INFORMATION LITIGATION IN CORPORATE LAW

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In recent years, shareholders have started to launch information lawsuits with new vigor. These demands—which often yield valuable corporate data without an explicit contractual right or public disclosure obligation—are typically brought in connection with a shareholder grievance about some other matter. Firm managers often resist the intrusion, leading to some blockbuster disputes. Indeed, it is becoming increasingly clear that information litigation is starting to play a much greater gatekeeping role for corporate governance problems. There are often serial-litigation battles where a fight over access to firm information is followed by a fight over the primary governance concern. Delays associated with the initial information lawsuit can even stymie resolution of the primary case.

Notwithstanding this increase in information litigation, lawmakers lack a comprehensive theory for evaluating the private right to corporate information. Many courts and commentators offer only short statements about a need for balance: shareholders should be able to obtain information necessary to exercise their rights, but they should not be able to harass managers or expose crucial corporate secrets. Legal standards for adjudicating private, ex post *information demands are vague. Most disputes are decided by asking whether the requested information is "necessary and essential" for pursuing a "proper shareholder purpose." But how should we award and scope this right?*

This Article argues that inspection rights are best justified in connection with efforts to mitigate managerial agency costs through forensic review. Much of corporate law seeks to maximize the benefits of centralized economic activity while minimizing the costs of suboptimal agent decision-making. Endless varieties of agency problems exist, but the distortions are all grounded in information asymmetry. Shareholder inspection rights are thus well suited to addressing agency lapses, and they are warranted in connection with this fundamental aim. An important corollary to this claim, however, is that shareholder inspection rights may not be a fundamental entitlement when deployed more broadly. If so, then corporations should enjoy some latitude to modify inspection rights via private ordering.

INTRODUCTION

Corporate information is valuable and often worth guarding. Firms must protect business strategies, and there is legitimate justification for opacity in the boardroom. At the same time, however, some information access is necessary to support sound corporate governance. If shareholders are expected to elect and monitor corporate leaders—as well as make personal investment decisions—then they must be able to muster facts about what is happening at the firm.

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One can imagine a regime where corporate lawmakers leave decisions about information exchange solely to the private parties. Equity investors might negotiate initial disclosures and ongoing promises of information transmission at the outset of a relationship, akin to the various obligations that are standard in debt contracts. Absent a contractual right, information would remain private unless a firm's managers found it in the corporation's self-interest to voluntarily share additional details.[1]

While contractual commitments of this sort occasionally play a role in corporate disclosures,[2] we typically look to regimes beyond contract law to govern what must be revealed about a firm's activities. Most of the focus centers on federal securities regulation. The Securities Act of 1933 and the Securities Exchange Act of 1934 establish broad public disclosure frameworks.[3] More recent laws, including the Sarbanes–Oxley Act and the Dodd–Frank Act, follow a similar strategy of mandating additional disclosures for many firms.[4] Typically these requirements are immutable and cannot be limited by private agreement.[5] Accordingly, much of the academic literature on corporate information debates the wisdom and efficacy of imposing mandatory public disclosures in various contexts.[6]

1. Firms are thought to have some incentives to voluntarily disclose operating information to attract investment capital. *See, e.g.*, Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2374–75 (1998).

2. Private information commitments are especially common in early stage ventures.

3. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2012); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq. The Securities and Exchange Act requires firms to file periodic reports with the SEC that discuss financial results and other material information. 15 U.S.C. §§ 78a–78qq. This requirement has historically been imposed on firms with more than $10 million in assets and a class of securities with more than 500 owners. *See* 15 U.S.C. § 78*l*(g) (2018); 17 C.F.R. § 240.12g-1 (2019). In 2012, the Jumpstart Our Business Startups Act amended these triggering requirements, allowing some smaller firms to avoid periodic reporting. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 501, 126 Stat. 306, 325 (2018) (codified as amended at 15 U.S.C. § 78*l*(g)).

4. For example, the Dodd–Frank Act requires firms to publish executive-compensation pay ratios, delineating the ratio between the firm's median employee salary and the salary of the very top officers. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953(b), 124 Stat. 1376, 1904 (2010).

5. The corporation and its shareholders can, of course, avoid the triggering rules for some of these requirements by eschewing public capital markets and limiting the total number of investors. Some commentators have reported on efforts by firms to eliminate public-reporting requirements by "going dark"—that is, moving trading activity to over-the-counter markets and reducing the number of record shareholders (importantly, *not* beneficial holders) to less than 500. *See, e.g.*, Jesse M. Fried, *Firms Gone Dark*, 76 U. CHI. L. REV. 135, 140–43 (2009).

6. The literature is vast. For a discussion of some potential benefits, see, for example, John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 733 (1984) (arguing that mandatory disclosure provides transaction-cost savings by centralizing information); Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 680–96 (1984); Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 VA. L. REV. 1335, 1356–69 (1999); Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 737–40 (2006) (arguing public disclosures can reduce search costs); Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1048 (1995) (arguing public disclosures might mitigate managerial agency costs). For some alternative views on mandatory public disclosure, see, for example, Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of*

There is another legal option, however, for a shareholder who seeks corporate information without an explicit contractual right or public disclosure entitlement. Corporation statutes in many states include a provision that allows shareholders to privately inspect the "books and records" of their firm.[7] There is also a parallel common law right to obtain corporate information via inspection.[8] These laws have existed for centuries, but private shareholder inspection rights have garnered only limited academic attention. Most historical commentary discounts the likelihood that shareholders will pursue private information gathering because the efforts seem too limited,[9] too expensive,[10] or too unpredictable.[11]

Recently, however, shareholders have started to initiate private inspection claims with new vigor.[12] These demands are typically brought in connection with a shareholder grievance about some other matter. Firm managers often resist the intrusion, leading to some blockbuster disputes.[13] Indeed, it is becoming increasingly clear that information litigation is starting to play a much greater gatekeeping role for corporate governance problems. There are often serial-litigation battles, where a fight over access to firm information is followed by a fight over the primary governance concern.[14] Delays associated with the initial information lawsuit can even stymie resolution of the primary case.[15]

Securities Regulation, 71 S. CAL. L. REV. 903 (1998); Romano*, supra* note 1. For a recent empirical assessment of mandatory public disclosure on firm value, see Allen Ferrell, *Mandatory Disclosure and Stock Returns: Evidence from the Over-the-Counter Market*, 36 J. LEGAL STUD. 213 (2007) (finding that mandatory public disclosures are associated with reduced volatility and positive abnormal financial returns).

7. 5A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2213 (Carol A. Jones ed., rev. vol. 2012) ("The existence of a right, either under the common law or by virtue of constitutional or statutory provisions, of every shareholder to inspect the books and records of the corporation seems to be accepted without question in all states.").

8. *Id.* § 2214.

9. *See* Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 420 (2006) ("Under state law, this right is not very broad . . . [and] not as impressive as it may sound.").

10. *See* Randall S. Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 356–57 (1996) (estimating that an inspection request would typically need to be supported by litigation costs of $25,000 to $50,000—an estimate that has undoubtedly grown much greater from the time that this article was published).

11. *See, e.g.*, Fried, *supra* note 5, at 140 n.23 ("A shareholder who litigates for access to the records may thus find precious little there.").

12. *See, e.g.*, James D. Cox et al., *The Paradox of Delaware's "Tools at Hand" Doctrine* 8 (Vanderbilt Law, Working Paper No. 19-10, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3355662 (reporting a thirteen-fold expansion of inspection claims in Delaware during recent years).

13. Walmart, for example, fought for three years with a shareholder group about the scope of information that would be supplied in connection with a governance dispute over Mexican bribery allegations. *See infra* notes 135–57 and accompanying text. Yahoo! recently refused to give information to shareholders about a hiring fiasco that rivaled Disney's disastrous courtship of Michael Ovitz in the early 2000s.

14. Indeed, if the shareholder claim is a derivative action, there are actually three battles: (1) the battle for information; (2) the battle over whether demand should be excused; and (3) the battle over whether there has actually been a breach of fiduciary duty.

15. *See infra* notes 135–57 and accompanying text (discussing the Walmart bribery case). Moreover, we should expect that private information battles will only increase as new technology allows shareholders to make better use of large volumes of unstructured information.

Consider an example. A few weeks after taking over as CEO of Yahoo! in the middle of 2012, Marissa Mayer received an email from a former colleague at Google named Henrique de Castro.[16] As a senior technology executive familiar with the online advertising market, de Castro expressed a desire to join Yahoo! as the firm's chief operating officer and number two leader.[17] Mayer was interested, and over the next few months, de Castro and Yahoo! reached a deal. During these negotiations, however, Yahoo!'s board of directors did not always dig deeply into the details of de Castro's compensation provisions, and the firm took only a limited look at de Castro's recent performance at Google.[18] The final terms of the employment contract differed significantly from the initial offer, and some changes were not run by the board prior to execution.[19] The deal was extremely complicated, and buried within the contract was a highly generous payout if Yahoo! fired de Castro without cause early in his tenure as chief operating officer.[20]

De Castro joined Yahoo! on October 15, 2012, but the match quickly proved to be a disaster.[21] Newspapers panned the decision. For example, the *Wall Street Journal* "described [de Castro's] compensation package as 'staggering.'"[22] Another article, entitled *Did Marissa Mayer Just Make a Horrible Mistake? Several Ex-Googlers Think So*, quoted a Google employee as saying that "Google should pay Yahoo to take him."[23] The *New York Times* reported that de Castro had a very poor reputation among his former colleagues at Google, who ridiculed him for his "grand, awkwardly worded pronouncements."[24] He apparently fared no better at Yahoo!, and his new colleagues began to complain about

16. Nicholas Carlson, *What Happened When Marissa Mayer Tried to Be Steve Jobs*, N.Y. TIMES MAG. (Dec. 17, 2014), https://www.nytimes.com/2014/12/21/magazine/what-happened-when-marissa-mayer-tried-to-be-steve-jobs.html.

17. *See id.*; Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752, 761 (Del. Ch. 2016), *abrogated by* Tiger v. Boast Apparel, Inc., 214 A.3d 933 (Del. 2019).

18. *See Amalgamated Bank*, 132 A.3d at 761–71. More specifically, the court reports that Yahoo!'s compensation committee approved an initial offer after thirty minutes of review (without detailed scenario planning for various components of the compensation package), revised the offer to embrace a new term that Mayer mistakenly represented was already in the initial offer, and did not carefully consider the potential implications of the revised offer. *Id.* at 762–68. The court also found that Mayer unilaterally revised the offer still further, without board approval, in a way that would significantly benefit de Castro if he was terminated early without cause. *Id.* at 768. The *New York Times* reported that Yahoo!'s board pushed for more extensive vetting of de Castro's recent performance at Google but abandoned the inquiries when Mayer insisted that this was unnecessary. *See* Carlson, *supra* note 16.

19. *See Amalgamated Bank*, 132 A.3d at 767–71.

20. *Id.*

21. *Id.* at 771–72.

22. *Id.* at 771. The pay package for de Castro's first year was $39.2 million. According to the court, this made him the 8th highest paid manager in Silicon Valley. *Id.* at 771–72.

23. Nicholas Carlson, *Did Marissa Mayer Just Make a Horrible Mistake? Several Ex-Googlers Think So*, BUS. INSIDER AUSTL. (Oct. 17, 2012), https://www.businessinsider.com.au/yahoo-coo-henrique-de-castro-2012-10.

24. *See* Carlson, *supra* note 16.

his abrasive leadership.[25] Even worse, Yahoo!'s performance slumped under his watch. De Castro was put in charge of sales, operations, and business development, but Yahoo!'s advertising revenue declined in every quarter after he started.

Within fourteen months, Mayer decided to fire de Castro.[26] She took over the advertising team personally, secured board approval for the termination, and told de Castro the news. It is not clear whether the board had a full understanding at this time of the cost of de Castro's termination payout or whether it explored grounds for a "for-cause" termination to reduce this payout.[27] A contemporaneous Securities and Exchange Commission (SEC) filing simply stated that he "'was leaving the Company' and would receive 'severance benefits provided for in his . . . Offer Letter.'"[28] But a few months later, Yahoo! disclosed the price tag for this hiring mistake: $60 million.[29]

Investors were not pleased, and some considered legal action against the firm. One shareholder, Amalgamated Bank, decided to ask for more details: it requested five categories of documents to explore "potential mismanagement . . . in connection with the payment of compensation to [the] corporation's officers and directors."[30] Yahoo! refused this request, and a lawsuit ensued. Should Amalgamated be allowed to obtain information about Yahoo!'s decision-making process in connection with de Castro's employment?[31] If so, exactly what data must Yahoo! provide? Board minutes? Mayer's private emails

25. *Id.*

26. *Amalgamated Bank*, 132 A.3d at 772.

27. *See id.*

28. *Id.*

29. This large payout was the result of at least three different factors: (1) the renegotiated contract with de Castro had shifted a great deal of his stock options into a category that would experience accelerated vesting if he was not terminated for cause, *see id.* at 768; (2) the contract defined for-cause termination extremely narrowly and in a way that seemingly made it difficult for Yahoo! to use this designation solely for very poor performance, *see id.* at 763; and (3) the price of Yahoo!'s stock had risen significantly during de Castro's fourteen-month tenure, *see id.* at 773. This latter factor was attributed to a large investment by Yahoo! in the Chinese e-commerce company Alibaba (not due to Yahoo!'s core operations), but it meant that the anticipated severance payout of $23.5 million had skyrocketed to $60 million. *Id.*

30. *Id.* at 774. The information included books and records from Mayer and the board related to de Castro's hiring, performance, and firing. Some additional materials were also requested. *Id.* at 788–96.

31. In the actual case, the Delaware Court of Chancery determined that the shareholder allegations were sufficient to provide a credible basis for a possible breach of fiduciary duty by Mayer and Yahoo!'s board, and the court granted much, but not all, of the shareholder's inspection request. *Id.* at 787–96. The corporate case was eventually dropped, but a second lawsuit was also filed in connection with this matter. This latter case settled after Yahoo! established a special board committee to investigate. The committee concluded that de Castro's firing had violated the firm's bylaws by not receiving full board approval but that shareholders did not have a viable claim because the board had not acted in bad faith or with gross negligence. The special committee also recommended new compensation committee governance procedures, which Yahoo! adopted. *See* Jeff Montgomery, *Yahoo Gets Nod for $2.4M 'Moot-Fee' Deal in $57M Pay Suit*, LAW360 (Aug. 9, 2017), https://www.law360.com/articles/952585/yahoo-gets-nod-for-2-4m-moot-fee-deal-in-57m-pay-suit; Yin Wilczek, *Yahoo Pays $2.4M 'Mootness' Fee to Settle Suit Over Exec Firing*, BLOOMBERG LAW (Aug. 10, 2017), https://news.bloomberglaw.com/corporate-law/yahoo-pays-24m-mootness-fee-to-settle-suit-over-exec-firing.

and text messages on the matter?[32] Strategic operating data that might reflect the skill of de Castro's performance? Questions like these are increasingly taking center stage as shareholders prosecute information litigation as a first step in the possible pursuit of a broader corporate governance grievance.

