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Reconceiving Corporate Rights and Regulation in the AI Era

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ABSTRACT

Can existing corporate governance principles properly guide the relationship between shareholders and directors as artificial intelligence ("AI") plays an increasingly prominent role in corporate management, planning, and operations? Without a doubt, AI technologies allow corporations to enjoy enhanced efficiency and innovation. But the vast range of AI capabilities—from sophisticated data analytics to autonomous decision-making—raises profound questions about whether traditional governance principles remain sufficiently robust to cabin the proper development and deployment of such a powerful and rapidly evolving set of new technologies. Current corporate governance structures that focus on human actors and traditional business decision-making mechanisms seem ill-suited to address some of the novel legal questions that increased reliance on AI poses, especially considering the opacity regarding how AI technologies actually function. Because the existing fiduciary framework for corporate governance remains insufficiently supple to accommodate AI's transformative impact on corporate practices and strategy, there is a pressing need to reconsider basic corporate governance principles.

Shaping appropriate corporate legal constructs to guide the development and dissemination of AI technologies will most likely require a multifaced approach involving new legislative enactments, reconsideration of existing common law principles, and regulatory reforms. Without this concerted approach, striking a sustainable balance between protecting the public interest and fostering innovation becomes far too precarious and uncertain. AI technologies offer incredible opportunities for economic growth, enhanced efficiency, and revolutionary innovation in the corporate realm. But enhanced reliance on algorithmic decision-making also raises

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troubling concerns regarding corporate accountability, transparency, and threats to important social and civic institutions. As a result, a holistic reconsideration of corporate rights and responsibilities seems essential to ensure a proper balancing between the manifold benefits AI advancements might produce and the continued integrity of public institutions and civic values. By examining the potential disconnect between AI advancements and current corporate governance standards, this Article uncovers the shortcomings of existing corporate jurisprudence and advances a set of principles for guiding the articulation of a more dynamic and responsible corporate governance approach to AI.

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I. INTRODUCTION

Can existing corporate governance principles properly guide the relationship between shareholders and directors as artificial intelligence ("AI") plays an increasingly prominent role in corporate management, planning, and operations? Without a doubt, AI technologies allow corporations to enjoy enhanced efficiency and innovation. But the vast range of AI capabilities—from sophisticated data analytics to autonomous decision-making—raises profound questions about whether traditional governance principles remain sufficiently robust to cabin the proper development and deployment of such a powerful and rapidly evolving set of new technologies. Current corporate governance structures that focus on human actors and traditional business decision-making mechanisms seem ill-suited to address some of the novel legal questions that increased reliance on AI poses, especially considering the opacity regarding how AI technologies actually function. Anticipating that the existing legal framework for corporate governance remains insufficiently supple to accommodate AI's transformative impact on corporate practices and strategy, a host of scholars, politicians, and business leaders have increasingly called for a significant re-evaluation of the legal principles that frame corporate rights and responsibilities.[1]

This push for re-evaluation goes far beyond tweaking existing governance principles for the sake of jurisprudential coherence as corporate practices inevitably evolve. Instead, the pressing need to reconsider basic corporate governance principles stems from broader societal concerns regarding the influence that artificially intelligent corporations have on our social, economic, and political lives. The pervasive integration of AI into corporate decision-making processes presents difficult questions about corporate accountability, especially in the cases of harm to the community or significant ethical breaches. Existing fiduciary duties based on notions of trust seem far too anachronistic in light of the complexities associated with algorithmic entities and processes animating AI decision-making. As AI continues to fundamentally reshape the basic nature and practices of corporations, legal frameworks must be developed to address the unique challenges posed by such a disruptive technology.

Shaping appropriate corporate legal constructs to guide the development and dissemination of AI technologies will most likely require a multifaced approach involving new legislative enactments, reconsideration of existing common law principles, and regulatory reforms. Without this concerted approach, striking a sustainable balance between protecting the public interest and fostering innovation becomes far too precarious and uncertain. AI technologies offer incredible opportunities for economic growth, enhanced efficiency, and revolutionary innovation in the corporate realm. But enhanced

[1] *See* Michael R. Siebecker, *Making Corporate Boards More Humane Through Artificial Intelligence*, 45 J. CORP. L. 95, 97–99 (2019) [hereinafter Siebecker, *Humane*].

reliance on algorithmic decision-making also raises troubling concerns regarding corporate accountability, transparency, and threats to important social and civic institutions. As a result, a holistic reconsideration of corporate rights and responsibilities seems essential to ensure a proper balancing between the manifold benefits AI advancements might produce and the continued integrity of public institutions and civic values. By examining the potential disconnect between AI advancements and current corporate governance standards, this Article uncovers the shortcomings of existing corporate jurisprudence and advances a set of principles for guiding the articulation of a more dynamic and responsible corporate governance approach to AI.

To understand the need to reconceptualize corporate governance standards in the age of AI, Part II of this Article describes the inadequacy of the legislative landscape and the fiduciary framework governing officers and directors. Part III explores some of the special challenges posed by AI to articulate coherent and effective corporate governance principles. Recognizing the increasing dominance of AI in several aspects of corporate management, operations, and communications, Part IV suggests a pressing need to reconsider granting artificially intelligent corporations' constitutional status as legal persons. Turning to the future of corporate governance in the AI era, Part V suggests some guiding principles to cabin AI technologies within the corporate realm while still allowing society to reap the extraordinary potential benefits this transformative technology presents.

II. THE INADEQUACY OF EXISTING CORPORATE GOVERNANCE PRINCIPLES

As the technological landscape evolves with breakneck speed, AI occupies an increasingly integral role in shaping corporate strategy, operations, and management. Beyond merely increasing efficiency and profitability, AI appears to change the basic nature of how corporations function, both internally and with respect to external constituencies affected by corporate actions.[2] Whether directing the content and timing of corporate communications or identifying new avenues for business development, algorithmic technologies are rapidly commandeering many corporate tasks previously relegated to humans.[3] As a result, traditional legal governance structures, whether rooted in common law fiduciary principles or legislative

[2] *See* Michael R. Siebecker, *The Incompatibility of Artificial Intelligence and* Citizens United, 85 OHIO ST. L.J. 1211, 1220–21 (2022) [hereinafter Siebecker, *Incompatibility*]; Michael Chui et al., *The State of AI in 2023: Generative AI's Breakout Year*, MCKINSEY & CO. (Aug. 2023), at 4, https://www.mckinsey.com/~/media/mckinsey/business%20functions/quantumblack/our%20insights/the%20state%20of%20ai%20in%202023%20generative%20ais%20breakout%20year/the-state-of-ai-in-2023-generative-ais-breakout-year-v3.pdf?shouldIndex=false [https://perma.cc/EN7T-3BJM].

[3] Siebecker, *Incompatibility*, *supra* note 2, at 1218–19.

enactments, have been strained in terms of their relevance and efficacy.[4] At their core, traditional legal structures are predicated on principles and processes that assume a fundamental sense of human agency in decision-making.[5] However, AI's revolutionary capabilities, such as its ability to sift through vast amounts of data, adapt to changing circumstances, predict and manipulate future behaviors, and make autonomous decisions without much (if any) human oversight, create unforeseen legal and ethical problems that existing corporate governance structures seem ill-equipped to address.[6] The result is a growing jurisprudential disconnect between the revolutionary and disruptive impact of AI on corporate practices and the long-standing legal doctrines meant to protect the interests of shareholders and other corporate constituencies. By examining some systemic shortcomings of existing regulatory and legislative efforts to cabin AI, as well as the growing incoherence of a fiduciary duty framework to guide its use, the need to reconceive basic corporate governance structures becomes clear.

