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HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

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First published in Great Britain 2019

A catalogue record for this book is available from the British Library.

A catalogue record for this book is available from the Library of Congress

ISBN: HB: 978-1-50992-137-9
ePDF: 978-1-50992-139-3
ePub: 978-1-50992-138-6

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

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Paper from responsible sources
FSC® C013604

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FOREWORD

This latest volume in the MSPL series comes as a splendid memorial to a truly excell conference at UCL, both for those like me who were lucky enough to attend and for th who missed the wide-ranging, deep and perceptive insights into our shared prop law, given by judges, academics and practitioners drawn from all over the common world.

It doesn't seem to matter for how long one practises, studies or adjudicates on prop law, the subject continues to present like an ever-expanding Swiss cheese, full of holes, g in the logic, awkward problems still to be resolved and, sometimes, controversies about fundamentals which cause passionate disagreement among otherwise friendly colleag To this rich soup must now be added the ground-breaking change, both in daily prac and in the law, which will surely have to accompany the fast approaching invasion of d tal communication and artificial intelligence. This will revolutionise the way in which create, deal with and share real, personal and intellectual property, and how we then res the inevitable disputes which those activities generate.

The essays in this volume make a distinguished and wide-ranging contribution to filling-in of those holes and gaps, and to a deeper understanding of some of the most elu of the fundamentals. There is also some really perceptive guidance into the beneficial which can be made of modern IT, in the context of land registration, with insights dra from experience as far away in geography, culture and law as China. Precisely beca each contribution is neither a text book, nor even a part of one, they each have their c refreshingly different approach and style, ranging from the almost ethereally academi the intensely practical. They also draw together learning from the whole worldwide sp trum of the common law, where differences about the detail never quite seem to destroy essential coherence of the whole. There is also a compelling study of the different way which the common law and civil law systems address shared social problems about prop in a joined-up world.

This book is not going to be a standard text for busy students, practitioners or jud to grab off the shelf to solve some thorny problem under pressure of time. Rather i going to be a treasured book for the legal bedside or fireside table, available to dip i for refreshment and the deepening of learning in moments of that precious disapp ing commodity, legal leisure. Just take one essay at a time. Don't worry about the or in which they are presented, logical though it may be. Choose one that takes your fa when the train is stuck in the wrong kind of leaves, the case is adjourned because they c find the judge, or when the rest of the family is watching Strictly Come Dancing. An one gets you really absorbed, there are footnotes galore to follow up on your laptop. I h already enjoyed many happy hours buried in these essays, and I am sure that you will to

Lord Briggs of Westbou

mean moving the law in a more morally justifiable direction. In the twenty-first century, this may require taking into consideration equality of opportunity, human rights, health and well-being, and more generally inclusion rather than exclusion.[113] Already there are indications that the law's definition of property has to shift to encompass things like security of the home; accessible and affordable housing; healthy and sustainable environments; greener cities; and inter-generational equity of resources.

If the definition of property law remains static, it will become irrelevant. So how might it be developed? As a start, and without deviating too far from Gray, a new set of sub-concepts might be introduced. So that if we refer back to the definition: '"Property" is the power-relation constituted by the state's endorsement of private claims to regulate the access of strangers to the benefits of particular resources', we could introduce 'reasonableness' into regulation, bringing with it sub-concepts of proportionality and necessity (both concepts which are encountered frequently, if fluidly, in law). Further, some consideration might be given to the intrusion of 'power-relation' reflecting an acknowledged imbalance between the power of the state, the private property owner, and the third-party stranger. An extension example can be found in the construction of physical barriers to prevent rough sleepers using doorways, benches and bus shelters which has given rise to public protest and adverse media coverage, to the extent that in some cases the state has been forced to back down.[114] Here, it is suggested, the power-relationship has shifted. As with park-runs, social media communication creates a powerful fourth estate. Even where an owner, be it a local authority or a private landlord, has the legal right to exclude, moral indignation may mean abandoning or not enforcing that right. This is particularly so if the state can no longer endorse the exercise of that right or is ambivalent about doing so. The fourth estate might argue that the guerrilla gardener, the graffiti artist, the park-runner and the rough sleeper are all part of the *demos* reflected in our understandings of democracy. Consequently, the 'state' might need to rethink the moral grounds of endorsement and thus exclusion, and this in turn might ultimately lead to limits on the legal right to exclude. So, a new sub-set of concepts informing the existing definition of property could allow a definition of property that more nearly reflects the meaning of property in the lived experience of many urban dwellers and perhaps better reflects the values of social justice which are beginning to emerge in the second decade of the twenty-first century. If it is to be relevant, a taxonomy of property law needs to reflect this reality.

[113] See too S Pascoe, 'Re-evaluating Recreational Easements – New Norms for the Twenty-First Century?' Chapter 10 in this volume, where the relevance of health and well-being to the law's definition of permitted easements is discussed.

[114] See Brown (n 111 above).

7

Corporate Shares as Shares

LARISSA KATZ

I. Introduction

In this chapter, I ask whether shares in corporations ought to command more attention within theories of property. Contemporary liberal property theorists typically take land (and sometimes goods) as the basic case of property. Shares tend to be left out of these accounts or treated as imitations or mutations of the basic case. Economists, for their part, have transformed the idea of ownership: 'owner' refers to the ultimate beneficiary of the *value* of assets. Shares are treated as a central case of property by those who take this approach. Shareholders are taken to own the corporation insofar as they are the ultimate beneficiaries of its value.

In this chapter, I concede shares do not fit within the traditional property framework.[1] This does not mean, however, that the traditional idea of property is obsolete and that a new property framework is in order.[2] The reason why shares fit awkwardly within the property framework is that shares are not, at their core, rights in the nature of property, even though property-related institutions of bankruptcy, expropriation, taxation, etc, have adapted to treat them as such. The legal concept of a 'share' is better accounted for as a right in a procedure for dividing a shifting mass of value. I introduce a distinction between a share and a part: a part, in contrast to a share, is defined in relation to a mass of unchanging size.[3]

[1] For a non-proprietary account of shares, see A Pretto-Sakmann, *The Boundaries of Personal Property* (Oxford, Hart Publishing, 2005) (explaining shares in terms of *in personam* obligations.) The alternative account I offer, which emphasises the procedural aspects of a share and the similarities to equitable interests, is consistent with Pretto-Sakmann's conceptual claim.

[2] TC Grey, 'The Disintegration of Property' in JR Pennock and JW Chapman (eds), *NOMOS XXII: Property* (New York, New York University Press, 1980). D Markovits and A Schwarz, 'Who Owns What? Re-Thinking Remedies in Private Law' (North American Private Law Theory Workshop, New Haven CT, October 2018) (cited with the authors' permission). For a more balanced take on the centrality of property in the conventional sense, see B Rudden, 'Things as Things and Things as Wealth' (1994) 14 *OJLS* 81.

[3] For a conflation of the two ideas see *Popat v Shonchhatra* [1997] 1 WLR 1367 (CA), 1372. Nourse LJ states that a partner's interest in partnership assets cannot be understood as a 'share' for as long as the partnership continues because no partner has a right 'to require the whole or even a share of any particular asset to be vested in him'. Nourse LJ goes on to say that the only stage at which a partner can be said to have a *share* in anything is at the point of division of the ultimate residue, which 'will be a share of cash.' With great respect, I think the idea of a share to which Nourse LJ refers is the idea of a part (as in a part of a whole). It is of course quite right that there can be no part-entitlement in a pool of assets of fluctuating value until the point when the mass is fixed in some form and ready to be divided into parts; that is to say, to be allocated as property.

