SHARE LAW:
TOWARD A NEW UNDERSTANDING OF CORPORATE LAW

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ABSTRACT

Shares are an instrumental phenomenon in law, finance and modern life. Much of corporate law revolves around shares and shareholders, but our current understanding of shares is in a troubling posture: it resorts to various frameworks—contract, property, trust, and fiduciary law—neither of which can correctly accommodate the concept of shares. Contrary to prevailing notions, in both Delaware and other jurisdictions around the world, this Article proves that shareholders are not directly owed fiduciary duties; nor can they be simply described as contractual parties, due to the unique properties of shares as residual claims. Where do shares derive their value from? What rules and principles govern shares? The answer is that shares inhabit their own legal space. Weaving together corporate theory, doctrine, and real-life cases, this Article proposes the concept of share law, a new field of classification within corporate law. Share law, which is grounded in equity, provides the normative structure for conceptualizing, analyzing, and resolving share-related issues—including some very high-profile topics, such as dividends and buybacks, aspects of mergers and acquisitions, appraisal rights, multiple-class equity, sharehold-

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er voting and activism, and shareholder litigation. This Article presents a nuanced account, strongly supported both positively and normatively, of shares and their proper treatment within corporate and general law. In the process, it sheds new light on other areas in high currency, including corporate fiduciary law, corporate personhood, and the law of corporate purpose.

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TABLE OF CONTENTS

1. Introduction....258
2. The *Co-Op* Case: Facts, Law and Judgment....263
3. Classifications in Corporate Law and the Uniqueness of Shares....269
4. The Starting Point: Simplistic Perceptions of Shares....278
5. Four Unsatisfactory Approaches to Shares....282
5.1. The Contract Approach....282
5.2. The Property Approach....285
5.3. The Trust Approach....287
5.4. The Fiduciary Approach....290
5.5. Summary of the Four Approaches....301
6. Equity as the Foundation of Share Law....302
6.1. Equity and Residuality: Two Links....303
6.2. Shares as Equitable Rights of Contractual Origin....307
6.3. Other Perspectives on the Share-Equity Link: History and Language....310
7. Topics in Share Law....311
8. Conclusion....319

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1. INTRODUCTION

Shares are fascinating. This type of security, issued by corporations,[1] ignites the imagination for the perceived unlimited upside it offers to the lucky investor who picks the "right" share. On a more concrete level, shares form the spinal column of modern economy. The total value of shares publicly traded on the world's exchanges, in 2017, was more than US$77 trillion.[2] Peoples' life savings lean on shares, or share-related instruments and schemes.[3] Share offerings finance the global expansion of human activity through corporations. In addition, shareholders—not other creditors—have a substantial degree of control over the governance mechanisms of corporations, through voting and other means, including access to certain types of legal actions. Since corporations are immensely important actors in today's world, shareholders occupy a unique position indeed.

Against this backdrop, it is troubling to realize how little we know about shares. Other types of corporate obligations, such as bonds, emanate from detailed contracts, defining the parties' rights and duties. Even where the contract itself is lacking, contract *law* provides ample solutions. When we turn to the "share contract"—the corporation's constitutional documents[4]—we quickly discover

[1] In this Article, "corporation" alternates between two meanings. Mostly, it refers to several different types of artificial persons, which include the company, the cooperative, the partnership and others, as far as the range of corporate laws in a given jurisdiction allows. They include both for-profit and other-purpose corporations. Related phrases, such as "corporate law," should be accordingly construed. More narrowly, a "corporation" is how Delaware and similar U.S. law describes the type of entity which other jurisdictions, including Israel and the U.K., call a "company." *See* Delaware General Corporation Law, DEL. CODE ANN. tit. 8, ch. 1 (2018) [hereinafter: DGCL]. This duality is not problematic, since every Delaware corporation is also a corporation in the broader sense. Where relevant in this Article, it is clear that the reference is to Delaware corporations, rather than corporations in the more general sense.

[2] *See Stocks traded, total value (current US$)*, THE WORLD BANK, https://data.worldbank.org/indicator/CM.MKT.TRAD.CD [https://perma.cc/622W-XFFC] (last visited Oct. 26, 2018). The numbers stated in that source should be considered in addition to the value of shares issued by private, or non-publicly-traded, corporations.

[3] *See generally* MICHAEL S. BARR ET AL., FINANCIAL REGULATION: LAW AND POLICY (2016) (discussing many types of investment schemes and institutions, such as pension funds, securities firms, mutual funds, private equity funds and derivatives, having shares as part of their asset portfolio or as their underlying asset).

[4] In corporate law, constitutional documents are certain documents required

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that it is a patently *undetailed* agreement,[5] augmented only to a limited extent by statutory provisions.[6] Furthermore, the very nature of the obligation toward shareholders is "residual," meaning that it derives from the constantly fluctuating difference between the corporation's assets and liabilities. Due to these factors, shareholders' legal position *cannot ever* be well-defined in advance. Based on what concepts, doctrines and principles should we examine share-related issues? As this Article reveals, not only contract law is unsuited to explain shares; so are the fields of property, trust and fi-

in order to create a corporation. Usually, they govern some fundamental aspects of the corporation's identity and affairs. They are also a normative source (mostly, a contract) binding the corporation and its residual claimants, the first of whom are also its founders. *See, e.g.*, DGCL § 101(a) (stating that every corporation shall have a certificate of incorporation); STAAR Surgical Co. v. Waggoner, 588 A.2d 1130, 1136 (Del. 1991) ("[A] corporate charter is . . . a contract between . . . the corporation and its shareholders. . . . The charter is also a contract among the shareholders themselves."); Companies Act, 5759-1999, §§ 15, 17(a), SH No. 1711 p. 189 (Isr.) [hereinafter: Israel Companies Act] ("Every company shall have an article of incorporation . . . ."; "The article of incorporation is legally a contract between the company and its shareholders and between [the shareholders] themselves."). Constitutional documents are sometimes called "organizational documents," *see, e.g.*, Sylvia Ann Mayer & Manesh Jiten Shah, *I Wish I May, I Wish I Might... File Chapter 11 Tonight: Authorization and D&O Considerations When Filing Chapter 11*, WEIL BANKRUPTCY BLOG 2 (Nov. 2010), http://business-finance-restructuring.weil.com/wp-content/uploads/2011/04/Mayer_BK10_Paper.pdf [https://perma.cc/Q5SZ-Y5KD] ("[T]he organizational documents (such as the charter, articles of incorporation, bylaws, limited liability company ("LLC") agreement, or partnership agreement) . . . ." (emphasis omitted)).

[5] In Delaware, the list of mandatory clauses for a certificate of incorporation is very short: the corporation's name, address, goals ("The nature of the business or purposes to be conducted or promoted."), authorized share capital and the names and addresses of the corporation's founders. *See* DGCL § 102. In Israel, only four clauses are mandatory in every article of incorporation (the sole constitutional document required under the Israel Companies Act): the company's name, goals, authorized share capital and type of liability limitation (if any). Additionally, the article of incorporation has to be signed by the company's founders (its first shareholders). *See* Israel Companies Act §§ 18, 23.

[6] Several sections of the Delaware corporate statute deal with shares, *see* DGCL §§ 102, 109, 151–174, 201–205, 211–233, 241–245, in addition to other sections where share law issues are intermittently mixed in with others, such as the merger and dissolution provisions in DGCL §§ 251–267, 271–285. For statutory share law in Israel, *see* Israel Companies Act §§ 1, 15–24, 33–35, 57–91, 127–139, 176–193, 285–313. Importantly, most of these sections contain fairly broad statements and do not attempt to provide rules of conduct or decision even for known types of share-related disputes, such as share dilution, withholding of dividends, or unfair prejudice. Similarly, none of them explain how the rights attached to shares are different from those attached to any other security or corporate obligation; none of these provisions address the unique nature of residual claims and the problems they give rise to. The same is true of constitutional documents, even when they are more detailed than the minimum statutory requirements.

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duciary law. Presumably, the share is a legal mystery. We are seemingly unable to answer even a simple question: "why do shares have value?" Yet, around US$80 trillion hinges on our answer.[7]

One reason for this gap is habit and routine. Dividends and merger proceeds get paid, or not; shareholder voting effects change, or not. It often feels as if corporations' successes and failures translate directly enough into shareholders' pockets. The most familiar perception of shares comes from the *secondary* market: the trading of shares in a stock exchange, with their prices going up and down. Not enough attention is paid to the underlying nature of shares, and the rules and principles governing them—in short, to *share law*.

However, such attention is highly necessary. It is required in order to grapple with very salient questions, such as shareholders' power compared to that of directors, or the position of non-shareholder constituencies. Additionally, things *do* go wrong within the relationships that shareholders are parties to: for many reasons, the corporation's fortunes might *not* translate into those of its shareholders, or part of them. That happens constantly, and in surprising ways. Due to their unusual characteristics, shares give rise to a very wide range of possible situations. To realize how broad that range is, it might be beneficial to take a look around the globe.

In September 2017, the Supreme Court of Israel issued its decision in *General Guardian v. Co-Op Blue Square Services Cooperative Ltd. (In Liquidation)*.[8] In that judgment, the Court held that the economic rights of shareholders cannot be taken away from them solely because they cannot be located. The Court ordered that, instead, those rights (here, a liquidating dividend in cash, totaling approximately US$15 million) will be held in trust, for the benefit of the unknown shareholders, for an unlimited period of time, to be claimed by the unknown shareholders when they do appear.

The *Co-Op* decision sheds profound light on the fundamental concepts relating to shares, not only in Israel, but under perceptions that evolved globally, since the birth of modern corporations. The decision is illuminating precisely because the Court struggled

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[7] *See supra* note 2.

[8] CA 238/16 Gen. Guardian v. Co-Op Blue Square Servs. Coop. Ltd. (In Liquidation) (Sept. 10, 2017) (Isr.) [hereinafter: *Co-Op*], http://elyon1.court.gov.il/files/16/380/002/N21/16002380.N21.pdf [https://perma.cc/G5VJ-7K6Y].

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to reach this outcome. Israel has a developed economy, with a common law system[9] featuring highly sophisticated bodies of corporate and other private law.[10] Yet, the Court could find no statutory, case law or contractual provisions clearly establishing that shareholders are entitled to the economic rights arising from their shares, and that this entitlement is unlimited in time. The opinion of the Court, by Judge David Mintz, relied on an amalgamation of written law provisions to reach the result.[11] In a concurrence,[12] Judge Daphne Barak-Erez attempted to formulate a broader principle: share rights are "property" rights, so that, like other types of property, they enjoy strong, constitutional protections and cannot be simply taken away from their owners.

In fact, the *Co-Op* Court operated as a court of equity, treating shareholders' claims as equitable rights, with the attendant results. Mainly, in this case, shareholder rights were regarded as quasi-property rights,[13] similar to (albeit different than) a trust beneficiary's rights. Like other equitable rights, those rights are both obligatory, toward the corporation; and quasi-proprietary, toward

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[9] *See, e.g.*, AMIR N. LICHT, DINEI EMUNA'UT: HOVAT HA'EMUN BA'TA'AGID U'BA'DIN HA'KLALI [FIDUCIARY LAW: THE DUTY OF LOYALTY IN THE CORPORATION AND IN THE GENERAL LAW] 23–24 (2013) ("[T]he question of Israeli law's classification into a legal family, if it was ever controversial, is no longer in dispute. The answer is clear: Israeli law is common law . . . .").

[10] *See generally* INTRODUCTION TO THE LAW OF ISRAEL (Amos Shapira & Keren C. DeWitt-Arar eds., 1995); ALON KAPLAN, ISRAELI BUSINESS LAW (1999); Itai Fiegenbaum & Amir N. Licht, *Corporate Law of Israel* (Eur. Corp. Governance Inst., Working Paper No. 372, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050329 [https://perma.cc/LK8K-8CT7].

[11] *But see infra* pp. 306–07 (describing how the equity approach, which the Court perceives as obvious, "operates behind the scenes" of the decision and motivates the outcome).

[12] *See Co-Op* at 28.

[13] The concurrence, *id.*, uses the term "property rights", but that wording (which does not appear in the opinion of the Court) is inaccurate. *See infra* Part 5.2 (explaining that shareholder rights toward the corporation's net worth are not property rights under property law). Alternatively, the concurrence might have referred not to the rights contained *in* the share, but to shareholders' rights *toward the share*. The latter are, indeed, property rights. *See infra* pp. 275–76. Of course, this does not resolve the legal content of the share itself. In *Co-Op*, shareholders' property rights toward their shares were undisputed; the issue was their right to receive a portion of the corporation's assets, which is one of the rights embedded in the share, and is governed by equity-based share law. Finally, the concurrence might have referred to "property rights" in a constitutional law sense, which is not congruent with private law classifications, and might include all manner of economic rights, whether proprietary, equitable, or obligatory. In constitutional and human rights law, such an approach is generally warranted.

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the shareholder's respective portion of the corporation's net worth. Indeed, net worth is also known as "shareholders' equity." That is one verification of the link between shares and equity; this Article details many others. Current approaches to shares rely on various legal disciplines, but none of these correctly and fully explain the share phenomenon. Equity is the basis of share law, both in positive law (people act according to this approach since the birth of modern corporations[14]) and normatively. The rights, and even the *existence*, of shares and shareholders cannot be adequately explained any other way. Especially when dealing with such extent of capital and such a scope of human interests, it is crucial to understand where shares come from, which actions pertaining to them are permissible, and what the parties to share-borne relationships may expect.

This Article weaves together theoretical, doctrinal and comparative approaches, producing a consistent model of corporate law and its subdivisions. To that end, this Article mainly surveys two jurisdictions: the United States, the prominent arena of business and legal activity in the world, and within it, as pertains to corporate law, mainly Delaware; and Israel, a country with a well-developed commercial sphere, legal system and common law jurisprudence, where the *Co-Op* case took place. Occasionally, this Article turns to other jurisdictions, such as the United Kingdom, which is historically the source of both American and Israeli law. Many of the core concepts of corporate and other private law are very similar among these jurisdictions—which makes any differences all the more telling.

The issues that comprise share law have been with us since the dawn of corporations. This Article, for the first time, introduces the concept of share law as a separate classification. It explores both the theoretical foundations of share law, and many of the practical topics it encompasses. This Article aims to assist future inquiries by businesspeople, investors, lawyers, judges and scholars, as it presents a unified framework for resolving the many questions that emerge from the share phenomenon. While doing so, this Article also provides a more nuanced understanding of such areas as corporate personhood and corporate purpose—other paradigms that give rise to some of the most pressing issues facing today's corporate jurisprudence.

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[14] *See infra* Part 6.3.

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2. THE *CO-OP* CASE: FACTS, LAW AND JUDGMENT

Before the establishment of the State of Israel in 1948, the land was under British mandate rule. British law in force, which was later absorbed into the law of Israel,[15] enabled people to start a regular business company; that was, as it still is in Israel, the most common type of corporation. The law also afforded promoters the option of establishing another, more unique type of corporation: a cooperative. This type of entity, having strong roots in the U.K. itself,[16] is a for-profit,[17] separate legal person,[18] with optional limited liability for shareholders.[19] These characteristics make a cooperative similar to other for-profit corporations. However, a cooperative also has several unique traits, intended, as its name implies, to foster social cooperation among its shareholders or "members." These include, among other things, restrictions on the maximum stake of the cooperative's outstanding shares any single shareholder can own (set at 20%);[20] a mandatory "one shareholder, one vote" rule;[21] and a rule excluding cooperative shares from being subject to a lien,[22] apparently intended to restrict their transferability to outsiders not as committed to the cooperative's goals as voluntary members are.

One of those corporations, established in 1942 and continuing to exist in Israel,[23] is Co-Op Blue Square Services Cooperative Ltd.

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[15] *See* Law and Administration Ordinance, 5708-1948, § 11, O.B. (Official Bulletin) No. 2 p. 1 (Isr.) (the first legislative act enacted in the State of Israel; this section declaring that the existing law of the land continues to be valid, as part of the law of Israel).

[16] *See generally* JOHN F. WILSON ET AL., BUILDING CO-OPERATION: A BUSINESS HISTORY OF THE CO-OPERATIVE GROUP, 1863-2013 (2013).

[17] *See* Cooperatives Ordinance, §§ 39, 40, HEI (Laws of the Land of Israel) Vol. 1 p. 336 (1933) (Isr.) [hereinafter: Israel Cooperatives Ordinance] (providing rules in regard to the cooperative's profits and the permissibility of various actions pertaining to them). Alternatively, a cooperative may be described as a "mixed-purpose" corporation; one purpose within the mix is the pursuit of profit.

[18] *See id.* at § 21.

[19] *See id.* at § 4.

[20] *See id.* at § 5(1).

[21] *See id.* at § 16.

[22] *See id.* at § 25.

[23] *See* *Cooperative Search*, MINISTRY OF ECONOMY, https://apps.moital.gov.il/CooperativeSocieties [https://perma.cc/8E32-6EFH] (last visited Oct. 26, 2018) (search for cooperative number 570004465; indicating that the cooperative was founded on Mar. 4, 1942 and is in liquidation proceedings).

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(Co-Op). This entity was in the business of food retail and distribution of produce; before its liquidation, it mainly operated through subsidiaries, many of them regular commercial companies.[24] As the years passed, Co-Op amassed substantial earnings: during its liquidation proceedings, its assets were sold for over 1.3 billion NIS (New Israeli Shekels),[25] equivalent in 2017 rates to about US$370 million.[26]

In 2002, Co-Op entered into court-ordered liquidation. The reasons for that decision are not pertinent for current purposes, but importantly, it is a non-bankruptcy liquidation: the corporation maintained a positive net worth (shareholders' equity), on the order of the sum of its assets. A cooperative is a for-profit, or at least mixed-purpose corporation; incidental to that, the persons entitled to receive its net worth, when it is distributed, are its shareholders.[27] Accordingly, the liquidator, appointed by the District Court of Tel Aviv, set out to distribute among shareholders the cash proceeds, gained from the sale of the corporation's assets. Most shareholders were indeed located and received their due fraction of the corporation's net worth. As a matter of course, that fraction derives from the relation between the number of shares owned by the shareholder and the number of outstanding shares.

There was a problem, however, which ended up at the heart of the case. Due to the age of the corporation and the time passed since the allocation of most of its shares—which were not publicly traded—it turned out to be impossible to contact the owners of about 10% of the outstanding shares. Many simply changed their addresses. It is naturally apparent that many shareholders passed away; this does not materially change the legal analysis, since their

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24 *See infra* note 31, para. 3.

25 *See* Brief for Appellant, para. 6, CA 238/16 Gen. Guardian v. Co-Op Blue Square Servs. Coop. Ltd. (In Liquidation) (Isr.), http://www.justice.gov.il/Pubilcations/Articles/Documents/KO_OP_FINAL.pdf [https://perma.cc/8JWX-WUH5].

26 *See Exchange Rates*, BANK OF ISRAEL, http://www.boi.org.il/en/Markets/ExchangeRates/Pages/Default.aspx [https://perma.cc/P9XT-PKWL] (last visited Oct. 26, 2018) (search for the exchange rate on Sept. 10, 2017; indicating that on the day of the *Co-Op* decision, the exchange rate was 3.504 NIS for 1 U.S. dollar).

