Antitrust and the Corporate Tax, 1909-1928

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> But besides making the Sherman Law certain, and providing legal machinery, we need administrative machinery… We must know, and know contemporaneously, what business-what big business-is doing. When we know that through an authoritative source, we shall have gone very far toward the prevention of the evils which attend the conduct of business.
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> - Louis D. Brandeis, The Regulation of Competition Versus the Regulation of Monopoly (1912)

Introduction: Corporate Bigness and Democracy

Before the end of the Civil War, there were in the U.S. hundreds of thousands of small for-profit corporations, incorporated under general incorporation laws with minimal interference by the state, and whose shareholders enjoyed limited liability. Those shareholders were relatively limited in number; few corporations before 1865 required massive amounts of capital, and most were small, closely-held enterprises. This enabled the Civil War income tax on corporate income to be imposed directly on the shareholders of corporations.[2]

This state of affairs began to change with the advent of the railroads, followed by the steel and oil companies. With the rise of large corporate enterprises, massive amounts of capital were required, and between 1865 and the 1890s the widely held, publicly traded, non-owner managed enterprises gradually became the norm for U.S. business activities. This was followed, from 1895 to 1904, by a wave of consolidation that left several important business areas dominated by monopolies run by the "robber barons," such as J.P. Morgan's U.S. Steel Corporation and John D. Rockefeller's Standard Oil Corporation.[3]

Between the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914, the question of what to do about "trusts" dominated American political life. Before 1889, the dominant form of amalgamating competing businesses was the trust, because corporations could not hold shares in other corporations, and instead the shareholders would exchange their shares for trust certificates. But in 1889 New Jersey (the "traitor state", according to muckraking journalist Lincoln Steffens) changed its corporate law to allow for holding company structures, setting of a great wave of amalgamations in areas like oil, tobacco, sugar and steel.[4]

This chapter will focus on one attempt to address the "trust problem" by means other than the Sherman Act (which faced some resistance in the courts, as the government lost the E.C. Knight case in the Supreme Court in 1895 and barely won the Northern Securities case in 1905). This was the corporate tax act of 1909, which as will be seen below, was primarily intended as an antitrust measure. However, after the enactment of the Clayton Act and the creation of the FTC in 1914, the corporate tax became less vital as an antitrust measure, and between 1919 and 1928 its antitrust features were largely eliminated.

Before embarking on the history, a few words on the problem of corporate bigness and its relation to democracy are in order. Big Tech is a well-studied example of how bigness in corporations can have ramifications beyond their respective industries. Aside from the intertwined nature of bigness and monopoly mentioned above, bigness itself can also create cross-industry, political, and social impacts.

Historically, industry monopolies and enormous trusts were the subjects of deep case law and vigorous public discussion.[5] Modern concerns over Big Tech evoke historical comparisons of Standard Oil to an octopus, such as over the intensity of acquisitions and market entrenchment led by those companies.[6] The well-documented benefits of network effects and other characteristics of online platforms facilitate rapid growth, often too difficult to challenge by potential competitors.[7]

Other concerns relate to Big Tech's ability to expand beyond their markets and leverage their resources into new, unexplored industries. While some have celebrated the rapid expansion of those industries to the rich investments by Big Tech, potential new start-up companies are possibly being discouraged from entering the market due to the overwhelming financial superiority of existing competitors.[8]

The political concern generated by the prominence of Big Tech has also generated much public attention. The widely publicized Facebook—Cambridge Analytica scandal in 2018 and issues of foreign meddling in American elections were centered around the members of Big Tech, particularly Facebook and Google. Commentators have also pointed out that sustained bigness in industries has historically encouraged the growth of extremist and illiberal, antidemocratic political movements.[9]

Lastly, the social concern generated by Big Tech has been their ability to shape the course of American economic development. Their hegemonic dominance over their respective industries has led some to question whether America's "marketplace of ideas" is facing restrictions and a decline.[10]

In what follows, I will first lay out the history of the corporate tax of 1909 as an antimonopoly measure (part 2). I will then explain why the antimonopoly features of the corporate tax were eliminated in the decade following World War I (part 3). Finally, I will develop a proposal to revive the antimonopoly features of the corporate tax by adopting a progressive tax structure (part 4). Part 5 concludes.

Antitrust and the Corporate Tax of 1909

The current US corporate tax dates to 1909, two years before the Supreme Court decreed the break-up of the Standard Oil Company and the American Tobacco Company in the second case implementing the Sherman Act of 1890.[11] An examination of the legislative history of the corporate tax shows that these two facts were related: The corporate tax was to a significant extent intended in 1909 as an antitrust device to limit the power of the monopolies in several ways. First, the original corporate tax provided for tax returns to be made public, giving the government as well as newspapers and voters information about which corporations were the most profitable and therefore the likeliest targets of antitrust enforcement. Second, the original corporate tax provided that corporate mergers would be taxable and that the profits of one corporation could not be offset by the losses of another. Third, while the original corporate tax rate was only 1%, both proponents and opponents of the tax understood that once such a tax was in place, the rate could be raised to levels that would fulfill Chief Justice Marshall's dictum that "the power to tax is the power to destroy."[12]

The corporate tax of 1909 was the third US federal income tax. The first one was enacted during the Civil War and was allowed to expire in 1872. It did not tax corporations, although it applied a withholding tax on dividends and interest paid by railroads and banks.[13] Instead, the 1864 version of the tax stated that "the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in this section, shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise."[14] This form of pass-through taxation was possible because in the 1860s most US corporations were small and distributed most of their earnings to the shareholders. The imposition of the tax on amounts that were not distributed to shareholders was upheld as constitutional by the Supreme Court in 1870.[15] As a practical matter, most of the tax was collected by withholding on the dividends distributed by railroads and banks, which were the only large corporations.[16]

The second US federal income tax was enacted after the financial panic of 1893 and the resulting recession. At the time, the main source of revenue for the federal government were tariffs imposed on imported goods, which were a highly regressive form of taxation since the poor consumed more of their income in purchasing such goods than the rich. The tariff benefited the manufacturing centers of the Northeast and burdened the agricultural South and West. In addition, as the passage of the Sherman Act in 1890 indicates, there was growing concern in Congress about the growing wealth and power of railroad, sugar and steel magnates, whose wealth was not reached by the state personal property tax because it was in intangible form such as stocks, bonds and trust certificates. In 1894, the Democrats representing the South and West gained a majority in Congress and enacted an income tax.

