Berle and Corporation Finance: Everything Old Is New Again

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In this essay, I want to illustrate how Adolf A. Berle Jr.'s *Studies in the Law of Corporation Finance*[1] was prescient about the kinds of financial innovation that are central to today's markets. For scholars who are not familiar with this publication, *Corporation Finance* is a compilation of edited versions of several of Berle's articles, along with some new material, most of which is focused on 1920s corporate practice. My primary goal here is simply to shine a light on this work and to memorialize for scholars the key passages that echo many of today's challenges. The punch line of this essay is straightforward: everything old is new again.

The overarching theme of *Corporation Finance* is that corporate law should (and did) depend on context and relationships. Accordingly, Berle focused on describing various cutting-edge aspects of corporate practice, many of which are strikingly similar to innovative financial practices today. My main job in this essay is one of curator. First, I culled from *Corporation Finance* various excerpts that I see as especially interesting or resonant. Then I grouped them into categories I think should resonate with scholars today. The categories are as follows:

1. Emphasis of Private Ordering Over Law
2. Increased Focus on History
3. Questioning Modern Corporate Objectives
4. Separation of Ownership from Ownership
5. Innovation in Financial Instruments
6. Anonymous Trading Challenges
7. Emergence of Non-Voting Stock
8. Increased Importance of Subsidiaries

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1. *See generally* ADOLF A. BERLE, JR., STUDIES IN THE LAW OF CORPORATION FINANCE (1928).

Each of these categories is important to corporate law scholarship today. For scholars who might not have the time to read through the entirety of *Corporation Finance*, the quotes amassed here provide a window into Berle's thinking at the time. The problems he confronted nearly a century ago are strikingly similar to the ones we confront today. I hope scholars and students of history will find these curated excerpts useful and interesting.

1. EMPHASIS OF PRIVATE ORDERING OVER LAW

First, and perhaps most fundamentally, Berle noted the importance of private norms to the understanding of corporate law. His focus was on the actions of lawyers, bankers, and managers rather than the rulings of courts. Because financial practice at the time was so far ahead of policymakers, Berle argued that private ordering often mattered more than legal rulings.[2]

The three quotes below illustrate Berle's emphasis on actual transactions. He focuses on the relationships among bankers and managers—and their lawyers—and emphasizes that there are unlikely to be legal precedents that apply to new forms of relationships and deals. This philosophical approach is essentially modern, and easily could apply today.

> Corporation law as traditionally taught and written about has concerned itself principally with questions affecting the creation, the delimitation and the method of action of the corporate entity. . . . Today, with the growth of American business, the concentration into large financial units, and the increased liberality of incorporation statutes, the center of interest has shifted. The problems now revolve about financial relationships between the various participants in the corporate enterprise.[3]

> Corporate transactions and financial methods are invariably some years ahead of court interpretations. Further, precedents having the

2. Many scholars have noted the importance of private ordering as compared to legal rulings, including in the business arena. *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329 (2010); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328 (2004); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L. ECON. & ORG. 225 (1985); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 682–83 (2005).

3. BERLE, *supra* note 1, at v.

> force of judicial decisions are common in corporate matters even though there is no judicial ruling.[4]
>
> Again, bankers and corporate managements habitually must settle, generally with the advice of lawyers, the ever-increasing range of problems arising out of new forms of securities and contracts, many of which involve new relations between the banker, the corporate management and one or more classes of security holders. Precedents here simply do not exist.[5]

2. INCREASED FOCUS ON HISTORY

In addition to being a lawyer focused on evolving business practices, Berle also was a historian. He emphasized the importance of understanding the extent of the role of the state in corporations generally.

Just as the analysis of history plays an increasingly important role in modern scholarship, particularly in thinking about corporate constitutional law and the role of the corporation in society,[6] Berle focused his scholarship on the history of the corporate idea, starting with Roman law. One of the classic issues from history, then and now, has been the question of whether to emphasize the separate existence of the corporate fiction versus the inherently corporate notion of the grouping of individuals. This distinction is crucial to the interpretation of various corporate rights and obligations.[7]

Berle emphasized several historical topics including: the limited role of the state in early Roman "universities," the developments associated with the East India Company during the sixteenth century, and the appearance of the South Sea Company in 1711. He chastised American lawyers for foolishly adopting some British ideas, including the notion that corporations arose only when British royalty granted charters. He also included descriptions of several of the earliest corporations, including "The Philadelphia Contributorship," described below, which was founded by Benjamin Franklin and still exists at 212 South 4th Street, between Walnut and Locust Streets in the Society Hill neighborhood of Philadelphia.[8]

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4. *Id.* at vi.

