THE ORIGINS OF THE MARKET FOR CORPORATE CONTROL

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This Article examines the origins of the market for corporate control in the United States. The standard historical narrative is that the market for corporate control took on its modern form in the mid-1950s with the emergence of the cash tender offer. Using hand-collected data from newspaper reports, we show that there in fact were numerous instances during the opening decade of the twentieth century where a bidder sought to obtain voting control by purchasing shares on the stock market. Moreover, share-for-share exchange tender offers likely were used to make takeover bids as early as 1901 and cash tender offers can be traced back to at least the mid-1940s. We argue that the way in which cash tender offers came to dominate the market for control after World War II can be explained primarily by changes in the pattern of share ownership and reduced opportunities bidders had for "managing" the stock price of intended targets.

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I. INTRODUCTION

The market for corporate control featured prominently in Professor Larry Ribstein's early scholarship as he established himself as a leading corporate law academic in the late 1980s.[1] Perhaps because takeover activity went through a "bear market" in the early 1990s,[2] Larry subsequently turned to other themes. Nevertheless, he did not forsake takeovers entirely. Indeed, the market for corporate control featured prominently in "Imagining Wall Street," a 2006 article where Larry used Oliver Stone's 1987 movie *Wall Street* as a lens through which to analyze the theories and assumptions driving Hollywood's coverage of business issues.[3]

In "Imagining Wall Street," Larry contextualized his analysis by providing an historical overview of takeover bids. He emphasized particularly how Michael Milken's development of the high-yield ("junk") bond market in the early 1980s greatly increased the financial firepower available to potential bidders.[4] But Larry noted that the story began well before this. He traced it back to the mid-1960s, when Henry Manne famously identified and labelled the "market for corporate control."[5] Larry noted that a key step in the emergence of the market for corporate control was that bidders learned that the tender offer, which he characterized as "an advertisement in the newspaper offering to buy at least a controlling share for a specified price,"[6] was a better way to proceed than the proxy contest, which, as Larry indicated, involves "a campaign to get the shareholders to turn over their votes."[7]

Larry's takeover chronology corresponds with the standard historical narrative. The general consensus is that the market for corporate control only emerged as a meaningful phenomenon at about the time

1. *See, e.g.*, Henry E. Butler & Larry E. Ribstein, *State Anti-Takeover Clauses and the Contract Clause*, 57 U. CIN. L. REV. 611 (1988); Larry E. Ribstein, *Takeover Defenses and the Corporate Contract*, 78 GEO. L.J. 71 (1989).

2. John C. Coates IV, *Measuring the Domain of Mediating Hierarchy: How Contestable are U.S. Public Corporations?*, 24 J. CORP. L. 837, 859 (1999).

3. Larry E. Ribstein, *Imagining Wall Street*, 1 VA. L. & BUS. REV. 165 (2006).

4. *Id.* at 172–75.

5. *Id.* at 170; *see* Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

6. Ribstein, *supra* note 3, at 170.

7. *Id.*

Manne coined the term.[8] For instance, a *Financial Times* columnist recently said of Alfred Sloan (president of General Motors from 1923 to 1956) and his contemporaries, "[t]hese figures of the past never imagined that their positions would be threatened by unwanted takeover activity."[9] Yet a closer look at the history of General Motors illustrates that a market for corporate control was actually in operation well before the conventional wisdom suggests. William Durant, a promoter-minded automobile manufacturer, gained majority control of General Motors in 1915 without board consent through a combination of buying shares in the open market and an offer to exchange shares in General Motors for shares in the Chevrolet Motor Company, which Durant cofounded in 1911.[10]

As this Article shows, the 1915 contest for control of General Motors was not an isolated incident. During the opening decades of the twentieth century there were numerous instances, particularly in the railway sector, where a bidder sought to obtain voting control without the consent of the target's board by purchasing shares on the stock market. Moreover, exchange tender offers such as Durant's and Chevrolet's, where shareholders in a target company were invited to offer ("tender") their shares in exchange for shares in the acquiring company, apparently were used to make takeover bids as early as 1901.[11] We also show that the history of the cash tender offer—a public invitation to a target corporation's shareholders to buy for cash shares tendered at a set price[12]—can be traced back to at least 1944.

Part II of this Article surveys prior literature on the history of the market for corporate control. Part III presents empirical evidence on attempts to obtain control of companies through purchases of shares on the open market. Part IV identifies early efforts to use tender offers to obtain voting control without the endorsement of the target company's board. We find that share exchange tender offers likely predated cash tender offers, which is surprising given that cash tender offers ultimately became the technique of choice among bidders. Part V considers why the cash tender offer did not catch on sooner and suggests that patterns of share ownership and the scope available for "managing" the stock price of intended targets are likely to have been important factors. Part VI concludes.

8. *See infra* notes 13–17 and related discussion.

9. John Kay, *Why Business Loves Capital Markets, Even if it Doesn't Need Capital*, FIN. TIMES (London), May 14, 2013.

10. AXEL MADSEN, THE DEAL MAKER: HOW WILLIAM C. DURANT MADE GENERAL MOTORS 142–44, 158–63 (1999); EARL SPARLING, MYSTERY MEN OF WALL STREET 34–35 (1930).

11. *See infra* notes 87-93 and accompanying text.

12. Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973).

II. PRIOR LITERATURE

Larry Ribstein was in good company when he identified Manne's hailing of the market for corporate control as the beginning of an era. Gregg Jarrell and Michael Bradley observed in a 1980 paper that "[c]ash takeover bids were very rare in the United States prior to the 1960s, but they burst onto the financial scene in the mid-1960s."[13] Oliver Williamson remarked in a 1984 article, "[i]t has often been noted that tender offers increasingly replaced proxy contests as a takeover technique beginning in the late 1950's."[14] John Pound elaborated on this theme in a 1993 article, identifying 1956 as the date "a new corporate governance mechanism arose in the U.S. market: the cash tender offer for shares" and observing that, "[b]y the late 1960s and 1970s, tender offers had come to dominate the landscape of corporate governance and control."[15]

Though 1956 was a crucial date from Pound's perspective, he acknowledged that there were prior instances where "raiders" sought to obtain control of companies without the consent of a target's board by purchasing blocks of shares privately and/or rapid buying on the open market.[16] Similarly, John Coates, while aligning himself with the received wisdom by observing in a 1999 article that "[a]t least since the 1950s, most boards of U.S. public corporations have faced a serious threat from the shareholders: 'the market for corporate control,'"[17] acknowledged that control of widely-held firms had in principle always been available on the market. He illustrated his point by drawing attention to a takeover battle for the Northern Pacific railway in 1901 which was characterized by frantic open market purchasing of shares.[18] Ed Rock identified in a 2001 article an even earlier takeover battle, namely Cornelius Vanderbilt's attempt in 1868 to obtain control of the Erie Railroad in the "Erie War" by buying a majority of the shares on the open market.[19]

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13. Gregg A. Jarrell & Michael Bradley, *The Economic Effects of Federal and State Regulations of Cash Tender Offers*, 23 J.L. & ECON. 371, 371 n.1 (1980).

14. Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1224 (1984).

15. John Pound, *The Rise of the Political Model of Corporate Governance and Corporate Control*, 68 N.Y.U. L. REV. 1003, 1015, 1017 (1993).

16. *Id.* at 1013.

17. Coates, *supra* note 2, at 849–50.

18. *Id.* at 850. The contest led to the creation of the Northern Securities Company, a holding company that combined the interests of J.P. Morgan and James J. Hill (i.e., the Great Northern Railroad) on one side and E.H. Harriman (i.e., Union Pacific) on the other after their stock market contest ended in a stand-off. *See* BALTHASAR HENRY MEYER, A HISTORY OF THE NORTHERN SECURITIES CASE (1906); MAURY KLEIN, THE LIFE & LEGEND OF E.H. HARRIMAN 225–39, 307–12 (2000). Pursuant to a 1904 decision of the U.S. Supreme Court, the Northern Securities Company was dissolved under an early application of the Sherman Act: Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890); N. Sec. Co. v. United States, 193 U.S. 197 (1904).

19. Edward B. Rock, *Encountering the Scarlet Woman of Wall Street: Speculative Comments at the End of the Century*, 2 THEORETICAL INQUIRIES L. 237, 242–45, 251–56 (2001). Erie directors Daniel Drew, Jay Gould, and James Fisk, each of whom achieved considerable notoriety as Wall Street speculators, thwarted Vanderbilt's efforts by unscrupulously issuing a large number of convertible Erie bonds and transforming them into shares. *See also* JOHN STEELE GORDON, THE SCARLET WOMAN OF WALL STREET 156–73 (1988).

While the existence of a rudimentary pre-1950 market for corporate control has been acknowledged, its operation has had very little analysis. The work of business historian Leslie Hannah is a notable exception. In a 2011 multi-country survey of the history of contested takeover bids, Hannah concludes that while there was no active market in corporate control in most U.S. industries prior to the 1950s, the railway sector was an exception.[20] There were, according to Hannah, "many examples of contested bids" for railways in the first half of the twentieth century, with the 1901 battle for Northern Pacific being the most prominent.[21] These early bidders, Hannah says, sought to obtain voting control by way of stock market purchases and direct approaches to significant shareholders rather than by using modern-style cash tender offers.[22]

III. THE EARLY TWENTIETH CENTURY: USING THE STOCK MARKET TO OBTAIN CONTROL

A. General Trends

As part of a 2011 study of shareholder activism in the first half of the twentieth century, we carried out what to our knowledge is the only empirical analysis of pre-1950 U.S. takeover contests.[23] We used the *ProQuest Historical Newspapers* database to search major daily newspapers, including the *New York Times* and the *Wall Street Journal*, over the period 1900–1949 for hostile "open market bids" ("OMBs"), which are instances where an attempt was made, without consent from a target company's board, to buy sufficient shares in the market to acquire control of a public company.[24] We excluded mere rumors,[25] cases with no evidence of board opposition, instances where a party merely sought to acquire a noncontrolling stake, and cases where private purchases of shares effectively delivered voting control.[26] In this way we identified eighty-two bids for control launched by way of open market purchases of shares on the stock exchange, quite often supplemented by private purchases negotiated with stockholders known to own a significant stake.

20. Leslie Hannah, *The Shareholders' 'Dog' That Did Not Bark: Contested Takeover Bids in Long-Run Comparative Perspective, in* MEN, WOMEN, AND MONEY: PERSPECTIVES ON GENDER, WEALTH, AND INVESTMENT 1850–1930 228, 233, 238 (David R. Green, et al., eds., 2011).

21. *Id.* at 233. On the Northern Pacific takeover contest, *see supra*, note 18 and accompanying text.

22. Hannah, *supra* note 20, at 237–38, 238 n.27 ("Cases of open public bids at a uniform price direct to shareholders in the modern manner appear rare . . . .").

23. John H. Armour & Brian R. Cheffins, *Origins of "Offensive" Shareholder Activism in the United States*, *in* ORIGINS OF SHAREHOLDER ADVOCACY 253, 269–71 (Jonathan G.S. Koppell ed., 2011).

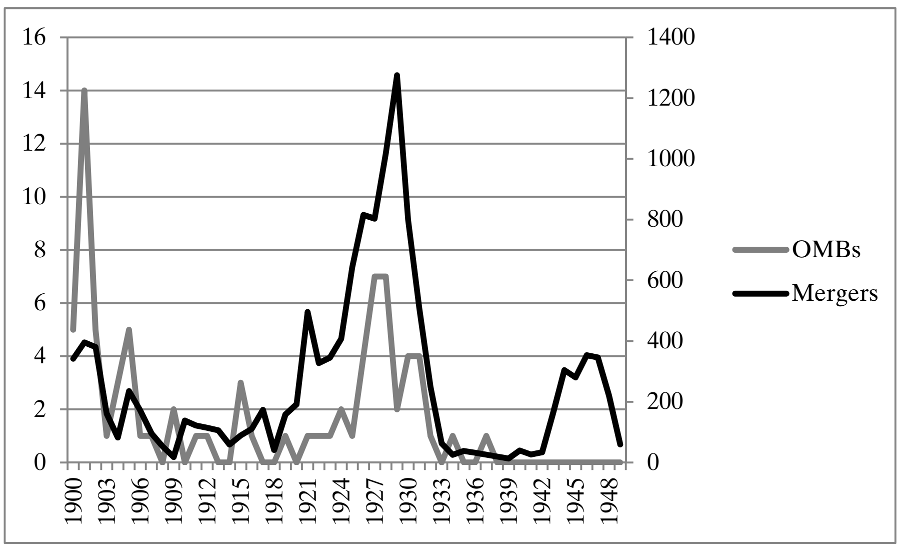
24. The initial search terms used were acquire* w/20 control OR secure* w/20 control OR obtain* w/20 control OR attempt* w/20 control AND "open market" AND stock OR shares.

