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EXPLORING "COOPETITION" IN THE ELECTRIC VEHICLE ENERGY MARKET: AN ANALYSIS OF THE EV BATTERY COMPETITION BETWEEN CHINA AND SOUTH KOREA

Alvin Hoi-Chun Hung

Abstract

This article employs a techno-econo-legal approach to analyze the potential "coopetition" (i.e., cooperation between competitors) between China and South Korea in the electric vehicle (EV) energy market. The investigation assesses a wide range of techno-econo-legal factors, including battery capacity, energy density, innovation, production capacity, and legal considerations. These legal considerations encompass intellectual property rights, trade practices, and environmental regulations. The central argument of this analysis posits that while South Korea holds an advantage in technological innovation, China's superior production capacity and governmental support present significant challenges. The relative success in this domain relies not only on technological proficiency and resource availability but also on the techno-econo-legal frameworks and legal systems governing these two nations. This distinction reflects the diversity between the Global North and the Global South countries. Additionally, the choice between Nickel-Cobalt-Manganese (NCM) and Lithium-Iron-Phosphate (LFP) batteries is a significant factor for these two competing nations. The article provides recommendations for adopting a coopetition strategy as a policy measure, which aims to promote equitable cooperation, moderated competition, and sustainable development in the global EV battery industry.

Keywords:

Lithium-ion Cell; EV battery; China vs. South Korea; Techno-econo-legal analysis

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INTRODUCTION

The electric vehicle (EV) battery market has been established as a sphere of undeniable Chinese dominance, with a robust 56% market share captured by Chinese battery firms in 2022.[1] The runner-up in terms of market competition and size is South Korea, which took up an impressive 26% share of the global EV battery production in the same year, with Samsung SDI, SK On, and LG Energy Solutions leading the pack.[2] While Chinese EV battery manufacturers mainly supply to the EV factories in China, those counterparts in South Korea are integral suppliers to notable American automobile giants including Tesla, Ford Motors, and General Motors.[3] China harbors four of the ten largest battery manufacturers in the world, while South Korean companies and Japanese firms also hold their own among the noteworthy contenders. The United States arenas based in China include prominent entities such as QuantumScape, A123 Systems, Enovix, SES AI, and Amprius Tech, all of whom feature as key players in the EV battery supplier ecosystem.[4]

With the increasing prevalence of EVs in the global automotive market, comprehending the technological ramifications of the lithium-ion batteries (LIBs) comprising these vehicles is imperative for sustainable EV deployment.[5] This article investigates the EV battery market competition between China and South Korea, representing an economic battle between the "Global North" and "Global South" nations. This is accomplished through the utilization of the techno-econo-legal analysis for understanding the impact of legal frameworks and systems on global market competition in EV batteries. In analyzing the EV battery market, techno-econo-legal analysis can allow looking at how legal frameworks and regulations influence the production, distribution, and consumption of car batteries in society.[6] It should be noted that it is not just about the economic battle between two nations but rather among developed and developing nations. The present inquiry also acknowledges the possibility of substantial variations and significance in technological innovation versus production capacity in the context of the strive for leadership in the global EV battery market.

This article employs a techno-econo-legal approach to analyze the possible *coopetition* between China and South Korea in the EV energy market. Coopetition refers to the practice of cooperation between competing firms in order to achieve mutual benefits.[7] It involves balancing competition and cooperation to allow firms to share resources, reduce costs, and increase overall market demand while remaining competitive.[8] This article has six parts. Part I introduces the

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[1] S. O'Dea, *Share Of The Lithium-Ion Battery Production Capacity Worldwide By Country 2021 & 2025*, STATISTA.COM (Jan. 5, 2023).
[2] *Id.*
[3] Ayfer Ustabaş & Ayşe Döner. *Inter-Firm Relations Between Battery Suppliers And Electrical Vehicles Manufacturers: A Network Analysis,* 24(2) ATATÜRK ÜNIVERSITESI SOSYAL BILIMLER ENSTITÜSÜ DERGISI at 527 (2020).
[4] Usman Kabir, *Lithium Battery Production By Country: Top 12 Countries*, INSIDER MONKEY, Feb. 10, 2023, https://finance.yahoo.com/news/lithium-battery-production-country-top-183050554.html.
[5] Qiang Dai ET AL., *Life Cycle Analysis Of Lithium-Ion Batteries For Automotive Application*, BATTERIES 5.2 at 48 (2019).
[6] Lívia Salles Martins ET AL., *Electric Car Battery: An Overview On Global Demand, Recycling And Future Approaches Towards Sustainability*, J. ENV MGMT., 295 at 113091 (2021).
[7] Keith Walley, *Coopetition: An Introduction To The Subject And An Agenda For Research*, INT'L STUD. MGMT & ORG. 37.2 at 11-31 (2007).
[8] *Id.*

various aspects of the EV battery market. Part II investigates the competition in the global EV energy market. Part III examines the role of national legal frameworks in the competition of the EV battery market. Part IV analyzes the competition between China and South Korea, and Part V analyzes the possible coopetition between China and South Korea and investigates the legal frameworks governing coopetition. The last part provides recommendations for enhancing coopetition in the EV battery market.

I. THE EV BATTERY MARKET

The global EV battery market has witnessed significant growth in the past few years, driven by the increasing adoption of EVs and the development of innovative battery technologies.[9] The market's growth is expected to continue at a steady pace shortly, owing to the ongoing transition towards sustainable and eco-friendly transportation solutions across the globe.[10]

One of the key factors driving the growth of the global EV battery market is the increasing demand for EVs, which has been driven by various factors such as stringent emission norms, rising fuel prices, and government incentives and subsidies.[11] Moreover, the declining EV battery prices, along with technological advancements and improvements in battery performance and durability, have also contributed to the increased EV adoption. In addition to the increasing demand for EVs, the global EV battery market is also driven by the development of innovative battery technologies, such as solid-state batteries, which offer improved energy density, higher efficiency, and longer lifespan compared to conventional lithium-ion batteries.[12] Furthermore, the development of recycling technologies and the increasing focus on sustainability are also expected to provide significant growth opportunities for the global EV battery market in the coming years. However, the growth of the global EV battery market has its challenges. One of the major market challenges is the high cost associated with EV batteries, which has significantly hindered the widespread adoption of EVs.[13] Moreover, the limited availability of raw materials such as lithium and cobalt, which are essential for producing EV batteries, is also a major concern for the industry.[14]

Despite these challenges, the global EV battery market is expected to witness significant growth in the coming years, driven by the increasing demand for EVs and the development of innovative battery technologies. As governments and industry players continue to focus on sustainability and eco-friendly transportation solutions, the market will likely witness further growth and expansion in the foreseeable future.[15]

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[9] Claire Curry, *Lithium-Ion Battery Costs And Market*, 5(4-6) BLOOMBERG NEW ENERGY FIN. at 43 (2017).
[10] Fazel Mohammadi & Mehrdad Saif, *A Comprehensive Overview of Electric Vehicle Batteries Market*, E-PRIME-ADVANCES ELEC. ENG'G, ELECS. & ENERGY 3 (2023).
[11] Martins, *supra* note 6 at 295.
[12] Long Kong ET AL., *Configuring Solid-state Batteries to Power Electric Vehicles: a Deliberation on Technology, Chemistry and Energy*, CHEM. COMMC'N. 57.94, 112587-12594 (2021).
[13] Thomas P. Narins, *The Battery Business: Lithium Availability and the Growth of the Global Electric Car Industry*, EXTRACTIVE INDUS. & SOC'Y., 4.2, 321-28 (2017).
[14] Achim Kampker ET AL, *Evaluation of a Remanufacturing for Lithium Ion Batteries from Electric Cars*, INT'L J MECH. & MECHATRONICS ENG'G, 10.12, 1929-1935 (2016).
[15] Madiha Bencekri ET AL., *Review of Eco-Friendly Guidance of Transport Infrastructure: Korea and the World*, CHEM. ENG'G TRANSACTIONS 89 at 235 (2021).

A. *What is a techno-econo-legal approach?*

The techno-econo-legal approach encompasses a multidisciplinary methodology that amalgamates technological, economic, and legal perspectives in order to dissect and redress intricate and multifaceted quandaries or predicaments. Given the complex nature of contemporary challenges, this analytical framework acknowledges the exigency for expertise spanning several domains, notably in nascent technologies, innovation paradigms, and intellectual property laws.[16]

The "techno" facet connotes an all-encompassing cognizance of the technological underpinnings intrinsic to a given subject, be it a technology, system, or innovation. This encompasses an adept comprehension of its operational mechanics, functionalities, constraints, and the conceivable repercussions emanating from its deployment.[17]

The "econo" dimension pertains to the economic implications and considerations of the subject under scrutiny. It entails an evaluative exercise encompassing market dynamics, rigorous cost-benefit analyses, the deployment of economic incentives, the formulation of pricing models, and the discernment of potential economic ramifications contingent on varied courses of action.[18]

The "legal" aspect converges upon the edifice of legal parameters and contemplations. This mandates a profound mastery of the pertinent legal canons, encompassing regulatory frameworks, statutory doctrines, policy directives, and jurisprudential precedents that govern the subject matter.[19] This also extends to ensuring compliance with prevailing laws, scrutinizing contractual compacts, safeguarding intellectual property rights, appraising matters of liability, and cogitating over potential legal ramifications.

The synthesis of these three pivotal dimensions within the techno-econo-legal approach engenders a holistic analytical milieu conducive to judicious decision-making. It firmly acknowledges that technology and innovation do not subsist in isolation but are profoundly entwined with economic imperatives and legal scaffolds. This analytical framework finds particularly salient application in domains where emergent technologies, the realm of intellectual property, adherence to regulatory precepts, and the vicissitudes of market dynamics converge.[20] It furnishes stakeholders with the acumen necessary for judicious decision-making, considering its technological viability, economic feasibility, and legal compliance.[21]

The application of the techno-econo-legal approach in scrutinizing competition within the EV battery market is underscored by its analytical capacity. It is instrumental in this context due to its adeptness in synthesizing the intricate interplay of technological, economic, and legal dimensions. First, a judicious comprehension of the EV battery market's technical intricacies is imperative. This encompasses a rigorous analysis of battery chemistries, energy densities, charging

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[16] M. Palmroth ET AL., *Toward Sustainable use of Space: Economic, Technological, and Legal perspectives*, SPACE POL'Y at 57 (2021).

[17] Tubagus Aryandi Gunawan & Rory FD Monaghan, *Techno-Econo-Environmental Comparisons Of Zero- And Low-Emission Heavy-Duty Trucks*, APPLIED ENERGY at 308 (2022).

[18] Mehdi Jahangiri ET AL., *Techno–Econo–Enviro Energy Analysis, Ranking And Optimization Of Various Building-Integrated Photovoltaic (BIPV) Types In Different Climatic Regions Of Iran*, ENERGIES 16.1 at 546 (2023).

[19] Tugce Uslu, *Advantages, Risks And Legal Perspectives of GMOs in 2020s*, 15(6) PLANT BIOTECHNOLOGY REP. 741-51 (2021).

[20] *See, e.g.*, KIRK ST. AMAND & BRIAN STILL, HANDBOOK OF RESEARCH ON OPEN SOURCE SOFTWARE: TECHNOLOGICAL, ECONOMIC, AND SOCIAL PERSPECTIVES (2007).

[21] *See, e.g.*, REBECCA MIGNOT-MAHDAVI, DRONES AND INTERNATIONAL LAW: A TECHNO-LEGAL MACHINERY (2023).

capabilities, and safety protocols. Such discernment is pivotal for an exhaustive assessment of the technological milieu, thereby affording insights into competitive differentiators.[22] Second, the economic vantage offers profound insights into the market's operational dynamics. This encompasses examining supply-demand dynamics, pricing models, and cost structures. Such scrutiny is germane in comprehending prevalent market trends, pricing strategies, and the potential for economies of scale—all of which are instrumental in gauging competitive positioning.[23] Third, the intricacy of the EV battery market necessitates a judicious navigation of the legal framework, which encompasses adherence to safety standards and environmental regulations and safeguarding intellectual property rights.[24] Mastery of this legal framework is imperative in averting legal entanglements, ensuring compliance, and safeguarding proprietary technologies.

In synthesis, the techno-econo-legal approach furnishes a comprehensive and integrated analytical paradigm for dissecting competitive dynamics within the EV battery market. By concurrently considering technological, economic, and legal dimensions, stakeholders are equipped to make judicious decisions that account for the intricate interplay of factors shaping this dynamic industry.

B. *Technological Evolution of EV Batteries*

The current state of EV battery technology has made significant progress in recent years, as advancements in materials science, chemistry, and manufacturing have led to increased energy densities and longer driving ranges. Lithium-ion is the primary technology used in EV batteries, accounting for over 90% of the global market share in 2020.[25] Lithium-ion batteries are rechargeable and store electrical energy by transferring lithium ions between two electrodes, usually composed of graphite and metal oxides like cobalt, nickel, and manganese.[26] The size and design of the battery pack depend on the specific requirements of the EV, including power output, weight, and driving range.[27]

Increased energy density is one of the most significant advancements in lithium-ion batteries. The energy density of a battery describes the amount of energy that can be stored per unit of weight or volume. As the energy density increases, the battery can store more energy, which translates into a greater driving range for EVs. Several strategies have been developed to increase the energy density of lithium-ion batteries, including using high-capacity cathodes and anodes, optimizing the electrolyte, and reducing internal resistance.[28] Another advancement in EV battery technology is the development of solid-state batteries.[29] These batteries use a solid-state electrolyte

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[22] Shabib-Ahmed Shaikh & B. R. Londhe, *Intricacies of Software Protection: A Techno-Legal Review*, 21(3) J. INTELL. PROP. RTS. 235 (2016).

[23] Joseph E. Stiglitz, *Information And Economic Analysis: A Perspective*, 95.supp ECON. J. 21-41 (1985).

[24] MARCELO CORRALES COMPAGNUCCI ET. AL., SMART CONTRACTS: TECHNOLOGICAL, BUSINESS AND LEGAL PERSPECTIVES (2021).

[25] AMERICA ROCIO QUINTEROS-CONDORETTY ET AL., IMPACT OF CIRCULAR DESIGN OF LITHIUM-ION BATTERIES ON SUPPLY OF LITHIUM FOR ELECTRIC CARS TOWARDS A SUSTAINABLE MOBILITY AND ENERGY TRANSITION 73-78 (2021).

[26] Matthew Li ET AL, *30 Years of Lithium-Ion Batteries*, 30(33) ADVANCED MATERIALS at 1800561 (2018).

[27] Jesús Sallán ET AL., *Optimal Design of ICPT Systems Applied to Electric Vehicle Battery Charge*, 56(6) IEEE TRANSACTIONS ON INDUS. ELECS. 2140-49 (2009).

[28] Martins, *supra* note 6 at 295.

[29] *See*, Ashok Bindra, *Electric Vehicle Batteries Eye Solid-State Technology: Prototypes Promise Lower Cost, Faster Charging, and Greater Safety*, IEEE POWER ELEC. MAG., March 2020, at 16; *see also*, Chakib Alaoui, *Solid-State*

instead of a traditional liquid electrolyte, which can increase the battery's energy density while reducing the risk of fires and improving safety.[30] A significant challenge in EV battery technology is the high cost of production. The current cost of battery production is still relatively high compared to conventional vehicles, causing a barrier to the mass adoption of EVs.[31] However, advancements in manufacturing techniques, including automation and standardization, are expected to reduce the cost of production in the near future.[32]

C. *Nations Competing in the EV Market*

The global EV market is a dynamic and rapidly growing industry driven by the increasing global demand for EVs. Several major countries are participating in the global EV battery market with each country playing a significant role in shaping the future of this industry. These countries include the United States, China, Japan, South Korea, and Germany.

China is considered the largest market for EVs in the world, and, as such, the country is also a significant supplier in the global EV battery market. Several major Chinese companies, including CATL, BYD, and Lishen, produce EV batteries.[33] The Chinese government has also announced ambitious plans to transition to EVs, a move expected to drive the demand for EV batteries further. South Korea is home to several major battery manufacturers, including LG Chem and Samsung SDI. Both companies invest heavily in developing advanced battery technologies, including solid-state and pouch-type batteries.[34]

The participation and competition of China and South Korea in the global EV battery market are expected to play a crucial role in shaping the future of this industry. As these countries continue to invest in developing advanced battery technologies, the demand for EVs is expected to grow, further driving innovation and growth in the global EV battery market.

D. *Legal Framework to Govern Competition in the EV Battery Market*

A nation's legal framework is crucial for the participation of its manufacturers to compete in the global EV battery market. Such a framework governing competition within the EV battery market plays a decisive role in delineating a nation's participation in this pivotal economic sector. This intricate ensemble of statutes, regulatory instruments, and judicial precedents ensures a competitive and just market milieu. The framework comprises an array of legal dimensions, collectively instrumental in shaping a nation's role in the global EV battery market. More specifically, the legal frameworks define regulations and policies that shape the operating environment for the EV battery industry, including safety standards, environmental regulations,

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Thermal Management for Lithium-Ion EV Batteries, 62(1) IEEE TRANSACTIONS ON VEHICULAR TECH., 98, 98-107 (2012).

[30] Hao Shen ET AL., *Solid-State Electrolyte Considerations for Electric Vehicle Batteries*, 3(7) SUSTAINABLE ENERGY & FUELS at 1647 (2019).

[31] Björn Nykvist & Måns Nilsson, *Rapidly Falling Costs of Battery Packs for Electric Vehicle*, 5.4 NATURE CLIMATE CHANGE, 329, 329-332 (2015).

[32] Meletios-Nikolaos Doulgkeroglou ET AL., *Automation, Monitoring, and Standardization of Cell Product Manufacturing*. FRONTIERS BIOENG'G AND BIOTECH. 8, 811 (2020).

[33] Shuoyao Wang & Jeongsoo Yu, *A Comparative Life Cycle Assessment on Lithium-Ion Battery: Case Study on Electric Vehicle Battery in China Considering Battery Evolution*, 39(1) WASTE MGMT. & RSCH, 156, 156-164 (2021).

[34] I-Yun Lisa Hsieh ET AL., *Transition to Electric Vehicles in China: Implications For Private Motorization Rate And Battery Market*, 144 ENERGY POL'Y at 111654 (2020).

intellectual property laws, and trade policies.[35] The legal frameworks provide a structured foundation for businesses and investors to operate within, enabling them to make informed decisions and manage risks appropriately.

Safety standards are among the most powerful legal frameworks impacting the EV battery market.[36] These standards ensure EV batteries are safely produced, transported, and used, preventing risks such as explosions and fires.[37] Without clear safety standards, users may be wary of investing in EVs, negatively impacting the growth of the EV battery market. Consumer protection laws specify most safety standards, representing an indispensable bulwark for consumer welfare.[38] Within the context of EV batteries, these statutes afford safeguards against the dissemination of substandard or unsafe products, underscoring the imperative of safety and reliability in this crucial domain.

Environmental regulations, predicated on sustainability imperatives, delineate the contours of production and disposal within the EV battery market. Adherence to stringent environmental benchmarks is exigent for nations aspiring to assert themselves competitively in this arena.[39] The production of EV batteries requires using rare earth minerals and other materials with significant environmental impacts. As such, strict environmental regulations can encourage the development of more sustainable and environmentally friendly production processes and materials, reducing the negative environmental impact.[40] In particular, emissions standards, reflective of ecological imperatives, furnish a palpable metric for the evaluation and demand of EVs and their associated batteries. Synchronizing with and meeting these standards is a *sine qua non* for effective market engagement.[41]

Intellectual property laws are another important legal framework determining a nation's participation in the EV battery market.[42] Intellectual property laws protect innovation and enable companies to develop new and groundbreaking battery technologies. They confer rights and obligations upon innovators and corporate entities in safeguarding their battery-related intellectual assets. This domain is pivotal in determining intellectual property's proprietary dominion and utilization, thereby shaping a nation's stance in the global EV battery market. A strong intellectual property legal framework can also encourage technology transfer, enabling businesses to

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[35] This is partly based on the suggestions provided by Tomás Gómez San Román, ET AL. in *Regulatory Framework and Business Models For Charging Plug-In Electric Vehicles: Infrastructure, Agents, and Commercial Relationships*, 39(10) *ENERGY POL'Y*, 6360, 6360-6375 (2011).

[36] Yuqing Chen ET AL., *A Review of Lithium-Ion Battery Safety Concerns: The Issues, Strategies, and Testing Standards,* 59 J. ENERGY CHEM., 83, 83-99 (2021).

[37] Lazarenko Oleksandr, Loik Vasyl, & Shtain Bohdan, *Research on the Fire Hazards of Cells in Electric Car Batteries,* 52.4 SAFETY & FIRE TECH., 108, 108-117 (2018).

[38] *Id.*

[39] Christian Aichberger & Gerfried Jungmeier. *Environmental Life Cycle Impacts of Automotive Batteries Based on a Literature Review*, 13(23) ENERGIES at 6345 (2020).

[40] Eckard Helmers & Patrick Marx, *Electric Cars: Technical Characteristics and Environmental Impacts*, 24.1 ENV'T SCI. EUR. 1, 1-15 (2012).

[41] "Sine qua non" represents something absolutely indispensable or essential. *See*, for example, Yunfeng Li, ET AL., *Symmetry is the sine qua non of shape*, *in* SHAPE PERCEPTION IN HUMAN AND COMPUTER VISION: AN INTERDISCIPLINARY PERSPECTIVE 21-40 (Sven J. Dickinson & Zygmunt Pizlo eds., 2013).

[42] *See* Ian Hartwell & James Marco, *Management of intellectual property uncertainty in a remanufacturing strategy for automotive energy storage systems*, J. REMANUFACTURING 1 (2016).

collaborate on research and development to drive innovation and growth in the EV battery market. Trade policies are also crucial for a nation's participation in the EV battery market.[43]

A nation's trade policy and legal framework are essential for participating in the global EV battery market. Trade policies, including tariffs and quotas, define import and export regulations that affect the prices of EV batteries.[44] An open trade policy can encourage competition, driving innovation and reducing prices, while a closed trade policy can protect domestic industries, potentially hindering growth in the EV battery market.[45] In addition, adequate legal frameworks that ensure safety, maintain environmental sustainability, protect intellectual property, and encourage trade competition are crucial for the growth and success of businesses within the industry, contributing significantly to the future of electric mobility and sustainable transportation.[46] The precise articulation of the trade policy and legal framework is contingent upon jurisdictional idiosyncrasies and is subject to evolution over time. Hence, a nuanced comprehension and adherence to these legal precepts is imperative for any nation aspiring to assert a robust and abiding presence within the dynamic and swiftly evolving EV battery market.

II. COMPETITION IN THE GLOBAL EV BATTERY MARKET

The EV energy market refers to the global market for EV batteries and their associated energy infrastructure. This includes producing and supplying EV batteries and charging stations as well as distributing and selling electricity to power these vehicles. The market for EV energy is rapidly growing, driven by several factors. First, governments worldwide incentivize EV adoption through various subsidies, tax breaks, and mandates for manufacturers to produce a certain percentage of EVs.[47] Another factor is the development of more efficient batteries, faster charging stations, and improvements in range, which have made EVs a more viable option for consumers.[48] In addition, increasing awareness about the negative impact of fossil fuels on the environment has led to a shift towards renewable energy sources and EVs.[49] Currently, most EVs are powered by lithium-ion batteries, which use lithium to store energy.[50]

The market for EV charging stations is also growing rapidly with businesses and governments investing in expanding this infrastructure.[51] EV charging stations can be owned by electric utilities, businesses, or individuals and can be public or private. In addition, selling

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[43] *See* Chuan Zhang, Yu-Xin Tian, & Meng-Hong Han, *Recycling Mode Selection And Carbon Emission Reduction Decisions For A Multi-Channel Closed-Loop Supply Chain Of Electric Vehicle Power Battery Under Cap-And-Trade Policy*, J. CLEANER PROD. 1 (2022).

[44] *See* Sergio Manzetti & Florin Mariasiu, *Electric Vehicle Battery Technologies: From Present State To Future Systems*, 51 RENEWABLE AND SUSTAINABLE ENERGY REV. 1004 (2015).

[45] *See* Qing Liu & Hong Ma, *Trade Policy Uncertainty And Innovation: Firm Level Evidence From China's WTO Accession*, J. INT'L ECON. 1 (2020).

[46] Hans Eric Melin ET AL., *Global Implications of the EU Battery Regulation*, 373 SCI. at 384 (2021).

[47] *See* Bradley W. Lane ET AL., *Government Promotion Of The Electric Car: Risk Management Or Industrial Policy?*, 4(2) EUR. J. RISK REGUL. 227-45 (2013).

[48] *See* Justine Sears, David Roberts, & Karen Glitman, *A Comparison Of Electric Vehicle Level 1 And Level 2 Charging Efficiency*, IEEE CONF. ON TECH. FOR SUSTAINABILITY 255 (2014).

[49] Stephen Eaves & James Eaves, *A Cost Comparison Of Fuel-Cell And Battery Electric Vehicles*, 130(1-2) J. POWER SOURCES 208-12 (2004).

[50] *Id.*

[51] *See* Antonino Genovese, Fernando Ortenzi &, and Carlo Villante., *On the Energy Efficiency of Quick DC Vehicle Battery Charging*, 7(4) WORLD ELEC. VEHICLE J. 570-576 (2015) (It.), https://doi.org/10.3390/wevj7040570.

electricity to power EVs is becoming an increasingly important part of the energy market.[52] This involves the distribution of electricity to charging stations and the development of pricing models to ensure that EV charging remains cost-effective and reliable. The EV energy market is rapidly evolving as consumers, businesses, and governments look for ways to reduce their environmental footprint and lower their reliance on fossil fuels.

A. *Types of EV batteries in the market*

There are currently two major types of car batteries within the EV battery market: NCM and LFP batteries.[53]

In the early days of EV batteries, nickel-metal hydride (NiMH) was used and gained popularity due to its superior energy density vis-à-vis traditional lead-acid batteries.[54] However, their capacity and performance were constricted by their limited capacity.[55] Later, the advent of lithium-ion batteries fundamentally transformed the landscape of the EV industry by virtue of their augmented energy density, extended lifespan, and diminished mass in comparison to NiMH batteries.[56] LFP batteries were introduced by using iron phosphate as their cathode material.[57] Subsequently, NCM batteries emerged as a seminal breakthrough based on lithium-ion battery technology. Comprising nickel, cobalt, and manganese, NCM batteries proffered heightened energy density, power output, and overall performance.[58] In pursuit of even greater energy density and consequent expansion of EV driving ranges, NCM batteries with heightened nickel content, such as NCM 622, NCM 523, and NCM 811, were devised.[59] NCM batteries have a higher energy density than LFP batteries, which means they can store more energy in the same size and weight as the battery pack.[60]

LFP is still in use because of its longer lifespan than NCM batteries, which allows them undergo more charge and discharge cycles before reaching the end of their life.[61] This makes them a better option for long-term durability applications, such as energy storage systems.[62] Expressed

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[52] *See* S. Hemavathi & A. Shinisha, *A Study on Trends and Developments in Electric vehicle Charging Technologies*, J. ENERGY STORAGE 1, 32-52 (2022).

[53] *See* Xin Sun ET AL., *Life Cycle Assessment of Lithium Nickel Cobalt Manganese Oxide (NCM) Batteries for Electric Passenger Vehicles,* J. CLEANER PROD. 1, 273 (2020).

[54] *See* Mengmeng Wang ET AL., *Recycling of Lithium Iron Phosphate Batteries: Status, Technologies, Challenges, and Prospects*, 163 RENEWABLE & SUSTAINABLE ENERGY REVS. 1, 2 (2022).

[55] *See* Guillaume Majeau-Bettez, Troy R. Hawkins & Anders Hammer Strømman, *Life Cycle Environmental Assessment of Lithium-Iion and Nickel Metal Hydride Batteries for Plug-in Hybrid and Battery Electric Vehicles*, 45(10) ENVTL. SCI. & TECH. 45, 48-51 (2011).

[56] *See* Hengjie Shen ET AL., *Thermal Runaway Characteristics and Gas Composition Analysis of Lithium-Ion Batteries with Different LFP and NCM Cathode Materials Uunder Inert Atmosphere*, 12(7) ELECTRONICS 1 (2023) (China).

[57] *See* Jiawei Quan ET AL., *Comparative Life Cycle Assessment of LFP and NCM Batteries Including the Secondary use and Different Recycling Technologies*, 819 SCIENCE OF THE TOTAL ENV'IRONMENT 1, 2 (2022).

[58] *See* Mengmeng Wang ET AL., *Recycling of Llithium Iiron Phosphate Batteries: Status, Technologies, Challenges, and Prospects*, 163 RENEWABLE &AND SUSTAINABLE ENERGY REVIEWS 1, 2 (2022).

[59] Xu-Hui Zhu ET AL., *Recycling Valuable Metals from Spent Lithium-Ion Batteries Using Carbothermal Shock Method*, ANGEWANDTE CHEMIE INT'L ED. 1 (2023).

[60] *Id.*

[61] Quan ET AL., *supra* note 57 at 153105.

[62] Hengjie Shen, ET AL., *Thermal Runaway Characteristics and Gas Composition Analysis of Lithium-Ion Batteries With Different LFP and NCM Cathode Materials Under Inert Atmosphere*, 12(7) ELECS. at 1603 (2023).

in terms of costs, LFP batteries are cheaper than NCM batteries due to the simpler cathode material used.[63] This makes them more cost-effective for large-scale energy storage applications. However, with the advancement of technology, the cost of NCM batteries is also decreasing, making them more viable for mass-market EVs.[64]

Notably, ethical concerns have cast aspersions upon the use of cobalt within NCM batteries, given its association with environmental degradation and human rights issues pertaining to cobalt mining. Consequently, endeavors have been undertaken to attenuate reliance on cobalt and explore alternative materials in the composition of NCM batteries. Concurrently, LFP batteries, also recognized as lithium iron phosphate batteries, have attained prominence within the EV market due to their distinctive attributes and advantages. Distinguished by their iron phosphate cathode material, LFP batteries obviate the necessity for cobalt, thereby ameliorating some of the ethical concerns associated with NCM batteries. Their superlative safety profile, thermal stability, and extended cycle life vis-à-vis NCM batteries have garnered recognition.[65] Despite a slightly inferior energy density relative to NCM batteries, LFP batteries excel in terms of inherent safety and suitability for applications necessitating robust power output and durability.

Regarding market dynamics, NCM batteries initially reigned supreme in EV batteries due to their elevated energy density, engendered augmented driving ranges, and enhanced performance. Nevertheless, apprehensions pertaining to cobalt supply chain complications, environmental impact, and cost reduction impelled manufacturers to explore LFP batteries as an alternative.[66] Notably, LFP batteries have witnessed heightened popularity, particularly within the Chinese EV market, wherein safety and cost-effectiveness are prioritized considerations.[67] Presently, some automakers opt for a hybridized approach, employing both NCM and LFP batteries in their EVs, leveraging the unique benefits conferred by each chemical composition to optimize performance and cost.[68]

Overall, the choice between NCM and LFP depends on the application and requirements of the system. For instance, EVs prioritize energy density and range, making NCM batteries the preferred option.[69] On the other hand, energy storage systems prioritize cycle life and cost-effectiveness, making LFP batteries a more suitable option.[70] The current state of EV battery technology has made significant progress in recent years, with advancements in materials science, chemistry, and manufacturing leading to increased energy densities and longer driving ranges. The

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[63] Hengjie Shen ET AL., *Thermal Runaway Characteristics and Gas Composition Analysis of Lithium-Ion Batteries with Different LFP and NCM Cathode Materials under Inert Atmosphere*, 12 ELECTRONICS 1603 (2023).
[64] Kostiantyn Turcheniuk ET AL., *Battery Materials for Low-Cost Electric Transportation*, 42 MATERIALS TODAY (2021).
[65] Jingjing Li ET AL., *Assessment of the Lifecycle Carbon Emission and Energy Consumption of Lithium-Ion Power Batteries Recycling: A Systematic Review and Meta-Analysis*, J. ENERGY STORAGE 1 (2023).
[66] David da Silva Vasconcelos ET AL., *Circular Recycling Strategies for LFP Batteries: A Review Focusing on Hydrometallurgy Sustainable Processing*, 13(3) METALS at 543 (2023).
[67] Weidong Zhuang ET AL., *Progress in Materials for Lithium-Ion Power Batteries*, INT'L CONF. ON INTELLIGENT GREEN BLDG. & SMART GRID (IGBSG) 1 (2014).
[68] Quan ET AL., *supra* note 57 at 153105.
[69] Christoph Roitzheim ET AL., *All-Solid-State Li Batteries With NCM–Garnet-Based Composite Cathodes: The Impact of NCM composition on Material Compatibility*, 5(6) ACS APPLIED ENERGY MATERIALS at 6913 (2022).
[70] Trias Andromeda ET AL., *Design of DC Fast Charging Buck Converter for LFP Battery on Electric Car*, *in* 2019 6TH INT'L CONF. ON ELECTR. VEHICULAR TECH. (ICEVT) 1 (2019).

industry is expected to grow, with research and development expanding into solid-state batteries and cost-reduction strategies to meet the growing demand for sustainable transportation and the ever-increasing requirement for sustainable energy.[71]

B. *Comparing Chinese and Korean EV Batteries*

China developed LFP in EV batteries, while South Korea focused on NCM.[72] One of the reasons why China focused on LFP is that it is a cost-effective technology that relies on inexpensive raw materials such as iron and phosphorus.[73] Compared to NCM technology, LFP is simpler to produce, meaning it has lower production costs. EV makers in China have traditionally focused on producing low-cost EVs for the domestic market, and LFP's cost advantage made it a more attractive option for them.[74] Additionally, LFP is considered safer than NCM technology as it is less prone to catching fire or exploding.[75] This feature allows EVs with LFP batteries to be more reliable and secure.[76] As a result, China's focus on LFP technology allowed the country to establish itself as a major player in the EV market with a strong emphasis on safety.[77]

The competition between China's LFP and South Korea's NCM batteries in the EV battery market is intensifying with both technologies vying for market share as automakers ramp up production of EVs. LFP batteries, made of lithium-ion technology, are relatively cheaper to produce, have a longer lifespan, and are considered more durable than NCM batteries.[78] The LFP's safety benefits are also attractive for EV makers, which helps China rely on LFP battery technology for its EV industry. On the other hand, Korean battery makers have been improving NCM batteries' performance by developing new formulas that reduce the amount of cobalt used, a rare and expensive material.[79] NCM batteries are generally considered more energy-dense than LFP batteries, so they are better suited for longer-range EV models.[80]

Several factors drive the competition between LFP and NCM batteries. One of the main factors is cost as LFP batteries are cheaper to produce than NCM batteries due to their simpler chemical composition.[81] Another factor is performance as NCM batteries are generally seen as

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[71] Joshua Thomas Jameson Burd ET AL., *Improvements in Electric Vehicle Battery Technology Influence Vehicle Lightweighting and Material Substitution Decisions*, APPLIED ENERGY, 1 (2020).
[72] Hoon-Hee Ryu ET AL., *Reducing Cobalt From Lithium-Ion Batteries For The Electric Vehicle Era*, 14(2) ENERGY & ENVT'L SCI. 844-852 (2021).
[73] Tao Feng ET AL., *Life Cycle Assessment of Lithium Nickel Cobalt Manganese Oxide Batteries and Lithium Iron Phosphate Batteries for Electric Vehicles in China*, 52 J. ENERGY STORAGE at 104767 (2022).
[74] Yixuan Wang ET AL., *Environmental Impact Assessment of Second Life and Recycling for LiFePO4 Power Batteries in China*, 314 J. ENVT'L MGMT. 1, 1-8 (2022).
[75] *Id.*
[76] Manh-Kien Tran ET AL., *Comparative Study of Equivalent Circuit Models Performance in Four Common Lithium-Ion Batteries: LFP, NMC, LMO, NCA*, 7(3) BATTERIES at 51 (2021).
[77] Han Hao ET AL., *GHG Emissions From the Production of Lithium-ion Batteries for Electric Vehicles in China,* 9 504 SUSTAINABILITY 1, 1-10 (2017).
[78] *Id.*
[79] Arup Chakraborty ET AL., *Review of Computational Studies of NCM Cathode Materials for Li-ion Batteries*, 60 ISR. J. CHEMISTRY 850, 850-862 (2020).
[80] Chen Yang, *Running Battery Electric Vehicles With Extended Range: Coupling Cost and Energy Analysis*, 306 APPLIED ENERGY at 118116 (2022).
[81] Nikita Klyshko & Alla Mikhailova, *Comparison of Electric Vehicle Batteries: NCA VS LFP*, *in* ACHIEVEMENTS AND PROSPECTS OF INNOVATION AND TECHNOLOGY 142, 142-147." (2019).

having higher energy density and longer life span, which makes them better suited for high-end or long-range EVs.[82] Moreover, EV battery makers increasingly seek sustainable and environmentally friendly battery technologies.[83] This can create an opportunity for LFP batteries since they rely on something other than cobalt, a controversial and unsustainable resource. However, LFP batteries also have some drawbacks. They are heavier and less efficient than NCM batteries, which limits their usefulness in long-range EVs.[84] Developing new NCM battery formulas that use less cobalt could make them more cost-effective and perform better than LFP batteries. The competition between LFP and NCM batteries in the EV battery market is intense with both technologies offering advantages and drawbacks.[85] The outcome will depend on how the market evolves and which of the two technologies can better meet the needs of automakers and consumers.

On the other hand, South Korea focused on NCM battery technology because of its proficiency in battery production and a strong supply chain for raw materials such as nickel, cobalt, and manganese.[86] South Korean battery manufacturers have invested heavily in new NCM formulas that can improve the performance and increase the energy density of NCM batteries. This has allowed South Korean companies to target the high-end EV market, focusing on performance and a longer range of vehicles. Furthermore, South Korean companies have shown a strong commitment to sustainability and environmentalism, leading them to develop more environmentally friendly batteries than traditional ones.[87] Their choice of developing NCM technology aligns with their commitment to more sustainable battery solutions.[88]

In essence, China developed LFP in car batteries due to its cost-effectiveness and safety, focusing on producing low-cost EVs. In contrast, South Korea focused on NCM battery technology due to its proficiency in battery production, access to raw materials, and commitment towards environmental sustainability and higher-end vehicles.

C. *Global North vs. Global South*

The competition in the EV battery market depends, to a great extent, on the economic development of the competitors' home countries.[89] Developed countries usually aim to develop more complex, upscale, environmentally friendly, and innovative products with higher added

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[82] KWO YOUNG, ET AL., ELECTRIC VEHICLE INTEGRATION INTO MODERN POWER NETWORKS, 15, 15-56 (R. Garcia-Valle & J.A. Pecas Lopes eds., 2013).

[83] Zhijie Yang ET AL., *Sustainable Electric Vehicle Batteries for a Sustainable World: Perspectives on Battery Cathodes, Environment, Supply Chain, Manufacturing, Life Cycle, and Policy*, 12(26) ADVANCED ENERGY MATERIALS, 2200383 (2022).

[84] *Id.*

[85] Alexandre Beaudet ET AL., *Key Challenges and Opportunities for Recycling Electric Vehicle Battery Materials*, 12 SUSTAINABILITY 1, 1-10 (2020).

[86] Sergio Manzetti & Florin Mariasiu, *Electric Vehicle Battery Technologies: From Present State to Future Systems*, 51 RENEWABLE AND SUSTAINABLE ENERGY REV. 1004, 1004-12 (2015).

[87] Yeongmin Kwon ET AL., *User Satisfaction With Battery Electric Vehicles in South Korea*, 82 TRANSP. RSCH. PART D: TRANSP. AND ENV'T (2020).

