States, even as it was ever further obscured within economics in the wake of the discipline's neoclassical or marginalist revolution after 1870.[30]

to the labor embodied in a commodity, but to the subjective pleasure derived from the last or marginal increment of the commodity that was still worth the consumer's while to consume, relative to other possible consumption choices. *See, e.g.*, TAKASHI NEGISHI, HISTORY OF ECONOMIC THEORY 319–20 (1989).

[30] *See* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 127 (1998); Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1013–14 (1990) [hereinafter Hovenkamp, *The First Great Law & Economics Movement*]; HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970, at 108 (2015) [hereinafter HOVENKAMP, THE OPENING OF AMERICAN LAW]. Some words about terminology are in order. First, it is worth noting that Hovenkamp re-labels "neoclassical legal thought" to encompass what Fried, following most, calls "Progressive Era" legal thought as well as legal realism. Fried's usage is more like Alexander's, which charts a movement from Progressive Era legal scholars like Commons to Realists by the 1930s. *See generally* ALEXANDER, *supra* note 21, at 311–51. Hovenkamp's titular usage does have some benefits. For example, "neoclassical legal thought" captures what is usually identified as having come before the late Progressive Era in the United States: namely, a period of "classical legal thought" after roughly 1860. At the same time, it also evokes the parallel emergence of neoclassical or marginalist economics. Here, however, Hovenkamp's usage can also become confusing, given that, as he grants, among the legal thinkers he focuses on during his post-classical "neoclassical" era of legal thought are individuals who as economists were heterodox "institutionalist" economists outside of the mainstream of neoclassical economics. Second, therefore, I use the term "institutionalist economists" or "early legal economists" to refer to figures like Thorstein Veblen, John R. Commons, Richard T. Ely, and Edwin Seligman in the way Hovenkamp generally does outside of his book's title, because it is more revealing than simply calling them "Progressive Era" legal scholars. Third, while I thus differentiate such figures from the legal realists, I concur with Hovenkamp that controversies around Realism should not obscure the obvious. That is, the Realists were, in essence, the lawyer-inheritors of institutionalist economics and championed its lessons through a time in the 1930s when the economics profession had thoroughly turned against its legacy and toward neoclassical orthodoxy in ways reproducing some tendencies of Hovenkamp while also, elsewhere, chafing against them—but focusing on classical economists in the United States alone. *See* Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 967 (1985).

In calling attention to this now neglected conception based on the idea of extracting rent in classical economics,[31] I offer a different way to think, in theory, about property's nature. At the same time, as the Article will go on to show, the perspective from property-as-rent also offers a better way to make sense of our contemporary reality, which for the last four decades has seen financial ownership claims on society's productive resources proliferate alongside a concurrent redistribution of wealth and income upwards. Since the mid-1970s, there has thus taken place a vast reordering of claims—claims that by their very nature extend long into the future—on society's productive resources via legal forms that are ambiguous between providing for control over *earned* income versus *unearned* rent. Indeed, as scholars from various disciplines have dubbed it, amidst the great eras of the economy's "financialization"[32]—through both the finance sector proper and the related sectors devoted to insurance and real estate—most notable has been the even more specific growth of *debt-based* financial asset claims on society's productive resources.[33]

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[31] To clarify, I am not suggesting that the significance of institutionalist economics—much less, legal realism—has gone unnoticed. However, attention to their significance is different from attention to the role of rent in effectively underpinning an alternative conception of property going back to the work of the leading classical economists, and even all the way back to the seventeenth century. By linking early institutionalist economics to an idea of property-as-rent, this Article departs from existing scholarship in the history of legal thought in the United States. The overall portrait presented here, therefore, is more indebted to work in the history of economic thought such as by Walter Eltis, E.K. Hunt, Mark Lautzenheiser, and Michael Hudson. *See* WALTER ELTIS, THE CLASSICAL THEORY OF ECONOMIC GROWTH, at xliii–xlv (2d ed. 2000); HUNT & LAUTZENHEISER, *supra* note 9, at 501; and MICHAEL HUDSON, KILLING THE HOST: HOW FINANCIAL PARASITES AND DEBT BONDAGE DESTROY THE GLOBAL ECONOMY 43–64 (2015). Finally, to diagram the ways that some of the themes of this Article cross paths with, or more genuinely intersect, recent writings by legal scholars, two last points are in order here. First, in emphasizing the very different way rent was conceived in classical versus neoclassical economics, I present a decidedly different point of view from that which can be gleaned in *Radical Markets*. *See* ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 42 (2018). This is notwithstanding any overlap in spirit in the policy prescriptions I offer in Part IV of this Article. At the same time, much of what I argue about the notion of property-as-rent could well benefit, if space permitted, from being put into further dialogue with recent work on law and political economy. *See, e.g.*, KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 40 (2019); MARIANA MAZZUCATO, THE VALUE OF EVERYTHING: MAKING AND TAKING IN THE GLOBAL ECONOMY 5 (2018).

[32] *See supra* note 8 and accompanying text.

[33] The literature overlaps with that on financialization. *See*, *e.g.*, JULIET B. SCHOR, THE OVERSPENT AMERICAN: WHY WE WANT WHAT WE DON'T NEED 19 (1999); DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 18 (2011); LOUIS HYMAN, BORROW:

Surely, then, focusing on the rise of debt-based financial asset property-in-rent tells a story different from that through which the link between the increasing liquidity of capital and property's de-physicalization has usually been told. That story has typically centered on the baseline events surrounding the validation of "property in value" through so-called laissez-faire constitutionalism in and around the time of the Gilded Age and amidst the rise of dispersed ownership with the advent of shareholder equity in the modern corporation.[34] Of course, in the United States, it is no coincidence that the early institutionalist economists and their legal realist inheritors pioneered the investigation of these themes. Highlighting the move to "exchange value" and "incorporeal property" was thus among John R. Commons' central preoccupations, just as it was Adolphe Berle and Gardiner Means who most visibly raised concerns about the implications of separating corporate ownership from control.[35]

On one level, then, focusing on property's conception in terms of the extraction of economic rent helps us to make sense of the growth of real estate-backed securities in specific and financial asset forms in general during the new "Gilded Age" of the present.[36] In this respect, it turns our attention to an era after the mid-1970s that was necessarily beyond the horizon of the first

THE AMERICAN WAY OF DEBT 14 (2012); ATIF MIAN & AMIR SUFI, HOUSE OF DEBT: HOW THEY (AND YOU) CAUSED THE GREAT RECESSION, AND HOW WE CAN PREVENT IT FROM HAPPENING AGAIN 112–13 (2015).

[34] *See*, *e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 145–46, 159, 166–67 (1994); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 89–90 (3d ed. 2008); ALEXANDER, *supra* note 21 at 248–76 (contesting the label though not necessarily reaching conclusions so very different); David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the* Lochner *Era*, 36 HASTINGS CONST. L.Q. 217, 218 (2009).

[35] JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 11–19 (1924); Murray L. Weidenbaum & Mark Jensen, *Introduction* to ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY, at ix, ix (Transaction Publishers 1991).

[36] The phrase has become a staple in media commentary and scholarship since inequality started coming back into visible focus after 2011. *See, e.g.*, Nathan Schneider, *The New Guilded Age*, NEW YORKER (Oct. 12, 2015), https://www.newyorker.com/business/currency/the-new-guilded-age [https://perma.cc/S9B9-R942]; Paul Krugman, *Why We're in a New Gilded Age*, N.Y. REV. BOOKS (May 8, 2014), https://www.nybooks.com/articles/2014/05/08/thomas-piketty-new-gilded-age/ [https://perma.cc/X5ER-PGR5] (reviewing THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., Belknap Press 2014) (2013)). Rigorous scholarly discussion of inequality, however, has been afoot, even if given little attention, from much earlier. *See infra* note 119.

generation of legal economists and their early legal realist inheritors as well as the legal historians who have remained interested in their work. On another level, focusing on property's conception in terms of rent also serves as a corrective to the way indifference, antagonism, and time have invariably lessened the impact of the work of the early pioneers. For example, consider Berle and Means whose attention to the separation of corporate ownership and control as a potential source of inefficiency was largely forgotten already in their own day, with neoclassical economists largely inverting the lesson to be drawn from their work.[37] Indeed, as neoclassicism continued its ascent after the 1930s, the main symbolic valence that came to surround the phenomenon of dispersed corporate equity was that of the vaunted "democratization" of shareholding. Moreover, this was despite the uncontroversial facts about how highly concentrated the holding of stock assets has always been, being confined to no more than a tiny sliver of the population, especially on any significant scale.[38]

A final reason why reckoning with debt-based financial property-in-rent is warranted is because of how surprisingly little attention legal scholars have paid to it, whether before or after the bursting of the housing bubble. This has been all the more noticeable given that, even despite the role of mortgage-backed securities in instigating the Great Recession and its aftermath, financial engineering has hardly ceased in continuing to create new legal mechanisms for capturing economic rent, including from land.[39]

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[37] HOVENKAMP, THE OPENING OF AMERICAN LAW, *supra* note 30, at 172–76.

[38] *See* HENWOOD, *supra* note 8, at 56–114 (treating this issue extensively); *see also* PIKETTY, *supra* note 36, at 15, 24 (figuring this issue into many of the trends that are empirically documented). Another excellent source of current figures is William Domhoff's "Who Rules America" series. *See* G. William Domhoff, *Wealth, Income, and Power*, WHO RULES AMERICA?, http://www2.ucsc.edu/whorulesamerica/power/wealth.html [https://perma.cc/4UN7-HRPV]; *see also* Benjamin Landy, *A Tale of Two Recoveries: Wealth Inequality After the Great Recession*, CENTURY FOUND. (Aug. 28, 2013), https://tcf.org/content/commentary/a-tale-of-two-recoveries-wealth-inequality-after-the-great-recession/ [https://perma.cc/XN8L-9LGZ].

[39] Indeed, warnings of a return to pre-crisis levels of risk were well underway only a half-decade after 2007. *See* J. David Cummins & Mary A. Weiss, *Systemic Risk and the U.S. Insurance Sector*, 81 J. RISK & INS. 489, 489–90 (2014); Christopher L. Culp & J. Paul Forrester, *Have Pre-Crisis Levels of Risk Returned in U.S. Structured Products?*, 21 J. STRUCTURED FIN. 10, 10 (2015); Natasha Sarin & Lawrence H. Summers, Have Big Banks Gotten Safer? 1 (Sept. 15–16, 2016) (unpublished working paper) (on file with Brookings Papers on Economic Activity); JACK RASMUS, SYSTEMIC FRAGILITY IN THE GLOBAL ECONOMY 35–38 (2016); *Asset Prices: The Bubble Without Any Fizz*, ECONOMIST: BRIEFING (Oct. 7, 2017), https://www.economist.com/briefing/

II. ANOTHER LAW AND ECONOMICS: PROPERTY-AS-RENT

In Part II, this Article now turns its attention more fully to the conception of property-as-rent that I argue was formative to economics before the neoclassical revolution, and that continued to influence early institutionalist or legal economists in the United States like Thorstein Veblen and John R. Commons.[40] By pointing to the potential wealth-siphoning and -destroying effects of property, this alternative conception was distinct not only from the extra-economic idea of property-as-propriety but also from the idea of property-as-commodity, especially as it has been inflected by the paradigm of neoclassical economics.

Before disinterring the conception of property-as-rent, two preliminary caveats are necessary. First, Part II makes no attempt at exhaustively summarizing how concern with the appropriation of land rent intersected with thinking about property in classical economics as a whole—that must be left to a different article. Second, nor does Part II advert to capture any singular essence of classical economics as if to suggest that it was a more uniform body of thought than it actually was, or that it shared nothing with economics after the neo*classical* revolution. Obviously, the notion of an auto-adjusting market—a notion on which neoclassical consumer theory, as well as post-Coasian law and economics, has relied—did not emerge out of thin air. Rather, like its neoclassical counterpart, classical economics was also generally premised on the idea of market-clearing equilibrium.[41] Yet even if more gradual than suddenly revolutionary, the advent of neoclassicism clearly did involve some kind of profound break

2017/10/07/the-bubble-without-any-fizz [https://perma.cc/ES3F-E6ZH]; Jim Reid et al., *Long-Term Asset Return Study: The Next Financial Crisis*, 2017 DEUTSCHE BANK MKTS. RSCH. 35–36. For a less ominous, although not necessarily inconsistent, point of view on euphoria and consternation in the financial markets in the wake of the COVID-19 shock see Robert J. Shiller, *Making Sense of Elevated Stock Market Prices*, N.Y. TIMES (March 5, 2021), https://www.nytimes.com/2021/03/05/business/stock-market-prices-bubble.html [https://perma.cc/HF89-K7LY].

[40] *See supra* text accompanying note 30. It is Veblen who coined the term "neoclassical," although it became ubiquitous only after mid-century. While Veblen is remembered as a sociologist, he is better thought of as a heterodox economist fiercely critical of the emerging neoclassical consensus.

[41] That is, market clearing through *free* rather than *perfect* competition. *See infra* text accompanying note 50. Of course, among the classical economists were indeed figures like Jean-Baptiste Say who raised the idea of supply equaling its own demand to a veritable scientific law that still bears his name today. *See* JEAN-BAPTISTE SAY, A TREATISE ON POLITICAL ECONOMY OR THE PRODUCTION, DISTRIBUTION, AND CONSUMPTION OF WEALTH 219–20 (Augustus M. Kelley 1971) (1803).

from the previous century-plus of "modern" economic theorizing in the Western world, which—notwithstanding predominant tropes about Adam Smith—generally worked from a very different paradigm.[42]

A. Different Properties: Classical Versus Neoclassical Economics

By way of further unpacking the last observation, Section II.A considers four more specific features that generally distinguish classical from neoclassical economic thinking: a first, having to do with the distinction classical thinkers made between natural price—and/or value—and market price; a second having to do with how neoclassical, or consumer, theory effectively erased the line between production and exchange; a third having to do with the distinct idea of profit that emerged after the neoclassical revolution; and a fourth having to do with the distinction between profit and rent.

1. Natural Versus Market Price

While it is common to assume that the defining question of economics is about maximizing behavior in the face of supposedly infinite wants, this focus on constrained optimization is better understood as the most basic transformation wrought by the so-called neoclassical revolution.[43] For most classical economists, before and after Adam Smith, the great question of the discipline had more to do with the growth of aggregate output, relative prices, and their effect on the distribution of class shares of income across society than it did with the metaphor of the invisible hand.[44] In response to *this* question, the principal answer was not one that pointed to the law of supply and demand, which, at any rate, the most prominent classical economists saw as only a modulating force. Rather, the answer pointed to the costs necessary to bring land, labor, and capital into production, which, as determined

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[42] *See, e.g.,* Sankar Muthu, *Adam Smith's Critique of International Trading Companies: Theorizing "Globalization" in the Age of Enlightenment*, 36 POL. THEORY 185, 193–94 (2008) (discussing the "two" sides of Adam Smith).

[43] Only then, moreover, was the discipline's guiding question made amenable to mathematical representation as a problem of constrained optimization subject to the techniques of differential calculus—in no small part by way of emulating a very nineteenth-century idea of science, especially physics. *See* PHILIP MIROWSKI, MORE HEAT THAN LIGHT: ECONOMICS AS SOCIAL PHYSICS, PHYSICS AS NATURE'S ECONOMICS 194–97 (1989); *see also infra* text accompanying note 47.

[44] ALESSANDRO RONCAGLIA, THE WEALTH OF IDEAS: A HISTORY OF ECONOMIC THOUGHT 324–25 (2009).

prior to and outside of the process of market exchange, were seen as the driving forces behind pricing.[45]

Accordingly, a staple feature of classical economism was to distinguish between "market price" and "natural price" and/or "value"—especially for those like the greatest of the tradition's exponents, the British economist David Ricardo.[46] Doing so went hand in hand with the overarching concern just noted with working out a cost of production account of commodity values rather than any theory based on the then still unquantifiable notion of hedonistic preference.[47] Indeed, among the leading classical economists, the logic of commodity was never simply synonymous with preference satisfaction through market purchase—whether, as for

[45] *See generally* ELTIS, *supra* note 31; RONCAGLIA, *supra* note 44; HUNT & LAUTZENHEISER, *supra* note 9; *see* HUDSON, *supra* note 31, at 53. Most of these issues would not reemerge until after 1950 with the so-called Keynesian synthesis and the emergence of neoclassical growth theory and development economics.

[46] DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1817), *reprinted in* 1 THE WORKS AND CORRESPONDENCE OF DAVID RICARDO 1, 91–92 (Piero Sraffa ed., 2004).

[47] Of course, by the beginning of the nineteenth century the utilitarian thinker Jeremy Bentham had coined the idea of tabulating utility through a so-called felicific calculus. However, these unsystematic musings notwithstanding, absent a basic idea of *marginal* utility Bentham's utilitarianism—let alone the non-utility-based thought of Smith, or, say, John Locke—could not sustain any theory of value as subjective preference. So long as "pushpin [was] as good as poetry" when the "quantity of pleasure" was equal, as Bentham's utilitarianism famously had to allow, not only was "interpersonal comparison[ ]" of utilities impossible, but so too was quantification. HUNT & LAUTZENHEISER, *supra* note 9, at 163; HOVENKAMP, THE OPENING OF AMERICAN LAW, *supra* note 30, at 112. Marginalism allowed for quantification through effectively introducing an ordinal rather than cardinal numbering scheme. However, especially for more redistribution-oriented economists during marginalism's early years, there were strong temptations to operate as if what had happened was the reverse. That is, the temptation was to imagine that the fruits of marginalism's quantifying mathematization of the discipline were actually ordinal so that relevant interpersonal comparisons of utilities could, in effect, be drawn. The issue, however, would come to a head, making for the dividing line between the old versus the new neoclassical welfare economics, roughly after the First World War. Indeed, a major achievement of Vilfredo Pareto as a welfare economist was to help do away with what many had come to feel was the embarrassment of earlier neoclassical welfare theory's belief in cardinal quantification through the notional idea that utility could be evaluated in terms of units of absolute measure known as "utils." Cambridge economist Nicholas Kaldor pushed Pareto's project even further after the late 1930s. As the years leading up to the Great Depression wore on, moreover, the political valence attached to the aspiration toward cardinal quantification and interpersonal comparison had also shifted, at least within the neoclassical mainstream. This was due to a growing antagonism to the progressive strand that had emerged within earlier marginalist argumentation favoring income redistribution. *See* HOVENKAMP, THE OPENING OF AMERICAN LAW, *supra* note 30, at 110–14 (covering some of these observations with different emphasis).

the neoclassicals, of consumer goods by households from firms or of productive factors by firms from households; nor, to any greater degree, was the logic underlying the conception of property that went with classical economism.

Of course, the last statement does not mean that classical economism had no apologetic streak, including with respect to the property that individuals had or acquired in their commodities through their role in the class-based hierarchy of income distribution.[48] It is, however, to say that whereas for the leading classical economists income distribution was the key determinant of the prices of commodities, the direction of causation was generally reversed in neoclassical thought, especially after its own theory of income distribution was perfected.[49] From the very start, therefore, the way was more open in classical economics to see within the right to property not just a basis for increasing economic well-being,[50] but also its stifling, insofar as property could also be identified with rent—as, indeed, it increasingly came to be, especially as a claim on land.[51]

2. Production Versus Exchange

To the extent that recent debate has sought to contest the object-centered view of property by switching focus to the view from propriety—that is, the view from property's independent role in forging social and communitarian relations—it has both equated economic explanation with neoclassicism and suggested that property's commodity character is exhausted by the theory of

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[48] *See* Kennedy, *supra* note 30, at 943, 955–57. Given Kennedy's focus on the form of classical *legal* thought that built on classical as well as early neoclassical *economics* in the fifty years after 1860–1870, his work suggests that the legal extrapolation of classical economics had a more pronounced apologetic streak than the economic tradition itself did.

[49] For neoclassical theorists, prices thus generally determined income distribution. As for what determined prices in their picture, this was one of the ways that supply and demand—itself now ultimately grounded in utility—was assigned a much broader role in neoclassical theory. For the leading classical economists, in contrast, supply and demand only helped determine "market price," which as noted was distinct from "natural price." HUNT & LAUTZENHEISER, *supra* note 9, at xx, 258. In theory, income distribution was thus independent from prices, being the determinant of, rather than determined by, *natural* price. *See id.*

[50] For the classical economists, increasing well-being corresponded to an increase not in "welfare" but "wealth," both by labor's foundational input into commodity production and, in turn, the gains brought from exchanging them under "free"—though, importantly, not "perfect"—competition. *See* Kennedy, *supra* note 30, at 942–43, 945; *see generally* ELTIS, *supra* note 31.