A. Legislative and Regulatory Shortcomings

With the dramatic speed at which AI technologies evolve, the glaring inability of existing corporate law statutes and regulations to effectively guide their development and use becomes readily apparent. In large part, this insufficiency stems from a systemic sluggishness in regulatory and legislative mechanisms, which inherently progress at a significantly slower pace than the celerity of technological innovation.[7] This regulatory lag leads to a guidance gap between the immediate challenges posed by emerging algorithmic technologies and the legal frameworks designed to regulate corporate conduct.[8] By leaving businesses with insufficient guidance on how to address pressing ethical, legal, and operational questions regarding AI's use, systemic sluggishness in the regulatory process consequentially hampers responsible technological innovation.[9] Perhaps based on an acknowledgement that

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[4] *See* Michael R. Siebecker, *Democracy, Discourse, and the Artificially Intelligent Corporation*, 84 OHIO ST. L.J. 953, 986–90 (2024) [hereinafter Siebecker, *Democracy*].

[5] *See id.*; Michael R. Siebecker, *Political Insider Trading*, 85 FORDHAM L. REV. 2717, 2747–48 (2017) [hereinafter Siebecker, *Political Insider Trading*].

[6] *See* Bruno Bastit et al., *The AI Governance Challenge*, S&P GLOBAL (Nov. 29, 2023), https://www.spglobal.com/en/research-insights/featured/special-editorial/the-ai-governance-challenge [https://perma.cc/YC9N-2LJB].

[7] *See* Adam Satariano & Cecilia Kang, *How Nations Are Losing a Global Race to Tackle A.I.'s Harms*, N.Y. TIMES (Dec. 6, 2023), https://www.nytimes.com/2023/12/06/technology/ai-regulation-policies.html [https://perma.cc/8LZA-8CLR].

[8] *See* Deborshi Dutt et al., *Now Decides Next: Insights From the Leading Edge of Generative AI Adoption*, DELOITTE (Jan. 2024), at 18, https://www2.deloitte.com/content/dam/Deloitte/us/Documents/consulting/us-state-of-gen-ai-report.pdf [https://perma.cc/5SNV-BH4R].

[9] *See* Brandy Aven et al., *Toward AI Accountability: Policy Ideas for Moving Beyond a Self-Regulatory Approach*, BLOCK CENTER, CARNEGIE MELLON U. (Jan.

legislative responses simply cannot keep pace with technological advances, many current regulations adopt broad and ambiguous prescriptions that fail to address the nuanced implications of AI technologies.[10] Although broad, overarching principles provide some oversight, they lack the specificity necessary to guide the varied and swiftly evolving uses of AI in the corporate sphere.[11] The lack of detailed guidance creates ambiguity, leading to inconsistencies in enforcement and compliance that ultimately undermine effective governance.

Moreover, the disparities in approaches across different industries compound the problem of regulatory inadequacy. For example, the healthcare and financial services sectors have witnessed much more focused regulatory responses to AI use than other sectors of the economy.[12] Sector specific regulation often creates siloed policy expectations, leading to a fragmented regulatory landscape that complicates compliance for corporations operating in multiple business areas.[13] Regulatory fragmentation creates potential loopholes for exploitation and weakens any sense of cohesive corporate

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2023), at 2, https://www.cmu.edu/block-center/responsible-ai/cmu_blockcenter_rai-memo_final.pdf [https://perma.cc/6H6N-Z689].

[10] *See* Andreas Kremer et al., *As Gen AI Advances, Regulators—and Risk Functions—Rush to Keep Pace*, MCKINSEY & CO. (Dec. 2023), at 7, https://www.mckinsey.com/~/media/mckinsey/business%20functions/risk/our%20insights/as%20gen%20ai%20advances%20regulators%20and%20risk%20functions%20rush%20to%20keep%20pace/as-gen-ai-advances-regulators-and-risk-functions-rush-to-keep-pace-vf.pdf?shouldIndex=false [https://perma.cc/P9QP-H595]; *see also* Melissa Heikkila, *The AI Act is Done. Here's What Will (and Won't) Change*, MIT TECH. REV. (Mar. 19, 2024), https://www.technologyreview.com/2024/03/19/1089919/the-ai-act-is-done-heres-what-will-and-wont-change/ [https://perma.cc/BC69-C2MJ] (describing how the European Union's new AI Act faces criticism for its potential overbreadth and ambiguity).

[11] *See* James Broughel, *The Case for Artificial Intelligence Regulation is Surprisingly Weak*, FORBES (Apr. 7, 2023, 9:41 AM), https://www.forbes.com/sites/digital-assets/2023/04/07/the-case-for-artificial-intelligence-regulation-is-surprisingly-weak/?sh=fb48f2b50a8c [https://perma.cc/8MAH-2GQM].

[12] *See* Sandeep Reddy*, Navigating the AI Revolution: The Case for Precise Regulation in Healthcare*, J. MED. INTERNET RSCH. (2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10520760/ [https://perma.cc/9GPV-H9RW]; Heinz-Uwe Hettling et al., *How the Challenge of Regulation AI in Healthcare is Escalating*, ERNST & YOUNG (July 22, 2022), https://www.ey.com/en_gl/insights/law/how-the-challenge-of-regulating-ai-in-healthcare-is-escalating#:~:text=Healthcare%20AI%20applications%20would%20generally,reduce%20risks%20and%20discriminatory%20outcomes [https://perma.cc/W6LY-3SQU]; Simon Toms et al., *How Regulators Worldwide are Addressing the Adoption of AI in Financial Services*, SKADDEN (Dec. 12, 2023), https://www.skadden.com/insights/publications/2023/12/how-regulators-worldwide-are-addressing-the-adoption-of-ai-in-financial-services [https://perma.cc/C4XN-WSHB].

[13] *See* Sanjay Modgil, *Beyond Silos: Why AI Regulation Calls for an Interdisciplinary Approach*, KING'S COLL. LONDON (Nov. 16, 2023), https://www.kcl.ac.uk/beyond-silos-why-ai-regulation-calls-for-an-interdisciplinary-approach [https://perma.cc/DJW4-KU4W].

governance of AI. The lack of a comprehensive regulatory strategy for AI, encompassing various economic sectors, underscores the need for a more integrated and coherent approach to tackle the complex challenges that AI presents in the corporate domain.[14]

The problem of regulatory fragmentation stretches beyond the United States' borders, presenting additional complications for multinational corporations.[15] Because many corporations engage in cross-national operations and AI's data consumption and application spans worldwide, a regulatory framework that transcends national borders seems essential. Despite the need for some international cohesion, the international regulatory landscape reflects incredibly divergent approaches to AI governance.[16] Absent globally consistent standards for employing AI, corporations face operational uncertainty that significantly hampers the efficient and ethical employment of AI in corporate practices.[17] The international regulatory patchwork stymies responsible AI innovation and global cooperation as multinational corporations attempt to navigate an uneasy sea of competing standards.

Addressing these shortcomings requires a more dynamic approach to AI regulation that can keep up with the speed of AI-enhanced technological innovation while providing specific guidance regarding AI's ethical development and deployment in corporate decision-making and operations. Ideally, a reconceived governance framework would balance the need for innovative freedom with corporate accountability in a manner that supports responsible AI development without threatening public safety or important institutions of civil society.[18] Although closing the gap between technological advancements and regulatory responses remains of paramount concern, a reformed governance structure should also promote an adaptable and coherent international regulatory ecosystem that guides corporations in the complex and rapidly evolving technological landscape.

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[14] *See* Alex Engler, *A Comprehensive and Distributed Approach to AI Regulation*, BROOKINGS (Aug. 31, 2023), https://www.brookings.edu/articles/a-comprehensive-and-distributed-approach-to-ai-regulation/ [https://perma.cc/A3JPMV35].

[15] *See* Modgil, *supra* note 13.

[16] *See* Blair Levin & Larry Downes, *Who is Going to Regulate AI*, HARV. BUS. REV. (May 19, 2023), https://hbr.org/2023/05/who-is-going-to-regulate-ai [https://perma.cc/HM6W-5THP].

[17] *See* Kremer et al., *supra* note 10, at 4 ("Despite some commonality in the guiding principles of AI, the implementation and exact wording vary by regulator and region. Many rules are still new and, thus, prone to frequent updates . . . This makes it challenging for organizations to navigate regulations while planning long-term AI strategies.").

[18] *See* Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 Fed. Reg. 75191, 75191 (Oct. 30, 2023).