5. *Id.* at vii.

6. This volume of articles is perhaps the best and most recent example. For other recent examples, *see also* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639 (2016).

7. *See* Lyman P.Q. Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135 (2012) (discussing the literature).

8. *See generally* THE PHILADELPHIA CONTRIBUTORSHIP, https://1752.com/ [https://perma.cc/6H9E-X2U3].

> This tendency is not new but old; and the historical analysis of the development of corporations will perhaps show that the bankers and business men are endeavoring to deal with the first principles of corporation law, whereas the lawyers have gone off on a tangent unhappily introduced into common law during a disreputable period of disorder under the Stuart dynasty in England.[9]

> There seem to have been corporations under the late Roman Republic. They were not made by the state, and the state had nothing to do with them. . . . A famous instance of such a corporation was the University of the Vestal Virgins, who appear to have held title in perpetual succession to the property owned by the temple in which they served.[10]

> The corporations mentioned up to this time evidenced the participation of the associates, not through a certificate representing a property right, or indeed by any measure of property, but through membership. And while participation might and in some cases did differ, the norm was an equal participation by everyone connected with the institution.[11]

> The idea of using the corporate form as a means of securing financial contributions does not appear until the reign of Queen Elizabeth.[12]

> Corporations now could be formed by merchant adventurers, could receive their charter from the king (suitable arrangements having been made with him) and could have as an outstanding feature the immediate issue of stock.[13]

> The earliest is probably the New York company "for Settling a Fishery," created in 1685 with share capital. . . . The fifth such corporation was the "Philadelphia Contributionship for the Insuring of Houses from Loss by Fire"—a share capital insurance company which, by the way, is still in existence.[14]

> But American lawyers were not as familiar with England's legal history then as they are now; with the result that the doctrine of corporations as mystical entities created by governmental fiat was regarded as somehow inherent in the general scheme of things.[15]

> Nothing is better settled under the continental law than that when two or more men join in a common enterprise, they form an entity distinct

9. BERLE, *supra* note 1, at 3.
10. *Id.* at 3.
11. *Id.* at 11–12.
12. *Id.* at 12.
13. *Id.* at 14.
14. *Id.* at 15–16.
15. *Id.* at 17.

> from any of the individuals concerned. They do this by contract; the state has nothing to do with it.[16]
>
> On the one hand in England a governmentally created corporation is recognized as a frame for its stockholders; on the other, in America, an aggregate without the governmental frame is nevertheless recognized for some purposes as a corporate entity. So has the circle come to complete itself.[17]
>
> The tendency suggests only one historical parallel. This is the transition which occurred in the early Middle Ages from private ownership of land (land then being the chief field in which capital could be invested) toward feudal control.[18]

3. QUESTIONING MODERN CORPORATE OBJECTIVES

Berle's discussion of corporate objectives easily could have been teleported from modern discussions of the role of the corporation in society and vice versa.[19] His references to General Electric and stakeholders read as if they were taken from the widely cited 2018 letter about corporate objectives from BlackRock, the large institutional investor.[20] Berle's questions about corporate objectives were connected more to his thoughts about private ordering than to any notions of social policy. He emphasized the nature of the relationships among various corporate actors as the source of questions about corporate objectives.

> The exact nature of a corporation has long been a subject of theoretical discussion. Today, however, it becomes a matter of practical importance as well. The reason for its emergence from the academic field is bound up with the tremendous development of the corporation as an engine of finance and as an instrument of economic organization.[21]
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> Incident to this has come a radical change in the popular conception of the relationship between management and stockholders. Mr. Owen Young was able to say recently that The General Electric Company owed its first duty to its labor, its next to the public it served, and its

16. *Id.* at 18.
17. *Id.* at 22.
18. *Id.* at 26.
19. *See, e.g.*, Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279 (2001) (questioning modern corporate objectives).
20. *See* Laurence D. Fink, *Larry Fink's Annual Letter to CEOs: A Sense of Purpose* (2018), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter [https://perma.cc/J5N2-EDTE].
21. BERLE, *supra* note 1, at 1.