25. A bid for control was characterized as a rumor if the initial report described it as such, or if other reports discredited the initial report. We categorized 143 reports as rumors.

26. The vendors in such cases would have owned enough shares collectively to control the company, meaning the takeover was in substance friendly.

We found considerable variation by decade in the incidence of OMBs (Figure 1). Still, while the eighty-two OMBs we identified were hostile in nature, their frequency tracked that of overall merger activity, rising when mergers were commonplace (the 1920s) and falling when they were not. The opening decade of the twentieth century, was the primary exception to the prevailing pattern. While the United States experienced its first general merger wave between 1897 and 1903,[27] by the standards of the first half of the twentieth century overall merger activity was unexceptional during the 1900s, and OMBs were relatively frequent as compared to the overall level of merger activity. In contrast, we found no OMBs occurring in the 1940s, despite a modest revival in merger activity.

FIGURE 1: CONTROL BIDS VIA OPEN MARKET BIDS (OMBS) AND MERGER ACTIVITY, 1900–1949

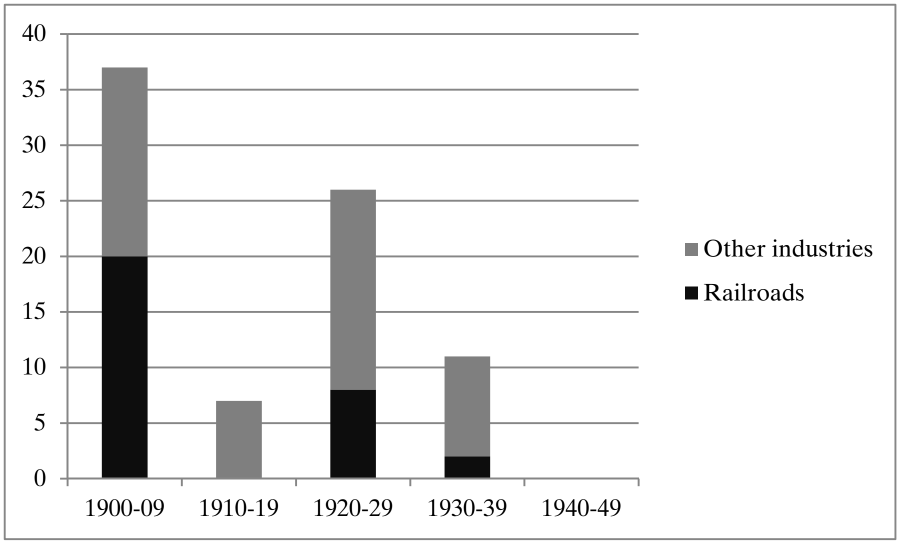


Sources: Open Market Bids from *ProQuest Historical Newspapers* database; Mergers from Klaus Gugler, Dennis C. Mueller & B. Burcin Yurtoglu, *The Determinants of Merger Waves*, (Univ. of Vienna Dep't of Econ., Working Paper, 2006).

During the first decade of the twentieth century, when OMBs were relatively common, a majority involved railway companies (Figure 2). Correspondingly, to understand the prevalence of OMBs during this era it is necessary to focus on that sector.

27. Brian R. Cheffins, *Mergers and Corporate Ownership Structure: The United States and Germany at the Turn of the 20th Century*, 51 AM. J. COMP. L. 473, 477 (2003).

FIGURE 2: TARGETS OF BIDS FOR CONTROL USING OPEN MARKET BIDS, RAILROADS AND OTHER COMPANIES, 1900–1949



Sources: *ProQuest Historical Newspapers* database; Armour and Cheffins, *supra* note 23.[28]

What was special about railroads? At the beginning of the twentieth century, they were undoubtedly prizes worth fighting for. Although U.S. railroads faced significant challenges both earlier and later in their history, they enjoyed halcyon years from the end of the nineteenth century through the opening decade of twentieth century.[29] Revenue generated by railway companies grew by thirty-three percent between 1897 and 1900 and profitability grew even faster, with earnings leaping forty-two percent over the same period.[30] The prosperity seemed to be well-founded, with the *New York Times* referring in 1909 to "the underlying strength of and confidence in American railway properties."[31]

To be sure, the railway sector was not the only source of attractive merger candidates as the twentieth century opened. With the general merger wave the United States experienced between 1897 and 1903, the stakes involved were often high because successful mergers from this era engendered numerous companies that became dominant players in the U.S. economy.[32] What was striking about the railway sector in this context was the frequency of *hostile* bids that took place. As we will see

28. The numbers presented in Figure 2 differ very slightly from those presented in Armour and Cheffins, *supra* note 23, at 271, owing to cleaning of the underlying data for the purposes of drafting this paper.

29. RICHARD SAUNDERS, JR., MERGING LINES: AMERICAN RAILROADS 1900-1970 19–20 (2001).

30. *Increase in Securities with Increased Profits*, N.Y. TIMES, Dec. 8, 1901, at WF5.

31. E.J. Edwards, *The Men Who Control the Nation's Railways*, N.Y. TIMES, June 27, 1909, at SM7.

32. Cheffins, *supra* note 27, at 477.

now, factors that fostered the development of an early market for corporate control in the railway sector turned out to be general preconditions for hostile takeovers.

B. Ownership Structure

One likely explanation for the relative prevalence of hostile bids in the railway sector is that its firms had more dispersed share ownership than was then typical. Diffuse share ownership is a basic precondition for a hostile control transaction.[33] If control is concentrated in the hands of a few individuals, then no acquisition can succeed without their consent. If they agree to sell their shares, the transaction, in effect, becomes friendly. In most of the big horizontal consolidations of key industries during the 1897–1903 merger wave, targeted companies had concentrated ownership structures that gave proprietors *de facto* vetoes over change in control.[34] Not so for the railway sector.

Data compiled by Edward Herman for the purposes of his 1981 book, *Corporate Control, Corporate Power*, indicated that as the twentieth century began, ownership and control of major companies was more widely dispersed amongst railways than in firms operating in other industrial sectors.[35] His research on share ownership in forty large corporations as of 1900 showed that a "majority control" pattern that was reasonably prevalent in major industrial companies was completely absent amongst leading railways (Figure 3).[36] Also, "management control," which Herman deemed to exist when a company lacked a shareholder owning ten percent or more of the shares, was reasonably prevalent in railway companies but rare in industrial companies.[37] Given that, as the twentieth century opened, U.S. railways had in place modern-style one share/one-vote capital structures rather than "capped" voting arrangements that imposed limits on the number of votes particular owners could exercise,[38] control of these companies was very much "in play."

33. Hannah, *supra* note 20, at 230; EDWARD R. ARANOW AND HERBERT A. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 6–7 (1973); DOUGLAS V. AUSTIN & JAY A. FISHMAN, CORPORATIONS IN CONFLICT – THE TENDER OFFER 112–13 (1970).

34. On the ownership structure of companies acquired during the 1897-1903 merger wave, see Cheffins, *supra* note 27, at 478–81.

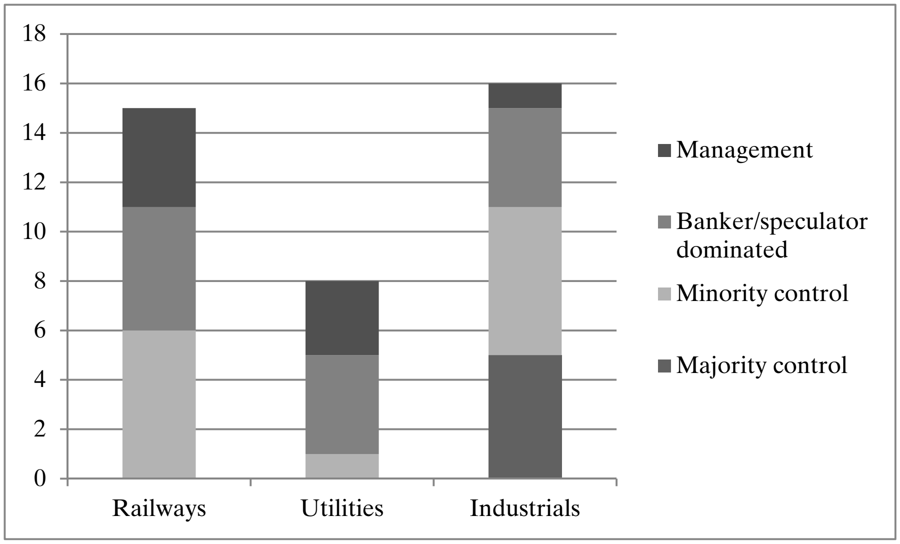
35. *See* EDWARD S. HERMAN, CORPORATE CONTROL, CORPORATE POWER 62, Appendix B (1981).

36. Herman's data was used to make the same point in Brian Cheffins & Steven Bank, *Is Berle and Means Really a Myth?*, 83 BUS. HIST. REV. 443, 447 (2009).

37. HERMAN, *supra* note 35, at 56–62.

38. Hannah, *supra* note 20, at 232–34 (contrasting U.S. railways of the time with companies elsewhere and using this as a partial explanation for hostile bids); BRIAN R. CHEFFINS, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED 32 (2008) (describing "capped" voting arrangements); Colleen A. Dunlavy, *From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights and Theories of the Corporation*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 66, 82–83 (Kenneth Lipartito & David B. Sicilia eds., 2004) (characterizing one-share/one-vote arrangements as the norm by the 1880s in the United States).

FIGURE 3: CONTROL CLASSIFICATION OF A SAMPLE OF FORTY OF THE LARGEST U.S. NONFINANCIAL CORPORATIONS, 1900–1901



Contemporaries were aware that dispersion of share ownership made control of railway companies what today we would call "contestable."[39] As the *New York Times* said in 1902, "[i]t is not very difficult to buy the 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."[40] Investors, for their part, seemed to be well aware of the implications. According to a 1908 study of the corporate relations of railways, "[o]ne has only to read the financial page of the daily newspaper and take note of the rumors of new corporate alignments to realize how alert is the public to scent incipient plans of this nature."[41]

The lively market conditions in the railway sector were a draw for outsiders who were minded, according to a 1911 article by Harvard economist William Ripley, "to gain control of a company from others, or else merely to manipulate prices in their own interest . . . ."[42] One such character was John W. "Bet-a-Million" Gates, dubbed in his 1911 *New York Times* obituary as "perhaps the most spectacular figure that this generation of Wall Street has seen."[43] Having made a fortune as a manufacturer and distributor of barbed wire, he achieved a reputation not only as a high-stakes gambler on cards and horse races, but also as a ruthless

39. *See, e.g.*, Coates, *supra* note 2.
40. *The Ownership of Railroads*, N.Y. TIMES, April 16, 1902, at 8.
41. Frank Haigh Dixon, *Railroads in their Corporate Relations*, 23 Q.J. ECON. 34, 36 (1908).
42. W.Z. Ripley, *Railway Speculation*, 25 Q.J. ECON. 185, 204 (1911).
43. *J.W. Gates Dead; Ill for Months in Paris*, N.Y. TIMES, Aug. 9, 1911, at 9. For background on Gates, see Hugh S. Fullerton, *John W. Gates Juggler with Millions*, CHI. DAILY TRIB., May 5, 1907, at E1.

stock market speculator. The *New York Times* in 1902 explained the attractiveness of the railway sector to such characters: "[A] wide distribution of shares is a direct incitement to idle capitalists like Mr. Gates, who, bored with the humdrum life of a hotel lobby, may at any moment turn to the pleasurable excitement of picking up the control of a railroad system."[44] Indeed, Gates and his allies successfully used open market purchases to obtain voting control of the Louisville and Nashville Railroad Company in 1902, the Chicago, Indianapolis & Louisville (or "Monon") Railway the same year, and the Chicago and Alton Railroad in 1904, before selling their controlling stake in each instance.[45]

C. Credible Disclosure

The extent of disclosure is an additional factor that helps to explain why early twentieth century railroads were relatively prone to control contests. Any prudent acquirer needs information to assess whether a potential corporate target is worth buying and for what price. This is a particular challenge for hostile bidders, who cannot expect directors of the target to provide access to any private information. The extent and quality of publicly-available information about potential targets may therefore be expected to affect parties' willingness to launch hostile bids.[46] Nowadays, anyone with a computer and a subscription to mainstream data providers has instant access to detailed financial data and substantial background information on thousands of publicly traded companies. Moreover, investors can typically assume publicly available information is credible and reliable since disclosure is governed by detailed legal rules.[47] Matters were different as the twentieth century got underway, and in a way that made railway companies more suitable targets for hostile acquisition than companies in other industrial sectors.

