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An Identity Theory of the Short- and Long-Term Investor Debate

Claire A. Hill*

INTRODUCTION

Economics famously treats market actors as homogeneous. People are *homo economicus*, rational self-interested maximizers of their own utility. So far, so good, notwithstanding supposed behavioral “deviations” from rationality (more on those later).¹ That people can view their own utility very differently from one another is recognized in theory, but not so much in practice. Also not sufficiently recognized is the extent to which people’s views of their own utility reflect their theories of who they are

* Professor and James L. Krusemark Chair in Law, University of Minnesota Law School. Thanks to the participants at the 9th Annual Berle Symposium on Investor Time Horizons, Brian Bix, June Carbone, and Robin Stryker for excellent discussions, and Scott Dewey of the University of Minnesota Law School Library for wonderful research assistance.

1. In my view, behavioral law and economics mistakenly focuses too much on supposed deviations from rationality, “mistakes.” Much of what behavioral law and economics could contribute is a broader understanding of how people understand their own interests. I have defended this claim in various papers, including: Claire A. Hill, *Beyond Mistakes: The Next Wave of Behavioral Law and Economics*, 29 *QUEEN’S L.J.* 563 (2004); Claire A. Hill, *The Rationality of Preference Construction (and the Irrationality of Rational Choice)*, 9 *MINN. J. L. SCI. & TECH.* 689 (2008); Claire A. Hill, *Rationality in an Unjust World: A Research Agenda*, 35 *QUEEN’S L.J.* 185 (2009); and Claire A. Hill, *A Positive Agenda for Behavioral Law and Economics*, 3 *COGNITIVE CRITIQUE* 85 (2011). Economics itself has been far more accommodating of psychology in toto; there is a burgeoning literature, for example, on how people’s personalities and other individual attributes might be taken into account in economic analysis. See, e.g., Mathilde Almlund, Angela Lee Duckworth, James J. Heckman & Tim D. Kautz, *Personality Psychology and Economics*, in 4 *HANDBOOK OF THE ECONOMICS OF EDUCATION* 1, 1–181 (Eric A. Hanushek, Stephen Machin & Ludger Woessmann eds., 2011); Lee Borghans, Angela Lee Duckworth, James J. Heckman & Bas ter Weel, *The Economics and Psychology of Personality Traits*, 43 *J. HUM. RESOURCES* 972 (2008); Aldo Rustichini, Colin DeYoung, Jon E. Anderson & Stephen Burks, *Toward the Integration of Personality Theory and Decision Theory in Explaining Economic Behavior: An Experimental Investigation*, 64 *J. BEHAV. & EXP. ECON.* 122 (2016); see also Ian D. Gow, Steven N. Kaplan, David F. Larker & Anastasia A. Zakolyukina, *CEO Personality and Firm Policies* (Rock Ctr. for Corp. Governance, Working Paper No. 220, 2016; Chi. Booth, Research Paper No. 16-13, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805635. See generally 51 *J. PERSONALITY & INDIVIDUAL DIFFERENCES* 199, 199–364 (2011) (special issue on personality and economics).

and how the world works,² and that they hold such views and theories not just atomistically, but also collectively—that is, socially. An over-the-top quote caricatures, but also makes, the point:

Bankers love watches. They love collecting watches. They love talking about watches. I've seen entire groups of analysts head to the nearest Rolex store the day their first bonus hits the account; the Submariner is the official Wall Street starter watch . . . Even if you don't care about watches, it's important to care about watches. It's often the first thing someone will use to size you up . . . The power move is to have a few watches stuffed away at home, and then, rarely, if ever, wear one. As my boss once said when a subordinate was showing off a new Rolex Yachtmaster, "I have one of those. I keep it on my yacht."³

At this juncture, lines in the broader short versus long term battle have been drawn between various camps: those favoring corporate management versus those favoring shareholder activists; those believing that corporations are best run for the exclusive benefit of shareholders versus those believing that other stakeholders' interests should also be taken into account; and those arguing that favoring the short term contemplates different actions than favoring the long term versus those arguing that the two time horizons should and do dictate the same actions.