Share-entitlements are inherently rights in a procedure, whereas part-entitlements are rights in the nature of property.[4] Share-entitlements and part-entitlements sometimes stand in an important relationship to one another. A procedure for dividing a mass of shifting value (with respect to which a right is held as a share) *ends* when the mass is fixed in size, at which point the entitlements with respect to the mass are held as part-entitlements.[5]

The account I offer here of corporate shares is of the corporate share *as a share* in this more general sense. Corporate shares, I argue, derive many of their features from this concept of a share although of course there are accretions to the idea of a share that reflect the particular context of shares in a corporation, given the corporate form (eg, voting rights). Corporate shares are rights in a procedure, ongoing during the operation of the corporation and complete only at the time of the dissolution of the corporation and the final distribution of corporate assets – the point at which share-entitlements turn into part-entitlements.[6] The normative idea of a fair procedure for dividing a mass of value explains many of the familiar features of shareholding: its regulative principles of proportionality, non-oppression and non-forfeiture, and finally the limits of contract in this context.

The idea of shares as rights in a procedure presupposes the very idea of property that *does* command centre stage in property theory today, viz, rights in the nature of property, of which property in land or goods are the central cases. The relationship of shares to traditional property is analogous in some ways to the relationship of equity derivatives to shares. Almost 100 years ago, Berle and Means described the immense shift of wealth from traditional property to corporate shares.[7] More recently, wealth has shifted again, from shares to derivative rights (roughly speaking, contractual rights to the future sale of shares at a fixed price) and the like.[8] More and more, the ultimate beneficiaries of the value of corporations hold that value in the form of derivative rights.[9] And yet equity derivatives[10] presuppose the idea of a share. Shares are no more the central case of property than derivatives are the central case of shareholding. Both are rights defined in relation to the acquisition of rights in another form: derivatives are in relation to shares, and shares in relation to classical property rights.

[4] I argue elsewhere that a litmus test for distinguishing rights in a procedure from rights in the nature of property is whether the right in question admits of self-help: while self-help is available with respect to property, a private actor can never help herself to a procedure. I set out and defend this thesis in other work on equity. See L Katz, 'Equity: Pathways to Legal Rights' in D Klimchuk, P Miller, I Samet and HE Smith, *Philosophical Foundations of Equity* (Oxford, Oxford University Press, forthcoming.)

[5] Note that bankruptcy is a way of avoiding the completion of the initial procedure. Through bankruptcy, shareholders are re-routed to another procedure in which they accept new rights in place of their original rights.

[6] It follows that all corporations must be *in principle* dissoluble, an idea we find, for example, in 8 Delaware Code § 276 (2015).

[7] AA Berle and GC Means, *The Modern Corporation and Private Property*, 1st edn (Piscataway NJ, Transaction Publishers, 1932).

[8] Other examples include options (the right to buy stock for a certain exercise price during an exercise period) and other equity incentives like phantom stock (that yields a cash payout keyed to the value of shares).

[9] See HTC Hu and B Black, 'Equity and Debt Decoupling and Empty Voting II: Importance and Extensions' (2008) 156 *University of Pennsylvania Law Review* 625, focusing on derivatives and the uncoupling of economic interests, which lie with the derivative interest-holder, and voting rights, which remain with the shareholder. In recent years, this decoupling of voting and economic interest has been used to acquire major stakes in companies without triggering disclosure rules that would otherwise apply if a person held more than a certain stake (eg 5% in Switzerland).

[10] When using the term derivatives for the purposes of this chapter, the discussion is limited to instruments whose ultimate value is tied to underlying shares of capital stock, ie, equity derivatives.

The conclusion I defend is that a person 'owns' shares only in a weak sense of *having* rights to the shares. Owning shares in the first sense of 'having rights' is not the kind of owning that a theory of property ought to take as central.[11] And what is more, 'having rights' in this context presupposes someone else's – the Corporation's – 'having *property* rights' in the traditional sense. The concept of a share in a corporation is formally tied to the allocation of the value of its assets remaining on dissolution. Two features of the corporation emerge as central to this account: corporations are always in principle purposive and so in principle dissoluble (when the purpose is exhausted); secondly, the primary source of a corporation's power is property, or some right with respect to property, as it is conventionally understood in property theory.

II. Land as the Paradigmatic Case of Property

Why is land taken to be the paradigmatic case of property in property theory?[12] One reason is that the moral salience of property and its conceptual contours are plainest in the context of land. In contemporary liberal property, property is understood to solve a problem arising from an unavoidable feature of human existence: people are necessarily located somewhere in space.[13] When people find themselves in proximity to others, there is a need for some system for coordinating their activities so that peaceable co-existence is possible. The idea of property solves the problem of co-existence in space. Property gives the standing to set the agenda with respect to land, with the result that no one is subject to the arbitrary (ie, unauthorised) decisions of anyone else within that space.

While property in land and property in goods are often taken to be on equal footing in property theory, there are normative reasons to start with land.[14] To see why that is so consider the relation between material goods and land. Material goods are themselves necessarily located somewhere in space and exercising ownership rights over material goods (accessing, possessing, using and even abandoning goods[15]) is itself a *land-based activity*.

[11] See eg, JW Harris, *Property and Justice* (Oxford, Oxford University Press, 1996) 9 ('"My", "yours", "his" may signify relationships that have nothing to do with owning.')

[12] See eg, J Waldron, *The Right to Private Property* (Oxford, Oxford University Press, 1988); A Ripstein, *Force and Freedom* (Cambridge MA, Harvard University Press, 2009); Harris (n 11); R Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge MA, Harvard University Press, 1985); RC Ellickson, 'Property in Land' (1993) 102 *Yale Law Journal* 1315; AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford, Oxord University Press, 1961) (the 11 incidents of ownership are not offered as land-specific but Honoré clearly has land in mind: he uses land throughout to illustrate how the incidents of ownership work and why they are important). There is a long tradition of thinking about land as the basic case of property outside of legal theory see eg U Vogel, 'When the Earth Belonged to All: the Land Question in Eighteenth-century Justifications of Private Property' (1988) 36 *Political Studies* 102.

[13] Kant wrote: 'Had the surface of the earth been an infinite plane, men could have been so dispersed upon it that they might not have come into necessary communion with each other.' I Kant, *Metaphysics of Morals*, M Gregor (tr) (Cambridge, Cambridge University Press, 1996) § 13. Modern property theorists like Bob Ellickson have put the point this way: 'Because human beings are fated to live mostly on the surface of the earth, the pattern of entitlements to use land is a central issue in social organization.' R Ellickson, 'Property in Land' (1993) 102 *Yale Law Journal* 1315, 1317.

[14] Note that many contemporary property theorists take material goods to serve just as well as land as a core example of the conceptual structure of property. See B McFarlane, 'Property and the New Doctrinalism: Comment' (2015) 163 *University of Pennsylvania Law Review* 293.

