

# SHAREHOLDER ACCESS TO CORPORATE BOOKS AND RECORDS: THE ABROGATION DEBATE

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## TABLE OF CONTENTS

I. Introduction .....	1088
II. Development of Shareholder Inspection Rights .....	1099
A. Overview .....	1099
B. The Common Law Right .....	1100
C. The Statutory Right .....	1103
1. Precursors to the MBCA .....	1103
2. Development of Inspection Rights Under the MBCA .....	1105
a. Earliest Edition .....	1105
b. Current Formulation .....	1107
3. State Adoptions and Adaptations of the MBCA .....	1110
III. Interpretation of the Statutes by the Courts: Abrogation vs. Non-Abrogation of the Common Law .....	1113
A. Majority Position: Non-Abrogation .....	1114
1. Blind Assertion .....	1115
2. Statutes Expand, Not Restrict, the Common Law .....	1117
3. Intent to Override Common Law Must Be Clear and on the Face of the Statute .....	1120
4. Legislative Intent as Reflected in the Savings Clause .....	1123
B. Minority Position: Abrogation .....	1125
IV. Arguments in Support of Statutory Abrogation of Common Law Inspection Rights .....	1132
A. Arguments Presented by Jurisdictions Taking the Majority Approach No Longer Hold Up .....	1134
1. Statutes Generally Expand, Not Restrict, the Common Law .....	1134

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2. Intent to Override Common Law Must Be Clear on Face of Statute .....	1137
3. Legislative Intent of Non-Abrogation as Reflected in Savings Clause .....	1139
B. Public Policy Reasons in Support of Abrogating Common Law Inspection Rights.....	1147
1. The Need for Checks and Balances on Derivative Litigation.....	1147
2. The Need for Checks and Balances on Inspection Rights.....	1152
V. Suggested Revisions to the MBCA to Effectuate Abrogation of Common Law Inspection Rights.....	1157
VI. Conclusion .....	1159
Table 1: Proposed Revision .....	1163

## I. INTRODUCTION

It is a widely accepted principle that shareholders of corporations have rights to access the books and records of the entities in which they hold an interest. While this principle first emerged in the common law, all fifty states and the District of Columbia currently provide access by statute.<sup>1</sup> Inspection rights serve a number of functions. Inspection rights, for example, give shareholders access to the record of shareholders and thereby give access to the means to communicate with one another.<sup>2</sup> This ability to reach out to other shareholders allows a shareholder who is unhappy with the directors and officers to wage a proxy fight to replace the current management team or to solicit support against a management proposal the unhappy shareholder thinks unwise.<sup>3</sup>

More importantly, inspection rights play a prominent role in derivative litigation. A derivative suit is one in which a shareholder sues

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1. See MODEL BUS. CORP. ACT § 16.02 annot. at 16–17 (2008) (serving as the basis for most of these jurisdictions' statutes). Numerous versions of the MBCA are discussed throughout this Article. Notation will be made to the particular version being discussed to ensure clarity.

2. Fred S. McChesney, "Proper Purpose," *Fiduciary Duties, and Shareholder-Raider Access to Corporate Information*, 68 U. CIN. L. REV. 1199, 1204 (2000).

3. See *id.* (quoting ROBERT CHARLES CLARK, CORPORATE LAW § 3.1, at 97–98 (1986)).

directors or officers of the corporation in the name of and on behalf of the corporation.<sup>4</sup> Derivative litigation is the ultimate tool for a shareholder to police corporate managers and thereby protect his economic interest in the corporation with proper investigation.<sup>5</sup>

Without access to books and records of the corporation, shareholders would be hard-pressed to use derivative litigation effectively for this watchdog function. This is because the shareholder must first overcome certain hurdles, and must do so with only limited access to discovery, in order to survive a motion to dismiss.<sup>6</sup> One of the more challenging hurdles is the so-called “demand” requirement, which requires the shareholder to make a formal request of the board itself to file the suit before the shareholder can proceed in a representative capacity against the alleged wrongdoers.<sup>7</sup> In states that have adopted the approach of the Model Business Corporation Act (MBCA),<sup>8</sup> “universal” demand is required—meaning the shareholder must, without exception, make a demand in every case.<sup>9</sup> In non-MBCA states, such as Delaware, demand has not been

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4. BLACK’S LAW DICTIONARY 509 (9th ed. 2009).

5. King v. VeriFone Holdings, Inc., 994 A.2d 354, 356 (Del. Ch. 2010) (“Representative litigation plays an important role in protecting the interests of stockholders . . .”), *rev’d*, 12 A.3d 1140 (Del. 2011). Though shareholders have other means of protecting their economic interest, such as selling their stock or waging proxy fights to bring about a change-of-guard in corporate management, the derivative suit allows the corporation to be compensated by the alleged wrongdoers—at least in theory. Thomas P. Kinney, Comment, *Stockholder Derivative Suits: Demand and Futility Where the Board Fails to Stop Wrongdoers*, 78 MARQ. L. REV. 172, 174 (1994).

6. See VeriFone, 994 A.2d at 355–56.

7. Kinney, *supra* note 5, at 175.

8. The MBCA is prepared by the Committee on Corporate Laws, which falls under the Business Law Section of the American Bar Association, and the Committee has “jurisdiction over the Model Business Corporation Act, which has been adopted by approximately 32 states.” *Corporate Laws: Mission Statement*, A.B.A., <http://www.abanet.org/dch/committee.cfm?com=CL270000> (last modified July 27, 2011).

9. MODEL BUS. CORP. ACT § 7.42 (2008). No shareholder may commence a derivative proceeding until:

(1) a written demand has been made upon the corporation to take suitable action; and

(2) 90 days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

*Id.*

universally required.<sup>10</sup> Rather, demand may be excused if the shareholder can show demand would be futile because, for instance, the board is comprised of a majority of interested directors.<sup>11</sup> Either way, if demand is rejected after it is made, the shareholder can only proceed with the derivative suit if he can establish in the complaint that the rejection was wrongful.<sup>12</sup> This can be a difficult showing considering that, in many jurisdictions, the business judgment rule may protect the board's decision to reject the demand if the board committee that made the decision was independent and followed proper procedures in coming to its conclusion.<sup>13</sup>

Moreover, pursuant to caselaw interpreting Federal Rule of Civil Procedure 23.1<sup>14</sup> and its state counterparts, shareholders are not allowed access to discovery to show either demand futility or wrongful demand refusal until they meet the proper burden of pleading.<sup>15</sup> In most cases, shareholders are required to rely solely on the "tools at hand" to make both showings.<sup>16</sup> This is where shareholder inspection rights come into play. While judges have noted such "tools at hand" include a number of sources—such as media publications, public filings with the Securities and Exchange Commission, and press releases—perhaps the most important of these are state shareholder inspection rights.<sup>17</sup> As such, inspection requests play a crucial role in allowing shareholders to gather information to support an argument for either demand futility or wrongful demand refusal and to further develop the merits of their claims.<sup>18</sup>

A 2010 case out of the Delaware Chancery Court, *King v. VeriFone*

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10. See *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004) (noting demand may be excused if "directors are deemed incapable of making an impartial decision regarding the pursuit of the litigation").

11. *Id.* at 1048–49 (footnote omitted).

12. *Levine v. Smith*, No. 8833, 1989 WL 150784, at \*344 (Del. Ch. Nov. 27, 1989).

13. *Id.* at \*346.

14. The complaint in a shareholder derivative action must state with particularity: "(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and (B) the reasons for not obtaining the action or not making the effort." FED. R. CIV. P. 23.1(b)(3).

15. See, e.g., *King v. VeriFone Holdings, Inc.*, 994 A.2d 354, 358 (Del. Ch. 2010), *rev'd*, 12 A.3d 1140 (Del. 2011).

16. *Brehm v. Eisner*, 746 A.2d 244, 262 n.57 (Del. 2000).

17. See, e.g., *VeriFone*, 994 A.2d at 363–64 n.33.

18. *Id.* (detailing how courts expect counsel to use these tools and use them well).

*Holdings, Inc.*,<sup>19</sup> highlights the importance of shareholder inspection rights to derivative litigation.<sup>20</sup> In that case, a plaintiff–shareholder submitted a books and records request to VeriFone *after* the shareholder had instituted a derivative proceeding against particular directors and officers of the corporation in federal court in California.<sup>21</sup> The California suit was dismissed without prejudice for failure to show demand futility, prompting the plaintiff to submit his books and records request for additional information to supplement his complaint.<sup>22</sup> In response to the books and records request, VeriFone partially complied, but the company would not provide access to some of the records demanded on the theory such records were privileged.<sup>23</sup> The shareholder sued VeriFone in Delaware to obtain access to the remaining books and records requested.<sup>24</sup>

In determining whether to grant the plaintiff’s inspection request, the court had to interpret the Delaware inspection statute.<sup>25</sup> Like most inspection statutes,<sup>26</sup> the Delaware statute requires the requesting shareholder to have a “proper purpose” for his request.<sup>27</sup> The court expressed its belief that the shareholder was simply trying to use the Delaware inspection statute to do an end run around the “no discovery”

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19. *Id.*

20. The derivative suit was precipitated by the acquisition of Lipman Electronic Engineering Ltd. by VeriFone. *Id.* at 357. Shortly after the acquisition, VeriFone announced it needed to restate its financial statements due to accounting errors arising from the integration of Lipman’s inventory systems with VeriFone’s system. *Id.* In the derivative suit, the plaintiff alleged corporate mismanagement of the integration process. *See id.*

21. *Id.*

22. *Id.* (“[T]he Federal Court granted King leave to amend his complaint yet again, and even suggested filing an action under § 220 of the Delaware General Corporation Law in this court to obtain facts necessary to establish demand futility.”).

23. *Id.* at 359–60 (stating VeriFone produced approximately 1,350 pages of documents but “refused to produce the audit committee report and its underlying documents, prepared by VeriFone’s counsel, summarizing the audit committee’s review of the [post-merger] integration process”).

24. *Id.* at 360.

25. *Id.* at 360–66.

26. Only five states—Hawaii, Maryland, Missouri, Nevada, and Texas—do not incorporate the “proper purpose” requirement in some respect in their inspection statutes. HAW. REV. STAT. § 414-470 (2004); MD. CODE ANN., CORPS. & ASS’NS § 2-513 (LexisNexis 2007); MO. ANN. STAT. § 351.215 (West 2009); NEV. REV. STAT. § 78.105 (2009); TEX. BUS. ORGS. CODE ANN. § 21.218 (West 2010). Though the proper purpose requirement is used differently from state to state, the concept is similar across the board. *See infra* Part II.B.

27. DEL. CODE ANN. tit. 8, § 220(b) (2008 & Supp. 2010).

rule provided by Federal Rule of Civil Procedure 23.1, and therefore, he did not have a proper purpose for his request.<sup>28</sup> As the court pointed out, the “no discovery” rule serves the purpose of prohibiting a shareholder from suing first and investigating later, thereby requiring a corporation to spend time and money in discovery and a trial merely based on a shareholder’s speculation and opinions.<sup>29</sup> Allowing the plaintiff access pursuant to his after-the-fact request would undermine such a purpose.<sup>30</sup>

The Chancery Court in *VeriFone* articulated a bright-line rule: once a shareholder has chosen to file a derivative suit, such shareholder may not then go back and burden the corporation and the other shareholders with a second suit under the state inspection statute in order to get information he would otherwise be unable to obtain through discovery in the derivative suit.<sup>31</sup> The upshot of the Chancery Court’s decision was to leave a plaintiff who filed suit in an unreasonably hasty manner without any meaningful access to survive a motion to dismiss.<sup>32</sup>

The Supreme Court of Delaware ultimately reversed the Delaware Chancery Court’s decision in *VeriFone*, holding that filing a derivative action first and a section 220 inspection action later is not, in and of itself, fatal to the prosecution of the section 220 action.<sup>33</sup> Despite overturning the lower court’s decision, however, the supreme court’s opinion continued to highlight the importance of would-be derivative plaintiffs using shareholder inspection requests as part of their “tools at hand” for pre-suit investigation before filing a complaint on behalf of the corporation.<sup>34</sup> First, the court pointed out that at least two potential scenarios exist in which filing a derivative suit first and a section 220 inspection suit second would

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28. *VeriFone*, 994 A.2d at 366.

29. *Id.* at 361 (quoting *Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000)).

30. *Id.* In support of this position, Vice Chancellor Strine discussed the necessity of restricting shareholder access to documents after-the-fact to some degree. *Id.* at 363. The purpose of the derivative suit would therefore not be compromised by allowing counsel to “prematurely file thinly-substantiated complaints . . . in order to beat their competitors in the plaintiffs’ bar, and then attempt to compensate for those inadequate pleadings through an after-the-fact process that needlessly saps corporate funds through drawn-out dismissal motion practice.” *Id.*

31. *Id.* at 356 (“Once a plaintiff files a derivative suit, he has made his election. . . . The corporation and, most important, its investors should not suffer the cost of duplicative proceedings.”).

32. *See id.*

33. *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1146 (Del. 2011).

34. *Id.* at 1147 n.36 (quoting *Ash v. McCall*, No. Civ.A. 17132, 2000 WL 1370341, at \*15 n.56 (Del. Ch. Sept. 15, 2000)).

still result in dismissal of the second suit, and, as such, proceeding in that order was “ill-advised.”<sup>35</sup> Second, the court appeared sympathetic to the same policy concerns driving the lower court’s decision.<sup>36</sup>

Ultimately, the Delaware Supreme Court was reluctant to allow the Court of Chancery to impose a “judge-made” rule fashioned as the appropriate remedy for perceived abuses if the derivative suit was originally filed in a section 220 proceeding.<sup>37</sup> In dicta, the supreme court suggested some potential remedies a lower court might use when faced with a similar premature filing made by an abusive plaintiff–shareholder.<sup>38</sup> For instance, the court noted the lower court could decide to dismiss the derivative suit with prejudice, thereby defeating any subsequent section 220 claim, or allow leave to amend once, but only if the plaintiff pays the attorneys’ fees incurred by the defendant from the initial motion to dismiss.<sup>39</sup> The court also suggested the less drastic remedy of either allowing the suit to proceed or dismissing it without prejudice, but refusing to confer lead-plaintiff status on the first plaintiff to file.<sup>40</sup> This would provide disincentives for eager plaintiffs’ attorneys who would otherwise benefit from winning the so-called race to the courthouse.<sup>41</sup> Therefore, though a section 220 action to help establish demand futility will not be dismissed solely due to having first filed a derivative action, the court’s proposal of these narrower remedies cautions would-be litigants against filing too hastily without first performing appropriate due diligence.<sup>42</sup>

Given the importance of inspection rights to the derivative litigation process and general policing of corporations, it is no surprise all jurisdictions have codified these rights. Though all jurisdictions have an inspection statute, statutes in different jurisdictions take varied approaches

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35. *Id.* at 1148. The court noted there would be no proper purpose for the later inspection request if (i) the derivative complaint was already dismissed with prejudice, or (ii) the complaint was still pending and the plaintiff was not granted leave to amend the complaint. *Id.* Neither scenario was present in King’s case because his suit was dismissed without prejudice and with leave to amend. *Id.* at 1150.

36. *Id.* (noting a derivative suit followed by a section 220 inspection request may be “imprudent and cost-ineffective” and agreeing with the lower court that a “regime that could require a corporation to litigate repeatedly the issue of demand futility” would be wasteful).

37. *Id.* at 1152.

38. *Id.* at 1151–52.

39. *Id.*

40. *Id.* at 1151.

41. *Id.*

42. *See id.* at 1151–52.

to this issue. For instance, states may or may not expressly allow access to the books and records of wholly-owned subsidiaries of the company,<sup>43</sup> may differ in terms of the scope of books and records that must be provided to the shareholder,<sup>44</sup> or may require different prerequisites the individual shareholder must meet before he can gain access to such books and records.<sup>45</sup> These differences reflect the varying decisions legislatures have made about how difficult or easy it should be for shareholders to access corporate books and records. States with few barriers to shareholder access seem more concerned with the ability of shareholders to protect their economic investment and hold corporate managers accountable. On the other hand, those states imposing additional barriers to shareholder access may be more focused on permitting corporations to govern themselves to the greatest extent possible without judicial or shareholder interference. In other words, the legislatures in these jurisdictions must balance the competing interests of managerial authority and managerial accountability. However, the differences among the various statutes are, for the most part, not very significant, and many are in fact guided by the codification of, and remedies for violation of, inspection rights provided in the MBCA.<sup>46</sup>

Despite the universal adoption of statutory rights, there is a historical trend—that is surprisingly maintaining traction even in light of modern books and records statutes—to allow shareholders to assert a common law inspection right *in addition to* the rights provided by statute. The majority of courts reviewing shareholder requests for access allow shareholders to proceed under a common law theory of inspection rights, even if such shareholders have failed to meet the statutory requirements for inspection

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43. Compare DEL. CODE ANN. tit. 8, § 220(b)(2) (2001 & Supp. 2010) (specifically providing access to a subsidiary's books and records in certain circumstances), with N.Y. BUS. CORP. LAW § 624 (McKinney 2003 & Supp. 2011) (silent with respect to applicability to subsidiaries).

44. Compare N.C. GEN. STAT. § 55-16-02(b)–(c) (2009) (denying access of accounting records to shareholders of public corporations under particularized circumstances), with NEV. REV. STAT. § 78.105 (2009) (providing no such specificity restrictions for shareholders of public companies).

45. Compare MD. CODE ANN., CORPS & ASS'NS § 2-513 (LexisNexis 2007) (limiting access to the books of account and shareholder list to shareholders who owned at least five percent of the corporation's stock for at least six months prior to the inspection request), with IOWA CODE § 490.1602(2) (2011) (which allows any shareholder to access accounting records and the shareholder list).

46. See *infra* Part II.C.3.



in the relevant jurisdiction.<sup>47</sup> In other words, the courts find that although

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47. See, e.g., *Estate of Bishop v. Antilles Enters., Inc.*, 252 F.2d 498, 500 (3d Cir. 1958) (interpreting Virgin Islands law, which states, “[S]tatutory provisions securing to stockholders the right to inspect books and records are to be regarded as supplemental to the common law right to such inspection and not as a restriction upon it” (footnote omitted)); *Rockwell v. SCM Corp.*, 496 F. Supp. 1123, 1126 (S.D.N.Y. 1980) (“A review of New York law leads to the inescapable conclusion that the common law right of inspection survived enactment of [section] 624 of the Business Corporation Law.” (citation omitted)); *Loveman v. Tutwiler Inv. Co.*, 199 So. 854, 855 (Ala. 1941) (“The statute is not merely a re-enactment of the common law on the subject. It enlarges the right, and removes certain common law restrictions tending to embarrass exercise of the right . . . .”); *Tucson Gas & Elec. Co. v. Schantz*, 428 P.2d 686, 690 (Ariz. Ct. App. 1967) (“Where a right exists at common law, such as the right of inspection of corporate records by a shareholder, and a statute is enacted likewise providing a remedy, such statutory remedy is merely cumulative to the common law remedy unless it explicitly provides that it shall be exclusive.” (citations omitted)); *Dines v. Harris*, 291 P. 1024, 1027–28 (Colo. 1930) (“[The statutes] are declaratory of the common law, and our decision here is little else than a rehabilitation of the common-law rule from which there should have been no departure in the first place, and from which we now believe the Legislature never intended to depart.”); *State ex rel. Costello v. Middlesex Banking Co.*, 88 A. 861, 862 (Conn. 1913) (holding Connecticut’s statute was enacted either “confirming or enlarging the common-law right”); *Rainbow Navigation, Inc. v. Pan Ocean Navigation, Inc.*, 535 A.2d 1357, 1359 (Del. 1987) (“In addition to the common law right of inspection, the unique nature of the right to examine the stock ledger has been recognized by its codification.”); *Soreno Hotel Co. v. State ex rel. Otis Elevator Co.*, 144 So. 339, 340 (Fla. 1932) (noting the common law right has been recognized, meaning “the right of inspection conferred by statutory provisions is absolute and unqualified except so far as it is limited by the terms of the statutory provision itself”); *Pfirman v. Success Mining Co.*, 166 P. 216, 218 (Idaho 1917) (“It is the decided weight of authority that such statutes have not only adopted the common-law rule, but have extended the same, and that the statutes make the right absolute.” (citation omitted)); *Wise v. H.M. Byllesby & Co.*, 1 N.E.2d 536, 539 (Ill. App. Ct. 1936) (finding even if the statute is inapplicable to defendant corporation because it is a foreign corporation, the right of inspection would still exist); *Lehman v. Nat’l Benefit Ins. Co.*, 53 N.W.2d 872, 876 (Iowa 1952) (“Statutes providing for the inspection by stockholders of corporation records . . . are generally regarded not as abridging the stockholder’s common-law right of inspection but as conferring rights supplemental thereto by removing some of the common-law restrictions.”); *Holdsworth v. Goodall-Sanford, Inc.*, 55 A.2d 130, 132 (Me. 1947) (“In addition to this statutory right, . . . a stockholder has a right at common law to examine the books, records and papers of a corporation . . . .” (citation omitted)); *Albee v. Lamson & Hubbard Corp.*, 69 N.E.2d 811, 813 (Mass. 1946) (providing separate analysis for the “statutory right of examination of the books and records” and the “common law right of a stockholder to examine the books and accounts of the corporation”); *State ex rel. G.M. Gustafson Co. v. Crookston Trust Co.*, 22 N.W.2d 911, 917 (Minn. 1946) (“The common law, in the absence of statute, provides for the right. Hence, the right may be entirely independent of statute.”); *State ex rel. Brown v. III Invs., Inc.*, 80 S.W.3d 855,

the statutory requirements are not met, there is a separate and distinct common law right which may provide the shareholder with the requested access.

