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Law Working Paper N°.121/2009
March 2009

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Abstract

Berle and Means famously declared in 1932 that a separation of ownership and control was a hallmark of large U.S. corporations and their characterization of matters quickly became received wisdom. A series of recent papers (Hannah, 2007; Santos and Rumble, 2006, Holderness, forthcoming) has called the Berle-Means orthodoxy into question. This paper surveys the relevant historical literature on point, acknowledging in so doing that the pattern of ownership and control in U.S. public companies has been anything but monolithic but saying a separation between ownership and control remains an appropriate reference point for analysis of U.S. corporate governance.

Keywords: Berle-Means, ownership, control of U.S. public companies
JEL Classifications: G32, G34, K22, N21, N22

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Berle and Means said in their famous 1932 book *The Modern Corporation and Private Property* "in the largest American corporations, a new condition has developed….(T)here are no dominant owners, and control is maintained in large measure apart from ownership."[1] Their assessment had a profound and enduring influence on debates about governance of public companies. As Hawley and Williams observed in 2000 "The phenomenon Berle and Means identified in 1932 – the divorce of ownership and control – would come to dominate most thinking about issues of corporate governance for the rest of the twentieth century."[2] Or as Monks and Minow said in the 2008 edition of their text on corporate governance, "(m)ost people begin the study of ownership in the context of the public corporation with…Berle and…Means".[3]

The impact the separation of ownership (in the sense of ownership of equity stakes in companies) and control (in the sense of having the authority to determine corporate policy) has had on the analysis of corporate governance can be readily

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[1] Adolf A. Berle and Gardiner C. Means, *The Modern Corporation & Private Property* (New Brunswick, N.J., 1997, originally published in 1932), 110-11.

[2] James P. Hawley and Andrew T. Williams, *The Rise of Fiduciary Capitalism: How Institutional Investors Can Make Corporate America More Democratic* (Philadelphia, 2000), 42. See also William W. Bratton, "Berle and Means Reconsidered at the Century's Turn", 26 (2001) *Journal of Corporation Law* 737, 737.

[3] Robert A.G. Monks and Nell Minow, *Corporate Governance*, 4th ed. (Hoboken, N.J., 2008), 110.

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explained. As Monks and Minow say, "Public companies have managers with agendas different from their owners."[4] Correspondingly, when corporations lack shareholders who hold sufficiently sizeable stakes to exercise influence over the board of directors and the executives the board appoints, "agency costs" generated by inattentive or self-serving managers become a major potential concern. Various market-oriented mechanisms, such as monitoring by outside directors, performance-oriented compensation and the market for corporate control, help to align the interests of management and shareholders. However, as the wholesale destruction of shareholder value in major publicly traded U.S. financial corporations during the recent market turmoil (e.g. AIG, Bear Stearns, Citigroup and Lehman Brothers) illustrated, major gaps in managerial accountability can remain. Hence, as Gilson has said, "the intellectual mission of American corporate governance took the form of a search for the organizational Holy Grail, a technique that bridged the separation of ownership and control by aligning the interests of shareholders and managers."[5]

In this paper we survey the literature concerning the separation of ownership and control, with our departure point being a series of papers challenging the received wisdom on point. Hannah, in a 2007 paper, sought to debunk conventional thinking concerning the historical evolution of ownership and control, with his main target

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4 Monks and Minow, *Corporate*, p. 94.

5 Ronald J. Gilson, "Corporate Governance and Economic Efficiency: When Do Institutions Matter?", 74 (1996) *Washington University Law Quarterly* 327, 331. See also Bratton, "Berle", p. 754; George W. Dent, "Toward Unifying Ownership and Control in the Public Corporation", *Wisconsin Law Review* [1990], 881, 881.

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being "the erroneous belief that America led in divorcing ownership from control."[6] Santos and Rumble, in a 2006 article, highlighted the ownership stakes commercial banks hold in large U.S. public companies through trust businesses they operate, remarking "the extent of banks' control over firms' voting rights…is surprising given the often-claimed separation between banking and commerce in the United States."[7] Holderness, in a forthcoming article entitled "The Myth of Diffuse Share Ownership in the United States" relied on his research on ownership patterns in a sample of publicly traded companies to argue "that most public corporations in the U.S. have large percentage shareholders, and the ownership concentration of U.S. corporations is similar to the ownership concentration of corporations elsewhere."[8]

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[6] Leslie Hannah, "The Divorce of Ownership from Control from 1900: Re-calibrating Imagined Global Historical Trends", *Business History* 49 (2007), 404, 423.

[7] João A.C. Santos and Adrienne S. Rumble, "The American Keiretsu and Universal Banks: Investing, Voting and Sitting on Nonfinancials' Corporate Boards" *Journal of Financial Economics* 80 (2006), 419, 436.

[8] Clifford G. Holderness, "The Myth of Diffuse Ownership in the United States", forthcoming *Review of Financial Studies*, 3 (cites are from a 2006 version of the paper).

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Using Hannah's chosen reference date of 1900 as our departure point,[9] we revisit Berle and Means' classic analysis and put into context the arguments advanced by Hannah, Santos and Rumble and Holderness. In so doing we take into account sources now largely neglected. For instance, while Holderness has said the 1980s yielded "(t)he first papers to study ownership concentration after (a) fifty-year hiatus",[10] we discuss various empirical studies of ownership and control conducted between the mid-1930s and 1980. Our literature survey indicates that U.S. corporate governance has never been characterized by a wholesale divorce between ownership and control. On the other hand, the United States was not the 1900 haven of family capitalism that Hannah suggests. Likewise banks have never been as influential as stockholders as Santos and Rumble imply nor has blockholding been as pervasive as Holderness indicates. Thus, the Berle and Means orthodoxy remains a valid starting point for analysis of U.S. corporate governance, both in historical and contemporary terms.

I. 1900-1915

The United States reputedly experienced a "corporate revolution" between 1880 and 1930, characterized by the closely held companies that dominated most industries giving way to large publicly traded corporations in which professional

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9 There is little data available on the position during the 19th century. For an exception, see Eric Hilt, "When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century" *Journal of Economic History* 68 (2008) 645.

10 Holderness, "Myth", p. 28.

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managers moved to the forefront.[11] Chandler argues the crucial transformation had occurred by World War I, saying that by this point the United States had, as compared with other economies, more extensive managerial hierarchies and a more clear-cut separation of ownership and management.[12] Hannah, in his 2007 paper, challenges this version of events, chiding "those with faulty memories (who) reconstruct the financial and business past to match the capital market present. Some historians, lawyers and economists even persuaded themselves that the USA had invented this aspect of modern capitalism…."[13] He aims to set the record straight, focusing on the ownership structure of railways, utilities and industrial companies in the U.S. and three major European economies, Britain, France and Germany. His verdict is that as

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11 Walter Werner, "Corporation Law in Search of its Future", (1981) 81 *Columbia Law Review* 81 (1981) 1611, 1641-42; Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (Oxford, 1992), 93-97; William G. Roy, *Socializing Capital: The Rise of the Large Industrial Corporation in America* (Princeton, N.J., 1997), 3, 17-18.

12 Alfred D. Chandler, "The United States: Seedbed of Managerial Capitalism" in Alfred D. Chandler and Herman Daems (eds.), *Managerial Hierarchies: Comparative Perspectives on the Rise of the Modern Industrial Enterprise* (Cambridge MA., 1980), 9; Alfred D. Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge, MA., 1990), 52, 84-85.

13 Hannah, "Divorce", p. 425.

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of 1900 "the contemporary extremes (were) substantial divorce of ownership and control (London) and persistent personal capitalism (New York)."[14]

Hannah performs admirable detective work on a time period that is "a statistical dark age."[15] Nevertheless, in various respects he pushes his argument too hard. Hannah, to make his case that the U.S. was a stock market laggard, relies on data from 1900 indicating the U.S. had far fewer companies with listed equity than Britain, France and Germany and ranked a poor third in aggregate market capitalization per capita and aggregate market capitalization/G.D.P., finishing barely ahead of Germany.[16] Hannah, however, sells the United States short in so doing by failing to take account of the full range of stock markets that were in operation, replicating a shortcoming that Sylla identified with empirical work done by Rajan and Zingales which purported to show that the United States had underdeveloped financial markets in global terms as of 1913.[17]

Specifically, Hannah fails to make any allowance for the fact that the London Stock Exchange and the New York Stock Exchange (N.Y.S.E.), the U.K. and U.S. stock markets he focused on, had radically different policies concerning listing

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14 Ibid., 421.

15 Ibid., 415.

16 Ibid., 406.

17 Richard Sylla, "Schumpeter Redux: A Review of Raghuram G. Rajan and Luigi Zingales's *Saving Capitalism from the Capitalists*", *Journal of Economic Literature* 44 (2006), 391, 401.

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securities for trading. Whereas the London Stock Exchange generally left its members free to deal in whatever financial instruments they chose, the New York Stock Exchange was selective in the securities it quoted, thus driving trading elsewhere and beyond the purview of Hannah's analysis.[18] Hence, while Hannah indicates that as of 1900 there were 123 companies with shares listed on the N.Y.S.E., according to O'Sullivan the total number of companies traded on the Exchange in 1900 was 296 once "unlisted" companies are taken into account and there was a total of 682 companies with shares traded on stock markets throughout the U.S.[19] As O'Sullivan acknowledges, this aggregate figure did not encompass the New York "Curb Market", an outdoor market that only dealt in securities not traded on the N.Y.S.E. As of 1908 there were 157 stocks traded on "the Curb".

An additional difficulty with Hannah's analysis concerns railway companies. Hannah claims as of 1900 "many American railways were under personal control"

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[18] On the N.Y.S.E.'s approach as compared with London's see Lance E. Davis and Robert E. Gallman, *Evolving Financial Markets and International Capital Flows: Britain, the Americas, and Australia, 1865-1914* (Cambridge, 2001), 328, 341; Ranald C. Michie, "The London and New York Stock Exchanges, 1850-1914", *Journal of Economic History* 46 (1986) 171, 185; John C. Coffee, Jr., "The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control", *Yale Law Journal* 111 (2001), 1, 34-39.