> third obligation in rank to its stockholders. A few years ago this would have been high socialism.[22]
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> Only by a close study of the business mechanism, the expectations of the parties, the business standards involved and the respective positions of the various parties in the situation, can we undertake to indicate the result which the law should strive to reach.[23]
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> In every new financial form, accordingly, it becomes necessary not merely to consider the draftsmanship of the papers, but also the possible results of any relations which may have been created.[24]

4. SEPARATION OF OWNERSHIP FROM OWNERSHIP

At several points in *Corporation Finance*, Berle echoes Chief Justice Leo Strine's insights about the agency cost problems that arose, and arise, from the disintermediation of individual savings through various institutions, a problem Strine has labeled the "separation of 'ownership from ownership.'"[25] Berle was particularly concerned about how these kinds of agency cost problems arose with respect to investment bankers as intermediaries. Berle's nostalgic descriptions of individual businesspeople resembles Chief Justice Strine's descriptions of the importance of remembering the role of individuals as the source of savings.[26]

> The individual shareholder may at once be eliminated from the discussion as a means of control. . . . There are, however, three distinct influences which can be brought into play. The first is the group of investment bankers. . . . A second instrumentality is found in the stock exchanges. . . . A third safeguard lies further in the future, though it is already forecast by present developments. This is the interposition between the corporate management and the stockholders of depositaries capable of protecting the stockholders' rights.[27]
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> [N]o one who saves money can altogether escape putting himself in the situation of the investor. He is, in a sense, an enforced investor. In large measure, his savings must necessarily go into the channels

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22. *Id.* at 1.
23. *Id.* at 193.
24. *Id.* at 194.
25. *See* Leo E. Strine, Jr., *Why Excessive Risk-Taking Is Not Unexpected*, N.Y. TIMES: DEALBOOK (Oct. 5, 2009), http://dealbook.nytimes.com/2009/10/05/dealbook-dialogue-leo-strine/ [https://perma.cc/624R-AUZM] (using the phrase "separation of 'ownership from ownership'" to describe investor intermediary conflicts); *see also* Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449 (2014).
26. Strine, *Why Excessive Risk-Taking Is Not Unexpected*, *supra* note 25.
27. BERLE, *supra* note 1, at 37–38.

> of corporation finance. They may not travel this path directly. They may find their way into the system through the medium of insurance companies, investment trusts, commercial banks, or even savings banks. But this merely removes the problem one step from the person actually saving a few hundred dollars to the institution to whom he entrusts these savings.[28]

> It is still possible for a man to own a corner grocery store or a small haberdashery shop, but even these are rapidly being replaced by chain stores owned by large corporate entities. . . . The personally owned business is becoming a thing of the past. It is possible for a man of means to own privately his town house, his country house, his clothing and his personal effects, his automobiles, and property designed for his personal necessities and pleasures. But his funds put out to economic uses almost of necessity find their way, through the medium of investment bankers, into the capital structure of corporations.[29]

5. Innovation in Financial Instruments

In several different chapters of *Corporation Finance*, and in several different contexts, Berle presaged various financial innovations, including the separation of rights in venture capital contracting and a range of corporate capital structure innovations.[30] Berle described examples of the potential tension among various types of preferred stock in ways that resonate today.[31] Berle ultimately advocated judicial intervention to address a range of innovations, a solution the Delaware courts have occasionally embraced but also have rejected.[32]

> Another of the management powers over individual stockholders' rights is found in control of accounting. . . . If the board determines that all earnings should be conserved so that the class B shares may ultimately obtain a larger participation at the expense of class A, they have power to do this by simply increasing depreciation charges, or

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28. *Id.* at 191.

29. *Id.* at 26.

30. For a description of a range of these innovations, as well as the extant judicial approaches, including Delaware's, see Frank Partnoy, *Adding Derivatives to the Corporate Law Mix*, 34 GA. L. REV. 599 (2000).

31. For example, Chancellor Allen addressed such tensions in the context of a dispute between preferred and common shareholders. *See* Equity-Linked Inv'rs, L.P. v. Adams, 705 A.2d 1040 (Del. Ch. 1997).

