

# Beyond Human Oversight: Corporate Law and the Case for AI Directors

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*Corporate laws in the United States require corporations to be governed by a board of directors consisting of humans—otherwise known as the natural person requirement. Mandating governance by individual persons stands in contrast to typical American business ideals and the freedom of contract. There are various reasons for corporate law’s imposition of the natural person requirement—many of them historical. But the justification for the natural person requirement has not been sufficiently critiqued, particularly in the context of AI. This Note argues this corporate law requirement should be amended to give corporations the option to permit AI directors in addition to other human and organizational entity directors. After reviewing the current corporate law landscape, this Note shows that the changes advocated for are quite simple to implement from a purely legal standpoint. Next, the Note presents three reasons for amending the requirement: (1) AI directors can be beneficial in ways that human directors cannot; (2) the justifications normally put forth in support of the natural person requirement fail; and (3) doing so would promote American ideals. Lastly, this Note discusses additional caveats and considerations to its proposal and compares approaches to organizational entity directors to the proposal made in this Note. The natural person requirement is outdated when considered in the context of modern artificial intelligence technology, and it should be amended to provide corporations with flexibility in designing their boards of directors.*

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## INTRODUCTION

Corporations are not a new concept; they have been in existence in some form for hundreds of years.<sup>1</sup> The earliest roots of the corporate board can likewise be traced back for centuries, to medieval Europe and its trade guilds.<sup>2</sup> Yet, for all the time that has passed since then, corporate laws in the United States and around the world continue to require governance under the supervision of the board of directors composed of natural persons.<sup>3</sup> Delaware, the leading home for corporations in the United States,<sup>4</sup> has required governance under a board of directors since it first passed a corporate law.<sup>5</sup> This early law implicitly instituted a natural person requirement for board membership.<sup>6</sup> It was not until 2002 that a natural person requirement was made explicit; but even then, there was no explanation for the requirement in the legislative history.<sup>7</sup>

Noticing the superficial change in law, Franklin Gevurtz, a leading commentator on corporate law,<sup>8</sup> remarked it was interesting that more scholarly attention had not been given to why corporate laws in the United States even call for governance under a board of directors.<sup>9</sup> This question was posed at the turn of the century, in light of the then-recent Enron<sup>10</sup> and WorldCom<sup>11</sup> scandals, and highlighted the tendency for scholars to focus their criticisms on board director behavior, rather than considering whether a natural person is the *only* entity well-suited to hold a director position.<sup>12</sup>

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1. See Sergio Gramitto, *The Technology and Archeology of Corporate Law 2* (Oct. 05, 2023) (unpublished manuscript) (on file at Law Archive Papers).

2. Fiona Lu, *The Origins of the Corporate Board*, EXEC. ADVISORY INST. (May 13, 2020), <http://executive-advisoryinstitute.com/2020/05/13/491>.

3. See Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 HOFSTRA L. REV. 89, 91 (2004).

4. See *About the Division of Corporations*, DEL. DIV. OF CORPS., <https://corp.delaware.gov/aboutagency> (last visited May 15, 2025).

5. See 21 Del. Laws 451–52 (1897); S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 9–10 (1976) (“[T]he corporation law, as originally enacted, had granted to the directors the power to manage the business of the corporation . . .”).

6. See 21 Del. Laws 451–52 (1897).

7. See 73 Del. Laws ch. 298 (2002); DEL. CODE ANN. tit. 8, § 141 (West 2025); LEWIS S. BLACK, JR. & FREDERICK H. ALEXANDER, ANALYSIS OF THE 2002 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW 2 (2002), <https://www.law.upenn.edu/live/files/6781-analysis-2002-amend-del-gen-corp-lawpdf>.

8. Frank Gevurtz, UNIV. OF THE PAC., <https://www.pacific.edu/campus-directory/frank-gevurtz> (last visited May 15, 2025).

9. See Gevurtz, *supra* note 3.

10. Troy Segal, *Enron Scandal and Accounting Fraud: What Happened?*, INVESTOPEDIA (Dec. 3, 2024), <https://www.investopedia.com/updates/enron-scandal-summary>.

11. Adam Hayes, *The Rise and Fall of WorldCom: Story of a Scandal*, INVESTOPEDIA (June 14, 2024), <https://www.investopedia.com/terms/w/worldcom.asp>.

12. See Gevurtz, *supra* note 3.

Perhaps the Enron and WorldCom scandals were not surprising to those paying close attention;<sup>13</sup> boards suffer from the same vices as humans: poor decision-making, bias, ego, and greed, among others.<sup>14</sup> Put these vices together with the right mixture of economic pressures and incentives, and the result is almost inevitably a governance scandal.<sup>15</sup> The law's natural person requirement only contributes to these human-related flaws of boards of directors.

Despite the Enron and WorldCom scandals and the other countless shortcomings of human-composed boards, corporate scholars still have not significantly scrutinized the board of directors' natural person requirement. That being said, some scholarly work has started to consider alternatives or changes to the corporate board of directors<sup>16</sup> by arguing that non-human entities such as corporations or other business organizations should be able to serve as directors.<sup>17</sup> Others have argued that other corporate entities specializing in management, known as "Board Service Providers" (BSP), should replace the corporate board of directors altogether.<sup>18</sup> While these proposals provide a possible alternative to human board members, they may suffer from some of the same weaknesses as human board members, including biases, conflicting incentives, and limited time and resources. More recently, amidst the artificial intelligence (AI) boom, the specter of AI or "robo-directors" replacing humans on the corporate board of directors has captured the attention of some because of its potential ability to meaningfully address concerns over human directors without suffering from the same human vices previously mentioned.<sup>19</sup> Although several articles conclude that AI should not

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13. Stanford GSB Staff, *What Led to Enron, WorldCom and the Like?*, STAN. GRADUATE SCH. BUS. (Oct. 15, 2003), <https://www.gsb.stanford.edu/insights/what-led-enron-worldcom> ("A report by former SEC chairman Richard Breeden made not one or two but 78 different recommendations to change corporate governance at WorldCom.").

14. GLOB. AGENDA COUNCIL ON THE FUTURE OF SOFTWARE & SOC'Y, WORLD ECON. F., DEEP SHIFT: TECHNOLOGY TIPPING POINTS AND SOCIETAL IMPACT 21 (2015), [https://www3.weforum.org/docs/WEF\\_GAC15\\_Technological\\_Tipping\\_Points\\_report\\_2015.pdf](https://www3.weforum.org/docs/WEF_GAC15_Technological_Tipping_Points_report_2015.pdf).

15. Stanford GSB Staff, *supra* note 13 ("Increases in executive compensation and stock options, jumps in incentives to manage earnings, and major shifts in the structure of auditing firms are just a few of the changes that led to loss of money and public confidence in corporations during the past decade . . .").

16. Stephen M. Bainbridge, *Corporate Directors in the United Kingdom*, 59 WM. & MARY L. REV. 65, 69 (2017).

17. *Id.* at 68.

18. Stephen M. Bainbridge & M. Todd Henderson, *Boards-R-Us: Reconceptualizing Corporate Boards*, 66 STAN. L. REV. 1051, 1056 (2014).

19. See Florian Möslin, *Robots in the Boardroom: Artificial Intelligence and Corporate Law*, in RESEARCH HANDBOOK ON THE LAW OF ARTIFICIAL INTELLIGENCE 649, 649–52 (Woodrow Barfield & Ugo Pagallo eds., 2018); Gavin Hinks, *Changes to Company Law Would Enable Use of 'Robot Directors'*, BD. AGENDA (Aug. 5, 2021), <https://boardagenda.com/2021/08/05/changes-to-company-law-would-enable-use-of-robot-directors/>; Il'ya Dudkin, *AI on the Board of Directors? A Hong Kong Company Made It Happen*, MINDY SUPPORT (Aug. 25, 2020), <https://mindy-support.com/news-post/ai-on-the-board-of-directors-a-hong-kong-company-made-it-happen>.

be allowed to replace human directors in any capacity—by citing concerns over a lack of transparency, liability, and human conscience<sup>20</sup>—this Note refutes this conclusion. As society, companies, and technology evolve, there should also be an increased flexibility for companies to *choose* how to make up their boards. In particular, this Note argues that corporate laws in the United States should amend the natural person requirement to allow other entities, particularly AI, to serve on the board of directors of corporations.

In Part II, this Note begins by outlining the history of the board of directors, specifically the natural person requirement, and providing an overview of AI and its abilities. Part III asserts that it is feasible to overcome any legal obstacles to permitting AI to sit on boards. Part IV presents the several reasons why the natural person requirement should be changed to allow AI to serve on the board of directors. First, AI can likely undertake the traditional board's duties, the oversight and advisory functions,<sup>21</sup> and do so more efficiently and effectively. Second, the usual justifications for why a human-only board of directors is necessary do not pass scrutiny in considering an AI alternative. These justifications include the claim that humans possess, and AI would lack, incentives and characteristics necessary to act in the corporation's best interests;<sup>22</sup> that humans provide transparency to corporate decision-making which AI directors would not provide;<sup>23</sup> and that humans can be held accountable and liable, whereas AI directors cannot.<sup>24</sup> Third, amending corporate law to permit AI directors promotes business efficiency and innovation, supports American ideals such as the freedom of contract, and can lead to changes in individual states, thereby promoting federalism. Finally, Subpart IV.D reviews additional considerations and objections to the proposal to permit AI directors. This Note will demonstrate that the justifications for the natural person requirement for directors either underestimate the abilities of AI, overestimate the value humans provide on the board of directors, or disregard the possibility that the correct frameworks can mitigate or eliminate supposed drawbacks of loosening the natural person requirement and permitting AI on the board of directors.

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20. See Sergio Alberto Gramitto Ricci, *Artificial Agents in Corporate Boardrooms*, 105 CORNELL L. REV. 869, 903–06 (2020); Joseph Lee & Peter Underwood, *AI in the Boardroom: Let the Law Be in the Driving Seat*, 16 INT'L & COMPAR. CORP. L.J. (forthcoming) (manuscript at 18–19).

21. Lynne L. Dallas, *Proposals for Reform of Corporate Boards of Directors: The Dual Board and Board Ombudsperson*, 54 WASH. & LEE L. REV. 91, 98–104 (1997).

22. See Möslin, *supra* note 19, at 666.

23. See Lee & Underwood, *supra* note 20, at 18.

24. See Ricci, *supra* note 20, at 894.

## II. BACKGROUND

### A. HISTORY OF THE BOARD OF DIRECTORS AND NATURAL PERSON REQUIREMENT

The natural person requirement is ingrained in the history of the board of directors. Although many of the critiques of today's boards of directors can be attributed to human vices, the natural person requirement remains intact.

Corporations have existed since medieval times, beginning with Roman cities and towns, rather than businesses.<sup>25</sup> The Romans were the first to decide that non-human entities, cities and towns, could have contracting capacity and liability.<sup>26</sup> The Roman Catholic Church further systematized the use of corporations, as well as their attributes and rules of governance.<sup>27</sup> As Sir William Blackstone remarked, England derived its corporations from these early Roman governmental and ecclesiastical corporations.<sup>28</sup> English companies further refined the Roman corporate form by using corporations for their business ventures,<sup>29</sup> leading to the development of business corporations.<sup>30</sup>

Early English companies also drew inspiration for their corporate model from the Middle Ages corporate governance scheme, which elected boards to conduct oversight and management.<sup>31</sup> These corporations also reflected widespread political practices and ideas, which could be seen in the assemblies or parliaments of medieval kingdoms, in town councils for guilds, and in the Church.<sup>32</sup> Inspired by this governance model, early English companies further refined the board of director role.<sup>33</sup> In fact, the first corporations created by charter in England were municipal corporations and trade guilds<sup>34</sup> that were

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25. See Gramitto, *supra* note 1; WILLIAM F. WALSH, OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW 452 (1923).