[19] See Mary O'Sullivan, "The Expansion of the U.S. Stock Market: Historical Facts and Theoretical Fashions", *Enterprise & Society* 8 (2007), 489, 497, 500, 504, 523.

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and that "board control through dominant shareholdings of a significant railroad remained normal in America."[20] However, as he himself notes, there was in the U.S. railway sector "a lively market for corporate control",[21] in the sense that predominant status was often achieved through the acquisition of shares on the open market. This implies, in turn, there was substantial diffusion of share ownership in the ordinary course of events. As the *New York Times* observed in 1902, "a wide distribution of shares is a direct incitement to idle capitalists" because "It is not very difficult to buy control of a railroad when 'blocks' of its shares are lying about in the hands of investors unaffected by the sentiment of control, and therefore open to the temptation of a good offer."[22]

Data compiled by Herman for the purposes of his 1981 book *Corporate Control, Corporate Power* confirms that there was significant dispersion of voting control among large U.S. railways.[23] Herman provided data on share ownership in 40 large corporations as of 1900, implicitly equating stockholding with voting power, a sensible presumption given that one-share/one-vote arrangements had by then largely displaced various schemes prevalent during the first half of the 19th century that imposed limitations on the voting power a particular shareholder could exercise.[24]

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20 Hannah, "Divorce", pp. 410, 421.

21 Ibid., 411.

22 "The Ownership of Railroads", *New York Times*, April 16, 1902, 8.

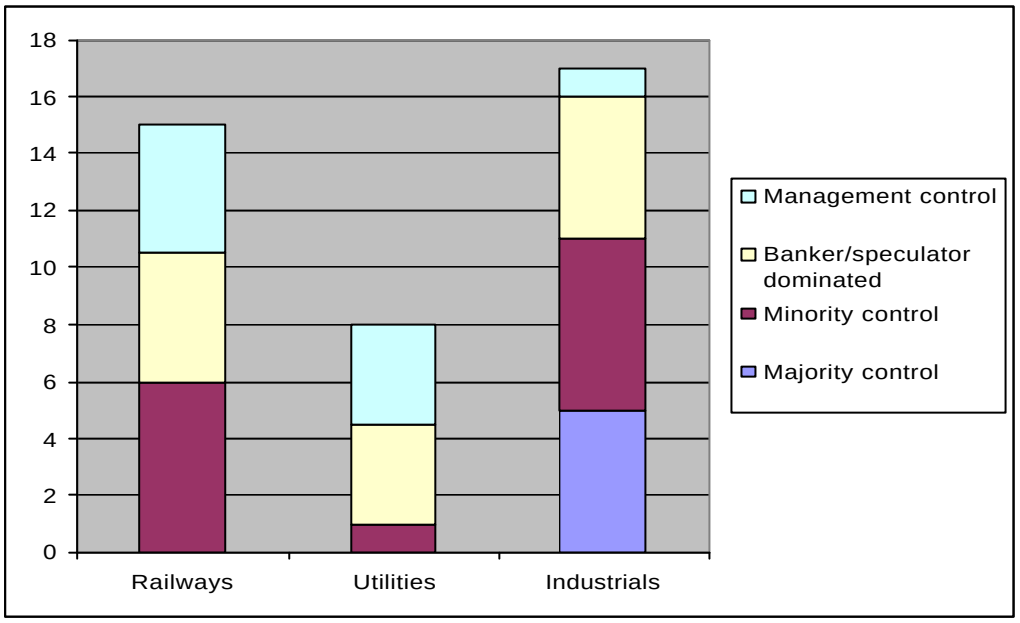
23 Edward S. Herman, *Corporate Control, Corporate Power* (Cambridge, 1981).

24 Colleen Dunlavy, "From Citizens to Plutocrats: Nineteenth-century Shareholder Voting Rights and Theories of the Corporation" in Kenneth Lipartito and

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Herman, who argued his findings showed "the separation of ownership and control was already well advanced by the turn of the century,"[25] found none of the railways he focused on had a majority shareholder (Figure I).

Figure I: Control Classification of a Sample of 40 of the Largest U.S. Non-financial Corporations, 1900-01



Source: Compiled with data from Herman, *Corporate Control, Corporate Power*, p. 67, Appendix B.

Hannah's analysis of industrial companies is also problematic. He observes, comparing the U.S. and Britain, that "Among large industrials, plutocratic family ownership… remained more common in America" and that the typical level of board

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David B. Sicilia (eds.), *Constructing Corporate America: History, Politics, Culture* (Oxford, 2004), 66, 79-84.

[25] Herman, *Corporate*, pp. 67.

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voting control "was plausibly as high as 50 per cent."[26] This claim is contestable both from a British and American perspective. Among the 15 largest British industrial companies as of 1912, there remained a blockholder presence in 14.[27] As for the United States, among the 40 companies in Herman's study, all five that were under majority control (Armour & Co., Consolidated Tobacco, Du Pont Powder, Lackawanna Steel and Standard Oil) were industrial companies.[28] However, contrary to Hannah's claim, majority-owned companies were in a minority even in this sector (Figure I).

Ownership not only was more dispersed in the U.S. as of 1900 than Hannah implies, things were changing, and quicker than Hannah suggests. Hannah refers to "the remarkably fast retreat from personal capitalism in the 1920s USA that Berle and Means chronicled",[29] thus implying little happened earlier. He makes his point by saying observers in Europe were drawing attention to a separation of ownership and control well before Berle and Means while no one was doing the same in the U.S. However, a 1908 article in the *New York Times* referred to "(t)he enormous increase in the number of shareholders in American corporations in the past four years" and indicated that among fourteen of the biggest U.S. companies (seven railroads and

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26 Hannah, "Divorce", p. 421.

27 Brian R. Cheffins, *Corporate Ownership and Control: British Business Transformed*, (Oxford, 2008), ch. 7.

28 Herman, *Corporate*, Appendix B.

29 Hannah, "Divorce", p. 422.

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seven industrial trusts), the shares of only one (Standard Oil) were closely held.[30] Likewise, Walter Lippmann, the well-known journalist and social commentator, said in 1914 "In the last thirty years or so American business has been passing through a reorganization so radical that we are just beginning to grasp its meaning."[31] He elaborated, saying "The managers are on salary, divorced from ownership and from bargaining….The motive of profit is not their personal motive. That is an astounding change."[32]

Changes that led observers in the U.S. to draw attention to a nascent separation of ownership and control were already occurring by 1900, Hannah's reference date. At this point the U.S. was in the midst of its first major merger wave, which peaked between 1897 to 1903 and helped to promote diffusion of share ownership in major industrial enterprises.[33] As Becht and De Long point out, among the 200 largest non-financial corporations in the U.S. that had dispersed share ownership as of 1938, the

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30 "Two Million Partners Own the Corporations", *New York Times*, October 4, 1908, SM1.

31 Walter Lippmann, *Drift and Mastery: An Attempt to Diagnose the Current Unrest* (1914, republished Englewood Cliffs, N.J., 1961), 38.

32 Ibid., 43.

33 Brian R. Cheffins, "Mergers and Corporate Ownership Structure: The United States and Germany at the Turn of the 20th Century", *American Journal of Comparative Law* 51 (2003), 473, 475-83; Lawrence E. Mitchell, *The Speculation Economy: How Finance Triumphed Over Industry* (San Francisco, 2007), 12-13.

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origins of nearly three out of four were traceable back to this merger wave.[34] The key distinguishing feature of the turn-of-the-century consolidation movement was its horizontal orientation, since the mergers typically involved the simultaneous amalgamation of many competitors in a single industry. In the industries affected, the companies acquired were typically locally or regionally based founder/family-dominated competitors. When an amalgamation occurred, the family-oriented governance pattern was disrupted as formerly autonomous proprietors not only sold their controlling stake in return for cash or shares in the amalgamated company but either retired or managed the business subject to the direction of the new owners. A partial dispersal of ownership was one by-product. The *New York Times* said of industrials in 1909 "it is remarkable how widely these shares have been scattered", citing the fact that among 40 leading industrial companies the average shareholding was only 88 shares.[35]

Data on shareholder numbers also suggests there was a trend in favour of dispersion of share ownership at the beginning of the 20th century. The National

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34 Marco Becht and Bradford de Long, "Why Has There Been so Little Blockholding in America" in Randall K. Morck (ed.), *A History of Corporate Governance Around the World: Family Business Groups to Professional Managers* (Chicago, 2005), 613, 646-48 (the list of manufacturing companies, 34 in all, was drawn from the Temporary National Economic Committee study summarized in Table I below).

35 "What 'Small Buyers' Mean to Wall Street", *New York Times*, May 9, 1909, SM2.

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Civic Federation's Distribution of Ownership in Investments Subcommittee compiled shareholder statistics for 75 large corporations from 1901 to 1913 and its unpublished research showed that the aggregate number of shareholders in these firms rose from 141,000 in 1901 to 415,000 in 1913. These findings revealed, according to Mitchell, "a significant spread in share ownership across the population…both directly, in holdings of less than one hundred shares, and indirectly in the form of increased stock ownership by insurance companies and savings banks."[36]

Research by Warshow corroborated the trend the National Civic Federation identified. Based on evidence collected by questionnaire, he listed the number of shareholders in 68 railway, industrial and utility companies as of 1900, 1913 and 1923.[37] Hannah relies on Warshow's evidence to make the point "Britain's medium-sized firms also often had wider stockholdings than American equivalents", citing the fact there was only one non-railway company on Warshow's list that had more than 10,000 shareholders. Warshow's data for 1913 reveals, however, that the trend was markedly upwards. By that point eight of the non-railway companies had 10,000 or more shareholders, the number of shareholders more than doubled in 31 firms and the aggregate number of shareholders had increased from 342,000 to 769,000.

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[36] Mitchell, *Speculation Economy*, pp. 202-203, citing documentation on file in the National Civic Federation Archives, New York Public Library.

