

HOLACRACY AND THE LAW

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ABSTRACT

No law requires companies to have CEOs, officers, supervisors, chains of command, or even employees. But traditional managerial structures are so ingrained in our political economy that legal doctrines take them for granted. What if they were to disappear? Under holacracy, a new version of participatory management adopted at companies like Zappos and Medium, companies are replacing managers, organizational charts, and subordinates with governance circles, roles, and lead links. The promise of holacracy is a system of management that devolves responsibilities to teams, empowers workers to act freely within specified zones of authority, and energizes the entire organization around an evolutionary purpose. This Article takes holacracy's fully imagined approach and asks how current law would respond. Looking at corporate law, fiduciary law, labor and employment law, contract law, and criminal law, the Article breaks down the legal and economic assumptions about traditional firm hierarchies and then contemplates how we can reconceive existing law and policy to match the purposes of holacracy and its kin. Ultimately, holacracy teaches us not only about the possibilities of participatory governance, but also the extent to which we assume that hierarchy goes hand-in-hand with business entities.

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INTRODUCTION

Ever since the development of the modern corporation, the law has assumed a hierarchical approach to internal corporate governance. Corporations are ruled by a board of directors that sits atop the hierarchy.¹ The board delegates governance responsibilities to a set of officers, who then control the actual workings of the corporation.² The chief executive officer has ultimate managerial power, with other officers below, and then executives, managers, and the mass of workers known simply as

¹ DEL. CODE ANN. tit. 8, § 141(a) (2016); MODEL BUS. CORP. ACT § 8.01 (2016).

² See, e.g., DEL. CODE ANN. tit. 8, § 142(a) (2016) (“Every corporation organized under this chapter shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors which is not inconsistent with the bylaws . . .”).

employees. This executive structure plays an especially important role in corporate law, as officers owe important duties to the board and the corporation itself.³ But the structure shapes the doctrine in other areas of law as well, such as securities regulation, labor and employment law, contract law, and criminal law. Most fundamentally, the corporate managerial hierarchy informs our legal and societal perspective on the nature of the organization itself.

Participatory management is a common term for those managerial methodologies that endeavor to flatten or shift the power relations within the traditional corporate pyramid. These efforts have waxed and waned over time, with a previous boom in activity in the 1990s.⁴ In an important recent trend, however, companies are rediscovering participatory management within a broader explosion of concern for corporate social responsibility and human flourishing.⁵ These approaches do not fall within the established alternatives such as employee-owned companies, consumer cooperatives, or non-profits. Instead, they are for-profit companies, organized as corporations, partnerships, or LLCs, that have radically restructured the internal hierarchy. These efforts have been accorded various labels, such as “self-managed,” “self-actualizing,” “evolutionary,” “integral,” “flat,” and even “teal.”⁶ They represent a movement seeking an economics of fairness, innovation, and sustainability as well as efficiency.

One particular instantiation of this broader movement is a system known as “holacracy.”⁷ Holacracy is a comprehensively designed internal

³ Deborah A. DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 847, 848 (2017) (discussing the “distinctive” and “crucial” roles that officers play within the corporation, including as a fiduciary).

⁴ For a detailed discussion of these approaches, see Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 658–59 (1996); Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 981–82 (1998).

⁵ For examples of this broader literature, see COLIN MAYER, *FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT* 8-9 (2013); RAJ SISODIA, JAG SHETH & DAVID WOLFE, *FIRMS OF ENDEARMENT: HOW WORLD-CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE* (2014).

⁶ FREDERIC LALOUX, *REINVENTING ORGANIZATIONS: A GUIDE TO CREATING ORGANIZATIONS INSPIRED BY THE NEXT STAGE OF HUMAN CONSCIOUSNESS* 43 (2014) (using “self-actualizing,” “evolutionary,” “integral,” and “teal”); Ethan Bernstein et al., *Beyond the Holacracy Hype*, HARV. BUS. REV. 38, 40 (2016) (using “self-managed” and “flat”). The “teal” label refers to the color system used by integral theory to designate various stages of human development. See, e.g., KEN WILBER, *INTEGRAL PSYCHOLOGY: CONSCIOUSNESS, SPIRIT, PSYCHOLOGY, THERAPY* (2000); KEN WILBER, *A BRIEF HISTORY OF EVERYTHING* 27–30 (1996); JENNY WADE, *CHANGES OF MIND: A HOLONOMIC THEORY OF THE EVOLUTION OF CONSCIOUSNESS* (1996).

⁷ See, e.g., BRIAN J. ROBERTSON, *HOLACRACY: THE NEW MANAGEMENT SYSTEM FOR A RAPIDLY CHANGING WORLD* 12–14 (2015); Bernstein et al., *supra* note 6.

management system that has received significant attention for its adoption at Zappos, Medium, and other tech companies.⁸ Holacracy replaces the internal firm hierarchy with a governance process that looks, in many ways, like a constitutional democracy. However, holacracy has a nomenclature all its own. CEOs hand over their power to a system of governance “circles”—teams that are assigned specific management responsibilities.⁹ These teams have the power to design and refine corporate policy within their jurisdictions. There is no overarching hierarchy to make ultimate decisions or overrule teams; instead, there is generally one ultimate governance circle—representing the entire organization—that has the final authority.¹⁰ The circles manage the assignment of roles to workers and oversee their performance.¹¹ Ultimately, holacracy is a combination of democratic republic, Quaker meetinghouse, and tech-speak: the system is structured to encourage participation by all employees in governance through a carefully designed set of roles and opportunities.¹²

Holacracy has received attention in the national media, popular managerial literature, and business school scholarship.¹³ But the phenomenon of integral managerial systems, such as holacracy, has important ramifications for the law of business governance. Much of the law surrounding the firm—corporate law, agency law, labor and employment law, contract law, and even criminal law—assumes the existence of the internal hierarchy in its operations and processes. If that hierarchy is taken away, the law no longer fits neatly into place. Instead, we have to rethink our assumptions about the structure of the business firm and transform the law in order to make it fit. In this respect, the holacracy model is a useful tool for reexamining and reevaluating our current legal

⁸ Bernstein et al., *supra* note 6, at 40; *see also* Roger D. Hodge, *First, Let's Get Rid of All the Bosses*, NEW REPUBLIC (Oct. 4, 2015), <https://newrepublic.com/article/122965/can-billion-dollar-corporation-zappos-be-self-organized>; Bourree Lam, *Why Are So Many Zappos Employees Leaving?*, ATLANTIC (Jan. 15, 2016), <https://www.theatlantic.com/business/archive/2016/01/zappos-holacracy-hierarchy/424173/>.

⁹ ROBERTSON, *supra* note 7, at 46–49.

¹⁰ *Id.* at 46.

¹¹ One such set of roles, known as “links,” connect the circles to one another and provide a leadership role within the circle. *Id.* at 49–55.

¹² *Id.* at 12.

¹³ *See, e.g.*, Bernstein et al., *supra* note 6, at 42; Hodge, *supra* note 8. Much of the business press has been strongly negative on holacracy, viewing as utopian and too focused on interaction (as opposed to action). *See* Jurgen Appelo, *Holacracy is Fundamentally Broken*, FORBES (July 14, 2016), <https://www.forbes.com/sites/jurgenappelo/2016/07/14/holacracy-is-fundamentally-broken/#1731f5201126>; Paul Bradley Carr, *A Holacracy of Dunces*, PANDO (July 3, 2015), <https://pando.com/2015/07/03/holacracy-dunces/>; Lam, *supra* note 8; Felix Velarde, *Is Holacracy Finally Dead?*, QUARTZ (May 16, 2016), <https://qz.com/677130/is-holacracy-finally-dead/>.

systems. Even if holacracy is only a blip in organizational theory, it can nevertheless help us better understand how dependent we have become on assumptions of internal hierarchical governance. We can learn more about the role of hierarchy in our current political economy by examining how the law might react and adapt to this much flatter system of governance.

Part I provides an overview of the holacracy system, both in theory and in practice. Part II examines holacracy's effect on our thinking about organization identity and purpose. Part III discusses the effect of holacracy on firm management, looking particularly at the roles of directors and officers. In Part IV, the paradigms of labor and employment law doctrines, particularly the labor-management divide, are contrasted with the reenvisioned holacratic workplace. Finally, Part V reconsiders the law of entity responsibility, particularly criminal liability, for the holacratic firm.

I. THE HOLACRACY SYSTEM

Systems of participatory management have a long, if limited, history, both in the United States and abroad.¹⁴ A similarly limited but robust academic literature has examined the strengths and weaknesses of various permutations of the approach.¹⁵ This Article is not a normative evaluation of participatory management generally or holacracy specifically. It is instead an effort to understand the particular system of holacracy and the ways in which holacracy would interact with legal doctrine. It therefore makes sense to begin by placing holacracy within the realm of management methods that undo hierarchies and involve workers in governance.

A. *Holacracy as a System of Participatory Governance*

Holacracy is only one of a set of relatively recent management systems that are designed to transform business hierarchies into flatter,

¹⁴ The last significant bloom of participatory management within firms occurred in the 1980s and 1990s. See Bainbridge, *supra* note 4, at 673 (“Over the last two decades, however, participatory management has emerged as the principal putative challenger to traditional corporate hierarchies.”). However, efforts to integrate employees into the governance of the firm are long-standing. See, e.g., Clyde Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 COMP. L. CORP. L. & SEC. REG. 155, 170 (1982).

¹⁵ See Bainbridge, *supra* note 4, at 986–90 (providing a taxonomy). See also HANDBOOK OF RESEARCH ON EMPLOYEE VOICE (Adrian Wilkinson et al. eds., 2014); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 901 (1993).

team-oriented, constitutional structures.¹⁶ These organizational forms have often been pursued in isolation from one another but share a set of common characteristics.¹⁷ First, these organizations place much more importance on their collective purpose. Unlike U.S. corporations, which generally have dropped any meaningful description of corporate purpose from their founding charters, these businesses see their mission statements as relevant to every decision that the company makes. Second, these businesses enact systems of internal self-management, rather than hierarchical governance, when it comes to firm management. Traditionally-managed firms have a strict chain of command from CEO to vice-presidents to managers and so on down to the line worker, but self-managed companies devolve much more power to the team level. And transformational decisions, such as mergers, new products, or supply chains, are subject to much greater input from the organization as a whole through the company's shared-governance approach. Finally, these companies generally have decision-making processes that are designed to engender conflict but then resolve it. Choices are made not based on hierarchical positions or even majority vote, but rather on a set of processes through which the issue is framed, discussed, and then resolved.

The management literature has surfaced various examples of these types of companies—some of which have delved more deeply into various aspects of the overall prototype. The Dutch firm Buurtzorg, for example, provides neighborhood nursing care through a system of nursing teams that are largely self-managed within the overall organization (with currently around 7,000 nurses).¹⁸ The company has received worldwide attention for its “complete care” approach to nursing that allows more time to spend with each patient on a variety of issues.¹⁹ Along with this organizational purpose, Buurtzorg's governance model consists almost entirely of teams of ten to twelve nurses. These teams are hierarchically flat, with no supervisor or “boss” to coordinate within the group and only thin organizational support for issues that might arise outside of the team's

¹⁶ ROBERTSON, *supra* note 7, at 203 (“Holacracy is just one example of a system that uses peer-to-peer self-organization and distributed control in lieu of more traditional approaches to achieving order.”); Ben Linders, *Adding Purpose to Scrum with Holacracy*, INFOQ (Jan. 9, 2017), <https://www.infoq.com/articles/purpose-scrum-holacracy> (“With Holacracy, the whole system is created to make your organisation Teal.”).

¹⁷ LALOUX, *supra* note 6, at 7.

¹⁸ *Id.* at 65.

¹⁹ See, e.g., Adam Brimelow, *Dutch District Nurses Rediscover “Complete Care” Role*, BBC (May 27, 2013), <http://www.bbc.com/news/health-22450482>; The Commonwealth Fund, *Home Care by Self-Governing Nursing Teams: The Netherlands' Buurtzorg Model* (May 29, 2015), <http://www.commonwealthfund.org/publications/case-studies/2015/may/home-care-nursing-teams-netherlands>.

expertise.²⁰ The nurses are extensively trained in the Buurtzorg approach to self-management, which provides a set of skills and processes for resolving the myriad issues that arise within the teams.²¹ The French manufacturing firm FAVI employs over 400 people making automobile gearbox forks and other brass and copper components.²² Like Buurtzorg, FAVI relies on teams of manufacturing workers to manage their own work with little middle management or support structure.²³ Coordination across teams is accomplished by the teams themselves, working together through group representatives to resolve issues, make budgets, and create temporary teams to handle more complicated difficulties.²⁴ And Morning Star—the West Coast tomato processor, not the investment firm—produces over forty percent of the tomato paste and diced tomatoes in the United States through a system of twenty-three horizontal teams.²⁵ Each worker—known as a “colleague”—annually writes a personal mission statement that defines the roles that the worker will take on in the upcoming year.²⁶ The workers then negotiate with coworkers over these roles one-on-one and receive a set of approvals for their proposed positions.²⁷

These illustrations demonstrate the commonalities between these various organizations that have all made commitments of some kind to a self-managed or integral model of management. Holacracy is different, however, in that it is not simply a set of common features between organizations; it is instead an organizational operating model that exists apart from any one company.²⁸ Holacracy is practiced by Holacracy One, the consulting firm that promotes the use of the holacracy system, as well

²⁰ LALOUX, *supra* note 6, at 67.

²¹ *Id.* (describing the approach, which includes a training course entitled “Solution-Driven Methods of Interaction”).

²² *Id.* at 73–74; Patrick Gilbert et al., *Work Organization and Innovation – Case Study: FAVI, France* 1 (2013), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1253&context=intl>.

²³ Gilbert et al., *supra* note 22, at 14 (“FAVI has produced a kind of distillation of many of the most recent organisational innovations: the flattening of structures, making employees more responsible, the client-focus approach, the calling into question of the usefulness of procedures, and the effort to ensure that the decision-making process is as close as possible to the action.”)

²⁴ LALOUX, *supra* note 6, at 75–78.

²⁵ *Id.* at 113. See also Leigh Buchanan, *One Company's Audacious Org Chart: 400 Leaders, 0 Bosses*, INC (Apr. 18, 2013), <https://www.inc.com/audacious-companies/leigh-buchanan/morning-star.html> (calling the organization “flatter than a pancake leveled by a steamroller”); Gary Hamel, *First, Let's Fire All the Managers*, HARV. BUS. REV. (Dec. 2011), <https://hbr.org/2011/12/first-lets-fire-all-the-managers>.

²⁶ LALOUX, *supra* note 6, at 115.

²⁷ *Id.* at 116–17.

²⁸ *Id.* at 117.

as other companies such as Zappos and Valve.²⁹ But it is not simply a catalogue of the practices at those companies; it exists independently as a fully-described system. The structure of Holacracy is laid out in the Holacracy Constitution, which provides the core rules, structure, and processes of the Holacracy operating system for companies.³⁰ It is further developed in the book on holacracy, authored by Brian Robertson, who is primarily responsible for designing the system.³¹ And Holacracy One has its own operating agreement available to the public, which provides more detail as to some of the legal organizational issues.³² These sources offer a deeper perspective into the functioning of this particular version of integral or self-managed (or teal) organizations.³³

Unlike other management programs that focus on what managers do, holacracy is a radical reinvention of the corporate structure. The holacracy approach centers on three main organizational reforms: first, a complex internal governance structure that distributes power to nonhierarchical groups; second, processes for raising and resolving issues within the governance structure; and, third, a focus on purpose.³⁴ Although pieces of the holacracy system can be adopted, the architects of the system warn against it.³⁵ However, there are choices to be made within the overall framework, and a variety of different organizations can implement holacracy with appropriate tailoring. Even a division or department inside a larger organization that follows a traditional structure can adopt holacracy.

²⁹ Bernstein et al., *supra* note 6, at 43.

³⁰ HOLACRACY CONST., <http://www.holacracy.org/constitution> (on version 4.1 as of this writing); *see also* Bernstein et al., *supra* note 6, at 43 (describing holacracy as “the best-known and the most fully specified” of the various systems of self-managed teams).

³¹ ROBERTSON, *supra* note 7.

³² Operating Agreement of Holacracy One, LLC (June 19, 2015), <https://tinyurl.com/yddk9zn3> [hereinafter Holacracy One Operating Agreement].

³³ *Id.* In addition, I also conducted an interview with Brian Robertson, who was extremely helpful in providing additional insight into the workings of holacracy in practice. Interview with Brian J. Robertson, author (Mar. 16, 2017) (notes on file with author) [hereinafter Robertson Interview].

³⁴ Robertson describes holacracy as “a new social technology for governing and operating an organization, defined by a set of core rules distinctly different from those of a conventionally governed organization.” ROBERTSON, *supra* note 7, at 12. He notes that holacracy includes the following elements: “a constitution, which sets out the ‘rules of the game’ and redistributes authority[;] a new way to structure an organization and define people’s roles and spheres of authority within it[;] a unique decision-making process for updating those roles and authorities[;] and] a meeting process for keeping teams in sync and getting work done together.” *Id.*

³⁵ *Id.* at 174 (describing holacracy as “one whole interwoven system”). Robertson does describe steps that organizations can take to move toward and prepare for holacracy. *Id.* at 176–83.

B. *The Holacracy Approach*

Participatory management systems generally restructure an organization's internal governance to eliminate hierarchical lines of authority and replace them with team- or group-oriented governance systems. Holacracy follows this general approach. However, through the work of Brian Robertson and his fellow partners at Holacracy One, LLC, a more fully realized and comprehensive system has been developed than these participatory governance structures that have been adopted piecemeal by individual firms. What follows is an overview of the most important pieces of the holacracy approach: the constitutional structure, the governance processes, and the organizational purpose.

1. Constitutional Structure

Holacracy is grounded in a complex system of governance that controls the internal dynamics of the firm. Like a state constitution, the Holacracy Constitution—or the particular variant of it adopted by a particular firm—is meant to be the controlling governance document.³⁶ As described by Robertson in *Holacracy*, the constitution is the “core rulebook for the organization” whose “rules and processes reign supreme, and trump even the person who adopted it.”³⁷ By adopting a constitution, the CEO and/or other firm leader(s) hand over their organizational power to the processes described therein. The model constitution has a signature page in which the ratifiers—presumably the CEO or the like—agree to adopt the constitution and “thereby cede their authority into the Constitution’s processes and endow the due results therefrom with the weight and authority otherwise carried by the ratifier(s).”³⁸ The legal status of the adoption depends on what legal steps are taken to ratify it. For example, a signature by the CEO will not ultimately bind a corporate board or even the CEO that signed it. However, if a corporation adopts the constitution through its legal bylaws or corporate charter, then it could only be amended by the processes established under state organizational

³⁶ The Model Constitution describes itself as “the core rules, structure, and processes of the Holacracy ‘operating system’ for governing and managing an organization. It provides the foundation for an organization wishing to use Holacracy, by anchoring the shift of power required in concrete and documented ‘rules of the game’, which everyone involved can rely upon.” HOLACRACY CONST., Intro.

³⁷ ROBERTSON, *supra* note 7, at 21.

