

# Decentralized Autonomous Organizations: To Statutorily Organize or Not?

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## *DECENTRALIZED AUTONOMOUS ORGANIZATIONS: TO STATUTORILY ORGANIZE OR NOT?*

*David M. Grant,\* Eric M. Kirby\*\* & Steven R. Hawkins\*\*\**

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## ABSTRACT

This Article explores the evolving concept of decentralized autonomous organizations (DAOs) in the context of Web3 technology. It raises critical questions about whether DAOs truly represent a step forward in limiting liability in entity governance structures or if they risk centralizing the decentralized. The text discusses the potential of DAOs to address regulatory and tax challenges while also highlighting concerns about their legitimacy and security. It compares the governance structures of traditional entities to DAOs and contemplates the reasons for formal organization pursuant to state statute. The Article further delves into some of the statutory laws in specific states recognizing and governing DAOs. Lastly, it suggests potential improvements in statutory frameworks to enhance legal predictability for DAO users and those seeking to ascribe liability.

## I. INTRODUCTION

Are decentralized autonomous organizations (DAOs) the next logical step in limiting liability of entity governance structures employing Web3 technology, or are they simply much ado about nothing, defeating their very own purposes by centralizing the decentralized? Do DAOs (pronounced “dows”) help solve regulatory and tax problems inherent when large communities of potentially anonymous individuals associate through blockchain software, or do they basically embody Cary’s race-to-the-bottom phenomena,<sup>1</sup> legitimizing the illegitimate by allowing businesses to operate in plain daylight, executing the collective orders of unidentified participants existing in the shadows? Will DAOs truly overturn the common hierarchical management model by reducing organizational costs on communication, collaboration, and management, or are the security and privacy issues and unclear legal status too big of a risk?<sup>2</sup> The above questions, among many others, might be considered when evaluating the desirability of conveying limited-liability status on DAOs.

DAOs combine elements of blockchain technology and smart contracts to create a self-governing and self-sustaining organization.<sup>3</sup> They aim to eliminate the need for traditional centralized management structures and instead rely on code and consensus mechanisms to make decisions and

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<sup>1</sup> William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

<sup>2</sup> See generally S. Wang et al., *Decentralized Autonomous Organizations: Concept, Model, and Applications*, 6 INST. ELEC. & ELEC. ENG’RS TRANSACTIONS ON COMPUTATIONAL SOC. SYS. 870 (2019).

<sup>3</sup> See *id.* at 871.

execute actions.<sup>4</sup> Given this, state recognition of DAOs seems to represent the next evolutionary phase in the decades-long history of legislatures granting limited-liability protections to new organizations designed for ever-changing business and legal environments.<sup>5</sup>

For purposes of this Article, Part II below will compare the governance structures of traditional corporations, partnerships, and limited-liability companies (LLCs) to those of DAOs and discuss common uses for these decentralized autonomous entities.<sup>6</sup> Part III will address whether DAOs should remain purely decentralized, or formally organize to streamline startup efficiency, provide limited liability protection to participants, and normalize tax and other regulatory relationships between the DAO and the government.<sup>7</sup> For those desiring the benefits of formal DAO registration, while accepting the natural consequences of moving away from more decentralized structural models, Part III will also provide comparative language and figures regarding the statutory laws and the general legal environments of the four states<sup>8</sup>—Vermont,<sup>9</sup> Wyoming,<sup>10</sup> Tennessee,<sup>11</sup> and Utah<sup>12</sup>—wherein legislatures have enacted specific laws formally recognizing and governing their use, thus helping decision makers and legal advisors make comparative decisions regarding jurisdictional situs and choice of law.<sup>13</sup> Finally, Part IV of this Article will comment on a few select areas where lawmakers might change statutory frameworks to improve legal predictability for both those who are seeking limited liability protection, as well as those who are attempting to ascribe liability to DAOs and their participants for damages caused by such.<sup>14</sup> These improvements

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<sup>4</sup> See *id.*

<sup>5</sup> See Gail Weinstein, Steven Lofchie & Jason Schwartz, *A Primer on DAOs*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sep. 17, 2022), <https://corpgov.law.harvard.edu/2022/09/17/a-primer-on-daos/> [<https://perma.cc/FC2H-REY8>].

<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* Part III.

<sup>8</sup> See *infra* notes 9–12. As of the date of this Article’s submission, the State of New Hampshire also had a DAO bill, introduced: January 12, 2023, pending before the House Commerce and Consumer Affairs Committee as of September 6, 2023. H.B. 645, 2023 Gen. Ct., Reg. Sess. (N.H. 2023). For other potential DAO jurisdictions, see Weinstein, Lofchie & Schwartz, *supra* note 5 (listing further jurisdictions where DAOs have developing legislative frameworks and formats, including, Colorado, the Cayman Islands, British the Virgin Islands, Guernsey, Ireland, Liechtenstein, Malta, Singapore, Switzerland, and the Marshal Islands).

<sup>9</sup> VT. STAT. ANN. tit. 11 §§ 4171–4176 (2023) (enacted May 30, 2018, effective Jul. 1, 2018).

<sup>10</sup> WYO. STAT. ANN. §§ 17-31-101–116 (2023) (enacted Apr. 2021, effective Jul. 1, 2021).

<sup>11</sup> TENN. CODE ANN. §§ 48-250-101–116 (2023) (effective Apr. 20, 2022).

<sup>12</sup> UTAH CODE ANN. §§ 48-5-101–406 (LexisNexis 2024) (enacted Mar. 13, 2023, effective Jan. 1, 2024).

<sup>13</sup> See Weinstein, Lofchie & Schwartz, *supra* note 5.

<sup>14</sup> See *infra* Part IV.

might help both populations better foresee and appreciate the potential legal outcomes of transacting with decentralized autonomous organizations.<sup>15</sup>

## II. COMPARISON OF GOVERNANCE STRUCTURES AND LIABILITY OF PARTICIPANTS

Corporations, partnerships, and LLCs are commonly used for organizing company structures to do business, conduct operations, and otherwise interact in the marketplace on behalf of those who have come together for common purposes. These traditional entities have provided the means for controlling management functions and coordinating processes in a predictable manner, while conveying assurances of the same to their inside participants and outside stakeholders. The advent of new technologies capable of exchanging and validating contracts between parties using digital tools now permits groups to transact with each other via mechanized mediums, instead of relying on human managers to do the job. Organizational functions can now be accomplished algorithmically, instead of heuristically; with programmers acting as scribes, rather than lawyers; with script, instead of pen or word processor, now documenting offer and acceptance; with custody and escrow functions provided by data centers and programming geeks, rather than filing cabinets, safe deposit boxes, and title agents; with distributed ledgers replacing auditors, and with code being the new bookkeeper. As these business and network functions become automated and self-executing in an increasing number of fields, new legal structures (i.e., DAOs) may more appropriately fill the governance roles once occupied by corporations, partnerships, and LLCs. This Part will review the structures and governance systems of traditional organizations, and then present an overview of how DAOs can be legally organized. It will also examine the legal limitations on personal liability of the participants in each of such structures.

### A. Corporate Organizational Structure and Governance

In a traditional top-down corporate organizational governance structure, shareholders elect directors, and directors then appoint officers, with the chief executive officer generally overseeing other high-level executives, who in turn supervise their respective mid-level managers.<sup>16</sup> Directors generally approve the corporation's strategies and budgets and

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<sup>15</sup> See *infra* Part IV.

<sup>16</sup> See generally Kenneth E. Scott, *Corporation Law and the American Law Institute Corporate Governance Project*, 35 STAN. L. REV. 927 (1983); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982); Bus. Roundtable, *Principles of Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sep. 8, 2016), <https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/> [https://perma.cc/7M4Z-HKHZ].

act as gate-keepers to focus and constrain the activities of the officers and managers who act as agents of the corporation and direct the activities of various departments and groups of employees who are charged with specific duties and functions serving the corporation's needs, as overseen by the directors and officers.<sup>17</sup> Moreover, in these centralized organizational structures, compensation contracts are generally used by directors in an attempt to incentivize officer performance, and by officers to incentivize other employees at each level of the corporation.<sup>18</sup> Just as with governments, some scholars have argued these hierarchical organizations build in bureaucracy, redundancy, and protection of the status quo.<sup>19</sup>

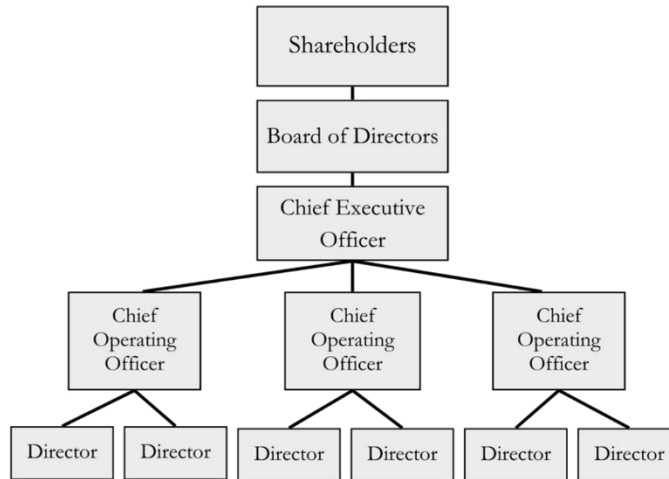
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<sup>17</sup> Bus. Roundtable, *supra* note 16.