B. Fiduciary Feebleness

The current fiduciary framework that governs corporate directors and officers appears increasingly inadequate in confronting the distinct challenges AI presents. The duties of care and loyalty stand as pillars of corporate governance, memorialized in both common law and state statutory frameworks.[19] These duties reflect a critical agency relationship, designed to ensure that the actions of directors and officers remain closely aligned with the interests of the stakeholders they represent.[20] At their core, fiduciary responsibilities embody relationships predicated on trust—a philosophically rich concept that lends a degree of ambiguity to the precise nature of these duties.[21] In any event, the fiduciary framework attempts to promote a sense of ethical stewardship. That stewardship represents an implicit social contract that affords directors and officers significant managerial discretion over corporate assets and strategy in exchange for a commitment to act responsibly in securing long-term sustainability and success of the corporation.[22] The framework attempts to mitigate conflicts of interest and ensure accountability and integrity in corporate practices.[23]

With respect to the duty of care, directors and officers are obligated to exhibit a degree of diligence in corporate decision-making that a reasonably prudent individual would exercise under comparable circumstances.[24] This duty requires directors to remain well-informed and make decisions in good faith, grounded in a reasonable assessment of the corporation's best interests.[25] Although the duty of care appears to establish explicit proactive requirements, compliance is assessed through the common law lens of the "business judgment rule," a presumption that corporate managers have fulfilled their duty of care in the absence of evidence pointing to fraud, conflicts of interest, gross negligence, or acts resulting in pure economic waste.[26] Consequently, breaches of the duty of care are infrequent, surfacing only in instances of particularly flagrant misconduct.[27]

Conversely, the duty of loyalty requires that directors and officers prioritize the corporation's welfare and the interests of its shareholders above

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[19] *See* Siebecker, *Democracy*, *supra* note 4, at 986.

[20] *See id.* at 986–87.

[21] *See* Siebecker, *Humane*, *supra* note 1, at 113–22.

[22] *See* Kristen A. Carpenter et al., *In Defense of Property*, 119 YALE L.J. 1022, 1069–72 (2009).

[23] *See* Siebecker, *Democracy*, *supra* note 4, at 986–90; *see generally* JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS, § 10 (2023).

[24] *See* COX & HAZEN, *supra* note 23, § 10.1.

[25] *See* Siebecker, *Democracy*, *supra* note 4, at 987.

[26] Michael R. Siebecker, *The Duty of Care and Data Control Systems in the Wake of Sarbanes-Oxley*, 84 CHI.-KENT L. REV. 821, 825–26 (2010) [hereinafter Siebecker, *Duty of Care*].

[27] *See id.*

their own personal gain.[28] As an extension of an agency relationship predicated on trust, the duty of loyalty forbids acts of self-dealing, the appropriation of corporate opportunities for personal benefit, competition against the corporation, and the diversion of corporate resources for individual use.[29] Embedded within the duty of loyalty is an additional obligation of oversight, mandating directors to establish and maintain information collection and reporting systems capable of identifying instances of corporate malfeasance.[30] Similar to the application of the business judgment rule, directors are given great discretion in implementing and overseeing adequate systems and will face liability for failing in their oversight duty only for "utterly fail[ing] to implement" any form of effective information and reporting mechanism.[31] This lax enforcement standard may allow widespread unethical corporate behavior to persist undetected, as evidenced by the spate of corporate scandals society continually suffers.[32]

Although designed to promote responsible stewardship, the fiduciary framework seems ill-equipped to guide corporate decision-making in the era of AI. Currently, the duties of care and loyalty are enforced through shareholder lawsuits and regulatory oversight, subjecting fiduciary breaches to legal scrutiny and penalties.[33] Those enforcement mechanisms, however, reflect a governance approach tethered to assessments of human judgment, discretion, and control. Liability generally hinges on whether corporate managers effectively gathered information, appropriately deliberated, and made informed decisions based on their considered understanding and experience.[34] The fiduciary model presumes a certain modicum of transparency and predictability in deliberative processes where the rationales of corporate decision-makers can be examined, understood, and contested by shareholders and regulators.

The advent of AI, however, exposes the feebleness of the fiduciary framework as a useful tool for stemming managerial misconduct. As corporations continually integrate AI systems to inform or directly execute decisions across diverse business functions, the expectation of direct human oversight essential to fulfilling fiduciary duties becomes illusory. AI's

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[28] *See* Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115, 136–37 (2009) [hereinafter Siebecker, *Trust*].

[29] *See id*. at 139.

[30] *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.3d 959, 970 (Del. Ch. 1996).

[31] Stone *ex rel*. AmSouth Bancorp. v. Ritter, 911 A.2d 362, 370 (Del. 2006); *In re* Caremark, 698 A.2d at 970.

[32] *See* Michael R. Siebecker & Andrew M. Brandes, *Corporate Compliance and Criminality: Does the Common Law Promote Culpable Blindness*, 50 CONN. L. REV. 387, 403–08 (2018).

[33] *See* Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2018–24 (2019).

[34] *See* Margaret M. Blain & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 298–305 (1999).

capacity to sift through extensive data sets and discern previously incomprehensible patterns injects a degree of complexity and unpredictability that undermines the ability to assess human fiduciary obligations.[35] This evolution in the corporate decision-making process creates significant concerns around corporate accountability, leaving a question of whether the fiduciary duties of care and loyalty should apply in contexts where decisions are heavily influenced or dictated by artificially intelligent algorithms.[36]

In particular, the opaqueness of many AI technologies, especially those reliant on complex machine learning algorithms, makes intelligibly applying the duty of care rather difficult. Fulfilling the duty of care, after all, requires that directors and officers act on an informed basis.[37] Despite the rapid adoption of AI technologies in many aspects of business operations and decision-making, few corporate actors remotely understand the complex mechanisms underpinning AI's functionality.[38] This "black box" nature of some AI technologies, especially those driven by complex machine learning algorithms, remains almost entirely inscrutable to human corporate managers, making it difficult—if not impossible—for directors and officers to understand or explain AI-driven decisions.[39] The opacity of AI technology not only severely frustrates the ability to assess whether directors and officers acted with appropriate due diligence but also significantly undermines shareholders' ability to hold corporate managers accountable.[40]

Additionally, the increasing reliance on AI in corporate decision-making calls into question the current viability of the duty of loyalty to ensure corporate behavior aligns appropriately with shareholder interests. Recall that the duty of loyalty requires directors and officers to act without conflicts and to prioritize the best interests of the corporation over personal gain.[41] With AI, however, new forms of conflicts arise that involve algorithmic biases potentially benefitting or disfavoring certain shareholders, corporate stakeholders, or members of the communities that corporations inhabit.[42] The

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[35] *See* Siebecker, *Democracy*, *supra* note 4, at 968–69.

[36] *See* Zhaoyi Li, *Artificial Fiduciaries*, 81 WASH. & LEE L. REV. (forthcoming 2024).

[37] *See* COX & HAZEN, *supra* note 23.

[38] *See* David S. Rubenstein, *Acquiring Ethical AI*, 73 FLA. L. REV. 747, 765–66 (2021); Kevin Roose, *Maybe We Will Finally Learn More About How A.I. Works*, N.Y. TIMES (Oct. 18, 2023), https://www.nytimes.com/2023/10/18/technology/how-ai-works-stanford.html [https://perma.cc/5MRM-GPVZ]; Zvi Mowshowitz, *How AI Chatbots Become Political*, N.Y. TIMES (Mar. 28, 2024), https://www.nytimes.com/interactive/2024/03/28/opinion/ai-political-bias.html [https://perma.cc/49PZ-3HCC].

[39] *See* Sylvia Lu, *Algorithmic Opacity, Private Accountability, and Corporate Social Disclosure in the Age of Artificial Intelligence*, 23 VAND. J. ENT.& TECH. L. 99, 114–29 (2020) [hereinafter Lu, *Algorithmic Opacity*].

[40] *See id*.

[41] *See* Siebecker, *Trust*, *supra* note 28, at 136–37.