Notwithstanding this increase in information litigation, lawmakers lack a comprehensive theory for evaluating the private right to corporate information.[33] Many courts and commentators offer only short statements about a need for balance: shareholders should be able to obtain information necessary to exercise their rights, but they should not be able to harass managers or expose crucial corporate secrets.[34] Legal standards for adjudicating private, *ex post*[35] information demands are vague, and the caselaw is messy. Most disputes are decided by asking whether the requested information is "necessary and essential" for pursuing a "proper [shareholder] purpose."[36] But how should we award and define the scope of this right? Should elective private contracting and mandatory public disclosures really be supplemented with additional inspection rights in corporate law? Moreover, are inspection rights fundamental for shareholders, or should it be permissible for firms to eliminate or modify these rights via charter or bylaw amendments?

This Article argues that inspection rights are best justified in connection with efforts to mitigate managerial agency costs through forensic review. Much of corporate law seeks to maximize the benefits of centralized economic activity

32. The request for private emails and other electronic documents from Mayer's accounts (even personal email accounts that were used for business) was a notable tension point for the case. The chancery court initially required these to be delivered to the plaintiff. *Amalgamated Bank*, 132 A.3d at 793. The Delaware Supreme Court quashed this order, however. *See* Jeff Montgomery, *Del. High Court Nixes Yahoo Email Release Pending Appeal*, LAW360 (Apr. 14, 2014), https://www.law360.com/articles/784686/del-high-court-nixes-yahoo-email-release-pending-appeal). More recent inspection decisions have also resisted shareholder requests for private emails. *See In re* UnitedHealth Grp., Inc. Section 220 Litigation, No. 2017-0681-TMR, 2018 WL 1110849, at *9 (Del. Ch. Feb. 28, 2018); *In re* Plains All Am. Pipeline, L.P., No. 11954-VCMR, 2017 WL 6016570, at *4–5 (Del. Ch. Aug. 8, 2017) ("[P]laintiffs [have not] carried their burden of showing why board-level documents alone would not be sufficient for their stated purposes.").

33. There have been some helpful articles in recent years about the proper scope of inspection rights. *See, e.g.*, Browning Jeffries, *Shareholder Access to Corporate Books and Records: The Abrogation Debate*, 59 DRAKE L. REV. 1087, 1132–39 (2011) (arguing that state inspection statutes should preempt common law rights of inspection).

34. *See, e.g.*, State *ex rel.* Pillsbury v. Honeywell, Inc., 191 N.W.2d 406, 410 (Minn. 1971) (construing Delaware law) ("Because the power to inspect may be the power to destroy, it is important that only those with a bona fide interest in the corporation enjoy that power."); Thomas, *supra* note 10, at 333–34.

35. I term these types of information requests *ex post* because they are released in response to a specific shareholder request for information. In other words, these might be contrasted to private *ex ante* information disclosures, where a firm releases periodic and ongoing information to shareholders in a way that mirrors (though need not duplicate) public-firm reporting obligations. Much of the debate in securities regulation has focused on this type of *ex ante* disclosure (whether public or private). *See, e.g.*, Merritt B. Fox, *The Issuer Choice Debate*, 2 THEORETICAL INQUIRIES L. 563, 567, 592–94 (2001) (agreeing that there are private incentives for regular reporting but arguing that positive externalities can support mandatory public reporting); Romano, *supra* note 1, at 2364 (advocating for reforms that enable opt-out from mandatory reporting to empower voluntary firm-based disclosures).

36. *See, e.g.*, KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 751–52 & n.72 (Del. 2019).

while minimizing the costs of suboptimal agent decision-making. Endless varieties of agency problems exist, but the distortions are all grounded in information asymmetry. Shareholder inspection rights are thus well suited to addressing agency lapses, and they are warranted in connection with this fundamental aim.

An important corollary to this claim, however, is that shareholder inspection rights may not be a fundamental entitlement when deployed more broadly. Recently, for example, shareholders have started to make sweeping information demands in connection with purported efforts to value their stock. Such requests have sometimes been permitted in the past. But demands for detailed, forward-looking corporate information should be treated with more caution. Invoking the right magic words—such as "I want to value my stock"—should not automatically open the doors to sensitive prospective corporate data. Inspection rights are best used to uncover (or refute) specific allegations of a possible governance abuse, not as an open-ended invitation to harvest forward-looking information. If this is true, then *ex ante* efforts to limit some shareholder inspection rights via private ordering in the key corporate documents might fit comfortably with the goals of corporate law.

This Article also highlights another intriguing aspect of a private information entitlement: it can be constrained by legal conditions. Public disclosures are, by design, open for everyone to review: current shareholders, potential investors, regulators, customers, competitors, and so on. Private information rights may be restricted. Delaware law, for example, allows courts to "prescribe any limitations or conditions with reference to the inspection" demand.[37] Judges have used this power to impose confidentiality obligations for decades.[38] But recent decisions have also started to envelop grants of private information with new types of conditions, albeit cautiously. For example, some courts have conditioned data release on a forum limitation requirement under which the shareholder is prohibited from using the information in any lawsuit filed outside the awarding jurisdiction.[39] Other firms have obtained "anti-cherry-picking" conditions that allow them to automatically incorporate any information that is provided to the shareholder in a legal response to a related, follow-on lawsuit.[40] Academic literature has not yet considered the theoretical importance of these conditional limits on private information.

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37. DEL. CODE ANN. tit. 8, § 220(c) (2011).

38. *See infra* Part II.C. This limitation does raise potential concerns about a shareholder's ability to communicate concerns with other shareholders in order to solve collective-action problems.

39. *See infra* Part II.C.

40. Again, these incorporation provisions have been employed in Delaware. The logic seems to be that they will prevent plaintiff shareholders from "cherry-picking" apparently damning facts out of context. *See infra* notes 179–82 and accompanying text.

The Article is organized as follows. Part I reviews the history and operation of shareholder inspection rights. Part II traces recent complications in application and scope. Part III advances a theory of private information access that is grounded in the promise of shareholder inspection as a forensic means to mitigate agency abuses. It argues that shareholder access to information should be considered a fundamental right of ownership. At the same time, however, some contexts for shareholder inspection, such as the pursuit of forward-looking, strategic information that presents significant risk of misuse, might still be limited through *ex ante* private ordering or *ex post* judicial condition. A brief conclusion summarizes the Article.

I. ESTABLISHING THE PRIVATE RIGHT TO CORPORATE INFORMATION

How much private information can shareholders demand from their firms? The question is fundamental to corporate governance because investors must know about a problem to respond.[41] Indeed, information requests from shareholders have skyrocketed in recent years, as judges admonish them to investigate a potential business concern in lieu of filing a knee-jerk lawsuit.[42] New technologies and algorithms for processing unstructured information may also be increasing the usefulness of corporate data.[43]

Although academic literature on shareholder information disputes is relatively sparse, most commentators recognize two key trade-offs. On the one hand, corporate information cannot be made ubiquitous without revealing business secrets.[44] Owning a share certificate is not a license to repeatedly harass top managers or harvest crucial information about the firm's strategy. On the

41. More specifically, the separation of ownership and control can unleash a wide variety of bad managerial behavior, such as shirking, theft, entrenchment, and excessive risk-taking—collectively referred to as "agency costs." Each of these problems can be blamed on asymmetrical information: if it costs nothing for shareholders to observe and understand how an agent's actions are linked to ultimate economic outcomes, then the agent would not be able to behave in a way that was incongruent with the shareholders' best interests. *See* Kenneth J. Arrow, *The Economics of Agency*, *in* PRINCIPLES AND AGENTS: THE STRUCTURE OF BUSINESS 37, 37–39 (John W. Pratt & Richard J. Zeckhauser eds., 1985); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308–10 (1976).

42. The clearest example of this can be seen in shareholder derivative lawsuits. These actions, filed in response to managerial misconduct, typically require shareholders to demonstrate that a demand on directors (to cause the corporation to sue) would be futile. Usually this means that the plaintiff shareholder will need to show that the directors themselves are conflicted or cannot otherwise be expected to make a good-faith decision regarding the lawsuit. For the past several decades, courts (especially in Delaware) have emphasized that these allegations cannot be cursory. Rather, shareholders must muster detailed information (without the right to legal discovery) that casts a reasonable doubt on the board's judgement. *See* Grimes v. Donald, 673 A.2d 1207, 1216–17 (Del. 1996), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993); Marx v. Akers, 666 N.E.2d 1034, 1037 (N.Y. 1996). Recent decisions have especially emphasized the need to move beyond superficial allegations.

43. There has been great interest in recent years about the possible use of deep-learning algorithms and other technology to process unstructured information. This clearly has direct application for electronic-information discovery, and there are obvious parallels to earlier investigatory efforts by shareholders.

44. *See, e.g.*, Thomas, *supra* note 10, at 334 ("Shareholders seeking to disrupt the corporation's business, or misuse its proprietary information, cannot be allowed unrestrained access to corporate secrets.").

other hand, shareholders do need to understand when something rotten might have occurred in the boardroom in order to launch an election contest or file a lawsuit to protect their investment. Effective corporate governance cannot occur in an information vacuum.[45]

These are difficult concerns to balance, and the highly varied contexts of information disputes have resulted in abstract legal standards. Delaware, for example, requires shareholders to demonstrate a "proper purpose" for obtaining private information.[46] As we then might expect, the law of corporate information is complicated and contextual. It is also governed by several overlapping regimes.

A. The History of Shareholder Inspection Rights

Shareholders have been allowed to demand private corporate information for a long time. But the legal requirements for obtaining inspection rights have shifted over the years, and it is helpful to understand this history before considering more recent developments.

1. Origins

Information rights have accompanied share ownership as a matter of common law since the rise of the modern corporation.[47] This access was typically justified as a way for shareholders to protect their property interest in an investment. For example, in the late 1800s, a shareholder at the renowned piano maker Steinway & Sons sought information about the firm's activity after gleaning rumors of mismanagement.[48] When the board refused, the New York Court of Appeals determined, after a long study of English common law, that the plaintiff should be allowed to inspect the firm's records.[49] According to the court, it was "the right of every [shareholder] to see that . . . property is well

45. *See id.* at 333.

46. *See* KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 751–52 (Del. 2019).

47. *See, e.g.*, Dominus Rex v. Fraternity of Hostman in Newcastle-upon-Tyne (1745) 93 Eng. Rep. 1144, 1144; 2 Str. 1223, 1223 ("[E]very member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though it was in a dispute with others.").

48. *See In re* Steinway, 53 N.E. 1103, 1103 (N.Y. 1899).

49. *See id.* at 1105 ("The right of a [shareholder] . . . to inspect the books and papers of the corporation, for a proper purpose and under reasonable circumstances, was recognized by the courts of king's bench and chancery from an early day . . . but always with caution, so as to prevent abuse."). At the time, the state of New York only conferred limited inspection rights by statute, so it was necessary to refer to common law rights. *Id.* at 1107.

managed, and to have access to the proper sources of knowledge in this respect."[50] Other courts expressed similar sentiments during this time period.[51]

Yet the common law right to corporate information was not absolute. Shareholders had to demonstrate a good reason—or proper purpose—for their request. Exactly what this meant was not always clear, but mere "idle curiosity" would not suffice.[52] The challenge for a plaintiff could turn circular: how could a shareholder know enough to assert a specific purpose for the request if she was unable to examine the firm's data to see what the corporation had been up to?[53] One cannot divine misdeeds. Some courts seemed to respond to this conundrum by imposing a relatively forgiving notion of proper purpose.[54] These common law inspection rights were usually enforced only through a writ of mandamus, however, which could be understood as an extraordinary remedy.[55]

Parallel to the development of common law rights, many states also enacted statutory amendments that explicitly granted inspection rights to shareholders via state corporation codes. New York, for example, adopted an information-access law as early as 1848.[56] These statutes did not always go as far as some might have wished, but they offered clear evidence that lawmakers saw information access as an important shareholder right. The codification provisions also eliminated formal pleadings necessary to obtain a writ of mandamus by creating a "positive" right of shareholder inspection.[57] Moreover, these codified rights were typically viewed as incremental to (and not preemptive of) common law inspection claims.[58]

As corporations grew larger and more complex, shareholders began to invoke inspection statutes more frequently to evaluate firm operations. While the codified rights initially mirrored the common law requirement of a proper shareholder purpose, some statutes were eventually modified or interpreted in a way that supported more liberal access to corporate information. By 1900, for

50. *Id.* at 1106 (quoting Cockburn v. Union Bank of La., 13 La. Ann. 289, 290 (La. 1858)). In arriving at its decision, the *Steinway* court also wrestled with interesting questions related to the equitable powers of the court. *See id.* at 1104–05.

51. *See, e.g.*, *Cockburn*, 13 La. Ann. at 290; Huylar v. Cragin Cattle Co., 2 A. 274, 278–79 (N.J. Ch. 1885), *rev'd*, 7 A. 521 (N.J. Ch. 1887); Lewis v. Brainerd, 53 Vt. 519, 521–22 (Vt. 1881).

52. *See, e.g.*, People *ex rel.* Bishop v. Walker, 9 Mich. 328, 330 (1861) ("I have examined all the cases to which we have been referred, and can find none where [inspection] was granted to enable a [shareholder] to gratify idle curiosity.").

53. *See, e.g.*, *Huylar*, 2 A. at 278 ("To say that they have the right, but that it can be enforced only when they have ascertained in some way without the books that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant.").

54. *Id.*at 278–79.

55. *See, e.g.*, State *ex rel.* Thiele v. Cities Serv. Co., 115 A. 773, 774–75 (Del. 1922).

56. *See In re* Steinway, 53 N.E. 1103, 1107 (N.Y. 1899) (tracing the history of statutory inspection rights in New York).

