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THE CORPORATE CHAMELEON

Megan Wischmeier Shaner *

INTRODUCTION

Since the adoption of the first American general incorporation statutes in the late nineteenth century, corporate law has contemplated three distinct actors involved in the corporation—directors, stockholders, and officers.¹ Today, officers are widely considered among the most central, if not the central, figures in corporate governance. Yet they are the least theorized participants.² While corporate statutes and case law make clear the identities of directors

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1. See, e.g., Act of Mar. 10, 1899, ch. 273, § 5, 21 Del. Laws 446 (1899) (granting corporations power “[t]o appoint such *officers* and agents as the business of the corporation shall require, and to allow them suitable compensation.” (emphasis added)); see also 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS*, § History (3d ed. Supp. II 2019) (providing a brief history of the General Corporation Law of the state of Delaware); 1 JAMES D. COX & THOMAS LEE HAZEN, *COX & HAZEN ON CORPORATIONS* 87–90 (2d ed. 2003) (describing the first American general incorporation acts); Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 896 (1990) (“Delaware adopted its first modern general corporation law in 1899.”); S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1 (1976) (discussing the early history of Delaware corporate law).

2. See WILLIAM T. ALLEN ET AL., *COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS* 108 (3d ed. 2009) (“In fact, most corporation statutes do not even mention the position of chief executive officer (CEO), the most important single organizational role in the large majority of corporations.”); Deborah A. DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 847, 848 (2017) (“Although officers are crucial to explaining how corporations function, scholarly and theoretical accounts of corporate law and governance tend to slight officers’ positions as well as the distinctive quality of their duties.”); Jennifer O’Hare, *Private Ordering and Improving Information Flow to the Board of Directors: The Duty To Inform Bylaw*, 53 U. RICH. L. REV. 557, 563 (2019) (“Given the importance of the role played by officers in corporations, as well as the use of the term in several corporate statutes, it is curious that neither the Delaware legislature nor the Delaware judiciary have defined ‘officer’ for purposes of corporate law.”); Robert B. Thompson, *Corporate Governance After Enron*, 40 HOUS. L. REV. 99, 108–09 (2003) (“[T]here is almost nothing in corporate

and stockholders, officers are left relatively undefined.³ Over 120 years after the creation of modern corporation law, “Who is an ‘officer’ of a corporation?” remains an open question. The definitional uncertainty surrounding “officer” is problematic at the individual, institutional, judicial, and legislative levels. Categorization as a corporate officer carries with it distinct legal duties, rights, and liabilities. Currently, individuals, boards, and their counsel are left to speculate as to “officer” status. Lacking in established definitional boundaries, parties opportunistically define “officer” to fit their particular argument, causing judicial analysis and rulemaking as it pertains to corporate officers to become inconsistent and unpredictable.

Historically, corporate codes identified a handful of officers that every corporation should, and in some cases, must have.⁴ Over the years, the adoption of statutory reforms largely stripped out all references to any particular office or title. Corporate statutes contemplate a distinct “officer” category, but refrain from articulating that role with any specificity, leaving it up to corporations to do so in their governing documents.⁵ Corporations have, however, refrained, through private ordering in their bylaws or otherwise, from clarifying the term “officer.”⁶ In fact, corporations have done the opposite; through exercising the freedom of contract provided under the enabling regime of modern corporate law, corporations have muddied the definitional waters, fashioning officer titles in myriad ways and giving titles to countless people, many of whom lack traditional officer responsibilities and authority. Over the years corporate law has developed in such a way that identifying the officers of a corporation, as that role is contemplated in corporate jurisprudence, is arguably a more challenging task than it has ever been.

statutes about the duties of officers . . .”).

3. See Verity Winship, *Jurisdiction over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. ILL. L. REV. 1171, 1195–96 (“‘Officer’ means . . . who-knows-what for triggering state-law fiduciary duties.”).

4. See, e.g., DEL. CODE ANN. tit. 8, § 142(a) (1967) (requiring corporations to have “a president, secretary, and treasurer”); MODEL BUS. CORP. ACT § 50 (AM. BAR ASS’N 1969).

5. See, e.g., § 142(a) (2019) (“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 . . .”).

6. See O’Hare, *supra* note 2, at 566 (finding that the bylaws of the fifty largest U.S. public corporations provide little information about officers or their duties beyond basic boilerplate provisions).

In addition to state corporate codes, federal securities law, jurisdictional statutes, and bankruptcy law all make reference to the corporate “officer.” Each defining “officer” in slightly different terms, courts disagree over the proper interpretation of “officer” and the proper identification of persons occupying this role.⁷ A contributing factor to the inconsistent interpretations is the lack of a “north star” definition in state corporate law for courts to look to for guidance. The resulting definitional fluidity within and across disciplines means that individuals can move in and out of “officer” status in a chameleon-like fashion depending on the context and jurisdiction in which they operate.⁸

To be sure, this chameleon-like result is not exclusive to the term “officer.” There are many words in the English language that take on new or specialized meanings depending on the area of law or jurisdiction in which one is operating. Moreover, legal definitions can expand, contract, or be transformed into new definitions depending on the context in which a word or phrase is being used. The variable nature of words in the law becomes problematic, however, when there is a lack of established consensus and clarity in defining a term. Linguistic precision is vital to the development, practice, and application of the law, but to achieve this, there needs to be clear delineation of a term’s legal meaning(s). This is necessary for individuals to understand their legal responsibilities and authority, and for lawyers and judges to communicate efficiently and effectively. If left unresolved, definitions will be determined *ex post*, allowing parties to opportunistically define terms to fit their particular argument or position.

While limited in scope, “officer” scholarship to date has focused on identifying the authority, responsibility, and liability of these individuals. Research in this area (including that written by this author) avoids the messy step of having to delineate with precision “officer” status in a corporation.⁹ However, before officer jurisprudence is further developed by the courts or scholars, the threshold

7. See, e.g., *infra* Sections II.A–B.

8. See ROBERT CHARLES CLARK, CORPORATE LAW 114 (1986) (stating that where to draw the line on who is an “officer” is “not always clear” and categorization as an “officer” can differ depending on the context at issue).

9. See, e.g., O’Hare, *supra* note 2, at 566; Megan Wischmeier Shaner, *Officer Accountability*, 32 GA. STATE U. L. REV. 357, 359 n.3 (2016) (focusing primarily on senior executive officers when discussing “officers” under corporate law); Lyman P.Q. Johnson, *Dominance by Inaction: Delaware’s Long Silence on Corporate Officers* n.9 (Wash. & Lee Univ. Sch. of Law Working Paper Series, Paper No. 2017-11, 2017), <http://ssrn.com/abstract=2964033>

question of “To whom does the doctrine apply?” needs to be answered. Corporate governance specifies different consequences that attach to the different categories of corporate actors. It is both normatively and practically problematic to decide consequences without reference to a clearly defined category.

Defining “officer” has become particularly pressing in light of the private ordering movement in corporate law. With increasing frequency, parties are structuring key aspects of corporate governance through private contracting methods.¹⁰ Observing that the ambiguity surrounding officers in corporate law makes it a ripe topic for private ordering, the American Bar Association (“ABA”) has created a Task Force on Officer Liability charged with developing ways of addressing uncertainties in officer doctrine and developing model provisions suitable for use in employment agreements and governing documents.¹¹ Integral to these efforts will be establishing a clear consensus on the legal default definition of “officer.” As individual corporations and their stockholders begin to attempt to structure the governance of their entity through provisions in the governing documents or contract, clarity as to whom the law views as an “officer” is critical.

This Article seeks to address what is currently missing from corporate law—a clear way of determining “officer” status as that distinct legal role is contemplated in corporate jurisprudence. Part I discusses the three primary actors involved in the internal governance of the corporation—directors, stockholders, and officers—and how the law defines each one. While corporate law clearly contemplates officers as a distinct role, a quick comparison of the three reveals a failure to identify with any precision the bounds of “officer” status. Part II looks to other areas of the law for guidance in defining and identifying the officers of the corporation. While the policy considerations underlying the definitions of “officer” in each of these other areas of the law may be similar or different to those

(“This chapter does not address how ‘officers’ should be defined.”) [<https://perma.cc/BXB3-XTDQ>].

10. See Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1638 (2016) (“[F]or the most part the innovations take the form of private ordering—that is, the adoption of issuer-specific rules that are contractual in nature (as opposed to statutes, agency rules, or decisional law).”); D. Gordon Smith et al., *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 127 n.12 (2011). This private ordering can occur in a corporation’s governing documents or in separate contracts.

11. See Notice of Business Law Section Annual Meeting, Am. Bar Ass’n Dir. & Officer Liab. Comm. (Sept. 10, 2018) (on file with author) (announcing and describing new Officer Liability Task Force).

animating “officer” for purposes of state corporate law, the articulation and identification of individuals occupying the officer role are nevertheless instructive. Finally, Part III applies the lessons learned from the struggles courts in securities law and bankruptcy law have had in identifying officers and proposes a test for determining “officer” status. Adopting a prototype-centered approach, the proposal rejects a fixed definition in lieu of a multi-factor approach that embodies the traditional and legal officer roles espoused by courts and scholars. The result stabilizes the meaning of “officer” as a category of corporate actor and provides predictability and certainty to corporations, officers, directors, stockholders, third parties, and their counsel going forward.

I. CORPORATE ACTORS

As the Supreme Court observed in 1906, “A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity.”¹² That association can range from a one-person, individually run enterprise to involving hundreds of thousands of people.¹³ Regardless of size, state statutes contemplate three participants in the governance of the corporate endeavor (which positions can be held by the same or different persons)—directors, officers, and stockholders.¹⁴ These internal participants are to be distinguished from what scholars and jurists frequently refer to as “other constituencies” which can include employees, creditors, and customers, among others.¹⁵

12. *Hale v. Henkel*, 201 U.S. 43, 76 (1906), *overruled in part by* *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52 (1964).

13. *See, e.g.*, Bernard F. Cataldo, *Limited Liability with One-Man Companies and Subsidiary Corporations*, 18 *LAW & CONTEMP. PROBS.* 473, 474–75 (1953); Warner Fuller, *The Incorporated Individual: A Study of the One-Man Company*, 51 *HARV. L. REV.* 1373, 1374–75 (1938).

14. *See* DEL. CODE ANN. tit. 8, §§ 141, 142, 151, 158; *see also* *Edgar v. Mite Corp.*, 457 U.S. 624, 645–46 (1982) (“The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation’s internal affairs—matters peculiar to the relationship among or between the corporation and its current officers, directors, and shareholders.”); JESSE H. CHOPER ET AL., *CASES AND MATERIALS ON CORPORATIONS* 5 (5th ed. 2000); COX & HAZEN, *supra* note 1, at 390 (describing the “traditional corporate pattern” as triangular and involving stockholders, directors, and officers); WALTER A. EFFROSS, *CORPORATE GOVERNANCE* 4 (2d ed. 2013) (describing the “basic triad” of a corporation—stockholders, directors, and officers—which reflects the ownership and management structure of the corporation).

15. *See* EFFROSS, *supra* note 14, at 1.

The internal participants in a corporation have a unique relationship shaped by the distinct rights and responsibilities vested in each actor in governing the corporate enterprise. The traditional pattern of corporate governance is structured in a hierarchical, triangular fashion.¹⁶ A small number of individuals sit atop the corporate triangle managing the business and affairs of the corporation.¹⁷ The largest number of participants, the stockholders, who are the residual owners of the corporation, comprise the base of the triangle and have limited governance rights.¹⁸ To protect against self-interested, careless behavior by those at the top, while ensuring efficient management of the corporation, corporate law provides for a system of checks and balances.¹⁹ Each with their own particular role to play in the corporate system of checks and balances, identification as a director, officer, or stockholder has significant implications for the legal authority, rights, responsibility, and liability of an individual.²⁰ Key topics in corporate law, such as fiduciary duties, derivative litigation, director elections, exculpation, advancement and indemnification, reliance on experts and

16. See COX & HAZEN, *supra* note 1, at 390 (describing corporate governance as a triangle of participants); Larry E. Ribstein, *Why Corporations?*, 1 BERKELEY BUS. L.J. 183, 196–98 (2004); see also ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 6–7 (The Macmillan Company 1932).

17. If one uses a statutory allocation of power lens through which to view the corporation the group at the top of the corporate governance triangle would be the board of directors. See § 141(a). On the other hand, when viewed from the perspective of actual day-to-day decision making at the corporation, executive officers would occupy the top position in corporate governance. See COX & HAZEN, *supra* note 1, at 390 (stating that officers occupy the top of the corporate governance decision-making pyramid).

18. See COX & HAZEN, *supra* note 1, at 390.

19. See Thompson, *supra* note 2, at 108–09 (“There are constraints on this broad power given to directors, as most students of corporate law could recite. Shareholder voting is required, not just to elect directors, but also as a prerequisite to mergers and similar transactions after they have been proposed by directors. Shareholder voting can sometimes act to cleanse conflicts of interest that exist for the directors. Fiduciary duty—perhaps the most visible legal check on board power—is an after-the-fact judicial limit on the use of the power given in the corporate statute.” (footnotes omitted)); Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 442 (2006) (“Fiduciary duties and shareholder approval requirements limit director autonomy, and the right to elect directors is intended to keep directors accountable to the shareholders.”). For example, ultimate power and authority for managing the business and affairs of the corporation is vested in the board of directors. See § 141(a). A principal constraint on this expansive grant of authority are the fiduciary duties owed by directors in making decisions. Stockholder-initiated lawsuits are the vehicle through which fiduciary duties are largely enforced. To protect against abusive stockholder litigation, however, corporate law restricts derivative lawsuits through the demand requirement provided for in Delaware Chancery Court Rule 23.1.