[42] *See* Don Fancher et al., *AI Model Bias Can Damage Trust More Than You May Know. But It Doesn't Have To*, DELOITTE (Dec. 8, 2021), https://www2.deloitte.com/us/en/insights/focus/cognitive-technologies/ai-model-bias.html [https://perma.c

widespread inability of humans to understand or detect these inherent biases challenge the ongoing feasibility of fiduciary concepts of loyalty to ensure AI-assisted decision-making aligns with the best interests of the corporation.[43]

Overall, the seemingly unstoppable trend toward enhanced AI integration into corporate decision-making signals an evolutionary leap in the very nature of the corporation. This evolution challenges the relevance of traditional principles of trust upon which the current fiduciary framework of corporate governance is premised. Algorithmic entities' inevitable increasing influence in corporate management requires reimagining the common law fiduciary duties and their underlying philosophical precepts to accommodate such a fundamental change.

III. SPECIAL GOVERNANCE CHALLENGES POSED BY AI

The pervasiveness of AI in so many aspects of corporate organizations and practices poses an array of special challenges for traditional corporate governance structures designed in a pre-digital era. One of the most pressing and prominent challenges is the need to retool the concept of corporate agency.[44] Related to the feebleness of the existing fiduciary framework, corporate law assesses decision-making through the lens of human directors and officers whose actions and intentions get attributed to the corporation through traditional common law agency principles.[45] But what constitutes human agency when decisions become so heavily reliant on artificially intelligent mechanisms, the inner workings of which remain a mystery to most? As AI's role in corporate management continues to grow, the line between human and machine blurs. Many corporate actions are no longer tethered directly to human judgment but are instead mediated by opaque AI mechanisms.[46] The inevitability of this algorithmic intermediary makes holding human actors accountable for corporate misdeeds quite difficult. Assigning managerial responsibility might make little sense under traditional agency principles when corporate decisions get made without much (if any) direct human oversight or intention.

Liability represents another pressing problem in the context of corporate decisions driven by AI. Especially when (nearly) autonomous AI decisions result in harm or loss, assigning liability becomes somewhat complex under

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c/R2L7-FNS7]; Mitra Best & Anand Rao, *Understanding Algorithmic Bias and How to Build Trust in AI*, PWC (Jan. 18, 2022), https://www.pwc.com/us/en/tech-effect/ai-analytics/algorithmic-bias-and-trust-in-ai.html [https://perma.cc/DLM2-ARFV].

[43] Fancher et al., *supra* note 42; Best & Rao, *supra* note 42.

[44] *See* Margot E. Kaminski & Jennifer M. Urban, *The Right to Contest AI*, 121 COLUM. L. REV. 1957, 1970–73 (2021).

[45] *See* Deborah A. DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 847, 848 (2017).

[46] *See* Sylvia Lu, *Data Privacy, Human Rights, and Algorithmic Opacity*, 110 CAL. L REV. 2087, 2095–2110 (2022).

prevailing legal constructs.[47] Traditionally, fault assessment in negligence claims centers on human error or failed oversight.[48] The opaque nature of some AI algorithms makes assigning liability much less straightforward because human actors may likely not understand precisely how a decision was reached, even with concerted effort.[49] As AI technologies evolve and adapt over time, the problem compounds. The bases upon which decisions are made will certainly shift as AI algorithms learn from their environment, making a static understanding of decision-making impossible.[50] In contrast to traditional legal constructs for assigning liability that focus on human intention, the dynamic nature of AI technologies calls for a more flexible approach to assigning liability that can account for ongoing changes in AI behavior and functionality.

Moreover, the ethical use of AI by corporate actors remains a paramount concern for ensuring the integrity of public institutions, human dignity, and social justice.[51] In an attempt to garner greater profits, corporations leverage AI technologies for competitive advantage.[52] Whether used to identify new business opportunities, enhance operational efficiency, manage human resources, conduct customer marketing and communications, or even engage in political activity, AI technology poses significant ethical risks that might accompany potential monetary gains.[53] To take one commonly reported example, AI technologies can perpetuate certain biases and promote systemic inequalities.[54] If the large datasets used to make predictions or decisions contain historical biases, machine learning algorithms may make decisions that inadvertently perpetuate and amplify those biases.[55] In addition, AI has developed the capability to produce "deepfake" videos, which are digitally manipulated videos of humans saying or doing things they never did.[56] As

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[47] *See generally* Alicia Lai, *Artificial Intelligence, LLC: Corporate Personhood as Tort Reform*, 2021 MICH. ST. L. REV. 597, 630–31 (2021).

[48] *See* Siebecker, *Duty of Care*, *supra* note 26, at 825–26.

[49] *See* Lu, *Algorithmic Opacity*, *supra* note 39, at 108–09.

[50] *See* Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARV. J. L. & TECH. 889, 897–906 (2018).

[51] *See* Peter Zipparo & Rachel Dooley, *From Principles to Practice: Putting AI Ethics Into Action*, MCKINSEY & CO. (July 8, 2022), https://www.mckinsey.com/featured-insights/in-the-balance/from-principles-to-practice-putting-ai-ethics-into-action [https://perma.cc/AZ7Z-3NR6]; Kremer et al., *supra* note 10, at 2.

[52] Chui et al., *The Economic Potential Of Generative AI: The Next Productivity Frontier*, MCKINSEY & CO. (June 14, 2023), https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/the-economic-potential-of-generative-AI-the-next-productivity-frontier#introduction [https://perma.cc/T7FL-P5S3].

[53] *See* Siebecker, *Democracy*, *supra* note 4, at 982–85.

[54] *See* Cat Zakrewski, *Federal Regulators Call AI Discrimination a 'New Civil Rights Frontier'*, WASH. POST (April 25, 2023), https://www.washingtonpost.com/technology/2023/04/25/artificial-intelligence-bias-eeoc/ [https://perma.cc/29DL-4U45].

[55] *Id.*

[56] *See* Robert McMillan, et al., *New Era of Deepfakes Complicates 2024 Elections*, WALL ST. J. (Feb. 15, 2024, 12:31 PM), https://www.wsj.com/tech/ai/new-

the increasing use of deepfakes demonstrates, corporations may use personal data to clandestinely manipulate consumer decisions or political choices.[57] With the growing ability of AI technologies to sift through vast amounts of data, basic concerns over privacy remain constant.[58] Although addressing all the ethical issues associated with AI exceeds the scope of this Article, the overarching concern remains: corporate governance structures shall be sufficiently supple to adapt to evolving technological innovations, yet strong enough to ensure corporate actors do not deploy AI to the detriment of essential human values and institutions.

IV. REDEFINING CORPORATE PERSONHOOD

The proliferation of AI technologies in corporate decision-making requires a re-examination of corporate personhood, challenging traditional legal doctrines that define the rights, responsibilities, and liabilities of corporate entities. Before the ascendance of AI in the corporate sector, many scholars and politicians advocated for disconnecting constitutional personhood from corporations and other business entities.[59] Nevertheless, just like sentient human beings, corporations enjoy a variety of constitutional rights and protections, including equal protection and due process of law under the Fourteenth Amendment, protections against unreasonable searches and seizures, freedom of association, religious freedom, and rights to political speech.[60]

As AI technologies quickly permeate many economic, social, and political institutions, debates about what status AI should enjoy remains critically important. Many scholars support rights for algorithmic entities,[61] while others warn that robotic rights could threaten the very foundations of

era-of-ai-deepfakes-complicates-2024-elections-aa529b9e/ [https://perma.cc/HPJ2-3TVR].

[57] *See* Neil Vigdor, *Fretting About Election-Year Deep Fakes, States Roll Out New Rules for AI Content*, N.Y. TIMES (Mar. 26, 2024), https://www.nytimes.com/2024/03/26/us/politics/election-year-deep-fakes-ai-rules.html [https://perma.cc/T3T7-S24G].

[58] *See* Cade Metz et al., *How Tech Giants Cut Corners to Harvest Data for A.I.,* N.Y. TIMES (Apr. 6, 2024), https://www.nytimes.com/2024/04/06/technology/tech-giants-harvest-data-artificial-intelligence.html [https://perma.cc/PW4V-TKZD].

[59] *See* Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 464–68 (2013); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1650 (2011).