32. For example, the Delaware courts have considered the extent to which fiduciary duties and standing in litigation might shift from shareholders to creditors when a corporation is in the vicinity of insolvency. *See* Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772 (Del. Ch. 2004); Credit Lyonnais Bank Nederland N.V. v. Pathe Commc'ns Corp., No. 12150, 1991 WL 277613 (Del. Ch. Dec. 30, 1991).

what not, with the result that the annual statement shows a deficiency.[33]

Powers granted to boards of directors are manifestly granted for use in forwarding the general interests of the corporation and of all classes of stock. This is implicit in the entire corporate mechanism. Use of any such power, not in the corporate interest and the general interest of all concerned, but for the purpose of benefiting one class of stock at the expense of another, obviously transcends the intended scope of the power. It is, further, probably an abuse of discretion by the directors.[34]

Essentially such securities are hybrid, bridging a gap between preferred and common stocks, and having some of the dividend rights inherent in both. . . . There may be, of course, endless permutations.[35]

Examination of the nature of rights in surplus arising upon creation of non-participating preferred stock and subsequent earning of surplus may show a single preference—that of the initial preferred dividend—or it may show a series of preferences . . . . So far as the writer is aware, this interpretation of the relation of various priorities of participating preferred stock is novel.[36]

Neither a convertible obligation nor a stock purchase warrant, as such, gives the holder an equitable right in shares of stock. Such instruments create no trust in respect of any reserved shares; nor do they place the holder in a position to enforce any of the rights of a shareholder. All of the incidents of the situation must be worked out on simple lines of contract.[37]

The fact that the conversion privilege uses a name which is applicable to the shares both before and after the splitting-up process, can hardly be construed to give the obligor corporation liberty to evade its promise by completely altering the unit value of the share.[38]

It is sufficiently obvious that the practice of issuing convertible obligations and stock purchase warrants is still in its infancy.[39]

It is practically undisputed that where the corporation is insolvent, the bondholder may apply to a court of equity to enjoin misapplication of corporate funds . . . . It is loosely stated that in such a situation the corporate management has become a trustee for the

33. BERLE, *supra* note 1, at 33–34.
34. *Id.* at 110.
35. *Id.* at 112–13.
36. *Id.* at 126 & n.11.
37. *Id.* at 134.
38. *Id.* at 139.
39. *Id.* at 152.

> benefit of creditors. This, however, is of little help; it is useless to lock the stable door after the horse has gone. It has also been held, however, that even prior to insolvency a bondholder may secure relief in equity against transactions by the corporate management constituting a 'waste' of the corporate assets . . . .[40]
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> Theoretically, there is a wide difference between a stockholder and a bondholder. In practice and as a matter of finance, the difference is not nearly as great as that which the law presupposes. . . . Every banker knows this; there is no reason why courts should ignore it. It is true that the obligation-holder has bargained for and obtained certain rights . . . . In practice, however, these do not greatly alter the situation. Ultimately, the only protection which most bondholders have is the faithful management of the enterprise; and they stand in only slightly better position than a preferred stockholder.[41]
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> [I]n exploring the somewhat amorphous field of corporation finance our search must be for relationships and their incidents. . . . [A] bondholder is a creditor . . . [b]ut he may also have a relationship to the management—specially if the corporation is on the brink of insolvency. A preferred stockholder has a charter clause governing his rights; but he also has a relation to the management which may entail additional duties of fidelity and fair dealing. Both of these may have a relationship with an investment banking house . . . . A holder of common stock . . . may have a different relationship to all three.[42]

6. ANONYMOUS TRADING CHALLENGES

Berle was not only concerned about the separation of rights in venture capital contracting and a range of corporate capital structure innovations, he was also concerned about insider trading. Berle's assessment of insider trading was far more sympathetic to uninformed traders than scholarly assessments today; unlike other aspects of *Corporation Finance*, his statements about insider trading are worth recalling simply to note how the modern treatment of insider trading as connected to fiduciary duty breaches was far from preordained in 1928.[43]

Berle considered the challenges associated with the fact that trading was increasingly anonymous, a puzzling aspect of 1920s markets, and addressed questions about when disclosure by insiders of facts should be required. He ultimately settled on three basic propositions. His description of the direct obligation between insiders and shareholders is interesting, as

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40. *Id.* at 160.
41. *Id.* at 156.
42. *Id.* at 192.
43. For a collection of leading articles tracing this evolution of insider trading law, see generally Stephen M. Bainbridge, *Insider Trading*, 36 J. CORP. L. 282 (2011).