³⁸ HOLACRACY CONST., *append. A (Constitution Adoption Declaration)*.

law for amending said bylaws or charter.³⁹ The Holacracy One, LLC Operating Agreement explicitly adopts the holacracy constitution.⁴⁰

Although using the term “constitution” to refer to its foundational document, the holacracy governance system does not follow traditional notions of constitutional democracy in its structure. Robertson likens holacracy to the human body, in terms of one overall organizational “unit” that contains many internal operating systems all working independently but together.⁴¹ The holacracy system carries this metaphor forward but with its own terminology for its structures and processes. Within the company, governance is operationalized through a system of “circles.” The circles represent both an area of authority—known as a “domain”—and the roles and accountabilities that operate within that authority. The holacracy system is essentially a series of nested and parallel circles that organize the internal processes of the company; these circles are the governance structure for the organizations. Although called a variety of names in self-managed companies,⁴² these structures are essentially teams: units of workers collected around a specific goal or purpose.⁴³

The outermost holacracy circle, which represents the purposes of the entire organization, is called the “anchor circle.”⁴⁴ Upon the adoption of the constitution, the anchor circle establishes all of the other circles within the organization.⁴⁵ The circles are built to have a specific purpose, an established domain of authority, and accountabilities for which they are responsible.⁴⁶ These three aspects are not just for show; they form the governance structure. Each circle has control over its own domains and

³⁹ Amending a corporation’s articles of incorporation is generally a three-step process: the board of directors must recommend the amendment to the shareholders; the shareholders must approve the amendment; and the amendment must be filed with the secretary of state for the state of incorporation. See STEPHEN M. BAINBRIDGE, *CORPORATE LAW* 14–15 (2d. ed. 2009) (bylaws can typically be amended only by shareholders, although the modern trend is to allow shareholders or the board of directors to amend); *HOLACRACY CONST.*, Intro. (cautioning that the constitution is “not a complete set of legal bylaws or a formal operating agreement”).

⁴⁰ *Holacracy One Operating Agreement*, *supra* note 32, § 3.1, at 7 (“The management and control of the Company and of its business, the power to act for and bind the Company, and all matters and questions of policy and management shall be vested exclusively in the due process defined in the Constitution, and any decisions to be made in connection with the conduct of the business of the Company shall be made by the Managers so authorized in the manner provided therein.”).

⁴¹ ROBERTSON, *supra* note 7, at 17, 38.

⁴² Bernstein et al., *supra* note 6, at 7 (noting that the terms “pods” is used to describe teams in a self-managed organization).

⁴³ *Id.* (“Whatever they’re called, these basic components . . . are the essential building blocks of their organizations.”).

⁴⁴ ROBERTSON, *supra* note 7, at 46; *HOLACRACY CONST.*, art. V, § 2.

⁴⁵ ROBERTSON, *supra* note 7, at 154–55.

⁴⁶ *Id.* at 48.

can veto any actions in those domains by those outside of the circle. Holacracy works not simply as a large constitutional democracy but rather more like a federalized system of authority in which the smaller units have almost complete authority within their jurisdictions.

The same is true for “roles,” which are the smallest unit of governance within holacracy. In some ways, roles and circles are the same: both have defined purposes, explicit domains, and expected accountabilities.⁴⁷ However, a role is a sub-unit of a circle and is performed by a company worker. Roles are given specific names and defined when they are created. The role’s domain is exclusive to that role (or set of roles) and provides the role-filler with exclusive authority within that domain.⁴⁸ Accountability is the flip side of the domain: the role is expected to produce the results that its domain empowers it to pursue.⁴⁹ So, to pick a trivial example, if the role is “coffee maker,” the role has domain over the coffee maker but is expected to make the coffee as specified within the role’s accountabilities.

Circles are made up of the roles necessary to pursue the purpose and accountabilities of a particular circle. However, holacracy also includes five additional governance roles within the circles. First, the “lead link” is the link between the circle itself and the broader circle that exists outside of it.⁵⁰ The lead link is the connection that insures that the circle is pursuing the purpose for which it was established.⁵¹ The lead link looks, in some ways, like a traditional manager or supervisor, in that the lead link generally sets priorities for the circle and assigns workers to their individual roles.⁵² However, once the role has been delegated, the lead link has no authority to override the decisions made within the role. If the lead link presents a role with a particular task, the role-filler can turn it down if it is outside the role’s accountabilities. Or the role-filler can fulfill the ultimate aim of the assignment in a different way. Each individual role retains control over its tasks, and lead links cannot demand that the work be done in a particular way or by a particular person simply on their own authority. Even the lead link in the anchor circle—the closest comparison to a CEO—cannot demand that another role do something in a particular

⁴⁷ *Id.* at 44; *see also* HOLACRACY CONST., art. I, § 1.

⁴⁸ ROBERTSON, *supra* note 7, at 44 (“A domain (of which there may be several) specifies something the role has the *exclusive* authority to control on behalf of the organization—in other words, this role’s ‘property.’”).

⁴⁹ *Id.*

⁵⁰ *Id.* at 49 (“The ‘Lead Link’ is appointed by the super-circle to represent its needs in the sub-circle.”).

⁵¹ *Id.* (“A lead link holds the perspective and functions needed to align the sub-circle with the purpose, strategy, and needs of its broader context.”).

⁵² *Id.* at 52, 57; *see also* HOLACRACY CONST., art. II, § 2.1.

way.⁵³ The constitution holds power within the organization and provides roles with a significant amount of autonomous authority.

A second governance role is that of the representative link, or “rep link.”⁵⁴ If the lead link represents the outer organization within the circle, the rep link connects the concerns of the circle to the outer organization. The rep link is elected by the members of the circle and participates in the governance of the outer circle. The rep link is supposed to be a true representative of the interests of the circle as well as a messenger regarding problems within the circle that need outside help to resolve.⁵⁵ On rare occasions, a third governance role known as a “cross link” will be created to connect sub-circles within a broader circle.⁵⁶ These roles are created only for *ad hoc* issues that arise between two sub-circles that are best addressed outside of the normal governance structure. The fourth and fifth roles are also roles elected within the circle: the “facilitator” and the “secretary.”⁵⁷ The facilitator runs the circle’s governance meetings, and the secretary administers those meetings by scheduling them and keeping all required records.⁵⁸

As the foregoing discussion shows, holacracy is not a shapeless, flat agglomeration of equally empowered participants. Instead, holacracy seeks to create significantly more structure than the traditional governance system and then populate that structure with empowered participants. Rather than using a hierarchical organizational tree, holacracy is a system of roles and circles that define the purpose of the organization and its subparts, the jurisdictional authority of each part, and the expected results that each part is designed to pursue and attain. The hierarchy is “flatter” in that each worker has control of her role’s domains and cannot be ordered to perform the role’s accountabilities in a particular way. However, the lead links act in similar ways to managers or supervisors, and the circles are organized so that important, firm-wide decisions are made by the anchor circle, in which only a select group of rep links and roles participate.⁵⁹

We know that holacracy is meant to replace the “CEO and below” traditional organizational approach—but what about the board of directors? The holacracy model is ambivalent about the board. When an existing organization adopts the holacracy approach, Robertson

⁵³ ROBERTSON, *supra* note 7, at 22–23.

⁵⁴ *Id.* at 49–50; *see also* HOLACRACY CONST., *append. A.*

⁵⁵ ROBERTSON, *supra* note 7, at 54.

⁵⁶ *Id.* at 55–56; HOLACRACY CONST., art. II, § 2.7.

⁵⁷ ROBERTSON, *supra* note 7, at 57; HOLACRACY CONST., *append. A.*

⁵⁸ HOLACRACY CONST., *append. A.*

⁵⁹ HOLACRACY CONST., art. V, § 5.2.

recommends that it be adopted via the CEO, without official board action, because of the “extra complexity of getting board-level buy-in up front.”⁶⁰ In such a situation, the board exists outside of holacracy—outside of the anchor circle—and retains ultimate control over the corporation. However, holacracy is also open to bringing the board into the system as the anchor circle, at which point the CEO becomes the lead link to a general company circle.⁶¹ The board/anchor circle is not required to have a lead link; instead, the board uses the holacracy decision-making process to run the board.⁶² (A facilitator and secretary would still be required.) In such cases, Robertson suggests that each director become a cross-link with one of the general company sub-circles.⁶³ All directors could become cross-links to the investor sub-circle, which would make these directors similar to the directors in a traditional for-profit company.⁶⁴ Alternatively, they could each link up with a different sub-circle, in the manner of stakeholder directors: one could link with key vendors, another with customers, a third with employees, and so on. This second possibility would be speculative, Robertson acknowledges, as it has not been tried on any scale.⁶⁵ Moreover, it would put investors in a more precarious position.⁶⁶ On the other hand, investors are already differently positioned within holacracy, as the focus of the organization is on its purpose and not on shareholder wealth maximization. In Robertson’s words, “With [h]olacracy adopted at the board level, the board does not exist to steward the company for the sake of its shareholders, or even for the sake of all of its stakeholders, but rather to steward it for the organization itself—in other words, for expressing the organization’s purpose.”⁶⁷

The governance structure of Holacracy One, LLC, provides unique answers to the questions raised by the holacracy model. As the name makes clear, Holacracy One is a Pennsylvania LLC, and it takes advantage of the significant flexibility provided by the LLC model.⁶⁸ The operating agreement specifically adopts the holacracy constitution and vests “[t]he management and control of the [c]ompany and of its business” to the constitution.⁶⁹ The anchor circle is singled out as the site of certain enumerated rights and powers, including specifying the company’s

⁶⁰ ROBERTSON, *supra* note 7, at 151.

⁶¹ *Id.* at 163.

⁶² *Id.* at 164; HOLACRACY CONST., art. V, § 2.2.

⁶³ ROBERTSON, *supra* note 7, at 164.

⁶⁴ *Id.* at 164.

⁶⁵ *Id.* at 165–66.

⁶⁶ *Id.* (noting that multi-stakeholder boards “tend to diminish investor protections, when investors are already legally last in line behind other stakeholders for getting paid”).

⁶⁷ *Id.* at 166.

⁶⁸ Holacracy One Operating Agreement, *supra* note 32, at 1.

⁶⁹ *Id.* § 3.1, at 7.

purpose, selling company assets, or prosecuting legal claims.⁷⁰ However, the agreement also purports to eliminate fiduciary duties on the part of the company's managers "to the fullest extent permitted by applicable law," except for the duty of good faith and fair dealing.⁷¹ The anchor circle works without a lead link and requires a cross-link for the purposes of linking up with key stakeholder groups.⁷² Although the cross-links must "remain defined to represent the [m]embers in their capacity as financial investment stakeholders in the [c]ompany,"⁷³ their purpose is not to maximize investor wealth; rather, it is to express the purpose of the organization and insure that the purpose is adhered to throughout the organization.⁷⁴ The organization's purpose plays an important role in both resolving disputes and setting the terms for evaluation. The board orients itself around the organization's purpose rather than the usual shareholder wealth maximization norm.

Holacracy One, LLC, also defines its workers as "partners" for purposes of the LLC.⁷⁵ All workers receive Class P membership units, which provide for a guaranteed draw from the company.⁷⁶ The Class P units can, under certain restrictions, be exchanged for investor shares.⁷⁷ Because they are members of the LLC, the company does not consider the workers to be employees; instead they are like partners or LLC members.⁷⁸ Partners have governance rights through the holacracy constitution. According to Robertson, the move to a partnership model is in keeping with the shift in authority and accountability from CEOs and supervisors to the average worker.⁷⁹

2. Governance Processes

Governance processes are critical to self-managed teams, and holacracy is no exception. Along with the governance structure based on roles, domains, and circles, holacracy adopts a stylized version of governance meetings and dispute resolution which move beyond discussions or elections. The process, described in Article III of the

⁷⁰ *Id.*

⁷¹ *Id.* § 3.5, at 9.

⁷² *Id.* § 4.1, at 10.

⁷³ *Id.*

⁷⁴ Robertson Interview, *supra* note 33.

⁷⁵ Holacracy One Operating Agreement, *supra* note 32, § 1.1, at 1.

⁷⁶ *Id.* § 7.4.1, at 16; Robertson Interview, *supra* note 33.

⁷⁷ Holacracy One Operating Agreement, *supra* note 32, § 7.4.2, at 16.

⁷⁸ ROBERTSON, *supra* note 7, at 190; Robertson Interview, *supra* note 33.

⁷⁹ ROBERTSON, *supra* note 7, at 190.

holacracy constitution, involves discrete steps taken to raise issues—known as “tensions”—and then address and hopefully resolve those tensions.⁸⁰

Restructuring the processes of governance is critical to holacracy because governance is so important to the holacracy structure. As Robertson notes, “[w]hen you replace top-down leadership with a process, that process needs to be robust and sophisticated enough to keep everyone aligned and unified as they navigate the complexity of their daily business.”⁸¹ The circle’s facilitator and secretary largely manage the governance processes and implement the decisions arrived at in the meetings.⁸² The meetings allow members of the circle to transform existing structures and adapt to changing conditions.

During governance meetings, participants can: create, amend, or eliminate roles; create, amend, or eliminate policies that govern within the circle; create, amend, or eliminate sub-circles; and elect members to specific roles.⁸³ These meetings follow a strict choreography that allows all members to participate but channels such participation into fairly specific areas. For example, during the check-in round, all are invited to contribute, but none are allowed to discuss or respond to another’s contribution.⁸⁴ The facilitator leads the group through the process and endeavors to resolve any tensions—perceptions of a “specific gap between current reality and a sensed potential.”⁸⁵ A tension raised in the “agenda building” session is then addressed through the “integrative decision-making process,” which provides participants with specific opportunities to propose solutions and raise objections.⁸⁶ Proposals are adopted if no objections are left unaddressed in the view of all of the members of the group.⁸⁷ This decision-making process is more fully described within the holacracy literature, but its essence is an effort to push people through a series of steps to reach an ultimate conclusion.⁸⁸ The facilitator must carefully keep participants on target for each particular round of participation and must make judgment calls about when someone’s comment is not relevant or when a proposal lies outside the circle’s jurisdiction.⁸⁹ Governance meetings are separate from operations

⁸⁰ HOLACRACY CONST., art. III.

⁸¹ ROBERTSON, *supra* note 7, at 64.

⁸² *Id.* at 66–67.

⁸³ *Id.* at 67.

⁸⁴ *Id.* at 70.

⁸⁵ *Id.* at 6.

⁸⁶ HOLACRACY CONST., art. III, § 3.5.

⁸⁷ *Id.* § 2

⁸⁸ *Id.* § 3.3

⁸⁹ HOLACRACY CONST., *append. A*

meetings, and the facilitator should reject efforts to bring in crossover material.⁹⁰ Strategic decisions can be covered in tactical meetings that follow a similar format but focus on operational issues and ongoing projects.⁹¹ The secretary records the meeting's results; software platforms, such as Glass Frog, assist holacracy secretaries in keeping track of the governance changes.⁹²

Within the governance process, holacracy employs a unique election process—known as the “integrative election process”—through which elected roles are assigned.⁹³ The process begins with each person filling out a ballot—no abstentions allowed—with their nominee.⁹⁴ These nominees are then explained and proposed to the group, and the facilitator leads the groups through a winnowing process whereby a final “proposal” is settled upon.⁹⁵ This proposal must then survive a round of potential objections; if it does, then the nominee goes through.⁹⁶

The holacracy process is not simple, and Robertson recommends that larger organizations employ a holacracy consultant or “coach” in order to get the process underway.⁹⁷ At the very least, training is necessary for all employees, since all employees participate in the governance process.⁹⁸ In this regard, holacracy is very much like other self-management systems. Buurtzorg also follows a very specific self-management process, and all new members undergo training in “solution-driven methods of interaction.”⁹⁹ Similar to holacracy, the group chooses a facilitator who then leads the group through a process that responds to objections, allows all voices to be heard, and settles on a solution.¹⁰⁰ Unlike holacracy, however, there is no lead link on the Buurtzorg teams—all of the nurses have the same governance rights.¹⁰¹ But both processes

⁹⁰ For an overview of a governance process, see ROBERTSON, *supra* note 7, at 68–78; HOLACRACY CONST., art. III, § 3.

⁹¹ ROBERTSON, *supra* note 7, at 94–104; HOLACRACY CONST., art. IV, § 2.

⁹² ROBERTSON, *supra* note 7, at 79.

⁹³ HOLACRACY CONST., art. III, § 3.6.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ ROBERTSON, *supra* note 7, at 149–50.

⁹⁸ *Id.* at 150.

⁹⁹ LALOUX, *supra* note 6, at 67.

¹⁰⁰ *Id.* at 68.

¹⁰¹ *But see id.* at 68–69 (noting that “fluid hierarchies of recognition, influence, and skill” can arise within the group based on individual “expertise, interest, or willingness”).

share a common understanding that the team and the process are to be respected above personal prerogative and individual interests.¹⁰²

Adapting to a nonhierarchical governance framework can be difficult for many employees as the traditional framework relieves the average employee of the burden of decision-making and responsibility.¹⁰³ Moreover, the process can be difficult to understand at first, with each system having its unique jargon about “tensions,” “objections,” and “domains.”¹⁰⁴ But these structured processes for dialogue and decision are necessary to prevent the team-production process from descending into chaos.

3. Organizational Purpose.

The idea of “purpose” is central to holacracy. It provides the core principle around which all of this process turns. Roles and circles are created, tensions are processed, and actions are justified all based on the central purpose of the organization and the subsidiary principles that flow therefrom. The Holacracy Constitution specifies that the anchor circle of the organization is established in order “to express the overall Purpose of the Organization.”¹⁰⁵ The purpose is described as “the deepest creative potential [the organization] can sustainably express in the world, given all of the constraints acting upon it and everything available to it.”¹⁰⁶ In determining the purpose, the anchor circle is to look to the organization’s “history, current capacities, available resources, Partners, character, culture, business structure, brand, market awareness, and all other relevant resources or factors.”¹⁰⁷ The anchor circle also has the authority to update the purpose as necessary, but if the anchor circle has a lead link, the lead link has the organization’s purpose within its accountabilities by default.¹⁰⁸

The purpose-oriented organization is another facet of holacracy’s focus on structure and process rather than on people. The organization exists above and apart from the people who populate it at any given time. As such, it must have an independent purpose that justifies its existence

¹⁰² ROBERTSON, *supra* note 7, at 110 (“[The facilitator’s] responsibility is not to support or take care of the people; it is to protect the *process*, which itself allows people to take care of themselves.”).

¹⁰³ LALOUX, *supra* note 6, at 68 (noting that the nurses “can’t offload these difficult decisions to a boss, and when things get tense, stressful, or unpleasant, there is no boss and no structure to blame”).

¹⁰⁴ See Bernstein et al., *supra* note 6, at 43.

¹⁰⁵ HOLACRACY CONST., art. V, § 2.

¹⁰⁶ *Id.* § 2.3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

and frames its actions.¹⁰⁹ Holacracy does not seem to have any ulterior or metaphysical idea in mind. Instead, the purpose is simply the concept that drives what the company does. As Robertson notes, “[t]he purpose of a garbage disposal company might be simply ‘to create cleaner cities’—which may not be glamorous, but nonetheless gets at the ‘why’ behind what the company does, and expresses a potential that the company is well suited to bring about in the world.”¹¹⁰ Holacracy expressly rejects the idea that the organization is simply the agglomeration of the personal aspirations of its participants; instead, the organization’s purpose must be found by its participants and must be followed in the organization’s activities.¹¹¹

Once established, the purpose does seem to have organizational power over the participants. Within the anchor circle, circle members must justify their decisions based on the organization’s purpose. Unlike traditional corporations, where shareholder wealth maximization is generally the *de facto* and *de jure* corporate purpose, the holacratic organization looks to the purpose in order to justify transformational decisions like a merger, acquisition, or dissolution.¹¹² And in the holacracy governance process, purpose plays a key role in structuring the dialogue within governance. For example, an objection within the integrative decision-making process “needs to be related to a particular role the objector fills, and to describe how the proposal would diminish the role’s capacity to express its purpose or enact its accountabilities.”¹¹³ Purpose drives the conversations.