For instance, imagine a statute in the relevant jurisdiction disallows a

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860 (Mo. Ct. App. 2002) (“Thus, a shareholder may well be entitled to exercise the statutory right even if unable to meet the requirements to establish the common law right.”); *State ex rel. O’Hara v. Nat’l Biscuit Co.*, 54 A. 241, 241 (N.J. 1902) (detailing the common law right and noting, “it is not perceived that the enactment of such legislation infringes upon any prerogative recognized under our judicial system”); *Schwartzman v. Schwartzman Packing Co.*, 659 P.2d 888, 891 (N.M. 1983) (“There is little doubt that applicable statutes and case law grant to shareholders the right to inspect . . . a corporation’s books and records. . . . This right was recognized under the common law and exists independently of statute.”); *Brentmore Estates, Inc. v. Hotel Barbizon*, 33 N.Y.S. 331, 336 (N.Y. App. Div. 1942) (“[I]n addition to the statutory rights, a stockholder has a common law right to inspect all corporate records and books of account.”); *Parsons v. Jefferson-Pilot Corp.*, 426 S.E.2d 685, 688–89 (N.C. 1993) (noting the official comments to the statute compelled the court “to conclude that the North Carolina Business Corporation Act ‘was intended to leave in effect any common law rights of inspection existing in North Carolina . . . .’” (citation omitted)); *Danzinger v. Luse*, 815 N.E.2d 658, 660 (Ohio 2004) (ruling that though the plaintiffs did “not have a statutory right to inspect the records of the bank,” they could still pursue a common law claim because “[i]n Ohio, ‘[n]ot every statute is to be read as an abrogation of the common law’” (alteration in original)); *Goldman v. Trans-United Indus., Inc.*, 171 A.2d 788, 790 (Pa. 1961) (“The Business Corporation Law . . . is merely a codification of the common law rule.”); *State ex rel. Lowell Wiper Supply Co. v. Helen Shop, Inc.*, 362 S.W.2d 787, 792 (Tenn. 1962) (“It is true that [the statute] provides for the inspection by stockholders of the stock books but this right is not limited in character nor exclusive in nature and it does not take away from a stockholder the right given him by common law, to make a reasonable inspection . . . .”); *Texas Infra-Red Radiant Co., Inc. v. Erwin*, 397 S.W.2d 491, 493 (Tex. Civ. App. 1965) (holding the statute specifically preserves “the right at common-law” of inspection); *Kimball v. Dern*, 116 P. 28, 34 (Utah 1911) (“While we find that the right of a stockholder as it existed at common law to inspect the books of a corporation has been enlarged and extended by statute both in England and in many of the states, still we have found no case in which it is held that any such rights under the common law have in any particular been restricted or abridged by statute.” (citations omitted)); *Kalanges v. Champlain Valley Exposition*, 632 A.2d 357, 359 (Vt. 1993) (analyzing both the statute and the common law in determining what is proper purpose); *State ex rel. Weinberg v. Pac. Brewing & Malting Co.*, 58 P. 584, 587 (Wash. 1899) (“[T]he right of inspection of corporate books is now guarantied to the stockholders by statute, and such statutes seem to be generally held not to be innovations in, but declaratory of, the common law.”); *State ex rel. McClure v. Malleable Iron Range Co.*, 187 N.W. 646, 647 (Wis. 1922) (“Statutes giving the right of inspection do not abridge that right as it existed at the common law, but rather enlarge and extend it by removing some of the common-law limitations, and these statutes, it has quite generally been held, are merely an affirmance of the common law.”).

shareholder of a public company from requiring the corporation to provide access to certain accounting records. This statute reflects the decision of the relevant jurisdiction's legislature that, because shareholders of public companies have access to a great deal of corporate information even without the access provided by the state statute, disallowing access to certain accounting records is an appropriate way to balance the competing interests of management accountability and management authority. Now imagine John Doe lives in this jurisdiction and is the shareholder of a public company, which is validly incorporated in the same jurisdiction. John would like access to certain accounting records, but the statute expressly denies such access. The court in John's state, however, could still require the corporation to provide him the requested records based on his common law inspection rights.

Alternatively, suppose the statute in question allows a shareholder to have access to books and records, but only if the shareholder is a shareholder "of record." Jane Doe lives in the jurisdiction where the above statute is in force. Jane is a shareholder of a corporation incorporated in that jurisdiction, and she would like access to the minutes of the board meetings of the company for the past three years. Jane, however, is not a shareholder "of record." Rather, as the holder of a voting trust certificate, she is considered merely a "beneficial shareholder."<sup>48</sup> Although she presumably would not have access under the state statute, she might still seek relief from a court; the court could allow her access based on her common law inspection rights.

These two illustrations may strike the reader, as they strike the Author, as examples of the judiciary acting contrary to legislative intent. Surely, when a statute speaks on a specific subject matter, the statute should be construed as abrogating the common law with respect to that matter. However, the fictional holdings described above actually represent the position of the majority of jurisdictions, which find the common law is

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48. See, e.g., *Brentmore Estates*, 33 N.Y.S.2d at 334. A shareholder who enters into a voting trust agreement might assign his stock under the agreement, but solely for the purpose of conferring the right to vote. See *id.* (stating the voting trust agreement provisions carry significant weight in this regard). The stock is cancelled and the "voting trustees" issue trust certificates to the stockholder. *Id.* As a holder of a voting trust certificate, the initial stockholder becomes a beneficial stockholder, not a stockholder of record. In other words, the stockholder no longer has the right to vote the stock, but retains all of the other incidents of ownership, such as a right to the economic benefits of the shares. *Id.* The stock is recorded in the names of the voting trustees, but not in the names of the original stockholders, meaning the original stockholder is no longer a stockholder "of record." See *id.* at 336.

not in fact abrogated by the relevant books and records statute, but rather continues to exist as an independent set of shareholder rights and remedies.

In this Article, the Author argues that the rationales asserted by the majority jurisdictions adhering to non-abrogation—i.e., the continued existence of a common law right—may have been appropriate under the earliest codifications of inspection rights but no longer make sense in light of modern books and records statutes. Rather, allowing both sets of rights and remedies to coexist undermines the carefully developed statutory scheme adopted by the state legislatures and results in usurpation of the legislature's role by the judiciary. The Author argues an abrogation approach is more consistent with the legislative intent of the drafters of the MBCA and the jurisdictions adopting similar inspection statutes, whereas non-abrogation results in the nullification of statutory requirements.

Additionally, the Author argues sound policy reasons exist to adopt the position that state law abrogates common law inspection rights. In this modern era of large, multinational corporations, allowing shareholders to have expansive inspection rights under two different legal regimes allows the single, minority shareholder to make decisions affecting the corporation as a whole. Though the interests of the single shareholder may be served, the multitude of other shareholders will often suffer as corporations must defer to a shareholder's common law right to inspect books and records.<sup>49</sup> The statutory rights and remedies regarding inspection provided by the MBCA and its progeny provide sufficient protection for shareholders interested in gaining corporate information.

In Part II, the history of the development of shareholder inspection rights is highlighted by tracing their origins in the common law through their modern statutory codification. This Part will incorporate a comparison of the 1953 edition of the MBCA with the current edition. The comparison will include an explanation of the reasons behind the substantive revisions that appear in the current MBCA, which has ramifications for the ultimate conclusion: any valid reasons that may have once supported the coexistence of statutory and common law rights no longer exist. Part III looks at the caselaw interpreting the statutory codifications. A discussion of the rationales put forth by the majority of

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49. See MODEL BUS. CORP. ACT § 16.02 annot. at 16-17 (2008) (explaining the inspection right is not absolute because of the "potential conflict between the individual interests of one shareholder and the collective interests of the other shareholders and the corporation").

jurisdictions—those that find the statutes do not abrogate the common law—will be presented. Additionally, this Part will discuss the handful of cases making up the minority position—the books and records statute does in fact abrogate the common law. In Part IV, the Author’s arguments in favor of the minority approach—statutory abrogation of the common law—are presented, including sound policy reasons why shareholder access to corporate books and records should be limited to the rights and remedies provided by statute. Finally, in Part V, the Author suggests some revisions to the MBCA and its comments that would serve to clarify the Act and, if adopted by state legislatures, would result in statutory abrogation of the common law.

## II. DEVELOPMENT OF SHAREHOLDER INSPECTION RIGHTS

### A. Overview

Shareholder inspection rights, whether under the common law or as codified by statute, evolved out of two underlying theories: the theory of ownership and the theory of agency.<sup>50</sup> Under the ownership theory, shareholders are recognized as the beneficial owners of the corporation’s assets.<sup>51</sup> Even though the shareholders and the corporation are legally separate from one another—actual title to the property of the corporation is vested in the name of the corporation itself and not the shareholders—the shareholders are still viewed as having underlying ownership of the corporation’s assets.<sup>52</sup> Courts applying this theory find that a shareholder who asks to inspect the books and records of the corporation is essentially asking to inspect that which is already his.<sup>53</sup>

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50. See *Guthrie v. Harkness*, 199 U.S. 148, 155 (1905) (“The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders, who are the real owners of the property.”) (citing *Cincinnati Volksblatt Co. v. Hoffmeister*, 56 N.E. 1033, 1035 (1900)); see also *Randall S. Thomas, Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 335–36 (1996) (“Inspection rights have developed from two overlapping sources: a shareholder’s property right in the corporation and the agency relationship that exists between shareholders and the corporation’s management.”).

51. *Brecker v. Nielsen*, 143 A.2d 463, 465 (Conn. Super. Ct. 1958) (citation omitted).

52. 5A WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 2213 (perm. ed., rev. vol. 2004 & Supp. 2010–2011) [hereinafter “FLETCHER CYCLOPEDIA”].

53. See, e.g., *Parsons v. Jefferson-Pilot Corp.*, 426 S.E.2d 685, 688 (N.C. 1993) (citing *Cooke v. Outland*, 144 S.E.2d 835, 841 (N.C. 1965)).

The agency theory is similar to, and overlaps with, the ownership theory. Pursuant to the agency theory, directors and officers as agents of the corporation function as trustees of the shareholders' ownership interests in the corporation.<sup>54</sup> Shareholders need to inspect the books and records of the corporation—which are maintained by the directors and officers—in order to confirm the financial well-being of the company, to ensure the directors and officers are not engaging in corporate waste or mismanagement, and to otherwise verify the directors and officers are properly conducting the business of the corporation and complying with their fiduciary duties.<sup>55</sup>

These two theories of agency and ownership formed the basis for the first shareholder inspection rights at common law.<sup>56</sup>

### B. *The Common Law Right*

The common law inspection right first appeared in the 1700s during the Industrial Revolution, as the modern corporation initially began to take shape.<sup>57</sup> English courts began providing shareholder inspection rights based on the idea that shareholders needed a mechanism by which to protect their economic interests.<sup>58</sup> In time, a general rule emerged: shareholders of corporations “have the right to inspect and examine the books and records of the corporation,” but this right is not absolute.<sup>59</sup> Rather, the right can only be successfully asserted if the shareholder shows (i) the request for inspection is reasonable in terms of time and place and (ii) a proper purpose exists for the request.<sup>60</sup>

The reasonable time and place limitation was straightforward and fairly noncontroversial, but the question of proper purpose was not as clear. If corporations denied shareholders' requests for inspection, claiming improper purpose, shareholders needed to enforce their inspection rights in the available judicial forms.<sup>61</sup> Though a number of

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54. *Guthrie*, 199 U.S. at 155 (“The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders.” (quoting *Huyler v. Cragin Cattle Co.*, 2 A. 274, 278 (N.J. Ch. 1885))).

55. *Albee v. Lamson & Hubbard Corp.*, 69 N.E.2d 811, 813 (Mass. 1946).

56. *Thomas*, *supra* note 50, at 335–36.

57. *Id.* at 337.

58. *Id.*

59. *Id.*

60. *Id.*

61. *See id.* at 337–38.

judicial mechanisms arose,<sup>62</sup> the proper means of enforcing the inspection right against a reluctant corporation was through a writ of mandamus.<sup>63</sup> In granting or denying a writ of mandamus, courts considered themselves obliged to exercise “sound discretion.”<sup>64</sup> Specifically, in the context of shareholder inspection rights under the common law, courts typically would not issue a writ of mandamus “to enforce a mere naked right, or gratify mere idle curiosity.”<sup>65</sup> Rather, the shareholder historically would have to “show some specific interest at stake, rendering inspection necessary, or some beneficial purpose for which the examination” was requested,<sup>66</sup> and that the inspection was not sought in bad faith.<sup>67</sup>

Although not all courts agree about which party has the burden of satisfying the proper purpose requirement<sup>68</sup> or what exactly constitutes a

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62. *Id.* at 338 (listing “mandamus at law; mandatory injunction in equity; animation-before-trial; or discovery-and-inspection”).

63. FLETCHER CYCLOPEDIA, *supra* note 52, § 2251. A writ of mandamus is generally used by a person who has a legal right to the performance of an act and is looking for the government to compel performance of that act. *See, e.g.*, Brecker v. Nielsen, 143 A.2d 463, 465 (Conn. Super. Ct. 1958) (“The writ of mandamus is a prerogative writ which will issue only to enforce a clear legal right where the person against whom it is directed is under a legal obligation to perform the act commanded. The discretion of the court in the issuance of a writ of mandamus will only be exercised in accordance with recognized principles of law where the plaintiff has a clear legal right to have done that which he seeks.” (citations omitted)); State v. Sagl, 229 N.W. 118, 120 (Neb. 1930) (“[T]he writ may issue to any ‘corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station.’” (citation omitted)). Ohio provides an example of a jurisdiction adopting a different enforcement mechanism. *See, e.g.*, Cincinnati Volksblatt Co. v. Hoffmeister, 56 N.E. 1033, 1034 (Ohio 1900) (holding mandatory injunction in equity was the appropriate enforcement mechanism, rather than mandamus).

64. *See, e.g.*, Cooke v. Outland, 144 S.E.2d 835, 843 (N.C. 1965) (quoting Guthrie v. Harkness, 199 U.S. 148, 156 (1905)).

65. Stone v. Kellogg, 46 N.E. 222, 226 (Ill. 1896).

66. *Id.* (quoting JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES: EMBRACING MANDAMUS, QUO WARRANTO, AND PROHIBITION § 310, at 216 (1874)).

67. FLETCHER CYCLOPEDIA, *supra* note 52, § 2220 (discussing the power of the court to deny a writ of mandamus when sought in bad faith).

68. *See id.* (explaining the majority of jurisdictions qualify the right to inspect by requiring the shareholder show a proper purpose, but a minority of jurisdictions place the burden on the corporations to show an improper purpose or motive by the shareholder); *see also, e.g.*, State *ex rel.* Dixon v. Missouri-Kansas Pipe Line Co., 36 A.2d 29, 31 (Del. Super. Ct. 1944); Soreno Hotel Co. v. State *ex rel.* Otis Elevator Co., 144 So. 339, 341 (Fla. 1932); Cooke, 144 S.E.2d at 843–44 (citation omitted); *but see*

proper or improper purpose,<sup>69</sup> a proper purpose was generally described at common law as one that was lawful and related to the petitioner's status as a shareholder.<sup>70</sup> Proper purposes included requesting access to the records to be able to communicate with other shareholders about matters related to their mutual interests in the corporation, investigating corporate mismanagement, and valuing a shareholder's stock in the corporation.<sup>71</sup> Improper purposes included satisfying one's idle curiosity, harassing or embarrassing the corporation or its directors or officers, using the information to compete with the corporation, and pursuing purely political or social ends.<sup>72</sup>

Even if a shareholder has a proper purpose, a court may not always issue the writ if there is another "plain and adequate remedy at law."<sup>73</sup> Moreover, a court maintains the discretion from common law to place limitations or conditions on the inspection as necessary to protect the corporation,<sup>74</sup> such as limiting access to books and records relevant to the

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Albee v. Lamson & Hubbard Corp., 69 N.E.2d 811, 813 (Mass. 1946); *State ex rel. Brown v. III. Invs., Inc.*, 80 S.W.3d 855, 860 (Mo. Ct. App. 2002) (noting the common law right requires the shareholder to carry the burden although the statutory right is different).

69. See, e.g., *State ex rel. Weinberg v. Pac. Brewing & Malting Co.*, 58 P. 584, 586–88 (Wash. 1899).

70. See, e.g., *Page v. Westport Precision, Inc.*, 845 A.2d 455, 460 (Conn. App. Ct. 2004) (citing *Cooke*, 144 S.E. 2d at 835).

71. Johnathan D. Horton, *Oklahoma Shareholder and Director Inspection Rights: Useful Discovery Tools?*, 56 OKLA. L. REV. 105, 116–17 (2003) (citations omitted) (detailing the application of proper purpose at common law as codified in jurisdictional statutes).

72. *Id.* at 117.

73. See, e.g., *State ex rel. Charvat v. Sagl*, 229 N.W. 118, 120 (Neb. 1930). Damages, however, may not be considered an adequate remedy compared to permission to actually view the documents. *Weinhenmayer v. Bitner*, 42 A. 245, 246 (Md. 1898).

74. See *Guthrie v. Harkness*, 199 U.S. 148, 156 (1905) ("[T]he court will exercise a sound discretion, and grant the right under proper safeguards to protect the interest of all concerned."). Not only can courts place restrictions on the time and place for review of documents, but courts can also limit the documents that can be reviewed. See *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 569–70 (Del. 1997) (noting it is the plaintiff's burden to prove the scope to be granted). For instance, if a shareholder requested board minutes for the past ten years, the court might require the corporation to provide access only to the minutes from the past three to five years. See, e.g., *Wallace v. Miller Art Co.*, 177 N.Y.S. 391, 392 (N.Y. App. Div. 1958) (holding inspection of records back to 1948 was "unduly oppressive" and instead only allowing inspection back to 1952). The court can also limit the requesting shareholder's use of the information by, for instance, requiring the requesting



requesting shareholder's proper purpose.

### C. The Statutory Right

#### 1. Precursors to the MBCA

In the nineteenth century, as corporations grew larger and more complex, the shareholders of any given corporation became more numerous, more geographically diverse, and less homogeneous in terms of their interests.<sup>75</sup> In this changing corporate climate, shareholders began having less and less involvement in the operations of the corporate business and, as a result, less access to corporate information.<sup>76</sup> The natural by-product of the changing corporate landscape shed new light on the importance of shareholder inspection rights and the remedies the law provided to redress a corporation's failure to respect those rights.<sup>77</sup>

By the late nineteenth century, with this increased emphasis on shareholder inspection rights as a backdrop, state legislatures had codified enhanced inspection rights, expanding the common law right to make it absolute.<sup>78</sup> Rather than requiring shareholders to provide evidence of a proper purpose to grant access—or allowing corporations to show evidence of an improper purpose to deny access—the requesting shareholder's purpose became entirely irrelevant by codifying these rights as absolute.<sup>79</sup>

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shareholder to enter into a confidentiality agreement with the company in respect to any particularly sensitive materials disclosed. *See, e.g.,* CM & M Group, Inc. v. Carroll, 453 A.2d 788, 794 (Del. 1982). Similarly, a court might require the documents first be reviewed *in camera* to make sure trade secrets will not be disclosed or to confirm the necessity of the shareholder's request. *See, e.g.,* Strauss v. Educ. Innovations, Inc., No. FSTCV084014480S, 2008 WL 5220278, at \*2 (Conn. Super. Ct. Nov. 14, 2008) (citing MODEL BUS. CORP. ACT § 16.02 annot. at 16-6 to 16-14 (2000–2002 Supp.)) (“If disputed by the corporation, the ‘connection’ of the records to the shareholder's purpose may be determined by a court's *in camera* examination of the records.”)).

75. *See* Thomas, *supra* note 50, at 338.

76. *Id.*

77. *Id.*

78. *Id.* at 339.

79. *Id.*; *see, e.g.,* Furst v. W.T. Rawleigh Med. Co., 118 N.E. 763, 766 (Ill. 1918) (requiring disclosing companies to provide access to requesting shareholder despite evidence suggesting shareholder's request was meant to harass and annoy that company); Wilson v. Mackinaw State Bank, 1920 WL 1078, at \*3 (Ill. App. Ct. 1920) (“[W]here a statute grants the right in absolute terms, the purpose or motive of the stockholder in seeking such inspection is immaterial and he cannot be required to state his reasons therefor . . . .”); Cincinnati Volksblatt Co. v. Hoffmeister, 56 N.E. 1033, 1035 (Ohio 1900) (“[W]here a suitor demands the enforcement of a clear right given

Mandamus, however, generally remained the appropriate way to enforce the statutory right<sup>80</sup> and allowed the court to exercise its discretion in terms of granting or denying the writ.<sup>81</sup> Yet in light of the new mandatory statutes, courts typically granted the writ as a matter of course, exerting discretion only to ensure the inspection was performed at reasonable times.<sup>82</sup> In fact, by the early twentieth century, not only was the proper purpose requirement irrelevant, but some statutes went significantly further and provided for punitive sanctions against the corporation or its officers for denial of requests, even where those requests were for purposes that would have at one time been improper.<sup>83</sup>

The 1930s brought a backlash in the legislatures against this absolute right of inspection.<sup>84</sup> The unqualified right led to a number of shareholder abuses, such as purchasing a de minimis number of shares for the sole purpose of gaining access to otherwise confidential information to compete with the corporation.<sup>85</sup> Concern regarding the frequency of these shareholder abuses caused some state legislatures to amend their inspection statutes to move away from the absolute right of inspection and back toward some of the restrictions of the common law.<sup>86</sup> In both states that did and did not amend their statutes, courts revisited earlier decisions and reversed course to the extent necessary in order to reintroduce some limitations on the inspection right.<sup>87</sup>

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him by law, whether the remedy be legal or equitable, his motive for such action is not a proper subject for judicial investigation.”).

80. FLETCHER CYCLOPEDIA, *supra* note 52, § 2220.

81. Additionally, recall in the context of inspection rights, this discretion usually took the form of disallowing the writ when there was evidence the request was for some illegal or improper purpose. *See supra* Part II.B.

82. *See, e.g., Wilson*, 1920 WL 1078, at \*3 (“The only qualification . . . to such examination is that it shall be exercised at reasonable times.”).

83. *See, e.g., CAL. CIVIL CODE* § 335 (Deering 1931); *IDAHO CODE ANN.* § 29-143 (1932); 1933 MINN. LAWS 419–20.

84. Thomas, *supra* note 50, at 339.

85. *Id.*

86. *See, e.g., 1933 MINN. LAWS* 419–20; N.Y. LAW, ch. 641, § 10 (1933)).