[60] *See* Matambanadzo, *supra* note 59, at 471–72; Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 98 (2014).

[61] *See generally* JOSHUA C. GELLERS, RIGHTS FOR ROBOTS: ARTIFICIAL INTELLIGENCE, ANIMAL AND ENVIRONMENTAL LAW 16–18 (Colin Perrin ed., 2021); SVEN NYHOLM, HUMANS AND ROBOTS: ETHICS, AGENCY, AND ANTHROPOMORPHISM 3 (2020).

human society.[62] Along those lines, the European Union's AI Act imposes requirements on companies designing and/or using AI in the European Union.[63] In striking contrast, a few years ago, Saudi Arabia took the remarkable step of granting formal citizenship to an AI-powered robot named Sophia.[64]

But does corporate personhood, or even corporate citizenship, make sense given the extraordinary authority corporations grant to AI entities? The influence of AI within the corporate sector extends well beyond mere enhancements in operational efficiency, product integrity, service delivery, and, ultimately, profit margins.[65] As corporations increasingly exert dominance over vast swathes of our economic, social, and political existence, the introduction of AI into management roles and potentially ownership stakes presents significant challenges concerning the societal role that corporations should play.

The growing dangers associated with corporate involvement in the political realm underscores the stakes involved in continuing to treat corporations as constitutional rights bearers. In the seminal ruling of *Citizens United v. Federal Election Commission*,[66] the Supreme Court conferred upon corporations essentially the same political speech rights enjoyed by human citizens. In my prior works, I have highlighted that the Court has yet to provide a clear demarcation between commercial speech, which is subject to substantial regulation, and political speech, which is largely shielded from government intervention.[67] Given the prevailing jurisprudence regarding corporate speech rights, a pressing concern is that corporations might craft a blend of minimally political commentary with predominantly commercial content, yielding a hybrid of politically-infused commercial speech that

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[62] *See, e.g.*, RYAN ABBOTT, THE REASONABLE ROBOT: ARTIFICIAL INTELLIGENCE AND THE LAW 4 (2020); Nadia Banteka, *Artificially Intelligent Persons*, 58 HOUS. L. REV. 537, 542 (2021).

[63] *See Shaping Europe's Digital Future: AI Act*, EUR. COMM'N, https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai [https://perma.cc/NP6L-7MGP] (last visited July 3, 2024).

[64] *See* Olivia Cuthbert, *Saudi Arabia Becomes First Country to Grant Citizenship to a Robot*, ARAB NEWS (Oct. 26, 2017, 1:45 AM), https://www.arabnews.com/node/1183166/saudi-arabia [https://perma.cc/D7EQ-G6FG].

[65] *See* David Morel, *The Future of Work: How Will AI Change Business?*, FORBES (Aug. 31, 2023, 10:44 AM), https://www.forbes.com/sites/davidmorel/2023/08/31/the-future-of-work-how-will-ai-change-business/?sh=1f2b30e178e7 [https://perma.cc/VY7E-ZZW3]; Somendra Narayan, *Revolutionizing Industry: How AI Changes the Game for Businesses*, MEDIUM (Apr. 15, 2024), https://medium.com/@narayan.somendra/revolutionizing-industry-how-ai-changes-the-game-for-businesses [https://perma.cc/7GNY-LUHB].

[66] 558 U.S. 310, 365 (2010).

[67] *See* Michael R. Siebecker, *Securities Regulation, Social Responsibility, and a New Institutional First Amendment*, 29 J. L. & POL. 535, 537–49 (2014); Michael R. Siebecker, *Building A "New Institutional" Approach to Corporate Speech*, 59 ALA. L. REV. 247, 250–57 (2008).

remains entirely protected from regulatory oversight or liability under the First Amendment.[68]

A constellation of three historical circumstances reveals why this concern regarding corporate personhood becomes so pressing in the AI era. First, following *Citizens United*, corporations have intensified their efforts to dominate the political sphere,[69] primarily motivated by a desire to enhance profits.[70] The extent of corporate political engagement only increases as corporations realize that shaping public political preferences can not only create a more favorable overall business environment but can directly influence consumer purchasing behavior.[71] For instance, recent reports link the promotion of social unrest with increased sales of firearms.[72] Regardless of the specific products or services being marketed, corporate executives' significant investments in political campaigns and lobbying make it abundantly clear that corporations seek financial gain through political engagement.[73]

Second, corporations' reliance on AI to influence the behavior of consumers, investors, and political actors is on the rise. With access to vast amounts of "big data," AI technologies enable corporations to craft highly detailed profiles for targeted communications aimed at producing specific attitudes or behaviors.[74] In the political realm, AI technologies have already

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[68] *See* Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 616–21 (2006).

[69] *See* Siebecker, *Political Insider Trading*, *supra* note 5, at 2720–28.

[70] *See* Michael R. Siebecker, *Bridging Troubled Waters: Linking Corporate Efficiency and Political Legitimacy Through a Discourse Theory of the Firm*, 75 OHIO ST. L.J. 103, 116–19 (2014) [hereinafter Siebecker, *Troubled Waters*]; *see generally* Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451 (2019).

[71] *See* James R. Bailey & Hillary Phillips, *How Do Consumers Feel When Companies Get Political?*, HARV. BUS. REV. (Feb. 17, 2020), https://hbr.org/2020/02/how-do-consumers-feel-when-companies-get-political [https://perma.cc/22H6-Q4DD] (observing that whether "[corporate advocacy] drives consumer[] behavior in a serious way is yet to be seen[,]" but its impact on the minds of consumers is "here to stay").

[72] *See* Marc Fisher et al., *'Fear on Top of Fear': Why Anti-Gun Americans Joined the Wave of New Gun Owners*, WASH. POST (July 10, 2021), https://www.washingtonpost.com/nation/interactive/2021/anti-gun-gun-owners/ [https://perma.cc/T8ND-WLQ3]; Rukmani Bhatia, *Guns, Lies, and Fear: Exposing the NRA's Messaging Playbook*, CTR. FOR AM. PROGRESS (Apr. 24, 2019), https://www.americanprogress.org/article/guns-lies-fear/ [https://perma.cc/7FQV-5KSA]; Ben Winck, *Gun Manufacturer Stocks Rise After Weekend Mass Shootings and Renewed Calls for Tougher Firearm Laws*, BUS. INSIDER (Aug. 5, 2019, 10:27 AM), https://markets.businessinsider.com/news/stocks/gun-stocks-rise-after-dual-weekend-shootings-calls-for-laws-2019-8-1028418220 [https://perma.cc/Z3AJ-XSAQ].

[73] *See* Siebecker, *Incompatibility*, *supra* note 2, at 1215–16.

[74] *See* David Court et al., *Big Data, Analytics, and the Future of Marketing & Sales*, MCKINSEY & CO. (Mar. 2015), at 4, https://www.mckinsey.com/~/media/Mc

been deployed to disseminate strategic messaging to sway vulnerable voters and disrupt election outcomes.[75] For instance, in the 2016 presidential election, Cambridge Analytica culled the data of millions of Facebook users to create incredibly detailed psychological profiles.[76] In doing so, Cambridge Analytica used those profiles to craft individually targeted communications on social media to influence voting behaviors.[77] In the same election cycle, a Russian company, the Internet Research Agency, used fake personas across various social media outlets, sowing particular social attitudes or fears to enhance support for specific candidates.[78] While most of the current AI

Kinsey/Business%20Functions/Marketing%20and%20Sales/Our%20Insights/EBook%20Big%CC20data%CC20analytics% 20and%20the%CC20future%CC20of%CC20marketing%20sales/Big-Data-eBook.ashx [https://perma.cc/F63K-4LDW].

[75] *See* Jeff Berkowitz, *The Evolving Role of Artificial Intelligence and Machine Learning in US Politics*, CTR. FOR STRATEGIC & INT'L STUDS. (Dec. 21, 2020), https://www.csis.org/blogs/technology-policy-blog/evolving-role-artificial-intelligence-and-machine-learning-us-politics [https://perma.cc/X9K2-GJXC] ("Gone are the days of political buttons, guessing about voter preferences, and the mass distribution of pamphlets about the positions of candidates for the highest offices in the country. The emergence of artificial intelligence (AI), machine learning (ML), and big data have fundamentally changed how politicians engage the American electorate and will continue to challenge centuries of political and intrapersonal norms surrounding voter enfranchisement.").