his early recognition of what is now known as the "bespeaks caution" doctrine and the safe harbor for forward-looking statements.[44] For example, just as these doctrines provide for a lower level of mandatory disclosure for opinions about the future, Berle noted that disclosures at the time were mandated only with respect to facts, not opinions about the future. Berle's three propositions were:

> (1) The fiduciary obligation of officers and directors creates obligations not only to the corporation but to the stockholders directly.[45]
>
> (2) Where a director buys or sells stock in his own corporation, he is liable to the seller or buyer for losses sustained where disclosure of facts sufficient to form a fair basis of judgment as to the value of the stock has not been made by him or is not available through the ordinary channels of publicity by way of announcement, corporation report, or other recognized means of publicity.[46]
>
> (3) Requirement of disclosure has to do with facts only, and not with prospects, hopes or estimates.[47]

7. EMERGENCE OF NON-VOTING STOCK

The two eras during the past century when non-voting stock emerged as a significant phenomenon were in recent years (most prominently with the initial public offering of Snap Inc.) and during the mid-1920s. Scholars often cite to William Z. Ripley's book, *Main Street and Wall Street*,[48] as an authoritative source on non-voting stock; *Corporation Finance* relied on and cited Ripley's earlier *Atlantic Monthly* article, from January 1926, with the same title. Many of the issues Berle addressed also have been addressed in the recent literature on non-voting stock.[49]

As has been the case with recent securities issues, including the Snap initial public offering, Berle expressed concerns about the separation of voting and economic interests. Berle also noted the importance of financial intermediaries, which remain important today.

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44. For an analysis of how such disclosures, particularly risk factor disclosure, have evolved over time, *see* Karen K. Nelson & Adam C. Pritchard, *Carrot or Stick?: The Shift from Voluntary to Mandatory Disclosure of Risk Factors*, 13 J. EMPIRICAL L. STUD. 266 (2016).

45. BERLE, *supra* note 1, at 181.

46. *Id.* at 183.

47. *Id.* at 181.

48. *See generally* WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET (1927).

49. For a recent and provocative discussion of the Snap issuance, see Amy Westbrook & David A. Westbrook, *Snapchat's Gift: Equity Culture in High-Tech Firms* (Univ. at Buffalo Sch. of Law, Legal Studies Research Paper No. 2018-003, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3200415.

> Non-voting stock, a relatively recent invention, was invoked (with other devices) in the case of the Goodyear Rubber Company to perpetuate control of that concern in the hands of a well-known firm of New York bankers. Transactions between the company and that firm and individual members of it were claimed to have resulted in private profits to the bankers. . . . [T]his litigation was settled out of court . . . .[50]

> The past few years have witnessed the rise of a new device, that of concentrating all corporate voting rights in a relatively small proportion of corporate stock. . . . Dangers attend this divorce of management from equitable interest. . . . Power without responsibility is, philosophically, a perilous matter.[51]

> The investment banking house is invariably in the center of a web of economic interests, to which it renders a real service and from which it derives a real return, but which afford possibilities for profitable transactions not necessarily benefiting the controlled corporations. While the banker's action may be adequately regulated by a high sense of banking ethics which largely prevails among reputable houses, the law can hardly leave investors subject to the doubtful protection of private consciences.[52]

8. Increased Importance of Subsidiaries

Finally, *Corporation Finance* addressed in great detail the importance of subsidiaries. Although Berle is not explicitly discussing modern corporate structure, his discussion echoes its complexities, such as the complexities of the Special Purpose Entities (SPEs) that became infamous surrounding the collapse of Enron to large banks' ongoing use of Variable Interest Entities, the successors to the SPEs.[53]

> Through the device of subsidiary companies all of these powers may be further enlarged. Should a corporation elect to transfer all its property to a subsidiary, taking in return stock of the subsidiary, it is in a position to control the entire action of the latter and thereby sanction almost any transaction into which the latter chooses to enter, quite irrespective of whether the original owner of the property is protected or not.[54]

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50. Berle, *supra* note 1, at vi.
51. *Id.* at 42.
52. *Id.* at 44–45.
53. *See* Frank Partnoy & Jesse Eisinger, *What's Inside America's Banks?*, Atlantic (Jan./Feb. 2013), https://www.theatlantic.com/magazine/archive/2013/01/whats-inside-americas-banks/309196/ [https://perma.cc/LX9B-34WH].
54. Berle, *supra* note 1, at 33.