[37] H.T. Warshow, "The Distribution of Corporate Ownership in the United States", *Quarterly Journal of Economics* 39 (1924), 15, 21-25, particularly Table II. He also provides data on a sub-set of the companies for 1910, 1917 and 1920.

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The upshot is that Hannah's characterization of the United States of 1900 as a bastion of plutocratic family ownership oversteps the mark. A divorce of ownership and control was by no means the norm and it was a highly personalized era in American capitalism, exemplified by business titans such as J.P. Morgan and John D. Rockefeller.[38] However, ownership had separated from control to a greater extent in the U.S. than Hannah suggests and there was a trend in favour of greater dispersion. Thus, contrary to Hannah's assertions, the U.S. was not a haven for "persistent personal capitalism."

II. 1915-1950

Hannah acknowledges, as mentioned, that stock market capitalism flourished in the U.S. in the 1920s, an observation borne out by the fact that the number of companies traded on stock exchanges increased from 682 in 1900 to 970 in 1915 and 2,659 in 1930.[39] With respect to the composition of stock ownership, particularly dramatic changes occurred during World War I and the immediate post-war period. Data Means compiled on dividends received by taxpayers in different income brackets confirmed the point, showing that between 1916 and 1921 the number of Americans who owned shares rose dramatically and that the distribution of shareholding became more middle-class in orientation.[40] He and Berle described the process in *The*

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[38] Glenn Porter, *The Rise of Big Business 1860-1920*, 2nd ed. (Wheeling, Ill., 1992), 23-24.

[39] O'Sullivan, "Expansion", p. 523.

[40] Gardiner Means, "The Diffusion of Stock Ownership in the United States", 44 (1930) *Quarterly Journal of Economics* 561

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Modern Corporation and Private Property as "a shift in corporate ownership…of almost revolutionary proportions."[41] A sharp wartime increase on taxation of income of the wealthy encouraged those in top income brackets to switch to tax-favored investments while a combination of a booming economy, liberal monetary policy and Liberty Bond marketing campaigns promoting the idea of securities investment prompted middle class investors to buy equities.[42]

When high marginal tax rates began to fall in 1921, the divestment of shares by upper income individuals halted abruptly.[43] However, due to a combination of a buoyant stock market, economic optimism fortified by revelations of new products and technologies, plentiful credit and likely some element of speculative excess, demand for shares continued to broaden.[44] The number of individuals owning stock in publicly traded companies correspondingly grew dramatically, with one estimate

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41 Berle and Means, *Modern*, p. 60.

42 B. Mark Smith, *Toward Rational Exuberance: The Evolution of the Modern Stock Market* (New York, 2001), 64-70; Steven A. Bank and Brian R. Cheffins, "Tax and the Separation of Ownership and Control" in Wolfgang Schön (ed.), *Tax and Corporate Governance* (Berlin, 2008), 111, 136-37.

43 Means, "Diffusion", pp. 573-74; Smith, *Toward*, p. 67.

44 Steve Fraser, *Wall Street: A Cultural History* (New York, 2005), 340-50.

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being that the total increased from half a million in 1900 to 2 million in 1920 and again to 10 million in 1930.[45]

The trend was not lost on contemporaries, who in turn inferred major changes were occurring to the ownership structure of corporations. Veblen argued in his 1923 book *Absentee Ownership* that captains of industry were obsolete, having been displaced by impersonal corporations whose owners focused on earnings and had little or nothing to do with day-to-day management.[46] F. Edson White, the president of Armour and Company, the meatpackers, claimed in a 1924 interview "Big business is rapidly becoming decentralized in ownership – and it desires to be."[47] In 1925, the *New York Times* hailed "a revolution in the ownership of industry", argued a "widespread diffusion of corporate ownership is unquestionably in full swing" and

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45 Jonathan Barron Baskin & Paul J. Miranti, Jr., *A History of Corporate Finance* (Cambridge, 1997), 190. Means estimated in his 1930 article that the number of stockholders rose from 4.4 million in 1900 to 8.6 million in 1917 to 18 million in 1928, but in so doing he made no adjustment for the fact investors in shares often owned stock in more than one company: Means, "Diffusion", p. 595; Smith, *Toward*, p. 65.

46 Thorstein Veblen, *Absentee Ownership and Business Enterprise in Recent Times* (New York, 1923), 59-61, 105-13, 215-16. Unlike Berle and Means, however, Veblen treated the banker, not the hired manager, as the central personality and did not stress the potential conflict of interest between managers and owners:

47 "The Silent Revolution in American Finance", *The Magazine of Wall Street*, December 20, 1924, 262, 263.

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said "the 'closed corporation' of any great size has all but passed away."[48] Ripley, a Harvard economist, asserted in his 1927 book *Main Street and Wall Street* "The prime fact confronting us as a nation is the progressive diffusion of ownership on the one hand and the ever-increasing concentration of managerial power on the other."[49]

While the diffusion of stock ownership was widely discussed during the 1920s, there was a dearth of hard data on ownership concentration within particular corporations. *The Modern Corporation and Private Property* filled the statistical void, which contributed to its subsequent academic prominence.[50] While the book contained several sub-themes (e.g. an emphasis on the growing concentration of economic power in large corporations), its main theme was that the U.S. was entering a new era of economic organization due to the separation of ownership and control in large business enterprises.[51] As they said, "we have reached a condition in which the individual interest of the shareholder is definitely subservient to the will of a controlling group of managers even though the capital is made up of the aggregated

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48 Evans Clark, "15,000,000 Americans Hold Corporation Stock", *New York Times*, November 22, 1925, xx5.

49 William Z. Ripley, *Main Street and Wall Street* (Boston, MA, 1927), 131.

50 George J. Stigler and Claire Friedland, "The Literature of Economics: The Case of Berle and Means", *Journal of Law and Economics* 26 (1983) 237, 241; Thomas K. McCraw, "Berle and Means", *Reviews in American History* 18 (1990) 578, 579.

51 Stigler and Friedland, "Literature", pp. 238-39; McCraw, "Berle", pp. 582, 584.

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contributions of perhaps many thousands of individuals.[52] Berle and Means, borrowing heavily from a 1931 paper by Means,[53] provided data on share ownership patterns in the 200 largest U.S. non-financial companies (Table I) to sustain their argument.

Table I: Empirical Studies of Ownership and Control, 1930s

Author(s), (publication date)	Sample	Data sources	Findings
Berle and Means (1932)[54]	Largest 200 non-financial corporations, ranked by assets, in the U.S. as of 1929 (42 railroads, 52 public utilities and 106 industrials).	Industrial manuals, press reports and "street knowledge".	1) Private ownership: 12 (6%); 2) Majority control: 10 (5%) 3) "Minority control" (individual/small group holding a sufficiently large minority stake to dominate the corporation): 46½ (23%) 4) "Control through legal device" (use of corporate "pyramids" etc. to secure the legal power to vote a majority of the voting shares): 41 (21%) 5) "Management control" (no individual or small group having a minority interest large enough to dominate the affairs of the company): 88½ (45%) 6) In receivership 2 (1%).
Gordon (1938)[55]	155 companies in the Berle and Means sample	Filings by companies with the S.E.C.,	Among the 155 companies, on average the combined stake of directors, officers and important

[52] Berle and Means, *Modern Corporation*, 244. Despite the reference to a "controlling group of managers", Berle and Means did not directly equate management with control. See Book II, chapter V ("The Legal Position of Management), Book II, chapter VI ("The Legal Position of Control"). On this point, see Kenneth Lipartito and Yumiko Morii, "Rethinking the Separation of Ownership from Management in American History" (2007), unpublished working paper.

[53] Gardiner C. Means, "The Separation of Ownership and Control in American Industry", (1931) 46 *Quarterly Journal of Economics* 68.

[54] Berle and Means, *Modern*, pp. 19, 67-85, 108-9.

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	which were listed on a stock exchange, which were not in receivership, which had not been dissolved by merger and for which data was available as of 1935.	generated to comply with disclosure rules introduced in 1935.	holdings outside of management (i.e. 10+%) was 18%. In 86 of the companies the figure was below 10% and in 105 it was below 20%.
T.N.E.C. (1940)[56]	Largest 200 non-financial corporations, ranked by assets, in the U.S. as of 1938.	S.E.C. filings, governmental reports and questionnaires submitted to the corporations, seeking to find out the % of shares held by each of the 20 largest shareholders.	No center of control: 61 (31%); family control: 77 (39%) controlled by other corporations: 56 (28%); joint family/corporate control: 6 (3%). A center of control was deemed to exist either where there was a sizeable concentration of equity in the hands of one or more identified dominant groups or where the dominant group lacked a substantial minority stake but had managerial representation and remaining shareholdings were highly dispersed.

Berle and Means inferred from their data "there are no dominant owners, and control is maintained in large measure from ownership".[57] The evidence on point was

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55 R.A. Gordon, "Ownership by Management and Control Groups in the Large Corporation", *Quarterly Journal of Economics* 52 (1938), 367, 369-70.

56 Raymond Goldsmith *et al.*, *The Distribution of Ownership in the 200 Largest Nonfinancial Corporations*, T.N.E.C. Investigation of Concentration of Economic Power, Monograph No. 29 (Washington D.C., 1940) ("T.N.E.C. Report").

57 Berle and Means, *Modern*, pp 110-11.

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in fact not so clear-cut.[58] Not only did a majority of companies fall outside the "management-controlled" category, but also only 21 of those that qualified did so by meeting the "bright line" standard Berle and Means used to define management control, namely the absence of a shareholder with a voting stake of 20 percent or more, itself a high threshold compared with subsequent studies of ownership and control.[59] The remainder of the "management controlled" list was composed of companies where the locus of control was doubtful but was "presumed" to be held by management and of companies categorized as "ultimately" management controlled on the basis that the major shareholders were themselves corporations that were management controlled.[60]

While Berle and Means' data did not offer unequivocal proof of their separation of ownership and control thesis, research by Gordon soon affirmed their message. Gordon relied on newly available Securities and Exchange Commission (S.E.C.) filings to update Berle and Means' study for the 155 of the 200 companies for which data was available. His finding that the directors, officers and outside investors owning 10% or more of the shares (if any) held collectively, on average,

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58 Dennis Leech, "Corporate Ownership and Control: A New Look at the Evidence of Berle and Means", *Oxford Economic Papers* 39 (1987), 534, 538-39; Yoser Gadhoum, Larry H.P. Lang and Leslie Young, "Who Control US?", *European Financial Management* 11 (2005), 339, 341-42.