[15] See EM Peñalver, 'The Illusory Right to Abandon' (2010) 109 *Michigan Law Review* 191, 202–08 on the centrality of land in this context.

Property in material goods may be held independently of property in the land on which they are located. Alternately, property in material goods may be derivative of ownership of land. If it is the latter, property in land must be established first: we know who owns the apple only once we know who owns the land on which the apple tree is located. If it is the former, we still cannot overlook the way in which ownership of material goods (eg, cars, baseballs, etc) is dependent on the prior configuration of rights over the space in which the thing is located and used. Fully-fledged ownership of goods requires that the owner of the goods be free from arbitrary interference within the space she requires for exercising her property rights. To be clear, it is not necessary for the owner of goods *herself* to own the land required to access and use the goods. A system of property can accommodate the possibility that someone other than the owner of goods is in charge of the space where the goods are. It does so through rules about access and control that temper the landowner's right to exclude. These accommodations range from allowing the creation of subordinate property rights in land (eg, leaseholds, easements, profits); recognising individualised privileges to use publicly-owned land (eg, privileges to use roads for the purposes of parking or driving one's car); or implying privileges to enter another's land, eg, to retrieve goods left there (eg, a tenant entering the land to pick up her personal property after the end of a lease). Accommodations that enable land-based use of property in goods must be consistent with the continued and separate ownership of land by another. At some point the possibility of accommodation runs out. The law of fixtures reflects this kind of line-drawing exercise. Where a chattel is permanently attached to someone else's land, so that use of the good would either depend on the landowner's say-so or undermine the landowner's authority, the common law shifts ownership of the chattel to the owner of the realty.[16] The key thought here is that ownership of material goods entails land-based activity and so depends on our already having solved coordination problems involving our activities in time and space. Property in goods depends, in other words, on property in land.

Contemporary property theory and common-law thinking also offer conceptual reasons for treating land or goods as the paradigm of property. Land ownership invokes most clearly the conceptual core of property, understood in liberal property theory and common law today as a right to exclude or perhaps exclusive and bounded decisional authority.[17] Because of land's durability and usability, land brings to bear the full range of ownership powers: the authority to set the agenda, to grant subordinate rights, to appoint a successor, etc, as well as

[16] A system of property will avoid a situation where ownership of the object *requires* long-term cooperation with a separate owner of space. It is difficult to imagine a situation in which it would make good normative sense for a system of property to allow that an object be separately owned but that treats it as permanently out of reach of the owner.

[17] On the conceptual core of property see Waldron (n 12 above); Harris (n 11 above); J Penner, *The Idea of Property in Law* (Oxford, Oxford University Press, 1997); McFarlane (n 14 above); B McFarlane, *The Structure of Property Law* (Oxford, Hart Publishing, 2008); L Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 *University of Toronto Law Journal* 275; L Katz, 'Philosophy of Property – Three Ways' in J Tasioulas (ed), *Cambridge Companion to Law and Philosophy* (Cambrige, Cambridge University Press, forthcoming); HE Smith, 'Property as the Law of Things' (2012) 125 *Harvard Law Review* 169; HE Smith and TW Merrill, 'What Happened to Property in Law and Economics?' (2001) 111 *Yale Law Journal* 357; HE Smith and TW Merrill, 'The Property/Contract Interface' (2001) 101 *Columbia Law Review* 773. All but Penner and McFarlane take land to be the basic case. See also CM Newman, 'Using Things, Defining Property' in J Penner and M Otsuka (eds), *Property Theory* (Cambrige, Cambridge University Press, forthcoming).

rights that accede to the office of ownership[18] (eg, rights to the yield of the thing, to chattels that are affixed, to airspace above[19]) and duties (to neighbours, the state and subordinate rights-holders) that an owner might have.[20] It makes less sense to work out what it means to be an agenda-setter or gatekeeper in the context of goods that are designed for a single use by a single user, such as a stick of chewing gum. For this reason, much of the contemporary conceptual work on property starts with the idea of land and is then extended to other things that operate like increasingly weak versions of property in land.[21]

III. Shares as Property: Imitation, Mutation or Transformation

There are three main approaches to thinking about shares as property. The most straightforward way to account for shares as property in the traditional sense is to reify shares, introducing the idea of an intangible 'thing', such as an income stream, that a shareholder can be said to own, an approach once defended by James Penner.[22] Seen this way, as right with respect to an intangible thing, shares are understood as property rights on equal footing with land or goods.

How else might shares fit within the traditional idea of property? A second approach involves thinking of shares not as an imitation but as a mutation of the central case.[23] Shares are property in this broader sense because they 'define [the shareholder's] position so far as access to and control of material resources is concerned.'[24] Shares, on this view, arise out of the fragmentation and recombination of traditional property rights, achieved where an original owner transfers her property rights to the corporation in order then to split and combine them in new ways. Waldron drew an explicit analogy between a share in a corporation and a mortgagee's interest or the interest of a beneficiary of a trust, all three of which he suggests are created by the power of an owner to fragment property. He writes

> individual owners have the power acting with others to constitute corporate persons and transfer *their* holdings to it. Once that has been done *those* holdings will be used, controlled and managed on a basis that is different from the paradigm of private ownership, where an individual determination is taken as socially decisive (emphasis added).[25]

Seen this way, shares are not distinct forms of right, but merely mutations of property. Latent in this understanding of shares as fragments of property is that shareholders collectively own the corporation's assets.[26]

[18] See L Katz, 'Property's Sovereignty' (2017) 18 *Theoretical Inquiries in Law* 299, 308–09.

[19] Whether airspace is just land on a vertical dimension, protected by trespass, or is better understand as a u right like an easement, protected by nuisance, is the subject of controversy. See eg, *Didow v Alberta Power Ltd* 1 ABCA 257, [1988] 5 WWR 606.

[20] See Honoré's 11 incidents of ownership (n 12 above). See D Attas, 'Fragmenting Property' (2006) 25 *Law Philosophy* 119, 147 suggesting that these can be reduced to four.

[21] ibid.

[22] Penner (n 17 above) 214–15.

[23] Waldron (n 12 above) 57–59 (rejecting the view that shares involve ownership of intangible things) and 37

[24] ibid 37.

[25] ibid 58.

[26] ibid.

Finally, there is a third approach that takes shares to be ownership rights, and the object of ownership, the corporation itself.[27] This view is associated with economists who have characterised shareholders as the true owners of corporations because of their economic interest in the company and its affairs. This approach relies on transforming the idea of ownership so that it is centrally concerned with entitlements to value. The economists' view of ownership as entitlements to value emerges from Berle and Means' famous insight that wealth in corporate form has split the 'property atom', by severing control-rights from 'beneficial ownership of this property – or in less technical language from the legal right to enjoy the fruits.'[28] For Berle and Means, the traditional idea of property served as a model for how to structure incentives in corporate property to avoid what economists now recognise as agency problems, where incentives between managers and owners are misaligned.[29] For economists today, ownership is conceptually independent from control and yet functionally dependent on it.