26. See Gramitto, *supra* note 1, at 3. Romans empowered corporations to have legal capacity. *Id.* Highly educated slaves were tasked with managing assets and a form of collective business called *negotatio per servos communes cum peculiam*, although they did not have formal legal capacity. *Id.* at 34. Romans, however, created a derivative form of legal capacity for the highly educated slaves, which was a mere extension of the legal capacity of the owners. *Id.* at 40. This can provide insight into structuring a modern board with AI directors—whereby the AI director has decisionmaking and legal capacity derivative of the corporations' and the corporation and/or the AI director firm providing the AI director can be held liable for the AI director's actions. *Id.* at 35.

27. Giancarlo Anello, Mohamed Arafa & Sergio Alberto Gramitto Ricci, *Sacred Corporate Law*, 45 SEATTLE U. L. REV. 413, 415 (2021).

28. See WALSH, *supra* note 25; 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 468 (George Sharswood ed., 1753).

29. See BLACKSTONE, *supra* note 28.

30. See Gramitto, *supra* note 1.

31. See Gevurtz, *supra* note 3, at 129; Lu, *supra* note 2.

32. See Gevurtz, *supra* note 3, at 129.

33. *Id.*

34. See WALSH, *supra* note 25, at 453.

managed by a board with oversight and decisionmaking powers.<sup>35</sup> This influence can also be seen in the governance structures of English banks, colonizing companies, and trading companies.<sup>36</sup> For example, the 1694 Charter of The Bank of England provided for a twenty-four-director board.<sup>37</sup>

Other examples of early corporate board of director governance structures include the English corporations chartered to establish colonies around the world<sup>38</sup> and English trading companies.<sup>39</sup> The role of these English trading companies' governing boards also evolved from a primarily regulatory function to a supervisory body, tasked with overseeing and running a business.<sup>40</sup> In fact, it was the East India Company, in a pioneering feat, who first granted the power to elect the corporation's chief executive officer to the governing board, resembling the type of power granted to boards of directors today.<sup>41</sup>

In turn, the governance structures of English banks, colonizing companies, and trading companies influenced the governance structures of early American companies. For example, the first Bank of the United States was governed by a twenty-five person board of directors annually elected by shareholders.<sup>42</sup> Further, the first general corporation statute, New York's 1811 Act,<sup>43</sup> provided that the "company shall be managed and conducted by trustees . . . elected at such time and place as shall be directed by the bylaws of the said company."<sup>44</sup> Of course, the methods of election and the use of the word "trustees" have both changed (the latter to "directors"), but the ideal of

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35. See Lu, *supra* note 2.

36. *Id.*

37. See Gevurtz, *supra* note 3, at 110; Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 111 (1888).

38. Tyler Halloran, *A Brief History of the Corporate Form and Why it Matters*, FORDHAM J. CORP. & FIN. L.: BLOG (Nov. 18, 2018), <https://news.law.fordham.edu/jcfl/2018/11/18/a-brief-history-of-the-corporate-form-and-why-it-matters>. For example, the London Company (later known as the Virginia Company) and the Plymouth Company originally each had two councils that provided governance: one council consisting of thirteen members providing management in the colonies and another council of thirteen members providing superior management and direction in England. The Massachusetts Bay Company also had a similar governing structure. See Gevurtz, *supra* note 3, at 111–12.

39. The charters for the East India Company, Hudson's Bay Company, Royal African Company, and other notable trading companies of the time committed management of the companies to groups of up to twenty-five people. Gevurtz, *supra* note 3, at 115; see Halloran, *supra* note 38; see also Gevurtz, *supra* note 3, at 115–17.

40. See Cyril O'Donnell, *Origins of the Corporate Executive*, 26 BULL. BUS. HIST. SOC'Y 55, 60 (1952).

41. See Gevurtz, *supra* note 3, at 118 (referring to the Historical Antecedents of Corporate Directors and Officers table which shows the evolution of corporate boards' role from a regulatory function to an oversight function).

42. An Act to Incorporate the Subscribers to the Bank of the United States, Pub. L. No. 1–10, § 4, 1 Stat. 191, 192–93 (1791); see Gevurtz, *supra* note 3, at 109. The Society for Establishing Useful Manufactures, a New Jersey corporation chartered in 1791 by Alexander Hamilton, was also managed by thirteen directors elected by the shareholders. *Id.*

43. See Gevurtz, *supra* note 3, at 108.

44. An Act Relative to Incorporations for Manufacturing Purposes, 1811 N.Y. Laws 350–51.

natural person board governance was apparent nonetheless.<sup>45</sup> The board of directors was growing in power and popularity, expanding these individual directors' influence in society.<sup>46</sup> In the early days of corporations, agency costs may have been more minimal, due to the smaller nature of early corporations. However, problems were apparent: conflicts between majority and minority shareholders were plentiful,<sup>47</sup> opportunities for fraud abundant,<sup>48</sup> and complaints about director inaction common.<sup>49</sup>

Although the nineteenth century in America began with smaller, closely held corporations comprising a large part of the economy, it did not take long for the growth of large industrial corporations, starting with the railroads, to occur.<sup>50</sup> By the beginning of the twentieth century, the manufacturing industry had also evolved to consist of primarily large-scale corporations.<sup>51</sup> This was the result of industry-wide mergers that combined or attempted to combine relatively small companies into giant corporations that dominated their respective industry.<sup>52</sup> Thus, a few sprawling firms dominated multiple sectors of the American economy, a trend that lasted for many decades.<sup>53</sup> A key upshot of the growth of large corporations was that the ownership of corporations became dispersed and diversified.<sup>54</sup> The result was increased agency costs. Rather than having a small corporation where the shareholders, managers, and directors were all the same individuals, large corporations had thousands of shareholders, the vast majority of which were not directors or officers. The exponential growth of large corporations highlighted the importance of boards of directors, as key components of the corporate structure.

While there had undoubtedly been minority shareholders inactive in the management of corporations prior to this time, there had not yet been a sense that such shareholders constituted a large enough class that deserved extra protection or academic attention.<sup>55</sup> But following the explosion of stock

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45. See Gevurtz, *supra* note 3, at 109.

46. Harwell Wells, *The Birth of Corporate Governance*, 33 SEATTLE U. L. REV. 1247, 1292 (2010).

47. Robert E. Wright, *Rise of the Corporation Nation*, in FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S, at 217, 222–23 (Douglas Irwin & Richard Sylla eds., 2010).

48. Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century* 12 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13093, 2007), [https://www.nber.org/system/files/working\\_papers/w13093/w13093.pdf](https://www.nber.org/system/files/working_papers/w13093/w13093.pdf).

49. See Gevurtz, *supra* note 3, at 107 nn.81–82.

50. See Wells, *supra* note 46, at 1254.

51. ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 340–44 (1977).

52. NAOMI LAMOREUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904*, at 1 (1985).

53. See Wells, *supra* note 46; THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDIES, JAMES M. LANDIS, ALFRED E. KAHN* 68–79 (1984).

54. See Wells, *supra* note 46, at 1254.

55. *Id.*; see Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68 J. ECON HIST. 645, 663–64 (2008).

ownership in the 1920s, when millions of Americans became first-time investors,<sup>56</sup> critics of boards of directors began citing concerns over director nonfeasance, agency costs, fraud, and self-interested acts.<sup>57</sup>

Given the possible divergence of interests between managers and shareholders in large corporations, and the fact that a diffuse set of small shareholders created conditions for unaccountable managers to take advantage of, a real concern over the separation of ownership and control began to grow among shareholders and academics.<sup>58</sup> Such concern was discussed in the foundational 1932 book “The Modern Corporation and Private Property” by Adolph Berle and Gardiner Means, which discussed the possibility of managers and directors pursuing their own interests at the expense of shareholders.<sup>59</sup> Although Berle and Means believed that directors are meant to act as intermediaries between shareholders and managers, they suggested that directors may not always fulfill this role, particularly when boards are dominated by managers.<sup>60</sup> However, the natural person requirement, which further perpetuated the growing criticisms of boards of directors, remained unquestioned. While the power of these growing corporations’ directors expanded and their unbiased decisionmaking became more critical, the shortcomings of boards of directors—often due to flaws so innate to human nature—became clearer.

At an extreme, modern examples of problems created by human directors and those in leadership positions include the Enron and WorldCom scandals; the failures of Lehman Brothers, Bernie Madoff, FTX, and Theranos; and other scandals such as the Volkswagen emissions scandal, among others.<sup>61</sup> These examples and others resulted from fraud, self-dealing, bribery, and insufficient oversight. Less extreme examples of problems created by human directors include self-serving transactions or a lack of due diligence on the part of directors, as in the famous cases of Revlon, Caremark, Weinberger, and Van Gorkom.<sup>62</sup> These represent situations where there may not be outright fraud or bribery, but directors’ lack of care or conflicted interests resulted in possible damages to shareholders.

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56. See Wells, *supra* note 46, at 1255.

57. William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1320–22 (1934); see ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 112–16 (2009); see also Wright, *supra* note 47, at 237–38.

58. See Wells, *supra* note 46, at 1255.

59. See BERLE & MEANS, *supra* note 57.

60. *Id.* The seminal work by Berle and Means is undoubtedly the most famous in corporate governance literature, is cited extensively, and has been the basis of numerous corporate governance policy reform efforts.

61. Team DigitalDefynd, *60 Biggest Business Scandals in History [2025]*, DIGITALDEFYND <https://digitaldefynd.com/IQ/biggest-business-scandals> (last visited May 15, 2025).

62. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 175–76 (Del. 1986); *In re Caremark Int’l Inc. Deriv. Litig.*, 698 A.2d 959, 964 (Del. Ch. 1996); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703 (Del. 1983); *Smith v. Van Gorkom*, 488 A.2d 858, 864 (Del. 1985).

Corporate scandals<sup>63</sup> and self-serving acts<sup>64</sup> by directors and managers can be characterized as the result of human board membership and, more fundamentally, as the result of the divergence of interests between separation and control.<sup>65</sup> These scandals and acts have fueled corporate governance reform efforts aimed at discouraging excess risk-taking, encouraging accurate reporting in company documents, and requiring more rigorous auditing, among others.<sup>66</sup> The reforms include Sarbanes-Oxley, Dodd-Frank, updates to Rule 10b-5, and a host of SEC regulations.<sup>67</sup> Despite the long and zealous efforts of corporate governance reformers to understand and improve the board of directors<sup>68</sup> and more generally corporate law, one aspect of corporate law has been largely overlooked: the legal requirement that the board of directors be composed of natural persons.<sup>69</sup>

The natural person requirement is the requirement that only human persons can sit on corporate boards of directors.<sup>70</sup> This prevents corporations and other legal entities from serving on a corporation's board of directors. Many other countries also implement this requirement, such as Canada, Australia, and the United Kingdom (at least one director must be a natural person).<sup>71</sup>

The idea of natural persons creating legal entities has ancient roots.<sup>72</sup> Legal persons (entities) consisting of natural persons were present during the Roman Empire.<sup>73</sup> Literature from the time of early English corporations clearly envisions underlying human ownership and control.<sup>74</sup> Accordingly, the idea of natural persons owning and controlling corporations dates back far in history. When the first natural person requirement in corporate law appeared is not completely clear, although it is possible that it goes back (in practice or in law) to the times of early corporations.<sup>75</sup>

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63. See, e.g., Stanford GSB Staff, *supra* note 13 (discussing the Enron and WorldCom scandals).