The 1894 version of the income tax imposed a tax of 2% on the net income of "corporations, companies, or associations doing business for profit in the United States, no matter how created or organized, but not including partnerships."[17] However, Prof. Bank has shown that despite this broad language the intent of the 1894 income tax was not to tax corporations but rather their shareholders.[18] Bank points out that dividends from corporations were excluded from the income of shareholders, and that the individual tax rate was also 2%, so that the corporate tax should be viewed as a withholding device to enforce the individual tax.[19] Moreover, Bank shows that the version of the 1894 income tax passed by the House of Representatives did not tax corporations but only imposed a withholding tax on dividends and interest and on amounts added to surplus, and that this provision was broadened in the Senate to apply to the undistributed income of all corporations.[20] Thus, the 1894 tax should be seen as a natural extension of the Civil War version of the tax, which was aimed at taxing shareholders. Bank further shows that the legislative history of the 1894 act indicates that its intent was to tax the rich shareholders, and not the corporations.[21] Finally, Bank argues that since in 1894 most corporate profits were still being distributed as dividends, a corporate tax was only imposed as a collection device on the shareholders of widely-held enterprises and as an anti-avoidance measure on amounts added to corporate surplus.[22]

The 1894 income tax was short-lived, because the Supreme Court struck it down in 1895 as a "direct" tax that could not under the Constitution be imposed without apportionment by number of residents of each state.[23] The result was that until the adoption of the Sixteenth Amendment in 1913, Congress was barred from imposing an income tax on individuals. This victory of Republican income tax opponents was sealed by the defeat of the Democrats in the 1896 and 1900 elections, which elected to the presidency William McKinley, who as chair of the House Ways and Means Committee was a major advocate for tariffs.[24]

However, the political situation was changed by the rise of the progressive faction within the Republican party and the ascension of Theodore Roosevelt to the presidency in 1901 following McKinley's assassination by an anarchist. Before Roosevelt, the Sherman Act had become a dead letter, because the federal government refused to enforce it despite the rapid growth of the trusts, after having lost the E.C. Knight case in 1895.[25] Roosevelt was determined to use the power of the federal government against the trusts, winning the Northern Securities case and initiating the litigation that ultimately led to the Standard Oil case in the Supreme Court.[26] In addition, Roosevelt established the federal Bureau of Corporations to collect information on corporate activity, which ultimately led to the establishment of the Federal Trade Commission.[27] Roosevelt also proposed unsuccessfully that all corporations should be incorporated under federal rather than state law.

This background explains the enactment of the corporate tax of 1909 as an antitrust device, modeled after an excise tax imposed by Congress in 1898 on the gross income of oil and sugar companies, which was upheld by the Supreme Court in 1899.[28] In 1907, there was another financial panic, during which the federal government was saved from default by the intervention of J.P. Morgan. In response, Roosevelt proposed to re-introduce an income tax, but opponents of the tax were able to postpone its consideration until after the 1908 election. President Taft was not a proponent of the income tax, which he viewed as unconstitutional, but was faced with pressure in Congress from both the Democrats and the progressive wing of his own party, who together outnumbered the conservative Northeastern Republicans.[29]

The debate in 1909 centered on the Payne-Aldrich tariff bill, supported by President Taft and the Northeastern Republicans but opposed by both Democrats and progressive Republicans. The tariff bill was passed in the House by the Republican majority, but in the Senate it faced difficulties because nineteen progressive Republicans threatened to join the Democrats and vote it down. The leaders of the opposition, Sens. Robert La Follette (R-WI) and Joseph Bailey (D-TX) argued that an income tax was required to counter the "envious voice of anarchy" (socialism). Ultimately, the main Republican opponent of the income tax, Sen. Nelson Aldrich (R-RI), met with President Taft in the White House and agreed on a compromise: There would be a corporate excise tax, regarded by both men as constitutional, and a constitutional amendment permitting a federal income tax, which neither Aldrich nor Taft expected to pass.[30] At the same time, the high tariffs would be maintained as the main source of revenue for the federal government. Aldrich explicitly stated in Congress that "I shall vote for a corporation tax as a means to defeat the income tax."[31] This compromise, which included the original corporate tax, passed the Senate 45-34 and the House 195-183 and was signed into law by the President on August 5, 1909.

The 1909 Corporate Tax Act imposed "a special excise tax with respect to the carrying on or doing business" of 1% of net income over $5,000 of "every corporation, joint stock company or association organized for profit" under U.S. law, and every foreign corporation engaged in business in the U.S.. Dividends from taxable corporations were excluded from taxable income, a provision that will be discussed later.[32]

As Prof. Marjorie Kornhauser has shown, the legislative history of the corporate tax of 1909 proves that it was enacted largely as an antitrust device to regulate and limit the power of large corporations.[33] This can already be seen in President Taft's message to Congress of June 16, 1909. The President's message gave three reasons for enacting a corporate tax, rather than an income tax. First, Taft stated that "[t]his is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock."[34] This characterization was needed to preserve the constitutionality of the tax because the Supreme Court had upheld a similar excise tax on sugar and oil companies in 1898, but Taft did not emphasize it because he was well aware that both the privilege of doing business and limited liability stemmed from state law and therefore could not justify a federal tax.[35]

Second, Taft explained that a corporate tax "imposes a burden at the source of the income at a time when the corporation is well able to pay and when collection is easy."[36] While the reference to collection "at the source" suggests that the tax was a withholding tax on the shareholders (referred to as "stoppage at source"), the emphasis is on the corporation's own ability to pay, since a tax on the shareholders was unconstitutional.

Finally, the main reason Taft gives for enacting the corporate tax was the power that such a tax gives the federal government to regulate the trusts. This argument is emphasized much more than the previous ones, since Taft devotes a whole paragraph to it:

> Another merit of this tax is the federal supervision which must be exercised in order to make the law effective over the annual accounts and business transactions of all corporations. While the faculty of assuming a corporate form has been of the utmost utility in the business world, *it is also true that substantially all of the abuses and all of the evils which have aroused the public to the necessity of reform were made possible by the use of this very faculty*. If now, by a perfectly legitimate and effective system of taxation, we are incidentally able to possess the Government and the stockholders and the public of the knowledge of the real business transactions and the gains and profits of every corporation in the country, we have made a long step toward that *supervisory control of corporations* which may prevent a further abuse of power.[37]

Since this paragraph was written at the same time that Taft's Department of Justice was litigating against Standard Oil all the way to the Supreme Court, it is clear that the "abuses" Taft is referring to were violations of the Sherman Act.