As of 1900, publicly owned industrial companies typically provided only very limited financial information to the outside world.[48] Whilst a balance sheet was almost always included in published financial reports, the quality and quantity of information supplied otherwise varied great-

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44. *The Ownership of Railroads*, *supra* note 40.

45. On the takeover of the Louisville and Nashville, see Ripley, *supra* note 42, at 206–07. On the Monon acquisition, see *Gates Gets Control of Monon Railway*, N.Y. TIMES, May 4, 1902, at 1. On Gates handing control of these railways over, see *The Monon Deal*, N.Y. TIMES, May 24, 1902, at 3; *Morgan Hits at Gates: Financier Explains Louisville and Nashville Deal*, CHI. DAILY TRIBUNE, Jan. 16, 1903, at 1. On the Chicago and Alton Railroad takeover, see *Gates Gets Alton Road Away from Harriman: Edwin Hawley and Rock Island Interests His Associates*, N.Y. TIMES, Sept. 9, 1904, at 1. In this instance, Gates may have acted from the start on behalf of the "Rock Island Party," led by the Moore Brothers, who made their fortune organizing industrial mergers. *See Rock Island in Alton Sale*, N.Y. TIMES, Sept. 10, 1904, at 11; Arthur Lambin, *Chicago Financiers Succeed in New York*, CHI. DAILY TRIB., Oct. 16, 1904, at E1.

46. Hannah, *supra* note 20, at 232.

47. Armour & Cheffins, *supra* note 23, at 260-61.

48. David F. Hawkins, *The Development of Modern Financial Reporting Practices Among American Manufacturing Corporations*, 37 BUS. HIST. REV. 135, 135 (1963).

ly.[49] As the twentieth century progressed, the level and frequency of corporate financial disclosure increased, as did the credibility of what was divulged, although only slowly.[50]

Prior to the enactment of federal securities legislation in the mid-1930s, the New York Stock Exchange ("NYSE") was the principal authority requiring disclosure by publicly traded companies. From the late 1860s onwards, the NYSE's official policy was that companies with shares listed for trading should publish some form of annual report.[51] Most companies, however, ignored the policy.[52] In 1900, the NYSE began requiring annual disclosure of an income statement and balance sheet as a condition for listing and after 1910 it expanded the scope of the disclosure requirements in listing agreements to deal with interim reports, audit requirements and obligations to disclose material information.[53] Nevertheless, the NYSE did not require listed companies to report their profits and even during the 1920s less than one half of companies listed on the "Big Board" offered shareholders full financial statements with information on items such as sales, interest costs, and dividends paid.[54]

The NYSE's influence was restricted, moreover, to companies that sought a full listing. Until 1910, companies could have their shares admitted to trading at the NYSE through its Unlisted Department without furnishing *any* financial information.[55] Thereafter companies could sidestep the NYSE's requirements by arranging to have their shares listed for trading on stock exchanges based in cities such as Chicago, Boston, and Pittsburgh, or by making provision for trading on "over-the-counter" markets.[56]

While disclosure by U.S. public companies was generally rudimentary by modern standards as the twentieth century got underway, railroads were very different. They were publicly divulging more extensive cost and nonfinancial data than many firms even disclose today.[57] The

49. Richard P. Brief, *Corporate Financial Reporting at the Turn of the Century*, J. ACCT., 142, 151 (1987).

50. Hawkins, *supra* note 48, at 136.

51. *Id.* at 149; Richard Sylla & George D. Smith, *Information and Capital Market Regulation in Anglo-American Finance*, *in* ANGLO-AMERICAN FINANCIAL SYSTEMS: INSTITUTIONS AND MARKETS IN THE TWENTIETH CENTURY 179, 195 (Michael D. Bordo & Richard Sylla eds., 1995); *see also* LAWRENCE E. MITCHELL, THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY 108–09 (2007).

52. MITCHELL, *supra* note 51, at 109; Hawkins, *supra* note 48, at 149.

53. Kumar N. Sivakumar & Gregory Waymire, *The Information Content of Earnings in a Discretionary Reporting Environment: Evidence from NYSE Industrials, 1905–10*, 31 J. ACCT. RES. 62, 65 (1993).

54. ALEX BERENSON, THE NUMBER: HOW THE DRIVE FOR QUARTERLY EARNINGS CORRUPTED WALL STREET AND CORPORATE AMERICA 8–9 (2003).

55. Hawkins, *supra* note 48, at 150; Mary O'Sullivan, *The Expansion of the U.S. Stock Market: Historical Facts and Theoretical Fashions*, 8 ENTERPRISE & SOC'Y 489, 500 (2007).

56. Hawkins, *supra* note 48, at 150; *accord* WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 213 (1927).

57. Sudipta Basu, *Discussion of Enforceable Accounting Rules and Income Measurement by Early 20th Century Railroads*, 41 J. ACCT. RES. 433, 435 (2003).

Interstate Commerce Act of 1887, following a pattern set down in state legislation, required railroads to file an annual report with the newly established Interstate Commerce Commission ("I.C.C.").[58] Beginning in 1906, the I.C.C. had the power to compel the use of uniform accounting methods.[59] Even prior to this point, those seeking to investigate the financial position of a railway were uniquely well-positioned. According to an 1896 article on federal railway regulation:

> The provision for annual statistical reports . . . has proved one of the most useful requirements of the [Interstate Commerce Act of 1887], and has resulted in the collection of a body of numerical facts relating to the business of railway transportation in the United States that is more accurately and completely descriptive of that business than the statistics that are available in any other country or for any other important industry at home or abroad.[60]

The upshot is that, while generally speaking during the early twentieth century, a lack of reliable public information would have discouraged hostile bids for control, in the case of railways, the level of disclosure should have bolstered the confidence of potential bidders.[61] This feature of railways, together with their prosperity and the configuration of ownership and control, made them the obvious focal point of the early twentieth century version of the market for corporate control.

D. What Changed in the 1920s?

Given that merger activity during the first half of the twentieth century peaked during the 1920s (Figure 1), it might have been thought that during this decade railway acquisitions would have bolstered the number of acquisitions executed by open market buying in the same way as occurred as the twentieth century opened. This was not the case. During the 1920s there were various instances where unsolicited open market buying of shares was used to attempt to obtain voting control of railways. We found, however, only half as many such open market bids occurred in the 1900s, despite the much greater overall rate of merger activity in the 1920s (Figure 2). One likely reason is that there had been by the 1920s a marked consolidation of administrative and financial control by powerful groups in the railroad industry,[62] which probably meant there were fewer companies "in play."

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58. Act to Regulate Commerce, ch. 104, 24 Stat. 379, sec. 20 (1887); Kumar N. Sivakumar & Gregory Waymire, *Enforceable Accounting Rules and Income Measurement by Early 20th Century Railroads*, 41 J. ACCT. RES. 397, 404 (2003).

59. Sivakumar & Waymire, *Enforceable, supra* note 58, at 404; Henry C. Adams, *Administrative Supervision of Railways Under the Twentieth Section of the Act to Regulate Commerce*, 22 Q.J. ECON. 364, 365–66 (1908).

60. H.T. Newcomb, *The Progress of Federal Railway Regulation*, 11 POL. SCI. Q. 201, 204 (1896).

61. Hannah, *supra* note 20, at 232.

62. ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 174–75 (1977).

Another consideration may well have been that by the 1920s railways were not the enticing takeover targets they were as the twentieth century opened. Their financial prospects were threatened both by powers the I.C.C. was given in 1906 to regulate freight rates and by the internal combustion engine breaking the railroads' *de facto* monopoly over ground transportation.[63] Antitrust law probably also had a role to play. The Supreme Court's *Northern Securities* decision of 1904, requiring the break-up of a leading railroad consolidation prompted by open market purchases,[64] is commonly regarded as having dampened merger activity among railroads, as well as the industrial sector.[65] Our data from the opening decade of the twentieth century is consistent with this theory. We found fifteen unsolicited open market bids for voting control in railway companies during the period 1900–1904, but only five from 1905–1909.

The Transportation Act of 1920 posed an additional obstacle to takeover bids in the railway sector.[66] This legislation expanded the I.C.C.'s jurisdiction over railways to include the power to veto acquisitions that failed to conform to national transportation policy.[67] Correspondingly, an acquirer who successfully bought up the desired percentage of stock could still lose out due to an I.C.C. veto. This likely was a serious deterrent to attempts to gain control by the unsolicited open market buying of shares.

I.C.C. intervention was by no means merely a theoretical possibility. There were at least two instances during the 1920s where the Commission exercised its veto power to block railroad acquisitions after voting control was successfully obtained on the open market. These were a 1928 ruling against the Chesapeake & Ohio Railway when it sought to acquire the Erie Railroad and a 1930 ruling against the Pennsylvania Railroad Company after one of its wholly owned subsidiaries bought up forty-eight percent of the shares of the Wabash Railroad.[68] The upshot is

63. Dixon, *supra* note 41, at 33–36 (describing the rate-setting power vested in the I.C.C.); STEWART H. HOLBROOK, THE AGE OF THE MOGULS 201 (1953) (discussing the impact of the rise of the automobile on railways); JOHN MOODY, THE MASTERS OF CAPITAL: A CHRONICLE OF WALL STREET 152–54 (1919) (citing the creation of the freight rate regulation power as one reason "the wild and dramatic days of 1901 to 1906, had practically closed").

64. See *supra* note 18 and accompanying text.

65. *See*, *e.g.*, KLEIN, *supra* note 18, at 141.

66. Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920).

67. Transportation Act of 1920, § 5(2). There was some doubt as to whether the relevant provision in fact was "prohibitory" in orientation, but crucially the Interstate Commerce Commission in practice exercised a veto power. On the nature of the I.C.C.'s powers in this context, see Sidney P. Simpson, *The Interstate Commerce Commission and Railroad Consolidation* 43 HARV. L. REV. 192, 197–200 (1929). On the basic nature of the jurisdiction of the I.C.C. under the Transportation Act of 1920, see MARK H. ROSE ET AL., THE BEST TRANSPORTATION SYSTEM IN THE WORLD: RAILROADS, TRUCKS, AIRLINES AND AMERICAN PUBLIC POLICY IN THE TWENTIETH CENTURY 20–23 (2006).

68. *Commerce Board Allows C. & O.-Marquette Merger But Bars Erie from Plan*, N.Y. TIMES, May 19, 1928, at 1; *Pennsylvania Told to Drop Wabash and Lehigh Valley*, N.Y. TIMES, December 7, 1930, at 1. In the 1928 ruling, Chesapeake & Ohio was permitted to buy the Père Marquette Railway and in the 1930 ruling the Pennsylvania Railroad was also required to divest a thirty percent stake in the Lehigh Valley Railroad.

that while there were examples of hostile bids occurring in the railway sector in the 1920s, various changes affecting railways meant that such transactions were rarer than they were in the 1900s. This in turn does much to explain why open market purchases were less prevalent in the 1920s than in the 1900s, despite a larger number of mergers.