64. See, e.g., *In re Trados Inc. Shareholder Litig.*, 73 A.3d 17, 79 (Del Ch. 2013).

65. See BERLE & MEANS, *supra* note 57.

66. *Id.*

67. *Corporate Governance in the United States*, ECGI, <https://www.ecgi.global/publications/codes/countries/corporate-governance-in-the-united-states> (last visited May 15, 2025).

68. See *supra* Part I.

69. See Bainbridge & Henderson, *supra* note 18.

70. DEL. CODE ANN. tit. 8, § 141 (West 2025).

71. *Director Requirements for Private Limited Companies: A Global Comparison*, NORDICHQ, <https://www.nordichq.com/director-requirements-country-comparison> (last visited May 15, 2025). England updated its requirements in 2014, prior to which non-natural persons could serve on the board of directors. See Bainbridge, *supra* note 16, at 70.

72. Sergio Alberto Gramitto Ricci, *Archeology, Language, and Nature of Business Corporations*, 89 MISS. L.J. 43, 44–45 (2019).

73. *Id.*

74. 1 WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 457 (2d ed. 1766).

75. See Williston, *supra* note 37, at 106–12.

The natural person requirement in the United States has been in place since 1899, when Delaware passed its first general corporation law,<sup>76</sup> the language of which vests management of the business in the board of directors and is suggestive of a natural person requirement for directors.<sup>77</sup> Presently, the Delaware General Corporation Law (DGCL) continues to require directors to be natural persons.<sup>78</sup> The Model Business Corporation Act (MBCA), adopted by more than thirty states, also prohibits non-natural persons from serving on the board of directors.<sup>79</sup> Because of these statutes, the practice of strictly natural-person boards has remained intact since the very first corporations in the United States. This is the case even though many of the criticisms of today's boards of directors can be attributed to the risks associated with having human board members. This Note argues that relaxing this natural person requirement will provide corporations with flexibility to ameliorate these risks.

#### B. PROPOSALS FOR CORPORATIONS AND OTHER ENTITIES TO SERVE ON BOARDS

From the time of the first corporations in the United States until very recently, there appears to have been very little discussion about the requirement that the boards of directors be comprised of natural persons.<sup>80</sup> Although the natural person requirement has not been widely questioned, some scholars have begun to look into possible changes to the requirement to address concerns over the effectiveness and shortcomings of boards of directors. This is because, as previously mentioned, these problems arise, at least in part, from self-interested directors,<sup>81</sup> improper skillsets, inefficient use of time and decisionmaking, and divergent incentives, among others.<sup>82</sup>

More specifically, one of the proposals to change the natural person requirement argued that corporations be allowed to sit on boards.<sup>83</sup> The proposal argued that a corporate director would likely be better at making decisions simply because the decisionmaking process would involve many individuals rather than a single director.<sup>84</sup> The plurality of opinions would

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76. 21 Del. Laws 451–52 (1897).

77. *See id.*

78. DEL. CODE ANN. tit. 8, § 141 (West 2025).

79. *See Model Business Corporation Act Resource Center: MBCA Enactment Map*, AM. BAR ASS'N [hereinafter A.B.A., *Model Business Corporation Act*], [https://www.americanbar.org/groups/business\\_law/resources/model-business-corporation-act](https://www.americanbar.org/groups/business_law/resources/model-business-corporation-act) (last visited May 15, 2025).

80. *See* M. Todd Henderson, *Reconceptualizing Corporate Boards: Should Board Members Have to Be "Natural Persons"?*, 36 REGUL. 28, 29 (2013) ("The typical response to board failures is to tweak the current governance model on the edges.")

81. Martin Petrin, *Corporate Management in the Age of AI*, 2019 COLUM. BUS. L. REV. 965, 1005.

82. *See* Bainbridge & Henderson, *supra* note 18, at 1064.

83. *See* Bainbridge, *supra* note 16, at 73.

84. *Id.* at 73–74.

presumably result in more reasoned decisions. Further, by employing multiple corporate directors, each with their own employees and directors, corporations would unlock greater access to resources.<sup>85</sup> Finally, the proposal posited that corporate directors may have better incentives than natural person directors.<sup>86</sup>

Stephen Bainbridge and Todd Henderson also proposed another alternative to the board of director model.<sup>87</sup> Similar to the corporate director proposal above, they argued that BSPs, professional firms specializing in director duties, be permitted to replace the board of directors for a corporation.<sup>88</sup> They identified various benefits, including risk pooling and talent allocation efficiencies, economies of scale, and improved accountability.<sup>89</sup> Ultimately, their proposal was banal: a minor change in corporate law to give corporations greater flexibility in their choice of board structure and composition.<sup>90</sup>

While the corporate director and BSP models certainly present the specter of certain benefits, they also may suffer from some of the same shortcomings of natural person directors. Both models will likely result in better decisionmaking, increased access to resources, and perhaps improved incentive structures. However, the models will also likely suffer from the same biases and conflicting incentives that afflict natural person directors, as well as shortcomings in time and knowledge.

An alternative to the natural person requirement that is both effective in addressing mounting concerns over natural person board membership and responsive to the critiques presented against corporations serving on boards, is the proposal that AI be permitted to serve on boards. Several recent articles have discussed this possibility of using AI, to supplement, change, or replace the board of directors.<sup>91</sup> Although these authors did not argue for a change in law specifically, their work evolved the discussion around changing the natural person requirement.

This Note furthers the dialogue critiquing the natural person requirement. As this Note will argue, the possible benefits from utilizing AI directors are immense, and likely greater than those created by corporate or BSP directors. However, like much of the scholarship in this area, this Note makes a limited proposal: to amend the natural person requirement so that corporations have

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85. *Id.* at 74.

86. *Id.*

87. See Bainbridge & Henderson *supra* note 18, at 1051.

88. See *id.*

89. *Id.*

90. *Id.* at 1058.

91. See generally Lee & Underwood, *supra* note 20 (discussing what AI use by the modern board should look like); Ricci, *supra* note 20 (discussing the feasibility of AI use by the modern board); Shawn Bayern, *The Implications of Modern Business-Entity Law for the Regulation of Autonomous Systems*, 19 STAN. TECH. L. REV. 93 (2015) (discussing the implementation of autonomous systems and company law in various countries).

yet another choice—AI directors—when structuring their board. This proposal will not suggest mandating AI directors, but instead expands upon similar proposals, to provide corporations with the option between natural persons, BSPs, AI directors, other entities—or any combination thereof.

### C. BACKGROUND ON AI

A brief overview of AI is necessary at this juncture to provide an understanding of the different types of AI and what AI involvement on the board of directors may look like. AI can be classified into two main categories: traditional AI and machine learning.<sup>92</sup> Traditional AI utilizes rule-based programming to solve problems and often struggles to adapt to new or complex scenarios.<sup>93</sup> Machine learning “focuses on the development of algorithms that enable systems to learn from and make predictions or decisions based on data.”<sup>94</sup> Machine learning is designed to automatically learn and improve from experience without being explicitly programmed, and uses statistical techniques to identify patterns, make insight, and reach informed predictions.<sup>95</sup> Generative AI, meanwhile is a subset of machine learning that uses machine learning to generate new, original content.<sup>96</sup> Machine learning is more likely to be a tool for analyzing data and making predictions, while generative AI usually focuses on making new content.<sup>97</sup>

An AI director will likely integrate these two techniques and fully utilize the capabilities of both machine learning and generative AI.<sup>98</sup> Machine learning can analyze data more efficiently than any human to make valuable predictions for corporate boards.<sup>99</sup> Generative AI, meanwhile, can produce and recommend data-driven strategies for companies to deal with evolving challenges.<sup>100</sup> The numerous shortcomings of corporate boards can be addressed through AI’s ability to achieve rational, data-driven decisionmaking

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92. Generative AI for Rackspace Technology, *AI, ML, and Generative AI: Key Differences and Applications*, RACKSPACE TECH. (June 14, 2023) [hereinafter Rackspace Technology, *Generative AI*], <https://www.rackspace.com/blog/distinctions-ai-ml-generative-ai>.

93. *Id.*; Bernard Marr, *The Difference Between Generative AI and Traditional AI: An Easy Explanation for Anyone*, FORBES (July 24, 2023, 1:41 AM EDT), <https://www.forbes.com/sites/bernardmarr/2023/07/24/the-difference-between-generative-ai-and-traditional-ai-an-easy-explanation-for-anyone>.

94. Rackspace Technology, *Generative AI*, *supra* note 92.

95. *Id.*

96. *Id.*; Marr, *supra* note 93.

97. Adrian Wohlfarth, *Machine Learning vs Generative AI: A Detailed Look*, OURCROWD (Mar. 27, 2024), <https://www.ourcrowd.com/learn/machine-learning-vs-generative-ai#:~:text=Machine%20learning%20is%20a%20tool,more%20as%20a%20creative%20assistant>.

98. *See id.*; Rackspace Technology, *Generative AI*, *supra* note 92; Alissa Kole, *A New Governance Paradigm is Necessary for AI-Powered Boards*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 21, 2024), <https://corpgov.law.harvard.edu/2024/04/21/a-new-governance-paradigm-is-necessary-for-ai-powered-boards/#more-164554>.

99. *See* Rackspace Technology, *Generative AI*, *supra* note 92; Kole, *supra* note 98.

100. *See* Rackspace Technology, *Generative AI*, *supra* note 92; Kole, *supra* note 98.

with less bias,<sup>101</sup> increased innovation, organizational efficiency, and decreased interference by directors' egos and self-interests.<sup>102</sup>

Admittedly, AI may have its shortcomings as well. Bias can occur at various points of the development and training process, and there may not be enough transparency.<sup>103</sup> AI has also been known to provide false or misleading information.<sup>104</sup> Finally, AI will naturally lack the ability to conduct human-to-human contact that may be a desirable component of a human director's responsibilities. Nonetheless, the shortcomings can likely be overcome. The development and training processes can be traced and analyzed to determine whether they were prone to bias.<sup>105</sup> As AI models become more refined, mistakes will almost certainly become rarer. Most importantly, the pros and cons mentioned above should be for the company to weigh, and the change advocated in this Note would provide companies with such an opportunity.

### III. THE LEGAL BARRIERS CAN BE OVERCOME

Before this Note presents the argument for a change in corporate law to permit AI board membership, it addresses the legal barriers to such a change. These impediments are not insurmountable, and should not be taken, in and of themselves, as a reason against a change in law permitting AI directors to serve on corporate boards. Although it is true that the law in most states, including Delaware, currently prevents AI from serving on or replacing a corporation's board of directors, the remedy to such an obstacle is relatively straightforward and certainly not unworkable. In fact, this Note argues that to allow corporations greater flexibility in their governance structures, overcoming this barrier is worthwhile.

In Delaware, the most popular state to incorporate in, any reform efforts to implement the changes discussed above will need to begin with the DGCL. DGCL section 141(b) provides that "[t]he board of directors of a corporation shall consist of 1 or more members, each of whom shall be a natural person. . . . The certificate of incorporation or bylaws may prescribe other qualifications for directors."<sup>106</sup> Consequently, in its current form, the DGCL does not allow for any non-human to serve on the board of directors; however, changing this standard would not be difficult. Section 141(b) can be revised to

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101. GLOB. AGENDA COUNCIL ON THE FUTURE OF SOFTWARE & SOC'Y, *supra* note 14; see *Bias in AI*, CHAPMAN UNIV., <https://www.chapman.edu/ai/bias-in-ai.aspx> (last visited May 15, 2025) (noting that although AI can result in biased outputs, identifying sources of bias and using inclusive prompts can create AI systems that are fairer and more just).