[88] *Id.*

[89] Shouheng Sun & Weicai Wang, *Analysis on the Market Evolution of New Energy Vehicle Based on Population Competition Model*, 65 TRANSP. RSCH. PART D: TRANSP. AND ENV'T 36, 36-50 (2018).

value.[90] Developing countries, however, tend to focus on cost-effective production, aiming at basic or entry-level products.[91] Many researchers use the "Global North" and "Global South" concepts to describe the stages of countries' economic progress and consider the production of appropriate products in line with their technological development.[92]

The terms Global North and Global South are often used in academic discourse to describe the economic, social, and political differences between developed and developing countries.[93] The Global North refers to wealthy, industrialized nations with advanced economies and high living standards, typically in the northern hemisphere.[94] The Global South, in contrast, generally refers to countries with lower levels of economic development, poorer living standards, and less political influence, often located in the southern hemisphere.[95] These geographic divisions have deep historical roots and reflect the legacies of colonialism, imperialism, and global power dynamics.[96] The Global North is seen as having an outsized influence on global economic and political affairs, while the Global South often struggles with issues such as poverty, instability, and marginalization.[97] These terms are used to analyze and critique global economic and political inequality patterns and examine how countries and regions are interconnected and entangled in complex systems of power and privilege.[98]

Expressed in terms of GDP, it can be argued that China and South Korea have different economic characteristics that may place them in different national groups. China is currently the world's second-largest economy, but its GDP per capita amounted to approximately $10,000, which is relatively low compared to developed nations.[99] While China has made significant economic progress in recent decades, it is still considered a developing country facing challenges such as high levels of inequality, environmental degradation, and other characteristics more commonly associated with Global South countries.[100] South Korea, on the other hand, has a highly industrialized economy and is often considered a developed country with a GDP per capita of

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[90] Sergio Manzetti & Florin Mariasiu, *Electric Vehicle Battery Technologies: From Present State to Future Systems*, 51 RENEWABLE AND SUSTAINABLE ENERGY REV. 1004, 1004-1012 (2015).
[91] Bijen Mali ET AL., *Challenges in the Penetration of Electric Vehicles in Developing Countries With a Focus on Nepal*, 40 RENEWABLE ENERGY FOCUS 1, 1-12 (2022).
[92] *See* Lemuel Ekedegwa Odeh, *A Comparative Analysis of Global North and Global South Economies*, 12 J. SUSTAINABLE DEV. AFR. 338, 338-348 (2010); Nour Dados & Raewyn Connell, *The Global South*, 11(1) CONTEXTS 12, 12-13 (2012).
[93] Fran M. Collyer, *Global Patterns in the Publishing of Academic Knowledge: Global North, Global South*, 66(1) CURRENT SOC. 56, 56-73 (2018).
[94] *Id.*
[95] RAY KIELY, THE RISE AND FALL OF EMERGING POWERS: GLOBALISATION, US POWER AND THE GLOBAL NORTH-SOUTH DIVIDE, (A. Broome & S. Breslin, eds. Springer, 2016).
[96] *Id.*
[97] Ya Wu & Li Zhang, *Can the Development of Electric Vehicles Reduce the Emission of Air Pollutants and Greenhouse Gases in Developing Countries?*, 51 TRANSP. RES. PART D: TRANSP. AND ENV'T 129, 129-145 (2017).
[98] Kevin Gray & Barry K. Gills, *South–South Cooperation and the Rise of the Global South*, 37(4) THIRD WORLD Q. 557, 557-574 (2016).
[99] BERND KRAMPEN, *Asia: China and Japan Provide Further Market Impetus*, *in* USING ECONOMIC INDICATORS IN ANALYSING FINANCIAL MARKETS 119 – 135 (Emerald Publ'g Ltd., Leeds, 2023).
[100] Sebastian Haug ET AL., *The 'Global South' in the Study of World Politics: Examining a Meta Category*, 42(9) THIRD WORLD Q. (2021).

approximately $31,000.[101] South Korea has made significant economic progress since the 1960s, becoming a major player in technology and innovation. It has achieved a high standard of living with socioeconomic characteristics more commonly associated with Global North countries.[102] Therefore, it can be argued that China may be classified as a Global South nation based on its GDP per capita, while South Korea may be classified as a Global North nation. However, it is important to note that GDP alone is not a sufficient measure of economic development, as it does not account for important factors such as income inequality, access to basic services, and environmental sustainability.[103]

It is important to note that the Global North-South divide is not a strict binary. Countries can generally have characteristics that place them somewhere between or outside these classifications. Therefore, it may be more accurate to consider these countries' specific economic, social, and political characteristics rather than trying to place them into rigid categories. Along this line of thinking, China has often been considered a rising global power and has the world's second-largest economy, which could suggest Global North characteristics.[104] However, China is also a developing country facing significant economic and social challenges, such as high levels of inequality and environmental degradation, which are more commonly associated with Global South countries.[105] On the other hand, South Korea is a developed and prosperous country with a highly industrialized economy and advanced technology, which are characteristics commonly associated with Global North countries.[106] However, South Korea also faces challenges such as high levels of household debt and a rapidly aging population, which are more commonly associated with Global South countries.[107]

D. *Production Capacity and Innovation*

Both South Korea and China are major global EV battery market players. While China has an advantage in production capacity and economy of scale, South Korea has been competing by focusing on innovation, high-quality products, and vertical integration.[108]

South Korean companies like LG Chem and Samsung SDI have invested heavily in research and development to develop more efficient and durable EV batteries.[109] They constantly innovate to improve their products, focusing on advanced technology in battery design,

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[101] Jung Woo Lee, *A Game for the Global North: The 2018 Winter Olympic Games in Pyeongchang and South Korean Cultural Politics,* 33(12) INT'L. J. HIST. SPORT 1411-1426 (2016)..

[102] Shahad Qassim Mohammed, *The Role of the Political Elite in Activating the Development Policies of the Republic of South Korea After the Year 2005 in Light of Economic Indicators*, 13(1) RES MILITARIS 1705-1714 (2023)

[103] Ziya Öniş, *Democracy in Uncertain Times: Inequality and Democratic Development in the Global North and Global South*, 23 METU STUD. DEV. 317-336 (2016).

[104] Hong Liu, *China Engages the Global South: From Bandung to the Belt and Road Initiative*, 13 GLOBAL POL'Y at 11 (2022).

[105] Sheng Ding, *To Build a "Harmonious World": China's Soft Power Wielding in the Global South*, 13 J. CHINESE POL. SCI. 193-213 (2008).

[106] Thomas Kalinowski, *The Politics of Climate Change in a Neo-Developmental State: The Case of South Korea*, 42(1) INT'L POLITICAL SCI. REV. at 48 (2021).

[107] *Id.*

[108] *Id.*

[109] Alexander Gerybadze & Helen Mengis, *Catch-Up and Reverse Catch-Up Processes in the Market for Lithium-Ion Batteries Innovation,* CATCH-UP & SUSTAINABLE DEV.: A SCHUMPETERIAN PERSP. at 183 (2021).

architecture, and new materials.[110] These Korean companies have a reputation for producing high-quality, reliable battery products that meet international standards.[111] Many EV manufacturers prefer to use batteries from South Korean companies as they offer better performance, safety, and longevity.[112]

Like China, many South Korean battery manufacturers are vertically integrated, meaning they are involved in the entire production process, from raw material extraction to battery cell production.[113] This means they have better control over the quality of their products and production efficiency.[114] Regarding partnerships with global automakers, South Korean battery manufacturers have partnerships with global automakers such as General Motors, Ford, and Hyundai.[115] They are working together to develop batteries with a higher energy density that can enable EVs to travel further without recharging.[116] Finally, the South Korean government has been vocal about promoting the growth of the battery manufacturing industry, offering tax incentives, economic development funds, and policy measures to support innovation and research.[117] While South Korea faces stiff competition from China in the global EV battery market, its focus on innovation, quality, and vertical integration, combined with government support, has helped it become a major player in the industry and continue to compete fiercely with China.[118]

In terms of technical factors, both China and South Korea face distinct advantages and challenges in the EV battery market. China has made significant progress in developing new battery technologies, such as solid-state batteries and metal-air batteries, which have the potential to increase the range and performance of EVs significantly.[119] Additionally, Chinese firms have invested heavily in the latest manufacturing technologies, allowing them to produce batteries at scale and lower costs.[120] South Korea, on the other hand, has a well-established research and development ecosystem, with a number of renowned research institutions and companies working on battery innovations.[121] South Korean firms have also made significant progress in improving

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[110] *Id.*
[111] Leopold Peiseler ET AL., *Globalising Innovation Through Co-Inventions–The Success Case of The Korean Lithium-Ion Battery Industry,* ENVT'L RES. LETTERS (2024).
[112] *Id.*
[113] Xieshu Wang ET AL., *Specialised Vertical Integration: The Value-Chain Strategy of EV Lithium-Ion Battery Firms in China*, 22(2) INT'L J. AUTO. TECH. & MGMT at 178 (2022).
[114] *Id.*
[115] Ustabaş & Döner, *supra* note 3 at 527.
[116] *Id.*
[117] Wonjae Choi & Han Ho Song, *Well-to-Wheel Greenhouse Gas Emissions of Battery Electric Vehicles in Countries Dependent on the Import of Fuels Through Maritime Transportation: A South Korean Case Study*, 230 APPLIED ENERGY 135–147.
[118] Min Jiang ET AL., *The Relationship Between Economic Growth and Air Pollution—A Regional Comparison Between China and South Korea*, 17(8) INT'L J. ENVT'L RES. & PUB. HEALTH at 2761 (2020).
[119] Hongwen He ET AL., *China's Battery Electric Vehicles Lead The World: Achievements in Technology System Architecture and Technological Breakthroughs*, 1(1) GREEN ENERGY & INTELLIGENT TRANSP. at 100020 (2022).
[120] *Id.*
[121] Doyeon Lee & Keunhwan Kim, *Research and Development Investment and Collaboration Framework for the Hydrogen Economy in South Korea*, 13(19) SUSTAINABILITY at 10686 (2021).

the energy density and safety of LIBs, which are still the predominant battery technology used in the EV market.[122]

Moreover, both countries also face technical challenges in the EV battery market. For example, the current need for a common standard for EV batteries could create problems for international trade and interoperability.[123] Additionally, there are concerns over the supply of critical materials, such as lithium and cobalt, necessary to produce batteries.[124] As demand for EVs grows, countries will need to work together to ensure a stable and sustainable supply of these materials.

III. THE ROLE OF LEGAL FRAMEWORKS IN EV BATTERY MARKET COMPETITION

When examining the competition between China and South Korea in the EV battery market through a comparative law lens, a multifaceted analysis of legal and regulatory elements reveals significant factors at play. These encompass safety standards, intellectual property protections, and the intricate webs of trade agreements governing the production, distribution, and marketing of EV batteries in both countries. By closely scrutinizing the legal frameworks, one can discern the mechanisms in place to safeguard patents, foster innovation, and protect intellectual property rights. Additionally, exploring the trade agreements sheds light on the regulations governing market access, import-export dynamics, and the broader trade environment, all shaping the competitive landscape within the EV battery market. Considering these legal and regulatory factors allows for a comprehensive understanding of the nuanced interplay that influences the competitive dynamics between China and South Korea in the EV battery industry.[125]

A. *Safety Standard*

The legal framework governing safety standards in the competitive landscape between China and South Korea within the EV car battery market is characterized by a nuanced interplay of domestic regulatory paradigms, international norms, and bilateral accords.[126] These legal constructs serve as bulwarks, collectively assuring the safety and dependability of EV batteries proffered by entities domiciled in both nations. A sophisticated interplay of domestic regulatory architectures, international standards, and bilateral agreements distinguishes such frameworks.[127] These legal configurations collectively serve as fortifications, ensuring the safety and reliability of EV batteries offered by entities domiciled in both nations.

Several pivotal components lie at the forefront of this legal architecture. Firstly, China and South Korea are steadfastly committed to upholding and adhering to internationally recognized

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[122] Keumju Lim ET AL., *Forecasting the Future Scale of Vehicle to Grid Technology for Electric Vehicles and its Economic Value as Future Electric Energy Source: The Case of South Kore*a, 31(8) ENERGY & ENV'T at 1350 (2020).
[123] Himadry Shekhar Das ET AL., *Electric Vehicles Standards, Charging Infrastructure, and Impact on Grid Integration: A Technological Review*, 120 RENEWABLE & SUSTAINABLE ENERGY REVS. at 109618 (2020).
[124] *Id.*
[125] Kuei-Kuei Lai ET AL., *Analyzing Co-Opetition Strategy Through Patents in the Stent Market*, *in* MANAGING MED. TECH. INNOVATIONS: EXPLORING MULTIPLE PERSPS., 133-155 (2020).
[126] Quanqing Yu ET AL., *Evaluation Of The Safety Standards System Of Power Batteries For Electric Vehicles In China*, 349 APPLIED ENERGY 1 (2023).
[127] *Id.*

safety standards.[128] Entities such as the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) constitute the fulcrum for articulating and disseminating globally acknowledged benchmarks pertaining to EV battery safety.[129] Conformance to these standards is often an indispensable prerequisite for market entry.[130]

Furthermore, enterprises located within the jurisdictions of both China and South Korea are subjected to exact testing protocols that are meticulously designed to ascertain the alignment of their EV batteries with extant safety standards.[131] These assessments are conducted under the auspices of accredited laboratories and certification bodies, which undertake the critical responsibility of substantiating compliance with regulatory imperatives, both domestically and internationally.[132]

Both China and South Korea maintain legal frameworks delineating product liability. These legal frameworks apportion accountability to manufacturers for any harm resulting from faulty products, including EV batteries.[133] This engenders an environment wherein manufacturers are incentivized to accord paramount importance to safety considerations in their products' conception, fabrication, and distribution.[134] Moreover, both nations have the prerogative to institute incentives and financial mechanisms geared towards catalyzing research and development initiatives to enhance EV battery safety. These incentives serve as catalysts for innovation and the integration of cutting-edge safety technologies.

B. *Protection of Intellectual Property*

The divergence in the legal frameworks of China and South Korea assumes particular significance in the domain of intellectual property protection, serving as a critical determinant of the competition dynamics within the EV battery market. South Korea's robust and well-developed legal system affords robust safeguards for intellectual property rights, thereby empowering domestic companies to innovate and spearhead advancements in battery designs and technologies.[135] In stark contrast, China's evolving legal landscape, while making progress, has witnessed instances of Chinese companies engaging in the unauthorized replication or

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[128] *See e.g*, Peng Liu ET AL., *Accumulation And Ecological Risk of Heavy Metals in Soils Along The Coastal Areas of The Bohai Sea And The Yellow Sea: A Comparative Study of China And South Korea*, 137 ENV'T. INT'L. 1 (2020).
[129] Domagoj Pejakušić,Yvonne Liermann-Zeljak, & Hrvoje Glavaš, *Application of ISO–IEC 80000–6: 2008 in the Description of Technical Systems*, 120(2) *ANNALS OF THE FACULTY OF ENG'G. HUNEDOARA* 111-115 (2022).
[130] Maximilian Bauer, *A Review of Electric Vehicle Safety Standards and Regulations: Current Status and Future Directions*, 5(1) J. HUMANS. & APPLIED SCI. RES. at 43 (2022).
[131] Kwon ET AL., *supra* note 87. *See also* Peng Liu ET AL., *Accumulation and Ecological Risk of Heavy Metals in Soils Along The Coastal Areas of The Bohai Sea And The Yellow Sea: A Comparative Study of China and South Korea*, 137 ENV'T. INT'L. (2020).
[132] *Id.*
[133] *See, e.g.,* Xuerou Sheng ET AL., *Green Supply Chain Management for a More Sustainable Manufacturing Industry in China: A Critical Review*, 25(2) ENVT., DEV., & SUSTAINABILITY at 1151 (2023) *and* Jong Min Lee ET AL., *Turning a Liability Into an Asset of Foreignness: Managing Informal Networks in Korea*. 65(3) BUS. HORIZONS at 351 (2022).
[134] *See, e.g.*, Sea-Ho Oh ET AL., *Comparison of The Sources And Oxidative Potential of PM2. 5 During Winter Time in Large Cities in China and South Korea*, *SCI. TOTAL ENV'T.* 859 (2023).
[135] Kim Tae-min & Park Heon-young, *Characteristics of Legal System Related to Security in Republic of Korea*, 2 *PROT. CONVERGENCE* 25-32 (2017).

infringement of the intellectual property rights held by foreign competitors.[136] Consequently, the imperative for bolstering intellectual property protection mechanisms within China has emerged as a pressing concern for South Korean enterprises, which heavily invest in research and development endeavors to fuel their innovative edge and create cutting-edge products.[137]

The contours of this competition are profoundly influenced by the protection of intellectual property rights, representing a pivotal issue at the forefront. South Korean companies, fueled by substantial investments in research and development, have successfully garnered multiple patents for their advanced battery designs and technological innovations.[138] However, Chinese companies have faced allegations of imitating and emulating South Korean battery technology, triggering legal disputes concerning patent infringement.[139] These contentious encounters have significantly strained bilateral relations and engendered heightened scrutiny of intellectual property rights within the EV battery market, prompting a comprehensive reassessment of protective mechanisms.

Notwithstanding the challenges faced, both China and South Korea grapple with complex sociolegal quandaries embedded within the EV battery market. The intellectual property disputes that frequently arise between Chinese and South Korean firms pertaining to battery technologies are of particular concern. Such disputes have the potential to culminate in protracted lawsuits, impeding innovation and hindering collaborative efforts within the industry.[140] Consequently, resolving these intellectual property conflicts assumes paramount importance, necessitating the engagement of legal practitioners to employ their specialized expertise in advocating for fair resolutions, fostering an environment conducive to cooperation, propelling inventive breakthroughs, and facilitating the continued growth and success of the EV battery market.

C. *Regulatory Systems*

The divergence between China and South Korea in their regulatory approaches constitutes a significant differentiating factor. China's centralized regulatory system controls the production, distribution, and marketing of car batteries. In contrast, South Korea adopts a decentralized regulatory framework, affording corporations greater operational flexibility.[141] This contrast manifests in the competition in the EV battery market, permeating both nations' social and legal systems. China's economic system is predominantly centrally planned, accompanied by a nascent legal apparatus, which occasionally poses challenges for foreign enterprises seeking adequate protection of their intellectual property rights.[142] Conversely, South Korea embraces a market-

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[136] Yu Hao ET AL., *How Does International Technology Spillover Affect China's Carbon Emissions? A New Perspective Through Intellectual Property Protection*, 25 SUSTAINABLE PROD. & CONSUMPTION 577, 577-7825 (2021).
[137] Baomin Dong ET AL., *Intellectual Property Rights Protection and Export Product Quality: Evidence From China*, 77 INT'L REV. ECONS. & FIN. at 143 (2022).
[138] Dukrok Suh & Junseok Hwang, *An Analysis of the Effect of Software Intellectual Property Rights on the Performance of Software Firms in South Korea*, 30(5) TECHNOVATION 376, 376-853 (2010).
[139] See, *e.g.*, Taewoo Roh ET AL., *How do Intellectual Property Rights and Government Support Drive a Firm's Green Innovation? The Mediating Role of Open Innovation*, 317 J. CLEANER PROD. at 128422 (2021).
[140] Eun Kyo Cho & Woojung Shim, *The Battle Over Batteries: Chinese Ascendancy and Challenges for Korea,* KOR. INST. FOR INDUS. ECON. & TRADE RES. PAPER (2023).
[141] *See, e.g.*, Xiaohui Yang ET AL., *Centralization or Decentralization? The Impact of Different Distributions of Authority on China's Environmental Regulation*, 173 TECH. FORECASTING & SOC. CHANGE at 121172 (2021).
[142] *See* Yansui Liu & Yang Zhou, *Territory Spatial Planning and National Governance System in China*, 102 LAND USE POL'Y at 105288 (2021).

oriented economy and a mature legal system, engendering heightened confidence among businesses regarding intellectual property rights.[143] Despite each country's unique strengths and challenges, the contours of this competition will invariably adjust in response to global market trends, trade agreements, and evolving regulatory frameworks.[144]

As the EV battery market evolves, a comprehensive understanding of these regulatory frameworks becomes indispensable. The legal profession assumes a crucial role in assisting enterprises to navigate these intricate systems, proffering counsel on compliance and intellectual property protection, and advocating for establishing harmonious regulatory environments that foster equitable competition.[145] Legal practitioners adeptly analyze the ramifications of regulatory disparities, strategize approaches for safeguarding intellectual property, and employ their expertise to shape regulatory landscapes conducive to sustained market growth.[146] Furthermore, legal professionals play a pivotal role in facilitating negotiations between nations to harmonize regulatory frameworks, bridge gaps between legal systems, and nurture an ecosystem that promotes innovation, fair competition, and the robust development of the EV battery market.[147]

D. *International Trade Agreements*

While economic factors influence the rivalry between China and South Korea in the EV battery market and are significantly impacted by trade agreements and international regulations, the existence of a free trade agreement between these nations has engendered a trade environment characterized by openness and transparency, thereby facilitating increased market access for South Korean firms within China.[148] This bilateral trade agreement, implemented in 2015, has played a pivotal role in establishing a favorable platform for South Korean enterprises to expand their market share in China, which is renowned as the global leader in the EV market.[149]

Recent trade tensions have cast a shadow of uncertainty over the EV battery market. These tensions stem from the intricate interplay between trade disputes and political considerations, specifically the deployment of the US Terminal High Altitude Area Defense (THAAD) missile system in South Korea.[150] These actions have given rise to vehement disagreements and strained diplomatic relations between China and South Korea.[151] Consequently, the EV battery market has encountered formidable obstacles, impeding the seamless operation and expansion of trade in this

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[143] Bae-gyoon Park, *Uneven Development, Inter-Scalar Tensions, and the Politics of Decentralization in South Korea*, 32(1) INT'L J. URB. REG'L RES. 40-59 (2008).
[144] David Gerber, *Global Competition: Law, Markets, and Globalization*, OXFORD UNIV. PRESS (2010).
[145] *See, e.g.,* Don C. Smith, *The Importance of Lithium in Achieving a Low-Carbon Future: Opportunities Galore, but Coupled With Key Challenges for Legal Professionals*, 38(1) J. ENERGY & NAT. RES. L. 38.1, 4 (2020).
[146] *Id.*
[147] *See* Samuel D. Hodge Jr. & Lauren Williams, *Vicarious Trauma: A Growing Problem Among Legal Professionals That May Become a More Prevalent Cause of Action*, 53 TX. TECH. L. REV. at 511 (2020).
[148] Jeffrey J. Schott, Euijin Jung, & Cathleen Cimino-Isaacs, *An Assessment of the Korea-China Free Trade Agreement*, PETERSON INST. FOR INT'L. ECON. POL'Y. BRIEF, No. PB 15-24 (2015).
[149] *See, e.g.,* Ying Chen, *South Korea's Agricultural Trade Dilemma: Open Markets or Protectionism? Beyond the China-South Korea Free Trade Agreement*, FREE TRADE AGREEMENTS: HEGEMONY OR HARMONY 53-76 (2019) (explaining the China-South free trade agreement).
[150] Jaganath Sankaran & Bryan L. Fearey, *Missile Defense and Strategic Stability: Terminal High Altitude Area Defense (THAAD) in South Korea*, 38(3) *CONTEMPORARY SEC'Y POL'Y* 321-344 (2017).
[151] *Id.*

sector. Therefore, the intricate interrelation between trade agreements, international regulations, and geopolitical factors underscores the complex dynamics shaping the trajectory of the EV battery market. In navigating this multifaceted landscape, stakeholders must develop comprehensive strategies that address the uncertainties arising from trade disputes and foster sustained growth and collaboration within the EV battery sector. The legal profession can play a crucial role in examining the legal implications of these trade agreements and regulations, providing guidance on dispute resolution mechanisms, and facilitating negotiations that seek to ameliorate tensions and foster a conducive environment for the EV battery market to flourish.

E. *Government support*

The level of government support for developing the EV battery industry varies between China and South Korea. The Chinese government has made significant investments in the development of EV technology, including battery factories and subsidies for EVs.[152] In contrast, the South Korean government has provided less support in this area, relying more heavily on private investment.[153]

In terms of socioeconomic factors, both China and South Korea have significant advantages in competing in the EV battery market. China is the world's largest EV market, and its government has been actively promoting the development of the EV industry.[154] The Chinese government has been investing heavily in EV infrastructure, providing incentives for consumers to buy EVs and implementing strict emission regulations for the automotive industry.[155] These policies have created a large domestic EV market, encouraging Chinese firms to invest heavily in developing batteries and other related technologies.

Various legal and regulatory factors influence the competition between China and South Korea in the EV battery market.[156] The level of protection of intellectual property, the regulatory frameworks governing the industry, the level of government support, and the impact of trade agreements and international regulations all affect the competitiveness of the two countries.

IV. COMPETITION BETWEEN CHINA AND SOUTH KOREA

There has been intense competition between China and South Korea in the EV battery market in recent years as both countries are major players in the industry and are constantly trying to outdo each other.[157] With its vast resources and massive manufacturing capabilities, China has

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[152] Yang Andrew Wu ET AL., *A Review of Evolutionary Policy Incentives for Sustainable Development of Electric Vehicles in China: Strategic Implications*, 148 ENERGY POL'Y 1, 1-11 (2021).

[153] Chul-Yong Lee, Jung-Woo Jang, & Min-Kyu Lee, *Willingness to Accept Values for Vehicle-to-Grid Service in South Korea*, 87 TRANSP. RSCH. PART D: TRANSP. & ENV'T 1-11 87 (2020).

[154] Shanjun Li ET AL., *The Role of Government in the Market for Electric Vehicles: Evidence From China*, 41(2) J. POL'Y ANALYSIS & MGMT at 450 (2022).

[155] *Id.*

[156] Inkyo Cheong, *Analysis of the FTA Negotiation Between China and Korea*, 15(3) ASIAN ECON. PAPERS 170, 170-187 (2016).

[157] *See, e.g.*, Wujin Chu ET AL., *Psychological and Behavioral Factors Affecting Electric Vehicle Adoption and Satisfaction: A Comparative Study of Early Adopters in China and Korea*, 76 TRANSP. RES. PART D: TRANSP. & ENV'T 1, 1-18 (2019).

produced batteries at a lower cost than South Korea.[158] However, South Korea has maintained its edge in technology and quality, which has given it an advantage in the premium segment of the market.[159] The competition between these two countries has resulted in a steady stream of innovation with companies on both sides investing heavily in research and development.

This has led to the development of new and improved batteries that are more efficient, longer lasting, and safer. China and South Korea are the leading players in the global market of lithium-ion car batteries. These two countries have a significant market share due to their expertise and investment in EV research and development. The demand for EVs is rapidly increasing, and China and South Korea are well positioned to meet this demand.[160] Their strong manufacturing base and supply chains enable them to produce high-quality batteries competitively. As a result, many major car manufacturers are turning to these two countries for their lithium-ion EV battery needs.[161]

A. *How China Can Win*

To face South Korea's challenges in the EV battery market, China needs to consider a techno-econo-legal analysis to identify areas that enhance its competitive edge. Here are some potential strategies they could consider. First, China should continue to provide favorable policies and incentives to support research and development in the battery industry.[162] This would encourage more investment and push technological advancements in the EV battery market. The government should also invest in building state-of-the-art research facilities and intellectual property training centers and providing tax benefits.

Regarding the supply chain, China should leverage its strong domestic supply chains and focus on producing high-quality lithium-ion batteries, allowing the country to lower production costs and sell these batteries at a reasonable price to the domestic market.[163] This would also enable battery manufacturers to produce batteries that meet international standards while reducing dependence on international suppliers. China should invest in infrastructure improvements for electrical vehicle (EV) charging stations and transportation to outperform South Korea. This will increase EV adoption and demand for batteries, ultimately translating into more robust growth in the industry.[164]

Intellectual property issues such as patent disputes have characterized the industry. To create a positive environment and avoid disruptive conflicts in the battery market, China should

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[158] Songyan Jiang, ET AL. *Assessment of End-of-Life Electric Vehicle Batteries in China: Future Scenarios and Economic Benefits*, 135 WASTE MGMT 70, 70-79 (2021).

[159] Feiqiong Chen, Xueying Li, & Qiaoshuang Meng, *Integration, Network and Industrial Innovation in Technology Sourcing Overseas M&A: a Comparison Between China and South Korea*, 31(10) TECH. ANALYSIS & STRATEGIC MGMT. 1168, 1168-1183 (2019).

[160] Martins, ET AL., *supra* note 6 at 295.

[161] *Id.*

[162] Xieshu Wang, Wei Zhao, & Joël Ruet, *Specialised Vertical Integration: The Value-Chain Strategy of EV Lithium-Ion Battery Firms in China*, 22(2) INT'L J. AUTO. TECH. & MGMT. 178, 178-201 (2022).

[163] Lei Ren, Sheng Zhou, & Xunmin Ou, *Life-Cycle Energy Consumption and Greenhouse-Gas Emissions of Hydrogen Supply Chains for Fuel-Cell Vehicles in China*, 209 ENERGY 1, 1-21 (2020).

[164] Shiqi Ou ET AL., *Modeling Charging Infrastructure Impact on the Electric Vehicle Market in China*, 81 TRANSP. RSCH. PART D: TRANSP. & ENV'T 1, 1-35 (2020).

work on establishing open standards for IP, which ensures that the competition is fair.[165] Regarding international partnerships, China should also establish partnerships with companies from other countries, especially Europe, where EV battery technology is rapidly advancing.[166] This would enable collaboration on new technology development to keep up with the competition, thereby enhancing China's global competitiveness.

Based on the techno-econo-legal analysis, for China to sustain its leadership ahead of South Korea in the EV battery market, it must focus on favorable government policies, establishing open standards for IP, investing in infrastructure, cultivating strong domestic supply chains, and establishing international partnerships. This approach will enable Chinese battery manufacturers to provide a competitive value proposition by offering cost-effective, high-quality, and innovative batteries in both domestic and international markets.

B. *How South Korea Can Win*

In recent years, China has emerged as a dominant player in the market, mainly due to its large production capacity and cost-effectiveness. However, South Korea has strengths in the EV battery market, including advanced technology, top-notch manufacturing processes, and efficient supply chain management.[167] To compete with China, South Korea can leverage its legal framework by building on innovative technology, which is the key to success in the EV battery market. South Korea has some of the most advanced technologies in the world for developing high-performance car batteries.[168] However, South Korea needs to improve its intellectual property rights (IPR) framework to protect these technologies.[169] By securing more comprehensive and robust IPR protection, South Korea can protect its battery technologies from being copied or stolen by competitors, such as China.

The South Korean government can significantly support its local EV battery manufacturers to help them compete with China. The government can offer tax incentives, low-interest loans, and subsidies for research and development activities. These incentives can help reduce the cost of manufacturing batteries, making South Korea's products more affordable and competitive. From an international perspective, South Korea can enter into international trade agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, to boost its EV battery exports.[170] By lowering tariffs and other trade barriers, South Korea can increase its battery market share in other countries, paving the way for growth and competitiveness. Battery technology is

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[165] Shaomin Li & Ilan Alon, *China's Intellectual Property Rights Provocation: A Political Economy View*, 3 J. INT'L BUS. POL'Y 60, 60-72 (2020).

[166] Gavin Bridge & Erika Faigen. *Towards the Lithium-Ion Battery Production Network: Thinking Beyond Mineral Supply Chains*, ENERGY RES. & SOC. SCI. at 89 (2022).

[167] *See, e.g.*, Sanghyun Kim & Gary Garrison, *Understanding Users' Behaviors Regarding Supply Chain Technology: Determinants Impacting the Adoption and Implementation of RFID Technology in South Korea,* 30(5) INT'L J. INFO. MGMT. 388, 388-398 (2010).

[168] Sora Yoon, *A Study on the Transformation of Accounting Based on New Technologies: Evidence From Korea*, 12(20) SUSTAINABILITY at 8669 (2020).

[169] Jung Kwan Kim & Ram Mudambi, *An Ecosystem-Based Analysis of Design Innovation Infringements: South Korea and China in the Global Tire Industry*, 3(1) J. INT'L BUS. POL'Y 38, 38-57 (2020).

[170] Terry Wu & Doren Chadee, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP): Implications for the Asia-Pacific Region*, *in* INT'L BUS. IN THE NEW ASIA-PAC.: STRATEGIES, OPPORTUNITIES AND THREATS 53-74 (Nailin Bu ed., 2022).

closely linked to environmental concerns, such as carbon emissions and pollution.[171] The South Korean government can enforce strict environmental regulations on battery manufacturers, ensuring their products meet specific standards. By doing this, South Korea can market itself as a responsible and sustainable player in the battery market, which can help improve its image and reputation.

South Korea has significant potential to compete with China in the EV battery market. Improving its legal framework and government support systems can create a more conducive business environment for its battery manufacturers. Additionally, by committing to sustainable and environmentally responsible practices, South Korea can differentiate itself in the market and gain a competitive edge over China.

South Korea is one of the leading producers of rechargeable LIBs widely used in EVs.[172] South Korean companies like LG Chem and Samsung SDI have established themselves as global leaders in the battery industry. South Korea's strong technological capabilities and highly advanced manufacturing base have allowed it to produce high-quality and low-cost batteries. Additionally, there is increasing pressure from governments and consumers for sustainable and ethical practices in battery production, which could impact the industry's operations and business models.[173]

Several issues could help support South Korea's competition with China in the global EV battery market. First, South Korea can strengthen its intellectual property (IP) protection laws and regulations to help prevent theft or unauthorized duplication of its EV battery technology by Chinese companies.[174] This would help the country retain its competitive edge and encourage innovation, investment, and growth in its EV battery industry. Their battery manufacturing companies, such as LG Chem and Samsung SDI, have invested heavily in battery research and development, so protecting their IP is crucial to prevent their technology from falling into the hands of competitors. South Korea should also work on restricting the illegal copying and distribution of their IP in China.

In terms of strengthening the supply chain, the South Korean government can negotiate new trade agreements with its partner countries to protect South Korean companies predominantly engaged in the EV industry against Chinese competitors. This can be achieved through mechanisms like import or export tariffs, quotas, and non-tariff barriers, which, if properly enforced, will create a level playing field for South Korean companies. To further strengthen the competitiveness of its EV battery industry, South Korea could provide tax breaks, subsidies, and financial incentives to its EV battery companies to support their research and development programs, scale up manufacturing infrastructure, and boost production capacity.

For environmental and infrastructure regulations, South Korea can introduce strict carbon emission control mechanisms, such as a carbon tax, and implement strong environmental

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[171] Ersha Fan ET AL., *Sustainable Recycling Technology for Li-Ion Batteries and Beyond: Challenges and Future Prospects*, 120(14) CHEM. REVS. 7020, 7020-7063 (2020).
[172] Eunsun Jeong & Jai S. Mah. *The Role of the Government in the Development of the Rechargeable Battery Industry in Korea*, 21(2) PERSPS. ON GLOBAL DEV. & TECH. 202, 202-220 (2022)
[173] *Id.*
[174] Gunda Schumann, *Economic Development and Intellectual Property Protection in Southeast Asia: Korea, Taiwan, Singapore and Thailand,* INTELL. PROP. RTS. IN SCI., TECH., AND ECON. PERFORMANCE 157-202 (Routledge ed., 2019).

regulations for the EV battery and automobile industries.[175] This would create a demand for EVs, as consumers would seek alternatives to fossil-fuel cars, which in turn would support the growth of the EV battery market. South Korea can take the necessary steps to invest in EV-charging infrastructure to increase the convenience and reliability of EVs for consumers. This can include offering incentives and subsidies for constructing new charging points and upgrading existing infrastructure. As South Korea is one of the leading producers of rechargeable LIBs widely used in EVs, South Korean companies like LG Chem and Samsung SDI have established themselves as global leaders in the battery industry.[176] South Korea's strong technological capabilities and highly advanced manufacturing base have allowed it to produce high-quality and low-cost batteries.[177] Additionally, there is increasing pressure from governments and consumers for sustainable and ethical practices in battery production, which could impact the industry's operations and business models.[178]

The South Korean government could provide support and incentives to encourage more research, development, and investment in the battery sector. In addition to financial incentives, the government could provide policies and regulations supporting the development, production, and export of advanced car batteries. Industry-specific regulations that align with the United Nations Sustainable Development Goals can also be implemented to leverage South Korea as a sustainable manufacturing hub. The government must ensure that its EV battery quality and safety standards meet or exceed global standards to outperform China in the battery market. In turn, this would increase consumer confidence, particularly in international markets. Modern battery technologies like solid-state batteries can also provide a unique selling proposition to the South Korean electric car ecosystem.

South Korean battery manufacturing companies could leverage the country's strong manufacturing capabilities and global supply chains to enrich their product procurement options and minimize geopolitical risks. Establishing strong relationships with international firms could secure long-term contracts that ensure stable supply chains. In addition, the nation should identify and target promising new domestic and international markets to expand its customer base. Domestic demand for EVs with reliable and high-performance batteries is increasing rapidly, and entering international markets such as India, Africa, and Southeast Asia could boost demand.[179]

In summary, for South Korea to compete with China in the EV battery market, it must strengthen regulations and IP protection laws, enhance product quality and innovation, secure supply chain linkages, and target new markets.[180] This approach would enable Korean battery manufacturers to provide competitive pricing, superior quality, innovation, and environmentally sustainable batteries aligned with global sustainable mobility goals.

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[175] Hanwoong Kim ET AL., *Integrated Assessment Modeling of Korea's 2050 Carbon Neutrality Technology Pathways,* 3 ENERGY & CLIMATE CHANGE 1, 1-16 (2022).
[176] Gerybadze & Mengis, *supra* note 109 at 183-207.
[177] *Id.*
[178] Morteza Rasti-Barzoki & Ilkyeong Moon, 146 RENEWABLE & SUSTAINABLE ENERGY REVS. 1, 1-23 (2021).
[179] Chengjian Xu ET AL., *Future Material Demand for Automotive Lithium-Based Batteries*, 1(1) COMMC'NS MATERIALS 99 (2020).
[180] Mojgan Samandar, Ali Eshtehardi, & Mehdi Goodarzi, *Improving the Iranian Industrial Property System (IPS): A Comparative Case Study of Iran and South Korea*, WORLD PATENT INFORMATION 63 (2020).

C. *Who Will Win?*

It is not easy to predict who will win in the competition for EV battery production. China's dominance in the EV market, coupled with its aggressive government incentives and strategic partnerships, gives it a significant advantage. However, South Korea's established research capabilities, innovative technology, and exceptional quality control standards make it a key player in the global EV battery industry. Both countries will likely continue investing heavily in EV battery production, their legal frameworks permitting.[181]

Competition between China and South Korea over EV battery production is complex and multifaceted, with important legal and strategic considerations. Both countries have regulatory frameworks to prevent anti-competitive practices and protect intellectual property. Who will win the competition is an open question, as both countries possess significant advantages in terms of economies of scale, technology, and government support.

Despite the competitive factors, the competition between China and South Korea in the EV battery industry may reach a standstill rather than a clear winner emerging. Both countries have invested heavily in research and development, with China, in particular, demonstrating unprecedented scale and speed in expanding its EV battery production capacity.[182] South Korea, on the other hand, boasts a number of established players in the industry with significant intellectual property portfolios and cutting-edge technology. While it is difficult to predict a clear winner, companies must navigate these complex dynamics to ensure sustainable growth and competitiveness.