IV. TENDER OFFER PIONEERS

While the evidence presented in Part III illustrates that hostile attempts to obtain voting control of publicly traded companies were occurring with some regularity more than a century ago, the way these bids were launched was very different from more recent control contests. As we have seen, by the 1960s the tender offer dominated the market for control landscape.[69] In contrast, the control contests discussed in Part III were carried out by way of open market purchases of shares of targeted companies. Nevertheless, contrary to conventional wisdom,[70] tender offers did occur prior to the 1950s. In this Part we identify tender offer pioneers and in Part V we explain why cash tender offers became, albeit somewhat belatedly, the technique of choice among bidders.

A. The First Tender Offers

Even though the 1868 contest for control of the Erie Railroad featured open market purchases Ed Rock has characterized Vanderbilt's efforts as a tender offer, arguing that if the Williams Act of 1968 had been in force at the time, Vanderbilt would have been required to comply with it.[71] This may well be correct in legal terms. The Williams Act of 1968, which imposed a range of obligations on parties making a tender offer[72]—ostensibly to protect target shareholders from misinformation and unequal treatment[73]—did not define "tender offer."[74] At the time the Act was passed, a tender offer was generally understood to mean a public invitation to a target corporation's shareholders to buy shares tendered at a set price (a cash tender offer) or to exchange them for a speci-

69. *Supra* notes 13, 15 and related discussion.

70. *Supra* notes 13–17 and accompanying text.

71. Rock, *supra* note 19, at 253–54.

72. Pub. L. No. 90-439, 82 Stat. 454. The Williams Act amended the Securities Exchange Act of 1934 to require the maker of a tender offer, *inter alia* to disclose information about the bidder and their plans for the company (Securities Exchange Act of 1934, §14(d)(1), 15 U.S.C. 78n(d)(1)); to keep the offer open for at least twenty days (*id.* Rule 14e-1, 17 C.F.R. § 240.14e-1); to accept from all tendering shareholders *pro rata* if the offer is oversubscribed (*id.* §14(d)(6), 15 U.S.C. 78n(d)(6)); to extend the offer to all shareholders (*id.* Rule 14d-10(a)(1), 17 C.F.R. § 240.14.d-10(a)(1)); and to pay each shareholder who tendered their shares the highest price paid to any other shareholder during the offer period (*id.* §14(d)(7), 15 U.S.C. 78n(d)(7); Rule 14d-10(a)(2), 17 C.F.R. § 240.14.d-10(a)(2)).

73. *See* Robert W. Hamilton, *Some Reflections on Cash Tender Offer Legislation* 15 N.Y.L.F. 269, 275–76 (1969) (discussing the legislative history of the Williams Act); Arthur Fleischer, Jr. & Robert H. Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317, 323–27 (1967) (summarizing policy debates preceding the Williams Act).

74. DALE A. OESTERLE, THE LAW OF MERGERS AND ACQUISITIONS 171 (3rd ed., 2005); Steve Mather, *The Elusive Definition of a Tender Offer*, 7 J. CORP. L. 503, 503 (1982).

fied number of the offeror's securities (an exchange tender offer).[75] These "conventional" tender offers so described—whether cash or share based—were clearly covered by the Act.[76] The Federal courts, however, subsequently ruled that the tender offer rules applied to more penumbral cases. The rules were deemed to apply, for instance, if an acquirer publicly announced the intention to gain control of a target by buying shares on the open market, with the logic being that investors fearing the loss of opportunity to sell out at a premium would be under pressure to sell their shares hastily, which is what the Williams Act was intended to preclude.[77] Vanderbilt's highly publicized Erie Railroad OMB may well have met this standard.

What about the "conventional" tender offer? When did these begin to occur? While, as mentioned, most scholars date the emergence of the unsolicited cash tender offer to the 1950s,[78] in 1961, *Barron's* said that "[t]ender offers have been part of the Wall Street scene for nearly two generations."[79] This appears to be about right.

To identify in a systematic fashion examples of tender offers prior to 1950, we began by searching the *New York Times*, *Washington Post*, and *Wall Street Journal* on the *ProQuest Historical Newspapers* database for the years 1900 to 1949 using the term "tender offer."[80] This search yielded a modest total of thirteen "hits," of which only one involved an attempt to secure voting control of a publicly traded company. The *Wall Street Journal* used the term "tender offer" in a January 1948 story indicating that First York Corp. was soliciting options to buy shares from certain large stockholders of Bell Aircraft Corp. and would, if this stock was obtained, ask all Bell Aircraft shareholders to tender their shares.[81] First York, which was only seeking to obtain a thirty-four percent stake in Bell Aircraft at that point, succeeded.[82]

In 1949, First York invited tenders for a sufficient number of shares to obtain a majority stake and it was again successful.[83] It is not entirely clear whether this was a hostile bid. First York may instead have been a "white knight" acting in tandem with Larry Bell, Bell Aircraft's founder

75. OESTERLE, *supra* note 74, at 162; *Developing Meaning, supra* note 12, at 1251.

76. *Developing Meaning, supra* note 12, at 1250–51, 1259–61.

77. OESTERLE, *supra* note 74, at 173–74.

78. *Supra* notes 14–15 and related discussion; *see also* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 59 (1996); Franklin Allen & Douglas Gale, *Corporate Governance and Competition, in* CORPORATE GOVERNANCE: THEORETICAL AND EMPIRICAL PERSPECTIVES 23, 40 (Xavier Vives ed., 2000) (both identifying the first hostile tender offer as occurring in 1956, referring specifically to cash tender offers. Hansmann acknowledged that hostile acquisitions could have occurred by way of individual trades prior to 1956).

79. Anna Merjos, *Embracing Tenders: Wall Street is Growing Increasingly Partial to Take-Over Bids,* BARRON'S NAT'L BUS. & FIN. WKLY, Mar. 6, 1961, at 5, 5.

80. The search was run on May 10, 2013.

81. *First York Corp. Plans to Buy Large Block of Bell Aircraft Stock*, WALL ST. J., Jan. 23, 1948, at 14.

82. *First York Corp. Acquires 150,000 Bell Aircraft Shares*, WALL ST. J., Feb. 10, 1948, at 6.

83. *Bell Aircraft Stock Tenders Asked by First York Corp.*, WALL ST. J., June 4, 1949, at 7; *Gets 56,000 Bell Shares*, N.Y. TIMES, June 28, 1949, at 41.

and a leading figure in the aircraft building industry.[84] First York was seemingly content for Bell, who narrowly retained control of the board after a 1947 proxy contest, to have the dominant managerial role after completing its takeover.[85]

Before the Williams Act, a "tender offer" was simply a way of describing events, as opposed to a category of conduct carrying with it legal implications. This opens up the possibility that, until the terminology became standardized, bidders might have made public invitations to buy a sufficiently large percentage of shares in a company to obtain voting control without the term "tender offer" being used in newspaper reports. It appears that what can retrospectively be viewed as conventional hostile tender offers—certainly in exchange for shares and perhaps for cash—were indeed made during the very first years of the twentieth century.

A hostile share exchange offer appears to have been made, for instance, in conjunction with the creation of U.S. Steel in 1901. U.S. Steel was formed as a result of an amalgamation of a large number of steel manufacturers organized by J.P. Morgan. Morgan was eager to secure the prompt agreement of the firms he targeted for amalgamation and so generally accepted their own measures of value, paid for in U.S. Steel stock.[86] One firm that did not participate in this way, despite initial indications that it might, was American Bridge Co., an iron manufacturing combine J.P. Morgan organized in 1899.[87] Although it is unclear why American Bridge was left out,[88] it seems possible that a sudden spike in the company's share price caused by insider trading was the culprit.[89] In any event, American Bridge Co. was added to the U.S. Steel combine five weeks after the merger was initially announced.[90] Crucially for our purposes, Percival Roberts, who was President of American Bridge at the time of the formation of U.S. Steel and later became a director of U.S. Steel, gave evidence in a 1912 antitrust trial indicating that U.S. Steel had made an unsolicited exchange tender offer to secure control.[91]

According to Roberts, J.P. Morgan & Co. proceeded without the knowledge of the American Bridge board, issuing on its own initiative a

84. On Larry Bell's status, see Richard P. Cooke, *Aircraft Builders: Bell Sees Industry's Future in Helicopters and Guided Missiles; Gears Itself to Stress Their Production*, WALL ST. J., Nov. 30, 1950, at 7.

85. *Id.*; *Bell Board Re-Elected*, N.Y. TIMES, April 22, 1947, at 55.

86. RON CHERNOW, THE HOUSE OF MORGAN 84 (1990) (noting, though, that Andrew Carnegie, proprietor of Carnegie Steel, successfully demanded payment in bonds); JEAN STROUSE, MORGAN: AMERICAN FINANCIER 403–04 (2000).

87. *The Bridge Trust Formed*, N.Y. TIMES, Sept. 15, 1899, at 6 (describing the formation); *Interest of Industrials: American Bridge Company*, WALL ST. J., Aug. 11, 1900, at 5 (describing the involvement of J.P. Morgan); *No Rival Steel Combine*, N.Y. TIMES, Mar. 2, 1901, at 16 (describing American Bridge's anticipated involvement in the U.S. Steel merger).

88. *No Rival Steel Combine, supra* note 87.

89. The incident was traced to purchases by a waiter tipped off by one of the key organizers of U.S. Steel. *See Fortune for a Waiter*, WASH. POST, Mar. 3, 1901, at 24.

90. THOMAS J. MISA, A NATION OF STEEL: THE MAKING OF MODERN AMERICA 1865-1925 166 (1995).

91. *Just Bid and Took American Bridge Co.*, N.Y. TIMES, May 22, 1912, at 8; *No Dicker By Morgan*, WASH. POST, May 22, 1912, at 10.

circular offering to exchange U.S. Steel stock for American Bridge shares.[92] A sufficiently large proportion of shareholders accepted the offer to ensure American Bridge was brought into the fold.[93] The manner in which the press reported Roberts' testimony indicates J.P. Morgan's tactics were unconventional, with the *New York Times* running the story under the headline "Just Bid and Took American Bridge Co." and the *Washington Post* doing likewise with "No Dicker by Morgan."[94] It is prudent to treat Roberts' account with some caution, given that he was testifying eleven years after the events in question and given that *ProQuest* newspaper searches we carried out for 1901 failed to uncover any stories confirming that a share exchange offer was made to secure control of American Bridge. Nevertheless, his version of events is consistent with what little we can glean about the transaction from sources contemporaneous to it and so we treat it as the first confirmed hostile exchange tender offer of which we are aware.

The hostile exchange tender offer reappeared in 1930. In April of that year, United Aircraft & Transport Corporation was seeking to acquire National Air Transport Inc., and made an exchange offer directly to the stockholders after the target's board rebuffed United Aircraft.[95] Later that year, Atlas Corporation, an investment company controlled by Floyd Odlum, made an exchange offer to shareholders of All America General Corporation, another investment company, with the intention of securing voting control.[96] The offer letter stated that Atlas had the target board's support and had acquired a controlling stake.[97] Both statements, however, were untrue,[98] meaning Atlas was really carrying out a hostile bid.

It is possible that at least one unsolicited cash tender offer may have occurred as far back as the turn of the twentieth century. According to press reports, Charles W. Morse, who had previously made a fortune

92. *No Dicker By Morgan*, *supra* note 91.

93. *See id.*

94. *Just Bid and Took American Bridge Co., supra* note 91. *No Dicker By Morgan, supra* note 91.

95. *Rentschler Plans Air Merger Fight*, N.Y. TIMES, Apr. 4, 1930, at 23.