This third approach has its counterparts within legal theory. Thomas Grey drew attention to the proliferation of rights to value: in the modern era of corporations, he argued, property just means rights to value; the traditional idea of property is obsolete.[30] Bernard Rudden's distinction between things as value, and things as things, also allows for the place of value in property.[31]

Recently, Daniel Markovits and Alan Schwarz have argued that shares are entitlements to value (EV) in contrast to entitlements to things (ET).[32] In their view,

> the modern corporation ... is a legal device for embedding property in contract and thus for constructing a shareholder's ownership entitlement in the corporation's property as an EV rather than an ET with managers – charged to exercise their business judgement to manage the corporation's assets – as the decider who fixes the V [value].

What is transformative about Markovits and Schwarz's account is the idea that 'property' is grounded in contract, a matter of private ordering, and not as conventional accounts of property understood, in the power of the state to define and enforce rights with respect to things.[33]

[27] This was the dominant view of the nature of shares and shareholding in corporate law and economics. As we will see, the idea of ownership invoked there has nothing to do with shareholding per se and everything to do with identifying the ultimate beneficiary of value, who may not hold shares but rather some right against those shares, like a derivative right.

[28] AA Berle and GC Means, *The Modern Corporation and Private Property*, revised 1st edn (Piscataway NJ, Transaction Publishers, 1967).

[29] OE Williamson, 'The Economics of Organization: The Transaction Cost Approach' (1981) 87 *American Journal of Sociology* 548.

[30] Grey (n 2 above).

[31] See Rudden (n 2 above). As Joshua Getzler has shown, Roman law has the conceptual apparatus necessary to foreground different aspects of property in different institutional contexts. Common law thinking about property has tended to settle on one or other of these contexts as central. See J Getzler, 'Plural Ownership, Funds and the Aggregation of Wills' (2009) 10 *Theoretical Inquiries in Law* at 250.

[32] Markovits and Schwarz (n 2 above) ('[P]roperty is predominantly protected by liability rules'). Markovits and Schwarz seems to conflate the dominance of liability rule protection with the proportion of assets protected by *in personam* obligations. See also Grey (n 2 above). The traditional view in law and philosophy of property is that property does not exist in the air but relates to particular subject matter or things: see eg, Lord Mustill in *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 91. See also, B Fried, 'Wilt Chamberlain Revisited: Nozick's "Justice in Transfer" and the Problem of Market-Based Distribution' (1995) 24 *Philosophy and Public Affairs* 226 for the distinction between things and value.

[33] See Markovits and Schwarz (n 2 above) ('On this account, the shareholder's entitlement is not fixed by the state but rather by the shareholders themselves, through the contracts that establish the corporation.')

Markovits and Schwarz, like others before them,[34] argue that property is main concerned with entitlements to value (protected by what Calabresi and Melamed identifie as 'liability rules'[35]) as opposed to entitlements to things (protected by property rules), ar conclude from this that EVs have now displaced ETs as the central case of property. Thu they say '[i]n the United States today, nearly 85 percent of all non-residential private fixe assets are held on terms that leave them under non-owner management.' The ubiquity EVs does not signal that rights to value are now to be taken as the central case of propert For one thing, the ubiquity of EVs is hardly a modern phenomenon. John Baker describes case from 1502 acknowledging that by the end of the fifteenth century, most land in Englan was held on use (the precursor of the modern trust).[36] A *cestui que use* (what we would ca today the beneficiary) did not herself have the entitlement to the thing (the ET) but mere a right in respect of her feoffee's ET that funnelled the benefits of ownership to her (aft subtracting any costs associated with providing those ownership services). This is the kin of right that, like shares, Markovits and Schwarz would characterise as EV: the ultima beneficiary of the value of the land was, for the most part, not the manager/ET-holder. An yet few would deny that 'classic' property in land was fundamental and basic to the arch tecture of property law then as indeed I think it is now. Then, as now, the entire schem depends on securing the ETs (the rights of the manager/corporation/trustee) with respe to which others' EVs are then defined.

IV. From Property to Procedure

There are difficulties with all three approaches to fitting shares within the idea of propert A shortcoming of the first approach, treating shares as rights to an intangible thing, is th artificiality of 'conjuring'[37] an intangible thing for the purpose of treating shares as propert A more serious shortcoming is that in this context the 'intangible thing' does not itself refe to a sphere of decision-making over which the shareholder has jurisdiction, in anythin like the way that land or material goods do. Shareholders are not in charge of any sphere

[34] See n 32 above.

[35] G Calabresi and AD Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedr (1972) 85 *Harvard Law Review* 1089. Calabresi and Melamed suggested that private rights might be classifie according to the kind of remedy they attract: liability rules respond to violations of rights with monetary award property rules respond with injunctions. The different types of rules, and the circumstances in which one kir of rule is to be favoured over the other, have been the subject of extensive discussion within law and economic The liability rule/property rule distinction roughly tracks the distinction between things as value and things things.

[36] JH Baker, *An Introduction to Legal History*, 4th revised edn (London, Butterworths, 2005) 251. As a cautiona note, there is a longstanding debate among trust scholars as to whether the beneficiary's interest in a trust is *in re* (proprietary) or *in personam*. (Indeed this mirrors the debate about the proprietary nature of shares.) A Canonic description of the two positions is FW Maitland, *Equity: A Course of Lectures* (Cambridge, Cambridge Universi Press, 1936) 115. My own view, which I do not have space to defend here, is that the beneficiary's interest as a rig in respect of property rights, is fundamentally an *in personam* right, even allowing that it can attach serially to o constructive trustee after another. See also S Agnew and B McFarlane, 'The Paradox of the Equitable Proprieta Claim' Chapter 17 in this volume for a discussion of how a beneficiary's right under a trust has proprietary effe in equity.

[37] Waldron (n 12 above) 57.

human interactions demarcated by the intangible thing itself. Of course, shareholders have transactional powers enabling them to act on the rights they have, such as the powers to assign, bequeath, or to sue to enforce the right itself, just as owners of land do. But owners of land hold those transactional powers over a right that in substance is very different: the underlying right that the owner of land can sell, fragment, etc, is a kind of authority to set the agenda for a thing that commands deference from the world at large. To equate shares with traditional property because both convey similar transactional powers is to miss a deeper and more profound difference between the underlying rights of shareholder and owner. In a corporation, it is the board of directors not the shareholders who have decision-making power.[38] Shareholders elect the members of the board of directors and have the power to change the composition of the board, but shareholders do not have the power to direct the board to take an action. The board has the power to, and in fact must as a matter of law, exercise its business judgement independently, subject to its fiduciary duties to determine the best interests of all shareholders and, in certain jurisdictions and instances, other stakeholders.

I also reject the second approach that shares are simply the combining, splitting and recombining of property rights. What is mistaken about this view is the creation story: the thought that shares emerge out of the powers of owners to fragment property, and then to split and recombine the fragments in different ways. It is also difficult to reconcile a conclusion from this premise, that shareholders are the real owners of the corporate assets,[39] with corporate law's insistence on a distinction between shareholding and ownership of the underlying assets.[40] Indeed, one danger of the property-in/property-out model implicit in the Waldron approach is that it undermines a signature feature of the corporate form, one that helped to distinguish it from a tenancy in common and a partnership. In a corporation, capital is genuinely locked in. There is no basis for a shareholder of a corporation to call for the return of 'his' contribution because he has no property interest in the assets of the corporation.[41] Shareholders also have no ability to force a board to declare a dividend

[38] But see J Armour, 'Companies and Other Associations' in A Burrows (ed), *English Private Law*, 3rd edn (Oxford, Oxford University Press, 2013) 3.50ff (describing situations where the decisional capacity of the board of directors is seriously impaired such that shareholders can step in, and situations where courts will 'pierce the corporate veil' in order to hold shareholders liable.)