102. GLOB. AGENDA COUNCIL ON THE FUTURE OF SOFTWARE & SOC'Y, *supra* note 14.

103. See *Bias in AI*, *supra* note 101; *Shedding Light on AI Bias with Real World Examples*, IBM (Oct. 16, 2023), <https://www.ibm.com/think/topics/shedding-light-on-ai-bias-with-real-world-examples>.

104. *Artificial Intelligence and Information Literacy*, UNIV. OF MD. (Dec. 4, 2024, 3:36 PM PST), <https://lib.guides.umd.edu/c.php?g=1340355&p=9880574>.

105. See *Bias in AI*, *supra* note 101.

106. DEL. CODE ANN. tit. 8, § 141(b) (West 2025).

say that each of the directors “shall be a natural or legal person,” whereby the definition of legal person would be defined to include “artificial intelligence machines.” Alternatively, section 141(b) can be modified to merely require a director to be a “person,” and the definition of “person” in section 302, Title 1 of the Delaware Code could be changed to include “artificial intelligence machines.”<sup>107</sup>

Moving beyond Delaware and looking at other states, the MBCA also imposes a natural person requirement.<sup>108</sup> The MBCA has been adopted by more than thirty states.<sup>109</sup> Section 8.03 of the MBCA requires a board to “consist of one or more individuals,”<sup>110</sup> while section 1.40(13) defines an “individual” as a “natural person.”<sup>111</sup> Similar to amending the DGCL, amending the MBCA to accommodate for AI on the board of directors would be quite straightforward. The definition of “individual” under section 1.40(13) would merely need to be amended to include a “natural person as well as a legal person, such as artificial intelligence.”<sup>112</sup>

Furthermore, listing requirements for various stock exchanges, federal laws, and state laws would presumably have to be changed.<sup>113</sup> For example, the NYSE Listed Company Manual requires boards to be comprised of a majority of independent directors,<sup>114</sup> and for certain committees to have only independent directors.<sup>115</sup> At the federal level, the Sarbanes-Oxley Act requires independent directors to constitute a majority of firm audit committees, and the definition of independence appears to envision individuals acting alone.<sup>116</sup> While others<sup>117</sup> have concluded that these rules are incompatible with a model in which an entity serves the entire board function, there is a solid argument that AI can adhere to the independent director test. A key aspect of AI that lends itself to this argument is that AI itself does not have the capacity to own property or establish human relationships, so it should actually be easier for AI to remain impartial and independent.<sup>118</sup> Additionally, impartiality could be preserved by the implementation of a policy whereby AI director decisions are presumptively independent and impartial, but where AI directors can be proven

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107. *See id.*; *Id.* § 302.

108. *See* Bainbridge & Henderson, *supra* note 18, at 1099.

109. *See* A.B.A., *Model Business Corporation Act*, *supra* note 79.

110. MODEL BUS. CORP. ACT § 8.03 (AM. BAR ASS’N 2016).

111. *Id.* § 1.40(13).

112. *See id.*

113. *See* Bainbridge & Henderson, *supra* note 18, at 1100.

114. *See* N.Y. STOCK EXCH., NYSE LISTED COMPANY MANUAL SECTION 303A CORPORATE GOVERNANCE STANDARDS FREQUENTLY ASKED QUESTIONS 1 (2021), [https://www.nyse.com/publicdocs/nyse/regulation/nysc/FAQ\\_NYSE\\_Listed\\_Company\\_Manual\\_Section\\_303A\\_7\\_28\\_2021.pdf](https://www.nyse.com/publicdocs/nyse/regulation/nysc/FAQ_NYSE_Listed_Company_Manual_Section_303A_7_28_2021.pdf).

115. *See id.*

116. *See* Bainbridge & Henderson, *supra* note 18, at 1100; Listing Standards Related to Audit Committees, 17 C.F.R. § 240.10A-3(b)(1) (2013).

117. *See* Bainbridge & Henderson, *supra* note 18, at 1100.

118. *See* Ricci, *supra* note 20, at 903.

to lack independence upon a showing that the AI code or training biased the AI in favor of a particular person, entity, or type of decision. This policy could apply whether AI replaces the entire board or whether AI merely replaces individual directors. Even if AI could not fit the independent director requirement and other requirements of the stock exchanges or federal laws, small safeguards built into legislation could remedy many of these legal obstacles.

Relatively small changes to legislation or in some cases, novel interpretations of current legislation, can provide the necessary legal framework to appoint AI to serve on or replace the board of directors. Although there has been a dearth of writing on the topic of AI directors,<sup>119</sup> several of those who have discussed the issue have concluded that AI directors are not possible, not desirable, or both.<sup>120</sup> Such authors have relied, not insignificantly, on the notion that current legal frameworks do not allow for AI on the board of directors and lack the accountability mechanisms that would be required.<sup>121</sup> But as this Note preliminarily explains, the current law either presently allows for AI directors or can be tweaked to allow for AI directors fairly quickly. The current status of legislation on board qualification requirements should not stand in the way of arguments in favor of allowing AI to serve on or replace the board of directors.

#### IV. THE LAW SHOULD CHANGE TO ALLOW AI TO BE A BOARD MEMBER

This Note will argue that the natural person requirement is outdated and that corporate laws in the United States can and should allow for non-human entities, particularly AI, to serve on corporate boards of directors for several reasons. Most importantly, AI will be able to assume the traditional duties of the board, including oversight and advisory functions, in a more efficient and effective manner than the boards of directors as currently constituted.<sup>122</sup> Furthermore, the general justifications put forth for natural person boards of directors, including the need for incentives, transparency, and liability, do not pass muster. Additionally, allowing AI to serve on or replace the board of directors can advance policy goals such as the freedom of contract, business innovation and efficiency, and federalism. Ultimately, the proposal here is a limited one: corporations should merely have a choice as to whether or not they use AI or other non-human entities to serve on or replace their board of directors.

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119. See generally *id.* (discussing AI in boardrooms); Lee & Underwood, *supra* note 20 (discussing AI in boardrooms); Petrin, *supra* note 81 (discussing AI in boardrooms); Möslin, *supra* note 19 (discussing AI in boardrooms).

120. See Ricci, *supra* note 20, at 905–06; Lee & Underwood, *supra* note 20, at 21; Möslin, *supra* note 19, at 663–66.

121. See Ricci, *supra* note 20, at 906; Lee & Underwood, *supra* note 20, at 17.

122. See Ricci, *supra* note 20, at 901.

## A. THE BENEFITS OF AI DIRECTORS

Allowing AI to serve on or replace the board of directors can have efficiency and effectiveness benefits. This is particularly true when it comes to the board's two primary functions: advisory and oversight.<sup>123</sup> Generally, the board's advisory role requires them to plan and strategize goals and objectives, while their oversight role requires them to monitor progress, review documents and assess risks.<sup>124</sup> These two high-level functions reflect a reality whereby boards are not involved in the day-to-day management of corporations, even if "corporation statutes appear to assign a [more] active role in firm management to boards".<sup>125</sup> DGCL section 141(a) provides that a corporation's business and affairs "shall be managed by or under the direction of a board of directors."<sup>126</sup> The MBCA similarly provides that "all corporate powers shall be exercised by or under the authority of the board of directors, and the business and affairs of the corporation shall be managed by or under the direction and subject to the oversight, of the board of directors."<sup>127</sup> As mentioned, the modern-day corporation nonetheless reflects a reality far from the duties expressed in these statutes.<sup>128</sup>

Some conceive of the duties of the board as a tripartite framework: management, oversight, and service, where service and management essentially equate with the advisory function.<sup>129</sup> Others conceive board duties as oversight, accountability, risk mitigation, and strategy.<sup>130</sup> Whichever conception one might subscribe to, these can all be unified under the advisory and oversight functions. In particular, modern-day boards usually place a high value on oversight.<sup>131</sup> Key to both the advisory and oversight functions are processing vast amounts of information and making high-level decisions based on such information. Some of the reasons boards struggle to keep up with their advisory and oversight responsibilities include inadequate time, misspent time, and inadequate information.<sup>132</sup> AI is particularly well-positioned to remedy these common problems due to its sheer ability to process vast amounts of data

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123. See Petrin, *supra* note 81, at 1007; *What Is a Board of Directors?*, MCKINSEY & CO. (July 7, 2023), <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-a-board-of-directors#>. Others conceive of the main functions as oversight, management, and service. Bainbridge & Henderson, *supra* note 18, at 1060.

124. Meghan Day, *The Role of the Board of Directors in Corporate Governance*, DILIGENT (Nov. 6, 2024), <https://www.diligent.com/resources/blog/the-role-of-the-board-of-directors-in-corporate-governance>.

125. Bainbridge & Henderson, *supra* note 18, at 1060.

126. DEL. CODE ANN. tit. 8, § 141(a) (West 2025).

127. MODEL BUS. CORP. ACT § 8.01 (AM. BAR ASS'N 2016).

128. See Bainbridge & Henderson, *supra* note 18, at 1060.

129. *Id.* at 1061.

130. Abby Adlerman: *On Board Oversight, Accountability, Risk Mitigation and Strategy (OARS)*, BOARDROOM GOVERNANCE WITH EVAN EPSTEIN, at 14:24 (Nov. 13, 2023), <https://boardroom-governance.com/episodes/abby-adlerman>.

131. See Bainbridge & Henderson, *supra* note 18, at 1061.

132. *Id.* at 1064.

at a rapid pace and, through objective development, make more objective judgments and recommendations.<sup>133</sup>

First, this is because AI will be able to conduct a more thorough and efficient oversight function.<sup>134</sup> Humans, and particularly human directors, necessarily have limited time. They often must delegate oversight work to experts, speedily review lengthy audits, reports, and other documents, and make conclusions based on the material reviewed.<sup>135</sup> In all corporations, and especially in large corporations, there is a potentially never-ending stream of information regarding all aspects of a business that directors may be tasked to review.<sup>136</sup> While a human director may have to skim documents, make logical shortcuts, and will almost certainly not catch every error, AI can likely review, analyze, and catch issues with greater accuracy and efficiency.<sup>137</sup> For example, AI contract-review platforms have reportedly caught risks and errors in a more accurate manner than attorneys.<sup>138</sup> Further, given the potential efficiency of AI, it is also possible that corporations may be able to cut down on the costs of outsourcing tasks to experts.<sup>139</sup> Consequently, AI could conceivably conduct one of the main roles of a board member better than a human director.

As to the advisory role, AI is also keenly positioned to remedy the shortcomings of human directors. Making decisions on the strategy and other operational aspects of the company requires processing large amounts of information, which, as discussed above, AI is likely more efficient and effective at than human directors.<sup>140</sup> Second, it requires objectivity to take “knowledge” (information) and transform it into a decision regarding the strategy and operations of the company.<sup>141</sup> To this effect, AI directors are capable of rendering their advice in an unbiased manner.<sup>142</sup> So long as the coding and training of the AI director is sound, an AI director should be more objective and less biased than a human director.<sup>143</sup> Additionally, there is the added benefit of being able to review the AI code and training, whereas the human thought process is a black box.<sup>144</sup> For example, when electing an officer, a human director is prone to have conscious or unconscious biases that

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133. Petrin, *supra* note 81, at 1004.

134. *See id.* at 973, 985–87; Möslin, *supra* note 19, at 656.

135. Petrin, *supra* note 81, at 973.

136. *See Ricci, supra* note 20, at 901.

137. *See id.*; Lee & Underwood, *supra* note 20, at 10.

138. Ricci, *supra* note 20, at 876.

139. *See Bainbridge & Henderson, supra* note 18, at 1085 (estimating that director services cost Fortune 500 firms a combined \$3 to \$4 billion per year and smaller publicly traded firms \$15 to \$30 billion per year).