87. *See, e.g., Dines v. Harris*, 291 P. 1024, 1027 (Colo. 1930) (noting the court may deny a demand without a showing of substantial interest or good faith); *Tate v. Sonotone Corp.*, 69 N.Y.S.2d 535, 536 (N.Y. App. Div. 1947) (“[A]lthough it has sometimes been stated that the right of inspection under [the relevant inspection statute] is absolute. ‘During the last few years, especially, the principle that the stockholder’s bad faith and improper purposes or motives constitute a bar to the judicial enforcement of the right of inspection has received new support. As said in one late case, “the trend, however, is toward a reversion to the common-law rule,

## 2. *Development of Inspection Rights Under the MBCA*

a. *Earliest edition.* It was not until twenty years later that one of the earliest editions of the MBCA was published for widespread distribution in 1953.<sup>88</sup> Prior to publication in 1953, the drafters noted in the preface of the 1950 revision of the MBCA that the MBCA emphasized the rights of shareholders in an attempt to strengthen and clearly define those rights.<sup>89</sup>

As part of that overarching goal of strengthening and defining shareholder rights, the MBCA codified shareholder inspection rights.<sup>90</sup> It also provided for remedies not available at common law for shareholders who met certain specified statutory requirements and were improperly denied access to books and records in violation of the statute.<sup>91</sup> But for shareholders who did not meet the statutory requirements, the common law inspection rights and remedies continued to provide a mechanism for obtaining access to a corporation's books and records.<sup>92</sup>

Specifically, the 1953 version of the MBCA provided that a shareholder of record who owned stock for at least six months immediately preceding his demand for access or held record of at least five percent of the outstanding shares of the corporation would have the right to inspect the books and records of account, minutes, and record of shareholders.<sup>93</sup> As with the common law right, the statutory right was limited by the reasonable time and proper purpose requirements.<sup>94</sup> If the corporation failed to provide access to any such shareholder—a shareholder with a proper purpose who owned five percent of the stock or owned stock for at least six months before demand—the statute provided specific remedies.<sup>95</sup> For example, the officer or agent of the corporation who refused the demand could be held personally liable for a penalty in the amount of ten

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which makes motive and good faith material in an application for inspection.””(citation omitted)).

88. MODEL BUS. CORP. ACT (1953).

89. *Id.* at preface to the 1950 revision, vi (1953).

90. *See id.* § 46.

91. *See id.* § 46 para. 3 (providing any agent who or corporation that refused to allow a shareholder access to records would be liable to the shareholder by ten percent of the value of shares owned by the shareholder).

92. *Id.* § 46 para. 4.

93. *Id.* § 46 para. 2.

94. *Id.*

95. *Id.* § 46 para. 3.

percent of the value of the shares owned by the shareholder in addition to any other remedy afforded by law, so long as the officer or agent was unable to establish one of the statutory defenses.<sup>96</sup> One statutory defense was showing the shareholder–plaintiff, within two years of securing examination of the books and records, (i) sold or offered for sale any list of shareholders of the corporation or (ii) improperly used any information within.<sup>97</sup> It was also a defense to show that the requesting shareholder was not acting in good faith or did not have a proper purpose for his demand.<sup>98</sup>

In addition to the statutory penalties, the 1953 edition of the MBCA contained what can be referred to as a “savings clause”—it “saved” the common law inspection right and allowed it to coexist with the statute.<sup>99</sup> This savings clause expressly stated nothing in the statute was meant to impair the power of a court, upon proof by a shareholder of proper purpose, to compel examination of books and records, even if the shareholder did not meet the statutory requirements of being a five percent owner or owning shares for at least six months prior to the demand.<sup>100</sup> Specific penalties, namely the potential for personal liability for officers or agents of the corporation, would only be available for certain classes of shareholders—those who owned at least five percent of the stock or owned stock for at least six months prior to the demand; however, common law rights and remedies still existed for all other shareholders.<sup>101</sup> In other words, if such a shareholder could establish a proper purpose for his request, the shareholder could still be awarded *access* to books and records under the common law, but he would not be entitled to *damages* from the officer or agent who denied the request under the statute.<sup>102</sup>

As the drafters noted, “[t]he penalty provision with its threat of personal liability, was intended to exert pressure on the corporation to permit inspection in cases where the purpose was clearly proper and to temper judgment in borderline cases.”<sup>103</sup> The five percent ownership

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96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* § 46 para. 4.

100. *Id.*

101. *Id.* § 46 para. 2, para. 4.

102. *See id.*

103. MODEL BUS. CORP. ACT § 52 cmt. (1971). Note the terms of the books and records provision in the 1971 edition of the MBCA were substantially similar to those of the 1953 version. As such, commentary from the 1971 version is equally applicable to both.

requirement and the six month holding requirement thus served as proxies for reasonable inspection demands because shareholders with large or long-term commitments to the corporation were seen as more likely to have proper motives for their requests.<sup>104</sup> Allowing for the penalty of personal liability would make it less likely corporations would deny these reasonable requests.<sup>105</sup> The remedy seemed driven by the belief that corporations tended to view shareholder inspection requests with great suspicion and routinely denied such requests, thereby requiring the shareholders to take the corporation to court to enforce their rights.<sup>106</sup> By imposing the possibility of personal liability in those cases that seemingly involved reasonable requests, the drafters intended to decrease this practice of automatic denial. Thus, the statutory MBCA and common law rights were designed to coexist.

b. *Current formulation.* In 2008, the Committee on Corporate Laws of the Section of Business Law of the ABA promulgated the modern MBCA formulation of the shareholder inspection right.<sup>107</sup> In the 2008 version, the five percent ownership or six months holding requirement<sup>108</sup> and the penalty of personal liability for officers or agents who wrongfully denied a shareholder request were dropped.<sup>109</sup> Instead, the newly revised MBCA provides for a bifurcated approach: shareholders must satisfy different prerequisites depending on what type of books and records the requesting shareholder is trying to access.<sup>110</sup> Generally speaking, for basic

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104. MODEL BUS. CORP. ACT § 16.02 cmt. historical background (1985 & Supp. 1997).

105. MODEL BUS. CORP. ACT § 52 cmt. (1971).

106. *Id.* (“At common law the shareholder’s inspection right was [often] hampered by the delay and expense which often accompanied enforcement of the right. With no penalties imposed, the corporation . . . could . . . delay inspection . . .”).

107. *See Mission Statement, supra* note 8.

108. MODEL BUS. CORP. ACT § 16.02 annot. at 16-18 to 16-20 (2008) (recognizing the drafters’ unwillingness to adopt the predecessor MBCA’s distinction based on the size of the shareholder’s holding or the length of time for which he was a shareholder because these requirements would not necessarily ensure inspection requests are made for proper purposes).

109. *Id.* “The penalty approach was rejected in part because of courts’ reluctance to impose penalties on officers or agents for actions taken on behalf of their principal and in part because concern for personal responsibility for large penalties may cause officers or agents to ignore their responsibilities to their principals.” *Id.* § 16.02 annot. at 16-20.

110. *Id.* § 16.02(a)–(c).

books and records, access was made more liberal.<sup>111</sup> But for more sensitive materials—materials like board meeting minutes and accounting records that the drafters felt were more likely to be requested for potentially improper purposes—access was made more restrictive.<sup>112</sup>

Currently, for the most basic, least sensitive “records of the corporation,” section 16.02(a) provides a corporation must grant access to every shareholder—no proper purpose is necessary—so long as he or she provides a written request five business days in advance of the desired inspection date.<sup>113</sup> The concept of “shareholder” is not limited merely to shareholders of record, but rather is defined to include a “beneficial owner whose shares are held in a voting trust or by a nominee on the shareholder’s behalf.”<sup>114</sup> The list of basic “records of the corporation” that can be so accessed consists of the corporation’s articles and bylaws, resolutions of the board “creating one or more classes or series of shares” if any such shares are issued and outstanding, minutes of shareholder meetings and actions without meeting for the previous three years, written communications to shareholders within the past three years, “names and business addresses of its current directors and officers,” and the most recent annual report filed by the corporation with the office of the secretary of state.<sup>115</sup>

For access to more sensitive materials, in addition to providing written notice within at least five business days, the shareholder must establish compliance with certain prerequisites before he will be granted access to the documents.<sup>116</sup> Under section 16.02(b), this subset of more sensitive records is as follows: (i) excerpts from minutes of meetings of the board, records of board committee action, “minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting” to the extent not provided for in the first category described in the immediately preceding paragraph; (ii) the

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111. *See id.* § 16.02(a) (allowing a shareholder access to inspect and copy records described in section 16.01(e) as long as shareholder provides written demand five days in advance).

112. *See id.* § 16.02 (b)–(c) (requiring a good faith demand and proper purpose for a shareholder to inspect records such as board meeting minutes and account records of the corporation).

113. *Id.* § 16.02(a).

114. *Id.* § 16.02(f); *see also id.* § 1.40(21) (defining “shareholder”).

115. *Id.* § 16.01(e); *see id.* § 16.02(a).

116. *Id.* § 16.02(b)–(c).

corporation's accounting records; and (iii) the record of shareholders.<sup>117</sup>

Pursuant to section 16.02(c), the prerequisites a shareholder must satisfy for access to these records consist of a showing that (i) the demand was for a proper purpose and in good faith; (ii) the shareholder described with reasonable particularity his purpose and which records he wants to inspect; and (iii) "the records are directly connected with the shareholder's purpose."<sup>118</sup> Though "proper purpose" is not defined in the MBCA, the comments indicate that a proper purpose is one "reasonably relevant to the demanding shareholder's interest as a shareholder."<sup>119</sup> In other words, the intended meaning of "proper purpose" under the MBCA is similar to the interpretations advanced by courts under the common law.<sup>120</sup>

The modern formulation of the MBCA further provides the rights granted by the section cannot be abolished or limited by a corporation's articles or bylaws.<sup>121</sup> The statute also contains a modified version of the earlier edition's savings clause in section 16.02(e)(2), which expressly maintains "the power of a court, independently of this Act, to compel the production of corporate records for examination."<sup>122</sup>

Though the current iteration of the MBCA rejects its predecessor's imposition of personal liability on officers or agents who wrongfully refuse a shareholder's request, the MBCA provides that if a corporation refuses a shareholder's demand, the shareholder may apply to the appropriate court for an order compelling production.<sup>123</sup> If the shareholder's request for documents is for nonsensitive documents, such as the articles or the bylaws—in other words, a request made under section 16.02(a)—the shareholder may seek a summary order compelling inspection.<sup>124</sup> Because the right of inspection under section 16.02(a) is automatic, and the court need only confirm the requesting party is, in fact, a shareholder, such summary order is appropriate.<sup>125</sup> If the requesting shareholder demanded access to more sensitive materials, such as the books of account of the

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117. *Id.* § 16.02(b)(1)–(3).

118. *Id.* § 16.02(c).

119. *Id.* § 16.02 cmt. 3.

120. *Id.* ("[I]t is traditional and well understood language defining the scope of the shareholder's right of inspection and its use ensures that the very substantial case law that has developed under it will continue to be applicable . . .").

121. *Id.* § 16.02(d).

122. *Id.* § 16.02(e)(2).

123. *Id.* § 16.04.

124. *Id.* § 16.04 official cmt.

125. *Id.*

corporation—in other words, a request made under section 16.02(b)—then a more comprehensive analysis by the court is required, including a consideration of whether the shareholder's request was made in good faith.<sup>126</sup> In such instances, the statute provides the appropriate court must hear the shareholder's application on an expedited basis.<sup>127</sup> Moreover, if the court orders production of the books and records, the corporation must prove its refusal was in good faith, or it may otherwise be required to pay the shareholder's expenses.<sup>128</sup> In the event of court-ordered production, the court may impose certain restrictions on the requesting shareholder's use or distribution of the records.<sup>129</sup>

While the initial versions of the MBCA inspection statute made it clear the MBCA and common law inspection rights would coexist, it is not at all clear the intent behind the modern formulation was the same. The changes instituted in the modern version support—indeed, the Author argues they may demand—an alternative interpretation of abrogation of the common law right. This theory will be explored in more detail in Part IV below.

### 3. *State Adoptions and Adaptations of the MBCA*

All fifty states and the District of Columbia now have some statutory codification of shareholder inspection rights.<sup>130</sup> A large number of jurisdictions follow the modern 2008 edition of the MBCA's formulation of inspection rights, while others retain an earlier version of the MBCA.<sup>131</sup>

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126. *Id.*

127. *Id.* § 16.04(b).

128. *Id.* § 16.04(c).

129. *Id.* § 16.04(d). *See supra* note 74 and accompanying text (exemplifying the types of restrictions that might be imposed).

130. *Id.* § 16.02 annot. at 16-22.

131. *Id.* § 16.02 annot. at 16-22 to 16-25. According to the drafters of the MBCA, as of 2008, twenty-seven states, "Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Maine, Massachusetts, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming[,] have either adopted section 16.02 or have a statute directly comparable to it." *Id.* at 16-23; *see, e.g.*, ARIZ. REV. STAT. ANN. § 10-1602 (2004 & Supp. 2010); ARK. CODE ANN. § 4-27-1602 (2001 & Supp. 2009); COLO. REV. STAT. ANN. § 7-116-102 (2010); CONN. GEN. STAT. ANN. § 33-946 (West 2005 & Supp. 2011); FLA. STAT. ANN. § 607.1602 (West 2007 & Supp. 2011); GA. CODE ANN. § 14-2-1602 (West 2003 & Supp. 2010); IDAHO CODE ANN. § 30-1-1602 (2005); IND. CODE ANN. § 23-1-52-2 (LexisNexis 2010); IOWA CODE § 490.1602 (2011); KY. REV. STAT. ANN. § 271B.16-020 (LexisNexis 2003 & Supp. 2010); ME. REV. STAT. tit. 13-C, § 1602 (2005 & Supp. 2010); MASS. GEN.



Earlier versions required a shareholder, in order to have access to the corporate books and records, to own a certain percentage of the corporation's outstanding stock or to have owned his stock at least six months prior to the demand for access, or both—thirteen states retain an earlier version.<sup>132</sup> For the most part, however, these thirteen jurisdictions have not retained the possible remedy of personal liability for officers or agents who wrongfully reject a shareholder inspection request, which is in contradistinction with earlier versions of the MBCA.<sup>133</sup> In fact, some of these states following the older version of the MBCA provide neither of the current MBCA remedies—(i) a court hearing the issue on an expedited basis or (ii) allowing for the court to award costs or attorneys' fees to a successful shareholder.<sup>134</sup>

LAWS ANN. ch. 156D, § 16.02 (West 2005 & Supp. 2011); MISS. CODE ANN. § 79-4-16.02 (West 1999); MONT. CODE ANN. § 35-1-1107 (2009); NEB. REV. STAT. ANN. § 35-1-1107 (LexisNexis 2008); N.H. REV. STAT. ANN. § 293-A:16.02 (LexisNexis 2009); N.C. GEN. STAT. § 55-16-02 (2009); OR. REV. STAT. ANN. § 60.774 (West 2003 & Supp. 2010); S.C. CODE ANN. § 33-16-102 (2006); S.D. CODIFIED LAWS §§ 47-24-2, 478-24-3.1 (2007); TENN. CODE ANN. § 48-26-102 (2002 & Supp. 2010); UTAH CODE ANN. § 16-10a-1602 (LexisNexis 2009); VT. STAT. ANN. tit. 11A, § 16.02 (2010); VA. CODE ANN. § 13.1-771 (2011); WASH. REV. CODE ANN. § 23B.16.020 (West 1994 & Supp. 2011); W. VA. CODE ANN. § 31D-16-1602 (LexisNexis 2009); WYO. STAT. ANN. § 17-16-1602 (2011).

132. MODEL BUS. CORP. ACT § 16.02 annot. at 16-23 to 16-24 (2008) (explaining as of 2008, Alabama, Arizona, Idaho, Louisiana, Maryland, Montana, Nevada, New Jersey, New Mexico, North Carolina, Virginia, Wisconsin, and the District of Columbia follow the 1969 MBCA and require either a certain percentage of ownership or a certain holdings period prior to demand, or both); *see, e.g.*, ALA. CODE § 10A-2-16.02 (LexisNexis 2010); ARIZ. REV. STAT. ANN. § 10-1602; D.C. CODE § 29-101.45 (LexisNexis 2001); IDAHO CODE ANN. § 30-1-1602; LA. REV. STAT. ANN. § 12:103 (2010) (allowing the five percent ownership requirement to be satisfied by more than one shareholder whose combined holdings achieve the requisite percentage if the shareholders make a collective request, rather than individual requests, for documents); MD. CODE ANN., CORPS & ASS'NS § 2-513 (LexisNexis 2007); MONT. CODE ANN. § 35-1-1107; NEV. REV. STAT. § 78.257 (2009); N.J. STAT. ANN. § 14A:5-28 (West 2003); N.M. STAT. ANN. § 53-11-50 (West 2001); N.C. GEN. STAT. ANN. § 55-16-02; VA. CODE ANN. § 13.1-771; WIS. STAT. ANN. § 180.1602 (West 2002).

133. Only two of these thirteen states retain the threat of personal liability. *See* ALA. CODE § 10-2B-16.02; N.M. STAT. ANN. § 53-11-50. Though the District of Columbia does not retain the personal liability remedy, it does not mirror the remedy of the MBCA exactly. *See* D.C. CODE § 29-101.45 (providing the corporation can be fined fifty dollars for wrongfully refusing to provide access to a requesting shareholder, in addition to any other damages afforded by law).

134. At least two of the thirteen states provide no remedy at all. LA. REV. STAT. ANN. § 12:103 (2010); N.J. STAT. ANN. § 14A:5-28; WIS. STAT. ANN. § 180.1602 (providing the costs and expenses remedy of the MBCA, but not the expedited hearing).

Some states, even those that adopted a version of the current MBCA, made their own variations to the statutory requirements. For instance, though the MBCA states that the articles and bylaws of the corporation cannot limit shareholder access to books and records, some states provide for the exact opposite, expressly allowing the articles and bylaws to limit shareholder access within certain parameters.<sup>135</sup> Another variation is found in North Carolina, where the statute limits the ability of shareholders of public companies to inspect accounting records or other records relating to any matter the corporation believes in good faith, if disclosed, may negatively affect the corporation or constitute material nonpublic information.<sup>136</sup> States like California and Kansas extend the shareholders' rights of inspection of books and records of the corporation to subsidiaries of the corporation—an issue on which the MBCA is silent.<sup>137</sup>

Other states, like Delaware, have chosen to craft their own inspection statutes with notable distinctions from the MBCA formulations. The Delaware provision, like the current MBCA, bifurcates the prerequisites for access depending on the type of materials requested and relies on the familiar concept of “proper purpose.”<sup>138</sup> Unlike the MBCA, however,

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135. See, e.g., GA. CODE ANN. § 14-2-1602(e) (West 2003 & Supp. 2010) (right to inspection may be limited by the corporation's articles of incorporation or bylaws “for shareholders owning 2 percent or less of the shares outstanding”); ME. REV. STAT. tit. 13-C, § 1602 (2005 & Supp. 2010) (allowing corporation's bylaws to put “reasonable restrictions” on the disclosure of certain classes of information); MO. ANN. STAT. § 351.215 (West 2001 & Supp. 2011) (noting a corporation, through its bylaws, may proscribe “regulations” for inspection).

136. N.C. GEN. STAT. ANN. § 55-16-02.

137. CAL. CORP. CODE § 1601(a) (West 1990 & Supp. 2011) (“The right of inspection created by this subdivision shall extend to the records of each subsidiary of a corporation subject to this subdivision.”); KAN. STAT. ANN. § 17-6510(b) (2007) (“Any stockholder . . . shall have the right . . . to inspect for any proper purpose, and to make copies and extracts from: . . . a subsidiary's books and records, to the extent that (i) the corporation has actual possession and control of such records of such subsidiary; or (ii) the corporation could obtain such records through the exercise of control over such subsidiary, provided that as of the date of the making of the demand (A) stockholder inspection of such books and records of the subsidiary would not constitute a breach of an agreement between the corporation or the subsidiary and a person or persons not affiliated with the corporation, and (B) the subsidiary would not have the right under the law applicable to it to deny the corporation access to such books and records upon demand by the corporation.”). Kansas's treatment of the subsidiary issue is notably identical to the approach used in Delaware. See DEL. CODE ANN. tit. 8, § 220 (2001 & Supp. 2010).

138. Compare DEL. CODE ANN. tit. 8, § 220(c) (explaining access depends on materials requested and relying on proper purpose), with MODEL BUS. CORP. ACT §

Delaware draws the line between access to the stock ledger and access to all other books and records.<sup>139</sup> When a stockholder wants to access the stock ledger, the corporation has the burden of demonstrating the purpose is in fact improper.<sup>140</sup> In order to access other books and records, the shareholder himself has the burden of proving his proper purpose.<sup>141</sup> Also, unlike the MBCA, the Delaware statute does not expressly limit the realm of materials a shareholder can access by listing out specific books and records subject to inspection.<sup>142</sup> Rather, as with the MBCA, the court has required the records requested be necessary to effectuate the stated purpose.<sup>143</sup>

### III. INTERPRETATION OF THE STATUTES BY THE COURTS: ABROGATION VS. NON-ABROGATION OF THE COMMON LAW

Not long after states adopted statutes regarding inspection rights did courts have the opportunity to interpret those statutes. An issue that arose almost immediately was whether the statutes abrogated the inspection rights and remedies that shareholders enjoyed at common law.

The majority of jurisdictions addressing whether the common law inspection rights would continue to exist as a separate set of rights and remedies for shareholders apart from the statute have held that the

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16.02 (2008) (requiring a proper purpose for more sensitive materials).

139. DEL. CODE ANN. tit. 8, § 220; *see also* Abbe M. Stensland, Note, *Protecting the Keys to the Magic Kingdom: Shareholders' Rights of Inspection and Disclosure in Light of Disney*, 30 J. CORP. L. 875, 881–83 (2005) (discussing the statute in kind).

140. DEL. CODE ANN. tit. 8, § 220(c) (“Where the stockholder seeks to inspect the corporation’s stock ledger . . . and establishes that such stockholder is a stockholder and has complied with this section respecting the form and manner of making demand for inspection of such documents, the burden of proof shall be upon the corporation to establish that the inspection such stockholder seeks is for an improper purpose.”).

141. *Id.* (“Where the stockholder seeks to inspect the corporation’s books and records, other than its stock ledger or list of stockholders, such stockholder shall first establish that . . . [t]he inspection such stockholder seeks is for a proper purpose.”).

142. *Compare id.*, with MODEL BUS. CORP. ACT § 16.02 (2008) (listing what materials a shareholder has access to); Stensland, *supra* note 139, at 883–84 (citing CM&M Group, Inc. v. Carroll, 453 A.2d 788, 793–94 (Del. 1982) (noting the access is not limitless but requires a balancing of interests)).