Other self-managed or “teal” organizations also share this emphasis on purpose. Described as “evolutionary purpose” by Laloux, these organizations orient around an idea, a goal, a direction, and then imbue the entire organization with that sense.¹¹⁴ Buurtzorg, for example, has a specific purpose: “to help sick and elderly patients live a more autonomous and meaningful life.”¹¹⁵ This purpose exists above and beyond the organization itself. Buurtzorg thus sees other nursing organizations not as competitors, but rather as allies in the struggle to pursue this purpose.

¹⁰⁹ ROBERTSON, *supra* note 7, at 33 (“Said another way, what does this organization want to be in the world, and what does the world need this organization to be?”).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 31–32; HOLACRACY CONST., art. I, § 1 (stating that a role has a purpose which is “a capacity, potential, or unrealizable goal that the Role will pursue or express on behalf of the Organization”).

¹¹² Robertson Interview, *supra* note 33.

¹¹³ ROBERTSON, *supra* note 7, at 116.

¹¹⁴ LALOUX, *supra* note 6, at 56.

¹¹⁵ *Id.* at 195. This purpose is not recorded in writing, but is spoken about frequently in order to keep it “alive” and prevent it from “becoming constraining.” *Id.* at 201.

Metrics like market share, growth, and profits are not important relative to the overall goal. Buurtzorg's tremendous growth may in fact be in furtherance of the purpose as it provides Buurtzorg's innovative services to a broader group of patients. But it is subsidiary to the organization's overall purpose. Purpose also drives strategy, at all levels of the organization: "people in these companies have a very clear, keen sense of the organization's purpose and a broad sense of the direction the organization might be called to go."¹¹⁶

Because the purpose is fluid, it may not be ensconced in the business organization's charter or operating agreement with a great deal of specificity. The Holacracy One, LLC, has a somewhat ambiguous purpose in its operating agreement:

Purposes of Company. The Company was initially formed for the purpose, to the extent permitted by the Act, of discovering and clarifying the deepest creative potential the Organization is best-suited to sustainably express in the world, given all of the constraints operating upon it and everything available for its use in such expression, including its history, current capacities, available resources, Partners, character, culture, business structure, brand, market awareness, and all other resources or factors which may be relevant¹¹⁷

This passage is essentially a paraphrasing of the Holacracy Constitution's definition of purpose rather than an actual and specific purpose. Because this purpose is locked in through the operating agreement, the LLC has preserved its legal flexibility while arguably derogating the substantive nature of the holacracy purpose requirement.

The primary purpose of the organization leads to the establishment of subsidiary circles, which each have their own subsidiary purposes within the overall purpose.¹¹⁸ When roles are established within these circles, each role must have a purpose along with a domain and an accountability.¹¹⁹ Although its domain defines the area of operation for a role, the role's purpose is also important in justifying the actions within

¹¹⁶ *Id.* at 207.

¹¹⁷ Holacracy One Operating Agreement, *supra* note 32, § 2.4, at 7.

¹¹⁸ ROBERTSON, *supra* note 7, at 48 ("A circle is not a group of people, but a group of roles, and it is also, in a sense, a really big role itself, with a single cohesive purpose to express, some accountabilities to enact, and possibly some domains to control."); HOLACRACY CONST., art. II, § 1 ("A 'Circle' is a Role that may further break itself down by defining its own contained Roles to achieve its Purpose, control its Domains, and enact its Accountabilities.")

¹¹⁹ ROBERTSON, *supra* note 7, at 80.

the role.¹²⁰ These purposes are recorded within the governance record-keeping system and can be referred to by the participants as they conduct the firm's business.¹²¹

These three components—internal constitutional structure, complex governance processes, and evolutionary purpose—make up the core of the holacracy system. They are also generally shared by other self-managed or “teal” organizations, but holacracy has a uniform and comprehensive approach that allows for more particularized study of these characteristics. To what extent are these differences meaningful under the law? Do we need to think our traditional legal approaches to these firms? The following Parts undertake an exploration of these questions.

II. HOLACRACY AND ORGANIZATIONAL IDENTITY

The holacracy system of management changes the internal structure of business organizations from a command-and-control system to a devolved system of shared power. But before turning to the effects of that change on the law of firm governance, it is important to recognize that holacracy changes the way we think about the organizations themselves. First, holacracy, and its use of the body as metaphor, provides a new perspective on the way we think about firms as entities or aggregates. Second, holacracy's focus on organizational purpose challenges our diminished expectations for the role of purpose in corporations and other business entities. These altered perspectives provide new insights about the roles of these organizations within our economy.

A. The Entity/Aggregate Debate

Ever since the law has allowed people to form organizations, the nature of these organizations has caused doctrinal and even metaphysical puzzles.¹²² Are organizations simply the sum of their parts—an aggregation of those who are involved in the enterprise—or is the organization itself an entity?¹²³ And is this organization, when represented

¹²⁰ HOLACRACY CONST., art. I, § 3 (“As a Partner assigned to a Role, you have the authority to execute any Next-Actions you reasonably believe are useful for enacting your Role’s Purpose or Accountabilities.”).

¹²¹ ROBERTSON, *supra* note 7, at 153–54.

¹²² Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1000 (2010) (noting how the corporation evolved from its origins in Roman law).

¹²³ Daniel S. Kleinberger, *The Closely Held Business Through the Entity-Aggregate Prism*, 40 WAKE FOREST L. REV. 827, 827 (2005) (discussing “whether the law envisages that form as an entity separate from its owners, rather than an aggregate of the several owners”).

as a legally created association, an artificially created entity or a “real” entity in the social and legal sense?¹²⁴ These questions have remained an open question within corporate law and business entity law more generally.¹²⁵ Scholars have identified three separate theories of corporate personhood: the aggregate theory, the artificial entity theory, and the natural entity theory.¹²⁶ Beyond the philosophical interest in such questions, they also may have an effect on corporate policy and doctrine.¹²⁷ For example, those who argue for the artificial entity theory may use it to push for greater state regulation of the corporation, while those who argue in favor of the aggregate theory may advocate for fewer restrictions because the aggregation is voluntary.¹²⁸

Holacracy’s approach adds a new layer to this debate by melding together all three theories in its perspective of the organization. Rather than coming down on the side of entity or aggregate, holacracy supports a blended conception that uses the human body as a metaphor for the organization.¹²⁹ While the body as a whole is one unit, it is supported by a variety of systems within systems that work together to ensure the functioning of the unit. Each cell, for example, is “both a self-contained, whole entity *and* a part of a larger whole, an organ.”¹³⁰ Similarly, each organ is both a self-contained whole and also part of a whole.¹³¹ This metaphor, in and of itself, may seem fairly straightforward. But holacracy takes the metaphor and uses it to justify its devolution of power to individual teams of employees:

¹²⁴ David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 201 (1990) (discussing “the distinction between the corporation as an artificial creation of state law and the corporation as a natural product of private initiative”).

¹²⁵ Kleinberger, *supra* note 123, at 830 (discussing the debate in the context of partnership).

¹²⁶ Avi-Yonah, *supra* note 122, at 1001 (“Those theories are the aggregate theory, which views the corporation as an aggregate of its members or shareholders; the artificial entity theory, which views the corporation as a creature of the State; and the real entity theory, which views the corporation as neither the sum of its owners nor an extension of the state, but as a separate entity controlled by its managers.”); Martin Petrin, *Reconceptualizing the Theory of the Firm—from Nature to Function*, 118 PENN ST. L. REV. 1, 14 (2013) (discussing “the fiction, reality, or aggregate nature of corporations”).

¹²⁷ See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960* 66–67 (1992) (discussing the impact of an 1886 U.S. Supreme Court decision that a corporation was a “person” under the Fourteenth Amendment). *But see* Millon, *supra* note 124, at 202 (“Historically, the political implications of the natural/artificial and entity/aggregate distinctions have been ambiguous, meaning different things at different times.”).

¹²⁸ Petrin, *supra* note 126, at 39 (“[C]ontractarians usually deny the firm’s ability to bear social or moral duties and responsibilities based on its fictional character and, in addition, contend that shareholder interests are paramount.”).

¹²⁹ ROBERTSON, *supra* note 7, at 17, 38.

¹³⁰ *Id.* at 38.

¹³¹ *Id.*

The rather miraculous human body functions efficiently and effectively not with a top-down command system but with a distributed system—a network of autonomous self-organizing entities distributed throughout the body. Each of these entities, which are your cells, organs, and organ systems, has capacity to take in messages, process them, and generate output. Each has a function and has the autonomy to organize how it completes that function.¹³²

If each cell, organ, or organ system had to be separately commanded by the brain, our systems would not work. Holacracy carries this analysis through to its system of roles and circles. Roles are similar to the individual cells while circles are like organs. Each role and circle must have an independent set of functions while, at the same time, must recognize itself as part of an overall whole.¹³³

I do not mean to make too much of holacracy's use of analogy here; obviously, the analogy is not only a common one, but also an imperfect one.¹³⁴ However, given the recent revival in the debate over the appropriate conception of the corporation, particularly at the Supreme Court,¹³⁵ holacracy's melding of theory and application does add usefully to the ongoing contemplations on the issue. Neither the entity theory nor the aggregate theory completely captures the facets of organizational existence. Instead, holacracy advocates for a system of entities within entities as the appropriate way to think through some of our larger questions of corporate identity.¹³⁶ This approach also lends itself to a new way of thinking about corporate and organizational purpose.

B. Organizational Purpose

Holacracy puts organizational purpose front and center. Deriving the entity's purpose is one of the first things to be done when the initial

¹³² *Id.* at 17.

¹³³ *Id.* at 47 (noting that “a circle that behaves as if it were fully autonomous will harm the system, just as a cell in the body that disregards the larger system becomes cancer”).

¹³⁴ *Id.* at 39 (noting the difference between human beings and cells).

¹³⁵ Avi-Yonah, *supra* note 122, at 1033–45 (discussing entity theory in the context of *Citizens United v. FEC*, 558 U.S. 310 (2010)); Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47, 49 (2015) (discussing entity theory in the context of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).

¹³⁶ For a systems-theory approach to corporate law, see Tamara Belinfanti & Lynn A. Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579 (2018).

“anchor circle” is established.¹³⁷ Certainly, having a set of goals, or a mission statement, or another statement of purpose is not unusual in Corporate America.¹³⁸ But the holacracy focus on purpose is imbedded into the constitution and informs the company’s governance processes. Moreover, this purpose is mission-driven. In that respect, a holacracy-derived purpose differs markedly from the *de facto* and *de jure* purpose of for-profit corporations: to maximize the wealth of shareholders. Thus, the primary questions for the law will be: to what extent does an organizational purpose, when achieved through holacracy, have legal meaning, and, to what extent can it override the shareholder wealth maximization norm?

In the earlier days of our republic, the law required corporations to establish a specific purpose as part of the incorporation process.¹³⁹ The purpose specified the nature of the business to be established and provided a sense of scope. This purpose was not merely hortatory—it established the boundaries of activities for participants within the firm.¹⁴⁰ It could be seen as jurisdictional in nature: the corporation could not operate outside of the markers of its delineated activity. This limitation was justified by the power that the state had provided to the corporation to exist in the first place. The first corporations could only be formed for a limited set of prescribed purposes, such a starting a university or building a canal.¹⁴¹ But as the scope of potential business purposes widened, the need for a specific purpose remained; an unlimited corporation could, theoretically, seek unlimited power.¹⁴² Therefore, corporations needed to specify their purpose as part of their chartering documents.¹⁴³ The purpose requirement was enforced through an *ultra vires*, or “beyond the powers,” legal action.

¹³⁷ ROBERTSON, *supra* note 7, at 153.

¹³⁸ *Id.* at 31.

¹³⁹ *Liggett Co. v. Lee*, 288 U.S. 517, 554–55 (1933) (Brandeis, J., dissenting) (“At first, corporations could be formed under the general laws only for a limited number of purposes . . .”).

¹⁴⁰ JOSEPH K. ANGELL & SAMUEL AMES, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* AGGREGATE 60 (Arno Press Inc. 1972) (“[T]he general powers of a corporate body must be restricted by the nature and object of its institution.”).

¹⁴¹ Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1145 (2012) (noting that “colleges, guilds, and municipalities were often organized as corporations, as were such public-serving transportation ventures as canals or turnpikes”).

¹⁴² *Cf. Liggett Co.*, 288 U.S. at 554–55 (Brandeis, J., dissenting) (“Limitations upon the scope of a business corporation’s powers and activity were also long universal The powers which the corporation might exercise in carrying out its purposes were sparingly conferred and strictly construed.”).

¹⁴³ Edward H. Warren, *Executory Ultra Vires Transactions*, 24 HARV. L. REV. 534, 534–35 (1911) (“But American legislatures in granting the corporate privilege, either by special charter or pursuant to the provisions of a general law, always have been, and still are, accustomed to incorporate any given body of associates for some, and not for all, purposes.”).

Under this doctrine, shareholders could sue the corporation if it went beyond the scope of its purpose, as established in the charter.¹⁴⁴ Because it limited the reach of corporate power to enumerated purposes, the *ultra vires* doctrine was “an important tool to protect the state's interest in restricting the power and size of corporations and to protect the shareholders from managerial overreaching.”¹⁴⁵ Cases typically involved a corporation purchasing another company that was outside of the firm's specified scope or carrying on business in violation of its charter.¹⁴⁶ In some cases, contracts were rendered void if the one party knew that the other party was acting *ultra vires*.¹⁴⁷ This led to the odd situation of corporations seeking to escape obligations on the grounds that they had exceeded their powers.¹⁴⁸

As corporations became more commonplace and less attention was paid to the specific charters, the *ultra vires* doctrine began to break down. Other doctrines came to occupy the same regulatory space: antitrust provided a better tool for preventing corporate overreaching and monopoly while shareholders brought derivative suits to enforce director and officer fiduciary duties.¹⁴⁹ *Ultra vires* prohibitions remain on the

¹⁴⁴ Adam J. Sulkowski & Kent Greenfield, *A Bridle, A Prod, and A Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior*, 79 ST. JOHN'S L. REV. 929, 930 (2005) (“The ultra vires doctrine historically allowed a shareholder to sue to prevent a company from engaging in an activity outside of the specific parameters of its corporate charter.”).

¹⁴⁵ Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1302 (2001).

¹⁴⁶ See *id.*

¹⁴⁷ Recent Cases, *Corporations - Ultra Vires - Continuing Contract Made for an Unauthorized Purpose*, 27 HARV. L. REV. 680, 680 (1914) (finding a contract for the sale of coal to a railroad for resale was void if the seller was chargeable with knowledge of the railroad's unlawful purpose—namely, to resell the coal outside of its scope as a common carrier).

¹⁴⁸ Cf. *Colo. Springs Co. v. Am. Pub. Co.*, 97 F. 843, 849 (8th Cir. 1899) (“The question concerning its power to execute the contracts is not raised by the state, but by the corporation itself, to avoid a liability to another corporation with which it has contracted; and for these reasons a more liberal view may be taken of its implied powers than could otherwise be entertained.”). Because of the potential for abuses under this approach, courts began to rein in the doctrine. See Editorial, *Ultra Vires Contracts in the Federal Courts*, 19 HARV. L. REV. 608, 609 (1906) (“In consequence there has been generally adopted a working rule lying half way between the two above suggested, and making an ultra vires contract neither quite void nor voidable by any particular party, nor yet quite good; but a thing which is a type unto itself, — bad unless there is some reason of justice or expediency to the contrary. Thus a wholly executory ultra vires contract is treated as if illegal, but if one side has performed, so that such treatment would cause hardship, a remedy is given.”).

¹⁴⁹ Prior to the New Deal securities acts, shareholders were still in a position to bring contract claims against officers if the corporation exceeded its purpose. Charles E. Carpenter, *Should the Doctrine of Ultra Vires Be Discarded?*, 33 YALE L.J. 49, 65 (1923) (“If the officers

books in almost every state.¹⁵⁰ Consequently, corporations learned to have as broad a corporate purpose as possible.¹⁵¹ Today, even though corporations are allowed to have specific purposes, for-profit companies generally follow specific language: the corporation is formed to conduct and transact all lawful business activities allowed under the laws of the state.¹⁵²

At around the same time as *ultra vires* actions were disappearing, the notion of shareholder primacy was beginning to take hold. Two influential works on this score—one a case, the other a book—emerged to frame the debate. *Dodge v. Ford Motor Co.* (“*Dodge*”),¹⁵³ emphasized the responsibility of management to run the company in the interests of the shareholders.¹⁵⁴ Through the shareholder action, the minority shareholders were able to force the controlling shareholder to provide a substantial dividend.¹⁵⁵ (The plaintiffs had also brought a claim of *ultra vires*, but it was dismissed by the court.¹⁵⁶) *The Modern Corporation and Private Property* provided a structural theory of shareholder rights in the face of management opportunism.¹⁵⁷ These two sources both represented the idea of shareholder primacy—the idea that the corporation is to be run

of the corporation enter into an *ultra vires* contract without the assent of the stockholder they violate his contract. For this he has his remedy. He may sue the officers for breach of contract.”).

¹⁵⁰ Sulkowski & Greenfield, *supra* note 144, at 945 (“The incorporation statutes of forty-nine states allow these states to dissolve a corporation or enjoin it from engaging in *ultra vires* activities—that is, activities outside of the corporation’s authority.”).

¹⁵¹ See, e.g., Recent Cases, *Corporations - Ultra Vires: What Acts Are Ultra Vires - Ill-Defined Objects of Incorporation*, 32 HARV. L. REV. 285, 290 (1919) (discussing a corporate purpose “enabling the company to carry on almost every conceivable kind of business which such an organization could adopt”).

¹⁵² Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 618 (2017) (“[F]or-profit corporations, including social enterprises organized as corporations, usually take advantage of the full breadth of the permitted purposes for which a corporation can be organized and operated under the applicable state law.”). For an example of this language, see MISSOURI DEPARTMENT OF STATE, FAQs, <http://www.sos.mo.gov/business/faqs.asp> (citing a “general purpose” which states that “[t]he corporation is formed to conduct and transact all lawful business activities allowed under the laws of the State of Missouri”) (last visited May 3, 2018).

¹⁵³ 170 N.W. 668 (Mich. 1919).

¹⁵⁴ *Id.* at 684 (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes.”); Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 322 (1998) (persuasively arguing that *Dodge* is actually about horizontal equity—the need to run the business in the interest of *all* shareholders and not just the controlling ones).

¹⁵⁵ *Dodge*, 170 N.W. at 685.

¹⁵⁶ *Id.* at 681.

¹⁵⁷ ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 1, 380 (Transaction Publishers rev. ed. 1932).

in the financial interest of the shareholders. As corporations were dropping specific purposes from their charters, the shareholder primacy norm was stepping in to provide a purpose in its place. The norm was supercharged in the 1970s with the push to increase shareholder returns through hostile takeovers and private equity acquisitions. The nascent law and economics movement provided intellectual ballast to the changing economic and financial norms. For the last fifteen to twenty years, if not more, the shareholder wealth maximization norm has dominated both boardrooms and the academic literature.¹⁵⁸

The importance of the shareholder primacy norm lies not only in its cultural sway. The norm also has the force of law. As the *Dodge* language first made clear, shareholders have the legal right to expect that the corporation will be run in their interest. Certainly, the business judgment rule provides a significant zone of activity within which the corporation can make decisions concerning its everyday business. But the norm has legal force in many states—Delaware being the most prominent. The recent words of then-Chancellor Chandler make the point plainly: “Having chosen a for-profit corporate form, the Craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders.”¹⁵⁹

Holacracy and shareholder primacy are, at best, uneasy bedfellows. The holacracy governance structure can fit within an otherwise traditionally structured corporation; the board of directors can retain all of its traditional powers but create a holacracy beneath it.¹⁶⁰ However, holacracy’s focus on purpose elevates the organization’s needs above the needs of the shareholders and replaces shareholder primacy with what might (clumsily) be called “purpose-primacy.” As described in *Holacracy*:

However you choose to populate your board, Holacracy also reframes the purpose of the board’s stewardship of the organization. With Holacracy adopted at a board level, the board does not exist to steward the company for the sake of its shareholders, or even for the sake of all of its stakeholders,

¹⁵⁸ Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2004 (2013) (“Many, and possibly most, public companies now embrace a shareholder-centered vision of good corporate governance that emphasizes ‘maximizing shareholder value’ (typically measured by share price) over all other corporate goals.”).