57. *See, e.g.*, Shaw v. Agri-Mark Inc., 663 A.2d 464, 467 (Del. 1995).

58. *See, e.g.*, *In re Steinway,* 53 N.E. at 1107.

example, revised statutes even seemed to offer unqualified shareholder inspection rights.[59] Further, courts began to punish firms that refused to allow inspection, even under circumstances where the shareholder's motives for demanding the information seemed highly questionable.[60] Some firms bought shares in a competitor to obtain confidential operating information. A few rogues even pored over corporate books in pursuit of compromising information that might be used to blackmail managers.[61]

The information pendulum had seemingly swung too far towards transparency. Managers could not run a business with investors constantly peering over their shoulders. The right to inspect had, in part, become a right to harm the firm—and, derivatively, to harm other shareholders—by grabbing corporate information for private advantage. Not surprisingly, there was a legislative backlash in the 1930s, and shareholder inspection statutes were again adjusted to clearly state that information would only be provided at a reasonable time and in connection with a proper shareholder purpose.[62] Some states went further by delineating certain categories of shareholders, such as very small owners or brand-new owners, who were ineligible to exercise inspection rights.[63]

Over the next few decades, sporadic inspection battles erupted from time to time, but the topic did not attract much attention. There was limited concern about claimants seeking access to shareholder address lists to conduct junk-mailing campaigns or to pursue other private commercial interest.[64] And sometimes a shareholder would file an inspection claim in pursuit of a social-justice initiative. In one notable case, for example, a concerned shareholder pestered Honeywell Corporation for information in an attempt to hinder the firm's production of shrapnel bombs during the Vietnam War.[65] This purpose was deemed improper, and the inspection request was turned down.[66] In general,

59. *See* Thomas, *supra* note 10, at 339 & n.46; *e.g.*, 1890 N.Y. Laws 1071–72 (stating that the corporate books and stock ledger "shall . . . , during business hours, be open for the inspection of [shareholders]"); 1884 Ohio Laws 197 (maintaining that the "books and records of such corporation shall at all reasonable times be open to the inspection of every stockholder").

60. Thomas, *supra* note 10, at 339.

61. *See id.*

62. *See, e.g.*, CAL. CIV. CODE § 355 (Deering 1931) ("The share register . . . the books of account, and minutes of proceedings . . . shall be open to inspection upon . . . demand of any . . . [stockholder] . . . at any reasonable time, and for a purpose reasonably related to his interests as a shareholder. . . .").

63. More specifically, some states imposed minimum shareholder-ownership thresholds and ownership periods before inspection rights could be exercised.

64. *See* 24 AM. JUR. 2D *Proof of Facts* § 71 (1980).

65. *See* State *ex rel.* Pillsbury v. Honeywell, Inc., 191 N.W.2d 406, 408 (Minn. 1971) (construing Delaware law). As a complete aside, the plaintiff was the college roommate of cartoonist Gary Trudeau and apparently served as a model for the character Mike Doonesbury in Trudeau's well-known comic series. *See* Sarah Pearce, *In Living Color: 'Doon' Runs for Congress*, YALE DAILY NEWS (Mar. 4, 2002, 12:00 AM), https://yaledailynews.com/blog/2002/03/04/in-living-color-doon-runs-for-congress/.

66. *Honeywell*, 191 N.W. at 413. It is not hard to imagine, however, how the plaintiff could have repurposed this request in a manner consistent with a proper corporate purpose. For example, he might have asked

however, shareholder inspection rights were not considered the most exciting feature of corporate law, and the topic attracted little academic interest.

2. *Screening Shareholder Litigation*

By the 1990s, however, everything changed again, and shareholder inspection rights began to play a renewed role in corporate governance. The catalyst was an increased concern over abusive litigation and a fear that some plaintiffs were not taking enough time to consider the merits of a potential claim. Courts began to screen shareholder lawsuits by insisting on heightened pleading requirements related to alleged misconduct.[67] Such a step could be more easily justified if shareholders had some way to obtain the information needed to substantiate allegations of insider misdeeds.

These tensions arose most directly with shareholder derivative litigation.[68] In these cases, a plaintiff shareholder seeks to wrest governance control from the corporation's normal decision makers to prosecute a lawsuit on the firm's behalf. The concerns are inevitably linked to allegations of managerial misconduct, and the lawsuits thus serve as a potential check on agency abuses.[69] But derivative litigation might also be weaponized by less scrupulous investors (or their lawyers) to extract strike settlements.[70] Accordingly, corporate law only allows derivative cases to go forward in limited circumstances, typically when there are strong signs that something seems rotten in the boardroom.

Shareholders file many claims each year, however, and a damning newspaper headline will often spark multiple lawsuits. A shareholder plaintiff should muster sufficient evidence of wrongdoing before being allowed to move forward with a claim. Practically, this is accomplished in the most important jurisdictions with a demand requirement. A plaintiff is, in theory, expected to approach a board of directors to demand that it initiate a lawsuit on behalf of the firm. But because the nature of the dispute almost always involves high-level misconduct—and because a board can often respond to a demand request by

for the information related to whether bad publicity over the bombs harmed Honeywell's business prospects. In the words of one law professor, "a little perjury would have solved this problem."

67. *See infra* notes 74–75 and accompanying text.

68. Another example of concern over excessive litigation, not emphasized in this Article, is evident in the federal enactment of the Private Securities Litigation Reform Act. *See* Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995).

69. Indeed, the power to sue is often described as one of three foundational governance strategies for shareholders (along with the right to elect new directors and sell their shares). *See, e.g.*, Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 LAW & CONTEMP. PROBS. 215, 216 (1999).

70. *See, e.g.*, Roberta Romano, *The Shareholder Suit: Litigation Without Foundation*, 7 J.L. ECON & ORG. 55, 84–85 (1991) (conducting an empirical study of shareholder litigation—including both derivate and class action lawsuits—and concluding that "[t]here are financial recoveries in only half of settled suits, and per share recoveries are small. . . . The principal beneficiaries of the litigation . . . appear to be attorneys, who win fee awards in 90 percent of settled suits.").

refusing to pursue the case[71]—well-advised shareholder plaintiffs are unlikely to make such a request.[72] Rather, they will argue that demand should be excused because the board cannot be trusted to consider bringing the claim.[73]

Litigation over demand excusal raises two critical questions. First, how much evidence must be presented to convince a court that demand is futile—allowing the shareholder to move forward with control of the case? Second, what steps can a shareholder take to obtain this evidence? In 1996, the landmark Delaware case of *Grimes v. Donald* addressed both issues.[74] First, the court stated that thin allegations of wrongdoing would not suffice. Rather, a plaintiff must present enough evidence to raise a "reasonable doubt" that there is a problem.[75] Yet an angry shareholder cannot engage in discovery at this stage in the litigation and must, in the words of the Delaware Supreme Court, use the "tools at hand" to uncover facts necessary to make out his case.[76]

When the court in *Grimes* announced this approach, it was not self-evident what "tools" were clearly "at hand" for a plaintiff shareholder. The court indicated that shareholders should scour any public securities law filings, newspapers clippings, and the like. But the court also suggested that shareholders in this situation might take advantage of private inspection rights to better determine whether a bad outcome could be corroborated with additional facts of managerial impropriety:

> [A] stockholder who has met the procedural requirements and has shown a specific proper purpose may use the summary procedure embodied in [Delaware's inspection statute] . . . . Surprisingly, little use has been made of [this statute] as an information-gathering tool in the derivative context. Perhaps the problem arises in some cases out of an unseemly race to the court house, chiefly generated by the "first to file" custom seemingly permitting the winner of the race to be named lead counsel. The result has been a plethora of superficial complaints that could not be sustained. Nothing requires the Court of Chancery . . . to countenance this process by penalizing diligent counsel who

71. In theory, upon learning of a board's refusal to act upon a demand request, a shareholder might try again through asserting that the failure to proceed was, in itself, wrongful. *See* Grimes v. Donald, 673 A.2d 1207, 1218–19 (Del. 1996), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000). As a practical matter, however, this second effort will usually be much more difficult because the shareholder must now challenge the litigation-refusal decision, and a firm can usually claim that the reputation harm from maintaining the claim would be significant.

72. *See* Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1784 (2004).

73. The exact standards differ slightly from state to state, but generally a plaintiff must show one of three things: (1) a majority of directors are self-interested in a transaction at issue; (2) a majority of directors are unable to evaluate the disputed transaction with independence because they are controlled or dominated by a self-interested insider; or (3) the challenged transaction is so egregious on its face that it could not have been the product of a sound business judgment of the directors. *See Grimes*, 673 A.2d at 1216; Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993); Marx v. Akers, 666 N.E.2d 1034, 1041 (N.Y. 1996).

74. *Grimes*, 673 A.2d at 1210.

75. *Id.* at 1217. The reasonable doubt standard has been questioned (and rejected in some other states) but remains the proper test in Delaware.

76. *Id.* at 1218.

> has employed these methods, including [this statute], in a deliberate and thorough manner in preparing a complaint that meets the demand excus[al] test . . . .[77]

The signal was loud and clear: derivative litigation ambulance chasing would not be tolerated in Delaware. Numerous opinions have repeated this assertion that shareholder plaintiffs need to pursue inspection rights in lieu of filing knee-jerk claims.[78] Commentators sympathetic to the view that Delaware courts exhibit a pro-management bias are critical of this move—grumbling that it offers further evidence of judicial efforts to shield insiders from lawsuits. But those more sympathetic to the problem of shareholder strike suits view this as a step towards balance in derivative litigation—balance that is needed to preserve shareholder lawsuits as a plausible governance device.[79] In any event, it means that once-moribund inspection rights have taken on a significant new role in corporate law.

3. Statutory Simplification and Expansion

A third, less regarded development in Delaware inspection law came in 2003 when the statute was modified to simplify and expand stockholder access rights. There were at least three key changes: (1) inspection rights for beneficial stockholders; (2) look-through rights to corporate subsidiaries; and (3) simplified procedural requirements for asserting inspection claims. None of these amendments were revolutionary, but taken together, they did represent a meaningful expansion of stockholder access to firm information.

First, consider the significance of expanding inspection to beneficial stockholders. Fifty years ago, many investors held their equity as record owners: they were listed directly on the firm's books as stockholders and were able to exercise governance rights without working through intermediaries. During the early 1970s, however, the entire stock-settlement system was reformed, and a new clearinghouse emerged to hold an increasing number of shares in centralized

77. *Rales*, 634 A.2d at 934 n.10 (Del. 1993).

78. *See, e.g.*, *In re* Wal-Mart Stores, Inc. Del. Derivative Litig., No. 7455-CB, 2016 WL 2908344 (Del. Ch. May 13, 2016). Delaware courts have also started to consider whether a given plaintiff has initiated an inspection demand when determining who should be named lead plaintiff. By 2012, the importance of inspection seemingly reached an apogee, as one opinion held that a failure to pursue shareholder inspection rights in advance of a derivate claim should result in a presumption that the shareholder was unable to provide adequate representation for the corporation. La. Mun. Police Emps.' Ret. Sys. v. Pyott, 46 A.3d 313, 349 (Del. Ch. 2012). The case was brought in a tricky context where a carefully investigated lawsuit might be precluded by a rapidly filed claim in another jurisdiction unless the second case was not deemed to adequately represent the interests of the firm plaintiff shareholder. This presumption of inadequate representation but for inspection was eventually overturned by the Delaware Supreme Court. Pyott v. La. Mun. Police Emps'. Ret. Sys., 74 A.3d 612, 618 (Del. 2013). But the importance of using shareholder inspection to perform advance spade work in a derivative litigation claim persists.

79. *See, e.g.*, Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands—Reprise*, 28 CARDOZO L. REV. 1287, 1413–14 (2006).

fungible bulk. The exact mechanics are complicated and unnecessary to review for present purposes,[80] but the upshot is that most stock is now held in street name. Actual investors are typically treated as beneficial holders, and they were thus not entitled to direct inspection rights under the former Delaware statute.[81] In other words, retrofitted trading markets had effectively modified inspection rights in a way that greatly pruned stockholder access to information.[82] Combining greater information obligations for shareholder lawsuits with a lack of direct inspection rights for many shareholders seemed poor policy. The 2003 Delaware amendment to include beneficial stockholders, though positioned as a minor change, had the important effect of restoring inspection rights to the average investor.[83]

The second Delaware amendment clarified that inspection rights included corporate subsidiaries.[84] Historically, shareholders were not allowed to examine a subsidiary unless they could prove fraud or demonstrate that the subsidiary was a mere "alter ego" of the parent corporation.[85] This 2003 amendment reversed the presumption and prevented a firm from trying to shuttle the most sensitive information down to a subsidiary to evade shareholder inspection. There was at least some evidence of this behavior by managers,[86] and Delaware lawmakers were on to the game.

Finally, the 2003 amendments made a few other procedural changes to simplify inspection rights. For example, earlier versions of the statute required shareholders to make a formal oath justifying the purpose of the request. The

80. For more on the topic, see George S. Geis, *Traceable Shares and Corporate Law*, 113 NW. U. L. REV. 227, 232–35 (2018).

81. *See, e.g.*, Shaw v. Agri-Mark, Inc., 663 A.2d 464, 468 (Del. 1995) ("[E]stablishing oneself as a stockholder of record is a mandatory condition precedent to the right to make a demand for inspection . . . ." (quoting Rainbow Navigation, Inc. v. Pan Ocean Navigation, Inc., 535 A.2d 1357, 1360 (Del. 1987))).

82. It might still be possible, of course, for a record shareholder to obtain inspection rights by trying to purchase some stock directly from the corporation or by working through the various layers of intermediaries to have the current record holder facilitate the inspection request. Yet these additional steps would clearly complicate the task.

83. 74 Del. Laws 214–15 (2003). Beneficial holders must still provide satisfactory evidence of their ownership. *See, e.g.*, Seinfeld v. Verizon Commc'ns Inc., 873 A.2d 316, 317 (Del. Ch. 2005) (denying inspection to a claimant failing to provide satisfactory proof of beneficial share ownership).

84. The new language stated that a shareholder had explicit access to "[a] subsidiary's books and records, to the extent that: a. [t]he corporation has actual possession and control of such records of such subsidiary; or b. [t]he corporation could obtain such records through the exercise of control over such subsidiary" as long as the examination of the subsidiary's information would not impede on other legal rights. DEL. CODE ANN. tit. 8, § 220(b)(2) (2011).