143. *See, e.g.*, Kortum v. Webasto Sunroofs, Inc., 769 A.2d 113, 119–20 (Del. Ch. 2000) (“Once the shareholder demonstrates its entitlement to inspection, it must also show that the scope of the requested inspection is proper, i.e., that the books and records sought are ‘essential and sufficient’ to the shareholder’s stated purpose.”).

relevant statute does *not* abrogate the common law.<sup>144</sup> Rather, the two separate sets of rights and remedies—one statutory and one at common law—coexist. In other words, the shareholder is free to pursue access to books and records under a common law theory even if (i) the shareholder has not satisfied one or more of the statutory prerequisites for access or (ii) the statute is silent with respect to the rights the shareholder is trying to assert. Only a handful of courts have held that the statute abrogates the common law, thereby finding a shareholder seeking access who is unable to satisfy the statutory prerequisites cannot get access to the books and records under a common law theory of inspection rights.<sup>145</sup>

The remainder of Part III will look at the caselaw supporting the majority and minority positions regarding abrogation. In this Part, the various rationales set forth for each position will be discussed, with the intent of examining the rationales for the majority and minority positions later in this Article to assess whether the majority arguments make sense in light of modern inspection statutes, public policy, and today's corporate climate.

#### A. Majority Position: Non-Abrogation

As previously noted, a majority of jurisdictions that have considered this issue have concluded the inspection statute in the relevant jurisdiction does not abrogate the common law.<sup>146</sup> Though there are a large number of cases that adhere to this majority position, they can ultimately be grouped into categories based on the reasoning each respective court uses to support its conclusion. The first category comprises the most poorly reasoned opinions—those where the court has blindly asserted the conclusion that the common law survives the codification of an inspection statute without providing any rationale for that position whatsoever. Cases not falling into this first category include those where the court was more thoughtful in its approach and provided support for its holding. However, the rationales asserted in these cases tend to overlap, and the supporting rationales can ultimately be grouped into one of three categories: (i) the “blind assertion” type referenced above; (ii) those holding statutes expand, not restrict, the common law; and (iii) those finding the intent to override the common law must be clear on the face of the statute. These three categories of reasoning sometimes exist in isolation and other times in

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144. See *supra* note 47.

145. See *infra* Part III.B.

146. See *supra* note 47.

combination. Each of these categories is described in greater detail below.<sup>147</sup>

1. *Blind Assertion*

The first and most frustrating of these apparent justifications is not much of a justification at all. Rather, in a number of opinions supporting the majority position, the court blindly assumed the common law remained a separate avenue of rights and remedies for shareholders without providing any basis for that belief.

For instance, in *Holdsworth v. Goodall-Sanford, Inc.*, the shareholder sought access to “any and all of the corporate books, records, documents or Directors’ and stockholders’ minutes of [the defendant corporation] . . . .”<sup>148</sup> The relevant statute at the time, however, provided access to a much more limited degree: shareholders could only inspect (i) records of shareholders’ meetings and (ii) records showing the complete list of all the shareholders, their addresses, and the amount of stock held by each.<sup>149</sup> The court noted without discussion that a shareholder had both a statutory and common law right of inspection.<sup>150</sup> The court simply stated, “In addition to [the] statutory right, . . . a stockholder has a right at common law to examine the books, records and papers of a corporation, when the inspection is sought at proper times and for a proper purpose.”<sup>151</sup> The court provided no explanation for its conclusion.

The issue presented in *Holdsworth*—determining the types of documents a shareholder can access—is a common factual scenario in these cases. A second, but equally typical, factual scenario presented itself in *Brentmore Estates, Inc. v. Hotel Barbizon*.<sup>152</sup> The *Brentmore* court did not address what documents could be accessed, but instead addressed what type of shareholder is able to access documents.<sup>153</sup> The petitioners in *Brentmore* had pledged their stock as part of a voting trust agreement, and

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147. While this section only highlights a handful of cases, they are representative of the majority of jurisdictions that have upheld the non-abrogation position. See *supra* note 47.

148. *Holdsworth v. Goodall-Sanford, Inc.*, 55 A.2d 130, 131 (Me. 1947).

149. *Id.* at 132 (citing ME. REV. STAT. tit. 49, § 33 (1944)).

150. *Id.* The Supreme Judicial Court of Maine ultimately refused to grant the writ on other grounds—namely due to failure to show proper purpose. *Id.* at 134.

151. *Id.* at 132.

152. *Brentmore Estates, Inc. v. Hotel Barbizon*, 33 N.Y.S.2d 331 (N.Y. App. Div. 1942).

153. See *id.* at 334.

thus were holders of voting trust certificates.<sup>154</sup> Because they gave up their right to vote their shares, these shareholders were considered “beneficial” shareholders, but were not shareholders of record.<sup>155</sup> However, the relevant inspection statute required that a shareholder “appear on the books of the company as a stockholder” to enjoy one’s statutory inspection rights.<sup>156</sup> Despite not meeting the statutory requirements, the court found without discussion that, in addition to his statutory rights, a shareholder has a common law right to inspect books and records, and therefore denied the corporation’s motion to dismiss.<sup>157</sup>

Still a third common factual scenario is whether shareholders of a type of business entity not included in the inspection statute should be able to access books and records of the entity pursuant to a common law right. For instance, in *Scattered Corp. v. Chicago Stock Exchange, Inc.*, the petitioner was a member of a nonstock corporation and requested access to books and records.<sup>158</sup> The relevant statute expressly provided that it only applied to shareholders of stock corporations.<sup>159</sup> The Delaware Chancery Court assumed, without discussion, that members of nonstock corporations could resort to common law procedure that was “largely (but not entirely) supplanted” by the Delaware inspection statute.<sup>160</sup> Arguably, this factual scenario is somewhat different from the facts in *Holdsworth* or *Brentmore*. In those cases, the facts at issue (i.e., what books and records may be accessed or what type of shareholder may access them) were expressly provided for in the inspection statute. In *Scattered*, the question of whether nonstock members could assert books and records rights was not directly mentioned by the statute.<sup>161</sup> The fact that the statute was silent on the issue may have influenced the court’s holding of non-abrogation, but it remains unknown if that is the case. The Delaware court, as in *Holdsworth* and *Brentmore*, provided no discussion of the reasons why the common law

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154. *Id.*

155. *Id.*

156. *Id.* at 336.

157. *Id.*

158. *Scattered Corp. v. Chi. Stock Exch., Inc.*, 671 A.2d 874, 875 (Del. Ch. 1994).

159. *Id.* at 876.

160. *Id.* at 879. It should be noted the court provides great length of discussion in deciding whether the court retains jurisdiction, which briefly touches on aspects of abrogation, but the arguments do not distinguish the issue as entirely presented here. *Id.* at 877–79.

161. *Id.* at 876.

remedy would still be available.<sup>162</sup> Unfortunately, examples of this type of asserted opinion are not difficult to find.<sup>163</sup>

## 2. *Statutes Expand, Not Restrict, the Common Law*

A second line of cases that have adopted the majority position of non-abrogation have found that the statutes, when enacted, were meant to expand, not restrict, the rights and remedies of shareholders. Thus, to give effect to the legislative intent of the statutes, the courts have reasoned (i) the rights and remedies at common law must remain in place, and (ii) the statutes supplement, rather than abrogate, the common law. These courts have held that to find otherwise would have the unintended consequence of restricting, rather than expanding, shareholder access to books and records.

When relying on this justification, cases have pointed to the fact that the statutory enactment omitted the common law's proper purpose requirement.<sup>164</sup> For instance, in *Rockwell v. SCM Corp.*, the petitioning shareholder failed to meet the statutory requirements for inspection.<sup>165</sup> Specifically, he held only 1.3% of the corporation's outstanding shares—an amount below the statutory minimum—and had not yet been a shareholder

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162. See *id.* at 879.

163. See *Estate of Bishop v. Antilles Enters., Inc.*, 252 F.2d 498, 500 (3d Cir. 1958) (“[I]t is generally held that statutory provisions securing to stockholders the right to inspect books and records are to be regarded as supplemental to the common law right to such inspection and not as a restriction upon it.”); *Albee v. Lamson & Hubbard Corp.*, 69 N.E.2d 811, 813 (Mass. 1946) (noting at the outset of the opinion that the petitioner was “not seeking to enforce any statutory right of examination of the books and records” provided by the relevant statute in the jurisdiction at the time, but was rather seeking to enforce his qualified common law right); *Gimpel v. Bolstein*, 477 N.Y.S.2d 1014, 1022 (Sp. Term 1984) (“[I]n the absence of bad faith, a shareholder has a statutory right to examination of shareholder records and a common law right to examine the corporate books of account.” (citation omitted)).

164. See, e.g., *In re Steinway*, 53 N.E. 1103, 1106–07 (N.Y. 1899). In that case, the statute at issue provided an absolute right of inspection for shareholders with respect to the stock book, but not to other books and records. *Id.* at 1107. In other words, shareholders did not need to show a proper purpose in order to access the stock book. *Id.* The court, however, held that this statute did not allow shareholders to access other corporate books and records through their common law inspection right without a proper purpose. *Id.* The court noted the statute “did not impliedly repeal the common-law rule” just because it allowed a stockholder “to get some information in a new way.” *Id.* (“By simply providing an additional remedy, the existing remedy was not taken away.”).

165. *Rockwell v. SCM Corp.*, 496 F. Supp. 1123, 1125 (S.D.N.Y. 1980).

for the required six months.<sup>166</sup> In holding the common law right survived the statutory enactment, the United States District Court for the Southern District of New York noted the statutory right of inspection was intended to supplement the common law right by omitting the proper purpose requirement.<sup>167</sup> The statute was meant to provide an absolute right of inspection for certain shareholders, regardless of purpose.<sup>168</sup> In doing so, the statute did not deprive other shareholders of their inspection rights so long as they still met the traditional common law requirements, including making the request in good faith and for a proper purpose.<sup>169</sup>

It is not just the removal of the proper purpose requirement that courts have relied on to support the argument that statutes are meant to expand, not restrict, shareholder inspection rights. In *Parsons v. Jefferson-Pilot Corp.*, the Supreme Court of North Carolina used a particularly unique argument for expansion of the common law right.<sup>170</sup> The statute at issue in this case generally allowed shareholders access to *accounting records* of a corporation, but provided that shareholders of public companies were not entitled to inspect or copy accounting records.<sup>171</sup> The petitioning shareholder was a shareholder of a public company seeking access to accounting records on the theory that the statute did not abrogate his common law rights.<sup>172</sup> Part of the court's holding—that the common law rights were not abrogated—relied on the fact that the statute provided shareholders with rights of inspection that did not exist under the common law.<sup>173</sup> For instance, there was a statutory requirement that the requesting shareholder provide written notice to the corporation of his demand at least five business days before the date on which he wished to inspect the

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166. *Id.*

167. *Id.* at 1126 (citation omitted).

168. *See id.*

169. *See id.* A similar argument was made by the court in *Texas Infra-Red Radiant Co., Inc. v. Erwin*, 397 S.W.2d 491 (Tex. Civ. App. 1965). In that case, the shareholder wife received a beneficial interest in stock as part of a divorce decree, but the stock was held in trust and her ex-husband had the right to vote the shares. *Id.* at 492. As such, she was not a stockholder “of record” as required for access under the statute. *See id.* at 492–93. The court held the inspection statute did not abrogate the common law because inspection statutes are not meant to abridge a stockholder's rights, but rather to supplement those rights. *Id.* The statute did so by only requiring shareholders to state their “purpose” and did not require such purpose to be “proper” before inspection would be granted. *Id.*

170. *Parsons v. Jefferson-Pilot Corp.*, 426 S.E.2d 685 (N.C. 1993).

171. *Id.* at 688.

172. *Id.*

173. *Id.*



documents.<sup>174</sup> The court curiously viewed this statutory requirement as an expansion of rights, providing “a new right to an *expedited inspection* of a corporation’s . . . records *within five business days* after making a proper demand,” rather than viewing this as a restriction by the legislature on shareholder access.<sup>175</sup>

Finally, several cases adopt the notion that the statute is an expansion of the common law, but fail to expressly address the reasons for the assertion. For instance, in *Schwartzman v. Schwartzman Packing Co.*, the Supreme Court of New Mexico stated, without explanation, the inspection statute did not abrogate the common law because the statutory right of inspection is sometimes described as “an extension or even an enlargement of the right as recognized under the common law.”<sup>176</sup> However, the court provided no basis for this conclusion and neither of the rationales described above—that the proper purpose requirement was removed by the statute or that the statute provided for an expedited basis for review upon five days notice—seemed to apply. The statute at issue in this case included a proper purpose requirement, did not provide for access on an expedited basis, and did not otherwise appear to expand shareholder access.<sup>177</sup> If anything, the statute appeared to restrict shareholder access by narrowing the scope of documents that could be reviewed to books and records of account, minutes, and the record of shareholders and limiting access to particular shareholders—those who either owned their shares for six months prior to the demand or owned at least five percent of the outstanding stock of the corporation.<sup>178</sup>

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174. *Id.* (citation omitted).

175. *Id.*

176. *Schwartzman v. Schwartzman Packing Co.*, 659 P.2d 888, 891 (N.M. 1983).

177. *See id.*

178. *Id.* The only possible support the Author gleans for the conclusion that the statute was an expansion of the common law right comes from the fact that the statute provided the remedy of potential personal liability of the officer or agent of the corporation who wrongfully refused a shareholder’s reasonable request. *Id.* However, since the court did not describe the basis for its conclusion, it is unclear whether this was what the court had in mind. A similarly poorly reasoned case came out of the Supreme Court of Florida wherein the shareholder, pursuant to the Florida inspection statute, had to show that his holdings represented “at least one-tenth of the subscribed stock.” *Soreno Hotel Co. v. State ex rel. Otis Elevator Co.*, 144 So. 339, 340 (Fla. 1932). It was undisputed that the holdings of the shareholder in *Soreno Hotel* did not reach the requisite one-tenth threshold, so the question was whether such shareholder could resort to a common law theory to gain access to the books and records. *Id.* at 341. In holding the common law right still existed, the court reasoned that the statutory

3. *Intent to Override Common Law Must Be Clear and on the Face of the Statute*

Many jurisdictions supporting the majority position of non-abrogation of the common law reason statutes that otherwise restrict common law rights must be strictly construed to leave those rights intact, unless the intent to override the common law is clearly expressed in the language of the statute.

For instance, in *Missouri ex rel. Brown v. III Investments, Inc.*, the scope of books and records requested by the petitioning shareholder was broader than the scope allowed by the relevant statute.<sup>179</sup> The petitioning shareholder argued to the Missouri Court of Appeals, however, that his common law inspection rights provided him access to this broader spectrum of materials.<sup>180</sup> The court agreed, finding that the statute did not abrogate the common law.<sup>181</sup> The court noted the legislature, where it intends to abrogate a common law right, must do so clearly, and unless a statute clearly abrogates a common law right—either expressly or by necessary implication—the common law right remains.<sup>182</sup> Unless a statutory remedy fully ““comprehends and envelopes the remedies provided by common law,”” such statute will not displace the common law.<sup>183</sup> The court held the statute<sup>184</sup> neither “expressly nor implicitly”

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inspection rights enlarged and extended the common law “by removing some of the common-law limitations.” *Id.* at 340. The court, however, did not describe what those common law limitations were or otherwise provide an indication of how the statute was an expansion of the common law.

179. See *State ex rel. Brown v. III Invs., Inc.*, 80 S.W.3d 855, 858 (Mo. Ct. App. 2002) (citing MO. REV. STAT. § 351.215 (1994)). The corporation, in response to the shareholder’s inspection request, provided the shareholder with a consolidated financial statement for the corporation, but refused to allow the shareholder access to the underlying documents from which the financial statements were prepared and certain other requested documents. *Id.* The statute allowed shareholders to have access to the “books” of the company. *Id.* at 860 n.5. This provision did not seem to include many of the documents being requested, like interoffice communications with internal analysis. *Id.* at 860.

180. *Id.* at 859.

181. *Id.* at 860.

182. *Id.* at 859–60.

183. *Id.* at 860 (quoting *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 668 (Mo. 1999) (citations omitted)).

184. Each corporation shall keep correct and complete books and records of account, including the amount of its assets and liabilities, minutes of the proceedings of its shareholders and board of directors, and the names and business or residence addresses of its officers; and it shall keep at its registered

abrogated the common law right of inspection.<sup>185</sup>

Specifically, the court noted the statute itself never mentioned the common law right, foreclosing the possibility of express abrogation.<sup>186</sup> Further, according to the court, the statute did not implicitly abrogate the common law because the statutory inspection rights differ from the common law in both “requirements and its scope.”<sup>187</sup> In order to exercise the common law right, the shareholder had to show proper purpose and, upon doing so, the shareholder could then inspect *any documents* related to the proper purpose.<sup>188</sup> On the other hand, under the statutory right, it was the corporation that would bear the burden of showing the shareholder had an improper purpose.<sup>189</sup> Yet, the shareholder could examine only the *books* of the corporation, without regard to purpose.<sup>190</sup> According to the court, a shareholder might be able to exercise the statutory right even if unable to meet the common law requirement.<sup>191</sup> The court used this reasoning to support its holding that both the statutory and common law rights should remain available.<sup>192</sup> Given the differences between and the availability of each remedy, the court reasoned the common law rule should coexist with the statute.<sup>193</sup>

The identical issue arose in *Tucson Gas & Electric Co. v. Schantz*, where the petitioning shareholder sought access to certain books and records that were not provided for by statute.<sup>194</sup> The Court of Appeals of

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office or principal place of business in this state . . . books and records in which shall be recorded the number of shares subscribed, the names of the owners of the shares, the number owned by them respectively, the amount of shares paid, and by whom, and the transfer of such shares with the date of transfer. Each shareholder may at all proper times have access to the books of the company, to examine the same, and under such regulations as may be prescribed by the bylaws.

MO. ANN. STAT. § 351.215 (West 2001 & Supp. 2011).

185. *Id.*

186. *III Invs.*, 80 S.W.2d at 860.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *See id.* at 862.

193. *Id.*

194. *Tucson Gas & Elec. Co. v. Schantz*, 428 P.2d 686 (Ariz. Ct. App. 1967).

In this case, the documents sought were copies of the proxies held and the ballots cast in the election of the board of directors at the annual meeting of shareholders. *Id.* at

Arizona noted, “Where a statute revises the common law and is clearly designed as a substitute therefor, the common law is repealed.”<sup>195</sup> Statutes are however “not deemed to repeal the common law by implication unless the legislative intent to do so is clearly manifested.”<sup>196</sup> Ultimately, the court concluded “[w]here a right exists at common law, such as the right of inspection of corporate records by a shareholder, and a statute is enacted likewise providing a remedy, such statutory remedy is merely cumulative to the common law remedy unless it explicitly provides that it shall be exclusive.”<sup>197</sup> The court held, without an explanation of where the statute and the common law intersected and diverged, that the statute was “partially declaratory of the common law” but did not abolish the remainder of the common law rule “since the legislature [did] not clearly manifest[] its intent to repeal the common law rule nor specifically declare the statutory remedy to be exclusive.”<sup>198</sup>

This rationale understandably gains more traction in cases where the issue is not expressly provided for in the relevant inspection statute. For instance, in *Minnesota ex rel. Boldt v. St. Cloud Milk Producers’ Ass’n*, the petitioner was a member of a cooperative—a nonstock corporation.<sup>199</sup> The relevant statute was in the code of corporations and, as such, only applied to stock corporations, not other types of business organizations.<sup>200</sup> Therefore, the question was whether the petitioner had a common law right to access the books and records of the cooperative.<sup>201</sup> In finding the petitioner did have common law rights—even in light of his failure to satisfy the statutory prerequisites to inspection—the court harnessed this

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686–87. The statute, however, only required corporations to provide shareholders access to the share register, books of account, and minutes and proceedings of the shareholders, board of directors, and executive committees. *Id.* at 687 (quoting ARIZ. REV. STAT. § 10-175 (1960)).

195. *Id.* at 690.

196. *Id.* (citing 15 AM. JUR. 2D *Common Law* § 16; 15A C.J.S. *Common Law* § 12a).

197. *Id.* (citations omitted).

198. *Id.*

199. *State ex rel. Boldt v. St. Cloud Milk Producers’ Ass’n*, 273 N.W. 603, 604 (Minn. 1937).

200. *See id.* at 605–06.

201. *See id.* at 606. This case is somewhat different from the others described, as the particular factual scenarios at issue were actually addressed by the statute in those cases. For instance, in two of the cases, the shareholders sought access to documents over and above those expressly provided for by the relevant statutes. *See Tucson Gas*, 428 P.2d at 686–87; *State ex rel. Brown v. III Invs., Inc.*, 80 S.W.3d 855, 858–59 (Mo. Ct. App. 2002).

notion that “existing common-law remedies are not to be taken away by a statute unless by express enactment or necessary implication.”<sup>202</sup> Since the statute “[did] not contain any clause repealing, restricting, or abridging the rule then in effect,” the statute was seen merely as a supplement to the common law.<sup>203</sup>

#### 4. *Legislative Intent as Reflected in the Savings Clause*

The reasoning of the various courts in each of the foregoing cases is based on a finding that the legislative intent is unclear (i.e., no express abrogation has occurred and insufficient evidence of implicit abrogation exists). Therefore, the statute must be construed narrowly so as not to abrogate the common law. However, some jurisdictions go further than this. Instead of stating the legislative intent is unclear, the courts in these jurisdictions hold that the legislative intent—the intent of non-abrogation—is actually quite clear as evidenced by both the language of the statute itself and the official comments thereto.

Specifically, section 16.02(e) of the current MBCA states the inspection statute does not affect:

the right of a shareholder to inspect records under [the section of the MBCA regarding access to the shareholders’ list prepared prior to each shareholders’ meeting] or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant; or

the power of a court, independently of this Act, to compel the production of corporate records for examination.<sup>204</sup>

Courts in jurisdictions that have adopted this part of the current MBCA look to the language in subsection (e)(2)—what will be referred to as the “Savings Clause”—as support for the legislative intent that the statute not abrogate the common law. The argument is that this language,

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202. *St. Cloud*, 273 N.W. at 606 (citation omitted).

203. *Id.* The Supreme Court of Minnesota reached the same result based on this reasoning when it addressed whether shareholders of a banking corporation should have inspection rights under a statute that did not relate to banking corporations. *State ex rel. G.M. Gustafson Co. v. Crookston Trust Co.*, 22 N.W.2d 911, 917 (Minn. 1946) (“Statutes relating to a stockholder’s right of inspection change the common law only to the extent that they so provide. Where there is no provision for a repeal of the common-law rule or a statutory declaration that the statutory rule shall be exclusive, common-law rules remain in effect.”).