¹⁵⁹ eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

¹⁶⁰ ROBERTSON, *supra* note 7, at 163–64. For further discussion of structural issues, see *infra* Part III.

but rather to steward it for the organization itself—in other words, for expressing the organization’s purpose. Interestingly, this makes the distinction between for-profit and nonprofit less relevant. Organizations running with Holacracy are first and foremost purpose-driven, regardless of their tax structure, with all activities ultimately being for the sake of realizing the organization’s broader purpose.¹⁶¹

A holacracy-governed organization would not follow the shareholder primacy norm. Instead, it would focus on the organization’s purpose, as derived through the holacracy process.

The holacracy literature is somewhat vague on the role of shareholders within the organization, as that literature offers a “broad tent” approach to encourage widespread adoption.¹⁶² At the same time, a true holacracy would reject shareholder primacy as the governing norm. Holacracy-governed corporations could potentially present the next wave of challenges to Delaware’s recent confirmation of the primacy norm. In *eBay Domestic Holdings, Inc. v. Newmark*,¹⁶³ the Court of Chancery rescinded the directors’ adoption of a shareholder rights plan that restricted minority shareholders’ ability to purchase shares and to freely sell shares as well as their effort to obtain a right of first refusal for the corporation over the shares held by minority shareholders.¹⁶⁴ However, if a holacratic corporation took similar steps, would its adoption of holacracy be sufficient to put shareholders on notice that it would not follow the shareholder primacy norm? Could a holacratic corporation opt out of the *Revlon* rule?¹⁶⁵ To some extent, the question is whether shareholder primacy is a default rule, and if it is, whether the choice of holacracy is

¹⁶¹ ROBERTSON, *supra* note 7, at 166.

¹⁶² *Id.* at 163.

¹⁶³ 16 A.3d 1 (Del. Ch. 2010)

¹⁶⁴ *Id.* at 34–35.

¹⁶⁵ The *Revlon* rule regards a company’s ability to either sell the company or otherwise divest complete control of the company; further, under *Revlon*, the board must seek to secure the highest possible bid once it has committed to selling. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). For an expansion on the *Revlon* rule, see BAINBRIDGE, *supra* note 39, at 406 (“Once a *Revlon* auction begins, it no longer matters whether benefiting nonshareholder interests may also benefit shareholders. Instead, shareholder wealth maximization is the board’s only appropriate concern.”) (quoting *Revlon.*, 506 A.2d at 182). Further, Delaware courts have not permitted corporations to waive the *Revlon* duties prospectively. For an opposing viewpoint, see David Jackson & Joseph B. Frumkin, *The Global Role of Corporate Law*, 25 DEL. J. CORP. L. 106, 119 (2000) (asking whether “the Delaware legislature, with the recommendation of the Delaware Bar, [might] be prepared to say that if you duly incorporate with a U.K. company, [you could] opt out in your charter from *Revlon* and *Unocal*, for example, and defer to the semi-private takeover board regulation which works in England”).

sufficient to opt out of it. But if shareholder primacy is a mandatory rule within Delaware, the choice of business organization becomes more important for holacracy-interested firms.

C. Choice of Organizational Form

The corporation is the most common form of business organization in the United States today.¹⁶⁶ However, there is an underappreciated variety of different business association types that are available to businesses: partnerships, limited partnerships (LPs), limited liability partnerships (LLPs), limited liability companies (LLCs), and—newest on the scene—the benefit corporation. Because of its unique take on the nature of the holacratic business entity as well as the focus on a broader purpose, holacratic firms may wish to explore alternative legal models for the formation and continuing governance of their firms.

The benefit corporation may, in fact, seem tailor-made for holacracy.¹⁶⁷ The signal change from corporation to benefit corporation is its rejection of the shareholder primacy norm for a more socially-beneficial corporate purpose. This purpose must fit within the rubric of “social benefit” as defined by the state statute. Although most states provide a relatively broad definition,¹⁶⁸ the benefit corporation restrains itself by opting for a purpose that can then be used as a metric. State benefit corporation law usually includes some mechanisms for enforcing the “benefit” component, such as benefit reporting, a benefit officer,

¹⁶⁶ Matthew T. Bodie, *Income Inequality and Corporate Structure*, 45 STETSON L. REV. 69, 71 (2015) (“Although a variety of different business organizational forms exist, such as the partnership, the limited liability company (LLC), and the sole proprietorship, the corporation clearly dominates the economic landscape.”).

¹⁶⁷ See Matthew J. Dulac, *Sustaining the Sustainable Corporation: Benefit Corporations and the Viability of Going Public*, 104 GEO. L.J. 171, 175 (2015) (“A benefit corporation is a for-profit corporation with a stated public benefit that operates in a responsible and sustainable manner; in other words, it pursues the dual mission of making a profit and achieving some social good.”). Benefit corporations (sometimes called B corps) are a form of business organization created by state statutes to promote a more socially-responsible orientation within the business. See Brett McDonnell, *Benefit Corporations and Strategic Action Fields or (The Existential Failing of Delaware)*, 39 SEATTLE U. L. REV. 263, 280 (2016) (“State statutes legally define benefit corporations. These statutes sit atop the basic business corporation statute. That is, benefit corporations *are* business corporations, subject to all of the rules of the business corporation statute, except insofar as the benefit corporation statute provides different or additional rules.”).

¹⁶⁸ Delaware defines public benefit, as “a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.” DEL. CODE ANN. tit. 8, § 362 (2016).

fiduciary duties related to the benefit, or *ultra vires* actions if the purpose is ignored. This new model might seem to match up well with the more socially-oriented framework of holacracy.

However, holacracy has not embraced the benefit corporation model. When holacracy talks of purpose, it does not specifically designate a “socially beneficial” purpose to the organization. Because it seeks widespread adoption as a governance method for firms of all shapes, sizes, and economic motives, holacracy does not want to be pigeonholed in the “green” or “good” economic space. Certainly, other integral or “teal” organizations may naturally gravitate towards a higher aim; Buurtzorg, for example, seeks to “help sick and elderly patients live a more autonomous and meaningful life.”¹⁶⁹ But these organizations may simply seek to better serve their customers; that idea, specified and framed as a purpose, is sufficient for holacracy. Moreover, for a company already grappling with the complexity of holacracy, adding in the new benefit corporation requirements may be piling too much on. It is even uncertain to what extent benefit corporations may escape from the shareholder primacy norm itself.¹⁷⁰

Holacracy One, LLC—as its name makes clear—opted to form as a limited liability company.¹⁷¹ It has included a purpose in its operating agreement, but a beneficial purpose is not required for LLCs, and Holacracy One’s purpose is actually fairly vague.¹⁷² Other than the duty of good faith and fair dealing towards the LLC members, the operating agreement expressly endeavors to exclude fiduciary duties owed by the firm managers to the extent allowed under law.¹⁷³ There is no specific mechanism for enforcing the company’s purpose. The operating agreement does have an arbitration clause providing “final, binding and non-appealable arbitration” for disputes that arise within the agreement.¹⁷⁴

Holacracy’s emphasis on organizational purpose, as discussed in Part II.B. above, appears to be a jarring contrast with Holacracy One’s vague and unenforceable statement of purpose. But I think the latter primarily reflects an effort to keep governance within the holacracy governance process and outside of the courts. This may seem of a piece with the familiar managerialism that is commonplace in all types of firms. But the holacracy movement is intent on creating its own private form of

¹⁶⁹ LALOUX, *supra* note 6, at 195. This purpose is not recorded in writing, but is spoken about frequently in order to keep it “alive” and prevent it from “becoming constraining.” *Id.* at 201.

¹⁷⁰ Heminway, *supra* note 152, at 632–33.

¹⁷¹ Holacracy One Operating Agreement, *supra* note 32, Preamble, at 1.

¹⁷² *Id.* § 2.4, at 7.

¹⁷³ *Id.* § 3.5, at 9.

¹⁷⁴ *Id.* § 17.8, at 37.

governance. To some extent, litigating over internal matters is opting out of the holacracy process, and holacracy is all about that internal process. In that respect, Holacracy One is an example of the organizational flexibility that commentators, such as Larry Ribstein¹⁷⁵ and Justin Blount¹⁷⁶ have touted in their writings. Although both Ribstein and Blount preferred shareholder primacy as a normative matter, they argued that the organizational tools existed to pursue other models of governance within business organizations. Holacracy One took the freedom to escape from shareholder primacy and, in its place, only inserted an unenforceable placeholder. But if participants want legal rights as to the firm's purpose, the public benefit corporation is developing those enforcement mechanisms. The success of benefit corporations, as opposed to LLCs or other vehicles, may show us whether the "market" for integrated organizations wants a legally-enforceable social benefit purpose—or just an internally enforced one.

For the rest of this article, however, we will primarily assume that the holacratic organization in question is a corporation. Although partnerships, LLPs, and LLCs have their advantages, it is more difficult to build a large-scale, publicly-financed business entity without the corporate frame.¹⁷⁷ LLCs may make the most sense for smaller, closely-held businesses like Holacracy One.¹⁷⁸ But corporations remain the organization of choice for larger, publicly-traded entities—the kind that drive most of our economy. Moreover, holacracy has significant effects on our traditional notions of corporate structure within the corporate form. It is to these changes in firm governance that we now turn.

III. HOLACRACY AND FIRM MANAGEMENT

Holacracy's claim to fame is its upending of the traditional corporate hierarchy and its installation of a constitutional system of team governance. It is a radical departure from existing managerial norms and

¹⁷⁵ LARRY E. RIBSTEIN, *THE RISE OF THE UNINCORPORATION* 1, 14 (New York, Oxford University Press 2010).

¹⁷⁶ Blount has argued that "it is clearly the case that existing corporate law allows for the creation of corporate entities in which multiple stakeholders have a formal role in governance." Justin Blount, *Creating A Stakeholder Democracy Under Existing Corporate Law*, 18 U. PA. J. BUS. L. 365, 368 (2016).

¹⁷⁷ See RIBSTEIN, *supra* note 175, at 153, 179–82 (discussing the limitations of LLCs, including the binary choice of manager- and member-management, restrictions on the transferability of management rights, and the lack of a default right to disassociate).

¹⁷⁸ LARRY E. RIBSTEIN & JEFFREY M. LIPSHAW, *UNINCORPORATED BUSINESS ENTITIES* 417 (LexisNexis, 4th ed. 2009) ("Acceptance of the LLC has grown to the extent that it is now the dominant business form for closely held firms.").

would dramatically change workplace culture. But what does holacracy mean for the law of firm management? Would we have to think differently about the legal rights and responsibilities of those who run our companies?

A. The Board of Directors

Most businesses with significant numbers of employees are structured as corporations.¹⁷⁹ Corporations are creatures of state law: fictional entities that entitle the participants to certain rights. The corporation is formed through a corporate charter or articles of incorporation.¹⁸⁰ Although states may not technically require a board of directors,¹⁸¹ the board is an almost universal feature.¹⁸² The directors manage the firm and may bind the corporation through contracts and transfers of property.¹⁸³ Shareholders select the directors at the annual shareholders meeting.¹⁸⁴ Directors are bound to act in the interests of the firm through common law fiduciary duties of care, good faith, and loyalty. However, the directors delegate the actual job of running the business to the officers, primarily through a hierarchy headed by the CEO.¹⁸⁵ This structure provides the basics of corporate law: shareholders select the directors, who in turn select the officers to run the corporation.

The default rule for holacracy is to leave this structure in place.¹⁸⁶ The holacratic process is about internal firm management, not capital structure. This decision is likely, in part, strategic: it is much easier to get a CEO to adopt holacracy as a managerial philosophy and practice rather than for the board to commit to holacracy on behalf of the entire organization. If adopted by the firm's management or even by the board on behalf of the firm's management (leaving the board in place), there is

¹⁷⁹ See Andrew Lundeen & Kyle Pomerleau, *Corporations Make up 5 Percent of Businesses but Earn 62 Percent of Revenues*, TAX FOUND. (Nov. 25, 2014), <https://tinyurl.com/yaaue3xx> (sixty-two percent of organizational tax revenues come from corporations); see also RIBSTEIN, *supra* note 175, at 4 (“The corporation undeniably has driven business growth in the United States since the Industrial Revolution.”).

¹⁸⁰ DEL. CODE ANN. tit. 8, § 101(a) (2016).

¹⁸¹ See, e.g., *id.* § 141(a) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.”).

¹⁸² MODEL BUS. CORP. ACT § 8.01 (2010).

¹⁸³ DEL. CODE ANN. tit. 8, § 141 (2016).

¹⁸⁴ *Id.* § 211.

¹⁸⁵ See, e.g., *id.* § 142(a) (“Every corporation organized under this chapter shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors which is not inconsistent with the bylaws.”).

¹⁸⁶ ROBERTSON, *supra* note 7, at 151 (suggesting that beginning holacracy adopters use a CEO policy, rather than board-level action, “to avoid the extra complexity of getting board-level buy-in up front”).

relatively little effect on the board.¹⁸⁷ As a next step, the board could retain its role within the company but implement holacracy at the board level. This change would reorient the board as the anchor circle, with the General Company circle as the only sub-circle.¹⁸⁸ The board's lead link to the General Company circle would be akin to the CEO, without the CEO's usual authority to circumvent internal governance processes. There would be no lead link at the board level, and the board would have a fairly similar structure. However, it would use the holacracy governance processes to raise tensions and pursue solutions through an integrative decision-making process.¹⁸⁹ Ultimately, the biggest change would be in the process and not in the structure.

A further extension of the holacracy approach would be a change more in the spirit of holacracy than its letter. As one twist on a holacracy-centered board, Robertson suggests the possibility of a multi-stakeholder board constructed through holacracy.¹⁹⁰ Such a structure would be too messy, he suggests, for a conventional board.¹⁹¹ But he argues that stakeholders would be better able to coexist on the board following the holacracy rules and integrative governance process.¹⁹² Robertson acknowledges that he cannot speak from authority about such an approach, but finds it "an intriguing possibility."¹⁹³

The law presumes that shareholders, rather than stakeholders, elect the board of directors.¹⁹⁴ However, there are a variety of ways in which a corporation could create a multi-stakeholder board. For example, in the articles of incorporation or in the bylaws, the board and/or the shareholders could install certain director qualifications, such as the requirement that one director shall be drawn from the ranks of a certain group of employees

¹⁸⁷ One important issue would be whether the board could bind itself to employ a holacratic management structure. As the model holacracy constitution permits holacracy to be undone the same way in which it was implemented, the board would have the same power to revoke. HOLACRACY CONST. art. V, § 5. A board could explore amending the corporation's charter or bylaws to require holacracy, but those actions could then be undone through the same amendment process.

¹⁸⁸ ROBERTSON, *supra* note 7, at 163.

¹⁸⁹ *Id.* at 163–64.

¹⁹⁰ *Id.* at 164–65.

¹⁹¹ *Id.* at 165 (positing that "a multi-stakeholder board in a conventional board power structure could easily devolve into a deadlock or a "tyranny of the majority").

¹⁹² *Id.* at 166.

¹⁹³ *Id.* at 165.

¹⁹⁴ *See, e.g.*, ROBERT C. CLARK, CORPORATE LAW § 3.1.1, at 94 (1986) ("Shareholders vote to elect the directors and to approve extraordinary matters like mergers, sale of all assets, dissolutions, and amendments of the articles of incorporation.").

or from the leadership of a certain set of environmental groups.¹⁹⁵ Shareholders would still elect the directors, but those directors would have to be drawn from certain pools. A more direct method would assign shares of various classifications to various stakeholders, making them “shareholders” even if they did not contribute capital.¹⁹⁶ These structures would be more complicated but are permissible under state law.¹⁹⁷ Of course, these structures would dilute the equity shareholders claims, to a greater or lesser extent, and would be objectionable to those equity holders on that basis.¹⁹⁸ Moreover, for public companies of a certain size, federal regulations and stock exchange listing requirement involve further complications.¹⁹⁹ But such structures would certainly be available to smaller and start-up firms, and it makes sense that the holacracy movement sees allies in the corporate social responsibility and stakeholder movements.

Holacracy-centered boards would also have to accommodate other legal requirements regarding composition and structure. The major stock exchanges require that a majority of directors be independent of management and define that independence as requiring the absence of financial interests that would cut against the director’s primary responsibilities as director.²⁰⁰ Under stock exchange rules, boards must also have certain committees, such as audit, nominating, and compensation committees, with particularized composition (as to independence) and detailed responsibilities.²⁰¹ Holacracy would have something to say about the internal governance processes within the committees and might label them as “sub-circles” within the board’s anchor circle. The board might also need to incorporate certain procedural protections to ensure that these committees, particularly the audit committees, retain certain metrics of independence, power, and

¹⁹⁵ DEL. CODE ANN. tit. 8, § 141(b) (2016); Blount, *supra* note 176, at 383–85 (discussing this avenue).

¹⁹⁶ Blount, *supra* note 176, at 385–93.

¹⁹⁷ For an example of a corporation that classified shares to allow a director to be elected with a \$10 capital stake, see *Lehrman v. Cohen*, 222 A.2d 800, 803 (Del. 1966).

¹⁹⁸ Blount, *supra* note 176, at 386.

¹⁹⁹ *Id.* at 393–400. The most difficult obstacles would likely be “voting rights” policies by NYSE and NASDAQ that prevent disparate restrictions or reductions in the rights of common equity shareholders. *Id.* at 395–97 (citing NEW YORK STOCK EXCHANGE, NYSE LISTED COMPANY MANUAL § 313.00 (2015), <https://perma.cc/SF39-SF4J> [hereinafter NYSE MANUAL]; NASDAQ STOCK MARKET, NASDAQ LISTING RULES §§ 5600–40 (2015), perma.cc/VJS6-RDLC).

²⁰⁰ BAINBRIDGE, *supra* note 39, at 80–83 (citing NYSE MANUAL §§ 303A.01, 303A.02, 303A.03).

²⁰¹ *Id.* at 84–89 (citing NYSE MANUAL §§ 303A.04, 303A.05, 303A.06).

authority.²⁰² Of course, holacracy's *modus operandi* is to devolve power to accountable bodies, so these structural mechanisms would likely reinforce, rather than contradict, the stock exchange independence requirements. But these specific requirements would need to be followed.

Finally, holacracy could change the nature—or, at least, seek to change the nature—of the fiduciary duties that the board owes to the corporation. The traditional fiduciary duties are those of care and loyalty towards the firm. The duty of care is substantially mitigated by the business judgment rule, which provides directors with substantial freedom from review of the reasonableness of their actions.²⁰³ Moreover, there is no reason to think that holacracy would change the directors' basic duties of care. Nor would holacracy impact the duty of loyalty, to the extent it requires directors to place the interests of the company above their own personal interests.²⁰⁴ As discussed earlier, holacracy would in fact dramatically change the existing presumption of shareholder wealth maximization, which may then alter the board's approach to certain questions, such as the sale of substantially all assets through an auction.²⁰⁵ However, for those extraordinary decisions, holacracy may in fact prioritize the needs of equity holders. To the extent that the board's stakeholder orientation would seek to change responsibilities such as *Revlon* duties,²⁰⁶ those changes would stand apart from the requirements of holacracy itself.