<sup>18</sup> *Id.*

<sup>19</sup> While it is may be generally believed that higher compensation of independent corporate directors should improve firm performance, one 2017 study indicated that “directors are overcompensated rather than undercompensated in terms of both magnitude and frequency . . . in addition, director excess compensation has a negative effect on monitoring. . . . [O]verpaying board members helps the CEO gain or keep additional job protection as well as pay. Excess compensation of directors seems to be a sign of board entrenchment. Overall, [the study] provides evidence that overcompensating directors has a negative effect on the soundness of the firm's governance structure. Excess compensation appears to be predicated by some sort of collusion and mutual back-scratching between the CEO and the directors.” Mustafa A. Dah & Melissa B. Frye, *Is Board Compensation Excessive?*, 45 J. CORP. FIN. 566, 582–83 (2017).

Figure 1 below is a generic organizational chart depicting some of the above-described parties and centralized organizational functions within a typical corporate structure:



**Figure 1.**

Under state law, shareholders generally enjoy limited liability from the debts, obligations, or other liabilities of the corporation.<sup>20</sup> Therefore, a shareholder's loss will generally be limited to the value of the shareholder's stock in the corporation. Likewise, corporate laws generally prohibit the judgment creditors of a shareholder from satisfying that shareholder's personal obligations by attaching corporate assets.<sup>21</sup> Additionally, a corporation's directors, officers, employees, and other agents are generally not liable for the debts, obligations, or other liabilities of the corporation, unless they act outside of the scope of their respective lawful agency relationships in some way that otherwise attracts personal liability.<sup>22</sup> As this Article is only providing a brief discussion regarding limited liability, for purposes of drawing parallels to statutory protections now available to state-registered DAOs, it is surely beyond the scope of this Article to discuss at length the statutory remedies and common law equitable doctrines that would support veil piercing and reverse veil piercing activities as exceptions to statutory limited liability.<sup>23</sup>

<sup>20</sup> See generally Robert B. Thompson, Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants, 47 VAND. L. REV. 1 (1994).

<sup>21</sup> See generally Michael J. Gaertner, Note, *Reverse Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?*, 30 WM. & MARY L. REV. 667 (1989).

<sup>22</sup> See Thompson, *supra* note 20, at 6–8.

<sup>23</sup> See generally Gaertner, *supra* note 21; David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371 (1981); Mark A. Olthoff, *Beyond the Form – Should the Corporate Veil Be Pierced?*, 64 UMKC L. REV. 311, (1995). An example: In Nevada veils can only be pierced if: (1) the entity be influenced and governed by the person asserted to be its alter

### B. Partnership Structures and Governance

The term partnership can be used to refer to many different organizational structures, including general partnerships (GPs),<sup>24</sup> limited partnerships (LPs),<sup>25</sup> limited liability partnerships (LLPs),<sup>26</sup> and limited-liability limited partnerships (LLLPs).<sup>27</sup> GPs are business organizations existing by agreement between partners, without any of them having the limited-liability status available through state statute for the other state-registered limited-liability entities, as heretofore mentioned.<sup>28</sup> This means the partners in a GP have general liability for all of the debts, obligations, and other liabilities of the GP. Conversely, the GP has general liability for the personal obligations of the individual partners in a GP. GPs are taxed as partnerships and *cannot* be taxed as corporations, unless they are converted to or merged into a corporation or another registered entity, like the aforementioned, which has elected to be taxed as a corporation.<sup>29</sup> Later in this Article, when we discuss the desirability of formally organizing a DAO under state law, rather than keeping it completely decentralized, this tax consideration will be one of the points we discuss.<sup>30</sup> Because of the

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ego; (2) there be such unity of interest and ownership that one is inseparable from the other; and (3) the facts be such that adherence to the fiction of a separate entity would, under the circumstances, sanction fraud or promote injustice. *Frank McCleary Cattle Co. v. Sewell*, 317 P.2d 957, 959 (Nev. 1957), *overruled on other grounds by* *Callie v. Bowling*, 160 P.3d 878 (Nev. 2007). In New York, the *Walkovsky* court held that plaintiffs need to prove that a shareholder used the corporation in question as the shareholder's agent to conduct business in an individual capacity. A court will pierce the corporate veil when it finds that the corporation is the shareholder's agent, and will hold the principal vicariously liable, under the doctrine of *respondeat superior*. *Walkovsky v. Carlton*, 223 N.E.2d 6, 10 (N.Y. 1966). In some states, like Nevada, the charging order is "a creditor's exclusive remedy in actions against debtors' interests in closely-held corporations (Nev. Rev. Stat. §§78.746 and 78.756), thereby making the stock of a Nevada corporation exempt from execution under state law, as long as the corporation meets [certain] requirements." David M. Grant & Jeremy K. Cooper, *Charging Order Protection is Now Available for Small Corporations*, 30 COMMUNIQUE MAG. 28–29 (2009) (found at <https://www.gmdlegal.com/charging-order-protection-is-available-for-small-corporations/> [<https://perma.cc/2KDZ-CBRM>]) (copy on file with *Wyoming Law Review*).

<sup>24</sup> See Christine Hurt, *Partnership Lost*, 53 U. RICH. L. REV. 491, 497–99 (2022).

<sup>25</sup> See *id.* at 499–500.

<sup>26</sup> See *id.* at 500 n.48 ("LLPs are general partnerships that have elected to shield all of their partners from personal liability from certain or all obligations of the partnership. The RUPA of 1997 contains a full-shield LLP provision in section 306(c): 'A debt, obligation, or other liability of a partnership incurred while the partnership is a limited liability partnership is solely the debt, obligation, or other liability of the limited liability partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the limited liability partnership solely by reason of being or acting as a partner.'").

<sup>27</sup> See *id.* at 500 n.49.

<sup>28</sup> See *id.* at 497–99.

<sup>29</sup> BILL HARDEN, ADVISER'S GUIDE TO S CORPS, C CORPS, PARTNERSHIPS, LLCs, AND SOLE PROPRIETORSHIPS: MAKING THE RIGHT CHOICE 1-3 (2011).

<sup>30</sup> See *infra* Part III.C.



aforementioned qualities, GP governance seems much less centralized than that of the corporation or LLC.

Because of the way LPs and LLLPs allocate the active management functions to general partners, while reserving to the limited partners a passive ownership interest, their governance systems are more centralized than those of the GP.<sup>31</sup> LPs, LLPs, and LLLPs, like GPs, are all generally treated as partnerships for tax purposes.<sup>32</sup> For limited-liability purposes, the general partners in LPs have general liability for the debts and obligations of the entity, just like with GPs.<sup>33</sup> With LLPs and LLLPs, on the other hand, the general partners are treated similarly to the members and/or managers of an LLC, in that the LLP's and LLLP's general partners have limited liability protection as to the debts and obligations of the entity and the other partners, just like the limited partners in an LP would have.<sup>34</sup>

### C. LLC Organizational Structures and Governance

In 1977 Wyoming famously became the first state to provide an alternative to the corporate form, and its long-standing, time-consuming formalities of holding annual meetings of shareholders and directors for the purposes of electing said directors and officers, and transacting other firm business, and then through formal organizational minutes and resolutions, documenting the same as it transpires at such meetings.<sup>35</sup> That alternative was of course the now widely-used *limited-liability company*, which in some form or another is now legislatively accepted in every domestic jurisdiction and most foreign jurisdictions.<sup>36</sup>

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<sup>31</sup> See Hurt, *supra* note 24, at 499–502.

<sup>32</sup> See HARDEN, *supra* note 29, at 1-4 to 1-5.

<sup>33</sup> See generally Thomas E. Rutledge, *To Boldly Go Where You Have Not Been Told You May Go: LLCs, and LLLPs in Interstate Transactions*, 58 BAYLOR L. REV. 205 (2006).