85. *See* Saito v. McKesson HBOC, Inc., 806 A.2d 113, 118 (Del. 2002) (quoting Skouras v. Admiralty Enters., Inc., 386 A.2d 674, 681 (Del. Ch. 1978)).

86. *See, e.g.*, *Skouras*, 386 A.2d at 681. The limits of this change continued to be tested, however, and a couple years later, the Delaware Supreme Court qualified this right by refusing inspection rights for a 45%-owned subsidiary. *See* Weinstein Enters., Inc. v. Orloff, 870 A.2d 499, 512 (Del. 2005).

2003 amendments replaced this requirement with a more straightforward declaration made under a penalty of perjury.[87] The legislature also adjusted the burden of proof for directors who assert inspection rights: such requests were now deemed presumptively proper.[88]

Taken together, these changes have renewed shareholder inspection rights in a way that sits comfortably with Delaware's rising expectation that shareholders pursue inspection as a prerequisite to filing more substantive legal claims. Importantly, however, access to private firm data is still only gained when there is a proper purpose. Determining whether any given purpose is "proper" has thus become more important than ever. How has this legal standard been understood in the context of shareholder inspection rights?

B. *Adjudicating "Proper Purpose"*

Whether grounded in common law or state statute, a shareholder's right to obtain private corporate information is only permitted for a proper purpose. This is obviously an open-ended standard, and, not surprisingly, it comprises the central battlefield for many inspection disputes. A court will inevitably look to context for resolution of this issue.[89] But the law has historically approved information requests connected with three different types of justifications: (1) communications with other shareholders for a governance event (such as a shareholder proposal or proxy fight); (2) investigations into suspected corporate mismanagement; or (3) efforts to evaluate the firm's business performance, usually in connection with prospective share valuation.[90]

87. *See* Del. Dept. of State, *General Assembly Approves 2003 Amendments to Corporate Law*, STATE OF DEL. (Jun. 20, 2003), http://wayback.archive-it.org/1232/20101227155516/http://corp.delaware.gov/2003amends.shtml.

88. *Id.* For shareholder inspection, by contrast, the burden of proof is more complicated. In Delaware, shareholders (like directors) are presumptively permitted to obtain information about the list and addresses of other current shareholders. The corporation bears the burden of proving that these information requests are for an improper purpose (like a junk-mail campaign). On the other hand, shareholders have the burden of demonstrating a proper purpose when seeking additional information. DEL. CODE ANN. tit. 8, § 220(c) (2011). Other states sometimes reverse the burden of proof for this latter category of information, as well, permitting shareholder inspection unless the corporation can demonstrate that a request is improper.

89. For example, the information requested must also be necessary and essential to "the crux of the . . . purpose" and "unavailable from another source." *E.g.*, Espinoza v. Hewlett-Packard Co., 32 A.3d 365, 371–72 (Del. 2011).

90. Some scholars have proposed additional categories. Cox and Hazen, for example, offer five different types of proper purposes:

> to ascertain (1) the financial condition of the company or the propriety of dividends; (2) the value of shares for sale or investment; (3) whether there has been mismanagement; (4) to obtain, in anticipation of a shareholders' meeting, a mailing list of shareholders to solicit proxies or otherwise influence voting; or (5) information in aid of litigation with the corporation or its officers involving corporate transactions.

JAMES D. COX & THOMAS LEE HAZEN, ON CORPORATIONS § 13.03 (2d ed. 2003) (footnotes omitted).

1. *Communication with Other Shareholders*

Large corporations have many investors, and a shareholder who seeks to impact corporate governance will often need to communicate with other owners.[91] An activist may seek to pitch a new slate of directors, for example, or secure approval for a shareholder proposal that influences future behavior. A firm's list of current shareholders is private, however, so the easiest way to obtain co-owner contact information is usually through an inspection request.[92] Accordingly, a shareholder may need to demand access to the corporation's stock register as a prerequisite to launching a broader communication campaign.[93]

Shareholders cannot normally state that they simply wish to communicate with other owners.[94] They usually need to offer a more precise reason for the desired contact.[95] For example, a shareholder might declare that he is concerned about a proposed merger, wants to make an offer to buy stock from other owners, or wants to solicit support for an upcoming shareholder proposal.

As mentioned earlier, much of the historical concern over register inspection rights arose from fears about the solicitation of shareholder lists to conduct unrelated mass-marketing campaigns. With the rise of direct-mailing advertisements, some commentators fretted about entrepreneurial promoters buying a single share of stock in, say, all Fortune 500 firms, requesting contact information for every shareholder in these corporations, and flooding the owners with junk mail. Relatedly, a few cases arose where shareholders appeared to be using shareholder contact information to conduct a political-social protest campaign that was unrelated to core governance operations. Courts routinely denied such requests,[96] though a fear that pretextual inspection demands will ultimately be used to mine personal data still lingers in the scholarly literature.

Today, it seems unlikely that courts need to guard against efforts to grab shareholder information for junk-mail campaigns. The direct-marketing industry has become much more adept at maintaining detailed and targeted consumer data. Moreover, the information that can be obtained from a stock-register inspection request is simply not very useful for direct-marketing purposes. Many

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91. The exception, of course, is a large activist shareholder who buys enough shares to have an influence on firm governance without the need to coordinate with others.

92. This information is also difficult to obtain, and corporations may need to work with many different brokers, and other intermediaries, to pull together a current list of beneficial owners.

93. Shareholders of Delaware firms enjoy a burden-shifting standard for this information: they are entitled to the ledger unless the corporation can prove it is requested for an improper purpose. DEL. CODE ANN. tit. 8, § 220(c)–(d).

94. Occasionally, courts allow shareholders to obtain address lists without a specific statement of governance intentions. *See, e.g.*, Lake v. Buckeye Steel Castings Co., 206 N.E.2d. 566, 570 (Ohio 1965).

95. *See* Nw. Indus., Inc. v. B.F. Goodrich Co., 260 A.2d 428, 429 (Del. 1969).

96. *See* State *ex rel.* Pillsbury v. Honeywell, Inc., 191 N.W.2d 406, 410–13 (Minn. 1971).

investors no longer own stock directly, preferring to hold diversified equity positions through mutual funds or exchange-traded funds. And the personal information that might be available—even with a comprehensive list of all beneficial stockholders—is high-level data that is ill-suited to targeted marketing efforts. For these reasons, historic concerns about junk marketing abuses seem outdated.

2. *Suspected Corporate Mismanagement*

Shareholders often justify an information request by stating that they want to investigate whether corporate leaders have breached a fiduciary obligation. As described above, Delaware has especially embraced this rationale to seek balance in shareholder litigation. Yet a shareholder might conceivably assert a sua sponte suspicion that something smells funny in the boardroom to justify a chase after other strategic information.[97] How much more, beyond an unsubstantiated hunch, must shareholders provide to unlock the doors for inspection in this context?

Consider an example from 2003: a small shareholder (named Seinfeld) at Verizon Communications sought private information about the compensation of the firm's top three executives.[98] Seinfeld alleged that all three executives were performing the "same job" and that they had received excessive pay that justified a waste lawsuit against the firm. Yet the plaintiff, when deposed, admitted that "he had no factual support for his claim that mismanagement had taken place."[99] Similarly, Seinfeld revealed that "he had no factual basis to allege the executives 'did not earn' the amounts paid to them under their respective employment agreements."[100] The paychecks just seemed large, and something felt wrong to him.

The court tossed out the case, insisting that while the desire to investigate corporate mismanagement is a proper purpose for inspection, a shareholder must establish a basis for the belief of wrongdoing.[101] This does not mean, of course, that shareholders must prove that mismanagement has actually occurred—only that they can offer a "credible basis from which the Court . . . can

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97. The related problems of pretextual justification and mixed motive raise perennial concerns. A well-advised investor might offer a standard purpose for the inspection while retaining another private motive for the information-gathering. The risk of perjury might stave off the most egregious deceptions, but courts continue to struggle with situations where shareholders do appear to have multiple purposes. *Compare* Carapico v. Phila. Stock Exch., Inc., 791 A.2d 787, 791 (Del. Ch. 2000) (stating that a secondary purpose will not defeat a shareholder's claim of another proper purpose for inspection), *with* Pershing Square, L.P. v. Ceridian Corp., 923 A.2d 810, 824 (Del. Ch. 2007) (finding the shareholder's stated purpose was proper but denying inspection rights due to an improper primary purpose for the request).

98. Seinfield v. Verizon Commc'ns, Inc., 909 A.2d 117, 118–19 (Del. 2007).

99. *Id.* at 119.

100. *Id.*

101. *Id.* at 121–23.

infer there is possible mismanagement that would warrant further investigation."[102] In the Verizon case, nothing had been offered beyond the plaintiff's hunches.

Seinfeld pushed back against this result, arguing that such an approach locked shareholders in a catch-22:

> [The] Court [has] instructed shareholders to utilize § 220 as one of the tools at hand. Yet, the Court of Chancery at bar, in requiring *evidence* makes a § 220 application a mirage. If the shareholder had evidence, a derivative suit would be brought. Unless there is a whistle blower, or a video cassette, the public shareholder, having no access to corporate records, will only have suspicions.[103]

Despite the court's protestations to the contrary, there is clearly some truth to this argument.[104] Indeed, we will return to this "bootstrapping" problem later as a central concern of private information rights. Nevertheless, the court was (quite rightly) worried about shareholder efforts to launch fishing expeditions to harass managers or satisfy idle curiosity. The credible-basis requirement seeks to balance these competing concerns, and shareholders must find some justification for alleged misbehavior beyond naked distrust.[105]

Once a credible basis for suspicion is satisfied, lawmakers must then determine the breadth of information that will be provided to shareholders. As discussed in the next Part, these problems in application and scope are often significant. Do a firm's "books and records" include electronic documents and email archives? Need the firm search disaster-recovery tapes for additional information? How far down into the operational details may a claimant penetrate? How far back in time can the inquiry go? Will attorney work-product privileges block some inspection requests? And so on. Importantly, the right to inspect is

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102. *Id.* at 123.

103. *Id.* at 121.

104. The court argued that using the credible-basis-from-some-evidence standard did not raise an insurmountable barrier to inspection rights by citing numerous cases where shareholders were able to present sufficient evidence of suspected mismanagement to unlock inspection. This is undoubtedly correct. But the fact that some plaintiffs have been able to break out of the catch-22 does not really address the broader question: how many plaintiffs would have been able to detect managerial wrongdoing if they had been able to see what was going on without mustering initial evidence for a credible-basis inspection claim? We cannot observe plaintiffs who would have investigated their firms but did not seek inspection in the shadow of this requirement.

105. In situations where shareholders have satisfied the credible-basis standard, they typically use evidence from SEC investigations, witness testimony, restated financials, inconsistent press releases by the firm, or other corporate documents. *See, e.g.*, Sutherland v. Dardanelle Timber Co., No. Civ.A 671-N, 2006 WL 1451531, at *8 (Del. Ch. May 16, 2006) (using testimony about the summary removal of a shareholder from the board); Deephaven Risk Arb Trading, Ltd. v. UnitedGlobalCom, Inc., No. Civ.A 379-N, 2005 WL 1713067, at *9 (Del. Ch. July 13, 2005) (using inconsistent corporate press releases); Freund v. Lucent Techs., Inc., No. Civ.A 18893, 2003 WL 139776, at *3 (Del. Ch. Jan. 9, 2003) (using an SEC investigation and financial statements).

not the right to discovery.[106] The former is narrower, and inspection in connection with suspected corporate mismanagement should be viewed as a bridge from credible initial suspicions to the full-fledged discovery rights that will attach once demand is excused as futile and the plenary lawsuit begins. Yet as we will see, the devil is in the details.

3. *Valuing Stock*

A third justification for inspection occurs when a shareholder asks for information to value stock holdings. This arises more often with private corporations because shareholders of public firms in liquid markets might simply glance at the stock ticker to estimate what each share is worth.[107] Yet there has been a rise in the number of inspection requests to value stock, particularly as more firms delay going public (or more shareholders realize that a valuation justification often unlocks corporate data).

What type of information will be released in this context? Theoretically, a shareholder should be most interested in managerial discussions or financial projections that shed light on the firm's forward-looking economic prospects. It is these future expected cash flows, not yesterday's news, that should determine what a share of stock is worth today.[108] But using inspection rights to obtain future strategic information is especially contentious.[109] At a minimum, however, shareholders will often ask for historical financial statements, tax records, information about recent stock sales by other investors, and other related data.

Managers may feel pressure to share this strategic data with influential shareholders. But some will resist handing sensitive information over to small shareholders—citing concerns about leaks to competitors or other potential problems. Corporations are even starting to include conditions in employee stock grants that require workers to waive future shareholder inspection rights.[110] In the most egregious cases, valuation inspection requests are just rejected in a manner that might approach bad-faith behavior.

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106. Limited discovery is sometimes permitted in connection with shareholder inspection, but it is much narrower—both in the range of methods and acceptable substantive topics—than discovery in more regular litigation. For example, a defendant firm might depose the shareholder, but the scope of the deposition is limited to inquiries about the purpose of the inspection request and compliance with technical prerequisites. Thomas, *supra* note 10, at 348. Likewise, the inspection plaintiff is confined to a much smaller range of acceptable inquiries. *See infra* Part II.A.

107. This should be caveated, of course, with the various concerns that might cast some doubts on the efficiency of public capital markets.

108. *See generally* RICHARD A. BREALEY ET AL., PRINCIPLES OF CORPORATE FINANCE 80–100 (13th ed. 2020).

109. *See, e.g.*, *In re* B & F Towing & Salvage Co., 551 A.2d 45, 51 (Del. 1988); Helmsman Mgmt. Servs., Inc., v. A & S Consultants, Inc., 525 A.2d 160, 161–63 (Del. Ch. 1987).