20. While directors and officers must be natural persons, stockholders need not. See § 141(b). For purposes of this Article, when stockholders are described as “individuals,” it is intended to capture individual natural persons as well as individual entities that own stock in a corporation.

officers, bylaw amendments, internal affairs doctrine, and books and records inspection rights all, to differing degrees, contemplate the distinct roles these actors occupy in the corporation.²¹

A. *Directors*

Director (n): “A person appointed or elected to sit on a board that manages the affairs of a corporation or other organization”²²

Corporate law situates the board of directors at the center of the governance universe. Statutorily tasked with managing the business and affairs of the corporation—a charge that can only be delegated, never abdicated—director primacy is viewed by many as a bedrock principle of corporate law.²³ In light of the importance of the board to a corporation’s livelihood, it is not surprising that state statutes detail the procedures surrounding the structure and composition of this decision-making body. Every board of directors must have at least one director on its board, with the exact number (which can be specific or a method for determining that number) set forth in the governing documents.²⁴ Directors need not be stockholders of the corporation they serve. State statutes merely require that directors be natural persons.²⁵ A corporation’s governing documents, federal securities laws, and stock exchange listing requirements may, however, prescribe other qualifications to be able to serve on the board.²⁶

21. See *id.* §§ 109, 141(e), 145, 211, 220; *CA, Inc. v. AFSCME Emp’s Pension Plan*, 953 A.2d 227, 231 (Del. 2008) (addressing the interplay of stockholder power to amend the bylaws with the statutory grant of authority given to directors); *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) (“The internal affairs doctrine applies to those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders.”); DEL. CH. CT. R. 23.1.

22. *Director*, BLACK’S LAW DICTIONARY (10th ed. 2014).

23. See § 141(a) (“The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors.”); *Gorman v. Salamone*, No. 10183-VCN, 2015 Del. Ch. LEXIS 202, at *14 (Del. Ch. July 31, 2015) (“Section 141(a) . . . establishes ‘the bedrock statutory principle of director primacy’”); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003); see also *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000).

24. See § 141(b) (“The board of directors of a corporation shall consist of 1 or more members”).

25. See *id.*; see also *Friedman v. Dolan*, C.A. No. 9425-VCN, 2015 Del. Ch. LEXIS 178, at *35 (Del. Ch. June 30, 2015) (“The DGCL does not discuss minimum levels of attendance, committee service, or professional experience.”).

26. For example, an entity’s organizational documents may impose stock ownership requirements (typically found in a close corporation), or independence requirements (typically

Identification of a corporation's directors is theoretically a relatively straightforward task. Corporate statutes address the selection, resignation, removal, and terms of directors.²⁷ Directors are generally elected by the stockholders of the corporation on an annual basis.²⁸ Where, however, there is a newly created directorship or vacancy on the board, such opening can be filled by the stockholders or the board.²⁹ In either scenario—election or appointment—a director holds his or her spot on the board until a successor is elected and qualified.³⁰ In addition to the election and qualification of a successor, corporate statutes recognize three other scenarios under which the term of a director ends: death, resignation, and removal.³¹ A director is free to resign at any time upon notice to the corporation.³² With respect to removal, only the stockholders of the corporation may remove directors.³³ Removal

found in a public corporation). *See* § 141(b) (“The certificate of incorporation or bylaws may prescribe other qualifications for directors.”); *Rule 5605 Board of Directors and Committees, in The Nasdaq Stock Market Rules*, NASDAQ (2019), http://nasdaq.cchwallstreet.com/NASDAQTools/bookmark.asp?id=nasdaq-rule_IM-5605&manual=/nasdaq/main/nasdaq-equityrules/ [<https://perma.cc/TF9Q-RFK8>]; *Section 303A.01 Independent Directors, in NYSE Listed Company Manual*, NYSE, <https://nyseguide.srorules.com/listed-company-manual> (last updated Nov. 25, 2009) (defining and requiring a majority of “independent” directors to serve on listed companies’ boards) [<https://perma.cc/6AR8-UDZ4>].

27. *See* § 141(b) (number of directors; providing for a minimum of one director); *id.* (the only statutory criteria for directors is that they be a natural person); *id.* (resignation of directors); § 141(d) (classified boards of directors); *id.* (directors designated by special classes or series of stock); § 141(k) (shareholder removal of directors); § 223 (filling vacancies on the board); § 225(c) (judicial removal of directors). Some of the director statutes cited herein are default provisions; thus, the process and procedures surrounding directors may be provided for in a combination of organizational documents (i.e., the corporate charter and bylaws) and the corporate statute.

Corporate statutes make clear the process and procedures regarding the selection and tenure of directors; however, actual implementation of those processes and procedures at any one corporation can result in uncertainty. *But see* Velasco, *supra* note 19, at 410 (“The role of the director in the corporation is clearly defined.”).

28. *See* § 211 (providing for the annual meeting of stockholders for holding the election of directors). A corporation's certificate of incorporation may provide for a staggered board of 1, 2 or 3 years, in which case only some (not all) of the directors are up for election in any one year. *Id.* § 141(d) (providing for staggered boards).

29. *See id.* § 223(a).

30. *See id.* §§ 141(b), 223. In the case of a staggered board, Section 223 makes clear that a director filling a vacancy or newly created directorship “shall hold office until the next election of the class for which such directors shall have been chosen, and until their successors shall be elected and qualified.” *Id.* § 223(b).

31. *See id.* § 141(b), (k); *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 400 (Del. 2010) (stating that the Delaware General Corporation Law contains “procedural methods by which the term of a sitting director can be brought to a close: first, where the director's successor is elected and qualified; second, if the director resigns; or third, if the director is removed”).

32. *See* § 141(b).

33. *See id.* § 141(k). Directors may not remove fellow directors. *See also* BALOTTI &

may be with or without cause, except in instances of cumulative voting or classified boards.³⁴

Clarity regarding the identity of the directors of the corporation at any one point in time is of paramount importance. The board is the backbone of the corporate enterprise, charged with ultimate responsibility of managing the corporation's business and affairs.³⁵ Because directors must act as a collective body, a corporation can become immobilized when controversy surrounds the validity of just one individual's director status.³⁶ Accordingly, in addition to setting forth the process and procedures surrounding director selection and removal, corporate statutes further provide an avenue for expedient judicial relief where questions exist surrounding the identity of the proper directors of an entity.³⁷

B. *Stockholders*

Stockholder (n): "Someone who owns or holds a share or shares in a company, esp. a corporation."³⁸

Corporate law describes stockholders as the owners of, and residual claimants to, the corporation.³⁹ This is because stockholder

FINKELSTEIN, *supra* note 1, § 4.4.

34. See § 141(k).

35. See *id.* § 141(a); CLARK, *supra* note 8, at 22 ("The model behind corporate law's treatment of authority is one of a unilaterally controlled flow of authority from a single wellspring of power [(the board)] rather than a bubbling up and flowing together of many individual sources of personal power.") (alteration in original); Thompson, *supra* note 2, at 108 ("The fulcrum of corporate governance for Delaware is clear: All corporate power is to be exercised by or under the direction of the board of directors.").

36. Directors are only authorized to act collectively, and not individually. CHARLES R. T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 150 (8th ed. 2017) ("[D]irectors' management power must be exercised collectively and by majority rule, and individual directors are not given general agency power to deal with outsiders.").

37. See § 225(a); 2 EDWARD P. WELCH ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 225.01 (6th ed. 2019). This includes resolving disputes arising from director elections, appointments, resignations, and removals. See, e.g., § 225(a); Martin v. Med-Dev Corp., C.A. No. 10525-VCP, 2015 Del. Ch. LEXIS 272, at *35–50 (Del. Ch. Oct. 27, 2015) (addressing the validity of a director resignation); Hockessin Cmty. Ctr., Inc. v. Swift, 59 A.3d 437, 459–60 (Del. Ch. 2012) (addressing removal dispute). Further, "[t]he court also has jurisdiction to determine the right of individuals to hold office even if such individuals are not subject to the jurisdiction of the court." WELCH ET AL., *supra*, § 225.01 (citing Grossman v. Liberty Leasing Co., 295 A.2d 749, 752 (Del. Ch. 1972)).

38. *Stockholder*, BLACK'S LAW DICTIONARY (10th ed. 2014).

39. See ROBERT W. HAMILTON & RICHARD A. BOOTH, BUSINESS BASICS FOR LAW STUDENTS 290, 294–95 (4th ed. 2006) ("The corporate model that appears in state incorporation statutes assumes that stockholders are the ultimate owners of the enterprise

status is tied to ownership of shares of stock—common stock or preferred stock—of the corporation. Shares represent a unit of interest in the corporation that entitles the holder to certain rights, powers, and preferences vis-à-vis the corporation.⁴⁰ Under statutory defaults, “there is no limit on the number of stockholders or the number of shares that a corporation may issue. A corporation may have thousands or even millions of stockholders.”⁴¹ Facebook Inc., for example, reported in its Form 10-K for 2018 that as of December 31, 2018, it had 2.385 billion shares of Class A common stock issued and outstanding and 469 million shares of Class B common stock issued and outstanding, held by approximately 3780 stockholders of record and forty-one stockholders of record, respectively.⁴²

Similar to directors, the law provides a means of definitively determining stockholder status. Corporate statutes prescribe in detail the procedures surrounding the creation, issuance, transfer,

. . . .”); O’KELLEY & THOMPSON, *supra* note 36, at 152 (“[T]he holders of those shares are the corporation’s risk bearers and residual claimants.”).

40. The specific rights, powers, and preferences attached to any class or series of stock must be set forth in the corporation’s certificate of incorporation. § 102(a)(4); *see* ALLEN ET AL., *supra* note 2, at 118. “Under their share contract and by virtue of their status as owners of shares, shareholders have three classes of rights against the corporation: (1) rights as to control and management, (2) proprietary rights, and (3) remedial and ancillary rights.” COX & HAZEN, *supra* note 1, at 718–19. As one prominent corporate casebook explains:

Corporate law everywhere provides that equity investors in the corporate entity legally own something distinct from any part of the corporation’s property: They own a share interest. This share, or stock, is their personal legal property, and generally . . . such a share may be transferred together with all rights that it confers.

ALLEN ET AL., *supra* note 2, at 99.

41. HAMILTON & BOOTH, *supra* note 39, at 290. While corporate statutes do not limit the number of shares a corporation may issue, the charter does. *See* § 102(a)(4) (requiring the charter to set forth the total number of shares a corporation is authorized to issue as well as the specific allocation of those shares across different classes or series of stock). Further, although state corporate statutes do not limit the number of shares any one person or entity can own, such limits may be provided for in the entity’s governing documents, private contracts such as stockholder agreements or federal regulations. *See* § 151(a) (stating that limitations, special rights or restrictions on stock shall be set forth in the certificate of incorporation). Defensive devices and provisions such as poison pills and anti-takeover statutes, while not limiting how many shares a stockholder can own, effectively do so through penalties resulting from hitting certain ownership thresholds. *See* § 203 (restricting “business combinations” with stockholders owning “15% or more of the outstanding voting stock of the corporation”); *Moran v. Household Int’l, Inc.* 500 A.2d 1346, 1349 (Del. 1985) (explaining how a rights plan, or “poison pill,” operates).

42. Facebook, Inc., Annual Report (Form 10-K) 31, 79 (Jan. 31, 2019). The 3780 stockholders of record for the Class A common stock is likely an underestimate, as the company acknowledges that “[b]ecause many of our shares of Class A common stock are held by brokers and other institutions on behalf of stockholders, we are unable to estimate the total number of stockholders represented by these record holders.” *Id.* at 31.

repurchase, and record keeping for shares of stock.⁴³ A corporation must be able to easily identify its stockholders and is statutorily required to maintain a “continuing record of stockholdings” including the names, addresses, and number of shares registered to each stockholder of record as well as a ledger reflecting any transfers of stock.⁴⁴ This stock ledger then serves as “the only evidence as to who are the stockholders entitled . . . to examine the list [of stockholders] or to vote . . . at any meeting of stockholders.”⁴⁵

While stockholders generally have limited participatory rights in managing the corporate enterprise, they are statutorily vested with certain election and approval rights.⁴⁶ Being able to determine with precision who is entitled to vote is thus imperative to establish the validity of corporate decision making and actions. On the front end, in addition to stock ledger requirements, state statutes set forth bright line rules for setting the record dates to determine who receives notices of meetings, who can vote at meetings, and who can act by written consent.⁴⁷ Inspectors are then appointed by a corporation to (1) determine the “number of shares outstanding and the voting power of each,” (2) “[d]etermine the shares represented at a [stockholders’] meeting and the validity of proxies and ballots,” (3) “[c]ount all votes and ballots,” (4) determine and keep “record of the disposition of any challenges made to any determination by the inspectors,” and (5) prepare a written report and certify the foregoing determinations.⁴⁸ Then on the back

43. See, e.g., § 102(a)(4) (capitalization structure must be in the certificate of incorporation); § 151 (classes and series of stock); § 152 (issuance of stock); § 158 (stock certificates); § 213 (record date); § 219 (list of stockholders); WELCH ET AL., *supra* note 37, § 213.01 (“A corporation should be able readily to identify its stockholders from the corporation’s records.”) (citing *In re Giant Portland Cement Co.*, 21 A.2d 697, 701 (Del. Ch. 1941)).