27 *See* Israel Cooperatives Ordinance §§ 39, 40; Companies Ordinance (New Form), 5743-1983, § 284, DMI (Laws of the State of Israel) No. 37 p. 761 (Isr.) [hereinafter: Israel Companies Ordinance] (providing rules in regard to the distribution of profits to shareholders, during the corporation's ongoing existence or during liquidation).

claims passed on to their heirs.[28] The liquidator did manage to locate some previously unknown shareholders, and at present they continue to show up, gradually.[29]

By 2015, the liquidation proceedings seemingly reached an impasse. All of the corporation's assets had been sold. The liquidating dividend was fully distributed to the known shareholders. It was perceived by many, including the liquidator and representatives of the known shareholders, that the chances of locating more unknown shareholders were becoming slimmer as time passed—although previously unknown shareholders *did* continue to show up, at however seemingly slow rate.[30] In 2015, the liquidator filed a motion with the lower court, the District Court of Tel Aviv, asking to end the liquidation proceedings, wind up the corporation and, most importantly, order the distribution of all remaining funds between the *known* shareholders, irrevocably nullifying the claims of currently unknown shareholders, even if they show up in the future. The known shareholders—the only ones appearing before the court—agreed to this, unsurprisingly. The lower court granted the motion.[31] Its decision did not include substantive discussion on the merits of the unknown shareholders' legal or equitable rights; rather, it was based on practical considerations, primarily the seeming inability to locate any more unknown shareholders expeditiously enough, in light of the liquidation stretching out for many years.[32] The lower court's decision also took somewhat for granted the link between winding up the corporation and distributing the remaining funds to the known shareholders. It did not expound on another possibility: depositing the remaining funds in trust, for the benefit of the unknown shareholders—although the appellant did raise this option before the lower court.[33]

The General Guardian, an agency of the Israel Ministry of Jus-

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[28] *See* Inheritance Act, 5725-1965, § 1, SH No. 446 p. 663 (Isr.) ("Upon a person's death his estate passes to his heirs.").

[29] *See Co-Op*, para. 5.

[30] *See id.*

[31] *See* LC (Liquidation Case) (TA) 1153/02 Co-Op Blue Square Servs. Coop. Ltd. v. Levitt (Nov. 26, 2015) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-02-1153-521.htm [https://perma.cc/L7JD-JM44].

[32] *See id.*, para. 10.

[33] *See id.*, para. 9.

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tice entrusted by statute[34] with representing the interests of property owners who are unidentified or unable to appear in court, timely appealed to the Supreme Court. The appellant also moved to stay the distribution to the known shareholders, until the appeal is decided. The Court granted this stay, soon after the appeal was filed.[35] The amount corresponding to the unknown shareholders' claims totaled 53 million NIS[36] (approximately US$15 million in 2017 rates[37]). At this stage, the unknown shareholders numbered 2,600,[38] giving each a claim of about US$5,700. If the lower court's judgment was to stand, they faced an irreversible loss of this amount.[39]

In September 2017, the Supreme Court issued its judgment in the case.[40] The opinion of the Court was written by Judge David Mintz, a 2017 appointee to the Court, who previously served on the District Court of Jerusalem and is renowned for his expertise in bankruptcy law.[41] Judge Yoram Danziger, the most senior member of the three-judge panel, joined in Mintz's opinion.[42]

The Court's analysis begins with a survey of the law of cooperatives, noting, as mentioned above, the dual nature of this type of corporation, which harbors both social and economic purposes.[43] Importantly, the Court then mentions that a cooperative's existence, like that of other corporations, is based on a constitutional

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34 *See* General Guardian Act, 5738-1978, SH No. 883 p. 61 (Isr.).

35 *See* CA 238/16 Gen. Guardian v. Co-Op Blue Square Servs. Coop. Ltd. (In Liquidation) (Feb. 2, 2016) (Isr.), http://elyon1.court.gov.il/files/16/380/002/O05/16002380.O05.pdf [https://perma.cc/MY5P-WCU3].

36 *See supra* note 31, para. 9.

37 *See supra* note 26.

38 *See Co-Op*, para. 5.

39 If the funds had been distributed among the known shareholders, then even if the lower court decision would have been later found to be in error, there is absolutely no procedural mechanism, either in Israel or in other countries, including the U.S. and U.K., that enables one (such as a previously unknown shareholder) to pursue an action seeking remuneration from a very large number of dispersed people (such as the tens of thousands known shareholders). A class action only works the other way around.

40 *Co-Op*, *supra* note 8.

41 *See Justices and Registrars of the Supreme Court*, SUPREME COURT OF ISRAEL, https://supreme.court.gov.il/sites/en/Pages/Justices.aspx [https://perma.cc/X2ZN-ZTBS] (last visited Oct. 26, 2018).

42 *See Co-Op* at 27–28.

43 *See id.*, para. 19.

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document—the article of incorporation.[44] This relates to the contractual approach to shares, discussed below.[45] The Court goes on to mention the strong link between company law and cooperative law, stating that doctrines from other areas of corporate law may be "imported" into cooperative law.[46] This is consistent with the methodology employed in this Article, viewing corporate law as a general field, with different types of corporations, having similar traits, entitled to similar treatment. In other words, although *Co-Op* involves a unique type of corporation, its lessons are fully applicable to "regular" companies and other corporations.

The Court then delves into a prolonged analysis of various provisions, gathered from cooperative law, bankruptcy law (occupying a large part of the opinion, even though the Court acknowledges the large positive net worth of the corporation, and that shareholders are its intended recipients;[47] this analysis might be expected, considering that most liquidation activity arises in bankruptcy), comparative law from the U.K. and U.S., Hebrew law, and even administrative law, but importantly, by the end of that part of the opinion,[48] the outcome remains to be clarified. Unsurprisingly, neither of these sources provide clear rules as to the unique situation involving unlocated shareholders in a liquidating corporation, entitled to large sums of money and facing (unbeknownst to any of them) a motion to distribute those funds among other, known shareholders.

Two statutory provisions mentioned by the Court come close to providing a decisive rule in the case. The first, Section 372 of the Israel Companies Ordinance, states that if some of the liquidating company's funds, held by the liquidator, are not duly claimed by anyone within six months, they shall be deposited in a bank account; if the claimant later appears, the funds shall then be paid; that section places no time limit on making the claim.[49] However, the Court mentions that non-shareholder creditors' claims *are* time-limited, by other statutory provisions, which the Court declines to apply to shareholders.[50] Why are shareholders different? Also,

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44 *See id.*, para. 20.

45 *See infra* Part 5.1.

46 *See Co-Op*, para. 21.

47 *See id.*, para. 2.

48 *See id.*, paras. 25–64.

49 *See* Israel Companies Ordinance § 372.

50 The Court simply states that "a shareholder is not required to file a proof of claim, since he is not considered as a creditor of the company but a participant

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what if Section 372 did not exist, or if it was less sufficiently worded (common predicaments of statutory law)? The second statutory provision, Section 248 of the Israel Companies Ordinance, deals with distributions to shareholders during the company's liquidation, ordering as follows: "A sum that a [shareholder] is entitled to due to being a [shareholder] . . . shall be taken into account in regard to adjusting the rights of all [shareholders] among themselves."[51] The Court invokes this provision to state that "there is no place to benefit one shareholder at the expense of another."[52] Again, besides merely quoting the statute, the Court does not explain how shareholders are different than other creditors.[53] Yet, this short provision does allude to an important principle of equity-based share law: the equality between identical shares (and hence, between equal shareholders).

The Court then announces the result: the lower court's decision is overturned. The monetary rights of the unknown shareholders shall be held in trust, by the appellant, for each shareholder to receive whenever in the future they may appear.[54]

In a short concurrence,[55] Judge Daphne Barak-Erez joins Judge Mintz's opinion. She also offers another explanation for the eternality of shareholders' rights: "The rights of the unknown shareholders are property rights for all intents and purposes. These are fundamental rights, which today even enjoy constitutional protection."[56] The concurrence also points out that "the known share-

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in it. Therefore, applying here the provisions relevant to a "creditor" would be problematic." *Co-Op*, para. 66. The term "participant" is synonymous with "shareholder," *see id.*, para. 67. The Court does not elaborate on what gives rise to this distinction between "creditor" and "shareholder."

51 Israel Companies Ordinance § 248.

52 *Co-Op*, para. 66.

53 Notably, the *pari passu* equality rule, which Israel Companies Ordinance § 248 secures to shareholders, also applies to creditors under general and bankruptcy law. At the bottom line, the Court's conclusion in paras. 65–67 of the opinion is simply that "creditors" must file a proof of claim in liquidation proceedings, and have a limited period of time to do so, while "shareholders" are different in both respects. This conclusion is not explained by the statutory language or the Court's discussion, *but see infra* pp. 306–07 (describing how the equity approach, which the Court perceives as obvious, "operates behind the scenes" of the decision and motivates the outcome).

54 *See Co-Op*, para. 70.

55 *See id.* at 28.

56 *Id.* Regarding the use of the term "property rights," *see supra* note 13. The constitutional protection referred to comes from Basic Law: Human Dignity and Liberty, § 3, SH No. 1391 p. 150 (Isr.) ("There shall be no violation of the property of a person.").

holders never had any legitimate expectation grounded in law to receive more than their respective fraction of the cooperative's assets. They are not the unknown shareholders' natural "heirs" or their partners."[57] This, again, is an allusion to principles of equity, such as the maxim "equity delights in equality."[58] In other words, there is no difference between a known and an unknown shareholder, at least none that justifies forfeiting the latter's rights and giving them to the former.

This is a remarkable decision, reached from a remarkable factual background. It warrants further discussion. What is the *fundamental* basis of *Co-Op*—and indeed, of shareholder rights and shares generally?

3. CLASSIFICATIONS IN CORPORATE LAW AND THE UNIQUENESS OF SHARES

The difficulty faced by the Court in *Co-Op* arises, to a large extent, from a gap in the way we currently classify the structure of corporate law. This Article explains how to close that gap. Its existence is somewhat perplexing, because lawyers must classify, and do so all the time. Peter Birks wrote that "taxonomy is the foundation of most of the science . . . . Without it there is only a chaos of unsorted information . . . . A sound taxonomy . . . is an essential precondition of rationality. . . . Abolition of categories would entail abolition of thought."[59] Pertinently, he warned that "[a]ll these are wanting in common law systems."[60] Corporate lawyers, in particular, classify a lot of things: is the claim derivative or direct? Is the transaction a merger or an acquisition? Was the breach of a duty of loyalty or care? Which statutory sections govern the current situation? Yet, the question is whether they are classifying *enough.*

Today, when we discuss corporate law, we often perceive one class of matters to "lie at its heart," or even amount to *all* of corporate law.[61] These matters can be termed *corporate fiduciary law*.[62] It

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[57] *Co-Op* at 28.

[58] MICHAEL LEVENSTEIN, MAXIMS OF EQUITY 103 (2014).

[59] Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 U. W. AUSTL. L. REV. 1, 3–7 (1996).

[60] *Id.* at 4.

[61] An example of this partial view is provided by Goshen and Hannes, who dramatically announce "the death of corporate law," while actually describing some changes in a specific area of corporate law—the balance of power between

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is the law governing the relationships between a corporation and its fiduciaries, that is, the people who owe it fiduciary duties. These include directors, other officers (such as managers), controlling shareholders and others. Such well-discussed and litigated topics as self-interested transactions,[63] appropriation of corporate opportunities,[64] and executive compensation[65] are part of corporate fiduciary law. Also within this field are some structural issues, such as the prerequisites for a new director appointment, the operation of board committees, or the roles of independent directors.

Indeed, corporate fiduciary law is a necessary, defining component of corporate law, and there is a fundamental reason for that: *every* corporation *must* have at least one fiduciary at any given moment. A corporation is a person, but not a natural person. It does not have eyes and hands, or any other bodily and cognitive capacities, entirely of its own. Therefore, it always has to operate through someone else (the fiduciary), whom by design it entrusts with acting in its benefit. While part of corporate law, corporate fiduciary law is also part of the broader field of fiduciary law.[66] The norms governing trustees, lawyers and many others,[67] even in non-corporate contexts, are part of fiduciary law. The unique duty characterizing fiduciary law is the duty of loyalty. Its underlying theme is the fiduciary principle: a fiduciary must single-mindedly act to the advantage of the beneficiary, without being swayed by

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directors, activist shareholders and courts. *See* Zohar Goshen & Sharon Hannes, *The Death of Corporate Law* (Eur. Corp. Governance Inst., Working Paper No. 402, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171023 [https://perma.cc/8EFR-CGMG]. That article treats a narrowing in the scope of corporate fiduciary law (at least as it is traditionally perceived) as a decline of all corporate law. In fact, shares and shareholders, with their voting and other rights, are also part of corporate law, which is alive and well.

[62] *See, e.g.*, David Kershaw, *The Path of Corporate Fiduciary Law*, 8 N.Y.U. J. L. & BUS. 395 (2012); Lawrence A. Hamermesh & Leo E. Strine, Jr., *Fiduciary Principles and Delaware Corporation Law: Searching for the Optimal Balance by Understanding That the World is Not* (Univ. of Pa. Law Sch. Inst. for Law & Econ., Research Paper No. 40, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044477 [https://perma.cc/ZBL3-UKS7] (using the term "corporate fiduciary law").

[63] *See generally* WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 292 (5th ed., 2016).

[64] *See generally id.* at 328.

[65] *See generally id.* at 343.

[66] Many volumes are devoted to general, rather than only corporate, fiduciary law. *See, e.g.*, TAMAR FRANKEL, FIDUCIARY LAW (2011); LICHT, *supra* note 9; LEONARD I. ROTMAN, FIDUCIARY LAW (2005).

[67] For a partial list, *see* ROTMAN, *supra* note 66, at 15.

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any other interest.[68] This is a much higher standard of behavior than that pertaining to regular, arm's length obligations, where each party is free to benefit itself. It arises when the fiduciary agrees to undertake this position, which involves the power to unilaterally affect the beneficiary's affairs and legal standing. The fiduciary also has absolute advantage in information over the beneficiary. Due to these power and information asymmetries, the regular law of obligations is insufficient, and a heightened type of duty is invoked to protect the beneficiary's interests, and more generally, justice and fairness. As a result, fiduciary law is known for its strictness toward fiduciaries.[69] Given this rigidity, corporate

[68] *See, e.g.*, Birnbaum v. Birnbaum, 539 N.E.2d 574, 576 (N.Y. 1989) ("[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect . . . . This is a sensitive and "inflexible" rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty . . . . Included within this rule's broad scope is every situation in which a fiduciary, who is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed, deals with a person "in such close relation [to the fiduciary] . . . that possible advantage to such other person might . . . consciously or unconsciously" influence the fiduciary's judgment . . . ." (third and fourth alterations in original) (second brackets in original) (citations omitted)); Bristol & W. Bldg. Soc'y v. Mothew [1996] EWCA (Civ) 533, [1998] Ch 1 at 18 (appeal taken from Eng.) (describing the conditions that give rise to a fiduciary relationship, stating that "[a] fiduciary is someone who has undertaken to act for or on behalf of another . . . in circumstances which give rise to a relationship of trust and confidence."; also describing the main obligations imposed on fiduciaries, including that "[t]he principal is entitled to the single-minded loyalty of his fiduciary."). This Article generally employs the American view of the scope of fiduciary duties, subsuming both loyalty and care. In other jurisdictions, fiduciary law might be understood to encompass only the duty of loyalty. *See, e.g.*, Christopher M. Bruner, *Is the Corporate Director's Duty of Care a "Fiduciary" Duty? Does It Matter?*, 48 WAKE FOREST L. REV. 1027, 1028 (2013) ("[U]nlike the United States, other common law jurisdictions including the United Kingdom, Australia, and Canada generally do not conceptualize the duty of care as "fiduciary" in nature.").

[69] *See, e.g.*, Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) ("A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty . . . . The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation."); Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has devel-

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fiduciary law employs mechanisms, such as the business judgment rule, meant to apply when the duty of loyalty has *not* been breached, in order to promote the dynamics of corporate life and other policy considerations that arise in the corporate context.[70]

However, corporate fiduciary law is only one part of corporate law. The fiduciary-corporation relationship is one of the *two* main relationships that uniquely define corporate law. When classifying corporate law, we also encounter a set of issues that are non-fiduciary or only partly fiduciary in nature. We talk about these topics in law school classes, practice them as lawyers, adjudicate them and draft statutes that govern them. These issues are at the heart of corporate law just as much as corporate fiduciary law is. They deal with the second group of persons[71] that *must* exist in relation to *every* corporation. In the broadest terms, that group may be called "residual claimants." Every corporation, at any given moment, has at least one of those.[72]

The underlying reason for this is that a corporation's life can end, as it often does, whether through merger or liquidation.

oped a tradition that is unbending and inveterate.").

[70] *See, e.g.*, Hamermesh & Strine, *supra* note 62, at 11 ("One of the earliest refinements in Delaware corporate fiduciary law was the articulation of the business judgment rule."). The article also discusses the rule's application and some of its justifications.

[71] In most corporations, the same person can be a member of both groups, that is, a fiduciary for the corporation and its residual claimant, at the same time.

[72] The absolute necessity of both fiduciaries and residual claimants can also be stated as follows: unlike a natural person, who is under no inherent duty to enter into any contract, a corporation, by design, *must* be party to at least two contracts, at any moment of its existence: one with its fiduciary (or fiduciaries) and the other with its residual claimant(s). This stems from first principles, described in this Part of the Article (the corporation, not being a natural person, is only able to act through others; the need to determine who would be entitled to receive the corporation's net worth at the end of its life), and from written law. *See, e.g.*, DGCL §§ 101(a) (stating that every corporation shall have a certificate of incorporation), 151(b) (instructing that after share redemption, the corporation must have at least one outstanding share); STAAR Surgical Co. v. Waggoner, 588 A.2d 1130, 1136 (Del. 1991) ("[A] corporate charter is . . . a contract between . . . the corporation and its shareholders."); Israel Companies Act §§ 15, 17 (stating that every company shall have an article of incorporation, and that it is a contract between the company and its shareholders); DGCL § 141(b) (stating that every corporation's board must include at least one director); Israel Companies Act § 219(b) (stating that every company must have at least one director). Regarding the contractual aspect of the fiduciary-corporation relationship, *see, e.g.*, *Bristol v. Mothew*, [1998] Ch 1 at 18 (stating that the fiduciary position has to be "undertaken" by the fiduciary), meaning that the relationship is based on agreement—while also, by definition, absorbing the norms of fiduciary law. Some of the fiduciary's "employment contract" may also be, and often is, in writing.

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When that happens, the corporation's interests (assets and non-economic interests alike) do not disappear. If the corporation has liabilities (including both economic and non-economic obligations), then according to general law,[73] its interests must first go toward satisfying those. Yet only rarely, if ever, do a corporation's interests precisely equal its liabilities. There must be *some* person entitled to receive the difference, or "residual."[74] That person is the residual claimant.