[51] *See infra* Section II.C.

the neoclassical consumer.[52] Indeed, this feature of resurgent debate has proved especially notable given that it was only as late as Hohfeld's own time when the latter theory came to cover more than just consumers in the ordinary sense. That is, it was still another several decades after 1870, the rough origin point of economics' revolution, and only with the development of neoclassical income distribution theory—as the American economist John Bates Clark expanded on the canonical work of the famed British marginalist Alfred Marshall—that marginalism was able to create a perfect symmetry between firms and households.[53] On the perfected view, assuming competitive equilibrium, households were said to maximize utility by making calculations at the margin about how much of the factors of production they owned to sell to firms—in exchange, ultimately, for consumption goods.[54] The firm, on the other hand, was said to make exactly analogous decisions, albeit here about the supposedly continuous marginal substitutability of the productive factors it purchased from households to maximize profits by receiving the moneys ultimately paid out for consumer goods.[55]

In contrast, among the leading exponents of the thought tradition of classical economics, property's importance was not reducible to its role as a source of utility arising from consumption choices made at the margin. Especially for the present purposes, more to the point are the competing roles it was assigned—on the

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[52] Tellingly, on Alexander's account it would seem that, without proper attention to property's independent sociopolitical or communitarian aspect, "disaggregative" or bundle thinking can reveal little more than object-centered views do, especially those that presume an unbroken continuity from Hohfeld to Coase. *See* ALEXANDER, *supra* note 21, at 381–82.

[53] *See* JOHN BATES CLARK, THE DISTRIBUTION OF WEALTH: A THEORY OF WAGES, INTEREST AND PROFITS 200 (Cosimo Classics 2005) (1899). The impression is often given that classical income distribution theory went into abeyance. However, that view is unfounded, having become untenable at least since the work of the famed Italian neo-Ricardian economist, Piero Sraffa, and the so-called Cambridge capital controversy it helped inspire. *See* PIERO SRAFFA, PRODUCTION OF COMMODITIES BY MEANS OF COMMODITIES: PRELUDE TO A CRITIQUE OF ECONOMIC THEORY 13–14 (1960); *see also* BLAUG, *supra* note 9, at 137–43 (presenting dueling views of Sraffa); HUNT & LAUTZENHEISER, *supra* note 9, at 434–57 (same).

[54] HUNT & LAUTZENHEISER, *supra* note 9, at 305–07.

[55] One can add that each factor the firm purchases is further portrayed as procured for the value of the marginal product it contributes to an output that is then, in turn, seen as being sold at cost. In this way, what the factor contributes to the output is exactly returned to the factor owner as payment in the same way that the payment the factor owner receives exactly corresponds to what is needed to procure the output. *See generally id.* at 286–308 (noting that the resultant picture is one in which "profit disappears in equilibrium").

one hand, as a prerequisite for production and hence for bringing value into being and, on the other, as a means of garnishing revenue generated out of production and hence for siphoning value. The murky line between these roles a matter of continuous preoccupation. After all, it was not by accident that the most prominent texts of the classical tradition were focused on the principles of political economy underlying the *production* and *taxation* of an economic surplus over and above ordinary subsistence.

Overall, then, the once analytically firm line that classical thinkers drew between production and exchange was steadily eroded amidst the protracted set of intellectual developments that made for the so-called neoclassical revolution as an actual historical process.[56] These unfolded gradually after 1870 and extended at least into the 1920s, when Vilfredo Pareto refined Léon Walras's ideas[57] into a new form of neoclassical "welfare" economics based on the "indifference curves" developed by his contemporary, the Englishman Francis Edgeworth.[58]

Even without saying more, it should thus be clear that preference satisfaction exhausts property's *economic* conception only to the extent that all economic activity is, itself, reconceived as a form of consumption choice on the market; this, however, only became the case more recently than is generally understood when reflexively equating economic thought in general with the neoclassical tradition in particular.[59]

Importantly, these first two distinguishing features of classical economism were not unrelated to one another. That is, in classical economics, the market price of a commodity represented only a modification around natural price's tether because natural price was more fundamentally tied to the cost needed to produce output or a commodity; that cost, itself, was seen as determined by the distribution of income among land, labor, and capital, conceived, in effect, as distinct social classes rather than just inert

[56] *See* HOVENKAMP, THE OPENING OF AMERICAN LAW, *supra* note 30, at 113.

[57] *Id.* at 207; SCHUMPETER, *supra* note 9, at 827.

[58] *See* Lansana Keita, *Welfare Economics and Positive Neoclassical Economics*, 33 J. VALUE INQUIRY 335, 339–46 (1999) (discussing the relationship between early welfare theory and neoclassicism). Here I am referring only to the Walrasian welfare economics of Pareto. An additional strain of neoclassical welfare theory can be traced to those who put a greater emphasis on Menger's version of marginalism. That tradition links both to the so-called Austrian School of economics associated with Ludwig von Mises and Friedrich Hayek already before 1950 and Milton's Friedman's Chicago School in the United States after 1950. *See, e.g.*, HUNT & LAUTZENHEISER, *supra* note 9, at 374–75; NEGISHI, *supra* note 29, at 279–315, 330–43.

[59] *See generally* ELTIS, *supra* note 31.

factors of production that could be owned by anyone.[60] Even looking no further than Adam Smith, as he notes repeatedly:

> The whole annual produce of the land and labour of every country, or, what comes to the same thing, the whole price of that annual produce, naturally divides itself . . . into three parts; the rent of land, the wages of labour, and the profits of stock; and constitutes a revenue to three different orders of people; to those who live by rent, to those who live by wages, and to those who live by profit. These are the three great, original, and constituent, orders of every civilized society, from whose revenue that of every other order is ultimately derived.[61]

As is possible to infer from no more than the above passage, immanent in this way of seeing things was a question about the extent to which the return going to each social class was truly *earned*—in the sense of being a payment necessary to bring what belonged to its respective members into production.[62] That with reference to those who owned land—something that was unproduced—the answer to this question should be in the negative became more apparent to leading thinkers in the classical tradition after Smith, especially his greatest inheritor, Ricardo.

3. Classical Versus Neoclassical Profit

The last observation leads us to a third key difference between the classical and neoclassical traditions of economic thinking that is worth highlighting. This is because, for neoclassicals, productive factors were no longer simply understood as threefold—through the division between land, labor, and capital—nor did they analytically correspond to different social groups. Rather, they were more various and more fungible things that could just as well be the property of any individual in society. Whoever was a factor's owner, therefore, her household was free to sell that factor—based on the appropriate maximizing calculation at the

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[60] Even the eighteenth-century French Physiocrats, who were a crucial influence on Smith, did not classify the spending of manufacturers as "sterile"—in their own threefold division between manufacturers, consumers, and landlords—only or mainly to venerate the spending of landlords as the opposite. Rather, by doing so they laid a policy basis for a "[s]ingle [t]ax" on the returns or rents of landed property in France. *See* HUDSON, *supra* note 31, at 48–49. In terms of policy focus, then, there was an even straighter line from the Physiocrats to the Ricardian Socialists in Britain and figures like Henry George—and even more so, the early institutionalist economists—in the United States than there was from Ricardo himself. *See infra* notes 71–73.

[61] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 161 (Harriman House 2007) (1776).

[62] *See* sources cited *supra* note 45.

margin—to firms, considered as the commanders of the now altogether additional factor of entrepreneurship. In turn, the profit that firms maximized under equilibrium was no more than a basic remuneration for the entrepreneurial labor or disutility—the line between these, too, now gone—of coordinating the creation of output from all the various factors the entrepreneur assembled together.[63] Indeed, as the neoclassical tradition matured, by 1930 interest more than profit had become the key category of revenue attributed to capital owners, with their entrepreneurial profit proper becoming merely a subcomponent of interest.[64]

On the one hand, then, this modified idea of profit in neoclassical consumer theory comprises a third important difference from the classical view. On the other, it further explains how the first two differences—rooted in the distinctions that classical economists drew between market price and natural price and between production and exchange—were made to all but disappear in neoclassical theory. That is, on the view formative to neoclassicism, profit maximization in equilibrium did not prevent output from being sold at cost.[65] To the contrary, like the factor of entrepreneurship, so too did every other factor—whoever happened to be its owner—get paid a purchase price conceived as exactly matching the value of the marginal product it contributed to output.[66] Here, one can further see how the direction of causality that the leading classical economists saw as holding between income distribution and prices—*from* the former *to* the latter—was generally reversed in neoclassical theory.[67]

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[63] *See, e.g.*, CLARK, *supra* note 53.

[64] For Chicago school economists like Frank Knight—one of Milton Friedman's mentors—profit thus represented the risk premium above the basic interest rate that could be earned on risk-free bonds. *See* MICHAEL HUDSON, THE BUBBLE AND BEYOND: FICTITIOUS CAPITAL, DEBT DEFLATION AND THE GLOBAL CRISIS 147–48 (2012). Knight's idea built on a more basic distinction between risk and uncertainty. *See* FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 19–20 (1921); *see also infra* note 83 and accompanying text.

[65] CLARK, *supra* note 53, at 115.

[66] Clark's description of his own purpose is instructive:

> [T]o show that the distribution of the income of society is controlled by a natural law, and that this law . . . would give to every agent of production the amount of wealth which that agent creates. . . . So far as it is not obstructed, it assigns to every one what he has specifically produced.

Id. at v.

[67] *See supra* note 49.

4. Profit Versus Rent

Together, the three differences recapitulated above imply a fourth as well. Even more directly connected to the additional conception of property that is the focus of Section II.B, this difference involved the much greater—and even overriding—attention that classical thinkers gave to distinguishing profit from *unearned* economic rent. Indeed, in Ricardo's economics not only was the contrast paramount, but it also made rent a—and even *the*—defining feature of the quintessential form of property held by Britain's landed gentry.[68] Of course, like those he influenced—including John Stuart Mill—Ricardo did not fail to see that revenues garnished by landowners could, in principle, include both profit and economic rent.[69] However, the important point was that the potential ambiguity between the two required vigilance.[70]

B. The Identification of Rent with Land in Classical Economics

For Ricardo, rent ultimately constituted a differential in the productive capacity of superior lands compared to those at the margin of cultivation; or, as he famously put it, rent was nothing other than "the produce obtained" from the same or different pieces of land "by the employment of two equal quantities of capital and labour" on it or them.[71] In this respect, Ricardo assumed an identity between rent and land, specifically landed property, in a way that was not uncommon for the classical economists.[72] A half-century after his death in 1823, however, in the wake of the neoclassical revolution, this assumption would come in for two very different types of qualification.

On the one hand, by the start of the twentieth century, there was a first qualification that broadly complemented a line of thought that initially began to emerge closer to Ricardo's own day in Britain; in the 1830s and 1840s, that line of thought pushed Ricardo's[73] own thinking in the direction of advocating for a policy

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[68] *See* RICARDO, *supra* note 46, at 87.

[69] *See id.* at 49–50.

[70] *See* ELTIS, *supra* note 31, at xlv–xlvi.

[71] RICARDO, *supra* note 46, at 57.

[72] Notwithstanding his disagreements about rent's implications and laudability, Ricardo's contemporary, the Reverend Thomas Malthus, shared this basic definition. *See* T.R. MALTHUS, AN INQUIRY INTO THE NATURE AND PROGRESS OF RENT, AND THE PRINCIPLES BY WHICH IT IS REGULATED 1–2 (1815).

[73] While it is clear that Ricardo's ideas influenced figures like Mill and certain of the so-called Ricardian socialists after his death, controversies remain about the extent to which Ricardo really directly influenced the latter group. *See, e.g.*, J.E. King,

of taxing away the economic rent of landlords as an "unearned increment."[74] John Stuart Mill, who coined the latter phrase, was the most prominent example,[75] and his mid-century extrapolation of Ricardo remained highly visible even at century's end in places like the United States, especially through its influence on the journalist Henry George and his "single tax" on land movement.[76] Given George's personal and political idiosyncrasy, however, as economist Michael Hudson notes, in the Progressive Era it was the early institutionalist or legal economists who most clearly picked up on and extended Ricardo's way of linking rent to landed property, in particular.[77]

While I will return to the institutionalists in Section II.C, for now it is enough to say that whereas they tended to expand the Ricardian concern with rent beyond land and thereby to sharpen its bite, neoclassical theory tended to do the opposite. The second major qualification that Ricardo's thought came in for, thus, involved questioning rather than extending his focus on land as rent's exclusive source. In pressing this point, neoclassical theory dispersed and dulled the force of classical rent theory. What early neoclassical thinkers found lacking in Ricardo's concern with the consequences of moving toward marginal land was his alleged

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Utopian or Scientific? A Reconsideration of the Ricardian Socialists, 15 HIST. POL. ECON. 345, 345 (1983).

[74] JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 817–18 (W.J. Ashley ed., 1909) (1848). Ricardo himself never advocated any such policy. While an antagonist of the landed gentry, he was even more of a partisan of British manufacturers and financiers. His key policy aim was vindicated only after his death in the late 1840s when the grain import restrictions known as the Corn Laws were lifted. On Ricardo's theory the Corn Laws meant domestic grain could only be procured through resort to increasingly marginal lands with a higher cost of production. In turn, increasing revenue was absorbed as a pure overhead of rent to landlords, which then cut into the profits of manufacture and, ultimately, economic growth. *See* RICARDO, *supra* note 46, at 373–78.

[75] MILL, *supra* note 74, at 818–19. As a transitional figure in the history of economics, Mill offered ideas about taxation that were, in his own day, seen as premised on equalizing "sacrifice." *See, e.g.*, Edwin R.A. Seligman, *Progressive Taxation in Theory and Practice*, 9 AM. ECON. ASS'N Q. 563, 795 (1909).

[76] *See* HENRY GEORGE, PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS, AND OF INCREASE OF WANT WITH INCREASE OF WEALTH 389 (1879); *see generally* EDWARD T. O'DONNELL, HENRY GEORGE AND THE CRISIS OF INEQUALITY: PROGRESS AND POVERTY IN THE GILDED AGE (1st paperback ed. 2017) (presenting a contemporary study of George).

[77] *See* Michael Hudson, *Henry George's Political Critics*, 67 AM. J. ECON. & SOCIO. 1, 4–5 (2008) [hereinafter Hudson, *Political Critics*]; *see also* Michael Hudson, *Veblen's Institutionalist Elaboration of Rent Theory* 7 (Levy Econ. Inst., Working Paper No. 729, 2012) [hereinafter Hudson, *Rent Theory*], http://www.levyinstitute.org/pubs/wp_729.pdf [https://perma.cc/Y7CS-LMC5].

failure to see that it was only one instance of a larger principle of diminishing returns.[78] That principle, they argued, was none other than the one the neoclassical revolutionaries had finally brought to light so as to put economics on a *truly* scientific foundation.[79] To say that it was the *marginal* increment rather than *total* quantity of utility that mattered was thus to point to the diminishing returns of satiety resulting from consumption. As mentioned earlier, it was only on this understanding of utility that a new theory of calculable or quantifiable economic value-as-market price could eventually be erected.[80]

Whereas Ricardo's focus was on the higher cost of production at the margin of cultivation, his neoclassical qualifiers suggested that he should have really used the principle of diminishing returns to ground an understanding of *all* economic activity in consumptive exchange. As John Bates Clark put it best,

> [w]e have already gone far enough to get a view of one very general law. So all-embracing, indeed, is it that it dominates economic life. Classical studies afforded a glimpse of the working of it, within a very limited field, by their study of the so-called diminishing returns from agriculture. . . .
>
> Modern studies of value afford a glimpse of the action of this principle in a wholly different sphere. They show that doses of consumers' goods, given in a series to the same persons, have less and less utility per dose. The final utility theory of value rests on the same principle as does the theory of diminishing returns from agriculture; and this principle has a far wider range of new applications. One law, therefore, governs economic life, and theories old and new contain partial expressions of it. . . . As this law may be traced in consumption, where the "final increment" of a particular article is less useful than earlier increments, so it is observable also in production, where the final increment of an industrial agent is less fruitful than earlier ones. As value depends on final utility, so shares in distribution depend on final productivity.[81]

As for rent, on this view, it was not only abstracted away from land but away from the very idea that legalized control over land could serve as a constraint on production that allowed economic value to be siphoned off as the revenue of those granted entitle-

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[78] *See* CLARK, *supra* note 53, at 191–92.

[79] *See, e.g.*, MIROWSKI, *supra* note 43, at 217–18; MARY S. MORGAN, THE WORLD IN THE MODEL: HOW ECONOMISTS WORK AND THINK 91–92 (2012).

[80] *See supra* note 47.

[81] CLARK, *supra* note 53, at 208.

ment to such legal constraint. In the process, the basis for linking land, rent, and the right to property was also dissolved. Read only as an insight concerning diminishing returns, Ricardo's idea of landlord rent no longer illustrated how the right to property could impose overhead charges on future income from production. Rather, it now merely illustrated that all incomes were "differential gain[s]" in the same way as was land rent.[82] In a passage indicating how the classical economists' concept of a "surplus" was restricted even as the role of interest was expanded in neoclassical theory, Clark's thoughts are again instructive:

> Ground rent we shall study as the earnings of one kind of capital-goods—as merely a part of interest. We . . . see that wages and interest, though they are determined by the law of final productivity, are also capable of being measured exactly as ground rent has been measured. That is to say, the Ricardian formula, which describes what is earned by a piece of land, may be used to describe what is earned by the whole fund of social capital: all interest may be made to take the form of a differential gain, or a surplus.[83]

It should thus not be surprising that the most visible face of the idea of rent in law, economics, and political science today has become that which traces back to the term's rechristening through Gordon Tullock and Anne Krueger's notion of "rent-seeking" after 1960.[84] In its latter version however, the concept has borne only a superficial resemblance to the idea of property-as-rent in classical economics, not to mention the attempted extension of the conception of property-as-rent by the early institutionalists to non-landed forms of entitlement as well. Further corroborating the point is how in public choice theory Tullock and Krueger's idea of rent-seeking has principally been used to evoke an image of public

[82] *Id.* at 191.

[83] *Id.* (footnote omitted) ("It is one of the most striking of economic facts that the income of all labor, on the one hand, and that of all capital, on the other, should be thus entirely akin to ground rent. They are the two generic rents, if by that term we mean differential products; and the earnings of land constitute a fraction of one of them."); *see also* Conway L. Lackman, *The Modern Development of Classical Rent Theory*, 36 AM. J. ECON. & SOCIO. 51, 53 (1977).

[84] *See* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974); *see also* Ronald Bird & Vincent J. Tarascio, *Paretian Rent Theory Versus Pareto's Rent Theory: A Clarification and Correction*, in 2 VILFREDO PARETO: CRITICAL ASSESSMENTS OF LEADING ECONOMISTS, VOLUME 2, 473, 474 (John Cunningham Wood & Michael McLure eds., 1999) (discussing the (misnomer of) " 'Paretian' rent[s]" in later neoclassical economic theory).

corruption born from the ability of political actors to use the state for their own enrichment. Implying virtually the opposite of what the conception of property-as-rent did, the contemporary notion of rent-seeking thus largely abandons focus on the market's in-built capacity to pervert economic well-being through the standing possibility for property entitlements to function as means of monopoly-like constraint. In place of any conception of property-as-rent, public choice theory's view from rent seeking instead tends to insist on the absolute primacy of the market—and, hence, the right to property—as the only true means of guaranteeing private well-being. On this view, rather than being an endemic feature of the market given its institutional basis in property, the seeking of rent becomes extrinsic to true economizing behavior.[85]

C. From the Origins of Property-as-Rent to Early Legal Economism and the Present

While Ricardo's neoclassical qualifiers suggested that identifying rent specifically with landed property was a symptom of shortsightedness, historically speaking, the matter was not so simple. The identity, in fact, hardly originated with Ricardo or even classical economics. Rather, it began to emerge more than a century before the publication of Smith's *The Wealth of Nations* in 1776, as first *property* and then *rent* started to be abstracted as concepts within legal and economic discourse.[86] If, as Bentham famously put it, "[p]roperty" was "born together" with "law," equally can we then say that the concept we now know under its name—that was grounded in control over land as its quintessential form—entered into the world only in tandem with rent.[87]

As historian Clive Holmes explains, it was thus really in the first two decades of the seventeenth century that the "notion of the right of property" started to be "transmuted" from a "narrow

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[85] *See* Biplab Dasgupta, *The New Political Economy: A Critical Analysis*, 32 ECON. & POL. WKLY. PE13, PE13–PE14 (1997) (providing an insightful overview of the "new political economy" forged out of the idea of rent-seeking and public choice theory); *see generally* NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA (2017) (discussing Nobel Laureate James McGill Buchanan's role in casting government as the principal source of "rents" and the public, in general, as those doing the seeking).