[39] Waldron implies that shareholders as owners of the underlying asset are only missing an incident or two in much the same way that owners in other contexts might (eg, landlords).

[40] See E Freund, *The Legal Nature of Corporations* (Chicago, University of Chicago Press, 1897) 34: 'A shareholder of a railway company has no distinct right of property in the rolling stock ... he cannot use the cars at his pleasure, he can give no orders to the employees and if he performs an act of ownership, he is a trespasser.' *cf* Bernard Rudden's account of shares in New River Corporation, understood as a fractional interest in *underlying corporeal assets of the company* (Rudden (n 2 above) 94). See also Pretto-Sakmann (n 1 above).

[41] See MM Blair, 'Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century' (2003) 51 *University of California, Los Angeles Law Review* 387. Modern partnership law departs from the traditional common law property-in/property-out structure of a tenancy in common with respect to capital contributions. Section 24(1) of the Partnership Act of 1890 clearly establishes a default rule of equal sharing with respect to partnership assets (capital and revenue profits) but more controversially seems also to provide for the equal distribution of capital contributions, subject to implied or express agreement to the contrary. See Nourse LJ's discussion *in obiter* (neither party challenged pro-rata distribution of capital in the case) in *Popat v Shonchhatra* (n 3 above) 1372 (saying that s 24(1) clearly alters the common law rule as to partners' pro-rata entitlements to capital but suggesting that the slightest of implied intentions to share according to pro-rata contributions would displace this provision.)

and so no right *to* dividends but only a right to their share if a dividend is declared. Th corporate structure is designed to sever the connection between the capital contribution of the shareholders and the assets of the corporation. Shareholders who contribute valu to the corporation are acquiring something new through the payment of value rather tha maintaining rights to value in some new form.

The third approach (ownership as rights to value) leads to conceptual and functiona instability. Conceptually it is unstable because, in attaching 'real ownership' to value, owner ship becomes a fugitive quality, not bound to any particular legal structure. Ownershi moves from one form of right to another, from conventional property to shares to pur contract, as rights to value become lodged in the contractual arrangements *behind* share The ultimate entitlements to value today are largely constructed out of contractual device like derivatives, options and, even further removed from traditional property, swaps an phantom shares.[42] The last kind of financial instruments are indeed *just* contractual rights t the payment of money, tied to the value of shares without involving any rights to the share themselves or even to their acquisition.

Among the dangers in locating 'ownership' in a foundation of contract is the risk of over looking differences in the ways rights to value perform on bankruptcy and insolvency, an on the dissolution of the company, depending on whether they are embedded in conven tional property, corporate shares or pure contract (eg, phantom shares).[43] Contractual right cannot separate or fuse entitlements in the way that property rights can be fragmented o merged into one undivided whole. Roughly speaking, the effect of property rights is that th creditor of one owner is not able to satisfy their claims out of the assets of another. Wher the assets have a common owner in the traditional property law sense, *all* the assets ar available to meet the claims of creditors of the owner, even where through contract ther are separate 'owners' in the sense of separate holders of entitlements to value.[44] Conversel where separate legal entities own assets, the assets of one are not usually available to mee the creditors of the other, even if there is a contractual overlay that brings both legal entitie under common management.

Nor can contract have free rein in delineating the boundaries of shareholders' interest in a way that holds on the bankruptcy or dissolution of the corporation, suggesting agai that we should not conceive of shares just as rights to value grounded in contract. Imag ine that shareholders of a corporation have a contractual arrangement that allocates profit from one class of assets that the corporation owns (car factories) to type 1 shareholders an

[42] See *Re Lehman Brothers International (Europe)* [2010] EWHC 2914 (Ch), [27]. The dispute turned in large pa on the question of whether contract generates property or merely replicates some of its costs and benefits in a wa that, when put to the test, does not amount to property.

[43] Note in common law and theoretical work on property, the effects of bankruptcy on rights is often the litmu test of property. See Penner (n 17 above) 132 on the proprietary character and treatment of choses in action i bankruptcy. See also: S von Pufendorf, *On the Law of Nature and Nations*, CH Oldfather and WA Oldfather (tr (Oxford, Clarendon Press, 1934)) 763 (book V chapter VIII section 2) on the dissolution of partnerships. Se *Re Lehman Brothers International (Europe)* (n 42 above) Lord Briggs [276]ff, distinguishing personal obliga tions that 'synthetically' created benefits equivalent to property (during the solvency of obligor) from proprietar interests.

[44] See H Hansmann and R Kraakman, 'The Essential Role of Organizational Law' (2000) 110 *Yale Law Journ* 387 (emphasising the organizing role of legal personality); J-P Robé, 'The Legal Structure of the Firm,' (2011) *Accounting, Economics, and Law* 5 (explaining the role of corporations to partition assets within firms); see als EM Iacobucci and GG Triantis, 'Economic and Legal Boundaries of Firms' (2007) 93 *Virginia Law Review* 51 525, 527.

allocates the profits of another type of corporate assets (mines) to type 2 shareholders. Say that shareholders have agreed among themselves that on dissolution this division of assets will hold, so that creditors of the car business will be paid out of the first class of assets and the creditors of the mining business will be paid out of the second. Imagine further that the contract stipulates that shareholders have residual claims on dissolution only to 'their' assets – car factories or mines. These contractual rights might create entitlements to value that are tied to specific assets but the kind of partitioning that contract achieves does not hold on bankruptcy or dissolution: the creditors of the corporation have claims that hold as against all the corporation's assets, notwithstanding the attempt to partition entitlements to value. Similarly, the interest shareholders have in the assets of the corporation at dissolution cannot be restricted to a particular class of assets, but relates rather to all the assets of the corporation remaining after prior claims have been satisfied. The rank-ordering of shareholders and the preference of some to others does not belie this point: the rank ordering is a contract-driven prioritising of interests in relation to what necessarily remains an undifferentiated pool of assets. All this is to say that contractually-created rights to value do not perform in the same way as property rights, even though shares can be subjected to a contractual overlay adjusting the value of what shareholders in the end receive.

There is an instability in the concept of ownership as a right to value. As it turns out, even those who think of ownership as rights to value, with shares as a primary example, ultimately recognise that rights to value depend to some extent on accompanying control rights.[45] A right to value simply does not function optimally in the total absence of control rights: the pure separation of control and value invites agency problems that reduce value. The conventional wisdom is to couple the right to value with *sufficient* control to guard against agency problems.[46] This suggests that traditional property, with its coupling of control and value, continues to serve as a model for how to structure property rights. It would be an odd thing to define ownership in a way that leaves out a constitutive part.