204. MODEL BUS. CORP. ACT § 16.02(e) (2008).

to have any meaning at all, must refer to the ability of courts to enforce a shareholder's common law inspection rights, even if he fails to meet the statutory requirements. Since statutes must be construed so as not to render a provision absurd, inoperative, useless, or meaningless,<sup>205</sup> the Savings Clause must be read as "saving" the common law; otherwise, it would have no purpose.<sup>206</sup>

In further support of this theory, courts have cited to the official commentary of the MBCA or the relevant state statute that has adopted the MBCA commentary.<sup>207</sup> The official comment to section 16.02 states that the section represents "an independent right of inspection that is not a substitute for or in derogation of rights of inspection that may exist . . . as a 'common law' right of inspection, if any is found to exist by a court, to examine corporate records."<sup>208</sup> According to the official comment, the section "simply preserves whatever independent right of inspection exists under these sources and does not create or recognize any rights, either expressly or by implication."<sup>209</sup> Though the drafters were agnostic about whether a common law inspection right exists, courts in jurisdictions that have adopted the MBCA and its official comments still use the language in the commentary as clear support for a non-abrogation stance.<sup>210</sup>

The North Carolina Supreme Court examined this issue in *Parsons v. Jefferson-Pilot Corp.*<sup>211</sup> As noted earlier, the court in *Parsons* relied partially on the argument that the statute was an expansion, not a restriction, of the common law right, and therefore, the common law right should continue to exist.<sup>212</sup> But the court also supplemented its reasoning by addressing this issue of legislative intent.<sup>213</sup> Specifically, the court looked at the legislative intent established by the North Carolina Savings Clause<sup>214</sup> and the official comment to the North Carolina inspection rights statute, both of which were substantially similar to MBCA section 16.02(e)

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205. 73 AM. JUR. 2D *Statutes* § 165 (2010).

206. See MODEL BUS. CORP. ACT § 16.02(e)(2) (2008).

207. See, e.g., *Parsons v. Jefferson-Pilot Corp.*, 42 S.E.2d 685, 688–89 (N.C. 1993).

208. MODEL BUS. CORP. ACT § 16.02 cmt. 4 (2008).

209. *Id.*

210. See, e.g., *Parsons*, 42 S.E.2d at 688–89.

211. *Id.* at 688.

212. *Id.*

213. *Id.*

214. N.C. GEN. STAT. § 55-16-02(e)(1)–(2) (1992).

and its commentary.<sup>215</sup> The court was persuaded that the language of the North Carolina statute, which expressly provided the statute did not affect the power of the court to compel production of corporate records, was evidence of legislative intent for non-abrogation.<sup>216</sup> The court also relied on the commentary, noting the commentary to a statutory provision, though not controlling, can be helpful in discerning legislative intent.<sup>217</sup> The court concluded that because the legislature intended to leave in effect any common law rights of inspection that existed at the time of the statutory enactment in North Carolina, and there were common law rights in existence at the time of the enactment of the statute, the common law rights remained in existence post-statute.<sup>218</sup>

### B. *Minority Position: Abrogation*

The majority of jurisdictions that have addressed this issue, as highlighted above, have concluded the codification of inspection rights by statute does not abrogate a shareholder's common law right to access books and records.<sup>219</sup> Only a handful of cases represent the minority position—the statute abrogates the common law and serves as a shareholder's exclusive right and remedy with respect to access to corporate materials.<sup>220</sup>

The few cases supporting the minority position use consistent reasoning to hold in favor of abrogation. The first rationale supporting abrogation is the idea that, if the statute were read to allow for the coexistence of the common law inspection right, it would render the statute meaningless. The second related rationale considers the comprehensiveness of the statutory scheme and posits that allowing the

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215. See *Parsons*, 42 S.E.2d at 688.

216. *Id.*

217. *Id.* at 689.

218. *Id.*

219. See *supra* Part III.A.

220. See, e.g., *Perilstein v. United Glass Corp.*, 213 F.R.D. 252, 255–56 (E.D. Penn. 2003) (“[E]ach state now has a statutory scheme that clearly abrogates any such hypothesized common law right.”); *Caspary v. La. Land & Exploration Co.*, 560 F. Supp. 855, 857 (D. Md.), *aff’d*, 707 F.2d 785 (4th Cir. 1983); *Mannato v. SunTrust Banks, Inc.*, No. A10A2291, 2011 WL 1012441, at \*2 (Ga. Ct. App. Mar. 23, 2011) (“[I]t appears the General Assembly intended to supercede any common law rights of inspection.”); *Neiman v. Templeton, Kenly & Co. Ltd.*, 13 N.E.2d 290, 291–92 (Ill. App. Ct. 1983) (noting the language used in the statute was meant to limit with the writ of the statute); *Cincinnati Volksblatt Co. v. Hoffmeister*, 56 N.E. 1033, 1034–35 (Ohio 1900); *Duarele v. Traders Fed. Sav. & Loan Ass’n*, 104 S.E.2d 320, 330 (W. Va. 1958).

common law to coexist with such a fully realized statute on the same subject would subvert the legislative intent.

The first rationale appeared by 1900, in perhaps the earliest case to support the minority position. In *Cincinnati Volksblatt Co. v. Hoffmeister*, the Supreme Court of Ohio addressed whether a requesting shareholder had to set out his reasons for desiring inspection prior to getting access.<sup>221</sup> In *Hoffmeister*, the relevant statute did not require the shareholder to show proper purpose.<sup>222</sup> However, the common law in that jurisdiction previously required such a showing.<sup>223</sup> The corporation argued the common law requirement should still apply because the statute was merely intended to codify the existing common law.<sup>224</sup> The court held the petitioning shareholder need not establish a proper purpose because the statute incorporated no such requirement.<sup>225</sup> In so holding, the court speculated the legislature would not have taken the trouble to codify shareholder inspection rights if the intent had merely been to affirm the common law rule.<sup>226</sup> The court noted a more reasonable conclusion was that “the object [of the legislature] was to get rid of all uncertainty, and of various conditions, whatever they were, and establish the right by a rule clear, direct, simple, and practically without qualification[.]”<sup>227</sup> Though the court did not expressly state in its holding that the statute entirely abrogated the common law, the rationale asserted may point to that conclusion.<sup>228</sup>

Admittedly, however, this rationale is fairly similar to the concept set forth by the courts adhering to the majority position: the statute is an

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221. *Hoffmeister*, 56 N.E. at 1034. The reasons for invoking the common law in this case were somewhat different than the reasons from the cases described in Part III.A above. In those cases, the common law was used by the petitioning shareholder as a sword to try to get the corporation to provide access, even though the shareholder did not satisfy the requirements of the inspection statute. *See supra* Part III.A. In *Hoffmeister*, the common law was used by the defendant corporation as a shield; even though the shareholder could get access under the language of the statute, the common law requirements would forbid him from doing so. *Hoffmeister*, 56 N.E. at 1034. Despite these differences, however, *Hoffmeister* can provide some initial insight into the rationales supporting the minority position.

222. *Id.*

223. *See id.*

224. *Id.*

225. *Id.* at 1035.

226. *Id.*

227. *Id.*

228. *See id.*



expansion, not a restriction, of the common law.<sup>229</sup> As such, had the roles been reversed and it was the shareholder who tried to invoke the common law because of his own failure to satisfy the statutory requirements—rather than the corporation invoking the common law to block access—it is certainly possible this court’s opinion might have ultimately looked more like one of the cases in Part III.A, with the court finding no preemption of the common law. Also, though *Hoffmeister* has not been expressly overturned, in the 2004 case *Danzinger v. Luse*, the Supreme Court of Ohio was asked to address whether shareholders had a common law right to access books and “records of a wholly owned subsidiary of the company in which they own stock.”<sup>230</sup> The Ohio statute was silent with respect to access to the records of wholly-owned subsidiaries.<sup>231</sup> As such, there was no statutory right available, yet the court held there was a common law right.<sup>232</sup>

Later cases in which the courts concluded the statute would be meaningless if the common law was found to coexist articulated this point more completely. Nearly forty years after *Hoffmeister*, for instance, the Appellate Court of Illinois used this rationale to support its holding in *Neiman v. Templeton, Kenly & Co.*<sup>233</sup> In that case, the court was asked to address whether a shareholder who did not meet the five percent ownership requirement of the statute could still assert a common law right to inspection.<sup>234</sup> In concluding the enactment of the statute foreclosed any possibility of asserting a common law right of inspection, the court relied partially on standard tenets of statutory construction, including the tenet that statutes should be read in a way such that no one part negates another.<sup>235</sup> If the Savings Clause were read as allowing the common law rights to exist simultaneously with the statute, the court reasoned such a reading would be tantamount to the legislature “having solemnly prescribed certain requirements, [and] in the same section repealed them.”<sup>236</sup> Later courts have adopted similar reasoning.<sup>237</sup>

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229. See *supra* Part III.A.2.

230. *Danzinger v. Luse*, 815 N.E.2d 658, 659 (Ohio 2004).

231. *Id.* at 660 (citing OHIO REV. CODE ANN. § 1701.37(c)).

232. *Id.* at 661.

233. *Neiman v. Templeton, Kenly & Co.*, 13 N.E.2d 290 (Ill. App. Ct. 1938).

234. *Id.* at 291.

235. See *id.* at 292.

236. *Id.*

237. See, e.g., *Daurelle v. Traders Fed. Sav. & Loan Ass’n*, 104 S.E.2d 320, 330 (W. Va. 1958) (“[T]he provisions of the present statute, clearly indicate that in enacting

The second rationale regarding the comprehensiveness of the statutory scheme was articulated in 1983 by the United States District Court for the District of Maryland. In *Caspary v. Louisiana Land & Exploration Co.*, a shareholder requested access to books and records of a corporation in which he held only 1000 shares.<sup>238</sup> The statute at the time was similar to the 1971 version of the MBCA in that it included the requirement that a requesting shareholder must own at least five percent of the stock to gain access to the stockholder list.<sup>239</sup> It was undisputed the shareholder did not meet the five percent ownership prerequisite; therefore, he asserted a common law theory for inspection rights, arguing that the statute was merely a supplement to the common law right of inspection.<sup>240</sup>

The court rejected this assertion, reasoning that a statute which deals with an entire subject matter is generally thought to abrogate the common law with respect to that subject matter.<sup>241</sup> The court pointed out the statutory scheme adopted by Maryland's legislature was comprehensive in its treatment of shareholders' inspection rights.<sup>242</sup> Under the statute, all shareholders were provided access to certain documents, but the shareholder list was only provided to shareholders who owned the five percent threshold amount—in other words, the five percent shareholders had more extensive inspection rights.<sup>243</sup> The court noted: "This comprehensive statutory scheme was intended to strike a delicate balance between a shareholder's right to inspect his company's records and management's need to conduct day to day business without undue interference."<sup>244</sup> The legislative intent was to preclude abuse of inspection

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the present statute the Legislature intended to deprive the stockholder of his common-law right to inspect the books and records of the corporation and to give him instead only such rights of that nature as are expressly mentioned in the statute. To give the statute any other meaning or effect would emasculate the statute and defeat the purpose of the Legislature in enacting it. If the stockholder after the enactment of the present statute still retains and may exercise his common-law right of inspection there is no need for the present statute, there was no valid reason for its enactment, and it should be regarded as inoperative and ineffective legislation.").

238. *Caspary v. La. Land & Exploration Co.*, 560 F. Supp. 855, 856 (D. Md.), *aff'd*, 707 F.2d 785 (4th Cir. 1983).

239. *See id.* at 857.

240. *Id.*

241. *Id.*

242. *See id.*

243. *Id.*

244. *Id.*

rights by a single shareholder when his small share holdings were insignificant in relation to the size of the company.<sup>245</sup> If the court allowed the common law to provide inspection rights in such circumstances, it would “run the risk of tipping the balance one way or the other.”<sup>246</sup>

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the lower court’s holding that the Maryland statute abrogated the common law with respect to shareholder inspection rights.<sup>247</sup> Agreeing with the district court, the court of appeals stated it would be difficult to imagine why the common law should be kept alive when the statute “did everything for the shareholder that the common law did and more.”<sup>248</sup> In fact, this “was a classic case of [the statute] ‘deal[ing] with an entire subject matter’” of shareholder inspection rights.<sup>249</sup> In response to the argument that the statute actually expanded, rather than restrained, the common law remedy, the court pointed out that, while inspection statutes initially enlarged the rights presented under the common law, the later trend was in favor of limitations restricting the rights.<sup>250</sup> Additionally, the court noted reliance on this “expansion” concept was misplaced because it could be viewed as *either* an expansion *or* a restriction, depending on the viewpoint adopted.<sup>251</sup> In other words, while it may look like an expansion from the shareholder’s perspective—enhancing a shareholder’s right to access books and records—it is a restriction when viewed from the corporation’s perspective—restricting a corporation’s right to reject shareholder requests for access.<sup>252</sup> According to the court, to say the common law survives the statute because it is an “expansion” of rights was potentially just a “play on words.”<sup>253</sup>

It became clear on appeal, however, that one significant difference

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245. *Id.*

246. *Id.*

247. Caspary v. La. Land & Exploration Co., 707 F.2d 785, 793 (4th Cir. 1983).

248. *Id.* at 789 n.8.

249. *Id.* at 789 n.8 (quoting Lutz v. State, 172 A. 354 (Md. 1934)).

250. *Id.* at 790–91. In support of this position, the court cited the historical trend away from disfavoring legislative action, stating, “Three-quarters of a century ago, the veneration for the common law and the dislike for statutory intrusion upon it were greater than they are today in a society far more accustomed to legislative governance.” *Id.* at 793.

251. *Id.* at 790–91 (noting the 1868 version of the statute expanded rights, whereas the 1908 version restricted them).

252. *See id.*

253. *See id.* at 791 n.11.

existed between the Maryland statute and the MBCA. As the court of appeals pointed out, the Maryland statute did not contain the Savings Clause language of the MBCA, which provides that nothing in the statute would impair the power of a court to compel the production of documents outside of the statutory inspection rights, regardless of ownership percentage.<sup>254</sup> As such, the Maryland statute also did not include the previously described official comment in the MBCA, which explains the statute was not meant to be a substitute for any common law right of inspection, if any were found to exist by a court.<sup>255</sup> It is unclear whether the opinion of the court of appeals would have been different had the statutory language included the Savings Clause.

There is precedent, however, suggesting the rationale set forth by the district court and court of appeals in *Caspary* would still be applicable even in states where the Savings Clause language of the MBCA has been adopted. For instance, in *Neiman*, the Savings Clause language was included in the statute, but the court still held the statute abrogated the common law.<sup>256</sup> More recently, in 2003, the United States District Court for the Eastern District of Pennsylvania confronted the same issue in *Perilstein v. United Glass Co.*<sup>257</sup> The case involved the statutes of three states—Georgia, Kentucky, and Pennsylvania—and required the court to determine whether a common law inspection right survived the codification of such rights in any of those states.<sup>258</sup> At the time, the statutes of Georgia and Kentucky included the MBCA language allowing a court to compel production of corporate books and records outside of the inspection statute—a version of the Savings Clause.<sup>259</sup> The issue in the case was whether the petitioning shareholder could be granted inspection rights without first making a written demand on the corporation stating his purpose, as required by the statute.<sup>260</sup> The court held that even if the common law of these states at one time would have allowed the petitioner to get access without written demand, the statutory scheme of each state

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254. *Id.* at 789 & n.7.

255. *See id.*

256. *Neiman v. Templeton, Kenly & Co.*, 13 N.E.2d 290, 292 (Ill. App. Ct. 1938).

257. *Perilstein v. United Glass Corp.*, 213 F.R.D. 252 (E.D. Penn. 2003).

258. *Id.* at 254–56.

259. *Id.* at 256 (citing GA. CODE ANN. §§ 14-2-1602(d)(2) and -1604(b) (West 2003 & Supp. 2010); KY. REV. STAT. ANN. §§ 271B.16-020(3)(b), -040(2) (LexisNexis 2003 & Supp. 2010)).

260. *See id.* at 255.

“clearly abrogate[d] any such hypothesized common law right.”<sup>261</sup> Despite Savings Clause language in each statute, the court found it would be “inconceivable that the Georgia, Kentucky, or Pennsylvania Supreme Court would subvert the well-ordered statutory schemes” of those states by recognizing the continued existence of some common law right.<sup>262</sup>

In 2011, the Court of Appeals of Georgia affirmed a decision of the Fulton County Superior Court’s Business Division, holding the state inspection statute abrogated the common law.<sup>263</sup> To support its holding, the court relied on a combination of the two arguments discussed above. In *Mannato v. SunTrust Banks, Inc.*, the petitioner, a shareholder who owned a de minimis number of shares in SunTrust, brought suit against the corporation to gain access to certain books and records.<sup>264</sup> Though the Georgia inspection statute is largely modeled on the MBCA, it includes additional language, which expressly allows a corporation to restrict access in its articles or bylaws to shareholders who own more than two percent of the corporation’s stock.<sup>265</sup> The bank’s bylaws did just that.<sup>266</sup> Since the shareholder in question did not satisfy the two percent ownership requirement, he sought access to the books and records under his common law right.<sup>267</sup> The court of appeals upheld the lower court’s granting of SunTrust’s Motion to Dismiss, holding the plaintiff–shareholder could not subvert the inspection statute requirements by asserting a common law right.<sup>268</sup> In seeking to effectuate the intent of the legislature, the court looked at the legislative history of the enactment of the inspection statute as evidence of an intent to abrogate the common law.<sup>269</sup> Additionally, the

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261. *Id.* at 256.

262. *Id.*

263. *Mannato v. SunTrust Banks, Inc.*, No. A10A2291, 2011 WL 1012441, at \*3 (Ga. Ct. App. Mar. 23, 2011).

264. *Id.* at \*1.

265. *Id.*

The right of inspection granted by this Code section may not be abolished or limited by a corporation’s articles of incorporation or bylaws. However, the right to inspection enumerated in . . . this Code section may be limited by a corporation’s articles of incorporation or bylaws for shareholders owning 2 percent or less of the shares outstanding.

GA. CODE ANN. § 14-2-1602(e) (West 2003 & Supp. 2010).

266. *Mannato*, 2011 WL 1012441, at \*1.

267. *Id.* at \*2.

268. *Id.*

269. *Id.*

court found allowing the plaintiff to invoke his common law rights would render portions of the Georgia inspection statute “meaningless”—a result precluded by the rules of statutory construction.<sup>270</sup>

#### IV. ARGUMENTS IN SUPPORT OF STATUTORY ABROGATION OF COMMON LAW INSPECTION RIGHTS

Though the majority of jurisdictions addressing this issue have held statutory inspection rights do not abrogate common law inspection rights, the argument in Part IV posits the minority position: abrogation is more appropriate, at least with respect to certain types of cases.

Cases that support the majority position can be grouped into one of two different factual categories. The first are the cases that evolved out of facts specifically addressed in the relevant statute. For instance, the petitioning shareholder is requesting access to books and records but only owns one percent of the outstanding stock of the corporation, and the statute requires the shareholder to own five percent of the outstanding stock before the statutory rights and remedies will be triggered.<sup>271</sup> The question is whether, even without satisfying the statutory prerequisites, this shareholder might still get access to the books and records under a common law theory. Other typical examples of this type of factual scenario are (i) where the shareholder must satisfy a holdings requirement—such as six months prior to demand—to get access but failed to do so;<sup>272</sup> (ii) where the statute requires the shareholder to be one “of record” but the requesting shareholder is merely a beneficial shareholder under, for instance, a trust agreement;<sup>273</sup> and (iii) where the shareholder is requesting access to books and records that are either expressly off limits under the statute<sup>274</sup> or are beyond the scope of those expressly provided for in the statute.<sup>275</sup> These types of cases are referred to as “Statutory Treatment Cases.”

The second type of cases involve circumstances where the statute is silent on the issue. For instance, assume the relevant statute provides shareholders a mechanism to access books and records of a corporation in

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270. *Id.*

271. *See, e.g.*, N.C. GEN. STAT. § 55-16-02 (2009).

272. *See, e.g.*, WIS. STAT. ANN. § 180.1602 (West 2002).

273. *See, e.g.*, *Brentmore Estates v. Hotel Barbizon, Inc.*, 33 N.Y.S.2d 331 (N.Y. App. Div. 1942).

274. *See, e.g.*, *Parsons v. Jefferson-Pilot Corp.*, 426 S.E.2d 685 (N.C. 1993).

275. *See, e.g.*, *Holdsworth v. Goodall-Sanford, Inc.*, 55 A.2d 130 (Me. 1947).

which it owns an interest, but the statute is silent as to whether the inspection rights extend to subsidiary corporations. The petitioning shareholder is attempting to get access to books and records of a wholly-owned subsidiary of the corporation in which he owns shares. Though he satisfies all of the statutory prerequisites necessary to gain access to the books and records of the corporation in which he holds an interest, the shareholder asks the court to grant him access under a common law theory because the statute does not address subsidiaries specifically. Other examples of this type of case involve application of the statute to certain types of business entities—most notably nonstock corporations, banking institutions, or foreign corporations—and the petitioner is a member or shareholder of such an entity.<sup>276</sup> These cases will be referred to as “Silent Statute Cases.”

For Statutory Treatment Cases, a non-abrogation approach is problematic for a number of reasons. First, a non-abrogation approach flies in the face of the legislative intent of the state legislatures that enacted comprehensive statutory inspection schemes. Moreover, non-abrogation in the context of Statutory Treatment Cases leads to confusion that legislatures likely were intending to get rid of and which could be eliminated by an abrogation theory that leaves just a single set of rights and remedies for requesting access to books and records. Finally, allowing the common law right to coexist with the statutory scheme presents public policy concerns about achieving the proper balance between managerial authority and managerial accountability. These concerns will all be addressed in more detail in this and the following parts.

These concerns are not as distinct in Silent Statute Cases. As previously discussed, in Silent Statute Cases, the legislature has not necessarily contemplated the particular factual scenarios at issue in these cases. Rather, leaving the common law intact in Silent Statute Cases provides additional rights and remedies for issues not addressed in any statute. Whether such additional rights and remedies should ultimately be codified is a different issue, addressed briefly in Part V.<sup>277</sup>

Part IV explains why a non-abrogation approach, while it may have been logical when inspection statutes were first enacted, is no longer desirable, at least with respect to Statutory Treatment Cases. First, the arguments relied on by the courts supporting non-abrogation will be

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276. See, e.g., *State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n*, 273 N.W. 603 (Minn. 1937).

277. A complete discussion of this issue is beyond the scope of this Article.

addressed. Then, the way in which these arguments are inconsistent with modern corporate law will be explained. This Part will show the legislative intent behind many modern inspection statutes likely was to abrogate the common law—not to allow the common law to coexist with the statutory inspection scheme. Even if non-abrogation were the legislative intent behind the inspection statutes, however, this Part concludes with a discussion of the various policy reasons that support and, in the author's opinion, demand the adoption of an abrogation approach on a going-forward basis for Statutory Treatment Cases.