59 Berle and Means, *Modern*, pp. 98-101.

60 Berle and Means, *Modern*, pp. 90-97.

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only 18% of the equity led him to conclude "In these very large corporations the separation of both management and control from ownership has proceeded far…."[61]

Additional fresh data soon became available in the form of a 1940 study by the Temporary National Economic Committee (T.N.E.C.), which had been established jointly by Congress and the President to investigate the concentration of economic power in the U.S. The T.N.E.C. assembled data on the percentage of shares owned by the 20 biggest shareholders in the 200 largest non-financial corporations as of 1938 and its efforts were generally praised for both accuracy and reliability.[62] The T.N.E.C. inferred from its findings (Table I) that control through ownership (albeit usually minority control) was the typical situation in the giant corporation, noting that "a wide dispersion of ownership . . . is more apparent than real."[63] Sweezy, in a 1942 article entitled "The Illusion of the 'Managerial Revolution'", made the point even more strongly, saying "it is clear the idea of absentee ownership as usually interpreted is largely a fiction."[64] The T.N.E.C., however, did not have the last word. Instead,

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61 Ibid., pp. 395, 396.

62 Dennis Leech, "Ownership Concentration and Control in Large U.S. Corporations in the 1930s: An Analysis of the T.N.E.C. Sample", *Journal of Industrial Economics* 35 (1987) 333, 333; Philip H. Burch, *The Managerial Revolution Reassessed: Family Control in America's Large Corporations* (Lexington, MA, 1972), 128.

63 T.N.E.C. Report, p. 15.

64 Paul M. Sweezy, "The Illusion of the 'Managerial Revolution'", *Science and Society* 6 (1942) 1, 6 (quoting an article from *Fortune*).

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Gordon, in a 1945 book,[65] re-examined the evidence and concluded that a separation of ownership and control was in fact the norm in large firms.

Gordon said that 24 of the 200 companies the T.N.E.C. studied should have been eliminated from consideration on the basis they were majority-owned by another corporation.[66] With the remaining 176 corporations, the T.N.E.C. found a dominant stockholding group in 118, but Gordon pointed out that in 60 of these 118 "control" was represented by minority interests of less than 30% and that in 33 of these 60 companies the minority interest was divided among two or more families or corporations. He also indicated that in 34 of the 77 companies among the 118 where there was "ownership control" by family groups, nearly half (34 in all) represented the combined holdings of two or more families. Gordon correspondingly inferred "that probably in less than a third of the 176 companies does a small, compact group of individuals exercise 'control'…by virtue of the size of its own stockholdings."[67] Gordon's reassessment of the T.N.E.C. report helped convince numerous observers

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65 Robert A. Gordon, *Business Leadership in the Large Corporation* (Washington, D.C., 1945), 42.

66 Gordon, *Business*, p. 25. To be precise, 21 were excluded on the basis of majority ownership. The other three, all railroads, were excluded because they had been leased to and were controlled by other railroads.

67 Ibid., 43.

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that management control existed to an important extent among the largest U.S. non-financial corporations of the 1930s.[68]

IV. The 1950s, 1960s and 1970s

A. General Trends

Kolko, citing the fact that the managerial class was the largest single group in the stockholding population, claimed in 1962 "To talk of a separation between management and major stockholders in the United States is obviously quite impossible; they are virtually one and the same."[69] His was very much a minority point of view. According to Glasberg and Schwartz, Berle and Means' 1932 book "initiated a 30-year era of almost unquestioned acceptance of the managerial portrait of the American economy."[70]

To illustrate, Mason argued in 1959 that "Almost everyone now agrees that in the large corporation, the owner is, in general a passive recipient; that typically control is in the hands of management; and that management normally selects its own replacements."[71] Berle observed similarly in 1962 "No one…now denies the essential

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68 Robert J. Larner, *Management Control and the Large Corporation* (New York, 1970), 7.

69 Gabriel Kolko, *Wealth and Power in America: An Analysis of Social Class and Income Distribution* (New York, 1962), 68.

70 Glasberg and Schwartz, "Ownership", pp. 311-12.

71 Edward S. Mason, "Introduction", in Edward S. Mason (ed.), *The Corporation in Modern Society* (Cambridge, MA, 1959), 1, 4.

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separation of ownership of the large corporation from its control."[72] Berle indeed contended that the separation of ownership and control accentuated markedly in the 30 years following the publication of *Modern Corporation*, a seemingly logical contention given an increase in the number of retail investors owning shares from 6.5 million in 1952 to 15 million in 1961 and surging demand for shares by institutional investors.[73] The upshot, according to a 1968 *Washington Post* book review, was that "Today's generation of young adults has been nurtured on the idea that corporate ownership is becoming more and more diffused…."[74]

The consensus concerning the separation of ownership and control initially developed despite, as Villarejo said in 1961, "Data on the largest stockholders (being) all too often scanty or badly out of date."[75] Holderness maintains there was a dearth of empirical research up to the 1980s and suggests the absence of fresh empirical data helped to solidify the received wisdom on dispersed ownership.[76] However, various

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72 Adolf A. Berle, "Modern Functions of the Corporate System", *Columbia Law Review* 62 (1962) 433, 437.

73 Smith, *Toward*, p. 179; Berle, "Modern", p. 437.

74 Frank Porter, "The American Plutocracy", Washington Post, August 6, 1968, A10.

75 Don Villarejo, "Stock Ownership and the Control of Corporations (Parts I, II)", *New University Thought*, Autumn 1961, 33, 49; see also *ibid.*, 34; Burch, *Managerial*, p. 9.

76 Holderness, "Myth", p. 28.

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studies conducted in the 1960s and 1970s helped to fill the statistical void, drawing primarily on data companies were required to file under securities law. Publicly traded corporations not only had to comply with rules introduced in 1935 requiring annual disclosure of equity owned by directors, officers and individuals owning 10% or more of the shares but, from 1942 onwards, had to disclose similar ownership data in publicly accessible proxy filings, assuming management asked shareholders to give written permission to vote shares owned.[77] The proxy disclosure threshold for major outside investors was reduced to 5% in 1977.[78]

A number of the studies done in the 1960s and 1970s indicated, in the spirit of Berle and Means, that dispersed ownership was the norm (Table II). Larner, author of the most widely-cited of these studies, claimed his results showed the "managerial revolution" was "close to complete".[79]

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[77] On the 1935 rules, see R.A. Gordon, "Stockholdings of Officers and Directors in American Industrial Corporations", *Quarterly Journal of Economics* 50 (1936), 622, 623, n. 3. On 1942, see Securities and Exchange Commission Release Notice, Release No. 33-2287, 34-3347 (Dec. 18, 1942), Sch. 14A, Item 5(C), E(3).

[78] Securities and Exchange Commission Release Notice, Release No. 33-5609, Release No. 34-11616, Release No. 35-19140 (Aug. 25, 1975); (proposing an amendment dropping the threshold to 5%); Robert D. Hershey, "S.E.C. is Tightening Rule on Disclosing Big Stockholders", New York Times, February 25, 1977, 73 (confirming the reduction).

[79] Robert J. Larner, "Ownership and Control in the 200 Largest Nonfinancial Corporations, 1929 and 1963", *American Economic Review* 56 (1966), 777, 787.

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Table II: Studies Confirming Ownership Dispersion (1960s/1970s)

Author(s), (publication date)	Sample	Data sources	Findings
Larner (1966)[80]	Replicating Berle and Means' sample (i.e. 200 largest non-financial companies measured by book assets) as of 1963.	Corporate proxy statements filed with the S.E.C.; annual reports filed with federal regulators by railroads and utilities.	Measured by "ultimate control" (i.e. identifying ownership structure of corporate owners), the breakdown was: 1) privately owned: 0 2) majority owned: 5 (3% of the total) 3) minority control" (10% or more of voting stock held by an individual, family or corporation): 18 (9%) 4) control "by legal device" (e.g. pyramiding/voting trust): 8 (4%) 5) no base of control: 169 (85%).
Fortune (1967)[81]	1967 *Fortune* 500.	Not revealed.	148 (30%) of the *Fortune* 500 (and 11 of the top 100) were "proprietorial"/family controlled, with control assumed to exist where the largest individual shareholder or a family had a stake of 10% or more.
Larner (1970)[82]	Same as Larner (1966), supplemented by a study of control in the 500 largest non-financial corporations as of 1963.	Same as Larner (1966).	For the 200 largest corporations, much the same as Larner (1966). The breakdown for the 500 largest corporations was 1) privately owned: 5 (1%) 2) majority owned: 18 (4%) 3) minority controlled: 72 (14%) 4) legal device control: 26 (5%) 5) management control: 377 (75%).
Palmer (1972)[83]	488 of the 1965 *Fortune* 500 (i.e. the 500 largest publicly traded industrial corporations measured by sales) for which data was available.	Moody's Industrial Manual; S&P Corporation Records; Value Line Investment Survey; Villarejo, 1961 (Table II).	161 (33%) of the companies were under owner control (the dominant group owned 10% or more of the voting stock); the residual category – labelled management control – was composed of 327 companies (67%).

80 Ibid.

81 Robert Sheehan, "Proprietors in the World of Big Business", *Fortune*, June 15, 1967, 178.

82 Larner, *Management*.

83 John P. Palmer, "The Separation of Ownership from Control in Large US Industrial Corporations", *Quarterly Review of Economics & Business* (1972) 12**,** 55.