Crucially, a corporation has residual claimants throughout its life, not only at or near its end. To explain this, the analysis above needs to be expanded. The phenomenon can be first explained in contractual terms: when a corporation is formed, its founders also choose its first residual claimants (usually themselves); that choice is found in the constitutional documents.[75] Put another way, the persons entering into that particular contract accept, as part of their contractual bargain, the fact that they are the residual claimants. Conversely, parties to other relationships with the corporation accept the fact that they are *not* the residual claimants. Second, the continuous, indispensable existence of residual claimants can be explained in terms of corporate purpose-setting: *someone* has to determine the ends toward which the corporation will act.[76] This, too, is part of a contractual bargain: the person who becomes a party to the constitutional documents agrees to accept a position as determiner of corporate purpose. Other creditors are not in that position, nor should they be, as long as the obligations they *are* entitled to are being met. Furthermore, in the case of for-profit corporations, the residual claimant is also the indirect economic bene-

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[73] That is, law external to corporate law. In this sense, general law also includes bankruptcy law, which often dictates where corporations' assets go when their lives end. For discussion of the relation between general law and corporate law, *see infra* notes 77, 142.

[74] The residual might be negative. In non-limited liability corporations, the analysis remains the same: residual claimants are entitled to receive the residual, which happens to mean they will be burdened with new obligations, rather than acquiring new rights. In limited liability corporations, when the residual is negative, residual claimants are legally entitled to forego it.

[75] *See supra* note 5 (noting that constitutional documents must specify the names of the first shareholders). With the transferability of shares, the residual claim passes on to each subsequent shareholder.

[76] This is done when a promoter (and soon-to-be residual claimant) selects a certain form of incorporation, with a known, fixed purpose (a for-profit, nonprofit, or mixed-purpose corporation), *see infra* note 142. Additionally, and subject to that fixed purpose, the residual claimant specifies the corporation's goals in its constitutional documents, *see supra* note 5.

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ficiary of pursuing those ends. From a deontological viewpoint, as long as the rights of no one else are violated,[77] there is nothing wrong with having a person determine the corporation's purpose and goals and indirectly enjoy their attainment.

In a sense, a natural person can also be said to have, at any given moment, "residual claimants": the person's presumptive heirs. They, too, are entitled to receive the future decedent's "net worth" (as their claim ranks below that of creditors) when the decedent's life ends. However, a natural person is different from a corporation in this regard, since heirs have no right to control the affairs of the future decedent *inter vivos*. This results from an important ex-

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[77] Indeed, by definition, residual claimants cannot bypass, or impair the rights of, non-residual creditors. Residual claimants *always* rank below creditors in the priority order of claims for the corporation's assets. The corporation must fulfill, or at least be able to fulfill, all of its obligations to creditors, before it is legally allowed to hand out any economic benefit to its residual claimants. Furthermore, residual claimants themselves cannot validly do anything (such as adopting a resolution in the shareholder meeting) that unilaterally impairs the content of the corporation's obligation to a creditor. These facts stem from the very concept of residuality. They are also protected by mandatory provisions of positive law, including general law (requiring every corporation, as any other person, to meet its obligations), bankruptcy law (placing residual claimants at the lowest level of priority, dictating that if the corporation's obligations to creditors are not fully met, residual claimants are not entitled to any value) and corporate law, *see, e.g.*, DGCL §§ 160(a), 170–174 (establishing mandatory rules to determine when a corporation is allowed to make a distribution to its shareholders, requiring that distributions not "impair" the corporation's capital, or that they be made out of the corporation's profits); Israel Companies Act §§ 301–305, 307, 309–313 (establishing mandatory rules to determine when a company is allowed to make a distribution to its shareholders, requiring, without exception, that it maintain its ability to meet all obligations to creditors). *See also* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 11 (1991) ("Equity investors are paid last, after debt investors, employees, and other investors . . . . These equity investors have the "residual" claim in the sense that they get only what is left over . . . ."). *But see, e.g.*, Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L. J. 1870, 1928–29 (2017) (criticizing that understanding of the relation between residual and non-residual claims). However, that part of Chief Justice Strine's article far from negates the concept of residual claimancy. First, it conjures up an image of an "ultimate reckoning of accounts," *id.* at 1929, on which residuality presumably depends, while overlooking the many concrete, continuously binding norms, some mentioned above, that support the priority of non-residual creditors. Second, it points to problems with the *enforcement* of law in this area, not with its substantive content. Certainly, it is *possible* to break the law, for example by transferring wealth to shareholders while obligations to creditors are not being met. Yet, no one has a *right* to do so. Similarly, a breach of contract does not modify the rules of contract law. Courts and other enforcement mechanisms exist in order to prevent and address such violations, in corporate law as in any other area.

tra-legal, philosophical distinction: a natural person is an end in himself, free to determine his own fate and life purposes. In contrast, a corporation exists to pursue some purpose and goals determined for it by others. Of course, due to the limits of the corporation's physical nature, there is simply no way it *could* determine its own purpose and goals without other people, and the choices they make. This does not undermine the corporation's existence as a separate person; it just means that an artificial person's life purpose is chosen in a different manner than that of a natural person. Moreover, the fixing of purpose, at the corporation's "birth," does not change the fact that the corporation, through its fiduciaries (and usually *not* its residual claimants), has extremely wide latitude in choosing its course of action, or "way of life," within that purpose.[78]

The logical chain laid out above leads to the inevitable existence of residual claimants, in respect to every corporation. Depending on the type of corporation, residual claimants can have many names, such as "partners" or "members." In some corporations, residual claimants are comprised of, and identical to, some other group of creditors, as in "mutual insurance companies," where policyholders are also the residual claimants.[79] In modern corporations, residual claimants are mostly known as "shareholders"—persons who own a "share." Like other securities, a share is a "thing," an object toward which property rights exist; a share has owners. It can also be rented, pledged as collateral, and so on. Simultaneously, the share itself is a bundle of rights:[80] it confers on its owner some obligatory *rights*, while attaching some *obligations* to at least one other person. The economic magnitude of these rights and obligations is equal to the residual interests of the cor-

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[78] *See, e.g.*, Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989) ("[Directors'] broad mandate includes a conferred authority to set a corporate course of action, including time frame, designed to enhance corporate profitability.").

[79] *See, e.g.*, *2017 Annual Report*, EQUITABLE LIFE INSURANCE COMPANY OF CANADA 15 (Feb. 13, 2018), https://cdn.equitable.ca/forms/unsecured/insurance/2017-Annual-Report.pdf [https://perma.cc/EU4P-4FYA] (showing "policyholders' equity" as the only type of equity in the balance sheet). Practically, this means that the residual claimants have a dual contract with the corporation, giving rise to claims under both general (contract and insurance) law and corporate law, including equitable claims as discussed in this Article.

[80] *See* Israel Companies Act § 1 (defining "Share" as "a bundle of rights in the company that are determined in law and in the article of incorporation[.]").

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poration—those left after all corporate obligations, of any kind, to all non-residual claimants are satisfied, in practice or in capacity.[81]

Most importantly, the related concepts of "share" and "residuality" create a long, open list of unique problems. This stems from the unusual, not easily explicable nature of residual obligations—mainly, the inherent lack of any contractual or other legal mechanism to determine what the shareholders' claim is, except for the phrase "what is left after all obligations to other creditors are satisfied." That phrase might seem straightforward, but it is not. Shareholders' claims are intricately tied to another person's acts, omissions, successes and failures. They ebb and flow with the corporation's fortunes. This situation has no parallels in other legal fields. In contract and property law, for instance, the claimant has a claim toward something grounded in external reality, such as concepts of money, time and place. An obligor might breach an obligation, but these concepts exist independently of him. This makes it comparatively easy for the claimant to ascertain and demand what is owed, for example, "one hundred dollars." In contrast, shareholders can never accurately know the extent of their claims, both because of information and power asymmetries to their detriment, and because many things, some wildly unexpected, might happen to the corporation, or within the various relationships arising from the share (shareholder-corporation, shareholder-shareholder and shareholder-third party). Therefore, "the claim attached to one percent of the corporation's outstanding shares," or what *should* be considered as that claim, is far more complex and problematic than "one hundred dollars."[82]

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[81] Residuality characterizes shares by default. "Regular" residual claim shares are often known as "common shares." There also exist types of securities, sometimes called "preferred shares" (although they can have many other names and properties), that carry some contractual terms endowing their owners with non-residual, or a combination of residual and non-residual, claims. Their owners may, in fact, be regular creditors. *See infra* pp. 280–81 (discussing preferred shares). This situation also occurs in U.S. mutual funds, where shareholders do not own a residual claim share; rather, they own trust law claims toward a corporate trustee and a defined pool, or segment, of its assets. That definition, often in terms of a certain investment strategy, appears in the contractual documents creating each class of "shares."

[82] These problems attach to the concept of shares at a very preliminary level. For example, the number of outstanding shares is a *starting* point in any determination of shareholder rights in a corporation. It gives meaning to the content of a single share, by establishing the relation between it and the entirety of shareholders' claims. However, a shareholder might not even be able to reach that point easily enough. It is possible that shareholders will have no knowledge of the real number of outstanding shares a corporation has at a given moment, due to some

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This unclarity leads to an extraordinary range of possible situations. Some of these are between the corporation and its shareholders: for example, in the case of no dividend being distributed for a long time; no *legal* right exists to demand distribution.[83] Some problems are among shareholders themselves, as in the case of a dilutive allocation of new shares, which is an indirect transfer of wealth from current to new shareholders; general contract law nowhere contemplates this situation.[84] Some problems are between shareholders and third parties, as in the case of harm done to the corporation, and indirectly to shareholders' claims toward it, which for some reason cannot be corrected with legal action taken by the corporation itself.[85] Another example is harm done to the

administrative error or an information gap (such as a private allocation of shares to a new shareholder, not timely and correctly reported to current shareholders, for any reason). Israeli law partly attempts to address this situation, *see* Securities Regulation (Private Offering of Securities in a Registered Company), 5760-2000, §§ 2, 21, KT 6051 p. 834 (Isr.) (requiring approval by the stock exchange and a public disclosure of the details of any private offering of shares by a public company). This provision is meant to prevent information gaps, so that all shareholders know of changes in the number of outstanding shares, including those resulting from a non-public allocation. However, this regulation, like any other, can be breached, intentionally or not. This possibility illuminates the crucial difference between shares and non-share claims, as the latter are grounded in concepts (such as sums of money) independent of the corporation.

[83] Yet, corporate law recognizes and may provide remedy against an inequitable withholding of dividends. *See, e.g.*, Hunter v. Roberts, Throp & Co., 47 N.W. 131, 134 (Mich. 1890) ("Courts of equity will not interfere in the management of the directors unless . . . they . . . refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute a fraud, or breach of that good faith which they are bound to exercise towards the stockholders."), *quoted in* Dodge v. Ford Motor Co., 170 N.W. 668, 682 (Mich. 1919). More generally, "the court of equity is at all times open to complaining shareholders having a just grievance." *Id.* at 684.

[84] Yet, corporate law recognizes and may provide remedy against inequitable dilution. *See, e.g.*, Gentile v. Rossette, 906 A.2d 91 (Del. 2006) (holding that former minority shareholders, deprived of value by a debt conversion transaction, can bring a direct claim against the former controlling shareholder; also holding that in various circumstances, share dilution can give rise to both derivative and direct claims); Feldman v. Cutaia, 956 A.2d 644, 655 (Del. Ch. 2007) ("A claim for wrongful equity dilution is premised on the notion that the corporation, by issuing additional equity for insufficient consideration, made the complaining stockholder's stake less valuable."); CA 667/76 L. Glickman Ltd. v. A. M. Barkai Inv. Co. Ltd. 32(2) PD 281 (1978) (Isr.), https://www.nevo.co.il/psika_html/elyon/LA-2-281-L.htm [https://perma.cc/S8FL-P9SK] (affirming grant of injunctive relief to minority shareholders, following a large allocation of new shares for consideration below their real value).

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ability of the corporation to distribute rights to its shareholders, as with limitations on dividends in the financial sector.[86] In some situations, the third party might be the corporation's creditors, as in the case of an unlawful distribution, or in non-limited liability corporations. The third party might also be the corporation's fiduciaries (directly, not derivatively), such as when the corporation is in *Revlon* mode.[87] Yet another group of such issues concerns those third parties involved in facilitating the corporation-shareholder link, such as banks, brokers, custodians, depositories, nominee companies, and stock exchanges, without the proper services of whom most shareholders would never practically enjoy their rights.

These issues need to be dealt with in a methodic manner, based on some unifying, underlying principles, as good law must strive to do. Together, they comprise the field of share law.

4. THE STARTING POINT: SIMPLISTIC PERCEPTIONS OF SHARES

Yet, the amount of methodic treatment given to share law, especially compared to corporate fiduciary law, is surprisingly minimal. One omnipresent problem is under-definition. In the Delaware General Corporation Law, no definition appears of the terms

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[85] Yet, corporate law recognizes the derivative action, brought on behalf of a corporation by a shareholder. *See infra* note 159.

[86] *See, e.g.*, BASEL COMM. ON BANKING SUPERVISION, BASEL III: A GLOBAL REGULATORY FRAMEWORK FOR MORE RESILIENT BANKS AND BANKING SYSTEMS (2010), https://www.bis.org/publ/bcbs189.pdf [https://perma.cc/99R6-Q968] (establishing guidelines for implementation by national regulators, regarding, among other things, limitations on banks' and similar financial institutions' ability to distribute capital to shareholders). This exemplifies a situation where the interests of the corporation, as well as its fiduciaries, are not aligned with those of shareholders. The corporation and its fiduciaries get a "good excuse" to keep and control more assets, rather than distribute them. Hence, they might be more aligned with the third party (the regulator) who imposes the limitation. Conceivably, legislatures and other regulators can mandate any extreme limitation, even barring distributions altogether. They might do so in regard to any corporation, not just financial services providers. This illustrates an equity situation, where no "legal" right exists (to be entitled to distribution), yet, an outcome where shareholders are completely separated from their investment is clearly unjustifiable. Shareholders might be able to challenge this type of regulation. Their claim would be direct, not derivative. Such a challenge would require (on multiple fronts, from procedural standing to substantive arguments) a well-grounded explanation of shares and shareholder rights. That explanation is provided in share law.

[87] *See infra* pp. 298–300.

"share" or "stock." This may be attributed to the lack of an introductory definitions section in that statute, but it is also the result of a deeper issue: that we think of the concept of a share as something "taken for granted," requiring little analysis because we do not really need to know what it is. Supposedly, the share is a black box. We easily and offhandedly identify its "outputs," such as dividends and voting rights, but we have no well-crafted idea of the process that generates these particular outputs. The Delaware statute is replete with no less than 662 mentions of the terms "shareholder" and "stockholder",[88] granting them a central role in many statutory provisions, without ever defining who they are or what they possess. The American Law Institute's Principles of Corporate Governance exemplify this problem even more strongly, with an empty definition of an "Equity security" as "a share . . . or . . . a security convertible [into a share.]"[89] The reader is left not knowing what a share, nor an equity security, actually is. The Israel Companies Act fares slightly better, when it defines a share as "a bundle of rights in the company that are determined in law and in the article of incorporation[.]"[90] This, first, identifies the basic nature of shares: they are rights (and not, say, contracts). Second, it creates a link between the share and another concept, the constitutional documents, so shares can arise only from that particular contract. If a security is not mentioned there, it is definitely not a share.[91] Yet, the statute fails to explain what are rights "in" another person (indeed, that phrase is meaningless[92]), or what prevents a corporation from also specifying the details of non-share obligations in its constitutional documents (indeed, nothing does).

Another example of this simplistic approach lies in how naturally we view the trading, on the same exchange floor, of shares issued by corporations that are incorporated in very different jurisdictions, or even legal traditions (civil and common law). The New

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88 *See* DGCL (search for the phrases "shareholder" and "stockholder" over the entire document).

89 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 1.20 (AM. LAW INST. 1994).

90 Israel Companies Act § 1.

91 This is further embodied in the mandatory requirement that the authorized capital, which is the maximum number of shares the corporation can issue of each class, shall be specified in the article of incorporation. *See* Israel Companies Act §§ 18(3), 33, 34. Therefore, if a security is not mentioned, in the article of incorporation, as having a certain authorized capital, it is definitely not a share.

92 *See infra* Part 5.2.

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York Stock Exchange lists equity securities issued by corporations from China,[93] Germany,[94] Israel[95] and the U.S.,[96] among many others, and they live unsuspiciously together. We perceive them just as "shares," rarely stopping to examine their insides. The corporate laws of these different places might treat shares in disparate ways. Such differences can be important in multiple respects. For example, only if a corporation has issued shares, not other securities, to the public, does it become a "public company,"[97] with all the massive legal ramifications that category entails. Being a "share," not something else, carries many other consequences, in a manner that often takes for granted the ability to differentiate between shares and non-share obligations.[98]

Even when we do try to discern shares from other legal phenomena, a common method is to discuss them in terms of a *list of rights*, or the benefits with which they *usually* endow their owners.[99] That list might include dividends, liquidation proceeds, merger proceeds, voting, access to certain information, and perhaps some court actions.[100] However, first, this list is both short and not always correct. It can be contracted around, leaving the security owners with more rights or less, or highly modified ones;

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93 *See, e.g.*, *Alibaba Group Holding Limited American Depositary Shares Each Representing One Ordinary Share (BABA)*, NYSE, https://www.nyse.com/quote/XNYS:BABA [https://perma.cc/6PRH-CGUM] (last visited Oct. 26, 2018).

94 *See, e.g.*, *SAP SE ADS (SAP)*, NYSE, https://www.nyse.com/quote/XNYS:SAP [https://perma.cc/M8JQ-JPM9] (last visited Oct. 26, 2018).

95 *See, e.g.*, *Teva Pharmaceutical Industries Limited American Depositary Shares (TEVA)*, NYSE, https://www.nyse.com/quote/XNYS:TEVA [https://perma.cc/SZK4-Z872] (last visited Oct. 26, 2018).

96 *See, e.g.*, *International Business Machines Corporation (IBM)*, NYSE, https://www.nyse.com/quote/XNYS:IBM [https://perma.cc/9ZS7-KYXM] (last visited Oct. 26, 2018).

97 *See, e.g.*, Israel Companies Act § 1 (defining "Public company" as "a company whose shares are listed on an exchange or were offered to the public . . . and are held by the public[.]").

98 *See, e.g.*, *supra* note 88 and accompanying text.

99 *See, e.g.*, ALLEN & KRAAKMAN, *supra* note 63, at 146 (introducing shares as distinct from debt securities, by focusing on two rights, voting and dividends: "Common stockholders elect the board. After the company has paid its expenses . . . and [paid its debts to creditors], whatever is left over can loosely be said to "belong" to the stockholders in the sense that it is available for the payment of dividends.").

100 *See, e.g.*, Israel Companies Act §§ 183–191, 194(a), 320–321; Israel Companies Ordinance §§ 284, 330(1) (detailing various rights granted to shareholders).