The same arguments were repeated in the Congressional debate. While some Senators mentioned the fact that the tax was an excise tax on corporations, and others raised the possibility that the tax could function as a withholding device, most of the discussion revolved around the antitrust features of the tax. In particular, opponents objected to the fact that the tax applied to all corporations, rather than just to the trusts, and also to the exclusion of intercorporate dividends, since holding company structures were the essential feature of the trusts. Proponents replied that it was necessary to impose the tax on all corporations to obtain the necessary information to discover which ones were abusive, and that it would be unfair and unnecessary to the antitrust purpose to tax corporate income twice by not excluding intercorporate dividends.

The excise tax argument was made primarily by proponents who were concerned about the constitutionality of the tax. For example, Sen. Elihu Root (R-NY), who was one of the main drafters of the bill and a personal friend of the President, defended the tax in part as based on the privilege of limited liability.[38] The opponents of the tax replied that this was not a valid basis for taxing corporations, since limited liability derived from state and not federal law.[39]

Opponents of the tax complained that if it were seen as a device for taxing the shareholders, it did not discriminate between wealthy and less wealthy ones. Proponents replied that this was not the purpose of the tax, since a tax on shareholders would be unconstitutional.[40]

Most of the Congressional debate focused on the regulatory, antitrust element of the tax, including both the publicity feature and the direct potential of the tax to limit corporate power. On publicity, Sen. Flint (R-CA), a supporter of the tax, stated that "it would give a certain amount of control of corporations by the national government, publicity as to the conditions and affairs of corporations, and supervision to a certain extent over those corporations."[41] Sen. Dixon (R-MT) stated that he favored the tax primarily because of the publicity feature.[42] Sen. Newlands (D-NV) likewise supported the tax as "securing, through publicity and otherwise, such supervisory control by the National Government as can be constitutionally exercised over corporations."[43] Even Sen. Aldrich (R-RI), the ultra-conservative chair of the Finance Committee, supported the publicity feature.[44] Sen. Cummins (R-IA), who opposed the tax, nevertheless supported the publicity feature because the "revolution in industry" resulting from the rise of large corporations "is simply a prelude to industrial commercial slavery unless the Government intervenes with its strong arm, and it cannot intervene unless it has the information necessary to enable it to act intelligently and wisely."[45]

Other senators emphasized the direct regulatory potential of the tax, even without the publicity feature. For example, Sen. Newlands stated that "I favor also present legislative action imposing an excise tax in such form as to reach the great accumulated wealth of the country, or its earnings, engaged in corporate enterprise."[46] This was not a reference to taxing the shareholders, because he went on to state that "there was no reason why *the great combinations monopolizing these industries* [protected by the tariff] should not pay some part of national expenses as well as the masses of the people who use and consume [their products]."[47] Newlands thus viewed the tax as falling especially on the monopolies.

Sen. Root likewise emphasized the potential of the tax to reach the accumulated wealth of the trusts:

> Mr. President, it has so happened that in the development of the business of the United States the natural laws of trade have been making the distinction [between earned and unearned income] for us, and they have put the greater part of the accumulated wealth of the country into the hands of corporations, so that when we tax them we are imposing the tax upon the accumulated income and relieving the earnings of the men who are gaining a subsistence for their old age and for their families after them.[48]

The same emphasis can be found in the words of opponents of the bill, who favored instead a tax that would be more focused on the trusts. Sen. Cummins, for example, was not opposed to any federal regulation through the corporate tax, just to a tax that indiscriminately applied to all corporations, big or small, as opposed to taxing the great trusts:

If we can regulate our corporations simply through the medium of taxation, we can destroy every trust in a fortnight. It would be a great deal better for the Finance Committee to turn its attention to *the imposition of such a tax upon corporations and the persons who actually need regulation, who are exercising powers that are injurious to the American people,* *destroying competition and invading our prosperity, than to attempt to levy a revenue tax upon all the little shareholders of all the little corporations throughout the length a breadth of the United States.*[49]

Other opponents of the tax also supported the antitrust feature of the tax, comparing it to the excise tax imposed on the gross income of the sugar and oil trusts in 1898. However, they opposed the corporate tax bill because it excluded intercorporate dividends and therefore holding company structures, which ever since New Jersey permitted them became the defining element of monopolies, supplanting the original trusts.

The legislative history thus shows that the original corporate tax of 1909 was primarily an antitrust device. From a modern perspective, it had several features that could be useful to regulate the trusts. The corporate tax of 1909 provided for corporate tax returns to be made public. It imposed tax on corporate mergers, and it did not include a provision for filing consolidated returns. In addition, once the Sixteenth Amendment was adopted in 1913, corporate movements from state to state became taxable to shareholders, which increased the potential of regulatory action by the states. However, as will be seen below, all of these antitrust features were eliminated by 1928, so that the tax lost its antitrust potential, and even the anti-corporate FDR administration was unable to revive those features.

The Unraveling of the Corporate Tax as an Antitrust Measure, 1910-1928

From an antitrust perspective, the 1909 corporate tax was flawed from its inception because of the exemption for intercorporate dividends. That provision, as opponents pointed out, encouraged the formation of holding company structures that were the legal basis for the trusts since New Jersey permitted them in 1889.[50] Proponents replied that it was better to have a corporate tax with an exemption than to not tax the trusts at all.[51]

The 1909 corporate tax did have some promising regulatory features, from an antitrust perspective. The publicity of corporate tax returns ensured that the public and the press would be aware of which corporations were the most profitable and therefore the most likely to be targets for antitrust enforcement. There were no provisions for consolidation, so that the profits of one corporation could not be offset by the losses of another in a holding company structure. Movements of corporations from one state to another resulted in the imposition of tax on the shareholders once the income tax was enacted in 1913. And there were no provisions for tax-free corporate mergers. All of these potentially useful features were dismantled in the period from 1910 to 1928.

The publicity feature was the first to go. It was already subject to criticism before enactment: The New York Times editorialized that it might lead to corporate bankruptcies because creditors will be made aware of the assets of the corporation and be induced to call in their debts.[52] Small corporations were concerned that larger competitors might use the information to harm them.[53] Others objected to the publicity feature as an illegitimate use of the taxing power for purposes unrelated to raising revenue.[54]

After enactment, the publicity feature was the main focus of criticism of the tax.[55] The first set of regulations issued by the Treasury acknowledged that there had been criticism but stated that the intent of Congress was clear and repeated the statutory language.[56] But already in

January 1910 the Treasury stated that returns would not be open to public inspection unless Congress appropriated money for that purpose. On February 17, 1910, the IRS issued a directive that contrary to section 6 of the corporate tax act, corporate returns were not to be treated as public records. Congress promptly followed by sharply limiting, and eventually eliminating, the publicity feature.[57]

The next major change came in lifting the corporate tax on mergers and acquisitions, despite their monopolization potential. There had been significant uncertainty whether the individual income tax (as well as the corporate tax) applied to capital gains or rather followed the UK (which did not tax capital gains until 1965) in exempting them. The uncertainty was ultimately resolved by the Supreme Court when it held in four related cases that capital gains were taxable.[58] At the same time, the IRS successfully imposed tax on the exchange of shares when DuPont and then General Motors reincorporated from New Jersey to Delaware.[59] The result of these cases was that corporate mergers as well as migrations from state to state were taxable events, and that created significant potential for using the tax to regulate monopolies since it would tax anti-competitive mergers and enable states to regulate corporations in the knowledge that they could not migrate.