> The purely intracorporate relationships of management, creditors, and stockholders are sufficiently complex. When, however, one corporation is a holding company, owning or at least wielding a controlling interest in other corporations, the intricacies of the situation become extreme.[55]
>
> Under their cover the legitimate use of subsidiaries has been obscured by a too frequent manipulation of accounting and credit; so that lawyers, bankers, and courts are now faced with complicated structures in which the actual interests cannot readily be discerned.[56]
>
> Subsidiary corporations may be divided into two main classes: (a) wholly-owned subsidiaries, having no stock or obligations apart from that owned by the parent; (b) subsidiaries controlled by a parent corporation but having a financial structure at least partly independent from that of the parent.[57]
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> The test, it is submitted, is a simple and absolute one. If a subsidiary incurs no debts on the strength of its own credit, and sells no securities, stocks, or bonds to anyone other than the parent, it falls within the first class. It then becomes, virtually, a bookkeeping division of the parent. Such subsidiaries present few problems apart from accountancy.[58]
>
> If, however, the subsidiary borrows money or incurs liability on its own credit-offers securities based on its own enterprise apart from that of its parent, or has a minority stock interest outstanding in the hands of persons whose hope of repayment or profit is limited to the success of the subsidiary enterprise-then it falls within the second class, and different rules must be applied.[59]
>
> It must be conceded that this division may not be plainly marked: a wholly owned subsidiary may incur liabilities to, say, its officers. But the fundamental distinction remains accurate though sometimes difficult of application. If its obligees look to the credit of the parent as their primary motivation, the subsidiary remains a mere bookkeeping convenience. If they look to the subsidiary itself, the situation is different.[60]
>
> If the *X* corporation has ninety per cent of the stock of the *Y* corporation, the holder of the remaining ten per cent can (if he be a true outsider and not in fact a dummy for the parent company . . . insist that the affairs of the subsidiary be run precisely

55. *Id.* at 153.
56. *Id.*
57. *Id.* at 154.
58. *Id.*
59. *Id.* at 154–55.
60. *Id.* at 155.

> as though it were independent. . . . The advent of the independent outsider, however, prevents either the parent or a judge sitting in equity from treating the subsidiary in this summary fashion.[61]
>
> Only by evolving rules which will adequately maintain the integrity of each unit in the chain can the subsidiary device be made safe . . . . The investing public is vitally interested in such rules; and they are, it is believed, sufficiently developed and sufficiently flexible to deal with the situation. The principal requirement is that they be clearly stated and clearly understood.[62]

Berle saw an issue that prevails to this day: companies using subsidiaries as "bookkeeping ventures." In order to protect the investing public, Berle argued that we need to look at the rules involving subsidiaries and insure those rules "maintain the integrity of each unit in the chain."

CONCLUSION

The wisdom of Berle's *Corporation Finance* was its recognition of two key ideas. First, the analysis of corporate rights requires that one explore the details regarding the relationships among corporate participants; Berle criticized simplistic views of the corporation and its actors. Second, shareholder rights, particularly voting rights, can be of limited utility, particularly in large public corporations. These two insights undergird the arguments that emerged four years later in Berle and Means's *The Modern Corporation and Private Property* (1932), and the broader notions of separation of ownership and control that have resonated so broadly since then.

Given the approach that I have followed here, I think the most appropriate way to reinforce these final observations is with two excerpts from *Corporation Finance*, one from near the beginning and one from near the end. As with all of the excerpts above, Berle is prescient about the issues that corporate law scholars confront today.

> Yet modern finance rests precisely on the safety and certainty of these intra-corporate rights; and the economic importance of the position of the stockholder with respect to his management and the enterprise in which he shares is vastly greater than the matter of the relation of the corporation to the state.[63]

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61. *Id.* at 169–70.
62. *Id.* at 175.
63. *Id.* at 2.

> The fiction further is that the voting stock controls the election of the management. The fact, of course, is that in many, perhaps most, cases, the stockholders' vote means precisely nothing.[64]

My goal here has been to preserve Berle's wisdom about various issues related to corporate finance. His essays are underappreciated and resonate today.

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64. *Id.* at 190.