Each side provides evidence for its position, but somehow, the other side is not convinced. One big reason why is that these are complex questions, scarcely amenable to resolution by definitive evidence.⁴

2. In this regard, economist Dani Rodrik noted, "What the economist typically treats as immutable self-interest is too often an artifact of ideas about who we are, how the world works, and what actions are available." Dani Rodrik, *When Ideas Trump Interests: Preferences, Worldviews, and Policy Innovations*, 28 J. ECON. PERSP. 189, 206 (2014).

3. John LeFevre, *A Wall Street Guide to Watches*, BUS. INSIDER (Aug. 5, 2015), <http://www.businessinsider.com/a-wall-street-guide-to-watches-2015-8>.

4. There is voluminous scholarship on the subject of what does and should count as definitive evidence. Philosopher Nancy Cartwright has written extensively on this subject. See, e.g., NANCY CARTWRIGHT, ANDREW GOLDFINCH & JEREMY HOWICK, EVIDENCE-BASED POLICY: WHERE IS OUR THEORY OF EVIDENCE?, CTR. FOR PHILOSOPHY OF NAT. AND SOC. SCI. CONTINGENCY AND DISSENT IN SCI. TECHNICAL REPORT 07/07, 15 (2007), <http://www.lse.ac.uk/CPNSS/research/concludedResearchProjects/ContingencyDissentInScience/DP/DPCartwrightetalEvidenceOnline.pdf> [<https://perma.cc/A6N6-74BE>] ("Nothing can count as evidence for anything except relative to a host of auxiliary assumptions; and the strength with which a body of evidence supports a hypothesis can never be higher than the credibility of these auxiliaries."); NANCY CARTWRIGHT, EVIDENCE: FOR POLICY AND WHERESOEVER RIGOR IS A MUST (London Sch. of Econ. & Political Sci., Order Project Discussion Paper Series, 2013), <http://www.lse.ac.uk/CPNSS/research/concludedResearchProjects/orderProject/documents/NancyCartwrightEvidenceWhereRigorMatters>.

However, this formulation omits a huge part of the problem. It is not just that finding (enough or the right kind of) evidence is hard. It is that evidence is not sufficient to convince people (and in some cases may even not be necessary). Not that evidence is irrelevant, of course, or that it does not have considerable influence. But it does not have nearly as much influence as it is supposed to have. People's own positions necessarily go beyond what the evidence definitively shows. (Indeed, and importantly, the characterization of something *as* evidence (or good or strong evidence) is not uncontroversial.) But staying agnostic is generally not tenable—law and policy have to be made, after all, and from a cognitive perspective, not having working assumptions as to many matters is quite costly. What fills the gap? Identity—a sense of self, of who and what “sort” of a person we are.⁵ And an important part of our identity is the beliefs we hold. To use a metaphor from analytic philosopher W.V.O. Quine, our beliefs form a web,⁶ and the closer the belief is to the core (center), the harder it will be to change since other core beliefs will have to change as well.⁷ The

