A New Corporate Tax

by Reuven S. Avi-Yonah

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In this article, Avi-Yonah argues for the development of a new corporate tax that would limit the power and regulate the behavior of our largest corporations, which are monopolies or quasi-monopolies that dominate their fields and drive competitors out of business.

> 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 and breadth of the United States.[1]

I. Introduction: Why Tax Corporations?

Should the U.S. tax corporations? For many academic and political observers, the answer is no.[2] The corporate tax is a strange tax because by definition it is not borne by the corporate taxpayer, because corporations are legal entities and cannot economically bear the burden of taxation. Moreover, unlike other indirect taxes (for example, consumption taxes that are passed on to consumers or the employer's portion of the payroll tax that is passed on to employees), economists after over 50 years of debate are not sure who bears the burden of the corporate tax: shareholders, all capital providers, corporate employees, or consumers. The most likely answer is that all of the above do in varying ratios depending on the current elasticities of capital, labor, and demand in the global economy, and on the degree to which the U.S. economy is open.[3]

The general public, on the other hand, is convinced that the corporate tax is borne by large corporations, and politicians respond by maintaining the corporate tax as a tax paid by someone other than the voters. But this fiscal illusion, the opponents of the tax pronounce, is hardly a valid reason to maintain a very complicated tax that is the cause of significant deadweight loss (changes in behavior caused by

[1] Statement of then-Sen. Albert B. Cummins on enacting a corporate tax, 44 *Cong. Rec.* 3978 (June 30, 1909).

[2] *See, e.g.*, Yariv Brauner, "The Non-Sense Tax: A Reply to New Corporate Income Tax Advocacy," 2008 *Mich. St. L. Rev.* 591 (Summer 2008); Edwin G. Dolan, "The Progressive Case for Abolishing the Corporate Income Tax," *Milken Institute Review* (Jan. 12, 2017); Simon Constable, "Six Reasons Trump Should Abolish Corporate Income Tax," *Forbes*, Dec. 19, 2016; Nathan Boidman, "Is Corporate Tax Abolition Unrealistic?" *Tax Notes Int'l*, Nov. 4, 2019, p. 433; and Boidman, "Boidman Offers Pillar 4: Abolish Corporate Taxes!" *Tax Notes Int'l*, June 8, 2020, p. 1161.

[3] In recent estimates, most of the burden of the corporate tax falls on capital and on rents. *See* Kimberly A. Clausing, "Who Pays the Corporate Tax in a Global Economy?" 66 *Nat'l Tax J.* 151-184 (2013) and "In Search of Corporate Tax Incidence," 65 *Tax L. Rev.* 433-472 (2012); and Edward Fox, "Does Capital Bear the U.S. Corporate Tax After All? New Evidence From Corporate Tax Returns," 17 *J. Empirical Legal Stud.* 71-115 (2020).

the tax) and transaction costs (tax compliance and avoidance costs).[4]

This article will argue that we do need a corporate tax, but not for the traditional reason, which is that if we do not tax corporations, rich shareholders will be able to defer tax on their income. Instead, the article will argue that we should tax corporations for the same reason we originally adopted the corporate tax in 1909: to limit the power and regulate the behavior of our largest corporations, which are monopolies or quasi-monopolies that dominate their respective fields and drive their competitors out of business (the best example being Big Tech — that is, Amazon, Apple, Facebook, Google, and Microsoft). But if that is the reason to have a corporate tax, it should have a different structure from the current flat corporate tax of 21 percent. Instead, the tax should be set at zero for normal returns by allowing the expensing of physical capital, but at a sharply progressive rate for supernormal returns (rents), culminating at a rate of 80 percent for income above $10 billion a year.[5]

After this introduction, Section II of the article discusses and rejects the traditional reason given for taxing corporations. Section III argues that the only reason to maintain a corporate tax is as a tax on monopolistic rents. Section IV develops this proposal in some detail and Section V provides a conclusion.

II. A Tax on Shareholders?

The traditional reason for taxing corporations is that if we did not, rich shareholders would be able to earn their income through corporations and defer the tax until there is a dividend distribution or they sell the shares, or even avoid the tax altogether by holding their shares until death and having their heirs sell at a stepped-up basis.

That is not a valid reason for keeping alive a tax as complicated and costly as the corporate tax, which is why many academic observers have called for its abolition. Given that the corporate tax rate has been sharply cut to 21 percent and that the revenue from the corporate tax is at $230 billion (in 2019) and only a small fraction (below 7 percent) of total federal revenues of $3.4 trillion, it does not appear impossible that some future president could successfully argue for abolishing the corporate tax, despite its public popularity.