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Herman (1981)[84]	200 largest publicly owned non-financial companies, measured by asset size as of 1974.	Govemment studies of ownership (e.g. the Patman Report, discussed in Table IV); documentation filed with the S.E.C. providing ownership data; the financial press; interviews.	Measured by ultimate control, 1) majority owned: 3 (2%) 2) government owned: 1 (0.5%) 3) "financial" control: 1 (0.5%) 4) receivership: 1 (0.5%) 5) minority ownership ("control" group owning 5+% of the stock): 29 (15%) 6) management control: 165 (83%).
Allen (1981)[85]	218 companies, derived from 284 companies ranked among the top 250 industrial companies by assets and sales as of 1975. Companies were excluded if they had CEO turnover (the sample was compiled to study executive pay) or were under minority control by another company.	S.E.C. filings, financial press reports and previous studies of ownership and control.	142 (65%) of the companies were under management control (i.e. no member of the board held a 5+% block of shares). The other 76 companies (35%) fell within one of three categories of "family control" ("direct"/"joint"/"indirect"), each of which presupposed that at least one member of the board held 5+% of the shares.
Demsetz (1983)[86]	50 companies, 30 from the 1975 Fortune 500, 10 randomly selected from outside the Fortune 500 and 10 public utilities, randomly selected	Value Line Survey of Corporations	Directors and officers collectively owned on average 17.5% of the shares, 1973-82.

84 Herman, *Corporate*, pp. 54-65.

85 Michael P. Allen, "Power and Privilege in the Large Corporation: Corporate Control and Managerial Compensation", *American Journal of Sociology* 86 (1981), 1112.

86 Harold Demsetz, "The Structure of Ownership and the Theory of the Firm", *Journal of Law and Economics* 26 (1983), 375, 388.

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Other studies, however, suggested that only a minority of companies had fully dispersed share ownership, which implied that a divorce between ownership and control was not as prevalent as was widely assumed (Table III).

Table III: Studies Questioning Ownership Dispersion (1960s/1970s)

Author(s), (publication date)	Sample	Data sources	Findings
Villarejo (1961)	232 companies among the 250 largest industrial corporations as of 1960 (ranked by assets) that had publicly traded shares and were not subsidiaries in a corporate group.	S.E.C. filings, news sources and information requested from large insurers and investment companies.	There was "potential working control" in 141 (61%) of the companies, with "potential working control" existing if the share ownership of the directors and officers, key institutional investors and other major shareholders collectively exceeded 5%.
Securities and Exchange Commission (1963)[87]	1530 "over the counter" issuers, comprised of a sample of companies in which the broker-dealer community showed interest in 1961.	S.E.C. questionnaire.	In 825 of the sample companies (54%), the 10 largest record holders held collectively 50% or more of the shares. Among the 152 corporations with 3,000 or more shareholders, in 58 (38%) the top 10 record holders owned 30+% of the shares and in 16 (11%) the top 10 owned 50+%.
Chevalier (1969)[88]	200 largest manufacturing companies as of 1965, ranked by sales.	Documentation filed with the S.E.C., the financial press and "numerous private sources".[89]	1) Majority control: 11(6%) 2) Minority control (control group represented on the board of directors and owned 5+% of the shares): 93 (47%) 3) "Dominant influence" (strong evidence of working control but no proof of ownership of 5+% of the shares: 16 (8%) 4) Management

87 Securities and Exchange Commission, Report of the Special Study of Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, 88th Cong., pt. 3,19-20, 30, Chart IX-a.

88 Jean-Marie Chevalier "The Problem of Control in Large American Corporations", *Antitrust Bulletin* 14 (1969) 163.

89 Ibid., 164, n. 7.

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			control (the residual category): 30 (40%).
Burch (1972)	The top 300 companies in the 1965 Fortune 500, ranked by sales, the top 50 merchandising companies (ranked by sales), the top 50 transportation companies (ranked by revenue) and the top 50 banks (ranked by assets).	Financial press, *Moody's* corporate data and monthly filings with the S.E.C. on dealings by directors, officers and major stockholders "only when no other data were available".[90]	Of the 300 Fortune 500 companies 128 (43%) were "probably under family control" (PF) (5+% of the shares held by an individual or family with representation on the board), 48 (16%) were "possibly family" (F?) (signs of family influence – e.g. board representation – but insufficient data to establish control) and 124 (41%) were "probably management" (PM) (no evidence of family control). Of the other 150 companies examined, 62 (41%) were PF, 27 (18%) were F? and 61 (41%) were PM.
Pedersen and Tabb (1976)[91]	597 companies, comprised of the 1970 Fortune 500, the 50 largest retailing firms and 47 other companies (transportation and utilities excluded) otherwise large enough to be among the top 500 industrials.	Filings with the S.E.C. and data reported in the Patman Report (Table IV).	1) "Single party control" (i.e. a single party owning 5+% of the shares): 383 (64%) 2) insider control (management collectively owns 5+% of the shares): 126 (21%); 3) management control (i.e. other companies): 88 (15%).

In 1974 Zeitlin drew upon the "discrepant findings on the alleged separation of ownership and control in the United States" to argue "the 'separation of ownership and control' may well be one of those rather critical, widely accepted pseudofacts with which all sciences occasionally have found themselves burdened and

90 Burch, *Managerial*, p. 28.

91 Lawrence Pedersen and William K. Tabb, "Ownership and Control of Large Corporations Revisited", *Antitrust Bulletin* 21 (1976), 53.

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bedeviled."[92] Similarly, Eisenberg, a leading U.S. corporate law academic, said in a 1976 monograph that "the more recent data indicates that the kind of concentration found by the T.N.E.C. still prevails" and also observed "there is substantial data showing the presence of a significant degree of concentration of shareholdings even where one would least expect it – among the very largest of the very largest."[93]

Nevertheless, the received wisdom on ownership and control remained largely undisturbed. Hetherington said in 1979 "There are two facts about shareholders and managers of publicly held companies on which commentators of all shades agree. The first is the existence of the separation of ownership and control. While the extent of the separation has been questioned (citing Eisenberg), it is generally agreed that absent a proxy fight, takeover attempt, or other special circumstance shareholders of publicly held companies play an entirely passive role in the election of directors."[94] Dent argued similarly a decade later "Berle and Means precipitated what remains the central controversy in corporate law" and "Most commentators accept the Berle-Means thesis."[95]

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92 Maurice Zeitlin, "Corporate Ownership and Control: The Large Corporation and the Capitalist Class", *American Journal of Sociology* 79 (1974), 1073, 1107.

93 Melvin A Eisenberg, *The Structure of the Corporation: A Legal Analysis* (Boston, 1976), 44-45.

94 J.A.C. Hetherington, "When the Sleeper Wakes: Reflections on Corporate Governance and Shareholder Rights", *Hofstra Law Review* 8 (1979), 183, 184.

95 Dent, "Toward", pp. 884, 894.

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Intellectual inertia may help to explain why the inconsistent empirical findings were insufficient to displace the received wisdom concerning ownership and control. In addition, however, the evidence overall suggested diffuse share ownership was a common characteristic in large public companies, even if blockholding was by no means unknown. The 1967 *Fortune* study cited in Table II is instructive. *Fortune*'s take on its findings was that they failed to support "sweeping generalizations" that the "individual entrepreneur or family that holds onto the controlling interest" was "a rare exception, something of an anachronism."[96] *Fortune* was correct in that its study showed a sizeable minority of companies had a major shareholder. However, in general terms the results -- 70% of the sample companies were not "controlled" (i.e. the largest shareholder held a stake of 10% or less) -- lent support to Berle and Means separation of ownership and control thesis.[97]

Also significant is the ownership/control benchmark used in the studies cited in Table III.[98] In each, with the exception of the 1963 S.E.C. study that focused on companies with shares traded "over the counter" rather than large business enterprises, a 5% test was adopted in determining whether there was "control". A 5%

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96 Sheehan, "Proprietors", p. 180.

97 Burch, *Managerial, supra* note xx, 5.

98 Chevalier, "Problem", p. 173 (using the benchmark adopted to explain the differences between his results and those of Larner, "Management"); Demsetz, "Structure", p. 388 (making the general point the number of companies identified as owner-controlled "varies inversely with the toughness of the criterion adopted").

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threshold has been used quite often in studies of patterns of corporate ownership.[99] This, however, is as strict a test as can be realistically adopted, since a smaller stake is unlikely to have a determinative influence on the outcome of shareholder voting. Though it is impossible to do more than speculate, it seems likely that if a 10% benchmark had been adopted in the Table III studies – another popular ownership concentration benchmark – managerial control would have been found to have been more prevalent than not.

B. Banks as Shareholders

Gordon has argued "The Berle-Means corporation of the twenty-first century exhibits the traditional separation of ownership and control" but says the separation has taken on a new form in that institutional shareholders, which can coordinate at much lower cost than dispersed retail investors, are moving to the forefront.[100] This analysis seems plausible currently, since as of 2008 U.S.-based mutual funds, pension funds and insurance companies collectively owned 47% of corporate equity in the

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99 See studies cited in Cheffins, *Corporate Ownership*, pp. 13-16, 22 (U.K. studies published between 1953 and 2007); John Cubbin and Dennis Leech, "The Effect of Shareholding Dispersion on the Degree of Control in British Companies: Theory and Measurement", 93 *Economic Journal* 93 (1983) 351, 351-52 (U.K. and U.S. studies published between 1932-79).

100 Jeffrey N. Gordon, "Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy", 61 (2008) *Vanderbilt Law Review* 475, 477.

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U.S.[101] This was a much more difficult argument to make in the 1960s and 1970s given that, as of 1970, the equivalent figure was only 18%.[102] Drucker did claim boldly in his 1976 book *The Unseen Revolution* that pension funds already controlled most major U.S. industrial corporations.[103] However, a different form of institutional owner was more commonly identified as compromising the separation of ownership and control, namely bank trust departments.