pdf [<https://perma.cc/9YL3-HBSX>] (collecting Nancy Cartwright's works on this subject); Nancy Cartwright, *Where's the Rigor When You Need It?*, 10 FOUND. & TRENDS ACCT. 106, 123 (2016) (stating with regard to randomized control trials that “[n]o result wears on its sleeve what it is evidence for”). In the absence of such evidence, what should one believe? Obviously, this question is well beyond the scope of this Essay, but it is clear that people have prior beliefs that go well beyond what they have evidence for. Consider the prior beliefs that paradigmatic civil servants are (a) well motivated and effective or (b) lazy and corrupt. I have known people who are quite certain that one or the other is the case for “most” civil servants; they typically go through machinations to account for stories that seem to present contrary evidence. See Claire Hill, *The Pervasive Role of Priors: Part One*, CONCURRING OPINIONS (Apr. 1, 2013), <https://concurringopinions.com/archives/2013/04/the-pervasive-role-of-priors-part-one.html> [<https://perma.cc/4QLB-FY3L>]; Claire Hill, *The Pervasive Role of Priors: Part Two*, CONCURRING OPINIONS (Apr. 4, 2013), <https://concurringopinions.com/archives/2013/04/the-pervasive-role-of-priors-part-2.html> [<https://perma.cc/2ZWP-LBU6>]; Claire Hill, *The Pervasive Role of Priors: Part Three*, CONCURRING OPINIONS (Apr. 24, 2013), <https://concurringopinions.com/archives/2013/04/the-pervasive-effect-of-priors-part-three.html> [<https://perma.cc/DVW3-BMPD>]; Claire Hill, *The Pervasive Role of Priors: Part Four*, CONCURRING OPINIONS (Apr. 29, 2013), <https://concurringopinions.com/archives/2013/04/the-pervasive-effect-of-priors-part-four.html> [<https://perma.cc/8SDT-3ADQ>]; see also DEIRDRE N. MCCLOSKEY, *THE RHETORIC OF ECONOMICS* 57–72 (2d ed. 1998) (discussing why economists believe the law of demand and arguing that the reasons are not actually scientific at all, but rather, more literary).

5. See, e.g., GEORGE A. AKERLOF & RACHEL E. KRANTON, *IDENTITY ECONOMICS: HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELL-BEING* (2010). In the book, the authors define identity as a person's sense of self. *Id.* at 11; see also Claire A. Hill, *The Law and Economics of Identity*, 32 QUEEN'S L.J. 389 (2007).

6. See generally W.V.O. QUINE & J.S. ULLIAN, *THE WEB OF BELIEF* (1978).

7. The position I argue for here is somewhat akin to that articulated by the field of cultural cognition: “Cultural cognition refers to the tendency of individuals to conform their beliefs about disputed matters of fact (e.g., whether humans are causing global warming; whether the death penalty deters murder; whether gun control makes society more safe or less) to values that define their cultural

remainder of this Essay attempts to persuade the reader that supposedly “substantive” arguments about investor time horizons are importantly *not* about substance, and why that matters.

I. IDENTITY AND WORLDVIEWS

People’s views are a product of their starting points (which I sometimes call “priors”) and the ways in which they take in “data,” both of which are importantly informed by how they understand and characterize themselves and the world.⁸ But people do not have views or characterizations in isolation. For instance, a person who regards herself as concerned with social justice and inequality, as a supporter of and believer in the power of free markets, as a critic of government’s capabilities or intentions, or as belonging to a particular religion, most often does so in a way that passes muster in the relevant community (that is, the group with whom the individual largely shares the views at issue). Stated differently, people come to and hold their views as part of a complex individual and social process.⁹ They exist in communities with shared values and worldviews—they have social identities, which include labels they apply to themselves in accordance with the community’s criteria for such labels and with the implicit (and sometimes explicit) concurrence of the community.¹⁰

identities.” THE CULTURAL COGNITION PROJECT AT YALE L. SCH. [hereinafter THE CULTURAL COGNITION PROJECT], <http://www.culturalcognition.net/> [<http://perma.cc/62RW-E8GW>].

8. I discussed priors, and how priors inform people’s worldviews, in Claire A Hill, *Reducing the Social Costs of (Some) Priors* (Minn. Legal Studies Research Paper, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2729509.

9. See generally RICHARD JENKINS, *SOCIAL IDENTITY* (4th ed. 2014). According to the author: [W]ith respect to identification, the individually unique and the collectively shared can be understood as similar in important respects; the individual and the collective are routinely entangled with each other; individual and collective identification only come into being within interaction; the processes by which each is produced and reproduced are analogous; [and] the theorisation of identification must therefore accommodate the individual and the collective in equal measure.