Even if the functional instability of the idea of ownership on the third approach is solved by aligning control and economic interests, there remain further difficulties with thinking of shareholding as tantamount to ownership of the corporation. Too *much* control is clearly as problematic as too little control. By too much control I do not mean here control *in excess* of economic interest (as where shareholders acquire 'empty votes' by buying up shares the value of which has gone to the holders of derivative rights).[47] A problem of too much control can arise where control and 'ownership' are actually perfectly aligned, as in the case of the shareholder who owns 100 per cent of the shares of a corporation and has

[45] R Romano, 'After the Revolution in Corporate Law' (2005) 55 *Journal of Legal Education* 342, 347 with reference to MC Jensen and WH Heckling, 'Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305.

[46] SJ Grossmann and OD Hart, 'The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration' (1986) 94 *Journal of Political Economy* 691; OD Hart and J Moore, 'Property Rights and the Nature of the Firm' (1990) 98 *Journal of Political Economy* 1119.

[47] Decoupling of voting and economic interest and then the acquisition of these empty votes by shareholders in excess of their economic interest is a problem that economists recognise is consistent with their view that economic interest and control should be aligned, see, for example: JM Barry, JW Hatfield and SD Kominers, 'On Derivatives Markets and Social Welfare: A Theory of Empty Voting and Hidden Ownership' (2013) 99 *Virgina Law Review* 1103.

100 per cent of the control. A sole (or majority[48]) 'owner' of the corporation can put in place a board of directors that allows the 'owner' to use the corporation and its assets in self-serving ways, eg by directing corporate assets to the use of the shareholder. The puzzle that the 100 per cent shareholder presents is that it is precisely where there is union of control and value that there is also the greatest risk of the perversion of the corporate form.

My point is certainly not that we see an abuse of corporate form in all cases of a 100 per cent shareholder; but it is precisely in these cases that there is the greatest *potential* for abuse of the corporate form: the tendency toward perversion increases with the consolidation of control. Courts are far more likely to find such perversion in the context of a 'one person' corporation than in public corporations where 'ownership' as entitlement to value is diffuse. This concern with perversion is manifest in the phenomenon of piercing the corporate veil, where a court disregards the corporate entity and attaches liability to the individual shareholder.

The third approach does not have the resources to explain why the concentration of ownership of a corporation in the hands of a few or even a single shareholder tends to destabilise the corporate form (even if problems do not materialise in every case).[49] While this one-person corporation structure raises the greatest potential for abuse of the corporate form, it is the logical conclusion of the third approach: surely an owner of the corporation understood as having a right to value, ought to be able to enhance the value of the corporation *to her* as best she is able, subject to the equal claims of other shareholders. Thus, the economists' approach seems to embrace an account of ownership which fails to explain why sole ownership, in the sense of an entitlement to value, can be problematic.

V. Shares as Shares: A Right in a Procedure

A share on my account is just a share: a right to share in the division of a mass of value along with ancillary rights that are in service of this primary right. The conceptual anchor for the idea of a share is a relationship to an ultimate pool of value accumulated as the corporation operates and that stands ultimately to be divided on dissolution. The idea of a share then gives conceptual priority to the right of the shareholder to a share of the assets of the corporation remaining at the time of dissolution (that is, those remaining after other creditors have been satisfied). This right has understandably been downplayed in accounts of the nature of the share, as it is a priority right that usually ends up placing shareholders precisely last, and also because corporations, although always in principle dissoluble, are in practice often meant to continue indefinitely. My account shows why, nonetheless, this ultimate right to share in the division of corporate assets is conceptually important to the very idea of share even while the corporation is ongoing. This is so even if empirically speaking t

[48] The takeover of the corporation by a majority stakeholder presents similar problems but I avoid this example here because it also raises worries of oppression, forfeiture and the potential violation of proportionality requirements as among shareholders.

[49] The threat of uniting ownership and control, through takeover, has been used as a tool for disciplining underperforming managers. See eg, R Romano, 'A Guide to Takeovers: Theory, Evidence and Regulation' (1992) 9 *Journal on Regulation* 119, 122–33.

value of a share to most actual shareholders is constituted by secondary markets, or by the exercise of important but conceptually secondary rights like the right to share in declared dividends. This right to share fairly in the division of a mass of value gives rise to what are in effect procedural safeguards regulating how that mass is dealt with in what we can now see as the interim: the period between the start of corporate operations and the end point at which the quantum is fixed and available for division. The fact that sometimes a shareholder may receive nothing, because as it turns out there is nothing left, or that the shareholder may be re-routed through a bankruptcy procedure and required to take up another position in relation to the available assets, does not change the fundamental nature of the share.[50] We still work out the idea of a share in relation to the right of a shareholder to a fair procedure for dividing a mass of value (for instance, we assess the justice of the shareholder's position in bankruptcy proceedings against the position they would have had in the event that the corporation was dissolved and assets distributed outright.)

A share in a corporation is, in short, fundamentally *a share*, an idea concerned with appropriate principles for dividing a mass of shifting magnitude. In this, a share in a corporation bears some similarity to other notions of shares and shareholding in private law, eg, the shares that equity recognises in a partition and sale where, in addition to the original contributions (which can be returned on an arithmetical basis), there are also losses and profits to allocate. The pro-rata shares that co-owners of an intermixture claim where the mixture has greater or lesser value than the original contributions is also a geometric principle for division that adds something to the basic idea in property law of the continuation of pre-existing property rights. A share, as a right in a procedure, properly attracts principles we might usually associate with public law:[51] principles of proportionality, non-oppression and non-forfeiture. I will turn to these principles, which I take to be important regulative principles appropriate to the very idea of a share, below. These principles offer a partial normative explanation of the bundle of rights conventionally associated with shares: rights to dividends, capital and voting, and the freedom to tailor the configuration of that bundle through contract.[52] My account suggests, however, that voting rights do not fall directly out of the basic idea of a share in a corporation but require further explanation. The idea that the right to vote comes apart from the idea of shareholding is consistent with the reality in corporate law that there can be voting and non-voting stock, a division that is not inherently problematic. Shares may convey additional rights relating to the governance of corporations, eg voting shares. But not all shares convey voting rights. Rights to vote have to do with membership in a corporation, not shareholding. Membership and shareholding

[50] A shareholder generally cannot be made worse off, in the bankruptcy proceeding, than she would be in the case of the dissolution of the corporation.

[51] And Equity, too. But then in my view Equity has a public law feel to it because Equity too emerges from the executive branch, and the prerogative, and so implicates a certain role of the state in relation to citizens, rather than the purely private relationality found in private law frameworks. See L Katz (n 4 above).

[52] See eg, Pretto-Sakmann (n 1 above); Harris (n 11 above) 51 ('Shares in companies consist in rights to money (dividends when declared and a share in the company's residuary assets on dissolution), and rights to vote in company resolutions.'). Some reduce this to two ideas. See Markovits and Schwarz (n 2 above) ("The purchaser of a share of stock in a company buys two things: the right that the company administer its property to maximize profits and the right to vote on important decisions, such as who should be directors and whether the company should be sold.').

are separate ideas (and so we can have non-stock corporations with members), and shai may or may not come with membership rights like voting rights. Voting rights relate to idea of membership in an association, corporate or otherwise. Voting rights follow from t status of a shareholder as a fully-fledged *member* of a corporation.