Due to legal restrictions in place as far back as 1864, U.S. commercial banks have typically had little scope to own shares on their own behalf.[104] However, since selection of trust investments is one of the fiduciary duties banks commonly perform and since the trust activities of banks have long been recognized as a service immune from restrictions on direct share ownership, U.S. commercial banks have in fact had

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101 Percentages derived from data set out in http://www.federalreserve.gov/releases/z1/ , series L.213, Corporate Equities, using figures for 2008, Q3 (accessed January 5, 2009).

102 Hawley and Williams, *Rise*, p. 53.

103 Peter Drucker, *The Unseen Revolution* (New York, 1976), 1-2.

104 Roe, *Strong*, Mark J. Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* (Princeton, N.J., 1994), 54-55; Joseph G. Haubrich and João A.C. Santos, "Alternative Forms of Mixing Banking with Commerce: Evidence from American History", *Financial Markets, Institutions and Instruments* 12 (2003), 121, 126-27.

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scope to hold and vote shares in publicly traded companies.[105] Perlo, in a 1958 paper, calculated that trust departments of commercial banks held more shares than all other types of institutional investor put together and remarked upon frequent bank representation on boards of directors.[106] A decade later, the House Committee on Banking and Currency's Subcommittee on Domestic Finance published a study, known as the Patman Report because the subcommittee was chaired by Wright Patman, provided hard data on the share ownership point (Table IV). According to the Patman Report its findings on banks showed "the trend of the last 30 to 40 years toward a separation of ownership from control because of the fragmentation of stock ownership has been radically changed toward a concentration of voting power in the hands of a relatively few financial institutions."[107]

Table IV: Empirical Studies of Ownership Stakes Held by Bank Trust Departments

Author(s), (publication date)	Sample	Data sources	Findings
Patman Report	Share ownership	Survey of banks	Among the 650 companies, in nearly

[105] Santos and Rumble, "American", p. 429; Haubrich and Santos, "Alternative", p. 134-35; Thomas J. Schoenbaum, "Bank Securities Activities and the Need to Separate Trust Departments from Large Commercial Banks", *Journal of Law Reform* 10 (1976-77), 1, 4-5.

[106] Victor Perlo, "'People's Capitalism' and Stock-Ownership", *American Economic Review* 48 (1958), 333, 343-44, 346.

[107] U.S. Congress, House Banking and Currency Committee, Subcommittee on Domestic Finance, *Commercial Banks and their Trust Activities*, 90th Cong., 2nd session (1968) (hereinafter Patman Report), 13.

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(1968).	by trust departments of 49 major commercial banks in the top 500 U.S. industrial companies, the top 50 transportation companies, the top 50 retail trade companies and the top 50 utilities, ranked by sales.	with legal authority to operate trust departments by House Banking and Currency Committee's Subcommittee on Domestic Finance.	one out of three one of the 49 banks held a stake of 5% or more of the common stock and in nearly three out of five one of the banks had representation on the board.
Kotz (1978)[108]	Largest 200 non-financial companies as of 1969 (ranked by assets).	Primarily the Patman Report; S.E.C., *Institutional Investor Study Report* (1971).[109]	Commercial banks "controlled" 52 of the 200 companies, with control either being "partial" (i.e. a bank had voting authority over 5+% of the shares and there was no 10+% shareholder) or "full" (i.e. a bank held voting authority over 10+% of the shares, there was no other 10+% shareholder and the bank either was a leading supplier of capital or had strong representation on the board).[110]
Santos and Rumble (2006)	403 non-financial companies in the S&P 500, as of 2000.	Filings investment managers of banks exercising investment discretion over $100+ million in assets were obliged to make under federal securities regulation.	71 of the 100 largest U.S. banks collectively owned 12% of the shares of non-financial companies in the S&P 500. 20% of the companies had a director employed at one of the 71 banks and these banks held a larger percentage of shares in companies with a banker on board (10.8%) than those without (9.7%).

The Patman Report provided the platform for various challenges to the Berle and Means orthodoxy. In a 1968 interview Berle himself acknowledged the complexion of U.S. capitalism was changing, saying "About fifteen or twenty of the

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108 David M. Kotz, *Bank Control of Large Corporations in the United States* (Berkeley, 1978).

109 Ibid., pp. 89-90.

110 Ibid., pp. 75-79, 108-9.

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big banks through their trust departments could today mobilize voting control of a very large percentage of American industry…."[111] In a 1970 article Fitch and Oppenheimer argued "The dramatic rise in institutional shareholding during the 1960s broke down the effective separation of ownership and control on which the theory of managerialism rested. Once again ownership and control were united in the trust departments of the great Wall Street banks…."[112] Kotz said in his 1978 book *Bank Control of Large Corporations in the United States*, "The Patman Report appeared to weaken the managerial thesis…." and drew on his own empirical analysis of institutional shareholdings in the largest 200 U.S. non-financial companies (Table IV) to argue "ultimate power rests with the bankers who are the major stockholders in and creditors of the modern large corporation. It is still a plutocracy."[113]

Despite garnering considerable attention in the 1960s and 1970s, the bank control theory failed to gain adherents, as critics made a number of telling points.[114] First, bank control theorists advanced generalizations that were too sweeping given the available data. Most strikingly, since 148 of the 200 non-financial corporations

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111 "The New Realities of Corporate Power", *Dun's Review*, December 1968, 43, 44.

112 Robert Fitch and Mary Oppenheimer, "Who Rules the Corporations? Part 2", *Socialist Revolution*, 1, #5, (1970), 61, 68.

113 David M. Kotz, *Bank Control of Large Corporations in the United States* (Berkeley, 1978), 10, 148.

114 On the notion of "imposing criticisms" in this context, see Beth Mintz and Michael Schwartz, *The Power Structure of American Business* (Chicago, 1985), 74.

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Kotz investigated were not under any form of banker control, his claim that "ultimate power" was in the hands of banks lacked a sound empirical foundation. As Herman tartly observed, Kotz's assertions constituted "ideological self-indulgence".[115]

Second, regardless of equity owned or directorships held, bankers generally refrained from becoming involved in corporate decision-making, save for crisis-driven interventions undertaken in the capacity of lender.[116] As Mintz and Schwartz said in a 1985 study of the power structure in U.S. corporations in which they generally subscribed to the notion that "financial hegemony conditions the economic sector", "institutional investing cannot be viewed as a systematic mechanism for establishing bank control or for gaining a position of influence over a set of corporations."[117] The manner in which banks exercised stockholder rights illustrated the defensive stance they took. As Herman said, sizeable stock acquisitions by a bank trust department were "regarded by the portfolio company as a vote of confidence and

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115 Edward S. Herman, "Kotz on Banker Control", *Monthly Review*, September 1979, 46, 54. See also Benjamin J. Klebaner, "Review. *Bank Control of Large Corporations in the United States*", *Journal Economic History* 38 (1978), 1017, 1018; Robert J.C. Lussier, "Review. *Bank Control of Large Corporations in the United States*", *Southern Economic Journal* 46 (1980), 976, 977.

116 Herman, *Corporate*, p. 156; Mintz and Schwartz, *Power*, pp. 76-82; Davita S. Glasberg and Michael Schwartz, "Ownership and Control of Corporations", *American Review of Sociology* 9 (1983) 311, 324.

117 Mintz and Schwartz, *Power*, pp. 100, 103.

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an act of loyalty by an ally who is a reliably friendly investor."[118] This was because, while trust departments of banks would occasionally vote against management to show they were not "patsies", they generally responded to disappointing managerial performance by exercising "the Wall Street rule" and selling out rather than challenging the executives and agitating for change.[119]

There was a similar attitude toward directorships. Herman, in his 1981 book, acknowledged banks were well represented on boards of public companies but argued that "banker presence or absence on boards is a limited and potentially misleading measure of bank power."[120] The standard arrangement, he said was "where eminent bankers serve on the board but have close to zero control. The bankers on mainstream model boards are almost always invited to be on the board by the top insiders of the companies; they are not there because they asked to serve."[121]

Third, it was no accident that banks failed to use their trust departments as a base for establishing control over publicly traded companies. Instead, countervailing

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118 Herman, "Do Bankers", p. 23.

119 Mintz and Schwartz, *Power*, pp. 98-99; Herman, "Kotz", pp. 53-54; Edward S. Herman, "Do Bankers Control Corporations?", *Monthly Review*, June 1973, 12, 23-24.

120 Herman, *Corporate*, pp. 129, 136.

121 Ibid., 134. See also Neil Fligstein and Peter Brantley, "Bank Control, Owner Control, or Organizational Dynamics: Who Controls the Large Modern Corporation?", *American Journal of Sociology* 98 (1992), 280, 285.

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pressures militated against such an effort. For instance, if a bank's trust resources were used to increase bank control over companies for the advantage of the bank's commercial business, the bank could face lawsuits alleging violation of its fiduciary duty to do its best as a prudent investor for its trust customers.[122] Competitive rivalry also came into play.[123] If a bank trust department adopted an investment policy dominated by the goal of controlling large non-financial companies, it ran a serious risk of delivering investment returns inferior to those generated by rivals that practiced diversification and adopted flexible trading strategies based on anticipated risk-adjusted returns. A control-based investment strategy therefore could be a disastrous marketing error. Indeed, bank trust departments, being eager to avoid inconvenient corporate entanglements, typically had internal rules limiting their holdings to less than 10% of a given class of securities.[124]

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[122] Herman, *Corporate*, pp. 149-50; Klebaner, "Review", p. 1018; Paul M. Sweezy, "The Resurgence of Financial Control: Fact or Fancy?", *Monthly Review*, November 1971, 1, 3.

[123] Herman, "Do Bankers", pp. 21-22; Lussier, "Review", p. 978; Steven R. Hunsicker, "Conflicts of Interest, Economic Distortions, and the Separation of Trust and Commercial Banking Functions", *Southern California Law Review* 50 (1977-78), 611, 672.

[124] Robert M. Soldofsky and Warren J. Roe, "Institutional Holdings of Common Stock: 1969, 1972, and New Developments", *Quarterly Review of Economics and Business* 15 (1975), 47, 55.