44. §§ 219, 220 (2019); see also *Funkhouser v. Fusion Sys. Corp.*, C.A. No. 12895 (Del. Ch. Mar. 17, 1993) (oral ruling); *Magill v. N. Am. Refractories Co.*, 128 A.2d 233, 236–37 (Del. 1956); *In re Giant Portland Cement Co.*, 21 A.2d at 701; WELCH ET AL., *supra* note 37, § 219.03 (“It is implicit in sections 219 and 220 that Delaware corporations have an affirmative duty to maintain a stock ledger.”).

45. § 219(c) (2019).

46. See Velasco, *supra* note 19, at 430–31 (“Shareholder voice is limited to a few instances explicitly authorized by statute.”); see, e.g., § 211 (election of directors); § 242 (approval of amendments to the certificate of incorporation); § 251 (approval of mergers); § 271 (approval of sales of all or substantially all of a corporation’s assets).

47. See § 213. State statutes also provide for record date setting with respect to dividends and distributions. *Id.*

48. *Id.* § 231(a)–(b).

end, statutes such as Section 225 of the Delaware General Corporation Law provide the courts with the power to review and determine the validity of *any* stockholder vote or written consent.⁴⁹

C. Officers

Officer (n): “Someone who holds an office of trust, authority, or command. . . . In corporate law, the term refers esp. to a person elected or appointed by the board of directors to manage the daily operations of a corporation, such as a CEO, president, secretary, or treasurer.”⁵⁰

While as a formal legal matter the board is the focal point of corporate power, its actual role in corporate decision making is much more modest. It is officers that largely shoulder the decision-making duties.⁵¹ The discrepancy between the allocation of formal legal authority to the board and actual exercise of authority by officers is particularly evident in public corporations.⁵² As is consistently noted in the literature and cases: “Today, directors in the modern public corporation select senior officers ‘and then step

49. See *id.* § 225(a) (addressing the review of the election or removal of directors and officers); § 225 (b) (addressing the review of any vote of stockholders on all matters other than the election of directors).

50. *Officer*, BLACK’S LAW DICTIONARY (10th ed. 2014).

51. See *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 340 (Del. Ch. 2008) (stating that “[officers] have the far more onerous task of operating the company each day”); BALOTTI & FINKELSTEIN, *supra* note 1, § 4.10[A], [C]; Claire Hill & Brett McDonnell, *Executive Compensation and the Optimal Penumbra of Delaware Corporate Law*, 4 VA. L. & BUS. REV. 333, 343 (2009); Ribstein, *supra* note 16, at 188 (“[T]he corporate form of centralized management involves dividing management between professional full-time executives who manage the firm day-to-day and directors who oversee the board and set policy.”); see also CLARK, *supra* note 8, at 105–06. Section 3.01 of the ALI Principles of Corporate Governance explicitly recognizes this delegation and reference principal senior executives alongside the board as having management authority. See PRINCIPLES OF CORPORATE GOVERNANCE, § 3.01 (AM. LAW INST. 2019) [hereinafter ALI PRINCIPLES]; *id.* at cmt. a (stating that “[section] 3.01 reflects long-established corporate practice” that it is the officers and not the board that operate the business of the corporation).

52. See *Grimes v. Donald*, No. CIV.A. 13358, 1995 Del. Ch. LEXIS 3, at *25–26 (Del. Ch. Jan. 11, 1995) (“Of course, given the large, complex organizations through which modern, multi-function business corporations often operate, the law recognizes that corporate boards, comprised as they traditionally have been of persons dedicating less than all of their attention to that role, cannot themselves manage the operations of the firm, but may satisfy their obligations by thoughtfully appointing officers, establishing or approving goals and plans and monitoring performance.” (citations omitted)), *aff’d*, 673 A.2d 1207 (Del. 1996); see also CLARK, *supra* note 8, at 105–06; MYLES L. MACE, DIRECTORS: MYTH AND REALITY 41, 58, 70, 73, 76, 191 (1971); Myles L. Mace, *Directors: Myth and Reality—Ten Years Later*, 32 RUTGERS L. REV. 293, 294–97 (1979).

aside, intervening only in times of crisis, or on very large issues such as a merger or major refinancing.”⁵³

In comparison to directors and stockholders, corporate statutes and case law provide limited guidance surrounding officers.⁵⁴ Corporate statutes merely specify that officers are to be elected by the board of directors unless otherwise provided in the corporation’s governing documents.⁵⁵ Historically, corporate statutes also articulated the traditional officer roles to be occupied within the corporation. Chief executive officer, president, vice president, treasurer, and secretary were officer positions typically cited in statutes.⁵⁶ As modern corporation law became more enabling, the specific statutory nomenclature regarding officers disappeared in favor of more general permissive language.⁵⁷ Today, corporations have considerable freedom to designate officers with whatever titles and duties they choose.⁵⁸ As a prominent treatise on corporate law advises: “A

53. Megan Wischmeier Shaner, *Stockholder Litigation, Fiduciary Duties, and the Officer Dilemma*, in RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 334 (Sean Griffith et al. eds. 2018) (quoting Lynn A. Stout, *On the Proper Motives of Corporate Directors (or, Why You Don’t Want to Invite Homo Economicus To Join Your Board)*, 28 DEL. J. CORP. L. 1, 18 (2003)). *But see* Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987 (2010) (describing the decline in executive power).

54. *See* DeMott, *supra* note 2, at 848 (discussing how officers have been overlooked in corporate law discussions and literature); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1617 (2005); Stephen P. Lamb & Joseph Christensen, *Duty Follows Function: Two Approaches to Curing the Mismatch Between the Fiduciary Duties and Potential Personal Liability of Corporate Officers*, 26 NOTRE DAME J.L., ETHICS & PUB. POL’Y 45, 46–47 (2012); Shaner, *supra* note 9; Megan W. Shaner, *The (Un)Enforcement of Corporate Officers’ Duties*, 48 U.C. DAVIS L. REV. 271 (2014); Johnson, *supra* note 9, at 6.

55. *See, e.g.*, DEL. CODE ANN. tit. 8, § 142; MODEL BUS. CORP. ACT § 8.40(a) (AM. BAR ASS’N 2016) (“A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.”); *see also* Gorman v. Salamone, No. 10183-VCN, 2015 Del. Ch. LEXIS 202, at *11 (Del. Ch. July 31, 2015) (holding that the board of directors, and not the stockholders, has the authority to remove and replace officers).

56. *See, e.g.*, § 142(a) (1967) (requiring a corporation to have “a president, secretary, and treasurer”); MODEL BUS. CORP. ACT § 50 (AM. BAR ASS’N 1969).

57. *See* § 142 (2019) (“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”); COX & HAZEN, *supra* note 1, at 335. Under Delaware law, the only positive limitations on selecting officers are that a corporation must have (1) an officer with the authority to sign instruments to be filed with the Secretary of State and stock certificates, and (2) an officer who has the duty to record stockholders’ meetings and directors’ meetings. §§ 142(a), 158.

58. *See* WELCH ET AL., *supra* note 37, § 142.02, 4-354.1 n.5 (“Professor Folk commented in the first edition of this treatise that the result of the 1970 amendment was to give a corporation freedom to designate its executives by whatever names it wishes and to allocate the managerial power delegated to executives.”) (citing ERNEST L. FOLK, III, THE DELAWARE GENERAL CORPORATION LAW § 142 cmt. 2 (1st ed. 1972)).

corporation need not have a president or a vice president or a secretary or a treasurer, as such; it could have a ‘czar’ or a ‘potentate’ and a ‘recordkeeper.’”⁵⁹ While these specific titles have not come into vogue, corporate America has seen some creative variations on the traditional officer titles. For example, Stonyfield Farm CEO Gary Hirshberg’s official title was “CE-Yo,” Steve Jobs’s official title at Apple was “iCEO,” Twitter CFO Adam Bain was the corporation’s “President of Revenue,” and even more unconventional, the CEO’s title at SCVNGR, Inc. is “Chief Ninja.”⁶⁰ While a bit extreme, these examples illustrate that identification of corporate officers is not always a straightforward task.

At the other end of the spectrum, individuals working at a corporation may be given officer-like titles when in substance their role is more akin to a rank-and-file employee. “A larger corporation may have a number of vice presidents, assistant vice presidents, assistant secretaries, assistant treasurers, and so on As the number of vice presidents in corporations has proliferated, super vice presidencies under such titles as ‘executive vice president’ or ‘senior vice president’ have been created”⁶¹ In the context of short-swing liability under federal securities laws, for example, the courts frequently point out the practice of giving individuals honorary officer titles with no commensurate responsibility or authority.⁶² Given the flexibility afforded to corporations in fashioning corporate offices and titles, officers are not fungible across corporations in the same way as directors.⁶³

59. BALOTTI & FINKELSTEIN, *supra* note 1, § 4.10[C].

60. Alyson Shontell, *13 Completely Ridiculous Tech Executive Titles*, BUSINESS INSIDER (Sept. 13, 2010, 12:10 PM), <https://www.businessinsider.com/completely-ridiculous-ceo-titles-2010-9> [<https://perma.cc/GNS3-RCXJ>].

61. COX & HAZEN, *supra* note 1, at 121.

62. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Livingston*, 566 F.2d 1119, 1122 (9th Cir. 1978) (finding that despite title, the individual lacked any power of an actual executive officer); *Rosenbloom v. Adams, Scott & Conway, Inc.*, 552 F.2d 1336, 1338–39 (9th Cir. 1977) (finding the plaintiff’s corporate title to be hollow).

63. The selection, removal, term, and duties of directors are relatively standardized across all corporations given the statutory framework within which these actors exist. The role of “officer,” on the other hand, is not statutorily structured to the same degree. Moreover, state and federal law have eliminated the ability to create figurehead or “dummy” directors. See *In re Puda Coal Inc. Stockholders Litigation*, No. 6476-CS, transcript of bench ruling issued (Del. Ch. Feb. 19, 2013). As explained by one well-known treatise:

The rationale for not permitting director titles and position without concomitant obligations is that there is a “holding out” and thus justifies imposition of fiduciary obligations. The same may not be true of honorary or purely titular officers. Unlike figure-head directors, merely making someone a vice president may not confer any authority nor impose any special fiduciary obligation.

Further complicating the matter is that the number of officers a corporation may employ has no limits. With respect to directors, state statutes make clear that the corporation's governing documents shall define the range, if not the exact number, of directors that can serve on the board.⁶⁴ No such analogous requirement exists for officers. And it would be the rare charter or bylaws that set forth a range or exact number of officers for the corporation. More often, bylaws provide for a few specific offices and then include broad authorizing language empowering the board to create such offices and appoint such other officers as the board may, in its discretion, deem necessary.⁶⁵ The lack of boundaries on the number of individuals that can serve as an officer coupled with the wide discretion in the titling of those individuals, means the potential for (and actual) abstruseness in identifying who occupies the officer role, as that role is contemplated in corporate jurisprudence, is great.

In sum, state corporate statutes and case law, as well as the internal governance documents of corporations, fail to provide a clear means for determining "officer" status. The next section summarizes efforts to define the role of corporate "officer" in other areas of the law. As quickly becomes clear in reviewing these definitions, there is no cohesive delineation of "officer" status; rather, the legal meaning of officer is relatively fluid.

II. COMPETING DEFINITIONS

As previously discussed, there is a dearth of corporate case law or statutes defining "officer." Identification of corporate officers has, however, implications beyond state corporate law. Securities laws, bankruptcy laws, jurisdictional statutes, and others specifically take into account the corporate "officer" position in their rules

⁵ THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 13.24 (6th ed. 2009).

⁶⁴. See DEL. CODE ANN. tit. 8, § 141(b) ("The number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors . . ."); MODEL BUS. CORP. ACT § 8.03 (AM. BAR ASS'N 2016) ("A board of directors shall consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.").

⁶⁵. See, e.g., BALOTTI & FINKELSTEIN, *supra* note 1, at art. IV ("The officers of the corporation shall consist of . . . such other officers as the Board of Directors may from time to time determine, each of whom shall be elected by the Board of Directors . . ."); see also O'Hare *supra* note 2, at 566 (reviewing public company bylaws and finding only boilerplate language).

and regulations. The following sections describe how these other areas of the law attempt to identify the officers of the corporation. While the policy considerations underlying the definitions of “officer” in each of these other areas of the law may be similar or different to those animating “officer” for purposes of corporate law, the articulation and identification of individuals occupying the officer role are nevertheless instructive. In fashioning its own definition, state corporate law can learn from the struggles legislators, courts, and parties have faced in trying to discern who is and is not an officer of the corporation.