[86] *See* Clive Holmes, *Parliament, Liberty, Taxation, and Property*, *in* PARLIAMENT AND LIBERTY FROM THE REIGN OF ELIZABETH TO THE ENGLISH CIVIL WAR 122, 138 (J.H. Hexter ed., 1992).

[87] JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE (n.d.), *reprinted in* THEORY OF LEGISLATION 88, 113 (R. Hildreth trans., Kegan Paul, Trench, Trübner & Co. 1908); *see also supra* note 74.

concept [within] the technical vocabulary of late medieval lawyers" into "an abstract right."[88] Especially pivotal in this process of "transmut[ation]" was the way that common law claims to land, in particular, were taken up into the right to property's incipient abstraction.[89] With rent, on the other hand, it took another few decades before its meaning began to rise out of the connotative web of ordinary English language. Only then had the basis developed for the concept to diverge from its origins in thirteenth-century French financial usage where it specified a certain class of annuities known as *rente*—as per an earlier technical meaning that obviously had already made its way into common law parlance well before the sixteenth century, as when stipulating the purchase price of land *at so many years of rent*.[90]

As the political theorist David McNally shows, the key vehicle for advancing rent's conceptual abstraction into a technical notion of *economic* rent was the proto-economic writing of Thomas Mun, an early director of the East India Company. In 1628's *English Treasure by Foreign Trade*, Mun developed a connection between the balance of trade—the oft-mentioned centerpiece of "mercantilist" unsophistication—and the increasing price of farm commodities.[91] His central point was that the net "influx of specie"—with which mercantilist thinkers are often said to have been naively preoccupied—was important not as an end in itself but for its effect on increasing the total quantity of what Mun dubbed rent, specifically agricultural rent.[92]

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[88] Holmes, *supra* note 86.

[89] *See id.* The details of the sequence Holmes describes cannot be recounted here in full. Overall, however, Holmes' concern, which is with the "complex," "intriguing" and ultimately *historical* "process" by which "a right to private property" was "insulated"—through its abstraction—"from arbitrary royal intervention." *Id.* Certainly, he is correct to challenge historically naive but common assumptions treating the right to property as just a fixture in the world rather than a concept with a history that emerged less than fully formed—whether through the *Magna Carta* or some even earlier tradition of primordial Saxon liberty.

[90] As the historian Niall Ferguson explains, *rente* annuities arose from the problem city-states faced in financing deficits without Church censure in the thirteenth century. While prohibiting interest, usury laws did not apply to medieval *census* deals, which enabled one party to purchase an annual payment stream from another. Just as these purchased payment streams took shape in the form of *rentes heritables* in Northern French towns, in Flemish ones they became the basis for the *erfelikrenten*. *See* NIALL FERGUSON, THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD 73–74 (2008).

[91] DAVID MCNALLY, POLITICAL ECONOMY AND THE RISE OF CAPITALISM: A REINTERPRETATION 31–32 (1988).

[92] *Id.*

More than Mun, however, it was his more famous inheritor, William Petty, who fastened the still newly abstracted concept of rent to the only slightly less new conceptual abstraction of the right to property, including in land. In 1662's *Treatise of Taxes and Contributions,* Petty effectively launched the proposition that the defining feature of land under the right to property was its ability to yield rent. Although in Petty's usage rent here was a stand-in for the soil's surplus output, once costs of production were subtracted,[93] the nominally same identity was maintained by those who would go on to coin and then refine the famed "[t]rinity [f]ormula"[94] of classical economics as it passed from the French Physiocrats, to Adam Smith to Ricardo.[95] While the ongoing modification of the formula eventually saw its first two elements—of the profits of stock and the wages of labor—further differentiated, the third element of the rent of land held constant as a metonymic stand-in for the special return appropriated by the owners of land.

Even exiting our brief historical excursus here, two points become clear. First, in further contrast to the neoclassical reception of Ricardo, there is good reason to see the focus on land as a source of rent that long predated him as being of central rather than incidental importance. Central, that is, because the focus on land as the source of rent implicitly buttressed an economic conception of the right to property that was distinct from any reduction of it, instead, to a means of preference satisfaction;[96] and more than incidental because the long-standing identity between landed property and rent which Ricardo observed was not important simply, or even mainly, because it illustrated the larger principle of diminishing returns at work.

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[93] *See* WILLIAM PETTY, A TREATISE OF TAXES AND CONTRIBUTIONS (1662), *reprinted in* 1 THE ECONOMIC WRITINGS OF SIR WILLIAM PETTY 1, 43 (Charles Henry Hull ed., Augustus M. Kelly 1963), *quoted in* MCNALLY, *supra* note 91, at 50.

[94] *See* 3 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 953–56, 958, 961, 965 (David Fernbach trans., Penguin Books 1991) (1894).

[95] *See* HUDSON, *supra* note 31, at 60–64.

[96] It is also worth noting that property-as-rent was distinct from an economic conception focused on wealth generation through inducing individuals to labor or invest, as the view from neoclassical consumer theory might be restated if one wanted to insist on locating its origins before 1870—whether through Bentham or Smith's work or even John Locke's so-called labor theory of property. *See, e.g.*, Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 330 (1996). As to whether Bentham's utilitarianism—let alone the non-utility-based thought of Smith or Locke—can really be seen as a version of neoclassical consumer theory in germ form, as noted earlier, there are ample reasons for doubt. *See supra* text accompanying note 47.

Second, the above excursus into the deeper history of identity between rent and the entitlement to land requires that we rethink the widely held idea that property started to be de-physicalized only upon being uncoupled from land and linked, instead, to intangible "exchange-value" as industrialization matured.[97] Especially in a United States that was long rendered land-rich[98]—through a process of dispossessing Native Americans that was, itself, still ongoing during the period of breakneck industrial expansion[99]—property's de-physicalization is often said to have begun only in the age of *laissez faire* constitutionalism. Indeed, this point often goes hand in hand with the further lament that because the right to property's economic conception is exhausted by the notion of preference-satisfying individualism, its distinct social and communitarian aspect gets short shrift.[100]

As Part II has sought to clarify, however, the standard story about the rise of "property in value" is incomplete and even misleading. Already long before the *first* industrial revolution—let alone the *second*[101]—there was a thoroughly de-physicalized vision of property that inhered in the idea that entitlement to land mattered precisely because it allowed its holder to appropriate a uniquely unearned stream of payment.[102] In this respect, rather than a misapprehension or case of tunnel vision, focusing on land as rent's source added a further—and, in ways, the very first—basis on which property became a "keystone right," to borrow a phrase from Carol Rose.[103]

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[97] *See* COMMONS, *supra* note 35, at 18–19; Weidenbaum & Jensen, *supra* note 35.

[98] *See* HOVENKAMP, THE OPENING OF AMERICAN LAW, *supra* note 30, at 78; *see also* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 70–71 (1991).

[99] *See generally* A.M. SAKOLSKI, THE GREAT AMERICAN LAND BUBBLE (1932); RICHARD SLOTKIN, THE FATAL ENVIRONMENT: THE MYTH OF THE FRONTIER IN THE AGE OF INDUSTRIALIZATION, 1800–1890 (1985); JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887–1934 (1991).

[100] *See, e.g.*, ALEXANDER, *supra* note 21, at 259–61, 325–29; Alexander, et. al., *supra* note 1, at 743–44.

[101] *See* C.A. BAYLY, THE BIRTH OF THE MODERN WORLD, 1780–1914, at 49–52, 110–12 (2004) (discussing the distinction).

[102] Here I am leaving aside the other earlier germ of de-physicalization. Already in the early nineteenth-century United States, this involved an accumulation of various legal exceptions to exclusively tangible property—as in business goodwill and accession—and, in turn, their role in helping to abstract property into a more general principle of judicial reasoning about rights. *See* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 333–35 (1980).

[103] Rose, *supra* note 96, at 329–30, 333.

Indeed, the conception of property-as-rent did not simply go into abeyance after neoclassical thinkers charged Ricardo with failing to appreciate that he had really just discovered one instance of a larger principle of diminishing returns that could be applied much more generally to economics. As I touched on earlier in Section II.B, the legal or institutionalist economists of the Progressive Era in the United States were also keepers of the idea of property-as-rent, a feature of their enterprise that has been far too little appreciated.[104] In their case, however, by trying to push beyond rent's strict identification with landed property alone they were pushing in a very different direction from their early neoclassical counterparts. Likewise, the limitation in Ricardo's thought that they sought to overcome was not about his alleged failure to see the true scope of the principle of diminishing returns. To the contrary, it was about overcoming his failure to treat money and debt as anything more than a neutral force that could be presumed to "affect[ ] commodity prices, wages, and other incomes symmetrically."[105] Still the dominant view today on such an understanding is that money always goes to payment for goods and services and never, say, to bidding up the value of real estate and financial assets or to eliciting an ever-expanding array of new debt-based property forms. That money could also be a political institution, a form of social power, a withdrawn hoard, and so on, was simply out of the question for Ricardo; and so too did it then remain in Alfred Marshall's canonical textbook of the early neoclassical tradition; as so too it still largely remains in the present.[106]

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[104] *See* sources cited *supra* note 31; Hudson, *Rent Theory*, *supra* note 77, at 7; Hudson, *Political Critics*, *supra* note 77, at 2–5.

[105] Dirk Bezemer & Michael Hudson, *Finance Is Not the Economy: Reviving the Conceptual Distinction*, 50 J. ECON. ISSUES 745, 748 (2016).

[106] *See* 1 ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 79 (1890). At least in the English-speaking world, Marshall's text remained the standard until Paul Samuelson's in the second half of the twentieth century. *See* PAUL A. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS (1947). While picked up *from* Ricardo, the idea of money's "neutrality" or its role as a mere "veil" also traced back *before* him to earlier versions of the quantity theory of money that was its underpinning. *See* Don Patinkin & Otto Steiger, Note, *In Search of the "Veil of Money" and the "Neutrality of Money": A Note on the Origin of Terms*, 91 SCANDINAVIAN J. ECON. 131, 138, 141 (1989) (setting forth the history of the "veil"or "neutrality" label, which Marshall did not himself use directly but which was used to describe him and his followers in the 1930s by the later British economist, John Hicks). Most prominently, there was David Hume's version of the latter from the 1750s. *Id.* at 131. In its modern incarnation in orthodox monetary economics, the quantity theory of money asserts a direct proportionality

Beyond his theory of comparative advantage, Ricardo's adherence to money's neutrality was the other key legacy of his thought that survived the neoclassical revolution. Just as it did for Ricardo himself, the view of money's neutrality would go on to enable his neoclassical inheritors in further excluding the possibility that interest-bearing bank credit, in its then still limited array of legal forms, might too be a means of taking proprietorship over unearned rent.[107] In fact, as noted earlier, neoclassical thinkers generally sought to demonstrate the opposite, instead transforming interest into the ordinary return of capital owners with profit, itself, being transformed into just one subspecies of interest.[108] Not surprisingly, for their own part, the early legal or institutionalist economists tended to challenge this way of embracing the seeming regression in Ricardo's thought as compared to Adam Smith's where the question of interest was concerned, although their objections quickly receded from within attention of most neoclassical thinkers.[109] Within the conversation that did remain audible to those in the neoclassical milieu, it would be John Maynard Keynes who would most clearly articulate some noticeable version of the same objection.[110]

Through their altogether different way of pushing past the Ricardian inheritance, it was thus the institutionalists who made the idea of property-as-rent more acute. In so doing, they eschewed simply remapping the concept onto a generalized notion of differential gain in the way neoclassical thinkers were intent on doing, to the ultimate effect of making labor and capital incomes, themselves, no more than "generic rents" as John Bates Clark put it.[111] While here is not the place to go into further detail about Clark's line of thought, understanding the competing ways in

between the general price level of goods and services and the amount of money in circulation. *Id.*

[107] *See* Bezemer & Hudson, *supra* note 105, at 748.

[108] *See* HUDSON, *supra* note 64, at 38–39.

[109] *See id.* at 39 (discussing Smith's much less sanguine view of interest-bearing debt and its continuity with a much longer previous history of the same).

[110] Picking up on his earlier work, in his best-known book Keynes described interest as a "rentier" return, and rentiers, themselves, as "functionless investor[s]" akin to the Ricardian landlord. *See*, JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1936), *reprinted in* 7 THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES 1, 376 (4th ed. 2013) ("Interest to-day rewards no genuine sacrifice, any more than does the rent of land. The owner of capital can obtain interest because capital is scarce, just as the owner of land can obtain rent because land is scarce."). *See* HUDSON, *supra* note 64, at 150–53 (considering how Keynes diminished his own earlier ideas in *The General Theory*).

[111] CLARK, *supra* note 53, at 191; *see also supra* note 83 (containing the full quote).

which the neoclassical and institutional economists handled Ricardo's legacy does make it easier to understand various aspects of institutionalist thought. Doing so, for example, clarifies the concerns that the greatest of the American institutionalists, Thorstein Veblen, was trying to address in 1923's *Absentee Ownership*. Likewise, it puts the lesser known but well-respected Edwin Seligman's abandonment of "sacrifice theory" as a basis for progressive taxation into new perspective, while also helping to explain why he instead endorsed what he called "the point of view of production" as the most realistic perspective from which to properly account for the "advantage[s]" that "possess[ors]" of producing "facult[ies]" were able to leverage toward the end of so effortlessly increasing their respective "possessions."[112] Much the same goes for the famed John R. Commons' thesis that the key shift that the United States' economy had undergone involved a transition from an age of "exclusive *holding* for self" to one premised on a power of creating scarcities by "*withholding from others.*"[113] Finally, understanding the early American legal or institutional economists as individuals attempting to extend Ricardo's view of rent beyond land as its exclusive source also makes more intelligible even the more slogan-like pronouncements of the famed realist Judge Jerome Frank—equating property with monopoly, for example.[114]

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[112] EDWIN R.A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 32 (2d ed. 1914); Seligman, *supra* note 75, at 289, 291. Seligman's abandonment of the "sacrifice theory" had to do with what Hovenkamp describes as the larger antagonism to progressive marginalism's key premise by the 1930s. *See* Hovenkamp, *The First Great Law & Economics Movement*, *supra* note 30, at 1033–37. By then, neoclassical welfare theory was arguing the strictly "positivist" position that determinate judgments could not be drawn about whether a wealthy person valued her marginal dollar less than a poor person. *Id.* at 1039, 1041–45. The "positivist" view thus said that interpersonal comparisons about even marginal satieties were impossible because they could only be known "ordinal[ly]." *Id.* at 1035. *See also supra* note 47.

[113] COMMONS, *supra* note 35, at 53 (first emphasis added); John R. Commons, *Law and Economics*, 34 YALE L.J. 371, 380 (1925) ("Now it is the engineer, the technologist, the labor manager, the laborer, who increases the efficiency values by *enlarging* output, but it is the business man, or rather the business function of all men, which maintains or increases the scarcity values by *withholding* output. The technologist is a specialist in efficiency, the business man a specialist in scarcity.").

[114] Standard Brands, Inc. v. Smidler, 151 F.2d 34, 38–39 (2d. Cir. 1945) (Frank, J., concurring), *quoted in* HOVENKAMP, THE OPENING OF AMERICAN LAW, *supra* note 30, at 199; *see generally* ROBERT JEROME GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW (1985) (discussing Frank's broader intellectual formation).

With all this said, however, it would still be a mistake to imagine that the importance of recovering the conception of property-as-rent—which land, in all its irreducible tangibility, underpinned—is to be found mainly on theoretical or historical grounds. To the contrary, by clarifying the continuity between "the first [great] law [and] economics movement" in the United States as pioneered by institutionalists like Veblen and Commons[115] and the concerns that started to be articulated well over two centuries before in the work of proto-economic thinkers like Mun and that continued to be perfected during the nineteenth century by thinkers like Ricardo, we also stand to gain better purchase on our own era. With its ever-proliferating forms of entitlement over debt-based financial assets, this is especially the case given how little our resurgent debate pitting the object-centered and progressive models of property against one another has been able to illuminate the present era. As for why it should be a priority for property scholars to try to gain better purchase on the present, on one level it is because debt-based financial asset claims are, in one way or another, ownership claims on future incomes from production. On another level, it is because of the even more striking fact that even today such claims remain, in no small part, ultimately staked on revenues derived from land's scarcity value.

Of course, here *land* must not simply be understood as coequal with *real estate*, a term that in the predominant market and accounting practice conflates the cost of built structures with the undifferentiated site prices of land proper. Ironically, then, to better understand our contemporary world by reaching around property's competing conceptions as commodity versus propriety and instead reaching toward its neglected conception as rent, we need not even be so rigorous as to pick up from where the legal and institutional economists of the Progressive Era left off. Instead, given how dependent our economy continues to be on scarcity premiums derived from land, we only really need to pick up from where the classical economist predecessors of the institutionalists left off. In other words, relaxing the identity between rent and landed property is, in a sense, beside the point when it comes to reckoning with the proliferation of debt-based financial asset claims on real estate value in the new "Gilded Age" of the present.

[115] *See* Hovenkamp, *The First Great Law & Economics Movement*, *supra* note 30, at 993.

As I will eventually show in Part IV of this Article, this is borne out by the fact surrounding the great acceleration of housing price increases in the United States economy since the mid-1970s, which has seen the value of land increasing far more rapidly than that of built structures. As a result, land's site price drives an ever-increasing share of housing price values in the real estate market. Inclusive of the varying scarcity of public goods that arise through differential government investment in the vicinities surrounding housing sites and exclusive of the value of new housing structures on sites that arise through private real estate entrepreneurialism, even today in the twenty-first century, the land's price remains a wellspring for the extraction of economic rent. Surely, then, it is no accident that financial forms devoted to taking proprietorship over land rent also continue to multiply.

III. CONTEXTUALIZING THE RISE OF FINANCIAL ASSET PROPERTY

I will return to the question of the land's rising site value and the new form of securitized property-in-rent it has permitted in the wake of the mortgage crisis–cum–Great Recession and what can be thought of as a long-gestating sequel, the ongoing economic turmoil touched off by the Coronavirus shock. Before doing so, however, Part III bridges Parts I, II, and IV by first discussing the larger context for understanding the more general rise of debt-based financial asset property in the United States since the 1970s. Part III emphasizes three elements of the last forty to fifty years of context in particular: (1) the growth of inequality in wealth and income; (2) the rise of debt, real estate securitization, and the FIRE sector; and (3) the phenomenon of financial asset-price inflation.

A. *Reckoning with the Growth of Inequality*

Already well before the rise of right-wing ultranationalism and the renewed economic crisis touched off by the Coronavirus pandemic, in the wake of the bursting of the last housing bubble and the ensuing Great Recession, it had grown thoroughly untenable to keep ignoring the way inequality[116]—in both income

[116] Unless otherwise stated, this Section focuses on inequality within the United States, not inequality within the globe's other nations, global inequality between nations, or inequality across the globe's entire population taken as individuals—the latter two are particularly affected by the outsized importance of goings-on in India and China. *See generally* BRANKO MILANOVIC, GLOBAL INEQUALITY: A NEW AP-

and, more importantly, wealth—had become a major economic problem and even a social emergency in the United States.[117] Of course, on both fronts the problem has been severely magnified across racial lines.[118] Moreover, as is equally clear, it is also no longer plausible—if it ever was—to continue trying to explain away the growth of inequality as a function of "a rising tide lifting all boats," despite the lingering ubiquity of such a sentiment. Even putting aside how income and wealth polarization is deleterious in itself, the rising tide metaphor is misplaced. While its logic might capture a dynamic that was still at play when John F. Kennedy popularized the phrase in the 1960s, it simply fails to capture present trends. At the risk of stretching the metaphor, more accurate would be to say that there have been rising yachts and a vast majority of lesser vessels left either rudderless or sinking, not to mention the large number of former passengers who have been thrown overboard.[119]

PROACH FOR THE AGE OF GLOBALIZATION (2016) (presenting an overview of trends in these different types of inequality).

[117] *See* Edward N. Wolff, *The Asset Price Meltdown, Rising Leverage, and the Wealth of the Middle Class*, 47 J. ECON. ISSUES 333, 336–37, 340–41 (2013) (discussing how inequality in income and wealth has fared after the Great Recession); *see also* Landy, *supra* note 38 (comparing wealth inequality trends before 2007).