<sup>34</sup> See generally *id.*

<sup>35</sup> Act of Mar. 4, 1977, 1977 Wyo. Sess. Laws ch. 158 (originally codified at WYO. STAT. ANN. §§ 17-294–329). Interestingly, the State of Wyoming continues to innovate legislatively when it comes to entity and trust governance, asset protection, and taxation, in order to drive capital movement and investment to the State. For example, in addition to being first to pass LLC legislation and the second state to pass DAO legislation, *see* Act of Apr. 21, 2021, 2021 Wyo. Sess. Laws ch. 162, § 1 (codified at WYO. STAT. ANN. §§ 17-31-101–116), its legislature passed laws creating the Qualified Spendthrift Trust, Act of Jul. 1, 2007, 2007 Wyo. Sess. Laws ch. 155, §§ 1, 2 (codified as amended at WYO. STAT. ANN. §§ 4-10-502, 510, 523), and the Discretionary Asset Protection Trust, *id.* at §§ 2, 5 (codified as amended at WYO. STAT. ANN. §§ 4-10-504, 506(c)). Moreover, Wyoming does not have a state income tax on individuals or corporations. For further discussion on comparative taxation between four DAO states, *see infra* Part III.C.

<sup>36</sup> See generally Sandra K. Miller, *What Standards of Conduct Should Apply to Members and Managers of Limited Liability Companies?*, 68 ST. JOHN'S L. REV. 21, 22–24, 32–36 (1994); Robert W. Hillman, *Limited Liability in Historical Perspective*, 54 WASH. & LEE L. REV. 615 (1997); Susan P. Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459 (1998).

Generally, LLCs can be organized under state law as manager-managed entities or member-managed entities.<sup>37</sup> When established as a member-managed LLC, the members seem to act with apparent authority on behalf of the LLC,

utilize[ing] the agency rule that existed in partnerships formed under the Uniform Partnership Act of 1914, under which each partner, as a partner, had agency authority to act on behalf of the partnership within the ordinary course of business. Consequently, the member-managed LLC is sometimes referred to as the “partnership model.” In contrast, in the manager-managed LLC, only those named as “managers” have apparent agency authority to act on behalf of the entity, and the members, as members, have no agency authority.<sup>38</sup>

As with the corporation, the manager-managed LLC is a top-down organizational governance structure, albeit more simplified than that of a corporate structure, with members (i.e., the LLC’s owners) appointing managers as agents of the LLC, who then direct the activities of the various departments and groups of employees, with each such department or group being charged with specific duties and functions serving the LLC’s needs.<sup>39</sup>

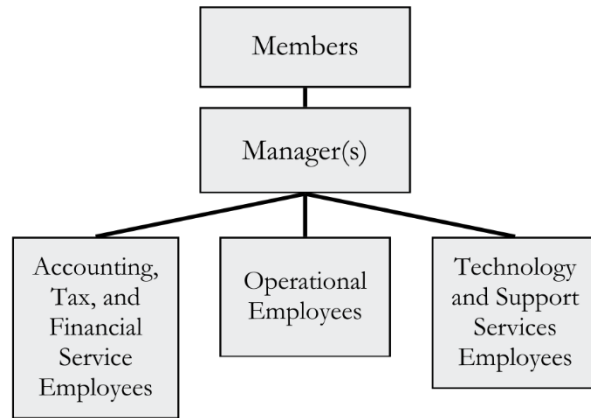
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<sup>37</sup> See Thomas E. Rutledge, *The Lost Distinction Between Agency and Decisional Authority: Unfortunate Consequences of the Member-Managed Versus Manager-Managed Distinction in the Limited Liability Company*, 93 KY. L.J. 737, 737 (2004–05).

<sup>38</sup> *Id.* at 739–40.

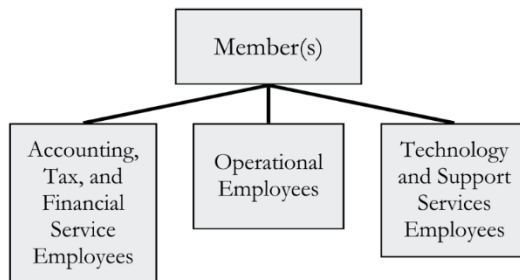
<sup>39</sup> See generally Jonathan R. Macey, *The Limited Liability Company: Lessons for Corporate Law*, 73 WASH. U. L.Q. 433 (1995).

The following Figure 2 is a generic organizational chart depicting some of the above-described parties within a typical manager-managed LLC centralized organizational structure:



**Figure 2.**

The following Figure 3 illustrates a generic organizational chart for an even flatter, and seemingly less centralized, member-managed LLC structure:



**Figure 3.**

As alluded to above, LLC members need not meet regularly for meetings and elections, and therefore, LLC organizations also do not require the associated resolutions and meeting minutes. Instead, modern LLC legislation has made it so the rights of members and managers with respect to each other can be determined by simple, long-term operating agreements, spanning multiple years if so desired, without the need for regular documented meetings and decision making as is required with corporations.<sup>40</sup> Even in the absence of an operating agreement, the members can simply rely upon common statutory defaults and their course

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<sup>40</sup> See Miller, *supra* note 36, at 32–38.

of dealing.<sup>41</sup> When taken together, these characteristics make LLC governance much simpler, less time consuming, and more decentralized than corporate structures.

It is noteworthy that many businesses choose the LLC format over the corporate format because members are able to receive pass-through tax status (*e.g.*, LLCs may be taxed as partnerships for multiple-member LLCs, or as disregarded entities for single-member LLCs), rather than paying taxes at both the corporate level and then again at the individual level on distributed dividends, when taxed as a C-corporation.<sup>42</sup>

Like with corporate limited liability, state-enacted laws generally shield the individual members and managers from debts, obligations, or other liabilities of the LLC.<sup>43</sup> Generally, member losses will be limited to the value of the membership interest.

#### *D. DAO Organizational Structures and Governance*

Expounding on the three words of the acronym in reverse order can help explain DAO organizational structure and governance. A DAO is an *organization*, or group of members, which shares a collective purpose or similar objective. Yet, it is *autonomous* because of its independence and freedom to govern itself without oversight and control of directors, officers and managers. This independence is generally achieved through *decentralized* decision making facilitated by smart contracts, which leverage

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<sup>41</sup> Using Wyoming as an example, WYO. STAT. ANN. § 17-29-110(b) (2023) dictates that “to the extent an operating agreement does not otherwise provide for a matter described in subsection (a) of this section, this chapter governs the matter.” Among other matters, subsection (a) of Chapter 29 provides for operating agreements to be able to regulate relations among the LLC’s members, define the rights and duties of managers, determine how the operating agreement can be amended, set forth voting and management rights, establish transferability rules, determine rights of member distributions, and “[a]ll other aspects of the management of the limited liability company.” *Id.* § 17-29-110(a)(i)–(ii), (iv)–(viii). Thus, if an LLC’s operating agreement is limited in its terms and scope, or even non-existent, then the Wyoming Limited Liability Company Act provides operating provisions to govern the relationship between members, managers and the entities. *See id.* § 17-29-110(b).

<sup>42</sup> *See infra* Part III.C; HARDEN, *supra* note 29 at 1-5. It should also be noted that an LLC, like a corporation, may elect under the Internal Revenue Code to be taxed as a subchapter S-corporation, 26 U.S.C. § 1361, provided the members would otherwise qualify as S-corporation shareholders. The S-corporation shareholder requirements include having no more than one hundred shareholders/members, only having what the IRS defines as “eligible shareholders,” meaning all shareholders/members must be either individuals, certain trusts (*i.e.*, QSSTs or ESBTs) or estates, have only one class of stock/membership interest, and all shareholders/members must either be U.S. citizens or legal residents. *Id.* § 1361(b).

<sup>43</sup> *See* UNIF. LTD. LIAB. CO. ACT § 304 (NAT’L CONF. COMM’RS UNIF. STATE L. amended 2013).

the potential of blockchain coding and encryption technologies, where control of its operations does not reside in a single place.<sup>44</sup> Just like any other contract, a smart contract is an agreement between two or more parties. Being “smart” means that the contract terms contain automatic instructions for carrying out certain actions. Unlike other traditional organizational structures, DAOs self-execute based on the occurrence or nonoccurrence of specified conditions in the blockchain code, script, or digital language. In other words, “[t]he underlying technology, blockchain, is what’s called a ‘distributed ledger’—a database hosted by a network of computers instead of a single server—that offers users an immutable and transparent way to store information.”<sup>45</sup> Such ledger “is chronological, consensus-based, decentralized and mathematically verified in nature.”<sup>46</sup> It may also be “cryptographically secured . . . and maintained via Internet, peer-to-peer network, or other interaction.”<sup>47</sup> These technologies are the basis for the new communication network known as Web3. Thomas Stackpole defined the term “Web3” as:

a convenient shorthand for the project of rewiring how the web works, using blockchain to change how information is stored, shared, and owned. In theory, a blockchain-based web could shatter the monopolies on who controls information, who makes money, and even how networks and corporations work. Advocates argue that Web3 will create new economies, new classes of products, and new services online; that it will return democracy to the web; and that is going to define the next era of the internet.<sup>48</sup>

This is exactly what DAO investors (commonly referred to as “creators,” “participants,” “contributors,” “members,” or “token holders”) are seeking in the context of organizational structures: a democratized alternative to long-held notions of top-down corporate and LLC governance.<sup>49</sup> The DAO objective is to put each participant in this smart-contract-based structure on equal footing and remove the layers of oversight, direction, and management which are not only typical, but

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<sup>44</sup> See generally Carla L. Reyes, *Autonomous Business Reality*, 21 NEV. L.J. 437, 443 (2021); Kyle A. Conway, Comment, *Blockchain Technology: Limited Liability Companies and the Need for North Carolina Legislation*, 45 CAMPBELL L. REV. 127, 130 (2022); Matthew R. McGuire, *The Internet, Personal Jurisdiction, and DAOs*, 80 WASH. & LEE L. REV. 1217, 1220 (2023).