Congress responded to these cases by gradually creating and then expanding the concept of tax-free reorganization. The Revenue Act of 1918 exempted from tax "reorganization, merger or consolidation", to be defined by the Treasury. Regulation No. 45, promulgated pursuant to the 1918 Act, outlined the types of transactions that were eligible for this nonrecognition treatment. To include cases where-

> corporations unite their properties by either (a) the dissolution of corporation B and the sale of its assets to corporation A, or (b) the sale of its property by B to A and the dissolution of B, or (c) the sale of the stock of B to A and the dissolution of B, or (d) the merger of B into A, or (e) the consolidation of the corporations.[60]

In 1921, in response to the Supreme Court's capital gains and realization cases and the DuPont Delaware transaction, Congress expanded this definition to include—

> a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation (however effected).[61]

This language was further expanded in 1924 to read:

> The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer or its stockholders, or both, are in control of the corporation to which the assets were transferred, or (C) a recapitalization, or (D) a mere change in identity, form or place of organization, however effected.[62]

Why did Congress enact these provisions? Prof. Steven Bank has argued that it was crafting a compromise between an accrual model of taxation (in which capital gains are taxed when they occur) and a consumption or cash flow model (in which capital gains are only taxed when they are consumed).[63] But this is a very modern view of the debate, and does not explain the departure from the regulatory goals of the 1909 act. In addition, the debate about realization that culminated in the Supreme Court's *Eisner v. Macomber* decision (1920) and the capital gains cases (1921-25) both happened **after** the original enactment of the reorganization provision in 1919, and therefore were not relevant to it. Jerome Hellerstein was right in pointing out that there was nothing in the original corporate or individual income tax that required such generous treatment of mergers.[64] In fact, the new provisions run directly counter to the spirit underlying the corporate tax on 1909, since they promote monopolization rather than restricting it. The provisions should be seen, as Hellerstein implied, as reflecting the influence of lobbying by the corporations and their wealthy shareholders, especially since it was not limited to stock consideration. The same Revenue Act of 1918 which invented tax-free reorganizations also invented the foreign tax credit, an unprecedentedly generous provision with no parallel in the world at the time, since it reduced US revenues dollar for dollar for foreign taxes (without even a limit to the US tax rate), and percentage depletion for oil and gas producers, another generous provision since it allows for depreciation without regard to basis. It also eliminated previous limits on the corporate interest deduction, the source of many later problems such as leveraged buyouts.[65] The most plausible explanation for these provisions as well is corporate lobbying of Thomas Adams, the Treasury economist responsible for tax policy.[66]

Prof. Hellerstein explicitly linked the allowance for tax free mergers to antitrust, which was also a major concern in the 1950s (when he wrote the following, the Supreme Court had just blocked the merger of GM and Dupont under the Clayton Act):

> Moreover, in formulating reorganization tax policy, *we must consider the impact of mergers on increased concentration of industry, the development of oligopoly in industry, and the elimination of small businesses basic to the health of our economy.* The extent of oligopolistic tendencies and significant accentuation of economic power in our economy, and the impact of mergers on these developments are open to controversy. But *we are here dealing with a provision of the tax law which extends an extraordinary tax advantage, not afforded to exchanges generally, to the type of transaction which is characteristic of mergers into larger companies.* While we do not have the data from which to ascertain the importance of this tax advantage in encouraging mergers, there is enough over-all

> evidence and there are a sufficient number of individual cases in which this tax factor has been disclosed to have been an element, although perhaps not a major factor, in the determination to merge. This would justify the conclusion that the reorganization provisions tend to encourage the merger movement. *In view of the risks of oligopoly and increased concentration of business and the importance of preserving the separate existence of smaller businesses, it would appear to be sound governmental policy to eliminate this tax incentive to such mergers and to leave the tax law neutral in this area -neutral in the sense that the usual tax results of sales and exchanges under the Code will attach to such mergers*.[67]

Finally, the last and most decisive move to eliminate any limits imposed by the corporate tax on monopolization came when Congress authorized the elective filing of consolidated returns. Ironically, consolidated returns were originally an anti-taxpayer provision: They originated in Regulation 41, Articles 77 and 78, of the War Revenue Act of 1917, which gave the *Commissioner* authority to require related corporations to file consolidated returns "whenever necessary to more equitably determine the invested capital or taxable income."[68] In 1921 the Commissioner was authorized by statute to consolidate the accounts of affiliated corporations "for the purpose of making an accurate distribution or apportionment of gains, profits, income, deductions, or capital between or among such related trades or business."[69] However, in 1928 the consolidated return provision was made elective, so that taxpayers could choose to file a joint return of their profitable and loss-making enterprises. Until 1969, there was not even a provision limiting the acquisition of target corporations for the purpose of using their losses. It is hard to imagine a tax provision more designed to undermine the anti-monopolization role of the original corporate tax.

Can the Corporate Tax Limit Monopoly Power?

The story told above ends on a pessimistic note: The antitrust features of the 1909 corporate tax were eliminated one by one, until by 1928 none were left. Moreover, the anti-corporate FDR administration was unable to reinstate them, despite putting some limits on the dividends received deduction and on tax-exempt reorganizations.[70] And even if we could reverse these changes by, e.g., eliminating the dividends received deduction, tax-free mergers and consolidated returns, this will not significantly change the business model of today's monopolists (and would adversely affect non-monopolists).