[118] DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 5 (10th anniversary ed., 2010); Carlos Gradin, *Race and Income Distribution: Evidence from the USA, Brazil and South Africa*, 18 REV. DEV. ECON. 73, 75 (2014); THOMAS M. SHAPIRO, TOXIC INEQUALITY: HOW AMERICA'S WEALTH GAP DESTROYS MOBILITY, DEEPENS THE RACIAL DIVIDE, AND THREATENS OUR FUTURE 14–17 (2017).

[119] It is obviously not possible to recount comprehensively how debate on domestic inequality has evolved. In brief, however, especially through the 1990s, when these questions were much less visible, versions of the "rising tide lifts all boats" argument were vigorously advanced as ostensible correctives to those calling for greater recognition of inequality as a problem. In effect, the corrective asserted that the *real* issue was not inequality but poverty. *See, e.g.*, Martin Feldstein, *Income Inequality and Poverty* 1–4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 6770, 1998), https://www.nber.org/papers/w6770.pdf [https://perma.cc/ZS4K-F6AX]. Such claims were often further accompanied by the idea that more concerted efforts to combat inequality through the tax and transfer system would sap economic growth and actually submerge the lower boats that were often simultaneously suggested to be rising. *See, e.g.*, Robert E. Lucas Jr., *The Industrial Revolution: Past and Future*, REGION, May 2004, at 4, 7, 20. Claims about the growth-inhibiting effect of redistribution thus gave rise to a further layer of debate. Likewise, the same happened with the equally recurrent claims questioning wage inequality's importance by suggesting that it was simply due to a skills gap favoring workers with information technology competence, as per so-called skill-biased technological change theories. Skipping over the details, by the present time, research has more and more forcefully reinstated and expanded on the original reason there seemed to be for alarm—rooted, as it was, in issues of class power, the bipartisan drift to tax policy favoring the

Even so, discussion of inequality has too easily been able to remain opaque, not only with respect to the question of periodization but also causation. Of these two aspects, the first is the easier to clarify, notwithstanding the persistence of the idea—especially in partisan discussion—that intensified inequality is a phenomenon of the first decade of the new millennium, whether in the lead-up to the Great Recession during the Bush years or after 2008 during the Obama years. In reality, the growing polarization of income and wealth in the United States—and, indeed, much of the world—has witnessed a sharpening separation of the top ten and, in reality, the top one and even top one-tenth of one percent of the population from those below since the mid-1970s.[120]

Furthermore, it must be noted that even though the ascent of inequality was given little spotlight before 2011, a clear effort to document the problem was already under way fifteen to twenty years earlier. Indeed, a disturbing picture had already emerged not only prior to the so-called sub-prime crisis of 2007, but even before the bursting of the dot-com bubble in 2001. Its quantitative dimension was filled in by select economists, sociologists, and

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wealthy, and so on. *See* Lawrence Mishel, Heidi Shierholz & John Schmitt, Don't Blame the Robots: Assessing the Job Polarization Explanation of Growing Wage Inequality 4, 7, 35–36 (Nov. 19, 2013) (unpublished working paper), https://files.epi.org/2013/technology-inequality-dont-blame-the-robots.pdf [https://perma.cc/CJE4-2SBB] (considering the current status of the skill-biased technological change argument). With respect to arguments about inequality and growth, an opposite perspective now seems to hold. That is, rather than correcting inequality through redistribution as a way of sapping growth, it is the increasing separation of the top segments of the income and wealth distribution from the sinking or static rest that is now feared as a major hindrance of growth—to say nothing of well-being in a broader sense. *See, e.g.*, Roy van der Weide & Branko Milanovic, *Inequality Is Bad for Growth of the Poor (But Not for That of the Rich)*, 32 WORLD BANK ECON. REV. 507, 508, 516, 525 (2018); Emmanuel Saez, Striking It Richer: The Evolution of Top Incomes in the United States, 1, 7 (Feb. 2020) (unpublished note), https://eml.berkeley.edu/~saez/saez-UStopincomes-2018.pdf [https://perma.cc/7GNY-HKWM]. Regarding the absolutely deleterious nature of inequality in and of itself, within the extensive literature, see generally RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER (2011); RICHARD WILKINSON & KATE PICKETT, THE INNER LEVEL: HOW MORE EQUAL SOCIETIES REDUCE STRESS, RESTORE SANITY AND IMPROVE EVERYONE'S WELL-BEING (2019).

[120] *See supra* notes 118–119; *see also* PIKETTY, *supra* note 36, at 388–90; Thomas Piketty & Emmanuel Saez, *Inequality in the Long Run*, 344 SCIENCE 838, 838–43 (2014); Thomas Piketty, Emmanuel Saez & Gabriel Zucman, *Distributional National Accounts: Methods and Estimates for the United States*, 133 Q.J. ECON. 553, 577–81 (2018); RICHARD V. REEVES, DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM, AND WHAT TO DO ABOUT IT 6 (2017) (setting forth a recent perspective that looks at impacts on broader well-being).

others who were assembling relevant data during the much-celebrated prosperity of the Clinton years.[121] The qualitative aspect of the picture was colored in by various others, including journalists and advocates, among whom it was becoming common to speak of the emergence of a new "working poor."[122] Already by the turn of the millennium the overall portrait was sharply at odds with the default image of generalized middle-class prosperity. By the mid-1990s, this prosperity still had an air of timelessness, although its roots really went back only so far as the gains that workers in the United States had achieved in the quarter century between 1945 and 1970 or 1975.[123] As concerning the periodization of mounting inequality, therefore, it should not be doubted that it substantially predates the Great Recession and even the advent of post–Cold War globalization.

As for the matter of causation, it is, admittedly, more complex. One benefit of the earlier discussion building outside of the spotlight in the 1990s is that it was taking place at a time that made it easier to avoid simplistic explanations based solely on globalization, which was then not only still a new phenomenon but also a new idea. This earlier state of affairs can profitably be compared to the discussion that became prevalent after the 2016 presidential election, which made it ever more common to reflexively equate inequality with globalization. The dissolution of working-class, and even middle-class, life in the United States is thus now ubiquitously attributed to a decline of the manufacturing sector due to the rise of the developing world and, especially, China. (Here, "China" stands ambiguously both for the People's Republic of China after its opening in the 1970s and the more general liberalization of supply chains and trade and investment flow into which China has figured so prominently since the end of the Cold War.) Such explanations are partly appealing, no doubt, because they dovetail with both liberal and conservative party political

[121] *See* Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON. 1, 4–5, 7, 11 (2003); JAMES K. GALBRAITH, CREATED UNEQUAL: THE CRISIS IN AMERICAN PAY 133–34 (1998).

[122] Catherine S. Chilman, *Working Poor Families: Trends, Causes, Effects, and Suggested Policies*, 40 FAM. RELS. 191, 191–92 (1991); Sheldon Danziger & Peter Gottschalk, *Hardly Making It: The Increase in Low Earnings and What To Do About It*, *in* AMERICA'S WORKING POOR 69, 70 (Thomas R. Swartz & Kathleen Maas Weigert eds., 1995); BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 59 (2001).

[123] *See* BRENNER, *supra* note 8, at 43–45. It is this roughly quarter century that historians dub the so-called golden age of capitalism, not without a reason.

ideology in the United States. That is, as a sound bite, the rise-of-China narrative can be invoked from the right to allege that *we* are being exploited by some *them* that is taking *our* jobs, with *them* being flexible enough to comprise people in China, specifically, the developing world more generally, or their "globalist" allies at home. Meanwhile, on the liberal end of the party political spectrum, the rise-of-China narrative provides a way to lament the plight of the American worker while still concluding, overall, that globalization should be vindicated as the presumptive agency behind bringing hundreds of millions, if not billions, out of poverty, in accord with *our* unquestionable commitment to a better international order.[124]

Side by side with the rise-of-China explanation for inequality, in recent years another has been emerging as well, albeit one that seems to appeal primarily to those on the liberal—or liberalizing—end of the spectrum. On this view, the decline of working and even middle-class life is attributed to job losses from technological automation—more than offshoring, free trade, or people in the developing world taking what is *ours*. Certainly, the explanation from automation cannot simply be disregarded.[125] However, it is clearly oversimplifying to the extent that its basis in the available evidence is far outstripped by the media frenzy concerning artifi-

[124] Clearly, the questions of if, how, and why global poverty has been changing are complex. To the extent that poverty can be said to be decreasing, the cause cannot be accounted for in as reductive a way as it often is when citing to vaguely defined notions of "globalization" or "liberalization." This, moreover, is to put aside the outsized effect on the data of China—with what, after all, has remained its state-run economy—and to a lesser extent, India. *See, e.g.*, Amartya Sen, *Indian Development: Lessons and Non-Lessons*, DAEDALUS, Fall 1989, at 369, 370, 372; Y.Y. Kueh, *Mao and Agriculture in China's Industrialization: Three Antitheses in a 50-Year Perspective*, 187 CHINA Q. 700, 701 (2006); Angus Deaton, *Price Indexes, Inequality, and the Measurement of World Poverty*, 100 AM. ECON. REV. 5, 31–32 (2010); Sanjay Reddy & Rahul Lahoti, *$1.90 a Day: What Does It Say? The New International Poverty Line*, 97 NEW LEFT REV. 106, 118–19 (2016); Martin Kirk & Jason Hickel, *Gates Foundation's Rose-Colored World View Not Supported by Evidence*, HUMANOSPHERE (Mar. 20, 2017), http://www.humanosphere.org/opinion/2017/03/gates-foundations-rose-colored-world-view-not-supported-by-evidence/ [https://perma.cc/5D9R-BVZR]; *see generally* JASON HICKEL, THE DIVIDE: A BRIEF GUIDE TO GLOBAL INEQUALITY AND ITS SOLUTIONS (2017).

[125] *See, e.g.*, Daron Acemoglu et al., *Import Competition and the Great U.S. Employment Sag of the 2000s*, 34 J. Lab. Econ. S141, S163 (2016); David H. Autor, David Dorn & Gordon H. Hanson, *Untangling Trade and Technology: Evidence from Local Labour Markets*, 125 ECON. J. 621, 624, 626, 643–44 (2015); Allan Collard-Wexler & Jan De Loecker, *Reallocation and Technology: Evidence from the U.S. Steel Industry*, 105 AM. ECON. REV. 131, 132 (2015).

cially intelligent robot futures it plays into.[126] Indeed, the fervor with which such explanations have been embraced in the United States since the 2016 presidential election is reminiscent of the way that talk of skill-biased technological change proliferated in the early 2000s and, in the process, was erroneously used to explain away increasing income inequality as nothing more than the product of varying information technology competence among different segments of the labor force.[127]

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[126] The snowballing pace of coverage around the 2016 presidential election in the United States often drew on the same hardly novel handful of studies as evidence. *See, e.g.*, Claire Cain Miller, *As Robots Grow Smarter, American Workers Struggle To Keep Up*, N.Y. TIMES (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/upshot/as-robots-grow-smarter-american-workers-struggle-to-keep-up.html [https://perma.cc/23A2-NXJS]; Steve Denning, *Do Trade Agreements Kill Jobs?,* FORBES (Mar. 8, 2016, 3:39 PM), https://www.forbes.com/sites/stevedenning/2016/03/08/should-we-blame-trade-agreements-for-loss-of-jobs/ [https://perma.cc/E957-4BDF]; Allison Burke, *What Is the Future of Free Trade? 5 Facts About U.S. Trade Policy*, BROOKINGS NOW (Nov. 18, 2016), https://www.brookings.edu/blog/brookings-now/2016/11/18/what-is-the-future-of-free-trade-5-facts-about-us-trade-policy/ [https://perma.cc/7TKL-JBCA]; Claire Cain Miller, *The Long-Term Jobs Killer Is Not China. It's Automation*, N.Y. TIMES (Dec. 21, 2016), https://www.nytimes.com/2016/12/21/upshot/the-long-term-jobs-killer-is-not-china-its-automation.html [https://perma.cc/S7CE-TWDY]. *But see* Adams Nager, *Trade vs. Productivity: What Caused U.S. Manufacturing's Decline and How To Revive It*, INFO. TECH. & INNOVATION FOUND. 1–2 (Feb. 2017), http://www2.itif.org/2017-trade-vs-productivity.pdf [https://perma.cc/D7VZ-YZL9] (rebuking media simplification).

[127] *See* Mishel, Shierholz & Schmitt, *supra* note 119, at 4–7 (considering the current status of such theories); *see generally* Aaron Benanav, *Automation and the Future of Work* (pt. 1), 119 NEW LEFT REV. 5 (2019), https://newleftreview.org/issues/ii119/articles/aaron-benanav-automation-and-the-future-of-work-1.pdf [https://perma.cc/62VC-NQLK]; Aaron Benanav, *Automation and the Future of Work* (pt. 2), 120 NEW LEFT REV. 117 (2019), https://newleftreview.org/issues/ii120/articles/aaron-benanav-automation-and-the-future-of-work-2 [https://perma.cc/4WAS-HYC9]. This, of course, is not to say that the "robots" argument is the same—or supported to the same extent—for all forms of automation. It is only to say that media frenzy around such themes, as much as the empirical determinacy of the data, is what drives oversimplification. *Cf.* DOUG HENWOOD, AFTER THE NEW ECONOMY (2005) (presenting a study of the frenzy of the early 2000s around the supposed imminence of work's transformation by new technologies). Within the technical economic literature, the leading exponent of the skills-biased technological change focus as the source of growing inequality is, perhaps, David Autor. *See, e.g.*, David H. Autor, Lawrence F. Katz, Melissa S. Kearney, *Trends in U.S. Wage Inequality: Revising the Revisionists*, 90 REV. ECON. & STAT. 300 (2008); David H. Autor, *Skills, Education, and the Rise of Earnings Inequality Among the "Other 99 Percent,"* 344 SCIENCE 843 (2014). For a discussion of countervailing evidence from other recent technical work see Kate Bahn, *Education Won't Solve Inequality*, SLATE (May 30, 2018, 10:00 AM), https://slate.com/human-interest/2018/05/study-unions-increasingly-represent-educated-workers.html [https://perma.cc/Q45S-N9CE] (citing Henry S. Farber et al., *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24587, 2018)).

Discussion of the timing and antecedents of our present era would thus better begin from facts that started emerging already from the mid-1970s. Among the most prominent of such facts are the stagnation of real wages for all but the top ten to twenty percent of the workforce by the end of that decade, corresponding gains in productivity in the decades after that were maintained in substantial part through increased working hours, and two other key mechanisms that functioned, until the onset of the Great Recession, to generally mask decades-long deterioration in the quality of economic life for working-class households and all but the top quintile of middle-class households.[128] The first of these mechanisms had to do with the possibility—at least until early in the 1990s—of increasing household, if not individual, income through more women coming into the labor force, a phenomenon leading to the generalized rise of the two-paycheck family. As for the second mechanism that provisionally masked the effects of increasing wealth and income inequality, it had to do with the growing availability of cheap credit.[129]

With this second mechanism, we also come to another causal factor behind economic polarization that dominant sound bites tend to ignore. This has to do with the increasing proportion of future income from production that has been absorbed since the end of the 1970s by the so-called FIRE sector. By now there is ample reason to suspect that growing dependence on cheap credit for consumption, and even subsistence, has ultimately been made possible by recycling the very wealth and income that has been redistributed upward to the effect of fueling increasing inequality in the first place. Indeed, as often noted, upward redistribution has been especially targeted toward the financial heights of the economy.[130]

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[128] Lawrence Mishel, *Causes of Wage Stagnation*, ECON. POL'Y INST. 1 (Jan. 6, 2015), https://files.epi.org/2013/causes_of_wage_stagnation.pdf [https://perma.cc/L5JU-QR4G]; Lawrence Mishel, Elise Gould & Josh Bivens, *Wage Stagnation in Nine Charts*, ECON. POL'Y INST. 4 (Jan. 6, 2015), https://files.epi.org/2013/wage-stagnation-in-nine-charts.pdf [https://perma.cc/2BUN-KDH3].

[129] *The Productivity-Pay Gap*, ECON. POL'Y INST., http://www.epi.org/productivity-pay-gap/ [https://perma.cc/3VZQ-M797] (last updated July 2019); RICHARD D. WOLFF, CAPITALISM HITS THE FAN: THE GLOBAL ECONOMIC MELTDOWN AND WHAT TO DO ABOUT IT 153–54 (2d ed. 2013).

[130] *See* sources cited *supra* notes 8, 38; *see also* Bradford M. Van Arnum & Michele I. Naples, *Financialization and Income Inequality in the United States, 1967–2010*, 72 AM. J. ECON. & SOCIO. 1158, 1165 (2013); Ken-Hou Lin & Donald Tomaskovic-Devey, *Financialization and U.S. Income Inequality, 1970–2008*, 118 AM. J. SOCIO. 1284, 1289, 1313 (2013); Eckhard Hein, *Finance-Dominated Capitalism and Redistribution*

B. Debt, Mortgage Securitization, and the FIRE Sector

The resort to cheap credit to make household ends meet was already becoming evident in the 1980s. That era, of course, witnessed the escalating ubiquity of the credit card or plastic economy as well as an explosion in home equity loans after the 1986 Tax Reform Act and the increasing resort to using one's home as an ATM.[131] It also gave us the cultural trope of the supersized—and even spendthrift—American consumer and the associated emergence on television and radio of the personal finance expert and advice industry.[132] Also highly visible was the rise of student debt as the preferred means of financing tuition increases that were outpacing inflation at institutions of higher education.[133] Another sign of the times, of course, was the rise of the bank fee–cum–toll booth economy that we are still growing accustomed to. Indeed, according to Harvard Business School's Robin Greenwood and David Scharfstein, between 1980 and 2012 the financial services industry—a category they confine to the activities of asset management and household credit provision professionals alone—has increased its share of United States gross domestic product ("GDP") from 4.9% to 7.9%.[134]

Less culturally visible but even more significant in the 1980s was the meteoric rise of structured finance, with its ever-increasing array of individually tailored products for high-end investors. Among these products were both the first notable form of credit card debt securitization[135] and the early expansion of the securitization of residential and commercial mortgage debt. The latter took place through the mortgage-backed security—a rechris-

of Income: A Kaleckian Perspective 2–4 (Levy Econ. Inst., Working Paper No. 746, 2013), http://www.levyinstitute.org/pubs/wp_746.pdf [https://perma.cc/5CCP-GQJG].

[131] *See, e.g.*, Julia Patterson Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 TUL. L. REV. 373, 380–81 (1994); HYMAN, *supra* note 33, at 234–36.

[132] *See* SCHOR, *supra* note 33, at 18–21, 24.

[133] JOEL BEST & ERIC BEST, THE STUDENT LOAN MESS: HOW GOOD INTENTIONS CREATED A TRILLION-DOLLAR PROBLEM 47–48 (2014); Susanne Soederberg, *Student Loans, Debtfare and the Commodification of Debt: The Politics of Securitization and the Displacement of Risk*, 40 CRITICAL SOCIO. 689, 696–700 (2014); Charlie Eaton et al., *The Financialization of U.S. Higher Education*, 14 SOCIO-ECON. REV. 507, 513–14, 529 (2016).

[134] Robin Greenwood & David Scharfstein, *The Growth of Finance*, 27 J. ECON. PERSPS. 3, 3–4 (2013). The peak year was 2006, when GDP share was 8.3%. *Id.* at 3.

[135] Between 1989, when the Federal Reserve began keeping records, and 1991, ten percent of consumer installment debt—in autos and revolving loans—was securitized. *See* JACK RASMUS, EPIC RECESSION: PRELUDE TO GLOBAL DEPRESSION 209 (2010).

tened and, eventually, vastly scaled-up form of the pre–Great Depression mortgage bond.[136] Sidelined since the 1920s,[137] the mortgage bond's initial return came as a means of raising housing finance directly from the capital markets to fund the Fair Housing Act ("FHA") of 1968's section 235 program, which aimed to extend credit to promote inner-city home ownership after the urban unrest of the late 1960s.[138] Though the section 235 program effectively ended by the early 1970s amidst allegations of fraud against the African American borrowers who were its intended beneficiaries, the revivification of mortgage securitization was sustained by the new Federal Home Loan Mortgage Corporation ("Freddie Mac").[139]

Freddie Mac had been created in 1970 to facilitate the development of a secondary market in conventional mortgages[140] by purchasing and bundling into securities loans originated by savings and loans banks rather than mortgage companies. It thus complemented the function of the Federal National Mortgage Association ("FNMA" or "Fannie Mae") and its counterpart, the Government National Mortgage Association ("GNMA" or "Ginnie Mae").[141] Ginnie Mae had initially specialized in an early form of the revived mortgage bond—known more specifically as the mortgage "pass[-]through[ ]" security. It was this same type of security, then, that Freddie Mac initially draw upon to help sustain initiatives like the section 235 program.[142] Fannie Mae, on the other hand, would not issue its own initial mortgage pass-

[136] FRANK J. FABOZZI & FRANCO MODIGLIANI, MORTGAGE AND MORTGAGE-BACKED SECURITIES MARKETS 18–19, 23, 28–29, 34 (1992). A form of competitive mortgage securitization had emerged—and failed—once previously as well in the late nineteenth-century. *See* Michael Simkovic, *Competition and Crisis in Mortgage Securitization*, 88 IND. L.J. 213, 216–18 (2013).