There are three reasons why the corporate tax is not a valid way of taxing shareholders.

First, despite over 50 years of economic research, economists are still unsure of who bears the burden of the corporate tax.[6] Plausible candidates are (a) the shareholders, if the corporate tax reduces corporate profits available to them as dividends or is reflected in the price of their shares (although even that assumes that the tax was not priced in when they bought the shares, in which case only the original shareholders in an initial public offering bear the burden); (b) all capital providers, if the tax causes capital to flow from the corporate to the noncorporate sector, which is influenced by the ever-changing relative tax rates on corporate versus passthrough businesses; (c) employees, if the corporations can effectively reduce wages in response to the tax by, for example, threatening to move production overseas; or (d) consumers, if corporations enjoy a monopolistic or quasi-monopolistic position and therefore can raise prices to include the tax without fear of being undercut by competition. The true answer is probably that all of the above bear the burden in

[4] Austan Goolsbee, "Taxes, Organizational Form, and the Deadweight Loss of the Corporate Income Tax," NBER Working Paper No. 6173 (Sept. 1997); and Chris Evans, Philip Lignier, and Binh Tran-Nam, "The Tax Compliance Costs of Large Corporations: An Empirical Inquiry and Comparative Analysis," 64 *Can. Tax J.* 751 (2016). All taxes except head taxes (assuming no interjurisdictional mobility) and Pigouvian taxes have some deadweight loss, but the corporate tax has more transaction costs than most. There is an entire industry of tax lawyers and accountants devoted to helping large corporations minimize their tax burden, and it employs some of the brightest minds who could have been contributing in more socially useful ways. On the corporate tax and economic growth, see OECD, "Tax Policy Reform and Economic Growth" (Nov. 3, 2010), describing the corporate tax as the most destructive form of taxation.

[5] See below for more on the rate structure. Fox and Zachary Liscow, "A Case for Higher Corporate Tax Rates," *Tax Notes Federal*, June 22, 2020, p. 2021, support a higher corporate tax rate for similar reasons but believe the rate should be limited by international considerations, which are addressed later.

[6] For recent studies on the incidence issue, see Fox, *supra* note 3; *see also* Clemens Fuest, Andreas Peichl, and Sebastian Siegloch, "The Incidence of Corporate Taxation and Its Implications for Tax Progressivity," VoxEU.org (Oct. 10, 2017); Stephen J. Entin, "Labor Bears Much of the Cost of the Corporate Tax," *The Tax Foundation*, Oct. 24, 2017; Laura Power and Austin Frerick, "Have Excess Returns to Corporations Been Increasing Over Time?" 69(4) *Nat'l Tax J.* 831-846 (2016); Clausing, "Who Pays the Corporate Tax in a Global Economy?" 66(1) *Nat'l Tax J.* 151-184 (Mar. 2013); Benjamin H. Harris, "Corporate Tax Incidence and Its Implications for Progressivity," Urban-Brookings Tax Policy Center (Nov. 2009).

different ratios over time depending on the elasticities (response to the tax) of capital, labor, and demand.

Second, as economists have recently emphasized, many shareholders are tax exempt. In fact, a recent study has shown that 70 percent of U.S. equities are held by tax-exempt institutions or individuals (for example, through retirement accounts).[7] The authors of the study argue that this is a reason to tax corporations because otherwise capital would not be taxed at all, but it seems to me that if we believe in the reason that we exempt these individuals and institutions from tax, there is no reason to tax them indirectly through a corporate tax (assuming that they do in fact bear the tax burden).

Third, even for taxable shareholders, there are better ways of taxing the shareholders directly, thereby eliminating the incidence issue. For closely held corporations, the answer is to tax the shareholders on their income earned through the corporation — that is, to make passthrough treatment mandatory — because there are no administrability issues for those corporations and most of them are passthroughs in any case. For publicly traded corporations and partnerships, passthrough taxation is not administratively feasible. Instead, the shareholders should be taxed on the changing value of their shares, because liquidity and valuation are not issues for publicly traded shares, and the same tax can be collected on a withholding basis on foreign shareholders and if necessary on tax-exempt domestic shareholders (the government can impose a lien on some of the shares and sell them if the tax is not paid by foreign shareholders).[8] Pre-enactment unrealized appreciation can be reached by applying the tax in the year of enactment to the difference between the end-of-year share value and original basis.

For these reasons, if the only rationale for having a corporate tax is to indirectly tax shareholders, it is not clear that it is worth fighting for against the many voices calling for its abolition. But that is in fact not the only rationale, as the next section explains.