Id. at 39–40.

10. I present these propositions here as uncontroversial, but much could be said about the topic. See, e.g., JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012) (arguing that liberals and conservatives have different values). The values are importantly social—they, in a sense, define the groups and bind members of a group to one another and to the group. See also THE CULTURAL COGNITION PROJECT, *supra* note 7. Not surprisingly, dealing with purer, more extreme examples is easier than dealing with murkier ones. Consider many people’s views towards the use of child labor in Thailand or a comparable country. But what if the children in question are teenagers, the wages are low by U.S. standards but middling by the standards of their country, and that were they not doing this work, there is a good chance that they would be doing more hazardous work at lower pay, and very little chance that they would be attending school?

The “baggage” of identity helps explain why evidence pointed to by one side will often not suffice for (or convince) the other side. Consider the debate about the desirability of greatly raising the minimum wage. Differing priors may include different commitments to theory, different views about “factual” matters, such as the availability of opportunities, and different values as to the obligations and privileges of citizenship.

Theory arguably favors one side: if wages rise, employers will hire more highly qualified people (and not the unskilled who most need a job and a raise), hire robots, or otherwise do something that will not help, and will more likely harm, the intended beneficiaries of the wage increase. But who knows? As is the case with all complex phenomena, the real world effect is hard to measure. The other side does not seem to have a theory of this sort. Rather, they argue that greatly raising the wage *will* help the intended beneficiaries in the aggregate. (All this sets aside the question of whether helping these intended beneficiaries is the “right thing to do.”) Both sides can point to evidence for their position, but the evidence is not definitive.

What happens? The two sides stay far apart. Those strongly wedded to the theory (and the view that what the theory dictates must be so) that raising the price of something, in this case the labor of those at the lowest rung of the hiring ladder, will result in less of that thing being demanded have enough evidence for their position that they can continue to maintain it.

But those on the other side in this debate have enough evidence on their side that they can maintain their position as well. They may be more agnostic about the role of theory, or at least the role of this theory. Both sides presumably have prior beliefs and values that inform their views. They may have priors as to, for instance, the desirability of “free markets,” whether society owes all employed people a wage they can live on, and the extent to which people are able, or willing, to acquire more skills and improve their situations.

A recent study done in Seattle seemed to provide evidence that increasing the minimum wage could be harmful to its intended beneficiaries.¹¹ The reactions on both sides were exceedingly strong, disputing methodology as well as values. Here are the results from the first page of a Google search done on October 5, 2017, for “Seattle minimum wage study”:

11. Ekaterina Jardim et al., *Minimum Wage Increases, Wages, and Low-Wage Employment: Evidence from Seattle* (Nat’l Bureau of Econ. Research, Working Paper No. 23532, 2017), <http://www.nber.org/papers/w23532>; see also *The Minimum Wage Study*, U. WASH. EVANS SCH. PUB. POL’Y & GOVERNANCE, <https://evans.uw.edu/policy-impact/minimum-wage-study> [<https://perma.cc/X744-LWW3>].

- Seattle Minimum Wage Study: Why It's Utter B.S. (Fortune)
- UW study finds Seattle's minimum wage is costing jobs (Seattle Times)
- UW minimum-wage study doesn't reflect reality of work in Seattle (Seattle Times)
- A 'very credible' new study on Seattle's \$15 minimum wage has bad news for liberals (Washington Post)
- New York Times Misleads On Seattle Minimum Wage Study (Forbes)
- How a Rising Minimum Wage Affects Jobs in Seattle (New York Times)
- The Overhyped Seattle Minimum-Wage Disaster (Bloomberg)
- Seattle minimum wage study: \$100M a year in lost payroll (Business Insider)
- That new Seattle study is a big problem for fans of a higher minimum wage — or is it? (Los Angeles Times)
- Five Flaws in a New Analysis of Seattle's Minimum Wage (Center for American Progress)¹²