D. *Benefits of Market Competition to Competitors*

The competition between China and South Korea in the EV battery market presents numerous benefits to both countries. Firstly, competition can drive innovation in the industry, with each country striving to develop more efficient, longer lasting, and cost-effective batteries. This competition for dominance increases investment in research and development, leading to the advancement of technology.[183] This innovation and technological advancement can provide a competitive edge in the global market, stimulating demand for EVs and increasing international market share and competitiveness. Secondly, the competition between China and South Korea can lead to price reductions. Lower costs make EVs more accessible, thereby increasing the number on the road and reducing environmental impacts. The advantage of cost-effective battery production capacity can provide a competitive edge in the global market. Thirdly, competition can drive enterprise creation, leading to job creation, increasing revenue, and economic prosperity. Chinese and Korean EV battery manufacturers have invested in production or battery technology. They could alternatively establish their operations in the United States, using the country's infrastructure, employees, location advantages, as well as technical and financial regulations to

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[181] Hongxia Chen, Jeongsoo Yu, & Xiaoyue Liu, *Development Strategies and Policy Trends of the Next-Generation Vehicles Battery: Focusing on the International Comparison of China, Japan and South Korea*, 14(19) SUSTAINABILITY (2022).

[182] Jian Xu, Xiuhua Wang, & Feng Liu, *Government Subsidies, R&D Investment and Innovation Performance: Analysis From Pharmaceutical Sector in China*, 33(5) TECH. ANALYSIS & STRATEGIC MGMT. (2021).

[183] Priyadarshan Patil, *The Future of Electric Vehicles: A Comprehensive Review of Technological Advancements, Market Trends, and Environmental Impacts*, 4(1) J. ARTIFICIAL INTELLIGENCE & MACH. LEARNING MGMT. 12, 12-23 (2020).

capitalize on the market. The long-term investment in the EV battery industry could bear fruit by providing a sustainable and low-carbon future, leading to economic prosperity.

Moreover, the competition between these countries can also foster advancements in the manufacturing process, which could minimize the environmental impacts associated with battery creation.[184] Improving the manufacturing process is critical for the cost and environmental sustainability of EVs. The technology and manufacturing methods discovered by firms in batteries can also translate into other goods and services, from electronic devices to renewable energy.

Furthermore, the competition can facilitate the market's growth beyond China and South Korea and expand the environmental benefits globally. The battery industry is critical to both countries' efforts to reduce carbon emissions and air pollution, among other environmental hazards.[185] By making the market more accessible, affordable, and sustainable, they can catalyze the effort to combat global environmental challenges.

In summary, the competition in the EV battery market between China and South Korea presents numerous benefits to both countries. These benefits include advancement in innovation and technology, cost-effectiveness, job creation, increased revenue, improved sustainability, reduced environmental impact of manufacturing, and market expansion beyond China and South Korea. By focusing on these areas, both countries can emerge as global leaders in the EV battery industry.

In terms of socioeconomic factors, both China and South Korea have significant advantages in competing in the EV battery market.[186] China is the world's largest EV market, and its government has been actively promoting the development of the EV industry.[187] The Chinese government has been investing heavily in EV infrastructure, providing incentives for consumers to buy EVs, and implementing strict emission regulations for the automotive industry.[188] These policies have created a large domestic EV market, encouraging Chinese firms to invest heavily in developing batteries and other related technologies. Meanwhile, South Korea is one of the leading producers of rechargeable lithium-ion batteries (LIBs) widely used in EVs.[189] South Korean companies like LG Chem and Samsung SDI have established themselves as global leaders in the battery industry.[190] South Korea's strong technological capabilities and highly advanced manufacturing base have allowed it to produce high-quality and low-cost batteries. [191]

E. *Benefits of Market Competition to Other Countries*

The competition between China and South Korea in the EV battery market presents numerous benefits to other countries, including the United States. Firstly, competition can drive innovation in the industry, with each country striving to develop more efficient, longer lasting, and

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[184] Kenneth Holmberg & Ali Erdemir, *The Impact of Tribology on Energy Use and CO_2 Emission Globally and in Combustion Engine and Electric Cars*, 135 TRIBOLOGY INT'L 389-396 (2019).
[185] Aritra Ghosh, *Possibilities and Challenges for the Inclusion of the Electric Vehicle (EV) to Reduce the Carbon Footprint in the Transport Sector: A Review*, 13(1) ENERGIES (2020).
[186] Chen, ET AL., *supra* note 181 at 12087.
[187] *Id.*
[188] Li ET AL., *supra* note 154 at 450-485.
[189] Kwon ET AL., *supra* note 87 at 102306.
[190] *Id.*
[191] Ming-Ta Lee & Wei-Nien Su, *Search for the Developing Trends by Patent Analysis: A Case Study of Lithium-Ion Battery Electrolytes*, 10(3) APPLIED SCIS. at 952 (2020).

cost-effective batteries. This competition for dominance increases investment in research and development, leading to the advancement of technology.

Secondly, the competition may lead to price reductions, ultimately decreasing the cost of EVs. Lower costs make EVs more accessible, thereby expanding the market for EVs, increasing the number of EVs on the road, and reducing environmental impacts.

Thirdly, competition can drive enterprise creation and improve economic prosperity. America can benefit from increased investment in the United States by Korean or Chinese EV battery manufacturers, including job creation and increased revenue. Furthermore, the increased market competitiveness will allow more American firms to compete with firms from China and Korea in the EV battery industry. Moreover, competition can facilitate the advancement of the manufacturing process, which could minimize the environmental impacts associated with battery creation. This foundation of increasingly efficient production techniques, practices, and methodologies advances the promotion of sustainable development in the United States.

Finally, learning from the strategies adopted by China and South Korea enables other countries, especially the United States, to gain insight into effective methods for supporting the growth of the EV market. Encouraging EV adoption, investing in charging infrastructure, promoting research and development in the battery industry, and other practices directed at the EV market are critical in power revolution efforts for energy independence, climate change action, extending energy supplies, and other factors.

The EV battery market competition between China and South Korea provides multiple opportunities and benefits for the United States. These benefits encompass improved innovation, reduced costs, job creation opportunities, economic prosperity, sustainability, learning from successful market stimulation techniques, advancing EV growth, climate change action, and setting the US toward energy independence and security.

F. *Challenges of market competition*

Both China and South Korea are facing challenges in the EV battery market. For example, there are intellectual property disputes between Chinese and South Korean firms over battery technologies.[192] These disputes could lead to lawsuits and hinder innovation and collaboration in the industry. Additionally, there is increasing pressure from governments and consumers for sustainable and ethical practices in battery production, which could impact the industry's operations and business models.[193]

In terms of technical factors, both China and South Korea face distinct advantages and challenges in the EV battery market. China has made significant progress in developing new battery technologies, such as solid-state batteries and metal-air batteries, which have the potential to increase the range and performance of EVs significantly.[194] Additionally, Chinese firms have

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[192] *See, e.g.*, Vincent H. Shie &, and Craig D. Meer, *Is This the Asian Century? China, India, South Korea and Taiwan in The Age of Intellectual Capitalism*, 40(1) J. CONTEMP. ASIA, 1-21 (2010).

[193] Huaying Gu, Zhixue Liu, & Qiankai Qing, *Optimal Electric Vehicle Production Strategy Under Subsidy And Battery Recycling*, 109 ENERGY POL'Y 579-589 (2017).

[194] *See* Qianqian Zhang, Cunjin Li, and Yuqing Wu, *Analysis of Research and Development Trend of the Battery Technology in Electric Vehicle With the Perspective of Patent,* 105 ENERGY PROCEDIA 4274, 4274-80 (2017).

invested heavily in the latest manufacturing technologies allowing them to produce batteries at scale and lower costs.[195]

South Korea, on the other hand, has a well-established research and development ecosystem with a number of renowned research institutions and companies working on battery innovations.[196] South Korean firms have also made significant progress in improving the energy density and safety of LIBs, which are still the predominant battery technology used in the EV market.[197]

However, both countries also face technical challenges in the EV battery market. For example, the current need for a common standard for EV batteries could create problems for international trade and interoperability. Additionally, there are concerns over the supply of critical materials, such as lithium and cobalt, necessary to produce batteries. As demand for EVs grows, countries will need to work together to ensure a stable and sustainable supply of these materials. While China and South Korea have distinct advantages in the EV battery market, they face significant challenges. Collaboration and innovation will be key to their success in this rapidly evolving industry.

V. COOPETITION BETWEEN CHINA AND SOUTH KOREA

As the demand for EVs continues to grow, the competition between China and South Korea in the lithium-ion EV battery market is expected to intensify. It remains to be seen who will come out on top. Still, one thing is certain, the competition has led to significant advancements in technological innovation, production capacity, and cost efficiency. Both countries have invested heavily in research and development to establish themselves as the dominant players in the market.[198] Traditional theories on competition saw that many businesses were locked into a zero-sum game mentality.[199] They saw their competitors as enemies and tried to dominate the market at all costs and believed this approach was not sustainable and limited the potential for growth and innovation.[200] Instead of direct competition, a coopetition strategy is suggested for adopting a win-win approach for both China and South Korea in the EV battery market.[201] It will allow them to collaborate and share their strengths to create a more sustainable future for EVs.

A coopetition strategy between China and South Korea could benefit both countries significantly. Collaborating on research and development of advanced battery technologies and sharing production facilities could enhance the competitiveness of both countries in the global market. Furthermore, it would stimulate further innovation, boost production efficiency, and reduce costs for both nations, allowing them to compete more effectively with other global competitors such as Japan and the United States.

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[195] *See* Yufeng Wu ET AL., *Temporal and Spatial Analysis for End-of-Life Power Batteries From Electric Vehicles in China,* 155 RES., CONSERVATION & RECYCLING, APL. 1, 1-12 (2020).
[196] Chen, ET AL., *supra* note 181 at 12087.
[197] *Id.*
[198] Paulo Rotella Junior ET AL., *Economic Analysis of the Investments in Battery Energy Storage Systems: Review and Current Perspectives*, 14(9) ENERGIES, 2503 (2021).
[199] Anna Minà & Giovanni Battista Dagnino, *Foundations of Coopetition Strategy: A Framework for Competition and Cooperation*, ROUTLEDGE, 112-140, (2021).
[200] *Id.*
[201] Ming-Chao Wang & Ja-Shen Chen, *Driving Coopetition Strategy to Service Innovation: The Moderating Role of Coopetition Recognition*, 16(5) REV. MANAGERIAL SCI. 1471-1501 (2022).

The competition between China and South Korea over EV battery production is increasingly fierce and complex. Both countries have significant advantages in economies of scale, cutting-edge technology, and government support. However, competition between the two countries raises important legal and strategic considerations within the relevant legal frameworks. This section will look into the effectiveness of a coopetition strategy in helping firms stay on top of market competition in the techno-econo-legal environment.

A. *Pursuing a coopetition strategy*

The idea of coopetition was first introduced by Brandenburger and Nalebuff in their 1997 book *Co-opetition*.[202] The concept emerged from their research on game theory and strategic decision-making, which they applied to the business context.[203] To address the disadvantages of direct competition, the authors proposed a new approach that combined competition and cooperation, which they called coopetition.[204] They argued that companies could benefit from working together in certain areas, such as technology development, while remaining competitive in other areas, such as marketing.[205] The idea of coopetition is a unique combination of cooperation and competition between firms.[206] It is a strategic concept where companies compete and collaborate to achieve mutual benefits.[207] This approach is based on the principle that companies can achieve greater success by working together than they can by working alone, even in the face of competition.[208] It involves firms sharing resources, knowledge, and expertise in order to generate new industries and products.[209] It also refers to the practice of firms working together to create a new market while also maintaining their competitive position in their respective markets.[210] Coopetition has been studied extensively in the fields of strategic management and economics. The theory of coopetition has since gained widespread recognition and has been applied in various industries and contexts. It has become an important strategic tool for companies looking to innovate, create new markets, and build long-term relationships with their competitors.

A basic theoretical perspective on coopetition is game theory, which can be used to model strategic interactions between firms.[211] Coopetition is rooted in game theory, which suggests that firms that work in a competitive environment can benefit from collaboration, particularly when they have significant interdependence or share common objectives.[212] Coopetition can help firms

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[202] *See* ADAM M. BRANDENBURGER & BARRY J. NALEBUFF, CO-OPETITION (Profile Books, 1997).
[203] *Id.* at 123-153.
[204] *Id.* at 123-130.
[205] *Id.* at 133-153.
[206] Leonardo Corbo ET AL., *Coopetition and Innovation: A Review and Research Agenda*, 122 TECHNOVATION, 102624 (2023).
[207] *Id.*
[208] *See, e.g.*, Wojciech Czakon, ET AL., *Coopetition Strategies: Critical Issues and Research Directions*, 53(1) LONG RANGE PLANNING, 101948 (2020).
[209] *Id.*
[210] D. R. Gnyawali & B. J. Park, *Co-opetition Between Giants: Collaboration With Competitors For Technological Innovation*, 40 RSCH. POL'Y 650, 650-63. 38(4), (2009).
[211] Abhilasha Meena, Sanjay Dhir, & Sushil Sushil, *A Review of Coopetition and Future Research Agenda*, 38 J. BUS. & INDUS. MKTG. 118, 121-124 (2023).
[212] Oliver Gernsheimer ET AL,. *Coopetition Research-A Systematic Literature Review on Recent Accomplishments and Trajectories*, 96INDUS. MKTG. MGMT 113-134 (2021).

overcome resource constraints, manage uncertainty, and enhance their ability to create value in the market.[213] Game theory suggests that coopetition can be a successful strategy when there are repeated interactions between firms as this can encourage trust and cooperation over time.[214]

Another perspective, the institutional theory, suggests that the norms and rules of the market environment can influence coopetition.[215] Institutional theory emphasizes the importance of shared norms and values in promoting cooperation and collaboration among firms, which can, in turn, facilitate coopetition.[216] The theory suggests that coopetition provides an excellent opportunity for firms to pool resources and expertise to tackle challenging issues, such as shared supply-chain disruptions. It fosters trust, cooperation, and constructive dialogue among competitors enhancing their collective problem-solving capabilities and reducing supply-chain risks.[217] Coopetition, therefore, offers a viable alternative to pure competition or collaboration in certain scenarios. It can foster a more cooperative, supportive, and innovative business environment that allows firms to maintain a competitive advantage while driving growth in the industry. Thus, adopting a coopetition strategy can provide a more sustainable, profitable, and effective approach to compete in the increasingly complex, offshore, and dynamic business world.

A coopetition strategy is a business approach in which companies that are both competitors and collaborators work together to achieve common goals, such as improving innovation, reducing costs, or expanding market share. This strategy can be seen as a way to leverage complementary resources and capabilities between firms, leading to higher levels of performance and competitiveness, unlike other competitive strategies, such as zero-sum competition, where one firm's gain is another's loss, coopetition enables firms to benefit from positive-sum outcomes.[218] Combining resources and expertise enhances firms' capacity to innovate and cooperate to increase efficiency, lower costs, and enhance differentiation.[219] A coopetition strategy stands out as a superior approach compared to other competitive strategies in certain scenarios.[220] Coopetition is a strategy where competitors collaborate to achieve common goals while retaining their competition, allowing firms to leverage complementary resources, share costs, and cultivate interorganizational learning while maintaining competitive advantages.[221]

The coopetition strategy is a sophisticated and academic approach for firms to enhance their competitiveness by leveraging collaboration between competitors, leading to mutual benefits. It enables firms to tap into broader markets and customer segments that may have been beyond their reach. By collaborating with competing firms, firms can leverage each other's distribution

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[213] *Id.*
[214] *See* BRANDENBURGER & NALEBUFF, *supra* note 123.
[215] *See* Guy Peters, *Institutional Theory*, *in* HANDBOOK ON THEORIES OF GOVERNANCE 323-335 (Edward Elgar Publishing, 2022).
[216] *See* R. Gulati, H. Singh, & M. L. Tushman, *The Processes of Firm Growth and Industry Evolution: The central Role of Cooperation*, 21(3) STRATEGIC MGMT. J. 319, 319-39 (2000).
[217] *See* Meena, ET AL., *supra* note 211 at 118-136.
[218] *Id.* at 118-136.
[219] Xiaohua Xin ET AL., *Enhancing Sustainable Development: Innovation Ecosystem Coopetition, Environmental Resource Orchestration, and Disruptive Green Innovation*, 32(4) BUS. STRATEGY & ENVT. 1388-1402 (2023).
[220] *See* Thommie Burström, Sören Kock, & Joakim Wincent, *Coopetition—Strategy and Interorganizational Transformation: Platform, Innovation Barriers, and Coopetitive Dynamics,* 104 INDUS. MKTG. MGMT. 101, 101-15 (2022).
[221] Gernsheimer ET AL., *supra* note 212 at 113-134.

networks, create new market opportunities, and promote cross-selling. A coopetition strategy fosters learning and knowledge transfer, improving firms' decision-making processes, enhancing operational efficiency, and promoting innovation.

B. *Legal frameworks governing coopetition*

The competition between China and South Korea may lead to the industry becoming increasingly fragmented, with different companies competing for market share based on quality, price, and innovation. Alternatively, collaborations between companies and government initiatives may help establish global standards for EV battery technology, enabling both countries to benefit from the industry's growth.[222]

The legal frameworks in place are important for ensuring fairness and balance. Still, ultimately, the success of individual companies will depend on a range of factors beyond just legal rules and regulations. Relevant legal theories and frameworks can further help analyze the coopetition between China and South Korea. It should be noted that the coopetition between China and South Korea raises legal issues related to international trade, antitrust, intellectual property, investment, and dispute resolution.[223] Both countries must ensure that they comply with the relevant laws and regulations with the legal frameworks when engaging in coopetition activities. First, China and South Korea have a complex relationship regarding international trade agreements. Both countries are World Trade Organization (WTO) members and have bilateral trade agreements.[224] International trade law is relevant to coopetition as it regulates the conditions under which goods and services can be traded between countries. Both countries need to comply with WTO rules and other relevant trade agreements when engaging in coopetition.

Under traditional competition law, businesses are prohibited from colluding with competitors to fix prices or limit output in a market.[225] Since coopetition involves collaboration between potential competitors, it can raise antitrust concerns. Antitrust laws aim to prevent monopolies and restraint of trade, and firms need to be careful to avoid engaging in anti-competitive behavior under the guise of coopetition. Antitrust laws also limit information sharing between competitors, which can be relevant to coopetition arrangements.[226] Regarding contract law, coopetition arrangements can be formalized through contracts, which govern the terms of the collaboration. Coopetition between Chinese and South Korean companies may be permitted in EV battery production if it contributes to technical advancement or energy conservation. For instance, China could collaborate with South Korea's LG Chem and Samsung SDI to invest in new battery technologies or jointly develop charging infrastructure that reduces energy consumption. However, such initiatives should be carefully structured to avoid potential legal challenges such as market collusion or abuse of a dominant market position.

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[222] *See* Yaocai Bai ET AL., *Energy And Environmental Aspects In Recycling Lithium-Ion Batteries: Concept Of Battery Identity Global Passport,* 41 MATERIALS TODAY 304, 304-15 (2020).
[223] *See* Jong Chan Lee, Yi Joong Won, & Sang Young Jei, *Study of The Relationship Between Government Expenditures and Economic Growth for China and Korea,* 11(22) SUSTAINABILITY 1, 1-11 (2019).
[224] *See* Sherzod Shadikhodjaev, *The WTO Agreement on Subsidies and Countervailing Measures and Unilateralism of Special Economic Zones*, 24(2) J. INT'L ECON. L. 381, 381-402 (2021).
[225] *See* RICHARD WHISH & DAVID BAILEY, COMPETITION LAW, (10th ed. Oxford U. Press, 2021).
[226] *See* Donghee Shin, *Toward Fair, Accountable, and Transparent Algorithms: Case Studies on Algorithm Initiatives in Korea and China*, 26(3) JAVNOST-THE PUBLIC 274, 274-90 (2019).

In the context of competition law, China and South Korea have established regulatory regimes prohibiting anti-competitive practices such as price-fixing, market allocation, and abuse of dominant market position.[227] These frameworks provide a legal basis for addressing any unfair competition practices that may arise. In addition, both countries have strong intellectual property regimes that protect patents, trademarks, and trade secrets. Companies operating in the EV battery industry must carefully navigate these legal frameworks to ensure compliance and avoid costly litigation. The Chinese government has implemented several measures to encourage innovation and investment in the EV battery industry, including national subsidies, preferential policies, and strategic partnerships.

On the other hand, South Korea has a well-established legal framework for prohibiting anti-competitive practices, including price-fixing, market allocation, and abuse of dominant market position.[228] Under Chinese competition law, cooperation among competitors is generally prohibited unless it is specifically authorized by the government or the cooperation results in technical advancement, improves product quality, or enhances energy conservation.[229] On the other hand, South Korea is governed by the Korean Fair Trade Commission Act, which prohibits all types of cartel activity, including price-fixing, market allocation, and bid rigging.[230] However, unlike China, South Korea has a well-established legal framework for cooperation between competitors through strategic alliances and joint ventures. Regarding investment law, coopetition between China and South Korea can involve investments in each other's markets.[231] Investment laws regulate the conditions under which foreign investors can invest in a country, as well as protect their rights.[232] Both countries must comply with relevant investment laws when engaging in coopetition activities.

When analyzed within the framework of corporate law, coopetition can take different organizational forms, including joint ventures, strategic alliances, and mergers. Corporate law provides the legal guidelines for creating and governing these different forms of organizational structure.[233] For example, forming a joint venture involves creating a new legal entity, while a strategic alliance may be based on a contractual agreement between existing firms. In addition, contract law provides the legal framework for creating enforceable agreements between firms and specifies the rights and obligations of each party. Contracts can cover a range of issues, including licensing, intellectual property, confidentiality, and dispute resolution.

Regarding intellectual property law, China and South Korea are both major players in the global electronics industry. As such, the sharing and protecting of intellectual property is a crucial

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[227] *See* Anu Bradford ET AL., *Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets,* 16 J. EMPIRICAL LEGAL STUD. 411, 411-43 (2019).

[228] *See, e.g.*, Kung-Chung Liu & Shufeng Zheng, *Asian IP Law: An Area of Rising Importance*,69(3) GRUR INT'L 249, 249-259 (2020).

[229] Li & Alon, *supra* note 165 at 60-72.

[230] Yo Sop Choi, *The Evolution of Fair and Free Competition Law in The Republic of Korea, in* RESEARCH HANDBOOK ON ASIAN COMPETITION LAW, 65-80 (Edward Elgar Publishing, 2020).

[231] *See, e.g.*, Gregory Shaffer & Henry Gao, *A New Chinese Economic Order?,* 23(3) J. INT'L ECON. L. 607, 607-35 (2020); *and* Bernie Bishop, *Foreign Direct Investment in Korea: The Role of the State*, ROUTLEDGE (2019).

[232] Farok J. Contractor ET AL., *How Do Country Regulations and Business Environment Impact Foreign Direct Investment (FDI) Inflows?*, 29(2) INT'L BUS. REV. 101640 (2020)

[233] Curtis J. Milhaupt & Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development Around the World*, UNIV. CHI. PRESS (2008).

part of the coopetition between the two countries. IP law governs the conditions under which IP can be shared or licensed, as well as the protection of the rights of IP owners.[234] Both countries must comply with IP laws when engaging in coopetition. Intellectual property law applies when coopetition is involved in the sharing or licensing of intellectual property between firms. Intellectual property laws protect the rights of IP owners and regulate the conditions under which IP can be shared or licensed. Firms must comply with IP laws when entering into coopetition arrangements. China and South Korea have strong legal regimes to protect patents, trademarks, and trade secrets. However, there have been some concerns about protecting intellectual property in China, particularly the potential for IP theft or infringement. As such, companies operating in both countries need to pay close attention to local IP laws and regulations.[235] Intellectual property protection is also a key consideration for coopetition in the EV battery industry. China and South Korea have strong legal frameworks for protecting intellectual property, including patents, trademarks, and trade secrets. To ensure that IP is adequately protected, any coopetition in the EV battery industry should be grounded in clear, mutually agreed upon licensing and revenue-sharing agreements.

As the sustainability of such coopetition is uncertain, it can easily become a conflict when the parties' interests diverge, or new technologies emerge. The current legal frameworks will continue to play an important role in governing the coopetition between China and South Korea in the EV battery industry.[236] However, companies must also take care to maintain trust and transparency when it comes to sharing sensitive information and resources with their competitors. The perspective of international arbitration law can be considered. If disputes arise between China and South Korea over coopetition arrangements, international arbitration may be used to settle the dispute. International arbitration laws regulate the conditions under which disputes can be settled through arbitration, including the selection of the arbitrator, the rules governing the arbitration proceedings, and the enforcement of arbitral awards.

In addition, given that the European Union (EU) is a major market for both China and South Korea, the legal framework particularly relevant to coopetition is the EU competition law. The EU recognizes the importance of coopetition and acknowledges that cooperation between competitors can have procompetitive effects.[237] For instance, the EU introduced a special framework for research and development agreements between competing firms, which allows them to cooperate within a safe harbor of legal exemptions.[238] Additionally, the EU established a leniency program, allowing companies to cooperate with competition authorities to identify and prosecute illegal cartel activities.[239] This program can help incentivize companies to engage in

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[234] Gustavo Ghidini & Andrea Stazi, *Coopetition: The Role of IPRs*, *in* INNOVATION, COMPETITION AND COLLABORATION 15, 15-22 (Edward Elgar Publishing, 2015).
[235] Leah Chan Grinvald & Ofer Tur-Sinai, *Intellectual Property Law and the Right to Repair*, 88 FORDHAM L. REV. 63, 88 (2019).
[236] Inge Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, 38 YEARBOOK EUR. L. 448, 448-99 (2019).
[237] Mika Naumanen ET AL., *Development Strategies for Heavy Duty Electric Battery Vehicles: Comparison Between China, EU, Japan and USA*, RES., CONSERVATION AND RECYCLING 151 (2019).
[238] Ariel Ezrachi, *EU Competition Law: An Analytical Guide Leading Cases*, BLOOMSBURY PUBL'G (2014).
[239] Alison Jones,B. E. Sufrin, & Niamh Dunne, *Jones and Sufrin's EU Competition Law: Text, Cases, and Materials*, Oxford Univ. Press (7th ed. 2019).

coopetition, as it offers legal protection and immunity from fines to companies that self-report and provide evidence of anticompetitive behavior.

VI. RECOMMENDATIONS: PURSUING COOPETITION FOR CHINA AND SOUTH KOREA

A coopetition strategy can bring mutual benefits to China and South Korea in the EV battery market competition due to complementary products produced by both countries. China and South Korea are major players in the EV battery market, with China dominating the production of LFP batteries and South Korea being a significant player in producing NCM batteries.[240] They are also home to the semiconductor industry and possess advanced manufacturing capabilities.

A coopetition strategy between China and South Korea in the EV battery market enables sharing competencies, gaining operational efficiencies, and enhancing both innovation and competitiveness by leveraging their respective strengths in battery technology. This can be further examined regarding the relevant coopetition strategies at national and corporate levels.

A. *Coopetition at the national level*

In the context of the EV battery market competition between China and South Korea, coopetition can be seen as a way for these nations to leverage their strengths in research and development, production capacity, and cost efficiency to outcompete other global players. A coopetition strategy at the national level could involve joint ventures, collaborative research projects, and shared production facilities that enable both countries to benefit from each other's expertise without sacrificing their competitiveness.

Adopting a coopetition strategy can benefit China and South Korea because of their complementary expertise in producing EV batteries. China is an industry leader in producing lithium iron phosphate (LFP) batteries that have a lower energy density but are much safer and less expensive than their counterparts.[241] Meanwhile, South Korea excels in producing nickel cobalt manganese (NCM) batteries with higher energy, density, and power but are relatively expensive. By pooling their resources, both countries can leverage the strengths of their respective expertise and benefit from each other's production capabilities. For example, China can enjoy the cost advantage of its LFP battery production while South Korea can contribute its advanced manufacturing technology and expertise in producing higher-performing NCM batteries. Moreover, coopetition provides an excellent opportunity for both countries to collaborate in research and development efforts to enhance and synergize their battery technologies.[242] By working together, they can develop innovative battery solutions that bridge the performance gap between LFP and NCM batteries, opening opportunities to create new high-performance EV batteries with the added advantage of safety and affordability. A coordinated effort can provide

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[240] Xin Sun ET AL., *Global Competition in the Lithium-Ion Battery Supply Chain: A Novel Perspective For Criticality Analysis*, 55(18) ENVT'L SCI. & TECH 12180, 12180-12190 (2021).

[241] Xieshu Wang, Wei Zhao, & Joël Ruet, *Specialised Vertical Integration: The Value-Chain Strategy of EV Lithium-Ion Battery Firms in China*, 22(2) INT'L J. AUTO. TECH. & MGMT. 178, 178-201 (2022).

[242] *See* Paavo Ritala, *Coopetition Strategy–When is it Successful? Empirical Evidence on Innovation and Market Performance*, 23(3) BRITISH J. MGMT. 307, 319-24 (2012).

both countries a competitive advantage in the global EV battery market with higher profitability, enhanced innovation, and a more robust market share.[243]

In addition, China and South Korea can collaborate on the research and development of EV batteries through joint ventures. This will allow for the pooling of resources and expertise, leading to the development of more advanced and efficient EV batteries that can compete with other global players. China and South Korea can further collaborate on managing the supply chain for EV batteries. This will allow them to secure the necessary raw materials and components at lower costs, ensuring a stable and reliable supply chain that can compete with other global players.[244] Regarding marketing efforts, both countries can collaborate to create joint marketing campaigns that promote their EV batteries. This will lead to higher brand recognition and market penetration, which will help them become more competitive in the global EV battery market.[245]

Through a coopetition strategy, China and South Korea can complement each other's strengths and overcome weaknesses by collaborating on research and development, sharing manufacturing and production assets, and establishing joint ventures. For instance, China can provide South Korea with a reliable source of raw materials and access to a large domestic market for EV batteries. In contrast, South Korea can provide China access to advanced manufacturing technologies and product design expertise. Furthermore, both countries can collaborate in developing new and innovative battery technologies such as solid-state batteries, fuel cells, and other next-generation battery technologies. By pooling their resources and expertise, both countries can enhance their competitiveness in the global EV battery market and benefit from the partnership. A coopetition strategy can provide China and South Korea with many opportunities for collaboration and mutual benefits by leveraging complementary products, capabilities, and technologies. By collaborating, both countries can establish a stronger foothold in the global EV battery market, gain a competitive edge, and successfully navigate future challenges.

B. *Coopetition at the corporate level*

Coopetition is a concept that significantly impacts competition and cooperation not just between nations but also between companies. Coopetition offers a new perspective on cooperation between companies, conducive to innovation, and complies with the relevant legal framework. While China dominates the world's EV market, South Korea's LG Chem and Samsung SDI are major players in the EV battery industry.[246]

As the EV battery industry is a rapidly expanding and highly competitive sector with the potential to drive sustainable economic growth and reduce greenhouse gas emissions, Chinese and Korean firms have the opportunity to engage in mutually beneficial cooperation by leveraging their complementary strengths and expertise, leading to a competitive advantage in the global

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[243] *See* Zhijie Yang, Haibo Huang, & Feng Lin, *Sustainable Electric Vehicle Batteries for a Sustainable World: Perspectives on Battery Cathodes, Environment, Supply Chain, Manufacturing, Life Cycle, and Policy*, 12(26) *ADVANCED ENERGY MATERIALS* 1, 16 (2022).

[244] *See* David Coffin & Jeff Horowitz, *The Supply Chain for Electric Vehicle Batteries*, J. INT'L COM. & ECON. 1, 8 (2018).

[245] *See* Wahyudi Sutopo ET AL., *Cost Estimation Application for Determining Feasibility Assessment of Li-Ion Battery in Mini Plant Scale,* 8 INT'L J. ON ELEC. ENG'G & INFORMATICS, 189, 194-95 (2016).

[246] *See* Simon Moores, *The Global Battery Arms Race: Lithium-ion Battery Gigafactories and Their Supply Chain*, OXFORD ENERGY F.. No. 126. at 26-28 (2021).

market.[247] In fact, there are already instances of coopetition as companies collaborate on research and development to improve the technology and reduce costs. For example, LG Chem and SK Innovation, two major South Korean companies, have been engaged in patent disputes with each other.[248] Nevertheless, both have collaborated with Chinese manufacturers, such as CATL, to create a safer, cheaper, and more efficient battery. Therefore, one potential area for cooperation between Chinese and Korean companies is the merger of Chinese low-cost battery technology and Korean high-quality battery manufacturing capabilities. This merger would allow Chinese firms to benefit from Korean expertise in producing high-quality and reliable batteries by leveraging Korean production lines and distribution networks. On the other hand, Korean companies can benefit from access to new technologies and innovations, which is crucial for remaining competitive in the rapidly evolving electric car battery industry.[249]

Another area of cooperation between Chinese and Korean companies is joint research and development of new electric car battery technologies. This collaboration could occur between research and development centers in both countries, which helps create new electric car batteries with higher energy density, longer driving range, and improved safety features. Collaboration could also extend to developing and using new materials such as lithium-air, solid-state, or sodium-ion batteries. Furthermore, Chinese and Korean electric car battery manufacturers can cooperate by sharing production facilities to achieve greater economies of scale and reduce costs.[250] This could include using shared production lines, source material procurement, and quality control systems. For example, in 2019, Chinese battery maker CATL signed a memorandum of understanding with South Korean battery manufacturer LG Chem to share facilities and explore joint battery projects.[251] This partnership is intended to allow both companies to expand their production capabilities, reduce costs, and achieve greater economies of scale.

Coopetition between Chinese and Korean electric car battery manufacturers have the potential to accelerate innovation, reduce costs, and increase the competitiveness of both countries' electric car industries leading to an overall more sustainable and cleaner transportation system. Coopetition is a valuable tool for companies leveraging their resources and collaborating with competitors legally, ethically, and pro-competitively. The legal framework around coopetition should balance encouraging innovation and competition while ensuring compliance with competition laws and regulations.

CONCLUDING REMARKS

While both China and South Korea have distinct advantages in the EV battery market, they also face significant challenges. Collaboration and innovation will be the key to their success in this rapidly evolving industry. The potential benefits of cost savings, technology sharing, and energy conservation make it a promising option for companies seeking a competitive advantage in

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[247] *See* Damien Geradin & Joseph A. McCahery, *Regulatory Co-opetition: Transcending the Regulatory Competition Debate*, TILEC DISCUSSION PAPER SERIES, May 2005, at 1, 13.
[248] *See* Moores, *supra* note 149. *See also* Jung Seung Leea & Hye Jin Kimb, *The Present and Future of the Electric Vehicle Battery Market*, 24th INTERNATIONAL CONFERENCE ON IT APPLICATIONS & MGMT. (2021).
[249] *See* Yong Choi & Seung-Whee Rhee, *Current Status and Perspectives on Recycling of End-of-Life Battery of Electric Vehicle in Korea (Republic of),* 106 WASTE MGMT. 261, 268-270 (2020).
[250] *See* Narins, *supra* note 11, at 321-328.
[251] *See* Chen, *supra* note 114, at 33.

the global EV market. The coopetition between China and South Korea in the EV battery industry is multifaceted, with both nations having distinct advantages. With the coopetitive framework in place, EV battery suppliers in China and South Korea can shape the industry's future.

In conclusion, the competition between China and South Korea in the EV battery industry is complex, with important legal and regulatory considerations. While both countries have significant advantages and challenges, it is worthwhile to note that a coopetition strategy combining cooperation and competition can ensure a win-win solution for both countries as the EV battery industry continues to grow and innovate.

HAVE YOU BEEN TO ORLANDO?: IN RELATION TO THE REGULATION OF SELF-PREFERENCING IN ANTITRUST LAW

*Eunkwang Ha**

* LL.M. Candidate, Georgetown Law Center, Class of 2024; Master of Law, Aug. 2022, Seoul National University; Bachelor of Economics, Feb. 2005, Seoul National University; Korea Fair Trade Commission, Sep. 2010 – Present (Senior deputy director), eh934@georgetown.edu.

Abstract

As a mother of two and a South Korean professional studying abroad in the United States, one of my top priorities for our family's time here was to visit Orlando. My children had endured quite a bit of disruption as I pursued my professional goals, and I felt visiting Disney World and Universal Studios would be a bit of recompense. Although I wanted to use a package deal from a Korean travel agency, it was not a good choice because I needed to stay at hotels connected to Disney World and Universal Studios.

Due to the self-preferencing of Disney World and Universal Studios, staying at affiliated hotels was more advantageous and convenient for enjoying the theme parks. Orlando hotel price hikes cannot be solely attributed to market competition; they result from monopolistic dominance and abuse of power by Disney and Universal Studios. The situation appears to have worsened over time, but U.S. competition authorities show no inclination toward regulation.

This indifferent stance extends beyond Orlando, as these authorities tolerate self-preferencing on various platforms. We now live under the influence of dominant companies known as GAFA, a situation starkly highlighted in the 2013 Google case, where U.S. authorities gave a green light to self-preferencing practices that led to substantial fines and sanctions in Europe and South Korea, respectively.

Amid growing concern about technology platforms' power, competition authorities recently introduced five antitrust bills, aiming to strengthen the regulation of companies like Google and Amazon. However, judicial uncooperativeness and legislative failures hampered these efforts, and they continue to present challenges for the future. Addressing these challenges will require a macroscopic perspective, emphasizing expert judgment over economic modeling. Comprehensive advocacy efforts should focus on common sense, historical experience, and ethical considerations.

This is more crucial than refining economic models, as the notion that such models alone can prevail against large corporations in court is unrealistic. Agencies have limited resources for economic modeling, while business enterprises possess greater capabilities for not only modeling but also lobbying and legal expenses. Redirecting efforts from economic expertise to comprehens ive public outreach is essential.

I. INTRODUCTION.

As a mother of two and a South Korean professional studying abroad in the United States, one of my top priorities for our family's time here was to visit Orlando.[1] My children had endured quite a bit of disruption as I pursued my professional goals, and I felt visiting Disney World and Universal Studios would be a bit of recompense. I had planned for us to go during my first winter break (December 2022). However, Magic Kingdom, Animal Kingdom, and the hotels operated by Disney World were fully booked, so I delayed our trip for a few months, to March 2023.[2] Indeed, Orlando was a paradise for the kids, just as I had anticipated. Despite the drop in my bank balance, the bright smiles on my children's faces during our four-day stay there made me genuinely happy. On our last night in Orlando, my younger child expressed a wish to go back in time a few days to relive the experience.

Talking about our trip after returning home, I was astonished to hear many native-born Americans who grew up in the United States seldom visit Orlando.[3] I found it puzzling that people who lived in this area for over thirty or forty years had never explored such a wonderful place. Why have they not visited Orlando? While reasons like lack of time, energy, and hot weather may play a role, the primary obstacle is likely economic. Orlando is an excessively expensive destination for family vacations. In fact, it stands as one of the most expensive vacation spots globally. To stay for seven nights, a family of four would need an average of $7,350.[4]

So, why is Orlando such an expensive tourist destination, making it difficult for even locals to visit? Is it simply due to its popularity and the common economic logic that prices rise when demand exceeds supply? Is Orlando designed to entertain only the elite? I do not believe that is the case. Through the lens of the questions raised in Orlando, I examine current challenges facing the competition authorities in the United States. I will focus on self-preferencing and examine how competition authorities in jurisdictions such as the EU and South Korea have dealt with related cases. Furthermore, I propose a policy shift from the prevailing economic paradigm to address these issues.