<sup>45</sup> Thomas Stackpole, *What is Web3?*, HARV. BUS. REV., (May 10, 2022), <https://hbr.org/2022/05/what-is-web3> [https://perma.cc/SX8E-85DB].

<sup>46</sup> WYO. STAT. ANN. § 34-29-106(g)(i); accord UTAH CODE ANN. § 48-5-101(23); TENN. CODE ANN. § 48-250-101(3).

<sup>47</sup> VT. STAT. ANN. tit. 12, § 1913 (2023).

<sup>48</sup> Stackpole, *supra* note 45.

<sup>49</sup> See generally Reyes, *supra* note 44; Conway, *supra* note 44; McGuire, *supra* note 44.

statutorily required, of traditional governance structures. Weinstein said DAOs are:

[E]ssentially an internet community with a shared purpose and the equivalent of a shared online bank account. Through a DAO, people can raise money (potentially large amounts) and organize energy aimed at a joint project, without a formalistic corporate overlay. DAOs have no physical headquarters, offices, or bank accounts; there are no directors, hired managers, other leaders, or employees. A DAO's governance rules and the parameters for its decision-making are encoded into the blockchain software on which it runs, making management essentially self-executing . . . ; and all of the DAO's transactions are immutably recorded on the blockchain, providing transparency to its members. Once a DAO's purpose and rules are established and the code reflecting them is created, there is no need for human involvement unless a member wishes to propose for a vote of the members any change to the DAO's purpose or the encoded rules (such as those governing how the DAO's funds are to be spent).<sup>50</sup>

DAOs operate with different assumptions and expectations than many of the traditional legal entities and other business associations found today. Wright said, "DAOs are not run by boards or managers, but rather aim to be governed by democratic or highly participatory processes or algorithms."<sup>51</sup> He continued:

Instead of operating in one or a handful of jurisdictions, DAOs seek to stretch across the globe, stitching together thousands—if not tens or hundreds of thousands—of members regardless of their physical location, background, or creed. DAOs often attempt to avoid written agreements or other forms of legal formalities, with members primarily agreeing to abide by and govern their affairs using software and the rule of code.<sup>52</sup>

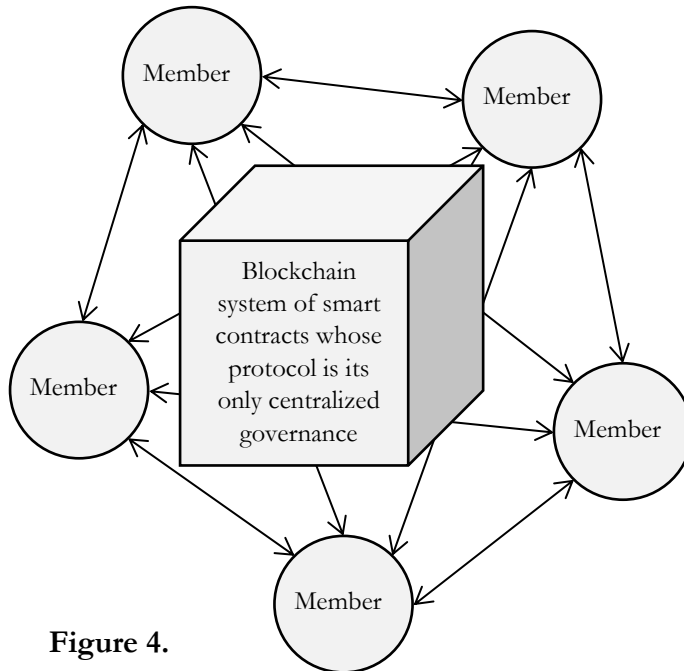
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<sup>50</sup> Weinstein, Lofchie & Schwartz, *supra* note 5.

<sup>51</sup> Aaron Wright, *The Rise of Decentralized Autonomous Organizations: Opportunities and Challenges*, 42 STAN. J. BLOCKCHAIN L. & POL'Y 152, 152 (2021).

<sup>52</sup> *Id.* at 152–53. When being compared to other existing legal entities, "DAOs present certain operational efficiencies and are currently used by organizations managing over \$500m in assets, suggesting that legal regimes should take steps to accommodate their growth and development. DAOs are able to rapidly pool and deploy capital, often implement low-cost and streamlined digital voting schemes, and implement internal

Figure 4, as shown below, depicts a DAO organizational chart where the centralized governance roles otherwise performed by directors and officers of a corporation, managers of an LLC, or general partners in partnership structure, are replaced by self-executing contracts operating on a blockchain protocol system.



**Figure 4.**

There are several key features that make DAOs different from other organizational structures:

First, DAOs often lack formal managers and the implied relationship between DAO members—for many DAOs—is not that of a fiduciary, but rather that members stand on equal footing, at least in terms of the availability to join and gain access to pertinent information related to how a given DAO operates. Second, DAO membership is not viewed as necessarily long lasting and may prove to be transitory in nature. Members may join for limited periods of time, participate in the organization, and exit a DAO due to a lack of interest, a better opportunity, or for other reasons.<sup>53</sup>

Moreover, it is worth noting that governance in DAOs often is more reliant on group consensus and is less hierarchical in nature. Unless a DAO

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controls that protect member assets and could help reduce the need for ongoing monitoring to detect fraud or other insider abuses.” *Id.* at 153.

<sup>53</sup> Wright, *supra* note 51, at 156.

is statutorily organized as a corporation, it will not rely on boards of directors or chief executive officers; instead,

an increasing number of DAOs are managed by distributed consensus—using smart contracts to aggregate the votes or preferences of members (i.e., *participatory DAOs*). A second, more nascent camp of DAOs aims to be entirely algorithmic in nature with the underlying smart contracts dictating the entire functionality of a DAO (i.e., *algorithmic DAOs*).<sup>54</sup>

Algorithmic DAOs rely entirely on software to structure and coordinate social interactions, similar to the way Bitcoin is designed to operate. On the other hand, participatory DAOs are used for traditional commercial purposes, like venture capital financing,<sup>55</sup> litigation funding,<sup>56</sup> charitable fundraising activities,<sup>57</sup> artwork and artifact purchasing pools,<sup>58</sup> and managing open-source technology via smart contracts on the

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<sup>54</sup> *Id.*

<sup>55</sup> As an example, one DAO raised money in an attempt to buy the Denver Broncos, an NFL football team located in America. See Julien Chaisse & Jamieson Kirkwood, *Tokenised Funding and Initial Litigation Offerings: The New Kids Putting Third-Party Funding on the Block*, 16 L. & FIN. MKTS. REV. 20, 34 (2022). As another example, “[i]n October 2021, more than 5,000 people from around the world who are part of a group called CityDAO pooled together over \$8 million USD and collectively bought 40 acres of land in Wyoming to experiment with ‘building the city of the future on the Ethereum blockchain.’ This unprecedented move made headlines in the crypto world, as it marked the first time that a DAO legally acquired and owned a piece of land on the blockchain.” HELENA RONG & ZESLENE MAO, DEEP-DIVE INTO CITYDAO: AN EXPERIMENT IN COLLECTIVE LAND OWNERSHIP AND DECENTRALIZED GOVERNANCE 1 (2023), <https://www.belfercenter.org/publication/deep-dive-citydao-experiment-collective-land-ownership-and-decentralized-governance> [<https://perma.cc/7LFN-WPQH>].

<sup>56</sup> As an example, in just a few days’ time, the Assange DAO was able to raise \$53 million to fund the legal defense of Julian Assange. Also, the Bitcoin Legal Defense Fund, a non-profit, was established by Jack Dorsey to defend against multi-front litigation and other legal threats faced by crypto developers. See Chaisse & Kirkwood, *supra* note 55, at 33–35.