140. Ricci, *supra* note 20, at 876.

141. Petrin, *supra* note 81, at 1005–06.

142. *See Ricci, supra* note 20, at 901.

143. *See Bias in AI, supra* note 101 (discussing the stages where AI bias can occur and how it is possible to achieve AI systems that are fairer and more just).

144. *Black Box*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/black%20box> (last visited May 15, 2025).

may prevent them from picking the best candidate for a position. Absent extreme, outright words or acts, it will not be obvious that the choice of candidate was influenced by biases. An AI director, on the other hand, should not harbor biases in selecting a candidate, provided the development and training of the AI is sound, and should lack potentially corrupting personal incentives that human directors may have.<sup>145</sup> Of course, this is not to say that AI directors are guaranteed to be unbiased and categorically outperform human directors; some decisions directors make are more qualitative and may lend themselves to subjectivity—but this is a decision that firms can make.<sup>146</sup> Further, AI directors can bring alternative ideas to the boardroom either through multiple AI directors on the board, or by virtue of the fact that AI directors can run multiple iterations of a situation with the same information, or both, creating a greater diversity of perspectives in the decision-making process.<sup>147</sup> Thus, AI directors can increase the efficiency and objectivity of decision-making by the boards of directors for corporations.<sup>148</sup>

#### B. JUSTIFICATIONS FOR HUMAN-ONLY BOARDS OF DIRECTORS FAIL

Although the articles that have considered the possibility of AI in the boardroom have conceded the efficiency, cost-savings, and other positive attributes of AI directors,<sup>149</sup> they have all concluded that AI directors are either not desirable, not feasible, or contained no normative claim.<sup>150</sup> The primary three justifications are: (1) AI directors lack the conscience, consciousness, and incentives that are necessary to be a director and that humans contain;<sup>151</sup> (2) AI directors will lack transparency, whereas human directors can explain their actions;<sup>152</sup> and (3) AI directors cannot be held accountable, primarily because they cannot be held legally liable, whereas human directors can be subject to liability.<sup>153</sup> These three justifications are raised in addition to and in furtherance of arguments that the current legal regime in the United States does not support AI directors, which is refuted above in Part III.<sup>154</sup>

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145. IBM Data and AI Team, *Shedding Light on AI Bias with Real World Examples*, IBM (Oct. 16, 2023), <https://www.ibm.com/think/topics/shedding-light-on-ai-bias-with-real-world-examples> (“When done well, AI governance ensures that there is a balance of benefits bestowed upon businesses, customers, employees and society as a whole.”).

146. *See id.*; *Bias in AI*, *supra* note 101.

147. *See Ricci*, *supra* note 20, at 901.

148. *See id.* at 903.

149. *See id.*; Lee & Underwood, *supra* note 20, at 11; Petrin, *supra* note 81, at 1029.

150. *See Petrin*, *supra* note 81, at 1030; Lee & Underwood, *supra* note 20, at 20; Ricci, *supra* note 20, at 906.

151. *See Petrin*, *supra* note 81, at 1029.

152. *See Lee & Underwood*, *supra* note 20, at 18–19.

153. *See id.*; Ricci, *supra* note 20, at 906.

154. *See supra* Part III.

Nonetheless, the justifications for why AI directors are not desirable or feasible do not withstand scrutiny. AI directors do not necessarily need to have a conscience or consciousness and can be sufficiently incentivized based on the reputational and monetary impacts on their creators,<sup>155</sup> and by training the AI directors to pursue certain metrics.<sup>156</sup> Further, a lack of transparency by AI directors should not be a major shareholder nor societal concern given that board dynamics and decision-making are already not particularly transparent.<sup>157</sup> Lastly, as to accountability, not only can liability regimes be reimagined<sup>158</sup> and reinvented to fit AI directors, but other forms of cost-spreading devices can easily quell apprehension about accountability and liability issues with AI directors.

To help understand what the impact of AI directors may be, consider Henderson and Bainbridge's BSP proposal.<sup>159</sup> Their vision of BSPs is that of professional firms specializing in director duties that replace the board of directors for a corporation.<sup>160</sup> Henderson and Bainbridge demonstrate how BSPs can provide numerous advantages when compared with a human director.<sup>161</sup> These benefits include devoting more time to the company, gathering information at a lower cost, and greater specialization.<sup>162</sup> Henderson and Bainbridge also explained how BSPs overcame objections to non-human directors, such as transparency and accountability.<sup>163</sup> Using the BSP model as a reference, this Note shows how the implementation of AI directors can follow a similar path as Henderson and Bainbridge's BSP proposal.<sup>164</sup> This will quell the possible objections to AI directors, particularly those based on incentives, transparency, and accountability. It would also spark interest in a market for corporate governance by AI directors, much like it did for BSPs.<sup>165</sup>

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155. See Bainbridge & Henderson, *supra* note 18, at 1081–82.

156. Petrin, *supra* note 81, at 1021.

157. A caveat to this is the reporting requirements for public companies. Troy Segal, *What Is Disclosure? How It Works and Laws on Transparency*, INVESTOPEDIA (Oct. 18, 2024), <https://www.investopedia.com/terms/d/disclosure.asp#:~:text=SEC%2DRequired%20Disclosure%20Documents,owned%20by%20their%20family%20members>. Even then, what is disclosed above the regulatory requirements, if at all, usually varies depending on the performance of the company. Ty Burke, *The More Investors Know, the More Executives Disclose*, KELLOGG INSIGHT (Sept. 5, 2023), <https://insight.kellogg.northwestern.edu/article/the-more-investors-know-the-more-executives-disclose>.

158. See Caroline Kropka, “Cruise”ing for “Waymo” Lawsuits: Liability in Autonomous Vehicle Crashes, RICH. J.L. & TECH. (Nov. 2023), <https://jolt.richmond.edu/2023/11/23/cruiseing-for-waymo-lawsuits> (discussing a software bug that caused an autonomous vehicle crash and eventually led to a settlement, and liability imposed against manufacturers, hospitals, and surgeons in the case of surgical robots).

159. See Bainbridge & Henderson, *supra* note 18, at 1068–69.

160. See *id.* at 1056.

161. See *id.* at 1074–75.

162. See *id.* at 1077–78.

163. See *id.* at 1104–05.

164. See Petrin, *supra* note 81, at 1004.

165. See *id.*; Bainbridge & Henderson, *supra* note 18, at 1069–70, 1080.

The market for corporate directors can be quite large, representing about 3 to 4 billion dollars in value to Fortune 500 companies and 15 to 30 billion dollars in value to publicly traded corporations,<sup>166</sup> making this area quite a profitable niche for developers of AI to capitalize on. If corporate law is changed to allow for AI directors, the economics will follow. Many startups or companies may begin creating AI directors.<sup>167</sup> Firms may even specialize in AI directors for certain types of industries.<sup>168</sup> This would stoke competition among firms and a resultant market for AI directors with benefits to both corporations and the AI director firms. Vertically integrated AI director firms will be able to take advantage of expertise, information sharing, and other institutional efficiencies to provide better service.<sup>169</sup> Corporations will not only receive better service, but will also see costs decrease.<sup>170</sup> In a market for AI directors, developers and providers would provide AI directors as a service.<sup>171</sup> Shareholders could replace some human directors; all human directors with individual AI directors; or the entire board with a single AI director entity. These AI directors would be vertically integrated into boards.<sup>172</sup> The possible benefits from such vertical integration are immense.<sup>173</sup>

### 1. *Incentives, Conscience, and Consciousness*

The first rationale proposed against AI director desirability or feasibility is that they lack a conscience, consciousness, and incentives, both monetary and reputational.<sup>174</sup> Contrary to this line of thought, this Note will show that a conscience, consciousness, and human desires are not necessary for an AI director. The case against AI directors proceeds as follows: without human desires, a conscience, and consciousness, AI cannot effectively take the place of human directors.<sup>175</sup> In essence, they argue that without such human qualities, AI cannot have the opinions necessary for judgment.<sup>176</sup> This is a form of accountability argument that concludes that the accountability void—the alleged inability of AI to account for its judgments—resulting from AI directors, is simply too great and one that our legal system is not prepared to accept.<sup>177</sup> Why not grant AI directors a conscience and consciousness? The

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166. See Bainbridge & Henderson, *supra* note 18, at 1085.

167. See *id.* at 1080.

168. *Id.*

169. See Bainbridge & Henderson, *supra* note 18, at 1080–81.

170. See *id.* at 1085.

171. See Petrin, *supra* note 81, at 1023–24.

172. See Bainbridge & Henderson, *supra* note 18, at 1084.

173. See *id.* at 1085.

174. See Ricci, *supra* note 20, at 906.

175. See *id.*; Petrin, *supra* note 81, at 1029.

176. Ricci, *supra* note 20, at 906.

177. See *id.*

answer is that it would raise too many risks.<sup>178</sup> Rather than challenging the conclusion that AI, with its own conscience and consciousness, is too risky at present, this Note objects to the premise regarding the human qualities that an AI director requires.

The premise that directors require a conscience, consciousness, and human desires is mistaken. This is because even without such human qualities, AI can still have judgment. At a basic level, an AI director simply must be able to process vast amounts of information and translate that into the accurate identification of lapses in compliance or business decisions that make the company profits.<sup>179</sup> “Judgement” is defined as the “ability to make sensible decisions after carefully considering the best thing to do.”<sup>180</sup> Accordingly, AI directors processing company information to make a strategic decision with the goal of increasing profits falls directly within the definition of “judgement,” and within the ambit of what an AI director can be equipped to do.<sup>181</sup> Rationally, shareholders will want directors that are better in their oversight and advisory capabilities, regardless of the form of the director. There is no need to have the AI director “want” to help investors or to desire compensation. Rather, the AI director merely needs to be able to achieve the objectives set for it in the most efficient manner. Human directors also set out to achieve corporate objectives in an efficient manner—often not as ends but rather means—to succeed in their role and earn a compensation.<sup>182</sup> An AI director, by contrast, will pursue the objectives as ends in themselves.<sup>183</sup> Just as ChatGPT does not need to “want” to write a lengthy memo for it to actually do so, an AI director does not need to “want” to pursue selfish ends to succeed as a director. In fact, the inability of AI directors to be compensated or accumulate wealth is itself a factor that weighs heavily in favor of reforms in corporate law that allow AI directors.<sup>184</sup> If AI directors cannot stand to accumulate wealth, then corporate law’s concern with self-dealing is largely mitigated.<sup>185</sup> Analogizing to Henderson and Bainbridge’s BSP example,<sup>186</sup> a

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178. *See id.* at 907.

179. *See* Petrin, *supra* note 81, at 1004–05.

180. *Judgement*, OXFORD LEARNER’S DICTIONARIES, <https://www.oxfordlearnersdictionaries.com/us/definition/english/judgement> (last visited May 15, 2025).

181. *See* Petrin, *supra* note 81, at 1021. Theoretically, AI should be able to pursue the objectives set for it. Numerical objectives (i.e., decrease costs) may lend themselves to effective, objective decisionmaking when compared with qualitative assessments (i.e., hiring a likeable CEO), particularly with the current state of AI. Even presently, however, AI directors could conceivably make certain qualitative decisions when given an objective and the relevant criteria. *See id.* Admittedly, some acts (such as interacting with employees and investors) are currently beyond the pale of AI.

182. *See* Petrin, *supra* note 81, at 1019–21; Tod Perry, Incentive Compensation for Outside Directors and CEO Turnover 7 (July 1999) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=236033](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=236033).

183. *See* Petrin, *supra* note 81, at 1020.

184. *See id.* at 1004–34.