*A. Arguments Presented by Jurisdictions Taking the Majority Approach No Longer Hold Up*

As described above,<sup>278</sup> cases asserting the majority position draw on relatively few rationales to support their non-abrogation stance. In some cases, the non-abrogation position is asserted blindly without any rationale whatsoever.<sup>279</sup> For obvious reasons, these cases lack persuasive value and will not be addressed here. However, there are three additional arguments proffered by the majority that merit discussion: (i) statutes generally expand, not restrict, the common law;<sup>280</sup> (ii) the intent to override the common law must be clear on the face of the statute;<sup>281</sup> and (iii) the legislative intent of non-abrogation is reflected in the Savings Clause of the MBCA and the official commentary related thereto.<sup>282</sup> Each of these arguments will be addressed in turn.

*1. Statutes Generally Expand, Not Restrict, the Common Law*

As previously discussed, courts asserting the majority position often rely on the notion that inspection statutes are meant to expand shareholder rights, not restrict the rights existing under the common law and, as such, should not abrogate those common law rights. Some of the cases that have articulated this rationale are not particularly well-reasoned. For instance, in *Parsons*, the court viewed the statutory language that required shareholders to provide five days notice of intent to inspect as an expansion of rights.<sup>283</sup> This view of the notice requirement seems like a particularly tortuous reading of what might more reasonably be interpreted

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278. See *supra* Part III.A.

279. See *supra* Part III.A.1.

280. See *supra* Part III.A.2.

281. See *supra* Part III.A.3.

282. See *supra* Part III.A.4.

283. *Parsons v. Jefferson-Pilot Corp.*, 426 S.E.2d 685, 688 (N.C. 1993).



as a restriction on access—albeit a mild one—rather than an expansion. Even less well-reasoned are those cases, like *Schwartzman*, that provide no explanation whatsoever for the conclusion that the statute is an expansion of the common law.<sup>284</sup>

Not all opinions adhering to this expansion rationale are so poorly reasoned. While courts supporting the minority position have tried to refute this expansion rationale, they have not always done so with much conviction. For instance, in *Caspary*, the United States Court of Appeals for the Fourth Circuit suggested reliance on this “expansion” concept was inappropriate because it was merely a trick of semantics.<sup>285</sup> While the original statutes could be seen as an expansion of a right—the shareholders’ ability to access books and records—they could also be seen as a restriction of rights—the corporations’ ability to reject shareholder requests for access.<sup>286</sup> As such, this “expansion” argument carries less weight. This rationale, however, lacked persuasive force because the court did not articulate any support for the claim that the statute was intended to be a restriction of the corporation’s rights.

More persuasively, the court in *Caspary* rightly pointed out that while expansion may have been the initial goal of the inspection statutes, the more recent trend is to restrict shareholder rights.<sup>287</sup> Though the court did not explore this idea in depth, it is this observation that lends the most credible support to the argument that the expansion approach is no longer viable.

If one considers the expansion rationale in light of modern inspection statutes, it becomes apparent the argument for an expansive approach is now largely moot. Where courts have asserted the expansive approach, the most well-reasoned opinions point to the fact that the relevant inspection requirement did not require the shareholder to establish a proper purpose, whereas such a requirement had been imposed under the common law.<sup>288</sup> As such, the argument goes, the purpose of the statute was to allow a certain subset of shareholders—five percent, for example—to get access to

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284. See *Schwartzman v. Schwartzman Packing Co.*, 659 P.2d 888, 891 (N.M. 1983).

285. See *Caspary v. La. Land & Exploration Co.*, 707 F.2d 785, 791 n.11 (4th Cir. 1983).

286. See *id.*

287. See *id.* at 790–91.

288. See, e.g., *Rockwell v. SCM Corp.*, 496 F. Supp. 1123, 1126 (S.D.N.Y. 1980).

books and records without having to assert a proper purpose, while allowing shareholders who did not meet the same statutory prerequisite to still obtain access under the common law, so long as they could show a proper purpose.<sup>289</sup>

This argument was true with respect to the initial statutory codifications of shareholder inspection rights; however, this argument cannot be sustained when viewed in the light of modern inspection statutes. The current MBCA no longer provides for different inspection rights depending on the characteristics of the requesting shareholder.<sup>290</sup> As previously discussed, the MBCA now treats all shareholders equally in terms of access to books and records.<sup>291</sup> Moreover, the current MBCA incorporates the concept of “proper purpose.”<sup>292</sup> While certain nonsensitive materials are available to shareholders without making a showing of proper purpose,<sup>293</sup> any of the more controversial documents, like the shareholder list and accounting records, can only be accessed if the shareholder establishes a proper purpose.<sup>294</sup> Today, even in states that retain the five percent ownership requirement, the six-month holding requirement, or some variation thereof, the codification typically incorporates the concept of proper purpose.<sup>295</sup>

Take, for example, the 1980 case of *Rockwell v. SCM Corp.*, wherein the New York inspection statute in place at the time allowed a category of shareholders—those who owned a certain percentage of the company’s stock—to access books and records without showing a proper purpose.<sup>296</sup>

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289. *See id.*

290. *Compare* MODEL BUS. CORP. ACT § 16.02(a)–(b) (2008), *with* MODEL BUS. CORP. ACT § 52 (1971).

291. *See supra* Part II.C.2.b.

292. MODEL BUS. CORP. ACT § 16.02(c)(1)–(3) (2008).

293. *See id.* § 16.02(a).

294. *See id.* § 16.02(b)(1)–(3), (c)(1)–(3).

295. *See id.* § 16.02 annot. at 16-24 to 16-25. According to the commentary, Hawaii, Maryland, Missouri, Nevada, and Texas are the only states that do not incorporate the proper purpose requirement into the books and records statute. *Id.* § 16.02 annot. at 16-25; HAW. REV. STAT. § 414-470 (2004); MD. CODE ANN., CORPS & ASS’NS § 2-513 (LexisNexis 2007); MO. ANN. STAT. § 351.215 (West 2001 & Supp. 2011); NEV. REV. STAT. § 78.105 (2009); TEX. BUS. ORGS. CODE ANN. § 21.218 (West 2010). Maryland, Nevada, and Texas are the only states that retain the five percent holdings requirement. *See* MODEL BUS. CORP. ACT § 16.02 annot. at 16-24 to 16-25 (2008); MD. CODE ANN., CORPS & ASS’NS § 2-513; NEV. REV. STAT. ANN. § 78.105; TEX. BUS. ORGS. CODE ANN. § 21.218.

296. *Rockwell v. SCM Corp.*, 496 F. Supp. 1123, 1125 (S.D.N.Y. 1980)

The court relied on this fact to suggest the common law should still have life, providing a remedy for those shareholders who could not meet the threshold requirement but could establish a proper purpose.<sup>297</sup> As of 2010, however, the New York statute requires every shareholder to establish his purpose is “reasonably related” to his “interest as a shareholder” in order to gain access.<sup>298</sup> Therefore, the court’s explanation in *Rockwell*—that the statute was meant to provide an absolute right of inspection for a certain class of shareholders—is no longer supported by the modern statute.<sup>299</sup> Based on this reasoning, it is not clear the holding in *Rockwell*, or the holdings in similar cases in other jurisdictions where the statute has been modernized over time, should hold up.<sup>300</sup>

## 2. Intent to Override Common Law Must Be Clear on Face of Statute

Jurisdictions will sometimes support their non-abrogation position by pointing out that while the common law can be abrogated by statute, the intent to so abrogate must be clear—in other words, by use of express language in the statute or by “necessary implication.”<sup>301</sup> Jurisdictions supporting the majority position do not believe the intent to abrogate the common law is clear from the statute, but a more reasonable argument is that such intent is clear. While the current MBCA and its progeny do not include express language to suggest abrogation of the common law, it is reasonable, and arguably necessary, to conclude the common law has been abrogated through “necessary implication.”

This position is supported by caselaw. In *Caspary*, the United States

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(quoting N.Y. BUS. CORP. LAW § 624).

297. See *id.* at 1126 (quoting *Crane Co. v. Anaconda Co.*, 346 N.E.2d 507, 511 (N.Y. 1976)) (noting previous New York decisional law “made it abundantly clear that the statutory right of inspection, originally adopted in 1848, was intended to expand the common law right of inspection ‘by omitting the “proper purpose” requirement”).

298. N.Y. BUS. CORP. LAW § 624(b) (McKinney 2003 & Supp. 2011).

299. Compare *id.*, with *Rockwell*, 496 F. Supp. at 1126.

300. Compare *Soreno Hotel Co. v. State ex rel. Otis Elevator Co.*, 144 So. 339, 340 (Fla. 1932) (involving the Florida inspection statute from that time, which allowed shareholders who owned at least one-tenth of the outstanding shares of the corporation to inspect books and records without showing proper purpose), with FLA. STAT. ANN. § 607.1602 (West 2007 & Supp. 2011) (following the MBCA by granting access to a very limited set of documents, such as the articles and bylaws, without showing proper purpose, but requiring a showing of proper purpose for anything else, including the shareholder list).

301. See, e.g., *State ex rel. Brown v. III Invs., Inc.*, 80 S.W.3d 855, 859 (Mo. Ct. App. 2002).

District Court for the District of Maryland reasoned a statute dealing with an entire subject matter must abrogate the common law with respect to that subject matter.<sup>302</sup> The United States Court of Appeals for the Fourth Circuit affirmed this position, finding that if a statute “did everything that the common law did and more,” it was a classic case of a statute “[d]ealing with an entire subject matter.”<sup>303</sup>

Modern inspection statutes are, for the most part, comprehensive in their treatment of shareholder inspection rights. As previously noted, the majority of modern inspection statutes have now incorporated the common law proper purpose requirement.<sup>304</sup> Modern statutes also typically address the types of books and records that can be inspected, sometimes providing a bifurcated approach like the MBCA, which gives shareholders easier access to less sensitive materials.<sup>305</sup> In addition, these statutes specify the procedures a shareholder is required to follow before inspection access will be granted, such as providing written notice of intent to inspect to the corporation a certain number of days before the desired inspection.<sup>306</sup> Some states require other prerequisites shareholders must meet before they gain inspection rights, such as owning a threshold amount of stock in the corporation.<sup>307</sup> Generally speaking, the current MBCA and its progeny have left no area related to shareholder inspection rights unaddressed. With such a comprehensive statutory scheme in place, the most reasonable position seems to be one of abrogation.

Other examples of this principle of statutory abrogation of the common law—meaning where the statute has spoken comprehensively on the issue—exist in the corporate arena. For instance, in *In re Morse*, the Court of Appeals of New York addressed the issue of whether a voting trust agreement, which would have been viable at common law, was effective in light of the fact it did not meet the requirements of the relevant statute regulating voting trusts.<sup>308</sup> The plaintiffs argued the common law,

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302. Caspary v. La. Land & Exploration Co., 560 F. Supp. 855, 857 (D. Md.), *aff'd*, 707 F.2d 785 (4th Cir. 1983).

303. Caspary v. La. Land & Exploration Co., 707 F.2d 785, 789 n.8 (4th Cir. 1983) (quoting Lutz v. State, 172 A. 354 (Md. 1934)).

304. See *supra* note 295 and accompanying text.

305. This is the approach in twenty-seven jurisdictions. See *supra* note 137 and accompanying text.

306. See *supra* Part II.C.2.b and accompanying text.

307. This encompasses thirteen jurisdictions. See *supra* note 132 and accompanying text.

308. See *In re Morse*, 160 N.E. 374, 376 (N.Y. 1928).

rather than the voting trust statute, should still apply, which would have likely invalidated the voting trust.<sup>309</sup> The court held the statute applied and abrogated the common law.<sup>310</sup> In so holding, the court pointed out “New York voting trusts do not stand or fall on common-law theories” but are “recognized and regulated by statute,” and “[w]hether they would be valid at common law in the absence of a statute defining and regulating them is immaterial.”<sup>311</sup> The court noted “[w]hen the field was entered by the Legislature it was fully occupied and no place was left for other voting trusts.”<sup>312</sup>

As with the voting trust agreement in *Morse*, the field of shareholder inspection rights has been “fully occupied” by the all-encompassing inspection statutes.

### 3. *Legislative Intent of Non-Abrogation as Reflected in Savings Clause*

The argument that the MBCA’s Savings Clause reflects a legislative intent of non-abrogation is probably the most persuasive argument in support of the majority position. The argument is really two-fold—partly based on the actual language of the statute and partly based on the official comment to the statute.

Addressing the Savings Clause first, the MBCA states the inspection statute does not affect “the power of a court, independently of this Act, to compel the production of corporate records for examination.”<sup>313</sup> Some courts have held this language is an indication of the legislature’s intent to allow the common law inspection rights to continue to exist.<sup>314</sup> Other

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309. *See id.* at 377 (explaining the plaintiff would be successful if the trust agreement was followed under common law).

310. *Id.* at 376.

311. *Id.*

312. *Id.*; *see, e.g.*, *Nicholas v. Baldwin Piano Co.*, 123 N.E. 226, 226–27 (Ind. Ct. App. 1919) (finding statutory abrogation of common law rule giving innkeepers a lien upon goods brought into an inn by guests); *Boston Ice Co. v. Boston & M.R.R.*, 86 A. 356, 358–59 (N.H. 1913) (finding statutory abrogation of railroad insurer’s common law right of subrogation in the event of negligently caused fire); *Burnett v. Myers*, 173 N.W. 730, 731 (S.D. 1919) (holding a statute that prescribed a remedy for damages caused by another’s trespassing animal abrogated the common law remedy).

313. MODEL BUS. CORP. ACT § 16.02(e)(2) (2008).

314. *See, e.g.*, *Parsons v. Jefferson-Pilot Corp.*, 426 S.E.2d 685, 688 (N.C. 1993) (“[T]he General Assembly did not intend . . . to abrogate shareholder’s rights of inspection already existing at common law; instead, it intended that [the Savings Clause] preserve all existing common law rights of inspection of corporate records.”); *Yeoman v. Pub. Safety Ctr., Inc.*, 250 P.3d 411, 418 (Or. Ct. App. 2011) (noting right to

courts, however, have held the language of the Savings Clause does not mean the common law should continue to exist and have different interpretations for the meaning of the provision.<sup>315</sup>

The fact that there is some disagreement over what the language of the statute means suggests this is an ambiguous provision. When analyzing the meaning of an ambiguous statute, the statutory canons of construction are often invoked. Particularly instructive here for would-be plaintiff-shareholders is the canon mandating a provision of a statute must not be interpreted in such a way as to negate a provision of the statute.<sup>316</sup> The argument can be made that if the Savings Clause was not, in fact, intended to “save” the common law, then the Savings Clause would have no meaning whatsoever and would be meaningless surplusage in the statute.<sup>317</sup> Such an argument, however, fails to take into account other possible meanings of the Savings Clause that would not render the language superfluous. For instance, the language could be referencing the ability of the court to compel production when production is required pursuant to the federal securities regulations<sup>318</sup> or other state statutes outside of the corporate code.<sup>319</sup> Additionally, the language of the Savings Clause never

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inspect corporation records is a matter of discovery rather than a product of the Oregon version of the Business Corporation Act).

315. See, e.g., *Neiman v. Templeton, Kenly & Co., Ltd.*, 13 N.E.2d 290, 292 (Ill. App. Ct. 1938) (noting the coexistence of common law under the Savings Clause negates the law); *Daurelle v. Traders Fed. Sav. & Loan Ass’n*, 104 S.E.2d 320, 330 (W. Va. 1958) (describing how the statute provisions could only be read as to deprive the stockholders of the common law rights).

316. See 73 AM. JUR. 2D *Statutes* § 165 (2010); see also *Pagett v. Westport Precision, Inc.*, 845 A.2d 455, 458–59 (Conn. App. Ct. 2004) (“‘No word or phrase in a statute is to be rendered mere surplusage. . . .’” (alteration in original) (quoting *Hibner v. Bruening*, 828 A.2d 150 (Conn. App. Ct. 2003))).

317. See *Pagett*, 845 A.2d at 458–59.

318. For instance, pursuant to the Securities Exchange Act of 1934, broker-dealers are required to create and preserve certain records and produce them upon request to the Securities and Exchange Commission. See 17 C.F.R. §§ 240.17a-3 to -5 (2010). Similarly, rules govern the information to be disclosed to shareholders in proxy statements. *Id.* § 240.14a-3.

319. See, e.g., DEL. CODE ANN. tit. 3, § 1226 (2001) (permitting the Department of Agriculture to enter private premises with written approval of the occupier in order to inspect books and records relating to shipment, sale, or use of pesticides, and if denied, allowing the Department to apply to a court of competent jurisdiction for a search warrant); *id.* tit. 5, § 2417 (Supp. 2010) (providing the State Bank Commissioner with authority to access books and records of licensed lenders); *id.* tit. 6, § 2432A (Supp. 2010) (allowing the Attorney General to access books and records of an entity licensed to provide debt management services); *id.* tit. 26, § 201

even mentions the common law. Had the drafters intended what the proponents of this argument suggest, they could have used clear, unambiguous language that expressly referenced the common law to fulfill that intent.<sup>320</sup>

This argument also ignores the reality that, if the language is in fact meant to maintain the existence of the common law, the remainder of the inspection statute *in its entirety* arguably becomes meaningless.<sup>321</sup> As previously indicated, the current MBCA and its relevant state counterparts provides a comprehensive statutory scheme for inspection rights. This comprehensive scheme was a product of the legislature's balancing of interests—weighing the shareholders' interests of protecting their investments and policing corporate mismanagement against the interest of the corporate directors and officers to be able to fulfill their statutory mandate of managing the affairs of the corporation free of shareholder interference.<sup>322</sup> Construing the Savings Clause so that it permits the

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(2009) (giving the Public Service Commission the right to review the books and records of utilities); *id.* tit. 30, § 364 (2009) (permitting the Secretary of Finance to examine any books and records “bearing upon matters required to be included in a return”). Though Delaware is used here, a simple search in any state would indicate a number of specialized statutes outside the corporate code permitting inspection of books and records.

320. In *Caspary*, the United States Court of Appeals for the Fourth Circuit suggested the Maryland statute could have used the following language had its intention been non-abrogation: “Besides introducing a 5% requirement for exercise of the existing unlimited right of inspection, we also intend to allow the common law right of inspection to any stockholder who demonstrates proper purpose.” *Caspary v. La. Land & Exploration Co.*, 707 F.2d 785, 792 n.15 (4th Cir. 1983). As precedent for this notion that the legislature might actually reference the common law in the statute if non-abrogation had been its intent, the court pointed to a provision of the Maryland criminal code, which stated: “Every person convicted of the common-law crime of indecent exposure, is guilty of a misdemeanor and shall be punished by imprisonment for not more than three years or a fine of not more than \$1,000, or both.” *Id.*

321. This argument was unsuccessful when made by the defendant corporation in *Rockwell*. *Rockwell v. SCM Corp.*, 496 F. Supp. 1123 (S.D.N.Y. 1980). Specifically, the defendant argued if the common law right were still available to shareholders, it would render the statute “absurd.” *Id.* at 1126. Though the United States District Court for the Southern District of New York rejected the argument, the court relied on the fact that the statute, “by omitting the ‘proper purpose’” requirement for a certain subset of shareholders, was meant to be an expansion of the common law, not a restriction. *Id.* (quoting *Cane Co. v. Anaconda Co.*, 346 N.E.2d 507, 511 (N.Y. 1976)). As already discussed, this argument no longer carries any weight in light of the modern inspection statutes in New York and elsewhere. See *supra* Part IV.A.1.

322. See *supra* Part II.C.2.

continued existence of the common law inspection rights permits courts to perform their own balancing of interests and defeats the purpose of the rest of the statute altogether. In other words, each restriction on access enacted by the legislature can be bypassed by simply reverting to the common law. As the Appellate Court of Illinois found in *Neiman*, to construe the Savings Clause as allowing the common law to coexist is to conclude the legislature made a body of rules and then repealed them in the same statutory section.<sup>323</sup>

A second canon of construction relevant to this debate is the notion that statutes “remedial” in nature should be construed liberally in favor of those whom they are intended to benefit.<sup>324</sup> This canon of construction would seem useful for interpreting the earliest statutory codifications of inspection rights, which were certainly characterized by a “remedial” quality. As previously discussed, many of the initial statutes of the late 1800s provided for an absolute right of inspection for shareholders, eliminating requirements such as the establishment of a proper purpose.<sup>325</sup> Even the initial version of the MBCA, which was promulgated in the middle of the twentieth century, seemed “remedial” for shareholder interests.<sup>326</sup> For example, the annotation to MBCA section 16.02 expressly states the earliest version of the MBCA was intended to result in “greater freedom of access to the books by shareholders with large or long-term commitments to the corporation.”<sup>327</sup> The initial version provided an absolute right of inspection for a certain class of shareholders—those who owned five percent of the stock or owned stock for more than six months.<sup>328</sup> Moreover, the initial formulation of the MBCA provided a penalty of potential personal liability for officers and agents of the corporation of an amount of ten percent of the value of the shares owned by the shareholder whose request was denied.<sup>329</sup>

This “greater freedom of access,” however, was taken away by the modern MBCA, which removed the separate provisions for five percent or

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323. *Neiman v. Templeton, Kenly & Co., Ltd.*, 13 N.E.2d 290, 292 (Ill. App. Ct. 1938).

324. *See Pagett v. Westport Precision, Inc.*, 845 A.2d 455, 459 (Conn. App. Ct. 2004) (“In construing this language, we consider the statute’s remedial purpose and give it a liberal construction.”).

325. *See supra* notes 79–81 and accompanying text.

326. *See* MODEL BUS. CORP. ACT § 16.02 annot. at 16-19 (2008).

327. *Id.*

328. *Id.* § 16.02 annot. at 16-18 to 16-19.

329. *Id.* § 16.02 annot. at 16-19.



six-month shareholders.<sup>330</sup> The modern formulation also removed the onerous penalty of personal liability for officers and agents.<sup>331</sup> In comparison with its statutory precursors, the current MBCA seems less remedial for individual shareholder inspection rights and more favorable to the interests of the remaining, nonrequesting shareholders and corporations who are able to invoke more protections against inspection requests.<sup>332</sup> It could be argued the current MBCA provides a modest expansion of rights by allowing all shareholders an absolute right of inspection to a certain subset of documents, as provided in section 16.02(a).<sup>333</sup> However, the documents shareholders can access under this section are nonsensitive documents, like the articles or bylaws, which corporations rarely hesitate to provide anyway and are somewhat available in the public record. Thus, to say this is an “expansion” of the inspection right seems disingenuous.