III. A Tax on Monopolistic Rents

When the corporate tax was enacted in 1909, taxing shareholders was not the reason. In fact, taxing shareholders would in 1909 have been unconstitutional under the Supreme Court's 1895 *Pollock* decision[9] which both President Taft and then-Senate Majority Leader Nelson Aldrich believed precluded a tax on shareholders, although to placate the Progressives they also introduced a constitutional amendment to allow Congress to tax individual income, which neither expected to pass. Instead, the corporate tax was designated as an excise tax on the privilege of conducting business through the corporate form, since the Supreme Court had held such excise taxes on corporations to be constitutional in 1898; but neither Taft nor Aldrich thought that was a good reason to impose a federal tax on corporations, because the privileges of the corporate form derived from state, not federal, law.

Instead, as I have shown elsewhere by examining the legislative history, the corporate tax of 1909 was primarily seen as a vehicle for limiting the power of and regulating the great trusts such as John D. Rockefeller's Standard Oil Co. or J.P. Morgan's U.S. Steel Corp.[10] The Taft administration was at the same time litigating against Standard Oil and American Tobacco (among many other trusts) to break them up under the Sherman Act of 1890, but the prospects of the litigation were uncertain (the government had lost the *E.C. Knight* case in the Supreme Court in 1895 and only narrowly won the *Northern Securities* case in 1904). Thus, as Taft said in his message to Congress, we should have a corporate tax to curb the trusts:

> 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

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[7]Leonard E. Burman, Clausing, and Lydia Austin, "Is U.S. Corporate Income Double-Taxed?" 70(3) *Nat'l Tax J.* 675-706 (Sept. 2017).

[8]Alternatively, the tax can be collected only upon the payment of a dividend or a sale of the shares with an interest charge added to eliminate deferral, but that raises administrability issues for sales of shares between foreign shareholders.

[9]*Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895).

[10]Reuven S. Avi-Yonah, "Corporations, Society and the State: A Defense of the Corporate Tax," 90 *Va. L. Rev.* 1193 (2004).

> 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.[11]

The corporate tax of 1909 had several features that were considered potentially effective as antitrust measures. First, even though the tax rate was only 1 percent, both supporters and opponents knew the rate could be increased (as it ultimately was, reaching 52.8 percent in 1968) and the threat of those changes might deter the trusts. Second, the tax returns were to be made public, thus alerting the press and the voters to which corporations were the most profitable and therefore the likeliest targets for antitrust enforcement actions. Third, while intercorporate dividends were exempt (a controversial feature, because the trusts were holding corporations), there were no tax-free reorganizations and no consolidated returns.

Unfortunately, all these antitrust features of the corporate tax were eliminated by 1928. The publicity feature was eliminated in 1910, tax-exempt reorganizations were adopted in 1919, and consolidated returns were made elective in 1928. Also, various pro-corporate provisions like accelerated depreciation, percentage depletion, and the foreign tax credit were adopted in the same period. While the Franklin D. Roosevelt administration limited the dividends received deduction and tax-exempt reorganizations in the 1930s, it never eliminated them, and subsequent enactments like investment tax credits reduced the corporate tax even further. As for the rate, it never exceeded 52.8 percent (as opposed to the individual rate, which reached 94 percent during World War II and was still as high as 70 percent when Ronald Reagan was elected president). The effective corporate tax rate was much lower because of interest and depreciation deductions and investment tax credits. In 1986 the corporate rate was reduced from 46 percent to 34 percent (later raised to 35 percent), and despite various base-broadening measures, the effective corporate rate remained low. Corporate tax revenues consequently declined from 25 percent of total federal revenues in the 1960s to less than 10 percent in the 2000s. Finally, in 2017 the corporate tax rate was reduced to 21 percent, and it was a flat rate — all the previous progressivity, which applied only to small corporations with revenues below $15 million, was eliminated.

Other than the rates, we are unlikely to reverse these pro-trust features of the corporate tax, because they are old, well established, and benefit small as well as large corporations, which are not the proper subject of a corporate tax designated to limit the power of monopolies and quasi-monopolies.

Recent research by Edward Fox has shown, however, that most of the existing corporate tax falls on supernormal returns.[12] Fox shows this by demonstrating from corporate tax returns for 1995-2013 that if expensing of capital expenditures were allowed before 2017, corporate tax revenues would have been almost identical to actual revenues. Because (as discussed later) expensing is equivalent to exempting the normal return, that means that the corporate tax has historically fallen primarily on supernormal returns, or rents. This finding is consistent with Laura Power and Austin Frerick's evidence from 2016 that excess returns to corporations have been increasing over time.[13] In the current environment, because expensing is in fact allowed until 2022, that finding is even more likely to be true.