The headlines above suggest the types of responses people on each side had—responses that were presumably completely consistent with *their* priors. Moreover, perhaps not surprisingly, an appreciable number of the study's fans and critics impugned the other side's motives in predictable ways, saying that the study was flawed and anybody purporting to draw big conclusions from it was doing so disingenuously, or that the study showed an unpalatable truth and those favoring a much higher minimum wage have to deny that truth and cast bogus doubt on the study.¹³ All this supports *my* priors, that the Seattle study would not and did not change many minds.

12. Google Search of "Seattle Minimum Wage Study," GOOGLE, <https://www.google.com/search?q=seattle+minimum+wage+study&oq=seattle+minimum+&aqs=chrome.69i59j0l3j69i57j0.10848j0j7&sourceid=chrome&ie=UTF-8> [https://perma.cc/GFF9-PSRM].

13. Casting doubt on someone else's motives in this manner should be distinguished from a benign—indeed, useful—diagnostic take on why someone else might hold a view one thinks is wrongheaded. Consider the blog post, Jeffrey Friedman, *Public Choice Theory and the Politics of Good and Evil*, NISKANEN CTR. (Aug. 9, 2017) [hereinafter Friedman, *Politics of Good and Evil*], <https://niskanencenter.org/blog/public-choice-theory-politics-charity/> [https://perma.cc/Y6MQ-XLNS] (discussing NANCY MACLEAN, *DEMOCRACY IN CHAINS* (2017)). MacLean's book depicts libertarians as sinister, disingenuous villains seeking to preserve power and wealth and deny both to "the masses." "[A]s a small army of aggrieved libertarian bloggers has pointed out, MacLean presents no evidence for her sensationalistic accusations. Instead what she presents are quotations taken out of

As the foregoing illustrates, priors can involve both matters of fact—matters that are, in principle, capable of being resolved one way or the other by some sort of empirical or theoretical demonstration—and values, which are not capable of this sort of resolution.¹⁴ For instance, consider a view that corporations should pursue long-term goals. A person might have such a view because of a belief that corporations do better financially when they pursue long-term goals (arguably, a factual belief that could be

context or so mangled by ellipses that they suggest the opposite of the quoted libertarians' intentions." *Id.*

As a work of history, this book is a fiasco [although, Friedman says, "worth reading"]. . . .

. . .

Yet, to be charitable to MacLean, she clearly finds it incredible that libertarianism could make sense to any intelligent person. Therefore, she has little choice but to think that libertarianism must be a mask for something deeper and darker. The tacit premise of the book is that nobody can honestly believe that the opposite of coercion, "freedom," overrides claims of need and welfare. But having been a libertarian myself, I can testify that that's exactly what libertarians honestly believe. Or—to be charitable to them—what they honestly think they believe. Libertarians take the sanctity of "liberty" (or "freedom") for granted. And they fail to question the legitimacy of private property ownership, so they include property rights among our sacrosanct freedoms. Thus, government incursions on property rights are as impermissible as coercion by private actors—also known, they are eager to point out, as "criminals." To libertarians, then, taxation is theft. Conscription is slavery. And government, whose every action is backed by "men with guns" (the police), is inherently suspect. . . .

. . .

. . . [She apparently] refuses to accept that libertarians' obtuse preoccupation with "liberty," correctly defined, explains their (apparently) cold indifference to the victims of social and economic problems. Thus, she searches for racist, plutocratic explanations of their indifference.

Id.