96. Investment companies, known today as mutual funds, had become big business during the stock market boom of the 1920s. Investors had flocked to purchase shares in these firms, the only business of which was to invest in other companies, but which offered professional management and stock-picking. The investment companies of the 1920s differed from today's mutual funds in that the vehicles were almost always "closed-ended"— investors did not have the option to exit by selling their shares back to the company—as is the case with modern "open-ended" mutual funds. Correspondingly, investors could only exit by selling to another investor, whether directly or via the stock market. *See* Armour & Cheffins, *supra* note 23, at 264–65. After the stock market crash of 1929, liquidity evaporated in the market for investment company stocks as the values of these companies plummeted. Odlum's Atlas Corporation was one of the few investment companies in this era still to have a solid balance sheet. He made use of this to consolidate a large section of the industry, offering disgruntled target shareholders in a wide range of investment companies the opportunity to exchange their shares for those in Atlas. *See Atlas Trust Offer Stirs Opposition*, N.Y. TIMES, July 16, 1932, at 19 (reporting general offer made by Atlas to exchange its shares for those in "almost every fixed investment trust").

97. *All America – Atlas: President Starring, of Former Company, Denies Merger Approval by Boards*, WALL ST. J., May 21, 1930, at 8.

98. *All America Board Decries Atlas Fusion*, N.Y. TIMES, May 23, 1930, at 41.

from an "Ice Trust" under the aegis of his American Ice Company, acquired a controlling stake in the New York-based Mercantile National Bank.[99] Of particular note for our purposes was Morse's strategy for acquiring control of the bank, which had the hallmarks of a cash tender offer. According to one press report, Morse "did not buy the stock in the open market, but sent a circular to all the stockholders offering to buy their stock at the price named and it is understood that he succeeded in acquiring a good majority of the stock at that price."[100] Though Morse's use of a circular to offer to purchase outstanding shares seems like a tender offer made to secure control, it is not clear whether this was a full-fledged hostile takeover bid. Most significantly, it is uncertain whether the circular was merely being used by Morse to fortify preexisting dominance. A report in the *New York Tribune* described Morse as sending a circular to Mercantile Bank shareholders "offering a price in excess of 350," but also indicated it was "understood that he paid as much as 410 for a large part of the stock purchased by him."[101] This implies he negotiated privately to buy the shares of stockholders who collectively owned a majority stake, and to whom he paid a premium. Moreover, the position the Mercantile Bank board took was not reported, meaning that even if Morse made a tender offer for control it may not have been hostile. We cannot therefore be sure that use of the cash tender offer as a means for securing control of a hostile target genuinely dates back as far as 1902.[102]

B. *Time Series of Cash Tender Offers, 1940s and 1950s*

As we have seen, the general consensus is that the unsolicited cash tender offer first emerged in the mid-1950s as a technique for obtaining corporate control.[103] This view seems likely to have been an artifact of reliance on an influential early study of tender offers by Douglas Austin and Jay Fishman. These scholars reported annual numbers of cash ten-

99. *Mr. Morse's Bank Stocks*, N.Y. TIMES, June 5, 1902, at 2.

100. *Morse Has Another Bank*, N.Y. TIMES, Sept. 12, 1902, at 12; *see also Bank Merger Rumor Revived*, N.Y. TRIB., Sept. 12, 1902, at 4.

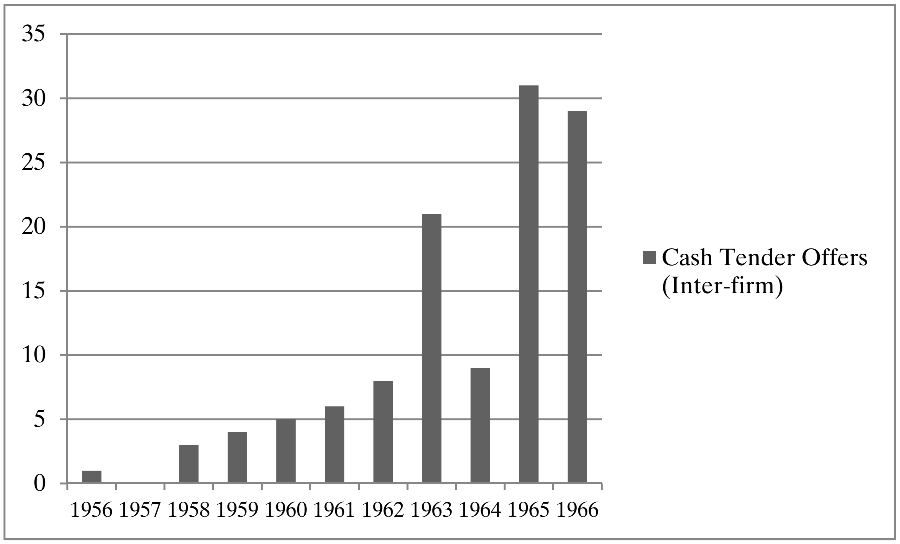
101. *Bank Merger Rumor Revived, supra* note 100.

102. The Mercantile National Bank had a colorful subsequent history. Morse went on to amalgamate the Mercantile National Bank with the National Broadway Bank, which he already controlled, and the Seventh National Bank, which was controlled by Edwin Gould, son of the notorious "robber baron" Jay Gould. *See Impending Bank Merger*, N.Y. TIMES, Oct. 22, 1902, at 12; *The Triple Bank Merger*, N.Y. TIMES, Jan. 13, 1903, at 11. When Morse and Gould subsequently fell out, Morse introduced copper baron F. Augustus Heinze as an investor, who bought out others supportive of Gould. *See Heinzes Get Big Bank Away from Edwin Gould,* N.Y. TIMES, Jan. 9, 1907, at 2. Matters ended disastrously when the Mercantile National Bank was at the center of the Wall Street "panic" of 1907, triggered by severe losses from speculative trading by Heinze's brother. *See Crash in Coppers; Heinze Quits Bank*, N.Y. TIMES, Oct. 17, 1907, at 1; *see also* ROBERT F. BRUNER & SEAN D. CARR, THE PANIC OF 1907: LESSONS LEARNED FROM THE MARKET'S PERFECT STORM, 37–41, 51–55 (2007). Mercantile National was bailed out as part of a rescue operation famously orchestrated by J.P. Morgan, but Morse and Heinze were compelled to give up all banking interests in New York. *See Wall Street Trembled*, BALT. SUN., Oct. 19, 1907, at 2; BRUNER AND CARR, *supra*, at 59–64.

103. *Supra* notes 13–17 and related discussion.

der offers involving NYSE listed companies from 1956–1967 (Figure 4),[104] with the focus being on instances where there was a control contest.[105] Of the 193 cash tender offers they reported during this period, only one occurred in 1956 and none in 1957.[106] A number of scholars appear to have drawn the inference from these data that there were no cash tender offers before 1956.[107]

FIGURE 4: CASH TENDER OFFERS (INTERFIRM), NYSE COMPANIES, 1956–1966



Source: Derived from data in AUSTIN & FISHMAN, *supra* note 104, at 10.

Since we knew as a result of our *ProQuest* newspaper searches that there in fact had been a 1949 cash tender offer (Bell Aircraft Corp.),[108] we used the *ProQuest Historical Newspapers* database to construct a time series of cash tender offers occurring during the 1940s and 1950s without the term "tender offer" being used in press reports. We conducted a

104. DOUGLAS V. AUSTIN & JAY A. FISHMAN, CORPORATIONS IN CONFLICT–THE TENDER OFFER 10 tbl 1 (1970).

105. Austin and Fishman said that "the ultimate purpose of the cash takeover bid is to gain maintain control of another firm . . . . Furthermore, the cash takeover bid is the most powerful type of tender offer since its main advantage is surprise, and the corporation being attacked is in a defensive position from the initial announcement." *Id.* at 4.

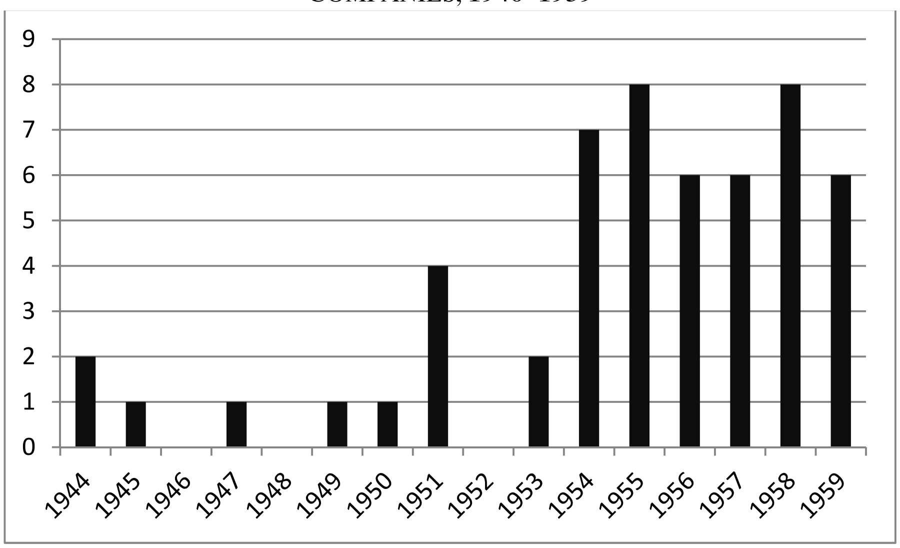
106. *Id.* at 10 tbl. 1. In a 1967 study, Samuel Hayes and Russell Taussig identified substantially more cash tender offers than Austin and Fishman, including thirteen in 1956 and eleven in 1957. *See* Samuel L. Hayes III & Russell A. Taussig, *Tactics of Cash Takeover Bids*, HARV. BUS. REV., March-April 1967, 135, 137. An important difference appears to be that Hayes and Taussig explicitly included friendly tender offers. Moreover, Austin and Fishman focused on NYSE-listed targets, whereas Hayes and Taussig did not so restrict themselves.

107. Pound cites Austin and Fishman's study when focusing on 1956. *See* Pound, *supra* note 15, at 1016, n.45. Hansmann cites Pound on this point. *See* HANSMANN, *supra* note 78, at 59 n.18. Allen and Gale cite Hansmann. Allen & Gale, *supra* note 78, at 40.

108. *Supra* notes 81–82 and accompanying text.

search of the *New York Times*, *Washington Post* and *Wall Street Journal* for January 1, 1940 to December 31, 1959 using the search "tender" & "offer" & ("control" or "merger") & ("share" or "stock"),[109] and this yielded 333 hits. Of these hits, only a minority involved a party inviting a company's shareholders to tender their shares for cash where the intention was to obtain voting control. Nevertheless, we identified fifty-three instances during the 1940s and 1950s where a cash tender offer was used as a takeover technique (Figure 5).

FIGURE 5: CASH TENDER OFFERS FOR CONTROL OF PUBLIC COMPANIES, 1940–1959



More than half (twenty-seven of fifty-three) of the tender offers in our 1940–1959 dataset were launched prior to 1956, which indicates that the tender offer was a reasonably well-established feature of the market of corporate control before then. We found a markedly higher number of tender offers between 1956 and 1959 (twenty-six) than Austin and Fishman (eight). This is probably because Austin and Fishman focused only on NYSE companies, whereas our searches were not similarly restricted.

The earliest cash tender offer we found using our search strategy involved a *Wall Street Journal* report of a September 1944 offer by Hayes Manufacturing Co. to acquire 160,000 shares of Farrel-Birmingham Co., another manufacturer, at twenty-five dollars a share.[110] Hayes Manufac-

109. This search strategy did not require the term "tender offer" to have been used as such. Instead it sufficed if a newspaper report mentioned that an "offer" was made under which shareholders were invited to "tender." It is possible that even this search strategy may be too restrictive, in that in some cases we would characterize as a conventional tender offer neither of these words would have featured in contemporary press reports. Our data therefore represent only a lower bound on the true frequency of these transactions.