<sup>57</sup> The Ukraine DAO was established on February 21, 2022 to raise money for the purpose of funding defense efforts against Russia and has donated over \$7 million in crypto currency to the Ukrainian government and other organizations supporting its efforts. UKR. DAO, <https://www.ukrainedao.love> (last visited Oct. 20, 2023); see also Chaisse & Kirkwood, *supra* note 55, at 34.

<sup>58</sup> As an example, the ConstitutionDAO amassed a sum of \$47 million from several thousand potential investors who contributed to the entity in exchange for crypto tokens, for the purpose of purchasing a rare, first-edition copy of the U.S. Constitution at a Sotheby’s auction, where it lost the bid. See MacKenzi Sigalos, *The Crypto Investors Who Raised \$47 Million to Buy a Copy of the Constitution Lost Their Bid – Here’s Where the Money Goes Now*, CNBC, (Nov. 19 2021, 8:17 PM), <https://www.cnbc.com/2021/11/18/constitutiondao-crypto-investors-lose-bid-to-buy-constitution-copy.html> [<https://perma.cc/834A-KVUR>].



Ethereum blockchain.<sup>59</sup> Participatory DAOs address some challenges associated with autonomous smart contracts.<sup>60</sup> They enable initial developers to transfer decision-making to a diverse group of users and supporters.<sup>61</sup> These DAO members can set parameters for the smart contract and update it through voting using a “token” distributed to users, developers, and investors.<sup>62</sup> This approach suggests a future where open-source technology is managed by users, ensuring ongoing development while keeping developers accountable and responsive to regulatory or technical organizational issues.<sup>63</sup>

Figure 5 below presents a system for classifying DAOs into the general categories of *algorithmic* and *participatory*, with further subcategories for each, which may be helpful when discussing, understanding, and grouping different types of DAOs and their respective structural qualities.<sup>64</sup>

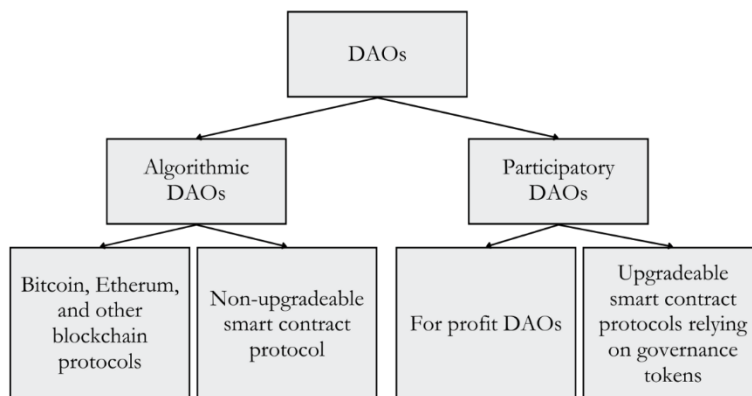


Figure 5.

Regarding the taxation of DAOs, depending upon the specific characteristics of a DAO and the organizational structure of its participants, it is possible for it to be taxed as either an entity (i.e., a corporation or a partnership) or as a currency.<sup>65</sup> More discussion regarding

<sup>59</sup> Wright, *supra* note 51, at 157.

<sup>60</sup> *Id.* at 158.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Wright presented and explained a graphic similar to Figure 5 entitled “A Taxonomy of DAOs.” See *id.* at 157 fig.1.

<sup>65</sup> See generally David J. Shakow, *The Tao of the DAO: Taxing an Entity That Lives on a Blockchain*, 160 TAX NOTES 929 (2018).

the tax implications of DAOs will be presented in Part III, Section C below.

### III. CENTRALIZING THE DECENTRALIZED

At first glance, it may seem ironic to consider organizing the autonomous coding belonging to a decentralized set of participants. It could even be seen as defeating an overriding purpose of DAOs by taking a group of potentially anonymous individuals, of possibly unknown numbers and located in unknown geographic locations, who are able to hide behind unbreakable encryption, and ask them to formally organize in a state jurisdiction. What might they have to lose by continuing forward? This Part will talk about the benefits of organizing under state statute, particularly talking about streamlining startup efficiency, providing limited liability protection to participants, and normalizing tax reporting.

#### *A. Streamline Startup Efficiency*

With regard to establishing a purely decentralized entity, the physical limitations and constraints involved in the DAO organizing process can be challenging and may not proceed very quickly, as participants engage to initiate the foundational governance. This is often accomplished as members propose algorithmic mechanisms to act and to grant certain authority to certain agents to carry out certain functions. With a DAO organized as member-managed, managers can have broader authority to move forward more quickly and efficiently at the early stages of startup. Of the four states which have enacted DAO legislation, more than ninety percent of the DAOs formed pursuant to state law have organized using Wyoming's statute.<sup>66</sup> Because Wyoming is the leader in terms of pure numbers of registrations, this Article pulls several examples from its body of legislation. It is important to recognize that

when Wyoming's statute was passed, it allowed for the articles of organization to classify the entity as either a member-managed DAO or an algorithmically-managed DAO, with a presumption that it is member-managed, if not otherwise specified. It was not the original intent to force DAOs into one of these categories; it was not meant as an "either/or" framework. Instead, the choice was meant to provide organizing with a broad spectrum of management options. Rarely does a DAO start in a purely decentralized manner. For DAOs that are organizing as a

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<sup>66</sup> DAVID M. GRANT, ERIC M. KIRBY & STEVEN HAWKINS, DAO LLC SURVEY RESULTS (2023) [hereinafter DAO LLC SURVEY RESULTS]. The authors' survey data and results are on file with the *Wyoming Law Review*.

legal entity, most DAOs start with a small number of organizers. Therefore, by necessity, those initial actors do much of the initial work of organization and start up with a goal of moving towards decentralization.<sup>67</sup>

Since the Wyoming statute provides a DAO's articles of organization may define a DAO as member-managed or algorithmically managed, and since DAOs organized as member-managed may evolve towards true decentralization and become algorithmically managed, unique challenges may exist.<sup>68</sup>

An algorithmically managed DAO, which would truly be decentralized, may only form if the underlying smart contracts are capable of updates or modifications. To address possible conflicts between a DAO's articles of organization, operating agreement, and the underlying smart contracts, the bill established a hierarchy. Through the creation of statute 17-31-115, the bill announces that, "[w]here the underlying articles of organization and operating agreement are in conflict, the articles of organization shall preempt any conflicting provisions. Where the underlying articles of organization and smart contract are in conflict, the smart contract shall preempt any conflicting provisions of the articles of organization, except [in limited circumstances]." Thus, Wyoming's bill expressly recognizes the *smart contract* as the primary document governing the rights of DAO members when organized under the new bill.<sup>69</sup>

Regardless of the desired DAO type (member-managed or algorithmically managed), organization pursuant to state statute can streamline startup efficiency. With the statute's clearly established hierarchy, operating agreements and articles of organization are statutorily preempted by the smart contract that ultimately facilitates the existence of

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<sup>67</sup> Telephone and email interviews with Matthew D. Kaufman, Esq., partner, Hathaway & Kunz, LLP, and Governor Appointee to Wyoming Legislative Select Committee on Blockchain, Financial Technology and Digital Innovation Technology, (Oct. 3, 2023) [hereinafter Kaufman Interview] (notes and emails on file with *Wyoming Law Review*). Find Kaufman's professional biographical sketch here: *Matthew D. Kaufman*, HATHAWAY & KUNZ, <https://www.hkwyolaw.com/attorney/matthew-d-kaufman/> [https://perma.cc/QP93-AZKF] (last visited Dec. 29, 2023).

<sup>68</sup> See WYO. STAT. ANN. §§ 17-31-101–116.

<sup>69</sup> William K. Kane, Zachary Golda & William de Sierra-Pambley, *Wyoming Takes the Lead with Decentralized Autonomous Organizations*, L. OF THE LEDGER (May 25, 2021), <https://www.lawoftheledger.com/2021/05/articles/blockchain/wyoming-decentralized-autonomous-organizations/> [https://perma.cc/M9DW-EN9Z].

any DAO, allowing the smart contract to be the primary focus of the organizers.