A. *Securities Law*

Federal securities laws make reference to the “officers” of a corporation in several different contexts, imposing disclosure requirements, certification requirements, and other obligations on individuals occupying this role. The definition of “officer” for purposes of the rules promulgated under the Securities Exchange Act of 1933 (“the 1933 Exchange Act”) and the Securities and Exchange Act of 1934 (“the 1934 Exchange Act”) is set forth in Rule 3b-2 and Rule 405, respectively: “The term *officer* means a president, vice president, secretary, treasury or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated.”⁶⁶ Rule 3b-7 further defines “executive officers” as “president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant.”⁶⁷ These definitions of officer and executive officer are relevant for obligations under the 1933 Exchange Act and 1934 Exchange Act such as disclosure of compensation and bonuses, disclosure of loans exceeding certain thresholds, certification of certain filings, whistleblower provisions, and disclosure of hedging practices.⁶⁸

66. 17 C.F.R. § 240.3b-2 (2019); *see* § 230.405 (Rule 405 containing the same general definition of “officer” for purposes of the 1933 Act).

67. § 240.3b-7; *see* § 230.501(f) (the definitional section for “executive officer” relating to unregistered sales made pursuant to Regulation D).

68. *See* Disclosure of Hedging by Employees, Officers, and Directors, 84 Fed. Reg. 2402, 2402–03, 2425–26 (Feb. 6, 2019) (to be codified at 17 C.F.R. pts. 229, 240); Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 787 § 402, amending section 13 of the 1934 Act,

Following the stock market crash of 1929, Congress enacted Section 16 of the 1934 Exchange Act to address, among other things, insider trading and short-swing profits.⁶⁹ The reporting and automatic liability provisions in Section 16 apply only to directors, officers, and beneficial owners of more than ten percent of any class of equity security of an issuer corporation.⁷⁰ Originally, the definition of “officer” in Section 16 was quite broad: “a president, vice-president, treasurer, secretary, comptroller, and any other person who performs for an issuer, whether incorporated or unincorporated, functions corresponding to those performed by the foregoing officers.”⁷¹

Despite a facially straightforward definition, early cases applying Section 16 to alleged officers disagreed as to the proper interpretation and application of that term.⁷² In analyzing transactions covered by Section 16, courts adopted three different approaches to determining who is an officer. The first test uses an objective approach, focusing solely on the title of the individual at issue.⁷³ The mere status of an individual triggers application of the statute. On the other end of the spectrum, some courts applied a subjective approach, looking beyond an individual’s title to his or her job duties, access to information, authority to influence corporate affairs, and decision making.⁷⁴ These courts reason that a more functional

15 U.S.C.A. § 78m (prohibiting loans to executive officers); Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 787 § 403 (requiring the CEO and CFO to certify financial statements).

69. See Brad B. Erens, *New Section 503(c) of the Bankruptcy Code—Who Is an “Officer” Under the KERPA Amendment?*, 21 No.7 ANDREWS CORP. OFFICERS & DIRECTORS LIAB. LITIG. REPORTER 14, at *3–4 (2005). In addition, section 16(a)’s notice of stock ownership requirements by corporate insiders like “officers” alerts investors to insiders engaging in transactions involving shares of the corporation. See Securities Exchange Act of 1934, § 16(a), 15 U.S.C. § 78p(a) (2012); 4 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 13.1[1]–[2] (5th ed. 2005).

70. Securities Exchange Act of 1934 § 16(a), 15 U.S.C. § 78p(a) (2012); see also THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 530 (6th ed. 2009).

71. Lockheed Aircraft Corp. v. Rathman, 106 F. Supp. 810, 812 (S.D. Cal. 1952).

72. See HAZEN, *supra* note 70, at 531; David E. Gardels, *Section 16(b) of the Securities and Exchange Act of 1934: Is a Vice President an Officer*, 58 NEB. L. REV. 733 (1979) (discussing case law addressing the definition of “officer” under Section 16(b) of the 1934 Exchange Act); A. John Murphy, *Who Is an Officer Under Section 16(b)—Who Knows*, 12 SAN DIEGO L. REV. 378, 378 (1975) (exploring the “spreading confusion and tests that are proliferating from the federal courts in their quest to resolve the dilemma of ‘who is an officer?’ under Section 16(b) . . .”).

73. See, e.g., Adler v. Klawans, 267 F.2d 840, 845 (2d Cir. 1959); Ferraiolo v. Newman, 259 F.2d 342, 344 (6th Cir. 1958).

74. See, e.g., C.R.A. Realty Corp. v. Crotty, 878 F.2d 562, 566–67 (2d Cir. 1989); Colby v. Klune, 178 F.2d 872, 873 (2d Cir. 1949).

analysis for determining “officer” status furthers the purpose and goals of the statute.⁷⁵ Drawing from both the objective and subjective approaches arose the “title-with-exception” analysis which provides that an individual’s title creates a presumption of “officer” status, which can be rebutted upon a showing that functionally the individual was not in a position to influence corporate decision making or have access to confidential information.⁷⁶

Later revisions to the rules promulgated under Section 16 are viewed as having put to rest at least some, if not all, of the uncertainty in determining who qualifies as an officer that arose from the competing approaches applied by the courts.⁷⁷ Additionally, Section 16’s “officer” definition was revised and narrowed in Rule 16a-1(f) so that Section 16 would apply to “executive officers” and not “officers” more broadly.⁷⁸ Rule 16a-1(f) provides that

[t]he term “officer” shall mean an issuer’s president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer.⁷⁹

These revisions were intended to clarify that Section 16’s responsibilities and liabilities are not applicable to those individuals who are an officer in title only, thereby rejecting the objective-only approach applied by some courts.⁸⁰ The revisions and the SEC’s guid-

75. See *C.R.A. Realty Corp.*, 878 F.2d at 566–67 (reasoning that a functional test would best serve the congressional purpose in enacting Section 16).

76. See, e.g., *Winston v. Fed. Exp. Corp.*, 853 F.2d 455, 457–58 (6th Cir. 1988); *Nat’l Med. Enters., Inc. v. Small*, 680 F.2d 83, 84 (9th Cir. 1982).

77. See HAZEN, *supra* note 70, at 531.

78. See *Ownership Reports and Trading by Officers, Directors and Principal Stockholders*, 53 Fed. Reg. 49,997, 50,000 (Dec. 13, 1988 (codified at 17 C.F.R. pt. 240)). In defining “officer” more narrowly for purposes of Section 16 only, the Securities and Exchange Commission (“SEC”) stated that “of particular concern is the inclusion of all vice presidents in the definition [of “officer”] and that “[m]any businesses give the title of vice president to employees who do not have significant managerial or policymaking duties and are not privy to inside information.” *Id.* at 50,000; see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Livingston*, 566 F.2d 1119, 1121–22 (9th Cir. 1978) (finding that a corporation had 350 “executive vice presidents”).

79. 17 C.F.R. § 240.16a-1(f) (2018). The revised definition of “officer” only applies to Section 16 and the rules promulgated thereunder. See § 240.16a-1 (“Terms defined in this rule shall apply solely to section 16 of the Act and the rules thereunder.”).

80. See HAZEN, *supra* note 70, at 531. The SEC has stated that section 16 was “intended to apply to those officers who have routine access to material non-public information, not

ance related thereto indicate that a subjective analysis is necessary in determining “officer” status, however, the degree to which function versus title should be considered by the courts is not entirely clear.

In sum, courts applying federal securities laws have struggled with the relative weight given to an individual’s title versus what role their functions should play in determining whether an individual is an “officer” as contemplated in the statute and rules promulgated thereunder. Even where statutes and regulations, such as Section 16 and Rule 16a-1(f), appear to articulate a clear definition for “officer,” ambiguity with respect to the exact ambit of that definition exists.

B. *Bankruptcy Law*

When a corporation is a debtor in bankruptcy, federal bankruptcy law imposes additional scrutiny on the review and approval of transactions, fees, and claims involving “insiders” of the entity. For example, included in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 were amendments to the U.S. Bankruptcy Code that placed stringent limits on the ability of a court to approve “key employee retention plans” (KERPs) and severance payments to insiders in corporate reorganizations.⁸¹ Another example is Section 547 of the Bankruptcy Code (“Section 547”), which imposes a longer preferential payment reach-back period to negate transfers of debtor property made to insiders—a one-year preference period for insiders as opposed to a ninety-day preference period for all others.⁸²

An “insider” as defined in the Bankruptcy Code includes, among others, the directors and officers of a debtor corporation.⁸³ “Officer” is not defined in the Bankruptcy Code and there has been limited case law interpreting the term.⁸⁴ In those instances where bankruptcy courts have had to determine “officer” status, they generally

those with particular titles.” Ownership Reports and Trading by Officers, Directors and Principal Stockholders, 53 Fed. Reg. 49,997, 50,000 (proposed Dec. 13, 1988) (to be codified at C.F.R. pts. 229, 240, 249, 270, 274).

81. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 331, 119 Stat. 23, 102 (codified at 11 U.S.C. § 503(c) (2012)).

82. § 547.

83. § 101(31)(B).

84. See *In re Glob. Aviation Holdings Inc.*, 478 B.R. 142, 147 (Bankr. E.D.N.Y. 2012) (citing *In re Borders Grp. Inc.*, 453 B.R. 459, 468 (Bankr. S.D.N.Y. 2011)); Erens, *supra* note

cite to the dictionary definition of “officer.”⁸⁵ The majority of courts have also made clear, however, that the presence or absence of traditional officer titles or words is not dispositive in determining “officer” status under the Code.⁸⁶ The courts instead have applied a case-by-case, functional approach taking into account an individual’s involvement in the affairs of the corporation and authority over critical financial decisions, dictating policy, and/or the disposition of assets.⁸⁷

One important takeaway from the cases interpreting “officer” is that the exact boundaries of “officer” status appear to shift depending on the particular section of the Bankruptcy Code at issue. Courts look to the particular purpose or policy underlying a statutory section in crafting its interpretation of “officer” and concluding whether an individual falls under that category.⁸⁸ For example, in the context of Section 547—the preferential payment reach-back—

69, at *1; Paul R. Hage & Partick R. Mohan, *Recent Developments in Section 503—Administrative Expenses & Key Employee Retention, Incentive and Severance Plans*, in NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 779, 823 (2013 ed.).

85. See *In re Glob. Aviation*, 478 B.R. at 147–48 (stating that “officer” is defined as a “person elected or appointed by the board of directors to manage the daily operations of a corporation”) (internal quotation marks omitted); *In re Foothills Tex., Inc.*, 408 B.R. 573, 579 (Bankr. D. Del. 2009) (stating that “in considering a statute the Court starts with its plain meaning” and then looking to dictionary definitions of “officer”); cf. *In re Borders Grp. Inc.*, 453 B.R. at 468 (citing the dictionary definition of “officer”).

86. See *In re Glob. Aviation*, 478 B.R. at 148; *In re Foothills Tex., Inc.*, 408 B.R. at 579 (“[T]he mere title of a person does not end the inquiry.”); Office of U.S. Tr. v. Fieldstone Mortg. Co., 2008 U.S. Dist. LEXIS 91479, at *8 (D. Md. 2008) (lower court stating that “the Court is not precluded by the terminology that I used from taking evidence from behind the titles that people hold in any given situation”). *But see id.* at *18–20 (reversing the bankruptcy court and holding that the important inquiry is whether the individual was appointed or elected by the board). In *NMI Sys., Inc. v. Pillard (In re NMI Sys., Inc.)*, for example, the court held that a vice president was not an officer for the purposes of the “insider” definition because his title was conferred for marketing purposes only. 179 B.R. 357, 370 (Bankr. D.D.C. 1995).

87. See *In re Glob. Aviation*, 478 B.R. at 148; *In re Borders Grp. Inc.*, 453 B.R. at 469; *Fieldstone Mortg. Co.*, 2008 U.S. Dist. LEXIS 91479, at *8 (“[T]he question is whether they are officers in the traditional sense, in the sense that they are making decisions, they’re acting on behalf of the corporation, they are in charge, they are insiders.”) (alteration in original); *In re 9281 Shore Rd. Owners Corp.*, 187 B.R. 837, 853 (E.D.N.Y. 1995). *But see Fieldstone Mortg. Co.*, U.S. Dist. LEXIS 91479, at *1–4 (“Insofar as the bankruptcy court understood the definition of ‘officer’ to require additional ‘traditional’ elements, like major decision-making, it expanded the term beyond its ordinary legal meaning.”).