However, I would like to suggest that tax law can in fact be useful in limiting monopoly power. Specifically, I would advocate for reinstating another FDR-era reform, albeit in a modified way: a progressive corporate tax.[71]

The current corporate tax is flat: "The amount of the tax imposed by subsection (a) shall be 21 percent of taxable income."[72] Between 1936 and 2017, there was some progressivity in the corporate tax, but it applied only to small corporations, most of whom were not subject to it. A flat rate of 35 percent applied to taxable income of corporations over $10 million, and a surtax eliminated the progressive rate structure for taxable income above $15 million.[73]

The rationale for the flat corporate tax was that corporations do not bear the burden of the tax, people do, and so it was an inappropriate vehicle for redistribution because the incidence of the tax was not clear (it could fall on shareholders, on all capital providers, on employees, or on consumers, depending on the economic model used).[74]

But if the main reason to have a corporate tax is to tax rents and limit monopolies, then the tax should have a different rate structure than we have now. I would suggest that the effective tax rate on normal corporate profits should be zero. On super-normal returns, since the main concern is monopolies and quasi-monopolies, the tax should be progressive, with a very high tax rate (e.g., 80%) for profits above a very high threshold (e.g., $10 billion). In between, there should be a series of graduated tax rates, similar to the individual rate schedule before 1980.

Normal Returns

There is no reason to tax corporations on normal returns. Normal returns are the risk-free return from investing in e.g. US Treasuries. In recent years, these returns have been quite low, but they have historically been higher. However, from the point of view of only applying the corporate tax to rents, these returns should be exempt. In addition, there is uncertainty about the incidence, which suggests that a tax on normal returns is less likely to contribute to the progressivity of the system. Finally, the deadweight loss from the corporate tax arises from the tax on normal returns, since a tax on pure rents does not generate deadweight loss (i.e., does not change taxpayer behavior, since taxpayers not subject to any competition would derive net profit from rents even if 99% of them were taxed away).

Since from a political perspective a zero tax rate on normal returns is unlikely to pass, and since it is hard to determine what normal returns are, I would suggest that we keep the current flat rate of 21% on corporations (with no de minimis exception, since small corporations are likely to be pass-throughs), but allow for permanent expensing of capital expenditures. Under the Cary Brown theorem, such expensing is equivalent to an exemption for the normal return to capital.[75] As explained below, however, we should not allow expensing for R&D, since that typically generates rents, nor a deduction for interest, since combining it with expensing generates negative tax rates.

Super-normal Returns (Rents)

Economists are unanimous in supporting a tax on rents since (a) it does not create deadweight loss and is therefore efficient, and (b) it falls on the above normal return to capital and is therefore progressive.

Above the de facto exemption resulting from expensing, the corporate tax should be sharply progressive. In order not to create sudden jumps in the marginal tax rate, progressivity should be gradual, similarly to the way the individual tax was structured when it was more progressive (before 1980).

The reason to have a progressive tax on rents is that in addition to targeting rents, we also want to discourage bigness, which is equivalent to monopoly or quasi-monopoly status. The less competition a business firm faces, the more profitable it is likely to be, because competition generally drives down prices. That is why our most monopolistic firms are also the most profitable, and why they engage in behaviors like "killer acquisitions" designed to eliminate competition.[76]

At the top, the corporate tax rate should be 80% for income above $10 billion.[77] In 2019, this rate would have applied to the Big Tech: Amazon ($10.1 billion), Apple ($59.5 billion), Facebook ($22.1 billion), Google ($30.7 billion), and Microsoft ($16.6 billion). Other corporations that had profits over $10 billion in 2019 include other major tech companies (Intel, Micron), Big Banks (Chase, Bank of America, Wells Fargo, Citi, Goldman Sachs, Visa), Big Pharma (Pfizer), Big Oil (Exxon, Chevron), Big Telecomm (AT&T, Verizon, Broadcom), United Health, Boeing, and some major consumer brands (Johnson & Johnson, Home Depot, Disney, Pepsi). All of those enjoy some degree of monopolistic or quasi-monopolistic status.[78]

Such a high tax rate would make corporate regulation through the tax highly effective. It should enable Congress to grant deductions for activities it deems desirable, such as job creation during the current recession or in underdeveloped areas of the country, and impose high rates on activities it deems undesirable, such as invading consumer privacy.

In addition, the high rate may persuade the corporations subject to it to split up. Splitting up corporations to reduce their profits and therefore escape the 80% tax rate is actually a feature of the proposal and not a bug: As Lina Khan and others have proposed, we should ideally want to induce Big Tech to divest their anti-competitive acquisitions (e.g., Facebook's acquisitions of Instagram and WhatsApp). And if the tax structure also motivates an actual break-up of the core business (e.g., along geographic or business segment lines), any loss in efficiency would be more than compensated by the removal of the threats to democracy posed by Big Tech.[79]

Besides the rate structure, the new corporate tax should have several other features missing from the current corporate tax.

The Tax Base

The problem with using current definitions of the corporate tax base is that it allows large corporations like Big Tech to pay low effective tax rates because of three factors: Profit shifting to offshore jurisdictions with low tax rates, expensing research and development (R&D), and deducting stock option compensation.

Profit shifting can be dealt with relatively simply by mandating consolidated returns (at the 50% level by vote or value, to prevent tax-motivated deconsolidation without giving up control) and including foreign corporations in the consolidation. The standard objection that this will impede competitiveness does not apply since rents are not subject to competition by definition.

R&D should not be expensed because unlike physical capital expenditures it does not just generate future profits but specifically future rents.[80] Thus, it should be amortized over a 15-year term like acquired intangibles. Unsuccessful R&D can be deducted when it becomes clear that it will not result in future profits.

Stock options should be valued and deducted as wages when granted, as is done for book purposes. There is no reason to pretend that stock options have no value when granted. The same goes for restricted stock and other forms of stock-based compensation.

Interest should not be deductible because combining an interest deduction with expensing results in negative tax rates. In addition, under current conditions much interest is effectively guaranteed by the government so it should not receive a tax subsidy as well.

Anti-Avoidance provisions

The most important anti-avoidance provision for public companies controlled by their founders is already in the Code: Section 877A prevents the controlling owners of Big Tech from expatriating and selling their shares with no tax. However, if the mark to market proposal raised above is adopted, this will be irrelevant if it is applied to the entire unrealized appreciation. If that move is not politically feasible, a high tax rate (discussed below) of 50% should be applied upon expatriation.

In addition, inversion transactions can be prevented, as the Obama administration proposed, by (a) reducing the section 7874 threshold to 50%, and (b) redefining corporate residence as location of the headquarters.

Shareholder Taxation

Ideally, shareholders in public corporations should be taxed on a mark to market basis, including on past unrealized appreciation. In addition, accrual taxation should be applied to non-publicly traded property as well by adding an interest charge when the property is sold and abolishing the section 1014 step-up. Those steps should enable the US to adopt a significantly more progressive system of individual taxation, up to e.g. 50%, for all income (including dividends).[81] Capital gains will not be taxed to domestic US shareholders, but stock buybacks as well as dividends should be subject to withholding tax for foreign shareholders not subject to the mark to market regime.