*B. Provide Limited Liability Protection to Participants*

Another reason DAOs may desire to organize under state law is to provide enhanced limited liability protection to its participants. Brummer and Seira presented the spectrum of legal wrappers possibly available to DAOs under state organizational laws to include traditional corporations, LLCs, Limited Cooperative Associations, as well as not-for-profit foundations and international organizations.<sup>70</sup> Most state statutes related to corporations and LLCs remain silent as to whether smart-contract-based entities can incorporate or organize under their statutes;<sup>71</sup> however, four states have taken steps to specifically authorize the same under their statutory law, including the Vermont Blockchain-Based Limited Liability Company, or “BLLC”;<sup>72</sup> the Wyoming Limited Liability Company DAOs, or “DAO LLC”;<sup>73</sup> the Tennessee decentralized organization, also known as “DO,” “DAO,” “DO LLC,” or “DAO LLC”;<sup>74</sup> and the Utah Limited Liability DAO or “LLD.”<sup>75</sup>

According to Matthew D. Kaufman, a member of the Governor’s Legislative Select Committee on Blockchain, Financial Technology and Digital Innovation Technology in Wyoming, “A key reason why DAO members decided to organize in the State of Wyoming, instead of remaining unorganized, is to avoid being classified as a general partnership under state law, thereby assuming general liability for any damages caused by the DAO or its other members.”<sup>76</sup>

As of September 30, 2023, the authors’ survey showed there were 830 registered Wyoming DAO LLCs, 580 of which were active; 66 Vermont BLLCs, 59 of which were active; and 22 Tennessee DAO LLCs, 13 of

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<sup>70</sup> See CHRIS BRUMMER & RODRIGO SEIRA, *LEGAL WRAPPERS AND DAOs* (2022), <https://assets.super.so/7c0ae78b-4328-4df4-a1ac-8e9c57aeca4c/files/f8be4086-42d6-4ed3-915b-2fffd682fbf.pdf> [<https://perma.cc/6EQN-HG97>].

<sup>71</sup> See *id.* at 10.

<sup>72</sup> See VT. STAT. ANN. tit. 11, §§ 4171–4176.

<sup>73</sup> See WYO. STAT. ANN. §§ 17-31-101–116.

<sup>74</sup> See TENN. CODE ANN. §§ 48-250-101–116. Searching for business names with all four of the possible name variations on the Tennessee Secretary of State’s website, proved challenging, especially when searching the “DO” naming option as all returned search results seemed to produce names of non-DAO entities established by Doctors of Osteopathic Medicine. For that reason, the authors would recommend legislatively dropping that “DO” from the list of options available to DAO organizers. Also noteworthy in the survey was that 6 of the 22 active DAO LLCs in Tennessee were not domestic LLCs in that state, but were foreign Wyoming DAOs.

<sup>75</sup> See UTAH CODE ANN. §§ 48-5-101–406.

<sup>76</sup> Kaufman Interview, *supra* note 67.

which were active.<sup>77</sup> As of that date, there were no LLDs organized in Utah, because the Utah statute does not go into effect until January 1, 2024.<sup>78</sup> Even though Wyoming's statute was passed after the Vermont legislation, the reason for it having so many more DAO registrations is likely because of its unique "digital asset regulatory regime, including statutory property definitions, rights, remedies, digital asset enabled business entities, and the support of Wyoming regulatory agencies."<sup>79</sup>

In Wyoming, the DAO statute states that its Limited Liability Company Act applies to decentralized organizations to the extent not inconsistent with the statute.<sup>80</sup> Likewise, the equivalent Vermont,<sup>81</sup> Tennessee,<sup>82</sup> and Utah<sup>83</sup> statutes say nearly the same thing as each other, thereby providing limited liability protection to members of organized DAOs in these states too.

In determining participants' fiduciary duties to one another and to the corporation, all four DAO states have provisions related to the following language found in the Tennessee statute, albeit Vermont's version (which was enacted first) is the weakest, and Utah's, enacted most recently, seems the most flexible:<sup>84</sup>

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<sup>77</sup> Of the 22 DAOs registered in Tennessee, interestingly, 6 were first organized domestically in Wyoming, and only later registered as foreign entities in Tennessee. *See* DAO LLC SURVEY RESULTS, *supra* note 66.

<sup>78</sup> *See supra* note 66; Decentralized Autonomous Organization Act, H.B. 357, 2023 Leg., Gen. Sess., (Utah 2023) <https://le.utah.gov/~2023/bills/hbillint/HB0357S01.htm> [<https://perma.cc/XN84-54RV>].

<sup>79</sup> Kaufman Interview, *supra* note 67.

<sup>80</sup> WYO. STAT. ANN. § 17-31-103.

<sup>81</sup> VT. STAT. ANN. tit. 11, § 4176.

<sup>82</sup> TENN. CODE ANN. § 48-250-102.

<sup>83</sup> UTAH CODE ANN. § 48-5-102. As an example, this Utah statute says the following:

A decentralized autonomous organization shall be governed by the following, listed in order of primacy: (1) this act; (2) the by-laws of the decentralized autonomous organization; (3) if this act and a decentralized autonomous organization's by-laws are silent, the provisions of Chapter 3a, Utah Revised Uniform Limited Liability Company Act; and (4) principles of law and equity.

*Id.* The fourth point on law and equity could cut both ways in terms of strengthening the limited liability veil or providing arguments for veil piercing, whereas DAO LLCs in the other three states not having this language would likely have similar limited liability treatment to that of their LLCs.

<sup>84</sup> *See* TENN. CODE ANN. § 48-250-103(c); WYO. STAT. ANN. 17-31-103; VT. STAT. ANN. tit. 11, § 4173(2)(F); UTAH CODE ANN. § 48-5-307.

## NOTICE OF RESTRICTIONS ON DUTIES AND TRANSFERS

The rights of members in a decentralized organization may differ materially from the rights of members in other limited liability companies. The Tennessee Decentralized Organization Supplement, underlying smart contracts, articles of organization, and operating agreement, if applicable, of a decentralized organization may define, reduce, or eliminate fiduciary duties and may restrict the withdrawal or resignation from the decentralized organization, or the transfer of ownership interests, return of capital contributions, or dissolution of the decentralized organization.<sup>85</sup>

In any event, it seems all four statutes want the bylaws or algorithm to be able to limit or expand fiduciary duties, depending upon the objectives of the DAO. This is important for either protecting the DAO's participants from suffering liability for breaches of this duty, or conversely we hypothesize it may be used to protect the entity and other members from saboteurs acquiring tokens just for nefarious purposes to interfere with the success of the entity and then skating free of personal liability because of the limitations on individual duties.<sup>86</sup>

While we readily acknowledge the inherent protection received through a participant's increased anonymity in a DAO which is not organized pursuant to state laws, it does seem that limiting the liability of DAO participants by using court-tested limited liability laws could be a major factor to consider when deciding to organize a DAO pursuant to state statute.

### *C. Normalize Tax and Regulatory Relationships*

As stated earlier, depending upon its specific characteristics and organizational structure of its participants, it is possible for a DAO to be taxed as either an entity (i.e., a corporation or a partnership) or as a currency.<sup>87</sup> Generally the more algorithmic and non-upgradable the DAO is, the more likely that it will be taxed as a mere currency. Conversely, the more participatory and upgradable the DAO is, the more likely it will be

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<sup>85</sup> TENN. CODE ANN. § 48-250-103(c).

<sup>86</sup> For example, if the DAO organized to buy the Denver Broncos football team had been successful in its bid, *see* Chaisse & Kirkwood, *supra* note 55, at 34, the authors theorize that many persons who are not fans of Denver, but instead of a rival football team, might be incentivized to acquire Bronco DAO tokens for the purposes of trying to subvert the team's ability to win through gaslighting or sabotaging the DAO's algorithm.

<sup>87</sup> *See* Shakow, *supra* note 65, at 939–41.

taxed as an entity.<sup>88</sup> Shakow points out that the fact DAOs could be taxed as an entity may be surprising to some because “[i]n some sense, it appears like a disembodied creation floating in cyberspace, with no apparent form.”<sup>89</sup>

This Article doesn’t attempt to discuss the foreign tax reporting requirements relating to persons owning interests in foreign investments. It is very easy to see how a pure DAO could be considered a foreign entity.<sup>90</sup> Suffice it to say, complex and increased reporting, disclosure, and withholding requirements exist when a person holds foreign interests and investments, and increased penalties may also exist for failure to comply with such laws and/or pay amounts owed in a timely manner.<sup>91</sup>

With that being said, the very clear dilemma in a government attempting to tax such an organization is that:

The pure blockchain structure intentionally omits a central authority playing any role in its ongoing operation. If a DAO is truly “autonomous,” those who developed it and promoted it no longer have any power to control it. Thus, in a DAO blockchain, there is no one responsible for filing the forms and returns needed by the tax system. There is no one to file corporate or partnership tax returns with the IRS; there is no one to furnish forms K-1 or 1099 to the owners to inform them of their income from the entities; and there is no one to withhold from any payments made to owners (or, indeed, if it is appropriate, to withhold from payments made to the “miners” without whom the blockchain would not be maintained). If forms are not filed and amounts are not withheld, who will be responsible for making the resulting payments and paying any penalties that the IRS will levy?<sup>92</sup>

Kaufman also said that:

Truly decentralized and anonymous memberships for DAOs still pose tax reporting compliance issues in many instances. However, one aspect of the Wyoming DAO LLC, is that it provides flexibility for a DAO entity to register formally, but maintain some optionality with

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<sup>88</sup> *See id.*

<sup>89</sup> *Id.* at 934–35.