185. *See id.*

market for AI directors can also help solve many of the potential problems that may result from AI directors that lack human desires, morality, and awareness.<sup>187</sup>

First, the success of vertically integrated developers and managers of AI directors will depend on their performance and reputation. These firms will be incentivized to ensure that their AI directors are making legal, efficient, and effective decisions; exercising good judgement.<sup>188</sup> Just like other sectors of the American economy, a firm that is not performing well will lose its share of the market and may go out of business. If an AI director firm becomes known for its underperforming directors, it will have a difficult time staying in business.<sup>189</sup> To the extent that certain AI director firms may succeed and develop a brand name, such name recognition can serve as an indicator of quality and stability, thereby reinforcing the market for AI directors and corporate governance. Such firms and the market they comprise will help overcome the lack of a conscience and consciousness in AI directors by creating incentives for AI producers.

Presently, there are various motivations that a director may have and that shareholders rely on to fuel good directorial conduct: monetary incentives, the possibility of liability, and perhaps a director's notion of morality and doing right by the investor.<sup>190</sup> Accordingly, a conscience and consciousness are only one aspect of how directors are incentivized. Further, AI director firms will themselves be managed by humans (for now, at least) who have their own conscience.<sup>191</sup> Hence, the firms providing these services will be comprised of individuals with a conscience and consciousness. Perhaps most importantly, the monetary incentives available for successful vertically integrated firms are likely a better driver of good directorial behavior than any given human director's conscience and awareness because properly designed incentives can be a strong predictor of company success.<sup>192</sup> If an AI director's oversight and advisory capabilities are better than a human director's capabilities, shareholders will likely elect the former, despite the lack of human traits.

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186. See Bainbridge & Henderson, *supra* note 18, at 1058.

187. See Petrin, *supra* note 81, at 1005.

188. See *id.* at 1008.

189. See *id.* at 33; Bainbridge & Henderson, *supra* note 18, at 1068.

190. See Bainbridge & Henderson, *supra* note 18, at 1067; Ronald W. Masulis & Shawn Mobbs, *Independent Director Incentives: Where Do Talented Directors Spend Their Limited Time and Energy?*, 111 J. FIN. ECON. 406, 436 (2014).

191. See Bainbridge & Henderson, *supra* note 18, at 1072 (discussing management of BSPs).

192. See Hugh Bachmann, Robin Ligon & Dominic Skerritt, *The Powerful Role of Financial Incentives Can Play in a Transformation*, MCKINSEY & CO. (Jan. 19, 2022), <https://www.mckinsey.com/capabilities/transformation/our-insights/the-powerful-role-financial-incentives-can-play-in-a-transformation>; Jack Kelly, *Follow the Incentives and That Will Tell You Everything You Need to Know About a Company's Culture*, FORBES (Aug. 18, 2023, 8:00 AM EDT), <https://www.forbes.com/sites/jackkelly/2023/08/18/follow-the-incentives-and-that-will-tell-you-everything-you-need-to-know-about-a-companys-culture>.

Pushing back on this claim, Ricci, a scholar who has written extensively on the historical roots of corporations and directors, concludes that accountability is not possible without a conscience and consciousness and that implementing AI directors leaves a void of accountability.<sup>193</sup> But this conclusion assumes that the only type of meaningful accountability that can be imposed is ex-post liability. It also concludes that shareholders should not have the choice between human and non-human directors, without fully justifying why such a choice should not be available.<sup>194</sup> There in fact are meaningful structures that can be implemented to incentivize accountability and good governance despite the lack of director consciousness and conscience.<sup>195</sup> A market for AI directors provides such a structure.

Second, the fact that AI directors cannot accumulate wealth or personally benefit is actually a strength, rather than a weakness, of AI directors. Corporate law is particularly concerned with director self-dealing.<sup>196</sup> Delaware corporate law, for example, does not apply the highly deferential business judgment rule if a director has an interest in a transaction and the transaction is not approved by a majority of the disinterested directors.<sup>197</sup> Since AI directors do not stand to profit from interested transactions, there will be a lesser concern of self-dealing.<sup>198</sup> Theoretically, AI can be programmed and trained to be objective and avoid “interested” transactions.<sup>199</sup> The monetary incentive that is claimed as a factor in favor of human directors will remain intact if there are firms offering AI director services, but such an incentive will be one “level” removed from the direct decisionmaker (the AI director) in any particular instance. An added degree of separation between the decisionmaker and the incentives that may flow to the decisionmaker serves as increased security against breaches of the duty of loyalty. It is possible, however, that firms offering AI director services could be involved in “interested” transactions that an AI director they developed or approved.<sup>200</sup> This should be addressed by roughly mapping the duty of loyalty of directors onto AI director firms (the entities implementing the AI director as well as the developer, if it has access to company information). The coding and training of AI can be implemented to

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193. See Ricci, *supra* note 20, at 906.

194. See *id.*

195. See Petrin, *supra* note 81, at 1028.

196. See, e.g., DEL. CODE ANN. tit. 8, § 144 (West 2025); N.Y. BUS. CORP. LAW § 713 (McKinney 2025).

197. See *The Delaware Way: Deference to the Business Judgment of Directors Who Act Loyal and Carefully*, DELAWARE.GOV: DEL. CORP. L., <https://corplaw.delaware.gov/delaware-way-business-judgment> (last visited May 15, 2025).

198. See Petrin, *supra* note 81, at 1021.

199. See *id.*

200. See *id.* at 1021–22. An interested transaction is a transaction between a company and an officer or director of the company or one of their affiliates. *Interested Director Transaction*, ORRICK TECH STUDIO, <https://www.orrick.com/en/tech-studio/resources/glossary/Interested-Director-Transaction#:~:text=An%20Interested%20Director%20Transaction%2C%20or%20Interested%20Party,properly%20approved%20by%20uninterested%20directors%20or%20stockholders> (last visited May 15, 2025).

specifically disfavor interested transactions.<sup>201</sup> Further, if an interested transaction occurs, the heightened entire fairness standard<sup>202</sup> or a similar legal standard can be applied on a case-by-case basis. Thus, corporate law's aim to avoid self-dealing while promoting firm efficiency and profitability will be furthered, not harmed, by AI directors. Instead of being a strong argument against amending the natural person requirement, the fact that AI directors lack a conscience, consciousness, and an ability to accumulate wealth actually supports the argument for a change in corporate law to allow for AI directors.

## 2. Transparency Issues

A second issue claimed as a reason to not allow AI directors is alleged transparency shortcomings. However, this issue also is not as problematic as claimed for two reasons: (1) only public companies are subject to a breadth of disclosures requirements,<sup>203</sup> and even then, retain a large amount of leeway as to disclosing the votes of individual directors;<sup>204</sup> and (2) AI directors can be just as, if not more, transparent than human directors.<sup>205</sup>

Boards of directors retain broad discretion over voting, conducting meetings, and recording minutes.<sup>206</sup> This gives boards of directors significant control over their conduct and reasoning within a meeting. Many states, including Delaware, leave the responsibility of recording and retaining minutes up to the corporation itself.<sup>207</sup> The Securities and Exchange Commission (SEC), which imposes a host of reporting requirements on publicly traded companies, is not focused on how corporations conduct meetings.<sup>208</sup> However, this does not mean that corporations do not track minutes and adopt good governance best practices. In fact, many corporations adopt the Robert's Rules of Order, espoused by governance companies such as Diligent and Board Portal.<sup>209</sup> These rules provide an orderly and fair way to conduct board

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201. See Petrin, *supra* note 81, at 1021.

202. Jenny Keller, *The Business Judgment Rule and the Entire Fairness Standard as It Applies to Controlling Stockholders*, PLUS BLOG (Nov. 28, 2023), <https://plusblog.org/2023/11/28/the-business-judgement-rule-and-the-entire-fairness-standard-as-it-applies-to-controlling-stockholders>.

203. See Segal, *supra* note 157.

204. See *What Are the Legal Requirements for Board Minutes?*, DILIGENT (June 15, 2018), <https://www.diligent.com/resources/blog/what-are-the-legal-requirements-for-board-minutes>.

205. See Mölslein, *supra* note 19, at 666–67.

206. See *What Are the Legal Requirements for Board Minutes?*, *supra* note 204.

207. See *id.*

208. *Divisions and Offices*, U.S. SEC. & EXCH. COMM'N (Apr. 8, 2025), <https://www.sec.gov/about/divisions>.

209. Meghan Day, *See What Are Board of Director Voting Procedures?*, DILIGENT (Nov. 5, 2024), <https://www.diligent.com/resources/blog/what-are-board-of-director-voting-procedures>; Casey Johnson, *Board Meeting Minutes Legal Requirements You Must Know*, BD. PORTAL (Dec. 9, 2024), <https://board-room.org/blog/board-meeting-minutes-legal-requirements/#~:text=Legal%20requirements%20for%20board%20minutes,board%20meeting%20provision%20and%20acknowledgment>.

meetings.<sup>210</sup> Even these model rules, however, create discretion by stating that how the minutes are kept “depends upon the kind of meeting, and whether the minutes are to be published.”<sup>211</sup> Further, they advise against keeping a record of the debates in ordinary meetings; only advise a recording of the outcome of a vote, rather than individual board members’ votes in a meeting;<sup>212</sup> and provide for various methods of voting that preserve anonymity.<sup>213</sup> This Note does not aim to question whether these practices are good or bad. Boards may very well have a whole host of reasons in choosing to keep certain actions and records confidential, including efficiency and the company’s interest in maintaining a competitive advantage where disclosure of board discussions or actions may jeopardize such advantage. Nonetheless, the notion that AI directors would reduce the transparency of the board itself is mistaken. AI directors could be subject to the same or even greater oversight duties and would present no real change as to the transparency of the board when it comes to voting, discussions, and the maintenance of minutes at board meetings.

Regardless of the transparency of current boards of directors, AI directors can be just as, if not more, transparent than human directors.<sup>214</sup> It should be relatively feasible to inspect the coding and training of AI. The coding and training of AI directors could be subject to periodic inspections to ensure adequacy. For liability issues, for example, if a shareholder or tort victim is asserting negligence, it should not be overly burdensome for a court to order the inspection of the coding and training of the AI directors and to have experts evaluate their adequacy.<sup>215</sup> Lee and Underwood discuss the possibilities of AI in the corporate boardroom and argue that the upshot of “black box scenarios following machine learning” is that a “developer cannot reasonably foresee every action and decision by the AI.”<sup>216</sup> This is true, and there are implications for the liability of developers and managers of AI directors.<sup>217</sup> However, it does not present significant transparency issues. This is because it should actually be easier to trace and inspect the more accessible coding and training of AI than looking “inside” the mind of a human director.<sup>218</sup> For example, if a high-level employee is alleging discriminatory hiring practices on the basis of

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210. See generally Henry M. Robert, *Robert’s Rules of Order Revised*, ROBERT’S RULES ONLINE, <http://www.rulesonline.com/rror--00.htm> (last visited May 15, 2025) (outlining model board meeting procedures).

211. Art. X. *The Officers and the Minutes*, ROBERT’S RULES ONLINE, <http://www.rulesonline.com/rror-10.htm> (last visited May 15, 2025).

212. See *id.*

213. Art. VIII. *Vote*, ROBERT’S RULES ONLINE, <http://www.rulesonline.com/rror-08.htm> (last visited May 15, 2025).

214. See Möslin, *supra* note 19, at 666–67.

215. See Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging Autonomous Vehicles*, 24 YALE J.L. & TECH. 706, 718–21 (2022).