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Santos and Rumble, for the purposes of their 2006 paper on shares owned and directorships held by bank trust departments, glossed over the prior literature, saying that "little attention" had been paid to "the extensive control that American banks have over firms' voting rights through the trust business" and claiming their findings were "novel for the United States."[125] Nevertheless, their paper harkens back to the heyday of bank control theory. They claimed, based on data they compiled on equity holdings and directorships (Table IV), that major banks made "sizeable equity investments in firms through their trust departments and, as a result, control important voting stakes in these firms" and that "bankers are more likely to join the corporate board of a firm in which their (bank) controls a large voting stake."[126]

It is unlikely Santos and Rumble's research will prompt greater acceptance of bank control theory than previous studies. Bank trust departments remain conservative in nature and pro-management in outlook.[127] Market and legal factors that militate against bank intervention appear unchanged. Moreover, the trust departments of banks have declined in importance as investors in shares of public companies, accounting for 3.5% of ownership of total corporate equity outstanding in 1998 as compared with 10.5% in 1969.[128] The upshot is that investments by bank trust departments have never compromised in any fundamental way the separation of ownership and control in U.S. public companies nor seem likely to do soon.

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125 Santos and Rumble, "American", pp. 421; see also p. 451.

126 Ibid., 435-36, 451.

127 Hawley and Williams, *Rise*, pp. 58-59.

128 *Ibid.*, p. 58.

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V. Bringing the Story up to Date

The separation of ownership and control thesis retains vitality today.[129] For instance, Monks and Minow say in their 2008 text on corporate governance "Today, with rare exceptions like Bill Gates of Microsoft and the late Sam Walton of Wal-Mart, large companies are led by men whose stakes in the company are dwarfed by the holdings of institutional investors."[130] The durability of the Berle and Means orthodoxy is explicable, given the available data. Shleifer and Vishny did say in a 1986 paper examining ownership patterns in Fortune 500 corporations that "large shareholdings are extremely widespread and very substantial where present."[131] Other post-1980 studies of very large U.S. companies, summarized in Table III, likewise indicated there were numerous examples of big firms where an individual, a family or the board of directors owned a dominant voting block. However, this ownership pattern remained the exception to the rule, with the majority of companies in each study falling short of benchmarks of concentrated share ownership.

Very large companies play an outsized role in the U.S. corporate economy. For instance, S&P 500 firms account for approximately 75% of the U.S. equity market by market value despite constituting just over 10% of the 4500 or so U.S.

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129 Gadhoum, Lang and Young, "Who", p. 343.

130 Monks and Minow, *Corporate*, p. 110.

131 Andrei Shleifer and Robert W. Vishny, "Large Shareholders and Corporate Control", *Journal of Political Economy* 94 (1986), 461, 462.

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companies listed on the N.Y.S.E. and traded on the NASDAQ.[132] Also, the 50 most profitable companies in the Fortune 500 as of 2006 accounted for nearly one-quarter of all profits generated by U.S. corporations.[133] Understandably, therefore, evidence concerning ownership patterns in very large companies has perpetuated the idea that a split between ownership and control characterizes U.S. corporate governance.

Table V: Studies of Ownership Dispersion Focusing on Very Large U.S. Companies (e.g. those in the *Fortune* 500), *c.* 1980– 2005

Author(s), (publication date)	Sample	Data sources	Findings
Shleifer and Vishny (1986)[134]	Fortune 500 as of 1980, excluding 44 companies on the basis they were subsidiaries, cooperatives, privately held or had disappeared by merger.	Corporate Data Exchange: Fortune 500.	354 of the 456 sample companies (78%) had a shareholder owning a 5+% stake. On average, the largest shareholder owned 15.4% of the shares and the five largest shareholders owned 28.8%.
Morck, Shleifer and Vishny, (1988)	As with Shleifer and Vishny (1986), omitting a further 85	Corporate Data Exchange: Fortune 500.	The mean combined stake of all board members was 10.6% but the median was only 3.4%. In 255 of the 371 sample companies (69%) the

132 http://www2.standardandpoors.com/spf/pdf/index/SP_500_Factsheet.pdf (last visited October 5, 2008); http://www.N.Y.S.E..com/about/listed/lc_ny_overview.html , entry under Region/United States (last visited Sept. 29, 2008) (80 pages of listed companies with 20 companies per page, save the final page, yielding nearly 1600 companies); http://www.nasdaq.com/reference/nasdaq_facts.stm (last visited Sept. 29, 2008) (3200 companies traded, 335 from outside the U.S.).

133 BEA, *Survey of Current Business*, Table 767 (http://www.census.gov/compendia/statab/tables/08s0767.pdf; "Fortune 500 2006, Most Profitable Companies: Profits", Fortune, April 17, 2006 issue.

134 Shleifer and Vishny, "Large".

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	companies because of the absence of market-based value measures of Tobin's *Q*.		collective board stake was below 10%.
La Porta, Lopez-de-Silanes and Shleifer (1999)[135]	As of 1995, the top 20 firms ranked by market capitalization.	Ownership data filed with the S.E.C., typically for 1997.	16 of the 20 companies lacked a shareholder owning 10% or more of the shares.
Anderson and Reeb (2003)[136]	The S&P 500 at the end of 1992, excluding banks and public utilities (403 companies).	Ownership data filed with the S.E.C.; corporate proxy statements.	262 of the 403 companies (65%) were not "family firms", meaning they lacked a member of the founding family owning shares or sitting on the board. With the 141 family firms (35%), the family owned on average 18% of the equity.
Gadhoum, Lang and Young (2005)[137]	Largest 500 of 3607 U.S. public companies.	Worldscope Global 1996 Discloser; SEC.GOV Internet site.	61% lacked a shareholder owning 10+% of the shares; 86% lacked a shareholder owning 20+%.
Villalonga and Amit (2006) [138]	Firms in the *Fortune* 500 between 1994 and 2000, other than financial services firms and utilities, for which Compustat data on sales, assets and market value was available.	Proxy statements, Spectrum data on institutional holdings, company websites, S.E.C. filings.	336 of 508 companies (66%) were not family firms (i.e. those where the founder or a member of his family was an officer or director). Of the 193 family firms (34%), founders or their families owned 16% of the shares but half used control-enhancing mechanisms (e.g. pyramids or differential voting rights) to bolster their voting power. In 96 (19%) of the 508 companies the founder or their family was the largest shareholder.

135 Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, "Corporate Ownership Around the World", *Journal of Finance* 54 (1999), 471.

136 Ronald C. Anderson and David M. Reeb, "Founding-Family Ownership and Firm Performance: Evidence from the S&P 500", *Journal of Finance* 58 (2003), 1301.

137 Gadhoum, Lang and Young, "Who"

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Holderness acknowledges his findings in "The Myth of Dispersed Ownership" (see Table VI) are dissimilar to what others have reported.[139] It is not surprising his results differ from the sources cited in Table V, which focuses on research on share ownership patterns in very large companies. Holderness' sample was drawn from publicly traded companies of all sizes, not just very large corporations, and it has long been known that big firms have more diffuse share ownership than their smaller counterparts.[140]

More striking is how Holderness' findings differ from the other studies summarized in Table VI, since the companies examined extended well beyond the very largest.[141] His data on the percentage of shares held collectively by directors and

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[138] Belen Villalonga and Raphael Amit, "How Do Family Ownership, Management and Control Affect Firm Value?", *Journal of Financial Economics* 80 (2006), 385.

[139] Holderness, "Myth", p. 7.

[140] Sweezy, "Illusion", p. 5; Villarejo, "Stock I/II", p. 52; Palmer, "Separation", p. 58.

[141] Ownership-oriented research accelerated beginning in the 1980s, due primarily to the emergence of electronic databases with commercially available share ownership data. Tables III and IV are not intended to provide a comprehensive survey of the relevant studies. For instance, samples biased in favor of companies with particular characteristics have not been included, such as Laura C. Field and Dennis P. Sheehan, "IPO Underpricing and Outside Blockholdings", *Journal of Corporate Finance* 10 (2004) 263 (firms that had recently carried out IPOs); David J. Denis, Diane K. Denis

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officers is broadly consistent with the other studies. On the other hand, while Holderness found that 96% of his sample companies have a shareholder owning 5% or more of the shares, others reported a sizeable proportion of companies lacked a shareholder of this sort. Particularly notable is the size of the largest block. Holderness found among his sample companies that had a blockholder – again virtually all of them – the largest shareholder held on average more than one-quarter of the shares. This sort of stake is much larger than that found by Heflin and Shaw (blockholders collectively held on average 12% of the shares) and by Bhagat *et al.* (nearly four out of five of the companies in their sample lacked a shareholder owning 10+% of the shares for a period of two years or longer).

Table VI: Studies of Ownership Dispersion covering a Broader Range of U.S. Companies, *c.* 1980– 2005

Author(s),	Sample	Data sources	Findings

and Atulya Sarin, "Ownership Structure and Top Executive Turnover", *Journal of Financial Economics* 45 (1997) 193 (firms experiencing CEO turnover); Manohar Singh and William N. Davidson, "Agency Costs, Ownership Structure and Corporate Governance Mechanisms", *Journal of Banking and Finance* 27 (2003), 793 (sample biased strongly in favor of companies that had diversified).