<sup>90</sup> *See id.* at 938.

<sup>91</sup> *See id.* at 938–39.

<sup>92</sup> *Id.* at 937.

respect to being taxed as a partnership or a corporation, which may help them find a path toward tax reporting compliance.<sup>93</sup>

With regard to state taxation, only Utah, the newest state to enact legislation, has a statutory tax provision. It makes it clear that DAOs can elect to be taxed as corporations, and that otherwise a multi-member DAO would be taxed as a partnership.<sup>94</sup>

Thus, we see while it is unclear how DAOs might ultimately be treated for federal, foreign, and state tax purposes in the real world, we know income is being realized through these structures, and so taxes surely have to be paid in some form.<sup>95</sup> Among the four DAO states, they all have different tax treatment for state income tax purposes. For example, Wyoming does not have a corporate or individual tax, while the other states do have some version of a corporate or individual taxes.<sup>96</sup> Moreover, we expect many future developments in this area, in terms of both legislative and enforcement actions, and believe that tax paying DAOs organized pursuant to state statute as partnerships or corporations will likely be treated more gently by tax authorities than those who remain in the shadows or organize in states without specific DAO statutes.<sup>97</sup>

#### IV. RECOMMENDATIONS

##### *A. Recommendations for Legal Predictability*

The rise of DAOs has resulted in conversations and legal discussions on appropriate governance models that would be most effective to regulate and govern such organizations.<sup>98</sup> One of the main arguments for such governance is to create rule of law and establish legal predictability. Legal predictability often refers to the degree of certainty and consistency in the application and interpretation of laws and regulations within a particular legal system and is a significant component of the rule of law.<sup>99</sup> The

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<sup>93</sup> Kaufman Interview, *supra* note 67.

<sup>94</sup> UTAH CODE ANN. § 48-5-406.

<sup>95</sup> *See id.*

<sup>96</sup> *See Taxes in Wyoming*, TAX FOUND., <https://taxfoundation.org/location/wyoming/> [https://perma.cc/X8TY-V58N] (last visited Dec. 19, 2023).

<sup>97</sup> *See id.* Utah's DAO statute is the only one of the four DAO states to have a specific tax provision.

<sup>98</sup> *See, e.g.*, Olivier Rikken, Marijn Janssen, and Zenlin Kwee, *Governance Challenges of Blockchain and Decentralized Autonomous Organizations*, 24 INFO. POLITY 397, 397–417 (2019).

<sup>99</sup> *See, e.g.*, STEFANIE A. LINDQUIST & FRANK C. CROSS, STABILITY, PREDICTABILITY, AND THE RULE OF LAW: STARE DECISIS AND RECIPROCITY NORM 1–3 (2010), <https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf> [https://perma.cc/5FKB-6FF4].



American Bar Association provides that “[t]he rule of law is intended to promote stability, but a society that operates under the rule of law must also remain vigilant to ensure the rule of law also serves the interests of justice.”<sup>100</sup> U.S. Court of Appeals Judge Diane Wood provided that, “[N]either laws nor the procedures used to create or implement them should be secret; and . . . the laws must not be arbitrary.”<sup>101</sup>

Legal predictability helps ensure that individuals, businesses, and organizations can reasonably anticipate how the law will be enforced and how legal disputes will be resolved in a given jurisdiction. In doing so, two initial needs must be met:

First, an open and transparent system of making laws and, second, laws that are applied predictably and uniformly. Openness and transparency are essential. If people are unable to know and understand what the law is, they cannot be expected to follow it. At the same time, people deserve to know why a particular law has been passed and why they are being asked to obey it.<sup>102</sup>

Legal predictability is important for several reasons, including business planning, risk management, investor confidence, contract enforcement, compliance and regulation, trade and relations, and stability. “Predictable results mean that people who act in the same way can expect the law to treat them in the same way.”<sup>103</sup> When legal systems are unpredictable or subject to frequent changes and inconsistencies, it can create uncertainty, hinder economic growth, and erode trust in the rule of law. “In the absence of stability and predictability in law, citizens have difficulty managing their affairs effectively. Legal stability also has a moral valence insofar as it assures that like cases will be treated equally.”<sup>104</sup> Therefore, governments and legal authorities should strive to create and maintain a predictable legal environment surrounding DAOs to support legal, societal, and economic goals.

With regards to improving the legal predictability of DAOs, some legal professionals believe that “[it’s] time for legislation and regulation to

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<sup>100</sup> *What Is the Rule of Law*, A.B.A., [https://www.americanbar.org/advocacy/rule\\_of\\_law/what-is-the-rule-of-law](https://www.americanbar.org/advocacy/rule_of_law/what-is-the-rule-of-law) (last visited Dec. 19, 2023).

<sup>101</sup> *Id.* (quoting Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 457 (2003)).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> LINDQUIST & CROSS, *supra* note 99, at 1.

follow where the technology is taking us.”<sup>105</sup> When lawmakers make the effort to provide laws, rules, and/or regulations regarding DAOs (such as in Wyoming), “[t]his allows for a greater degree of predictability of the treatment of the DAO than in other jurisdictions.”<sup>106</sup> By understanding state requirements for the creation of business entities (i.e. LLCs, corporations, etc.), and after reviewing what states have done to help provide legal predictability in their respective jurisdictions for DAOs, below are several of our recommendations that lawmakers could consider in designing and supporting statutory frameworks to improve legal predictability among DAOs.

1. Create clear and comprehensive legislation or regulatory guidelines specifically addressing the recognition, legal definitions, and treatment of DAOs.
2. Provide a legal framework that recognizes DAOs as distinct legal entities, such as a new form of business entity (i.e., LLCs), rather than simply amending an existing LLC statute.
3. Establish straightforward registration and reporting requirements for DAOs, similar to those imposed on traditional businesses.

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<sup>105</sup> Louis Lehot & Patrick D. Daugherty, *DeFi and the DAO: How the Law Needs to Change to Accommodate Decentralized Autonomous Organizations*, LAW.COM (Dec. 14, 2021, 7:00 AM) [https://www.law.com/legaltechnews/2021/12/14/defi-and-the-law-needs-to-change-to-accommodate-decentralized-autonomous-organizations/](https://www.law.com/legaltechnews/2021/12/14/defi-and-the-dao-how-the-law-needs-to-change-to-accommodate-decentralized-autonomous-organizations/) [<https://perma.cc/CCK8-GQAD>]. In consideration of his interview, *see* Kaufman Interview, *supra* note 67, the authors provided Kaufman with an advance version of this Article, to which he responded:

Practitioners need to understand, and at least consider, that for many DAO’s and their participants[,] traditional [principles] and expectations of corporate governance may need to be modified, or even let go. The ethos of much of the digital asset industry is oriented toward true community governance and participation, and the insistence by the legal community to only permit new entity types, and individual participation in those entity types, to occur within the confines of traditional notions of corporate governance, rights, and remedies, may not be accepted by the DAO community. Of course, time will tell.

Email from Matthew D. Kaufman, Esq. to David Grant, Assistant Professor of Bus. L. & Acct., (Nov. 10, 2023) (email on file with *Wyoming Law Review*).

<sup>106</sup> Morgan Johnson, *Decentralized Autonomous Organization Laws Across the U.S.*, STINSON (Oct. 4, 2023), <https://www.stinson.com/newsroom-publications-decentralized-autonomous-organization-laws-across-the-us> [<https://perma.cc/XK29-GJKQ>].

4. Provide clear guidance on the tax treatment of DAOs, including how income generated by DAO activities is taxed and any tax incentives or exemptions available.<sup>107</sup>
5. Encourage DAOs to conduct regular smart contract audits to ensure the security and integrity of their code, which can help prevent issues arising from vulnerabilities or bugs, being careful not to defeat the purpose of decentralization.<sup>108</sup>
6. Implement consumer protection measures to safeguard the interests of token holders and users of DAO platforms, such as disclosure requirements and dispute resolution mechanisms.<sup>109</sup>
7. Establish a legislative mechanism for ongoing review and adaptation of regulations as the technology evolves.
8. Launch and fund educational campaigns to inform the general public about the legal status and rights of DAOs.