II. MY ORLANDO TRAVEL JOURNAL.

I first share the thought process and decisions I had to make regarding the hotel and itinerary upon deciding to visit Orlando with my kids. Most visitors likely face similar considerations, and these choices contribute to making Orlando the world's most expensive tourist destination

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[1] I currently serve as a senior deputy director at the Korea Fair Trade Commission (KFTC). I am also a mother of two children, born in 2012 and 2015. From 2022 to 2024, I am studying at Georgetown Law Center, living in Washington D.C. with my children. The opinions expressed in this paper are entirely personal and unrelated to the policies of the KFTC.

[2] The budget-friendly options at the hotels operated by Disney World were fully booked; only the very expensive hotel rooms were available.

[3] A professor raising children similar in age to mine, along with all the Teaching Assistants I met, mentioned they had never been to Orlando. When our kids went to school and shared their experiences of visiting Disney World and Universal Studios, their classmates and homeroom teacher were envious because they have never had the chance to visit.

[4] Elizabeth Pritchett, *Orlando Named World's Most Expensive Destination for Family Vacation: Report*, FOX BUSINESS (Feb. 15, 2023).

A. Appealing Korean Package Deals.

Initially, as it was a trip with just me and the kids, I explored package tours targeting Koreans or Korean Americans.[5] The costs per person were: $799 for two nights and three days; $1,099 for three nights and four days; $1,499 for four nights and five days; and $1,799 for five nights and six days.[6] Considering that three of us would be traveling, if we opted for the four nights and five days package, the cost would be $4,497.[7]

The Korean package tours provide pick-up and drop-off services at the airport and theme parks. The four nights and five days package included hotel expenses, breakfasts, and admission to the customer's choice of up to four theme parks from among Disney World,[8] Universal Studios,[9] Sea World Water Parks, and the Kennedy Space Center.[10] This seemed reasonable, and I even called the travel agency to inquire about the details. However, I ultimately decided against this travel package, primarily because of the hotel factor.

The Korean package deals included stays at external hotels (such as Hilton or Best Western) that are not operated by Disney World or Universal Studios. However, I decided it would be better to stay at hotels operated by Disney World[11] and Universal Studios[12] for preferential access to the Universal Studios and Disney World theme parks. My colleague and her family, who planned to travel with us, also considered this the most rational approach.[13]

B. Reasons for Choosing Affiliated Hotels.

1. Cost Efficiency.

When planning a visit to the world-renowned Disney World and Universal Studios theme parks with young children, a crucial consideration is minimizing wait times for popular attractions. The actual waiting times, or queue times, can significantly exceed an hour for some of Universal Studios' most popular attractions. In February 2023, the estimated wait times at Universal Studios was seventy-one minutes for Harry Potter and the Escape from Gringotts, which was a 50% decrease compared to the previous month.[14] Our group waited for over two hours to ride the popular attraction Hagrid's Motorbike.[15]

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[5] Here, by "Korean package deals," I refer to U.S. corporations that primarily target Koreans and Korean expatriates, operate websites in Korean, and provide guided services in Korean. Examples include companies like Dongbu Tour (New York) and Samho Tour (LA).

[6] For example, Dongbu Tour (last visited Mar. 13, 2023).

[7] This is based on an assumption of double occupancy in the hotel room, and since we would be using a triple occupancy room, there might be a discount of around $100. This was one of the issues I discussed with Dongbu Tour on January 5, 2023.

[8] Disney World consists of four theme parks: Magic Kingdom, Hollywood Studios, Epcot Center, and Animal Kingdom (confirmed through Disney World official websites).

[9] Universal Studios comprises Universal Studios Florida, Island of Adventure, and Volcano Bay (water park) (confirmed through Universal Studios official websites).

[10] Tour itinerary of Dongbu Tour homepage, (last visited Nov. 17, 2023).

[11] Disney's Pop Century Resort, Disney's All-Star Music Resort, Disney's Art of Animation Resort, and so on (last visited Nov. 19, 2023).

[12] Loews Portofino Bay Hotel, Hard Rock Hotel, Loews Royal Pacific Resort, and so on (last visited Nov. 19, 2023).

[13] A senior deputy director from the KFTC, her husband, and their daughter joined us on the Orlando trip. Since their daughter was similar age as our kids, the three of them bonded well and had a great time together.

[14] David Mumpower, *Universal Orlando Resort Wait Times for February 2023* (last visited Feb. 6, 2023).

[15] I purchased Express Passes, but unfortunately, Hagrid's Motorbike was not included. Like others who did not buy Express Passes, I had to wait in the long line. As a side note, after riding Hagrid's Motorbike and feeling severe dizziness, I initially wanted to abandon all plans and return to the hotel. However, I was held captive by the kids and

For elementary school children, waiting for attractions can be a significant challenge. Just imagine enduring the hot Florida sun, standing in line for popular attractions for an hour or two each time. Most children would spend more time complaining and testing their parents' patience than enjoying the thrilling moments. It is common sense to expect that even with good planning, the number of attractions one can experience in a day is limited.

However, there is a simple way to eliminate these concerns—purchasing Express Passes. With Express Passes, we could skip the regular lines at participating rides and attractions. To acquire this benefit, one simply needs to pay an additional amount per person. For example, at Universal Studios Florida the pass costs $119.99 per person, and at Islands of Adventure it costs $124.99 per person, in addition to the theme park admission.[16] For three people, that means an extra $734.94—prohibitively expensive for many.[17] However, a despairing customer searching the website might be excited to learn that Express Passes are included with a stay at a Universal-affiliated Premier category hotel.[18]

From this point on, the calculations get more complex. While I do not know the exact cost of the Orlando hotel included in the Korean package, it cannot exceed $734.94 per day. Therefore, it seems more cost-effective to stay at a hotel affiliated with Universal Studios, rather than opting for the Korean package and paying an additional $734.94 for Express Passes.[19]

I actually paid $775.13, including taxes, to stay at Loews Royal Pacific Resort, affiliated with Universal Studios.[20] It is clearly more cost-effective to stay at a Universal Studios-affiliated hotel, especially when using Universal Studios theme park Express Passes, than staying elsewhere and buying the passes separately.

2. Fast Reservations for Rides and Attractions.

So, how about Disney World? Disney World offers a product similar to the Express Passes of Universal Studios, allowing for fast entry through the Lightning Lane Entrance without waiting in line. Disney World's system is slightly more complex, with two options: Genie+, and the Individual Lightning Lane (ILL).[21] Both require an additional cost and offer the ability to reserve specific times at attractions, providing a way to experience popular attractions at Disney World without waiting in line for an extended period.

ILL covers five attractions: the Seven Dwarfs Mine Train and Tron in Magic Kingdom, the Rise of the Resistance in Hollywood Studios, the Avatar Flight of Passage in Animal

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could not leave the amusement park until evening. It is not recommended for those with a weak constitution.

[16] *Universal Express Passes Cost*, (last visited Oct. 1, 2023).

[17] (119.99 + 124.99) * 3 = $734.94.

[18] *Universal Express Passes Introduction*, (last visited Oct. 1, 2023).

[19] In our case, savings amounted to $734.94 as three individuals used Express Passes. A family of four would have saved $979.92 ((119.99 + 124.99) * 4 = 979.92).

[20] During the time of my search (October 22-23, 2023), the same product was available for $610.87. During the same period, the price for a 4-star hotel like Loews Royal Pacific Resort was much higher than Marriott Orlando Airport Lakeside ($178.88) and Holiday Inn Orlando ($216), and even higher than Hyatt Regency Orlando ($427.96) and Hilton Orlando ($385.76). (Prices from booking.com as of October 1, 2023).

[21] Robbie Whelan & Jacob Passy, *Disney's New Pricing Magic: More Profit from Fewer Park Visitors*, WALL ST. J. (Aug. 27, 2022) (stating that, after Genie+ and Individual Lightning Lane were introduced in October 2021, they have significantly improved Disney World's profitability. Specifically, "[t]he biggest change in the past two years—and the most lucrative for Disney—[wa]s the introduction of a smartphone-app feature called Genie+. . . But Genie+ does not cover everything. To skip the standby lines at the most sought-after attractions, including some Star Wars and Guardians of the Galaxy-themed rides, reservations now cost an additional $10 to $17.").

Kingdom, and Guardians of the Galaxy: Cosmic Rewind in Epcot.[22] These attractions are among the most popular in each theme park. Therefore, if you do not purchase these options, the wait times can be long, ranging from two to three hours. According to a statistics website, the average wait time for Avatar Flight of Passage is 92 minutes, with a record peak wait time of 345 minutes.[23]

So, does paying an additional fee allow wait-free access to all attractions? Unfortunately, that's not the case. Daily quantities of the Genie+ and ILL options are both limited, and reservations, which are made on a first-come, first-served basis, often fill up very early. For attractions like Avatar in Animal Kingdom, it is quite common for all slots to be booked as soon as the reservation window opens at 7 a.m. For most attractions, there are rarely ILL slots left by the park's opening time, usually around 9 a.m.[24]

This is related to hotel decisions because daily reservations open at 7 a.m. only for guests staying at Disney World-affiliated hotels; for others, it opens at the theme park's regular opening time.[25] This provides an advantage for Disney World hotel guests, allowing them an earlier opportunity to secure ILL slots. Imagine flying all the way to Orlando, visiting Animal Kingdom, and leaving without experiencing the most popular attraction: Avatar Flight of Passage. What would be the point of the trip? Realizing this, my colleague and I began searching for hotels affiliated with Disney World.

3. Early Park Entry is Available.

Another way to experience popular attractions like Avatar without waiting in line is to immediately rush to the attraction as soon as the theme park opens. However, even this option has its limitations. Disney World, for instance, opens thirty minutes early exclusively for hotel guests.[26] Universal Studios follows a similar practice, allowing guests staying at affiliated hotels to enter the park one hour before the general opening time.[27]

My colleague and I booked a three-night stay at the All-Star Pacific Resort, which belongs to the most affordable category among the Disney hotels. We reserved a Disney Resort Hotel Package, including theme park tickets (two parks) and a hotel stay (three nights), and paid

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[22] *Disney Genie Lightning Lane - Save Time Waiting In Line - Walt Disney World*, WALT DISNEY WORLD (last visited Oct. 1, 2023).

[23] *Avatar waiting time*, THRILLDATA.COM (last visited Oct. 1, 2023).

[24] Even if there is an available seat, the competition will be extremely fierce. We did not want to invest such a significant amount of money and travel time and risk missing this opportunity.

[25] *Stay in the Magic with Disney Resorts Collection*, *in* Enhance Your Visit, WALT DISNEY WORLD (last visited Oct. 1, 2023) ("If you're a Guest of a Disney Resort hotel, you're eligible to make your first individual Lightning Lane purchase starting at 7:00 AM each day of your visit. You can select a one-hour arrival window, one at a time, for up to 2 different attractions per day. . . All other Guests are eligible to make their first purchase when the park opens.").

[26] *Disney World Guest Service*, WALT DISNEY WORLD (last visited Oct. 1, 2023) (stating "[g]uests staying at Disney Resort hotels and select other hotels can take advantage of a 30-minute early entry into Walt Disney World theme parks every day.").

[27] *Universal Studios Early Park Admission*, UNIVERSAL ORLANDO RESORT (last visited Oct. 1, 2023) (encouraging guests to "[m]ake the most of your time at Universal Orlando Resort with Early Park Admission*. . . Early Park Admission at Universal Volcano Bay, Universal Studios Florida, and Universal Islands of Adventure is available up to one (1) hour prior to park opening.").

a total of $1,551.98 after taxes.[28] It was a reasonable choice, given the added benefits of staying at a Disney Resort Hotel.[29]

4. Transportation Services are Included.

Both Universal Studios and Disney World offer complimentary transportation between their hotels and theme parks. In our case, we used the free water taxi provided by Universal Studios[30] and the free shuttle offered by Disney World.[31] Disney World goes the extra mile by providing a free shuttle that travels round-trip between the airport and the resort.[32] This made it convenient for me to travel with my children without the need for a guided tour package.

In summary, to visit Universal Studios and Disney World in Orlando, it is most efficient to stay at the hotels operated by each theme park. For Universal Studios, utilizing Express Passes is cost-effective, while for Disney World, taking advantage of rider and attraction reservations is highly advantageous, leaving little reason to consideration of other hotels. Additionally, these affiliated hotels offer the benefit of quicker access to attractions and provide transportation, making it difficult for other accommodation options to compete. Even now, when someone expresses a desire to visit Orlando, I relate my experience and emphatically recommend staying exclusively at hotels affiliated with Universal Studios and Disney World as the most efficient choice.

III. IS IT CONVENIENT? WE HAVE TO CONSIDER WHETHER IT IS LEGAL.

While having a great time at the theme park, I could not shake a sense of unease and mentioned it to my colleague. We had originally intended to only visit the theme park but ended up utilizing the hotel services, and something felt off. I questioned whether the parks' practices might be an abuse of their dominant position in the theme park market to restrict competition in the hotel market. She, being much wiser than I am, and also staff of the Korea Fair Trade Commission (KFTC), responded, "Why bother digging into that? Just enjoy the experience. We already have enough headaches with cases in our country."

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[28] The All-Star Pacific Resort cost $162 per night for the dates of October 22-23, 2023. While it may not be on the cheaper side when compared to other 3-star hotels during the same period—Tru by Hilton Orlando Convention Center ($133.52), Embassy Suites by Hilton Orlando International Drive ICON Park ($125.27), SpringHill Suites by Marriott Orlando Theme Parks/Lake Buena Vista ($130.61). All of these hotels include breakfast in their prices (as of October 1, 2023).

[29] So, what happened? My colleague and I met every morning at 6:55 a.m. to reserve the attractions for the day at 7 a.m. It was a nerve-wracking moment, fearing we might miss out on reservations. Fortunately, we were able to secure reservations for popular attractions like Avatar and Seven Dwarfs Mine Train without waiting in line. Despite reaching extreme levels of mental and physical fatigue, seeing the laughter and bright smiles of our children enjoying the attractions made us feel that the trip was a great decision.

[30] *Universal Studios Hotel Benefits*, UNIVERSAL ORLANDO RESORT (last visited Oct. 5, 2023) (stating "[o]ur hotels are almost this close to the theme parks and Universal CityWalk. And you can hop on free water taxis or shuttles.").

[31] *Disney World Resort Transportation*, WALT DISNEY WORLD (last visited Oct. 5, 2023) ("Stop by one of the convenient, well-marked pick-up points at your hotel and throughout Walt Disney World Resort, and your ride will arrive ready to transport you throughout the Resort—often within minutes.").

[32] *Disney World Airport Transportation*, WALT DISNEY WORLD (last visited Oct. 5, 2023), ("Orlando Airport Shuttle: The airport shuttle service is an economical transportation option that connects you from the airport to your Disney Resort hotel.").

I wholeheartedly agreed with her words, and while in Orlando, I set the matter aside. However, upon returning from Orlando, the question still occupied a corner of my mind. Something seemed odd. I decided to carefully examine the legal aspects of the park practices.[33]

A. Dominant Market Position.

Disney World, featuring Disney characters, operates as a monopoly in the theme park industry. While there are Disneyland locations in various places, including Anaheim, California, Paris, Tokyo, Hong Kong, and Shanghai,[34] Disney World in Orlando is the only one of its kind worldwide. While California's Disneyland consists of 2 theme parks, Disney World in Orlando, Florida, is the largest globally,[35] encompassing 4 theme parks, 2 water parks, and 32 hotels and resorts.[36] Disney World, at 30,700 acres, is 50 times larger than the 160 acre California Disneyland.[37] While Disneyland can be explored in 4 days, Disney World, with its vast size, encourages visitors to take a full week to experience all theme parks, offering a wealth of attractions unparalleled by Disneyland.[38]

Disney World has another advantage compared to non-Disney amusement parks: Disney characters. Attractions like Avatar and the Seven Dwarfs Mine Train seamlessly integrate Disney characters, providing children with a unique experience that cannot be found outside Disney properties. The regular performances also depict stories from Disney animations. Listening to Aladdin's "I Can Show You the World" or meeting Belle from *Beauty and the Beast* are experiences that can only be found in Disney parks.

Universal Studios is also akin to a monopoly in the theme park industry. In addition to the Florida park, Universal Studios operates Universal Hollywood in California. Comparing the two is challenging. In terms of size, Universal Orlando spans 735 acres, while Universal Studios Hollywood is 415 acres.[39] Universal Orlando comprises three distinct theme parks: Universal Studios Florida, Universal's Islands of Adventure, and Universal's Volcano Bay, which is Universal Orlando's waterpark.[40] Additionally, there are eight Universal-owned hotels and a large shopping and entertainment district.[41] In contrast, Universal Studios Hollywood has one theme park, a working film studio, no Universal-owned hotels, and a large shopping and entertainment district.[42]

Similar to Disney, Universal Studios boasts licensed characters that set their parks apart. Wielding Harry Potter's wand and shouting "*Wingardium Leviosa*!" while objects seem to move

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[33] Given the limited data currently available, proving a legal violation as rigorously as writing a complaint (or a statement of objections) in a company is challenging. Rather than presenting concrete evidence, I offer here an overview of the reasoning.

[34] Aline, *Disney Worldwide: The Different Theme Parks*, MILESOPEDIA (Aug. 30, 2023).

[35] *How Big is Walt Disney World®?* FUNPARKGO (Feb. 9, 2022).

[36] *Comparing Disneyland vs. Disney World 2023*, https://theparkprodigy.com/disneyland-vs-disney-world/ (last visited Oct. 5, 2023) ("With only 500 acres to make magic, Disneyland hosts 2 theme parks, 3 resort hotels, and the Downtown Disney shopping and dining district. Sprawling and astonishing 43 square miles (27,520 acres), Walt Disney World holds 4 theme parks, 2 water parks, 32 resort hotels, 5 golf courses, 1 professional sports complex, and 2 shopping and dining districts.").

[37] *Id.*

[38] *Id.*

[39] Matt Berry, *Which Is the Better Park for Your Family* (Feb. 20, 2023).

[40] *Id.*

[41] Matt Bery, *Universal Studios Hollywood Or Universal Orlando: Which Is The Better Park For Your Family?*, GOINFORMED.NET (Feb. 20, 2023).

[42] *Id.*

as if by magic and experiencing the taste of Butterbeer from the novels are experiences exclusive to Universal Studios.[43]

Families seeking a theme park-focused vacation with easy access to both Universal Studios and Disney World may find Orlando to be the ideal choice.[44] If you aim to experience both, be aware that it is significantly more convenient in Orlando. The distance between Universal Orlando and Disney World is approximately 10 miles, typically taking less than 30 minutes by car, making visiting both parks simple from a logistics standpoint.[45] Disney and Universal parks in California are not in close proximity. The distance is around 35 miles, which, given the traffic in Los Angeles, often translates to well over an hour's drive.[46] The parks' opening time, and frequently Universal Hollywood's closing time, can result in navigating Los Angeles rush hour traffic.[47]

B. Leveraging Their Dominant Theme Park Position to Restrict Hotel Competition.

Disney and Universal Studios are transferring market dominance power through self-preferencing. Self-preferencing, a type of dominant position abuse, happens when a market leader uses its influence in one market to unfairly favor its own product in a related market, disadvantaging competitors.[48] This can result in exclusionary effects and can be illegal under antitrust laws when there is no valid justification or proof of efficiencies for such actions.[49]

In essence, Disney and Universal Studios employ self-preferencing to limit competition in the hotel market by leveraging their dominance in the theme park market. Universal Studios has implemented a strategy of privileging customers staying at their hotels over others by using Express Passes to enhance their services—and making the passes prohibitively expensive unless accommodations are also purchased. Similarly, Disney World discriminates between customers using its hotel services and those who stay elsewhere by leveraging popular attraction reservation times and opening hours. They offer significantly superior benefits exclusively to hotel guests, effectively suppressing competition in the hotel market.

Second, both Universal Studios and Disney World have gradually increased theme park prices, resulting in a trend of rising income.[50] After introducing Genie+ in the fall of 2021, Disney World experienced a peculiar phenomenon where visitor numbers decreased but profits increased.[51] The year 2021 saw a significant 17% decrease in visitor numbers due to the impact of the COVID-19 pandemic.[52] However, post-2022, Disney achieved record-breaking operating

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[43] This is the incantation used to levitate objects in the Harry Potter novels.

[44] Orlando is not only home to theme parks like Disney World and Universal Studios but also offers a plethora of other entertainment options, including SeaWorld, the Kennedy Space Center, and more.

[45] *Supra* note 41.

[46] *Id.*

[47] *Id.*

[48] Roberto Rustichelli, *Self-Preference, Global Dictionary of Competition Law*, CONCURRENCES, ART. No. 111802 (last visited Dec. 12, 2023).

[49] *Id.*

[50] In analyzing the rising theme park prices at Universal Studios and Disney World, it is important to consider inflation rates (e.g., U.S. or Florida averages). Despite factoring in inflation, substantial price increases are anticipated. Additionally, the impact of COVID-19 on the theme park industry calls for a comparison with pre-pandemic data before 2019.

[51] Whelan & Passy, *supra* note 21 ("Attendance remains below pre-pandemic levels, but Disneyland and Disney World are making more money than ever. The company has raised some prices and eliminated or started charging for other services and features that used to be free.").

[52] *Id.*

profits, with per capita visitor spending increasing by 17%, three times the average annual growth rate of the previous decade.[53]

This phenomenon is likely a result of third-degree price discrimination, where consumer surplus is absorbed into the profits of the monopoly operator.[54] Third-degree price discrimination involves charging different prices to different consumer groups based on elasticities of demand,[55] with the less elastic group facing higher prices.[56] Disney World implemented this strategy by introducing products like Genie+ and ILL, selling them at different prices to consumers who purchase them and those who do not. Consumers with higher price elasticity might not make extra purchases, like Genie+. In contrast, consumers with lower price elasticity willingly contribute their consumer surplus to the monopoly operator through additional purchases.[57]

The fact that such a system can operate implies that in the market, the business entity has the power to set prices rather than accept given prices—the entity is a price–maker rather than price–taker.[58] In other words, the ability to erode consumer surplus through price discrimination not only signifies a restriction on competition but also indicates that the business entity holds a degree of monopoly power.[59]

Universal Studios' revenue and profits are also consistently trending upward.[60] In June 2022, the theme park implemented a price increase, with annual pass costs rising between $30 and $80.[61] As a result, in 2022, Universal's theme parks reported an annual revenue of $7.5 billion, a

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[53] *Id.* ("For the quarter that ended July 2, the business unit that includes the theme parks also posted record revenue of $5.42 billion and record operating income of $1.65 billion. In fiscal [year] 2021, the first year that both of Disney's two main U.S. resorts had reopened following the worst of the coronavirus pandemic, attendance at Disney's U.S. parks fell by 17% compared with the previous year, the company reported, but per-capita spending by guests grew by 17%, or nearly three times the average annual growth rate during the previous decade. Disney does not disclose attendance for its theme parks.").

[54] Simon Cowan, *Third-degree Price Discrimination and Consumer Surplus*, 60 THE JOURNAL OF INDUSTRIAL ECONOMICS 333, 333 (2012) ("Third-degree price discrimination is probably the commonest form of direct discrimination. The firm uses an exogenous signal that differ[s] across the markets.").

[55] LYNNE PEPALL & DAN RICHARDS, INDUSTRIAL ORGANIZATION: CONTEMPORARY THEORY AND EMPIRICAL APPLICATIONS 95 (5th ed. 2014) ("Third-degree price discrimination, or group pricing, is defined by three key features. First, there is some easily observable characteristic such as age, income, geographic location, or education status by which the monopolist can group consumers in terms of their willingness to pay for its product. Second, the monopolist can prevent arbitrage across the different groups. . . Finally, a central feature of third-degree price discrimination is that, while the monopolist quotes different unit prices to different groups, all consumers within a particular group are quoted the same unit price. Consumers in each group then decide how much to purchase at their quoted price.").

[56] *Id.* ("Consumers for whom the elasticity of demand is low should be charged a higher price than consumers for whom the elasticity of demand is relatively high.").

[57] *Id.* ("While not initially employing explicit criteria for typical third-degree price discrimination, the monopoly operator effectively divides consumer groups by naturally separating those who spend more money.").

[58] *See* DAVID BESANKO ET AL., ECONOMICS OF STRATEGY 235 (6th ed. 2013) ("Monopolists have such a substantial share of their market that they ignore the pricing and production decisions of fringe firms. They may set prices well above marginal cost without losing much business.").

[59] *Id. See also* Laya Neelakandan, *Disney World and Disneyland Raise Prices for Passes and Tickets*, CNBC: ENT. (Oct. 11, 2023, 10:48 AM) (last visited Dec. 11, 2023) (explaining that Disney World is also increasing theme park admission fees apart from Genie+).

[60] *Id.* Apart from Genie+, Disney World is also increasing its theme park admission fees.

[61] For instance, the 2-Park Preferred Pass increased from $399.99 to $439.99, and the 2-Park Premier Pass increased from $559.99 to $639.99. In April 2023, Universal Studios implemented another price increase, increasing the Florida resident two-park annual Premier Pass by $150, from $754.99 to $904.99. The Preferred Pass, with no blackout dates but without free parking or Universal Express, saw a non-Florida resident increase of $90, from $539.99 to $629.99. Lisa Stump, *Price Increases Announced for Universal Orlando Resort Annual Passes*, WDW NEWS TODAY (Apr. 20, 2023).

50% increase over the previous year, and 12% higher fourth-quarter earnings of $2.1 billion.[62]

Third, over the past few years, hotel prices for Disney World and Universal Studios properties have consistently shown an increasing trend—higher than equivalent Orlando hotels.[63] The All Star Pacific Resort associated with Disney World was priced at $162 per night for October 22-23, 2023. This was relatively high compared to other three-star hotels during the same period, such as Tru by Hilton Orlando Convention Center at $133.52, Embassy Suites by Hilton Orlando International Drive ICON Park at $125.27, and SpringHill Suites by Marriott Orlando Theme Parks/Lake Buena Vista at $130.61—all of which include breakfast.[64] The price for this property has been increasing and is expected to continue rising.[65] Based on the current trend, 2024 hotel prices are expected to increase more than 3% over 2023 prices (a $5 increase for a $150 hotel room).[66]

Universal Studios reflected a similar situation, with Loews Royal Pacific Resort for October 22-23, 2023, priced at $610.87—much higher than other four-star hotels like Marriott Orlando Airport Lakeside at $178.88 and Holiday Inn Orlando at $216.[67] Compared to 2017, the prices for Universal Studios-associated hotels have surged, for example, from a minimum of $454 in 2017 to at least $836 in 2023, marking an increase of over 84% in six years.[68]

Table 1: Comparison of Prices for Universal Studios' Flagship Hotels (2017 vs. 2023).[69]

	Cabana Bay Beach Resort		**Loews Sapphire Falls Resort**		**Loews Royal Pacific Resort**		**Hard Rock Hotel**		**Loews Portofino Bay Hotel**	
Year	2017	2023	2017	2023	2017	2023	2017	2023	2017	2023
Value Season	From $139	From $174	From $189	From $262	From $259	From $406	From $304	From $453	From $319	From $484
Regular Season	From $159	From $194	From $204	From $269	From $294	From $442	From $339	From $511	From $349	From $534
Summer Season	From $179	From $229	From $229	From $308	From $344	From $680	From $419	From $740	From $404	From $782
Peak Season	From $194	From $254	From $249	From $336	From $354	From $573	From $429	From $627	From $424	From $675
Holiday Season	From $229	From $304	From $299	From $405	From $454	From $836	From $524	From $895	From $519	From $943

[62] COMCAST, COMCAST REPORTS 4TH QUARTER AND FULL YEAR 2022 RESULTS (2023) ("Theme Parks revenue increased 12.0% to $2.1 billion in the fourth quarter of 2022.").

[63] As mentioned earlier, it is important to consider an appropriate inflation rate and the impact of the COVID-19 virus when considering these trends.

[64] Prices from booking.com as of October 1, 2023.

[65] Since these prices are linked to theme park prices and packages, it is challenging to view hotel costs as encompassing only the hotel service itself. In other words, due to the bundled nature of package deals, it is difficult to assert that the superficially presented hotel cost fully reflects the actual hotel price (making it challenging to separate theme park and hotel costs). However, it is evident that hotel costs are high and steadily rising.

[66] Robin Burks, *How Disney World Hotel Prices Will Change by 2024*, THE DISNEY FOOD BLOG, (last visited Oct. 12, 2023).

[67] Prices from booking.com as of October 1, 2023.

[68] *Universal Orlando's Hotels: Overview and Rates*, ORLANDO INFORMER (Mar., 2023).

[69] Despite a notable increase in the number of hotels associated with Universal Studios during the same period, prices have surged considerably.

In conclusion, it seems likely that Disney and Universal Studios are abusing their dominant position through self-preferencing, adversely affecting consumers and competing businesses. While I acknowledge the limitations and potential inaccuracies of the cited data, they are also supported by anecdotal evidence from Disney World visitors who generally express dissatisfaction with high prices relative to other hotels of similar grade or inadequate facilities for the price point.[70]

This comparison made me wonder why the U.S. competition authorities allowed these practices, which even a foreigner feels are unfair. The fact that the market can persist in the same state despite these complaints indicates encouraging competition in this market may be challenging.

IV. PAST INDIFFERENT TO SELF-PREFERENCING.

In 1890, the United States enacted the Sherman Antitrust Act to curb potential harms arising from monopolies.[71] However, U.S. competition authorities not only remained silent about the monopolistic enterprises in Orlando, but they also overlooked platform businesses for a long time.[72] The result is a platform-leading world that is unprecedented in history.[73] Has any historical business model seen a company installing its hub in each apartment and dominating the distribution market? Today, I went to the Amazon hub in the apartment parking lot to pick up items ordered through Amazon Prime. Has any company historically had the current level of data on individuals' location, habits, and preferences? Google occasionally informs me where I went last month and when I was busiest. Because I searched for Orlando hotels a few times, Google now bombards me with Orlando advertisements. Historical monopolies like Standard Oil, Northern Securities, and American Tobacco would envy modern companies' reach.[74]

Today, global competition regulators are closely watching platform businesses for potential monopolization due to their unique characteristics such as network effects and data control,[75] which tend to lead to market dominance by a few companies.[76] While many competition authorities

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[70] It is unlikely that only my acquaintances share these sentiments; it is probable that everyone who visited had similar grievances. As I will elaborate later, I believe that the discontented voices people feel in their everyday lives are more important evidence than numerical data. These dissatisfied voices should not be dismissed as non-scientific inquiry, and competition authorities should always pay attention to them.

[71] During that era, many countries, including Korea, were not at a stage of economic development to even have concerns about monopolies. Considering the historical context, the U.S. legislation was undoubtedly among the most advanced policies of its time—this foresight should be applauded. To this day, many competition authorities refer to U.S. decisions when handling their own cases and consider U.S. programs among the best in the world to learn antitrust law.

[72] ALEX MOAZED & NICHOLAS L. JOHNSON, MODERN MONOPOLIES. WHAT IT TAKES TO DOMINATE THE 21ST CENTURY ECONOMY, 111 (2016) (defining platform as "a business that connects two or more mutually dependent groups in a way that benefits all sides.").

[73] NICOLAS PETIT, TECHNOLOGY GIANTS, THE MOLIGOPOLY HYPOTHESIS AND HOLISTIC COMPETITION: A PRIMER, 15 (2016) (explaining that major tech companies such as Google, Amazon, Facebook, Apple, and Microsoft currently exert considerable market power in core industries where the potential for competitor substitution is low. Specifically, Petit argues that "[s]urely, all [tech companies] have a core business: Google is predominantly a 'search' company; Apple a communication and media devices firm; Facebook a social network; Amazon an online retailer; and Microsoft an operating systems developer.").

[74] THE ECONOMIST, *How the Pandemic has Changed the Weather in the Technology Industry* (Oct. 29, 2021) (even with the pandemic that began in late 2019, the growth trajectory of 'Big Tech' companies has been steep, further solidifying their market dominance and stature).

[75] Moazed & Johnson, *supra* note 72, at 100 ("But combined with the network effects of established platforms, this additional value creates the kind of lock-in that makes competing with a successful platform extremely difficult.").

[76] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 785 (2017) ("For the purpose of competition policy, one of the most relevant factors of online platform markets is that they are winner-take-all. This is due largely to

express concerns, U.S. regulators often adopt a lenient approach. In this section, I explore key cases of self-preferencing in Europe, the United States, and South Korea, as the stances of competition authorities in these places serve as a reference for understanding current phenomena.

A. U.S. Google Case: Antitrust Authorities Failed to Raise Concerns about Google's Conduct.

The Federal Trade Commission (FTC) conducted an extensive investigation into allegations of Google unfairly favoring its own content on search results pages and selectively demoting competitors' content.[77]

Google's search results redesign, preferring its specialized results and lowering competitors' prominence, sparked FTC scrutiny.[78] The investigation focused on whether Google aimed to stifle competition or improve user experience.[79] On January 3, 2013, the FTC issued a brief unanimous statement,[80] only four pages long, clearing Google of any wrongdoing regarding its self-preferencing. After analyzing the evidence, the FTC concluded that Google's changes were aimed at enhancing search quality, with any negative impacts on competitors ruled incidental to efficiency-driven competition.[81]

Acknowledging potential drawbacks for competitors, like reduced traffic due to altered rankings, the FTC did not dismiss these concerns, but found Google's design changes justified.[82] They saw innovation, improved user experience, and overall benefits, leading to the determination that Google did not violate antitrust laws.[83]

This decision seems to align with prevailing legal views.[84] Advantaging a company's products, including the prioritization of web pages, is a common practice not only for Google, but also for non-dominant services like Yahoo.[85] Some argue that competing internal market forces can sufficiently address search bias, while others advocate for government protection of freedom of expression in search result representation.[86] The U.S. Ninth Circuit Court of Appeals stated that

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network effects and control over data, both of which mean that early advantages become self-reinforcing. The result is that technology platform markets will yield to dominance by a small number of firms. . . Network effects arise when a user's utility from a product increases as others use the product. Since popularity compounds and is reinforcing, markets with network effects often tip towards oligopoly or monopoly.").

[77] PRESS RELEASE, FED. TRADE COMM'N, *Statement of the Federal Trade Commission Regarding Google's Search Practices*, at 1-2 (Jan. 3, 2013) (In simpler terms, Google created Google Shopping, charging businesses for ads when consumers clicked on the product. The problem arose as Google adjusted the search algorithm, placing this product at the top of search results. Businesses using Google's ads appeared prominently, while others were less visible, making it challenging for consumers to find them).

[78] *Id.*

[79] *Id.* at 2.

[80] *Id.*

[81] *Id.* at 3.

[82] *Id.*

[83] *Id.* at 3-4.

[84] Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality is the Answer, What's the Question?* COLUM. BUS. L. REV. 151, 174-175 (2012) ("The finding that search engine bias is ubiquitous is not surprising. The fact that search engines such as Yahoo!—which certainly do not have market power—exhibit similar bias suggests that the practice is not anticompetitive.").

[85] Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 722 (2010) ("When choosing between government regulations to ensure that each intermediary is everything to everyone, on the one hand, and allowing audiences to choose from among intermediaries each exercising their own voice, on the other, free speech principles clearly regard the latter as the lesser of the two evils.").

[86] Eugene Volokh & Donald M. Falk, *Google First Amendment Protection for Search Engine Search Results*, 8(4) J. L. ECON. & POL'Y 883, 899 (2012) ("Google, Microsoft's Bing, and Yahoo! Search exercise editorial judgment about

design changes benefiting consumers, without anti-competitive practices, do not violate the Sherman Act unless accompanied by exclusionary conduct.[87]

B. EU Google Case: EU Competition Authorities Issued a Harsh Decision Against Google for Similar Practices.

The European Commission found that Google abused its dominant position in the general search services market by restricting competition in the comparison shopping services market.[88] It imposed a fine of approximately 2.4 billion euros on Google.[89] The European Commission highlighted that Google's behavior could reduce traffic to third-party shopping services while increasing traffic to its own service in the downstream market.[90] Recognizing the significant impact of Google's general search traffic on competing services, the Commission expressed concerns about the potential anticompetitive effects, highlighting that Google's dominant position in the general search market might restrict competition in the shopping services market.[91] Google appealed to the General Court,[92] but their claim was rejected in November 2021.[93] Google has now taken the case to the highest EU court, the Court of Justice of the European Union (CJEU).[94]

In EU jurisprudence, self-preferencing, encompassing actions like discrimination, tying, unfair pricing, and exclusive dealing, can be prohibited without the need to assess essential facility requirements.[95] For instance, in the *Deutsche Bahn* case, the EU Commission found a violation based on discriminatory pricing without determining the facility's essential nature.[96] Similarly, in the *GT-Link* case,[97] the CJEU ruled that a state owned port enterprise discriminating in port duties

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what constitutes useful information and convey that information—which is to say, they speak to their users. In this respect, they are analogous to newspapers and book publishers that convey a wide range of information from news stories and selected columns by outside contributors to stock listings, movie listings, bestseller lists, and restaurant guides. And all of these speakers are shielded by the First Amendment, which blocks the government from dictating what is presented by the speakers or the manner in which it is presented.").

[87] *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 998-99 (9th Cir. 2010) ("We also agree that there is no Section 2 violation; the undisputed evidence shows that the patented OxiMax design is an improvement over the previous design. Innovation does not violate the antitrust laws on its own.").

[88] Commission Decision 1/2003 of June 27, 2017, relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area, 2017 O.J. (C AT.39740) 57, 77(EC).

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] Google and Alphabet v. Comm'n, Case T-612/17, Gen. Ct. of the Eur. Union (Nov. 10, 2021).

[93] Johannes Persch, *Google Shopping: The General Court Takes its Position*, KLUWER COMPETITION L. BLOG, (Nov. 15, 2021) ("The counter-argument from the Commission was that even if Google's argument that the conduct in question had improved its service was true, this would not preclude an abuse of dominance. . . How could there be an improvement in the service if Google users were encouraged to click on results other than the most relevant for their search query?").

[94] *Google Appeals €2.4B Antitrust Fine at Top EU Court*, COMPETITION POL'Y INT'L (Jan. 23, 2022).

[95] Critics like Lamadrid argue that competition authorities wrongly deemed self-preferencing illegal to sidestep applying essential facility theory, departing from established precedents and applying flawed legal reasoning. *See generally* Alfonso Lamadrid, *Google Shopping Decision-First Urgent Comments*, CHILLIN' COMPETITION (Jun., 2017) ("So the Commission does not label Google as an essential facility (because that would be pretty hard to do given the high legal standard), but it does treat Google as if it were, thus bypassing that legal standard. I fail to see . . . the logic or consistency of this reasoning against the backdrop of the relevant case law. In my view, and not having yet read the decision, this suggests a possible bypassing of established legal rules and standards with ad-hoc case specific theories and remedies, thereby risking turning the prohibition of abuses of dominance into the realm of the arbitrary.").

[96] Deutsche Bahn AG v Commission, T-229/94, ECR [1997] II-1689, Ct. of 1st Instance, (Oct. 21 1997).