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they might still be shareholders. A good example is preferred shares. The term "preferred share" denotes a family of securities that straddle the line between actual shares and other securities, namely bonds. A preferred share, despite its name, might not be a "share" in any substantive sense. Even when it is, its content is often markedly different than that of other securities called "shares;" for example, it might not carry any voting rights. How do we tell if something is a share or not?[101] How do we determine the legal treatment that should be given to a particular security? These questions are part of share law, and its interaction with broader concepts of corporate and private law. General, simplistic views of shares do not suffice to explain preferreds, or to fully and fairly determine the rights of their owners—problems that recent scholarship has grappled with.[102]

Second, the "list of rights" approach fails to note an important fact: a given corporation might not experience any rights distribution event (such as a dividend or liquidation) for an extremely long time—in fact, a potentially *unlimited* period—yet, shares of that corporation will have intrinsic value and people will buy and sell them, for a price, at the secondary market. This is in contrast to other kinds of obligations, which do have a maturity date, or otherwise limited lifetime. It is clear why bonds have value: their owners have a contractual right to receive known sums of money at known times. Shares carry no such rights; in fact, it is hard to ascertain from any textual source (contract or law) what *is* the economic content a share carries throughout its existence. So, why do shares have value? What is their intrinsic content? What claims does a shareholder have, and toward what or whom?

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[101] A question of great practical importance, due to, *inter alia*, the special status that corporate law confers upon shareholders and not others, often by mere reference to the word "share" or "shareholder," presupposing the ability to differentiate between shares and other securities. *See supra* note 88 and accompanying text (noting that the DGCL mentions the terms "shareholder" and "stockholder" 662 times, without defining shares).

[102] *Compare* William W. Bratton & Michael L. Wachter, *A Theory of Preferred Stock*, 161 U. PA. L. REV. 1815 (2013), *with* Leo E. Strine, Jr., *Response: Poor Pitiful or Potently Powerful Preferred?*, 161 U. PA. L. REV. 2025 (2013) (articles presenting different views regarding the nature of preferred shareholders' rights, on a spectrum between equitable rights, similar to those attached to common shares, and contractual rights, similar to those attached to non-share corporate obligations).

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5. FOUR UNSATISFACTORY APPROACHES TO SHARES

These questions are traditionally answered using several approaches (that is, beyond the simplistic "black box" and "list of rights" approaches outlined above). As the discussion below reveals, even these more developed approaches only examine the topic via their own, entrenched perceptions. Some offer correct observations, but none is free of inaccuracies; none can serve as the basis for a theory and law of shares. This Part surveys the four main approaches invoked today to explain the share phenomenon. As a unifying theme, it asks how the *Co-Op* decision might be justified, if at all, under each approach.

5.1. The Contract Approach

According to one common approach, shareholders are just a group of creditors, who have paid large sums of money[103] to enter into a contract (the constitutional documents) which in itself is devoid of meaningful content. It includes no maturity date, no periodic payments, no financial covenants, and no right to sue under general contract law even when the corporation is running badly and the chances of getting a return become slim.[104] It is a contract for a *residual* claim, with all the attendant problems.[105] This approach views shareholders as contractual parties, but with a largely unwritten,[106] custom-based or implied covenant-based con-

[103] *See supra* note 2. The amounts mentioned there are on a global scale, but they are composed of the holdings of many separate shareholders, each the owner of substantive rights that should be protected by legal norms and institutions, as any other right.

[104] In non-limited liability corporations, shareholders bear an even bigger risk: ending up with shares of negative value, due to having to satisfy part or all of the corporation's liabilities themselves. *See supra* note 74. Non-residual creditors do not bear such a risk; if insolvency occurs, they stand to lose, at most, their own claim. This further demonstrates the unique position of shareholders, compared to all other creditors.

[105] *See supra* Part 3.

[106] *See, e.g.*, Lewis A. Kornhauser, *The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel*, 89 COLUM. L. REV. 1449, 1451 (1989) ("Complications arise in corporate transactions, however, because the relevant "agreement" is generally unwritten, frequently ambiguous or contradictory and often not an agreement at all."). *See also supra* notes 5, 6.

tract[107] and with legal rights disproportionate to their economic investment. They are creditors having none of the protections of contract law.

On the other hand, they might incur the downsides: in *Co-Op*, one could argue that the unknown shareholders have "abandoned" or "slept on" their rights, which under contract law doctrine, is possibly sufficient to negate those rights.[108]

Furthermore, contract law generally provides a rich, well-developed doctrinal environment; a good example is the availability of remedy against an *anticipatory* breach of contract.[109] However, contract law is largely built on the assumption that creditors know, or *can* know (and prove), what they are entitled to. For shareholders, no remedy against "anticipatory breach" is possible, because the shareholder has nothing specific enough to anticipate.

Another important doctrinal problem is that under contract law, "the drafting burden [is] on the party asserting the right[.]"[110] Hence, it could have been claimed that the unknown shareholders should have had, in Co-Op's constitutional documents, express clauses saying that they hold quasi-property rights, unlimited in time, toward the corporation's net worth; and regulating many other situations that might occur, no matter how remote. Such clauses are practically not found in any constitutional documents. Similarly lurking are statute of limitations arguments, which cannot be raised as easily against owners of property or quasi-property (equity) rights.[111]

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[107] Although the contract approach itself might not necessarily say so, equity is the main source of the customs and implied covenants embodied in shares. *See infra* Part 6.

[108] *See, e.g.*, DEL. CODE ANN. tit. 6, § 2-309(1) (2018) ("The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time."); Contracts Act (General Part), 5733-1973, § 41, SH No. 694 p. 118 (Isr.) [hereinafter: Israel Contracts Act] ("If no time has been agreed on for the fulfillment of an obligation, it has to be fulfilled a reasonable period after the formation of the contract, at a time of which the creditor has given notice to the debtor a reasonable period in advance.").

[109] *See, e.g.*, DEL. CODE ANN. tit. 6, § 2-610 (2018) ("When either party repudiates the contract with respect to a performance not yet due . . . , the aggrieved party may . . . resort to any remedy for breach . . . ."); Contracts Act (Remedies for Breach of Contract), 5731-1970, § 17, SH No. 610 p. 16 (Isr.) ("If a party indicates its intention not to perform a contract, or if it appears from the circumstances that [the party] will be unable or unwilling to perform [the contract], the other party is entitled to remedies according to this Act even before the date set for the performance of the contract . . . .").

[110] Bratton & Wachter, *supra* note 102, at 1820.

[111] *See, e.g.*, Peter Watts, *Some Aspects of the Intersection of the Law of Agency*

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To a large extent, the contractual approach is associated with the school of law and economics and the "nexus of contracts" theory. Under these disciplines, a contract is simply a contract; one contract may differ from another in terms, but not in general nature. Hence, shareholders are presumably just another group of stakeholders in the corporate nexus.[112] It is worth noting that according to the nexus of contracts theory, the corporation itself is an aggregation of contracts.[113] However, that statement is wrong. How can "a contract" (or any number thereof) sue someone in court, own property, or do anything else? More correctly, the corporation is a person; it is not *the* nexus of contracts, but the central *party* to the nexus of contracts.[114]

Of the four approaches discussed in this Part of the Article, the contract approach, equally with the trust approach,[115] is probably the least wrong when it comes to shares. The share relationship is, at a basic level, a contractual relationship between shareholder and corporation.[116] When a person owns a share, that person primarily

with the Law of Trusts, *in* EQUITY, TRUSTS AND COMMERCE 29, 45 (Paul S Davies & James Penner eds., 2017) ("In many jurisdictions, limitation periods do not apply to actions for failure to account brought against an express trustee.").

[112] *See, e.g.*, HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 15 (1996) ("[S]upplying capital to the firm is simply one of many transactional relationships to which ownership can be tied, and there is nothing very special about it."); Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 274 n.8 (1986) ("There is no fundamental difference between debt and equity claims from an economic perspective."). The answer to this line of argument is that, although non-residual creditors might sometimes lose part or all of their positive law claim, this does not modify the claim's intrinsic content, which is not residual, is often fixed, is represented by some concepts (such as money and time) external to the corporation, and is governed by some normative framework external to corporate law. For creditors, what fluctuates is not their claim's content, but the *probability* of receiving it. Creditors' rights may be negated when the corporation becomes insolvent, which is the exception; most corporations are not insolvent. The content of creditors' claims can change only according to external law, such as contract or bankruptcy law. The rule, and the general perception of being a "creditor," is that creditors have a relatively stable claim, and they usually get it. In contrast, residual claimants' positive law claim is *intrinsically* non-fixed and entirely dependent on the corporation. Their claim is *always* fluctuating, even when the corporation is not insolvent, and even if it is very successful. Therefore, shareholders are indeed special and different than non-residual creditors.

[113] *See, e.g.*, Henry N. Butler, *Corporation-Specific Anti-Takeover Statutes and the Market for Corporate Charters*, 1988 WIS. L. REV. 365, 369 (1988) ("The corporation is a nexus of contracts.").

[114] *See infra* Part 5.2.

[115] *See infra* Part 5.3.

[116] In addition to the other relationships arising from shares: the shareholder-

owns a claim toward a corporation. However, by design, that claim is exceptionally vague and ill-defined. It is never put well into words—neither in contract, nor in law. It is far removed from the concept of a contract as we normally think of it. As a result, whenever we discuss the contractual approach, we must remember that the "share contract" is singularly exceptional, among all the corporation's relationships. It should never be described in terms of contract law alone. Rather, it is intertwined with another normative framework—equity. Part 6 of this Article expands on that distinction.

5.2. *The Property Approach*

At the other end of the spectrum, some have argued that shareholders "own" the corporation,[117] or are the true owners of the corporation's assets.[118] This approach is related to the "aggregate theory" of the corporation, which contends that a corporation is just a grouping of other individuals, usually its shareholders.[119]

Property rights are eternal; they do not have a maturity date. Under this approach, the result in *Co-Op* may be justified: property rights cannot be taken away, absent some exceptional circumstances, even if their owner fails to demand those rights or show

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shareholder and shareholder-third party relationships. *See supra* pp. 277–78.

[117] *See, e.g.*, William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–65 (1992) ("In the first conception, the corporation is seen as the private property of its stockholder-owners."); Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 592 (1999) ("[W]hat does a corporate shareholder own? The corporation, of course. It is the corporation itself as a "thing" that a corporate shareholder legally owns. A corporate shareholder is literally a holder of a corporate share, a bundle of participatory and pecuniary rights in the corporation.").

[118] *See, e.g.*, VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE 2 (1882) ("[T]he rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being."), *quoted in* Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1458 (1987).

[119] *See, e.g.*, Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMP. L. 39, 42 (2000) ("The aggregate or partnership model of the corporation, which was prevalent in the 19th century, assumed [a role as the "owners" of the corporate enterprise] for shareholders . . . ." (citation omitted)). On the aggregate theory, *see generally* Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 566 (1987).

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up in court to defend them. Certainly, they can be eliminated much less easily than purely obligatory rights.

However, the property approach is also mistaken. A corporation is a person.[120] It exists separately from any other person, including its shareholders. Like other persons, a corporation can enter into obligatory relationships and can *own* property. A corporation is not and cannot *be* property. Shareholders do not own the corporation; they own shares.[121] While it is meaningful to discuss the ownership of a *right toward* a corporation, it is unclear what might it mean, in both philosophical and property law terms, to "own" a corporation—another person, with interests and volition of its own.[122] Furthermore, the corporation is the full owner of its own assets,[123] including that portion amounting to its net worth

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120 *See, e.g.*, DGCL § 122 (detailing a list of "powers" held by every Delaware corporation, generally similar and often identical to the capacities of a natural person); Israel Companies Act § 4 ("A company is a legal person capable of any right, duty and act that is consistent with its character and nature as an incorporated body."); Hawes v. Oakland, 104 U.S. 450, 453–54 (1882) ("This corporation, like others, is created a body politic and corporate . . . . [It] may make contracts, commit torts, and incur liabilities, and may sue or be sued in [its] corporate name in regard to all of these transactions. The parties who deal with [the corporation] understand this, and that they are dealing with a body which has these rights and is subject to these obligations, and they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation."); Salomon v. A. Salomon & Co. [1897] AC 22 (HL) 30 (appeal taken from Eng.) ("[O]nce the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself . . . ."); MODEL BUS. CORP. ACT § 3.02 (AM. BAR ASS'N 2016) ("Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . . ."); ALLEN & KRAAKMAN, *supra* note 63, at 77 ("The corporation is considered a separate person in the eyes of the law."); John C. Coates IV, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 818–35 (1989) (discussing in detail the "natural entity theory" of the corporation); Schane, *supra* note 119, at 592–609 (providing legal and linguistic analysis of the concept of corporate personality).

121 *See, e.g.*, YEDIDIA Z. STERN, HA'BA'ALUT BA'HEVRAH HA'ISKIT: TE'ORYAH, DIN, METSI'UT [THE OWNERSHIP OF A CORPORATION: THEORY, LAW, REALITY] 129 (2008) ("Shareholders, as their name also attests, hold a right of ownership in a share and not a right of ownership in the company.").

122 *See id.* at 136 ("The company is an entity with interests of its own, that differ from those of any other actor . . . . The company is meant to act independently of any other entity to promote those interests."); *infra* note 145 and accompanying text.

123 *See, e.g.*, DGCL § 122(4) ("[Every corporation created under this chapter shall have power to] [p]urchase, receive, take by grant, gift, devise, bequest or otherwise, lease, or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with real or personal property, or any interest therein . . . [.]");

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(shareholders' equity). Shareholders, as other creditors may do, have entered into a *contract*, not a possessory relationship, with the corporation.[124] That contract is the constitutional documents, along with the legal and equitable norms they necessarily absorb. In summary, a corporation is not property, and its own property belongs to it, not to its shareholders. Therefore, a property approach to the nature of shares cannot hold.

5.3. *The Trust Approach*

The trust approach would turn to trust law, viewing the corporation[125] as a trustee, where shareholders are the beneficiaries and the corporation's net worth is the trust property. Seemingly exemplifying this approach is A. A. Berle's famous 1931 article.[126]

If this approach is correct, the *Co-Op* decision can be rather easily explained: shareholders have a trust claim toward their fractions of the corporation's net worth; that claim, somewhat similar to a property right as discussed above,[127] does not have a maturity date (unless otherwise specified in the terms of the trust; there was no such stipulation in Co-Op's constitutional documents), so shareholders own a right that is unlimited in time.

Once again, upon closer inspection, both trust law and corporate law do not support this approach. First, trust law is conservative. It is geared toward different purposes than corporate law. By default, the trustee has to maintain the trust property,[128] not engage

MODEL BUS. CORP. ACT § 3.02(d) (AM. BAR ASS'N 2016) ("[Every corporation has power] to purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property . . . [.]"). The same proposition is implicit in Israel Companies Act § 4. In addition, references to the company's own property are spread throughout that statute, which also never mentions any proprietary link between shareholders and the company's assets.

124 *See supra* notes 4, 72.

125 In a different variation, the corporation's directors are the trustees or fiduciaries for shareholders. That approach may equally be refuted, *see infra* Part 5.4.

126 *See* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (arguing that "all powers granted to a corporation . . . are . . . exercisable only for the . . . benefit of . . . shareholders", and that this is analogous to limitations on the power of trustees).

127 *See supra* Part 5.2.

128 *See, e.g.*, DEL. CODE ANN. tit. 12, § 3302 (2018) (instructing trustees as to "authorized investments"); Trust Act, 5739-1979, § 6, SH No. 941 p. 128 (Isr.)

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in complex, risky activities, typical of the modern corporation. A chief consideration in trust law is the welfare of the beneficiary. In corporate law, shareholders are important, but their interests are not nearly as overriding as those of trust beneficiaries.

Second, a trust is a narrowly and strictly articulated concept. For example, in Israel, it is defined as "a relation to an asset according to which a trustee has to hold or act upon it for the benefit of a beneficiary or for another goal."[129] The "asset"—some piece of property—is a key component of any trust. Indeed, trust law is property-oriented, but the modern corporation is not simply a keeper of assets. It is an active and dynamic person, engaging in a host of acts that are often unrelated to safeguarding shareholders' investment. For example, when SpaceX develops a new type of Mars-going rocket,[130] besides being a risky use of corporate funds (related to the first point above), it is also an activity that has absolutely nothing to do with the work of a trustee. Abiding by the narrow strictures of trust law would not have allowed many modern corporations to exist, and would hinder the interests of both corporations and shareholders.[131]

Third, there is little support in positive law to the concept of the corporation being a trustee for shareholders. A survey of the corporate statutes of Israel, Delaware, the MBCA, and the U.K. reveals that none of them offer such a proposition. Furthermore, courts have repeatedly held that the corporation is not a fiduciary for its shareholders.[132] Since a trustee is one type of fiduciary,[133] it

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[hereinafter: Israel Trust Act] ("Those trust funds that are not required for [the trust's] ongoing needs, the trustee is obliged to *hold* or invest as is efficient *to maintain the principal* and make returns . . . ." (emphases added)).

[129] Israel Trust Act § 1.

[130] *See, e.g.*, Stephen Clark, *Musk: Atmospheric tests of interplanetary spaceship could happen next year*, SPACEFLIGHT NOW (Mar. 13, 2018), https://spaceflightnow.com/2018/03/13/musk-atmospheric-tests-of-interplanetary-spaceship-could-happen-next-year [https://perma.cc/9LJJ-P7VN]. Space Exploration Technologies Corp., also known as SpaceX, is a Delaware corporation. *See Division of Corporations - Filing*, DELAWARE.GOV, https://icis.corp.delaware.gov/ecorp/entitysearch/NameSearch.aspx [https://perma.cc/6GKQ-BNT4] (last visited Oct. 26, 2018) (search for entity name "Space Exploration Technologies Corp." or file number 3500808).

[131] *Cf.* Kornhauser, *supra* note 106, at 1450 ("Unlike contract, which allows much discrimination in allocating entitlements among parties to the agreement, trust does not seem adequately flexible to explain the complex allocation of obligations and privileges among this web of actors.").

[132] *See, e.g.*, *In re* Stillwater Capital Partners Inc. Litig., 851 F. Supp. 2d 556, 573 (S.D.N.Y. 2012) ("A corporation does not owe a fiduciary duty to its shareholders . . . ."); Alessi v. Beracha, 849 A.2d 939, 950 (Del. Ch. 2004) ("Earthgrains

is all the less plausible to see the corporation as shareholders' trustee.