Improving legal predictability for DAOs is a complex task that requires a delicate balance between promoting innovation and protecting stakeholders. “Individuals or entities that wish to form a DAO will need to stay up to date with the constantly shifting landscape as state regulators are pressured to begin recognizing this new form of business organization.”<sup>110</sup> Moreover, in attempting to create mechanisms to ensure legal predictability, lawmakers should work closely with legal experts who specialize in blockchain and cryptocurrency law and understand the associated technology, as well as other legal specialties wanting connections with DAO laws, as they can provide guidance on regulatory compliance and help navigate complex legal issues.<sup>111</sup> We predict

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<sup>107</sup> See Jason Schwartz, *Squaring the Circle: Smart Contracts and DAOs as Tax Entities*, BANKLESS DAO (July 29, 2022, 10:00 AM), [https://www.friedfrank.com/uploads/siteFiles/Publications/Decentralized%20Autonomous%20Organizations%20\\_%20Decentralized%20Law.pdf](https://www.friedfrank.com/uploads/siteFiles/Publications/Decentralized%20Autonomous%20Organizations%20_%20Decentralized%20Law.pdf).

<sup>108</sup> See Solidity Acad., *Smart Contract Auditing: Ensuring Security in Solidity-based Applications*, MEDIUM (May 16, 2023), <https://medium.com/coinmonks/smart-contract-auditing-ensuring-security-in-solidity-based-applications-5d32fd8c854b> [<https://perma.cc/B6GR-J8VA>].

<sup>109</sup> See generally U.S. GOV'T ACCOUNTABILITY OFF., REPORT TO CONGRESSIONAL REQUESTERS (2023), <https://www.gao.gov/assets/gao-23-105346.pdf> [<https://perma.cc/EC7U-M9GH>].

<sup>110</sup> Kane, Golda & de Sierra-Pambley, *supra* note 69.

<sup>111</sup> As an example, a collaboration between estate planning legal specialists and DAO legal experts could result in new uses, protections and greater clarity for using DAOs to assist with distributions of inheritances. Kaufman said,

Estate planning provides another innovative opportunity for using a DAO's smart contract protocol. Imagine using a 'special purpose depository bank,' or trust company, to digitally and algorithmically distribute inheritances from a trust when the grantor dies. These

implementing these proposed measures will help produce legal predictability thereby inducing economic growth and more participation in DAOs.

*B. Recommendations for DAO Organizers*

Despite the passing of the supplemental bill, DAOs must remain wary of federal regulations as “DAO’s operations could subject the developers, or managers to enforcement actions by the SEC or [the Commodity Futures Trading Commission].”<sup>112</sup> Additionally, DAOs may still need to navigate evolving regulations. To streamline compliance, DAOs should work closely with legal experts familiar with Wyoming’s (or the state they will register in) specific regulations and ensure they meet the state’s requirements for registration, reporting, and taxation. Access to traditional banking services can also be challenging for blockchain-based startups. As such, DAOs should proactively seek out banks or fintech platforms that are crypto-friendly and understand the needs of blockchain companies.<sup>113</sup> Moreover, DAOs rely heavily on smart contracts, which need to be developed efficiently. It is recommended to collaborate with experienced blockchain developers or to outsource development work to reputable firms to ensure that your smart contracts are secure and efficient. If the DAO plans to issue tokens or conduct a token sale, it must ensure compliance with securities laws and token issuance regulations. This may involve working with legal experts to structure the DAO token offering properly.

Although DAOs are decentralized, they still need mechanisms for decision-making and governance. Implementing effective voting systems and dispute resolution processes can streamline decision-making and reduce inefficiencies caused by disagreements. It is also important to build a strong community around the DAO, which is essential for its success. To build a stronger community and foster participation, one should engage

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‘digital asset banks,’ and trust companies, which, by the way, are now coming online in Wyoming, and are fully regulated. Using DAOs for this purpose could dramatically reduce the expense, time, and hassle involved with executors, trustees, and other fiduciaries having to fulfill these roles individually. Think of it: when someone dies, their family could receive on-time distributions with exactness in timing and purpose pursuant to a smart contract.

Kaufman Interview, *supra* note 67.

<sup>112</sup> Kane, Golda & de Sierra-Pambley, *supra* note 69.

<sup>113</sup> The word “Fintech” is the combination of the words “financial” and “technology.” Fintech platforms or companies employ technology to provide more efficient and user-friendly financial services for their users. Venmo, which facilitates peer to peer payments, and Coinbase, which facilitates Crypto currency transactions are examples of Fintech platforms.

with potential stakeholders and contributors, and use social media and online forums.

Security breaches can be especially detrimental to DAOs. It is important that DAO organizers invest in robust cybersecurity measures and conduct regular audits of the smart contracts and systems to mitigate potential risks. Organizers that tap into the local blockchain ecosystem by collaborating with other blockchain startups, industry associations, and academic institutions will likely be more successful at preventing security breaches and mitigating other risks. Wyoming has a growing blockchain community, and networking can help with finding talent, investors, and business opportunities. Organizers or states such as Wyoming that want to promote DAO participation should also consider investing in education and training programs to attract talent and develop a skilled workforce.

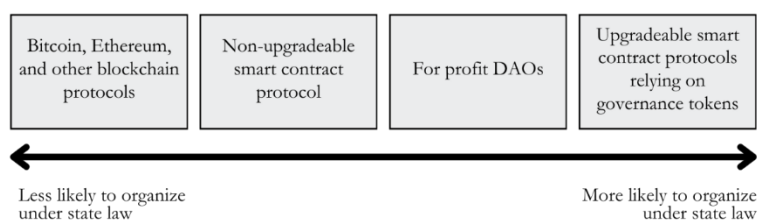
Finally, a DAO organizer should ensure their DAO is keeping accurate financial records and is prepared for tax reporting. Wyoming's tax laws can be advantageous, but proper accounting is essential for compliance and financial management. Organizers should actively engage in discussions with regulators and policymakers to advocate for clear and favorable regulations for blockchain and DAOs. Organizers should collaborate with industry associations to promote the interests of the blockchain community. Following these recommendations may help organizers avoid potential pitfalls when establishing DAOs.

## V. CONCLUSION

In conclusion, the exploration of DAOs and the question of whether to statutorily organize them presents a multifaceted and dynamic legal landscape. As blockchain technology continues to disrupt traditional business and legal paradigms, policymakers and legislators face the formidable task of striking a balance between facilitating innovation and ensuring legal predictability and protection for all stakeholders. The concept of DAOs embodies the principles of decentralization, transparency, and autonomy, offering exciting possibilities for new forms of collaboration, governance, and economic activity. However, their rapid proliferation has also exposed vulnerabilities, ranging from security flaws in smart contracts to the potential for malicious or negligent activities and the need for legal recourse.

The type, purpose, and governance structure of a DAO will also likely determine whether it will organize under state law or remain classically

decentralized.<sup>114</sup> Figure 6 below illustrates how organizations based upon blockchain systems of smart contracts may be more or less likely to organize under the provisions of a state statute.<sup>115</sup> The more participatory the governance structure, the more likely a DAO might be to organize under state law. Similarly, the more easily a DAO's protocol may be upgraded, and the smoother it is to achieve consensus on forks in the code, the more likely such an organization will see benefits to organizing under state law. Conversely, the more algorithmic a business's operation, and the more a DAO's tokens behave like a currency and less like a security, the less likely it may be to organize under state law.



**Figure 6.** DAO Organization Continuum

This Article has attempted to shed some light on the key considerations surrounding the statutory organization of and legal allowance for DAOs. It is evident that while regulatory clarity is essential to provide legal recognition and protection, overregulation can stifle innovation and impede the growth of this transformative technology. Striking the right balance requires a nuanced approach that acknowledges the unique nature of DAOs and their potential benefits. Ultimately, the decision whether to statutorily organize DAOs should be informed by a thorough understanding of their evolving technology, the needs and rights of their stakeholders, and the broader regulatory and economic context. As legislators contemplate the development of DAO-specific legislation and the ongoing regulation of such legislation, it is imperative that they engage with blockchain experts, legal professionals, and the DAO community to craft a regulatory framework that fosters responsible innovation, protects against misuse, and ensures legal predictability for all parties involved.

In the fast-paced world of blockchain and decentralized technology, flexibility, adaptability, and a commitment to ongoing review and

<sup>114</sup> Trivial note: It may seem odd to refer to an organizational structure that was invented within the last two decades as “classical,” yet with the relative speed at which technological advances are made, such description may be congruous.

<sup>115</sup> See *supra* Figure 5; Wright, *supra* note 51, at 157 fig.1, which was clearly used as the chassis for this Figure 6 continuum.

refinement of regulations will be essential. It is only through collaborative efforts, informed decisions, and a deep appreciation for the transformative potential of DAOs that we can navigate this evolving legal landscape effectively and create a regulatory framework that promotes the responsible growth of DAOs while safeguarding the interests of their participants and the broader society.