But, Friedman points out, public choice theorists, the main object of MacLean's criticisms, have dedicated their entire careers to "denying interpretive charity to the political actors with whom they disagree," characterizing them as seeking personal gain notwithstanding claims to be motivated by public-spiritedness. *Id.* Friedman concludes: "MacLean and public-choice theorists, of course, are not unique in ascribing the worst to their political opponents. Everybody does it." *Id.*

14. While I do not believe that there is a completely clear distinction between facts and values, I think the distinction is sufficiently workable to be made use of in this context. The muddiness reflects the fact (!) that facts do not announce and label themselves. An analogy familiar from law is the Corbin versus Williston debate as to the parol evidence rule. Corbin would be taking the "there is no such thing as a pure fact" position here insofar as he said that words do not interpret themselves. For purposes of this discussion, fact versus value should be seen more as a difference of degree than of kind, where facts are more a matter of consensus, at least in principle—if something really is a fact, everyone "should" believe it—whereas values are acknowledged to be more personal and not really amenable to being "wrong" in the same sense. The fact/value distinction critiques were much discussed in the philosophy of Hilary Putnam and W.V.O. Quine, prominent analytic philosophers of the 20th Century. All of this being said, my use of the terms "data" and "facts" in quotes in the text is an acknowledgment that facts do not announce and present themselves as such.

shaken with the right evidence, based on the presumably uncontroversial-to-most value that doing well financially is a good thing). A person also might have such a view because of a prior belief that pursuing long-term goals is likely to be better for stakeholders other than shareholders (presumably, a belief that such stakeholders' interests should be taken into account, which is a belief about values, as well as a factual belief that taking other stakeholders' interests into account will in fact yield good results for such stakeholders).

Upton Sinclair has been famously quoted as saying: "It is difficult to get a man to understand something, when his salary depends on his not understanding it."¹⁵ My point here can be summarized as: it is difficult to get a person to understand something when her (individual and more importantly, social) identity depends on her not understanding it.¹⁶ In making this point, I want to suggest something perhaps fairly heretical: that, for instance, lawyers in the business of arguing that corporate management is the best steward of the corporation, far better than activist shareholders, may not be as qualitatively different in the nature and sincerity of their beliefs as social activists arguing that corporations should take into account the interests of employees and the broader society. A critical perspective might find considerable disingenuity (as well as sincerity) in both positions.¹⁷

15. UPTON SINCLAIR, I, CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED 109 (1935).

16. Identity is of course an exceedingly complicated subject, but for present purposes, a simplified account can suffice: identity is how a person views and defines herself, and it is also who she sees herself as sharing her identity with. See generally Hill, *supra* note 5 (discussing different conceptions of identity).

17. One simple and largely mistaken way to characterize my position would be to rely importantly on the terms "confirmation bias" and "motivated reasoning." The former has become especially familiar in behavioral law and economics. For an interesting and fairly early article on confirmation bias in the psychology literature, see generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175 (1998). Confirmation bias and motivated reasoning are both mechanisms by which a person reaches her desired (and, pretty much invariably, incorrect) conclusion. The former nominally focuses on how one takes in data, and the latter nominally focuses on how one reasons, but for present purposes, there are more similarities than differences in the concepts. The characterization is mistaken because it suggests that bias-free and unmotivated cognition and reasoning is possible and indeed, is the base case, such that confirmation bias and motivated reasoning are somehow exceptional. They *are* exceptional in the types of extreme examples that may readily spring to mind—Jane finds yet another way to conclude that her rotten boyfriend is really a good guy; Bill concludes that the politician he favors from his political party was just taking an objectionable position because he needed to get elected, and once elected, he would surely not act on the position. But again, these are extremes; bias-free and unmotivated reasoning is *not* the norm. We are not agnostic about our theories, and will quite naturally and not incorrectly proceed with that prior in mind. The alternative is paralyzing and unimaginable. See also Daniel F. Stone & Daniel H. Wood, *Cognitive Dissonance, Motivated Reasoning, and Confirmation Bias: Applications in Industrial Organization*, in HANDBOOK OF BEHAVIORAL INDUSTRIAL ORGANIZATION (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834072 (making the link not