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(publication date)			
Demsetz and Lehn (1985)[142]	The 511 US companies for which the authors could obtain detailed ownership, accounting and security price data as of 1980 (average market capitalization: $1.2 billion).	Corporate Data Exchange, which relied on S.E.C. documentation to prepare ownership data.	Among the sample, the largest five shareholders collectively owned, on average, 24.8% of the shares and the largest 20 owned 37.7%.
Mikkelson and Partch (1989)[143]	240 companies that were a cross-section of companies traded on N.Y.S.E. or the American Stock Exchange and were included in the *Moody's Industrial Manual*.	Annual proxy statement for each firm in the sample.	The mean proportion of votes controlled by directors and senior officers was 20% in 1973, 21% in 1978 and 19% in 1983. In 60% of all instances, the directors and officers collectively held under 20% of the shares.
La Porta, Lopez-de-Silanes and Shleifer (1999)[144]	As of 1995, the smallest 10 firms with a market capitalization of at least $500 million.	As with La Porta *et al.*, Table III.	Half of the 20 "medium-sized" companies lacked a shareholder owning 10+% of the shares. 18 of the 20 lacked a shareholder owning 20+% of the shares.
Holderness, Kroszner and Sheehan (1999)[145]	4202 corporations traded on the N.Y.S.E., AMEX and NASDAQ for which Compact Disclosure (see Data sources) offered complete data on share ownership by directors and officers as of	Compact Disclosure, which contained information from proxy statements and annual reports.	Directors and officers of the 4202 corporations collectively owned, on average, 21% of the shares. The figure dropped to 1.5% for the largest 420 companies.

142 Harold Demsetz and Kenneth Lehn, "The Structure of Corporate Ownership: Causes and Consequences", *Journal of Political Economy* 93 (1985), 1155.

143 Wayne H. Mikkelson and M. Megan Partch, "Managers' Voting Rights and Corporate Control", *Journal of Financial Economics* 25 (1989) 263.

144 La Porta, *et al.*, "Corporate".

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	1995.		
Heflin and Shaw (2000)[146]	260 companies listed on the N.Y.S.E. with transaction data available in the 1988 Institute for the Study of Securities Markets database, having an average market capitalization of $3.4 billion.	Annual proxy statements.	The average number of blockholders (i.e. shareholders owning 5+% of the shares) in the sample was two and the average total block ownership was 12%. 87 of the companies (34%) had no blockholder.
Becht (2001) [147]	1309 corporations listed on the N.Y.S.E. and 2831 listed on NASDAQ.	Global Researcher Database as of May 1997, which usually identified blockholders by use of corporate proxy statements.	641 of 1309 (49%) N.Y.S.E. companies lacked a blockholder owning 5+% of the shares and 886 (68%) lacked a blockholder owning 10+% of the shares. The equivalent figures for NASDAQ were 1188/2831 (42%) and 1533/2831 (54%) respectively.
Bhagat, Black and Blair (2004)	1534 publicly traded companies, composed of the largest 1000 non-financial firms and 100 largest financial firms as of 1983 and 1992.	CDA/Spectrum, which compiled information from S.E.C. filings into computer-readable form.	Of the 1534 companies in the sample, the number with a "relational investor" (ownership of 10+% for two or more years) increased from 259 (17%) in 1983 to 459 (30%) in 1992. The average number per year for the 1983-92 period was 343 (22%).
Gadhoum, Lang and Young (2005)[148]	3607 U.S. public companies.	Worldscope Global 1996 Discloser; SEC.GOV Internet site.	40% lacked a shareholder owning 10+% of the shares; 72% lacked a shareholder owning 20+%.

145 Clifford G. Holderness, Randall S. Kroszner and Dennis P. Sheehan, "Were the Good Old Days That Good? Changes in Managerial Stock Ownership Since the Great Depression", *Journal of Finance* 54 (1999), 435.

146 Frank Heflin and Kenneth W. Shaw, "Blockholder Ownership and Market Liquidity", *Journal of Financial and Quantitative Analysis* (2000) 35, 621.

147 Marco Becht, "Beneficial Ownership in the United States" in Fabrizio Barca and Marco Becht (eds.), *The Control of Corporate Europe* (Oxford, 2001), 285.

148 Gadhoum, Lang and Young, "Who"

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Holderness (2008)[149]	Random sample of 375 corporations traded on the N.Y.S.E., AMEX and NASDAQ for 1995, with an average equity capitalization of $1.1 billion.	Annual proxy statements, supplemented by other S.E.C. filings.	360 of the 375 (96%) of the companies in the sample had a blockholder, defined as a shareholder owning 5+% of the shares. On average, aggregate stock ownership of all blockholders was 39%, with the collective stake of directors and officers averaging 24%. When a firm had a blockholder, the average size of the largest block was 26%. Families held the largest stake in 53% of the companies with blockholders.

A "size effect" helps explain the discrepancy because Holderness' sample incorporated more small publicly traded firms than did Heflin and Shaw's (an average market capitalization of $1.1 billion vs. $3.4 billion) and Bhagat *et al.*'s (a sample of 1100 large companies vs. a cross-section of approximately 4300 companies). A "size effect" cannot be used to explain, however, the discrepancy between Holderness' data and the findings of Becht and of Gadhoum, Lang and Young, who sought offer a comprehensive analysis of ownership and control of all listed U.S. corporations. As Holderness points out, his sample "is essentially a random sub-set of Becht's sample".[150]

It may be that Holderness' data collection efforts were superior to those of Becht and of Gadhoum, Lang and Young because he hand-collected data company-by-company using filings made under securities law rather than relying on commercial data providers.[151] However, the findings of Becht and Gadhoum, Lang and Young are corroborated by additional evidence indicating blockholding levels

149 Holderness, "Myth".

150 Ibid., 9.

151 Ibid., 5, 9, discussing Becht's study. Holderness does not cite the Gadhoum, Lang and Young study.

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among the full range of publicly traded U.S. companies are not as high as Holderness' findings suggest. In 2004, S&P reweighted its stock market indices to take into account the "investable weight factors" (IWFs) of the companies involved, attributing a reduced weighting to companies with "strategic" shareholders whose ownership of shares depended on concerns such as maintaining control rather than the economic fortunes of the company (i.e. holdings by one corporation in another, government holdings and stock ownership by board members, founders and current and former directors and officers).[152] For companies where an investor falling into one or more of these three groups held a voting stake exceeding 10%, the holdings of that group were excluded from the share count to be used in index calculations and the IWF was reduced accordingly.[153] Companies lacking any such blockholders were given an IWF of 1.00.

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[152] Standard & Poor's, "Press Release: S&P Releases Details of Full Float Adjustment for U.S Indices", Sept. 28, 2004, available at http://www2.standardandpoors.com/spf/pdf/index/092804FloatFinalPR.pdf (accessed September 8, 2008).

[153] Standard & Poor's, "Float Adjustment FAQ", Sept. 28, 2004, 5, available at http://www2.standardandpoors.com/spf/pdf/index/Float%20FAQ.pdf (accessed September 8, 2008).

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Among the S&P 500, 395 companies (79%) had IWFs of 1.00 as of 2004.[154] This finding is not particularly surprising, given that studies undertaken since the 1960s have indicated that among the largest companies in the U.S. blockholders are by no means unknown but are not the norm (Tables II, V). More striking was the pattern in S&P's MidCap 400, which encompasses 400 companies having a market capitalization of between $1 billion and $4.5 billion and a public float of 50% or more, and the S&P SmallCap 600, which encompasses 600 companies having a market capitalization between $250 million and $1.5 billion and the same sized public float.[155] While Holderness' findings imply most of the companies in these indices would have had an IWF of less than 1.00, among the MidCap 400 only 120 (30%) qualified and among the SmallCap 600, this was the case with only 214 firms (36%).[156] The discrepancy can be accounted for partly on the basis that S&P did not treat institutional investors as "strategic" shareholders for the purpose of calculating IWFs, but with families being the largest blockholder in just over half of Holderness' companies (Table VI), institutional investors were not the driving force behind his findings.

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154 Standard & Poor's, Standard & Poor's, "Impact of Float Adjustment of U.S. Indices", Sept. 28, 2004, 18, available at http://www2.standardandpoors.com/spf/pdf/index/Float%20Impact.pdf (accessed September 8, 2008).

155 http://www2.standardandpoors.com/ , link to S&P MidCap 400 and S&P SmallCap 600 under United States (accessed September 9, 2008).

156 Standard & Poor's, "Press Release"; Standard & Poor's, "Impact", p. 18.

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VI. Conclusion

The proposition that a separation between ownership and control is a hallmark of U.S. corporate governance has been subjected to considerable criticism recently. Should the conventional wisdom be discarded? It appears not. While Hannah argues that as of 1900 the United States was dominated by a persistent personal capitalism to an extent unmatched by leading European industrialized countries, there were numerous publicly traded U.S. companies by this time and ownership was beginning to split from control in the largest corporations. As Santos and Rumble point out, banks, through their trust departments, currently have sizeable equity portfolios and have representation on the boards of numerous public companies. Nevertheless, banks have historically adopted a "hands off" approach to corporate governance in companies in which their trust departments own shares and there is little reason to expect the pattern to change. Holderness, in an empirical study of a cross-section of the full range of companies traded on the N.Y.S.E. and NASDAQ, found fully dispersed ownership was extremely rare. Other evidence on ownership patterns encompassing small and mid-size public companies indicates, however, that blockholding is not as prevalent as Holderness' findings imply.

While recent critiques of the received wisdom fail to justify a fundamental reappraisal of corporate governance arrangements in U.S. public companies, a review of the literature reveals the pattern of ownership and control in U.S. public companies has been anything but monolithic. Though Berle and Means are commonly credited with proving empirically that ownership was divorced from control in large U.S. companies, in fact fewer than half of the 200 companies they focused on were under what they categorized as managerial control. The T.N.E.C.'s 1940 study verified that

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blockholding remained commonplace in big firms. Share ownership likely became more widely dispersed following World War II but studies of ownership and control carried out in the 1960s and 1970s offered only qualified endorsements of the separation of ownership and control thesis. The pattern with more recent studies is similar.

While there clearly has never been a total divorce between ownership and control in U.S. public companies, the premise so commonly associated with Berle and Means is more than a "pseudofact" or "myth". Studies of the largest U.S. public companies extending back at least to the 1960s generally show that, while blockholders are by no means unknown, the typical very large firm lacks a shareholder owning a dominant stake. The largest companies are very much giants among their corporate brethern. As a result, a separation between ownership and control remains an appropriate reference point for those seeking to come to terms with the historical development of U.S. corporate governance and current arrangements in public corporations.

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