In that case, and if the main reason to have a corporate tax is to tax rents and limit monopolies,

[11] 44 *Cong. Rec.* 3344 (1909).

[12] Fox, *supra* note 3.

[13] Power and Frerick, *supra* note 6.

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 be zero. On supernormal returns, because the main concern is monopolies and quasi-monopolies, the tax should be progressive, with a very high tax rate (for example, 80 percent) for profits above a very high threshold (for example, $10 billion). In between, there should be a series of graduated tax rates, similar to the individual rate schedule before 1980.

A. Normal Returns

There is no reason to tax corporations on normal returns. Normal returns are the risk-free return from investing in, for example, U.S. treasury securities. 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. Also, there is the 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, because a tax on pure rents does not generate deadweight loss (that is, does not change taxpayer behavior, because taxpayers not subject to any competition would derive net profit from rents even if 99 percent of them were taxed away).

Because from a political perspective a zero tax rate on normal returns is unlikely to pass, and because it is hard to determine what normal returns are, I would suggest that we keep the flat rate of 21 percent on corporations (with no de minimis exception, because small corporations are likely to be passthroughs), but allow for permanent expensing of capital expenditures. Under the Cary Brown theorem, as explained later, that expensing is equivalent to an exemption for the normal return to capital.[14] As elaborated later, however, we should not allow expensing for research and development, because that typically generates rents, nor a deduction for interest, because combining it with expensing generates negative tax rates.

The Cary Brown theorem demonstrates the theoretical equivalence, under specified assumptions, of expensing and exempting the normal return to capital.

To take a common example, suppose a taxpayer earns 100 subject to a tax of 50 percent and can invest the after-tax income in a machine generating a return of 10 percent per year. Under an income tax, the 100 of earnings is subject to tax of 50, and the remaining 50 is invested in the machine, yielding 55 after one year; the 5 of income is subject to income tax, leaving the taxpayer with only 52.5.

In an exemption regime that exempts the normal return to capital from tax, the 100 of income is subject to tax of 50 when earned. The remaining 50 is invested in the machine, but when the additional 5 of income is earned, it is exempt from tax, so that the taxpayer is left with 55.

In an expensing regime, the 100 of income is expensed, and the resulting deduction eliminates the tax on the 100, so that the taxpayer can invest the entire 100 in the machine. However, when the machine is sold for 110 a year later, because the basis is zero, the sale is subject to tax at 50 percent, leaving the taxpayer with the same 55 as in the previous example.

Hence, the Cary Brown theorem demonstrates that expensing the 100 is equivalent to exempting the normal return from tax.

The Cary Brown theorem makes two important assumptions. The first is that tax rates do not change between the time the income is expensed and the time the machine is sold. If the tax rate changes, the equivalence does not hold, because exemption applies the rate at the beginning of the investment and expensing the rate at the end. However, this assumption may not matter too much because rates can either increase or decrease over time, so that it is unclear which form of the tax is more beneficial to the taxpayer.

The other assumption, however, has clear implications. That is the assumption that the taxpayer can invest the savings from exempting at the same rate as the underlying investment. This holds true when the investment is a commonly available one, yielding what the economists call marginal (normal) returns. However, suppose the

[14] The following is based on Avi-Yonah, "Risk, Rents and Regressivity: Why the United States Needs Both an Income Tax and a VAT," *Tax Notes*, Dec. 20, 2004, p. 1651.

underlying investment is in a unique business opportunity, yielding what the economists call inframarginal (extraordinary) returns, or rents. In that case, the investor may be unable to invest the tax savings from expensing at the same rate as the underlying investment because the size of the unique investment opportunity is limited, and the Cary Brown equivalence does not hold.

For example, suppose in the earlier example the underlying investment yields a 50 percent return but the tax savings can only be invested in a bond earning 10 percent. In a regime that exempts the normal return, the taxpayer earns 100, pays 50 in tax, and invests the other 50 in the high-yielding opportunity, resulting after a year in a 25 return exempt from tax, for a net after-tax of 75. In an expensing regime, the investor earns 100 and does not pay tax because of expensing; however, of the 100, only 50 can be invested at a return of 50 percent, and the other 50 (the tax savings) is invested at 10 percent. The result is a yield after a year of 75 from the underlying investment and 55 from the tax saving, for a total of 130, and when that is sold and is subject to tax at 50 percent, the taxpayer nets only 65. To put it another way, in an expensing regime, only the normal yield is exempt from tax; the extraordinary yield is fully taxable. So how should those extraordinary yields (rents) be taxed?