[76] *See* Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html [https://perma.cc/PYY4-KDLX]; John Gapper, *Cambridge Analytica Exploited Facebook Data with Style*, FIN. TIMES (Mar. 21, 2018), https://www.ft.com/content/bb24f946-2918-11e8-b27e-cc62a39d57a0 [https://perma.cc/4AHT-2TSP].

[77] *See* Paul Lewis & Paul Hilder, *Leaked: Cambridge Analytica's Blueprint for Trump Victory*, GUARDIAN (Mar. 23, 2018, 8:53 AM), https://www.theguardian.com/uk-news/2018/mar/23/leaked-cambridge-analyticas-blueprint-for-trump-victory [https://perma.cc/NYZ3-G6VU]; Matthew Rosenberg et al., *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html [https://perma.cc/5UYJ-KW2D]; Harry Davies, *Ted Cruz Using Firm That Harvested Data on Millions of Unwitting Facebook Users*, GUARDIAN (Dec. 11, 2015, 5:22 PM), https://www.theguardian.com/us-news/2015/dec/11/senator-ted-cruz-president-campaign-facebook-user-data [https://perma.cc/MZ5W-G6Z5] (regarding the use of psychological profiling based on mined data to influence presidential primary elections).

[78] *See* Adrian Chen, *The Agency*, N.Y. TIMES MAG. (June 2, 2015), https://www.nytimes.com/2015/06/07/magazine/the-agency.html [https://perma.cc/NGT4-AWDU]; Elizabeth Dwoskin et al., *Russians Took a Page from Corporate America by Using Facebook Tool to ID and Influence Voters*, WASH. POST (Oct. 2, 2017), https://www.washingtonpost.com/business/economy/russians-took-a-page-from-corporate-america-by-using-facebook-tool-to-id-and-influence-voters/2017/10/02/681e40d8-a7c5-11e7-850e-2bdd1236be5d_story.html [https://perma.cc/EWU8-JR66]; SPECIAL COUNSEL ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION

communication technology harmlessly aims to improve the marketing of goods and services, there is real concern that corporate AI-generated deepfakes will mix consumer marketing with just enough political content to create a blend of politically-flavored commercial speech protected from liability or regulation under the First Amendment.[79]

Third, corporations are more frequently delegating crucial decision-making processes to AI technologies and entities in pursuit of higher profits, ceding control to algorithms that outperform humans in nearly all aspects.[80] Initially regarded as mere tools for enhancing human productivity, AI technologies are progressively supplanting human decision-making power across a broad spectrum of corporate environments.[81] It is becoming common for AI not just to influence but to take complete control of critical business planning, strategy formulation, and goal-setting activities.[82] AI's role extends beyond aiding humans in making more informed decisions; it frequently assumes management responsibilities traditionally reserved for people.[83] In an unprecedented move, some corporations have started recognizing AI

14–35 (Mar. 2019), https://www.justice.gov/archives/sco/file/1373816/download [https://perma.cc/UA3L-UTDM].

[79] *See* Siebecker, *Incompatibility, supra* note 2, at 1217; *The Emerging Threat of Deepfakes to Brands and Executives*, CONSTELLA (Mar. 2, 2021), https://constellaintelligence.com/the-emerging-threat-of-deepfakes-to-brands-and-executives-2/ [https://perma.cc/U629-2G5d] ("[D]eepfakes have already been used in a wide array of contexts, including in the production of 'fake news' and manipulated content or malicious impersonations with the objective of obtaining sensitive data for financial gain (also known as 'social engineering' within this context) or influencing public opinion for corporate or political reputational damage."); HANNAH SMITH & KATHERINE MANSTED, WEAPONISED DEEP FAKES: NATIONAL SECURITY & DEMOCRACY 4 (2020) ("Deep fakes will pose the most risk when combined with other technologies and social trends: they'll enhance cyberattacks, accelerate the spread of propaganda and disinformation online and exacerbate declining trust in democratic institutions."); James Manyika et al., *The Promise And Challenge Of The Age Of Artificial Intelligence*, MCKINSEY & CO. (Oct. 2018), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/artificial%20intelligence/the%20promise%CC20and%CC20challenge%CC20of%CC20the% 20age%20of%CC20artificial%20intelligence/mgi-the-promise-and-challenge-of-the-age-of-artificial-intelligence-in-brief-oct-2018.pdf [https://perma.cc/S9TL-YSXT] ("Cybersecurity and 'deep fakes' that could manipulate election results or perpetrate large-scale fraud are also a concern.").

[80] *See* Claire Cain Miller & Courtney Cox, *In Reversal Because of A.I., Office Jobs Are Now More at Risk*, N.Y. TIMES (Aug. 24, 2023), https://www.nytimes.com/2023/08/24/upshot/artificial-intelligence-jobs.html [https://perma.cc/49GQ-73WK]; Paola Cecchi-Dimeglio, *How AI is Shirting the World of Employment*, FORBES (July 28, 2023, 10:44 AM), https://www.forbes.com/sites/paolacecchi-dimeglio/2023/07/28/how-ai-is-shifting-the-world-of-employment/?sh=3ee1c5361d5c [https://perma.cc/N825-UTJB]; Anna Gordon, *Why Protestors Around the World Are Demanding a Pause on AI Development*, TIME (May 13, 2024, 7:20 PM), https://time.com/6977680/ai-protests-international/ [https://perma.cc/YL7Y-SJJ7].

[81] *See* Siebecker, *Humane*, *supra* note 1, at 104–13.

[82] *See id.*

[83] *See* Siebecker, *Incompatibility*, *supra* note 2, at 1218.

entities as active members on their boards of directors, integrating machine intelligence into their highest levels of governance.[84] Most notably, and perhaps most concerningly, there is a growing trend where AI entities own and manage their own business ventures with minimal to no human supervision.[85] This shift marks a significant evolution in the role of AI in the corporate world and raises questions about the future landscape of corporate governance in light of AI's increasing autonomy in decision-making processes.

The rapid and significant transformation of corporate practices in the AI era calls for a fundamental re-evaluation of whether corporations should enjoy the same constitutional rights as individuals, especially concerning rights to political speech. When pursuing profit maximization, corporations strategically leverage AI for data mining and predictive analytics to sway political preferences and election results.[86] In doing so, they put the integrity and legitimacy of our democratic systems at risk.[87] Furthermore, as AI technology assumes a pivotal, if not dominant, role in shaping corporate political communication, allowing corporations to enjoy the same political speech rights as individuals essentially hands over control of the political sphere to machine-driven entities. Despite the potential for AI to enable corporations to behave in more ethical and humane ways,[88] the reality of corporations being significantly influenced or controlled by AI challenges the jurisprudential soundness of treating them as entities with full constitutional rights.[89] AI's growing role in management and possibly ownership makes the political folly of granting corporations the same speech rights as humans abundantly clear. If algorithmic entities dominate our political discourse and manipulate our preferences, we place human sovereignty over our polity in peril.

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[84] *See* Florian Möslein, *Robots in the Boardroom: Artificial Intelligence and Corporate Law*, in RESEARCH HANDBOOK ON THE LAW OF ARTIFICIAL INTELLIGENCE 649, 657–66 (Woodrow Barfield & Ugo Pagallo eds., 2017) ("Deep Knowledge Ventures . . . had appointed an algorithm named Vital . . . to its board of directors.").

[85] *See* Siebecker, *Incompatibility*, *supra* note 2, at 1341–46.

[86] *See supra* notes 69–72 and accompanying text.

[87] *See* Elaine Kamarck, *Malevolent Soft Power, AI, and the Threat to Democracy*, BROOKINGS (Nov. 19, 2018), https://www.brookings.edu/research/malevolent-soft-power-ai-and-the-threat-to-democracy/ [https://perma.cc/Z2T9-GVJ6].