[97] GT-Link A/S and De Danske Statsbaner (DSB), C-242/95, ECR [1997], ECR I-4449, 6th Chamber, (Jul. 17, 1997).

among ferry operators violated Article 102(c) of the Treaty on the Functioning of the European Union (TFEU).[98]

Self-preferencing is one of the techniques used by dominant platforms to give preferential treatment to their own products or services.[99] Owners of essential facilities are prohibited from self-preferencing, and it is considered an abuse of power for dominant companies—even when not meeting the essential facility requirements—to engage in self-preferencing if it results in anticompetitive effects.[100] Essentially, self-preferencing is not inherently abusive but should be assessed using the effects test.[101] For vertically integrated digital platforms, especially those acting as critical intermediation infrastructure with high entry barriers, the burden of proof should be on the platform to demonstrate that self-preferencing does not cause long-term exclusionary effects in the product market.[102]

The European Commission thought it was not enough, and they wanted to enforce the Digital Markets Act (DMA)[103] from May 2023, signaling robust regulation of platforms. This law categorizes anti-competitive self-preferencing by major tech platforms as "unfair practices," explicitly prohibiting them.[104] Big tech companies are prohibited from favoring themselves or affiliates in content arrangements, and violations may incur fines of up to 10% of global revenue.[105]

C. Naver and Kakao Cases in South Korea: South Korean Competition Authorities Actively Regulate Self-Preferencing.

The South Korean Fair Trade Act[106] was enacted in 1981, with the KFTC gaining independence in 1990. Despite its late start, KFTC swiftly incorporated competition laws and rigorously enforces sanctions for self-preferencing, similar to European courts.[107] Recent cases involving major companies like Naver and Kakao demonstrate the country's strict approach to such

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[98] Nicolas Petit, *Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf*, 1 COMPETITION L. & POL'Y DEBATE 4, 6-7 (2015).

[99] JACQUES CREMER, YVES-ALEXANDRE DE MONTJOTE & HEIKE SCHWEITZER, COMPETITION POLICY FOR THE DIGITAL ERA (FINAL REPORT), European Commission, 2019, at 7 ("One specific technique of leveraging a platform's market power is self-preferencing, i.e. giving preferential treatment to one's own products or services when they are in competition with products and services provided by other entities using the platform.").

[100] Pablo Ibáñez Colomo, *Self-Preferencing: Yet Another Epithet in Need of Limiting Principles,* 43 WORLD COMPETITION 417, 428 (July 17, 2020) ("The fundamental point to note, in this regard, is that the prospect of a self-preferencing strategy is in itself insufficient to take action against a non-horizontal merger. The decisive question is not whether the firm would have the incentive use a variety of strategies to favour its affiliates, but whether these strategies are likely to have anticompetitive effects on the relevant market.").

[101] Cremer et al., *supra* note 99, at 66.

[102] *Id.* at 66-67.

[103] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance), PE/17/2022/REV/1, OJ L 265, 12.10.2022.

[104] DMA Article 6(5) ("The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking.").

[105] DMA Article 30(1)(a) ("In the non-compliance decision, the Commission may impose on a gatekeeper fines not exceeding 10 % of its total worldwide turnover in the preceding financial year where it finds that the gatekeeper, intentionally or negligently, fails to comply with: (a) any of the obligations laid down in Articles 5, 6 and 7.").

[106] The official name of the law is the "Monopoly Regulation and Fair Trade Act."

[107] South Koreans generally have a strong preference for things happening quickly. At a Starbucks in South Korea, coffee is often ready as soon as the customer places an order.

practices.[108]

1. Naver Shopping Case.[109]

Naver, South Korea's leading search engine, operates both an online comparison-shopping service for searching and comparing products across various malls and its own open market.[110] Naver adjusted its algorithm to influence the search rankings of shopping products to prioritize the visibility of its open market products.[111] Since 2012, during the early stages of its open market business, Naver consistently modified the algorithm in favor of its services, monitoring the impact on product exposure through pre-implementation simulation and post-implementation verification.[112]

The KFTC determined that Naver's conduct distorted search results and impaired competition in the open market, and imposed a fine (approximately KRW 26.6 billion[113]) along with a relief order.[114] First, the KFTC determined that Naver is the dominant operator in the comparative shopping service market, accounting for more than 70% of the market share based on commission profit, brokerage transactions, and traffic.[115] Second, the KFTC found that Naver's algorithmic adjustments and maintenance resulted in an increase in the exposure of Naver's open market vendors' products in Naver Shopping search results, and a decrease in the exposure of competing open market vendors' products.[116] As a result, the share of Naver (Smart Store) in the open market by transaction value increased from approximately 1.6% in 2012 to approximately 21% in 2018.[117] Naver contested the decision, filing a lawsuit for cancellation,[118] but the Seoul High Court dismissed the claim on December 14, 2022.[119]

2. Kakao Mobility Case.

Kakao, renowned for its social network service (SNS) KakaoTalk,[120] introduced the taxi-hailing service Kakao Mobility in 2015.[121] Holding over 90% market share, Kakao Mobility implemented algorithms favoring its affiliated drivers in the Kakao T app general dispatch service,

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[108] Naver and Kakao are among the Top 10 companies in South Korea's market capitalization. (As of January 28, 2022, based on closing prices, Naver ranks 5th, and Kakao ranks 10th.) (last visited Jan.28, 2022).

[109] There is limited information in the English press release regarding this case, so I focus on the Korean press release and the decision.

[110] Min-chul Lim, *Naver's Search Share Recovers to 70% Level... Google Chasing*, AJU KOREA DAILY (Aug. 21, 2023) (As of August 2023, Naver (naver.com) leads the Korean search engine market with a 70% share, according to Bizspring's "Internet Trend" analysis. Naver holds the top position at 68.94%, with Google in second place with 23.60%.). *See also* Naver Home Page, NAVER.COM (last visited April 1, 2024), *and* Naver Shopping Services, NAVER.COM (last visited April 1, 2024).

[111] Press Release, KFTC, KFTC Sanctions Naver Shopping and Video for Unfairly Prioritizing Exposure of Their Own Services (Oct. 6, 2020).

[112] *Id.*

[113] Calculated at an exchange rate of around KRW 1,300 per dollar, it amounts to approximately $20.5 million.

[114] In the Naver case, for which I was the case manager, the KFTC determined that not only Naver Shopping, but also Naver Real Estate and Naver Video constituted exclusionary conditional trade practices and discriminatory treatment, respectively. For the Naver Real Estate case, *see* Press Release, KFTC, KFTC Sanctions Naver Real Estate for Excluding Competitors (Sep.4, 2020).

[115] Korea Fair Trade Commission Decision 2021-027, Jan. 27, 2021 (Case No. 2018SeoGam2521).

[116] *Id.*

[117] *Id.*

[118] Korea, Seoul High Court, Dec. 14, 2022, 2021Nu36129.

[119] Pyo Taejun, *Court: Naver Fined 26.7 Billion Won for Manipulating Search Algorithm,* CHOSUN ILBO (Dec. 14, 2022, 2:59 PM).

[120] This service is similar to WhatsApp in the United States.

[121] This service is similar to Uber and Lyft in the United States.

resulting in higher income for them.[122] In effect, since the launch of the affiliated taxi service in 2019, these practices involve prioritizing calls to affiliate drivers and discreetly adjusting algorithms to exclude or reduce short-distance dispatches under one kilometer.[123]

KFTC imposed a relief order and a fine of KRW 271.2 billion on Kakao for restricting competition in the general transportation service call market.[124] Kakao Mobility's dominance in the taxi market, favoring its affiliate drivers, limited competition and raised concerns about exclusion of competitors.[125] Kakao T Blue's market share in the taxi franchise service significantly increased (14.2% in 2019 to 73.7% in 2021), making it difficult for other businesses to recruit affiliate taxis.[126] Additionally, Kakao maintained and strengthened its dominance in the general call market (92.99% in 2019 to 94.46% in 2021), potentially leading to higher passenger call fees and driver app usage fees.[127]

KFTC applied the same criteria as the Naver case, addressing abuse or market dominant power.[128] Kakao has contested this decision and filed a lawsuit, which is pending with the Seoul High Court as of November 2023.[129]

3. Establishment of Evaluation Guidelines for Online Platforms.

The KFTC has introduced specific guidelines for online platform operators effective January 12, 2023.[130] These guidelines outline evaluation criteria for four key types of actions: (1) restricting multihoming; (2) demanding MFN (Most Favored Nation) status; (3) self-preference; and (4) tying sales.[131]

The guidelines prohibit online platform operators from favoring their own products or services over those of competitors on their platform.[132] The core anticompetitive concern is with online platform operators, whose dual roles as platform operators and direct sellers on the platform enable the leveraging of this dual position to boost the accessibility to their products. This can lead to the transfer and reinforcement of dominance in associated markets, maintaining and enhancing dominance in existing markets through exploitation.[133]

V. RECENT CHALLENGES FOR U.S. COMPETITION AUTHORITIES.

Over seven years since the Google case, there has been a noticeable shift in U.S. regulatory sentiment. The newly appointed and ambitious chairperson, voicing opposition to Google's exoneration, highlights the change. The House Judiciary Subcommittee on Antitrust, after

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[122] Korea Fair Trade Commission Decision 2023-093, June 13, 2023 (Case No. 2021SiGam0760).
[123] *Id.*
[124] Press Release, KFTC, Sanctions Against Kakao Mobility for Directing Calls to Its Affiliated Taxis (Feb. 14, 2023).
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Jung Yoo-rim, *Fined 27.1 Billion Won, Kakao Mobility Files Administrative Lawsuit Against Fair Trade Commission*, INEWS24 (July 20, 2023).
[130] *Guidelines for the Assessment of Abuse of Dominant Market Position by Online Platforms*, Fair Trade Commission Ordinance No. 418 (January 12, 2023).
[131] *Id.*
[132] *Id.* (The guidelines encompass the concept of both direct self-preference (such as priority exposure) and indirect self-preference (favoring products of online platform users engaging in transactions with the platform operator)).
[133] *Id.* (On the other hand, it acknowledges that such self-preferential practices can offer user benefits by integrating or linking products in connection with online platform services and associated markets).

intensive collaboration since June 2019,[134] released a 450-page report in October 2020, alleging abuse of monopolistic positions by Google, Amazon, Facebook, and Apple (GAFA).[135] Despite these efforts, tangible outcomes are elusive, as legislative and judicial branches often do not align on antitrust endeavors, resulting in numerous unsuccessful attempts. This section examines recent changes in the U.S. competition authorities' approach and the challenges they continue to face.[136]

A. Recent U.S. Antitrust Efforts.

1. Google in Antitrust Subcommittee Report.

The report accused Google of three major antitrust violations. First, it claimed Google engaged in data misappropriation and used self-preferencing to solidify market dominance, hindering competition and innovation and causing harm to users and businesses.[137] Additionally, it alleged Google weakened potential competitors and maximized search advertising revenue by privileging its own services through a strategy of demoting third-party content.[138]

Second, the report argued that Google posed a threat to innovation and the open internet,[139] alleging Google's actions stifled competition, reduced the incentive for competitors to invest in new and innovative products, and hindered Google's own innovation.[140]

Third, the report accused Google of raising market prices and diminishing search quality,[141] alleging Google modified the display of ads on search engine results pages over the years, increasing the number of ads above organic results and blurring the distinction between ads and

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[134] Press Release, House of Representative Judiciary Committee, House Judiciary Committee Launches Investigation into Competition in Digital Markets (Jun. 3, 2019) ("The committee's investigation will focus on three main areas: 1) Documenting competition problems in digital markets; 2) Examining whether dominant firms are engaging in anti-competitive conduct; and 3) Assessing whether existing antitrust laws, competition policies and current enforcement levels are adequate to address these issues.").

[135] 117 Congress 2d Session, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (July 2022).

[136] In this section, I focus on self-preferential practices and efforts made by competition authorities. Apart from the cases mentioned here, there are numerous instances demonstrating robust constraints on Big Tech companies.

[137] 117 Congress 2d Session, *supra* note 135, at 151 ("Google Leverages Dominance Through Data Misappropriation and Self-Preferencing. When Google launched in 1998, the search listings it delivered were 'ten blue links,' or a set of organic results that guided users off Google's webpage to locate relevant information. In the years since, Google, as well as Bing, has evolved to displaying blue links alongside a variety of Google's own content, as well as "information boxes" that list responses directly on the search results page. While this model may, in certain instances, provide users with direct information more quickly, documents collected by the Subcommittee show that Google built some of these features through aggressive tactics that exploited its search dominance. Google's conduct helped maintain its monopoly in online search and search advertising while dissuading investment in nascent competitors, undermining innovation, and harming users and businesses alike.").

[138] *Id.*

[139] *Id.* at 160 ("Threatening Innovation and the Open Internet. Through misappropriating third-party content and giving preferential treatment to its own vertical sites, Google abused its gatekeeper power over online search to coerce vertical websites to surrender valuable data and to leverage its search dominance into adjacent markets. Google's conduct both thwarted competition and diminished the incentive of vertical providers to invest in new and innovative offerings.").

[140] *Id.*

[141] *Id.* at 163 ("Google Increased Prices for Market Access and Degraded Search Quality. In 2000, Google launched AdWords, which allowed advertisers to pay for keyword-based ads that would appear to the right of Google's search results. In the years since, Google has changed the display of the ads on its search engine results page in several ways, most notably by (1) increasing the number of ads placed above organic search results, and (2) blurring the distinction between how ads and organic listings are presented on Google's search results page. These changes have effectively raised the price that businesses must pay to access users through Google. Market participants told the Subcommittee that Google's conduct has undermined competition, misled consumers, and degraded the overall quality of Google's search results—all while enabling Google to further exploit its monopoly over general online search.").

actual results.[142] This policy, according to the report, compelled companies to pay higher advertising fees, leading to increased product prices.[143] Moreover, Google's alleged blurring of the line between paid ads and organic results was said to make users click on ads more and organic results less.[144]

2. Introduction of 5 Package Bills.

In response to the Subcommittee Report on Antitrust, the U.S. House proposed five package bills[145] on June 11, 2021, touted as the "most robust antitrust legislation in history." Led by Congresswoman Pramila Jayapal, the bills aim to address unregulated Big Tech monopolies, holding them accountable for anticompetitive practices and expanding opportunities for consumers, workers, and small businesses.[146]

In particular, the "American Innovation and Choice Online Act" in the legislative package directly regulates self-preferencing by covered platform operators.[147] It prohibits self-preferencing,[148] discriminatory practices,[149] and the "use [of] non-public data" for self-products. Violations can lead to competition authorities imposing emergency injunctions with court approval.[150]

The Ending Platform Monopolies Act[151] goes further, outright prohibiting covered platform operators (CPO) from owning or controlling any other business using their platform.[152] Once designated as a target platform under § 6(a), it becomes illegal for "platform operator[s] to own, control," or possess any other business sector beyond the designated target platform.[153]

3. Open App Markets Act.

Introduced in August 2021, the Open App Markets Act[154] prohibits app store companies

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[142] *Id.*

[143] *Id.*

[144] *Id.* at 171 ("One study found that over 59 percent of consumers were not aware of the difference between organic results and paid ads on Google, and about 34 percent of those who did recognize paid ads said they would deliberately avoid clicking on them.").

[145] The term "five Package Bills" refers to the American Choice and Innovation Online Act, Platform Competition and Opportunity Act, Ending Platform Monopolies Act, Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, and Merger Filing Fee Modernization Act in the United States.

[146] Pramila Jayafal, *Jayapal and Lawmakers Release Anti-Monopoly Agenda for "A Stronger Online Economy: Opportunity, Innovation, Choice,"* (Jun. 11, 2021).

[147] American Innovation and Choice Online Act, S.2992, 117th Cong. (as introduced in Senate Oct. 18, 2021).

[148] Jayapal *supra* note 148; S. 2992 § 3(a)(1), ("unfairly preference the covered platform operator's own products, services, or lines of business over those of another business user on the covered platform in a manner that would materially harm competition on the covered platform").

[149] Jayapal *supra* note 148; *See* S. 2992 § 3(a)(5), ("condition access to the covered platform or preferred status or placement on the covered platform on the purchase or use of other products or services offered by the covered platform operator that are not part of or intrinsic to the covered platform itself").

[150] *See* S. 2992 §(3)(a)(6); *See also id.* at § 3(c)(5)(C)(i), ("(C) INJUNCTIONS.— 9 (i) IN GENERAL.—The Assistant Attorney General in charge of the Antitrust Division, the Commission, or the attorney general of any State may seek, and the court may order, relief in equity as necessary to prevent, restrain, or prohibit violations of this Act.").

[151] Ending Platform Monopolies Act (H.R. 3825), 117th Cong. (2021).

[152] Jayapal *surpa* note 148. *See* H.R. 3825 § 2(a), ("Section 2 (a)(1) . . . utilizes the covered platform for the sale or provision of products or services, (2) offers a product or service that the covered platform requires a business user to purchase or utilize as a condition for access to the covered platform, or as a condition for preferred status or placement of a business user's product or services on the covered platform; or (3) gives rise to a conflict of interest.").

[153] *Id.* H.R. 3825 §2(a); *See id. at* §6(a).

[154] Open App Markets Act (S. 2710, 117th Cong. (2021).

with more than fifty million U.S. users from engaging in exclusive practices.[155] This includes mandating the use of their in-app payment system and enforcing Most Favored Nation (MFN) clauses.[156] The Act further restricts unfair preferential treatment or ranking practices, preventing companies from giving unjust advantages or higher rankings to their apps or affiliates compared to others on the app store.[157]

4. Amazon's Self-Preferencing Investigation.

On September 23, 2023, the U.S. FTC and seventeen state attorney generals filed a lawsuit against Amazon, accusing the online retail giant of unlawfully maintaining a monopoly.[158] The allegations include obstructing competitors from lowering prices and degrading quality, claiming that Amazon used pricing algorithms to artificially control competitors' prices.[159]

The FTC is specifically investigating the practice of "biased search results favoring Amazon's products."[160] According to a report from the U.S. House Antitrust Subcommittee, Amazon maintains a growing share of its own product sales in certain categories, such as books, where Amazon's direct sales constitute 74%, while third-party sellers make up only 26%.[161] The use of algorithms is suspected to effect better exposure for Amazon's private-label products, and customer information gathered through the AI speaker, Alexa, is utilized to strengthen recommendations for Amazon's branded items.[162]

B. U.S. Competition Authorities: Setbacks and Failures.

Despite these efforts, U.S. competition authorities faced challenges, notably in the Microsoft case.[163] The FTC opposed Microsoft's $68.7 billion acquisition of Blizzard, but a California federal judge rejected the FTC's bid to halt the deal, citing uncertainty about its impact on competition.[164]

A Department of Justice's (DOJ) lawsuit against Google's search engine[165] also faced

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[155] *Id.* § 2(a)(3); *See id.* § 3(a). ("Section 3 (a) A Covered Company shall not— (1) require developers to use an In-App Payment System owned or controlled by the Covered Company or any of its business partners as a condition of being distributed on an App Store or accessible on an operating system; (2) require as a term of distribution on an App Store that pricing terms or conditions of sale be equal to or more favorable on its App Store than the terms or conditions under another App Store; or (3) take punitive action or otherwise impose less favorable terms and conditions against a developer for using or offering different pricing terms or conditions of sale through another In-App Payment System or on another App Store.").

[156] *See Id.* § 3(a)(1).

[157] *See Id.* § 3(e).

[158] Press Release, *FTC Sues Amazon for Illegally Maintaining Monopoly Power*, FTC (Sep. 26, 2023).

[159] *Id.*

[160] *Id.*

[161] 117 Cong. 2d Session, STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 137, at 231 ("In response to a question from the Subcommittee, however, Amazon admitted that by percentage of sales—a more telling measure—Amazon's first-party sales are significant and growing in a number of categories. For example, in books, Amazon owns 74 percent of sales, whereas third-party sellers only account for 26 percent of sales.").

[162] *See Id.* at 261 ("Besides favoring Amazon services with default voice commands, Alexa also allows Amazon to favor its retail products over products offered by third-party sellers.").

[163] *See* Press Release, FTC, *FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.* (Dec. 8, 2022).

[164] Sarah E. Needleman & Dave Michaels, *Microsoft Can Close Its $75 Billion Buy of Activision Blizzard, Judge Rules*, WALL ST. J. (Jul. 11, 2023) ("U.S. District Judge Jacqueline Scott Corley said in her opinion that the Federal Trade Commission had not shown that Microsoft's ownership of Activision games would hurt competition in the console or cloud-gaming markets.").

[165] Press Release, DOJ, *Justice Department Sues Google for Monopolizing Digital Advertising Technologies*, (Jan. 24,

setbacks, with some claims dismissed by the courts.[166] In another case, the FTC objected to Meta's[167] acquisition of app creation company Within,[168] but the court dismissed the claim.[169] By the end of 2022, legislative conservatism hampered the progress of five bills and the Open App Markets Act, essentially leading to their abandonment.[170] The conservative nature of the U.S. legislative and judicial branches seems to have made them unwilling to accept many of the efforts of competition authorities.

VI. THE PARADIGM OF COMPETITION POLICY NEEDS TO CHANGE.

U.S. competition policy requires a shift in prevailing theories, as it operates within a system where competition authorities cannot operate effectively without the alignment of the legislative and judicial branches. This necessary change will not happen overnight but could emerge after ample time for consensus to develop among the majority. In this section, I explore the fundamental changes needed to empower competition authorities.

A. Avoiding Fixation on Sophisticated Economic Models.

I negotiated a 100 billion won (about 77 million dollars) consent decree with a major U.S. cell phone manufacturer after years of debate.[171] I spent whole days debating economic influence. When investigating Naver, South Korea's largest search engine company, for abuse of its dominant market position, prominent local microeconomists were sharply divided, leading to a prolonged and inconclusive dispute.[172] Can economics ever provide a clear answer? No. The academic discipline can inform the debate but cannot offer definitive solutions.

Using economic theory in competition law involves creating sophisticated models that quantify the impact on the market, primarily through microeconomic analysis. These models incorporate "exogenous variables" (externally determined) and "endogenous variables" (internally determined based on relationships between variables).[173] In economic models, an exogenous

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2023) ("As alleged in the complaint, over the past 15 years, Google has engaged in a course of anticompetitive and exclusionary conduct that consisted of neutralizing or eliminating ad tech competitors through acquisitions; wielding its dominance across digital advertising markets to force more publishers and advertisers to use its products; and thwarting the ability to use competing products. In doing so, Google cemented its dominance in tools relied on by website publishers and online advertisers, as well as the digital advertising exchange that runs ad auctions.").

[166] Lauren Feiner, *Judge Narrows Case in Google Antitrust Suits Brought by States and DOJ*, CNBC (Aug. 4, 2023) ("It is a significant win for Google, though it will still need to face other claims brought by the enforcers when the trial begins September 12.").

[167] Facebook's parent company.

[168] Press Release, FTC, *FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within*, (July 27, 2022).

[169] Diane Bartz, *FTC Withdraws from Adjudication in Fight with Meta over Within Deal*, REUTERS, (Feb. 10, 2023, 5:05 PM) ("The agency lost in court. Judge Edward Davila of the U.S. District Court for the Northern District of California rejected the FTC's concerns that Meta's purchase of Within would reduce competition in a new market and declined to order a preliminary injunction.").

[170] *See* Emily Birnbaum, *How Big Tech Defeated the Biggest Antitrust Push in Decades on Capitol Hill*, BLOOMBERG (Dec. 20, 2022) ("Despite an aggressive eleventh-hour push, the bills were not included in the end-of-year spending package released Monday, the final shot this year.").

[171] Press Release, KFTC, The Fair Trade Commission (FTC) has Officially Confirmed the Final Approval of KFTC Finalizes the Consent Decree Resol. with Apple Korea, Excluding a – Apple Korea Offers Support Programs worth KRW 100 Billion Won Support Plan Intended for Consumers and Small Businesses, (Feb. 4, 2021).

[172] As explained in footnote 110, Naver (naver.com) can be likened to Google (google.com) in the United States, as it dominates about 70% of the search engine market in South Korea, holding the top position.

[173] Hal R. Varian, HAL R., Microeconomic Analysis, 202 (3rd ed. 1992) ("Typically, there will be two types of variables in our model, endogenous variables, whose values are determined by our model, and exogenous variables, whose

variable is imposed on the model, and an exogenous change refers to a change in such a variable.[174]

The limitations of these models are a critical issue, as rival models are proposed and their weaknesses are attacked in debates. No matter how sophisticated, models are inherently fragile. Why? Because we challenge given exogenous variables, arguing that what was deemed exogenous is, in fact, endogenous.[175] For instance, if someone claims interest rates, considered exogenous in a model, are endogenous, influenced by factors like money supply and foreign interest rates, the model breaks. This argument is often challenging to counter, as exogenous variables rarely behave like constants, especially when their future movement is uncertain.

There are often ample grounds to attack exogenous variables. To give a few examples, one model did not account for the possibility of North Korea launching a newly invented missile into the Pacific. It did not reflect the probability of a prominent building in New York City being attacked.[176] It did not consider the sudden emergence of a global pandemic and resulting lockdowns.[177] So, what about the claim that the model did not reflect the possibility of aliens attacking the White House?[178]

The apparent solution is to make nearly every variable endogenous, reducing vulnerability to counterarguments. Unfortunately, the limited number of endogenous variables prevents the creation of more equations than unknowns.[179] In mathematics, an underdetermined system "has [fewer] equations than unknowns."[180] The inability to infinitely expand endogenous variables reflects the limited human ability to predict the unpredictable future. Bringing every variable into endogeneity and precisely calculating possibilities is not possible in the realm of reality.

The criticisms economists bring to the debate in the hearing resemble questioning why one could not become a god, highlighting the inevitable unrealities in assumptions and exogenous variables due to human limitations. Economics, like the models, cannot definitively determine a solution. Lengthy debate often ends with mutual acknowledgment that the competing economic models are all incomplete. There are no winners or losers—only wounds remain.

B. Trusting Judgment over Numbers.

Ultimately, the conclusion of this prolonged debate falls under the jurisdiction of law. What is needed is an arbiter to affirm that an economic model, while imperfect, is sufficiently realistic. This involves a value judgment in a highly political and policy-oriented domain, relying on sound

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values are predetermined.").

[174] *Id.*

[175] This often occurs at the stage of assumptions and premises, where attacks on the model are most frequent.

[176] Before 2001, those making such claims were often dismissed as implausible.

[177] Before 2019, those making such claims were also likely to be considered crazy.

[178] For now, it certainly seems implausible.

[179] *See* REMIZOV, LINEAR ALGEBRA AND GEOMETRY 56 (David Kramer & Lena Nekludova, trans., Springer 2013) (2009) ("We also refer to this as the Rouché–Capelli theorem. In linear algebra, the Rouché–Capelli theorem determines the number of solutions for a system of linear equations, given the rank of its augmented matrix and coefficient matrix. A system of linear equations with n variables has a solution if and only if the rank of its coefficient matrix A is equal to the rank of its augmented matrix [A|b]."). IGOR R. SHAFAREVICH & ALEXEY O. REMIZOV, LINEAR ALGEBRA AND GEOMETRY 56 (Aug. 23, 2012) ("Thus the compatibility criterion formulated in Theorem 1.16 can also be expressed in terms of the rank: the rank of the matrix of [the] system (1.3) must be equal to the rank of the augmented matrix of the system. Since by Theorem 2.37, the rank of the matrix and augmented matrix of the initial system (1.3) are equal to the ranks of the corresponding matrices of (1.18), we obtain the compatibility condition called the Rouché–Capelli theorem . . . The system of linear equations (1.3) is consistent if and only if the rank of the matrix of the system is equal to the rank of the augmented matrix.").

[180] BISWA NATH DATTA, NUMERICAL LINEAR ALGEBRA AND APPLICATIONS 263–264 (2nd ed. 2010) ("An underdetermined system has either no solution or an infinite number of solutions.").

common sense, historical experience, and ethical or moral considerations.[181] Such judgments prioritize expert judgment over technical calculations.

Economic analysts may articulate complex pathways, asserting that consumer welfare remains similar or improves under certain conditions. Reluctantly agreeing, I find that uneasy intuition to be correct. According to their explanations, if a single firm enjoying a monopolistic position shows higher welfare indicators than when 100 firms compete, it implies a better economic environment.[182] If, politically, a dictator guarantees higher welfare indicators, would you support it?[183]

My homeland, South Korea, witnessed rapid economic growth exceeding 10% on average in the 1960s and 1970s.[184] People refer to the miraculous economic growth during that time as the "Miracle on the Han River."[185] Last year, 2022, South Korea's economic growth rate was 2.61%, and the U.S. rate was 1.94%,[186] decidedly less of a boom period. However, do those who experienced the miracle want to go back? Not really; except for some far-right extremists, most South Koreans do not view that period as particularly good. It was a time when a military officer named Park Chung-hee staged a coup, became a dictator, amended the constitution multiple times, made himself president for life, and maintained power until his assassination in 1979.[187]

The 10% economic growth rate statistic fails to reflect the pain and despair experienced by many South Koreans during that time. The screams of those tortured during the democratic movement, the cries of parents not knowing their children's whereabouts, and the tears of female workers[188] grappling with low wages are not expressed by the growth numbers. The essence of

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[181] *See* Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 54-55 (2018) (emphasizing the political aspect of competition law in this context, pointing out that, at the present moment, competition law is not fully fulfilling its role. TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 55 (2018)). ("In our times, when concerns about corporate influence over government have reached a fever pitch, the political importance of antitrust as a check on private power might seem more obvious than ever. Yet over the last few decades, the very idea of political role has all but disappeared, as antitrust's focus has become exclusively and narrowly economic.").

[182] Khan, *supra* note 77, at 744 (sharply criticizing aspects of the Chicago School of thought, arguing that "the Chicago School shifted the analytical emphasis away from process—the conditions necessary for competition—and toward an outcome—namely, consumer welfare. In other words, a concern about structure (is power sufficiently distributed to keep markets competitive?) was replaced by a calculation (did prices rise?). This approach is inadequate to promote real competition, a failure that is amplified in the case of dominant online platforms.").

[183] Wu, *supra* note 181, at 55 ("No one denies that economic considerations are what should govern any individual case. But the broad tenor of antitrust enforcement—the broader goals of enforcement—should be animated by a concern that too much concentrated economic power will translate into too much political power, and thereby threaten the Constitutional structure.").

[184] *See* World Bank, *GDP Growth (annual %) – Korea, Rep.* (last visited Oct. 18, 2023) (Yearly economic growth rates for South Korea: "1963 (9.0%), 1964 (9.5%), 1965 (7.3%), 1966 (12.0%), 1967 (9.1%), 1968 (13.2%), 1969 (14.6%), 1970 (10.1%), 1971 (10.5%), 1972 (7.2%), 1973 (14.9%), 1974 (9.5%), 1975 (7.8%), 1976 (13.2%), 1977 (12.3%), 1978 (11.0%), 1979 (8.7%) (provided by the Bank of Korea and the World Bank).").

[185] It originated from likening South Korea's rapid leap to prosperity after its defeat in the Second World War to the "Wirtschaftswunder" (economic miracle) of West Germany, which quickly became an advanced country. This comparison led to calling it the "Miracle on the Han River," drawing a parallel to the Rhine River in Germany.

[186] World Bank, *GDP growth (annual %)*, (last visited Oct. 18, 2023).

[187] After enduring 18 years of authoritarian rule, the people of South Korea prohibited unlimited presidential terms during the 9th constitutional amendment in 1987. The original constitution of South Korea (1948) followed the U.S. system with two 4-year terms for the president. Additionally, during the constitutional amendment, they added a provision, DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSITUTION] art. 128, (S. Kor.), stating that the president at the time of the amendment could not run for the presidency again.

[188] At that time, South Korea maintained a low-wage policy to promote export industries. Many female workers, sacrificing further education for their brothers' higher education, worked in factories.

human dignity, which cannot be quantified, aligns with Antoine de Saint-Exupéry's wisdom in *The Little Prince*—the most important things are invisible and go beyond the scope of numbers.[189]

The presence of multiple companies in the market goes beyond consumer benefits, it signifies a balance of political power and a healthy economic ecosystem. Concentrating power in a single company may offer immediate convenience, but it disrupts the balance, making ecosystem restoration challenging.[190] Monopolistic companies can hire economists to prove their dominance is unproblematic and legal scholars to provide justifications for their monopoly. Additionally, through broad lobbying, they gain the power to suppress challenges.[191] Do we want to live comfortably under their influence? While South Korea's current economic growth rate has declined, most Koreans prefer the present, where they can freely criticize their commander in chief during their evening meals.

C. Societal Support Is Crucial.

Regulating monopolies is not an easy task for competition authorities alone, especially in countries like the United States, where enforcement depends on alignment between competition decisions and judicial judgments.[192] Easing competition law enforcement requirements through legislation could improve the alignment of judicial judgments. Persuading voters, who elect legislative and judicial representatives, is the simplest way to mobilize these branches. Essential to persuading voters is reigniting voter interest, highlighting the seriousness of the situation, and encouraging citizen involvement in finding solutions.

The Sherman Act was originally designed to disperse economic power, addressing concerns about its concentration and ensuring citizens' freedom from economic dominance.[193] The "concentration of economic power" leads to political power concentration, posing a threat to the republic system.[194] If public opinion strongly supports competition authorities, legislative and judicial officials may prioritize protecting U.S. consumers (and, by extension, their own re-election) over safeguarding the interests of big business. This is more crucial than refining economic models, as the notion that such models alone can prevail against large corporations in court is unrealistic. Agencies have limited resources for economic modeling, while business enterprises possess greater capabilities for not only modeling but also lobbying and legal expenses. Redirecting efforts from economic expertise to comprehensive public outreach is essential.[195]

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[189] Antoine de Saint-Exupéry, The Little Prince (Richard Howard trans., 2000) (1943).

[190] Khan, *supra* note 77, at 738 ("This approach is misguided because it is much easier to promote competition at the point when a market risks becoming less competitive than it is at the point when a market is no longer competitive.").

[191] Emily Birnbaum, *Big Tech Is Spending Lots of Money to Make Antitrust Reform Seem Scary*, BLOOMBERG (Aug. 3, 2022) ("Big Tech companies engaged in a multimillion-dollar spending spree lobbying against the bills. Since the start of last year, tech giants like Amazon, Meta, and Google spent over $120 million on television ads to discredit the legislation.").

[192] In Europe and South Korea, competition laws are enforced based solely on the decisions of competition authorities. Courts intervene to assess competition authority decisions only when a company files a lawsuit.

[193] *See* Wu, *supra* note 181, at 88-89 ("He wanted antitrust law to fight "inequality of condition, of wealth, and opportunity" and feared that the trusts created "a kingly prerogative, inconsistent with our form of government.").

[194] Khan, *supra* note 77, at 740 ("Animating this vision was the understanding that concentration of economic power also consolidates political power, "breed[ing] antidemocratic political pressures").

[195] In August 2011, I and other KFTC officials took a 14-hour flight to Washington DC for a meeting with DOJ Antitrust officials. The DOJ officials warmly welcomed us and apologized that because of the unfavorable relationship with the legislature, their budget did not allow for their hosting lunch. The KFTC officials, who had a better relationship with the South Korean legislature, bought lunch. This case illustrates the extensive impact of intragovernmental relationships.

VII. CONCLUSION: CONVENIENT? THEN BE SKEPTICAL!

My skepticism began in Orlando. Although I wanted to use a package deal from a Korean travel agency, it was not a good choice because I needed to stay at hotels connected to Disney World and Universal Studios. Due to the self-preferencing of Disney World and Universal Studios, staying at affiliated hotels was more advantageous and convenient for enjoying the theme parks. I believe this is a case where convenience should be cause for suspicion.[196]

Orlando hotel price hikes cannot be solely attributed to market competition; they result from monopolistic dominance and abuse of power by Disney and Universal Studios. The situation appears to have worsened over time, but U.S. competition authorities show no inclination toward regulation.

This indifferent stance extends beyond Orlando, as these authorities tolerate self-preferencing on various platforms. We now live under the influence of dominant companies known as GAFA, a situation starkly highlighted in the 2013 Google case, where U.S. authorities gave a green light to self-preferencing practices that led to substantial fines and sanctions in Europe and South Korea, respectively.

Amid growing concern about technology platforms' power, competition authorities recently introduced five antitrust bills which aim to strengthen the regulation of companies like Google and Amazon. However, judicial uncooperativeness and legislative failures hampered these efforts, and they continue to present challenges for the future. Addressing these challenges will require a macroscopic perspective, emphasizing expert judgment over economic modeling. Comprehensive advocacy efforts should focus on common sense, historical experience, and ethical considerations.

If a Disney World vacation has been out of reach for your family, at least a little of the blame belongs on the U.S. competition authority, which happens to have been especially permissive of self-preferencing and other anti-competition behavior compared to international equivalents; fortunately, this is no longer the case, I believe. They prioritized companies' interests even when mass actions were taken against platforms in Europe and other countries worldwide. Similarly, they declined to take action to regulate Most Favored Nation (MFN) clauses of international online travel agencies (OTA),[197] preferring to watch civil litigation to address consumer concerns.[198]

If I worked for the U.S. FTC, I would promptly draft an investigation plan and, upon approval from my supervisor, book tickets to Orlando immediately. I would want to ensure that

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[196] Even though we may feel comfortable right now, consumer caution is warranted, as significant costs may be on their way. This can be observed with platforms like YouTube, which increasingly inserts intrusive advertisements, and Netflix, which is reducing the number of people allowed to share an account.

[197] Eunkwang Ha (하은광), Dijiteolpeulraetpomui Choehyedaeuyogu (MFN)e Daehan Gochal-OTA (Online Travel Agency) Sageoneul Jungsimeuro (디지털플랫폼의 최혜대우요구(MFN)에 대한 고찰
-OTA (Online Travel Agency) 사건을 중심으로-) [*A Study on Most Favoured Nations Clauses of Digital Platform Based on OTAs Cases*], seouldaehaggyo daehag-won (서울대학교 대학원) [Seoul National University] (Aug. (Germany, the United Kingdom, Sweden, France, Italy, Australia, Austria, Belgium, Japan, Hong Kong, Russia, South Korea, and others2022), at 52-72..)

[198] Of course, the structure of the hotel industry in the United States differs from that in Europe, which may explain why MFN sanctions were not heavily enforced. In the United States, large-scale and chain hotels dominate, whereas in Europe, there are numerous small independent hotels. However, one could argue that the responsibility of competition authorities also lies in creating an industry structure that does not favor only large-scale and chain businesses, even in the hotel industry.

the happiness seen in the children's faces and the smiles of the parents I witnessed last March can be enjoyed more broadly.

ELECTRONICS, AUTOMOBILES, AND CORPORATE LAW: CAN ASPECTS OF KOREA'S CHAEBOL SYSTEM BE SUCCESSFULLY EXPORTED TO THE UNITED STATES?

by

Kyle Cooper

Supervised by Professor Benjamin Means
University of South Carolina School of Law
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I. INTRODUCTION

The United States economy is driven by family-owned businesses (hereinafter FOBs). In 2021, FOBs constituted eighty-seven percent of all business tax returns,[1] generating fifty-four percent of the national private sector GDP.[2] In America, FOBs are usually conceptualized as small, mom-and-pop enterprises, and the salience of such enterprises in American culture has enormous influences U.S. social and economic policies. South Korea (hereinafter Korea), however, has a much different conceptualization of the FOB. Although Korean "mom and pops" exist, the broader Korean economy is dominated by a much different type of FOB: the *chaebol*.[3] In fact, chaebols are so vital to the Korean economy that in 2021, roughly sixty percent of the country's entire GDP was generated by the ten largest chaebols alone.[4] Given the immense importance of chaebols to the Korean economy, some authors have described Korea as a "chaebol-driven or chaebol-centered system."[5]

Put succinctly, chaebols are large business conglomerates controlled by a central family group.[6] Chaebols are organized into pyramids, but can be distinguished from traditional conglomerates by concentrated minority ownership structures created by circular shareholding.[7] For example, the founding family will often control a set of central firms; those central firms will then own a majority stake in second-level firms and minority interests in other central firms; finally, those second-level firms will own minority interests laterally in one another and upward in the central group. This system can be continued downward for whatever amount levels chaebol organizers desire. The result is a complex web of intra-group ownership which allows the founding family to use their direct control over the central firms to indirectly control the entire conglomerate, despite being entitled to only a small percentage of the total cashflow rights.[8]

It comes as no surprise that, due do their significant contribution to the Korean economy, the chaebol system is frequently the focus of public debate. To begin, chaebol founding family members are often the subject of tabloid headlines for "rage" scandals in which family members are criticized for engaging in public tantrums.[9] Moreover, chaebols are scrutinized for their

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[1] Torsten M. Pieper, *Update 2021: Family Businesses' Contribution to the U.S. Economy*, FAMILY ENTERPRISE USA 1, 13 (last visited Dec. 13, 2023) (defining "family business" as one where the family has "either full strategic control of the company, or partial strategic control paired with a proven participation of the family in the company.").

