

Opening Remarks

Chancellor William B. Chandler III

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Thank you very much, Professor O’Kelly, for that very kind introduction. I am delighted to be here and honored to take part in the dedication of the Adolf A. Berle, Jr. Center on Corporations, Law and Society.

Law is, in many ways, a backwards-looking field. We litigate over facts that have already occurred, challenge deals that have already been signed, and apply rules of decision based on previously-established precedent or statutes already enacted. To the extent that this Center and the symposium reflect on Berle’s work, they too are an exercise in looking back. Indeed, some might say the establishment of a Center named in Berle’s honor is a monument to the past.

So, for a moment, let’s consider whether that’s such a good thing. Any sort of monument carries the risk of freezing a moment in time or rendering something fixed in place and content. Where the monument you’re making is a piece of art capturing a fleeting moment of bliss, John Keats would wholeheartedly approve. Keats’s *Ode on a Grecian Urn* tells us that “happy” are the trees that “cannot shed [their] leaves nor ever bid the Spring adieu.” But what if the monument attempts to capture and tell future generations of a particular figure’s greatness? Should we then be talking about another poet—Percy Bysshe Shelley? Shelley’s *Ozymandias* ridicules a now-battered and dilapidated statue erected to honor the Egyptian Pharaoh Ramesses the Great.

So, which is it? Are we today dedicating a Keatsean “Attic shape” that “dost tease us out of thought / as doth eternity,” or a Shelly-esque set of “[t]wo vast and trunkless legs of stone / stand[ing] in the desert?”

I would suggest the answer is neither. No matter your view of the aesthetic merits of Greek pottery or the utility of Egyptian relics, it is the two poems themselves that bestow immortality on the “fair youth” depicted on the Grecian Urn in Keats’s *Ode* or the “king of kings” whose statue has fallen into disrepair in Shelley’s *Ozymandias*. It is an immor-

tality reinvigorated by every English student who writes an essay on these poems or any judge who cites these English Romantic Poets in a speech about a corporate law scholar. It is through this ongoing dialogue with the text that the subject matter still lives.

Similarly, I don't believe the mere establishment of a "Center" in Adolf Berle's honor does much one way or another to burnish or tarnish his legacy and contributions. What *does* matter, however, is precisely what this Center will foster, starting with this weekend's symposium: a dialogue that invests Berle and his important work with an immortality of sorts. And when the many gifted scholars in attendance here make their presentations, they will, I hope, do more than merely memorialize Adolf Berle.

Berle, I believe, would have it no other way. He was, first and foremost, a radical thinker—something that does not always go over well in the backwards-looking field of law. Indeed, Berle was the kind of guy that can make you feel bad about yourself. He was a very successful lawyer, a groundbreaking scholar, a diplomat, an assistant secretary of state, an ambassador, a speechwriter for the president, a policymaker, and a member of FDR's so-called "brain trust." His resume alone probably deserves to have a Center built in its honor. But more than any of these impressive credentials, he literally redefined the universe of American corporate law. I'll leave it to the various scholars among us to explain and to analyze the more nuanced and subtle of Berle's contributions; I want to talk about a few of the perhaps very obvious things, things we take for granted.

First, Berle was one of the original scholars to recognize the core concern of corporate law: the separation of ownership from control. As a judge on the Delaware Court of Chancery, this particular observation is in a very real sense a meaningful part of my day-to-day work. A great number of the lawsuits that I hear arise from this tension. Of course, Berle also recognized early on that the rise of institutional investors did not mark the end of the ownership-control separation phenomenon. Instead, it simply added additional layers of complexity. Many institutional investors are themselves corporate (or corporate-like) entities that have the same disparate, disconnected ownership characteristics as the mass of individual shareholders. If these institutions function as passive investors, they simply widen the gap between corporate managers and the individuals in society that are the ultimate beneficial owners. If the institutions function as active shareholders, then control again is shifted—from corporate managers to institutional managers—but ownership and control remain separate, and the phenomenon continues with the same intense debates about its implications.

Second, having recognized this core concern about the separation of ownership and control, Berle also offered advice on what to do about it. Along with his partner, the economist Gardiner Means, Berle argued that managers were “trustees” of the shareholders and that they could exercise the powers they had only for the benefit of those shareholders. In other words, Berle articulated the governing premise of the fiduciary duties that now inform nearly every aspect of Delaware corporate law. As professors Bratton and Wachter (both of whom are participating, I believe, in the symposium) noted in an article they published last year, “[t]his was by no means a settled principle of law.”¹

Third, Berle put this notion of fiduciary duties in context by articulating a two-part test for review of managerial action. The first level of review is the technical power conferred on managers by articles of incorporation, bylaws, and statutory law. The second level of constraint consists of the common law fiduciary duties. This is where Berle’s work touches my job, because he insisted that the judiciary had a legitimate role to play in ensuring managers met their fiduciary duties to shareholders. It is particularly true in Delaware, where chancery and state supreme court judges have broad powers of equity that enable them to ensure that justice is done based on the unique facts of a given case. There are notable instances in Delaware case law where our courts have set aside the actions of management even though those actions were technically legal. Almost forty years ago, for example, in a case styled *Schnell v. Chris Craft Industries, Inc.*, the Delaware Supreme Court strongly rejected the notion that directors’ compliance with the general statutory law was all that was required to meet their obligations.