[137] William N. Goetzmann & Frank Newman, *Securitization in the 1920s*, 1, 18 (Nat'l Bureau of Econ. Rsch., Working Paper No. 15650, 2010).

[138] *See* LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK 229–30 (2011).

[139] *See* HYMAN, *supra* note 33, at 197.

[140] *Id.* at 203; HYMAN, *supra* note 138, at 231. Freddie Mac was created through the Emergency Home Finance Act of 1970.

[141] Fannie Mae originated as a New Deal–era government-sponsored entity created in 1938 to buy mortgages from depository institutions and, in effect, to federally insure them. It was through the 1968 FHA that Fannie Mae was made into a fully private corporation and split in two. Alongside the entity that kept its name was Ginnie Mae, which became a wholly owned government corporation focused on FHA and other government-insured mortgages. *See* FABOZZI & MODIGLIANI, *supra* note 136, at 19–20, 23.

[142] *Id.* at 21–22.

through bond, which did officially bear the name of a "mortgage-backed securit[y]," until 1981.[143] By 1983, however, Freddie Mac would become the key backer of the first collateralized mortgage obligation ("CMO"), a more exotic subtype of the conventional pass-through variety of the MBS.[144]

Even so, it was not until the late 1990s—after an early part of the decade spent still in the shadow of the Savings & Loans and junk bond crises of the 1980s—that the MBS truly began to emerge as a structurally significant new means for asserting financial ownership claims over revenue streams routed through real estate.[145] In 1997, the stage was set for the sharp run up that began in 2001 when regulators cleared the way for private label residential MBS ("RMBS") products. Private label securitization, in turn, became instrumental in the parallel rise of so called credit creating shadow banks beyond the reach of the Federal Reserve, with the shadow banks themselves then stimulating further securitization.[146] By the early 1990s, for example, of the roughly one trillion dollars in outstanding home mortgage debt—a total that was similar to the figure for 2000—only thirty-five percent

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[143] *Id.* at 23.

[144] *Id.* at 25. The first CMO was created for Freddie Mac by the investment banks Solomon Brothers and First Boston. The special purpose entity ("SPE") issuing the CMO holds multiple pools of securities and then offers tranches for potential investor purchase. *See* Laura Choi, *Creating a Marketplace: Information Exchange and the Secondary Market for Community Development Loans* 39 (Fed. Rsrv. Bank of S.F. Cmty. Dev. Inv. Ctr., Working Paper No. 2007-01, 2007), https://www.frbsf.org/community-development/files/wp07-011.pdf [https://perma.cc/88E8-AEVK]. The tranches represent categorizations based on different risk and maturity dates—allowing for the further splitting of the underlying loans in various ways. *See* Andrew Kelman, *Mortgage-Backed Securities and Collateralized Mortgage Obligations: Prudent CRA Investment Opportunities*, CMTY. INVS. (Fed. Rsrv. Bank of S.F., S.F., Cal.), Mar. 2002, at 20, 22, https://www.frbsf.org/community-development/files/mbs.pdf [https://perma.cc/Z7AR-DEJM]. CMOs thus differ in several ways from the class of conventional pass-through securities that usually take the name of "mortgage-backed securities," a category to which they both, technically, belong. Overall, one can think of the CMO as derivative of the plain vanilla pass-through MBS, including insofar as the CMO can pool conventional MBSs together. By the latter half of the 1980s, because most CMOs were issued by real estate mortgage investment conduits ("REMIC") the terms CMO and REMIC became largely synonymous. *Id.*

[145] *See* RASMUS, *supra* note 135, at 205, 208.

[146] Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1182–83 (2012). The term "shadow banks" encompasses various financial intermediaries arising especially after the 1990s, including investment banks, insurance companies, hedge and private pension funds, real estate investment trusts, private equity firms, and the new financial wings of large corporations like General Motors. *See* RASMUS, *supra* note 135, at 212–13. Among what made their credit creation activities possible was the elimination or reduction of minimum reserve requirements of the kind that restricts ordinary commercial banks. *Id.* at 213.

was securitized—most of this being sold to Fannie Mae and Freddie Mac.[147] Of the some ten trillion dollars in home mortgage debt attached to residential property by 2008[148]—approximately four trillion dollars of which was issued between 2002 and 2006 alone, including some half that being sub-prime[149]—some ninety percent of the total was securitized with about fifty percent coming through private-label MBS activity.[150]

Real estate has thus played a major role in fueling the FIRE sector. Indeed, real estate has long comprised the largest asset category in most, if not all, economies,[151] a striking fact relative to what classical economists like Mill assumed about the likely policy fate of land's "unearned increment."[152] Of course, this first fact cannot be separated from a second that is just as important—namely, that in the United States, as well as countries like Canada and Australia, in the recent past mortgage lending has comprised as much as approximately eighty percent of bank loans.[153] Consequently, it is lending against built structures and especially land—as national income accounting practices tend to obscure by not properly disaggregating these distinct components of real estate prices—rather than productive capital investment that has driven credit expansion.[154] In turn, it is also the quintessential form of property in land that has enabled further debt to be issued against other assets—as well as for debt initially created against real estate to move toward those other assets.[155] The final element

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[147] RASMUS, *supra* note 135, at 209; Fligstein & Goldstein, *supra* note 7, at 59 fig.2.

[148] Andrea Riquier, *What the Shrinking Amount of Mortgage Debt Tells Us About the Housing Market*, MARKETWATCH (Feb. 23, 2016, 8:45 AM), http://www.marketwatch.com/story/what-the-shrinking-amount-of-mortgage-debt-tells-us-about-the-housing-market-2016-02-22 [https://perma.cc/93PK-UVLF]; WOLFF, *supra* note 129, at 145.

[149] RASMUS, *supra* note 135, at 211.

[150] Fligstein & Goldstein, *supra* note 7, at 23, 59 fig.2.

[151] Hudson, *supra* note 64, at 250; SAMUEL STEIN, CAPITAL CITY: GENTRIFICATION AND THE REAL ESTATE STATE 2 (2019).

[152] *See supra* note 74 and accompanying text.

[153] HUDSON, *supra* note 64, at 250.

[154] MIAN & SUFI, *supra* note 33, at 80–81 (considering arguments questioning the pitting of housing debt against so-called "animal spirits" as the real driver of credit expansion). Within the existing literature, one also finds researchers pressing the case for another variety of intellectual uncertainty—over whether new mortgage products pushed housing prices to rise as opposed to whether such products emerged due to market participants expecting ongoing appreciation. *See* Morris A. Davis & Stijn Van Nieuwerburgh, *Housing, Finance, and the Macroeconomy*, *in* 5B HANDBOOK OF REGIONAL AND URBAN ECONOMICS 753, 804 (Gilles Duranton, J. Vernon Henderson & William C. Strange eds., 2015).

[155] *See infra* text accompanying notes 170–171.

within the networked relation between the parts of the FIRE sector—meaning, the *I* for "insurance"—also runs in no small part through real estate, whether because mortgage lending necessitates the purchase of home insurance, because growing insurance company reserves get directed back into real estate, or because banks swollen from real estate lending acquire or merge with insurance companies.[156]

C. Financial Asset-Price Inflation

One prerequisite for grappling with the growth of the FIRE sector since the 1970s—including the attendant proliferation of financial proprietorship claims on other assets—is that we move past the notional idea that debt is simply going toward investment in productive assets.[157] Highly idealized, this idea captures neither the dynamics driving household debt expansion in the real world nor the preference for debt leverage that became so visible on corporate balance sheets starting in the 1980s and that has been so visibly apart of the post–Great Recession era of easy money.[158] Putting aside other forms of government debt, nor does it do well in capturing the related rise of securitization.

This, of course, is not to say that finance, including through debt, can have no place in bridging gaps that would otherwise prevent ordinary consumers from making purchases or firms from investing in plants and equipment. Nor is it to say that the financial sector floats freely of the real economy. Indeed, to highlight how land was central rather than incidental to originally ground-

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156 HUDSON, *supra* note 31, at 150–52, 161.

157 At least at the margins of orthodox theory, this view has become highly questionable. *See, e.g.*, William Easterly, Roumeen Islam & Joseph E. Stiglitz, *Shaken and Stirred: Explaining Growth Volatility*, 2000 ANN. WORLD BANK CONF. ON DEV. ECON. 191, 208 n.4, http://documents1.worldbank.org/curated/en/525851468740663147/pdf/multi0page.pdf [https://perma.cc/5YAG-H7PK]; Jean-Louis Arcand, Enrico Berkes & Ugo Panizza, *Too Much Finance?* 24 (Int'l Monetary Fund Working Paper, No. WP/12/161, 2012); *see also* Greenwood & Scharfstein, *supra* note 134, at 5–6 (working, however, from the more traditional sense of unreserved optimism about finance's benefits).

158 Since the Great Recession, the prioritization of using newly printed money to keep financial asset prices high—and still inflating—has meant corporate debt remains as important as ever. Beyond the sums indirectly channeled into the five to six trillion dollars in stock buybacks and dividend payments, low interest rates and free money policy have meant an ongoing explosion in the corporate bond market. This has included a large expansion in the market for "junk" bonds issued by the very large percentage of corporations with performance problems. *See* JACK RASMUS, CENTRAL BANKERS AT THE END OF THEIR ROPE? MONETARY POLICY AND THE COMING DEPRESSION 318–19 (2017); Reid et al., *supra* note 39, at 24, 29–30.

ing the idea of property-as-rent is to suggest precisely the opposite. Then there is also the fact that complex structured products like the CMO could not exist absent the abstraction of housing, in all its physicality, into another type of property.[159] That said, to question the oversimplified idea that debt is merely going toward productive investment *is* to say that starting from our actual empirical-historical situation is a must. For example, as has been known for some time, in both Europe and the United States, it is through current earnings—rather than external means, whether on the debt *or* stock markets—that most corporations finance actual capital investment.[160] Indeed, in this regard, the points reviewed at the end of Section III.B about the overwhelming importance of real estate lending become even more striking.

Where, then, has the mass of new funds, which appeared as capital until the Great Recession threatened their evaporation, gone? In the remainder of Section III.C, I will discuss the idea of debt-driven asset-price inflation as one likely answer. As is now finally being recognized, since the 1980s firms have directed increasingly available financial resources not to investment or wage growth but to activities like stock buybacks, dividend payments,[161] corporate takeovers, and so on.[162] Through such activities directing debt or credit garnished from elsewhere in the economy to the purchase of already existing assets, there has been a marked effect of inflating their values. As economist Dirk Bezemer puts it, beyond "financing innovation," what Joseph Schumpeter called "the secondary wave" of credit thus becomes

[159] Kelman, *supra* note 144, at 22.

[160] *See, e.g.*, HENWOOD, *supra* note 8, at 72–73, 149; *see also* Fox & Lorsch, *supra* note 8, at 50 (providing an updated assessment drawing on Henwood's never celebrated work).

[161] Indeed, since 2010 alone, corporate stock buybacks and dividend payments have summed to close to six trillion dollars. *See* Mark DeCambre, *S&P 500 Companies Spent $7 Trillion on Buybacks and Dividends and "Been Rewarded" by Coronavirus Bailouts, Says Social Capital CEO*, MARKETWATCH (Apr. 25, 2020, 11:33 AM), https://www.marketwatch.com/story/sp-500-companies-spent-7-trillion-on-buybacks-and-dividends-and-been-rewarded-by-coronavirus-bailouts-says-social-capital-ceo-2020-04-22 [https://perma.cc/8AUJ-4H9K]. With the vast money-printing operation involved in the bailout largely flowing to the FIRE sector, this sum is most striking because it roughly mirrors the loss in equity of the ordinary homeowner. Landy, *supra* note 38, at 2, 5–6.

[162] *See* Fox & Lorsch, *supra* note 8, at 51–52, 54–56*; see also* DAVIS, *supra* note 8, at 19–21, 63–64, 84–85; Roger Martin, *The Age of Customer Capitalism*, HARV. BUS. REV., Jan.–Feb. 2010, at 58, 59–60; LYNN STOUT, THE SHAREHOLDER VALUE MYTH 3, 5 (2012). The issue was also treated extensively in the 1990s. *See* HENWOOD, *supra* note 8, at 264–65, 269–74. *See also supra* note 147 and accompanying text.

speculative once it gravitates toward "assets already in place, rather than new production."[163]

Outside of the world of corporate finance, the same is even more dramatically evident in the real estate context—at least "assuming that mortgages finance transactions in existing real estate rather than new building" as, in point of fact, Bezemer notes "is mostly . . . the case."[164] Indeed, here it is worth recalling that as President Obama's Financial Crisis Inquiry Commission found, during the peak years of the explosion in mortgage lending from 2001 to 2004, by far the most debt issued was to refinance the mortgages of existing homeowners rather than those of new purchasers, a category that would not, at any rate, be restricted to purchasers of new *constructions*.[165] The fact that such a large share of lending was devoted to refinancing existing mortgages may have been one reason why the post-2007 foreclosure crisis hit African Americans—especially, elderly African American women homeowners—particularly hard.[166]

Consider the economist Michael Hudson's calculation that some eighty percent of asset-price gains—a concept he distinguishes from capital gains in the tax code—occurred in the real estate sector, with the remainder going to bonds and stocks.[167] Using Federal Reserve Flow of Funds data, he notes that in 2007 the rise in price for the country's raw land rose by $2.5 trillion, a figure that comes to more than twenty percent of national income.[168] As for the distinction between asset-price gains and capital gains, it is important because the latter are only declared for tax purposes if considered "realized." Even putting aside the

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[163] Dirk J. Bezemer, *Schumpeter Might Be Right Again: The Functional Differentiation of Credit*, 24 J. EVOLUTIONARY ECON. 935, 938 (2014). As Bezemer notes, Schumpeter's idea was not restricted to real estate assets already in place but existing assets in general. *See id.*; *see also* RASMUS, *supra* note 39, at 398–400 (discussing the famed heterodox economist Hyman Minsky's distinct, but in ways compatible, idea of economies entering stages of "Ponzi" finance).

[164] Bezemer, *supra* note 163.

[165] FIN. CRISIS INQUIRY COMM'N, PRELIMINARY STAFF REPORT: THE MORTGAGE CRISIS 5 (2010), https://fraser.stlouisfed.org/files/docs/historical/fct/fcic/fcic_report_prelim_mortgage_20100407.pdf [https://perma.cc/FW89-JMF4].

[166] *See, e.g.*, Gary Dymski, Jesus Hernandez & Lisa Mohanty, *Race, Gender, Power, and the U.S. Subprime Mortgage and Foreclosure Crisis: A Meso Analysis*, 19 FEMINIST ECON. 124, 135–38 (2013) (discussing how lenders targeted minorities during the mortgage crisis); Landy, *supra* note 38, at 6.

[167] HUDSON, *supra* note 31, at 109.

[168] Michael Hudson, *The Transition from Industrial Capitalism to a Financialized Bubble Economy*, 1 WORLD REV. POL. ECON. 81, 85 (2010). Hudson's own refinement of the Fed's flow-of-fund figures puts 2007 raw land value at $3.5 to $4 trillion. *Id.*

decades-long decline in the tax rates applied to capital gains, the category simply excludes "unrealized" real estate gains like those that result from the transfer of property on death or from sales proceeds that are then put into new purchases. This, moreover, is not even taking into account the various other ways that decades of tax policy has altogether removed residential and commercial real estate from effective taxation, thus freeing up potential government revenue to be used instead for the purposes of creating financial property-in-rent that is ultimately transformed into bank interest.[169]

As another example, consider that from 2001 to 2005—at the peak of the last housing bubble—low interest rates and escalating house price values allowed homeowners in the United States to extract one trillion dollars per year from their houses after closing costs and mortgage payments.[170] Triple the annual amount of the previous decade, approximately half of this total went back into the housing market through new home purchases—though not necessarily purchases of new constructions—and improvements; another quarter went to non-home financial assets; and of the remaining quarter devoted to personal consumption, even much of this still went to paying credit card, auto loan, and student loan debt.[171]

In all of these ways, therefore, the vast expansion of derivative financial asset forms staking ownership claims directly or indirectly on real estate value—that itself is generated out of more basic

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[169] *Id.* at 87. As for the other key elements of tax policy, they include the ability of commercial real estate owners to repeatedly, and on an accelerated basis, write off tax costs through depreciating assets that are in fine repair—and when they can no longer do so, re-transfer them to new owners who can do the same—the notorious tax-shelter-creating effect of the home mortgage interest deduction, and others. *See id.* at 96; *see also* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES, 190–91 (1985); Joseph J. Thorndike, *How Tax Law Fertilized America's "Crabgrass Frontier*,*"* 146 TAX NOTES 1439, 1439–40 (2015). Recent technical studies have approached the mortgage deduction from the standpoint of its negative "welfare effects." *See* Davis & Van Nieuwerburgh, *supra* note 154, at 800–02. On changes to the deduction made under the Trump administration, see Jim Tankersley & Ben Casselman, *As Mortgage-Interest Deduction Vanishes, Housing Market Offers a Shrug*, N.Y. TIMES (Aug. 4, 2019), https://www.nytimes.com/2019/08/04/business/economy/mortgage-interest-deduction-tax.html [https://perma.cc/Z9US-25BG].

[170] Landy, *supra* note 38, at 2.

[171] *Id.* (noting that by 2012, six trillion dollars in housing value disappeared). *See also* Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 967 (2009) (providing similar estimates for the period "between mid-2006 and the end of 2008").

forms like the home mortgage loan—bring to mind the nineteenth-century identity between property's quintessentially most irreducible form, in land, and rent. Indeed, as I turn to directly, insofar as landed property can be disaggregated from built structures in the pricing of real estate, credit's acceleration into asset-price inflation—rather than productive investment—only further reminds us of why the now largely forgotten conception of property-as-rent was so vital in the first place.

IV. THE SINGLE-FAMILY RENTAL-BACKED SECURITY AND DEBT-DRIVEN PROPERTY-AS-RENT

In this final Part of the Article, I open with a discussion of long-term trends in the composition of home price values in the residential real estate market in the United States. Using unique data compiled by the economist Morris Davis, Section IV.A is organized around a series of graphs looking at both the national and selected state- or metro-level residential real estate markets. Through these figures, I show the importance of underlying land or site price values relative to the cost of built structures and demonstrate their role as the key driver of increasing home price values in the residential real estate market. In Section IV.B, I then turn to the single-family residential rental-backed security as one new example of our ongoing reliance on securitized financial asset property built on real estate value. Section IV.C then concludes by discussing some normative alternatives to our ongoing reliance on real estate securitization and the new forms of property-in-rent like the SFRBS it generates.