[2] *Id.* at 14.

[3] Eleanor Albert, *South Korea's Chaebol Challenge*, COUNCIL OF FOREIGN RELATIONS (May 4, 2018) (explaining that "non-chaebol firms hold less than a quarter of South Korea's market capital," despite employing "almost 90 percent of the country's workers.").

[4] *Korean chaebols explained: The family-owned empires that developed South Korea*, DAXUE CONSULTING (Nov. 10, 2023).

[5] Ok-Rial Song, *The Legacy of Controlling Minority Structure: A Kaleidoscope of Corporate Governance Reform in Korean Chaebol*, 34 LAW & POL'Y INT'L BUS. 183, 185 (2002).

[6] The precise definition of *chaebol* is still under debate. Generally, however, to constitute a chaebol, a firm "must be (1) a conglomerate; (2) family controlled; and (3) have a substantial proportion in the national economy." Jeong-Pyo Choi, *The Theory and the Reality of the Korean Chaebol* 6-7 (2004). *See also* Kab Lae Kim, *Implication of U.S. Venture Capital Theories for the Korean Venture Ecosystem*, 2(1) J. BUS. ENTREPRENEURSHIP & L. (2008).

[7] Heitor Almeida et. al., *The structure and formation of business groups: Evidence from Korean chaebols*, J. FIN. ECON. 99, 2 (2011).

[8] Ok-Rial Song, *supra* note 5 at 185.

[9] Choe Sang-Hun, *Korean Air Chairman Strips Daughter's Titles After Her 'Foolish' Behavior*, N.Y. TIMES (Dec. 12, 2014); Jake Kwon, *Culture Of Abuse And Violence At The Heart Of Some Of South Korea's Biggest Companies*,

corporate governance issues which not only create internal inefficiencies and costs, but also potentially destabilize the broader Korean economy.

Internally, the fact that the founding family heavily influences corporate group creates agency problems where conflicts may arise between the founding family's, outside shareholders', and managers' interests. For instance, the founding family may be incentivized to use its voting control to rearrange company assets in a manner that increases its cash flow rights at the expense of outside shareholders and the chaebol itself. Moreover, managers would be incentivized to aid in this tunneling because crossing the founding family could compromise their careers. The manager's incentives to comply in this hypothetical scenario would be even greater if the managers themselves were members of the founding family.[10] This arrangement puts outside shareholders at substantial risk of their voting rights being "ineffectual" in the sense that they are unable to use their stock to control management decisions absent a supermajority voting bloc.[11]

Additional internal costs stem from inefficient rent seeking among founding family members. In accordance with Confucian traditions, patriarchal lineage is a "key factor" in determining business succession.[12] This inheritance system causes infighting among chairman's descendants, all of whom are jockeying to become heir apparent to the empire. Given the billions of USD at stake,[13] these internal battles can become quite heated.[14] Because of the substantial

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CNN (Feb. 21, 2019) (outlining the "nut rage incident," which took place on a flight from Korean Air, a member firm of the Hanjin Group chaebol. Here, Heather Cho, daughter of the Korean Air chairman, caused the plane on which she was a passenger to stop taxiing on the runway and return to the gate in order to expel a flight attendant who served her macadamia nuts in a plastic bag, rather than a porcelain dish, in breach of the airline's service protocol. The expelled flight attended stated that Cho "forced him to kneel and apologize on the plane as punishment . . ., adding that Ms. Cho called him names, hit him several times with a folder of documents, and hurled it at a junior steward."). *See also* Cho Chung-un, *Korean Air Chief Apologizes, Fires Daughters Over 'Water Rage,'* THE KOREAN HERALD (Apr. 22, 2018) (describing the "water rage incident." In this case, Cho Hyun-min and Cho Hyun-ah, also family members of the Hanjin Group chaebol, were forced by the chairman to resign from their executive posts after "throwing water at an agency official during a meeting.").

[10] A 2020 survey of the CEOs of Korea's top 500 companies found that 18.4% of executives were related to the company chairman, 29.1% were outside executives, and 52.5% were appointed through internal promotions. Song Chae Kyung-hwa, *Proportion of Chaebol Family Members Occupying CEO Positions Gradually Decreasing, Survey Finds*, HANKYOREH (Jul. 19, 2020).

[11] Jeong Seo, *Who Will Control Frankenstein? The Korean Chaebol's Corporate Governance*, 14 CARDOZO J. INT'L & COMP. L. 21, 45 (2006).

[12] Tomasz Sleziak, *The Influence of Confucian Values on Modern Hierarchies and Social Communication in China and Korea: A Comparative Outline*, 8(2) KRITIKE 207, 222 (2014) (explaining the importance of patriarchal succession in Confucian-influenced sociaties). *See also* Han-Kyung Rho, *Shareholder Activism: Corporate Governance Reforms in Korea*, 53 fig. 5.2 (2007) (showing the heredity passage of chairmanship among the biggest chaebols); Song Su-hyun, *LG Group Speeds Up Leadership Succession Process*, KOREA HERALD (May 17, 2018), (describing the "inheritance process from the third generation of the owner family to the fourth generation," and explaining how "[u]nder the owner family's strict principle of handing over the leadership to the eldest son, the chairman's son . . . is joining the board.").

[13] Kate Birch, *Top 10 chaebol chiefs: driving conglomerates in South Korea*, BUSINESS CHIEF (Jul. 4, 2023) (outlining how Korea's top ten largest chaebols are valued between $47.2 to $341.1 billion USD).

[14] Kwak Jung-soo, *Another Chaebol Squabble - Family Infighting A Part Of Korea's Corporate Landscape*, HANKYOREH (Jul. 30, 2015) (explaining that, among the top ten largest chaebol founding families, succession "conflicts have included the 2012 legal battle over an inheritance by Samsung brothers Lee Kun-hee and Lee Maeng-hee, the 2000 'princes' war' between Hyundai brother Chung Mong-koo and Chung Mong-hun, an inheritance battle between Hanjin chairman Cho Yang-ho and his siblings, an early 1990s conflict between Hanwha chairman Kim Seung-youn and siblings, and a 2005 battle between Doosan chairman Park Yong-oh and his siblings."). *See also* Nyshka Chandran, *Vicious South Korean Family Feud Exposes Chaebol Peril*, CNBC (Aug. 5,

control the chairman exerts over a chaebol, uncertainty regarding who will occupy that office creates uncertainty for investors and depresses stock prices.[15] Commensurate to the investment risks associated with weak corporate governance, chaebol securities trade at a fraction of the value of comparable American and Japanese companies, a phenomenon known as the "Korean discount."[16]

This infighting can have negative externalities affecting the broader Korean economy, where significant dips in a single company's stock price could be dangerously destabilizing.[17] Further, as a result of the control business elites wield over the Korean economy, business elites have close relationships with policymakers which on many occasions has crossed a line, becoming corruption.[18] Such corruption typically manifests as leniency for chaebol executives. Specifically, in instances where sanctions or prison sentences have been imposed on chaebol family members and officers, such sanctions or sentences have been either disproportionately light compared to those imposed on non-chaebol members or followed by presidential pardons.[19] This two-tiered justice system is often justified on grounds "that punishing corporate defendants, especially from larger chaebols, would damage the reputation of the company and in turn cause serious economic damage to the country."[20]

While the negative aspects of chaebols system are readily apparent to western critics, polling from the Federation of Korean Industries found that "[n]early 60 percent of Koreans

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2015) (explaining how founding family infighting frequently involves legal battles over illegitimate succession documents, siblings exerting undue influence over elderly chairman, and family members being ousted from their executive or board positions).

[15] Romain Ducret & Dušan Isakov, *The Korea Discount And Chaebols*, PAC.-BASIN FIN. J., 63, 18 (2020) (finding that the succession "process harms the value of [chaebol-]affiliates and increases their discount," as compared to non-chaebol-affiliated firms." *See also* Yoo-chul, *infra* note 17.

[16] OCED, Reforming the Large Business Groups To Promote Productivity And Inclusion In Korea. (explaining that "[i]f weak corporate governance allows owner families to favour their own interests over the profitability of some affiliated companies, it is rational for investors to pay less for their shares."). *See also* A.C. Pritchard, *Monitoring of Corporate Groups by Independent Directors*, J. KOREAN L. 9, 1, 13 ("[T]he stock market appears to recognize this risk of abuse by the controlling shareholders of chaebol firms."); *The Korea Discount: Corporate Governance Explains South Korea's Low Stock market Ratings*, ECONOMIST (Feb. 11, 2012), (noting "the prime cause of the discount is more likely to be poor corporate governance.").

[17] Kim Yoo-chul, *Samsung Could Revive 'Control Tower' To Become More Agile*, THE KOREAN TIMES (Oct. 17, 2022) (explaining how "controversies, debates, criticism and setbacks regarding . . . these top-tier industrial conglomerates put[] the overall stability of Korea at risk, should they fail."). Consider, for example, Samsung, which "represents more than 20 percent of Korea's gross domestic product." *Id.*

[18] Joongi Kim, *The Formation of the Rule of Law in Corporate Governance*, in THE RULE L. IN S. KOREA 119-23 (Jungryn Mo & David W. Brady eds., 2009) (describing Korean corporate governance as "largely revolved around rule of man in lieu of rule of law" such that authoritarian tendencies sometimes led to corruption and distorted incentives). *See also* Choe Sang Hun, *Park Geun-hye, Ex-South Korean Leader, Gets 25 Years in Prison*, N.Y. TIMES (Aug. 24, 2018) (describing the history of corruption in the Korean presidential office).

[19] Sherisse Pham, *South Korea's Long History of Light Sentences for Business Leaders*, CNN BUS. (Jan. 17, 2017). *See also* Choe Sang-Hun & Raymond Zhong, *Samsung Heir Freed, to Dismay of South Korea's Anti-Corruption Campaigners*, N.Y. TIMES (Feb. 5, 2018) ("Over the decades, numerous chaebol executives have been paraded into courts on bribery and other charges. But they have usually walked away with light sentences (most of them suspended), free to manage their businesses, even as courts routinely sentenced lesser-known white-collar criminals to far longer terms for lesser offenses. . . When . . . the de facto leader of Samsung walked free on Monday after spending barely a year in jail, it reaffirmed a pattern South Koreans have fought for decades to break: business tycoons convicted of corruption here hardly spend any time behind bars.").

[20] Kim, *supra* note 18 at 333 (citing Heon-Pyo Hong, Noe-mul-gong-yeo-joe [The Crime of Bribery], Chosun Ilbo, June 21, 1995) at 2.

expressed a favorable view of the country's chaebol[s]."[21] This sentiment seems logical when considering, from the Korean perspective, chaebols are viewed as a successful product of economic nationalism.[22] Specifically, Korean economic policies dating back to the 1940's, when Korea enacted its first post-colonial constitution,[23] have advocated for "significant central planning and guided capital markets."[24] Thus, from the Korean government's perspective, chaebols provide net efficiency benefits because larger conglomerates provide the government with more convenient vehicles through which to allocate resources and dictate market strategies.[25] Moreover, the dynastic processes through which chaebol control is passed down creates a "repeat player" dynamic, allowing the government to be confident it can maintain long-term partnerships with chaebol founding families.[26] Finally, because of the economic successes associated with the chaebol model, due largely to long-term government subsidization,[27] policymakers were able to cement their authority as central planner and "maintain their . . . legitimacy among the Korean people well into the late 1990s and the twenty-first century."[28]

The Korean government is able to exact these efficiency benefits from chaebols through the National Pension Service (hereinafter NPS). A government-controlled pension fund, the NPS

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[21] Song Seung-hyun, *6 In 10 View Chaebol Favorably: FKI Survey*, THE KOREA HERALD (Sep. 12, 2023). (Notably, this survey did not poll respondents on *chaebols* specifically, and instead used the term *large corporations* under the assumption that respondents would consider the two as "synonymous concepts." Further, this study found that "[o]nly 8.6 percent of the total respondents expressed an 'unfavorable' view of large corporations," and "41.0 percent answered that their views [toward large corporations] have 'improved,'" as compared to a decade ago. Finally, a supermajority of respondents believed that large corporations make substantial contributions to the following facets of the economy: "exports" (90.7 percent); "economic growth" (88.0 percent); "investment" (74.7 percent); "job creation" (71.0 percent); and "innovation" (71.0 percent); and "increasing the national income" (62.9 percent). Conversely, "when it comes to social responsibility, less than half (49.7 percent) believe that large corporations are making a contribution. In terms of promoting ethical and lawful business practices, only 36.1 percent thought that large firms actively engage in such practices.").

[22] You-il Lee & Kyung Tae Lee, *Economic Nationalism and Globalization in South Korea: A Critical Insight*, ASIAN PERSPECTIVE, 39, 1 (2015) 125, 130 (explaining that "economic nationalism should be understood as 'a set of policies that results from a shared national identity or from the predominance of a specific nationalism in the politics of a state,'" and that "economic nationalism involves the implementation of economic policy that follows national purpose and direction and that prioritizes national interests above private property and profit motives.").

[23] Lim Jong-hoon, *The Constitution of the Republic of Korea, in* EDUC. MATERIALS, NAT'L MUSEUM OF KOREAN CONTEMP. HIST. ("The First Constitution of the Republic of Korea was promulgated in July 1948, three years after the liberation of Korea [from Japanese colonial rule].").

[24] KOREAN CONSTITUTION, art. 119(2) (S. Kor.) (stating "[t]he Korean system has included significant central planning and guided capital markets, with regulatory and prosecutorial actions as the primary sources of legal action with respect to disciplining managers of large corporate wealth (as opposed to private litigation). The governance environment resulting from the economic and political institutions of Korea are unique to the nation.").

[25] Michael Breen, *The Story Of A Nation: The New Koreans* 218 (2017) ("Korea appeared capitalist on the surface, but socialist in practice and attitude in terms of the strength of central control."). *See also* Jongcheol Kim, *Constitutional Law*, *in* INTRODUCTION TO KOREAN LAW 31, 79 (Korea Legislation Research Institute ed., 2013) (describing Korean economics "as a kind of mixed-economy or a 'social market economy.'").

[26] Robert J. Rhee, *The Political Economy of Corporate Law and Governance: American and Korean Rules Under Different Endogenous Conditions and Forms of Capitalism*, 55 WAKE FOREST L. REV. 649, 687 (2020) (citing Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia*, *in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH).

[27] *See infra*, Part 2.

[28] Grace Lee, *Taming the Beast: Confucianism As the Key to Reforming Korea's Chaebol System for the Common Good*, 45 FORDHAM INT'L L.J. 155, 160 (2021) (citing Mel Marquis & Jingyuan Ma, *Confucian Bureaucracy and the Administrative Enforcement of Competition Law in East Asia*, 43 N.C. J. INT'L L. 1, 42-44 (2018)).

is the largest institutional shareholder in Korea[29] and third largest globally.[30] By controlling large voting blocs in chaebols, the government is able to prevent undesirable acquisitions of perceived national assets,[31] oversee chaebols' boards of directors, and serve as plaintiff in derivative actions.[32] Given the NPS's substantial voting power in chaebols, the chaebol system provides the Korean public with "a strong national identity and a collective sense of shared interest in the national economy."[33]

While the majority of research on chaebols focuses on corruption, agency costs, and corporate governance abuses, "we should not ignore the fact that the chaebol system has historically produced some great successes."[34] Consequently, the purpose of this note is to investigate those successes and analyze how elements of the chaebol system could be imported to the American corporate environment to benefit domestic FOBs, an understudied topic in U.S. legal literature. This note argues that, while the corruption and abusive corporate practices associated with chaebol structures are a legitimate concern, American corporate law, regulatory systems, and social forces make such negatives difficult to import to domestic corporations. Ultimately, this note concludes that American lawmakers should consider introducing governance auditors, a feature of Korean law, into the corporate law ecosystem. Although additional compliance mechanisms impose additional costs on U.S. firms, this paper argues that incorporating additional officers dedicated specifically to regulatory compliance and ethical governance would improve the overall functioning of domestic marketplace, thereby making small and medium family-owned enterprises more competitive and benefiting the broader economy.[35]

Part II outlines the history of Korea's economic development and chaebol formation. Part III describes the mechanics of Korean corporate law that allow founding families to convert small ownership stakes into actual control over a chaebol, methods through which Korean lawmakers attempt to curtail such conversions, and the American analogues of such mechanics. This Part concludes that corporations in the two countries are able to achieve the same end using different means; therefore, American lawmakers attempting to bolster small and medium FOBs' competitiveness should not give great weight to shareholder voting mechanism reform when attempting to make FOBs more chaebol-like.

Part IV investigates shareholder protections in the U.S. and Korea. This Part outlines the various methods a chaebol might use to deny voting rights to shareholders, and Korea's weak derivative action laws. This Part concludes that American lawmakers seeking to benefit FOBs

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[29] Geoffrey Cain, *Korean Pension Fund Backs Corporate Royals Again*, ASIA TIMES (Mar. 23, 2019) (noting that the NPS holds 5 to 10 percent of chaebol companies). *Compare with* Euysung Kim, *The Impact of Family Ownership and Capital Structures on Productivity Performance of Korean manufacturing Firms: Corporate Governance and the "Chaebol Problem"*, 20(2) J. JAPANESE & INT'L ECONS., 209, (2006) (finding that, on average, chaebol founding families own, on average, only 21.8% interest in their chaebols).

[30] Eun-Young Jeong, *Want to Oversee the World's Third-Largest Pension Fund? There's Just One Catch*, WALL ST. J. (Sept. 11, 2018, 10:57 AM), (noting that the NPS is the world's third-largest pension fund with $565 billion in assets).

[31] Michael Breen, *The Story Of A Nation: The New Koreans* 233 (2017) ("While making money out of foreigners—i.e., exporting—was considered virtuous, there was a collective revulsion at the notion that foreigners should be making profits in Korea.").

[32] Rhee, *supra* note 26 at 709.

[33] *Id.* at 694.

[34] Song, *supra* note 5 at 185.

[35] An important caveat: this note only considers incorporated American FOBs. This note does not consider partnerships, LLCs, or any other types of business organizations.

should not consider adopting Korean shareholder protection principles because, due to fundamental disagreements over shareholder or corporate primacy, American corporate laws provide shareholders much stronger protections. However, this part argues that a statutorily designated overseer, similar to the Korean auditor, could benefit domestic corporations by improving transparency, mitigating agency costs, and monitoring board actions.

Part V compares the fiduciary duties of care and loyalty across American and Korean systems. After outlining how the Korean duty of care is designed to maximize directors' personal liability because it was developed in an economy dominated by large corporations, this Part concludes that importing liability-enhancing schemes could have destructive effects on the current FOB landscape. Further, this Part compares American and Korean duties of loyalty, and concludes that no reform is necessary due to the substantial similarities between the two. Ultimately, this Part argues that American lawmakers seeking to benefit domestic FOBs should not tinker with the board of directors' fiduciary duties.

Part VI concludes that, despite the successes chaebols have had in Korea, aspects of the chaebol model would not import well into the American corporate system. In most regards, U.S. corporate law provides either the same or greater stakeholder protections against corporate abuses than does Korean law. However, American lawmakers should consider investigating the Korean corporate auditor system, which implements a special overseer who is granted broad powers to monitor board activities. Further evaluation is necessary before a solid determination regarding the success of such a program in the U.S. can be made.

II. DEVELOPMENT OF THE CHAEBOL SYSTEM AND THE KOREAN ECONOMY

For over 500 years, the Joseon Dynasty ruled the Korean peninsula.[36] During this time, Korea's "commercialized peasant economy" lagged behind its Chinese and Japanese neighbors, both of which had begun developing an industrial base.[37] During the late 1890s, war broke out between those two East Asian powers over control of the peninsula.[38] The war resulted in Japanese annexation of Korea in 1910, thereby ending the longest reigning dynasty in Korean history.[39] Japan quickly started exporting capitalism to the frontier, undertaking to industrialize its new, primarily agrarian, territory.[40] Thus began Korea's first industrial revolution.[41] Over the course of its colonial rule, "Japan . . . built an extensive infrastructure of roads, railroads, ports, electrical power, and government buildings," and "located various heavy industries—steel, chemicals, and hydroelectric power—across Korea."[42]

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[36] Ben Griffis, *Early Joseon Period*, WORLD HIST. ENCYCLOPEDIA (Feb. 2, 2021) (noting the dynasty lasted from 1392 until 1910).

[37] Myung Soo Cha, *The Economic History of Korea*, EH.NET ENCYCLOPEDIA (Mar. 16, 2008).

[38] Samuel S. Kim, *The Two Koreas and the Great Powers*, CAMBRIDGE U. PRESS 2 (2006) (describing the Sino-Japanese War of 1895, and explaining that "an aggressive, imperial Japan was at the forefront of hegemonic wars in a quest to extend the Japanese hegemony over Korea.").

[39] Ku Daeyeol, *Korea 1905–1945: From Japanese Colonialism to Liberation and Independence*, Renaissance Books; 2021, at 3 (Accessed Dec. 21, 2023).

[40] Federal Research Division Library of Congress, *The Japanese Role in Korea's Economic Development*, *in* SOUTH KOREA: A COUNTRY STUDY, (eds. Andrea Matles Savada & William Shaw) (1990).

[41] Myung Soo Cha & Nak Nyeon Kim, *Korea's first industrial revolution, 1911–1940*, 49(1) EXPLORATIONS IN ECON. HIST., 60, 61 (2012).

[42] Federal Research Division Library of Congress, *supra* nota 40.

Despite its new industrial infrastructure and eventual independence from Japan, Korea was unable to become a major player in the global economy until after the Korean War.[43] Fallout from the war had immensely destructive effects on Korean industry which deteriorated foreign trade, cut prices, and resulted in heavy inflation.[44] Following the war, Korea's reconstruction efforts were backstopped almost entirely by foreign aid.[45] The Korean government, pursuant to its constitutional obligation of central economic management,[46] "strategically directed public resources, much of which were American development aid, toward specific industrial sectors, firms, and entrepreneurs. The government picked winners and losers in private enterprise with the idea that the winners would drive economic growth and national revival."[47]

The winners were the founders of modern chaebols who were able to game political and economic subsystems, tap into the influx of foreign capital, and benefit from industrial subsidies.[48] They were further able to leverage newly developed political connections to exchange campaign contributions for economic favors, frequently impeding the growth of small- and medium-sized enterprises and denying economic opportunities for large industrialists, thereby increasing their share of public resources.[49] By the end of the 1950s, the most successful businesspeople had grown into large-scale monopolists and their conglomerates were labeled *chaebol*,[50] although the modern understanding of such structures would not form for several more decades.[51]

Chaebols' relationship with the government changed in 1961 when Major General Chung Hee Park staged a coup d'état and implemented a military junta, which he chaired until being elected president several years later.[52] After taking power, the Park administration's top policy objectives included making the Korean economy self-sufficient and effecting a second Korean industrial revolution.[53] Park's first move was to nationalize all private banks, effectively converting them from independent credit examiners into "tool[s] of Korean government's

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[43] Minho Kuk, *The Governmental Role In The Making Of Chaebol In The Industrial Development Of South Korea*, 12(1) ASIAN PERSPECTIVE, 107, 111 JSTOR (1988) (accessed Dec. 21, 2023).

[44] Jong Won Lee, *The Impact of the Korean War on the Korean Economy*, 5 INT'L J. OF KOREAN STUD. 97, 98 (2001) (explaining that when the Korean War ended in 1953, "44% of factory buildings and 42% of production facilities lay in ruins," and that "[t]he total war damage was estimated as high as 41.23 billion won, equivalent to USD $6.9 billion when the official exchange rate was applied.").

[45] Jiyoung Kim, *Foreign Aid and Economic Development: The Success Story of South Korea*, 26(2) PAC. FOCUS, 260, 264 (2011) (explaining that "[f]rom . . . 1948 until the 1960s, foreign aid was the greatest source of the country's savings and investment.").

[46] *See* Breen, *supra* note 25.

[47] Rhee, *supra* note 26, at 659–60 (citing Eun Mee Kim & Gil-Sung Park, *The Chaebol*, *in* THE PARK CHUNG HEE ERA: THE TRANSFORMATION OF SOUTH KOREA 127, 266-68 (Byung-kook Kim & Ezra F. Vogel eds., 2013)).

[48] Kyong-Dong Kim, *Political Factors in the Formation of the Entrepreneurial Elite in South Korea*, 16(5) ASIAN SURVEY, 465, 467-68 (1976) (last visited Dec. 21, 2023).

[49] *Id.* at 469.

[50] Eleanor Albert, *South Korea's Chaebol Challenge*, COUNCIL OF FOREIGN RELATIONS (May 4, 2018) (explaining "[t]he word chaebol is a combination of the Korean words *chae* (wealth) and *bol* (clan or clique).").

[51] *See* Kim, *supra* note 48, at 467-69.

[52] Justin W. Malzac, *Mythbusting Park Chung Hee: A Reexamination Of Park And His Coup*, PITTSBURGH STATE U. DIGIT. COMMONS 1, 1-2 (Nov. 2016) (MA thesis, Pittsburgh State University) (describing how "[o]n May 16, 1961, Park Chung-Hee, a Major General in the Republic of Korea (ROK) Army, participated in a coup against the recently created parliamentary government of Prime Minister Chang Myon. . . After toppling the Chang government, a military junta was established and ruled until late 1963, when open elections were held and Park was elected president . . . Park stayed in power until he was assassinated in October of 1979.").

[53] Sudip Chaudhuri, *Government and Economic Development in South Korea, 1961-79*, 24(11/12) SOC. SCIENTIST 18, 18-9 (1996).

industrial and resource allocation policies."[54] This created a moral hazard where banks, knowing the government would provide relief in cases of failure, were incentivized to disregard risk-exposure limitations imposed in traditional lending markets and extend highly preferential loans to businesses involved in the Park administration's industrial revitalization efforts.[55] So, to protect their assets in this "lax" lending environment, banks required "high amounts of collateral as well as debt guarantees."[56] Large chaebols were easily able to meet this demand by orchestrating intra-company debt guarantees across affiliated firms, thus granting the chaebol access to "better financial treatment and opportunities for expansion than . . . other, smaller companies."[57]

Despite their enhanced access to financing, "[c]haebols' appetite for capital did not end with the loans they secured from banks."[58] To satiate this hunger, chaebols began aggressively investing in banks and nonbank financial institutions when they were eventually reprivatized in the 1980s.[59] Chaebols' advances into the financial sector proved successful and "financial institutions were gradually turned into private vaults for the chaebol."[60] Operating under the historical assumption that the Korean government would never permit financial institutions to fail, chaebols used their financial services arms to funnel resources to low-performing affiliates.[61] While these practices created an outward appearance of stability in a chaebol,[62] the actual effect was to make the chaebol system much more fragile.[63] Complex webs of intra-chaebol debt guarantees meant "[t]he collapse of one affiliate could endanger others . . . and start a chain reaction that could threaten a string of companies, if not the entire conglomerate."[64]

Chaebols' unfettered access to capital and government subsidies ground to a halt when the Korean won crashed in 1997 and the theoretical chain reaction described above came to pass.[65] The sharp currency devaluation left chaebols unable to pay debts to affiliate banks in their "internal capital markets,"[66] leaving those banks then unable to pay debts to foreign investors in

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[54] Sea-Jin Chang, *Financial Crisis and Transformation of Korean Business Groups: The Rise and Fall of Chaebols*, CAMBRIDGE U. PRESS, 133 (2003).
[55] *Id.* at 133-34.
[56] *Id.* at 135.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 137.
[60] *Id.* at 140.
[61] Phil-Sang Lee, *Economic Crisis and Chaebol Reform in Korea*, COLUM. BUS. SCH. 1, 9 (2000) (explaining that "[i]n the absence of shareholder monitoring, bank management was generally obliged to provide 'policy-directed' or 'politically favored lending' to corporate customers.").
[62] Grace Lee, *Taming the Beast: Confucianism as the Key to Reforming Korea's Chaebol System for the Common Good*, 45 FORDHAM INT'L L. J. 155, 163 (2021).
[63] Kim, *supra* note 18 at 287.
[64] *Id. See also* Hyun-Han Shin & Young S. Park, *Financing Constraints and Internal Capital Markets: Evidence From Korean "Chaebols"*, 5(2) J. CORP. FIN. 169, 182 (1999) (explaining that "[c]haebol firms cannot finance the other companies' projects freely since they are independent legal entities. However, chaebol firms can support each other's financing of projects or bank loans by cross payment guarantees. For example, firm A co-signs firm B's bank loan and firm B co-signs firm A's bank loan. Or, firm A can lend money to an affiliated non-bank financial institution within the chaebol and then the non-bank financial institution lends money to firm B in the same chaebol.").
[65] *See supra* note 64. *See also* Federal Reserve Board, *Foreign Exchange Rates: South Korea Historical Rates*, (last visited Dec. 25, 2023) (outlining that the KRW-to-USD exchange rate nearly doubled over the course of 1997).
[66] Hyun-Han Shin & Young S. Park, *Financing Constraints And Internal Capital Markets: Evidence From Korean "Chaebols"*, 5(2) J. CORP. FIN. 169, 190 (1999) (finding "evidence of internal capital markets for chaebols, where the parent company may arrange financing for subsidiaries through affiliated bank and cross-payment guarantees,"

global capital markets.[67] This forced highly leveraged chaebols into large-scale corporate bankruptcies.[68] The resulting non-performing loan rate in Korea skyrocketed,[69] causing an liquidity crisis.[70] Ultimately, the International Monetary Fund, World Bank, Asia Development Bank, and other G7 countries were forced to intervene and provide $58 billion USD in emergency financing to prevent a wider economic disaster.[71]

During this time, commentators criticized chaebols and the chaebol system for causing, in part, the crisis with their suspect financial practices and weak corporate governance.[72] Since then, however, other scholars have noted that chaebols have been "wrongly blamed for the crisis" because the large-scale corporate bankruptcies seen during 1997 could have occurred in countries with strong corporate governance regimes and investor protections.[73] Those scholars argue that "the most important feature[s] inviting the crisis," were not the chaebols' ownership systems or management styles, but instead were their "highly leveraged capital structures and consequent financial vulnerability."[74] Widespread government intervention across the economy created perverse incentives where chaebols were induced to divert cash flows with debt rather than pay them out and to make reckless investments,[75] and banks were pressured to issue loans for those investments and disregard traditional borrower-monitoring protocols.[76] The effects of these incentives were accelerated by institutions' mistaken belief that they "had sovereign guarantee[s] from 'Korea, Inc.'"[77] While these observations do not suggest that the old chaebol system should be reinstated, examining its theoretical foundation will allow other countries to learn from the chaebol model's strengths and weaknesses, thus improving foreign corporate markets.

III. VOTING CONTROL MECHANISMS, KOREAN REGULATIONS, AND AMERICA'S RESPONSE TO THOSE CONCERNS

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and that "[h]igh sensitivity of investment to other cash flow for chaebol firms implies that there is an internal capital market.").

[67] Bernard Black et al., *Financial and Corporate Restructuring Assistance Project, Corporate Governance in Korea at the Millennium: Enhancing International Competitiveness—Final Report and Legal Reform Recommendations to the Ministry of Justice of the Republic of Korea*, 26 J. CORP. L. 537, 553 (2000).

[68] Song, *supra* note 5 at 191.

[69] Anne O. Krueger & Jungho Yoo, *Chaebol Capitalism and the Currency-Financial Crisis in Korea*, U. CHI. PRESS, 601, 635 (2002) https://www.nber.org/system/files/chapters/c10645/c10645.pdf.

[70] Song, *supra* note 5 at 191.

[71] David T. Coe & Se-Jik Kim, *Introduction*, *in* KOREAN CRISIS AND RECOVERY (2001) (David T. Coe & Se-Jik Kim, eds.) (noting that, at the time of provision, Korea's rescue package was the largest issued in IMF history) https://www.imf.org/external/pubs/nft/seminar/2002/korean/.

[72] Joon-Ho Hahm & Frederic S. Mishkin, *Causes of the Korean Financial Crisis: Lessons for Policy*, NATIONAL BUREAU OF ECONOMIC RESEARCH 16 (2000).

[73] Song, *supra* note 5 at 191.

[74] *Id.* at 245 n.26. *See also* Hwa-Jin Kim, *Living with the IMF: A New Approach to Corporate Governance and Regulation of Financial Institutions in Korea*, 17 BERKELEY J. INT'L L. 61, 64 (1999) (outlining that, by the end of 1997, the average debt-to-equity ratio for the thirty largest chaebols was 519%).

[75] Oliver Hart & John Moore, *Default and Renegotiation: A Dynamic Model of Debt*, 113 Q. J. ECON. 1, 1 (1998); Il Chong Nam et. al., *Corporate Governance In Korea*, OCED Conference On Corporate Governance In Asia: A Comparative Perspective, ¶ 55 (1999).

[76] Phil-Sang Lee, *Economic Crisis and Chaebol Reform in Korea*, COLUMB. BUS. SCH. 1, 9 (2000) (explaining that "[i]n the absence of shareholder monitoring, bank management was generally obliged to provide 'policy-directed' or 'politically favored lending' to corporate customers.").

[77] Kim, *supra* note 18 at 286-87 (explaining that chaebols adhered to the "*dae-ma-bul-sa* (<<foreign language>>) doctrine," which literally translates to "large horses do not die," and essentially means "too big to fail.").

a. Chaebol Voting Control Mechanism: The Controlling Minority

The Berle-Means corporation has become "the paradigmatic American public company."[78] This structure, named after the authors who first studied the phenomenon, describes an organizational pattern where corporate ownership is separated from corporate control.[79] Berle and Means noted that large corporations, particularly in the U.S. and U.K., often lack a single shareholder or shareholder group who "owned a sufficient percentage of the shares as to be characterized as 'controlling' the firm."[80] Consequently, the corporation's "effective locus of control in fact lay with the directors, and their hired managers, to whom the shareholders as a collective had notionally delegated the power to run the firm," and who generally own insufficient equity to independently exercise the authority delegated to them.[81]

Chaebols present a "unique twist on the Berle-Means problem."[82] Dubbed the "controlling minority structure," founding families are able exercise actual control over the affiliated group despite owning a minority stake in the group's overall equity.[83] Although evidence that the "[Korean] discount may not come from inefficient monitoring, but rather from the extraction of private benefits by controlling-minority shareholders," founding families are likely to find that these private benefits outweigh any losses incurred from affiliated firms' stock trading at a lower price.[84] In particular, by owning only a small fraction of the chaebol's cash flow rights, the founding family is able to tolerate stock price declines caused by their own mismanagement.[85] Moreover, because of their low ownership interests, "they are fully insulated from market disciplinary forces, and no threat of removal exists to help ensure they will not act against the interests of other public investors."[86]

Generally, there are three mechanisms that would allow a founding family to retain managerial control while owning a minority of the firm's equity. The first is dual class stock, where the corporate organizer "can simply attach all voting rights to the fraction . . . of shares that are assigned to the controller, while attaching no voting rights to the remaining shares that are distributed to the public or other shareholders."[87] However, Korean law does not permit dual class stock.[88] Korean public policy views dual class stock as a violation of shareholder equality

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[78] Brian Cheffins, *The Rise and Fall (?) of the Berle-Means Corporation*, 50 U. CAMBRIDGE FAC. L. LEGAL STUD. RSCH PAPER SERIES 1, 3 (2018).
[79] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).
[80] John Armour & Jeffrey N. Gordon, *The Berle-Means Corporation in the 21st Century*, (unpublished manuscript) (on file with the Yale Law School) 1, 6
[81] *Id.*
[82] Rhee, *supra* note 26 at 661.
[83] Lucian A. Bebchuk et al., *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, *in* CONCENTRATED CORPORATE OWNERSHIP 1, 2-3 (Randall K. Morck ed., 2000). *See also* Song, *supra* note 5 at 197 (explaining that founding families of the top thirty chaebols, on average, "own more than 40% of voting rights by having less than 10% of cash flow rights.").
[84] Lauren Yu-Hsin Lin, *Controlling Controlling-Minority Shareholders: Corporate Governance and Leveraged Corporate Control*, OXFORD L. BLOGS (2017).
[85] Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, Working Paper No. 434/2018 ECGI Working Paper Series in Law 1, 12 (Jun. 2019).
[86] *Id.*
[87] Bebchuk et al., *supra* note 83 at 3.
[88] Commercial Act art. 369 (1) (S. Kor.) (stating that "[e]very shareholder shall have one vote for each share."). *See also New Developments on Dual-Class Shares*, Kim & Chang (Sept. 27, 2023) (noting that in April 2023, the Korean National Assembly passed a measure permitting dual class stock for "venture businesses" which meet

and property rights, so Korean courts have long followed the "One Share One Vote Rule" with almost no exceptions.[89] Therefore, because "it is impossible to separate cash flows and corporate control in a single firm,"[90] founding families generally turn to the other two shareholding mechanisms: stock pyramiding and cross ownership.[91]

Founding families can combine "complex—and often opaque—pyramidal, cross- and circular-shareholding arrangements," to augment their total voting power without violating corporate laws or securities regulations.[92] With stock pyramiding, a founding family can exert control with a single class of stock by organizing a group into tiers of affiliated firms where firms at each tier own interests in firms at the same level and below.[93] The important function of stock pyramiding is that "for any fraction α, however small, there is a pyramid that permits a controller to control a company's assets completely without holding more than α of the company's cash-flow rights."[94] The founding family can then link firms together through chains of cross- and circular-shareholding to distribute voting rights across a group and entrench the family as central controller.[95] The end result of these operations is to convert who would otherwise be "an activist shareholder, [with] a seat at the table of corporate influence perhaps," into the controlling shareholder.[96]

b. Korean Regulatory Frameworks for Voting Control

Regulations do, however, limit controlling-minority shareholding schemes in three main ways. First, Korea's Commercial Act (hereinafter "KCA") prohibits, with certain exceptions, a subsidiary from acquiring shares of its parent company when that parent company owns at least fifty percent of the subsidiary's outstanding shares.[97] Similarly, Korea's Monopoly Regulation and Fair Trade Act (hereinafter "MFRTA") imposes a blanket prohibition on companies within a "business group subject to limitations on cross shareholding" from acquiring interests in other affiliated companies.[98] Notably, the MRFTA has no percentage limitation like its KCA counterpart, providing only that "[a] member company of a [designated business group] . . . shall

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certain eligibility criteria. Taking effect November 2023, this would be the first exception to the One Share One Vote Rule to be officially recognized in law.)

[89] Song, *supra* note 5 at 198 (explaining how Korean law disfavors stock sales where "different shareholders end up with different bundles of rights."). *See also* Chanho Park, *Commercial Law*, *in* INTRODUCTION TO KOREAN LAW 187, 194 (2013).

[90] Song, *supra* note 5 at 198.

[91] Bebchuk et al., *supra* note 83 at 2.

[92] *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2017 WL 2616916, at *1 (N.D. Cal. Apr. 5, 2017).