88. See, e.g., *In re NMI Sys. Inc.*, 179 B.R. at 369–70; see *C.R.A. Realty Corp. v. Crotty*, 878 F.2d 562, 566–67 (2d Cir. 1989) (concluding that the test for “officer” status for purposes of Section 16(b) of the 1934 Exchange Act was whether the individual had access to confidential information that would allow the individual to engage in the actions the section sought to prohibit). *But see In re Foothills Tex., Inc.*, 408 B.R. at 583 (disagreeing “that the meaning of ‘officer’ should vary according to the context in which the word is used”).

the courts have focused on the individual's ability to dictate financial decisions and have access to sensitive financial information in determining "officer" status.⁸⁹ In support of its attention to financial controls, the courts reference the policy and purpose underlying Section 547—the prevention of insiders with access to nonpublic financial information influencing the disposition of assets to their benefit and the detriment of the non-insider creditors.⁹⁰ In contrast, KERP challenges under Section 503—which are primarily concerned with the prevention of self-interested executive compensation—elicit a broader functional assessment by the courts where an individual's more general responsibilities and authority to influence corporate decision-making (not just financial decisions) are taken into account for determining "officer" status.⁹¹ Yet nowhere in the Bankruptcy Code is there an indication that "officer" is intended to have this type of definitional fluidity across provisions. Rather, it is a product of the lack of clarity in defining "officer" not only in bankruptcy law, but across disciplines.⁹²

C. *Jurisdictional Statutes*

In 2004, the Delaware legislature amended its implied consent statute to include certain officers of Delaware corporations. Specifically, Section 3114(b) of the Delaware Code provides that individuals who accept election or appointment as an officer (or serve in such capacity) are deemed to have consented to personal jurisdiction in the state of Delaware.⁹³ For purposes of the statute, "officer" is defined as one who:

89. See, e.g., *In re NMI Sys. Inc.*, 179 B.R. at 370 (applying the Bankruptcy Code's preference statute and tying "officer" status to whether an individual "was . . . in the inner circle making the company's critical financial decisions").

90. See *id.* at 368–69 (distinguishing "officer" status under securities laws from bankruptcy laws in that the policies behind the statutes are different and stating that "the employee's functions and status, viewed relative to the statute's goals in using the term 'officer,' ought to control whether the person is an officer"); *In re Erin Food Svcs., Inc.*, 980 F.2d 792, 796 (1st Cir. 1992).

91. See, e.g., *In re Glob. Aviation*, 478 B.R. at 148.

92. See *In re NMI Sys. Inc.*, 179 B.R. at 368 (noting the lack of case law addressing the meaning of the term "officer"); see also Erens, *supra* note 69, at *2–4.

93. DEL. CODE ANN. tit. 10, § 3114(b); see also Eric A. Chiappinelli, *Jurisdiction over Directors and Officers in Delaware*, in RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 316, 319 (Sean Griffith et al. eds., 2018); Eric A. Chiappinelli, *The Underappreciated Importance of Personal Jurisdiction in Delaware's Success*, 63 DEPAUL L. REV. 911, 944 (2014); Winship, *supra* note 3 (discussing Delaware's implied consent statutes).

- (1) Is or was the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful;
- (2) Is or was identified in the corporation's public filings with the United States Securities and Exchange Commission because such person is or was [one] of the most highly compensated executive officers of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful; or
- (3) Has, by written agreement with the corporation, consented to be identified as an officer for purposes of this section.⁹⁴

In defining "officer," the statute takes a more formulaic approach, focusing on the titles of individuals within the corporate enterprise in part (b)(1), and the identification as a highly compensated executive officer for purposes of certain federal securities regulations reporting requirements in (b)(2). Interestingly, while the Delaware General Corporation Law has moved to eliminating any specific titles in its provisions, the jurisdictional statute that applies to corporate participants includes them. Further, in contrast to bankruptcy law and other federal securities regulations, Delaware's jurisdictional statute lacks a catch-all provision in the definition of "officer" to pick up individuals who are functional equivalents of those titled offices, instead relying on compensation levels to serve as a proxy for "officer" status.

D. *ALI Principles*

The American Law Institute ("ALI") is an independent organization founded in 1923 for the purpose of bringing clarity to different areas of the law through the articulation of basic legal principles, while also providing constructive assessments of the law and recommendations on what the law should be.⁹⁵ To that end, the ALI promulgates Restatements of the Law, Model Codes, and Principles of Law.⁹⁶ In 1994, the ALI published a study and set of recommendations in the area of corporate governance (the ALI Principles). A stated purpose of the project was "to clarify the duties and obligations of corporate directors and officers and to provide guidelines for discharging those responsibilities in an efficient

94. § 3114(b).

95. See *About ALI*, A.L.I., <https://www.ali.org/about-ali/> [<https://perma.cc/D395-TAWL>].

96. *Id.*

manner, with minimum risks of personal liability.”⁹⁷ Based in part on federal securities rules and regulations, the ALI Principles define “officer” as:

- (a) the chief executive, operating, financial, legal, and accounting officers of a corporation;
- (b) to the extent not encompassed by the foregoing, the chairman of the board of directors (unless the chairman neither performs a policy-making function other than as a director nor receives a material amount of compensation in excess of director’s fees), president, treasurer, and secretary, and a vice-president or vice-chairman who is in charge of a principal business unit, division, or function (such as sales, administration, or finance) or performs a major policymaking function for the corporation; and
- (c) any other individual designated by the corporation as an officer.⁹⁸

The ALI incorporates both function and labels in its definition. In Subsection (a), “officer” status arises out of a combination of the duties an individual performs as well as their status within the corporation (i.e., “chief”).⁹⁹ Subsection (b) then shifts to looking at the title of an individual while still preserving functional space with the catch-all category of “performs a major policymaking function for the corporation” as a whole.¹⁰⁰ Finally, Subsection (c) captures purely the corporation’s labeling of its participants as “officers” of the enterprise without reference to duties or function.¹⁰¹

Similar to the approach adopted by federal securities laws, the ALI tiers the legal consequences of “officer” status based on which part of the definition—(a), (b), or (c)—the individual satisfies.¹⁰² For example, the sections of the ALI Principles addressing the duty of care and the business judgement rule apply to all individuals falling under Section 1.27’s “officer” definition.¹⁰³ In contrast, only

97. ALI PRINCIPLES, *supra* note 51, *President’s Foreword* at XI, XXI.

98. *Id.* § 1.27; *see id.* at cmt. a (“Subsections (a) and (b) are derived in part from Rule 16a-1(f) under the Securities Exchange Act, Rule 405 under the Securities Act, and Federal Securities Code § 202(112).”).

99. *Id.* § 1.27 cmt. b (“The term ‘chief’ in Subsection (a) modifies each of the functions in that subsection. If, as sometimes occurs, the corporation designates more than one individual to hold an office encompassed within Subsection (a) (e.g., a two- or three-person office of the chief executive), all the individuals so designated should fall within that Subsection.”).

100. *See id.* § 1.27(b). Subsection (b) is narrower than the definition of “executive officer” of Rule 3b-7 of the Securities Exchange Act, upon which it is based. *See id.* § 1.27 cmt. c.

101. *See id.* § 1.27(c).

102. *See id.* § 1.27 cmt. d.

103. *See id.* § 4.01 (“A director or officer has a duty to the corporation to perform the director’s or officer’s functions in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent

individuals who qualify as “officer[s]” under Subsections (a) or (b) are considered “senior executive[s]” and are subject to provisions like disclosure of corporate opportunities.¹⁰⁴ Finally, individuals who are “chief” officers under Subsection (a) are further defined as “principal senior executives”¹⁰⁵ and in that capacity have additional rights and obligations in managing the corporate enterprise.¹⁰⁶

III. DEFINING “OFFICER” IN STATE CORPORATE LAW

The American legal system generally operates through a system of categories and consequences.¹⁰⁷ Corporate law is no different. State corporate law depicts directors, officers, and stockholders each as distinct categories of actors within the operations and governance of the corporation.¹⁰⁸ And membership in each of these categories carries with it distinct legal duties, rights, and liabilities.

While consequences are important, it is largely categorization that drives legal analysis and rulemaking.¹⁰⁹ Corporate law clearly envisions a distinct “officer” category,¹¹⁰ but it fails to articulate that role with any certainty, leaving it up to corporations to do so in their governing documents. To date, however, corporations fail

person would reasonably be expected to exercise in a like position and under similar circumstances. This Subsection (a) is subject to the provisions of Subsection (c) (the business judgment rule) where applicable.”)

104. See *id.* § 1.33 (“Senior executive’ means an officer described in Subsection (a) or (b) of § 1.27 (Officer).”); see also *id.* § 5.02 (Transactions with the Corporation).

105. See *id.* § 1.30 (“Principal senior executive’ means an officer described in Subsection (a) of § 1.27 (Officer).”).

106. See, e.g., *id.* § 3.01 (Management of the Corporation’s Business: Functions and Powers of Principal Senior Executives and Other Officers); § 5.15 (Transfer of Control in Which a Director or Principal Senior Executive Is Interested).

107. Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1158–59 (2010) (“Laws attach consequences to particular categories of behavior.”).

108. See, e.g., DEL. CODE ANN. tit. 8, § 145 (identifying the directors, officers, agents and employees of a corporation).

109. See Hickman & Hill, *supra* note 107, at 1185; cf. Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2074 (2017) (describing how the Illegal Immigration Reform and Immigration Responsibility Act of 1996 attaches deportation consequences based on categories of crimes committed by non-citizens).

110. See Iman Anabtawi & Lynn A. Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1257 (2008); R. Franklin Balotti & Megan W. Shaner, *Safe Harbor for Officer Reliance: Comparing the Approaches of the Model Business Corporation Act and Delaware’s General Corporation Law*, 74 LAW & CONTEMP. PROBS. 161 (2011); Johnson & Milon, *supra* note 54, at 1617; Lamb & Christensen, *supra* note 54, at 46; Shaner, *supra* note 53; Megan Wischmeier Shaner, *Restoring the Balance of Power in Corporate Management: Enforcing an Officer’s Duty of Obedience*, 66 BUS. LAW. 277 (2010).

to provide any meaningful specificity in this regard.¹¹¹ Moreover, courts and scholars have focused their efforts on expounding the legal consequences of “officer” status largely to the exclusion of the categorization issue.¹¹² As discussed in more detail *infra*, courts have made clear that there is a formal distinction in corporate law (1) between officers and directors, and (2) between officers and employees or agents.¹¹³ The officer-director and officer-agent divides trigger significant legal consequences vis-à-vis the individual officer, the corporation, and third parties; however, where those demarcations are, exactly, is left to speculation.

A. *Officers Versus Directors*

Officers are frequently grouped together with directors in discussions of corporate governance and described collectively as “corporate management.”¹¹⁴ Yet the officer clearly occupies its own discrete role in the corporate form.¹¹⁵ Legally and practically speaking, there is a formal distinction between the two types of corporate managers. Officers are selected by and serve at the pleasure of the board of directors.¹¹⁶ Further, officers, unlike the board, have no inherent authority to act on behalf of the corporation, rather they acquire it via delegation from the board or in the bylaws.¹¹⁷ Consequently, the typical division of managerial responsibilities within a corporation is (1) the board is tasked with setting

111. See O’Hare, *supra* note 2, at 566 (finding only boilerplate language regarding officers in a review of public company bylaws).

112. See, e.g., Johnson, *supra* note 9, at 5 n.9 (“This chapter does not address how ‘officers’ should be defined.”); O’Hare, *supra* note 2, at 563 (pointing out the issue but focusing on officer disclosure obligations instead); Shaner, *supra* note 9, at 359 n.3 (focusing primarily on senior/executive officers when discussing “officers” under corporate law). *But see* DeMott, *supra* note 2, at 848 (exploring the implications of the definitional fluidity surrounding “officer” and answering the question using agency law).

113. See § 141(e) (referencing officers and employees separately); § 145 (delineating between directors, officers, employees, and agents for purposes of indemnification and advancement).

114. See, e.g., Anabtawi & Stout, *supra* note 110, at 1262–65, 1307 (discussing officer and director fiduciary duties in the same manner); Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663, 665 (2007) (finding a disparity in the advice that corporate lawyers provide to directors and officers regarding fiduciary duties).

115. See Anabtawi & Stout, *supra* note 110, at 1262–63; Johnson & Millon, *supra* note 54, at 1617; Shaner, *supra* note 110; Lamb & Christensen, *supra* note 54, at 62.

116. See, e.g., § 142; MODEL BUS. CORP. ACT § 8.40 (AM. BAR ASS’N 2016); Gorman v. Salamone, No. 10183-VCN, 2015 Del. Ch. LEXIS 202, at *16–19 (Del. Ch. July 31, 2015) (holding that the board has the authority to hire and fire officers of the corporation).

117. See § 142; WELCH ET AL., *supra* note 37, at 4-358 (“Professor Folk commented in the

corporate policy and approving corporate acts, and (2) the officers are charged with implementing those policies and managing the day-to-day business and affairs.¹¹⁸ Regardless of the specific allocation of managerial functions, at all times the board remains the ultimate authority within the corporation and therefore must monitor the corporate enterprise, including officers.¹¹⁹

B. *Officers Versus Employees or Agents*

Officers, are, for legal purposes, an extension of the corporation's own self.¹²⁰ They control the daily operations of the corporation, binding the entity for purposes of contract and tort obligations.¹²¹ In addition, notice given to and the knowledge of an officer can be considered notice and knowledge of the entity, regardless of whether the notice or knowledge was, in fact, communicated.¹²² While these are also consequences attendant to agency status generally, officers occupy a more elevated role than the average agent. Officers, as contemplated in corporate jurisprudence, and realized at most corporations, wield significant power and authority within the corporate enterprise.¹²³ They are also afforded considerable

first edition of this treatise that apart from the bylaws or authorization by the board of directors, officers have relatively narrow inherent or presumptive authority.”).