Fourth and very pointedly, even when Berle wrote of shareholders' rights in trust, he did so by analogy. The analogy is to equity. Berle says so explicitly:

> [I]n every case, corporate action must be twice tested: first, by the technical rules having to do with the existence and proper exercise of the power; second, by *equitable rules somewhat analogous* to those which apply in favor of a [trust beneficiary] to the trustee's exercise of wide powers granted to him . . . .[134]

"Somewhat analogous" is far from "identical." In fact, throughout Berle's paper, "equity" and its inflections appear more frequently than "trust": 52 and 38 times, respectively.[135] Quite plainly, Berle meant to say that shareholders have *equitable*, or more-than-legal, more-than-contractual rights. The liberty Berle took in using "trust" for the title of his article is partly understandable, because trust law is a branch of equity. A right in trust is one, very common type of equitable right. Yet, as the discussion above illustrates, trust law is a specific area of jurisprudence, adding its own rules and conventions on top of those of general equity. Every corporation is an equitable obligor; not every corporation is a trustee.[136] The trust approach, like the contract approach, comes

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[(defendant corporation)] owes no fiduciary duty to Alessi [(plaintiff shareholder)]. I will not require Earthgrains to remedy Alessi's injury without a valid legal theory for holding Earthgrains liable.").

133 *See, e.g.*, *Trust Code Summary*, THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://uniformlaws.org/ActSummary.aspx?title=Trust%20Code [https://perma.cc/P4MD-J57Y] (last visited Oct. 26, 2018) ("A trustee is a fiduciary, sometimes described as the utmost fiduciary.").

134 Berle, *supra* note 126, at 1049 (emphasis added).

135 *See id.* (search for the phrases "equit" and "trust" over the entire document). Moreover, many uses of the word "trust" in Berle's article are as part of a name, such as "Fidelity Trust Company", *id.* at 1064, so the actual balance favors "equity" even more.

136 Of course, a corporation can also become a trustee, usually by entering into a trust contract. Some corporations, such as trust companies and money managers, are primarily devoted to such activity. The trust beneficiary is an equitable but non-residual creditor of the corporation. The beneficiary's rights are grounded in a field of law (trusts) that is external to corporate law, and they relate to some asset that is not entirely the product of the corporation's fortunes. On the distinction between residual claims and those grounded in external reality, *see supra* p. 276.

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relatively close to the truth, but still requires qualification. Even when, as this Article urges, we adopt a broad, holistic view to protect substantive rights, precision is important.

5.4. *The Fiduciary Approach*

According to another approach, which presumably reflects most law in the United States, what shareholders own is a direct claim toward the corporation's fiduciaries. For example, a common reading of the famous *Dodge v. Ford* decision[137] implies that directors owe their duties not only to the corporation, but also *directly* to shareholders. No other group of creditors enjoys those duties. This can be taken to mean that shareholders and directors are parties to the same relationship, which gives rise to a heightened duty toward shareholders, co-existing with directors' duties toward another person—the corporation. Some Delaware cases seemingly imply the same.[138] This position accords with a pluralistic view of fiduciary law, which allows for the recognition of multiple, separate types of beneficiaries within the same fiduciary arrangement.

However, this approach, as well as the assertion that it reflects current American law, are both incorrect. First, even if it did mirror U.S. law, the pluralistic view is globally an exception. Other jurisdictions, including Israel,[139] the U.K.,[140] and most civil law Euro-

[137] Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

[138] *See, e.g.*, Cede & Co. v. Technicolor, 634 A.2d 345, 360 (Del. 1993) ("[D]irectors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders."); Crescent/Mach I Partners, L.P. v. Turner, 846 A.2d 963, 979 (Del. Ch. 2000) ("Directors have an unyielding fiduciary duty to protect the interests of the corporation and the stockholders alike."). *But see infra* pp. 298–300 (explaining that the mergers and acquisitions context, where the cases mentioned in this footnote arose, is an exception partly allowing for direct duties toward shareholders).

[139] *See* Israel Companies Act §§ 252(a) ("An officer owes toward the company a duty of care . . . ."), 254(a) ("An officer owes a duty of loyalty to the company . . . ."). The term "officer" includes a director, *see* Israel Companies Act § 1.

[140] *See* Companies Act 2006 § 170(1) (UK) ("The general duties specified in sections 171 to 177 are owed by a director of a company to the company."). *See also* D. D. Prentice, *Directors, Creditors, and Shareholders*, *in* COMMERCIAL ASPECTS OF TRUSTS AND FIDUCIARY OBLIGATIONS 73, 73 (Ewan McKendrick ed., 1992) ("It is a generally accepted principle of company law that directors owe their duties to the company and not to the company's creditors or to its shareholders . . . .").

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pean countries,[141] take the monistic view: directors and similar fiduciaries owe their duties only to the corporation. In turn, the corporation owes various obligations to others—contractual, tort, equitable, environmental, or any other kind. Like any person, the corporation is required to obey positive law, including share law, and meet its obligations. Yet, this has nothing to do with extending *fiduciaries'* duties, beyond their duty to the corporation.[142]

Second, from a normative standpoint, this approach is bad law. A core tenet of fiduciary law is that a fiduciary may not be the servant of two masters.[143] In other words, under fiduciary law, divided loyalty is breached loyalty.[144] The interests of the corporation and its shareholders can and do diverge.[145] Therefore, this du-

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141 *See* Klaus J. Hopt, *Directors' Duties to Shareholders, Employees, and Other Creditors: A View from the Continent*, *in* COMMERCIAL ASPECTS OF TRUSTS AND FIDUCIARY OBLIGATIONS 115, 116 (Ewan McKendrick ed., 1992) ("The general rule in most European countries is that directors have direct duties and liabilities only to their company.").

142 This can be stated in terms of corporate purpose: the for-profit corporation's purpose is the lawful pursuit of profit. *See, e.g.*, Israel Companies Act § 11 ("The purpose of a company is to act according to business considerations to maximize its profits . . . ."); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("I cannot accept as valid . . . a corporate policy that . . . seeks *not* to maximize the economic value of a for-profit Delaware corporation . . . ."). The "lawful" part is not mentioned in these sources, but it is obvious: everyone must obey positive law; even if a corporation wanted to have a non-lawful purpose, by definition, law cannot give cognizance to such an attempt. Directors and other fiduciaries are duty-bound to promote the achievement of the corporation's purpose. As pertains to the corporation's relationship with shareholders, this relates to both the "lawful" (the corporation must obey share law) and the "pursuit of profit." When fiduciaries cause the corporation to *not* operate this way, they steer the corporation away from its purpose and thus breach their duty to the corporation.

143 *See, e.g.*, *supra* note 68 (citing judicial decisions holding that a fiduciary is bound to act single-mindedly for the interests of the beneficiary); EASTERBROOK & FISCHEL, *supra* note 77, at 38 ("[A] manager told to serve two masters . . . has been freed of both and is answerable to neither.").

144 *See, e.g.*, LICHT, *supra* note 9, at 183 ("[T]he duty of loyalty can sustain only one interpretation—the monistic interpretation. A pluralistic approach and a duty of loyalty are contradictory in the most basic sense—definitionally, in fact—so an attempt to interpret and apply the duty according to this approach counters [the duty of loyalty's] principles and values. Such an attempt amounts to an elimination of the duty of loyalty . . . .").

145 The benefit of shareholders is closely related, but not identical, to the benefit of the corporation. The two may diverge in various situations, including the distribution of a dividend or a share buyback, the mergers and acquisitions context, or a decision on voluntary dissolution. This divergence was also examined in a well-known Delaware Court of Chancery opinion. *See* Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., 1991 Del. Ch. LEXIS 215, at *108 n.55 (Del. Ch. Dec. 30, 1991) (illustrating a situation where a corporation, its sharehold-

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ality is neither desirable nor practicable.

Third, this approach is structurally flawed. Even if shareholders did enjoy direct duties owed by directors, that would not be of much help, because directors are not the owners of the corporation's assets; the corporation is. If, for any reason, the corporation loses a certain amount of wealth (an indirect loss for shareholders), that amount does not necessarily go into directors' pockets. This is particularly true when the loss results from a breach of the duty of care, rather than the duty of loyalty; or when it results from no fiduciary breach at all, but from the action of a third party, which directors could not practically have prevented. Moreover, the larger the amount, the less likely it is that directors (or their insurers) can or will fully compensate for it. In any case, the economic claim held by shareholders is toward the corporation and its net worth, not its directors and *their* net worth.

Fourth, this approach is also flawed from another structural perspective. Shareholders and directors are not parties to the same contract. Each director is party to a contract with the corporation, an "employment contract" of sorts, heavily laden with terms of fiduciary law (often unwritten and implied). These contracts are initially entered into when the corporation is created and its first directors embark upon their roles.[146] They are separate from another contract—the corporation's constitutional documents, also coming into force the moment the corporation is formed.[147] That contract is recognized, either by statute or case law,[148] to involve the corporation and its shareholders as parties. The one person who is party

ers and its creditors each have a different interest as to the same business decision). This non-identity is further reflected in the difference between various "time frames" toward which the corporation may be oriented. The corporation may operate for its long-term benefit, or some other time horizon lawfully determined by its fiduciaries. *See, e.g.*, Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989) ("[Directors'] broad mandate includes a conferred authority to set a corporate course of action, including time frame, designed to enhance corporate profitability. . . . [A]bsent a limited set of circumstances . . . , a board of directors . . . is not under any *per se* duty to maximize shareholder value in the short term . . . ." (citation omitted)). While this should *also* benefit shareholders, as claimants toward the corporation and the residual of its wealth, it does so in a manner that might be objectionable to some, or even the majority of, shareholders. This is far from the pretense that the corporation and its shareholders are the same, have the same interests, or can be the object of the same duties.

[146] *See supra* note 72.

[147] *See, e.g.*, DGCL § 106; Israel Companies Act § 16 ("A company's article of incorporation . . . is in force from the time of its incorporation.").

[148] *See supra* notes 4, 72.

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to *both* contracts is the corporation. This, too, makes plain that shareholders' rights come to them from the corporation.

Fifth, careful examination reveals that even *Dodge v. Ford* supports the monistic view: directors owe their duties only to the corporation. *Dodge v. Ford* never says that shareholders directly benefit from fiduciary duties,[149] but only that shareholders are special, compared to all other creditors. That is because "[a] business corporation is *organized* and *carried on* primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[150] Clearly, the topic *Dodge v. Ford* entertains is *the purpose of the corporation*, not the identity of fiduciary law beneficiaries. The rights of shareholders are channeled through the corporation—they are a product of the existence and organization of the corporation. They do not directly flow from directors, whom *Dodge v. Ford* instructs as to carrying on the business *of the corporation*.

Even when not relying on *Dodge v. Ford*, for example in Delaware,[151] the "direct fiduciary" interpretation is misguided. Given the weight of positive and normative evidence against a fiduciary approach to shares, as presented in this section, decisions and other materials to such effect should be read accordingly. Where "duties to the corporation and its shareholders," or similar language, is employed, its correct construction is "duties to the corporation, who in turn owes to shareholders." This reading fully conforms with existing law, while correcting a certain imprecision, which tends to occur for several reasons. To begin with, shareholders' claim is *closely linked* to the corporation's well-being, which directors are duty-bound to advance. The more the corporation achieves *its* purpose, *usually* the greater the benefit of shareholders, assuming correct operation of share law. This close relation, between the welfare of residual claimants and that of the corporation, might easily motivate the inaccurate wording. Courts write as if the two are identical, so there is no "translation" process between them, and there is not much difference between saying "the corporation" and "its shareholders." As this Article demonstrates, that assumption is untrue. The relation is not an identity; equating the

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149 In fact, the word "fiduciary" is never mentioned in the decision. *See Dodge v. Ford*.

150 *Id.* at 507 (emphases added).

151 *See supra* note 138.

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two is, at most, a general metaphor.[152]

The phrasing inaccuracy might also arise from the fact that shareholders' rights are grounded in equity-based share law, and equity is closely related to fiduciary law. In essence, courts are using "fiduciary" as code for "equity." They are trying to convey that shareholders are not regular, arm's length creditors, but equity claimants, with more-than-legal, more-than-contractual rights, justified by power and information asymmetries, similar to those found in fiduciary relationships. That is entirely accurate; yet, it does not turn shareholders into fiduciary law beneficiaries. Fiduciary law and equity are not synonymous. Different types of equity claimants exist.[153] This distinction has far-reaching practical implications. Fiduciary law is strict. With the duty of loyalty at its heart, it requires the fiduciary to self-abnegate and to treat all beneficiaries with the same, extremely high standard of conduct.[154] Loyalty is not a matter of degree. Equity, the taxonomical parent of fiduciary law, operates more broadly: it can inject flexibility where required. It enables us to fine-tune the concept of shareholders, recognizing they are separate from the corporation, and cannot be the object of the same duties, while also realizing they are different from non-residual creditors, and must be protected appropriately. In fact, Delaware law submits to this distinction. It concedes that direct duties, owed by directors to shareholders, are an *exception*, arising only in situations such as those invoking *Revlon* duties.[155] Moreover, the *Unocal* and *Revlon* standard of re-

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152 *See, e.g.*, LICHT, *supra* note 9, at 199 ("[T]he [duty of loyalty] itself is toward the company. Shareholders are beneficiaries in a conceptual and indirect manner . . . ."); Paul L. Davies, *Directors' Fiduciary Duties and Individual Shareholders*, *in* COMMERCIAL ASPECTS OF TRUSTS AND FIDUCIARY OBLIGATIONS 83, 83–84 (Ewan McKendrick ed., 1992) (discussing "the doctrine that the duties of directors are owed to shareholders collectively" in a way that reveals no practical difference from duties "to the company"; further mentioning that "directors' duties . . . involve obligations owed . . . [to a] group not normally limited to the existing shareholders of the company", but also including future and "potential shareholders"—which confirms that the only actual, identifiable person, to whom those duties can run, is the company). *See also supra* note 145. A purpose-based formulation of corporate law can easily bridge this conceptual gap, by clarifying that the fiduciary's duty, toward the corporation, is to promote the achievement of the corporation's purpose, which is the lawful pursuit of profit, which in turn (by operation of share law) also benefits shareholders. *See supra* note 142.

153 *See infra* pp. 303–05.

154 *See supra* notes 68, 69, 144; *infra* pp. 304–05.

155 *See infra* pp. 298–300.

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view is an "intermediate standard"[156] of "enhanced scrutiny",[157] above the business judgment rule, but below the entire fairness required by the duty of loyalty.[158] This is precisely the flexibility afforded by equity, and forbidden under fiduciary law. Delaware itself, the seeming focal point of "direct fiduciary" language, in fact adopts a nuanced, equitable approach to share law.

Sixth, another proof that even the American (and specifically Delaware) view is monistic, as in other jurisdictions, comes from the distinction between derivative and direct actions. If directors owed directly to shareholders, or if the corporation's "middleman" status was otherwise eliminated, there would be no difference between harm to the corporation and harm to its shareholders. *Every* lawsuit against directors (or any other defendant, for that matter) could then be brought as a direct action, in the name of shareholders. In reality, the existence of, and insistence on, derivative actions demonstrate that only the corporation is the beneficiary of directors' duties. Shareholders may assert a breach of those duties only indirectly, on behalf of the corporation. Practically, this distinction is extremely consequential, as any plaintiff who tries to navigate the unique procedural hurdles of derivative litigation quickly learns.[159]

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[156] *See* Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 248 (1989) ("[T]he Delaware courts' most recent response to the tension between the intrinsic fairness standard and the business judgment standard in the takeover context [is a]n intermediate standard of review mandating that management's defensive tactics must be "reasonable in relation to the threat posed" by a hostile offer." (citation omitted)).

[157] *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986) (discussing "the enhanced scrutiny which *Unocal* requires of director conduct."); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) ("When a board addresses a pending takeover bid . . . there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.").

[158] *See, e.g.*, Gilson & Kraakman, *supra* note 156, at 247 ("[T]he intrinsic fairness test[does] not seem adequate [(due to over-strictness)] when courts must evaluate defensive measures that implicate . . . [management's] loyalty to shareholder interests."). If management really owed to shareholders a full duty of loyalty, the same as it owes to the corporation, then according to fiduciary law principles, *see supra* notes 68, 69, 144, it would be impossible to diverge downwards from the entire fairness test. Clearly, then, that is not what management owes to shareholders.

[159] For the rules governing the distinction between direct and derivative actions, and the pretrial stages of a derivative action in Delaware, *see* Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (holding that the distinction between derivative and direct claims turns solely on "who suffered the

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Furthermore, not only shareholders can file derivative lawsuits; sometimes, creditors can do so as well.[160] In any case, the action is brought *on behalf of the corporation* and for *the corporation's* benefit. The fundamental idea behind *Gheewalla*[161] is that just like shareholders, if creditors are to be righted for a wrong they suffered, they have to address the corporation; their rights are channeled through the corporation; they do not have direct claims toward anyone else. The ultimate, indirect outcomes of fiduciary duties and their breach can be complex (such as harm to creditors, rather than or in addition to shareholders), but those duties are owed to the corporation, who is itself the distributor of wealth (or other legal effects) to both shareholders and creditors, and the object of claims by them.

Seventh, contrary to the common yet mistaken reading of *Dodge v. Ford* and the "direct fiduciary" Delaware decisions, multiple other landmark cases and leading authorities, from Delaware itself, support the same proposition as this Article: the corporation

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alleged harm" and "who would receive the benefit of any . . . remedy"); Rales v. Blasband, 634 A.2d 927, 933–34 (Del. 1993) (determining whether to allow a derivative action to proceed, where the board that would consider the pre-suit demand is not the same board that committed the alleged harm); Spiegel v. Buntrock, 571 A.2d 767, 775–76 (Del. 1990) (holding that by sending a demand letter, the plaintiff concedes that the board's decision not to pursue the action should be reviewed under the business judgment rule, thereby practically negating the plaintiff's derivative claims; thus, establishing a universal non-demand rule, where the adjudication on the merits of a derivative action is centered on the issue of demand excusal in the pretrial, motion to dismiss stage); Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984) (establishing the test to determine whether a demand on the board is excused prior to filing a derivative action). *See also infra* note 244. In Israel, every derivative action involves a preliminary certification stage, consisting of a trial in itself, whereby the court determines if the plaintiff may represent the corporation and proceed to litigate the main case. In that preliminary stage, the court is instructed to consider, first, whether conducting the lawsuit would be in the benefit of the corporation (taken to require a *prima facie* showing of a cause of action) and, second, whether the plaintiff acts in good faith. *See* Israel Companies Act § 198(a). Similarly to Delaware, the actual adjudication on the merits usually occurs in the preliminary stage. The main idea is that derivative actions are different, and usually more complicated to bring and maintain, than direct actions.

[160] *See, e.g.*, Israel Companies Act § 204 (allowing creditors of a company to file a derivative action if it arises from certain causes of action, mainly unlawful distribution to shareholders); N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 103 (Del. 2007) ("[I]ndividual creditors of an insolvent corporation have no right to assert direct claims for breach of fiduciary duty against corporate directors. Creditors may nonetheless protect their interest by bringing derivative claims on behalf of the insolvent corporation . . . ." (emphases omitted)).

[161] 930 A.2d 92.