[93] Bebchuk et al., *supra* note 83 at 4 (explaining that "[i]n a pyramid of two companies, a controlling-minority shareholder holds a controlling stake in a holding company that, in turn, holds a controlling stake in an operating company. In a three-tier pyramid, the primary holding company controls a second-tier holding company that in turn controls the operating company.").

[94] *Id.*

[95] *Id.* at 5.

[96] Rhee, *supra* note 26 at 664 (2020).

[97] Commercial Act art. 342-2 (1) (S. Kor.) ("[w]here a [parent company] holds more than half of the total number of issued and outstanding shares in [a subsidiary company], the subsidiary company may not acquire shares in the parent company.").

[98] Monopoly Regulation and Fair Trade Act art. 9 (1) (S. Kor.). *See also id.* at art. 14 (1) (empowering the Korean Fair Trade Commission to designate which companies do and do not constitute a "business subject to limitations on cross shareholding.").

neither acquire nor hold shares of any affiliate that, in turn, acquires or holds shares of that member company."[99]

Second, KCA strips a company of its voting rights "[w]here a company, its parent company and its subsidiary company together, or its subsidiary company alone holds more than one tenth of the total number of issued shares of another company."[100] To illustrate, consider the following example: (1) Firm A owns 6% interest in Firm C and is the parent company to Firm B; (2) Firm B owns 5% interest in Firm C; and (3) Firm C owns 5% interest in Firm A. In this situation, Firm C, as a matter of law, would be divested of any voting rights with respect to Firm A because Firm A's and Firm B's collective ownership in Firm C (here, 11%) exceeds KCA's ten-percent threshold. While Firm C's investment in Firm A's shares still hold value in the securities market, they are effectively rendered non-voting shares while held by Firm C.

Finally, similar to the KCA prohibition described above,[101] the MFRTA prohibits, with some exceptions, companies within designated business groups from engaging in "circular shareholding."[102] The Act defines circular shareholding as "a relationship in which affiliates are interconnected by establishing a chain of three shareholdings, acting both as a company having a shareholding in an affiliate and an issuing company."[103] This shareholding prohibition governs the following fact pattern: (1) Firm A owns 20% of Firm B; (2) Firm B owns 15% of Firm C; and (3) Firm C owns 10% of firm A. In this scenario, there is an interconnected chain of shareholders where each firm owns interest in the next, creating a cycle, and all three firms serve dual roles as both shareholder and issuer.

Given the large number of affiliated firms in a pyramid and shareholding links between them, it is "next to impossible to distinguish investments that circumvent cross-ownership rules from ordinary equity investments."[104] Accordingly, Korean regulators struggle to detect illegal shareholding arrangements.[105] Despite their difficulties, regulators in the Korean Fair Trade Commission (hereinafter "KFTC") have successfully been able to "close" a large number of shareholding loops and "push for ownership structure transparency."[106]

c. Regulating Voting Control in America

Perhaps the most important difference between U.S. and Korean corporate law is that U.S. law permits firms to issue dual class stock. Although American jurisprudence at one point

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[99] Monopoly Regulation and Fair Trade Act art. 9 (1) (S. Kor.).
[100] Commercial Act art. 369 (Kor).
[101] *See supra*, note 87 and accompanying text.
[102] Monopoly Regulation and Fair Trade Act art. 9-2 (2) (S. Kor.).
[103] *Id.* at art. 9-2 (1)(4).
[104] Song, *supra* note 5 at 200, note 26 (giving the following example: "[s]uppose that companies A, B, C, D, and E comprise a corporate group, and there is a circular-shareholding in the form of A → B → C → D → E → A. In this case, several shareholdings such as A → C, A → D, B → D, B → E, C → E, C → A, D → A, D → B, E → B, and E → C are not in violation of any rules in the Korean corporate law and antitrust law.").
[105] *Id.* at 200.
[106] Akash Chattopadhyay et. al., *Governance Transparency and Firm Value: Evidence from Korean Chaebols*, WORKING PAPER 22-012 HARV. BUS. SCH. 1, 3 (2021) (finding that while "28% of chaebol firms had been part of a circular shareholding structure in 2011, only 5% remained in ownership loops in 2018 (a 82% proportional decline). However, chaebol families' controls of group firms remained similar throughout our sample period: about 60% of group firms were controlled by chaebol families both in 2011 and 2018.").

followed systems similar to Korea's One Share One Vote Rule,[107] corporations have been able to issue stock with disproportionate voting rights for over one hundred years.[108] Today, dual class stock is increasingly becoming the norm with over one-fifth (21.1%) of IPOs offering dual class stock in 2022.[109] In fact, some of the largest companies in the U.S. utilize dual class stock.[110] Through dual class stock, corporate organizers in the U.S. are able to separate voting rights from cash flow rights, sort those rights into different classes, and distribute to themselves the stock class that has low cash flow rights but high voting power. After the transfer, the organizer is able to "exercise effective control over decision making," and at the same time is "insulated from market disciplinary forces . . ., which would mitigate the risk that they will act in ways that are contrary to the interests of other public investors."[111] This result bears a stark resemblance to the outcomes achieved by chaebol founding families through stock pyramiding and cross shareholding.[112]

Another important difference between voting rights in America and Korea is the direction those rights flow. The KCC permits upward voting control, whereby a subsidiary may vote on its parent's affairs so long as the subsidiary holds fewer than half of the parent's outstanding shares.[113] On the other hand, American corporate law generally does not permit upward voting control. The Model Business Corporation Act (hereinafter "MBCA") is a useful exemplar for U.S. law. Although the MBCA has not been adopted by every state, its voting-flow provisions have been adopted by thirty-four states, thus making it the majority rule.[114]

First, the MBCA permits dual class stock, stating that "unless the articles of incorporation provide otherwise, each outstanding share, regardless of class or series, is entitled to one vote on each matter voted on at a shareholders' meeting."[115] Second, the Act provides that "[s]hares of a corporation are not entitled to vote if they are owned by or otherwise belong to the corporation directly, or indirectly through an entity of which a majority of the voting power is held directly or indirectly by the corporation or which is otherwise controlled by the corporation."[116] In other words, "the [MBCA] does not allow the vote of shares of a corporation if those shares are owned, directly or indirectly, by a second corporation and the first corporation owns, directly or

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[107] *See* Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 446-47 (2008) (suggesting that the idea of one-share, one-vote has its roots in the American Constitutional mandate of "one-person, one-vote").

[108] David T. White, *Delaware's Role in Handling the Rise of Dual-, Multi-, and Zero-Class Voting Structures*, 45 DEL. J. CORP. L. 141, 142 (2020) (explaining how, "[b]eginning in 1918, common practice for corporations was to issue two classes of common stock: (1) a 'one share-one vote' stock, and (2) a zero-class share.").

[109] Jay R. Ritter, *Initial Public Offerings: Dual Class Structure of IPOs Through 2022*, U. FL. (2023) (using IPO data from 1980-2022, where "[t]he sample [wa]s IPOs with an offer price of at least $5.00, excluding ADRs, unit offers, closed-end funds, REITs, natural resource limited partnerships, small best efforts offers, banks and S&Ls, and stocks not listed on CRSP (CRSP includes Amex, NYSE, and NASDAQ stocks).").

[110] *See generally* Council of Institutional Investors, Dual Class Companies List (2017) (for example, Alphabet (formerly Google), Berkshire Hathaway, Facebook, Ford Motor, and News Corp all use dual class stock systems).

[111] Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L. J. 1453, 1466 (2019).

[112] *See supra* note 92 and accompanying text.

[113] *See* Commercial Act art. 369 (Korea) *supra* note 100 and accompanying text.

[114] *See generally* Model Business Corporation Act Resource Center: MBCA Enactment Map, ABA,. Notably, the MBCA has not been adopted in Delaware, which has the highest incorporation rate out of any other US state. Delaware law imposes no directional limitation on voting rights, providing instead that "each stockholder shall be entitled to 1 vote for each share of capital stock held," unless the "certificate of incorporation provides for more or less than 1 vote for any share." Del. Code Ann. tit. 8, § 212(a) (West)

[115] Model Bus. Corp.Act ("MBCA") § 7.21(a).

[116] MBCA § 7.21(b).

indirectly, a majority of the shares entitled to vote for directors of the second corporation."[117] The MBCA, however, provides an important exception: the above stated prohibition would not apply to "[s]hares held by the corporation in a fiduciary capacity for the benefit of any person" where the person is not controlled, directly or indirectly, by the parent corporation.

The comments to the MBCA § 7.21 are illustrative. Official Comment 3 to MBCA § 7.21 states that:

> [t]he purpose of the prohibition in section 7.21(b) is to prevent a board of directors or management from using a corporate investment to perpetuate itself in power. While [a corporation's own shares that the corporation acquires] cease to be outstanding under section 6.31, except as provided in that section, and therefore are not entitled to vote, other arrangements may be devised seeking to obtain the benefits of ownership without actually acquiring the shares at all or not acquiring the shares at the time the right to vote is determined. The concept of shares that "otherwise belong to" is included in addition to "owned by" to ensure that courts will have the flexibility to apply public policy considerations to arrangements under which shares are not technically "owned," or under which shares may or will be owned at a later time, but which have a similar effect. For example, if the corporation or a controlled entity has entered into a forward purchase contract for shares with the right to vote or direct the vote of the shares, a court could find that the shares belong to the corporation and are not entitled to be voted under section 7.21. Similarly, if the voting power is exercised by someone acting on behalf of the corporation or by a member of management of the corporation, a court could find that the shares otherwise belong to the corporation, and are not entitled to vote under section 7.21. Section 7.21(c), however, makes the prohibition of section 7.21(b) against voting of shares inapplicable to shares held in a fiduciary capacity where the beneficiaries are persons other than the corporation directly or through an entity controlled by the corporation.[118]

In some sense, then, MBCA §§ 7.21(a) and (b) appear incongruous. In avoiding stock pyramiding by prohibiting upward subsidiary voting rights, the MBCA's drafters acknowledge the possibility for corporate managers to cement long-term control over the corporation. However, the drafters seem to undermine their desired effect by permitting corporations to issue multiple stock classes, thus allowing corporate organizers to become entrenched by distributing stock classes with high voting rights to themselves.[119]

Much of the regulatory heavy lifting, however, comes from § 7.21's discretionary analysis function. To begin, consider that chaebols' c-suites and boards are typical made up of related parties, both genetically and socially.[120] For example, in 2012, 40% of chaebols had three

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[117] Voting entitlement of shares; nonvoting classes of stock; preferred stock and conditional voting rights, 5 Fletcher Cyc. Corp. § 2026.

[118] MBCA § 7.21, cmt. 3.

[119] *See supra* note 110 and accompanying text. *See also* § 19:6. Meetings of shareholders—Voting entitlement, 13 Mass. Prac., Business Corporations § 19:6 (2023-2024 ed.) (explaining that "[MBCA § 7.21(a)] gives the corporation the power to vary voting rights among classes and/or series.").

[120] *See supra* note 11 (showing that 18.4% of chaebol management have familial relationships to the company's chairperson).

or more board seats occupied by founding family members.[121] Moreover, for those board members without founding family ties, around 25% had personal connections to the CEO, usually either from high school or similar regional origins.[122] Although board votes and shareholder votes are distinct corporate activities, there is occasional overlap in that high-level officers and directors often enjoy some small amount of voting power.[123] Section 7.21, through the MBCA's broad definitions of "belong[ing] to" and "owned by," would almost certainly deem the voting rights tied to those shares as being "exercised by . . . a member of management of the corporation," and would divest the those shares' voting rights as a consequence.[124] Section 7.21's vote-denying properties could potentially sweep even more broadly in light of the immense pressure unconnected, outside directors face to conform to the founding family's policy objectives.[125]

In light of the above, American shareholder voting restrictions appear to be farther-reaching on their face than do Korean voting restrictions. This is because the MBCA grants courts broad flexibility to deny voting rights not only to a corporation's shareholding subsidiaries, but also to natural entities who are a part of or who act on behalf of the corporation's management.[126] This is sharply contrasted against Korean voting restrictions, which permits chaebol-affiliated subsidiaries to vote on a parent's affairs so long as the subsidiary's ownership stake is below 10% and permits founding families to use their social and cultural cache as a cudgel to compel a firm's officers and directors to fall in line behind the founding family.[127]

Despite the enhanced restrictions in U.S. corporate law, American lawmakers attempting to improve small and medium FOBs' standing in the marketplace should not look to deregulation. If, for example, the MBCA relaxed its voting restrictions for related parties and affiliated subsidiaries, the resulting obscurity in which shares are in-fact controlled by the CEO or board chairperson would increase the risk that smaller shareholders' voting stock is rendered ineffectual.[128] As a result, all firms' shares price would almost immediately drop, creating an American version of the Korea discount.[129]

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[121] R. Jones, *Reforming the large business groups to promote productivity and inclusion in Korea*, OECD Economics Department Working Papers 1, 32, No. 1509, OECD Publishing (2018), Paris.

[122] *Id.* (explaining how board members and high-level officers are often chosen on the basis of "[r]egional rivalries [and alliances], which reflect conflicts between ancient kingdoms.").

[123] Takao Kato et. al., *Executive Compensation, Firm Performance, and Chaebols in Korea: Evidence from New Panel Data*, IZA Discussion Papers, No. 1783, INST. FOR STUD. LAB. 1, 9 (2005) (analyzing chaebol executive compensation schemes and finding that the "average firm in our sample had over 10 percent of its stock owned internally by their directors.").

[124] MBCA § 7.21, cmt. 3.

[125] OCED reports have noted that out "[o]f 9,101 agenda items proposed to directors of 100 large Korean firms over 2010-12, there were only 33 instances (0.4% of the total) in which at least one outside director cast a dissenting vote (broadly defined to include conditional consent)." *Reforming the large business groups to promote productivity and inclusion in Korea* at 32. Moreover, dissenting outside directors are "are nearly twice as likely to be replaced as those who never oppose agenda items." *Id.* These results indicate a connection between "Korea's corporate culture" and "outside directors[']. . . willing[ness] to abandon their fiduciary duties and leave decisions to inside directors, . . . avoid being labelled as 'trouble makers', [sic] and losing their value in the market for outside directors." *Id.* at 32-3.

[126] *See supra* note 119 and accompanying text.

[127] *See supra* note 101 and accompanying text.

[128] *See supra* note 12.

[129] *See supra* note 17 and accompanying text.

Alternatively, if the MBCA repealed § 7.21(a), permitting corporations to issue dual class voting stock, corporate organizers would still be able to entrench themselves.[130] During the height of America's one-share-one-vote era, corporate organizers were permitted to issue multiple classes of stock: "one having full voting rights on a one vote per share basis, the other having no voting rights."[131] As such, organizers could distribute a majority of the one-share-one-vote stock to themselves and to related parties, and the leftover voting stock and zero-vote stock to the public. This, again, creates the dangerous potential for a "America discount." In either case, devolving the MBCA is not a viable strategy to strengthen domestic corporations—lawmakers should not bring American FOBs up by bringing the rest of the economy down.

IV. SHAREHOLDER PROTECTIONS

Generally, economists argue that there is a positive correlation between shareholder protection laws and capital market development.[132] Thus, one would expect a top-fifteen global economy to have reasonably robust minority shareholder protections.[133] Korea, however, poses an exception to this general principle. While, in theory, a chaebol "might be run by competent professional managers who are vigorously monitored by the controlling stockholders," reality demonstrates that such is not the case.[134] Instead, chaebols are rampant with nepotism and positions of authority within a firm are often occupied by the chairperson's children rather than professional managers.[135] The absence of professional managers creates risks for asset mismanagement and tunneling, and arguably increases the need for minority shareholders to diligently monitor a chaebol's activities. Therefore, having previously discussed the techniques a corporate organizer or founding family can use to entrench themselves with disproportionate voting power, it becomes important to consider what support structures are available to non-controlling shareholders.

a. Monitoring Chaebols

Chaebol firms employ a number of tactics to prevent minority shareholders from participating in the voting process.[136] For example firms might: (1) hold their annual general meetings on the same day; (2) prohibit non-shareholders from serving as proxies; (3) restrict qualified proxies' voting powers to only a small window; or (4) bundle several resolutions into a

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[130] *See supra* note 116.

[131] *See generally* Stephen Bainbridge, *Understanding Dual Class Stock Part I: An Historical Perspective*, PROFESSOR BAINBRIDGE (Sept. 9, 2017) (providing a history of dual class stock's origins, and the various theories arising during its development).

[132] *See generally*, Rafael La Porta et al., *Legal Determinants of External Finance*, 52(3) J. FIN. 1131 (1997) (explaining that when controlling shareholders extract value from minority shareholders, buyers in securities markets become unwilling to pay full price for the firm's shares, thereby creating a discount. If the discount becomes too high through over-extraction, securities market participants become unwilling to trade shares and markets are unable to grow).

[133] *South Korea*, *in* 2023 Index of Economic Freedom, HERITAGE FOUNDATION (2023) https://www.heritage.org/index/country/southkorea

[134] Jeong Seo, *Who Will Control Frankenstein? The Korean Chaebol's Corporate Governance*, 14 CARDOZO J. INT'L & COMP. L. 21, 28–29 (2006).

[135] Choi Ha-yan, *Nepotism remains prevalent at Korean chaebols*, HANKORYEH (Dec. 11, 2017).

[136] R. Jones, *Reforming the large business groups to promote productivity and inclusion in Korea*, No. 1509 OECD Economics Department Working Papers, 1, 36 OECD Publishing, Paris (2018) https://doi.org/10.1787/9e9052b5-en.

single vote.[137] Moreover, chaebols can distribute uncancelled treasury shares to anyone, subject to board approval, thereby altering the voting proportions necessary to pass board resolutions.[138] Finally, if a minority shareholder is able to cast votes, that minority shareholder is likely an institution.[139] Institutional shareholders, however, often have business relationships or group affiliations with a chaebol, and are therefore disincentivized from monitoring the chaebol's corporate practices.[140]

Likely appreciating the difficulty retail shareholders have monitoring chaebols, the KCA designates a corporate "auditor."[141] Distinct from the financial context, corporate auditors provide an additional layer of oversight for the board and officers.[142] Auditors are statutorily required to be independent of all board members and officers.[143] Further, they are able to exercise expansive powers, including: (1) "audit[ing] directors' performance of duties"; (2) "[at] any time request[ing] a director to report on relevant business"; (3) "investigat[ing] the affairs and the financial conditions of a company"; and (4) seek[ing] assistance from professionals at the expense of the company."[144] Directors additionally owe the auditor certain obligations, such as reporting to the auditor substantial losses which are likely to occur,[145] or convening a board meeting at the auditor's request.[146] External to their assigned firm, the auditor is empowered to investigate the firms subsidiaries.[147] However, like most laws applied against chaebols, the code does not work in practice as intended.

> The audit system under the Commercial Act is unique and rare in other countries. But it is unfortunate that the audit system in the past was merely a system existing only on the Act. Auditors were not active in a company and powerless. It was common to see auditors present at a general meeting to just read a report that was prepared by a company. They failed to check the management as expected by the Commercial Act.[148]

American corporate practice has no such analogue. However, creating additional layers of board oversight would fit nicely into U.S. policies designed to mitigate agency costs and protect minority shareholders' rights. Therefore, corporate auditors present a suitable starting point for American lawmakers seeking to improve governance in domestic FOBs.

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[137] *Id.* (noting that, in 2017, "924 firms out of around 2,000 listed firms held their . . . [annual general] meeting on 24 March.").
[138] Hwa-jin Kim, *The Case for Market for Corporate Control in Korea*, OXFORD U. COMP. L. FORUM (2009) (explaining that Korean law requires firms to offer newly issued shares to existing shareholders. Treasury shares, on the other hand, may be sold to any person subject to board approval. As a result, chaebols can distribute treasury shares to friendly parties and increase the voting bloc minority shareholders must overcome).
[139] Hicheon Kim & J. Lee, *Transformation of Corporate Governance in Korea*, *in* THE CONVERGENCE OF CORPORATE GOVERNANCE (2012) (A. Rasheed and T. Yoshikawa, eds.).
[140] Jones, *supra* note 136 at 36.
[141] Commercial Act, art. 412 (S. Kor.).
[142] Chanho Park, *Commercial Law*, *in* INTRODUCTION TO KOREAN LAW 31, 203 (Korea Legislation Research Institute ed., 2013).
[143] Commercial Act, art. 411 (S. Kor.).
[144] *Id.* art. 412.
[145] *Id.* art. 412-2.
[146] *Id.* art. 412-3.
[147] *Id.* art. 412-5.
[148] Park, *supra* note 142 at 204.

a. Derivative Actions; Shareholder Primacy

Shareholders are further unprotected due to Korea's weak derivative action statutes. While minority shareholders could become effective corporate monitors through derivative actions, the KCA requires shareholders to own 0.01% of a company's shares to have standing.[149] Put numerically, the KCA requires a shareholder to own $100,000 of stock in company with $1 billion market capitalization. As such, retail shareholders are rarely able to meet this threshold, leaving the sole option to bring these claims to institutional investors, which, as mentioned above, is uncommon.[150] Moreover, even if a retail shareholder met the ownership threshold to bring a claim, the plaintiff would struggle finding an attorney to represent them. This is because the KCA permits a prevailing plaintiff to "demand reimbursement . . . for the cost incurred in relation to the action and a reasonable amount of other expenses," but not attorney fees.[151] Thus, plaintiffs and plaintiffs' attorneys have no economic incentive to bother bringing derivative actions against a firm.

The American derivative action rules are exceedingly liberal in comparison. First, unlike the KCA's 0.01% ownership threshold, U.S. law simply requires the plaintiff to have been "a stockholder at the time of the subject transaction."[152] Second, U.S. courts may grant a plaintiff attorney fees if the plaintiff's challenge provided the corporation a substantial benefit.[153] These substantial differences can likely be explained by the fact that the American public policy views derivative actions as an important "enforcement mechanism for policing fiduciaries . . . on behalf of nominal shareholder plaintiffs."[154] In Korea, however, the nominal shareholders are often times founding family members or directors who have no need to police the board through the court system. Instead, their social power is generally sufficient.[155]

It is important to note that, lingering above shareholder protections discussions are fundamentally different views of shareholder primacy. Shareholder primacy is the philosophy that corporation's sole purpose is to maximize wealth for its shareholders.[156] This philosophy would require corporate directors and officers to maximize stock value by any legal means necessary.[157] "[I]n the United States, it is a rule of law," and it can be found woven throughout the fabric of domestic corporate law and judicial precedents.[158] Such is not the case in Korea, however.[159] Korean directors owe their fiduciary duties to the corporations, rather than to shareholders.[160] This disparity appears logical when considering how Korean corporate law

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[149] *Id.* at art. 542 (6) (S. Kor.).
[150] Hwa-Jin Kim & Sung-Joon Park, *Directors' Duties and Liabilities in Korean Companies*, in KOREAN BUSINESS LAW 4, 28 (Hwa-Jin Kim ed., 2012) (noting how derivative actions are increasing, but that such actions are few.)
[151] Commercial Act art. 405 (1) (S. Kor.).
[152] Del. Code Ann. tit. 8, § 327 (2019); MBCA § 7.41 (2016).
[153] *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 972 (Del. Ch. 1996).
[154] *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 133 (Del. Ch. 1999).
[155] Kyung-Hoon Chun, *Korea's Mandatory Independent Directors: Expected and Unexpected Roles*, *in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 176, 179 (Dan W. Puchniak et al. eds., 2017).
[156] Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012).
[157] *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (holding that firms are required to "maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders").
[158] Robert J. Rhee, *The Political Economy of Corporate Law and Governance: American and Korean Rules Under Different Endogenous Conditions and Forms of Capitalism*, 55 WAKE FOREST L. REV. 649, 678 (2020).
[159] *See* Sang Yop Kang, *Tension Between Shareholder Primacy and (Quasi) Monopoly: A Theoretical Analysis of Controlling Shareholder Economies and China*, 11 U. PA. ASIAN L. REV. 128, 139-40 (2015).
[160] Commercial Act art. 382-3 (S. Kor.).

developed against a backdrop of substantial central planning by the government and a culture that views "business groups as 'national treasures' that must be protected."[161]

In light of this fundamental policy views, American lawmakers should not look to Korean corporate law generally when attempting to bolster domestic minority shareholder protections because, in accordance with Korean preference of companies over shareholders, Korean law restricts plaintiffs' ability to bring derivative suits against a corporation. In the board room, Korean law provides minority shareholders with few avenues through which to exercise their voting rights or direct company policy. American lawmakers should, however, investigate the Korean auditor system. Implementing an additional layer of oversight would help to mitigate agency costs and reduce abusive corporate governance practices. American lawmakers should be aware of flaws in the Korean model, largely stemming from the founding family's social forces, that makes the auditor system ineffective, and be aware of "auditor capture" when drafting legislation.

V. CORPORATE GOVERNANCE: DUTIES OF CARE AND LOYALTY

Despite the fact that corporate founders in both Korea and the U.S. are able entrench themselves by separating voting rights from cashflow rights, founders' disproportionate voting power is typically implicated only once a year during the firm's annual general meeting. On a day-to-day- basis, most of a firm's operations are overseen by corporate governance rules. These rules serve an important function: mitigating agency problems. Generally, "an 'agency problem' . . . arises whenever the welfare of one party, termed the 'principal', depends upon actions taken by another party, termed the 'agent.'"[162] In this way, corporate governance rules serve as an important check on the board's authority to control a firm and motivate the board to act in the best interests of all stakeholders, rather than just its own.[163] American corporate governance rules attempt to solve these agency problems by imposing fiduciary duties, specifically duties of care and loyalty, on directors and liability for breaches thereof.

a. Duty of Care

The American duty of care in the corporate context is distinct from the standard of care applied in tort law. Unlike the tort law standard, which assesses whether someone acted reasonably in a given situation, the corporate duty of care invites directors to take risks in their business ventures by requiring only that they be informed and exercise good faith business judgment when making decisions.[164] This business judgment rule limits directors' liability by creating a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[165] If left unrebutted, the business judgment rule's presumption precludes a court from reviewing the board's decision.[166]

Korea's Commercial Act provides a different formulation of the duty of care. The KCA imposes joint and several liability on directors who "intentionally or negligently act[] in violation

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[161] Jones, *supra* note 136 at 36.
[162] John Armour et. al., *Agency Problems, Legal Strategies, and Enforcement* (Harvard John M. Olin Discussion Paper Series, No. 644, July 2009).
[163] *Id.*
[164] *See generally Smith v. Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985), overruled by *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009).
[165] Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U. J. L. & BUS. 27, 48 (2017) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (internal citations omitted)).
[166] *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 968 note 16 (Del. Ch. 1996).

of any Act or subordinate statute or of articles of incorporation or has neglected to perform his or her duties."[167] If any such intentional or negligent act was conducted through a board resolution, then all assenting directors may similarly be held liable.[168] Given this daunting duty of care, it logically follows that Korea lacks a corresponding business judgment rule.[169] These director-liability sections naturally create boards which are more risk-averse, thereby dampening a firm's potential profitability.[170]

From the American perspective, it appears extreme to hold directors personally liable for mistakes arising while "merely doing [their] job" in good faith and in the best interests of the firm.[171] However, given the massive fraction of Korean GDP that chaebols control, "Korean law may rationally prefer a policy that says, in effect, 'don't take stupid risks and tank our economy.'"[172] It is precisely this difference that makes importing a KCA-type system to the U.S. inappropriate, because doing so would contradict longstanding U.S. public policies designed to encourage business formation in several ways.[173]

First, implementing Korea's director-liability scheme would invite shareholders to file simple negligence actions against FOB directors. An influx in lawsuits would substantially raise demand for liability insurance, driving up prices, and increasing a firm's overall operational costs. Additional negligence suits against domestic FOBs would be significantly distressing considering that, already, "51% of small business owners [believe] making a professional mistake is one of their biggest worries."[174] Second, exposing FOBs' directors to personal liability for negligence would seriously depress risk taking and innovation. Presently, American small business "are disproportionately responsible for the innovations that drive economic growth," and commentators have described potential decreases in such innovation as a "national emergency."[175] While a negligence suit against a single U.S. company would not pose an existential risk in the same way a negligence suit against a chaebol might, the flood of lawsuits brought under a KCA-style system could have potentially devastating consequences for American FOBs and the broader national economy.[176] Therefore, U.S. lawmakers should consider neither relaxing the business judgment rule or duty of care, nor adopting a KCA-inspired liability model.

b. Duty of Loyalty

The duty of loyalty is another tool through which U.S. law attempts to solve corporate agency problems. The duty of loyalty does so pointedly by prohibiting ""[c]orporate officers and

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[167] Commercial Act art. 399 (1) (S. Kor.) (imposing liability against a director to the firm). *See also id.* art. 401 (1) (imposing liability against a director to third parties for "neglect[ing] to perform his or her duties intentionally or by gross negligence.").
[168] *Id.* at (2).
[169] Johneth Chongseo Park & Doo-Ah Lee, *The Business Judgment Rule: A Missing Piece in the Developing Puzzle of Korean Corporate Governance Reform*, 3(2) J. KOREAN L. 15, 15-6 (2003).
[170] *Id.* at 15.
[171] *Id.* at 45 (explaining that, under the KCA, a director could be held personally liable for corporate debt simply by approving a loan if it turned out that the director did so negligently).
[172] Rhee, *supra* note 672.
[173] *About Us: What We Do*, U.S. Chamber of Commerce.
[174] Wil Chan, *90% Of Small Business Owners Aren't Confident That They Are Adequately Insured, According to Survey*, NEXT (Jan. 3, 2024).
[175] *Policy Agenda to Revitalize American Entrepreneurship*, Center for American Entrepreneurship.
[176] *See supra* note 1 and accompanying text.

directors [from] us[ing] their position of trust and confidence to further their private interests."[177] Under modern case law, a corporation's controller may be held liable for breaching the duty of loyalty if they engage in: (1) "disloyalty in the classic sense (i.e., preferring the adverse self-interest of the fiduciary or of a related person to the interests of the corporation)";[178] (2) "intentional dereliction of duty or conscious disregard of one's responsibilities";[179] or (3) "fiduciary conduct motivated by actual intent to do harm."[180] In determining who controls a corporation, however, U.S. courts look to transactional realities, rather than mere transactional form.[181]

In this respect, the Korean rule closely follows its American analogue.[182] To begin, when determining controller liability, Korean courts similarly look to the substance over the form of a transaction. Specifically, the KCA creates liability not only for directors,[183] but also for "person[s] who instructs a director to conduct business by using his or her influence over the company"[184] and shareholders who own a 10-percent-or-greater stake in the firm.[185] Those qualified as directors or de facto directors are then prohibited from engaging in U.S. courts would likely consider classic disloyalty.[186]

Additionally, both countries deny exculpation to directors who breach the duty of loyalty. Delaware corporate law permits a firm's articles of incorporation to exculpate a director's personal liability for breaches of fiduciary duties, but not for the duty of loyalty.[187] Similarly, the KCA places limits on a director's financial exposure for breaches of the duty of care.[188] If the director breaches the duty of loyalty, however, the limits do not apply.[189]

Given the strong similarities between U.S. and Korean theories of fiduciary loyalty, American lawmakers should not consider this an area ripe for reform. Both countries' systems: (1) prohibit directors from engaging in activities that would run against the corporation's best interests; (2) look behind the form of transactions to condemn actors who extract private benefits, but attempt hide their conduct with above-board paper trails; (3) extend liability to persons who tamper with a corporation's affairs, despite not having an official position with managerial authority; and (4) employ mechanisms to prevent those who breach the duty of

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[177] *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939); *see also Schoon v. Smith*, 953 A.2d 196, 206 (Del. 2008).
[178] *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66 (Del. 2006).
[179] *Id.* at 64.
[180] *Id.* at 66.
[181] *Gatz v. Ponsoldt*, 925 A.2d 1265, 1280 (Del. 2007).
[182] Kim & Park, *supra* note 48, at 4 n.11 (explaining that Korean corporate law adopted the American theory of duty of loyalty). *See also* Commercial Act art. 382-3 (S. Kor.) (requiring "[d]irectors [to] perform their duties in good faith for the interest of the company in accordance with Acts, subordinate statutes, and the articles of incorporation."). Importantly, this provision incorporates criminal codes as acts supporting a violation of the duty of loyalty.
[183] Commercial Act art. 399 (1) (S. Kor.).
[184] *Id.* at art. 401-2 (1).
[185] *Id.* at art. 542-8 (2) (explaining that a shareholder who owns 10% or more of a firm "exerts de facto influence on important matters related to the management of the listed company.").
[186] *See, e.g., id.* at art. 397 (prohibiting directors from competing with their firm); *id.* at art. 397-2 (prohibiting directors from appropriating opportunities and assets); *and id.* at art. 398 (prohibiting directors from engaging in related party transactions).
[187] Del. Code Ann. tit. 8, § 102(b)(7)(i) (West).
[188] Commercial Act art. 400 (2) (S. Kor.) (imposing a cap on a director's liability equal to six times an inside director's annual compensation, or three times an outside director's annual compensation).
[189] *Id.*

loyalty from shielding themselves from liability. Consequently, American lawmakers seeking enact legislation benefiting small and medium domestic FOBs should look elsewhere.

VI. CONCLUSION

Strong corporate laws serve as the backbone of any economy seeking to thrive in the modern era of globalized financialization. Needless to say, different countries have different internal socio-cultural forces, experiences with capitalism, and goals for development into the future. This does not mean, however, that countries should develop in vacuums. This note provided an analysis of a unique type of business in Korea, the chaebol, and investigated whether attributes of chaebols could be applied in the U.S. to the benefit of domestic firms. Ultimately, this note concludes that it would be inappropriate for American lawmakers to look to chaebols for inspiration when seeking to improve American FOBs. Unfortunately, Korea's long history of central planning, social factors, and legal development in light thereof pose substantial difficulties for lawmakers attempting to import Korean law to the U.S. This note highlights, however, one potential feature of Korean corporate law viable for transplant: the auditor. The auditor, in theory, is granted broad authorities to oversee a board and investigate affairs on minority shareholders' behalf. In reality, however, the auditors rarely exercise the sweeping powers granted to them. Future investigations on this topic should look more closely at the auditor, detail what prevents them from exercising their authority, and generally investigate the effects such a system might have on American corporations.

[ORDERED] LIBERTY AND JUSTICE FOR ALL? THE ELUSIVE "RIGHT TO PRIVACY" AND A COMPARISON OF AMERICAN AND CANADIAN WOMEN'S RIGHTS SCHEMES

by

Caroline Wakefield

Supervised by Professor Thomas Crocker
University of South Carolina School of Law
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I. INTRODUCTION

In May of 2022, amidst the chaos of the second year of the COVID-19 pandemic, political news outlet Politico leaked a draft of Justice Samuel Alito's majority opinion in the case of *Dobbs v. Jackson Women's Health Organization*, a case that would go on to overturn *Roe v. Wade* and significantly restrict American women's access to safe abortions.[639] The leak of the draft opinion was culturally significant for a number of reasons. First, the Politico leak marked the first time in the modern era of the Supreme Court that an opinion had been disclosed publicly while the case was still pending.[640] This leak cast a shroud of concern regarding the Court's ability to uphold confidentiality when necessary, and the Court itself declared the leak to be a "grave assault on the judicial process."[641]

More significantly, in *Dobbs*, the Court brutally denounced any constitutional protection of a woman's right to an abortion and dealt fatal blows to the landmark abortion rights cases *Roe v. Wade* and *Planned Parenthood v. Casey*, while severely damaging the rationale for other significant cases, such as *Griswold v. Connecticut*[642] and *Eisenstadt v. Brandt*, which granted unrestricted access to contraceptives for all women,[643] married or unmarried, and *Lawrence v. Texas*, which protected private homosexual intimate acts from government intrusion.[644]

This opinion came as a shock to many Americans, and scholars have predicted that the impacts of *Dobbs* will permeate beyond the borders of America.[645] Many American leaders, scholars, and politicians have long-boasted about the country's commitment to liberty and democracy as a means of protecting human rights,[646] and yet, America is not recognized internationally as one of the fourteen countries that offer full equal rights for both men and women.[647]

This paper seeks to understand why America struggles with granting equal rights to women through assessing the Court's justification for overturning *Roe v. Wade*. This paper will examine *Roe*'s foundations in the women's rights movement, discuss how decades of legislation and social action set the scene for the *Dobbs* opinion, explore Canada's women's rights scheme, and identify why Canada is regarded as a one of the countries with the most legal protections for women, while the United States is not.