B. Officers

Holacracy does not require change to the superstructure of the firm, at least in composition. A holacratic corporation could still have a board of directors, and that board could still operate as a traditional board. However, the nature of the CEO's position, as well as the other subsidiary officers, would change dramatically under holacracy. Holacracy is a system of defined powers and responsibilities. Rather than a monarchy in which one person's decisions control the rest of the organization, holacracy establishes domains of authority throughout the organization and governance processes that enable a group of people to decide policy.

²⁰² See, e.g., NYSE MANUAL § 303A.07 (listing audit committee requirements such as a written charter, an annual report, a set of confidential, anonymous reporting whistleblowing procedures, and the power to retain independent counsel).

²⁰³ See CLARK, *supra* note 194, § 3.4, at 123.

²⁰⁴ See *id.* § 4.1, at 141.

²⁰⁵ See *supra* Part II.B.

²⁰⁶ For a discussion of *Revlon* duties, see *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); BAINBRIDGE, *supra* note 39, at 405–06.

Rather than holding power at the whim of the CEO, holacracy participants hold the power that the governance structure has provided.²⁰⁷ It is a “shift from personal leadership to constitutionally derived power.”²⁰⁸

On a day-to-day level, this change in organizational structure has a dramatic effect on the CEO position. Authority and responsibility are taken off the CEO’s shoulders and distributed to the other organizational players. Robertson describes the “tremendous relief” that most CEOs feel after a shift to holacracy.²⁰⁹ Should this shift in power also mean a shift in the legal accoutrements of the position? In other words, perhaps the holacracy CEO—and other corporate officers—should no longer be considered “officers” under the law.

Compared to directors, whose role and function are specified clearly under statute, the role of officers within corporate law is less settled.²¹⁰ Under Delaware law, officers are creatures of a corporation’s bylaws or board resolution.²¹¹ Thus, it may seem that the firm’s officers are whomever the corporation designates as such.²¹² However, there is also the sense that officers should have some underlying definition that is consistent across corporations. We see this consistency with various titles: the CEO is the top of the hierarchy; the chief operating officer is the second-in-command and in charge of general operations; and the chief financial officer is primarily responsible for finances and financial risk. Indeed, a mark of status for a particular business field is to have a “chief officer” in the subject area, such as “chief information officer” or “chief privacy officer.”²¹³ However, “officer” is not statutorily defined, and courts have arrived at different definitions of the term for different purposes.²¹⁴ One definition from two well-regarded commentators—one

²⁰⁷ ROBERTSON, *supra* note 7, at 26 (“Holacracy thus takes some of the organizational design functions that traditionally reside with a CEO or executive team and place them into processes that are enacted throughout the organization, with everyone’s participation.”).

²⁰⁸ *Id.* at 22.

²⁰⁹ *Id.* at 23.

²¹⁰ DeMott, *supra* note 3, at 848.

²¹¹ DEL. CODE ANN. tit. 8, § 142(a) (2016).

²¹² See, e.g., *In re Brocade Commc'ns Sys., Inc. Derivative Litig.*, 615 F. Supp. 2d 1018, 1049 (N.D. Cal. 2009) (“Brocade’s bylaws define ‘officers’ to include ‘one or more Vice Presidents, and such other Officers that will be appointed by the Board of Directors.’ Jensen, as the Vice President of HR, was therefore an officer of the Company and did owe it fiduciary duties.”).

²¹³ For sense of the relative fortunes of these two positions, see Thomas H. Davenport, *Why No One Wants to Be a Chief Information Officer Any More*, FORTUNE (Mar. 10, 2016), <https://tinyurl.com/jshbqak>; Sarah K. White, *5 Reasons You Need to Hire a Chief Privacy Officer*, CIO (Feb. 1, 2016), <https://tinyurl.com/y9adx5ge>.

²¹⁴ Verity Winship, *Jurisdiction over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. ILL. L. REV. 1171, 1195–96 (2013) (“While directors are usually easily identified, the definition of officer is more fluid, and may vary by corporation or by area of the

of the few definitions available in the literature—is that: “[t]he term ‘officer’ is properly applicable only to those in whom administrative and executive functions have been entrusted, and does not apply to those without judgment or discretion as to corporate matters.”²¹⁵ But this definition seems significantly overbroad, as it would essentially apply to all of a firm’s administrative and executive employees that have some degree of discretion. Another definition describes officers as “executives, tasked with making decisions about the running of the company.”²¹⁶ This definition comes closer, in my view, but in some ways merely replaces “officers” with “executives.”²¹⁷

Under holacracy, traditional officer positions would be eliminated in favor of particularized “roles.” These roles are created within the governance structure to address needs within the company. There are four holacracy-related links (lead link, rep link, facilitator, and secretary), but otherwise the links are generated and eliminated as necessary. As discussed in Part I, the lead link for the anchor circle is the closest holacracy comes to a CEO. But the lead link for the anchor circle is certainly not the same as the CEO. Through holacracy, the CEO hands over her absolute authority within the corporation to the holacracy process.²¹⁸ The power of any particular individual, including a lead link, is based entirely on the set of roles that the person has. Robertson, for example, is akin to the CEO of Holacracy One, LLC, but his position within the company is based on his role as anchor circle lead link along with over thirty other roles that he serves.²¹⁹ And roles are different than positions or titles; while people have a particular title; roles are different than the people who hold them.²²⁰ The role exists whether or not a particular person fills it, and people take on or shed roles within their working life with much more fluidity.²²¹

law. ‘Officer’ means one thing for personal jurisdiction, another for securities disclosure rules, and who-knows-what for triggering state-law fiduciary duties.”).

²¹⁵ A. Gilchrist Sparks, III & Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 BUS. LAW. 215, 216 (1992) (citing *Lethem v. Wilson*, 185 A. 642, 643 (Pa. 1936); *Colonial Capital Co. v. Gen. Motors Corp.*, 29 F.R.D. 514, 517 (D. Conn. 1961)).

²¹⁶ John Armour & Jeffrey N. Gordon, *Systematic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 65 (2014).

²¹⁷ See *supra* Part I.B 1 & 2.

²¹⁸ ROBERTSON, *supra* note 7, at 151.

²¹⁹ Brian Robertson, GLASS FROG, <https://app.glassfrog.com/people/47> (listing the “accountabilities” for each of the roles).

²²⁰ ROBERTSON, *supra* note 7, at 43 (“Holacracy focuses on clearly differentiating individuals from the roles they fill.”).

²²¹ *Id.* at 43–45.

Holacracy's lack of officers—or, more precisely, the diffusion of officer responsibilities into governance processes and roles—further clouds the already murky waters around officers' fiduciary duties. Such duties were not established clearly under Delaware law as recently as a decade ago—but now have been explicitly endorsed.²²² However, the nature of those duties remains ambiguous. Delaware case law declares the officers' duties to be “identical” to directors' duties.²²³ However, officers serve the corporation much more directly and have more day-to-day power over the operations. The Model Business Corporation Act (“MBCA”) defines officers as employees—which they generally would seem to be.²²⁴ Because employees are considered to be agents, they would owe a different set of additional duties that agents owe to their principals—and employees owe to their employers.²²⁵ Deborah DeMott has advocated for a much more rigorous set of fiduciary duties based on officers' unique roles as high-ranking employees.²²⁶ She argues that the duties of loyalty, care, competence, diligence, and obedience are inherent in the underlying relationship between officer and corporation.²²⁷ In particular, she singles out the specific agency duty requiring agents to adhere to the instructions provided by their principals.²²⁸ Moreover, DeMott rejects the application of the business judgment rule to officers as the rule is typically applied only to corporate directors and not to other agents.²²⁹

With holacracy radically redistributing power and authority within the organization, fiduciary obligations would likely change. The most straightforward option would allocate duties according to title and find that none of the non-official workers are fiduciaries. This would arguably follow Delaware law, which has tended to place a premium on the use of “officer” nomenclature to designate actual officers. However, Delaware and other states might blanch at the idea of an officer-less organization. Another potential tack would be to follow the authority “downwards” as it is reallocated to other various roles. The lead link of the anchor circle would likely be a fiduciary as that lead link role would have control over filling roles in the general company circle and would serve as the direct

²²² *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009) (holding explicitly that “officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors”).

²²³ *Id.* at 708.

²²⁴ MODEL BUS. CORP. ACT § 1.40(8).

²²⁵ See Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1601 (2005) (making the case that “corporate officers are fiduciaries because they are agents”).

²²⁶ DeMott, *supra* note 3, at 859–62.

²²⁷ *Id.* at 859–60.

²²⁸ *Id.* at 859–62.

²²⁹ *Id.* at 866–70

liaison to the board. However, below that level, it might be difficult for any one person to accumulate a set of roles that approximate the authority that officers have in a hierarchical system. Alternatively, courts could interpret holacracy to mean that all workers have greater fiduciary responsibilities to the firm because more authority has been devolved to them. After all, one of the key tenets of holacracy is the allocation of significant discretion over decision-making to a wider array of firm participants.²³⁰ This may lead to holacracy “officers” being treated as ordinary employees.²³¹ Ultimately, because holacracy represents such a deviation from the standard norms of firm hierarchy and organization, courts may lean more heavily on the holacracy “contract” to determine the parties’ reasonable expectations.²³² The constitution may be seen as a form of “lawful instructions” to the workers, especially if adopted through a board resolution. Rather than differentiating between officers and other employees or agents, courts may adopt more of a case-by-case, spectrum approach to determining the appropriate level of fiduciary duty owed by a particular worker or role to the organization.

IV. HOLACRACY AND WORKPLACE LAW

A. Workers as Employees

Like many aspects of organization law, workplace law has also been built on the assumption of the existence of a hierarchical relationship within the firm. The assumption of a hierarchy begins with the very definition of employment itself. Under the traditional common law, employees—called “servants”—were defined by their relationship with their “masters.” The *Restatement (Second) of Agency* defines a servant as “an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.”²³³ The right to control means “being entitled to tell the servant when to work (within the hours of

²³⁰ Cf. LALOUX, *supra* note 6, at 113 (noting that all Morning Star employees can purchase on behalf of the company, provided that they have sought advice from coworkers beforehand).

²³¹ The fiduciary duties of employees under holacracy are discussed in Part IV.C.

²³² Cf. Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1 (1990) (arguing in favor of a contractual approach to fiduciary duties).

²³³ RESTATEMENT (SECOND) OF AGENCY § 2(2) (AM. LAW INST. 1958); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. LAW INST. 2006) (defining an employee as “an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work”).

service) and when not to work, and what work to do and how to do it.”²³⁴ Although the *Restatement* test includes nine additional factors as part of the test, the control factor is the first and generally receives the bulk of analytical attention.²³⁵ The Supreme Court has extended the control test beyond the common law to serve as the default definition for “employee” whenever used without further explanation in a federal statute.²³⁶

The control analysis aligns with several theories about the nature of the employment relationship. Ronald Coase based his theory of the firm on the employment relationship.²³⁷ The purpose of firms, according to Coase, is to avoid transaction costs by allowing the parties to organize in a hierarchical manner without the need for markets, prices, or specific contracts.²³⁸ The control over employees was central to the firm: “If a workman moves from department *Y* to department *X*, he does not go because of a change in relative prices, but because he was ordered to do so.”²³⁹ Coase then looked to the legal definition of employee to determine whether his transaction-costs theory was supported in practice.²⁴⁰ Since the “control” test was based on the employer’s ability to require its employees to take specific actions, he concluded, “[w]e thus see that it is the fact of direction which is the essence of the legal concept of ‘employer and employee,’ just as it was in the economic concept which was developed above.”²⁴¹

Others have highlighted hierarchy as a critical feature of employment. Guy Davidov has argued that the lack of participation in the control of the enterprise—which he terms “democratic deficits”—is one of the three “axes” of the employment relationship, along with dependency

²³⁴ Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 404 (1937).

²³⁵ RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

²³⁶ In *Community for Creative Non-Violence v. Reid*, the Court said that “[i]n the past, when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” 490 U.S. 730, 739–40 (1989). The Fair Labor Standards Act (“FLSA”) and the Family and Medical Leave Act (“FMLA”) use the “economic realities” or “economic dependence” test. See 29 U.S.C. § 203(g) (2012) (defining “employ” as “suffer or permit to work”); 29 U.S.C. § 2611(3) (2012) (using the FLSA definition for “employ” and “employee”); *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302 (1985) (“The test of employment under the [FLSA] is one of ‘economic reality’”). It is generally interpreted to provide a more expansive definition to the term “employee,” one that covers more vulnerable workers who may have some aspects of separation from the firm but lack true economic independence.

²³⁷ See Coase, *supra* note 234.

²³⁸ *Id.* at 386–87.

²³⁹ *Id.* at 387.

²⁴⁰ *Id.* at 403 (“We can best approach the question of what constitutes a firm in practice by considering the legal relationship normally called that of ‘master and servant’ or ‘employer and employee.’”).

²⁴¹ *Id.* at 404.

on the relationship for the fulfillment of certain social and psychological needs and economic dependency that renders it difficult to spread risks.²⁴² However, Davidov specifies that control “does not necessarily mean control of the employer over every aspect of the production process.”²⁴³ Instead, he argues that control means “the superior power of the employer *vis-à-vis* the employee within their relationship and the resulting inability of the employee to control her own (working) life.”²⁴⁴ These democratic deficits—the lack of employee power within the firm—justifies the myriad employment protections that are provided to employees.²⁴⁵

This traditional employment law two-step—employees are controlled by the employer and therefore deserve employment-related protections—is called into question by holacracy. Under holacracy, employees have significantly more control over their working lives than they do under hierarchical systems. Under a holacracy constitution, the firm delegates power to a myriad of roles within the firm, with each role having significant authority. A lead link within a circle—the closest thing in holacracy to a supervisor—cannot “control” how the member carries out her role.²⁴⁶ At best, a lead link can assign a member to a particular role, but then the member has the authority to carry out that role.²⁴⁷ For example, a member with a particular role is allowed to turn down a particular assignment from a lead link if the member thinks there is a better way to achieve the underlying objective.²⁴⁸

Putting workers into this complex constitutional structure may remove much of the “control” from the traditional definition of employment. But does that mean they are no longer employees? The organizational web created by holacracy would certainly not seem to render the workers within to be independent contractors. Rather than working independently of any organization, these workers seem to be working more closely than ever—bound by overlapping relationships and

²⁴² Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357, 394 (2002).

²⁴³ *Id.* at 381.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 360 (discussing the employment question as “how to define the group of workers that should enjoy certain protective regulations”).

²⁴⁶ ROBERTSON, *supra* note 7, at 50–54.

²⁴⁷ *Id.* at 52.

²⁴⁸ The example posed a request from a lead link to create an internal wiki for employees to share best practices. However, the member does not have to accept the project and create the wiki if the member believes the role would be best expressed through a blog or other means to share best practices. The lead link cannot override the decision; at best, the link could reassign the role or bring the role’s accountabilities to a governance meeting for more specific resolution. *Id.* at 53–54.

responsibilities. In fact, holacracy seems to be a better fit for the definition of a firm propounded in the “team production” model. In an important response to Coase’s work, Armen Alchian and Harold Demsetz disagreed with Coase’s focus on control, authority, and direction, and instead argued that the firm coordinates production in the midst of a variety of inputs.²⁴⁹ Alchian and Demsetz defined team production as “production in which 1) several types of resources are used and 2) the product is not a sum of separable outputs of each cooperating resource.”²⁵⁰ As a result, team production is used when the coordinated effort increases productivity, after factoring out the costs associated with monitoring and disciplining the team.²⁵¹

Holacracy is premised on the idea of managing team production through a constitutionalized structure. Rather than depending on the direction and authority of individuals within a hierarchy, the contributors to the team can rely on the underling structure to manage their interrelationships. In their economic model, Alchian and Demsetz proposed a specialized, independent monitor to ensure that the team members all contribute appropriately and are rewarded appropriately.²⁵² That central monitor—the recipient of the residual profits—would be the firm. Under holacracy, the firm takes on a life of its own; its organizational existence is the ongoing process through which team production is managed.

Under a “team production” theory of the firm, there is little doubt that the holacracy workers would be employees rather than independent contractors. As I have argued previously, “[t]he critical insight is that employment is defined not by control, but by participation—participation in team production.”²⁵³ Control should not be necessary or sufficient to the employment relationship. Instead, employees and equity contributors have “cast their lots together to engage in economic activity that would otherwise be extremely difficult to tease out into separate contracts.”²⁵⁴ Holacracy workers are more empowered than those within a traditional hierarchy, but that does not mean they are not employees.²⁵⁵

²⁴⁹ Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777 (1972).

²⁵⁰ *Id.* at 779.

²⁵¹ *Id.* at 780.

²⁵² *Id.* at 782–83.

²⁵³ Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 705 (2013).

²⁵⁴ *Id.* at 706.

²⁵⁵ Even the *Restatement (Third) of Agency* recognizes the difficulty for the control test as to workers higher in the hierarchy. “In some employment relationships, an employer’s right of control may be attenuated. For example, senior corporate officers, like captains of ships, may exercise great discretion in operating the enterprises entrusted to them, just as skilled

Of course, holacracy's changes to the employment relationship may lead us to reexamine our legal construction of that relationship. If, as Davidov argues, society's regulations over employment are based in part on "democratic deficits," to what extent can we reconsider those regulations in light of holacracy? As discussed subsequently in this Part, holacracy may wreak changes on existing labor and employment laws.²⁵⁶ However, for the most part, employment regulations will apply to employees whether they are under a holacratic system or a hierarchical. Once the definition is met, the employee then receives the panoply of common-law and statutory regulations, such as workplace safety, minimum wages, overtime, pension and welfare benefits, unemployment compensation, workplace accident compensation, and wrongful discharge.²⁵⁷ If holacracy engenders a more empowered and engaged workforce, can we ease back some of our current regulations and trust that employees will grab these formerly-mandated terms for themselves, as they desire?

In my view, a transition to holacracy by all of the nation's businesses would still not be enough to displace our current regime of employment protections. Although holacracy does engender a more distributed system of power within the organization, it does not necessarily address the market power of lower skill workers within the overall economy. The big question remaining on the table is what powers the board and the lead link of the anchor circle retain over the allocation of resources within the organization. Holacracy can extend to the board level, and the board could be chosen by stakeholders, including current employees.²⁵⁸ If employees have more organizational power at the highest levels of the company, they will be able to better protect their interests through governance as opposed to regulation.²⁵⁹ However, if the board is a traditional shareholder-elected board, and the board has sole power over the choice of lead link for the anchor circle, not much will have changed in the superstructure of the company.²⁶⁰ Individual employees within the company will have more organizational power over their jobs but that may

professionals exercise discretion in performing their work. Nonetheless, all employers retain a right of control, however infrequently exercised." RESTATEMENT (THIRD) OF AGENCY §7.07 cmt. f (AM. LAW INST. 2006).

²⁵⁶ See *infra* Part IV.B & IV.C.

²⁵⁷ For an overview of the employer's responsibilities to its employees, see Matthew T. Bodie, *Employment as Fiduciary Relationship*, 105 GEO. L.J. 819, 837–45 (2017).

²⁵⁸ ROBERTSON, *supra* note 7, at 165.

²⁵⁹ For an extended discussion of the tradeoffs between employment regulations and employee power within the firm, see Bodie, *supra* note 257, at 867–70.

²⁶⁰ ROBERTSON, *supra* note 7, at 163–64.

not translate to more power over issues such as wages, benefits, and protections against employer opportunism.