In addition to the actual language of the statute, the official comment to section 16.02 of the MBCA supports the majority position that the legislature’s intent was non-abrogation of the common law.<sup>334</sup> The drafters stated the MBCA inspection statute represents “an independent right of inspection that is not a substitute for or in derogation of rights of inspection that may exist . . . as a ‘common law’ right of inspection, if any is found to exist by a court, to examine corporate records.”<sup>335</sup> Such language has been used as an expression of legislative intent to justify the majority position.<sup>336</sup> This argument, however, is flawed.

The language of the official comment, even in states where it was adopted, is not the law. Indeed, the *Parsons* court, which looked to this language in support of its non-abrogation provision, conceded that comments are not controlling law.<sup>337</sup> Though not controlling, comments

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330. *Id.* § 16.02 annot. at 16-20.

331. *Id.*

332. Precedent supports this notion that there has been a “trend away from an earlier tendency to expand the inspection rights of shareholders beyond their rights at common law in favor of limitations restricting the rights.” *Caspary v. La. Land & Exploration Co.*, 707 F.2d 785, 790 (4th Cir. 1983) (citing 5 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2215.1 (rev. vol. 1976)).

333. MODEL BUS. CORP. ACT § 16.02(a) (2008).

334. *Id.* § 16.02 cmt. 4.

335. *Id.*

336. *See, e.g., Parsons v. Jefferson-Pilot Corp.*, 426 S.E.2d 685, 689 (N.C. 1993).

337. *Id.*

can be indicative of legislative intent.<sup>338</sup> But it is not a foregone conclusion that the intent so expressed was for common law inspection rights to coexist alongside the statutory inspection scheme. Evidence of this is the fact that the comment's language does not expressly state whether the drafters believed any common law right of inspection existed in the first place.<sup>339</sup> Rather, the drafters are noncommittal on this point, referencing a common law right of inspection "if any is found to exist."<sup>340</sup>

Second, even if the drafters of the MBCA comment intended for the continued existence of the common law, this does not necessarily translate into the legislative intent of the adopting jurisdictions. For instance, Georgia adopted a modified version of the current MBCA's books and records statute and commentary.<sup>341</sup> The Georgia statute differs substantively from the MCBA only in that it gives corporations the option of restricting access to certain enumerated books and records to only those shareholders owning more than two percent of the corporation's stock.<sup>342</sup> Such election can be made in the bylaws of the corporation.<sup>343</sup>

Even though the Georgia statute and commentary thereto reflect traits of the MBCA, there is convincing legislative history that suggests the legislative intent was not to reinforce the existence of the common law, but rather to abrogate it.<sup>344</sup> For instance, statements made by then-Senator Roy Barnes expressed support for the restrictions in the inspection statute and "focused on the need to prevent harassment of corporations by shareholders who own relatively small interests."<sup>345</sup> Other senators

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338. See William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carney and Shepherd's "The Mystery of Delaware Law's Continued Success,"* 2009 U. ILL. L. REV. 95, 120–21 (2009).

339. MODEL BUS. CORP. ACT § 16.02 cmt. 4 (2008).

340. *Id.*

341. GA. CODE ANN. § 14-2-1602 (West 2003 & Supp. 2010). Notably, the Georgia statute includes the modern MBCA's Savings Clause. *Id.* § 14-2-1602(f). Additionally, the official comment to the Georgia statute uses language found in the MBCA comments, which states the statute is not a substitute for a common law right of inspection, to the extent one is found to exist by a court. *Id.* cmt.

342. *Id.* § 14-2-1602(e).

343. *Id.*

344. It has been noted a single legislator's statements do not hold precedential value as evidence of the entire legislature's intent. See *Tucson Gas & Elec. Co. v. Schantz*, 428 P.2d 686, 689–90 (Ariz. Ct. App. 1967). Even though such evidence might not dictate a particular outcome, it is still relevant to the debate.

345. K. Barfield, *Revised Georgia Business Corporation Code*, 5 GA. ST. U. L. REV. 285, 300 (1988) (citing Interview with Sen. Edward Hine, Jr., Senate District No.

supported this position, sharing the belief that the restrictions were necessary for Georgia to remain “a probusiness state.”<sup>346</sup> The legislators appear to have adopted the books and records language of the MBCA, including its comment, without considering whether the Savings Clause could be interpreted as continuing to give shareholders rights and remedies in addition to those provided by statute. Rather, according to the legislative history, statutory revisions were enacted to restrict shareholder access to corporate books and records and abrogate the common law.

The legislative history referenced above reflects Georgia’s intent to restrict access in certain circumstances and to abrogate the common law. Admittedly, Georgia’s legislative history relates to the adoption of the two percent ownership provision and, as such, would not necessarily relate to other states that do not have such a provision. However, this legislative history is indicative of a larger point: state legislatures may adopt the MBCA comments as a matter of routine, without giving them much thought. Though the intent appears to have been to restrict shareholder access to corporate books and records, the incongruity between this intent and the MBCA comment was not recognized.

Even the drafters of the MBCA do not appear to have fully considered the ramifications of the Savings Clause in the modern formulation of the inspection statute. The comment about preserving the common law appears to be a relic of the earlier formulations of the section. Originally, as has already been discussed, the MBCA provided for a dichotomy between the statutory right and the common law right because different penalties were associated with each.<sup>347</sup> Under earlier formulations of the MBCA, for instance, if a shareholder held five percent of the shares of the corporation, such shareholder had the ability to enforce a penalty of personal liability against the officers or agents who wrongfully refused the request. If a shareholder did not meet the five percent threshold, the shareholder could still assert his common law inspection rights, but the penalty of personal liability was not available to him.<sup>348</sup> In fact, the drafters of the MBCA indicated the “primary purpose” of the inspection legislation at the time was to “prescribe penalties which should make it unlikely that reasonable requests will be refused.”<sup>349</sup> In other words, the purpose of the

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52, in Rome, Georgia (Mar. 23, 1988)).

346. *Id.* (citing Interview with Sen. Edward Hine, Jr., Senate District No. 52, in Rome, Georgia (Mar. 23, 1988)).

347. *See supra* Part II.C.2.

348. *See* MODEL BUS. CORP. ACT § 52 (1971).

349. *Id.* § 52 cmt.

initial MBCA inspection statute was to allow a certain class of shareholders to have a special remedy—that of personal liability for officers and agents—while shareholders who did not meet that classification would be able to access books and records under the common law but without the special statutory remedy.<sup>350</sup>

Under the current MBCA, there is no longer a threat of personal liability for the officers or agents of the corporation.<sup>351</sup> There is also no longer a set of special remedies for any class of shareholder; all shareholders are collapsed into one category and all must show a proper purpose to gain access to the more sensitive corporate books and records.<sup>352</sup> All shareholders now have access to the same set of remedies.<sup>353</sup> As such, the drafters' original reasons for the need to maintain the shareholders' common law rights and remedies no longer seems to apply. The modern statutory scheme still provides certain remedies not available at common law. Specifically, under the MBCA, if the court orders the corporation to provide the shareholder access to its books and records, the shareholder can recover its costs of enforcement, including attorneys' fees.<sup>354</sup> These limited remedies do not provide reason enough to subvert the comprehensive statutory scheme and allow shareholders who do not meet the statutory requirements to gain access to books and records under a separate common law theory.

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350. *See id.*

351. The drafters recognized courts were reluctant to impose penalties on officers or agents for action taken on behalf of their principals, which was one reason for rejection of this remedy in the later versions of the MBCA. MODEL BUS. CORP. ACT § 16.02 annot. at 16-19 (1996).

352. MODEL BUS. CORP. ACT § 16.02(b)–(c) (2008).

353. The remedies typically do not include the ability to impose personal liability. According to the drafters of the MBCA, there are still thirteen jurisdictions that adhere to the earlier edition of the MBCA or a variant thereof, requiring either an ownership requirement based on percentage or a particular time period. *Id.* § 16.02 annot. at 16-23 to 16-24; *see supra* note 132 and accompanying text. Of these thirteen, only Alabama and New Mexico still retain the personal liability penalty of the earlier MBCA. ALA. CODE § 10-2B-16.02 (LexisNexis 2010); N.M. STAT. ANN. § 53-11-50 (West 2001). In fact, two of the states that still retain the threshold requirements—Louisiana and New Jersey—have not only gotten rid of the personal liability provision, but provide no remedy at all. LA. REV. STAT. ANN. § 12:103 (2010); N.J. STAT. ANN. § 14A:5-28 (West 2003). This provides even more support for the argument that there is no need to retain common law inspection rights, even if such a need existed at the time the initial versions of the MBCA were promulgated.

354. MODEL BUS. CORP. ACT § 16.04 (2008).

*B. Public Policy Reasons in Support of Abrogating Common Law  
Inspection Rights*

The reasons outlined above for why state inspection statutes should abrogate the common law are predominately based on the notion that a non-abrogation position disregards the legislative intent to abide by one comprehensive set of inspection rights and remedies. However, even if this underlying assumption is ultimately flawed—in other words, even if the legislative intent did *not* trump the common law but instead allowed it to coexist—this Part argues there are important policy considerations in favor of legislative reform that would effectuate the abrogation of common law inspection rights.

Specifically, many of the same policy concerns supporting the need for checks and balances on derivative litigation also support statutory abrogation of common law inspection rights. In order to provide background into this corollary topic, this Part will first provide an overview of some policies behind placing limitations on the availability of derivative litigation. Those same policy considerations will then be applied in the context of shareholder inspection rights.

1. *The Need for Checks and Balances on Derivative Litigation*

As explained, inspection rights play an important role in derivative litigation, and derivative litigation, in turn, plays an important role in protecting shareholders' interests.<sup>355</sup> Representative litigation not only provides a remedy to the corporation for losses it suffered at the hands of corrupt or incompetent managers, but it also purportedly deters directors and officers from engaging in wrongful behavior in the first place.<sup>356</sup> Protection of shareholder interests, however, is not the only policy concerned in representative litigation. Due to the deterrence effect of derivative litigation, officers and directors may also be reluctant to engage in entrepreneurial risk-taking, resulting in less competitiveness due to a play-it-safe mentality.<sup>357</sup> As such, courts recognize the importance of allowing corporations to govern themselves to the maximum extent possible without judicial involvement in their internal business affairs.<sup>358</sup> A

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355. *See supra* Part I.

356. Kinney, *supra* note 5, at 174.

357. *Id.* at 175.

358. *See* King v. VeriFone Holdings, Inc., 994 A.2d 354, 361 n.26 (Del. Ch. 2010) (citing 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1831 (3d ed. 2010)), *rev'd*, 12 A.3d 1140 (Del. 2011).

tension thus exists between allowing shareholders to demand management accountability and requiring shareholders to respect management authority.

When a court allows a shareholder to proceed with a derivative suit and the shareholder sues on behalf of and in the name of the corporation, an odd role-reversal takes place. It appears the shareholder steps into the role of management, making decisions about whom the corporation will sue and all of the other litigation-related decisions, such as when to settle and for what amount.<sup>359</sup> The shareholder, however, may not be in the best position to make such decisions. For instance, a potential conflict can arise between the interests of one shareholder—particularly a shareholder with an investment in the corporation that is small in size as compared to the size of the corporation as a whole—and the interests of the other shareholders and the corporation.<sup>360</sup> Also, because the shareholder is not familiar with the managerial role, the shareholder might have a more short-sighted or narrow vision of the corporation than those charged with running the company.<sup>361</sup> Finally, because shareholders are not typically bound by the fiduciary duties that bind corporate officers and directors, nothing deters them from acting in their own self-interest and ignoring the interests of the other shareholders to the extent their interests are not aligned.<sup>362</sup>

This tension between the competing values of managerial authority and managerial accountability has always been at the core of corporate jurisprudence.<sup>363</sup> However, concerns become even more prominent when placed in the context of modern derivative litigation and the ever-increasing prevalence of the strike suit.<sup>364</sup> In a strike suit, it is actually the plaintiffs' attorneys who drive the derivative litigation—not the actual

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359. Stensland, *supra* note 139, at 893–94.

360. *Id.* at 889 (“[E]ach individual shareholder has some personal reasons for being involved, and those personal reasons are not shared by the shareholders-at-large. Therefore the potential for divergent interests arises again.”).

361. *See id.* at 894. In other words, even when there is evidence of corporate mismanagement, handling the matter internally rather than suing the wrongdoers and making the matter public might ultimately serve the corporate interests more. *See id.*

362. *Id.*

363. For a more complete discussion of this topic, see Stephen M. Bainbridge, Star Lopez, & Benjamin Oklan, *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 563–74 (2008) [hereinafter “*The Convergence of Good Faith*”].

364. WILLIAM A. KLEIN ET AL., BUSINESS ASSOCIATIONS 234 n. (6th ed. 2006) (“To this day, the principal effective incentive that generates derivative actions is legal fees, not shareholder dissatisfaction.”).

wronged shareholders themselves.<sup>365</sup> As an uninterested third party with no economic investment in the corporation, the attorney has no reason to protect the corporation's interests and is instead the main beneficiary.<sup>366</sup>

Strike suits have led to concerns about the effectiveness of derivative litigation. While the stock price may show improvement as a result, such improvement is typically marginal, and the lengthy and often complex litigation, which is costly for the corporation, usually settles for far less than the amount sought.<sup>367</sup> Moreover, when the corporation is contractually obligated to indemnify management for suits if there has been no breach of the duties of loyalty or good faith, the wrongdoers are not the ones actually paying—the corporation's premiums on its directors' and officers' insurance increase, and, as stated, the attorneys are left as the main beneficiaries.<sup>368</sup>

Examples have been made of plaintiffs' attorneys relying on "professional plaintiffs" to do their bidding, highlighting the fact that it is too often the attorneys driving the course of—and ultimately benefiting from—the litigation, not the shareholders themselves.<sup>369</sup> Such "career" or "professional" plaintiffs are repeat plaintiffs who are regularly proffered as the named plaintiff in derivative suits because they own a small amount of stock in many companies.<sup>370</sup> Such plaintiffs typically have little say in the representation and, as such, the attorneys typically decide when to settle and for how much based on their own financial interests.<sup>371</sup>

In such cases, it is not hard to find particularly egregious examples of attorneys who have not even met the purported plaintiff, despite being well

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365. See *King v. VeriFone Holdings, Inc.*, 994 A.2d 354, 362–63 n.31 (Del. Ch. 2010) ("[T]he derivative action is susceptible to abuse in cases where derivative claims are filed 'more with a view to obtaining a settlement resulting in fees to the plaintiff's attorney than to righting a wrong to the corporation (the so-called "strike suit")'" (quoting DENNIS J. BLOCK ET AL., *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 1384–85 (5th ed. 1998))), *rev'd*, 12 A.3d 1140 (Del. 2011).

366. See Kinney, *supra* note 5, at 174.

367. See *id.*

368. *Id.*

369. See *In re JP Morgan Chase & Co. S'holder Derivative Litig.*, No. 08 Civ. 974(DLC), 2008 WL 4298588, at \*10 (S.D.N.Y. Sept. 19, 2008) (quoting S. Rep. No. 104–98 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 685) (noting the Senate specifically addressed concern over attorneys in these types of cases).

370. *Id.* (quoting S. Rep. No. 104–98).

371. *Id.* (quoting S. Rep. No. 104–98, at 6).

into the litigation process. In one North Carolina case, for instance, the court admonished the attorney in a derivative suit for knowing virtually nothing about his client.<sup>372</sup> The court instructed the attorney to “at least find out how many shares of [the corporation’s] stock his client owned.”<sup>373</sup> It was only upon making this inquiry, at the behest of the court, that the attorney learned the plaintiff had actually sold his minimal interest in the corporation and therefore lacked standing to sue.<sup>374</sup> The same firm was involved in a suit in New York with similar results.<sup>375</sup> In that case, the firm proffered a plaintiff who had no understanding of the nature of the derivative action.<sup>376</sup> The firm failed to consult with the plaintiff about critical events in the litigation, but again was instructed to do so by the court.<sup>377</sup> It was only from the court-ordered consultation with its client that the firm learned the plaintiff wanted to withdraw from the case because he doubted it had any merit.<sup>378</sup> The firm replaced the initial plaintiff with a professional plaintiff whose services were “at the beck and call of his friend,” an attorney.<sup>379</sup> The attorney–friend would monitor the professional plaintiff’s investments, decide when he would serve as a plaintiff in derivative litigation, and refer him to a plaintiff’s attorney.<sup>380</sup> The court noted that this named plaintiff was “demonstrably ignorant” of the many derivative actions—twenty-five at the time—filed in his name.<sup>381</sup>

Despite these problems with derivative litigation, it still remains an important means through which a shareholder can protect his economic interest in the corporation. However, in balancing the interests of managerial authority and accountability, derivative litigation is not the only protection shareholders have against corporate mismanagement. A number of additional protections exist—both formal and informal. Among the informal protections are various market forces. Managers, for instance, have their reputations to protect, and their bonus compensation is often

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372. Egelhof v. Szulik, No. 04 CVS 11746, 2008 WL 352668, at \*2 (N.C. Super. Ct. Feb. 4, 2008).

373. *Id.*

374. *Id.*

375. *See In re JP Morgan*, 2008 WL 4298588, at \*8.

376. *Id.* at \*9.

377. *Id.* at \*4.

378. *Id.*

379. *Id.* at \*9.

380. *Id.* It is highly likely this attorney–friend received referrals in return for his services of directing the career plaintiff’s actions.

381. *Id.* at \*10.



tied to stock performance.<sup>382</sup> Similarly, because managers often own stock in their own corporations, their interests are arguably aligned with those of the corporation and other non-management shareholders.<sup>383</sup>

Formal protections exist mostly for shareholders of publicly traded corporations.<sup>384</sup> Such formal protections include the federal regulations mandated by the Sarbanes-Oxley Act of 2002 that expand disclosure and governing rules, which now require public corporations to establish audit committees and prohibit auditors from providing any services to their audit clients other than audit services to avoid any conflicts of interest.<sup>385</sup> The New York Stock Exchange (NYSE) and NASDAQ have also imposed stringent listing requirements.<sup>386</sup> For instance, corporations listed on the NYSE must have a majority of independent directors and shareholder approval of equity compensation plans in addition to having an independent audit committee.<sup>387</sup> Public corporations are also subject to rigorous disclosure requirements pursuant to the Securities Exchange Act of 1934.<sup>388</sup> Companies with more than one million dollars in assets or more than five hundred shareholders must regularly file reports with the Securities and Exchange Commission, which are made publicly available to shareholders.<sup>389</sup> The Securities Exchange Act also governs the disclosures

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382. See Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 827 (2006) (“Managers, [unlike shareholders], cannot diversify their firm-specific human capital (or their general human capital, for that matter). If the firm fails on their watch, it is the top management team that suffers the principal losses.”).

383. See Anne Tucker Nees, *Who’s the Boss? Unmasking Oversight Liability Within the Corporate Power Puzzle*, 35 DEL. J. CORP. L. 199, 213–14 (2010).

384. There are, however, state law protections that apply to both private and public corporations, such as the corporate jurisprudence involving oversight liability. See *The Convergence of Good Faith*, *supra* note 363, at 594–95 (noting examples of directors’ obligations, which include taking steps to establish compliance measures by ensuring proper reporting systems in management).

385. *Id.* at 571–72.

386. *Id.* at 572.

387. NYSE: *Listed Company Manual*, NYSE EURONEXT, <http://nysemanual.nyse.com/LCMTTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F3&manual=%2Fflcm%2Fsections%2Fflcm%2Dsections%2F> (last visited August 23, 2011).

388. 15 U.S.C. § 78l (g)(1) (2006) (codifying section 12(g) of said Act).

389. *Id.*; but see 17 C.F.R. § 240.12g-1 (2010) (“An issuer shall be exempt from the requirement to register any class of equity securities pursuant to section 12(g)(1) if on the last day of its most recent fiscal year the issuer had total assets not exceeding \$10 million and, with respect to a foreign private issuer, such securities were not quoted in an automated inter-dealer quotation system.”).

contained in materials used to solicit shareholders' votes in meetings of the shareholders.<sup>390</sup> Such formal protections are constantly evolving. For instance, in light of the most recent corporate corruption scandals emerging from the housing market crash, a House-Senate conference committee recently approved proposals restricting trading by banks for their own benefit and requiring banks and their parent companies to segregate much of their derivatives activities into separately capitalized subsidiaries.<sup>391</sup>

Given all these considerations, courts and legislatures have carefully balanced the competing interests of managerial authority and accountability, and determined that it is appropriate to erect certain barriers in the way of a would-be litigant wanting to file a derivative lawsuit. Such barriers include the demand requirement and the "no discovery" rule of Federal Rule of Civil Procedure 23.1.<sup>392</sup> One purpose of such hurdles is to deter the "sue first, investigate later" mentality often espoused by plaintiffs' attorneys, who file suit and only *then* go through corporate files "hunting for signs of wrongdoing."<sup>393</sup>

## 2. *The Need for Checks and Balances on Inspection Rights*

These same policy concerns support the statutory abrogation of inspection rights shareholders previously had under the common law. Because shareholders are denied access to discovery in pleading demand futility or improper demand rejection, it is critical they still retain the basic

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390. *The Laws that Govern the Securities Industry*, U.S. SECURITY & EXCH. COMM'N, <http://www.sec.gov/about/laws.shtml> (last visited August 23, 2011).

391. Dealbook, *House and Senate Agree on Finance Overhaul*, NYTIMES.COM (June 25, 2010, 6:31 AM), <http://dealbook.blogs.nytimes.com/2010/06/25/congress-reaches-final-agreement-on-overhaul>.

392. *See supra* Part I.

393. Kinney, *supra* note 5, at 175, 178–79; *see also, e.g.*, King v. VeriFone Holdings, Inc., 994 A.2d 354, 358 (Del. Ch. 2010) (addressing the issue of whether it was proper for VeriFone to deny the plaintiff-shareholder access to the requested records, and in so doing, expressing extreme displeasure with the plaintiff's failure to make any meaningful pre-suit investigation), *rev'd*, 12 A.3d 1140 (Del. 2011). Rather than using the inspection statute and the other "tools at hand" to gather information before filing the derivative suit, the shareholder hastily filed the suit a mere eleven days after the precipitating event. *Id.* at 358, 364. The court surmised the reason the shareholder—or perhaps more to the source, his attorney—filed on such an expedited basis was merely to "win the filing Olympics" and be appointed lead plaintiff. *Id.* at 355. The court pointed out the complaints did not seek "expedited treatment or injunctive relief"; rather, they simply sought "monetary damages for the consequences of past events" and, as such, the corporation's shareholders would not benefit from hastening the litigation. *Id.* at 357.

right to access the books and records of the corporations in which they invest. However, such inspection rights must be tempered for the same reasons various barriers were established in derivative litigation.