110. *See* Rolfe Winkler, *Startup Employees Invoke Obscure Law to Open Up Books*, WALL ST. J. (May 24, 2016), https://www.wsj.com/articles/startup-employees-invoke-obscure-law-to-open-up-books-1464082

In early 2016, for example, a shareholder (and former employee) at a technology company called Domo asked for information about the firm's recent performance.[111] A senior Domo officer responded that "[a]t the current time we aren't providing annual reports or distributing financial information to shareholders."[112] When the shareholder responded that he thought he was entitled to some basic information about the company by law, the Domo officer sent the following response (copying the firm's general counsel):

> Since Domo is a privately held company, shareholders are not entitled to financial information as a matter of law. If there is a particular law or right that you're thinking of, I'd be glad to take your question to our general counsel, but unlike publicly traded companies, private companies are not obligated to disclose financial information to shareholders.[113]

Domo was incorporated in Delaware, and this response seems misleading with respect to inspection rights. Eventually the shareholder made a formal demand under Section 220 asking for financial information to help value his shares. Domo pushed back. It hired a large law firm to manage the request and filed a lawsuit against the shareholder for defamation and breach of a non-disparagement clause in the former employee's severance agreement. As the parties continued to negotiate, Domo offered to send some information if the shareholder signed a new nondisclosure agreement. But when the shareholder received the agreement, it contained several terms that he viewed as onerous—including a litigation fee-shifting provision, strict limits on sharing the information with financial advisors, and a right for Domo to audit the shareholder's actions to determine whether he had disclosed the financial documents to anyone else.[114] Subsequent negotiations broke down, and litigation commenced. Clearly, Domo was quite concerned about releasing sensitive information to a former and possibly hostile employee.

As this incident suggests, a shareholder's right to demand information for share valuation can raise difficult issues. Because this justification is easier to assert than a request to investigate a specific, and credibly alleged, management problem, almost any shareholder could make such a request. Moreover, the scope of data is potentially vast and especially sensitive: a shareholder might conceivably demand market forecasts, competitive analysis, customer profitability assessments, future investment plans, and so on. All of this information

202. The fitness tracking company Fitbit Inc., for instance, revealed in a registration statement filing that it had included these types of inspection waivers in share grants. The legality of contractual waivers of shareholder inspection rights, however, remains questionable under Delaware law. *See infra* Part III.B.3.

111. Verified Complaint for Inspection of Books and Records Pursuant to 8 Del. C. § 220 at 1, Biederman v. Domo, Inc., No. 12660-VCG (Del. Ch. filed Aug. 15, 2016).

112. *Id.* at 6.

113. *Id.* at 6–7 (emphasis omitted).

114. *Id.* Domo had initially also proposed a liquidated-damages provision for breach of the nondisclosure agreement, but this was eventually dropped in response to the shareholder's protestations.

seems relevant to putting a price on the stock. Relatedly, there are continuing questions about whether *ex ante* waivers of inspection rights or *ex post* nondisclosure agreements that limit use of the information should be enforced. Some state inspection statutes are immutable law, not waivable default rules,[115] so attempts to constrain the right in this manner seem questionable.

To quickly recap, then, corporate law has historically upheld inspection demands in three key situations: communicating with other shareholders, investigating corporate mismanagement, and valuing shares. There is obviously some overlap between these justifications; determining whether a firm has performed especially poorly, for instance, might also offer evidence of managerial misconduct or justify a proxy fight to elect a new board. But many plaintiffs will grab onto just one of these purposes to justify an information request.

Despite the rising incidence of information litigation, evaluation of these requests is not usually grounded in normative theories of private information revelation. Seeking information to address retrospective agency abuses may not be the same as pursuing a request for prospective strategic data. It is important to assess the broader goals of corporate law when using inspection to mitigate information asymmetries between firm and shareholder. Before doing so, however, we need to understand how the stakes of private information battles are increasing by looking at several recent complications.

II. PROBLEMS IN APPLICATION AND SCOPE

A. Defining "Books and Records"

Lawmakers drafted inspection statutes in an era of paper. The typical language states that shareholders are entitled to inspect a firm's "books and records," not all corporate data that might shed light on a topic.[116] The mental model seems to be one where a shareholder arrives at the corporation's front door one sunny Monday morning and strolls into a conference room to pore over general ledger accounting books and typewritten minutes from recent board meetings. Today, of course, we often have paperless offices. Key corporate documents may only reside in the cloud. What does it mean, then, to award private inspection of books and records in an era of electronic information? Statutes and interpretive judicial decisions often remain coy on this question.

115. The Model Business Corporation Act (MBCA), for example, includes the following language on shareholder inspection: "The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws." MODEL BUS. CORP. ACT § 16.02(f) (AM. BAR ASS'N 2016). It does not specify whether something similar might be achieved through a separate contract at the time of sale, but such an attempt seems highly questionable.

116. *E.g.*, DEL. CODE ANN. tit. 8, § 220(b) (2011) ("[a]ny stockholder . . . shall . . . have the right . . . to inspect for any proper purpose . . . (1) [t]he corporation's stock ledger, a list of its stockholders, and its other *books and records* . . . ." (emphasis added)).

Discovery offers a possible analogy. Although, as mentioned earlier, inspection is not discovery,[117] it still might be helpful to see how lawmakers have responded to the rise of digital data in this parallel context. In 2006, lawmakers amended the Federal Rules of Civil Procedure to sweep in most electronic information. Rule 34 allows a party to discover "electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations."[118] This is qualified, however, by Rule 26(b)(2)(B) which states that a "party need not provide discovery of electronically stored information from sources that the party identifies as not *reasonably accessible* because of undue burden or cost."[119] Despite this limit, the rise of so-called e-discovery is now thought to play a central role in many litigation matters.[120]

Some commentators have called for a similar amendment that explicitly grants access to electronic data in shareholder inspection disputes. One recent article, for example, argues that Delaware should require corporations to produce "appropriate [electronically stored information] in response to a proper Section 220 demand."[121] Yet, to date, no statute has rendered such an expanded statement of shareholder inspection rights. Disputes continue to be decided by asking whether the information is necessary and essential to the shareholder's inquiry.[122]

Importantly, some courts also shift the burden of proof for inspection requests. With discovery, a plaintiff is presumptively entitled to the production of documents, and a responding party must bear the burden of obtaining a court order to limit the scope of production. This is often reversed with inspection litigation, and the plaintiff must usually bear the burden of proving that specific types of documents are necessary and essential.[123]

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117. *See, e.g.*, Saito v. McKesson HBOC, Inc., 806 A.2d 113, 114 (Del. 2002) (explaining that the right of inspection "does not open the door to the wide ranging discovery that would be available in support of litigation").

118. FED. R. CIV. P. 34(a)(1)(A).

119. FED. R. CIV. P. 26(b)(2)(B) (emphasis added).

120. *See, e.g.*, Robert Hardaway et al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521 (2011); Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889 (2009).

121. Francis G.X. Pileggi et al., *Inspecting Corporate "Books and Records" in a Digital World: The Role of Electronically Stored Information*, 37 DEL. J. CORP. L. 163, 163 (2012).

122. *See, e.g.*, Espinoza v. Hewlett-Packard Co., 32 A.2d 365, 371–72 (Del. 2011) (explaining that documents are necessary and essential to a shareholder inspection request if they "address the crux of the shareholder's purpose, and [are] unavailable from another source" (footnotes omitted)).

123. KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 751 (Del. 2019).

Given this setup, it is not surprising that many recent information lawsuits haggle over the precise details of what data must be provided. The Yahoo! executive compensation case,[124] mentioned at the start of this Article, is illustrative. Recall that a shareholder group was concerned about allegedly improper actions related to the hiring and firing of a senior executive at the company. As you might expect, the plaintiffs sought electronic data, including emails and attachments from Marissa Mayer and the board. After ruling that the plaintiffs had indeed presented a credible basis for their concerns, the court turned to consider the scope of information that Yahoo! needed to hand over.

Yahoo! began by arguing that because Delaware's inspection statute "does not mention 'electronically stored information,'" the shareholder's request for emails and other electronic files should be instantly rejected.[125] Vice Chancellor Laster quickly shut down this line of argument, offering an explicit statement of Delaware's view on this matter: "[E]mail[s] and other electronic documents . . . count as corporate books and records. . . . Although it is true that Section 220 does not contain those words, Yahoo is wrong that inspection rights are limited to paper records."[126]

Accordingly, the court ordered Yahoo! to provide all formal board minutes and materials—even if they were only available as electronic documents. But did Yahoo! have to turn over the relevant emails of Marissa Mayer? The chancery court said yes, even if the emails were sent from her private email accounts (so long as they related to official firm business).[127] Some additional board documents, beyond the formal materials, were also awarded, though the court did not agree to give everything that the plaintiffs wanted.[128]

Yahoo! appealed, claiming this was an "unprecedented" release of private information. It also asked for a stay until it could appeal the case to the Delaware Supreme Court.[129] The chancery court refused, but it permitted a shorter stay until Yahoo! could appeal the stay refusal.[130] The timing problem was acute, as efforts were also underway by Yahoo!'s top management to sell the firm. The supreme court granted the longer stay, and the substantive decision over the precise scope of the information release never made it back up to the supreme

124. Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752 (Del. Ch. 2016), *abrogated by* Tiger v. Boast Apparel, Inc. 214 A.3d 933 (Del. 2019).

125. *Id.* at 792.

126. *Id.* The court supported this with reference to several other cases that had ordered the production of electronic information pursuant to an inspection request. *Id.* at 793 n.43. It is not clear, however, whether this approach would be followed in every jurisdiction. Questions also remain about whether Delaware might adjust or limit this expansive view in a way that parallels the "reasonably accessible" limit in federal discovery. *See* FED. R. CIV. P. 26(b)(2)(B). One possibility is that the state's necessary and sufficient standard might be flexed to take some of these cost considerations into account. *See, e.g.*, *KT4 Partners*, 203 A.3d at 760.

127. *Amalgamated Bank*, 132 A.3d at 793.

128. *Id.* at 794.

129. *Delaware Supreme Court Grants Yahoo Stay in Dispute Over Email Production*, 13-8 Mealey's Litig. Rep. Disc. 2, MAY 12, 2016.

130. *Id.*

court, perhaps because Yahoo! announced its sale to Verizon just a few months later.[131]

In 2019, the Delaware Supreme Court finally had a chance to focus on the matter. In *KT4 Partners v. Palantir Technologies*,[132] the court reversed a lower court ruling that a defendant corporation did not need to produce electronic information related to suspected board misdeeds. Holding that the plaintiff had "made a sufficient showing that emails were necessary to investigate potential wrongdoing," the court ordered Palantir to hand over the electronic information.[133] The full reach of this case was clouded, however, by the fact that Palantir seemed to have conducted much of its business informally over email and did not have other paper records related to the alleged transgressions.[134]

It's a fair bet that these types of disputes will increasingly take center stage as litigants debate the scope of inspection—and especially the degree to which this right extends into cyberspace. The rise of electronic information might also bring new concerns. For instance, as the capability of algorithms to process and manage unstructured information blossoms, so does the risk that a shareholder might crunch large data sets to uncover proprietary secrets. In short, the increase in electronic information ups the ante for inspection rights.

B. The Ticking Time Bomb of Preclusion

A second problem can arise when a firm resists an inspection request and the resulting litigation produces a drawn-out dispute. In theory, the parties might simply wait for a decision on the information litigation and then turn to the underlying governance grievance. But in a system of multi-jurisdictional lawsuits, these delays can sometimes preclude the shareholder's grievance in a frustrating manner. The problem is complicated, however, and it is easiest to illustrate with an example.

One April morning in 2012, the *New York Times* published a blockbuster article entitled *Wal-Mart Hushed Up a Vast Mexican Bribery Case*.[135] It claimed that Walmart had engaged in an extensive bribery campaign for the past decade to support rapid business expansion. The piece was compelling, and the journalist

131. *Id.*; Brian Solomon, *Yahoo Sells to Verizon in Saddest $5 Billion Deal in Tech History*, FORBES (July 25, 2016, 6:30 AM), https://www.forbes.com/sites/briansolomon/2016/07/25/yahoo-sells-to-verizon-for-5-billion-marissa-mayer/#68b993d8450f.

132. 203 A.3d 738 (Del. 2019).

133. *Id.* at 742. In the words of the court, "[t]oday, emails and other electronic communications do much of the work of the paper correspondence of yore." *Id.* at 753.

134. *Id.* at 750.

135. David Barstow, *Wal-Mart Hushed Up a Vast Mexican Bribery Case*, N.Y. TIMES (Apr. 21, 2012), https://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?searchResultPosition=1.

would eventually win a Pulitzer Prize.[136] When markets opened the following Monday, Walmart's stock plummeted, losing over $10 billion in value.[137]

The article did not just describe individual bribes; it also presented a story about how the problems were seemingly covered up by top leaders at the firm. Some angry shareholders decided to file a derivative lawsuit that would compel Walmart to pursue these managers for an apparent breach of fiduciary obligations. The most likely claim involved a failure to monitor for criminal corporate activity,[138] though other board duties might also have been breached.

As is often the case with high-profile shareholder litigation, several different groups (and their lawyers) jockeyed for control. One faction, comprised of a New York City pension fund and other large shareholders, filed a claim in Delaware—the state of Walmart's incorporation.[139] The *New York Time's* article had been detailed, but it was still not clear exactly what Walmart's board had known about the bribery scheme and how it had responded. Accordingly, the lawsuit might not have been able to survive efforts by the defendants to retain control of the situation.[140] The shareholders, heeding the frequent warnings of the Delaware courts, decided to gather more information first and then see if further legal action might be warranted. They sent a demand letter to Walmart requesting inspection of several categories of information related to the bribery story.[141]

Walmart was reluctant to comply with this information request—or at least to fully comply—and the parties spent the next two years litigating the scope of information that should be released. The company initially sent about 3,000 documents, including board and audit committee minutes and materials referencing the bribery allegations.[142] But many of the documents were highly redacted without explanation.[143] The shareholder plaintiffs complained to the chancery court, and Walmart released some additional materials and more lightly redacted copies of the initial files.[144] The plaintiffs were still not satisfied, and they sought to depose some officers at Walmart to learn about additional

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136. *See 2013 Pulitzer Prizes*, PULITZER PRIZES, http://www.pulitzer.org/prize-winners-by-year/2013 (last visited Sept. 14, 2019).

137. *See* Jessica Wohl & Elinor Comlay, *Wal-Mart Shaken by Bribery Probe, Shares Plunge*, REUTERS (Apr. 23, 2012, 9:46 PM), https://www.reuters.com/article/us-walmart/wal-mart-shaken-by-bribery-probe-shares-plunge-idUSBRE83L0C820120424.

138. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968–72 (Del. Ch. 1996).

139. Walmart Inc. Quarterly Report (Form 10-Q) (Sept. 6, 2019).

140. In other words, the plaintiffs needed to argue that demand was excused as futile. *See supra* Part I.A.2.

141. More specifically, the stated purpose of the inspection was to investigate: "(1) mismanagement in connection with the WalMex Allegations; (2) the possibility of breaches of fiduciary duty by Wal-Mart or WalMex executives in connection with the bribery allegations; and (3) whether a pre-suit demand on the board would be futile as part of a derivative suit." Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW, 95 A.3d 1264, 1268–69 (Del. 2014).