Taxing actual dividends in addition to mark to market may seem like double taxation, but in practice it is not because the market value of stock is not a good proxy for underlying corporate earnings, and the receipt of dividends increases ability to pay as much as capital gains (which will be taxable under either mark to market and/or the higher tax rates). Dividends as well as interest should not be deductible.

Conclusion

This chapter has sought to tell the story of the origins of the corporate tax as an antitrust device and to develop a proposal for a new corporate tax that could be appropriate for targeting rents earned by large, monopolistic or quasi-monopolistic enterprises like the Big Tech. Its main recommendations are that normal corporate returns should be functionally exempt by allowing permanent expensing for capital expenditures, but that super-normal returns should be taxable on a progressive basis (up to 80% above $10 billion in profit) and on a broad base that (a) includes foreign subsidiaries, (b) disallows current R&D and interest deductions, and (c) limits deductions for stock-based compensation to value on date of grant. In addition, I recommend a mark to market regime for shareholders as well as full taxation of dividends at a progressive rate of 50%, but would allow for tax-free split-ups. These steps should complement antitrust enforcement to bring our large monopolies down to a normal size, without creating deadweight loss.

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[2] Act of July 1, 1862, ch. 119, sec. 81-82, 12 Stat. 432, 473.

[3] See generally Naomi R. Lamoreaux, *The Great Merger Movement in American Business, 1895-1904* (New York: Cambridge University Press, 1985).

[4] Lincoln Steffens, *The Struggle For Self-Government* 209 (New York: McLure, Phillips & Co. 1906); Edward Q. Keasbey, 'New Jersey and the Great Corporations," 13 *Harv. L. Rev.* 198, 209-11 (1899).

[5] Early American history is rich with public discussion of monopoly, and later trusts. See William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, UCHICAGO L. J. 226—235 (1956); Barry C. Lynn, *Cornered* (Hoboken: Wiley, 2010), 98—113.

[6] See Axel Gautier and Joe Lamesch, "Mergers in the Digital Economy," CESifo Working Paper No. 8056 (Feb. 3, 2020); Colleen Cunningham, Florian Ederer, and Song Ma, "Killer Acquisitions," *Journal of Political Economy* 129, no. 3 (2021); Marc Bourreau and Alexandre de Streel, "Big Tech Acquisitions," Issue Paper: Center on Regulation in Europe (2020).

[7] See Kenneth A. Bamberger and Orly Lobel, "Platform Market Power."

[8] For example, nearly 80% of the virtual reality (VR) device market in 2018 was composed of four multi-billion dollar companies: Sony, Facebook, HTC, and Microsoft. See https://www.statista.com/statistics/755645/global-vr-device-market-share-by-vendor/.

[9] See Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (New York: Columbia Global Reports, 2018), 78—83.

[10] See Lina M. Khan, *Amazon's Antitrust Paradox*, 126 *Yale L. J*. 767 (2017); Barry C. Lynn, *Cornered*, ch 6.

[11] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911). The first case was Northern Securities Co. v. United States, 193 U.S. 197 (1904), a 5-4 decision, following the government's defeat in United States v. E. C. Knight Co., 156 U.S. 1 (1895).

[12] McCulloch v. Maryland, 17 US 316 (1819).

[13] Act of July 1, 1862, ch. 119, sec. 81-82, 12 Stat. 432, 473. Shareholders and bondholders were permitted to exclude dividends and interest subject to withholding from income. Id., sec. 91, 12 Stat. 473-74. On the early history of the corporate tax in the U.S. See generally Steven A. Bank, "Entity Theory as Myth in the Origins of the Corporate Income Tax," 43 William & Mary L. Rev. 447 (2001) ("Bank").

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[14] Act of June 30, 1864, sec. 117, 13 Stat. 282. Under this act a withholding tax was imposed on dividends and interest paid by certain types of corporations and those dividends and interest were excluded from income. Id., sec. 120-122, 13 Stat. At 283-85.

[15] *Collector v. Hubbard*, 79 US (12 Wall) 1 (1870).

[16] Bank, supra, note 24.

[17] Tariff Act of 1894, ch. 349, sec. 32, 28 Stat. 509, 556.

[18] Bank, supra note 24, at 459.

[19] Tariff Act of 1894, ch. 349, sec. 28, 28 Stat. 509, 554; Bank Id., at 462.

[20] 26 Cong. Rec. 6831 (1894).

[21] Bank, supra, note 24..

[22] Bank, supra note 24., at 530-31.

[23] *Pollock v. Farmers' Loan & Trust Co*., 157 U.S. 429 (1895).

[24] On the development of the income tax debate between 1894 and 1913 see generally Randolph E. Paul, *Taxation in the United States* (Boston: Little, Brown & Co., 1954); Marjorie E. Kornhauser, "Corporate Regulation and the Origins of the Corporate Income Tax," 66 Ind. L.J. 53 (1990); Steven R. Weisman, *The Great Tax Wars: Lincoln to Wilson- The Fierce Battles over Money and Power That Transformed the Nation* (New York: Simon and Schuster, 2002); Reuven S. Avi-Yonah, *Corporations, Society and the State: A Defense of the Corporate Tax*, 90 *Va. L. Rev.* 1193 (2004).

[25] See, e.g., George Bittlingmayer, *Antitrust and Business Activity: The First Quarter Century*, 70 *Business History Review* 363 (1996); E.C. Knight, supra, note 11 (rejecting government attempt to break up sugar trust).

[26] Northern Securities, supra, note 11 (5-4 decision, upholding breaking up a trust for the Northwestern railroads); Standard Oil, supra, note 11 (8-1 government victory).

[27] Act of Feb. 14, 1903, ch. 552, sec. 6, 32 Stat. 825. See Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 *Antitrust L.J.* 1 (2003).

[28] Spreckles Sugar Refining Co. v. McClain, 192 US 397 (1899).

[29] Weisman, supra, note 24.

[30] Kornhauser, supra, note 24.

[31] 44 Cong. Rec. 3929 (June 29, 1909).

[32] Tariff Act of 1909, sec. 38, 36 Stat. 112.