The conclusion that integrates Part IV's three subsections with one another as well as with Parts I to III is worth stating up front. This is, namely, that disaggregating residential real estate prices as I do in Section IV.A—so as to isolate the role of the land value component in driving up home price values—crystallizes the key policy question that the perspective from property-as-rent poses. How socially useful is it to inflate real estate prices in the way our legal system has encouraged by providing tax breaks for accumulating mortgage debt, in the residential real estate context, and other interest payments, especially in the commercial real estate context, through allowing for accelerated and fictitious depreciation? To do so *might* make sense if the reason for running up real estate debt—whether in the form of an ordinary homeowner taking out a mortgage *or* a private equity firm using leverage to buy up foreclosed homes to lease back to the foreclosed—

was rooted in "rising construction costs" functioning to "increase the cost of buildings and other capital improvements."[172] However, if higher real estate prices "simply reflect higher prices for land sites that have no cost of production," then using tax policy to facilitate the inflation of those prices is "merely [to] make[ ] new buyers" and non-owner-occupying tenants "pay more," in mortgage and rental payments, respectively.[173] In other words, the less that the growth of real estate prices comes from investing in new construction and capital improvements, the less can it be argued that "rising property prices elicit more investment in the form of construction activity."[174] Moreover, if the growth of real estate price values is really coming from "bid[ding] up" land prices, it is not the case that more land, as a limited asset "provided freely by nature," will somehow come into supply.[175] Rather, the activity of providing the homes, office buildings, and industrial plants that already sit atop such land will garner an increasing economic rent. Consequently, it would make more sense to shift to a policy portfolio geared toward taxing away this economic rent rather than facilitating its insulation from taxation. Of course, there is one way that rising prices for underlying land or sites could be made to coincide with an increase in its supply, so to speak. This occurs when *more* public goods investment—in schools, transport networks, and the like—increases the supply of *attractive* land sites. Such a possibility, however, would only strengthen the case for shifting our policy portfolio, given that, as "has long been argued," the "public sector should recover the cost of this infrastructure by taxing" the resulting "increase" in land's "site value[ ] along the [more attractive] route."[176]

A. The Increasing Importance of Land's Site Value

Using pre-crisis data, Morris A. Davis and Jonathan Heathcoate estimate the total market value of housing stock in the United States in 2005 as summing to $24.1 trillion—some one hundred and fifty percent of the combined capitalization of the major stock exchanges.[177] In pointing to this fact, they have been among the

[172] Hudson, *supra* note 168, at 99–100.
[173] *Id.* at 100.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] Morris A. Davis & Jonathan Heathcote, *The Price and Quantity of Residential Land in the United States,* 54 J. MONETARY ECON. 2595, 2596 (2007). This includes

most prominent economists to argue for the consequent importance of disaggregating housing into a bundle of two different components: structures, on the one hand, and land or sites, on the other. Within this distinction there is another they intend as well, according to which *house* or *home* prices should ideally be decomposed into a weighted average of the cost of produced structures and the price of unproduced land or sites. Accordingly, in their pioneering 2007 paper, Davis and Heathcoate employ a method for isolating land price values from home price values by subtracting the explicitly determinable replacement costs of structures, after accounting for depreciation. Qualitatively speaking, as the authors explain, the residual "land" price data that is inferred from this method can be thought of as "anything that makes a house worth more than the cost of putting up a new structure of similar size and quality on a vacant lot."[178] This indirect method for determining land price values through inference from house prices and structure costs, as they explain, is necessary to avoid what are otherwise likely to be intractable direct measurement problems.[179]

While significant limitations remain on this indirect method for determining land price values, especially ones that may underestimate their magnitude,[180] Davis and Heathcoate have provided a series comprising the first constant-quality price and quantity indexes for total United States residential land stock.[181] Their key purpose in doing so has been to help us better "explore[ ] the evo-

owner-occupied, rental, and vacant units. *Id.* at 2603 n.16. Davis has also constructed an assessment of all land values in the United States. *See* Morris A. Davis, *The Price and Quantity of Land by Legal Form of Organization in the United States*, 39 REG'L SCI. & URB. ECON. 350 (2009).

[178] Davis & Heathcoate, *supra* note 177, at 2595. As they further explain, while they use the Bureau of Economic Affairs' ("BEA") published series for replacement costs as their basis to estimate structure values, they remove the accumulated value of commissions from existing home sales (which the BEA counts as part of residential investment) because it does not increase the stock of structures in place. The result is to reduce the BEA's estimates by about 8.5%. *Id.* at 2601.

[179] *Id.* at 2596 (explaining that the intractability derives from the fact that except for "land sales at the undeveloped fringes of metro areas—where land is relatively cheap—there are very few direct observations of land prices from vacant lot sales, because most desirable residential locations have already been built on").

[180] *See infra* note 196.

[181] *See* Davis & Heathcoate, *supra* note 177. The authors also review the most prominent of the few earlier attempts to estimate land price values, including data for home versus site prices for properties for which the FHA was the mortgage issuer—producing discernible estimates for the years between 1935 and 1979—and A.D. Manvel's well-known land versus improvements estimates for real estate parcels in twelve large assessment areas from the late 1960s. *See id.* at 2605; Allen D. Manvel, *Land Use in 106 Large Cities*, *in* THREE LAND RESEARCH STUDIES 18, 19 (1968).

lution of land and structures prices separately" so as to "make[ ] it . . . easier to understand the dynamics of house prices."[182] Indeed, as they note in their paper, doing so allows real estate's demand side to be differentiated into "a capital input in home production and leisure activities," composed of the structure cost, and a separate source, the land price, that represents the "capitaliz[ation of] the market value of local schools and the commuting distance from employment centers."[183] Assessed from the supply side, as they note, the distinction between land or, equivalently, as I have also put it, site prices and structure costs proves "even more stark."[184] This is because it suggests that "increases in the demand for housing will have very different effects on the prices of these two components, even if there is no change in the relative taste for structures versus land."[185] Overall, therefore, the disaggregation of home price values will warn against expecting changes in demand-side variables like interest rates and demographics to significantly affect the relative price of structures, which depend on factors like the relative productivity of the construction industry and materials costs.[186] Because "desirable land is largely non-reproducible," on the other hand, it is the opposite that is to be expected with respect to changes in demand for housing, itself, which is more likely to "have a large effect" in driving up "the price of land."[187] Especially to the extent that the demand for housing has, itself, been contingent on the expansion of housing debt since the 1970s,[188] the logic behind Davis and Heathcoate's approach coincides with the observations made at the end of Part II about real estate's ability to demonstrate the ongoing vitality of the conception of property-as-rent. That is, separating land from structures demonstrates how dependent real estate price values—and hence the various forms of new financial proprietorship claims attaching to them—are on underlying scarcity premiums associated with land rather than real estate developer entrepreneurialism.[189]

The remainder of Section IV.A uses the data that Davis and Heathcoate have made available to researchers to graphically de-

[182] Davis & Heathcoate, *supra* note 177.
[183] *Id.* at 2597.
[184] *Id.*
[185] *Id.*
[186] *See id.*
[187] *Id.*
[188] *See supra* note 154.
[189] *See* Davis & Heathcoate, *supra* note 177, at 2613–15, 2618.

pict some relevant long-term trends. Figures 1 to 3 look at relationships between prices for home price values on the residential real estate market, structure costs, and inferred land or site prices for the United States as a whole in the period from 1930 to 2000.[190] Here, I have adjusted all nominal dollar values in the data to real year 2000 levels using the Price Consumption Expenditure Index of the Bureau of Economic Affairs' National Income and Product Accounts[191] and indexed to 1930.[192] Using additional data for the state and metro area level that Davis has made available to the Lincoln Institute of Land Policy, now hosted by the American Enterprise Institute, Figures 4 to 6 then drill down below the national or aggregate level.[193] While the state and metro area[194] data sets have the benefit of being more current, extending to 2018, they begin only in the mid-1970s and mid-1980s respectively. For the purposes of the Figures 4 to 6, I have also simplified by using only a single information point for each given year, rather than the full set of quarterly numbers the data sets include.[195]

As Figure 1 makes clear, the rapid ascent of home prices in the residential real estate market did not begin until the early 1970s, a fact that is telling when considered relative to the context discussed in Part III. As per the central point of Davis and Heathcoate's exercise, even more important is what Figure 1 shows

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[190] *See Historical Land Price Indicators*, AM. ENTER. INST., https://www.aei.org/historical-land-price-indicators/ [https://perma.cc/2QDM-3SXU] (last visited Dec. 23, 2020) (containing the data set utilized by Davis and Heathcoate in their article, *supra* note 177).

[191] In using the PCE rather than the CPI or some other index to make the adjustment, the presentation of the data follows the method that Davis and Heathcoate suggest. *See Table 2.3.4. Price Indexes for Personal Consumption Expenditures by Major Type of Product: Annual*, FED. RSRV. BANK OF ST. LOUIS, Line 1, https://fred.stlouisfed.org/release/tables?rid=53&eid=43831&snid [https://perma.cc/QRF4-UT7W] (last visited Dec. 23, 2020).

[192] The presentation of the data diverges from the authors'. *See* Davis & Heathcote, *supra* note 177, at 2607 fig.1 (beginning from and indexing to 1975).

[193] *See Annual Historical Dataset, 1930–2000*, AM. ENTER. INST., https://www.aei.org/wp-content/uploads/2018/10/LANDDATA_HISTORY.xlsx [https://perma.cc/AD3L-KDWC] (last visited Dec. 23, 2020).

[194] *See Quarterly MSA Dataset, 1984:Q1–2018:Q2*, AM. ENTER. INST., https://www.aei.org/wp-content/uploads/2018/10/LANDDATA.MSA_.2018Q2.xlsx [https://perma.cc/R9XS-KVWE] (last visited Dec. 23, 2020). The figures in this Article use data up to January 1, 2016. The metro area data is linked to other work by Davis with the Federal Reserve Board's Michael Palumbo. *See* Morris A. Davis & Michael G. Palumbo, *The Price of Residential Land in Large U.S. Cities*, 63 J. URB. ECON. 352, 353 (2008).

[195] Figures 2 to 6 do not generally correspond to any that Davis and co-author present. Therefore, there is no question of if or how their presentation differs from my own. *See, e.g.*, *supra* note 192 (demonstrating this in the case of Figure 1).

about the role of aggregate land price value increases as the key driver of aggregate home price value increases in the period after the ascent began. The additional information Figure 2 reveals about the greater volatility of aggregate land price value as compared to aggregate structure cost value provides a different window into the same point.

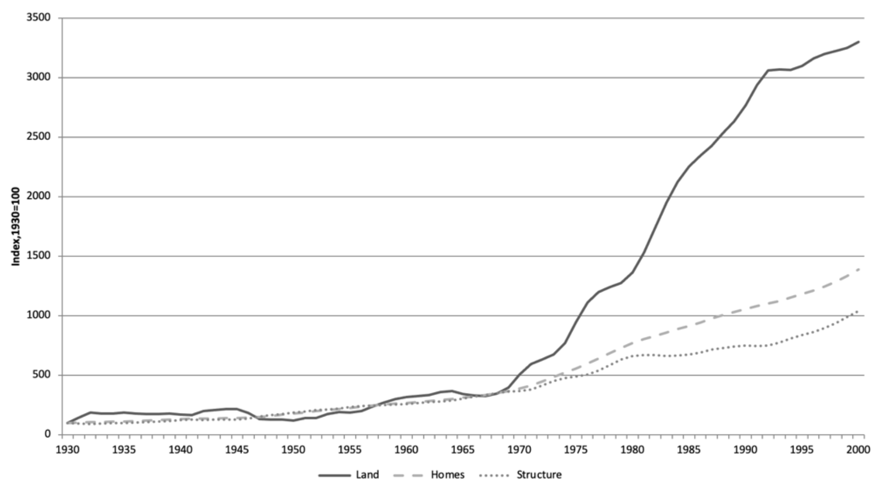

Figure 1: Growth in Aggregate Prices of Homes, Land, and Structures, 1930–2000

That is, Figure 2 shows that fluctuation in aggregate land price value—deriving from the scarcity premiums associated with land sites—plays the major role in aggregate home price value fluctuations in the real estate market. Indeed, apart from the few years after 1946—when a big drop in aggregate land price values went hand in hand with an increase in aggregate home price values due to increasing aggregate structure cost values—it has been aggregate land price value that has been key in maintaining or driving up aggregate home price value in the face of declining aggregate structure cost value. This occurred most dramatically in the period from 1970 to 1990, when the overall share of aggregate land price value in aggregate home price value doubled from twenty to forty percent.[196] Throughout this period, repeated

[196] Here it is important to make explicit the point alluded to earlier about the underestimating tendency, even of Davis and Heathcoate's version, of the residual-of-structure cost method for inferring land or site prices. As Hudson explains, assessors in the United States often put the land or site price share in home price values at forty to as much as sixty percent, the upper end of which pushes well beyond what the Federal Reserve, also following a residual-of-structure cost method, reaches. The

bouts of declining aggregate structure cost value were outstripped by corresponding periods of increasing aggregate land price value.

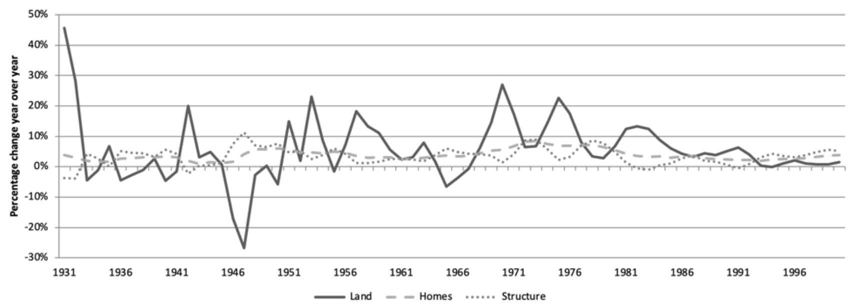

Figure 2: Percent Change in Prices of Homes, Land, and Structures, 1931–2000

There is an important related point that Figures 1 to 3 do not fully make clear, given that the series represented ends in 2000. As Davis and Heathcoate are able to extrapolate further in their paper, this is, namely, that this doubling in aggregate land price value's share in aggregate home price value was higher than the corresponding increase that took place amidst the peak years of the housing bubble of the early 2000s. In the decade from 1996 to 2006, in other words, aggregate land price value's share in aggregate home price value increased only about ten percent—moving from its late 1990s dip down to thirty-four percent to a 2006 level of forty-six percent.[197] Among the noteworthy implications of this fact would thus seem to be that the bubble of the 2000s was neither anomalous nor "unique in history" as has been argued by many prominent commentators.[198]

A last aspect of the picture that Figures 1 to 3 help paint has to do with issues raised in Part III about the inflationary effects of attaching debt to assets that are already in place. For example, as Davis and Heathcoate point out, and as Figures 1 to 3 imply, there are evidently "intrinsic differences in the price dynamics of new versus existing homes," with "typical newly built homes and

problem with the Fed's method is that by "valuing buildings at their reproduction cost, including capital gains that reflect[ ] rising construction costs" it "leaves an unrealistically low residual for land." Moreover, doing so may "make[ ] land prices appear more volatile than overall real estate." HUDSON, *supra* note 64, at 264–65.

[197] Davis & Heathcoate, *supra* note 177, at 2616.

[198] *Id.* at 2617 (citing ROBERT J. SHILLER, IRRATIONAL EXUBERANCE 2 (2d ed. 2005)); *see* Carmen M. Reinhart & Kenneth S. Rogoff, *Is the 2007 U.S. Sub-Prime Financial Crisis So Different? An International Historical Comparison*, 98 AM. ECON. REV. 339, 342 (2008) (considering a different kind of rejoinder).

existing homes" proving to be "quite different goods."[199] By 2006, when aggregate land price value reached about half of the aggregate value of the country's housing stock, buyers were thus paying "40% more on average for existing homes relative to newly built structures of similar size and quality."[200] One inference to draw from this, of course, is the one that the authors do directly: namely that "a large fraction of the market value of land under existing houses reflects the value placed by home-buyers on these older homes' locations, and that the locations of newly built houses, on average, are considered much less desirable."[201] Here, we should not fail to realize that "the quantity of new development" was and remains "small relative to the existing stock of housing."[202] Yet as suggested at the top of this paragraph, given the fact that aggregate housing price value increasingly comes from scarcity premiums for sites, and eventually will mainly do so, there is another possible inference worth considering as well. This concerns whether new financial forms tied legally to real estate are proprietary not just because they are rooted in the value of housing stock but also because they are rooted in payments of scarcity rent that is routed through it. Indeed, this is all the more compelling to the extent that such rent overlaps with the kind of rent that was central to making *land* the right to property's "keystone" form starting at least from the seventeenth-century, at a time, ironically, that most property scholars would call "feudal."[203]

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[199] Davis & Heathcoate, *supra* note 177, at 2608.

[200] *Id.* at 2608–09.

[201] *Id.* at 2609.

[202] *Id.* at 2613.

[203] *See* Rose, *supra* note 96, at 334–37. Of course, among historians of medieval Europe, the "feudal" age proper is often restricted to the period from the ninth to thirteenth centuries. *See, e.g.*, F.L. GANSHOF, FEUDALISM 131–32, 150 (Philip Grierson trans., 1996).

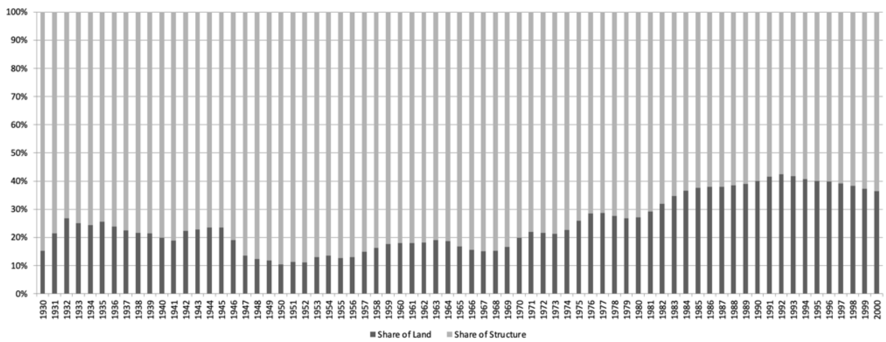

Figure 3: Aggregate Home Prices: Share of Structures vs. Share of Land, 1930–2000

Turning briefly to Figures 4 to 6, three points are worth making explicit. First, as expected, despite the limited portrait based on only six states, the aggregate tendency is corroborated at the state level as well. That is, as Figure 4 and the solid lines in Figure 6 for each relevant state suggest, after 1975 and 1985 respectively and until 2006, the land price value component of house price values increased in every state. In the major metro areas, as Figure 5 shows, they either increased or remained at a steady high relative to the overall share of land price values in home price values for the state each metro area is located. Indeed, notwithstanding the clearly enormous downward ratchet of the bursting of the last housing bubble, by 2016 the same overall trend was restored for each of the six states amidst the recovery and reinflation of the housing market after 2012. As Figure 5 suggests, some metro areas show a land price value component that is yet to again surpass the 1985 level or pre-2006 low.