The notion of a potential conflict between the interests of one minority shareholder, or his attorney, and the interests of the collective group of shareholders is no more apparent than in the inspection arena. An individual shareholder may experience personal gain from inspecting the books and records, but such inspection might not benefit—and instead might actually harm—the corporation as a whole.<sup>394</sup> This reality is particularly obvious in some cases, where it is clear the shareholder does not have the interests of the corporation in mind at the time of the request.

For instance, a shareholder might request access to documents for the primary purpose of harassing corporate management. This may be with an eye toward personal gain—for example, harassing management so as to create a nuisance value for the shareholder's stock, essentially forcing the corporation to purchase his stock at a premium.<sup>395</sup> Or perhaps it is alleged a stockbroker-shareholder wants to depress the market value of the stock with the hope of facilitating her dealing in the same stock as a broker.<sup>396</sup> Harassment might be motivated by even more basic desires than personal gain, such as revenge against corporate management. A shareholder, motivated by personal hostility toward one or more officers or directors of a corporation, might make requests with the hope of finding something she might use out of context to stir up dissatisfaction with the current management.<sup>397</sup>

In addition to harassment, competition is another personal reason for which a shareholder might make an inspection demand on a corporation.<sup>398</sup>

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394. See Stensland, *supra* note 139, at 889, 893–94.

395. See, e.g., *Neiman v. Templeton, Kenly & Co., Ltd.*, 13 N.E.2d 290, 291 (Ill. App. Ct. 1938).

396. See, e.g., *Moore v. Rock Creek Oil Corp.*, 59 S.W.2d 815, 818 (Tex. Comm'n App. 1933).

397. *C.f.* *Furst v. W.T. Rawleigh Med. Co.*, 118 N.E. 763, 766 (Ill. 1918) (“While there is much in the pleadings which shows that appellee is particularly hostile towards the officers of the appellant company and which leads one to seriously question whether he is actuated by any other motive than that of harassing and annoying that company, no facts are alleged which show an abuse by him of the exercise of his rights as a stockholder under our statute.”).

398. See, e.g., *Schulman v. Louis Dejonge & Co.*, 59 N.Y.S.2d 119, 122 (N.Y. App. Div. 1945) (“While it has been held that the mere denial by the corporation of mismanagement and waste is insufficient to defeat an application by a stockholder to

If the shareholder owns only a small interest in the corporation but owns a large interest in its rival, that shareholder would be individually benefited by passing along corporate information to the competitor, whereas the corporation as a whole and the other shareholders would clearly be harmed.

Even when shareholders making inspection requests think they are acting in the best interests of the corporation, a conflict with the other shareholders and the corporation may arise. Complying with inspection demands is not costless, particularly for large multinational corporations.<sup>399</sup> The burdens placed on the corporation in responding to any given inspection request might not be worth the resulting benefit to the corporation, assuming any such benefit will even materialize.<sup>400</sup> Though the MBCA provides a mechanism whereby a corporation might charge a shareholder reasonable costs for production and reproduction of the relevant documents,<sup>401</sup> a corporation still may have to expend a large number of man hours and incur attorneys' fees to accommodate a request.

For instance, in *Mannato v. SunTrust Banks, Inc.*,<sup>402</sup> a shareholder who held only a de minimis interest—approximately three hundred shares of SunTrust—requested documents related to the corporation's refusal of a demand to bring suit against some of the company's officers and directors for corporate mismanagement.<sup>403</sup> Specifically, the shareholder requested,

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examine its books, it is equally well settled that an examination will not be permitted where the ulterior purpose of the inspection is to supply knowledge of the inner workings and details of a corporation's business to a competitor, or embarrass the corporation." (citations omitted)).

399. See *Holdsworth v. Goodall-Sanford, Inc.*, 55 A.2d 130, 132–33 (Me. 1947) (noting how careful the court must be in granting the power to inspect books and records because an inspection order can "affect unfavorably so many innocent stockholders, and may cause such inconvenience or perhaps such ruinous results" to an international corporation with extensive operations).

400. See *McChesney*, *supra* note 2, at 1207–08 (pointing out the costs of generating information at some point "fall short of the benefits of having more information" and become "wealth-reducing"). Once the request becomes wealth-reducing, presumably the shareholders as a group would not want to require the corporation to produce the information.

401. MODEL BUS. CORP. ACT § 16.03(d) (2008).

402. *Mannato v. SunTrust Banks, Inc.*, No. A10A2291, 2011 WL 1012441 (Ga. Ct. App. Mar. 23, 2011).

403. Complaint in Equity to Enjoin SunTrust Banks, Inc. from Refusing to Permit and Facilitate Examination of Corporate Books and Records at 1 para. 5, *Mannato v. SunTrust Banks, Inc.*, No. 2009-CV-179167 (Fulton Cnty. Super. Ct. Dec. 18, 2009) (on file with the author).

among other things, “books and records provided or, presented to, created by or for, or otherwise reviewed by” the Board or Senior Management—a group totaling at least thirty-one individuals—regarding the impact of “deteriorating housing market conditions” on SunTrust’s performance from the previous four and a half years.<sup>404</sup> This request came after the corporation had already provided the requesting shareholder a sixty-five page report of the Demand Review Committee—comprised of three independent directors and counsel—outlining its conclusion that the demand lacked factual or legal merit.<sup>405</sup> Compliance with the shareholder’s request would have been difficult since it was made in 2010—just two years after the housing market crash and ensuing financial crisis.

Labor, copy, and mail costs are not the only expenses associated with compliance. In some jurisdictions, courts are empowered to craft reasonable restrictions on the inspection rights so as to protect the corporation’s legitimate business concerns.<sup>406</sup> So, for instance, a court might require a shareholder to sign a confidentiality agreement with the corporation, agreeing not to disclose certain information learned from the inspection to competitors.<sup>407</sup> There are costs associated with drafting and negotiating such confidentiality agreements or complying with other “reasonable restrictions.”<sup>408</sup> And, when the corporation feels the confidentiality agreement has been breached, further costs are associated with enforcement.<sup>409</sup>

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404. See *id.* at 11 nn. 2–3, 41 para. 108.

405. See *id.* at 7 para. 18, 33 para. 91 (referring to Exhibit I which is confidential).

406. See, e.g., *Security First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 569 (Del. 1997).

407. Johnathan D. Horton, Essay, *Oklahoma Shareholder and Director Inspection Rights: Useful Discovery Tools?*, 56 OKLA. L. REV. 105, 118 (2003). Another common limitation is for the court to restrict the manner in which documents may be reviewed, such as requiring on-site review with an eye toward preventing dissemination of the information. See, e.g., *Schwartzman v. Schwartzman Packing Co.*, 659 P.2d 888, 890 (N.M. 1983). Though this might protect the corporation from unwanted and harmful dissemination of the information, providing on-sight access can have costs and disruption for the corporation, particularly if a team of five accountants is hired to inspect the books and records of the corporation and they are given access to the corporate premises during business hours. *Id.*

408. See, e.g., Stensland, *supra* note 139, at 878–79 (discussing the large amount of legal work involved in drafting such agreements properly with all the parties involved).

409. Practically speaking, enforcement might not even be possible, particularly when large numbers of shareholders request access to the same documents. For

Compounding all of these factors, of course, is the issue of the strike suit discussed above. Since the person driving the litigation might not be a shareholder at all, this person has nothing to lose from decisions that might ultimately harm the corporation.<sup>410</sup> If the books and records request is made as part of such a suit, the collective shareholders and the corporation as a whole might suffer from costly production of documents, which is simply part of the process of padding the plaintiff's attorney's wallet.

As previously discussed, inspection rights play an important role in corporate jurisprudence and are increasingly important as one of the "tools at hand" available for would-be plaintiffs in shareholder derivative suits.<sup>411</sup> But allowing shareholders to circumvent the additional restrictions imposed by inspection statutes by reverting to outdated theories of the common law discounts the thoughtful policies behind the barriers currently in existence for would-be derivative plaintiffs. Certainly, more expansive access to books and records allows shareholders to do at least a partial end run around the "no discovery" rule in Federal Rule of Civil Procedure 23.1, which prohibits shareholders from gaining access to more sensitive and voluminous corporate materials at an early stage of litigation.<sup>412</sup> Such an end run discredits the very real concerns about the "sue first, investigate later" mentality that is commonplace in derivative litigation,<sup>413</sup> particularly in attorney-driven suits when the attorney is concerned with being appointed lead counsel.

The MBCA inspection statute and its progeny recognized these concerns by borrowing some restrictions from the common law, such as the proper purpose requirement, and imposing additional restrictions formulated by the MBCA drafters and state legislators, such as allowing access only to a defined list of books and records.<sup>414</sup> By imposing statutory restrictions on shareholders seeking access to books and records, an individual shareholder—or an individual plaintiff's attorney—is prevented

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instance, a corporation likely would not be able to determine exactly who breached the agreement. *Id.* at 896. Confidentiality agreements are not costless for shareholders either; it may have a chilling effect in that a shareholder—particularly a less savvy shareholder—might decide not to make the request in the first place when faced with a confidentiality agreement. *Id.*

410. King v. VeriFone Holdings, Inc., 994 A.2d 354, 362–63 n.31 (Del. Ch. 2010), *rev'd*, 12 A.3d 1140 (Del. 2011); *see also* Kinney, *supra* note 5, at 174.

411. *See supra* Part I.

412. *See supra* Part I.

413. *See supra* Part IV.B.1.

414. MODEL BUS. CODE ACT § 16.02 (2008).

from unduly burdening the resources of the corporation to benefit one at the expense of the whole.<sup>415</sup> The inspection rights are not intended to give shareholders a right in the day-to-day management of the firm and, as such, must be restricted. The statute provides for virtually automatic access to basic documents like the articles and bylaws of the corporation and minutes from recent shareholders' meetings.<sup>416</sup> Additionally, it provides for attorney fee-shifting under section 16.04 if the corporation has frivolously refused access to a shareholder.<sup>417</sup> This statutory regime, combined with the other formal and informal protections that exist to safeguard shareholders' economic interests, strike the appropriate balance between managerial authority and autonomy.

#### V. SUGGESTED REVISIONS TO THE MBCA TO EFFECTUATE ABROGATION OF COMMON LAW INSPECTION RIGHTS

As set forth above, the drafters of the MBCA and the legislatures adopting the MBCA likely did not intend for the common law rules to survive enactment of the books and records statute—at least not in its current form, which is more restrictive than the common law in a number of ways. However, even if the legislative intent was to allow the common law inspection rights to continue, the public policy reasons outlined above suggest the need for reform.

In order to encourage the shift from a non-abrogation to abrogation approach in those jurisdictions currently adhering to the majority position, some changes are necessary to the MBCA inspection statute. Fortunately, only modest changes to the inspection statute are necessary to have a great impact on the abrogation debate. In fact, though sections 16.01 through 16.04—and certain other discrete sections of the MBCA, such as section 7.20—all deal directly with shareholder inspection rights, only section 16.02 requires amendment.<sup>418</sup> Specifically, statutory abrogation of the common law could be clearly achieved by (i) removing the Savings Clause language in section 16.02(e)(2), and (ii) incorporating a new subsection (g) that would expressly abrogate the common law.<sup>419</sup> These two suggested revisions are set out more clearly in Table 1, attached to this Article. As discussed above, the Savings Clause could be interpreted to mean courts

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415. See Stensland, *supra* note 139, at 893.

416. MODEL BUS. CODE ACT § 16.02(a) (2008).

417. *Id.* at § 16.04.

418. *Id.* at § 16.02.

419. *Id.*

are still able to compel production of documents under other statutes, such as the federal securities laws, but not under the common law. Despite this alternative interpretation, the language of the Savings Clause has clearly caused confusion in the law; ultimately, the provision is not necessary.

In addition to the revisions to the actual statutory language, the Official Comment to section 16.02 also requires amendment. The language of the Official Comment does not directly state a common law inspection right exists.<sup>420</sup> Even though the comment is agnostic about the existence of a common law right, it still lends itself to the interpretation that the drafters' intent was non-abrogation. As such, the language in section 4 of the Official Comment regarding sections 16.02(d) and (e) of the statute should be revised by removing the current reference to the potential existence of a common law right.<sup>421</sup> In its place, language should be added to expressly indicate the intent that a shareholder should only be able to access the books and records of a corporation if it meets the applicable statutory requirements.

These two simple changes will sufficiently address Statutory Treatment Cases. Shareholders seeking access to books and records will be able to review the relevant statute and know exactly what prerequisites they need to establish before they have viable inspection rights. Some of the issues involved in such a determination—such as establishing the existence of a proper purpose and good faith—ultimately may require court intervention. However, this change should somewhat streamline books and records litigation by making it clear exactly what types of documents are available for inspection. For instance, a shareholder will only be able to seek access to minutes of meetings of the board and shareholders, action taken without meeting, accounting records, and the record of shareholders. Shareholders will not be able to access internal memoranda and other sensitive materials. This may eliminate overreaching on the part of plaintiffs' attorneys attempting to subvert the "no discovery" rule in Federal Rule of Civil Procedure 23.1. Additionally, in one of the dozen or so jurisdictions that impose additional requirements on shareholders, such as a minimum ownership requirement for access to sensitive books and records, shareholders who do not meet that threshold would be discouraged from litigating an inspection request, knowing there is no other potential avenue for such access.<sup>422</sup>

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420. *Id.* at § 16.02 cmt. 4.

421. *See id.*

422. Two such states that maintain these additional requirements—Louisiana



These suggested changes would not necessarily affect Silent Statute Cases. In Silent Statute Cases, the statute does not expressly address the subject matter. Therefore, the issue of whether a shareholder should be able to access the books and records of the entity in question would still be open to debate. Allowing litigants to resort to common law theories of inspection rights for these cases does not present the same concerns that exist in Statutory Treatment Cases.<sup>423</sup> For Statutory Treatment Cases, the legislature has spoken on the very factual scenario at issue in the case—for instance, where the legislature has specifically delineated what books and records are available for inspection, such as minutes and accounting records, and the shareholder seeks access to something else, such as internal memoranda. For Silent Statute Cases, the argument that the legislature has not preempted the arena is more plausible because the statute is silent on the particular factual scenario at issue.<sup>424</sup>

## VI. CONCLUSION

Shareholder inspection rights historically have played a prominent role in shareholder derivative litigation. Moreover, the losses suffered by companies and investors in the wake of the 2008 financial crisis have brought shareholder access issues to the forefront. In light of the obfuscation involving subprime mortgages, which led, in part, to the financial crisis, the natural temptation is to react against the lack of transparency that characterized the transactions leading to the meltdown. Thus, the most obvious reaction is to open the floodgates to shareholders, allowing them more and more access to corporate books and records—a reaction a majority of jurisdictions seem poised to follow given their previous unwillingness to limit shareholder access to that granted by state

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and Maryland—have already gotten it right by eliminating the MBCA Savings Clause language and the related commentary. LA. REV. STAT. ANN. § 12.103 (2010); MD. CODE ANN., CORPS. & ASS'NS §§ 2-512, 2-513 (LexisNexis 2007 & Supp. 2010).

423. See *supra* Part IV.

424. See *supra* Part IV. While allowing for the common law to coexist in these Silent Statute Cases may be acceptable in certain instances, addressing some, though not all, of these issues in the MBCA could provide additional clarity in the law. Additionally, providing statutory treatment of Silent Statute Cases is not without precedent. See, e.g., DEL. CODE ANN. tit. 8, § 220 (West 2001) (providing for the inspection by shareholders of books and records of a wholly owned subsidiary). A complete discussion of the proper statutory treatment of the Silent Statute Cases, however, is beyond the scope of this Article.

statutes. However, such a reaction would undermine the thoughtful barriers placed on derivative litigation, potentially increasing strike suits to the benefit of plaintiffs' attorneys and to the detriment of the majority of shareholders, and potentially upsetting the balance created by state legislatures in enacting inspection statutes. Moreover, such a reaction does not take into account other protections, both formal and informal, that already exist for shareholders to protect their economic interest in the corporation.

By clarifying section 16.02 of the MBCA and the related Official Commentary and specifically providing for abrogation of the common law rules regarding shareholder access, the drafters of the MBCA would remedy confusion in the law surrounding the existence of two separate regimes governing the rights and remedies of shareholders requesting corporate books and records. Such a position is justified by the fact that the arguments of jurisdictions taking the non-abrogation approach no longer hold up in light of modern books and records statutes. Though early inspection statutes did not require a shareholder to establish a proper purpose to obtain access and therefore could be viewed as an expansion of the common law rather than a restriction, most modern statutes do incorporate such a requirement. As such, the notion that the common law should continue to exist because it was more restrictive than the statutes is no longer accurate. Additionally, though the MBCA and its progeny do not include express language to suggest abrogation of the common law, it is reasonable to conclude the common law has been abrogated through "necessary implication" by the statutes. The statutes are, for the most part, comprehensive in their treatment of shareholder inspection rights. With such a complete statutory scheme, virtually no area of inspection rights of shareholders has been left unaddressed, and there is no room for the continued existence of the related common law rules. Finally, though a reasonable interpretation of the Savings Clause is that the legislative intent was for non-abrogation, it is certainly not the only interpretation. In fact, if the language of the Savings Clause was meant to maintain the common law, the remainder of the inspection statute arguably becomes meaningless.

There are also sound policy reasons supporting the notion that inspection statutes should trump their common law counterparts. In the inspection arena, there is a real potential for a conflict of interest between the interests of one shareholder, or his attorney, and the interests of the collective group of shareholders. An individual shareholder may experience personal gain from inspection of the books and records, while that same inspection request might actually harm the corporation—and

therefore the other shareholders—as a whole. Compounding this potential conflict is the issue of the strike suit. Since the person driving the litigation might not be a shareholder at all, but rather an attorney, this person has nothing to lose from decisions that might ultimately harm the corporation. Additionally, allowing shareholder-plaintiffs to circumvent the restrictions imposed by inspection statutes discounts the thoughtful policies and legislative balancing behind the barriers that currently exist. The statutory regime of the MBCA, as modified per my suggestions, combined with the other formal and informal protections that exist to safeguard shareholders' economic interests, provides the appropriate protection for shareholders and strikes the right balance between managerial authority and accountability.

As previously discussed, these modifications to the MBCA would really only have an impact on the Statutory Treatment Cases—the Silent Statute Cases would not necessarily be affected by these suggested changes. As discussed above, the most common Silent Statute Cases involve the following questions: (i) whether shareholders can access the books and records of a wholly owned subsidiary of a corporation in which they own an interest; and (ii) whether members of banking corporations, foreign corporations, or nonstock corporations should be able to access books and records of the entities in which they hold an interest. Neither of these is specifically addressed by statute, and this Article does not suggest that such issues need to be codified in the inspection statute. Allowing courts to use the common law to guide them on whether such access should be permissible is acceptable to the extent the legislature has not codified the matter either through its state inspection statute or through some other means.<sup>425</sup> However, it would seem that once courts have made the determination that a shareholder or member does in fact have some base level right of access in these situations, the scope of the access granted should not be greater than that provided by the inspection statute.<sup>426</sup>

While allowing the common law to coexist in these Silent Statute Cases may be acceptable in certain instances, addressing some, though not all, of these issues in the MBCA could provide additional clarity in the

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425. For instance, a state's LLC code addressing the inspection of books and records by members of an LLC should trump any common law discussion of the issue.

426. Unless, of course, another statute conflicts with this. For instance, if the LLC statute provides for more access to books and records for members of an LLC than the relevant state statute on shareholder inspection rights, then this additional access should be granted. Of course, in this instance where there is a statute on point, the common law would not have been involved in the first place.

law.<sup>427</sup> The concerns presented by Statutory Treatment Cases are much more immediate than those presented by Silent Statute Cases and can be—indeed, should be—addressed by the changes to the MBCA, Official Commentary, and state counterparts thereof described above and further delineated in Table 1.

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427. It is beyond the scope of this Article, however, to fully address the different types of Silent Statute Cases and the proper statutory treatment of each.

TABLE 1: PROPOSED REVISION

<i>2008 MBCA</i>	<i>Proposed Revision</i>
<p>§ 16.02. INSPECTION OF RECORDS BY SHAREHOLDERS</p> <p>(a) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in section 16.01(e) if the shareholder gives the corporation written notice of his demand at least five business days before the date on which the shareholder wishes to inspect and copy.</p> <p>(b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of the shareholder's demand at least five business days before the date on which he wishes to inspect and copy:</p> <p>(1) excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under section 16.02(a);</p> <p>(2) accounting records of the corporation; and</p> <p>(3) the record of shareholders.</p> <p>(c) A shareholder may inspect and copy the records described in subsection (b) only if:</p> <p>(1) the shareholder's demand is made in good faith and for a proper purpose;</p> <p>(2) the shareholder describes with reasonable particularity the shareholder's purpose and the records the shareholder desires to inspect; and</p> <p>(3) the records are directly connected with the</p>	<p>§ 16.02. INSPECTION OF RECORDS BY SHAREHOLDERS</p> <p>(a) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in section 16.01(e) if the shareholder gives the corporation written notice of his demand at least five business days before the date on which the shareholder wishes to inspect and copy.</p> <p>(b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of the shareholder's demand at least five business days before the date on which he wishes to inspect and copy:</p> <p>(1) excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under section 16.02(a);</p> <p>(2) accounting records of the corporation; and</p> <p>(3) the record of shareholders.</p> <p>(c) A shareholder may inspect and copy the records described in subsection (b) only if:</p> <p>(1) the shareholder's demand is made in good faith and for a proper purpose;</p> <p>(2) the shareholder describes with</p>

<p>shareholder's purpose.</p> <p>(d) The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws.</p> <p>(e) This section does not affect:</p> <p>(1) the right of a shareholder to inspect records under section 7.20 or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant;</p> <p>(2) the power of a court, independently of this Act, to compel the production of corporate records for examination.</p> <p>(f) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or by a nominee on the shareholder's behalf.</p>	<p>reasonable particularity the shareholder's purpose and the records the shareholder desires to inspect; and</p> <p>(3) the records are directly connected with the shareholder's purpose.</p> <p>(d) The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws.</p> <p>(e) This section does not affect the right of a shareholder to inspect records under section 7.20 or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant.</p> <p>(f) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or by a nominee on his behalf.</p> <p>(g) This section abrogates any inspection rights that any shareholder of a corporation may have had at common law.</p>
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