142. *Id.* at 1269.

143. *Id.*

144. *Id.*

documents that might exist.[145] Walmart, in turn, sought a broad protective order.[146]

The chancery court responded with an order for limited depositions and a restricted protective order.[147] This caused Walmart to vastly expand its review of the situation: it examined over 160,000 documents, interviewed many current and formers employees and officers, and searched additional data troves. Eventually the firm sent more information to the plaintiffs, but continued bickering meant that the matter was soon headed to trial.[148]

The sole issue was whether Walmart's response had satisfied its obligations under Delaware's inspection statute. The case still took a year. Walmart raised a number of concerns: a right to screen the documents in possession of the firm's data custodians for relevancy, reluctance to produce documents that were prepared but never ultimately seen by the board, anxiety over the seven-year time period of the plaintiff's request, an insistence that it need not search backup tapes for additional information, and a refusal to share materials that were protected by attorney–client privilege or the attorney work-product doctrine.[149] The chancery court rejected all these arguments and ordered Walmart to hand over all the requested data, search the backup tapes, and release any privileged documents.[150]

Walmart immediately appealed to the Delaware Supreme Court. Its argument, in a nutshell, was that the lower court's grant of inspection rights was far too vast—essentially sweeping in the type of information that should only be available with discovery (and therefore prohibited until demand was excused and the shareholder took over control of the firm's plenary lawsuit against its directors). The supreme court didn't see it that way, agreeing with the lower court that all "core information regarding the . . . bribery . . . situation and how it was handled within Walmart by high-level officers and directors . . . is essentially central to the plaintiff's request."[151] The full extent of the relevant custodial records was in. The information that only went to officers, and not the board, was in. Walmart had to search disaster-recovery backup tapes to make sure it was not missing anything. It had to offer up data for the full seven years.

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145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* Intriguingly, around this time, the attorneys for the plaintiff shareholders received an anonymous package of high-level Walmart documents from a whistleblower. *Id.* The lawyers notified Walmart, and the firm indicated that the materials had been stolen by a former employee. The firm moved to prevent the shareholders from using these materials, and the Delaware Supreme Court ultimately upheld this motion. *Id.* at 1269, 1281–82.

149. *Id.* at 1272–80.

150. *Id.* at 1270. The court did impose a condition on the shareholder plaintiffs that required confidentiality protections for the materials that were covered by attorney–client privilege and the attorney work-product doctrine. *Id.*

151. *Id.* at 1272–73.

And the attorney privileges would not shield the firm from sharing relevant information with shareholders.[152] The plaintiff shareholders won on almost all fronts.[153]

Alas, it was too late! During this time, a different group of shareholders in Arkansas had filed a parallel derivative lawsuit related to the same bribery activity.[154] These alternative plaintiffs seemed much less worried about obtaining detailed information, and they rested much of their case on reporting by the *New York Times*. As a result, the complaint simply advanced conclusory allegations that Walmart's leaders had done something wrong. The Arkansas case was tossed for failure to plead that demand was futile;[155] this, in turn, was held to have preclusive effect on the Delaware case.[156] Because the issue of demand futility had already been decided—on a thin factual record in Arkansas—Delaware could not revisit the issue. The Delaware plaintiffs may have tried to do the right thing, by mustering and evaluating more detailed information before asserting managerial wrongdoing, but the delay caused by litigation over what information should be provided ultimately cost them an opportunity to even consider bringing their main case.[157]

This saga must have been frustrating for the Delaware plaintiffs, as well as for anyone who wanted to learn whether Walmart's board had really done anything wrong. Yet the topic of shareholder preclusion and multi-jurisdiction litigation raises complex legal and policy questions.[158] Courts must respect final decisions of other courts under the Full Faith and Credit Clause of the U.S.

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152. This was perhaps the most difficult issue for the court. To reach this conclusion, the court needed to decide whether to adopt the *Garner* doctrine—which the Fifth Circuit Court of Appeals established to recognize a fiduciary exception to limits imposed by the attorney–client privilege. The Delaware Court of Chancery had relied on this concept to approve broad inspection rights, and the supreme court agreed. *Id.* at 1276–81.

153. The Delaware Supreme Court did agree with the lower court that the plaintiff was not allowed to use the whistleblower documents. *Id.* at 1281–82.

154. *In re* Wal-Mart Stores, Inc. S'holder Derivative Litig., No 4:12-cv-4041, 2015 WL 13375767 (W.D. Ark. Apr. 3, 2015).

155. As discussed in Part I.A.2., a shareholder plaintiff is required to demonstrate with particularity that demand should be excused as futile to maintain control of a derivative lawsuit. The Arkansas court ruled that the plaintiffs did not meet this requirement because "[n]othing in the Complaint suggests any particularized basis to infer that a majority of the Board had actual or constructive knowledge of the alleged misconduct, let alone that they acted improperly. . . ." *Id.* at *7 (citing Guttman v. Huang, 823 A.2d 492, 504 (Del. Ch. 2003)).

156. Cal. State Teachers' Ret. Sys. v. Alvarez, 179 A.3d 824, 840 (Del. 2018).

157. Not content to pack up and go home, the Delaware plaintiffs pressed forward by disputing the preclusive effect of the Arkansas lawsuit. They raised several arguments, including inadequate representation by the Arkansas plaintiffs and a violation of the due process rights of the Delaware plaintiffs. *Id.* at 829. The court considered the situation very carefully, noting its "troubling nature" and even asking the chancery court to prepare a supplemental opinion. Yet it ultimately rejected the plaintiff's arguments based on a need to respect the final opinions of other jurisdictions. *Id.* at 839–40.

158. I discuss the topic in more detail in George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261 (2014).

Constitution.[159] And the failure to halt follow-on litigation about the same underlying legal concern raises the specter of "zombie lawsuits" that never go away. In the derivative context, for example, new shareholders might continue to pick up the pieces of a failed lawsuit if they are not understood as being in privity with other co-investors. There must be *some* stopping point. These issues need to be balanced against the concerns raised by the Walmart plaintiffs and perhaps by the due process rights of individual shareholders.[160] It is very difficult to carve out a principled middle position.

More to the point of this Article, however, it should be easy to see how drawn-out adjudication of corporate information litigation can lead to serious timing problems. The lesson a Machiavellian corporate defender might take away from the Walmart saga is that a sound legal strategy involves stalling on a shareholder inspection request until a bumbling plaintiff in a different state can save the day by blowing demand excusal and precluding the more diligent plaintiffs.[161]

One way to address this concern might be to develop a more explicit theory of shareholder information rights. Such a theory could allow inspections claims to proceed more rapidly in a way that diffuses the ticking time bomb of preclusion. A diligent shareholder plaintiff might not be stymied as easily if inspection disagreements take weeks or months instead of years.

C. *Conditioning Information Access and Use*

I want to consider one other piece of the puzzle before turning to a more general theory of private access to corporate information. Unlike public disclosure, private information rights can be restricted. A court might condition the sharing of firm information in any conceivable manner, and recent developments suggest that the full importance of this shaping power is only starting to be fully appreciated.

Delaware law, for example, is expansive, allowing courts to "prescribe *any limitations or conditions* [on] the [shareholder's] inspection" request.[162] The MBCA provides similar flexibility: "[i]f the court orders inspection and copying of the records demanded . . . it may impose reasonable restrictions on their . . . use or

159. U.S. CONST. art. IV, § 1.

160. The plaintiffs pressed this due process argument in a cert petition to the United States Supreme Court, but the Court declined to hear the case. *See* Petition for a Writ of Certiorari, Cal. State Teachers' Ret. Sys. v. Alvarez, 139 S. Ct. 177 (2018) (No. 17-1695).

161. It is not always clear, of course, why the second shareholder plaintiff in this example would wish to follow this course. One might speculate, however, that some law firms may encourage shareholders to pursue many such claims, viewing each case as a lottery ticket that may pay off if a court is indeed willing to rule that demand is excused upon relatively little evidence. If that happens, the defendant corporation may feel pressure to settle, and the lottery ticket pays off.

162. DEL. CODE ANN. tit. 8, § 220(c)(3) (2011) (emphasis added).

distribution by the demanding shareholder . . . ."[163] When and how have these conditions been imposed?

Historically, judicial inspection conditions have mostly been used to protect sensitive corporate information with a confidentiality requirement. The issue arose, for example, at the Walt Disney Company in 2004 when Roy Disney fell out with the rest of the firm's management team. After resigning from the board, Roy Disney—who remained a shareholder—filed a Delaware inspection request seeking documents about the compensation of five senior officers to evaluate potential mismanagement, waste, and other possible concerns.[164] The Walt Disney Company did not dispute the propriety of his request. But the parties eventually wound up in court when Roy Disney decided to share some documents with the public to drum up support for a leadership change.[165] The court emphasized that it "has the duty to safeguard the rights and legitimate interests of the corporation" and that it should "prevent possible abuse of the shareholder's right of inspection by placing such reasonable restrictions and limitations as its [sic] deems proper on the exercise of the right."[166] In this case, the information had to remain confidential unless there was an exigent justification for Roy Disney's need to publicize the information.[167] Many other courts have upheld privately negotiated confidentiality agreements or imposed a judicial confidentiality condition related to the release of especially sensitive information.[168]

More recently, Delaware courts have also imposed some other types of conditions on successful shareholder inspection demands. One example relates to the concerns about multi-jurisdiction litigation that we explored in the prior Subpart. Seeking to channel a lawsuit to a single jurisdiction, some Delaware courts have imposed a forum-selection condition on plaintiffs who exercise inspection rights. For example, in 2012 a shareholder of United Technologies sent a letter to the board asking the directors to consider prosecuting a claim by the firm against some executives for breaking the law in connection with the

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163. MODEL BUS. CORP. ACT § 16.04(c) (AM. BAR ASS'N 2016).

164. Disney v. Walt Disney Co., 857 A.2d 444, 445 (Del. Ch. 2004).

165. The case was complicated by a private agreement allowing Walt Disney to designate some documents as confidential and allowing Roy Disney to challenge that designation if a good-faith dispute arose over the appropriateness of such a designation. *Id.* The court, however, took the position that it would be considering the request for a confidentiality condition in accordance with its prior jurisprudence. *Id.* at 447.

166. *Id.* at 447 (quoting CM & M Grp., Inc. v. Carroll, 453 A.2d 788, 793–94 (Del. 1982)).

167. *Id.* at 450. The court emphasized, for instance, that if Roy Disney discovered wrongdoing that justified a lawsuit against the managers, then he could use the information uncovered by his inspection demand to file a complaint against the firm. *Id.*

168. *See, e.g.*, Rodgers v. Cypress Semiconductor Corp., No. 2017-0070-AGB, 2017 WL 1380621 (Del. Ch. Apr. 17, 2017) (upholding a privately negotiated confidentiality agreement), *abrogated by* Tiger v. Boast Apparel, Inc., No. 23 2019, 2019 WL 3683525 (Del. Aug. 7, 2019); Pershing Square, L.P. v. Ceridian Corp., 923 A.2d 810, 820–24 (Del. Ch. 2007) (imposing a judicial confidentiality condition).

sale of military helicopter technology to China.[169] The board rejected this demand, and the shareholder decided to exercise his inspection rights to take a closer look at the situation.[170]

United Technologies was willing to comply but asked the shareholder to sign a confidentiality agreement. When it sent over the agreement, however, the shareholder discovered that there was an additional provision "requiring that 'any claim, dispute, controversy or causes of action . . . arising out of, relating to, involving or in connection with' the inspection be brought in a Delaware court."[171] The plaintiff didn't want to lock himself into Delaware and filed a Section 220 lawsuit seeking access to the firm's information without any usage restrictions. During the ensuing trial, United Technologies asked for a court-imposed condition, under Section 220(c), that would restrict use of the firm's information to Delaware lawsuits—essentially mirroring the forum-selection term that had been rejected during the private negotiations.

The chancery court, uncomfortable with the firm's request and worried that it lacked authority to impose a forum-selection limitation under the language of Section 220, refused to impose the condition.[172] Upon appeal, however, the Delaware Supreme Court disagreed, insisting that the judiciary possessed very broad authority to impose limiting conditions on inspection.[173] It focused on the expansive language of the statute—permitting *any* limitations or conditions (related to) inspection—and the qualified nature of inspection rights to assert that the lower court "erred in concluding it lacked the statutory authority to impose its own preclusive limitation here."[174] The case was remanded so the lower court could decide whether to impose the forum-selection condition.[175]

The *Treppel* case may engender more frequent use of forum-selection conditions in inspection. But the implications of such a move are still developing, and Delaware has signaled a cautionary approach.[176] Unfortunately, however, this type of condition will not solve the preclusion problem described earlier in

169. United Techs. Corp. v. Treppel, 109 A.3d 553, 554–55 (Del. 2014).

170. *Id.* Because the shareholder had made a demand on the board (and therefore waived any claim that demand was excused for futility), the context for the litigation now shifted to whether the board had behaved properly in connection with its decision not to pursue the lawsuit on the firm's behalf. *See* Grimes v. Donald, 673 A.2d 1207, 1218 (Del. 1996) (describing this second "'arrow' in the 'quiver'" of a shareholder plaintiff who wants to challenge the board's decision to refuse a lawsuit), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

171. *Treppel*, 109 A.3d at 555 (alteration in original).

172. *Id.* at 557.

173. *Id.* at 559.

174. *Id.*

175. *Id.* at 562. The lower court never reached a substantive decision about whether to impose the condition, as the parties reached a private agreement and the case was dropped. Treppel v. United Techs. Corp., No. 8624-VCG, 2015 WL 5703539 (Del. Ch. Sept. 28, 2015) (trial order).