[88] *See generally* Siebecker, *Humane*, *supra* note 1; Jacques Bughin & Eric Hazan, *Can Artificial Intelligence Help Society as Much as It Helps Business?*, MCKINSEY & CO. (Aug. 2019), at 1, 2, https://www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20analytics/our%20insights/can%20artificial%20intelligence%20help%20society%20as%20much%20as%20it%20helps%20business/can-artificial-intelligence-help-society-as-much-as-it-helps-business.pdf [https://perma.cc/NVW6-CH9A].

[89] For an early warning about granting constitutional rights to artificially intelligent entities, including corporations, see Lawrence B. Solum, Legal Personhood for Artificial Intelligences, 70 N.C. L. Rev. 1231, 1258–76 (1992).

V. PRINCIPLES FOR THE FUTURE OF CORPORATE LAW AND REGULATION IN THE AI ERA

As corporations continue to integrate AI into their decision-making structures and operations, corporate governance frameworks must evolve to address the unique complexities introduced by AI technologies. This Part briefly outlines some key principles that should guide the development of corporate law and regulation in the AI era, ensuring that legal frameworks remain effective, adaptable, and equitable in the face of rapid technological advancement.

A. Ethical AI Use

Considering the speed of technological advancement, the incorporation of ethical considerations into the legal and regulatory frameworks governing corporate behavior remains one of the most pressing concerns.[90] As many ethicists, philosophers, business leaders, and politicians have already advocated, focusing on ethics helps ensure the deployment of AI technologies in a manner that safeguards human rights, promotes fairness, and prevents harm to individuals and communities.[91] Embedding ethical guidelines and standards within the legal fabric of corporate governance could not only help guide corporations in the proper deployment of AI but could also serve as a benchmark against which corporate practices can be evaluated. Moreover, promoting ethical AI use could encourage a culture of ethical mindfulness and accountability.

Emphasizing ethics in the use of AI should go beyond mere compliance with legal mandates. An explicit dedication to ethics would encourage

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[90] *See* Sara Castellanos, *Companies Need Help Tackling Ethical Concerns Posed by AI*, WSJ PRO ARTIFICIAL INTELLIGENCE: ADVANCES IN TECHNOLOGY PUSH AI INTO THE MAINSTREAM 5 (Dec. 2, 2018).

[91] For example, the MIT Media Lab and the Berkman Klein Center for Internet & Society at Harvard University launched an Ethics and Governance of Artificial Intelligence initiative that studies the effect of AI technologies on "fairness, human autonomy, and justice." *See The Ethics and Governance of Artificial Intelligence Initiative*, AI INITIATIVE, https://aiethicsinitiative.org/ [https://perma.cc/Z89A-B56B] (last visited July 3, 2024); *see also* Darrell M. West & John R. Allen, *How Artificial Intelligence Is Transforming the World*, BROOKINGS (Apr. 24, 2018), https://www.brookings.edu/research/how-artificial-intelligence-is-transforming-the-world/#_edn2 [https://perma.cc/VE94-PSLP] ("[T]hese developments raise important policy, regulatory, and ethical issues. For example, how should we promote data access? How do we guard against biased or unfair data used in algorithms? What types of ethical principles are introduced through software programming, and how transparent should designers be about their choices? What about questions of legal liability in cases where algorithms cause harm?"); James Vincent & Russell Brandom, *Axon Launches AI Ethics Board to Study the Dangers of Facial Recognition*, THE VERGE (Apr. 26, 2018, 11:58 AM), https://www.theverge.com/2018/4/26/17285034/axon-ai-ethics-board-facial-recognition-racial-bias [https://perma.cc/9BVR-F43D].

corporations to engage in continual and proactive reflection about the implications of AI technologies, such as considering the long-term impacts of AI deployment on society, the potential for biases within AI systems, and the ancillary negative ramifications of AI-driven decision-making processes.[92] Explicitly incorporating ethics into corporate governance principles would help ensure that the benefits of AI are realized in a way that promotes public trust in that enhanced reliance on algorithms would not erode societal values in the name of seeking greater profits.

B. Safeguarding Human Autonomy

Complementing the need for an enhanced focus on corporate ethics, governance structures in the AI era should prioritize the preservation of human agency in AI technologies' deployment.[93] Despite the potential for business entities to be wholly owned and operated without much (if any) human oversight under the current corporate legal regime, AI-era governance structures should ensure that AI systems are designed and used to complement human judgment rather than replace it. The importance of maintaining human oversight and control should remain essential in decision-making processes that pose significant risks of harm to individuals and society. Mandating the deployment of AI technologies in a manner that preserves the centrality of human decision-making could help ensure that AI serves to augment rather than diminish human capacities.[94]

Protecting human autonomy also involves protecting individuals' ability to make free and informed decisions despite the persuasive, if not coercive, influence by AI technology.[95] Governance structures, whether through reinvigorated fiduciary duties or consumer fraud statutes, should target the potential for AI-driven content, recommendations, and interactions to manipulate preferences, behaviors, and choices. By safeguarding human autonomy, legal frameworks could help maintain the dignity and freedom of individuals in a rapidly changing technological landscape where AI plays an increasingly influential role.

C. Transparency and Accountability

AI's increasing integration into corporate decision-making and business operations necessitates enhanced transparency and accountability. Although current governance structures do not impose any general disclosure

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[92] *See* Kremer et al., *supra* note 10, at 6–7.

[93] *See* Siebecker, *Democracy*, *supra* note 4, at 983–84.

[94] *See* Kremer et al., *supra* note 10, at 3.

[95] *See* Raymond H. Brescia, *Social Change and the Associational Self: Protecting the Integrity of Identity and Democracy in the Digital Age,* 125 PENN ST. L. REV. 773, 779–84 (2021).

obligations,[96] in the era of AI, robust legal frameworks should mandate corporate disclosure regarding how AI systems are deployed within their operations. This disclosure should include the decision-making processes governed by AI and the safeguards implemented for ethical and responsible deployment of AI technologies. While not unique to the AI era, transparency builds trust among stakeholders and supports regulatory oversight, guaranteeing that the deployment of AI technologies would align with societal values and legal norms.[97]

Effective enforcement mechanisms should play a crucial role in confirming that corporations meet the legal and regulatory standards that govern AI usage.[98] Strong enforcement mechanisms would not only deter potential violations but also emphasize the gravity of AI governance. This may require the creation of specialized units within regulatory agencies equipped with the expertise to manage and oversee AI technological development, as well as the use of technology to support monitoring and enforcement activities.[99]

Moreover, strong enforcement mechanisms should adopt a comprehensive approach that combines punitive actions with incentives for compliance and ethical conduct.[100] This might include introducing recognition programs for corporations that excel in AI governance or creating industry standards that promote self-regulation and accountability among peers. By prioritizing enforcement mechanisms, legal frameworks could transcend aspirational goals for AI usage in corporate settings and actively influence corporate practices toward responsible and ethical AI deployment.

D. Adaptability and Flexibility

The rapidly changing landscape of AI technology requires adaptable and flexible legal frameworks. Considering the celerity of technological development, corporate law and regulations should not merely respond to the current state of technological progress but also anticipate future technological advancements.[101] This would require shifting from rigid legal structures to

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[96] *But see* Siebecker, *Trust*, *supra* note 28, at 143–44 (discussing a special disclosure obligation under Delaware law).

[97] For a general discussion of the benefits of corporate transparency, see generally *id.*

[98] *See* Kremer et al., *supra* note 10, at 6.

[99] *See* Tom Wheeler, *The Three Challenges of AI Regulation*, BROOKINGS (June 15, 2023), https://www.brookings.edu/articles/the-three-challenges-of-ai-regulation/ [https://perma.cc/PM2A-5KUV].

[100] *See* David Nolan et al., *The Urgent But Difficult Task of Regulation Artificial Intelligence,* AMNESTY INT'L (Jan. 16, 2024), https://www.amnesty.org/en/latest/campaigns/2024/01/the-urgent-but-difficult-task-of-regulating-artificial-intelligence/ [https://perma.cc/H6VJ-S2VQ].

