

The Value of a Shareholding

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Charles Korsmo and Minor Myers, *What Do Stockholders Own? The Rise of the Trading Price Paradigm in Corporate Law*, 47 **J. Corp. L.** ____ (forthcoming, 2021), available at [SSRN](https://ssrn.com).

The valuation of a shareholder's interest in a corporation is a central issue in corporate law. In recent cases the Delaware courts have responded to appraisal arbitrage by limiting recovery in appraisal actions to deal price, deal price less synergy, or even market price unaffected by the deal. The cases have given rise to a literature of both praise and critique. Charles Korsmo and Minor Myers take the analysis a step further in [What Do Stockholders Own? The Rise of the Trading Price Paradigm in Corporate Law](#), arguing that the implications of these appraisal decisions reach beyond appraisal to cases involving mergers more generally, and suggest an incipient paradigm shift in how Delaware law conceives of the (value of the) stockholder's interest in the corporation: "[i]n a real sense, the Supreme Court in the appraisal cases has simply altered its conception of the public corporation as a form of property." (P. 3.) The authors argue that the new paradigm is a negative development, essentially eliminating appraisal (which they see as a remedy with beneficial effects), reducing incentives for investors to buy shares in public corporations, and creating undesirable uncertainty about bedrock propositions of Delaware corporate law.

This is an important argument in a very readable and carefully argued article, one that is perhaps even more significant now, as appraisal is not the only area where the Delaware Supreme Court is limiting shareholder litigation. In the appraisal context the authors say it is not "the first time the Delaware Supreme Court has recently tried to hide sweeping doctrinal change beneath a veneer of "nothing-to-see-here" consistency." (P.

4.) [Brookfield Asset Management v Rosson](#) and [United Food and Commercial Workers Union v Zuckerberg](#) have much the same feel.

If the market price of shares is the starting point for valuation of the shareholder's interest in the appraisal context, why would this same approach not apply in other contexts? The authors suggest that the Delaware courts are now treating shares as goods such as toasters, rather than as a bundle of rights to a share of distributions, to votes on defined matters and to "compel directors to live up to their fidelity obligations" together with rights to bring derivative suits and access corporate books and records. (P. 7.) In addition to noting language in the appraisal opinions that "echoed the language of critics of Delaware's traditional rejection of market price, declaring the identity of market prices and fair value as "economic fact," (P. 5) the authors argue that the original conception of the shareholder's entitlement developed in the context of appraisal and therefore appraisal is a natural context for the development of a replacement conception. The shift has implications for valuation in other contexts and for directors' ability to defend against acquisitions. Delinking valuation in the appraisal context from other contexts would impair the coherence of Delaware corporate law.

The article traces the development of Delaware appraisal jurisprudence, in which the market price was a relevant factor, but did not answer the question of the value of "the entire corporate estate" or of "the corporation itself." The authors also identify the same approach to valuation in other Delaware merger-related doctrines and they note that in some of the most notable merger cases in the last ten years the Delaware courts have looked to the "appraisal-based conception of stockholder entitlements" in assessing damages. (P. 16.) After a brief discussion of defensive measures the authors move on to discuss the recent appraisal decisions. The article considers, and rejects, the idea that the paradigm shift described is a mirage, and that the change will be limited to appraisal actions, noting that the change in the appraisal context was driven by a desire to reduce appraisal activity. There is much more here about the advantages of appraisal, and the disadvantages of rules that will make public company stockholding less attractive. But the core argument, that in fixing one set of problems the Delaware Supreme Court may have set in motion developments that will change Delaware corporate law significantly, is a must-read.

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