B. Supernormal Returns (Rents)

Economists are unanimous in supporting a tax on rents because (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, similar 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 monopolistic or quasi-monopolistic 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.[15]

At the top, the corporate tax rate should be 80 percent for income above $10 billion.[16] In 2019 this rate would have applied to 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 exceeding $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 Telecom (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.[17]

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.

Also, 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 percent 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 companies to divest their anti-competitive acquisitions (for example, Facebook's acquisitions of Instagram and WhatsApp). And if

[15] *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); and Marc Bourreau and Alexandre de Streel, "Big Tech Acquisitions," Center on Regulation in Europe (2020).

[16] While we never had a corporate tax rate above 53 percent, the World War II excess profits tax, which applied to rents resulting from the war, was capped at 80 percent. *See* Avi-Yonah, "Taxes in the Time of Coronavirus: Is It Time to Revive the Excess Profits Tax?" University of Michigan Public Law Research Paper No. 671 (May 19, 2020).

[17] *See* Fortune.com, "Fortune 500."

the tax structure also motivates an actual breakup of the core business (for example, along geographic or business segment lines), any loss in efficiency would be more than compensated for by the removal of the threat to democracy posed by Big Tech.[18]

IV. A New Corporate Tax

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

A. The Tax Base

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

Profit shifting can be dealt with relatively simply by mandating consolidated returns (at the 50 percent 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 because 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.[19] 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.[20] Also, under current conditions much interest is effectively guaranteed by the government so it should not receive a tax subsidy as well.

B. Antiavoidance Provisions

The most important antiavoidance provisions for public companies controlled by their founders are already in the code: Section 367 imposes tax on all large shareholders in an inversion, and 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 earlier 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 later) of 50 percent should be applied upon expatriation.

Also, inversion transactions can be prevented, as the Obama administration proposed, by (a) reducing the section 7874 threshold to 50 percent, and (b) redefining corporate residence as the location of the headquarters. If that is not enough, the United States can follow EU countries by treating a move of the headquarters as a realization event and taxing both the shareholders and the corporation on a deemed sale of stock and assets. Those "exit taxes" are the reason no EU countries have experienced inversions despite having similar effective tax rates to the U.S. rate before 2017.[21]

C. Shareholder Taxation

Ideally, shareholders in public corporations should be taxed on a mark-to-market basis, including on past unrealized appreciation. Also,

[18] On Big Tech and democracy, see Barry C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* (2010); Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (2018); and Khan, "Amazon's Antitrust Paradox," 127 *Yale L.J.* 710 (2017).

[19] *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 — that is, matched to the income stream it generates.

[20] Assume the tax rate is 50 percent and a taxpayer borrows 100 at 10 percent interest and buys a machine which it expenses. The machine produces 10 in income each year. Before tax, the taxpayer has 10 (income from the machine) minus 10 (interest), or zero. After tax, the taxpayer has deductions of 100 (expensing) plus 10 (interest), or 110, and income of 10, so that produces a net loss of 100 which can offset other income, for a negative tax rate of -50 percent.

[21] Avi-Yonah and Yaron Lahav, "The Effective Tax Rates of the Largest US and EU Multinationals," 65 *Tax L.Rev.* 375 (2012).

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 United States to adopt a significantly more progressive system of individual taxation — up to, for example, 50 percent — for all income (including dividends).[22] Capital gains will not be taxed to domestic U.S. 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 the ability to pay as much as capital gains (which will be taxable under either mark-to-market or the higher tax rates). Dividends as well as interest should not be deductible.

V. Conclusion

This article has sought to develop a new corporate tax that is appropriate for targeting rents earned by large, monopolistic, or quasi-monopolistic enterprises like Big Tech. Its main recommendations are that normal corporate returns be functionally exempt by allowing permanent expensing for capital expenditures, but that supernormal returns be taxable progressively (up to 80 percent 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. Also, I recommend a mark-to-market regime for shareholders as well as full taxation of dividends at a progressive rate of 50 percent, 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. ■

[22] Rates above 50 percent may induce the rich to work less, and we have never (except during World War II) had effective rates of more than 50 percent on the rich (top 1 percent) 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," 111 *Yale L.J.* 1391 (2002) (review of Joel B. Slemrod, *Does Atlas Shrug? The Economic Consequences of Taxing the Rich* (2000)).