II. A BRIEF HISTORY OF WOMEN'S RIGHTS IN AMERICA

i. A Woman in Revolutionary America

As the dust from the Revolutionary War was settling, scholars and politicians debated about what the future of their new country would look like, and women were very much a part of the conversation. As early as 1776, the new state of New Jersey promoted ideas of women's suffrage

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[639] Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022).
[640] *Id.*
[641] Amy Howe, *Supreme Court Investigators Fail to Identify Who Leaked* Dobbs *Opinion*, SCOTUSBLOG (Jan. 19, 2023).
[642] *Griswold v. Connecticut*, 381 U.S. 479 (1995).
[643] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[644] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[645] *See* Risa Kaufman ET AL., *Global impacts of* Dobbs v. Jaxson Women's Health Organization *and abortion regression in the United States*, NAT'L LIBR. MED. (Nov. 16, 2022).
[646] *Human Rights and Democracy*, U.S. Department of State.
[647] Katharina Buchholz, *Only 14 Countries have Full Equal Rights for Women*, STATISTA (Mar. 9, 2023).

in their own state constitution.[648] Paragraph four of the New Jersey Constitution stated that "inhabitants of this colony of full age, who are worth fifty pounds proclamation money clear estate in the same, and have resided within the country in which they claim to vote twelve months immediately preceding the election, shall be entitled to vote."[649] This clause specifically included no gender limitation on voter eligibility. The New Jersey legislature affirmed their intentions to include women as part of the eligible voter population in 1797, when they enacted a law regarding voting processes across the state and included the language, "every voter shall openly, and in full view deliver *his or her* ballot to the said judge."[650] This "experiment" in women's suffrage was short lived, as in 1807, the state legislature once again passed legislation concerning voting and declared that no person other than a "free, white, male citizen of this state" had such a right to vote.[651]

Beyond the debate concerning women and the vote, female scholars, such as Judith Sergeant Murray, voiced the desire for equal capacity in political engagement.[652] Opposition to this revolutionary era feminine movement was prevalent and the spark was doused as early as 1895 with *Martin v. Commonwealth of Massachusetts,*[653] which upheld coverture as legal,[654] effectively classifying women as property of their husbands.

ii. American Women in the 19th Century

Even prior to the legal classification as property found in *Martin*, early American women lived with this subordinate status for decades before the next spark in the movement ignited. Suffragettes and female scholars had been brewing since 1776, and finally found their footing in 1848. The Library of Congress estimates that in July of 1848, over 300 people were in attendance of the inaugural Seneca Falls Convention—a "convention to discuss the social, civil and religious condition and rights of [w]oman."[655] The convention spanned two days—the first day exclusively for women, while the second day invited attendance from both men and women.[656] Notably on the second day, sixty-eight women and thirty-two men affixed their signature to the "Declaration of Sentiments,"[657] a document modeled after the Declaration of Independence which "asserted the equality of men and women while reiterating that all people are endowed with unalienable rights to life, liberty and the pursuit of happiness."[658] This gathering is largely considered to be the first American woman's rights convention.[659]

In 1869, Wyoming was the first state to pass a woman's suffrage law.[660] By 1890, it had granted women the right to vote in all elections.[661] Federally, women were not recognized as

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[648] *Women's Suffrage Experiment*, WAMS New York Historical Society.
[649] *1776 State Constitution*, State of New Jersey Department of State.
[650] *Women's Suffrage Experiment*, *supra* note 10 (emphasis added).
[651] *Id.*
[652] Judith Sargent Murray, *On the Equality of* Sexes, NATI'L HUMAN. CTR.
[653] *Women's Suffrage Experiment*, *supra* note 10 (emphasis added).
[654] *Martin v. Commonwealth*, 1 Mass. 346 (1805).
[655] John Muir, *Today in History – July 19, The Seneca Falls Convention,* LIB. CONG.
[656] *Id.*
[657] *Report of the Woman's Rights Convention, held at Seneca Falls, New York, July 19th and 20th, 1848. Proceedings and Declaration of Sentiments*, LIB. CONG.
[658] Chris Price, *Women's rights throughout U.S. history*, Politico (Jan. 20, 2019).
[659] *Today in History – July 19, The Seneca Falls Convention*, *supra* note 17.
[660] Price, *supra* note 20.
[661] *Id.*

eligible voters until the passage of the Nineteenth Amendment in 1920.[662] The amendment read "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."[663]

Women in 19th century America would not be satiated with the right to vote. Activists began to turn to other issues regarding female autonomy and hoped to prove that they were entitled to the other rights granted to free white men in America. The first woman to run for president, Victoria Woodhull, threw her name in the ring for the 1872 presidential election.[664] A woman in Montana, Jeanette Rankin, was the first female elected to the United States House of Representatives in 1916.[665]

By 1917, New York Penal Law had established that selling, advertising, giving away, or giving advice regarding how to obtain any drug for the prevention of conception would be classified as a misdemeanor.[666] Margaret Sanger was convicted of violating this section of the penal code.[667] While Sanger was ultimately not successful with her claim regarding the constitutionality of the section of the penal code as a result of a standing issue, in *People v. Sanger*, the court, perhaps unintentionally, drafted an opinion that was ultimately a step towards solidifying women's freedoms regarding contraception and access to birth control. The opinion found that, for the narrow purposes of curing or preventing diseases, a physician could give help or advice regarding contraceptives to a married person.[668]

The battle for equal rights for women found its next major milestone with the Equal Rights Amendment (ERA) proposed by Alice Paul in 1923—on the 75th anniversary of the Seneca Falls Convention.[669] This proposed amendment launched a decades-long battle that would span into the 21st century.

iii. The 20th Century Battle for Equal Rights

"Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."[670] This short statement, the text of the proposed original Equal Rights Amendment, would shape the women's rights movement through the 20th century. The text of the proposed Amendment was modified by drafter Alice Paul in 1943 to say, "[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[671]

As discussed on the ERA website, the women's rights movement has historically been intertwined with the battle to end slavery and the subsequent civil rights movement.[672] Just as women expressed desires for equal rights and representation while enslaved individuals fought for recognition as individuals rather than property in post-revolutionary America, the two groups found themselves similarly situated in the middle of the 20th century. In the 1960s, African Americans faced a tumultuous future as the civil rights movement ripped throughout the United

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[662] *Constitution of the United States, Nineteenth Amendment*, Constitution Annotated.
[663] *Id.*
[664] Mariana Brandman, *Victoria Woodhull*, NAT'L WOMEN'S HIST. MUSEUM (2022).
[665] *Id.*
[666] *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (N.Y. 1918).
[667] *Id.*
[668] *Id.*
[669] *Hist. of the Equal Rts. Amend.*, ERA.
[670] *Id.*
[671] *Id.*
[672] *Id.*

States, and women's rights activists turned up the heat on America's women to fight for equal rights.

In 1963, Betty Friedan's *The Feminine Mystique* re-ignited the spark in American women, from housewives to single mothers, to mobilize in an effort to solidify their rights in the eyes of the United States government.[673] *The Feminine Mystique* sought to tap into the unease of the American housewife.[674] Betty Friedan targeted the previously unrecognized group of women resigned to living on the "pedestal" (who soon realized that there's not much room to move around up there).[675]

a. Access to Birth Control

By 1880, all states in America enacted some legislation to ban abortions in all cases but for "therapeutic reasons."[676] In 1960, the oral contraceptive was first approved for sale in America by the Food and Drug Administration.[677] "Within two years, 1.2 million American women were using the birth control pill."[678] The introduction of the pill in America revolutionized a woman's access to contraceptive methods. The 1960s saw a resurgence of activism in the women's rights movement that originated in Seneca Falls. Friedan and other supporters founded the National Organization of Women to serve as "civil rights organization for women."[679]

Still, many women in America were unable to access birth control pills as a result of state provisions of the Comstock Act—the very act that Margaret Sanger was indicted under in her 1917 conviction for selling, advertising, or giving advice regarding how to obtain any drug relating to preventing conception.[680] In 1965, the Supreme Court heard *Griswold v. Connecticut*. The Court held that several constitutional protections create a "zone of privacy" in which the government cannot "forbid[] the *use* of contraceptives."[681] The landmark case of *Griswold* paved the way for access to the oral contraceptive for all women, regardless of marital status, in 1972 when the Court heard *Eisenstadt v. Baird*.[682] In *Eisenstadt*, the Court expanded the ruling of *Griswold,* also under a "right of privacy" justification, to hold that "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting the person as the decision whether to bear or beget a child."[683]

The holdings of *Griswold* and *Eisenstadt* relied on a constitutionally guaranteed right to privacy and seem to communicate a clear message—private decisions regarding the bearing of a child should not involve the United States government.

b. The Underground Abortion Movement

In spite of these positive judicial decisions that granted broader access to contraceptives, unwanted pregnancies continued. Even in modern America, no form of contraceptive is 100%

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[673] *Women's History, Second Wave Feminism*, GALE.
[674] Debra Michals, *Betty Friedan*, NAT'L WOMEN'S HIST. MUSEUM (2017).
[675] *Margaret Atwood Quotes*, BRAINYQUOTE. *See also* Gus Wezerek & Kristen R. Ghodsee, Opinion, *Women's Unpaid Labor is Worth $10,900,000,000,000*, N.Y. TIMES (Mar. 5, 2020).
[676] Irin Carmon, *A Brief History of Abortion Law in America*, MOYES (Nov. 14, 2017).
[677] Audiey Kao, *History of Oral Contraception*, AMA J. ETHICS, 55 (June 2000).
[678] *Id.*
[679] *Founding*, NAT'L ORG. OF WOMEN (July 2011).
[680] *See* Price, *supra* note 20.
[681] *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (emphasis added).
[682] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[683] *Id.* at 453.

effective.[684] Lower income women have persistently had higher rates of unintended pregnancies than women in other socioeconomic groups.[685] And until 1993, marital rape was not federally criminalized.[686] As a result, the demand for terminating pregnancies was present throughout the 1960s. Women, who had just recently affirmed their right to access contraception, had no legal path towards terminating pregnancy. But where demand exists, supply follows.

In 1969, the Abortion Counseling Service of Women's Liberation was founded.[687] The group began as a referral source for women seeking to have a safe abortion.[688] The group, later referred to as the Jane Collective ("Pregnant? Don't want to be? Call Jane."),[689] evolved beyond referring women to safe abortions and began training members on safe abortion techniques.[690] The operation even offered childcare and waiting areas for family members waiting on their loved ones to complete the operation.[691] The gynecologist-trained members of the Jane Collective performed abortions for women, provided them with antibiotics, explained the procedure, administered antibiotics, and provided counselors to comfort women during the procedure.[692] The organization was so prominent that CNN reported that "[b]etween the late 1960s and 1973 the year that the Supreme Court decided *Roe v. Wade*, Jane had arranged or performed over 11,000 abortions."[693]

iv. Roe *and* Casey

The backdrop for one of the most recognizable cases to be argued in front of the Supreme Court spanned decades and has been interwoven with American history since the country's birth. Chief Justice Warren's Court that heard *Griswold* had changed by five members at the time *Roe v. Wade* was decided.[694] The Court was led by a new Chief Justice—Warren Burger—who presided over and dissented in *Eisenstadt*.[695] *Roe* relied on many of the principles of the right to privacy acknowledged in *Griswold* and *Eisenstadt*. The Court once again affirmed that family planning decisions, including the decision to terminate a pregnancy, were beyond the purview of the government, both state and federal.[696] The *Roe* Court, balancing the compelling state interest in human life, declined to expand the right to abortion, housed under some right to privacy, to encompass the entire pregnancy.[697] Instead, a "trimester scheme" was implemented to regulate when during pregnancy a woman could chose to terminate.[698] Justice Blackmun penned the opinion that found that the state's interest in human life would become compelling, such that it would outweigh the mother's right to privacy in her decision to terminate the pregnancy, at the

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[684] *How Effective is Contraception at Preventing Pregnancy?* NHS (Apr. 17, 2020).
[685] *See Unintended Pregnancy in the United States*, GUTTMACHER INST. (Jan. 2019).
[686] *See* Raquel Kennedy Bergen & Elizabeth Barnhill, *Marital Rape: New Research and Directions*, VAWNET, (Feb. 2006).
[687] Rainey Horwitz, *The Jane Collective (1969-1973)*, ARIZ. ST. UNIV.: EMBRYO PROJECT ENCYCLOPEDIA (Aug. 7, 2017).
[688] Sandee LaMotte, *These Women Ran an Underground Abortion Network in the 1960s. Here's What They Fear Might Happen Today*, CNN HEALTH (Apr. 23, 2023, 11:08 AM).
[689] *Id.*
[690] Horwitz, *supra* note 49.
[691] *Id.*
[692] *Id.*
[693] LaMotte, *supra* note 50.
[694] *Justices by Court*, OYEZ.
[695] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[696] *Roe v. Wade*, 410 U.S. 113 (1973).
[697] *Id.*
[698] *Id.*

point of viability.[699] The Court further identified the end of the first trimester as the point at which the fetus could be deemed viable.[700]

Additionally, the support for the so-called right to privacy was weakened—the Court could point to no constitutional provision that explicitly offered such a right but reaffirmed that "certain areas or zones of privacy" exist under the Constitution and turned to Amendments Fourteen ("concept of personal liberty") and Nine ("reservation of rights to people") as possible sources of support.[701]

In 1992, *Roe*'s trimester scheme was abandoned in favor of an "undue burden" standard.[702] *Planned Parenthood v. Casey* upheld a majority of *Roe*, but modified the application of the opinion in favor of deference to state legislature.[703] Unlike *Roe*, which enjoyed a comfortable seven-to-two vote in favor of the right to privacy and abortion, *Casey*'s tight margin of five-to-four signaled the Court's changing opinions. *Casey*'s "undue burden" standard still provided significant protections for women seeking to terminate their pregnancies. The undue burden standard relied on the balancing of interests of the state and interests of the woman—the interests that *Roe* attempted to balance with its trimester scheme—but provided room for state regulations and a framework by which courts could assess the state regulations.[704]

As the previously discussed cases did, *Casey* relied heavily on the constitutional right to privacy as reasoning for the opinion. *Casey* went so far as to declare that the Constitution promises a "realm of personal liberty which the government may not enter."[705]

The 1960s and 1970s saw the abortion landscape evolve rapidly as the Court wrestled with balancing interests and building protections for a previously under protected group. But throughout each opinion discussed, the theme of a "right to privacy" permeated.

v. The Right to Privacy

The right to privacy was first introduced to American jurisprudence in *Griswold v. Connecticut*, but the concept of this right was not entirely new.[706] In 1890, two future Supreme Court Justices wrote of the "Right to Privacy" in a Harvard Law Review article.[707] The *Griswold* majority opinion pointed to the First, Third, Fourth, Fifth, and Ninth Amendments, taken together, to find support for a "zone of privacy." A concurrence by Justice Harlan found support in the Fourteenth Amendment's protections over "basic values 'implicit in the concept of ordered liberty.'"[708]

As discussed, the right to privacy was fundamental for the string of abortion opinions that were issued throughout the 1960s and 1970s. The right to privacy was also fundamental in the case of *Lawrence v. Texas*, the 2003 decision concerning the sexual conduct of homosexual individuals.[709] In *Lawrence*, as in *Griswold* and *Roe* before it, the Justices pointed to liberty, as in liberty from "unwarranted government intrusions into a dwelling or other private places," as a

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[699] *Id.*
[700] *Id.*
[701] *Id.*
[702] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[703] *Id.*
[704] *Id.*
[705] *Id.*
[706] Legal Information Institute, *Privacy,* CORNELL L. SCH.
[707] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4(5) HARV. L. REV., 193, 193-220 (1890).
[708] *Privacy, supra* note 68 (Harlan citing *Palko v. Connecticut*).
[709] *Lawrence*, 539 U.S. at 558.

justification for the opinion.[710] The Court, quoting *Eisenstadt*, once again explicitly reaffirmed the judicial acknowledgement of the Constitutional right to privacy.[711]

After fifty-seven years of enjoying a right to privacy, in 2022, the Supreme Court heard *Dobbs v. Jackson Women's Health Organization* and stripped the right from Americans.

III. DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

Associate Justice Samuel Alito penned the majority opinion for *Dobbs* on behalf of the Supreme Court. In concurrence were Justices Thomas, Gorsuch, Kavanaugh, and Barrett. Justices Thomas and Kavanaugh also filed concurring opinions. As stated in Justice Alito's opinion, the Court granted certiorari "to resolve the question whether 'all pre-viability prohibitions on elective abortions are unconstitutional.'"[712]

Although this call to review specifically focuses on the narrow issue of the constitutionality of the potential right to pre-viability elective abortions, Justice Alito's carefully plotted path takes many curious turns and perhaps heedlessly ignores other avenues of analysis. Justice Alito attempts to begin his discussion of this question by plainly considering if the Constitution confers the right to an abortion.

i. Constitutional Protections Against Discrimination

When the Court addresses questions of constitutional rights, the Court first looks directly to the text of the Constitution to determine if a right is explicitly granted.[713] If the Court finds no such right, the Court can then turn to the Fourteenth Amendment's Due Process Clause to determine if the right under consideration is impliedly protected through the Fourteenth Amendment's reference to "liberty."[714] Under this clause, the Court will assess if the proposed right is "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[715]

Justice Alito quickly determined that the Court's opinion in *Planned Parenthood v. Casey* did not conduct the appropriate analysis and instead, relied on the principle of stare decisis, a doctrine under which courts will rely on precedent in making decisions. As such, Alito himself was responsible for conducting the Due Process Clause analysis.

a. An Explicit Right to Abortion?

It is well known that the Founding Fathers did not plainly include a provision within the Constitution or Bill of Rights that expressly grants a woman the right to terminate her own pregnancy. However, as discussed in *Roe* and *Casey*, many advocates assert that support for the right, such that it should be granted constitutional protection, can be found in a multitude of places throughout America's founding documents.

Roe pointed to Amendments One, Four, Five, Nine, and Fourteen as its sources for constitutional justification.[716] Under multiple theories, Justices found support under the Ninth Amendment as it reserves certain rights to the people.[717] The *Roe* Court also pointed to a

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[710] *Id.*
[711] *Id.*
[712] *Dobbs v. Jackson Women's Health Clinic*, 597 U.S. 215, 233 (2022).
[713] *Id.*
[714] *Id.*
[715] *Id.* (quoting *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997)).
[716] *Roe v. Wade*, 410 U.S. 113, 113 (1973).
[717] *Dobbs*, 597 U.S. at 235.

combination of Amendments One, Four, and Nine as incorporating the right into the Fourteenth Amendment's Due Process Clause,[718] and the Court examined the Fourteenth Amendment alone as a source for support under the theory that the right to abortion is a "component of the 'liberty' protected by the Fourteenth Amendment's Due Process Clause."[719]

The *Casey* Court, perhaps as a result of their steadfast commitment to the stare decisis principle, did not discuss all constitutional paths towards the protection of a woman's right to terminate her pregnancy, and instead focused solely on the Fourteenth Amendment "liberty" argument. The *Dobbs* Court also briefly addressed the Fourteenth Amendment's Equal Protection Clause, which some advocates argued could serve as "another potential home for the abortion right."[720] The Court quickly dismissed this argument, referencing the precedents of *Sessions v. Morales-Santana*,[721] *Gedulig v. Aiello*,[722] and *Bray v. Alexandria Women's Health Clinic*[723] to conclude that heightened scrutiny did not apply to laws intended to restrict access to abortion.

The Court offered no further justification for why they did not consider the goal of preventing abortion to be unfairly discriminatory towards women in this context, in spite of the fact that regulations concerning abortion would necessarily only impact the bodily autonomy decisions of women. As a result, the Court reasoned that the heightened scrutiny protection offered by the Fourteenth Amendment's Equal Protection Clause (which asserts that a regulation must be narrowly tailored to some important government interest and the means by which the regulation regulates must be substantially related to such interest) did not apply,[724] but rather abortion regulations "are governed by the same standard of review as other health and safety measures."[725]

Health and safety measures are reviewed under a "rational basis" standard which requires only that the regulation "have a legitimate state interest, and that there be a rational connection between the [regulation]'s means and goals."[726] Additionally, under rational basis review, the burden of proof falls on the challenger of the regulation. This lower standard of review is distinct from a standard of intermediate or heightened scrutiny in that under rational basis, the government's interest does not have to be substantially related to an important purpose—under this umbrella, any government interest will serve as justification for state regulation. In other words, under a rational basis standard, there is little room for the interests of the citizen to eclipse the interests of the government such that the citizen would be protected from government intrusion into their "liberty." The Fourteenth Amendment's Equal Protection Clause "rational basis" analysis allows a state's regulation of abortion that addresses the state's legitimate interest in the protection of unborn life through the rational means of imposing any number of restrictions on women seeking to terminate their pregnancy during any point in their term, as legitimate under the Constitution.

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[718] *Id.*

[719] *Id.* at 10.

[720] *Id.*

[721] *Sessions v. Morales-Santana,* 582 U.S. 47 (2017) (about gender-based classifications are subject to heightened scrutiny).

[722] *Dobbs* at 10-11 ("[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'").

[723] *Id.* at 11 ("the 'goal of preventing abortion' does not constitute 'invidiously discriminatory animus' against women.").

[724] Legal Info. Inst., *Intermediate Scrutiny*, CORNELL L. SCH.

[725] *Dobbs* at 11.

[726] Legal Info. Inst., *Rational Basis Test*, CORNELL L. SCH.

b. The Fourteenth Amendment Due Process Clause

Thus, Alito did not rely on the Fourteenth Amendment's Equal Protection Clause's rational basis analysis to strip the constitutional guarantees of a right to an abortion from women. Rather, Alito turned to the Due Process Clause, also within the Fourteenth Amendment to discuss two prongs, first, whether the right is deeply rooted in America's history and tradition, and next, whether the right is "essential to our Nation's 'scheme of ordered liberty.'"[727]

i. Alito and "Liberty"

Intertwined throughout Justice Alito's analysis is a theme of struggling to define "liberty" as the Founding Fathers would have understood it. In fact, Alito expends a significant number of words on defining liberty—a word commonly understood to represent total autonomy—and asserting that American liberty should be construed more narrowly and should fit within the boundaries of so-called "ordered liberty." Alito swiftly labeled liberty as capacious, or "roomy," a categorization similar to how modern dictionaries generally define "liberty."[728] Merriam Webster defines liberty as the "quality or state of being free; the power to do as one pleases; freedom from physical restraint; freedom from arbitrary or despotic control; the positive enjoyment of various social, political, or economic rights and privileged; or *the power of choice*."[729]

Although Justice Alito acknowledges the expansiveness of liberty promised to American citizens through the Constitution, he quickly turns to narrowing its reach. Alito seems to imply that while the framers of the Constitution unquestionably referenced liberty in the founding texts, and despite such liberty being deeply entwined with American culture,[730] perhaps they did not mean such an expansive definition of liberty. Alito points to no historical support for this assertion, but rather relies on a quote by President Abraham Lincoln[731] and a report by Isaiah Berlin,[732] a Russo-British philosopher, which "catalogued more than 200 different senses in which [liberty] had been used."[733] Justice Alito proceeded with these misguided conclusions to provide further justification for the Court's "'reluctan[ce]' to recognize rights that are not mentioned in the Constitution."[734]

ii. Historical Analysis of the Right to Abortion

Guided by a desire to ask "what the Fourteenth Amendment means by the term 'liberty,'"[735] and a desire to not "confuse what [the] Amendment protects with our own ardent views about the liberty that Americans should enjoy,"[736] Alito progressed to the question of whether or not the right to abortion was deeply rooted the history and tradition of America.

Over a span of fifteen pages, Justice Alito discusses the legal history of abortions and the concept of quickening as an indicator of viability, and thus a dividing line between abortion as homicide post-quickening and abortion as merely impermissible pre-quickening.[737] Alito points to

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[727] *Dobbs*, slip op. at 12.
[728] *Liberty*, Merriam-Webster.
[729] *Id.* (emphasis added).
[730] *The Pledge of Allegiance*, USHISTORY.COM ("I pledge allegiance to the flag of the United States of America, and to the republic for which it stands, one nation under God, indivisible, with *liberty and justice*, for all.") (emphasis added).
[731] *Dobbs*, slip op. at 13 ("We all declare for Liberty; but in using the same word, we do not all mean the same thing.").
[732] *Isaiah Berlin*, STANFORD ENCYCLOPEDIA OF PHIL..
[733] *Dobbs*, slip op. at 14.
[734] *Id.*
[735] *Id.*
[736] *Id.*
[737] *Id.* at 14-30.

common law justifications for the state's interest in protecting the sanctity of human life,[738] and declared an "overwhelming consensus" against abortion that endured until the deciding of *Roe*.[739]

However, Alito's historical analysis is largely silent on other indicators of public opinion concerning abortion. Justice Alito's conclusions rely heavily on 19th century legislation to conclude that by 1863, twenty-three of thirty-seven states criminalized abortions, even those performed before quickening.[740] By 1910, an additional nine states had enacted like legislation.[741] Justice Alito failed to mention that women were not federally granted the right to vote until the ratification of the Nineteenth Amendment, in 1920.

iii. Abortion as a Broader, Entrenched Right

In finding that the right to abortion is not deeply rooted in the history and tradition of America, Justice Alito elected not to complete the due process analysis for unenumerated rights. The Court has long held that "an unenumerated right [must] be 'deeply rooted in this nation's history and tradition' *before* it can be recognized as a component of the 'liberty' protected in the Due Process Clause."[742] Still, the majority opinion briefly addressed an argument on behalf of supporters of *Roe* and *Casey,* that the right to an abortion exists as part of a broader, entrenched right—the right to privacy argument.

Justice Alito acknowledges that the *Roe* Court wrote of a "right to privacy," while *Casey* discussed a "freedom to make 'intimate and personal choices' that are central to personal dignity and autonomy.'"[743] Alito further asserts that even though these "rights" were addressed in both *Roe* and *Casey*, the Court could not have possibly meant for such rights to be absolute.[744] Rather, Alito distinguishes the right to think and say "what [you] wish about 'existence,' 'meaning,' the 'universe,' and 'the mystery of human life'" from the right to act on those thoughts. Undoubtedly, there has been no question of the right to think and say your opinions on the great mysteries of life,[745] but the argument in favor of restricting actions based on those thoughts because such right to privacy or making choices "central to personal dignity and autonomy" is not inclusive of actions, undermine decades of case law and significant decisions related to women's rights and access to contraception.[746] Still, Justice Alito's discussion of the broader right to privacy avoids deeper discussion of these issues in favor of acknowledging that by granting a broader right to privacy, courts could ultimately endorse "fundamental rights to illicit drug use, prostitution, and the like."[747]

Alito briefly addresses some other public policy argument but quickly dismisses them because "[supporters of *Roe* and *Casey*] have failed to make [a] showing" that the Court has the authority to weight the arguments.[748]

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[738] *Id.*
[739] *Id.* at 24.
[740] *Id.* at 23.
[741] *Id.*
[742] *Id.* at 36 (quoting *Glucksberg*, 521 U.S. at 721) (emphasis added).
[743] *Id.* at 30 (quoting *Planned Parenthood v. Casey,* 505 U. S. 833 (1992)).
[744] *Id.* at 30.
[745] *See* U.S. Const. amend. I.
[746] *See Griswold v. Connecticut,* 381 U.S. 479 (1965); *see also, Eisenstadt v. Baird,* 405 U.S. 438 (1971).
[747] *Dobbs*, 597 U.S. at 32. *See also*, *Slippery Slope Fallacy*, Excelsior Online Writing Lab, for more information on the "slippery slope fallacy".
[748] *Id.* at 35.

ii. Stare Decisis Analysis

Finally, the majority opinion turns to the issue of stare decisis, a commitment to uphold precedent. Alito addressed stare decisis not as an "inexorable command,"[749] and asserted that the principle is "at its weakest when we interpret the Constitution."[750] In tandem with his own analysis discussed *supra*, Justice Alito identifies five factors in favor of overruling the precedents of *Roe* and *Casey*: (1) the nature of the error, (2) the quality of the reasoning, (3) the "workability" of the rules imposed, (4) the rules' disruptive effect on other areas of the law, and (5) the absence of concrete reliance.[751]

Justice Alito argues that *Roe*, and subsequently *Casey*, were so erroneous that they were "on a collision course with the Constitution from the day [they were] decided."[752] Alito contorts *Roe* to conclude that it actually stripped away a right from Americans—the right for citizens to express their opinions on abortion through the democratic process.[753] As mentioned, Justice Alito on behalf of the majority felt no need to acknowledge that this right, now guaranteed to *all* Americans, was not guaranteed to women when legislatures were enacting anti-abortion legislation in the 19th century when discussing such legislation as a justification for showing that the right to an abortion was not entrenched in the Nation's history and tradition.

Under the stare decisis analysis, the majority further continued to maintain the opinion that the reasoning of *Roe* was not only seriously flawed, but that it stood on "exceptionally weak grounds."[754] This further attack on the "right to privacy" relied on the reasoning that the right as discussed in *Griswold* and *Eisenstadt*[755] was erroneously applied in the instances of abortions in *Roe* as abortions had a unique element of impacting "potential life."[756]

The majority also found that the "workability" of the "undue burden" standard established by *Casey* was poor—in other words, per the Court, it was difficult for states to apply and understand the standard in a consistent manner. The Court critiques the *Casey* standard's language such as "substantial obstacles" and "undue burden" as vague and hard to apply.[757] The Court does so while simultaneously applying a test that requires an assessment of whether a right is "deeply entrenched" in the Nation's history and tradition and if it is an "essential component" of ordered liberty.[758] Both tests rely on vague language and a court's ability to balance factors to apply the analysis to a specific set of facts, but the opinion still distinguishes *Casey*'s standard as unworkable. The majority additionally discusses how the *Casey* opinion directs courts, when assessing the constitutionality of abortion regulations, to "examine a law's impact on women."[759] Justice Alito finds fault in this directive because courts will not be able to identify which group of women they should examine when considering the law's impact.[760] This reasoning seems to

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[749] *Dobbs,* 597 U.S. at 39 (quoting *Pearson v. Callahan,* 555 U.S. 223 (2009)).
[750] *Id.* at 39 (quoting *Agostini v. Felton,* 521 U.S. 203 (1997)).
[751] *Id.* at 43.
[752] *Id.* at 268.
[753] *Id.*
[754] *Id.* at 270.
[755] *Eisenstadt v. Baird*, 405 U.S. 438 (1972) ("the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting the person as the decision whether to bear or beget a child").
[756] *Dobbs*, 597 U.S. at 273. *See also Birth Control*, MedlinePlus.
[757] When is a burden undue? When is an obstacle substantial?
[758] When is a right deeply entrenched? When is a component "essential"? How does the court distinguish liberty from "ordered" liberty?
[759] *Dobbs*, 597 U.S. at 282.
[760] *Id.*

communicate an unwillingness of the courts to participate in the impact analysis because it would be burdensome on the Court.[761] And yet, the very purpose of the judicial branch is to determine the constitutionality of laws.[762]

The Court briefly expressed concern for how the abortion cases were "dilut[ing] the strict standard for facial constitutional challenges,"[763] before turning to the issue of "reliance interests."[764] Courts may point to reliance interests as justification for upholding precedent and honoring stare decisis in instances where citizens have modified their lifestyle to rely on precedent and, by overturning precedent, individuals would be harmed. "Traditional reliance interests arise 'where advance planning of great precision is most obviously a necessity.'"[765] Instances of family planning, childbirth, and childbearing processes that will have life-long impacts on individuals, particularly women, would seemingly fall within this category. However, the Court rejects this argument under the reasoning found in *Casey* that "abortion is generally [an] 'unplanned activity,'"[766] and as such, does not fall within the scope of traditional reliance interests. The Court refuses to acknowledge the long-term implications of carrying a child to term, such as nine months of pregnancy, eighteen years of legal guardianship over a minor child, and a lifelong connection to biological offspring.

The Court addresses the possibility of "intangible" forms of reliance, as exemplified by how

> "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[767]

The Court, however, rejected these unconventional forms of reliance as it is "ill-equipped to assess 'generalized assertions about the national psyche.'"[768] Once again, the Court seemingly deemed an entire area of analysis to be beyond their scope, or to be burdensome to the resources of the judicial system. Surprisingly, the Court pointed to the "electoral [and] political power" of women as a source of resolution for these issues.[769] The Court called on women to mobilize through the democratic and legislative processes to make their opinions known, but once again failed to acknowledge that the constitutional rights afforded to the free white male that allowed them to be integrated into the American democratic process were not granted to women until almost 150 years after the founding of the nation.

iii. A New Standard to Govern Abortion Regulations

The *Dobbs* opinion concludes by offering a new standard of review for abortion regulations – states may regulate abortions, and like other health and welfare regulations, abortion regulations are entitled to a strong presumption of validity.

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[761] *See Id.*
[762] *Court Role and Structure*, UNITED STATES COURTS.
[763] *Dobbs* at 63.
[764] *Id.*
[765] *Id.* at 64 (quoting *Casey*, 505 U.S. at 856)
[766] *Id.*
[767] *Id.* (quoting Casey, 505 U.S. at 856).
[768] *Id.* (quoting Casey, 505 U.S. at 957).
[769] *Id.* at 65.

IV. ANALYZING DOBBS

The full *Dobbs* opinion is a huge blow to women's rights in America. Not only does the opinion explicitly remove any constitutional protections for the right to abortion, but it also seriously calls into question the "right to privacy" that underpins other Supreme Court decisions integral to the advancement of women's rights. Alito's definition of "right to privacy" that seemingly only encompasses the right to think and speak, but not act, on certain private decisions is a complete modification of the right to privacy as understood by *Griswold* and *Eisenstadt*.

Alito's selective history ignores the fact that women, even wealthy white women, have not been afforded the same rights to the democratic process of white men since the foundation of America. The historical analysis also refuses to acknowledge the social battle for women's rights that dominated culture in the middle of the twentieth century.

Alito unfoundedly declares that liberty as commonly understood by the American citizen is not actually what the founding fathers intended. *Dobbs* transforms America from the "land of the free" to the "land of the free (subject to terms and conditions as decided by the Supreme Court)." The undefined concept of ordered liberty presents as a dangerous tool that any justice could call on whenever they see fit. Further, the opinion, with little support, seems to assert that the rights afforded to Americans in the Constitution, Bill of Rights, and subsequent amendments are exhaustive of how the framers of the Constitution intended liberty to be understood.

Finally, when asked to clarify points of ambiguity in *Roe* and *Casey*, the Court declines to do so, instead choosing to declare entire areas of analysis beyond the purview of the Court. This selective analysis calls into question the Court's commitment to addressing the constitutionality of issues and seems to suggest that the Court is ignoring entire areas of analysis out of convenience.

Notably absent from the 117-page majority opinion was the concept of women's rights as human rights, and perhaps unsurprisingly, discussion of human rights plays an integral role in Canada's women's rights scheme.

V. THE CANADIAN WOMEN'S RIGHTS SCHEME

i. An Overview

America's neighbor to the north, Canada, has been regarded in the international community as one of the few countries with comprehensive protections for women. A 2023 World Bank report named Canada as one of only fourteen countries that "offer full equal rights for men and women, at least from a legal perspective."[770] UN Women categorizes Canada as "a global leader in the promotion and protection of women's rights and gender equality."[771] Internationally, Canada has a reputation of being "one of the first countries to sign and ratify the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),"[772] an "international legal instrument" with the stated goal of "eliminat[ing] discrimination against women . . . in all areas."[773] Canada is also known for pioneering a Feminist International Assistance Policy in 2017 to "contribute to global efforts to eradicate poverty by empowering women and addressing inequalities."[774]

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[770] *Buchholz*, *supra* note 9.
[771] *UN Women and Canada*, UN Women.
[772] *Id.*
[773] *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for Youth*, UN WOMEN (2016).
[774] *UN Women and Canada, supra* note 132.

But within its borders, what does Canada do to ensure that its women citizens are protected? Canada has continually built upon its human rights legislation to ensure that its protections for women are extensive. Canada also boasts policy and programs aimed at addressing gender equality issues.[775] Does this multi-prong approach justify why Canada was named as one of the only fourteen countries offering full equal rights to both men and women, and America was not?

The Canadian government points to the Canadian Human Rights Act (CHRA) and the Canadian Charter of Rights and Freedoms (1982) as the foundations for their gender equality protections.[776] And federally, Canada has promulgated the Employment Equity Act, Pay Equity Act, Canadian Gender Budgeting Acts, and Canada Labour Code to "further define[]and protect" these rights.[777]

The 1977 CHRA declared that "all Canadians have the right to equality, equal opportunity, fair treatment, and an environment free of discrimination on the basis of sex, sexual orientation, marital status, and family status."[778] The Canadian Charter of Rights and Freedoms (the "Charter") furthered these protections by "ensur[ing] equal protection and benefit of the law 'without discrimination . . . based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability,'" and "guarantee[ing] all rights covered in the Charter apply equally to men and women."[779]

These gender equality foundations have encountered some tension with regards to abortion rights issues. As *Roe v. Wade*, and now *Dobbs v. Jackson Women's Health* stand in American history as landmark abortion rights cases, Canada looked to *R. v. Morgentaler* and *Tremblay v. Daigle* to solidify their judicial opinions on abortion issues.[780] Prior to 1969, Canadian law, specifically Section 251 of the Criminal Code, prohibited the inducement of an abortion except where the life or health of the woman was endangered.[781] "[A] doctor, or anyone else assisting a woman [in] end[ing] her pregnancy," could face a maximum penalty of life imprisonment.[782] A woman terminating her own pregnancy, if convicted, would face two years.[783]

ii. R. v. Morgentaler *(1988)*

In 1988, the Supreme Court of Canada had the opportunity to review Section 251 of its own Criminal Code. Section 251 of the Canadian Criminal Code (the "Code"), which criminalized abortions, provided limited exemptions in cases of danger to the mother's life and health, pending approval from a majority of members of a therapeutic abortion committee of an accredited or approved hospital.[784]

The case of *R. v. Morgentaler* came before the Canadian Supreme Court after three medical practitioners established an abortion clinic to perform abortions for women who had not obtained a certificate allowing such abortion from a therapeutic abortion committee.[785] The practitioners asserted that promulgating Section 251 of the Code was beyond the authority of the Canadian

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[775] *Federal gender equality laws in Canada*, GOV'T CAN. (Nov. 6, 2023).
[776] *History of Abortion in Canada*, NAT'L. ABORTION FED'N.
[777] *Federal gender equality laws in Canada*, *supra* note 136.
[778] *Id.* (quoting *Canadian Human Rights Act*).
[779] *Id.* (citing *Canadian Charter of Rights and Freedoms*).
[780] *History of Abortion in Canada*, *supra* note 137.
[781] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (1988).
[782] Linda Long, *Abortion in Canada*, CAN. ENCYCLOPEDIA (May 10, 2022).
[783] *Id.*
[784] *Morgentaler*, 1 S.C.R. 30.
[785] *Id.* at 31.

Parliament and was in conflict with both the Charter, enacted in 1982, and the Canadian Bill of Rights. [786]

The Supreme Court of Canada addressed the following relevant questions in their opinion: "Does Section 251 . . . infringe or deny rights and freedoms guaranteed by [the Charter] . . . [and] is Section 251 . . . ultra vires of [the Canadian Parliament]?"[787] The Court first turned to the language of the Charter, which "sets out those rights and freedoms that Canadians believe are necessary in a free and democratic society."[788] Section 7 of the Charter reads "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[789]

Counsel for the medical practitioners "bas[ed] his argument largely on American constitutional theories and authorities" and argued that the right to security as referenced in the Charter should be read as "a wide-ranging right to control one's own life and to promote one's individual autonomy."[790] Counsel further reasoned that such right would "therefore include a right to privacy and a right to make unfettered decisions about one's own life."[791] The court's analysis recognized "that life, liberty, and security of the person" as referenced in the Charter, should each be recognized as distinct, protected elements.[792] In a narrow opinion, Chief Justice Brian Dickson wrote,

> "[a]t the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sections, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations is a profound interference with a woman's body and thus a violation of security of the person."[793]

iii. *After* Morgentaler

Canada's parliament and legal system continued to fortify abortion rights for women in the successive years with *Tremblay v. Daigle* (1989), which ruled that "a father has no legal right to veto a woman's abortion decision," and other rulings that forced provinces to allow private abortion clinics.[794]

Canada's women's rights scheme could be viewed simply as a human rights scheme. A key difference between the rights protected through Canadian legislation, charters, and rulings is the open acknowledgment of a right to "security of [the] person." This is a right recognized by the United Nations in Article 3 of the Universal Declaration of Human Rights, but it is a right not

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[786] *Id.*
[787] *Id.*
[788] *Morgentaler*, 1 S.C.R. 30, 32.; GOV'T OF CAN., *Guide to the Canadian Charter of Rights and Freedoms*, (last modified Dec. 13, 2022).
[789] Canada Act, 1982 c 11 (U.K.), *reprinted in* R.S.C. 1985, app II, no 44, § 7 (Can.).
[790] *Morgentaler*, 1 S.C.R. at 51.
[791] *Id.*
[792] *Id.* at 52 (quoting *Singh v. Minister of Emp. and Immigr.*, [1985] 1 S.C.R. 177 (Can.)).
[793] *Id.* at 56-57.
[794] *History of Abortion in Canada*, *supra* note 137.

recognized in American jurisprudence.[795] Readers should note that the Universal Declaration of Human Rights was adopted by the United Nations General Assembly in 1948, with forty-eight of fifty-six members voting in favor of the declaration, and eight members (the then-USSR, then-Ukrainian Soviet Socialist Republic, then-Byelorussian Soviet Socialist Republic, Yugoslavia, Poland, Saudi Arabia, and South Africa) abstained.[796] Readers should also note that the United States became a United Nations member in 1945.[797]

IV. CONCLUSION

The simple distinction of how America views women's rights and how Canada views women's rights lies in whether each country classifies women's rights as human rights or not. The Universal Declaration of Human Rights provides a clear path for American jurisprudence to grant rights to privacy and rights to security in their person. Even absent the UDHR, American courts have a multitude of other paths towards granting this right to women. Unfortunately, the modern Supreme Court seems to understand their role in interpreting the constitution as one of originalism — a commitment to the original public meaning of the texts — with little room for modern interpretation.[798] The right to privacy, or, at the very least, zones of privacy in which the government should not interfere, is an important right that should be guaranteed for Americans. In the post-*Dobbs* world, the onus now lies with the American voter to ensure that these rights are guaranteed.

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[795] G.A. Res. 217 (lll) A, Universal Declaration of Human Rights (Dec. 10, 1948).
[796] Peter Danchin, *Drafting History*, COLUM. UNIV. CTR. FOR NEW MEDIA TEACHING AND LEARNING, at 10,
[797] *UN Membership*, DAG HAMMARAKJÖLD LIBR..
[798] Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT'L CONST. CTR.