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is the beneficiary of directors' duties, while shareholders have a claim *toward the corporation*, *derived* from its well-being—in any case, a claim different than that which the corporation holds toward *its* fiduciaries.[162]

Eighth, to be certain, shareholders also do not normally owe fiduciary duties to one another. This is especially true with "regular," non-controlling shareholders, not otherwise acting in fiduciary capacity (for example, the tens of thousands known shareholders in *Co-Op*).[163] That is so for a good reason: contrary to a fiduciary position, share ownership carries far more rights than duties. This conforms with the generally held perception of shares, arising mainly from the fact that shareholders pay for their shares and correctly expect to become "creditors" or claimants, not the opposite (debtors or obligors). Even those shareholders who *are* fiduciaries owe their duties *to the corporation*.[164] What *all* share-

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[162] *See, e.g.*, *Gheewalla*, 930 A.2d at 101 ("It is well settled that directors owe fiduciary duties *to the corporation*. When a corporation is *solvent*, those duties may be enforced by its shareholders, who have standing to bring *derivative* actions on behalf of the corporation because they are *the ultimate beneficiaries of the corporation's* growth and increased value." (first and last emphases added) (citation omitted)); *Tooley*, 845 A.2d at 1033, 1035 (distinguishing shareholders from the corporation, in the context of discerning direct claims from derivative claims); Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989) ("[Directors'] broad mandate includes a conferred authority to set a corporate course of action . . . designed to enhance corporate profitability. . . . [D]irectors, generally, are obliged to charter a course for a corporation which is in its best interest[.] . . . [A]bsent a limited set of circumstances as defined under *Revlon*, a board of directors . . . is not under any *per se* duty to maximize shareholder value in the short term . . . ." (citation omitted)); Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L. J. 629, 636 (2010) ("[T]he director's job demands affirmative action—to protect and to better the position *of the corporation*. . . . [E]very act must be taken for a proper *corporate* purpose[.] . . . [A] loyal fiduciary must protect *the corporation* . . . ." (emphases added) (citation omitted)).

[163] *See, e.g.*, Israel Companies Act § 192(a) (stating that all shareholders must act "in good faith", which is merely a recitation of the general normative standard applied to *every* act in private law, by any person, at any time—that is, a non-equitable, non-fiduciary standard, not specific to shareholders. This standard originates from Israel Contracts Act §§ 12, 39, 61(b)); *infra* note 165.

[164] *See, e.g.*, Israel Companies Act § 193 (specifying three types of shareholders, mainly a "controlling shareholder" and a shareholder having decisive power in a shareholder meeting, who owe a duty of fairness to the company); Pepper v. Litton, 308 U.S. 295, 306 (1939) ("A director is a fiduciary. . . . So is a dominant or controlling stockholder or group of stockholders. . . . Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested there-

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holders do owe to one another is some set of equitable duties.[165] Consistent with a recurring theme of this Article, those duties are equitable, but not fiduciary; they are part of share law, not fiduciary law. The important difference between the fiduciary-beneficiary and shareholder-shareholder relationships has also been pointed out in scholarship.[166]

Ninth, while there are certain situations where directors can be said to have a direct duty toward shareholders, they are the exception, not the rule. These situations, in the U.S. generally known as "*Revlon* mode," arise mainly in the mergers and acquisitions context, when a corporation is nearing the end of life in its current form—a "breakup" or a "sale of control", in the language of the *Paramount* decisions.[167] This is an equitable construct, acknowledg-

in." (citations omitted). Regarding the quote's final words, *see supra* pp. 293–95 (explaining that where "duties to the corporation and its shareholders," or similar language, is employed, its correct construction is according to the monistic view)); Cinerama, Inc. v. Technicolor, Inc., 1991 Del. Ch. LEXIS 105, at *63 (Del. Ch. June 21, 1991) ("[W]hen a shareholder, who achieves power through the ownership of stock, exercises that power by directing the actions of the corporation, he assumes the duties of care and loyalty of a director of the corporation.").

165 *See, e.g.*, Israel Companies Act § 192(b) ("A shareholder shall not act with unfair prejudice toward other shareholders."). In Israel, this is the only statutory duty that applies to *all* shareholders (besides the non-shareholder-specific good faith duty, *see supra* note 163). The law of unfair prejudice is not part of fiduciary law. *See, e.g.*, LICHT, *supra* note 9, at 211 ("[T]he law of unfair prejudice is not based on fiduciary relations supported by duties of loyalty.").

166 *See, e.g.*, Tan Cheng-Han & Wee Meng-Seng, *Equity, Shareholders and Company Law*, *in* EQUITY, TRUSTS AND COMMERCE 1, 9–10 (Paul S Davies & James Penner eds., 2017) ("[I]f the stated basis is that shareholder power must be exercised not for the benefit of the shareholder but for others, this is not the correct principle that operates in a shareholder dispute . . . . This is because there is a fundamental difference in the relationship between partners inter se and between partners and the partnership (which is fiduciary), and between shareholders inter se or between shareholders and the company (which is not). Accordingly, . . . the test of a power that must be exercised for the benefit of another is not an appropriate test where shareholders are concerned.").

167 *See Paramount v. Time*, 571 A.2d at 1150 ("[A]bsent a limited set of circumstances as defined under *Revlon*, a board of directors . . . is not under any *per se* duty to maximize shareholder value in the short term[.] . . . [T]here are, generally speaking . . . , two circumstances which may implicate *Revlon* duties. The first . . . is when a corporation initiates [a transaction] involving a clear break-up of the company. . . . [The second is when] a target abandons its long-term strategy and seeks an alternative transaction also involving the breakup of the company. . . . If, however, the board's reaction . . . is . . . not an abandonment of the corporation's continued existence, *Revlon* duties are not triggered . . . ." (citations omitted)); Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 47–48 (Del. 1994) ("There are few events that have a more significant impact on the stockholders than a sale of control or a corporate break-up. Each event represents a fundamental (and perhaps irrevocable) change in the nature of the corporate enterprise from

ing that when directors make decisions affecting shareholders' own legal and financial positions, in a manner not channeled through the corporation, the person standing to gain or lose from directors' actions is not the corporation, but shareholders. This "channeling principle" might apply in situations outside strict *Revlon* mode;[168] at any rate, these are exceptions. We then extend the usual scope of director obligations, importing fiduciary duties[169] into the *ad hoc* director-shareholder relationship. As if to emphasize that this is the exception, some of the important authorities discussing the rule—duties toward the corporation—do so in the mergers and acquisitions context.[170] Outside such situations,

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a practical standpoint. It is the significance of each of these events that justifies . . . focusing on the directors' obligation to seek the best value reasonably available to the stockholders . . . ." (emphasis omitted)).

[168] Such situations include those where the corporation's interests have become extremely minimized, as in *Revlon* itself, or where the corporation's interests are simply not being affected. Consider, for example, an interference with shareholders' voting rights, *see* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988) (requiring "compelling justification" for "board acts done for the primary purpose of impeding the exercise of stockholder voting power", while discussing fiduciary duties owed by directors to shareholders). In these unique situations, the effect on shareholders is unrelated to what the corporation does, or what happens to it. The corporation does not vote in its shareholder meeting; shareholders do. The remedy goes to the shareholders, not the corporation. Generally, fiduciaries might commit actions that affect shareholders' standing *in relation* to the corporation—in other words, the very content of their rights under share law. Shareholders should be appropriately protected even where fiduciaries' usual duties, to the corporation, are not at issue.

[169] *But see supra* notes 154–158 and accompanying text (explaining that because *Unocal* and *Revlon* give rise to an "intermediate standard", lower than entire fairness, it is not the uniformly high standard imposed by the duty of loyalty).

[170] *See, e.g.*, *Paramount v. Time*, 571 A.2d at 1150 ("Delaware law imposes on a board of directors the duty to manage the business and affairs *of the corporation*. . . . This broad mandate includes a conferred authority to set a *corporate* course of action . . . designed to enhance *corporate* profitability. . . . [D]irectors, generally, are obliged to charter a course *for a corporation* which is in *its* best interest . . . ." (emphases added) (citation omitted)); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("[Once the company was for sale,] [t]he duty of the board had thus *changed* from the preservation of Revlon *as a corporate entity* to the maximization of the company's value at a sale for the stockholders' benefit. . . . The directors' role [before the change was] defenders of the *corporate* bastion . . . ." (emphases added)); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954–58 (Del. 1985) ("[T]he board's power to act derives from its fundamental duty and obligation to protect *the corporate enterprise*, which *includes* stockholders[.] . . . [T]he board had a supervening duty to protect *the corporate enterprise*, which *includes* the other shareholders, from threatened harm." (emphases added)); City Capital Assocs. Ltd. P'ship v. Interco, Inc., 551 A.2d 787, 802 (Del. Ch. 1988) ("[T]he duties the board *always* bears [are]: to act . . . in the good faith pursuit of *corporate* interests and *only* for that purpose." (emphases added)).

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particularly during the "going concern" phase of corporate existence, directors owe their duties to the corporation,[171] and shareholders' rights come to them from the corporation. In any event, figuring out what directors owe shareholders (in monetary or other terms) necessitates an inquiry of share law. It requires answers to questions such as "why do shares have value?" and "which rules and principles apply in this share-related situation?", all relying on a satisfactory theory and law of shares.

Under the fiduciary approach, the holding in *Co-Op* is not only unjustifiable, it is impossible. That is because in *Co-Op*, there was no breach of fiduciary duty by anyone. The liquidator performed his job diligently, trying to locate as many shareholders as possible. Other fiduciaries, such as the corporation's administrative personnel through the years, also cannot be held responsible: the failure to keep an updated shareholder register is *the corporation's* own act, not any fiduciary's. As a rule, corporations bear their own rights and duties; it is the corporation who had a duty to correctly maintain this register.[172] There is also no reason to assume this was some fiduciary's personally interested act, since none would have gained any benefit from one group of shareholders, rather than another, receiving the funds. Even if the corporation's fiduciaries somehow did wrong, the third point of discussion in this section applies:[173] these people would likely not have US$15 million, or anything close to that, just lying around; nor are most of them alive today; nor would damages of such scope be an appropriate sanction for a relatively small omission (at the time it was made); nor could the fiduciaries (or their heirs) be required to pay such amounts to the unknown shareholders, when the obvious solution, which fits the parties' pre-liquidation expectations, is the one reached by the Court: just keeping the corporation's money undistributed, allowing the unknown shareholders to claim it when they do. All along, the shareholders' claim was toward funds in the corporation's, not any fiduciary's, pocket. Clearly, *Co-Op* is a cor-

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[171] *See, e.g.*, ROTMAN, *supra* note 66, at 512 ("By analogy with the application of *Revlon* duties, it would seem logical that so long as the corporation remains viable as a going concern, directors and officers retain fiduciary duties to act in the corporation's best interests.").

[172] *See* Israel Companies Act § 127 ("A company shall administer a shareholder register."), § 130(a) ("In the shareholder register [the following] shall be registered[:] . . . The name, identification number and address of each shareholder, all as submitted to the company[.] . . .").

[173] *See supra* p. 292.

porate law case, but not a fiduciary law case. It is a case in share law.

5.5. *Summary of the Four Approaches*

As we now see, in reality, none of the approaches surveyed above is the law. Indeed, like many[174] other creditors, shareholders are parties to a contract with the corporation. It is perfectly correct to say that shareholders are "creditors"—as long as we keep in mind that they are a *singularly unique* type of creditors. Their contract is inherently coupled with extra-contractual, equitable norms. Without this qualification, and the special treatment stemming from it, the shareholders' contract would be practically meaningless, and certainly not align with the parties' actual expectations and the generally accepted perception of shares.

It is also true that shareholders have some sort of claim related to the corporation's net worth, but that claim is not a property right, nor is it identical to a trust beneficiary's claim toward a trustee or trust property.

Finally, it is correct that shareholders have rights different than those of all other creditors, but they do not have direct claims toward directors or other fiduciaries. Rather, the corporation itself, who is the beneficiary of its fiduciaries' duties, is the vessel through which shareholders' rights flow.

In summary, the rights, or even the *existence*, of shares and shareholders cannot be adequately explained by contract, property, trust or fiduciary law. This should hardly serve to weaken or obscure them: "Doctrinal formalism has been no match for human nature's inclination towards fairness and justice."[175] So, where do they come from?

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[174] Many, but not all, creditors have a contract with the corporation. For example, tort law injured parties are involuntary creditors, having no such contract. They may be grouped together with non-residual contract creditors in that the rights of both arise primarily in law, not equity.

[175] LARRY A. DIMATTEO, EQUITABLE LAW OF CONTRACTS 150 (2001).

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6. EQUITY AS THE FOUNDATION OF SHARE LAW

Equity is the field of jurisprudence meant to promote justice and fairness in situations where regular "law" is unfit or insufficient for that purpose.[176] As this Article demonstrates, that is precisely what happens with shares: first, shares have characteristics, such as textual (contractual and legal) ambiguity and the phenomenon of residuality, which make them impossible to comprehend in familiar legal terms. Second, all the seemingly applicable areas of law (contract, property, trust and fiduciary law) are maladjusted to treat shares. Trust and fiduciary law are branches of equity. Yet, equity is a field in its own. Other branches of it may also exist. As it turns out, an important branch of equity is share law.

There are many angles from which to explore the link between shares and equity. This Part of the Article turns to the following: residuality, the equity contract, and historical and linguistic connections.

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[176] This idea is inherent to equity, both conceptually and historically. *See, e.g.*, Anton-Hermann Chroust, *Aristotle's Conception of Equity (Epieikeia)*, 18 NOTRE DAME L. REV. 119 (1942) (explaining Aristotle's view of equity as a supplement to law, whenever the latter has to be rectified for achieving justice); F. W. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 3–6 (1909) (describing the rise of equity as a response to inadequacies in the administration of law, especially what we today call power and information asymmetries: "Though these great courts of law have been established there is still a reserve of justice in the king. Those who can not [sic] get relief elsewhere present their petitions to the king and his council praying for some remedy. . . . Very often the petitioner . . . complains that for some reason or another he can not [sic] get a remedy in the ordinary course of justice and yet he is entitled to a remedy. He is poor . . . , his adversary is rich and powerful . . . , or has by some trick or some accident acquired an advantage of which the ordinary courts with their formal procedure will not deprive him. . . . The complaints that come before [the Chancellors] are in general complaints . . . which [the ordinary courts] ought to redress. But then owing to one thing and another such wrongs are not always redressed by courts of law."). The analogy, between Maitland's plaintiff and the modern shareholder (if not for the protections of equity), is apparent. For some of Maitland's insights on the development of corporate law and shares, *see* F. W. Maitland, *Trust and Corporation*, *in* STATE, TRUST AND CORPORATION 75 (David Runciman & Magnus Ryan eds., 2003) [hereinafter: Maitland, *Trust and Corporation*] (chronicling the origins of trusts and the rise of corporations). *See also* Joshua Getzler, *Frederic William Maitland - Trust and Corporation*, 35 U. QUEENSLAND L. J. 171 (2016) (exploring the background and key thesis of Maitland's work).

https://scholarship.law.upenn.edu/jil/vol40/iss1/6

6.1. Equity and Residuality: Two Links

The concepts of "equity" and "residuality" are related in two ways. First, equity is a normative framework needed in a situation where a claimant's rights are residual, *wholly* dependent on another person. That is because, similarly to other equitable relationships, the claimant is severely disadvantaged in power and information, compared to his obligor (in this case, mainly the corporation). The second link between "equity" and "residuality" lies in the fact that equity is a residual normative framework—simply, it is the one left over after all others fail to accommodate a given situation.

First, a shareholder, while not a trust[177] or fiduciary law beneficiary,[178] is situated in a *very similar* position to these types of actors. Members of all three groups may be termed "equity claimants." That is because, like the other two, a shareholder is not a regular contractual party. A shareholder is *inherently disadvantaged* vis-à-vis his obligor—in this case, mainly the corporation.[179] This inferiority is in terms of both power (the ability to affect one's legal position) and information (the ability to know what that position is). This results from the unique phenomena explicated above:[180] first, the share contract (constitutional documents) is exceptionally undetailed, compared to other contracts regularly entered into in private law. Second, the shareholder's claim relates to the ever-fluctuating residual, or difference between the corporation's assets and liabilities, so it is not grounded in any fact of external reality; the shareholder's claim is *entirely* dependent on the corporation. As with any person, the corporation's fate can result from its own deeds, or from acts done to it by others. In any case, shareholders can hardly do anything to control these actions. They have some governance power, but it is practically limited to appointing *other* people and hoping they, and the corporation, do the right thing. Shareholders must accept what the corporation hands them, good or bad, with little recourse to any *legal* claim. Yet, that is not what

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177 *See supra* Part 5.3.

178 *See supra* Part 5.4.

179 In addition to the other relationships that arise from shares: the shareholder-shareholder and shareholder-third party relationships. *See supra* pp. 277–78. In each of these, as well, a shareholder might stand in a position of power or information asymmetry to one or more of the other parties.

180 *See supra* Part 3.

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the parties opt for: the corporation ought to try and succeed, with an understanding that this will *also* protect and grow shareholders' investment. Shareholders give their money to the corporation, who now owns it; yet, there is a sense that shareholders continue to own an interest in it, somehow different than that of a "regular" creditor. A mismatch exists between the parties' rights and the legal tools available to address them. Therefore, justice and simple reason require that the share relationship not be seen as a regular, arm's length relationship under "law" only, but rather, as one that invokes the protections of equity.

The substantive content of shareholders' equitable claim is similar, albeit different, than that of other equity claimants. For instance, under trust, fiduciary, and share law, the claimant enjoys a quasi-proprietary right toward property owned, held, or managed by another person. This is not a full proprietary right under property law; it is also not a mere obligatory right under contract law. It is something in-between, and the questions pertaining to it are answered in the field of equity.

The major difference between the various equity claims is that trust and fiduciary law impose the duty of loyalty, but share law does not. That duty requires total self-abnegation by the trustee or other fiduciary,[181] while a corporation can, and in many respects *must*, operate for its own benefit.[182] Another illustration of non-fiduciary equity lies in the operation of courts: standards of review for actions affecting shareholders *per se* and the corporation are different.[183]

Shareholders' lack of fiduciary claims can become very consequential: take, for example, a shareholder facing bankruptcy, which would be avoided only if the shareholder received a dividend from the corporation. If the corporation, or even its directors, were fiduciaries for the shareholder, they would have to pay the dividend, consistent with fiduciary principles of self-abnegation and acting only in the beneficiary's interest.[184] However, such duty

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181 *See supra* notes 68, 69.

182 *See supra* notes 142, 145.

183 *See supra* notes 154–158 and accompanying text (explaining that although direct duties toward shareholders are often referred to as "fiduciary" duties, they may give rise to less stringent, "intermediate" standards, inconsistent with fiduciary law principles).

184 One might respond that the "fiduciary" (whether the corporation or its directors) presumably owes duties not to any specific shareholder, but to shareholders "collectively" or to a "fictional shareholder." *See, e.g.*, Davies, *supra* note 152; Caleb N. Griffin, *The Hidden Cost of M&A*, 2018 COLUM. BUS. L. REV. 70, 80 n.24

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clearly does not exist in positive law, or normatively: the corporation is meant to pursue its own benefit and its own plans (which a large dividend might upset); corporate decisions, including those on dividends, must accord with *the corporation's* interests.