However, holacratic firms may also try to take the employment relationship into their own hands and rejigger it through private ordering. Rather than seeking to push its workers further outside of the firm by labeling them independent contractors, Holacracy One, LLC, has turned all of its workers into members of its LLC.²⁶¹ Under the operating agreement, workers receive Class P membership units, which provide for a guaranteed draw from the company.²⁶² The Class P units can, under certain restrictions, be exchanged for investor shares.²⁶³ Because they are members of the LLC, the company does not consider the workers to be employees.²⁶⁴ Holacracy shuns the employee label, at least in part, because it sees the employment relationship as a “codependent parent-child dynamic,” rather than a “peer-to-peer relationship.”²⁶⁵

There are also, admittedly, regulatory benefits to taking away the employment label and replacing it with a “partner” or “member” label. So, can holacratic employers—pointing back at the “control” test—claim that their workers are not employees? It is unclear if most companies—even Holacracy One, LLC—can shed their employment label by providing ownership interests to their workers. Under some statutory regimes, owners of various stripes—partners, LLC members, shareholders—have come within the statutory definition of “employee.”²⁶⁶ The *Restatement of Employment Law* states that only those who “control all or part of the enterprise” fall outside the definition of “employee” if they otherwise meet the test.²⁶⁷ Following the Equal Employment Opportunity Commission’s (“EEOC”) approach, the Supreme Court framed the issue, (for purposes of the Americans with Disabilities Act) as “whether the individual acts independently and participates in managing the organization, or whether

²⁶¹ *Id.* at 190. Robertson states that “everyone [at Holacracy One] is a partner in a legal partnership governed by the Holacracy constitution.” *Id.* However, from the operating agreement, it appears that the business’s organizational structure is an LLC and that the participants are members of the LLC. See Holacracy One Operating Agreement, *supra* note 32.

²⁶² Holacracy One Operating Agreement, *supra* note 32, § 7.4.1, at 16; Robertson Interview, *supra* note 33.

²⁶³ Holacracy One Operating Agreement, *supra* note 32, § 7.4.2, at 16.

²⁶⁴ ROBERTSON, *supra* note 7, at 190; Robertson Interview, *supra* note 33.

²⁶⁵ ROBERTSON, *supra* note 7, at 190.

²⁶⁶ See, e.g., Frank J. Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. REV. 137, 142 (2010) (arguing that “under the common law of agency a bona fide partner can be and often is an employee regardless of the amount of managerial power the partner possesses, regardless of any conflict between the entity theory and the aggregate theory, and independently of any appeal to statutory purpose”).

²⁶⁷ RESTATEMENT OF EMPLOYMENT LAW § 1.03 (AM. LAW INST. 2015).

the individual is subject to the organization's control."²⁶⁸ Under either of these standards, holacracy members/partners would not be exempted from the definition of employee. All holacratic workers are subject to the firm's control; that is, indeed, the very purpose of the holacracy constitution. The constitution may free individual members to do their jobs without intrusion from other workers, but ultimately no individual members—outside, perhaps, the lead link of the anchor circle—have control over the management of the firm. Thus, despite claims to the contrary, the Holacracy One, LLC, members are likely employees, at least for most employment-regulation purposes.²⁶⁹

Holacracy may challenge some of our assumptions about the employment relationship, especially the primacy of “control” in defining it. However, it would not make sense to change the definition of employees to exclude holacracies and their workers, at least without further reforms at the top of the pyramid. Holacracies better integrate employees within the system and provide employees with greater voice and control over their work life. The next step is to look at specific labor and employment regulations and determine whether holacracy does, and/or should, have an impact on that regulatory regime.

B. Labor-Management Relations

As discussed in Part IV.A, holacracy does not likely remove its workers from the legal definition of “employees” under common law and statutory regimes, even if they are provided with ownership interests. If the workers are defined as “employees” under law, the statutory scheme applies. However, the picture is complicated as to the application of labor law. These difficulties flow from the central premise at the core of labor law, which is that labor and management should bargain over the terms and conditions of employment. The preamble to the National Labor

²⁶⁸ *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449 (2003). The Court endorsed the EEOC's approach to this question, specifically in regard to its six factors for determining control: “[1] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work, [2] Whether and, if so, to what extent the organization supervises the individual's work, [3] Whether the individual reports to someone higher in the organization, [4] Whether and, if so, to what extent the individual is able to influence the organization, [5] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts, and [6] Whether the individual shares in the profits, losses, and liabilities of the organization.” *Id.* at 449–50 (citing EEOC Compliance Manual § 605:0009).

²⁶⁹ For a discussion of the particular issue of LLC member as employees, see Daniel S. Kleinberger, “*Magnificent Circularity*” and the *Churkendoose*: LLC Members and Federal Employment Law, 22 OKLA. CITY U. L. REV. 477 (1997).

Relations Act (“NLRA”) states that the Act is designed to resolve workplace issues by “encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”²⁷⁰ The NLRA puts in place a structure whereby employees can elect a collective representative for their bargaining unit, and that representative has the power to demand that the employer bargain in good faith. Collective bargaining is the engine of the labor law machine.

In order to have collective bargaining, you need at least two sides. American labor law is premised on a dichotomy between labor and management. On one side are the employees, and on the other side is the employer. Under the common law definitions, the employees would be everyone who works for the company, and the employer would simply be a fictional business entity. But a fictional entity cannot negotiate. The NLRA shifts the “management” employees from the employee side to the employer side. Managers and supervisors represent the employer and are excluded from the definition of “employee” under the Act. As Justice Douglas explained in his dissent in *Packard Motor Car Co. v. N.L.R.B.*,²⁷¹ which concerned whether foremen were within the definition of “employee”:

[Failing to exclude supervisors and managers from NLRA coverage] tends to obliterate the line between management and labor. It lends the sanctions of federal law to unionization at all levels of the industrial hierarchy. It tends to emphasize that the basic opposing forces in industry are not management and labor but the operating group on the one hand and the stockholder and bondholder group on the other. The industrial problem as so defined comes down to a contest over a fair division of the gross receipts of industry between these two groups.²⁷²

A struggle between shareholders and all employees, rather than between management and labor, was not what the Act intended.²⁷³ Instead, workers were meant to bargain with their entrepreneurial core of the company—those who set the course of the firm and the firm’s relationship with its employees.

²⁷⁰ 29 U.S.C. § 151 (2012).

²⁷¹ 330 U.S. 485 (1947).

²⁷² *Id.* at 494 (Douglas, J., dissenting).

²⁷³ *Id.* at 495.

So even though there is no specific statutory exclusion for managers under the Act, the National Labor Relations Board (“NLRB” or “Board”) and the Supreme Court have carved them out of the “employee” category. Managerial employees are defined as “executive employees who are in a position to formulate, determine and effectuate management policies.”²⁷⁴ The Board has also emphasized the need for managerial employees to “have discretion in the performance of their jobs” independent of their “employer’s established policy.”²⁷⁵ In some instances, employees who execute important tasks and exercise discretion in those tasks have been lumped in with management. Large-scale buyers, for example, are managerial if they “are authorized to make substantial purchases for the [e]mployer” and have substantial discretion in making such purchases.²⁷⁶ In *N.L.R.B. v. Yeshiva University*,²⁷⁷ the Supreme Court held that the professors who participated in faculty governance were managerial employees.²⁷⁸ Arguing that the Act was “intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry,” the Court distinguished the operations of “the typical ‘mature’ private university” as one based on notions of shared authority.²⁷⁹ As the Court found:

[The faculty’s] authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these.²⁸⁰

²⁷⁴ *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 276 (1974) (citing *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946)).

²⁷⁵ *Bell Aerospace Corp.*, 219 N.L.R.B. 384, 385 (1975).

²⁷⁶ *Am. Locomotive Co. (Dunkirk, N.Y.)*, 92 N.L.R.B. 115, 116–17 (1950). *But see* *Bell Aerospace Corp.*, 219 N.L.R.B. 384, 386 (1975) (“While it is true that the buyers are in a position to commit the Employer’s credit, the record reveals that the discretion and latitude for independent action must take place within the confines of the general directions which the Employer has established.”).

²⁷⁷ 444 U.S. 672 (1980).

²⁷⁸ *Id.* at 679.

²⁷⁹ *Id.* at 680.

²⁸⁰ *Id.* at 686.

It was irrelevant, said the Court, whether the professors exercised independent judgment; the key was that the university used their collective judgment in the process of its own governance.²⁸¹ The Board has recently refined its test to determine whether the faculty “actually exercise control or make effective recommendations”²⁸² over five types of decisions: academic programs, enrollment management, finances, academic policies, and personnel policies and decisions.²⁸³ Critical to this analysis is whether the workers exercise “actual—rather than mere paper—authority.”²⁸⁴ Faculty members at one school were held to be non-managerial because the faculty’s decisions on governance matters were frequently ignored or reversed by the academic dean or the college’s president.²⁸⁵

Applying the managerial standard to holacracy, it seems that either all employees or none of the employees would be considered managerial. The design of holacracy is to provide significant discretion to workers in making decisions within their authority. Although the lead link of a particular circle assigns the roles for that circle, the worker holding the role gets to determine how to express the purpose and achieve the accountabilities of the role.²⁸⁶ In that sense, holacracy employees are similar to large-scale buyers—they have the authority to make decisions and the discretion to exercise that authority how they like. And as a collective, holacracy workers have the authority to determine high-level policy for the organization. Holacracy circles make decisions about the creation, elimination, or amendment of roles and sub-circles.²⁸⁷ Circles conduct governance meetings to resolve structural issues within the circle, as well as tactical meetings to address operational concerns and actions.²⁸⁸ Circle membership consists of the roles within the circle, a lead link appointed by the outside circle, and rep links from the circle’s sub-circles, so that all workers involved in the circle participate in governance.²⁸⁹ Although the circle’s facilitator has important discretion within the governance process, the facilitator’s role is to manage the process—not

²⁸¹ See also *Ithaca Coll.*, 261 N.L.R.B. 577, 578 (1982) (holding that the faculty were managerial employees because of the way they “possessed and exercised” their authority); *LeMoyne-Owen Coll.*, 345 N.L.R.B. 1123, 1132 (2005) (holding that the faculty were managerial employees because they exercised “substantial authority in a majority of critical areas”).

²⁸² *Pac. Lutheran Univ. & Serv. Emps. Int’l Union, Local 925*, 361 N.L.R.B. No. 157, at *1 (2014).

²⁸³ *Id.* at *23–27.

²⁸⁴ *Id.* at *24.

²⁸⁵ See *Bradford Coll.*, 261 N.L.R.B. 565, 566–67 (1982).

²⁸⁶ ROBERTSON, *supra* note 7, at 52–54.

²⁸⁷ HOLACRACY CONST., art. II, § 1.1.

²⁸⁸ ROBERTSON, *supra* note 7, at 58.

²⁸⁹ *Id.* at 57.

dictate the outcome. The purpose of governance is to allow all circle members to participate and to use the holacracy processes to arrive at a group decision. Thus, if each circle exercises managerial authority in setting policies as to its own domain, then all of the participants in that circle are exercising managerial authority.

There are similar questions as to whom within a holacratic company would be considered to be supervisors under the NLRA and thus excluded from the definition of “employee.” The term supervisor is defined as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them” when “such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”²⁹⁰ Under this definition, it appears that lead links would be considered supervisors. Although they lack many of the traditional supervisory roles, such as firing or disciplining employees, they do have the authority to assign roles within the circle.²⁹¹ As the test for supervisor is disjunctive, this authority is sufficient to fulfill one of the twelve listed roles and thereby meet the definitional requirements.²⁹² Although lead links can also take away someone’s role, this is not the same as terminating them. Holacracy does not have set processes for hiring; the organization is expected to develop these processes or choose a holacracy “app” developed for the purpose.²⁹³ If these roles were to be defined as circle governance prerogatives, it is possible that all circle members would assume supervisory power.

The Board has yet to be faced with the question of holacratic governance. Other self-management entities will face similar issues, although perhaps more dramatically. At Buurtzorg, the teams of ten to twelve nurses are almost entirely self-managed with very little exterior input or oversight.²⁹⁴ At Morning Star, all employees have the power to make purchasing decisions or even to initiate the hiring process.²⁹⁵ Faced with these situations, the Board would essentially have three choices: (1) apply the current doctrine broadly and find most or all employees to be managerial; (2) apply the current doctrine narrowly and find none of the

²⁹⁰ 29 U.S.C. § 152(11) (2012).

²⁹¹ ROBERTSON, *supra* note 7, at 52.

²⁹² See SAMUEL ESTREICHER & MATTHEW T. BODIE, LABOR LAW 63 (Found. Press 2016) (discussing the twelve functions of supervisors that define their role); see also Oakwood Healthcare, Inc., 348 N.L.R.B. 686, 689 (2006) (defining “assign” as the “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee”).

²⁹³ ROBERTSON, *supra* note 7, at 171.

²⁹⁴ LALOIX, *supra* note 6, at 67–69.

²⁹⁵ *Id.* at 113; Hamel, *supra* note 25, at *9–10.

employees to be managerial; or (3) use the rough proportions of the current doctrine to find some small group of employees to be managerial, such as those who participate in the anchor circle. Something along the lines of option (3) is perhaps most likely, if only to maintain the traditional notions of labor-management relations, but options (1) or (2) would make more sense, given the spirit behind the current doctrine.

If the Board did approve a unit of workers at a holacratic company to select a collective bargaining representative, collective bargaining would then endeavor to impose itself over the existing holacratic structure. How would this work? Although there is significant overlap between the two processes, there may be space for them to coexist without insoluble conflict.

Collective bargaining concerns the terms and conditions of employment for the employees of the bargaining unit.²⁹⁶ Although unions can bring other issues to the table, only terms and conditions are considered “mandatory” subjects of bargaining.²⁹⁷ Parties can insist on bargaining to impasse over mandatory issues but not over permissive ones.²⁹⁸ Neither party must accede to the other party’s efforts to bargain over permissive terms.²⁹⁹ Moreover, employers must bargain over changes to mandatory terms but need not bargain over permissive ones.³⁰⁰ There are other requirements to bargaining—parties must engage in the process, share relevant information, and be willing to entertain proposals from the other side.³⁰¹ But the limitations on subject matter generally channel bargaining into matters that concern employment.

Holacracy, on the other hand, is oriented towards the work of the business rather than human resources issues. The taproot of holacracy is the organizational purpose; all governance flows from that purpose.³⁰² Roles and circles are created to serve the primary purpose but develop individualized purposes of their own, along with domains and accountabilities.³⁰³ Governance exists to manage the ongoing business responsibilities—it is, in fact, a new management system.³⁰⁴ In contrast,

²⁹⁶ 29 U.S.C. § 158(d) (2012) (setting forth the obligation to bargain over “wages, hours, and other terms and conditions of employment”).

²⁹⁷ *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (setting forth the mandatory-permissive distinction).

²⁹⁸ ESTREICHER & BODIE, *supra* note 292, at 134.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 125–33.

³⁰² ROBERTSON, *supra* note 7, at 31–34.

³⁰³ *Id.* at 40–42, 46–49.

³⁰⁴ *Id.* (where the subtitle to Holacracy is “The New Management System for a Rapidly Changing World”).

holacracy seems at times uncomfortable with the issues surrounding employment. Despite the intricacy of its system, it does not have a specific process for hiring, firing, or determining compensation. And since one's employment relationship exists apart from one's "roles," there is even more of a separation between holacracy governance and collective bargaining.³⁰⁵

So perhaps collective bargaining could work within or alongside a system of holacracy by serving as an "app" for employment-related issues. Robertson describes a variety of "apps" that are available to determine employee compensation under holacracy. For example, under the Badge-based Compensation App, workers are awarded badges related to particular roles and their service within those roles, and the badges are then tied to compensation levels.³⁰⁶ If an employee has an issue with her badge, she raises it as a "tension" at the appropriate governance meeting.³⁰⁷ The holacracy system is fairly ecumenical about compensation practices, suggesting primarily that holacratic companies move away from the traditional managerial prerogative over pay.³⁰⁸ Certainly, a collective bargaining relationship would provide one possible system for negotiating over terms on behalf of employees. The problem would be: with whom would the union negotiate? As discussed above, in a holacratic system, it is difficult to determine which employees are actual management. Perhaps the best way to harmonize collective bargaining with holacracy would be to have the union engage in initial bargaining with the anchor circle and its representatives, and then negotiate for structures within holacracy that could serve the employees' interests while staying true to the holacratic processes. Roles could be left to holacracy, but removing someone from a role could be done through a holacracy-arbitration hybrid that would provide the worker with union representation while allowing the appropriate circle to make the final judgment. Obviously, there is much more to consider. And there is, of course, the undeniable tension between the two different systems of collective negotiation and dispute resolution. They may be irreconcilable. But holacracy does leave some space for grafted processes, especially when it comes to human resource issues.

One final labor law issue for holacracy to confront is whether employers using holacracy are committing an unfair labor practice.

³⁰⁵ For one (fictional) depiction of being relieved of one's roles without being fired, see *Silicon Valley: Fiduciary Duties* (HBO television broadcast Apr. 27, 2014).

³⁰⁶ ROBERTSON, *supra* note 7, at 160–61.

³⁰⁷ *Id.* at 161.

³⁰⁸ *Id.* at 159 (suggesting that having lead links in control of compensation "creates a pull back toward conventional power relationships").

Section 8(a)(2) of the NLRA prohibits employers from acting “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”³⁰⁹ This provision was originally intended to outlaw employer-based or company unions, which sprung up to block legitimate unions from gaining a toehold. However, the Board has extended the protections of Section 8(a)(2) to a broader range of employer-related phenomena than simply company unions. Finding a Section 8(a)(2) violation requires two analytical steps: (1) determining whether the group, policy, or practice at issue is a “labor organization,” and if so, (2) whether the employer has dominated, interfered, or provided financial support to it. The Act defines a labor organization as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”³¹⁰ Consequently, a “labor organization” need not be an independent organization at all; it can be a subcommittee of workers within the employer itself or an employer-created plan of engagement. The only additional requirements are that employees participate in some way and that the purpose of the organization, committee, or plan is to deal with terms and conditions of employment.

With the rise of quality management teams and other participatory work models in the early 1990s, there was a wave of fear that these internal structures were in violation of Section 8(a)(2).³¹¹ And in *Electromation, Inc.*,³¹² the Board held that the employer’s “action committees,” which were set up to provide interactions between workers and managers on labor-related issues, were labor organizations that the employer “dominated” and “supported” by the employer.³¹³ The committees—dealing with absenteeism, no-smoking policies, the communication

³⁰⁹ 29 U.S.C. § 158(a)(2) (2012).

³¹⁰ 29 U.S.C. § 152(5) (2012).

³¹¹ *The Dunlop Commission on the Future of Worker-Management Relations – Final Report*, U.S. COMM’N ON THE FUTURE OF WORKER-MGT. RELATIONS (Dec. 1, 1994) (“The evidence presented also shows that as practiced today some employee participation programs may be in violation of Section 8(a)(2) of the NLRA.”), available at <https://tinyurl.com/ycxdpqpq>; Samuel Estreicher, *Employee Involvement and the “Company Union” Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 127 (1994) (“Recent rulings by the National Labor Relations Board[,] . . . the agency responsible for enforcing the NLRA, raise doubts about the legality of off-line employee involvement systems (and perhaps some types of on-line systems as well).”).

³¹² 309 N.L.R.B. 990 (1992), *enfd* 35 F.3d 1148 (7th Cir. 1994).