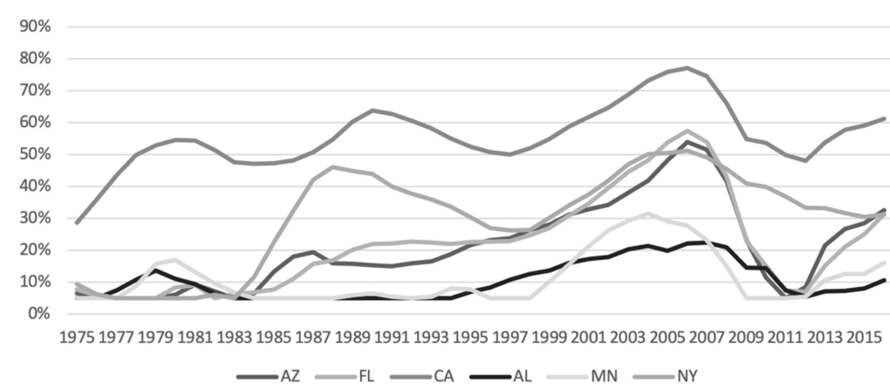

Figure 4: Land Prices as Share of Home Prices in Six States, 1975–2016

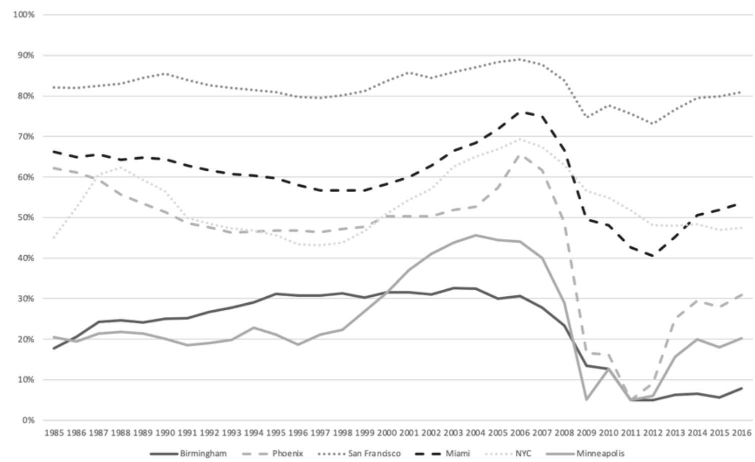

Figure 5: Land Prices as Share of Home Prices for Six Metros, 1985–2016

Second, both relative to the six states selected and all six selected metro areas in these states, the central observation from the aggregate data about land price value being driven by scarcity premiums is again borne out. That is, it is in the places that intuition tells us are the hottest real estate markets, and those which we would informally call the ripest for speculation, that the scarcity value of sites has paid the highest premiums. This is evidenced both in the generally greater share that land price value has played in the prices of homes in these areas and the sharp ascent of land price value's share of home price value in boom times. Indeed, this latter observation applies with respect to both those states and cities that are conventionally considered to be the hottest real estate markets. That is, what intuition would tell us are the most overheated of the six state-level real estate markets—namely, California, New York, and Florida, or, perhaps, Arizona—are the ones where land price values in the corresponding states have made for the highest, and during boom times most sharply ascending, share of their respective aggregated home price values. Likewise, what intuition tells us are the most overheated markets in each of the six states—namely, their respective major metros—are also areas where the share of land price values relative to home price values exceeds the share of land price values in home price values for each respective state as a whole. Finally, as is hinted in Figure 6, there is another point to emphasize that Davis and Heathcoate also make: in states where homes are "relatively expensive (reflecting pricier land), house prices have historically been more volatile" while also "appreciat[ing] more rapidly on average."[204]

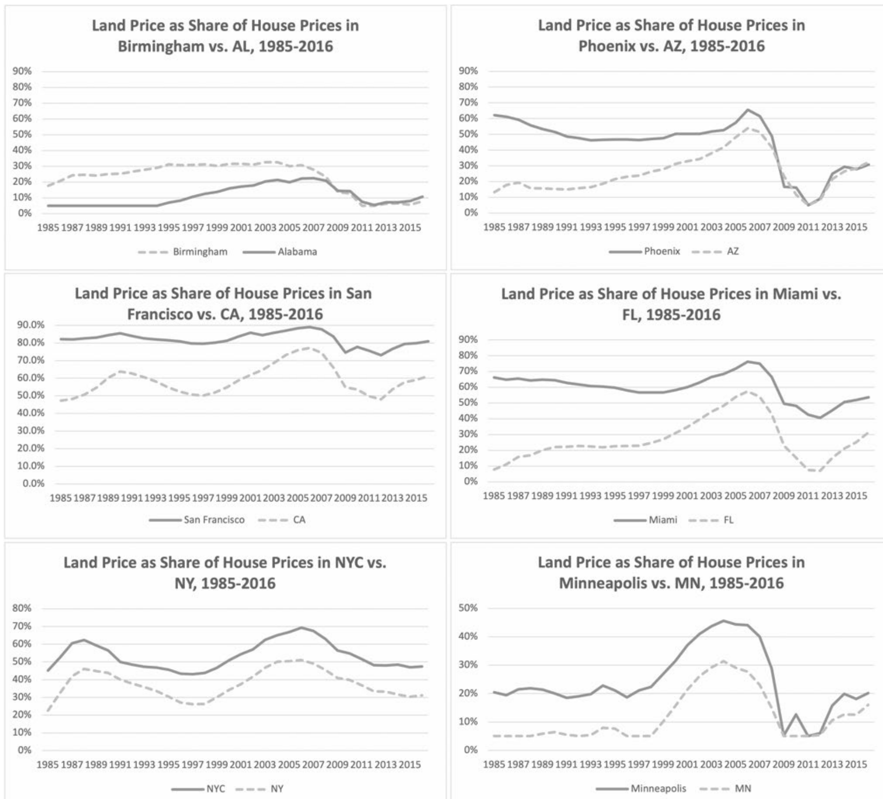

Figure 6: Land Price as Share of House Prices, City vs. State

B. Securitizing Single-Family Rental Payments: Beyond the Democratization of Credit

A final feature of the state- and metro area-level trends in Figures 4 to 6 is worth highlighting as well. This follows from looking at the Great Recession years, from roughly 2007 to 2012. As noted in Section IV.A, since 2012, the share of land price values in the composition of home price values in all six state and metro areas has resumed its upward trajectory—and has now surpassing its level during the boom of the mid-1980s in most places. As Davis and Heathcoate's analysis makes explicit, and as Figures 4 to 6 also suggest, the post-bubble collapse showed up in the outsize

[204] Davis & Heathcoate, *supra* note 177, at 2618.

effect of the decline in land price values on the overall decline in home price values. Of the six states, Arizona is most striking, which may seem surprising given its land-rich status. Arizona thus serves as a reminder that scarcity is not just a function of open land area but also differential public goods investment, which makes it more appropriate, if less intuitive, to speak of land's site scarcity.

There is a second way that Arizona's trend—inclusive of that for its major metro area of Phoenix—is telling as well. This is due to another factor at work in the extended aftermath of the crisis brought on in 2007—namely, a decline in home price values that coincided with a rise in the rent-to-price ratio for owner-occupied housing across the country. That is, as purchasing homes became less desirable—or, more accurately, unattainable—a greater number of people were in need of renting rather than buying. This is evident from Figure 7, which is taken directly from another of Davis' articles.[205] Indeed, it was in states like Arizona and areas like Phoenix that the more lucrative market for rentals and the large number of vacant, bank-owned, or underwater homes first paved the way for the new form of real estate securitization in the form of the SFRBS.[206]

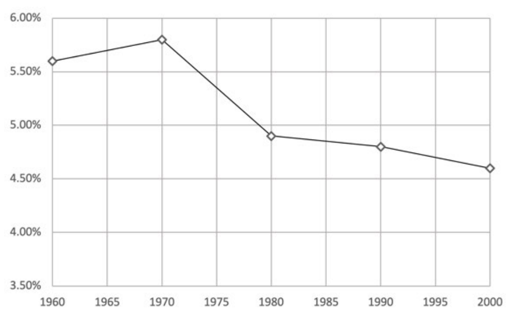

Figure 7: Gross Rent-Price Ratio Owner-Occupied Housing, 1960–2000[207]

Since their emergence in 2013, SFRBS offerings have grown and mutated rapidly in structure. Initially, private equity firms

[205] Morris A. Davis, Andreas Lehnert & Robert F. Martin, *The Rent-Price Ratio for the Aggregate Stock of Owner-Occupied Housing*, 54 REV. INCOME & WEALTH 279, 283 fig.1 (2008).

[206] Deirdre Pfeiffer & Joanna Lucio, *An Unexpected Geography of Opportunity in the Wake of the Foreclosure Crisis: Low-Income Renters in Investor-Purchased Foreclosures in Phoenix, Arizona*, 36 URB. GEOGRAPHY 1197, 1213 (2015).

[207] *See supra* note 205.

like the Blackstone Group were simply buying up single-family homes left over from the housing crisis at cut-rate prices.[208] They did so to create a new portfolio of real estate owned ("REO") rental properties.[209] These, in turn, could be leased back to the foreclosed, among the various others now priced out of the homeownership market.[210] Very quickly, however, private equity firms partnered with investment banks to prepare a new class of real estate derivatives through the pooling of rental payments from such homes and slicing them into different tranches with varying levels of potential risk and reward.[211] As with the MBS before it, the new form of bond property that resulted allowed investment banks to attract institutional investors like hedge and pension funds to invest their large quantities of liquid capital—itself garnered either directly from earned incomes originating elsewhere in the productive economy or from credit created out of such incomes elsewhere in the financial economy—in search of yield.[212]

If 2013 was the turning point for the SFRBS, it was partly because by then the economy's ostensible recovery was seeing land prices resume their historically upward ascent compared to relatively flat structure prices. The still-high rent-price ratio was also likely necessary to spark initial investor interest, especially since ratings agencies like Fitch refused to assign ratings to the new products due to the absence of historical performance data, among other reasons.[213] Of course, to the extent that the resurgence of house price values suggested that the rent-price ratio would fall, other trepidations about whether the SFRBS was built to last resulted from fears specific to the rental market.[214] Yet various reasons for confidence also persisted. These included the oft-cited shift in the supposed preferences of millennials away

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[208] Pfeiffer & Lucio, *supra* note 206, at 1200.

[209] *See*, *e.g.*, Morgan W. Pierson, REO to Rental: The Creation of a New Asset Class and the Transformation of the American Single-Family Landscape 17 (Jan. 17, 2014) (M.S. thesis, Massachusetts Institute of Technology) (on file with the Massachusetts Institute of Technology Libraries). Relatedly, as Stein notes, by 2016 some "37 percent of home sales were [being] made to absentee investors." STEIN, *supra* note 151, at 3.

[210] Pierson, *supra* note 209, at 20.

[211] *See id.* at 50.

[212] *See id.* at 19–20.

[213] John Layton, *Single-Family Rental Securitizations*, PENNSTATE: INST. FOR REAL EST. STUD. 1, 3 (2015), https://www.smeal.psu.edu/ires/documents/single-family-rental-securitizations-spring-2015 [https://perma.cc/TKK6-QN58].

[214] *See, e.g.*, Tracy Alloway, Anjli Raval & Arash Massoudi, *Zeal for Blackstone Home Rental Bond Fades*, FIN. TIMES (Feb. 4, 2014, 4:50 AM), https://www.ft.com/content/74447996-8cf2-11e3-ad57-00144feab7de (subscription required).

from owning, which are undoubtedly better seen as deriving from necessity.[215] There was also the likelihood that pouring money into the single-family home market would re-inflate prices and create a new class of "[p]redatory [r]entals" owned by "Wall Street landlords" whose distance from tenants would make it easier to charge assorted new fees and more aggressively push up rates.[216] Residents of Colony Capital's Colony Starwood homes in Los Angeles, for example, have had to absorb a nine- to thirteen-percent increase in payment rates to stay in their homes.[217]

All told, by autumn 2013 Blackstone had readied to issue the first SFRBS in a deal backed by Deutsche Bank. The typically Byzantine structure is laid out in Figure 8.[218] Known as the Invitation Homes 2013-SFR 1, the bond was backed by 3,207 single-family rental homes spread across Arizona, California, Florida, Georgia, and Illinois,[219] selected from some 40,000 then owned by Blackstone.[220] While distributed in a number of states, the underlying assets underlying the bond were highly concen-

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[215] WonJu Sul, *Single-Family Rental Securitization: Where Are We and Where Will We Be?*, CRE FIN. WORLD, Autumn 2015, at 22, 23. Of course, as the housing market has moved further out of its historic crash, the reasons for confidence have also congealed into something more like a new reality, albeit one premised on "a housing recovery without a homeowner recovery." Francesca Mari, *A $60 Billion Housing Grab by Wall Street*, N.Y. TIMES (March 5, 2020), https://www.nytimes.com/2020/03/04/magazine/wall-street-landlords.html [https://perma.cc/MV85-6NCU]. At least within the first half-year of the Coronavirus crash, it would appear that even despite warnings of an impending eviction crisis the gains wrought from the homeownerless housing recovery have yet remained intact. *See* Jen Kirby, *America's Looming Housing Catastrophe, Explained*, VOX (July 8, 2020, 10:00 AM), https://www.vox.com/21301823/rent-coronavirus-covid-19-housing-eviction-crisis [https://perma.cc/HGB5-6RKU]; *Why, Despite the Coronavirus Pandemic, House Prices Continue To Rise*, ECONOMIST (Sept. 30, 2020), https://www.economist.com/finance-and-economics/2020/09/30/why-despite-the-coronavirus-pandemic-house-prices-continue-to-rise [https://perma.cc/2LHF-373H]. *But see* Shehryar Qazi, *Another Real Estate Crash Is Coming*, JACOBIN (May 16, 2020), https://jacobinmag.com/2020/05/real-estate-crash-pandemic-coronavirus [https://perma.cc/8HLV-ZEGX] (sounding a skeptical alarm about the intermediate term health of the housing, real estate, and mortgage-related markets amidst the Coronavirus crisis).

[216] All. of Californians for Cmty. Empowerment Inst., *Financialization of Single-Family Rentals: The Rise of Wall Street's New Rental Empire*, KCET: CITY RISING (Oct. 4, 2017), https://www.kcet.org/shows/city-rising/financialization-of-single-family-rentals-the-rise-of-wall-streets-new-rental [https://perma.cc/N5KY-RW63].

[217] *Id.*

[218] Elora Raymond, *Are Single-Family Rental Securitizations Here To Stay?*, FED. RSRV. BANK OF ATLANTA: REAL EST. RSCH. (May 16, 2014), https://www.frbatlanta.org/blogs/real-estate-research/2014/05/16/are-single-family-rental-securitizations-here-to-stay [https://perma.cc/SA2L-ASLT]; Pierson, *supra* note 209, at 67 fig.12.

[219] Raymond, *supra* note 218.

[220] Pierson, *supra* note 209, at 59.

trated. About nine percent of the 3,207, for example, were located in Phoenix.[221] There was also further concentration within locales. A mapping of the included houses in Phoenix shows that the assets backing the security were concentrated in low- and middle-income neighborhoods, with some "hav[ing] at least one, if not two or three, Blackstone-owned homes on just about every block."[222]

The underlying basis of Invitation Homes 2013-SFR 1 in the 3,207 houses Blackstone selected from its larger stock can be compared to the estimated 14.5 million single-family home rental units existing across the United States at the outset of 2013, as compared to 24.5 million apartment rental units.[223] Indeed, the impending success of Blackstone's Invitation Homes 2013-SFR 1 offering meant that already by the third quarter of 2013 competition for purchasing single-family homes began to heat up, especially as real estate investment trusts ("REITs") became interested.[224] While there were no REITs in the business of purchasing single-family properties in 2011, as the Blackstone Group's efforts were beginning to come to fruition, the first REIT devoted to doing so emerged in the form of the Silver Bay Realty Trust Corporation, which at the very end of 2012 had an initial public offering of $300 million with a market capitalization of $709 million.[225] By the third quarter of the next year, 2013—just as Blackstone was issuing the Invitation Homes 2013-SFR 1 product—Silver Bay, along with two other new REITs that were formed to compete with it, committed to spending over $600 billion on single-family housing stock.[226] By 2014, these three REIT's

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[221] Laura Gottesdiener, *How Wall Street Has Turned Housing into a Dangerous Get-Rick-Quick Scheme—Again*, MOTHER JONES (Nov. 29, 2013), http://www.motherjones.com/politics/2013/11/wall-street-buying-foreclosed-homes/ [https://perma.cc/A35R-UEYD].

[222] *Id.*

[223] Pierson, *supra* note 209, at 76.

[224] REITs are companies authorized to own and operate real estate. James Chen, *Real Estate Investment Trust (REIT)*, INVESTOPEDIA (June 30, 2020), https://www.investopedia.com/terms/r/reit.asp [https://perma.cc/3BCT-M7Q5]. First authorized in the 1960s, their founding purpose was analogous to that of a mutual fund investing in the stock markets. *Id.* REITs also invest in other real estate assets. *Id.* Traditionally they did so in either properties themselves or mortgages on properties. It was thus mortgage REITs that characteristically invested in the MBS markets, though there is no absolute distinction between what activities—real estate unit owning versus mortgage debt owning—they can devote themselves to.

[225] Pierson, *supra* note 209, at 70. REITs need not be publicly traded in the way Silver Bay is traded.

[226] *Id.*

alone had succeeding in acquiring some 33,000 units.[227] On average, Silver Bay and the other two REITs are estimated to have spent five to ten thousand dollars on renovations per home, at a total cost of approximately seventy million dollars.[228] Of course, very quickly, reports of poor quality renovation, upkeep, and exploitative landlord practices emerged as well, as they continue to do alongside various other concerns about profiteering on the disadvantaged.[229]

Between the upsurge in REIT activity and the issuance of additional SFRBS offerings—for example, another by Colony Capital appeared in March 2014[230]—it was soon apparent that the market for investing in single-family rentals was a real one. By May 2014, the San Francisco Federal Reserve Bank estimated that institutional players had purchased some 90,000 to 150,000 properties, with fifteen to twenty billion dollars.[231] Two years later, by January 2016, the San Francisco Fed reported that the seven largest institutional investors involved in the single-family REO business controlled some 170,000 units, concentrated, especially, in the Sun Belt states.[232]

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[227] *Id.*

[228] *Id.*

[229] *See, e.g.*, Aaron Glantz, *Profiting off Pain: Trump Confidant Cashed in on Housing Crisis*, REVEAL (June 8, 2017), https://www.revealnews.org/article/profiting-off-pain-trump-confidant-cashed-in-on-housing-crisis/ [https://perma.cc/Y7P6-NY4N]; Darwin BondGraham, *The Rise of the New Land Lords*, E. BAY EXPRESS (Feb. 12, 2014), https://www.eastbayexpress.com/oakland/the-rise-of-the-new-land-lords/Content?oid=3836329 [https://perma.cc/FUN4-SBJ8]; Aimee Inglis & Rhonda Michele Smith, *The New Single-Family Home Renters of California*, TENANTS TOGETHER (May 2015), https://www.tenantstogether.org/sites/tenantstogether.org/files/The%20New%20Single-Family%20Home%20Renters%20of%20California.pdf [https://perma.cc/7NE5-2D2D]; Kenny Stancil, *Wall Street Titan Gloats over Pandemic Profits from Rentals as Eviction Tsunami Looms*, SALON (Dec. 19, 2020, 5:30 PM), https://www.salon.com/2020/12/19/wall-street-titan-gloats-over-pandemic-profits-from-rentals-as-eviction-tsunami-looms_partner/ [https://perma.cc/6HY5-XVJN].

[230] *See* Glantz, *supra* note 229.

[231] Raymond, *supra* note 218.

[232] Desiree Fields, Rajkumar Kohli & Alex Schafran, *The Emerging Economic Geography of Single-Family Rental Securitization* 1 (Fed. Rsrv. Bank of S.F. Cmty. Dev. Inv. Ctr., Working Paper No. 2016-12, 2016), https://www.frbsf.org/community-development/files/wp2016-02.pdf [https://perma.cc/8JTY-7HTL].

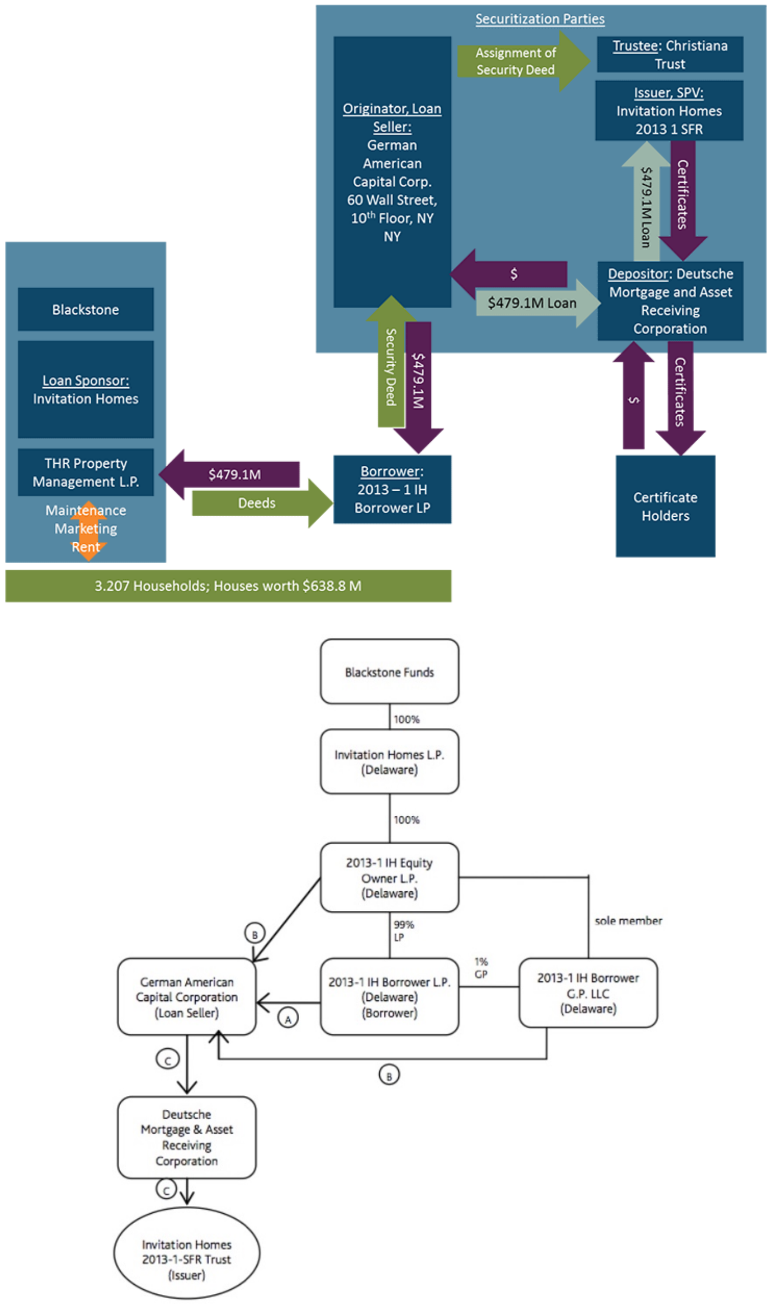

Figure 8: Two Snapshots of the First SFRBS[233]

[233] *See* sources cited *supra* note 218.