Of course, that the corporation is not shareholders' fiduciary does not mean it can do whatever it wishes, even if that harms shareholders, or otherwise violates the terms of the relationship. The strong link, between the corporation's well-being and that of its shareholders,[185] is guarded by equity. The translation of the former into the latter is achieved through the workings of share law, many of which are discussed in Part 7 of this Article.

Second, equity may be viewed as a *residual normative framework*, designed to provide conceptual and doctrinal infrastructure for dealing with situations where other fields of jurisprudence are insufficient, irrelevant, or would lead to incorrect results. As this Article demonstrates, the origin and nature of shares, and the rights of shareholders, cannot be explained through "law"—contract and property law.[186] Even two *branches* of equity—trust and fiduciary law—have specific characteristics that similarly preclude them from serving that purpose: trust law is built on narrow definitions and does not correspond to the nature of the modern corporation;[187] corporate fiduciary law is indeed an important *part* of corporate law, but it pertains to a separate relationship, that involving directors and other fiduciaries, to which the corporation is party, but shareholders are not.[188] The corporation itself also is not

(2018) (citing sources that discuss the "fictional shareholder"). However, such a statement is meaningless in terms of fiduciary law, which deals with very strict obligations to actual persons. Practically, duties to a "fictional shareholder" are indistinguishable from duties to the corporation (an actual, identifiable person). There is no reason, then, to misapply the unique norms of fiduciary law, by misidentifying the parties to the various relationships. "Fictional shareholders," "shareholders as a whole" and similar phrases simply place us back in the framework of share law, as discussed in this Article.

[185] Most of the time, that link appears obvious: a gain for the corporation is an indirect gain for shareholders. Practically, they may realize it through such events as the distribution of a dividend, or selling their shares in the secondary market. In any case, these are channeled through share law: shareholders cannot reach any of the corporation's assets or interests, except through their shares and the legal framework governing them. Furthermore, it is possible for the corporation's interests to diverge from those of its shareholders. *See supra* notes 86, 145.

[186] *See supra* Parts 5.1, 5.2.

[187] *See supra* Part 5.3.

[188] *See supra* Part 5.4.

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shareholders' fiduciary.[189] Shareholders have claims similar to those found in fiduciary law (in that both are more-than-contractual, non-arm's length), but uniquely, no one owes them a duty of loyalty. Yet, they invest fortunes, in money or effort, to acquire their shares.[190] Due to this and related reasons (such as defending legitimate expectations and encouraging further investment), they undoubtedly have rights, deserving of protection. We face a situation where four different, well-developed areas of law cannot serve as the foundation of those rights. What is left is equity itself, or more specifically, equity-based share law.

The *Co-Op* decision illustrates both of these links between equity and residuality. First, the Court treats shareholders' claim toward the rights arising from their shares as having some quasi-proprietary traits. This is exemplified by the Court not mentioning any statute of limitations or similar issue, which is consistent with the rights of an equity claimant, rather than a purely contractual party.[191] Of course, this is also demonstrated by the final result in the case: the Court treats the unknown shareholders' rights as quasi-proprietary, first, when it defends their claims' continued existence (rather than distributing the money to the known shareholders), and second, when it orders the creation of a trust for an unlimited period, where the unknown shareholders' funds will be held. Since proprietary rights, unlike obligatory (contractual) ones, are generally unlimited in time (they do not have a "maturity date"), this conforms with a quasi-property, or equity, approach.

From another typical perspective, the Court recognizes that the unknown shareholders are a weak, disadvantaged party. Despite possessing a considerable financial claim, they do not even know about it. The unknown shareholders are completely unable to defend their interests. The power and information asymmetries here are apparent. They are even more extensive than in most equity cases. These shareholders truly need the protection of equity, and the Court does not turn its back on them: it acts as a court of equity.[192]

Second, *Co-Op* also exemplifies how equity serves as a residual

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[189] *See supra* Part 5.3, specifically *supra* note 132.

[190] *See supra* notes 2, 103.

[191] *See supra* note 111 and accompanying text.

[192] *Cf.* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("[T]he court of equity is at all times open to complaining shareholders having a just grievance.").

normative framework. That is because the Court's decision simply cannot be explained any other way. As the opinion shows,[193] the Court never finds it necessary to delve into substantive contractual, property, trust, or fiduciary law analysis. Even if it tried, Part 5 above illustrates how these approaches are simply incorrect, or (especially the fiduciary approach) completely irrelevant to the facts of the case. Furthermore, despite the Court browsing through many of those, no statutory—that is, "law"—provisions actually establish the outcome. Effectively, the Court takes the equity approach for granted. The treatment of shareholders as equity claimants operates behind the scenes of the decision: what the Court is essentially doing, throughout the lengthy opinion, is trying to find some legal exception to the equitable rule of shareholders' more-than-contractual, quasi-property rights. When the Court finds no such exception, it does what it perceives as obvious, and orders the conservation of the funds for the unknown shareholders' benefit.

6.2. Shares as Equitable Rights of Contractual Origin

Another way to explain the link between shares and equity, briefly discussed above,[194] employs a fairly straightforward idea: shareholders have equitable rights, bundled into shares, because the corporation and its shareholders have entered into a contract that calls for such rights. In other words, corporate constitutional documents are a contract that *also* gives rise to an equitable relationship. This statement is nothing far-reaching: a trust contract[195] with a trustee[196] operates the same way.[197] The contract-equity duality naturally extends into corporate law, as the Delaware Court of

[193] *See supra* pp. 266–69.

[194] *See supra* pp. 284–85.

[195] Also often called a "deed of trust" or "trust instrument."

[196] *See, e.g.*, Israel Trust Act § 2 ("A trust is created according to law [or] according to a contract with a trustee . . . .").

[197] The argument here is not that an equitable relationship is purely or mainly contractual (and can be contracted around), as has been claimed in regard to fiduciary relationships, *see, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & ECON. 425 (1993). Rather, the argument is that more-than-contractual obligations can be imposed with the aid of a contract. People can agree to be bound by certain *legal norms*, including the norms of equity. In other words, the parties can create a stone that the contract cannot lift. More accurately, they invoke a pre-existing stone: equity.

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Chancery had vigorously emphasized.[198]

In effect, the parties voluntarily summon the norms of equity to be part of their relationship. They do so not in explicit writing—it would be unusual to find constitutional documents that state "the norms of equity are part of this document for all intents and purposes"—but, in accordance with contract law rules of construction, through intent and implied covenants. The parties, necessarily unaware of the extremely wide range of eventualities that might occur (as *Co-Op* vividly illustrates), absorb equity into their agreement, because that is the only way to deal with this lack of ability to look into the future.[199]

The injection of equitable norms into the shareholders' contract, and not into others (such as bonds), is justified because a residual claim contract simply *cannot ever* be detailed enough to protect shareholders from the possibilities that uniquely attach to their claim.[200] Even if it could, constitutional documents are just not very detailed in practice, due to the parties' natural efficiency motives, pushing them to comply with legal dictates and not much more.[201] Unlike shareholders, bondholders have a claim to a certain (or contractually determinable) amount of money, at a certain (or contractually determinable) date. That claim is grounded in facts of reality—concepts of money and time—that lie outside the corporation.[202] If a bond contract is breached, bondholders will promptly know that and will likely seek remedy, emanating either from the bond itself or from external legal default rules.[203] Similar-

[198] *See, e.g.*, Sample v. Morgan, 914 A.2d 647, 664 (Del. Ch. 2007) ("An essential aspect of our form of corporate law is the balance between law (in the form of statute and contract, including the contracts governing the internal affairs of corporations, such as charters and bylaws) and equity . . . . Stockholders can entrust directors with broad legal authority precisely because they know that that authority must be exercised consistently with equitable principles . . . ." (citing Berle, *supra* note 126; Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971))).

[199] *See, e.g.*, Tan & Wee, *supra* note 166, at 12 ("The common thread . . . is that reasonable shareholders would not generally contemplate the occurrence of such circumstances within companies of which they are members (even though there was no express discussion or agreement between them on such matters) and equity will therefore not allow the exercise of strict legal rights to maintain this uncontemplated status quo.").

[200] *See supra* Part 3.

[201] *See supra* notes 5, 6.

[202] On the distinction between residual claims and those grounded in external reality, *see supra* p. 276.

[203] *See, e.g.*, LICHT, *supra* note 9, at 232 ("In the [arm's length] relationship [between debtor and creditor], the person who suffers a breach is basically aware of his interests, and when a breach occurs he knows about it—that his property or

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ly extensive laws also protect other creditors, such as employees. In the share context, however, neither the contract itself nor legal default rules are designed to answer all questions that can possibly arise, or even those that frequently do arise. Shareholders *must* have equity in their contracts because otherwise asserting a "breach" would almost never succeed. On purely legal-contractual grounds, it is impossible to prove that a dividend "should" be distributed,[204] or that shares have been allocated to new owners for "too low" a price,[205] or that shareholders, as in *Co-Op*, have "quasi-property" rights, unlimited in time. Equity is well-versed in precisely these kinds of inconvenient arguments.

As this Article shows, the majority of share-related concepts and norms are simply not written anywhere; they seem to be taken "for granted." It is as if the parties are somehow told: "you do not have to think of this in advance; when questions arise, people just know what to do." Of course, people would *not* know what to do, if not for equity, designed to provide answers that cannot be found elsewhere. As a result, like every director employment contract[206] implicitly absorbs the norms of corporate fiduciary law, every corporation's constitutional documents implicitly absorb the norms of equity-based share law.[207]

The outcome reached by the Court in *Co-Op* precisely squares with the above. Every time a Co-Op shareholder assumed this position, the corporation and the shareholder agreed to a contract. That contract is the corporation's constitutional documents, and these contain equitable norms. It is implicitly perceived by the parties that shareholders have an equitable claim, which, as *Co-Op* demonstrates, makes it a quasi-property claim. Accordingly, it is unlimited in time, and is "stronger" than a mere contractual claim in other respects as well.[208] Indeed, discussing "quasi"-property rights, which straddle the line between several legal disciplines, is

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body were damaged or that his contract was not fulfilled.").

[204] *See supra* note 83.

[205] *See supra* note 84.

[206] That is the contractual arrangement, unwritten in part, that governs the relationship between a director and the corporation. *See supra* note 72; *supra* pp. 292–93.

[207] *Cf.* Tan & Wee, *supra* note 166, at 15 ("Although a contractual approach has judicial support, it operates only by analogy and it must not be forgotten that the basis of the court's jurisdiction lies in equity. Any contractual analysis must ultimately be able to support relief in equity.").

[208] *See supra* p. 283.

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not easy. Yet, aside from being time-honored,[209] this usage is unavoidable, due to the complexity of human affairs. Situations and relationships, commercial or otherwise, are not made to fit into pre-existing molds.[210]

6.3. Other Perspectives on the Share-Equity Link: History and Language

The close relation between the concepts of shares and equity can also be examined from two more perspectives: historical and linguistic. Historically, modern corporations developed as creatures of equity. By the 17th century, "joint stock companies" began to surface in England.[211] In practice, they were very similar to partnerships.[212] The analogy is that in a partnership, partners have the power to influence the legal position of each other, in various ways not pre-defined in contract or otherwise, thereby necessitating the protections of equity; in a company, that power is vested mainly with the company itself, and acts toward its shareholders. However, partnership law only partly and ineffectively responded to the needs of rapidly growing corporations during the 18th and 19th centuries.[213] As a result, "real" company law developed, retaining equity as its foundational concept.[214] Corporate law changed considerably over the years, but equity remains at its core.[215] As this Article illustrates, the range of situations that shareholders can find themselves in is remarkably wide. Equity responds to this fact as it guides the daily practice and adjudication of corporate law.

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[209] *Cf.* Maitland, *Trust and Corporation*, *supra* note 176, at 109 ("*quasi* is one of the few Latin words that English lawyers really love . . . .").

[210] *Cf.* LEVENSTEIN, *supra* note 58, at 61 ("All law, no matter its content or era, is flawed . . . . Equity could not plausibly surmount this very *human* limitation, but its charge is nevertheless to attempt the impossible.").

[211] *See, e.g.*, Tan & Wee, *supra* note 166, at 1.

[212] *See id.*

[213] *See id.* at 2.

[214] *See id.* at 4 ("[A]s the business organisation that was adopted in early company law was based on a fusion of partnership and trust law, together with the law of agency, which were all heavily infused by equitable doctrines, company law was susceptible to the influence of the law of equity." (citation omitted)).

[215] *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919); Sample v. Morgan, 914 A.2d 647 (Del. Ch. 2007) (two judicial decisions, reached 88 years apart, both pointing to equity as a fundamental norm of corporate law).

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The linguistic connection between "shares" and "equity" is practically taken for granted. This link does not necessarily prove that the two *should* be related—other sections of this Article deal with that. Rather, it is one proof that they *are* related, on a very intuitive, culture-wide level. This connection can be seen in the interchangeable use of the phrases "share," "stock," and "equity." For example, the word "equity" might simply be used instead of "shares."[216] A textbook might introduce the various types of financial instruments that a corporation can issue, grouping shares under the title "Equity Securities".[217] The phrase "shareholders' equity" is equivalent to "the corporation's net worth," or assets minus liabilities (obligations to non-residual creditors). "Shareholders' equity" is very widely used and appears regularly in, among other places, corporations' financial reports[218] and the press.[219] At a web forum devoted to English linguistics, an explanation, generally similar to that presented in this Article, was offered in regard to the link between the two concepts.[220]

7. TOPICS IN SHARE LAW

What else is part of share law? The previous Parts of this Article mainly discuss the equitable principles of share law. Yet, these are only a fraction of that field. This Part offers a non-conclusive list of topics in share law, frequently encountered by businesses,

216 *See, e.g.*, ALLEN & KRAAKMAN, *supra* note 63, at 145 (using the title "Legal Character of Equity" for a section on the characteristics of shares).

217 *See* ALAN S. GUTTERMAN, THE LEGAL CONSIDERATIONS IN BUSINESS FINANCING: A GUIDE FOR CORPORATE MANAGEMENT 20 (1994) (describing the basic types of equity securities).

218 *See, e.g.*, Berkshire Hathaway Inc., *Form 10-K*, SEC.GOV (Feb. 26, 2018), https://www.sec.gov/Archives/edgar/data/1067983/000119312518057033/d437858d10k.htm [https://perma.cc/KU4G-H848] (annual report mentioning the phrase "shareholders' equity" 28 times).

219 *See, e.g.*, Sui-Lee Wee, *After Wanda Deal, Chinese Property Developer Faces Debt Risk*, N.Y. TIMES (July 14, 2017), https://www.nytimes.com/2017/07/14/business/dealbook/china-debt-wanda-sunac.html [https://perma.cc/TCL3-Q9HH] ("In 2016, the company's net gearing ratio—a measure of total debt to shareholders' equity—rose to 121.5 percent . . . .").

220 *See* Kevin Beach, *Reply in thread titled "Equity - companies and corporations"*, WORDREFERENCE.COM (Dec. 14, 2010), https://forum.wordreference.com/threads/equity-companies-and-corporations.2007192/#post-10036633 [https://perma.cc/TER8-5C93].

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lawyers, judges, legislators, and scholars. This list is meant to serve as a guide for further inquiry, tying these topics together under the share law classification.

1. *Statutory share law*. As mentioned above,[221] corporate statutes, such as the Delaware General Corporation Law and the Israel Companies Act, contain multiple sections dealing with shares. These statutory provisions, and the myriad issues they cover, are part of share law. Some of these issues are also discussed below.
2. *Share allocation and dilution*. Shares are a sensitive and manipulable way to represent claims toward a common pool of wealth. For example, when new shares are allocated for less than the economic value of each current share, wealth indirectly flows from current to new shareholders. This is a core issue of share law, also addressed in litigation and scholarship.[222]
3. *Dividends and buybacks.* A transfer of economic value from a corporation to its shareholders, by virtue of them being shareholders, is known as a distribution. These actions include dividends and buybacks.[223] This is a hotbed of legal issues, some among shareholders themselves (for example, if the distribution is not made equally), some between shareholders and the corporation,[224] and some between the corporation and its creditors.[225]
4. *Various aspects of mergers and acquisitions*. These are, after all, transactions in shares. M&A law might sometimes seem to focus on issues of corporate fiduciary law, such as directors' duties on either side of the *Revlon* threshold;

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221 *See supra* note 6.

222 *See, e.g.*, *supra* note 84; Mira Ganor, *The Power to Issue Stock*, 46 WAKE FOREST L. REV. 701 (2011).

223 *See, e.g.*, Israel Companies Act § 1 (defining "Dividend" and "Distribution").

224 *See, e.g.*, *supra* note 83 and accompanying text. The opposite situation is also possible: if an unlawful distribution occurs, *see infra* note 225, the corporation might gain a right of rescission toward the shareholder. *See* Israel Companies Act § 310. This right may also be enforced derivatively by creditors, *see supra* note 160.

225 *See, e.g.*, DGCL §§ 160(a), 170–174 (establishing mandatory rules to determine when a corporation is allowed to make a distribution to its shareholders, requiring that distributions not "impair" the corporation's capital, or that they be made out of the corporation's profits); Israel Companies Act §§ 301–305, 307, 309–313 (establishing mandatory rules to determine when a company is allowed to make a distribution to its shareholders, requiring, without exception, that it maintain its ability to meet all obligations to creditors).

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however, for such issues to arise, there has to be some (actual or planned) deal—a share transaction, which must also conform with share law. For instance, when can shares be taken away, or even cancelled, without their owner's consent? When is it permissible to diverge from the rule of equality among identical shares?[226]

5. *Appraisal rights*. Appraisal is rooted in equitable considerations; the power and information asymmetries inherent to shares make a determination of their true value, when they are taken from their owners,[227] involve more than looking at their market price, if they have one at all. This topic lies deep within share law; tellingly, appraisal requires no fiduciary breach.[228]
6. *The distinction between shares and other securities*. This topic is important in the general structure of corporate law,[229] as well as in the preferred share context.[230] It is also critical in accounting: when a corporation gets money for a newly issued security, those funds have to be placed, in the balance sheet, under either "liabilities" or "shareholders' equity."

[226] For example, in *Unocal*, the corporation announced a self-tender offer, aiming for a large buyback of its shares; the offer excluded one shareholder, who was trying to acquire control of the corporation at the time. This unequal treatment, of shareholders having the exact same security, was deemed lawful. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 953–54, 955 (Del. 1985) (finding that "in the acquisition of its shares a Delaware corporation may deal selectively with its stockholders", if the action is not "inequitable"). Federal securities law was later amended to prohibit a discriminatory self-tender offer. *See* 17 C.F.R. § 240.13e-4(f)(8) (2006) ("No issuer or affiliate shall make a tender offer unless: . . . The tender offer is open to all security holders of the class of securities subject to the tender offer[.]"). However, unequal treatment of identical shares is still possible in other M&A-related settings, as with the poison pill, where a rights issue can be made to some shareholders and not others.

[227] The question of which shareholders are entitled to appraisal rights is answered quite differently in different jurisdictions. *See, e.g.*, DGCL § 262 (granting appraisal rights to shareholders voting against a cash-out merger); Israel Companies Act § 338 (granting appraisal rights to offerees in a potentially coercive tender offer). Appraisal rights may also arise outside of the M&A context, albeit exceptionally. *See, e.g.*, Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L. J. 223, 251–54 (1962) (discussing appraisal rights following amendment of constitutional documents).