118. See *Grimes v. Alton, Inc.*, 804 A.2d 256, 266 (Del. 2002) (holding that a CEO lacked the authority to enter a contract to sell shares of stock because the statute required board approval of such acts); ALLEN ET AL., *supra* note 2, at 102, 110–12; BALOTTI & FINKELSTEIN, *supra* note 1, § 4.10[A] (“The term ‘management,’ however, is deemed to encompass ‘supervision, direction and control,’ while ‘the details of the business [may be] delegated to inferior officers, agents and employees.’”) (alteration in original) (quoting *Canal Capital Corp. v. French*, No. 11764, 1992 Del. Ch. LEXIS 133, at *8 (Del. Ch. July 2, 1992)); Johnson & Ricca, *supra* note 114, at 78–79 (“Typical functions of the officers include entering into ordinary business transactions, devising business strategies, setting business goals, managing risks, and generally working with subordinates to [p]lan, direct, or coordinate operational activities.”) (footnotes omitted).

119. See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

120. See *Goldman v. Shahmoon*, 208 A.2d 492, 494 (Del. Ch. 1965) (“Officers as such are the corporation.”); cf. Deborah A. DeMott, *Forum-Selection Bylaws Refracted Through an Agency Lens*, 57 ARIZ. L. REV. 269, 270 (2015).

121. See ALLEN ET AL., *supra* note 2, at 102 (“Legally speaking, the corporate officers are agents of the company.”); COX & HAZEN, *supra* note 1, at 326 (“The officers of a corporation are in legal theory the agents of the corporation.”). Directors, on the other hand, are not agents of the corporation. See *Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cunningham*, 2 Ch. 34 (Eng. C.A. 1906).

122. See *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 950–51 (N.Y. 2010) (imputing knowledge of executive's fraud to the corporation under agency principles for purposes of the doctrine of *in pari delicto* defense).

123. *Haft v. Dart Grp. Corp.*, 841 F. Supp. 549, 570 (D. Del. 1993) (“Basic to the law of corporations is the notion that a corporate office embraces the right to exercise corporate functions.”).

discretion in their decision making. As made clear by the Delaware Court of Chancery, “the terms officers and agents are by no means interchangeable.”¹²⁴

Agent status can apply to a broad array of individuals working on behalf of a corporation.¹²⁵ Examples range from the chief executive officer, to outside legal and financial advisors, to a checkout clerk at the local franchise. Language in the case law, however, indicates that corporate law contemplates “officers,” as being distinct from mere “employees,” articulating the difference as a result of the discretionary authority or power to exercise corporate functions that officers, but not employees, possess.¹²⁶ What constitutes sufficient discretionary authority or power to rise to the level of an officer is, however, less than clear.

At the extremes, delineating officers from other corporate agents is not difficult. In the examples used above, one can easily distinguish a CEO from a checkout clerk. Likewise, *outside* legal and financial advisors, by definition, will not by that role itself be considered part of the *internal* governance structure as an officer. The exercise becomes much more challenging in the middle where individuals are afforded limited discretion in corporate affairs and have ambiguous designations, thus allowing for considerable subjectivity, and consequently inconsistent, determinations regarding their legal role. Given the distinct legal features attendant to “officer” status, distinguishing officers from other corporate agents *ex ante* and *ex post* can carry with it significant legal consequences.

124. *Goldman*, 208 A.2d at 493–94 (stating that “there appears to be a historically rigid view of the attributes which set a corporate officer apart from an employee. . . . Officers as such are the corporation. An agent is an employee.”).

125. There are three elements necessary to establish an agency relationship: (1) mutual consent between the principal and agent, (2) the agent agrees to act on the principal’s behalf, and (3) the agent agrees to be subject to the principal’s control. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006). The parties do not need to have contemplated that an agency relationship be created, nor is the parties’ characterization of their relationship in an agreement or in the context of industry or popular usage determinative of agency status. *See id.* § 1.02. Rather, an agency relationship is created when all three elements are present. *See id.*

126. *See Goldman*, 208 A.2d at 492–94 (finding person with “no discretionary authority or power” not to be an “officer”); *see also Haft*, 841 F. Supp. at 570 (“Basic to the law of corporations is the notion that a corporate office embraces the right to exercise corporate functions. . . . Not every corporate employee is possessed of the authority and duty to exercise the powers of the corporation.”); CLARK, *supra* note 8, at 114 (“Generally, only the more important executives in the corporation are called officers. Where the line is drawn is not always clear . . .”).

C. *The Need for a Definition*

As explained in the previous section, corporate jurisprudence and scholarship explore and delineate the various roles within the corporate structure—director versus officer versus employees or agent—vis-à-vis the legal consequences attendant to those roles. Yet, to date, these resources fail to identify with any precision the bounds of “officer” status itself. Corporate doctrine specific to officers is relatively new as compared to directors and agents, and thus is underdeveloped.¹²⁷ Analyzing and creating the law in this area without linguistic certainty as to the term “officer” is both normatively and practically problematic. The following two examples illustrate why.

Officers are entrusted with managing vast aggregations of wealth on behalf of the stockholders.¹²⁸ “The existence and exercise of this power carries with it certain fundamental fiduciary obligations to the corporation and its shareholders.”¹²⁹ The Delaware Supreme Court explained officers’ fiduciary obligations in *Gantler v. Stephens*, holding that “the fiduciary duties of officers are the same as those of directors.”¹³⁰ In situating officers in their own special director-like fiduciary role within the corporation, *Gantler* and its progeny make a well-defined dividing line between officer and ordinary agent status imperative. Corporate law makes clear that the basis for imposing fiduciary duties on directors is the trustee-like role they occupy in the corporation and not because of any agency relationship.¹³¹ As a result, there are important differences

127. See Shaner, *supra* note 9, at 367–70; Shaner, *supra* note 53, at 334; Shaner, *supra* note 54, at 276.

128. See Myron T. Steele, *The Moral Underpinnings of Delaware’s Modern Corporate Fiduciary Duties*, 26 NOTRE DAME J. L., ETHICS & PUB. POL’Y 3, 14–18 (2012); Lynn A. Stout, *On the Proper Motives of Corporate Directors (or, Why You Don’t Want To Invite Homo Economicus To Join Your Board)*, 28 DEL. J. CORP. L. 1, 3–4 (2003).

129. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); see Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 808 (1983) (“[T]he risk of abuse which all fiduciary relations pose for the entrustors is the main feature which triggers the application of fiduciary law, when the protective mechanisms outside of fiduciary law cannot adequately eliminate this risk.”).

130. 965 A.2d 695, 708 (Del. 2009).

131. A director is not a legal agent of the corporation. The fiduciary nature of directors arises from the statutorily dictated role of the board and the breadth of the board’s managerial power and responsibility. See *In re Goldman Sachs Grp., Inc. S’holder Litig.*, No. 5215-VCG, 2011 Del. Ch. LEXIS 151, at *2 (Del. Ch. Oct. 12, 2011) (“The restrictions imposed by Delaware case law set this boundary by requiring corporate officers and directors to act as faithful fiduciaries to the corporation and its stockholders.”); *Gorman v. Salamone*, No. 10183-VCN, 2015 Del. Ch. LEXIS 202, at *14 (Del. Ch. July 31, 2015) (“Section 141(a) . . . establishes ‘the bedrock statutory principle of director primacy’”).

between the content of directorial and agency fiduciary duties.¹³² Under current legal principles, officers, on the other hand, awkwardly straddle the agent-director fiduciary dichotomy. Scholars disagree as to the proper classification of officers and case law and treatises seem to point in both directions.¹³³ Absent from the *Gantler* court's opinion (or subsequent opinions) is clarity regarding which corporate agents are the officers who owe the parallel fiduciary duties described by the court.¹³⁴ Given that corporate statutes are similarly silent in defining "officer," individuals and their counsel are left to speculate as to which fiduciary principles they are obliged to discharge—director or agency.¹³⁵

Along similar lines, there is still much to be developed in the way of officer fiduciary doctrine.¹³⁶ Going forward, as courts tackle the task of delineating the contours of officer fiduciary duties, "*Who*

132. These differences include, for example, the different standards of liability for the duty of care—simple negligence for agents and gross negligence for directors. *See Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006) (discussing "the conduct giving rise to a violation of the fiduciary duty of care (i.e., gross negligence)"); MODEL BUS. CORP. ACT §§ 8.30–.31 (AM. BAR ASS'N 2016); RESTATEMENT (THIRD) OF AGENCY § 8.08 (AM. LAW INST. 2006). In addition, agents owe the duties of care, loyalty, and obedience, while directors only owe the duties of care and loyalty. *See Stone*, 911 A.2d at 370; MODEL BUS. CORP. ACT § 8.30 (AM. BAR ASS'N 2016); RESTATEMENT (THIRD) OF AGENCY §§ 8.01–.12 (AM. LAW INST. 2006); BALOTTI & FINKELSTEIN, *supra* note 1, § 4.13 at 4-113 ("[D]irectors [of a Delaware corporation] 'owe fiduciary duties of care and loyalty to the corporation and its shareholders.'") (quoting *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989)); ROBERT A. RAGAZZO & FRANCES S. FENDLER, *CLOSELY HELD BUSINESS ORGANIZATIONS*, 104 (2d ed. 2012) ("The law places three major duties on the agent: loyalty, care, and obedience.").

133. *See DeMott*, *supra* note 2, at 850; A. Gilchrist Sparks, III & Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 BUS. LAW. 215, 217–20 (1992).

134. *See Paul E. McGreal*, *Corporate Compliance Survey*, 71 BUS. LAW. 227, 239–40 (2016) (discussing the effects of this uncertainty).

135. While Professors Johnson and Ricca assert that officers' lack of legal advice on fiduciary obligations is a result of the scant fiduciary duty doctrine, another significant factor contributing to this state of affairs is the ambiguity surrounding who should be receiving the advice. *See Johnson & Ricca*, *supra* note 118, at 665–66 (discussing the lack of advice officers receive regarding fiduciary duties).

136. This is a fact frequently noted by the Delaware courts. *See Chen v. Howard-Anderson*, 87 A.3d 648, 666 n.2 (Del. Ch. 2014) ("A lively debate exists regarding the degree to which decisions by officers should be examined using the same standards of review developed for directors. Given how the parties have chosen to proceed, this decision need not weigh in on these issues and intimates no view upon them.") (citations omitted); *Hampshire Grp., Ltd. v. Kuttner*, No. 3607-VCS, 2010 Del. Ch. LEXIS 144, 2739995, at *35 (Del. Ch. July 12, 2010) ("There are important and interesting questions about the extent to which officers and employees should be more or less exposed to liability for breach of fiduciary duty than corporate directors. The parties in this case have not delved into any of those issues, and I see no justifiable reason for me to do so myself."); *see also Shaner*, *supra* note 53, at 334.

is an officer?” is an essential consideration.¹³⁷ How can courts articulate fiduciary obligations without a clear reference point as to whom they apply? Indeed, the basis for imposing fiduciary duties, the contours of those duties, and the applicable standards of judicial review differ in important respects depending on an individual’s legal status.¹³⁸ Declaring and imposing legal obligations on individuals without first making clear to whom they apply is a normatively problematic way of developing the law.

There are also strong pragmatic reasons why corporate law needs a definition of “officer.” Because there is a lack of established consensus in defining “officer,” parties will opportunistically define it ex post in a way that suits their particular argument or position. This may, however, be a very different definition than the ex ante expectations regarding “officer” status. The case of *Aleynikov v. Goldman Sachs Group, Inc.*¹³⁹ illustrates this problem. In *Aleynikov*, the Third Circuit was tasked with interpreting Goldman’s advancement bylaw provisions.¹⁴⁰ Specifically, the court had to decide whether Sergey Aleynikov, who served as a vice president at Goldman, Sachs & Co., a subsidiary of Goldman, was included in the definition of “officer.”¹⁴¹

137. See *In re Citigroup Inc. S’holder Derivative Litig.*, 964 A.2d 106, 114 n.6 (Del. Ch. 2009) (“In defining [fiduciary] duties, the courts balance specific policy considerations such as the need to keep directors and officers accountable to shareholders and the degree to which the threat of personal liability may discourage beneficial risk taking.”); Hickman & Hill, *supra* note 107, at 1185.

138. See § 141(b); *supra* note 132. In addition, the standard of liability for a director’s breach of the duty of care is gross negligence, while it is simple negligence for an agent. See *Stone v. Ritter*, 911 A.2d 362, 369 (discussing “the conduct giving rise to a violation of the fiduciary duty of care (i.e., gross negligence)”); MODEL BUS. CORP. ACT §§ 8.30–8.31 (AM. BAR ASS’N 2016); RESTATEMENT (THIRD) OF AGENCY § 8.08 (AM. LAW INST. 2006). Further, a director is not a legal agent of the corporation. The fiduciary nature of directors arises from the statutorily director role of the board and the breadth of the board’s managerial power and responsibility. See *In re Goldman Sachs Grp., Inc. S’holder Litig.*, No. 5215-VCG, 2011 Del. Ch. LEXIS 151, at *2 (Del. Ch. Oct. 12, 2011) (“The restrictions imposed by Delaware case law set this boundary by requiring corporate officers and directors to act as faithful fiduciaries to the corporation and its stockholders.”); *Gorman v. Salamone*, No. 10183-VCN, 2015 Del. Ch. LEXIS 202, at *14 (Del. Ch. July 31, 2015) (“Section 141(a) . . . establishes ‘the bedrock statutory principle of director primacy’”).