176. *See* KT4 Partners LLC v. Palantir Techs., Inc., 203 A.3d 738, 757–65 (Del. 2019) (reversing the chancery court's grant of a broad jurisdiction-limiting inspection condition).

connection with the Walmart story.[177] A shareholder plaintiff might still file a bare-bones derivative lawsuit in another state without ever bothering to seek inspection rights in Delaware. Without the inspection request, there is no hook to pull the case back into that state. Indeed, it is possible that greater use of forum-selection conditions in inspection orders will amplify the preclusion problem. A shareholder plaintiff who wants to litigate in another state may avoid requesting inspection in Delaware out of a fear that the court will force it into the state for any underlying governance dispute. This could even have the effect of generating less informed lawsuits in other jurisdictions and increasing the likelihood of rapid dismissal that could preclude other, more diligent investigations.[178]

Another recent condition might be called a "no-cherry-picking" condition. It allows defending firms to guard against plaintiffs who seek to use the fruits of an inspection order out of context. Again, it is easiest to illustrate with a quick example. In early 2017, a shareholder invoked inspection rights to investigate possible misconduct at Universal Health Services (UHS), a large hospital-management company.[179] The firm contested the breadth of the inspection request, but it agreed to provide some information if the plaintiff would sign a confidentiality agreement that included an incorporation-by-reference clause. This latter provision stated that the plaintiff "agrees that the complaint in any derivative lawsuit that it files relating to, involving or in connection with the Inspection Demand or any Confidential Inspection Material, shall be deemed to incorporate by reference the entirety of the books and records of which inspection is permitted."[180] The upshot of this clause is not obvious, but it could allow the company to defend against any subsequent lawsuit by grabbing exonerating information that was included in the inspection production but ignored in the plaintiff's ultimate lawsuit. The plaintiff refused to agree to these terms.

177. *See supra* Part II.B.

178. An even more interesting situation might arise if a shareholder requests inspection rights under Delaware corporate law in another state. Come back, for instance, to the facts of the Walmart bribery case. If the second plaintiff in Arkansas had sought inspection rights through a court order in that state, what would result? Under the internal affairs doctrine, the court in Arkansas would presumably seek to apply Delaware corporate law and award inspection rights, if appropriate, under Section 220. If the Arkansas court thought that a Delaware court would impose a forum-selection provision for any underlying governance lawsuit, might it also do so in an effort to replicate Delaware practices? It is not easy to imagine the Arkansas court acting this way (if it wanted to move the affair to Delaware, it can already do so under the *forum non conveniens* doctrine). *See, e.g.*, Leo E. Strine, Jr. et al., *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1 (2013). But more regular use of these conditions in Delaware may encourage some out-of-state court to take such action, which could conceivably have a beneficial impact on the overall preclusion problem. Of course, such a decision might also undermine efforts to seek inspection in out-of-Delaware courts out of a fear that a plaintiff's core case will be "bounced" to Delaware.

179. More specifically, the plaintiff, tipped off by an article published online by *BuzzFeed*, wanted to determine whether UHS had systematically lured patients into some health facilities with offers of free wellness examinations, tricked them into accepting that they harbored suicidal tendencies, and committed them for treatment until their insurance benefits were drained. City of Cambridge Ret. Sys. v. Universal Health Servs., Inc., No. 2017–0322–SG, 2017 WL 4548460, at *1 (Del. Ch. Oct. 12, 2017).

180. *Id.* at *2.

The court—after considering the breadth of its "conditioning power" under Section 220—concluded that it could indeed impose this type of no-cherry-picking condition and that it was proper to do so in this case.[181] Other recent cases, including the Yahoo! dispute mentioned at the start of this Article, have also imposed this condition.[182]

From a policy perspective, the use of an incorporation by reference condition is difficult to evaluate. On the one hand, it might offer some balance to shareholder litigation by making it easier for a defending firm to rebut an opportunistic complaint. On the other hand, it is conceivable that a firm might seek to "plant" information in an inspection response solely to rebut an anticipated complaint. It is not clear, however, whether firms would really take the time to bother with this, and commentators may wish to keep an eye on future developments.

* * *

Let me offer a quick synthesis of the discussion so far. Corporate information litigation has grown dramatically, as shareholders increasingly seek private data in various contexts. Yet most cases are not decided by a theory of optimal information revelation. Rather, courts will usually ask two types of questions. First, has the shareholder plaintiff offered a satisfactory justification for the request by citing a proper purpose? Second, is any given parcel of information necessary and essential for their stated justification? This whole structure is a bit odd, akin to a formal writ system of old. It is also quite cumbersome from a jurisprudential standpoint, because the value of precedent is minimized by the highly contextual circumstances of any given inspection debate. Finally, the problem is compounded by the rise of technology and the timing problems that can arise with protracted information litigation.

For all these reasons, corporate law might profit from a more robust theory of private information rights. The final Part of this Article pursues such a theory.

III. A THEORY OF SHAREHOLDER INFORMATION RIGHTS

Why should shareholders enjoy the power of inspection? One plausible justification can be found in a fundamental goal of corporate law: empowering the use of centralized resources in a way that minimizes the costs of representative leadership. Shareholder inspection rights can be a tool for driving down agency costs in the firm.

181. *Id.* at *3.

182. *See* Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752, 796–99 (Del. Ch. 2016) (treating the issue as one of first impression), *abrogated by* Tiger v. Boast Apparel, Inc., 214 A.3d 933 (Del. 2019).

A. The Agency Cost Problem and Information Asymmetries

The agency cost problem is familiar for corporate scholars and merits only a short discussion here. It is fundamentally a bad news story—the downside of centralizing power in a corporation. The core of the dilemma comes from a simple truth: it is impossible to prevent parties from taking self-interested actions when they are given control over other people's property.[183] These distortions arise through information asymmetries between the principal and agent.[184] If a principal could freely observe and understand how an agent's actions impacted her wealth, then the agent would have no reason to behave differently than the principal would when faced with the same circumstances. But a principal cannot always know what an agent is doing or thinking, and it is often difficult to determine whether bad (or good) outcomes are caused by acts of the agent or by external factors beyond everyone's influence.[185]

Concealed by this cloud of opacity, an agent may engage in a variety of suboptimal actions—in essence, running up a bill that is ultimately sent to the principal's table. The agent might spend time on easy tasks instead of taking on difficult, but more important, ones.[186] He may stuff his pockets with secret compensation schemes and other perquisites.[187] Or he may make decisions that reflect mismatched risk profiles. For instance, an agent might take too little risk with the principal's property by making overly safe decisions that preserve the agent's job. Or he may take on too much risk by gambling for resurrection in the face of insolvency.[188]

With corporations, the focus of the agency cost problem usually centers on the relationship between investor and manager. The shareholders, as capital contributors and residual owners, are viewed as principals, and the managers, enjoying discretion over most decisions, are seen as agents.[189] Importing the agency framework in this manner is not perfect—there are usually other parties, such as debt investors or trade creditors, who also maintain an ownership stake

183. The agency cost problem has been discussed extensively in the legal and economic literature. For much of the foundation of the work, see ADOLPHE A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932); Jensen & Meckling, *supra* note 41. For additional background on agency theory, see Arrow, *supra* note 41; Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57 (1989); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, 51 ECONOMETRICA 7 (1983).

184. These asymmetries are sometimes divided between the "hidden action" and the "hidden information" of an agent. *See, e.g.*, Arrow, *supra* note 41, at 38–45.

185. Jensen & Meckling, *supra* note 41, at 308–10.

186. *See, e.g.*, JEAN TIROLE, THE THEORY OF CORPORATE FINANCE 16 (2006) (describing this sort of suboptimal task allocation as the primary manifestation of shirking).

187. *Id.* at 17.

188. *Id.*; *see also* Barry E. Adler, *A Re-examination of Near-Bankruptcy Investment Incentives*, 62 U. CHI. L. REV. 575, 576 (1995) (arguing that managers "have a strong incentive to gamble with the firm's assets" in times of financial distress).

189. TIROLE, *supra* note 186, at 16–17.

(though generally not a residual one).[190] But agency theories do seem to have some explanatory and predictive power over the inner workings and governance of a corporation.[191]

Viewed in this manner, agency costs offer a downside to corporate growth. Large and complicated corporations harbor darker corners, and managers might try to use this information asymmetry to take advantage of equity owners. These problems are compounded when economic ownership of corporate assets is split among a diffuse population of shareholders—who may find it difficult to coordinate on any defenses.[192] A comprehensive accounting of the costs and benefits of centralized corporate activity must therefore include the drag of agency distortions.

Shareholders are not defenseless, however, and they will often take steps to mitigate agency costs. Perhaps they will demand incentive-based compensation to better align managerial interests. Or perhaps they will insist on frequent audits or other monitoring activity. So far, however, no one has designed the perfect antidote to the agency cost problem, and monitoring strategies are not free. A proper tally of agency costs must also include these incremental outlays.[193]

For these reasons, corporate law also has a role to play in mitigating the agency cost problem. Shareholder lawsuits can be understood as a tool for addressing or preventing extreme agency distortions. And because most agency problems arise through information asymmetries, shareholder inspection rights are another plausible tonic. Indeed, I would contend that the key rationale for a private shareholder information entitlement *is* the reduction of managerial agency costs. When the inspection problem is focused through this lens, several helpful design principles can emerge.

B. *Design Principles for Shareholder Inspection*

1. *Forensic Versus Prospective Information*

If the primary rationale for shareholder inspection is indeed to reduce agency costs, then lawmakers might start by distinguishing between forensic and prospective information. Does a shareholder information request focus on

190. *See, e.g.*, Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. PA. L. REV. 1209 (2006) (focusing on the ownership and governance role of debt investors).

191. For example, the range of governance topics discussed under the rubric of agency theory includes hostile takeovers, proxy fights, share block holding, independent directors, disclosure requirements, and so on. *See* TIROLE, *supra* note 186, at 15–16.

192. *See, e.g.*, Bernard S. Black, *Shareholder Passivity Reexamined,* 89 MICH. L. REV. 520, 522–24 (1990); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 446 n.37 (1991).

193. *See* Jensen & Meckling, *supra* note 41, at 308 (defining agency costs as the sum of the principal's monitoring costs, the agent's bonding costs, and the residual loss, measured as "[t]he dollar equivalent of the reduction in welfare experienced by the principal" as a result of divergent agent interests).

something that happened in the past, or does it involve the future strategic plans and prospects of the firm? Historical information can be directly tied to monitoring efforts, while the connections with forward-looking planning are often more tenuous.

To be sure, the distinction between forensic and prospective may not always be binary. It can be possible to entangle some future-looking data in a historical concern. For example, "did the managers engage in fraud when they inflated the five-year forecast for the company?" But there is a clear difference in perspective between "give us your data about what happened at the firm last year" and "give us your data about what you think will happen at the firm next year."

How do the most common justifications for inspection claims map on to a forensic-prospective framework? Recall that shareholders often assert one of three standard purposes: (1) to communicate with other shareholders; (2) to investigate suspected corporate mismanagement; or (3) to value their shares.

The first rationale, requesting stock registration lists to facilitate communication with other owners, clearly involves historical information. A shareholder is asking for ownership information as of a given date—not for future predictions about who might buy or sell the stock. More generally, obtaining contact information to communicate with other shareholders is also consistent with an effort to mitigate agency costs by breaking down collective-action problems among shareholders. For instance, faulty governance might prompt a proxy campaign to vote out incumbent managers, and the insurgents need to know who to lobby.

The second justification, investigating possible managerial misconduct, also seems to implicate historical data. Shareholders want to know what a managerial group did or did not do in order to weigh a lawsuit or other response. They will not typically ask for information about future events. And this type of information is again squarely in the wheelhouse of agency-cost-mitigation efforts. Shareholders seek to monitor managerial activity through the inspection of possible wrongdoing. Even better, the threat of such an inspection might stop contemplated executive malfeasance in the first place.

The third inspection justification, share valuation, is by far the most difficult rationale to classify on the prospective-versus-forensic-information spectrum. As the earlier discussion of the *Domo* case suggests, shareholders are increasingly trying to leverage inspection rights to secure financial information and other key details at private corporations. In recent years, some firms have avoided public capital markets as a way of sidestepping mandatory information disclosures. The investment climate has proved hospitable, and the number of private "unicorns"—firms thought to be worth more than a billion dollars—has skyrocketed. In some cases, these corporations only provide confidential information to large, influential investors; smaller shareholders may learn nothing about how the firm is performing. Yet, as we have seen, demanding information to value one's shares is traditionally seen as a proper purpose for shareholder inspection.

What type of information is relevant in this context? Some historical data might be useful: recent financial statements, tax records, information about previous stock sales by other investors, and so on. But finance theory suggests that the value of stock will really be determined by a firm's future performance. It is these future expected cash flows, not yesterday's news, that should determine what a share of stock is worth today. Accordingly, prospective information, like strategic-planning discussions or financial projections, is most responsive to this inspection justification.

We should also recognize that using inspection rights to obtain prospective valuation information steps away from a goal of mitigating the agency cost problem. To be sure, historical financial information may not be irrelevant, as shareholders might understandably worry about a managerial problem if the firm performed especially poorly during a prior period. But future operating predictions are not tied closely to past managerial misdeeds. Inside managers and many other shareholders may also justifiably balk at a dissident's efforts out of a fear that sensitive information will be misused or shared with competitors.

For these reasons, I would contend that shareholders are on firmer ground when they seek forensic information about the firm. This does not necessarily mean that forward-looking data should be presumptively unavailable—only that the legal justification for asserting such a demand may not be as strong. If one accepts this general premise, then we can turn to the second important design variable: how and when information rights should be triggered.

2. *Triggering the Rights*

Many rights in corporate law are not absolute, and shareholders will often need to leap a hurdle before they can enjoy a legal entitlement. For instance, a shareholder wishing to prosecute a derivative lawsuit on the firm's behalf is only allowed to take control under certain conditions (typically demand excusal). They have the right to sue, but the exercise of this right is qualified.

Information access rights should be considered in this same light: a shareholder can assert a proper purpose, but they still may not obtain information if they fail to meet a necessary threshold to trigger the inspection rights. What must a plaintiff demonstrate to prosecute an information claim?

It is important to recognize that the access "hurdle" has different heights for each of the three main inspection justifications. A shareholder who wants a list of co-owners for communication purposes needs to leap a very low hurdle. A few claimants have been tripped up in the past by a communication justification that was deemed inconsistent with the goals of the corporation. For example, a shareholder trying to obtain mailing lists for marketing purposes or to promote a social agenda may fall short of triggering the rights. But today, it is exceedingly easy for a shareholder to sign an affidavit saying that they want to communicate with other shareholders, perhaps to sell their stock or to coordinate on a voting proposal. Inside managers or outside judges are not in a good position to contest this statement. Accordingly, it is very easy to trigger inspection rights in this context.