A. Principles of Proportionality, Non-Domination and Non-Forfeiture

The regulative principles appropriate to the idea of a share in a corporation are principles proportionality, non-domination and non-forfeiture. These are manifest as a right (exigil against the human managers of the corporation) to be treated with horizontal proportion ity (fairness vis-à-vis fellow shareholders); a right that managers deal with corporate ass so as to maximise profits; and a right to a share of the corporate assets remaining on diss lution, or to its equivalent[53] in bankruptcy proceedings.[54] The right to proportionality manifest as a right to any dividends declared. It is a matter of horizontal proportionality tl if corporations declare a dividend, shareholders have a right to their share, subject to a contractual modification of that right. But of course a right to purely horizontal proportio ality cannot trigger a right *to* income. The power to declare a dividend remains exclusiv a decision of the corporation.

A principle against forfeiture also explains why assets cannot actually be removed frc the pool available on dissolution to satisfy shareholders' pro-rata claims. *How* the mass ultimately divided may be established contractually, but the mass of assets – *what* is to divided in that way – is beyond the reach of contract. The share is a right that floats o the entire mass until the division is complete, leaving only the manner of division to established through contract.[55] To limit a shareholder's right to a procedure for dividi only a part of the mass is a forfeiture of a kind: she forfeits a right to share in the division the whole mass of value, whatever its size. This is so even if in practical terms she does r end up with less in her pocket: what is lost or forfeit is the position in relation to a ma the accumulation, retention and division of which are all subject to her procedural rights

A shareholder's right against forfeiture is generally manifested as a right that the corp ration, through its human managers, *maximise* profits. The right against forfeiture echc but it is importantly different from Milton Friedman's claim that the social responsibility a corporation is to maximise profits.[56] On my account, the responsibility of the corporati to the shareholders is indeed to maximise profits. But a corporation can only discharge tl

[53] The equivalence between bankruptcy and dissolution is an equivalence as between two procedures. The idea a share as a right in a procedure fits better this understanding of equivalence than the idea of a share as a prope right that is lost and replaced with some other kind of right altogether, in the bankruptcy context.

[54] See eg: s 211(7)(d) Canadian Business Corporations Act (RSC, 1985, c C-44) (distribution of remain property among shareholders according to their respective rights after dissolution) and ss 141, 140.1 Canad Bankruptcy and Insolvency Act (RSC, 1985, c B-3) (rateable pay of (postponed) equity claims).

[55] *cf* Grossmann and Hart (n 46 above); Hart and Moore (n 46 above).

[56] M Friedman, 'A Friedman Doctrine – The Social Responsibilty of Business Is to Increase Its Profits' *The N York Times* (New York, 13 September 1970).

responsibility consistently with its own agency.[57] A corporation, in exercising its powers of ownership, its powers to contract, and its by-law-making powers, must do *its* utmost to maximise profits; but its utmost is just that: a bounded capacity. The gist of my argument is this: owners occupy an office of ownership that does not in itself require decisions about things to be made in the public interest. And yet the nature of the agent or officeholder shapes the kinds of decisions open to that agent within that otherwise unlimited office.[58] Any of the private powers that the corporation holds can only be exercised in a manner that is consistent with its nature as a corporation. The key feature of a corporation – one that follows the corporation into the office of ownership and constrains the reasons for which it can act in the exercise of any power it has – is the corporation's inherent, formal purposiveness.

B. Purposiveness of Corporations

A reason to resist conflating shareholding with ownership of a corporation (and so ownership with entitlements to value) is that corporations are formally structured as purposive entities. The structure of managerial decisions about the corporation is distinct from the structure of ownership decisions. Ownership decisions are inherently self-serving: owners are not formally constrained by some external purpose of the thing in making decisions about it. By contrast, managerial decisions about the corporation are structured, at least formally speaking, by the *purposiveness* of corporations. The purposiveness of corporations is a positive feature, not something to be avoided. Corporations gain their powers largely from their ownership of assets but they have capacity to own *because* they are legal persons who owe their existence to an act of government.[59] As legal persons created always by an act of government (legislative or executive), they are inherently purposive: government could not use its public authority to confer legal personhood for no purpose at all (because all exercises of public authority are for a public purpose). There is some purpose or end for which corporations are always designed, even if that purpose (as is mostly the case today) is very broadly construed. Corporations are *structurally* purposive agents even in contexts where there is very little content poured into this structure. And so the manner in which a corporation exercises any of its powers is constrained by the purposive nature of its agency. Indeed, we might say precisely the same thing about trustees: a trustee has an office that is inherently purposive (to benefit another in the exercise of ownership).

[57] A similar phenomenon of officeholder shaping office applies where state actors hold private property. The nature of the official/agent affects the way the office is held. See also: Waldron (n 12 above) 40–41; Harris (n 11 above) 104–06.

[58] See for example: *Sun Indalex Finance, LLC v United Steelworkers* [2013] 1 SCR 271, 2013 SCC 6; *Rollins v Rollins*, 755 SE 2d 727 (Ga 2014) in particular on the implications of the business judgement rule; REN, 'The Trust Corporation: Dual Fiduciary Duties and the Conflicts of Institutions' (1961) 109 *University of Pennsylvania Law Review* 713 (note); PB Miller, 'Multiple Loyalties and the Conflicted Fiduciary' (2014) 40 *Queen's Law Journal* 301; similar conflicts can arise in the case of for-profit providers of healthcare, housing, education, etc but will be attenuated when similar services are provided by non-profit corporations as provided for, eg in the Ontario Not-for-Profit Corporations Act 2010 (SO 2010, c 15).

[59] For the American history of creating corporations, by government act or by prescription (period of time after which lost grant presumed, see TC Spelling, *A Treatise on the Law of Private Corporations* (New York, LK Strouse & Co Law Publishers, 1892) 22–23.

That purposiveness colours everything the office of trustee touches, including for examp the exercise of powers which the trustee has as owner of particular assets.

The purposiveness of the private corporation has receded from view and manifests itse now as a merely formal structuring principle. Few private corporations have clearly artic lated purposes that actually do any work in shaping corporate decision-making. But as conceptual matter, a corporation remains a legal person with delegated powers to act fc purposes, no matter how broadly construed. Even in a world in which corporate law h thinned the notion of purposiveness dramatically, there remain institutional indicia of th bedrock idea.[60] The formal idea was given legal expression in the idea of visitorial jurisdic tion. A visitor, holding a common law office, has an administrative rather than a judici role: to supervise corporate conduct to ensure consistency with the corporation's nature an purposes.[61]

The formal purposiveness of corporations explains in part what is problematic abo the total unity of economic interest and control, as in the case of the shareholder who h 100 per cent of the shares in the corporation and uses that position to strip the corporatio of its value, for self-serving reasons. The point is that corporations are meant to be struc tured as powers for purposes and so are not meant to be available for the purely self-servin ends of a shareholder. The fact that the purposes of most private corporations are unde developed conceals this formal structural constraint on corporations and their capacity t serve the interests of shareholders, whatever those might be. The problem with treatin corporations as totally non-purposive does not emerge as clearly where there are multipl shareholders, whose economic interests are often best served by enhancing the value of th corporation itself rather than stripping it of value in order to achieve some ulterior gai Concerns about horizontal proportionality and non-oppression among shareholders wi tend to operate as the primary check on value-stripping for the benefit of one shareholde among many, even if the purposiveness of the corporation is overlooked.