216. See Lee & Underwood, *supra* note 20, at 18.

217. See *id.*

218. See Rachlinski & Wistrich, *supra* note 215.

gender, the coding and training processes can be traced and analyzed to determine whether they were slanted to bias a particular gender.<sup>219</sup> On the other hand, the mind of a human director cannot so easily be inspected. Absent an obvious discrepancy between the qualifications of candidates, a human director could mask their bias in closer cases with explanations that focus on other factors of the hiring process. Moreover, a human director often may not even realize their own bias.<sup>220</sup> Thus, the argument that AI directors will be more transparent than human directors is quite strong and should not be considered a strong objection to the modification of the natural person director requirement.

### 3. *AI Director Liability*

The third critique raised as a reason for not adopting changes in law that allow for AI directors is that they lack liability, but this argument fails to consider the mechanisms and structures that can be implemented to render liability a nonissue. Such mechanisms and structures include the market for AI directors, entity liability, director and officer (D&O) insurance, and even possible strict liability regimes.<sup>221</sup>

These critiques, first and foremost, do not take into account the possibility that a market for AI directors could offset any liability issues by providing entities that can be held accountable and function as an effective cost-spreading tool.<sup>222</sup> As mentioned, one critique considers the possibility of attaching liability to developers but concludes against it by reasoning that developers would face “black box” scenarios whereby they cannot predict “every [possible future] action and decision by the AI.”<sup>223</sup> According to the critique, because developers cannot predict “every action and decision by the AI,” they would not be willing to research and develop AI models if they may

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219. *See id.* (discussing the possibility of liability, and variations thereof, for autonomous vehicles). Of course, that is not to say that AI is not biased. Already, there have been many examples in the news. *See, e.g.,* Stefan Milne, *AI Tools Show Biases in Ranking Job Applicants' Names According to Perceived Race and Gender*, UW NEWS (Oct. 31, 2024), <https://www.washington.edu/news/2024/10/31/ai-bias-resume-screening-race-gender>; Anne Trafton, *Study Reveals Why AI Models That Analyze Medical Images Can Be Biased*, MASS. INST. TECH. NEWS (June 28, 2024), <https://news.mit.edu/2024/study-reveals-why-ai-analyzed-medical-images-can-be-biased-0628>. However, AI bias may be easier to prove, see and incremental improvements should ameliorate any such problems over time. For a discussion on stages where AI can occur, see *Bias in AI*, *supra* note 101.

220. *See* Bainbridge & Henderson, *supra* note 18, at 1097 n.183.

221. *See id.* at 1106; Möslin, *supra* note 19, at 666–67.

222. If there is a market for AI directors, this will act as an effective cost-spreading tool compared to the current state of affairs in which directors are indemnified by the corporation and the corporation (and the insurance company) effectively bear the costs of a director's missteps. By contrast, multiple AI directors—potentially from different firms—could be elected as directors. These firms would be well-funded and carry their own insurance—thus spreading the risk across the market for directors.

223. Lee & Underwood, *supra* note 20, at 18.

face liability for their coding or training.<sup>224</sup> However, to avoid liability, developers and managers of AI directors need not foresee every possible scenario that an AI director may come across.<sup>225</sup> Instead, this Note proposes—for the time being—a duty of care equivalent to a negligence standard for developers and managers of AI directors. They only need to program and train the AI director in accordance with what is reasonable under the circumstances—a standard that can be developed, much like the duty of care for directors in Delaware, through common law.<sup>226</sup> This would essentially map the duty of care that directors currently have onto AI developers and managers. For example, if the coding is made to disfavor merger offers, no matter how good a deal, that would almost certainly be negligent. And as discussed above, AI director developers and managers (the entities implementing the AI director and the developer, if it has access to company information) should be subject to a duty of loyalty or its equivalent.<sup>227</sup>

Ricci, on the other hand, argues against AI directors by concluding that if AI directors were to replace entire boards, there would be no one to hold accountable, since accountability “requires human desires and virtues.”<sup>228</sup> And, according to Ricci, if no one is available to be held directly liable, then relying on director insurance is an ex-post remedy that is simply not good enough.<sup>229</sup> Ricci is likely correct that insurance alone would not be a sufficient accountability mechanism if methods of liability were not available. However, this Note has already shown that accountability is possible despite a lack of conscience, consciousness, and human desires.<sup>230</sup> More importantly, a market for AI directors provides for an entity to be held liable—not at the individual level but at the organizational level.<sup>231</sup> Thus, it would no longer be the case that if AI directors replace the entire board, there would be nobody left to be held accountable. Corporations would even be able to “shop around” to select AI directors from firms that are the best match and have a proven track-record of sound decision-making by AI.<sup>232</sup>

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224. *Id.*

225. For example, one could envision imposing liability on the developer of an autonomous vehicle for faulty coding that leads to a car’s failure to recognize a pedestrian and a subsequent accident. *See, e.g.,* Rachlinski & Wistrich, *supra* note 215. It may be more difficult to envision holding a developer liable for a failure to create and train a vehicle with a response of what to do in an earthquake. In the latter example, the developer would not be liable because there was no fault in their coding that caused a foreseeable injury.

226. *Ask a MoFo: What Fiduciary Duties Do I Have as a Director of a Delaware Corporation?*, MORRISON FOERSTER (June 28, 2023), <https://www.mofo.com/resources/insights/230628-fiduciary-duties-director-of-a-delaware-corporation>.

227. *See supra* Subpart.III.B.1.

228. *See Ricci, supra* note 20, at 906.

229. *See id.*

230. *See supra* Part.III.

231. *See Petrin, supra* note 81, at 1015–18; Bainbridge & Henderson, *supra* note 18, at 1074.

232. *See Bainbridge & Henderson, supra* note 18, at 1118.

Not only would vertically integrated AI director firms be able to be the subject of liability, but allocating liability to these firms can represent an upgrade to current liability frameworks. This is because AI director firms would have deeper pockets for creditors and tort victims to pursue than individual directors currently do.<sup>233</sup> As previously mentioned, Lee and Underwood claim that allowing for entity liability against AI director firms could undercut investment and innovation in the industry.<sup>234</sup> A second knock on their theory is that they overlook the fact that AI director firms can simply price the possibility of liability<sup>235</sup> into the services they offer, much like any other industry.<sup>236</sup> At the same time, investors and third-parties such as creditors and tort victims will benefit because they can rest assured that they will not be pursuing a party without the deep pockets to pay out the necessary funds.<sup>237</sup> Courts may also be more willing to hold a defendant entity who is adequately capitalized liable rather than an individual director.<sup>238</sup> Thus, holding AI director firms liable can function as a beneficial cost-spreading tool.

Additionally, other mechanisms of last resort such as D&O insurance can remain in place to be used when necessary.<sup>239</sup> Strict liability regimes may also be desirable in certain scenarios, such as personal injuries suffered by a third party or blatantly wrong financial statements.<sup>240</sup>

Issues surrounding the access of AI director firms to information that is confidential, whether it be customer or corporate information, can also be managed under one of two approaches. Under the first approach, AI director firms would not have any access to the corporation's customer information or the corporation's own information whatsoever. AI director firms may want access to such information, however, for purposes of training the AI. If so, under the second approach, the AI director firm and its employees should be made subject to confidentiality requirements regarding all information obtained from the company. The firm and employees should also be treated as "insiders" for insider trading purposes, just like accountants, lawyers, and others with access to confidential information who are providing services to companies.<sup>241</sup>

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233. *See id.* at 1085.

234. *See* Lee & Underwood, *supra* note 20, at 18.

235. Although AI firms may offset the risk of liability by pricing their services accordingly, AI directors would not necessarily cease to function as a cost-effective option. For example, they would still presumably be more efficient and face fewer conflicts of interest issues, both of which can lead to decreased costs.

236. *See* Bainbridge & Henderson, *supra* note 18, at 1086–87.

237. *See id.* at 1085.

238. *Id.*

239. *Id.* at 1086.

240. *See* Petrin, *supra* note 81, at 971.

241. Glob. Future City Holding Inc. Insider Trading Policy (Exhibit 99.4) (Nov. 11, 2015), [https://www.sec.gov/Archives/edgar/data/1164964/000101968715004168/globalfuture\\_8k-ex9904.htm](https://www.sec.gov/Archives/edgar/data/1164964/000101968715004168/globalfuture_8k-ex9904.htm).

While the various mechanisms and structures discussed above will likely not provide the necessary accountability tools in isolation, they provide a sufficient and perhaps improved accountability framework when taken together. Roughly mapping a duty of loyalty and care onto AI director management firms and developers in the manner discussed above is a strong starting point. Although an analysis of the details of fiduciary duties that should be applied to these firms and developers is beyond the scope of this Note, such entities should be made subject to the duty of loyalty and duty of care at a foundational level. Thus, any gaps in liability that may arise when switching from human directors to AI directors can be dealt with adequately through new and existing frameworks.

As discussed, the three justifications for human-only boards fail and should not stand in the way of amending the natural person requirement. In fact, the arguments against such justifications outlined in this section *bolster* the case that AI directors should be able to sit on corporate boards. Additionally, corporations and their shareholders can take any of the valid concerns underlying the justifications into account when choosing whether an AI director is the right fit for their particular board.

#### C. AMENDING CURRENT LAW TO ALLOW FOR AI DIRECTORS FURTHERS AMERICAN IDEALS

The third reason why the natural person requirement should be amended to permit AI directors is that it will strengthen two American ideals: business efficiency and innovation, and federalism. First, although American business law places a high value on freedom of contract and allows for greater tailoring in other business associations,<sup>242</sup> the current restrictions on the composition of the board of directors stands in contrast to these values.<sup>243</sup> Allowing for AI directors would change the lack of congruence between this aspect of American corporate law and business law. Second, even if only one or two states initially change their laws to allow for AI directors, such a change can further an ideal of federalism whereby states act as laboratories for innovation in law.

##### 1. *Freedom of Contract and Greater Tailoring*

Changing corporate law to allow for AI directors will support the value Americans place on the freedom of contract and tailoring business associations. The freedom of contract is a key pillar of American law, and the Constitution even prohibits states from impairing the obligations of contracts.<sup>244</sup> Although the actual extent of protection given to the freedom of

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242. See Bainbridge & Henderson, *supra* note 18, at 1118; Bayern, *supra* note 91, at 94.

243. See Bainbridge & Henderson, *supra* note 18, at 1118.

244. U.S. CONST. art. I, § 10.

contract has varied from time to time, freedom of contract occupies a special place in American law.<sup>245</sup> In the realm of corporate law, the law “is generally permissive about how companies structure their governance, providing merely a set of default rules that can be altered by contract.”<sup>246</sup> Thus, DGCL section 141(b) is an outlier.<sup>247</sup> Accordingly, allowing for AI directors brings current corporate law into greater alignment with the fundamental notion that corporate law usually provides defaults.<sup>248</sup> Furthermore, unincorporated business associations such as partnerships and LLCs are usually permitted to have other business associations serve in the management role occupied by a board of directors.<sup>249</sup> One scholar has even demonstrated that it is likely possible to have an autonomous, perpetual LLC.<sup>250</sup> It is quite surprising that the law mandates that the industry of corporate directors is supplied through sole proprietors only.<sup>251</sup> Such a state of affairs is particularly surprising because markets for professional services and their accompanying firms have developed for lawyers, accountants, investment bankers, consultants, and other professionals.<sup>252</sup> Yet, no such market for director professional services has been created due to the law’s natural person insistence. The proposal is quite simple: corporate law should be amended to uphold any agreement that gives legal significance to the action of any process or system (AI director) without regard to the legal personhood of that process or system.<sup>253</sup> Thus, the argument presented in this Note merely aligns with the long-held notion that firms should be able to design their own, tailored, locally optimal corporate governance and director structures.<sup>254</sup> The proposal for a change in law will not mandate a one-size-fits-all approach, but rather allows companies to choose their governance structure from a greater variety of options, adding to the other benefits of AI directors discussed in this Note.