[33] Kornhauser, supra note 24, at 53. For the opposite view that the 1909 tax was also designed to tax shareholders see Bank, Steven A., Entity Theory as Myth in the U.S. Corporate Excise Tax of 1909. *Studies in the History of Tax Law*, vol. II, John Tiley, ed., (Portland, O.R.: Hart Publishing, 2006); UCLA School of Law, Law-Econ Research Paper No. 06-02. Available at SSRN: https://ssrn.com/abstract=880100; Steven A. Bank, "The Shareholder-Based Origins of the Corporate Income Tax," Stanford/Yale Jr. Faculty Forum Paper No. 01-02 (2001). Available

at SSRN: https://ssrn.com/abstract=275444 or http://dx.doi.org/10.2139/ssrn.275444. Bank seems to have accepted the regulatory purposes of the 1909 corporate tax in Bank and Ajay Mehrotra., "Corporate Taxation and the Regulation of Early Twentieth-Century American Business," in *Corporations and American Democracy*, ed. Naomi Lamoreaux and William Novak (Cambridge, MA: Harvard University Press, 2017); UCLA School of Law, Law-Econ Research Paper No. 17-18. Available at SSRN: https://ssrn.com/abstract=3084802.
[34] 44 Cong. Rec. 3344 (June 16, 1909).
[35] Spreckles Sugar Refining Co. v. McClain, 192 US 397 (1899), cited by Taft in 44 Cong. Rec. 3344 (1909).
[36] 44 Cong. Rec. 3344 (1909).
[37] 44 Cong. Rec. 3344 (1909).
[38] 44 Cong. Rec. 4006 (July 1, 1909).
[39] "The United States did not create these corporations." Sen. Cummins, 44 Cong. Rec. 3977 (June 30, 1909).
[40] "Shall we levy an income tax upon the stockholders of all corporations for pecuniary profit, without respect or regard to the extent of the income earned or enjoyed by those stockholders" (Sen. Cummins, 44 Cong. Rec. 3955 (June 29, 1909)). See also 44 Cong. Rec. 4008 (July 1, 1909) (statement of Sen. Clapp to same effect).
[41] 44 Cong. Rec. 3937 (June 29, 1909).
[42] 44 Cong. Rec. 3941 (June 29, 1909). See also 44 Cong. Rec. 4000-01 (July 1, 1909) (statement of Sen. Bourne in favor of the publicity feature: "I personally concur with the President that the corporation net-earnings tax, in view of the publicity feature incident to it, is of infinitely greater importance and will be far more beneficial to this country than either the inheritance or income tax.")
[43] 44 Cong. Rec. 3756 (June 24, 1909). See also 44 Cong. Rec. 3759 (June 24, 1909) ("securing information which would enable Congress to act intelligently in future with reference to taxation, the regulation of industrial combinations, and the imposition of tariff duties.")
[44] 44 Cong. Rec. 3930 (June 29, 1909); See also 44 Cong. Rec. 4006-07 (July 1, 1909) (statement by Sen. Root in support of the publicity feature).
[45] 44 Cong. Rec. 3965 (June 30, 1909).
[46] 44 Cong. Rec. 3756 (June 24, 1909).
[47] 44 Cong. Rec. 3761 (June 24, 1909) (emphasis added). See also 44 Cong. Rec. 3762 ("Justice demands that the various forms of manufactured wealth, in whose favor the taxing power of the Nation is so freely exercised, should make some substantial contribution to the national expenses.").
[48] 44 Cong. Rec. 4003 (July 1, 1909); See also 44 Cong. Rec. 4006 (distinguishing between earned income and "accumulated capital" which should be taxed). Sen. Cummins argued that the

corporate tax would not achieve this purpose since it would fall on all shareholders, rather than just on management. 44 Cong. Rec. 4038 (July 2, 1909).
[49] 44 Cong. Rec. 3978 (June 30, 1909) (emphases added). See also 44 Cong. Rec. 4047 (July 2, 1909) (statement of Sen. Hughes arguing that regulation should be done directly). Sen. Cummins also suggested that much higher rates would drive the trusts out of business, 44 Cong. Rec. 4232 (July 7, 1909).
[50] 44 Cong. Rec. 4010 (July 1, 1909) (statement of Sen. Clapp); 44 Cong. Rec. 4230 (July 7, 1909) (Sen. Dolliver). Sen. Aldrich replied that the exemption was necessary to avoid double corporate taxation and that no for profit corporation was exempt from tax. Id., at 4231. On New Jersey, see Edward Q. Keasbey, New Jersey and the Great Corporations, 13 *Harv. L. Rev.* 198, 209-11 (1899).
[51] 44 Cong. Rec. 4036 (July 2, 1909) (statement of Sen. Davis).
[52] NY Times, June 26, 1909.
[53] Kornhauser, supra, note 24, 116.
[54] Kornhauser, supra, note 24, 117.
[55] Kornhauser, supra, note 24, 118.
[56] Kornhauser, supra, note 24, 125.
[57] Kornhauser, supra, note 24, 133. The only remnant was a rule allowing a 1% shareholder to view corporate tax returns, which is still in the Code.
[58] Marjorie E. Kornhauser, *The Origins of Capital Gains Taxation: What's Law Got to Do with it*, 39 Southwestern Law Journal 869 (1985).
[59] *United States v. Phellis*, 257 U.S. 156 (1921); *Rockefeller v. United States*, 257 U.S. 176 (1921); *Cullinan v. Walker*, 262 U.S. 134 (1923); *Marr v. United States*, 268 U.S. 536 (1925).
[60] Treas. Reg. 45, art. 1567, 21 Treas. Dec. 170, 395 (1919). Importantly, this rule was not limited to stock consideration.
[61] Revenue Act of 1921, ch. 136, 42 Stat. 227, section 202.
[62] Revenue Act of 1924, ch. 234, § 203(h)(1), 43 Stat. 253, 257.
[63] Steven A. Bank, "Mergers, Taxes, and Historical Realism," *Tul. L. Rev.* 75 (2000): 1.
[64] Jerome R. Hellerstein, "Mergers, Taxes, and Realism," 71 Harv. L. Rev. 254 (1957). Prior to the publication of Hellerstein's article, the definitive analysis of the subject was a 1938 Columbia Law Review article by Milton Sandberg. See Milton Sandberg, "The Income Tax Subsidy to 'Reorganizations,'" 38 *Colum. L. Rev.* 98 (1938). Both Hellerstein and Sandberg opposed the tax-free reorganization provisions.
[65] See Steven A. Bank, "Historical Perspective on the Corporate Interest Deduction," 18 *Chapman Law Review* 29 (2014); UCLA School of Law, Law-Econ Research Paper No. 14-04. Available at SSRN: https://ssrn.com/abstract=2413968; on the later problems from an unlimited interest deduction see Daniel N. Shaviro, *Decoding The Corporate Tax* (Washington: Urban