110. WALL ST. J., Sept. 30, 1944, at 2.

turing was seeking to buy enough shares to obtain control of Farrel-Birmingham.[111] Hayes Manufacturing withdrew its offer, however, when it became clear that not enough shares would be tendered to give Hayes voting control.[112]

V. EXPLAINING THE BELATED ARRIVAL OF THE CASH TENDER OFFER

A. The Puzzle

While the earliest confirmed cash tender offer we found only occurred in 1944, within two decades it had become the most prominent technique bidders used to obtain control of target companies. A 1961 article in *Barron's* entitled "Embracing Tenders" discussed how Wall Street was growing increasingly partial to cash tender offers.[113] In January 1966, the *New York Times* ran a story entitled "Cash is Eclipsing Proxy Wars."[114] A month later, the *Wall Street Journal* published a front page article entitled "Tender Offers Become a Much-Favored Way to Acquire Companies."[115] The Austin and Fishman data reported in Section IV.B confirm the growing popularity of this takeover technique in the 1960s (Figure 4).

The chronology is somewhat puzzling. As Part IV indicated, hostile control transactions predated the dominance of the cash tender offer by more than half a century. Why did those seeking to take control of public companies not make cash tender offers in earlier periods? This question is most appropriately addressed across two dimensions. The first relates to the choice of whether to try to obtain control by achieving boardroom dominance by securing in a proxy contest the backing of unaffiliated shareholders—described by Ronald Gilson and Alan Schwartz as a "transfer by vote"—or by acquiring a majority of shares ("transfer by sale").[116] The second relates to the choice between "transfer by sale" methods, namely cash tender offers, share for share exchange tenders, and open market purchases.

B. Why Not Proxy Fights?

We have considered elsewhere why in historical terms a party seeking to obtain corporate control would opt for a transfer by sale as opposed to a transfer by vote and so will not revisit the issue in detail here.[117] Briefly, for the putative acquirer the key trade-off will be that

111. *Stock Offer Weighed*, N.Y. TIMES, Sept. 30, 1944, at 2.
112. *Purchase Offer Withdrawn*, N.Y. TIMES, Nov. 27, 1944, at 28.
113. Merjos, *supra* note 79, at 5.
114. *Cash is Eclipsing Proxy Wars: Take-Over Experts Rely Increasingly on Tender Offer*, N.Y. TIMES, Jan. 17, 1966, at 63.
115. Fred L. Zimmerman, *Takeover Tool: Tender Offers Become a Much-Favored Way to Acquire Companies*, WALL ST. J., Feb. 11, 1966, at 1.
116. Ronald J. Gilson & Alan Schwartz, *Sales and Elections as Methods for Transferring Corporate Control*, 2 THEORETICAL INQUIRIES L. 783, 790 (2001).
117. Armour & Cheffins, *supra* note 23, at 267–69.

the financial outlay will be greater with a transfer by sale because a controlling stake will have to be bought. The acquirer, however, will not have to share any post-acquisition gains from improvements in shareholder return, assuming the acquirer ultimately buys all of the target's shares.[118] For target company shareholders, a transfer by sale potentially offers the virtue of simplicity because they may well be exiting in exchange for cash, meaning they will not have to worry about what the bidder does after obtaining control.[119]

C. Why Not Exchange Tender Offers?

The virtue of simplicity associated with transfers by sale is contingent largely upon payment being in cash because with an exchange tender offer target company shareholders must assess not only the price but also the bidder's prospects when deciding whether to accept. We might therefore expect cash tender offers to dominate the share-for-share exchange as a technique for executing transfers by sale. Edward Aranow and Herbert Einhorn made this point forcefully in the 1971 edition of their book on tender offers. They pointed out that an acquirer making a cash tender offer has "a distinct psychological advantage" because target shareholders

> need not evaluate the relative efficiency of the incumbent management and the insurgent offeror. In contrast, the interests of prudent investment judgment would necessarily require the tendering shareholder to make such an evaluation in an exchange offer because he will, in effect, be exchanging an interest in the target for one in the offeror.[120]

Aranow and Einhorn's punch line was that "the almost primitive appeal to stockholders in straight dollars and cents language can prove to be a decided advantage in attempting to acquire control."[121]

The fact that shareholders in a target company weighing an exchange offer would need to assess the merits of the bidder company when deciding whether to tender their shares influenced the configuration of a regulatory structure that until the late 1960s further tilted the balance in favor of cash tender offers. An acquirer executing an exchange offer would need to issue shares to the target company's shareholders. This sort of acquirer correspondingly had to register under the Securities Act of 1933 and, in fulfillment of the requirements that legislation creates when companies issue shares to the public, became obliged to prepare a prospectus divulging business and financial data concerning both the acquirer and the target.[122] Since a cash tender offer did not in-

118. *Id.*
119. *Id.*; ARANOW & EINHORN, *supra* note 33, at 65.
120. ARANOW & EINHORN, *supra* note 33 at 29–30.
121. *Id.* at 30.
122. Securities Act of 1933, 15 U.S.C. §77e–g (2012); Manuel F. Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAW. 149, 149 (1966); Fleischer & Mundheim, *supra* note 73, 347–48 (1967).

volve the issuance of securities and was instead akin to a market purchase of shares these regulatory requirements were inapplicable.[123]

Manuel Cohen, chairman of the Securities and Exchange Commission, argued in a 1966 article that it was anomalous for a cash tender offer to be treated differently from an exchange offer from a disclosure perspective, reasoning that a shareholder deciding whether to accept a cash tender bid would in effect be buying into a transformed company if the shareholder opted not to sell out and the bid succeeded.[124] He made the point to argue in favor of enactment of legislation introduced by Senator Harrison Williams before Congress that would amend the Securities Exchange Act of 1934 to require anyone who acquired a stake of five percent or more of a class of equity security registered under the 1933 Act to disclose the stake, provide details on the buyer of the shares, and divulge plans, if any, to acquire control of the company.[125] The disclosure requirements were in fact included in the Williams Act of 1968, resulting in the addition of section 13(d) of the 1934 Act,[126] and in 1970 the Williams Act was amended to regulate cash and exchange offers equally.[127]

While the situation changed with the Williams Act, before its enactment the absence of cash offer disclosure requirements equivalent to those applicable to exchange offers provided putative bidders with an incentive to use the cash tender offer format. The primary advantage was the preservation of the element of surprise, as the bidder executing a cash tender offer could move in quickly and give an all-powerful appearance before anyone, including the target's incumbent management team, had a chance to think.[128] As Senator Williams said in 1965 when he introduced a precursor to the bill that would ultimately become the Williams Act, "the biggest loophole open to the corporate raider is this

123. Cohen, *supra* note 122, at 149–50; Fleischer & Mundheim, *supra* note 73, at 348–49.

124. Cohen, *supra* note 122, at 152.

125. *Id.* at 150.

126. Securities Exchange Act of 1934 § 13(d); 15 U.S.C. § 78m(d). Between 1968 and 1970 the ownership threshold was ten percent rather than five percent. *See* Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 65 n.84 (2011).

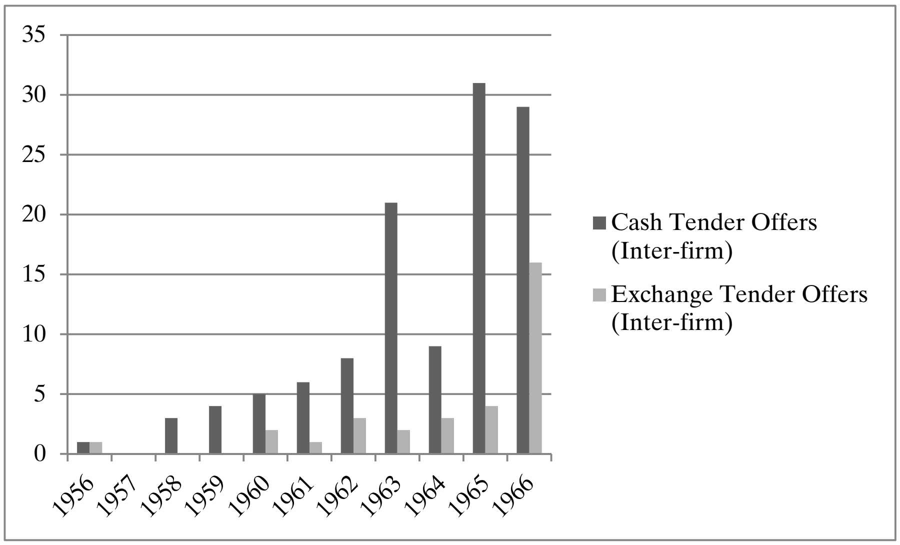
127. James F. Jorden & David R. Woodward, *An Appraisal of Disclosure Requirements in Contests for Control Under the Williams Act*, 46 GEO. WASH. L. REV. 817, 819, 828 (1978).

128. Hayes & Taussig, *supra* note 106, at 137; *see also* CARTER F. HENDERSON & ALBERT C. LASHER, 20 MILLION CARELESS CAPITALISTS 211 (1967); Lee Berton, *Fighting Takeovers: Some Companies Try New Tactics to Block Moves to Gain Control*, WALL ST. J, July 11, 1967, at 1 (suggesting that "[a]dvance warning no doubt would enable companies to counter tender offers more effectively than they can now"). By virtue of federal securities law, a putative bidder could not operate in complete secrecy because ownership of more than ten percent of a company's outstanding stock would likely have to be disclosed, most prominently under the insider reporting provisions of § 16 of the Securities and Exchange Act. 15 U.S.C. § 78p. *See* Fleischer & Mundheim, *supra* note 73, at 333, n.67; SUBCOMMITTEE ON SECURITIES, UNITED STATES SENATE COMMITTEE ON BANKING AND CURRENCY, FULL DISCLOSURE OF CORPORATE EQUITY OWNERSHIP AND IN CORPORATE TAKEOVER BIDS 24 (1967) (testimony of SEC chairman Manuel Cohen, who acknowledged that the disclosure requirements existed but said they were inadequate in the takeover context because shareholders in the target company were not provided with information concerning the proposed acquisition or the bidder's future plans for the company).

cloak of secrecy under which he is permitted to operate while obtaining the shares needed to put him on the road to successful capture of a company."[129]

Given the advantages cash tender offers afforded compared to exchange offers, at least prior to the Williams Act of 1968, the former logically should have been used more commonly to capture voting control. Indeed, according to a 1967 law review article on corporate acquisition by tender offer, bids were "usually in cash".[130] Data compiled by Austin and Fishman for NYSE companies conform to this pattern (Figure 6).

FIGURE 6: CASH TENDER AND EXCHANGE OFFERS (INTERFIRM), NYSE COMPANIES, 1956–1966



Source: Derived from data in AUSTIN & FISHMAN, *supra* note 104, at 10.

Whatever advantages a cash tender offer might have over an exchange offer, it was only possible for matters to proceed if the cash was available. This was a point Larry Ribstein was well aware of, as he said of tender offers in his 2006 "Imagining Wall Street" article that they were "expensive", prompting him to wonder "where does the money come

129. Fred L. Zimmerman, *SEC Backs Bill to Require Filing of Report by Anyone Planning Corporate Tender Bid*, WALL ST. J., May 16, 1966, at 5 (statement of Sen. Harrison Williams); *see also* SUBCOMMITTEE ON SECURITIES, UNITED STATES SENATE COMMITTEE ON BANKING AND CURRENCY, *supra* note 128, at, 42–43 (comments by Senator Williams and Kuchel on the advantages of secrecy with cash tender offers); Jorden & Woodward, *supra* note 127, at 828 ("Debate on the bill stressed the significant advantage that tender offerors could obtain by operating secretly.").

130. Fleischer & Mundheim, *supra* note 73, at 317; *see also id.* at 348 n.119 ("Exchange offers are unusual.").

from?"[131] As he noted, it was not until the 1980s that "junk bonds" supercharged the market for corporate control by providing bidders with financial firepower.[132] Nevertheless as time went by the acquirers of the 1950s and 1960s became increasingly well positioned to buy companies using cash.