³¹³ *Id.* at 997–98 (noting that the committees were created by the employer, staffed according to the employer’s specifications, and required to meet on work time at the employer’s premises).

network, pay progression for “premium” positions, and the attendance bonus program—were to meet on a weekly basis during working hours to develop proposals for management to consider.³¹⁴ The employees on the attendance bonus committee did, in fact, develop a policy, but the management member of the committee rejected it as too costly; they then developed a second policy, which was never presented to the president.³¹⁵

Would holacracy governance circles similarly violate Section 8(a)(2)? Probably not. Holacracy is not a system that allows workers to interact or “deal with” management—instead, holacracy replaces management. The Board has held that employers may avoid the “dealing with” prong of the labor-organization definition by delegating managerial tasks completely to employees or employee groups. In *Crown Cork & Seal Co.*,³¹⁶ the employer utilized four production teams and three administrative committees to manage a variety of workplace issues. The teams had the authority to stop production lines, allocate training assignments, and even administer the employee absentee program.³¹⁷ Upper-level management did reserve some authority to review these decisions, but it deferred to the teams in almost every case.³¹⁸ Similarly, the three administrative committees had their own bailiwicks of authority, and they each made recommendations to the higher-ranked Management Team on matters of plant discipline, certification raises, and plant safety.³¹⁹ The recommendations were rarely, if ever, not followed. Because the teams and committees had authority “comparable to that of the front-line supervisor,” the Board found that they were not labor organizations.³²⁰ Holacracy circles have even more authority than the teams in *Crown Cork & Seal*; delegated discretion is essentially unreviewable, unless and until it is redelegated. By transferring power so completely to the holacracy constitution and the power-sharing governance processes it creates, holacratic companies should be able to dodge any Section 8(a)(2) ramifications.

Thus, we end where we began—with the ramifications of holacracy as a new system of management and governance. Because holacracy endeavors to replace traditional management with a governance process, it unsettles the standard paradigm for labor-management relations. While

³¹⁴ *Id.*

³¹⁵ *Id.* at 991–92.

³¹⁶ 334 N.L.R.B. 699 (2001).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 699–700.

³²⁰ *Id.* at 701; *cf.* *Keeler Brass Co.*, 317 N.L.R.B. 1110, 1114 (1995) (finding an employee-grievance committee to be a labor organization because the committee’s grievance decision was rejected by management and sent back for further proceedings).

collective bargaining and holacracy could potentially coexist, the two systems would need to amend their approaches in significant and, perhaps, unsustainable ways. Holacracy endeavors to upend the traditional system of hierarchical management which collective bargaining currently assumes. A hybrid is possible—but it is unclear whether partisans from either side would accede to such a hybrid.

C. Employee Fiduciary Duties

Do employees owe fiduciary duties to their employers? The law is currently unsettled. Under traditional agency law, employees are agents of their employers and owe an agent's fiduciary duties of loyalty and performance.³²¹ However, a set of recent cases have held that employees lower down in the organizational hierarchy do not owe fiduciary duties.³²² The recent *Restatement of Employment Law* applies the fiduciary duty of loyalty only to employees "in a position of trust and confidence."³²³ Other employees have only a limited duty of loyalty with respect to trade secrets or a contractual duty of loyalty.³²⁴ The *Restatement* avers that: "As a general matter, the duty of loyalty stated in this Section has little practical application to the employer's 'rank-and-file' employees"³²⁵

The policy dispute underlying this confusion concerns the relative obligations that employees and employers owe to each other. Under a traditional principal-agent relationship, the agent is charged with

³²¹ RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. LAW INST. 2006) ("[A]n employee is an agent"); *id.* §§ 8.02–8.06 (duty of loyalty); *id.* §§ 8.07–8.12 (duty of performance).

³²² See, e.g., *TalentBurst, Inc. v. Collabera, Inc.*, 567 F. Supp. 2d 261, 266 (D. Mass. 2008) (examining Massachusetts law to conclude that "the duty of loyalty does not extend to 'rank-and-file' employees under Massachusetts law, absent special circumstances indicating they held a position of 'trust and confidence'"); *Dalton v. Camp*, 548 S.E.2d 704, 708 (N.C. 2001) (holding that the circumstances regarding the employment relationship in question were akin to "virtually all employer-employee relationships" and were therefore "inadequate to establish [the employee's] obligations as fiduciary in nature"); see also Michael Selmi, *The Restatement's Supersized Duty of Loyalty Provision*, 16 EMP. RTS. & EMP. POL'Y J. 395, 402–03 (2012) ("[S]ome, though not many, courts [] hold that at-will employees owe no duty [of loyalty] to their employer, while many other courts impose only a limited duty of loyalty on at-will employees, for to do otherwise would go beyond what the parties presumably bargained for").

³²³ RESTATEMENT OF EMPLOYMENT LAW § 8.01(a) (AM. LAW INST. 2015).

³²⁴ *Id.* ("Other employees who come into possession of the employer's trade secrets owe a limited fiduciary duty of loyalty with regard to those trade secrets. In addition, employees may, depending on the nature of the employment position, owe an implied contractual duty of loyalty to the employer in matters related to their employment.").

³²⁵ *Id.* § 8.01 cmt. A; see also Aditi Bagchi, *Exit, Choice, and Employee Loyalty* in CONTRACT, STATUS, AND FIDUCIARY LAW 271, 278 (Paul Miller & Andrew S. Gold eds., 2016) ("Most states in the United States have abandoned the fiduciary model of employment.").

responsibility on behalf of the principal and therefore must carry out this responsibility appropriately.³²⁶ The fiduciary duties of loyalty and performance ensure that the agent act with the principal's best interests at heart. Going back to its origins in master and servant law, the employment relationship was a special subcategory of the agency relationship in which the servant acted on behalf of the master, subject to the master's control.³²⁷ The master-servant relationship made the master liable for the servant's actions under *respondeat superior*, but it also had the effect of making the servant responsible to the master as a fiduciary.³²⁸ Because the servant could bind the master and was often charged with managing the master's property or affairs, the servant had to act in the interests of the master.

From the perspective of agency theory, employees clearly have discretion over their employer's property and business interests and must therefore have responsibility to use those assets in a way that benefits the employer. However, when taking a more modern view to the employment relationship, the employee's vulnerabilities are highlighted. Employees work under a default rule of employment at-will, meaning the employer can fire them at any time.³²⁹ Notions of lifetime employment and corporate loyalty to employees are much less common amongst employers.³³⁰ Many commentators now feel it would be dangerously one-sided to enrobe employees with fiduciary responsibilities when employers can drop them on a moment's notice.³³¹

The theory behind employee fiduciary duties has always rested on something of a conundrum. The common-law definition of employment centers on the employer's right to physical control over the employee's

³²⁶ RESTATEMENT (THIRD) OF AGENCY § 8.07 cmt b (AM. LAW INST. 2006).

³²⁷ See RESTATEMENT (SECOND) OF AGENCY § 2 cmt. a (AM. LAW INST. 1958) (“A master is a species of principal, and a servant is a species of agent.”); see also *id.* § 220(1) (defining “servant”).

³²⁸ *Id.*

³²⁹ RESTATEMENT OF EMPLOYMENT LAW § 2.01 (AM. LAW INST. 2015).

³³⁰ KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67-86 (2004).

³³¹ See, e.g., Bagchi, *supra* note 325, at 278 (“[E]mployees should not be subject to any fiduciary duty to their employers by virtue of their employment per se.”); Catherine Fisk & Adam Barry, *Contingent Loyalty and Restricted Exit: Commentary on the Restatement of Employment Law*, 16 EMP. RTS. & EMP. POL’Y J. 413, 419 (2012) (“The employer owes no duty of loyalty to the employee and is free to pursue its self-interest by firing him to hire another for a lower wage or for better skills. Yet the employee’s ability to pursue her own self-interest by seeking better opportunities is limited.”); Selmi, *supra* note 322, at 398 (warning against a robust duty of loyalty that “could create substantial barriers to employee mobility without any obvious or added benefit to employees”).

work.³³² The employee is thus almost an instrumentality of the employer—an extension of the employer’s will. At the same time, the primary theoretical justification for fiduciary duties is the exercise of discretion.³³³ Because a fiduciary has discretion in the completion of tasks that inure to the good of the beneficiary, fiduciary duties are necessary to cabin and channel the fiduciary’s actions. If an employee is controlled and has little discretion over her tasks, then there is little reason for fiduciary duties to come into play.

Holacracy, however, reintroduces discretion into the life of the employee. Each role has a specific domain over which that role has near absolute authority.³³⁴ But the individual role-filler exercises that discretion for the good of the whole. As such, each role carries with it a responsibility to serve the organization and its ultimate purpose.³³⁵ This responsibility looks much like the fiduciary expectations placed on an agent. Similarly, workers participate in larger circles that govern the broader policies of the organization.³³⁶ These circles have their own domains and accountabilities but ultimately exist to serve the organization’s purpose. The participants of the circle have a responsibility to the whole.³³⁷

It may seem inapposite to invoke fiduciary duties in these particularized contexts of roles and circles within holacracy. But workers

³³² RESTATEMENT (SECOND) OF AGENCY § 2(2) (AM. LAW INST. 1958) (“[A]n agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.”); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. LAW INST. 2006) (defining an employee as “an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work”).

³³³ *See* Bodie, *supra* note 257, at 855 (“Many of the most prominent fiduciary theorists place the primary emphasis on discretion.”); D. Gordon Smith & Jordan C. Lee, *Fiduciary Discretion*, 75 OHIO ST. L.J. 609, 610 n.6 (2014) (“The most commonly cited scholarly works in the canon of fiduciary law emphasize the importance of discretion in fiduciary relationships.”). For examples, *see* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 915 (“[T]he fiduciary obligation is a device that enables the law to respond to a range of situations in which, for a variety of reasons, one person’s discretion ought to be controlled because of the characteristics of that person’s relationship with another.”); Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 262 (2011) (defining fiduciary relationship as “one in which one party (the fiduciary) enjoys discretionary power over the significant practical interests of another (the beneficiary)”); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402 (2002) (arguing that “fiduciary relationships form when one party (the ‘fiduciary’) acts on behalf of another party (the ‘beneficiary’) while exercising discretion with respect to a critical resource belonging to the beneficiary”) (emphasis omitted).

³³⁴ ROBERTSON, *supra* note 7, at 80–82.

³³⁵ *Id.* at 85.

³³⁶ *Id.* at 48.

³³⁷ *Id.* at 47 (“[A] circle that behaves as if it were fully autonomous will harm the system, just as a cell in the body that disregards the larger system becomes cancer.”).

in a holacratic firm participate in the life of the organization in a way that workers in a hierarchical firm do not. In some ways, holacratic workers are more akin to partners than employees; partners owe reciprocal fiduciary duties to the partnership as a separate entity as well as to their fellow partners in the aggregate.³³⁸ Creating duties of performance and loyalty for holacracy participants may smooth some of the bumps that are created by the pockets of discretion within the organization.³³⁹

There is a catch, though. Fiduciary duties are imposed upon contracting parties and add to, if not override, the underlying agreement. But the Holacracy Constitution is a system of governance that endeavors to provide a comprehensive approach for firm governance. Holacratic firms may prefer to resolve employee duties through internal processes, rather than resorting to judicially enforced duties. For example, if a worker is potentially breaching her duty of loyalty by working at another firm, the company may prefer to handle it as a “tension” that is resolved through a circle governance meeting.³⁴⁰ Resorting to the courts may be characterized as opting out of the game and relying on outsiders to take care of internal affairs. Perhaps that is why Holacracy One, LLC, disclaims all fiduciary duties outside of the duty of good faith for its managers.³⁴¹ But this disclaimer reinforces the idea of holacracy itself as an agreement—a governance agreement between the participants in the firm.

D. Holacracy as Employment Contract

The use of a constitution is essential to the holacracy system. The first step in transitioning to holacracy is adopting the Holacracy Constitution.³⁴² Ratifying the constitution is not framed as a run-of-the-mill employer human resources decision; rather, the choice is intended to be formal and binding. The company must choose to place its managerial authority within the governance structure created within the

³³⁸ 2 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.07(a) (2004); *see also* Smith, *supra* note 333, at 1457.

³³⁹ *See* Bodie, *supra* note 257, at 868–69 (arguing that employees who participate in firm governance should be expected to owe more robust fiduciary duties to the firm).

³⁴⁰ ROBERTSON, *supra* note 7, at 111–13 (discussing the processing of tensions).

³⁴¹ Holacracy One Operating Agreement, *supra* note 32, § 3.5 at 9 (“Any fiduciary duties that the Managers may have to the Members shall be limited and eliminated to the fullest extent permitted by applicable law, except that the Managers shall have the fiduciary duties of good faith and fair dealing in any relationship with such Members.”).

³⁴² ROBERTSON, *supra* note 7, at 151.

Constitution.³⁴³ The decision must be transparent and the Constitution must be signed, published, and made available to all involved.³⁴⁴ Only then is the Constitution binding. The shift from a hierarchy of people to a constitution of roles and processes is the critical move.³⁴⁵ The powers that were individually held by the CEO, officers, managers, supervisors, and individual employees are now transferred to the holacratic structure. The “Adoption Declaration” found in the prototype Holacracy Constitution requires the ratifiers to sign under the declaration in which they “adopt the Holacracy Constitution” and “thereby cede their authority into the Constitution’s processes.”³⁴⁶ And Section 5.1 of the Constitution similarly provides that the ratifiers “cede their authority to govern and run the Organization or direct its Partners, and may no longer do so except through the authority granted to them under the Constitution’s rules and processes.”³⁴⁷

Although the Constitution is intended to bind the organization, it is unclear to what extent the organization is legally bound. In terms of changing the Constitution or terminating it, Section 5.5 provides that the ratifiers may amend the Constitution or repeal it entirely “using whatever authority and process they relied on to adopt it.”³⁴⁸ The only requirement appears to be notification: the changes must be in writing and published in a way that is accessible to all of those in the organization. This process does allow the ratifiers a way out if they regret the transition to holacracy.³⁴⁹ Robertson stresses, however, that the Constitution is binding as long as it is in effect.³⁵⁰ If it has not been terminated through the appropriate process, it remains controlling.

But if we assume that the Constitution has been adopted by company representatives and remains in force, we must confront the question of whether it is legally enforceable. If the company representatives disregard the processes or follow them improperly, the

³⁴³ *Id.* (“In order to adopt Holacracy as a new power structure for your organization (or team/department), you must first have whoever formally holds power clearly cede that power to Holacracy’s ‘rules of the game.’”).

³⁴⁴ *Id.* at 152 (“Everyone needs to know that the current power holder has formally ceded power.”).

³⁴⁵ *Id.* at 146 (“Either a manager declares what rules or processes will be used, or managers are bound by the constitution and no longer have the authority to make such declarations.”).

³⁴⁶ HOLACRACY CONST., Const. Adoption Declaration.

³⁴⁷ HOLACRACY CONST., art. V, § 1.

³⁴⁸ *Id.* § 5.

³⁴⁹ If the ratifiers choose a complicated process for ratification—for example, a majority vote amongst employees—then they may not be able to escape holacracy so easily.

³⁵⁰ ROBERTSON, *supra* note 7, at 152 (“[The CEO] can retain the right to ‘unadopt’ Holacracy at any point and go back to the old way of running things, but not to override specific constitutional rules in the meantime.”).

Holacracy Constitution itself has mechanisms for challenging the actions.³⁵¹ These are clearly holacracy's preferred avenues for dispute resolution. But if these holacratic processes break down and the constitutional breach remains unaddressed, a participant may seek legal enforcement of the constitutional provisions. Such a legal action would make particular sense when a worker has suffered a loss of role, a demotion, a loss in pay, or termination. In such instances, the constitutional violation has not merely broken an internal role but has also led to concrete and cognizable injury.

The Holacracy Constitution looks a lot like other types of employer policies or documents that provide a roadmap to the firm's internal governance. The employment relationship, though contractual, is often informally created with no specific written contract to control its terms. The basics of compensation and job responsibilities will likely be hammered out, but peripheral matters are many times left open. In the midst of this uncertainty, courts have developed certain default rules like employment at-will to manage the contractual terms.³⁵² In addition, employers may provide guidance through employee manuals, handbooks, policy statements, or other internal distributions that purport to explain or provide for certain aspects of the employment relationship. These employer distributions provide guidance to managers, supervisors, and employees about the firm's structure and the policies that guide its inner workings.³⁵³

Employees have primarily turned to these manuals or other policy statements to enforce procedural safeguards against adverse employment actions, particularly termination. Prior to the 1980s, courts generally ignored employer statements about employment terms made outside the context of a written contract.³⁵⁴ However, courts eventually began to take

³⁵¹ The Constitution gives primary responsibility to a circle's secretary for interpreting the Constitution with respect to circle matters. HOLACRACY CONST., art. III, § 4. When a circle nevertheless continues with actions that conflict with the constitutional rules, the Constitution provides that the outer circle (or super-circle) must take action to resolve the violation. *Id.* § 5.

³⁵² Employment at-will is more than just a default rule; it has turned into something of a sticky default. *See* Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 677 (2006) (finding the at-will rule to be "highly sticky" as a default).

³⁵³ Jennifer L. McClain, *Ten Reasons Every Employer Should Have an Employee Handbook*, 52 ORANGE COUNTY LAW. 10, 10 (2010) ("An employee handbook is a set of written policies that can be a powerful tool for businesses. The handbook sets out all the policies that a company uses in the regular course of business, explains company programs, and communicates general information.").

³⁵⁴ MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 9.3, at 729 (5th ed. 2015) ("Before the 1980s, courts generally held that promises and statements made by employers in employment handbooks and manuals did not give rise to any contractual obligations."); J.H.

these statements seriously and treat them as legally enforceable. In one line of cases, courts held that employers had created a unilateral contract with employees by distributing the manual and treating it as binding company policy.³⁵⁵ In another line of cases, courts focused on the employer's creation of reasonable expectations as justification for enforcement.³⁵⁶ Although the routes to enforcement differ, it is settled law that handbooks, manuals, and other policy statements can create obligations that are binding on employers.³⁵⁷ The critical issue is whether the employer has evinced an intent to be bound by the policy statement in question.³⁵⁸ Such intent may be gleaned in part from a broad distribution of the statement to employees as well as the lack of formal, written employment contracts.³⁵⁹ But courts have generally treated such statements as non-binding when the employer includes a clear disclaimer

Verkerke, *The Story of Woolley v. Hoffman-La Roche: Finding a Way to Enforce Employer Handbook Promises*, in *EMPLOYMENT LAW STORIES* 23, 27 (Samuel Estreicher & Gillian Lester eds., 2007) (“If you could travel back in time to the early 1970s, it would seem very odd, perhaps even preposterous, for an employment lawyer to believe that statements in a company’s employee handbook or personnel policy manual concerning job security would be legally enforceable.”).

³⁵⁵ See, e.g., *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257, 1267 (N.J. 1985) (holding that “the manual is an offer that seeks the formation of a unilateral contract—with the employees’ bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue”); *Asmus v. Pac. Bell*, 999 P.2d 71, 77 (Cal. 2000); *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987).

³⁵⁶ See, e.g., *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980) (holding that “employer statements of policy . . . can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee”); *Bankey v. Storer Broad. Co.*, 443 N.W.2d 112, 119 (Mich. 1989) (“[Written policies] are not enforceable because they have been ‘offered and accepted’ as a unilateral contract; rather, their enforceability arises from the benefit the employer derives by establishing such policies.”); *Drobny v. Boeing Co.*, 907 P.2d 299, 302 (1995) (“This rule rests on the principle that by using a manual or handbook, an employer secures promises from the employees which create a loyal, orderly and cooperative work force, such that the employer should be equally bound to its promises to the employee which are designed to create an atmosphere of job security and fair treatment.”).

³⁵⁷ RESTATEMENT OF EMPLOYMENT LAW § 2.05 (AM. LAW INST. 2015) (“Policy statements by an employer in documents such as employee manuals, personnel handbooks, and employment policy directives that are provided or made accessible to employees, whether by physical or electronic means, and that, reasonably read in context, establish limits on the employer’s power to terminate the employment relationship, are binding on the employer until modified or revoked”); *id.* § 2.05 Reporters’ Notes to cmt. a (noting the “position of the clear majority of U.S. jurisdictions . . . that unilateral employer policy statements can, in appropriate circumstances, establish binding employer obligations”).