Institute Press, 2009), 44, 48; Alvin C. Warren, Jr., "The Corporate Interest Deduction: A Policy Evaluation," 83 *Yale L.J.* 1585, 1585 (1974).
[66] See Michael J. Graetz and Michael M. O'Hear, "The Original Intent of US International Taxation," 46 *Duke L.J.* 1021 (1996). On the Revenue Act of 1918 see also Reuven S. Avi-Yonah, "The Worst Tax Law Ever Enacted?," 47 *International Tax Journal* 45 (2020). Available at SSRN. I hope in the future to be able to re-examine the Adams papers at Yale, which include significant evidence of Adams' close ties to the gas, cement and sugar industries, among others. See Thomas Sewall Adams papers, archives.yale.edu.
[67] Hellerstein, supra, note 64, at 279-80 (emphasis added).
[68] T.D. 2694, 20 Treas. Dec. Int. Rev. 294, 321 *(1918).* See also War Revenue Act of 1917, ch. 63, 40 Stat. 300 (1917).
[69] Revenue Act of 1921, ch. 136, section 240(d), 42 Stat. 260 (1921) (reenacted in Revenue Act of 1924, ch. 234, section 240(d), 43 Stat. 288 (1924), and Revenue Act of 1926, ch. 27, section 240(f), 44 Stat. 46 (1926)).
[70] On the DRD see Steven A. Bank, "When We Taxed the Pyramids," 41 *Florida State University Law Review* 39 (2013); UCLA School of Law, Law-Econ Research Paper No. 13-18. Available at SSRN: https://ssrn.com/abstract=2340152; and Steven A. Bank and Brian R. Cheffins, "The Corporate Pyramid Fable" (January 28, 2010). UCLA School of Law, Law-Econ Research Paper No. 10-01; ECGI - Law Working Paper No. 146/2010. Available at SSRN: https://ssrn.com/abstract=1544023. On tax-free reorganizations see Bank, Steven A. and Mehrotra, Ajay K., "Corporate Taxation and the Regulation of Early Twentieth-Century American Business," in *Corporations and American Democracy*, ed. Naomi Lamoreaux and William Novak (Cambridge, MA: Harvard University Press, 2017).
[71] On the history of the progressive corporate rate see Steven A. Bank, "Taxing Bigness," *Tax Law Review* (2013): UCLA School of Law, Law-Econ Research Paper No. 12-20. Available at SSRN: https://ssrn.com/abstract=2188647
[72]Section 11(b).
[73]Former section 11(b), as in effect before Dec. 31, 2017:

> The amount of the tax imposed by subsection (a) shall be the sum of:
> (A) 15 percent of so much of the taxable income as does not exceed $50,000,
> (B) 25 percent of so much of the taxable income as exceeds $50,000 but does not exceed $75,000,
> (C) 34 percent of so much of the taxable income as exceeds $75,000 but does not exceed $10,000,000, and
> (D) 35 percent of so much of the taxable income as exceeds $10,000,000.
> For a corporation which has taxable income in excess of $100,000 for any taxable year, the amount of tax determined under the preceding sentence for that taxable year shall be

increased by the lesser of (i) 5 percent of that excess, or (ii) $11,750. For a corporation which has taxable income in excess of $15,000,000, the amount of the tax determined under the foregoing provisions of this paragraph shall be increased by an additional amount equal to the lesser of (i) 3 percent of that excess, or (ii) $100,000.

[74]For a recent discussion of the incidence issue and an argument that the corporate tax falls mostly on economic rents and is therefore born by capital, see Edward G. Fox, "Does Capital Bear the U.S. Corporate Tax After All? New Evidence From Corporate Tax Returns," 17 *J. Empirical Legal Stud.* 71 (2020); *see also* Laura Power and Austin Frerick, "Have Excess Returns to Corporations Been Increasing Over Time?" 69 *Nat'l Tax J.* 831 (2016). Given today's environment (expensing for equipment, some interest deductibility), this is probably even more the case under current law.

[75] For an explanation see, e.g., Avi-Yonah, "Risk, Rents and Regressivity: Why the United States Needs Both an Income Tax and a VAT," 105 *Tax Notes* 1651 (2004).

[76] *See, e.g.*, Naomi R. Lamoreaux, "The Problem of Bigness: From Standard Oil to Google," 33(3) *J. Econ. Persp.* 94-117 (2019); Kenneth A. Bamberger and Orly Lobel, "Platform Market Power," 32 *Berkeley Tech. L.J.* 1051 (2017); Axel Gautier and Joe Lamesch, "Mergers in the Digital Economy," CESifo Working Paper No. 8056 (Feb. 3, 2020); Colleen Cunningham, Florian Ederer, and Song Ma, "Killer Acquisitions" (2019); Marc Bourreau and Alexandre de Streel, "Big Tech Acquisitions" (2020).

[77] While we never had a corporate tax rate above 53%, the World War II excess profits tax, which applied to rents resulting from the war, was capped at 80%. See Avi-Yonah, Reuven S., "Taxes in the Time of Coronavirus: Is It Time to Revive the Excess Profits Tax?" (2020). University of Michigan Public Law Research Paper No. 671; U of Michigan Law & Econ Research Paper No. 20-008. Available at SSRN: https://ssrn.com/abstract=3560806 or http://dx.doi.org/10.2139/ssrn.3560806.

[78] See Fortune 500: https://fortune.com/fortune500/2019/search/?profits=desc.

[79]Khan, supra, note 10.

[80] See Calvin H. Johnson, "The Effective Tax Ratio and the Undertaxation of Intangibles," *Tax Notes*, Dec. 15, 2008, p. 1289. Arguably, R&D generates positive externalities (mostly in the form of ideas that can migrate to other firms) but (a) there is less human capital migration than there used to be because of the above market rate salaries offered by Big Tech, and (b) there are significant negative externalities imposed by Big Tech. R&D should be treated like any other expense, i.e., matched to the income stream it generates.

[81] Rates above 50% may induce the rich to work less, and we have never (except during World War II) had effective rates of over 50% on the rich (top 1%) even though nominal rates were much higher. That is why the corporate tax on rents should be higher than the top individual tax rate, which will also encourage moving businesses out of subchapter C and distribution of

dividends, both of which make it easier to tax the rich on business profits. See Avi-Yonah, "Why Tax the Rich? Efficiency, Equity, and Progressive Taxation" (Review of Slemrod, *Does Atlas Shrug? The Economic Consequences of Taxing the Rich* (Cambridge: Harvard University Press, 2000)), 111 *Yale L. J.* 1391 (2002).