An upswing in corporate cash generation in the first half of the 1960s was one factor that assisted acquirers minded to make a cash tender offer.[133] For companies without cash on hand, easier access to debt financing also helped to prompt the use of the cash tender offer, at least beginning in the 1960s.[134] Even though capital markets revived in the United States following World War II, leading investment banks were modestly sized partnerships specializing in underwriting for larger public companies that initially disdained hostile takeovers upon which their core corporate clientele may have looked askance.[135] Conservative big-city banks were also reluctant to allow takeover-minded companies to borrow funds that would be deployed for a hostile cash tender offer.[136]

In the 1960s, matters began to change. Investment banks became more proactive in the M&A arena as new firms were pushing for business and commercial banks were swung around to the idea of providing finance to acquisitive companies by competition for attractive fees.[137] The process was hastened by the growing respectability of hostile cash tender offers. What had been an unsavory technique used by only those on the outer fringes of the business community was becoming an increasingly accepted tool of corporate expansion.[138] Hence, in 1965, Pennzoil Co., which was one-ninth the size of United Gas Corp., relied on bank loans and the sale of a convertible bond to make a cash tender offer for United Gas shares and ultimately paid $215 million to acquire a forty-two percent ownership stake.[139]

131. Ribstein, *supra* note 3, at 170, 171; *see also* John J. Abele, *Tender Offer: For Some It's a Boon and For Others a Threat*, N.Y. TIMES, April 2, 1967, 129 ("The No. 1 requirement is to have the money with which to pay for the stock.").

132. Ribstein, *supra* note 3, at 172–73; *see also* discussion *supra* note 4 and related discussion.

133. *Affluent Companies: Build-Up of Cash Makes Firms Less Dependent on Banks, Stock Issues*, WALL ST. J, Sept. 9, 1963, at 1 (drawing attention to sharply rising cash flows that U.S. corporations were experiencing and explaining that various corporations were using the internally generated cash to pay for acquisitions).

134. Hayes and Taussig, *supra* note 106, at 138.

135. Ron Chernow, *The Lost Tycoons*, N.Y. TIMES, Sept. 28, 2008, at WK12.

136. DIANA B. HENRIQUES, THE WHITE SHARKS OF WALL STREET: THOMAS MELLON AND THE ORIGINAL CORPORATE RAIDERS 246 (2000).

137. *Id.*; John Pound, *Raiders, Targets, and Politics: The History and Future of American Corporate Control*, J. APPLIED CORP. FIN., Fall 1992, at 6, 11; CHARLES R. GEISST, DEALS OF THE CENTURY: WALL STREET, MERGERS, AND THE MAKING OF MODERN AMERICA 143–44, 164 (2004).

138. Hayes & Taussig, *supra* note 106, at 138; SUBCOMMITTEE ON SECURITIES, UNITED STATES SENATE COMMITTEE ON BANKING AND CURRENCY, *supra* note 128, at 56 (testimony of Samuel Hayes).

139. Zimmerman, *supra* note 115, at 8; *see also* Joseph Rosenberg, *Minnow and Whale: Leverage is the Key to Some Unusual Corporate Couplings*, BARRON'S NAT'L BUS. FIN. WKLY., Jan. 24, 1966, at 5.

D. Why Not Open Market Purchases?

While cash tender offers could only proceed if they could be paid for, potential bidders who had the financial wherewithal to make a cash tender offer theoretically could have simply gone into the market to buy control of their intended targets. As S.E.C. chairman Manuel Cohen said in 1967 testimony to a Senate Subcommittee on Securities, "[a] corporation or individual . . . can acquire a substantial block of a company through a program of purchases in the open market, or through privately negotiated purchases from substantial stockholders."[140]

Deployment of a cash tender offer and open market purchases were not strictly an either/or proposition. Indeed, until the Williams Act required investors purchasing a sizeable stake in a publicly traded company to disclose what they had done,[141] it typically made sense for putative bidders to buy sufficient shares in the open market to obtain a substantial "toehold" prior to launching a tender offer. Such a toehold could be acquired without building in the same takeover premium that a tender offer would subsequently incorporate and could also give the bidder the opportunity to earn a tidy profit by exiting if a second (higher) bidder subsequently emerged.[142] Moreover, being a shareholder might make it possible for a bidder to gain access to a stockholder list that could be used to target the tender offer effectively.[143]

While combining open market purchases with a tender offer could be a smart tactic and even though open market purchases had been used quite often in the opening decades of the twentieth century to acquire public companies,[144] the general consensus by the 1960s was that the cash tender offer was the superior mechanism for securing outright control.[145] Lloyd Cohen, in a 1990 article, has provided the most sophisticated analysis of why a bidder would use a tender offer rather than open market purchases to obtain voting control of a publicly traded company.[146] He argued that price trends associated with open market purchases could

140. SUBCOMMITTEE ON SECURITIES, UNITED STATES SENATE COMMITTEE ON BANKING AND CURRENCY, *supra* note 128, at 24; *see also* Victor Brudney, *A Note on Chilling Tender Solicitations*, 21 RUTGERS L. REV. 609, 610 (1967) ("Acquisition of control may be sought by discreet and isolated purchases over a long period of time, privately or on the open market through brokerage houses acting for undisclosed principals . . . .").

141. *Supra* notes 125–27 and related discussion.

142. Jeremy Bulow, et al., *Toeholds and Takeovers*, 107 J. POL. ECON. 427, 428 n.4 (1999).

143. Hayes & Taussig, *supra* note 106, at 139; *see also* AUSTIN & FISHMAN, *supra* note 104, at 113–14. The courts generally agreed that inspection was entirely proper for the purpose of purchasing shares. *See* Frank G. Newman, *Inspection of Stock Ledgers and Voting Lists*, 16 SW. L.J. 439, 441, 453 (1962). Nevertheless, there were cases involving tender offers where the courts denied the right to inspect, reasoning that a tender offer furthered the business interests of the bidder rather than the target company. Aranow & Einhorn, *supra* note 32, at 15–18.

144. *Supra* note 26 and related discussion.

145. *See supra* notes 113–15, 130 and accompanying text.

146. Lloyd R. Cohen, *Why Tender Offers? The Efficient Market Hypothesis, the Supply of Stock, and Signaling*, 19 J. LEGAL STUD. 113, 116–17 (1990) (discussing the paucity of theoretical analysis up to that point). The question has attracted little attention in the time since. Cohen's article has only been cited on a small number of occasions and none of the papers in question focused on his analysis of tender offer/open market purchase choice.

create a serious problem for a putative bidder. Share prices, he reasoned, would spiral ever upwards as investors, having faith in the informational efficiency of capital markets, would imagine that increases in the share price prompted by the bidder's buying of shares were due to improvements in the firm's fundamental value.[147] A tender offer could break this cycle because it would signal that the price the bidder was offering did not reflect the underlying value of the corporation in current hands—the pre-tender offer share price was the appropriate metric if this state of affairs continued—but rather the value of the company if and when control changed hands.[148]

In the opening decades of the twentieth century, attempts to obtain voting control by way of open market purchases could drive the target company's share price up in the same fashion as they potentially could later in the century.[149] Correspondingly, the cash tender offer could have provided a signalling benefit before World War II as well as after. Why was it, then, that bidders for voting control were apparently not making cash tender offers in the opening decades of the twentieth century?[150]

During the 1960s, as the cash tender offer grew in prominence, various observers attributed its popularity to logistical advantages. *Barron's* observed in 1961 that "when the object of accumulation is a concern of any size, with numerous and widely scattered shareholders, tenders usually fit the bill."[151] Henry Manne, in his seminal 1965 paper on the market for corporate control, said that using a tender offer was preferable for bidders because of the risk that the share price would increase rapidly

147. *Id.* at 128–29; *see also* Yedidia Z. Stern, *Acquisition of Corporate Control by Numerous Privately Negotiated Transactions: A Proposal for the Resolution of Street Sweeps*, 58 BROOK. L. REV. 1195, 1217–18 (1993) (contrasting a corporate acquisition carried out by a "street sweep," which involves open market purchases of shares, with other types of acquisition on the basis that, with a street sweep, the parties involved are unaware that the purpose of the transaction is the transfer of control).

148. Cohen, *supra* note 146, at 129–30.

149. KLEIN, *supra* note 18, at 225, 233–35 (explaining that "[o]rdinarily large purchases attracted attention" and describing how the open market purchases engaged in with the contest for control of the Northern Pacific, discussed *supra* note 122, drove up the share price); RICHARD D. WYCKOFF, WALL STREET VENTURES AND ADVENTURES THROUGH FORTY YEARS 2–83 (1930) (describing how the author profited when the share price of Chicago, Burlington & Quincy Railroad rose in 1901 as J.P. Morgan relied on open market purchases to obtain voting control); S.S. HUEBNER, THE STOCK MARKET 400 (rev. ed. 1934) ("[A]ccumulating . . . large lines of stock . . . will tend to raise the price unduly.").

150. Cohen addressed the point briefly in his 1990 article, arguing that the investors of the 1960s were more inclined than their forerunners to ignore the workings of the corporations in which they owned shares and to have faith in share prices as a signal of fundamental value: Cohen, *supra* note 146, at 140. Cohen's implicit logic is that the cash tender offer that was needed in the 1960s to provide a robust signaling device was not previously required because there was a more attentive breed of shareholder that was not as fixated on the share price. It seems unlikely, however, that shareholders were so different in the opening decades of the twentieth century. Adolf Berle and Gardiner Means' characterization of shareholders in their well-known 1932 book *The Modern Corporation & Private Property* suggests that shareholders fit Cohen's profile well before the cash tender offer became popular: "The net result of stripping the stockholder of virtually all his power within the corporation is to throw him upon an agency lying outside the corporation itself—the public market. It is to the market that most security holders look both for an appraisal of the expectations on their security, and . . . for their chance of realizing them." *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY 247 (1932).

151. Merjos, *supra* note 79, at 5.

if news spread that there was a heavy buyer in the market for the target's shares.[152] Similarly, Samuel Hayes and Russell Taussig, in a 1967 law review article on tender offers, suggested it could take years for a bidder to acquire control in the open market without prompting a prohibitive run-up in the share price, which in turn would give the incumbent managers ample time to take defensive action.[153]

If the cash tender offer was logistically superior in the 1960s, why did its advantages not bring it to the forefront as the twentieth century got underway? A plausible explanation is that capturing voting control by carrying out open market purchases was more straightforward in the 1960s than was the case when merger activity revived following the prolonged Depression-related slump.[154] To put matters into context, while there was a consensus during the 1960s that tender offers offered logistical advantages, in practice, getting a bid before the shareholders could be challenging.[155] Bidders would usually seek to obtain a stockholder list to contact shareholders but management of the target was often able to delay handing over the list until it was of little use.[156] Bidders would frequently advertise in the *Wall Street Journal*, *New York Times*, and some other major newspapers to publicize their tender offer, but this did not guarantee that stockholders would find out what was going on.[157] Bidders correspondingly often had to rely heavily on an investment banker that was engaged to spread the word and to encourage brokers to tender shares held for their own accounts or for their customers.[158]

Back when the twentieth century got underway, the world was simpler in ways that affected the operation of the market for corporate control. Wall Street was, as it had been throughout its history to that point, "a small, insular world."[159] One by-product was that using open market purchases to obtain outright voting control was much more likely to be feasible than would have been the case subsequently. Indeed, a party seeking to acquire voting control of a target company potentially could do so with a single set of instructions to a savvy Wall Street operator. For instance, in 1901, when J.P. Morgan sought to rely on stock market purchases to trump E.H. Harriman and the Union Pacific railroad by acquiring voting control of the Northern Pacific, he enlisted James R. Keene, Wall Street's "master manipulator" of the time, to achieve the

152. Manne, *supra* note 5, at 116.

153. Hayes & Taussig, *supra* note 106, at 136–37. Austin and Fishman, in their 1970 book, likewise cited the risk with open market purchases of the share price being driven upwards and of the incumbent team finding out what was going on and moving to thwart the bid. AUSTIN & FISHMAN, *supra* note 33, at 111.

154. On merger activity, see *supra* Figure 1; RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY 1895-1956 122–24 (1959).

155. *See* Edward C. Schmults & Edmund J. Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 BUS. LAW. 115, 123 (1967).

156. *Id.*; Hayes & Taussig, *supra* note 106, at 141.