The equitable principles of fiduciary duty, the *Schnell* Court held, would overlay and constrain the statutory powers of directors. This was not innovative; instead, it was part of the longstanding operation of our law and a manifestation of a principle that Berle initially offered.

These basic principles have spurred intense debate ever since Berle first articulated them. It is a debate that still rages today. For example, the separation of ownership and control phenomenon is at the heart of the current shareholder-rights movement. It also influences other timely corporate law debates, including proposals to federalize corporate law. Berle’s fundamental observation—which is today widely accepted as true—has nonetheless generated a pitched debate as to its precise implications. Scholars, academics, and policymakers, although they credit Berle for his seminal observation, posit widely divergent arguments as to

1. William W. Bratton & Michael L. Wachter, *Shareholder Primacy’s Corporatist Origins: Adolf Berle and The Modern Corporation*, 34 J. CORP. L. 99, 108 (2008).

what Berle's observation means for corporation law and broader public policy.

As I said before, I hope that despite this Center's quite proper affection for Adolf Berle, the participants in this weekend's symposium and future symposia will freely wrestle with and challenge every assumption he made and every conclusion he reached. This is actually a wholesome thing, for as the Scottish philosopher David Hume observed, "Truth springs from argument amongst friends." This should not be any less so in academic or political circles. And in the final analysis, I am confident we will find that corporate law has been made all the better because of the intense debate over the implications of Berle's core observations about the separation of ownership and control.

Finally, we should keep in mind that Berle made some of his most important and game-changing observations in the midst of the Great Depression—a time of unprecedented political and economic upheaval, a time not altogether unlike the present. Then, as now, questions loomed about how to regulate corporate conduct and about the proper role the government should play in that regulation. Astutely, Berle recognized that the stakeholders in this debate were more than just the stockholders and the managers of any particular corporation—they also included society in general. This, then, is the debate we must have. What is the purpose of a corporation? How does it best create wealth and serve the interests of society? It is precisely the kind of "argument among friends" that I referenced earlier, that this new Center is uniquely positioned to facilitate.

And, if anything, the stakes have only grown since Berle's time. While the pertinent question in the 1930s was whether the corporate law of an individual American state could temper the exercise of an American corporation acting on a national scale, today the question is whether the globalization of product and capital markets has made it impossible for nation states—even the United States—to effectively regulate corporate behavior. Berle lived and wrote in a time of substantial economic uncertainty and on the heels of marked changes in corporate America. He thought deeply about the causes of the economic crisis that confronted his generation, the changing role of corporations in society, and the appropriate legal responses to both. Berle articulated his groundbreaking conceptions of the corporation in a cogent and thoughtful fashion, unafraid to lend his voice to the ongoing debate. Many of his ideas influenced the New Deal policies of the Roosevelt administration, which brought permanent changes in the American economy and culture. To be sure, Adolf Berle's ideas did not put to rest the ongoing discussion about the proper role of government or of corporations in

American society. Nor would we want it to do so. So long as America is comprised of free thinkers in a robust democracy it is inconceivable that anyone could put these great debates to rest. But what Adolf Berle did was to contribute to the discussion in a significant and permanent way.

And now it is our turn to do the same. Berle contributed enormously to the corporate legal landscape, and we owe it to him to ensure that this Center, named in his honor, does not “decay” into a “colossal wreck” like the statue of Ramesses that so fascinated Shelley. Instead, let it be like the poem itself, an enduring source of inspiration and challenge.

I have a hunch that the Center will succeed because its first director is Professor Charles O’Kelly. Like Adolf Berle, Charles O’Kelly is a corporate law scholar (and an expert on Delaware corporate law, I might add), and Chuck’s professional life also has been devoted to continuing and enriching the debate about the purpose of the corporation in our society and to offering real world solutions for the problems we confront. Frankly, I cannot imagine a more appropriate and fitting director for the Adolf Berle Center. And so, I want to congratulate Professor O’Kelly publicly, and wish him, and Seattle University, the best with the new Center.

Thank you very much for inviting me to be with you today.