The third shareholder justification has a similarly low hurdle. If a shareholder wants to value her shares, then what more does she really need to show? Nothing—the plain request should suffice. Unless some evidence emerges that the purported valuation justification is a pretext, the shareholder information entitlement seems almost automatic. Who doesn't want to know what their property is worth?

By contrast, the assertion of inspection rights in the context of ferreting out possible managerial misdeeds has a higher hurdle. Naked suspicions or hunches about misconduct will not suffice. Instead, a shareholder seeking this type of information needs to demonstrate a credible basis for suspicion before inspection rights will be granted. On the one hand, this seems sensible because managers cannot run a corporation if rogue shareholders are prowling the halls with microscopes. A very low hurdle would harm other shareholders by sapping firm resources and hindering core operations.

But on the other hand, a higher threshold does raise what I referred to earlier as a "bootstrapping problem." How will enough information emerge to secure inspection rights for possible managerial wrongdoing if shareholders are not able to gather any information in the first place? There is an obvious parallel with shareholder derivative litigation, where a plaintiff must somehow gather particularized information about alleged managerial conflicts to keep control of the lawsuit. The Delaware Supreme Court has asserted that a shareholder plaintiff should use the "tools at hand" to get this information[194]—but critically, the main "tool" seems to be shareholder inspection rights! If specific information is needed to access shareholder inspection rights to access more specific information to access control of the governance lawsuit, then one might question the degree to which this whole edifice is built on a foundation of sand.

To be sure, one can imagine situations where the "zygote" of information arises through an inside whistleblower or an intrepid investigative journalist. But, in my view, this bootstrapping problem is the most difficult—and the most conceptually important—feature of a shareholder information dispute. In any event, we should recognize that the hurdle for inspection rights in this context is set higher.

194. Grimes v. Donald, 673 A.2d 1207, 1218 (Del. 1996), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

We might summarize the discussion thus far with the following table:

Table 1. *Overview of Contexts for Shareholder Inspection*

Inspection Justification	Nature of Information	Triggering Hurdle
Shareholder Communication	Forensic	Low
Managerial Wrongdoing	Forensic	High
Share Valuation	(Mixed) Forensic and Prospective	Low

3. Ex Ante *Management via Charter or Bylaw*

As shareholder information lawsuits continue to increase in importance and scope, I would predict the rise of new attempts by corporate leaders to limit or modify these rights in an *ex ante* manner. These efforts might arise through a charter provision, a bylaw amendment, or perhaps even through a private contract with some shareholders.[195] Such a development would be consistent with a broader governance trend, where various players seek to set rules in advance of a specific dispute that might tilt the playing field in their favor.[196]

Imagine, for instance, that the board of a firm adopts a bylaw amendment that eliminates all shareholder inspection rights at the firm. Is this okay? What if the limitation is only set for a single shareholder via contract, perhaps as the result of a stock-purchase agreement by a possible competitor? And if an outright ban is not allowed, is it okay for a board to adopt a narrower restriction? Lawmakers may soon need to address these questions as the salience and volume of inspection lawsuits continues to accelerate and some firms respond with *ex ante* strategies to manage inspection.

The permissibility of *ex ante* inspection limitations might differ by jurisdiction. A firm in a state governed by the Model Business Corporation Act, for instance, has less room to maneuver. The statutory code—which devotes an entire chapter to information rights—explicitly states that "[t]he right of inspection granted by this section may not be abolished or limited by a corporation's

195. It is also possible, of course, that an activist-shareholder group might seek to expand inspection rights through a unilateral bylaw amendment. I view this as less likely, however, and do not evaluate this possibility in detail here.

196. *See generally* George S. Geis, *Ex-Ante Corporate Governance*, 41 J. CORP. L. 609 (2016); Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate "Contracts,"* 93 WASH. L. REV. 265 (2018).

articles of incorporation or bylaws."[197] In the face of such a clear textual command, it is difficult to imagine a successful *ex ante* restriction of the rights.[198]

In Delaware, the ability to manage inspection rights is far more complicated and will probably depend on whether shareholder inspection is considered a fundamental shareholder right. A little more background is necessary to develop this idea.

As mentioned above, shareholders and managers are increasingly emphasizing tactics that move from *ex post* response to *ex ante* planning. Instead of removing individual directors, for example, a shareholder group might try to eliminate a staggered board—so investors will find it easier to replace the entire board later, if warranted. Instead of fighting shareholder lawsuits in multiple jurisdictions, a board might adopt a forum-selection provision that corrals future litigation into one preferred location. By shaping key aspects of corporate governance before a specific incident arises, both directors and shareholders aim to establish structural rules that are favorable to their causes.

The important Delaware case of *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* upheld such a strategy in the context of a forum-selection provision for shareholder lawsuits.[199] Emphasizing that the restriction—which channeled the litigation into Delaware—related only to the internal affairs of the corporation, the court stated that a bylaw was a proper exercise of directorial power.[200] By contrast, a bylaw that tried to mandate a forum for a shareholder's direct tort or contract claim would not be permissible because that would implicate a right external to the corporate relationship.

In the wake of *Chevron*, boards became more attracted to the idea of *ex ante* governance, and it has taken on new strategic importance for corporate governance theory. One sally, to mandate fee-shifting provisions for failed shareholder litigation, was quickly halted when Delaware's legislature revised the Delaware General Corporation Law (DGCL) to explicitly prohibit this possibility.[201] Another attempt to channel private securities law claims under Section 11 into federal court via charter amendment was also struck down because the cause of action sounded in federal law.[202] In short, an *ex ante* provision

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197. MODEL BUS. CORP. ACT § 16.02(f) (AM. BAR ASS'N 2016).

198. I am unaware of any efforts to test this prohibition in court. Interestingly, at least one state that adopted the MBCA (Florida) did not include this provision. A short note suggests, however, that any attempt to restrict inspection rights in a bylaw or charter amendment under Florida law would still be impermissible. *See* John M. Byrne, Note, *Limiting the Right to Inspect Under Florida Corporation Law*, 3 FLA. S. U. BUS. REV. 115, 120–22 (2003).

199. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 950–54 (Del. Ch. 2013).

200. *Id.*

201. *See* DEL. CODE ANN. tit. 8, §§ 101(f), 109(b) (2011). The legislature also codified the *Chevron* decision embracing forum-selection bylaws in Section 115.

202. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018) (currently on appeal to the Delaware Supreme Court).

in Delaware might shape internal corporate affairs, but it can't abrogate an external legal right just because the plaintiff also happens to own a share of stock.

Inspection rights clearly relate to the internal affairs of the corporation, so an *ex ante* provision purporting to eliminate or reduce this entitlement is in the zone of permissibility for Delaware law. It is not an external legal right. But that should not be the end of the analysis. As I have argued elsewhere, a firm seeking to scope or limit shareholder rights—through provisions in the corporate charter, bylaw, or private contract—will generally have more latitude to act if a right is not fundamental.[203]

Exactly how this works for Delaware shareholders is an important question that lawmakers have approached slowly. One conceivable starting point is DGCL Section 102(b), which touches on some optional additions to the corporate charter. Specifically, Section 102(b)(1) states that

> [t]he certificate of incorporation may also contain . . .
>
> [a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders . . . if such provisions are not contrary to the laws of this State.[204]

One could interpret this provision as fully embracing the elimination or restriction of inspection rights in a corporate charter.[205] On the other hand, Section 220 states that "[a]ny stockholder . . . *shall* . . . have the right . . . to inspect for any proper purpose."[206] Other parts of the DGCL signal a default rule with the phrase, "[u]nless otherwise provided in the certificate of incorporation."[207] And still other sections specifically circumscribe what restrictions are okay and what might go too far.[208] Does the use of the imperative for inspection signal an immutable right such that an effort to undercut inspection in the charter would be "contrary to the laws of this State" and therefore invalid under Section 102(b)(1)? This is seemingly another variant of the "recursive loop" problem in corporate law,[209] and statutory analysis will only take us so far.

Accordingly, we might approach this from a normative perspective by asking whether inspection should be deemed a fundamental shareholder right. If

203. *See* Geis, *supra* note 196, at 639–44.

204. DEL. CODE ANN. tit. 8, § 102(b)(1).

205. It takes more analytical work to support a bylaw provision to the same effect, but such a conclusion might also be possible. *See* Geis, *supra* note 196, at 641 (analyzing the DGCL for unilateral bylaw amendments).

206. *E.g.*, DEL. CODE ANN. tit. 8, § 220(b) (emphasis added).

207. *E.g.*, *id.* § 212 (a) (voting).

208. *See, e.g.*, *id.* § 202 (restrictions on transfer and ownership).

209. *See* Jeffrey N. Gordon, *"Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett*, 19 CARDOZO L. REV. 511, 546 (1997) (illustrating the "recursive loop" present in Delaware corporate law); Brett H. McDonnell, *Shareholders Bylaws, Shareholder Nominations, and Poison Pills*, 3 BERKELEY BUS. L.J. 205, 213–14 (2005).

so, it might be more difficult to limit the availability of private shareholder information rights in an *ex ante* manner. If not, then perhaps there is endless room to adjust the relationship.

Delaware courts and commentators offer only limited guidance on exactly what shareholder rights are considered fundamental to Delaware corporate law. The most common articulation is a triad of rights: the right to vote, to sell, and to sue.[210] A close textual reading of the DGCL suggests that only voting rights and other financial preferences are fundamental rights; it says little about a shareholder's right to sell, sue, or do anything else.[211] Delaware courts have held that a shareholder's right to sue is fundamental, but this does not preclude the possibility of other fundamental rights.[212] How, then, should we think about inspection rights?

In my view, shareholders in Delaware should be understood to possess a fundamental right of information access related to forensic governance activity. This view is consistent with the longstanding judicial embrace of inspection rights in both common and statutory law. It is also consistent with a right to sue that prosecutes a shareholder claim related to denied inspection. More practically, an *ex ante* ban on all inspection rights by a firm is unlikely to be sound as a matter of legal policy.

But even fundamental shareholder rights can be shaped or limited, and Delaware courts are only starting to develop jurisprudence to flesh out what sorts of strategies will be tolerated. Many *ex ante* provisions, currently thought to be valid, place some restrictions on shareholders seeking to exercise their fundamental rights. A forum-selection bylaw limits where shareholders can sue. An advance-notice bylaw limits how shareholders can vote—by requiring nominations for board elections to be submitted in advance of annual meetings. Indeed, even the designation of a location for the annual meeting may impact the ability of some shareholders to vote. What types of *ex ante* restrictions are OK under corporate law?

It is possible to imagine at least two types of restrictions on inspection rights: limits about the type of information (e.g., "no electronic information") and limits about the purposes for inspection (e.g., "no inspection for share-valuation purposes"). It seems reasonable to conclude that the former type of restriction will often be problematic because it allows a firm to cut off all information simply by switching to a prohibited medium.

210. *See, e.g.*, Thompson, *supra* note 69.

211. *See* DEL. CODE ANN. tit. 8, § 202 (where Section 202 does mandate a few protections related to a shareholder's right to sell).

212. *See, e.g.*, Strougo v. Hollander, 111 A.3d 590, 595 n.21 (Del. Ch. 2015) ("Modern corporate law recognizes that stockholders have three fundamental, substantive rights: to vote, to sell, and to sue."). The chancery court has also suggested that inspection rights may be critical. *See* Jones Apparel Grp., Inc. v. Maxwell Shoe Co., Inc., 883 A.2d 837, 849 n.30 (Del. Ch. 2004).

A limit on permissible inspection purposes, however, might be more consistent with sound policy. Of course, this depends on what purpose is curtailed. Restricting access to shareholder lists seems undesirable because shareholders do need to identify co-owners to solve collective-action problems. Likewise, restricting access to information about possible managerial misdeeds runs counter to what I consider the primary goal of inspection: driving down the agency costs of a corporation. Moreover, the relatively higher hurdle that shareholders must leap to obtain inspection rights in this context makes shareholder abuse of the right less likely. But placing some *ex ante* limits on shareholder valuation efforts—and especially on forward-looking firm information—might not be as concerning. As discussed earlier, this information is especially sensitive, and it is less connected with agency cost problems. Furthermore, the low hurdle to assert such a claim might mean that the risk of harassment or improper use is higher than other contexts for shareholder inspection.

Some shareholders might object to any limits, even those on forward-looking data. But there are a few possible replies. First, an investor might still be granted access to historical firm information, including financial reports. To be sure, historical performance is water under the bridge in the valuation context: a potential seller should be far more concerned with how much money the firm can generate in the future. But historical reports might still provide useful information that helps shareholders develop their own financial projections to value the stock. Second, it is worth emphasizing that inspection rights can be augmented by additional contractual provisions. A shareholder who anticipates the need to see internal projections down the road might demand broader information rights at the time of the investment.

In summary, shareholder information rights relating to the mitigation of managerial agency costs should be considered fundamental to the investor relationship. Other contexts, including share-valuation efforts, might be viewed as default inspection rights, and lawmakers should perhaps allow more leeway for private ordering via *ex ante* governance efforts. The exact limits for all types of inspection battles are contextual, of course, and will need to be worked out over time. Indeed, I predict that these types of disputes will increasingly take center stage as Delaware continues its efforts to delineate acceptable ranges for balancing power between shareholders and the board.

CONCLUSION

Private information is more valuable today than ever before. Technology behemoths aggregate individual data for profit in ways that society is only starting to understand. Mining for personal data is even being compared with the historical practice of drilling for oil.[213] It should not be surprising, therefore, that access to corporate data is also starting to take on greater importance. Shareholders are increasingly using longstanding inspection laws to demand details about the internal workings of their firms, and it is a safe prediction that corporate information will soon play an even more important role in the law. Yet despite the rise of these claims—and the importance of inspection lawsuits for resolving underlying governance disputes—we lack a clear theory for how and when corporate information should be released to shareholders.

This Article has offered a strategy for balancing corporate information disputes. Some information must be given to shareholders to fight off agency problems and promote sound governance. But forcing insiders to divulge sensitive information can also harm business prospects, kneecap fruitful investment projects, and stymie potential innovation. Transparency is not a universal ideal, and there is a legitimate role for opacity in the corporate boardroom. The problem is admittedly complex. But a balanced approach that emphasizes historical information access while also accommodating some degree of private ordering might preserve fundamental corporate secrets—while also maintaining the promise of shareholder lawsuits as a meaningful safeguard against tainted corporate governance.

213. S*ee, e.g.*, *The World's Most Valuable Resource Is No Longer Oil, but Data,* ECONOMIST (May 6. 2017), https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data.