³⁵⁸ SAMUEL ESTREICHER & GILLIAN LESTER, *EMPLOYMENT LAW* 50 (Found. Press 2008) (“It is often a question for the trier of fact whether a particular unilateral employer statement, or set of such statements, reasonably read in context, was intended to bind the employer.”).

³⁵⁹ *Id.*

that the statement has no legal or contractual effect.³⁶⁰ Although the disclaimer may be washed out in the face of demonstrated employer signaling to the contrary,³⁶¹ it is generally held to be strong evidence that the employer did not intend to be bound.³⁶²

In contemporary cases, disputes over employer policy statements generally come down to the power of the disclaimer versus the surrounding context. However, there is no disclaimer in the Holacracy Constitution. In fact, the Constitution takes pains to establish that it is, in fact, binding upon the organization as long as it remains in effect.³⁶³ Given the weight that holacracy places upon the Constitution's binding nature, it would be almost oxymoronic to claim that the Constitution was not intended to bind the company. All signals are to the contrary. As such, the Constitution would easily meet the requirements that it was "provided or made accessible" and that it "establish[ed] limits on the employer's power."³⁶⁴

Of course, the Holacracy Constitution does not itself proscribe employment at-will, nor does it provide a specific approach to employee termination, demotion, or reduction in pay. Instead, the Constitution provides a governance process whereby procedures for issues like performance evaluations and compensation are themselves developed through the system of roles, circles, and governance meetings.³⁶⁵ In order to bring a suit under the Constitution, the employee would need to establish that the governance system was not followed, and, as a result of that breach, he was terminated without the proper process. It may be that the process established through holacracy was not followed,³⁶⁶ or, on a

³⁶⁰ *Id.* ("All jurisdictions give considerable weight to the presence of a prominent disclaimer."); Verkerke, *supra* note 354, at 24 ("By indicating clearly that the handbook was not intended to have contractual effect . . . , employers could opt out of these newly discovered contractual obligations and thus restore the long-standing rule of employment at will.")

³⁶¹ RESTATEMENT OF EMPLOYMENT LAW § 2.05 cmt. c (AM. LAW INST. 2015) ("Any such disclaimer should be viewed, of course, in the context of the entire statement, other employer policies, and the employer's course of conduct.")

³⁶² *Id.* § 2.05 Reporters' Notes to cmt. c ("All jurisdictions give considerable weight to the presence of a prominent disclaimer in the employer statement as evidence that the statement is not a binding commitment.")

³⁶³ HOLACRACY CONST., art. V, § 1 (providing that the ratifiers "cede their authority to govern and run the Organization or direct its Partners, and may no longer do so except through the authority granted to them under the Constitution's rules and processes")

³⁶⁴ RESTATEMENT OF EMPLOYMENT LAW § 2.05 (AM. LAW INST. 2015).

³⁶⁵ ROBERTSON, *supra* note 7, at 158 ("[T]he Holacracy constitution gives you an underlying platform, or a meta-process—a set of core rules for defining, evolving, and enacting your business processes over time.")

³⁶⁶ As an example, assume that a company follows the holacracy governance process to establish a two-warning discharge system, but the employee is fired without two warnings.

more meta-level, that the Constitution was not followed in setting up a process, even if that process was properly followed in the instant case.³⁶⁷ In either case, the sanctity of the underlying process was not respected, and as a result the employee can claim that the adverse employment action was a breach of contract. Moreover, the workers in these situations will have the advantage of judges who come steeped in an understanding of constitutional process. By framing the Holacracy Constitution as a constitution, holacracy gives its internal structure an even stronger sense of legality and a metaphor upon which to build.

If a company was looking to avoid this result while still adhering to the principles of holacracy, it could emphasize that holacracy was an internal governance structure that was meant to be enforced internally. The Constitution has an internal dispute resolution system to deal with conflicts between parties, including conflicts over whether the constitutional rules are being followed.³⁶⁸ When adopted by a company, the Constitution could include language that the rights created under the document only extend to the enforcement provisions created within and do not comprehend legal enforcement. Alternatively, the Constitution could provide for arbitration of all disputes relating to the Constitution, after any internal processes are exhausted. The Holacracy One Operating Agreement provides that disputes under the Operating Agreement are to be resolved through a process of negotiation, mediation, and ultimately final and binding arbitration under the rules of the American Arbitration Association.³⁶⁹ Given the complexity of the holacracy process, an arbitrator trained in holacracy may in fact provide better dispute resolution than a judge or jury confronted with “lead links” and “sub-circles.” However, employees may feel that the rights granted through the Constitution are undermined when only enforceable through arbitration.

V. HOLACRACY AND FIRM LIABILITY

Firms are generally liable for the actions of their representatives. The idea of responsibility for the actions of another derives from English master/servant law, in which the master was liable for the tortious actions of her servant if such actions were undertaken as part of the servant’s role.³⁷⁰ The modern doctrine holds an employer liable for the acts of its

³⁶⁷ As an example, assume that the employer set up a two-warning discharge system and the employee was given two warnings, but the two-warning system itself was set up by a lead link who did not follow the appropriate governance processes under the Constitution in setting up the system.

³⁶⁸ HOLACRACY CONST., art. III, §§ 4, 5.

³⁶⁹ Holacracy One Operating Agreement, *supra* note 32, § 17.8, at 37.

³⁷⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES *417 (1765).

employees committed within the scope of employment.³⁷¹ Although many different justifications for the doctrine have been given, most justifications center around the responsibility for, or control of, the employer over the employee.³⁷² When the employer has directed the employee to perform a certain act, the responsibility is clear.³⁷³ However, even when the employer has not directly ordered the particular action, it is still liable for actions taken when the employee is acting as an employee and on behalf of the employer. This form of vicarious liability is justified on the grounds that the employer should be responsible for its actions as an organization.³⁷⁴ The organization “caused” the tort and thus must face the liability attendant to that action.³⁷⁵ *Respondeat superior* also provides incentives for employers to monitor the acts of their employees and shifts the risk of individual tortfeasor insolvency from the victim to an organization entity that benefits from the actions of the tortfeasor generally.³⁷⁶ Despite the somewhat fictionalized sense of “blame” placed

³⁷¹ RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006) (“An employer is subject to liability for torts committed by employees while acting within the scope of their employment.”); RESTATEMENT (SECOND) OF TORTS § 409 (AM. LAW INST. 1965) (“Except as stated in §§ 410–429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.”).

³⁷² W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499–501 (5th ed. 1984). Employers can also be liable for the torts of independent contractors, but generally only under one of three conditions: (1) the employer is negligent in “selecting, instructing, or supervising the contractor;” (2) the employer has a nondelegable duty of care to the public as a whole or the particular plaintiff; or (3) the work done by the contractor for the employer is “specially” or “inherently” dangerous. RESTATEMENT (SECOND) OF TORTS § 409 cmt. b.

³⁷³ Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 105 (1916) (“If a master choose to give orders to his servant, no one can fail to understand why he should be held liable for the consequences of their commission.”).

³⁷⁴ ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 186 (1995) (arguing that vicarious liability “construes (indeed constructs) the doer as a composite: the-employer-acting-through-the-employee”); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 565 (1988) (“In most cases in which an employee commits a tort during the ordinary course of duties, no question arises as to whether the employee acted within the scope of employment. The wrongful conduct is plainly a consequence of the employment relationship and represents the materialization of a risk that is normally attendant upon such employment relationships.”).

³⁷⁵ *Id.* at 609 (“The scope of employment limitation upon *respondeat superior* liability may be understood in many instances as a way to limit the employer’s liability to torts that are ‘caused’ by the business enterprise.”) (emphasis added); see also *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968) (finding a “deeply rooted sentiment that business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities”).

³⁷⁶ Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1241–42 (1984) (emphasizing insolvency); see also Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1763–64 (1996) (providing a deterrence-based argument for vicarious liability).

on the entity, vicarious liability is settled law, widely supported by scholars of all stripes.³⁷⁷

Organizational criminal liability, on the other hand, is much less common and less established as a matter of theory. As a matter of basic doctrine, business organizations may be held criminally responsible for the misdeeds of their employees along the same lines as *respondeat superior*.³⁷⁸ In order to satisfy the *mens rea* requirement, courts have additionally required that the employee have acted with the intent to benefit the business entity.³⁷⁹ This basic and broad approach has become “firmly entrenched as, more or less, the across-the-board rule of enterprise liability for all manner of crimes.”³⁸⁰ However, courts—and particularly prosecutors—have in practice adopted a narrower standard of liability centering around the role of management in the crime. This practice is reflected in the American Law Institute's Model Penal Code (“MPC”), which finds a corporation to be criminally liable if the criminal conduct was “authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.”³⁸¹ The United States Department of Justice, in a series of memoranda setting

³⁷⁷ Schwartz, *supra* note 376, at 1767 (“Within the United States the current consensus in favor of vicarious liability (among both scholars and interest groups) is so broad as to make vicarious liability almost a nonissue.”). For discussions of extending vicarious liability to controlling shareholders, see Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1247–50 (2002). For an argument for extending liability to corporate officers, see Timothy P. Glynn, *Beyond “Unlimiting” Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 396–98 (2004).

³⁷⁸ See *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 495 (1909).

³⁷⁹ See, e.g., *Standard Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962) (describing the requirements as elements of liability taken from civil tort law); see also Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1662 (2007) (“Under current law, a firm faces criminal liability for virtually any criminal act by an agent. The standard is *respondeat superior*: the master is liable if the agent acted within the scope of employment and at least in part to benefit the master. In practice, this standard amounts to strict vicarious liability because almost any act on the job is ‘within the scope of employment’ and because courts have all but read the ‘intent to benefit’ element out of the law.”) (citing 1 KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* §§ 3:01–:11, at 89–145 (2d ed. 1992)) (emphasis added).

³⁸⁰ Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 475–76 (2006); see also Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 836–37 (1994) (stating that the existing legal regime closely approximates a rule of “pure strict vicarious liability”).

³⁸¹ MODEL PENAL CODE § 2.07(1)(c) (AM. LAW INST. Proposed Official Draft 1962); see also Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1103 (1991) (“This standard still uses a *respondeat superior* model, but in a limited fashion: the corporation will be liable for conduct of only some agents (its directors, officers, or other higher echelon employees.)” (emphasis added)).

forth the standards for when corporations should be charged with crimes,³⁸² has consistently required more than mere *respondeat superior* liability.³⁸³ And in assigning appropriate punishment for corporate crimes, the United States Sentencing Guidelines (“Sentencing Guidelines”) assessed punishment for corporate guilt based on whether “an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or tolerance of the offense by substantial authority personnel was pervasive throughout such [entity].”³⁸⁴ Commentators have noted a change from vicarious liability to more of a negligence standard as to corporate management’s role in overseeing internal investigations.³⁸⁵

A move to holacracy will change the traditional calculus for civil and criminal liability. The change will be less significant on the civil side where *respondeat superior* broadly sweeps most employee activity into the “scope of employment.” The holacracy system of roles and domains, rather than positions, may allow companies to make stronger claims that the employee was acting outside the scope, since the roles more specifically define the type of activities expected, and domains more specifically set forth the zone of responsibility.³⁸⁶ *Respondeat superior* rests on the notion that the employer has designated the employee as its

³⁸² See Memorandum from Deputy Attorney Gen. Sally Q. Yates on Individual Accountability for Corporate Wrongdoing to the Assistant Attorney Gen. 4 (Sept. 9, 2015), available at <https://www.justice.gov/archives/dag/file/769036/download>; Memorandum from Deputy Attorney Gen. Mark R. Filip on Principles of Fed. Prosecution of Bus. Orgs. 4 (Aug. 28, 2008), available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>; Memorandum from Deputy Attorney Gen. Paul J. McNulty on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep’t Components 4 (Dec. 12, 2006), available at http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf; Memorandum from Deputy Attorney Gen. Larry D. Thompson on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep’t Components (Jan. 20, 2003) <https://tinyurl.com/y9f7mtrm> [hereinafter Thompson Memorandum].

³⁸³ Some of the factors in determining when to charge a corporation within the Thompson Memorandum include: “the nature and seriousness of the offense,” “the pervasiveness of wrongdoing within the corporation,” “the corporation’s history of similar conduct,” and “the adequacy of civil or regulatory enforcement.” Thompson Memorandum, *supra* note 382, at 3.

³⁸⁴ U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(b)(1)(A) (U.S. SENTENCING COMM’N 2012).

³⁸⁵ See, e.g., Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 572 (2005) (“[A]t least since the adoption of the Organizational Sentencing Guidelines (OSG) in 1991, the U.S. legal regime has been moving away from a system of strict vicarious liability toward a system of duty-based organizational liability.”).

³⁸⁶ ROBERTSON, *supra* note 7, at 42 (discussing roles within holacracy); *id.* at 44 (“A domain (of which there may be several) specifies something the role has the *exclusive* authority to control on behalf of the organization—in other words, this role’s ‘property.’”).

representative with regard to actions undertaken through employment; as in principal-agent law, the principal-employer has given the agent-employee the authority to act on its behalf.³⁸⁷ Holacracy sharpens the delegation between employer and employee, requiring (in theory) more specific instructions to the employee.³⁸⁸ It should thus be easier for a holacratic company to show that an employee was acting outside of the scope of her authority. However, courts have largely blurred the scope of the employment doctrine, generally finding the employer liable if the employee's action was job-related.³⁸⁹ If the employee is acting outside of her domain but more generally in service to the employer, it is unlikely that a court would allow the employer to escape from vicarious liability.

When it comes to criminal liability, however, holacracy's change to the traditional management structure unsettles the trend in corporate criminal law. Most companies use a hierarchical management structure to run the company, and prosecutors and courts look to managerial involvement to determine enterprise responsibility. For example, the Model Penal Code requires the participation of "high managerial agents" to find liability; such agents are defined as those with "duties of such responsibility that [their] conduct may fairly be assumed to represent the policy of the corporation or association."³⁹⁰ Similarly, the Sentencing Guidelines look to whether "an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense."³⁹¹ In a traditionally-managed firm, this focus on the upper reaches of the hierarchy makes some sense, as these actors makes the broader policy decisions and may be more responsible for the organization's culture.

Holacracy, however, eschews the hierarchical organization chart and instead installs a constitutional structure. Circles create governance policies, and roles carry out their accountabilities. Management is conducted through the structure and not through individuals.³⁹² As a result, it will be difficult or nonsensical to assign organizational blame based purely on hierarchical culpability. On the other hand, it will be

³⁸⁷ RESTATEMENT (THIRD) OF AGENCY § 2.01 (AM. LAW INST. 2006) ("An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.")

³⁸⁸ ROBERTSON, *supra* note 7, at 42 ("The Holacracy governance process generates clarity by defining explicit roles with explicit accountabilities, which grant explicit authority, and then continuously evolves these definitions to integrate . . .").

³⁸⁹ See Sykes, *supra* note 374, at 586–87, 609 (discussing the broad contours of employer liability, especially in "frolic and detour" cases).

³⁹⁰ MODEL PENAL CODE § 2.07(4)(c) (Proposed Official Draft 1962).

³⁹¹ U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(b)(1)(A) (U.S. SENTENCING COMM'N, 2012).

³⁹² ROBERTSON, *supra* note 7, at 34–59.

easier to blame the corporation if the wrongdoer was acting within her role and domain on behalf of the company. Holacracy empowers individual workers by assigning them roles, domains, and accountabilities directly from the organization's constitutional governance structure. The worker was not installed in her position by a supervisor; she was instead assigned a role within a circle and asked to manage the accountabilities of that role within the role's domain. It is thus easier to blame the organization as a whole, rather than the individual, if the individual committed the crime within her role. The firm is more directly accountable.

The holacracy approach also helps to resolve an ongoing tension within enterprise criminal liability over the tension between direct responsibility and overall authority. As existing practice makes clear, we are more likely to assign blame to the organization as a whole if the organization's leadership is involved in the crime. On the other hand, many instances of corporate crime involve the activities of those who are lower within the hierarchy. In the British Petroleum ("BP") Deepwater Horizon disaster, lower-level employees made the mistakes that led to the disastrous spill, and some of those most directly responsible died in the explosion.³⁹³ At the same time, BP leadership was feckless and unprepared to deal with the accident's consequences. There is thus a dilemma over responsibility. As Samuel Buell explains it:

The trouble with blaming the managers and executives is that, as in many cases of corporate crime, it's difficult to pinpoint who within the massive, bureaucratic global organization that is BP both knew enough and was in charge enough to be the right target for blame. This isn't just a lawyer's problem, a mere difficulty of proof. It's a problem of responsibility and culpability. The higher you go in BP, the more responsible the managers seem to be—but the less they knew and were involved day-to-day in the Deepwater Horizon rig.³⁹⁴

Under holacracy, on-site employees need not wait for directions from far-away management, nor is management expected to be omniscient about its many jobsites. Instead, responsibility is handed over to the structure and devolved to those more directly involved in the task. Holacracy mitigates the tension between responsibility and authority; the "lower-level" employee has more authority over the task and is thus more responsible for the outcome. That might make the employee look more

³⁹³ SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 110 (2016).

³⁹⁴ *Id.* at 111.

individually responsible for the decision. But since the employee is empowered under holacracy, and the firm itself has adopted holacracy for its management system, it seems fairer to blame the corporation as a whole.

That does not necessarily mean that holacratic firms will be more vulnerable to criminal liability. As suggested earlier, individuals acting outside of their roles and domains will look more like individual “rogue” agents than they would with a less defined set of responsibilities. Moreover, there is evidence that workers are less likely to commit crimes if they feel that workplace policies are legitimate and follow procedurally just rules.³⁹⁵ Although deterrence and incentives play a role in compliance, studies have found that employees are more likely to follow internal and external rules if they believe in the legitimacy of workplace authority.³⁹⁶ Holacracy fosters that sense of legitimacy by creating participatory processes that depend on the workings of an agreed-upon set of rules, rather than managerial fiat.³⁹⁷

We recognize that organizations, such as corporations, can be held blameworthy for acts that are committed by individuals acting within them.³⁹⁸ Holacracy helps make sense of this liability by moving away from a hierarchy-based theory of blame and focusing on a true sense of entity-oriented responsibility. However, prosecutors and courts would need to move away from their notions of managerial responsibility to adapt to the new reality.

CONCLUSION

The law takes the economic firm and places its participants into familiar categories: corporations, directors, CEOs, officers, and employees. Holacracy unsettles those categories. It challenges our ideas of internal firm governance, strips management of its traditional powers, and recasts workers from controlled subjects to participating players. Although holacracy is only one example from the palette of participatory

³⁹⁵ Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 AM. CRIM. L. REV. 267, 267 (2014) (arguing that “legitimacy is important for internal regulation, as businesses with ethical cultures that are legitimate to employees are less likely to engage in wrongdoing”).

³⁹⁶ *Id.* at 277 (“Research suggests that certain values, such as legitimacy, can motivate self-regulatory behavior in organizational settings.”). For an example of one such study, see TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS 190–92 (2000).

³⁹⁷ TYLER & BLADER, *supra* note 396, at 198 (“Many new management techniques have . . . made strides toward including employees directly in the process, increasing the respect shown to employees, and empowering those employees.”).

³⁹⁸ BUELL, *supra* note 393, at 115 (“Organizations cause bad things to happen When we organize ourselves into groups for even the noblest purposes, we can’t help but produce some ill effects.”).

governance approaches, its fully-imagined scope and detail provide an ideal subject for testing the impact of the latest participatory governance thinking on existing legal doctrines. The results? The law can adapt to holacracy and its relations, but it will require a willingness from courts, companies, attorneys, and academics to understand these new systems and move beyond our existing answers.