[101] *See* Eric Fruits, *AI Regulation Needs a Light Touch*, INT'L CTR. FOR L. & ECONS. (Aug. 14, 2023), https://laweconcenter.org/resources/ai-regulation-needs-a-light-touch/ [https://perma.cc/YKZ5-CY3M].

more dynamic, principle-based regulations that could adjust and evolve in tandem with technological progress. Imbued with sufficient flexibility, governance principles could guide corporate behavior in a way that fosters innovation while protecting societal interests.

Moreover, with the context of integrating AI into corporate decision-making processes, a dedication to adaptability and flexibility would highlight the need for a legal framework that encourages experimentation and learning. A governance framework could better support the responsible development of AI technologies by adopting a regulatory posture open to adjustment based on technological advancements and new empirical evidence. Such regulatory flexibility would foster continued exploration of AI's potential in a manner that could align technological advancements with broader societal values.

E. Promoting Innovation

In the era of AI, corporate law and regulation should actively encourage responsible innovation while addressing AI's complex ethical and social implications.[102] Recognizing the transformative potential of AI technologies to contribute positively to society and the economy, governance structures should strike a balance between mitigating risks and enabling the exploration of new AI applications.[103] Tax incentives, grants, and the creation of regulatory "sandboxes" are some governance structures that might facilitate the safe exploration of AI technologies under regulated conditions.[104] These measures, among others, could effectively lower the barriers to innovation while maintaining substantive oversight. By incentivizing such focused development, legal structures could catalyze the adoption rate of AI in diverse economic, social, and scientific fields while also ensuring these technological advances are ethically grounded.

F. Protection of Privacy and Data Rights

The rapid spread of AI technologies underscores the urgent need to protect individual privacy and data rights. Given AI systems' heavy reliance on collecting and processing vast amounts of data, legal frameworks need to implement robust data protection regulations to guard against misuse of personal information.[105] Accomplishing this goal might entail adopting strict regulatory requirements for data privacy, such as those in the European

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[102] *See* Bastit et al., *supra* note 6.

[103] *See* DEP'T. FOR SCIENCE, INNOVATION & TECH., OFFICE FOR ARTIFICIAL INTELLIGENCE, GOV.UK, *AI Regulation: A Pro-Innovation Approach* (Mar. 29, 2023), https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach [https://perma.cc/WCP5-CWT4].

[104] *See* Orly Lobel, *The Law of AI for Good,* 75 FLA. L. REV. 1073, 1122–27 (2023).

[105] *See* Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy,* 21 YALE J. L. & TECH. 106, 181–85 (2019).

Union's General Data Protection Regulation ("GDPR") .[106] From a fiduciary perspective, duties of care and loyalty may require that corporations maintain transparency about their data handling practices and remain accountable for meeting those standards.

Furthermore, safeguarding privacy and data rights in the AI era calls for a governance framework that continually looks forward by preparing for the changing dynamics of data use and the potential for misuse.[107] Without compromising the potential need for strict regulatory requirements for data privacy, legal constructs should remain sufficiently malleable to protect against privacy abuses from new technologies and their applications, such as the use of AI for surveillance or the unauthorized use of personal images to promote corporate messaging. By rigorously protecting privacy and data rights, corporate governance structures could preserve individual autonomy and maintain public trust in the corporations that deploy AI technologies.

G. International Cooperation and Harmonization

The worldwide adoption of AI technologies along with the global operations of multinational corporations make critical the international cooperation and harmonization of legal standards. Of course, there is no national law of corporations in the United States, nor is there international law of corporations that provides uniformity in governing the actions of corporate directors and officers.[108] Nonetheless, sensibly addressing the extraordinarily complex and significant risks posed by AI requires some appreciation for generalizable principles that cut across boundaries. For instance, as part of implementing the European Union's AI Act, the European AI Office has committed to engage in "international dialogue and cooperation on AI issues, acknowledging the need for global alignment on AI governance."[109] Such efforts are vital for addressing the challenges AI poses across national borders, including issues related to data privacy, intellectual property rights, and ethical guidelines. Even if no specific regulatory obligation exists to conform to international standards, fiduciary obligations could be reconstrued to require consideration of global norms when determining what constitutes the best interests of the corporation. By embracing the need for harmonization of standards regarding the development and deployment of AI technologies, corporate governance structures could more consistently promote ethical use, transparency, and accountability.

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[106] For a general discussion of the GDPR approach, see Woodrow Hartzog & Neil Richards, *Privacy's Constitutional Moment and the Limits of Data Protection,* 61 B.C. L. REV. 1687 (2020).

[107] *See* Manheim & Kaplan, *supra* note 105, at 181–86.

[108] *See generally id.*

[109] *Shaping Europe's Digital Future: AI Act*, *supra* note 63.

H. Stakeholder Engagement and Public Participation

Developing corporate governance structures for the AI era requires direct involvement from shareholders, corporate stakeholders, business leaders, policy experts, and the general public. From a regulatory standpoint, holistic engagement would secure the consideration of a wide range of perspectives and interests in crafting regulations, enhancing their relevance, effectiveness, and broader acceptance.

From a fiduciary perspective, engaging stakeholders could further the understanding of AI's potential effects and address concerns of those most impacted by their use. In prior works, I have advocated for retooling fiduciary duties through the lens of political discourse theory.[110] That jurisprudential correction would require continual discourse between corporate managers and all constituencies affected by corporate behavior. Although describing the tenets of a new discourse theory of the firm lies well beyond the scope of this Article, the approach would cultivate a shared sense of responsibility among all involved in AI governance, leading to cooperative efforts to solve complex issues.[111] Specifically, public participation in deliberations about how corporations should use emerging technologies would help align AI development and usage with societal norms and priorities. Such deliberative engagement would not only make the regulatory process more democratic but would strengthen trust in AI technologies and the entities that implement them. By prioritizing stakeholder engagement and public participation, corporate governance frameworks could better reflect a broad consensus on the ethical use, transparency, and accountability of AI systems, contributing to a more equitable and just digital future.[112]

Overall, these few overarching principles do not aim to provide a comprehensive framework for reconceiving corporate governance structures in the age of AI. Nonetheless, considering the obvious shortcomings of the current corporate governance framework in addressing the unique challenges posed by AI, these principles provide some insight for how an inevitable revamping of corporate governance structures might proceed.

V. CONCLUSION

In the wake of AI's rapidly expanding role within corporate decision-making and operations, it becomes increasingly clear that existing corporate governance structures require a significant intellectual overhaul. Only through a multifaceted approach involving legislative action, common law adaptation, and regulatory mandates can society hope to achieve a governance framework that both protects public interests and nurtures technological

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[110] *See* Siebecker, *Democracy*, *supra* note 4; Siebecker, *Troubled Waters, supra* note 70; Michael R. Siebecker, *A New Discourse Theory of the Firm After* Citizens United, 79 GEO. WASH. L. REV. 161 (2010).

[111] *See* Siebecker, *Incompatibility*, *supra* note 2, at 953.

[112] *See* Siebecker, *Democracy*, *supra* note 4, at 1006.

advancement. The potential of AI to drive economic growth, enhance corporate efficiency, and spawn innovative solutions remains undeniable. Yet, without corporate governance structures that adequately address AI's unique challenges, including concerns over ethical use, transparency, and accountability, we risk undermining the social and civic institutions that underpin our society.

As we dive more deeply into the AI era, it is imperative that we re-evaluate corporate rights and responsibilities by equipping legal frameworks to manage the complexities introduced by AI technologies. By embracing the principles of ethical AI use, safeguarding human autonomy, ensuring transparency and accountability, and promoting innovation within a carefully cabined legal and ethical framework, we can foster an environment where AI's benefits are realized to their fullest potential and their risks are simultaneously mitigated. International cooperation and harmonization, stakeholder engagement, and public participation remain critical in shaping a global approach to AI governance that engenders widespread acceptance and trust. Without a fundamental reconsideration of corporate rights and responsibilities in the AI era, however, society risks surrendering human dominion over our collective lives to algorithmic entities.