139. 765 F.3d 350 (3d Cir. 2014).

140. *Id.* at 353.

141. *Id.* Section 4.1 of Goldman’s bylaws authorized Goldman’s Board of Directors to “elect [such officers as necessary, including] . . . one or more Vice Presidents.” Section 6.4 of the bylaws contained a specific advancement provision for officers of Goldman Sachs Group subsidiary companies which stated that

the term “officer,” . . . when used with respect to a Subsidiary . . . shall refer to any person elected or appointed pursuant to the by-laws of such Subsidiary or other enterprise or chosen in such manner as is prescribed by the by-laws . . .

In analyzing the relevant bylaw provisions, the court concluded that the term “officer” was ambiguous and allowed extrinsic evidence to be introduced to help determine its meaning.¹⁴² Citing to several dictionary definitions of “officer,” the court stated that “the plain meaning of the term officer is someone holding a position of trust, authority, or command.”¹⁴³ Interestingly, in articulating the definition of “officer,” the court stated that “the election or appointment requirement cannot properly be considered a part of the ordinary, dictionary definition of officer.”¹⁴⁴ This is in direct contrast to decisions under the Bankruptcy Code and the 1934 Exchange Act, which specifically tie “officer” status to election or appointment by the board.¹⁴⁵ Ultimately, the court concluded that Aleynikov was not an “officer” covered by the advancement bylaw.¹⁴⁶

In addition to the suit before the Third Circuit, Aleynikov had filed a parallel suit seeking advancement in the Delaware Court of Chancery.¹⁴⁷ While noting that issue preclusion prevented re-litigating the interpretation issues previously resolved in the Third Circuit decision, the court nonetheless indicated in dicta that the Third Circuit had erred in finding that “officer” did not encompass “vice presidents.”¹⁴⁸ The court considered a broad body of evidence in interpreting “officer” including the bylaw language itself, drafting history, the ordinary and plain meaning of the language at issue, industry standards/trade usage, corporate policy considerations, applicable state and federal government regulations, the conduct of the parties themselves, and the transactional context.¹⁴⁹ Ultimately, the court concluded that someone given the “title ‘Vice

[and] shall include in addition to any officer of such entity, any person serving in a similar capacity or as the manager of such entity.

The Goldman Sachs Grp., Amended and Restated Bylaws (Form 8-K), Exh. at 14, 17–18 (May 28, 2013).

142. *Aleynikov*, 765 F.3d at 353, 360–61.

143. *Id.* at 360–61.

144. *Id.* at 361.

145. *See, e.g.*, Office of U.S. Tr. v. Fieldstone Mortg. Co., No. CCB-08-775, 2008 U.S. Dist. LEXIS 91479, at *11–14 (D. Md. Nov. 5, 2008) (“[T]he fact of board appointment or election is frequently identified as distinguishing ‘officer’ positions from other titled positions within a corporation.”).

146. *Aleynikov*, 765 F.3d at 367.

147. *Aleynikov v. Goldman Sachs Grp., Inc.*, No. 10636-VCL, 2016 Del. Ch. LEXIS 222, at *1 (Del. Ch. July 13, 2016).

148. *See id.* at *18–19.

149. *Id.* at *7–18.

President' could reasonably conclude that he was an 'officer' who was entitled to advancement rights under the Bylaws."¹⁵⁰

The differing conclusions reached by the courts in the *Aleynikov* litigation highlight the practical problems stemming from the ambiguity of "officer" status in corporate law. As both the Court of Chancery and the New Jersey District court pointed out, "officer" in the case of Goldman Sachs bylaws clearly includes someone with the title of "vice president." Indeed, both courts concluded that at the time of Aleynikov's receipt of the title of "Vice President," the parties believed he was an officer of the entity.¹⁵¹ Nevertheless, capitalizing on the inherent ambiguity of such term, the corporation was able to successfully avoid its advancement obligations by challenging the term *ex post* in litigation. With no consensus surrounding "officer" status as a general matter of law, parties may strategically define "officer" to avoid legal obligations (as was the case in *Aleynikov*) or, alternatively, apply legal obligations such as fiduciary duties, even when *ex ante* the parties' understanding of "officer" was different.

A final development in corporate law necessitating the need for definitional clarity with regard to "officer" is the private ordering movement. With increasing frequency, the governing documents of corporations are being used as a platform for defining and structuring key aspects of corporate governance.¹⁵² Corporate law provides corporations with the freedom to fashion their corporate offices as they see fit.¹⁵³ This contractual freedom, coupled with the

150. *Id.* at *8. The District Court of New Jersey that originally heard the case similarly found that "[t]he usual and ordinary meaning of vice president, supplemented by [precedent,] ma[de] out a fair case that the By-Laws here is unambiguous" and that the category of "officers" in the Bylaws included a person with the title of "vice president." *Aleynikov v. Goldman Sachs Grp., Inc.*, No. Civ. 12-5994 (KM), 2013 U.S. Dist. LEXIS 151603, at *55-56. (D.N.J. Oct. 22, 2013).

151. *Aleynikov*, 2013 U.S. Dist. Lexis 151603, at *52-53; *Aleynikov*, 2016 Del. Ch. Lexis 222, at *15-16.

152. See Megan Wischmeier Shaner, *Interpreting Organizational "Contracts" and the Private Ordering of Public Company Governance*, 60 WM. & MARY L. REV. 985, 996-1005 (2019) (describing the private ordering movement in corporate America).

153. See *Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996) ("At its core, the Delaware General Corporation Law is a broad enabling act which leaves latitude for substantial private ordering[s]."); *supra* note 57 and accompanying text; see also COX & HAZEN, *supra* note 1, at 143 ("Under the corporation acts of most states, wide latitude is given to the organizers to include in the articles certain optional provisions and to make certain special variations on the ordinary rules prescribed by statute"); Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1257, 1260 (2001) (describing the DGCL as creating "a wide realm for

existing uncertainties surrounding officer duties and liabilities, makes corporate officers a ripe area for private ordering. Indeed, a task force of the American Bar Association has begun looking at just such matters.¹⁵⁴ In order for private ordering in this space to be effective and fair, a set of standard default rules or definitions from which parties can then deviate is necessary.¹⁵⁵ In the absence of a set of standard defaults, parties incur material transaction costs in the drafting process.¹⁵⁶ Even more concerning, private ordering in the absence of legal defaults results in “unique provisions that lead to *ad hoc* judicial decisions interpreting specific provisions that provide no predictability in future cases [because the provisions] are often poorly drafted and unclear, leading to increased litigation costs and inefficiencies for all parties.”¹⁵⁷ Establishing a uniform understanding of what “officer” means for purposes of corporate law would serve as a solid foundation for private ordering and interpreting such contracting going forward.

D. *Considerations in Crafting a Definition*

There are several lessons to be learned from the struggles in defining and interpreting “officer” in areas outside of corporate law. First are the tiered definitions of officers. In securities laws, for example, “officer” is defined somewhat broadly while “executive officer” captures a narrower set of individuals.¹⁵⁸ In contrast to officers, executive officers are subject to more stringent reporting requirements and automatic liability for certain transactions.¹⁵⁹ The definitions in the ALI’s Corporate Governance Principles similarly propose different ranks within “officer” status—“officer,”¹⁶⁰ and

private ordering”); Leo E. Strine, Jr. et al., *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1, 56–57 (2013).

154. See *supra* note 11 and accompanying text.

155. See Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, in RESEARCH HANDBOOK ON PARTNERSHIPS, LLCs, AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 11, 11–13 (Mark Lowenstein & Robert Hillman eds. 2014).

156. See *id.* at 11–12. These transaction costs occur, in part, because parties “cannot rely on their understandings of default principles of law. Instead, they must evaluate entity-specific provisions, ostensibly bargained for on an investment-by-investment basis to protect their interests.” *Id.* at 12.

157. *Id.* at 12. Chief Justice Strine and Vice Chancellor Laster have discussed these problems in the context of limited liability companies and limited partnerships, which enjoy unlimited contractual freedom with few statutory defaults. *Id.* at 11.

158. See *supra* notes 78–79 and accompanying text.

159. See *supra* notes 79–80, 169–70 and accompanying text.

160. See ALI PRINCIPLES, *supra* note 51, § 1.27.

“principal executive officer.”¹⁶¹ The Principles distinguish the substantive legal treatment applicable to an individual based on the exact officer classification.¹⁶² While all “officers” owe, for example, the duty of care,¹⁶³ a smaller subset of this group is subject to the disclosure obligations regarding corporate opportunities,¹⁶⁴ and a smaller group yet—principal executive officers—are vested with director-like management authority and subject to other obligations.¹⁶⁵ State statutes do not, however, employ different types of officers as these other resources do. Nor do state corporate statutes make distinctions within the category of “officer.”¹⁶⁶ Thus, in crafting a definition for “officer” that will work for corporate statutes as currently drafted, such definition must be flexible enough to encompass all of the different references to, and uses of “officer.”¹⁶⁷

The second, perhaps more complicated, consideration to take into account in designing a cohesive definition is the subjective versus objective approaches employed by courts in determining “officer” status. This has also been described as the “legal officers” versus “traditional officers” debate.¹⁶⁸ In both the securities and bankruptcy contexts, courts disagree whether “officer” status should be determined based on (1) objective criteria such as title and director election or appointment,¹⁶⁹ or (2) subjective, functional criteria such as responsibilities, duties, access to information or financial resources.¹⁷⁰ Advocates of an objective, legal

161. *See id.* § 3.01.

162. *See id.* § 1.27, cmt. c.

163. *See id.* at Part IV.

164. *See id.* § 5.02 (Transactions with the Corporation).

165. *See id.* § 3.01; *see also id.* § 5.15 (Transfer of Control in Which a Director or Principal Senior Executive is Interested).

166. The Delaware General Corporation Law, for example, does not differentiate between its references to “officer” throughout its provisions. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(e) (directors ability to rely on officers of the corporation); § 142 (providing for officers in the corporation); § 145 (providing for indemnification and advancement for officers); § 225 (determining the validity of officer appointment and removal). The statute does, however, delineate between directors, officers, employees, and agents. *See, e.g.*, § 145 (referencing each of these different corporate roles for purposes of indemnification and advancement); § 141(e) (referencing officers and employees separately).

167. Alternatively, states could amend their corporate statutes to provide for different types of officers akin to that employed by securities laws and the ALI Principles.

168. *See* Office of U.S. Tr. v. Fieldstone Mortg. Co., No. CCB-08-755, 2008 U.S. Dist. LEXIS 91479, 1, at *8–9 (D. Md. Nov. 5, 2008) (discussing the difference between the legal definition of “officer” and officers in the “traditional” sense (i.e., function)).

169. *See, e.g., id.* at *8.

170. *See, e.g.*, C.R.A. Realty Corp. v. Crotty, 878 F.2d 562, 563 (2d Cir. 1989); Colby v. Klune, 178 F.2d 872, 873, 975 (2d Cir. 1949). Some courts have sought a middle ground on this debate, looking first to titles and then analyzing subjective factors. *See, e.g.*, Winston v.

approach to defining “officer” cite to the clear guidance it provides to market actors. Courts employing the subjective, pragmatic approach push back on this argument, asserting that a title-focused approach is akin to strict liability and “places responsibility for meticulous observance of the provision upon the shoulders of the insider, and he or she must bear the risk of any inadvertent miscalculation.”¹⁷¹

The consideration first raised—the lack of different degrees of “officer” in corporate codes—may actually dictate the answer to the second consideration—whether to employ a subjective or objective approach. A definition of “officer” must be flexible enough to work for all of the different references to “officer” in state corporate statutes. Unlike the more rigid objective approach, the subjective approach leaves room for consideration of the specific statute’s policy and purpose in defining “officer.”¹⁷² This would allow for a more nuanced definition of “officer” that could span the different instances when that term is used in the statute. Further, a subjective approach would accommodate the freedom in creating offices that corporate law allows as well as the varying duties officers may have across and within corporations.¹⁷³

E. A Proposal: Establishing the “Officer” Prototype

As previously discussed, the law specifies different consequences that attach to different categories of corporate actors—directors, officers, stockholders, agents, employees. To avoid incoherent and

Fed. Exp. Corp., 853 F.2d 455, 457 (6th Cir. 1988); Nat’l Med. Enterpr., Inc. v. Small, 680 F.2d 83, 84 (9th Cir. 1982).

171. 14 CAROL A. JONES, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 6857.15 (2012) (Liability for Short Swing Trading Under Section 16(b)—Definition of Director and Officer Under Section 16(b)).