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245. See generally David E. Bernstein, *Freedom of Contract* (Geo. Mason Univ. L. & Econ. Rsch. Paper Series, Working Paper No. 08–51, 2008) (discussing the history of contract law in the United States); DAVID N. MAYER, *LIBERTY OF CONTRACT* (2011) (discussing the freedom of contract as a limit on government power).

246. See Bainbridge & Henderson, *supra* note 18, at 1057. It should be noted that the freedom of contract as an organizing principle of corporate law is contested as a descriptive and normative matter. See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 860–61 (1997) (reviewing LAWRENCE E. MITCHELL, *PROGRESSIVE CORPORATE LAW* (1995)).

247. See DEL. CODE ANN. tit. 8, § 141(b) (West 2025).

248. See Bainbridge & Henderson, *supra* note 18, at 1057.

249. See *id.*

250. See Bayern, *supra* note 91, at 101–02.

251. DEL. CODE ANN. tit. 8, § 141(b) (West 2025); see Bainbridge & Henderson, *supra* note 18, at 1085.

252. See Bainbridge & Henderson, *supra* note 18, at 1075.

253. See Bayern, *supra* note 91, at 99.

254. See Bainbridge & Henderson, *supra* note 18, at 1068.

## 2. Federalism

Because corporate law is primarily state law, if a state changes its board membership requirements to allow for non-natural persons to serve on the board, it will effectively be taking the role of serving as a laboratory of experimentation among the states. This aligns with Supreme Court Justice Louis Brandeis's famous conception of states as social laboratories in a federal system.<sup>255</sup> Justice Brandeis wrote that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the country."<sup>256</sup> A state that chooses to amend its corporate laws to allow AI directors would be precisely implementing Justice Brandeis's conception of states as laboratories. Such an opportunity may be particularly compelling to states such as Nevada, Wyoming, and Texas that are increasingly looking to compete with Delaware as a home for corporations.<sup>257</sup> In particular, Wyoming may find it desirable to allow AI directors. Wyoming has "passed avant-garde legislation to provide a safe-harbor for digital asset companies, introduced a blockchain-dedicated chancery court, and replicated the initiatives put in place by Nevada to attract incorporators."<sup>258</sup> Wyoming's commitment to targeting a market niche (specifically one that has a meaningful growth potential) through the aforementioned strategies likely means that it is amenable to innovative legal structures.<sup>259</sup> Regardless of the state or states that choose to pursue the policy recommended by this Note, if one or two states do choose to make a change in their corporate law to allow for AI directors, this furthers federalism and the "states as laboratories" ideal.

Amending state corporate statutes to permit AI directors encourages efficiency and innovation by empowering business organizations to use their freedom of contract to tailor boards to their needs. At the same time, it can promote federalism by "testing" the policy in a select few states prior to nationwide passage.

## D. ADDITIONAL CONSIDERATIONS & CAVEATS

A number of other considerations and objections to AI directors must be discussed in evaluating the AI director proposal put forth in this Note. First, although LLCs currently allow for AI management, there are practical conditions that stand in the way. Second, it is important to note that practical circumstances may prevent close corporations from implementing AI directors.

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255. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

256. *Id.*

257. See William P. Barr & Jonathan Berry, *Delaware Is Trying Hard to Drive Away Corporations*, WALL ST. J. (Nov. 24, 2023, 3:12 PM ET), <https://www.wsj.com/articles/delaware-is-trying-hard-to-drive-away-corporations-business-environmental-social-governance-investing-780f812a>.

258. Pierluigi Matera, *Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?*, 27 FORDHAM J. CORP. & FIN. L. 73, 79 (2022).

259. See *id.*

Third, it is also important to recognize that a discussion of AI managers and employees is beyond the scope of this paper. And finally, a brief comparison with BSPs shows that although AI directors provide many benefits over BSPs, the choice of directors should ultimately be for the corporation to make.

### 1. *Why Not LLCs?*

The flexible structure provided by Limited Liability Corporations (LLCs) already accommodates for AI management,<sup>260</sup> which can serve as an objection to amending corporate law to permit for AI directors (since LLCs already provide the sought-after flexible business structure). LLCs provide greater flexibility in management and ownership structure than corporations do.<sup>261</sup> This is because LLCs are governed according to their own operating agreement, while a more uniform governance and ownership structure is required of corporations.<sup>262</sup> Because if this, perpetual, memberless LLCs may even be possible.<sup>263</sup> Why amend the natural person requirement if another kind of business entity already allows for a structure that incorporates AI? One issue is that most LLCs are member-managed,<sup>264</sup> which eliminates the possibility of AI governance since AI cannot also be an investor. This means that the only way that AI could be incorporated into the management structure of LLCs is if the LLCs were manager-managed. Further, because the majority of LLCs are small businesses with limited resources,<sup>265</sup> AI governance may not be feasible or practical for such businesses. Additionally, the fact that LLC laws appear to allow for AI governance (at least in some form) but LLCs have not used AI in governance may indicate that corporations will provide for a market of AI governance that LLCs do not.

Artificial Intelligence governance is likely to be the most suitable and impactful, for the time being, for larger corporations where directors are tasked with reviewing vast amounts of information. Larger corporations will also be the most likely to have the funds to invest in AI. Additionally, corporate law tends to offer greater protections to investors, who may particularly value such protection when a new technology is being implemented. Considering all of this and the fact that more advanced AI is a relatively new phenomenon, it is unsurprising that news about the implementation of AI in governance has been

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260. Bayern, *supra* note 91.

261. See Dave Griswold, *LLC vs. Inc: Understanding the Differences Between an LLC and a Corporation*, WOLTERS KLUWER (Jan. 2, 2025), <https://www.wolterskluwer.com/en/expert-insights/llc-vs-inc-understanding-the-key-similarities-and-differences-between-an-llc-and-inc>.

262. See *id.*

263. See Bayern, *supra* note 91, at 101–04.

264. See David M. Steingold, *Member-Managed LLCs vs. Manager-Managed LLCs*, NOLO (Apr. 14, 2022), <https://www.nolo.com/legal-encyclopedia/member-managed-llcs-versus-manager-managed-llcs.html>.

265. See *id.*

sparse.<sup>266</sup> Accordingly, although LLCs present an opportunity to integrate AI into management, there are practical considerations that likely prevent or inhibit such integration. Corporations, on the other hand are well-positioned to implement AI directors should they desire to do so.

## 2. *Close Corporations*

One caveat to this Note's argument is that close corporations may not find the same utility in AI directors as larger private or public corporations. This is because close corporations may not have the funds nor be large enough to the point where an AI director will provide efficiencies.<sup>267</sup> Melvin Eisenberg, a long time leading scholar on corporate governance, illustrates the decreased potential for efficiency in his comparison of decisionmaking in a close corporation to a partnership.<sup>268</sup> He explained that in partnerships, agreements between shareholders, who are often also directors and officers, are likely to be bargained out.<sup>269</sup> Thus, if a partnership's shareholders are able to communicate efficiently, reach agreements through bargaining, and minimize agency costs, then AI directors may not pose the same operational efficiency upgrade that they may provide for larger private and public corporations.<sup>270</sup> Nonetheless, close corporations should have the ability to select AI directors if they so desire. This Note advocates for a change in the law that would allow them to do so.

## 3. *Why Not Officers and Employees?*

A third consideration is whether the argument that AI directors could replace human directors *also* means that AI could replace officers and employees as well. One article considering the possibility of AI in management, for example, predicts that boards and management will become fused as a result of AI.<sup>271</sup> The article is correct that for now, there are likely good reasons to have both groups of directors and officers.<sup>272</sup> Yet it is also correct that AI software will soon entail close to zero or drastically reduced agency costs, such that a two-tiered leadership of directors and officers will no longer be necessary.<sup>273</sup> Thus, it is possible that AI officers and employees will

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266. See, e.g., Rob Wile, *A Venture Capital Firm Just Named an Algorithm to Its Board of Directors—Here's What it Actually Does*, BUS. INSIDER (May 13, 2014, 8:19 AM PDT), <https://www.businessinsider.com/vital-named-to-board-2014-5>; see Kole, *supra* note 98. These two examples provide the most prominent examples, as other examples are very difficult to find.

267. See Adam Hayes, *Closely Held Corporation: Definition, Types, and Examples*, INVESTOPEDIA (June 26, 2021), <https://www.investopedia.com/terms/c/closely-held-corporation.asp>.

268. MELVIN A. EISENBERG, *THE STRUCTURE OF THE CORPORATION* 9–17 (1976).

269. *Id.*

270. See Hayes, *supra* note 267.

271. See Petrin, *supra* note 81, at 1006–07.

272. See *id.* at 1000–01.

273. See *id.* at 1007.

come after AI directors, or even before. However, corporate law does not prevent employees from being replaced by AI, and even the DGCL provision on officers does not contain an explicit natural person requirement like that required of directors.<sup>274</sup> The central focus of this Note is to demonstrate why AI directors should be permitted under corporate law; but it is important to briefly acknowledge that there is no similar legal hurdle for employees and officers.

#### 4. *A Brief Comparison with BSPs*

Given the analogies and references to Bainbridge and Henderson's BSP model, one may ask, why not simply use the BSP model? The BSP model will allow for many of the benefits discussed above, such as vertical integration, decreasing costs, better director performance, and cost-spreading, all without replacing human directors.<sup>275</sup> It is helpful to briefly address this possible critique. The best answer to this criticism is to point out that asking why not simply use BSPs rather than AI is the wrong question to ask. The reality is that this Note's proposal simply advocates allowing for a relaxing of the membership requirements for corporate boards of directors.<sup>276</sup> Rather than the one-size-fits-all approach, corporations should have the ability to choose between human directors, BSPs, AI directors, or a mix of all three. Even if one was to compare BSPs and the AI director proposal<sup>277</sup> put forth in this Note, AI directors present numerous advantages including (likely) lower costs, greater efficiency, and easier to manage conflicts of interest issues.<sup>278</sup> Nonetheless, BSPs, AI directors, and humans need not be mutually exclusive and can coexist. The law should allow for such coexistence by providing greater flexibility for organizational management structure.

#### CONCLUSION

This Note sets out to show why corporate laws can and should be changed to *allow* for AI directors on corporate boards of directors. First, this Note explains that although corporate laws would need substantial amendments, these changes are not so substantial as to present an insurmountable or even serious obstacle to permitting AI directors. Second, the Note demonstrates that AI directors would undertake the traditional roles of directors, including the oversight and advisory functions, in a more efficient and effective manner than human directors. Third, the Note highlights how

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274. Compare DEL. CODE ANN. tit. 8, § 141(b) (West 2025), with DEL. CODE ANN. tit. 8, § 142 (West 2025).

275. Bainbridge & Henderson, *supra* note 18, at 1093–94.

276. See *supra* Part.IV.

277. See *supra* Subpart.IV.D.4.

278. See *supra* Subpart.IV.D.4.

common objections to the implementation of AI directors, including the lack of a conscience, consciousness, and human desires, as well as transparency and liability concerns, do not pass muster. Fourth, this Note shows that changing corporate laws to allow for AI directors advances freedom of contract and federalism ideals. Lastly, this Note considers additional caveats and considerations to the argument for amending corporate law to allow for AI directors. Ultimately, AI directors can co-exist with BSPs and human directors, leading to the modest proposal here: corporations should have the right but not the requirement to appoint AI directors, and corporate laws should be changed to provide for the necessary flexibility to do so.