[228] *See, e.g.*, Lawrence A. Hamermesh & Michael L. Wachter, *The Importance of Being Dismissive: The Efficiency Role of Pleading Stage Evaluation of Shareholder Litigation*, 42 J. CORP. L. 597, 648 (2017) ("[T]he petitioners in [statutory appraisal] litigation . . . need not plead any breach of fiduciary duty . . . .").

[229] *See supra* Part 4.

[230] *See supra* pp. 280–81.

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Therefore, share law must provide clear rules in this area.

7. *Share-related securities*. Such securities include warrants, convertible bonds, rights issues, restricted share units (RSUs), and other convertibles. As with shares (and in different ways, suited to the characteristics of each security), equity is involved here. These securities also include American Depositary Receipts (ADRs) and similar instruments, giving rise to issues regarding their owners' precise legal standing—in other words, to what extent are they like regular shareholders.
8. *Multiple-class equity, as opposed to "one share, one vote"*. This is a highly salient issue. Even in Israel, where the stock exchange is explicitly prohibited by statute from listing equity securities of companies with more than one class of shares,[231] recent case law has emerged on this topic.[232] All the relationships dealt with in share law are affected by this choice: the shareholder-corporation (as some shareholders are left without any meaningful say on the corporation's affairs), shareholder-shareholder (as shareholders of different classes have diverging interests, and might more readily act adversely to one another), and shareholder-third party relationship (the main third party being the corporation's fiduciaries, who are often personally interested in the existence of multiple share classes).[233]
9. *Secondary market share transactions*. Here, share law interacts with securities law. Such transactions may also lie outside securities law, as in the case of private corporations. Quantitatively, most share transactions are in the secondary market, not involving the issuing corporation. This topic includes various aspects of the routine trading of shares on stock exchanges, in addition to other practices—for example, equity decoupling, where different rights arising from

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[231] *See* Securities Act, 5728-1968, § 46b, SH No. 541 p. 234 (Isr.).

[232] *See* CC (TA) 40274-09-15 Perrigo Co. plc v. Mylan N.V. (Oct. 28, 2015) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-15-09-40274-859.htm [https://perma.cc/J9NR-DMB8] (holding that in certain circumstances, mainly due to policy considerations such as the promotion of securities market activity, shares of a foreign corporation with multiple classes of authorized shares may be registered for trading on an Israeli stock exchange).

[233] For recent discourse on this topic, *see, e.g.*, Robert J. Jackson, Jr., *Perpetual Dual-Class Stock: The Case Against Corporate Royalty*, SEC.GOV (Feb. 15, 2018), https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty [https://perma.cc/HTQ6-ACW3].

https://scholarship.law.upenn.edu/jil/vol40/iss1/6

a single share (voting, dividends, etc.) are contractually transferred, by a shareholder, to different owners.[234]

10. *Non-economic changes to shares*. This topic involves actions such as a share split and share consolidation (or "reverse share split"), as well as the allocation of bonus shares. As a rule, these actions represent no transfer of economic value from one person to another. Yet, they exemplify how shares are sensitive to various errors and manipulations. The seemingly benign "non-economic" transaction might actually cause a transfer of wealth. This can happen, for example, when a shareholder owns a number of pre-transaction shares that does not wholly divide by the consolidation ratio. If a corrective measure is not taken (namely, the payment of cash or other compensation for the fractional share), some of the shareholder's claim "disappears," or usually, is transferred to other shareholders. Another aspect of this topic relates to the shareholder-third party relationship.[235] Brokers, banks, online financial information platforms and others may commit errors, often unintentionally, in the context of non-economic share transactions—for example, treating the share price as if it actually changed. Unless these mistakes are recognized and corrected, the loss of legal and economic rights gives rise to a legally enforceable claim.
11. *Shareholder registration*. How does one know who the corporation's shareholders are? Usually, through a dedicated list, administered by the corporation: the shareholder register. This becomes more complex with public corporations, whose shareholders change very rapidly. An important issue in this area is nominee companies, such as Cede & Co., who appear in public corporations' shareholder registers as "street name" holders. In Israel, the real, ultimate shareholders are also the full legal shareholders, for all intents and purposes;[236] it would be advantageous to minimize any

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[234] *See, e.g.*, Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006) [hereinafter: Hu & Black, *The New Vote Buying*]; Henry T. C. Hu & Bernard S. Black, *Debt, Equity, and Hybrid Decoupling: Governance and Systemic Risk Implications*, *in* INSTITUTIONAL INVESTOR ACTIVISM 349 (William W. Bratton & Joseph A. McCahery eds., 2015) [hereinafter: Hu & Black, *Debt, Equity, and Hybrid Decoupling*].

[235] *See supra* pp. 277–78.

[236] *See* Israel Companies Act § 132 (stating that "a nominee company shall

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confusion around this issue in other jurisdictions as well.[237] Also within this topic is the issue of bearer shares.[238]

12. *Shareholder meetings and voting*. While shareholders are normally not fiduciaries for the corporation, their choices might still bind it; however, no individual shareholder can do so.[239] Rather, shareholders must go through the mecha-

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not be considered a shareholder of the [issuing public company], and the shares in its name are owned by those entitled to them . . . .", and that upon a shareholder's request, the shareholder's name shall be registered in the issuing company's shareholder register, in respect to the appropriate number of shares, substituting the nominee company's name). The nominee company is not even a trustee, as it never owns the shares. It is part of a mechanism related only to registration.

[237] Shares are exceedingly sensitive to various misunderstandings to begin with, and the current nominee system in the U.S. makes the situation far worse, bordering on the absurd. *See, e.g.*, Matt Levine, *Banks Forgot Who Was Supposed to Own Dell Shares*, BLOOMBERG (July 14, 2015), https://www.bloomberg.com/view/articles/2015-07-14/banks-forgot-who-was-supposed-to-own-dell-shares [https://perma.cc/92EH-AU6H] (discussing specific cases of nonsensical outcomes under the U.S. nominee system). For an overview, *see* David C. Donald, *The Rise and Effects of the Indirect Holding System: How Corporate America Ceded its Shareholders to Intermediaries* (Sept. 27, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017206 [https://perma.cc/JLT8-WGSP]. Reform is clearly needed in this area, possibly requiring changes to both state corporate law and federal securities law, to produce a rule similar to that in other jurisdictions, *see supra* note 236.

[238] The ownership of a bearer share is not determined using a central register, but through a share warrant, which is usually a transferable paper document, governed by both share law and negotiable instruments law. Expectedly, this creates its own set of issues. It can rather easily give rise to situations similar to those encountered in the *Co-Op* case, *see supra* Part 2. For example, in Switzerland, in 2018, legislation has been proposed to convert all bearer shares, of all private companies, into registered shares, by operation of law. However, the proposal includes the following: "After the expiry of the grace period [for surrendering share warrants to the issuing company], shareholders who have not identified themselves will definitively lose all rights attached to the shares. Their shares will be deemed void and the company will need to issue, in place of such void shares, new shares as treasury shares." Daniel Jenny & Florian Jung, *Farewell to bearer shares and introduction of criminal sanctions for violations of transparency obligations?*, LEXOLOGY (Mar. 7, 2018), https://www.lexology.com/library/detail.aspx?g=f8b31110-c8c2-4099-a0f8-043e05d3d49a [https://perma.cc/YAQ6-5427]. Given the nature of shareholders' rights, as discussed in this Article, it is clear why that proposal is extremely problematic. Furthermore, owners of bearer shares are *especially* prone to being unaware of their shareholding and not contacting the issuing corporation, thereby inadvertently and unjustifiably being placed at risk of their rights "disappearing." There are many alternatives to the excessive proposal quoted above; one would be adopting a similar solution to that reached by the *Co-Op* Court: registering the shares in the names of trustees, or a comparable arrangement, for the benefit of the unknown shareholders.

[239] If a shareholder *does* individually (or in cooperation with others) have the power to bind the corporation, or materially influence its course of action, that

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nism of *voting* in *shareholder meetings*. This topic is in very high currency, particularly in the U.S., due to the activist shareholder phenomenon.[240] It interacts with other topics listed here, such as the relation between share law and corporate fiduciary law. This arises both in director elections, and in voting on other proposals, as when shareholders seek to constrain management from pursuing certain activities. This topic also relates to other issues, such as vote buying[241] and circular share ownership.[242]

13. *Other shareholder governance rights*. These mainly include access to information.[243] Such rights are necessary to minimize the information asymmetries that shareholders are inherently subject to. This topic has far-reaching implications for other areas of corporate law, including the conduct of

shareholder owes fiduciary duties to the corporation. *See supra* note 164. Yet, it is possible for many dispersed shareholders, in their meeting, to lawfully reach a decision—even one that seriously affects the corporation—with no prior agreement or coordination among themselves, and with none of the shareholders owing any fiduciary duty. This is another unique aspect of share law.

[240] *See generally* INSTITUTIONAL INVESTOR ACTIVISM (William W. Bratton & Joseph A. McCahery eds., 2015); LISA M. FAIRFAX, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION (2011).

[241] *See, e.g.*, Schreiber v. Carney, 447 A.2d 17 (Del. Ch. 1982) (defining vote buying and upholding the legality of such agreements, if they are not fraudulent or disenfranchising); Hu & Black, *The New Vote Buying*, *supra* note 234; Hu & Black, *Debt, Equity, and Hybrid Decoupling*, *supra* note 234.

[242] *See, e.g.*, DGCL § 160(c) (suspending the voting rights arising from shares owned by the issuing corporation itself, or by another corporation, if the majority of the latter's voting shares are owned by the issuing corporation); Speiser v. Baker, 525 A.2d 1001 (Del. Ch. 1987) (broadly construing DGCL § 160(c), by suspending the voting rights attached to shares owned by a corporation *effectively* controlled by the issuing corporation). In Israel, this pertains to the concept of vacant shares, also known as treasury shares or dormant shares. Such shares are created whenever a corporation buys back shares it formerly issued, without immediately cancelling them. *See* Israel Companies Act § 308. Hence, this also relates to the topic of buybacks, *see supra* p. 312. Vacant shares provide neither voting rights nor any other right. *See* Israel Companies Act § 308. The principle operating here is that it is impossible to contract with oneself; every contractual relationship (in this case, that arising from the constitutional documents) must have at least two parties; therefore, a corporation cannot be its own shareholder. *See* Israel Contracts Act § 2 (requiring the involvement of at least two persons for the formation of a contract). This is a broader, more exact principle than that invoked by Delaware law, which seeks mainly to prevent directors from voting the shares of the same corporation they are serving. In Israel, when a direct subsidiary corporation acquires shares issued by its parent, these become semi-vacant shares: they provide no voting rights, for similar reasons to Delaware's, while maintaining all other rights. *See* Israel Companies Act § 309(b).

[243] *See, e.g.*, DGCL § 220; Israel Companies Act §§ 184–187, 198a.

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shareholder litigation.[244]

14. *Procedural aspects of shareholder litigation*. For example, when fiduciary law beneficiaries file a complaint in court (either themselves or through others, as in a derivative action), they may enjoy a shifted burden of proof, placed on the fiduciary-defendant.[245] The law recognizes that power and information asymmetries prevent administration of justice under the usual procedure, designed for arm's length disputes. These asymmetries are shared by all equity claimants, including shareholders. How do, or should, modified procedural rules apply to (non-derivative) shareholder claims?
15. *The relation between share law and the law of corporate purpose*. As discussed above, share law—and indeed, the very existence of shares and shareholders—is closely tied to questions of corporate purpose.[246] Under positive law, the for-profit corporation's purpose is the lawful pursuit of profit.[247] Shareholders have an equitable claim toward those profits, along with the rest of the corporation's net worth. This is widely known as "shareholder primacy," but in fact, it is simply the corporation, like a natural person, being allowed to lawfully act for its own benefit. Yet, there is an equitable sensitivity here: for example, if a legislature announced that corporations are no longer allowed to have profits, or that their assets must go to some stakeholders irrespective of their pre-existing rights, the corporation itself

[244] *See, e.g.*, Cal. State Teachers' Ret. Sys. v. Alvarez, 2017 Del. LEXIS 34, at *1 (Del. Jan. 18, 2017); Cal. State Teachers' Ret. Sys. v. Alvarez, 179 A.3d 824, 831 (Del. 2018) (decisions ultimately dismissing a derivative action filed in Delaware, on behalf of Walmart Inc., after the plaintiffs "did exactly what this Court has suggested on numerous occasions, namely, use the "tools at hand" to inspect the company's pertinent books and records before filing a derivative complaint." While the Delaware plaintiffs were engaged in the highly preliminary inspection stage, which "lasted nearly three years" due to defendants' resistance, a federal court dismissed a less factually detailed complaint, filed by other shareholders. On grounds of estoppel, this led to the dismissal of the Delaware complaint).

[245] *See, e.g.*, Michael W. Stockham & Mackenzie S. Wallace, *Fiduciary Duty Litigation and Burden Shifting*, ABA SECTION OF LITIGATION (Mar. 4, 2014), http://apps.americanbar.org/litigation/committees/trialevidence/articles/winter2014-0314-fiduciary-duty-litigation-burden-shifting.html [https://perma.cc/Z2ZU-LKMF] ("The entire fairness standard . . . [requires] the defendants to prove the entire fairness of the transaction . . . .").

[246] *See supra* pp. 273–75.

[247] *See supra* note 142.

https://scholarship.law.upenn.edu/jil/vol40/iss1/6

might not be the only one harmed. Due to the nature of shareholders' claims, the effect of such a decision could be legally and equitably limited, and it might be successfully challenged, by the corporation as well as by shareholders.

16. *The relation between share law and corporate fiduciary law*. The two are distinct, but related. For example, when the law gives fiduciaries the power to commit certain acts, such as amending the constitutional documents, it also narrows shareholders' exercise of that power.[248] As another example, when a corporation is in *Revlon* mode, or other situations where directors' effect on shareholders is not channeled through the corporation, a direct relationship is formed between its directors and shareholders.[249] The interaction between the two fields also appears in situations where a shareholder, such as a controller, is considered to be a fiduciary.[250]

8. CONCLUSION

Classification and precision are important parts of any legal inquiry. Under-categorization or over-generalization can lead to serious difficulties in resolving actual issues, both in and out of court, involving very tangible rights. As Part 2 above details, the 2017 *Co-Op* case, which concluded a dispute concerning approximately US$15 million, is a clear-cut example of such an occurrence.

That case, and the legal conundrum it presented (before being correctly decided), illustrate how corporate law suffers from a persistent strain of under-analysis: as shown in Parts 3 and 4 above, we readily discuss issues of corporate fiduciary law, which is the law of the relationships between the corporation and its fiduciaries,

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[248] In Delaware, *see* DGCL § 109(a) ("[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors . . . ."). The bylaws exist along with and pursuant to the certificate of incorporation. *See* DGCL § 109(b). Moreover, any amendment to the certificate of incorporation can only be proposed by directors. *See* DGCL § 242(b). In Israel, fiduciaries cannot amend the company's article of incorporation; that power is always reserved to shareholders. Directors, as well as certain shareholders, can propose an amendment, but only the shareholder meeting may affect the change. *See* Israel Companies Act §§ 20, 57(1), 58(a), 66.

[249] *See supra* pp. 298–300.

[250] *See supra* note 164.

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such as directors. Yet, we have not previously paid enough methodic attention to a separate field, also at the heart of corporate law: share law—the law of shares, shareholders, and their relationships with the corporation, with one another and with third parties.

Although they inform each other, share law is distinct from corporate fiduciary law. Part 5.4 above proves that for the most part, shareholders are not owed fiduciary duties. This distinction is practically significant, given the strict obligations, primarily the duty of loyalty, imposed by fiduciary law. Under established law, the corporation itself, not anyone else, is the object both of its fiduciaries' duties, and of shareholders' and other creditors' claims. Many corporate cases might involve no breach of fiduciary duty, yet, a substantial amount of wealth may be at stake.

Furthermore, Part 5 above reveals that *all* the jurisprudential sources regularly invoked to explain shares—two of them part of general "law" (contract and property), the other two offshoots of equity (trust and fiduciary law)—explain only parts or certain aspects of the share phenomenon; none does so fully or flawlessly. Because shares represent a *residual* claim, they inherently give rise to power and information asymmetries, a central factor making them impossible to address through "conventional" legal classifications. Yet, the total value of shares in the world, their importance in the modern economic structure and human life, and their prominence within the governance structure of every corporation, demand that we examine shares in a more coherent manner.

When no other source can explain the existence of, or govern the adjudication and resolution of questions relating to, certain legal phenomena, a "residual" normative framework applies: equity. From its origins to the present day, equity is designed to enable justice-making where it cannot be reached under "law"—in other words, through the classifications we are familiar with. Trust and fiduciary law are themselves branches of equity; yet, the properties of each preclude them from serving as the foundation of share law. We are left with equity itself. Unsurprisingly, the word "equity" is synonymous with "shares," and "shareholders' equity" has long been interchangeable with "the corporation's net worth," which is the size of the economic claim held by shareholders. As Part 6 above explains, shares and equity are related in multiple ways, and on the most fundamental level. In the case of shares, equity is not a "complement" or conscionable "exception" to contract and written law; rather, from the outset, equity is *the* core expectation of the

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parties to share-based relationships.

The nuanced understanding of corporate law, from which the concept of share law directly results, also informs other hotly debated topics: namely, corporate personhood and corporate purpose. The "shareholder/stakeholder" debate is often framed as a dichotomy, replete with catchphrases like "shareholder primacy," but this Article suggests there is a third way, strongly supported both positively and normatively: the corporation, a separate person, exists to achieve its own purpose, which is the lawful pursuit of profit; shareholders have an equitable (not proprietary or fiduciary, nor contractual) claim toward the corporation; by definition, as residual claimants, they rank below all other creditors or stakeholders—whose rights are determined outside of corporate law. It would be beneficial to consider how this more refined account might promote the resolution of that long-standing, high-stakes controversy.

Share law, equally with corporate fiduciary law, is a major field of classification within corporate law. It is the framework for conceptualizing, analyzing, and resolving share-related issues. These issues have existed since the emergence of corporations, but their legal treatment has been plagued with various theoretical, doctrinal, and practical misunderstandings. That kind of legal vacuum is not an unalterable fact of life. This Article, for the first time, proposes the concept of share law, allowing us to treat share-related issues comprehensively, within a well-defined legal paradigm, based on unifying principles, and capable of meeting the specific challenges that shares, by definition, give rise to. Through this lens, Part 7 above examines a multitude of high-currency topics encompassed by share law, including dividends and buybacks, aspects of mergers and acquisitions, appraisal rights, multiple-class equity, shareholder voting and activism, and shareholder litigation. Lawyerly, judicial, and scholarly inquiries into share law should continue, around the world, on a disciplined, methodic basis. Hopefully, this Article serves as a starting point for those facing other questions surrounding that unique creature of human enterprise, the corporate share.

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