172. See *In re NMI Sys., Inc.*, 179 B.R. 357, 370 (Bankr. D.D.C. 1995) (defining “officer” status under Section 101(31) of the Bankruptcy Code in light of the specific preference statute that referenced the term and concluding that “officer” status was based on whether the individual was “in the inner circle making the company’s critical financial decisions”); *C.R.A. Realty Corp.*, 878 F.2d at 567 (concluding that “officer” status arises when the employee had access to confidential information that could permit the employee to take actions that Section 16(b) seeks to prohibit); see also Erens, *supra* note 69, at *3 (“Courts, however, are not likely simply to adopt the definition of “officer” in Rule 16a-1(f) for purposes of determining who is an officer under the Bankruptcy Code under Section 503(c). Among other things, a functional approach to determining the contours of the definition requires that a court look to the purpose of Section 503(c), which differs from the purpose of Section 16 of the Securities Act.”).

173. See *supra* notes 57–59 and accompanying text (describing the enabling nature of corporate law and flexibility in creating corporate offices).

inconsistent application of the law, criteria for membership in any particular category must be established.¹⁷⁴ Scholars in law, psychology, and philosophy have studied the topic of categories and developed theories surrounding category formation.¹⁷⁵ One identified model is the prototype-centered category. A prototype-centered category may be defined through identification of one or more prototypes (i.e., an example of “what [the] category most obviously includes”) or, alternatively, it may be based on some number of features generally common to the prototype.¹⁷⁶ The prototype-centered model of category is often used in creating and applying legal principles.¹⁷⁷

Two examples in business law that employ a prototype-centered category in determining legal status are agency law and partnership law. The test for establishing principal-agent status flows from the definition of “agency” in section 1.01 of the *Restatement (Third) of Agency*: “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”¹⁷⁸ Based on this definition, courts have identified three requisite characteristics for an agency relationship to exist: (1) mutual agreement, (2) the agent must act on behalf of the principal, and (3) the agent will act subject to the principal’s control.¹⁷⁹ Courts use these specific features to differentiate a legal agency relationship from other uses and understandings of “agency” (for example, commercial, economic, philosophical, and literary definitions).¹⁸⁰ The comments to section 1.01 of the *Restatement* illustrate the prototype-focused approach of determining

174. See Hickman & Hill, *supra* note 107, at 1185–86 (discussing theories of categories across disciplines).

175. See *id.* at 1186. Three of the main views on category formation discussed in the literature are (1) necessary and sufficient conditions categories, (2) prototype-centered categories, and (3) goal-centered categories. See *id.*

176. *Id.* at 1186, 1190.

177. *Id.* at 1191 (“Given the reliance of ordinary language on prototypes, it is not surprising that legal categories often center on prototypes as well.”).

178. RESTATEMENT (THIRD) AGENCY § 1.01 (AM. LAW INST. 2006).

179. See RAGAZZO & FENDLER, *supra* note 132, at 7. In determining whether these characteristics are present, courts employ a fact-specific analysis.

180. See RESTATEMENT (THIRD) AGENCY § 1.01 cmt. b. (AM. LAW INST. 2006) (discussing the different understandings of “agency”).

agency status, distinguishing the agency prototype from other legal relationships (e.g., debtor-creditor, bailor-bailee) based on the absence of specific features common to an agency relationship.¹⁸¹

A partnership is defined as an “association of two or more persons to carry on as co-owners a business for profit.”¹⁸² Because there is no bright-line test for resolving disputes over the characterization of profit-sharing, courts have also looked to different factors in determining the existence of a partnership. Those include “(1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise.”¹⁸³ A potential fifth factor, the parties’ own characterization of their relationship, is sometimes also taken into consideration but courts are clear that such characterization is not dispositive.¹⁸⁴ Like agency law, determining partner status is a case-by-case, fact-specific analysis. Also, like agency status, the legal category of “partnership” is prototype-centered with the partnership prototype being defined in relation to the absence or presence of the common features outlined above.

In light of the lack of a specific statutory definition, “officer” status should be analyzed in a prototype-centered manner similar to that of agency and partnership status. First, when the law uses a term from ordinary language, such as “officer,” a prototype-centered category is well suited to define the scope of that legal category.¹⁸⁵ As explained by Professors Kristin Hickman and Claire Hill:

For most words, terms, and concepts, we quickly recognize some clear examples. We can also readily imagine cases that are murkier. The Pope and a thirteen-year-old boy, while meeting the formal definition of bachelor, are certainly not prototypical. The obvious instances represent the category’s core, while the more questionable ones are at the category’s penumbra.¹⁸⁶

181. *Id.* § 1.01 cmt. c.

182. UNIF. P’SHIP ACT § 6(1) (UNIF. LAW COMM’N 1914); REVISED UNIFORM P’SHIP ACT § 202(a) (UNIF. LAW COMM’N 1997).

183. *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997).

184. *See id.* at 176–77.

185. Hickman & Hill, *supra* note 107, at 1191; *cf.* RESTATEMENT (THIRD) AGENCY § 1.01 cmt. b. (AM. LAW INST. 2006) (“Moreover, the terminology of agency is widely used in commercial settings and academic literature to characterize relationships that are not necessarily encompassed by the legal definition of agency.”).

186. Hickman & Hill, *supra* note 107, at 1191.

Obvious examples like a CEO, CFO, or COO represent the core of the “officer” category while roles such as vice president, vice secretary, and vice treasurer are more attenuated and raise questions as to “officer” status and thus make up the penumbra of “officers.”

A prototype-centered approach to defining “officer” is further fitting as it allows for a subjective, functional based component in the analysis. As discussed in section III.D, a subjective approach accommodates the different statutory provisions throughout corporate statutes that use “officer” as well as the wide variation in officer titling and appointment that occurs in today’s corporations. A prototype-centered definition of “officer” would be based on some number of features generally common to the officer prototype, thus taking into account the substance of the officer role before attaching legal consequences. The proposed test avoids a fixed definition tied to formal titles in lieu of a list of factors that embody the substance of the officer role that corporate law seeks to regulate. Accordingly, using characteristics of corporate officers frequently identified by courts and scholars, the following factors should be considered in determining “officer” status.

- * Title given to the individual.¹⁸⁷
- * Articulation of the office held in the corporation’s governing documents.¹⁸⁸
- * Appointed or elected by the board (or an officer with delegated appointment authority).¹⁸⁹

187. See *Adler v. Klawans*, 267 F.2d 840, 845 (2d Cir. 1959) (finding officer title to be *per se* evidence of Section 16 liability under the 1934 Exchange Act); *Ferraiolo v. Newman*, 259 F.2d 342, 344 (6th Cir. 1958); see also DEL. CODE ANN. tit. 8, § 142(a) (“Every corporation . . . shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board . . .”). *But see In re Foothills Texas, Inc.*, 408 B.R. 573, 579 (2009) (determining “officer” status and stating that “the mere title of a person does not end the inquiry”).

188. See § 142(a) (providing that the officers may be provided for in the bylaws).

189. See *id.* § 142(a) (providing for director appointment of officers); *Office of U.S. Tr. v. Fieldstone Mortg. Co.*, No. CCB-08-775, 2008 U.S. Dist. LEXIS 91479, at *12–14 (D. Md. Nov. 5, 2008) (“[T]he fact of board appointment or election is frequently identified is distinguishing ‘officer’ positions from other titled positions within a corporation.”). *But see Aleynikov v. Goldman Sachs Grp., Inc.*, 765 F.3d 350, 361 (3d Cir. 2014) (holding that the “election or appointment requirement cannot properly be considered a part of the ordinary, dictionary definition of officer”). Officers can also appoint other officers if such power is provided in the governing documents or delegated by the board. See § 142(a); Transcript of Record at 23, *Kale v. Wellcare Health Plans, Inc.*, No. 6393-VCS, 2011 WL 11071500 (Del. Ch. June 13, 2011) (“[A]nd when the bylaws of the company let officers, key officers make other officers, I think it’s pretty, to me—there’s no real rebuttal evidence.”); *Aleynikov v. Goldman Sachs Grp., Inc.*, No. 10636-VCL, 2016 Del. Ch. LEXIS 222, at *16 (Del. Ch. July 13, 2016) (noting that the bylaws allowed officers to appoint other officers).

- * Industry custom/standards.¹⁹⁰
- * Involvement in policymaking functions for the corporation.¹⁹¹
- * Exercises discretionary authority or power in managerial decision making (e.g., exercising the power of the corporation).¹⁹²
- * Occupies a position of trust, which can include performing duties that would allow the individual access to financial information or other confidential information about the corporation's affairs such that the individual could "exert undue influence over corporate decisions."¹⁹³

These factors take into account both the legal and traditional roles of officers in the corporation. Courts should look at the totality of the circumstances in determining "officer" status, and no one of the factors in the above list should be wholly dispositive. The factor-based test proposed here directly rejects prior case law basing "officer" status solely on labels or election/appointment by the board.¹⁹⁴ As a prototype-based category, there is a "concern . . . that, in the absence of meaningful constraints against minimal compliance pressures, a category's coverage may become incoherent and inconsistent, and the category may operate to treat in the

190. See *Aleynikov*, 2016 Del. Ch. LEXIS 222, at *15–17 (citing to banking industry customs and standards in interpreting "officer").

191. See ALI PRINCIPLES, *supra* note 51, § 1.27(b); *In re NMI Sys., Inc.*, 179 B.R. 357, 369–70 (Bankr. D.D.C. 1995) (stating that officers are "active in setting overall corporate policy"); see also *W.H. Elliott & Sons Co. v. Gotthardt*, 305 F.2d 544, 545 (1st Cir. 1962) (a factor cited in a common law breach of fiduciary duty claims case brought by creditors); *Officer*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining officer as "a person who holds an office of trust, authority, or command."); *Officer*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2009) ("One who holds an office of trust, authority, or command.").

192. See *Haft v. Dart Grp. Corp.*, 841 F. Supp. 549, 570 (D. Del. 1993) ("Basic to the law of corporations is the notion that a corporate office embraces the right to exercise corporate functions. . . . Not every corporate employee is possessed of the authority and duty to exercise the powers of the corporation."); *Goldman v. Shahmoon*, 208 A.2d 492, 493–95 (Del. Ch. 1965) (finding person with "no discretionary authority or power" not to be an "officer"); John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 65 (2014) (describing "officers" as "executives, tasked with making decisions about the running of the company" and holding "power to initiate corporate decision-making"); Sparks & Hamermesh, *supra* note 133, at 216 (describing an "officer" as a person entrusted with "administrative and executive functions" but not one who lacks "judgement or discretion as to corporate matters").

193. *In re NMI, Sys., Inc.*, 179 B.R. at 370; see *C.R.A. Realty Corp. v. Crotty*, 878 F.2d 562, 567 (2d Cir. 1989); *Colby v. Kline*, 178 F.2d 873, 873 (2d Cir. 1949).

194. See *supra* note 73 and accompanying text.

same way things that do not seem to bear any substance-based relationship to one another.”¹⁹⁵ The per se “officer” test applied by the courts in fact, does just that by basing categorization on minimal qualifications such as title and appointment thereby capturing substantive and shallow “officers” alike in the category. Instead, this paper proposes a holistic approach that considers all relevant “officer” characteristics. Moreover, the proposed approach is consistent with the fact-specific, case-by-case analysis that is characteristic of corporate law.¹⁹⁶

CONCLUSION

Corporate law is clear that “officers” play a distinct legal role within the corporation. Yet ambiguity persists in determining who exactly occupies this space. State statutes, cases, corporate governing documents, and academic scholarship have all, to date, avoided squarely addressing the question “Who is an ‘officer’ of a corporation?” The lack of consensus in delineating “officer” status has allowed parties to opportunistically choose definitions that support their ex post interests.¹⁹⁷ And the courts differ in their interpretation and identification of officers leading to inconsistent and incoherent results.¹⁹⁸ At this juncture, corporations, directors, officers, stockholders, and third parties alike live in a state of uncertainty and unpredictability with respect to these important corporate actors.

In addition to these pragmatic problems, the ambiguity in defining “officer” has contributed to the marginalization of officer doctrine, in particular the development of fiduciary duties. How can courts, parties, and scholars engage in a thoughtful, informed dialogue regarding the proper role and accountability for officers if there is not a clear understanding of who an “officer” is? How can legal counsel adequately advise these key management members of their legal responsibilities if the law makes it unpredictable as

195. Hickman & Hill, *supra* note 107, at 1195.

196. See *supra* notes 87–88 and accompanying text. Another example of an area of corporate law employing this type of balancing test is the corporate opportunity doctrine. See *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148 (1996).

197. See *supra* notes 148–51 and accompanying text.

198. Compare *Office of U.S. Tr. v. Fieldstone Mortg. Co.*, No. CCB-08-775, 2008 U.S. Dist. LEXIS 91479 at *12–16 (D. Md. Nov. 5, 2008) (relying on board election/appointment as determiner of “officer” status), with *Aleynikov v. Goldman Sachs Grp., Inc.*, 765 F.3d 350, 361 (3d Cir. 2014) (holding that board appointment was not a determiner of “officer” status).

to whom these rights, responsibilities, and liabilities will apply? And in an era of private ordering, how can parties engage in efficient, fair contracting regarding officers if the default legal principles from which they are operating are undefined?

This Article attempts to remedy the definitional fluidity attached to “officer.” A prototype-centered officer category based on both objective and subjective factors allows for a nuanced, yet consistent definition that can function under existing corporate statutory regimes. Hopefully, as the category of “officer” becomes stabilized in corporate law, the legal consequences attached to that status will similarly become clear.