Finally, it is important to acknowledge the reasons why there is strong resistance t requiring a more substantive purposiveness of private corporations (and, it is worth addin why there has been the move to erode the purposiveness of corporations in Anglo-Americ law). It is plain that there is a demand for a sphere for private ordering beyond the goal oriented or managerial purview of the state. Indeed, it seems that Maitland understood th dominance of the trust and unincorporated associations, and the relatively late adoptio of the corporation, to reflect precisely this worry about the link between corporations an the state.[62] The worry about state overreach may have something to do with the origins o

[60] See eg, Companies Act 2006, ss 31, 39, 42.

[61] See eg R Pound, 'Visitorial Jurisdiciton over Corporations in Equity' (1936) 49 *Harvard Law Review* 369; Judg Glock, 'The Forgotten Visitorial Power: The Origins of Administrative Subpoenas and Modern Regulatio (2017–18) 37 *Review of Banking & Financial Law* 205, 213: 'The position of "visitor" is almost unknown today, bu it once carried great weight. Under English law, from at least the fifteenth century, a visitor was the representativ of the founder of a religious or charitable corporation.' See too, *King v Lee* (1690) 1 Shower KB 251, 89 ER 554 555: 'Every private corporation has a visitor.'; S Kyd, *A Treatise on the Law of Corporations* (London, J Butterworth 1793) 286; 1 Bl Comm 480; FW Wegenast, *The Law of Canadian Companies* (Toronto, Carswell, 1931) 775–76 I am grateful to Lionel Smith for drawing my attention to the role of visitors and to these sources. For the distinc tion between visitorial and judicial oversight see: *Cuomo v Clearing House Association, LLC*, 557 US 519 (2009).

[62] See F Maitland, 'Trust and Corporation' (1904) in M Ryan and D Runciman (eds), *Maitland: State, Trust an Corporation* (Cambridge, Cambridge University Press, 2003), discussed by J Getzler, 'Frederic William Maitland - Trust and Corporation' (2016) 35 *University of Queensland Law Journal* 171.

the corporate form in the Royal prerogative, an exercise of state power to rule, based on *salus populi*.[63] Fear of corporations began as fear of an overreaching royal prerogative; the same fears that dogged equity. The worry is a larger worry about the state in a managerial mode, foisting its purposes on citizens rather than establishing a non-purposive framework for legal relations, available then for private purposes.[64] Eventually, Parliament reined in the prerogative in relation to the corporation (just as it did in relation to equity): the legislature took over the creation of corporations (and the regulation of commerce too).[65] A worry about the managerial state operating within the private sphere is heightened where the state sets down the ends of private action. This worry, however, is not warranted where the purposiveness of corporations is understood formally: a corporation is purposive in the formal sense where the purposes themselves are set privately.

VI. Conclusion

The view of the nature of shares as rights in a procedure for dividing a mass of value helps to resolve a number of unresolved questions about the nature of shares. It also defends against claims that so-called 'corporate property' ought to dominate theories of property.

On rights-based accounts of shares, a shareholder's right is a right to an intangible thing, 'an income stream in an economic enterprise.'[66] Seen this way, the right to income is taken to be a normal and indeed central incident of shareholding. My account offers a different way of explaining shares that does not foreground rights to income nor does it require the invention of an intangible thing. By accounting for shares as rights in a procedure for dividing a mass of value, I explain why dividends are in a sense foreign to the idea of a share, while at the same time explaining why *if* cash is paid out in the form of dividends, management has a duty to make these payments consistently with the shareholders' rights in the procedure (rights to fairness, non-domination and proportionality). A right to dividends, far from being a constitutive element of a share as a share, is understood better as a consequence of a more basic claim of fair treatment or horizontal proportionality.[67]

My account builds on some of the central insights of Waldron's approach, for instance that shares are in some respects *like* the equitable rights of mortgagors and of beneficiaries of a trust. The analogy refers not to splitting and recombining property rights, but rather to setting out and regulating rights in a procedure. Equitable rights take the form of rights in

[63] DEC Yale (ed), *Sir Matthew Hale's The Prerogatives of the King* (London, Selden Society, 1976).

[64] See eg, M Oakeshott, *Rationalism in Politics and Other Essays*, reprint edn (Indianapolis IN, Liberty Fund, 1991); T Poole, *Reasons of State: Law, Prerogative and Empire* (Cambridge, Cambridge University Press, 2015).

[65] Corporations by legislation are not as obviously concerned with governance and purposes as those created by prerogative. And yet there remains a close relationship between these. This is the same kind of analogy I think that Pomeroy employed when he suggested that that unregistered property rights in recording acts were like equitable rights (*Pomeroy's Equity Jurisprudence and Equitable Remedies*, vol I, 3rd edn (San Francisco, Bancroft-Whitney, 1905) 82–83 (§ 76). Creatures of statute can behave like equity.)

[66] Penner (n 17 above) 214.

[67] This account fits well with the economist's view that payment of cash to shareholders in the form of dividends tends to be inefficient. See notably, F Black, 'The Dividend Puzzle' (1976) 2 *Journal of Portfolio Management* 5; R La Porta, F Lopez-de-Silanes A Shleifer and RW Vishny, 'Agency Problems and Dividend Policies around the World' (2000) 55 *Journal of Finance* 1, with further references.

respect of other people's rights, and concern the pathways to legal rights that equity regu lates. It is no coincidence that shares share some of the features of equitable rights. Bot corporations and equity emerged out of the exercise of the royal prerogative.[68] The purpc sive and managerial quality of governmental power beyond the creation of corporation and the doing of equity has left its mark on both. In understanding shares as rights in procedure, I aim to show how that is so. Whereas the Waldron approach conceives of corpc rate shares in terms of arithmetical principles of division and so presupposes fragments c property (eg, a slice of a fixed pie), I suggest that we think of shares as geometric principle of division: principles for dividing a magnitude subject to increase and decrease. A principl of arithmetical division presupposes a whole comprised of fixed parts: it is just a matter c dishing out each predetermined 'slice', to continue the pie metaphor. In contrast, a principl of geometric division (only) anticipates an allocation of part-entitlements.

My account suggests why ownership theories of shareholding are also conceptually prob lematic, whether or not the shares are dispersed among many or concentrated in the hand of a few. Shares are *relational* by design, and the relation they concern is the relationshi of proportionality among fellow participants within a procedure. This concern about hori zontal proportionality generates constraints on management decisions. Where there are n such allocative questions or concerns about horizontal proportionality among shareholder as in the case of the 100 per cent shareholder, the idea of a share ceases to be a relational ide about a fair procedure for dividing something. Shareholding in those contexts operates lik ownership but without the authority and responsibility built into the office of ownershi Economists are right to worry about the inefficiencies in these cases, and courts are righ then to pierce the corporate veil. The explanation for why it is a perversion of the corporat form can be understood in terms of the nature of shares themselves.

[68] See further for the royal prerogative: S Whittaker, 'Public and Private Law-making: Subordinate Legislatior Contracts and the Status of "Student Rules"' (2001) 21 *OJLS* 108, fn 30 with reference to 1 Bl Comm 472; F Polloc and FW Maitland, *The History of English Law before the Time of Edward I*, reprinted 2nd edn (Indianapolis IN Liberty Fund, 1968) 669.