Within just four years, some one percent of the country's fourteen to fifteen million renter-occupied single-family properties had been absorbed, with the greatest number situated in the Phoenix area.[234] Yet this likely underestimates the true significance. Other estimates, for example, point out that private equity firms have brought some untold additional number of homes into their single-family rental stock by making ongoing purchases through "proprietary software and algorithms" that "instantly bid on thousands of homes at auctions across the country," thus crowding out ordinary purchasers.[235] As various REITs have further gone public, now subjecting them to the further demands of equity owners demanding shareholder value, this additional form of securitization represents a major "paradigm shift for the single-family rental market," as the San Francisco Fed put it.[236] Indeed, by February 2017, Invitation Homes transformed into the country's biggest REIT specializing in single-family home purchases, with its industry pioneer parent, the Blackstone Group, raising "$1.54 billion in an initial public offering" for "77 million shares [priced] at $20 each."[237]

Moreover, after the first initially uncertain two years, SFRBS assets have now evolved into a hybrid between the earlier residential and commercial MBS, and the largely unregulated market is now even further blurring the line between rental- and mortgage-backed securities. In addition to so-called multi-borrower deals,

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[234] *Id.* at 3.

[235] All. of Californians for Cmty. Empowerment Inst., *supra* note 216. There has also been a steady stream of ongoing reporting on these matters. *See, e.g.*, Desiree Fields, Alex Schafran & Zac Taylor, *Wall Street Landlords Are Chasing the American Dream—Here's What It Means for Families*, CONVERSATION (Sept. 7, 2017, 8:49 AM), https://theconversation.com/wall-street-landlords-are-chasing-the-american-dream-heres-what-it-means-for-families-82146 [https://perma.cc/6SYZ-34GR]; Rebecca Burns, *You Think Your Landlord Is Bad? Try Renting from Wall Street*, INTERCEPT (Jan. 20, 2018, 7:00 AM), https://theintercept.com/2018/01/20/you-think-your-landlord-is-bad-try-renting-from-wall-street/ [https://perma.cc/2PB9-2M48]; Alana Semuels, *When Wall Street Is Your Landlord*, ATLANTIC (Feb. 13, 2019), https://www.theatlantic.com/technology/archive/2019/02/single-family-landlords-wall-street/582394/ [https://perma.cc/G3SM-UF5M]; Mari, *supra* note 215.

[236] Fields, Kohli & Schafran, *supra* note 232, at 1. The Bank reports that Phoenix-Mesa-Glendale, Arizona, played host to 8,080 properties owned by new institutional landlords and patched into REIT/SFRBS holdings, with an average market value of $173,897 and an average monthly payment of $1,078. *Id.* at 4. Atlanta, Georgia, was second, with 7,306 units, and Tampa-St. Petersburg-Clearwater, Florida, was third with some 4,395 single-family home units absorbed by investors. *Id*.

[237] Diana Olick, *Blackstone Takes Its Single-Family Rental Bet Public as Sector Soars*, CNBC (Feb. 1, 2017), https://www.cnbc.com/2017/02/01/blackstone-takes-its-single-family-rental-bet-public-as-sector-soars.html [https://perma.cc/9U3Q-G3PP].

newer SFRBS products are now moving in the direction of pooling together real estate assets consisting of *both* the rental payments from the ever-increasing number of single-family homes that private equity firms are buying up *and* mortgage payments from ordinary owner-occupied homes.[238]

C. Some Normative Alternatives

One way to assess the normative dimension of the SFRBS might be from a perspective of the kind that scholars of securities, banking, and business law have devoted to earlier forms of securitization. However, one will quickly see that the lion's share of such attention emerged only after the Great Recession, usually while looking back on the bursting of the housing bubble as the precipitating event.[239] Given its relative novelty, however, the securitization of rental payments discussed in Part IV is yet to lend itself to such retrospective treatment. As a result, the rise of the SFRBS is more likely to be comprehended in the way the upsurge in MBS products was for much of the 1980s and 1990s. That is, it is more likely to be viewed through the lens of technical questions about the structuring of the underlying deals that SFRBS products are built on.[240]

Indeed, much as the RMBS was when the market for that product began to be ramped up in the late 1990s, the SFRBS to date has been normatively justified in the way securitization more generally has been: as a means of promoting liquidity[241] in the

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[238] *See, e.g.*, Lorenz Schwarz & Laura Ferris, *Single-Family Rental Securitization: The Evolution of a New and Growing Asset Class*, J. STRUCTURED FIN., Fall 2015, at 15, 15, 18; Fields, Kohli & Schafran, *supra* note 236, at 2.

[239] *See generally* Kenneth C. Kettering, *Securitization and Its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553 (2008); Tamar Frankel, *The New Financial Assets: Separating Ownership from Control*, 33 SEATTLE U. L. REV. 931 (2010); Levitin & Wachter, *supra* note 146; Steven L. Schwarcz, *Shadow Banking, Financial Markets, and the Real Estate Sector*, 32 REV. BANKING & FIN. L. 179 (2012); Dov Solomon, *From the Great Depression to the Great Recession: On the Failure of Regulation in the Mortgage Market*, 42 J. LEGIS. 162 (2016).

[240] *See, e.g.*, David Alan Richards, *"Gradable and Tradable": The Securitization of Commercial Real Estate Mortgages*, 16 REAL EST. L.J. 99, 122–24 (1987); Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 TEX. L. REV. 1369, 1383 (1991); Alan Kronovet, Note, *An Overview of Commercial Mortgage Backed Securitization: The Devil Is in the Details*, 1 N.C. BANKING INST. 288, 296–303 (1997); Douglas Arner, *Emerging Market Economies and Government Promotion of Securitization*, 12 DUKE J. COMPAR. & INT'L L. 505, 512–14 (2002).

[241] *See, e.g.*, Jaume Roig Hernando, *The Securitization of Residential Rental Revenue Streams In Europe*, 10 INT'L J. HOUS. MKTS. & ANALYSIS 503, 508 (2017);

housing market, especially given the sharp contraction in mortgage lending after the crisis.[242] Such justifications are also, as with the RMBS before, further burnished by the idea that securitization is a way of democratizing access to credit and mitigating past inequities in mortgage lending.[243]

To close Part IV, therefore, I will make explicit the Article's alternative framework for approaching the normative dimension of the SFRBS specifically and derivative financial asset property rooted in real estate value more generally. The proposals made below are, taken on their own terms, quite mild. However, they

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Kishore K. Yalamanchili, *Single-Family Rental Securitizations: Residential Wine in a Commercial Bottle*, 21 J. STRUCTURED FIN. 15, 18 (2016). For the generally laudatory reception that picks up on the normative argument from democratizing credit, the best sources are in real-time media discussion. *See, e.g.*, Rob Wile, *Robert Shiller: We May Be on the Verge of a Revolution in the U.S. Housing Market*, BUSINESS INSIDER (Nov. 4, 2013, 5:41 PM), https://www.businessinsider.com.au/shiller-blackstone-product-good-for-housing-2013-11 [https://perma.cc/8EAP-D95D].

[242] While intuitive, this line of reasoning is curious if one recalls the ostensible rationale for the post-2006 bailout. Indeed, maintaining liquidity was the main professed purpose of the seven hundred billion dollars the Emergency Economic Stabilization Act ("EESA") of 2008 authorized for the United States Department of Treasury to buy troubled mortgages, together with its Section 109 provisions on preventing foreclosure by facilitating loan modification. Yet that rationale dissipated in the face of immediate changes that were made to the Act, which allowed banks to sit on the funds and use them for other purposes. As with other parts of the bailout, the promoting liquidity rationale was kept intact largely through inverting its meaning. In public sphere discourse it thus came to imply that liquidity for Main Street would somehow trickle down from the heights to which most of the printed money was directed. In reality, the many trillions of dollars made available through the EESA, the TARP, and related quantitative easing measures have generally been devoted to vastly expanding the funds available for asset-price inflation. *See* Matt Taibbi, *Secrets and Lies of the Bailout*, ROLLING STONE (Jan. 4, 2013, 9:25 PM), https://www.rollingstone.com/politics/politics-news/secrets-and-lies-of-the-bailout-113270/ [https://perma.cc/YU78-LQJL] (discussing the EESA); RASMUS, *supra* note 39, at 260–85 (discussing the TARP, quantitative easing, and the larger twenty-five trillion dollars in central bank created credit globally); *see generally* BAROFSKY, *supra* note 5.

[243] The origin of the phrase—"the democratization of credit"—is often attributed to former Director of the National Economic Council (2001–2002) Lawrence Lindsey. *See* Lawrence B. Lindsey, Remarks to the National Bankers Association, New York, New York: What Do We Do for an Encore? 2 (Sept. 14, 1995), https://fraser.stlouisfed.org/title/938/item/36471 [https://perma.cc/TL8E-NN3D]. The phrase has also been used in the context of securitization and the pre-crisis ascent of the MBS. *See, e.g.*, U.S. DEP'T OF THE TREASURY, GOVERNMENT SPONSORSHIP OF THE FEDERAL NATIONAL MORTGAGE ASSOCIATION AND THE FEDERAL HOME LOAN MORTGAGE CORPORATION 57–58 (1996); THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION 53–60, 119–20 (Picador 2012) (2000); Karen E. Dynan, Douglas W. Elmendorf & Daniel E. Sichel, *Can Financial Innovation Help to Explain the Reduced Volatility of Economic Activity?*, 53 J. MONETARY ECON. 123, 127–29 (2006); Cassandra Jones Havard, *Democratizing Credit: Examining the Structural Inequities of Subprime Lending*, 56 SYRACUSE L. REV. 233, 255–61 (2006).

may appear all the more bold and even politically feasible in light of the reasons discussed in the Introduction there are to think that we may be ready to leave behind the impulse that characterized the initial policy response to the Coronavirus shock that found us largely eschewing structural transformation—much as we did in the aftermath of the 2007 crisis—for measures that instead prioritized channeling free or low-cost money to large corporate and financial actors that have grown accustomed to financial asset price inflation as a modus operandi.

1. Shifting Tax Burdens Back onto Real Estate and Capital Gains

As I noted at the start of Part IV, the key policy question that the perspective from property-as-rent poses has to do with asking how socially useful it is to inflate real estate prices in the way our legal system has encouraged by providing tax breaks for accumulating various kinds of real estate debt. Given constraints of space, the reader can refer back to that earlier part of the discussion, which also made explicit the purpose of disaggregating residential real estate prices in the way I have in Section IV.A. At the most basic normative level of proposing new policy options, therefore, the argument presented at the outset of Part IV stands. Taxing the economic rent of land price inflation—as distinct from real estate price inflation based on rising costs of capital improvements and construction—thus merits serious attention. This is especially important given the way tax policy at the local, state, and national levels has now for decades regressively shifted burdens off of real estate and asset price gains rooted in real estate—not to mention financial asset property more generally—and onto consumption and labor incomes by and of the parts of the population that have little accumulated wealth to tax in the first place.[244]

2. Mis-accounting for Land Price Gains as Structure Cost Increases

In addition to elements of our tax law that allow for the excessive depreciation of buildings, especially in the commercial real estate context, as noted earlier there is reason to think

[244] HUDSON, *supra* note 64, at 95–96; *see generally* EMMANUEL SAEZ & GABRIEL ZUCMAN, THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY (2019).

predominant national income accounting practices overestimate the cost of maintaining and replacing built structures.[245] As a result, the indirect method for inferring land price values by subtracting the replacement cost of structures from the price buyers pay for real estate in the market is liable to have an underestimating tendency. Insofar as the land price component of real estate values is higher than our existing data suggests, therefore, modifying our accounting practices would add to the normative weight of the policy changes discussed in Section IV.C.1.

3. Reframing the Justification from Promoting Liquidity

From the overall perspective this Article has elaborated from Part I to Part IV, how does the default justification of securitization—and financial asset property rooted in real estate value more generally—fare?[246] Is there a way to critically assess the justification of promoting liquidity or democratizing credit without retrospection affording us the luxury of knowing that securitization has evidently exposed the economy to too much systemic risk? What does the SFRBS look like if it is instead surveyed from the standpoint of a conception of property-as-rent that is as authentic to western legal and economic thinking about the right to property as any other? In this final segment of Section IV.C, I discuss the normative dimension of securitization in this more abstract sense.

Of course, one may here feel it appropriate to draw a seemingly important distinction between the residential MBS and the SFRBS. This is because when assessed at the level of the home as a tangible physical shelter, it may appear that the mortgage payments comprising the revenue streams making the RMBS possible are fundamentally different from the rental payments making the SFRBS possible. Indeed, one might even be willing to reflexively grant a *weak* form of the case against the argument of promoting liquidity or democratizing credit in the context of the

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[245] *See* HUDSON, *supra* note 64.

[246] There have also been other critical views on the securitization of rental payments in the limited discussion that exists. *See*, *e.g.*, Stella J. Adams, The Fair Housing Act Implications of the Emerging REO-to-Rental Housing Market 1 (Aug. 13, 2013) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309182; Yves Smith, *Hidden Bomb in Single-Family Rental Securitizations: Trigger Risk,* NAKED CAPITALISM (Sept. 2, 2014), https://www.nakedcapitalism.com/2014/09/hidden-bomb-rental-securitizations-trigger-risk.html [https://perma.cc/YT2G-DKYN]; Pfeiffer & Lucio, *supra* note 206, at 1200–05, 1208, 1213–14.

SFRBS—say, by deeming it vaguely extractive—in exact proportion to one's more considered unwillingness to do so in the other, given the equity building payments that seem to support the RMBS—this is especially the case insofar as RMBS remain an important part of the landscape of financial property. Yet there are a number of problems, both empirical and theoretical, with going only so far as we would be allowed by a mere weak case against the normative argument of promoting liquidity or democratizing credit.

First, at the empirical level, given the more than six trillion dollars in equity capital and wealth that vanished in the wake of the 2006–2007 crisis, it is evidently not so easy to draw a line between equity-building payments and extractive landlord payments.[247] Second, even without referring to the disappearance of Main Street's illusory capital amidst the great unwinding of the post-2006 era, as Section IV.A shows so vividly, many—and eventually most—mortgage payments must be seen as servicing scarcity premiums that derive from land rather than directly building the equity of the ordinary consumer's portfolio. While this would not necessarily be too striking to observers in the eighteenth century, it surely should be to us today, long after the conception of property-as-rent has largely been lost.

What of the problems at the theoretical level with making only a weak case against the normative argument from promoting liquidity or democratizing credit, by making some kind of distinction between the SFRBS and RMBS? Here, the last observation—about the empirical importance of what Section IV.A demonstrates about land's site value—must be understood as also having evident theoretical implications. Indeed, as much is made clear by the very conception of property-as-rent. Less obviously, it is also necessary to consider how more precisely we should understand the role of housing as an asset that exists under the right to property. The idea that RMBS bonds are predicated on equity-building payments in a way that distinguishes them from SFRBS payments is thus true only to the extent that one limits one's perspective in a very particular way. That is, it is true only to the extent that housing's role as property is thought to be fully determined by asking who owns a house in its capacity as a tangible shelter, together with the direct equity value such ownership ostensibly permits to that owner. Yet there are clearly other—and

[247] Landy, *supra* note 38, at 2.

relative to the larger anonymous forces of the global economy, more important—ways that housing is converted into property.

Indeed, coming full circle to where the Article began, every kind of securitization of underlying housing assets demonstrates that the homeowner's "right to exclude" or even "right to exclusively determine use" does not really entail any such thing. In other words, it is not up to the homeowner whether her house is to be excluded from being made into debt-based financial asset property belonging to an investment fund. Indeed, such varieties of use determination are made in complete defiance of whatever the owner may want to the contrary. Instead, various other kinds of use determination will have evidently been taking place simultaneously by the legal system's ability to fashion and distribute even the most seemingly non-bundle-like object as just some additional stick in some other institutional investor's own bundle—or, even, as just some additional stick in some other institutional investor's own stick that is, itself, part of still some other institutional investor's own bundle, as in the case of the CMO as distinct from the RMBS. Ultimately, then, even if we all decided to say that a house's *owner* held the real "*thing*" she *owned* so unitarily as to effectively embody the caricature of the Blackstonian "sole dominion" holder, which no theorist today actually endorses, their right to property would still not consist of any right of *exclusive* use determination let alone absolute exclusion of whatever other kind.

Finally, and still at the theoretical level, the weak case against the argument of promoting liquidity or democratizing credit that normatively underpins the SFRBS, and securitization more generally, does not go far enough, because we should not be confused by semantics. In other words, the underlying payment streams that support the SFRBS are not "rent" because they fail to build equity in the way that the mortgage payments that underlie the RMBS propose to be. Nor, indeed, do the mortgage payments that underlie the RMBS capture "rent" only when a crisis induces a collapse of trillions of dollars in apparent equity. Rather, when considering the normative argument for financial innovation that is rooted in the idea of promoting liquidity or democratizing credit, we must ask whether command over the payments that support both the SFRBS and RMBS amounts to a form of property-as-rent for at least three other reasons: (1) because of the possibility that they service debt that is making claims on future incomes that would otherwise derive from production and productive investment; (2) because much of that debt is, itself, built on real estate lending as the historically largest source of debt in the economy more generally; and (3) because of how much of the real estate debt alluded to under item (2) is, itself, really based on lending against the scarcity premiums of land rather than produced structures.

CONCLUSION

Through a method that has been, by turns, analytical, historical, and empirical, this Article has sought to contribute to ongoing debate about the nature of, and the right to, property in law. Its central argument has been that there is a long-standing conception of property-as-rent that has remained too long neglected, whether by those who offer object-centered views, focusing on property's exclusionary aspect, or those who privilege "propriety," and thus property's social or communitarian rather than economic, preference satisfying, and commoditarian aspect.

In clarifying the roots of the alternative conception of property-as-rent going back to the work of the leading classical economists, and really before, this Article has also emphasized the importance of this conception to the early legal or institutionalist economists during the Progressive Era in the United States and their inheritors. Being more than just an exercise in legal history, however, this Article has put this alternative conception into dialogue with the reality of our post-1970 political economy in order to demonstrate the ongoing importance of legal forms that permit an identity between land, the right to property, and the control of economic rent. As this Article has sought to demonstrate empirically, this is because scarcity premiums associated with the land price component of home price values in the market for residential real estate remain central to the ongoing proliferation of various new forms of debt-based financial ownership claims on society's productive resources. Using the example of one such new form—the SFRBS—this Article ultimately uses all three of its perspectives—analytical, historical, and empirical—to make a normative case against renewing our reliance on exotic varieties of real estate securitization, which continue to be justified mainly based on the argument of democratizing credit.

After the Great Recession, in an age when "[s]tretched [a]sset [p]rices succumbing to [g]ravity" had become a question of *when* rather than *if* well before the Coronavirus shock would again precipitate a crisis of world-historical proportions for American and global capitalism, it was already hazardous to sit content waiting for the distance of retrospection to begin saying "we should have known better."[248] To continue doing so now—after the intensifed financialization of real estate has subsisted side by side with a mounting crisis of affordabilty and increased calls to decommodify the provision of shelter, after not one but two proverbial black swans have appeared in a period of barely ten years, and after the first real signs in decades of a more fundametnal possible shift being afoot in our political economic priorities—would simply be inexcusable.[249]

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[248] Reid et al., *supra* note 39, at 28–52.

[249] NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE xxi–xxii (2d ed. 2012); *see also* U.N. Conference on Trade and Development, *supra* note 7, at II (summarily pointing to "a series of pre-existing conditions that were threatening the health of the global economy before the pandemic hit, including high and entrenched inequality, sluggish growth, weak investment, endemic wage repression in the developed world and precarious working conditions in the developing world"). Also see Deutsche Bank's most recent report on the coming of an "Age of Disorder" that, as it notes, "is hastened, but not caused by, the [C]orona virus[, that] threatens the current high global asset valuations[,] and [that] will see governments and corporates take on even more debt." *See The Age of Disorder*, *supra* note 7.