157. Hayes & Taussig, *supra* note 106, at 141; Schmults & Kelly, *supra* note 155, at 123.

158. Schmults & Kelly, *supra* note 155, at 123.

159. MAURY KLEIN, RAINBOW'S END: THE CRASH OF 1929 51 (2001).

desired objective.[160] Similarly, in 1911 Thomas Ryan, a tobacco magnate, asked Bernard Baruch, a prominent stockbroker, to buy enough shares on the open market to give Ryan control of Wabash Railway, which Baruch proceeded to do.[161]

Modestly sized share registers help explain why a single stock market "operator" could orchestrate a sufficient number of open market purchases to secure voting control as the twentieth century got underway. At that point even the largest companies—which also would be the most likely to have the dispersed share ownership required for a takeover bid to be viable[162]—lacked what by the standards of later decades was a large shareholder base. Among sixty-eight leading railway, industrial, and utility companies of this era, only seventeen had more than 5000 shareholders.[163] With shareholder lists being of this relatively modest size, a savvy stock market operator should have been able to orchestrate quite readily a sufficiently sizeable number of stock exchange transactions to deliver control. This would, in turn, have meant that matters could potentially proceed swiftly enough to preclude meaningful defensive action from the target's company management team. Moreover, while NYSE rules governing stock market commissions precluded volume discounts for large block purchases,[164] the modest size of the shareholder lists would have helped reduce the transaction costs associated with *de facto* hostile bids executed by open market purchases.

Tolerance of subsequently prohibited methods of stock price manipulation would also have facilitated the use of open market purchases to obtain voting control.[165] In particular, for a savvy stock market operator, it was feasible to take steps designed to short circuit the share price increase that large block purchases would normally engender. For in-

160. *James R. Keene: The Story of His Career With Its Record of Ups and Downs -- Sidelights on Some of His Pools and His Characteristics*, N.Y. TIMES, Jan. 30, 1910, at SM2 (describing Keene); KLEIN, *supra* note 18, at 233 (discussing Keene's role in the Northern Pacific contest); *see also* BERNARD M. BARUCH, BARUCH: MY OWN STORY 155 (1957) (characterizing Keene as a "wizard"); Victor Smith, *Meteoric Career of John W. Gates, Skilful Juggler of Millions*, ATLANTA J.-CONST., June 15, 1902, at A4 (stating that Keene was "regarded as the ablest operator the street has ever known").

161. BARUCH, *supra* note 160, at 112; JAMES GRANT, BERNARD M. BARUCH: THE ADVENTURES OF A WALL STREET LEGEND 107–08 (1997).

162. On ownership dispersion and the viability of takeover bids, see *supra* note 33 and accompanying text. On the association between corporate size and ownership diffusion, see Brian R. Cheffins, *Corporate Governance Convergence: Lessons from Australia*, 16 TRANSNAT'L LAW. 13, 39 (2002).

163. H.T. Warshow, *The Distribution of Corporate Ownership in the United States*, 39 Q.J. ECON. 15, 24 (1924).

164. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 302–3, 398, 445, 475–77, 480–81 (1982) (describing how, until reform prompted by the Securities and Exchange Commission in the 1970s, New York Stock Exchange rules governing stock market commissions members of the Exchange would charge nonmembers precluded volume discounts for large-block transactions).

165. On legislative prohibitions, see Securities and Exchange Act of 1934, ch. 404, §§ 9, 10, 48 Stat. 881, 889–91 (1934); 15 U.S.C. § § 78i, 78j (2006). On tolerance of stock market manipulation, see, e.g., *Finance: Stock Exchange and "Manipulation"*, THE NATION, Jan. 6, 1910, at 22 ("Perhaps the most impressive fact about last week's so-called 'Rock Island corner,' in the course of which the stock went up 31 points in the first ten minutes of business on the Stock Exchange, and down 31 points within the next hour or so, was the fact that the public at large appeared to accept the occurrence as a natural incident of present-day Stock Exchange trading.").

stance, prior to the Wabash Railway takeover, Ryan asked Baruch to buy control of the Norfolk and Western railway by way of open market purchases, and while Baruch's efforts to obtain outright control failed, he did buy a large block of Norfolk and Western shares on Ryan's behalf and, according to Baruch, did so without advancing the share price materially.[166]

The "matched order" is an example of a type of stock price manipulation that could be used to temper the share price increase that would otherwise be associated with an attempt to obtain voting control by way of open market purchases.[167] The most straightforward way for the party seeking to acquire control of a company to proceed would have been to give a first broker orders to sell shares already owned at prices progressively lower than the then-current market price, and simultaneously give, unbeknownst to the first broker, a second broker orders to buy shares at the prevailing stock market price.[168] So long as the purchases by the second broker were large enough to be recorded on the stock exchange ticker, the matching of the orders would cause the price indicated by the stock market ticker to fall.[169] This might well prompt nervous investors to sell and drive the price down still further.[170] The party seeking to acquire control could then snap up a sizeable number of shares cheaply before the share price rebounded due to the buying activity.[171]

In various ways, securing voting control of target companies by way of open market purchases would have become more difficult to execute as the twentieth century progressed. For instance, relying on matched orders to affect the share price of a potential target became increasingly problematic. In 1913 the NYSE adopted a resolution to prevent manipulation of share prices, especially in the form of matched orders.[172] In practice NYSE officials apparently seldom detected or penalized such fictitious transactions.[173] The Securities and Exchange Act of 1934, however, specifically banned matched orders entered into for the purpose of creating a false or misleading appearance with respect to the market for

166. BARUCH, *supra* note 160, at 118.

167. *Finance: "Matching Orders" on the Stock Exchange,* THE NATION, Aug. 27, 1908, at 193; *see also* CHARLES AMOS DICE, THE STOCK MARKET 423 (1928) (describing matched orders).

168. *The Stock Exchange Begins Self Reform: Governors Adopt a Drastic Rule to End Manipulation by Matched Orders*, N.Y. TIMES, Feb. 6, 1913, at 1 (providing a detailed example of the pattern but focusing on a party that wanted to drive the share price up).

169. One hundred shares was the minimum because the New York Stock Exchange constitution specified that one hundred shares constituted the unit of trading: DICE, *supra* note 167, at 53, 266.

170. DANA L. THOMAS, THE PLUNGERS AND THE PEACOCKS 47 (1967).

171. DICE, *supra* note 167, at 423–24 (indicating that one purpose of matched orders was to accumulate a lot of stock "at a very low price").

172. *The Stock Exchange Begins Self Reform: Governors Adopt a Drastic Rule to End Manipulation by Matched Orders*, *supra* note 168. Matters would have been similar with other U.S. stock markets because it was "an almost universal rule of the exchanges that all transactions, at least those involving a variation in price, [should] be promptly reported, and in fact, they become open market information within a very few seconds." *See* A.A. Berle, *Liability for Stock Market Manipulation*, 31 COLUM. L. REV. 264, 270–71 (1931).

173. SELIGMAN, *supra* note 164, at 17–18 (making the point by reference to "wash sales," a related type of fictitious transaction).

shares of public companies, and the Securities and Exchange Commission enforced the law sufficiently robustly to generate a fair amount of case law.[174]

Expansion of the share registers of potential target companies would have created additional obstacles for those who wanted to acquire control of companies by way of open market purchases. By 1930, American Telephone & Telegraph Co, had approximately 540,000 stockholders, and it was commonplace for large public companies to have over 100,000 shareholders.[175] The transaction costs associated with buying a sufficiently large number of shares to acquire voting control would have escalated accordingly. Moreover, a prospective acquirer would have struggled to find a single stock market operator who could deliver control by using open market purchases. As the number of shareholders grew and share turnover multiplied, it became increasingly difficult for even those as skilled as Keene and Baruch to achieve desired objectives single-handedly.[176] As early as 1917, a *New York Times* article entitled "Exit the Swashbuckling Trader of Wall Street" called Keene "the last of the class of great operators."[177]

Changes in the way the exchange floor operated may well have created an additional obstacle for those inclined to use open market purchases to acquire voting control of a target company, at least one traded on the NYSE. Trading on the NYSE was often routed through "specialists", who acted as market-makers for particular stocks. In the early years of the twentieth century there often were multiple specialists making markets in the same stock, but within a few decades the norm was for only one specialist to hold a book in a particular stock.[178] As matters evolved, specialists in the dealing of shares of particular companies could become complacent quasi-monopolists lacking strong incentives to meet promptly all demand for trading.[179] This could create bottlenecks in large-volume trading that would frustrate a bidder seeking to use the stock market to obtain voting control of a target company before the share price increased substantially or the incumbent board took defensive action.[180]

Given that the obstacles facing those who wanted to acquire control of a company by way of open market purchases of shares began to accumulate not long after this takeover technique's heyday in the opening

174. Securities and Exchange Act of 1934, § 9(a)(1), 15 U.S.C. 78i(a)(1); Lewis D. Lowenfels, *Sections 9(a)(1) and (2) of the Securities Exchange Act of 1934: An Analysis of Two Important Anti-Manipulative Provisions Under the Federal Securities Laws*, 85 NW. UNIV. L. REV. 698, 698–701 (1991).

175. I. MAURICE WORMSER, FRANKENSTEIN, INCORPORATED 49–50 (1931).

176. On the significance of share turnover in this context, see WYCKOFF, *supra* note 149, at 149.

177. *Exit the Swashbuckling Trader of Wall Street*, N.Y. TIMES, May 13, 1917, at SM8.

178. SELIGMAN, *supra* note 164, at 337–38.

179. ROBERT SOBEL, INSIDE WALL STREET: CONTINUITY AND CHANGE IN THE FINANCIAL DISTRICT 51 (1977) (relating a contemporary description of a specialist, who "spent his entire day at play with some of his friends").

180. SELIGMAN, *supra* note 164, at 338 (noting "the difficulties the specialists had in handling large-volume transactions").

decade of the twentieth century, it might have been thought that deployment of the cash tender offer would necessarily follow. Merger activity dipped dramatically, however, throughout much of the 1930s and 1940s (Figure 1), and attempts to secure control of companies by hostile means seemingly temporarily vanished. Correspondingly, even if obtaining control of companies by way of open market purchases had become too difficult to accomplish, cash tender offers remained unknown until the mid-1940s and were uncommon until the mid-1950s.

VI. CONCLUSION

With respect to the chronology of the takeover bid, Larry Ribstein adhered to the conventional wisdom, which is that the story began in earnest in the 1960s and took a dramatic turn in the 1980s with the rise of junk bonds.[181] In this Article, we have challenged the standard takeover bid narrative that Larry endorsed. That might seem to be an ill-mannered approach to take at an event celebrating his scholarship. We suspect, however, that Larry would find our approach appealing, given that being provocative was one of the hallmarks of his academic writing. For instance, he no doubt ruffled feathers in numerous major U.S. law firms when he predicted "the end of the major role large law firms have played in the delivery of legal services" in a 2010 article "The Death of Big Law."[182] Larry's book *The Rise of the Uncorporation* was similarly contrarian; Grant Hayden and Matthew Bodie said in a 2011 review of Larry's narrative: "It takes the traditional law and economics story of the corporation and turns it on its head."[183]

The revisionist history we provide here is by no means complete. For instance, while it is well known that Michael Milken popularized the junk bond as a catalyst for hostile takeovers,[184] we have yet to find out which investment bankers and/or lawyers deserve credit for developing the cash tender offer as a takeover mechanism. Similarly, while we have traced the history of the exchange tender offer back to 1901 and the cash tender offer to 1944, and perhaps 1902, we freely acknowledge that the searches we have conducted on point have not been sufficiently definitive to mean that our chronology will be the last word. Nevertheless, while all pieces of the historical puzzle are not yet in place, the evidence we have provided suffices to demonstrate that the received wisdom concerning the history of the takeover bid requires at least a partial rewrite.

181. *Supra* notes 4–5 and related discussion.

182. Larry E. Ribstein, *The Death of Big Law*, 2010 WISC. L. REV. 749, 813.

183. Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of the "Nexus of Contracts" Theory*, 109 MICH. L. REV. 1127, 1128 (2011).

184. *Stars of the Junkyard*, THE ECONOMIST, OCT. 21, 2010, http://www.economist.com/node/17306419.