II. THREE ILLUSTRATIVE DEBATES

With that as backdrop, and in order to keep the analysis tractable and parsimonious, I will focus on three different debates. One is what I will call the Lipton versus Bebchuk debate. It is the debate between the inventor of the poison pill and perennial defender of corporate management, Marty Lipton of Wachtell Lipton, and Harvard Law School Professor Lucian Bebchuk, known for his pro-activist, anti-management stance. The debate is, generally speaking, about how much say shareholders should have in whether their corporation is taken over and in how their corporation is run. The second is the debate between those arguing that corporations should act only in shareholders' interests, and those arguing that corporations should also act to further certain other stakeholders' interests. The third is the debate between those who believe that what is in a corporation's long-term interests is necessarily in its short-term interests (as "proven" by standard theory), and those who think a corporation's pursuit of short-term profits is often antithetical to a pursuit of its long-term profits (and goals).

A. *Lipton v. Bebchuk*

Let us begin with the first debate, between Lipton and Bebchuk. Much of the recent action in the debate has concerned empirical evidence, with dueling papers and findings. Here is Bebchuk's view, as set forth in a recent article:

We test the empirical validity of a claim that has been playing a central role in debates on corporate governance—the claim that interventions by activist hedge funds have a detrimental effect on the long-term interests of companies and their shareholders. We subject this claim to a comprehensive empirical investigation, examining a long five-year window following activist interventions, and we find that the claim is not supported by the data. . . . Our findings have significant implications

only between motivated reasoning and confirmation bias but also cognitive dissonance—the fact that people may have incompatible beliefs that they need (and use) mechanisms to reconcile). The article includes the following quote from Friedrich Nietzsche's *Thus Spoke Zarathustra*: "And you say to me, friends, there is no disputing over tastes and tasting? But all of life is a dispute over taste and tasting!" *Id.* (manuscript at 2).

for ongoing policy debates. Policymakers and institutional investors should not accept the validity of the assertions that activist interventions are costly to firms and their shareholders in the long term; such claims do not provide a valid basis for limiting the rights, powers, and involvement of shareholders.¹⁸

In the following quote from a blog post, Lipton criticizes Bebchuk's evidence and conclusions:

Prof. Bebchuk released an article describing what he characterized as empirical evidence that attacks by activist hedge funds do not harm companies and their long-term shareholders. . . . I released a paper pointing out serious deficiencies in the methodology, analysis and conclusions that Prof. Bebchuk used and I cited an academic study questioning his statistics, an empirical study to the contrary and real-world experience and anecdotal evidence that activism and its concomitant short-termism destroy long-term value and damage the American economy. . . . Apparently, my paper touched a raw nerve. In an attempt to resuscitate his promotion and justification of attacks by activist hedge funds, Prof. Bebchuk has published a new paper ("Don't Run Away from the Evidence: A Reply to Wachtell Lipton") accusing me of running away from the evidence; a serious accusation, but demonstrably untrue. Let's take a look at some of the evidence (empirical, experiential, and overwhelming) that supports my views. . . . It should be noted that Prof. Bebchuk's claim that "supporters of the myopic activists view have failed to back their view with empirical evidence or even to test empirically the validity of their view" is patently false. In fact, numerous empirical studies over the years have produced results that conflict with those Prof. Bebchuk espouses.¹⁹

18. Lucian A. Bebchuk et al., *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1085 (2015).

19. Martin Lipton et al., *Empiricism and Experience; Activism and Short-Termism; the Real World of Business*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 28, 2013), <https://corpgov.law.harvard.edu/2013/10/28/empiricism-and-experience-activism-and-short-termism-the-real-world-of-business/> [<https://perma.cc/LR2B-U6EG>].

Underlying the two sides' positions are different worldviews. In Bebchuk's view, agency issues loom large—managers have the incentive to “take advantage” of their position as agents to shaft their principal, the corporation (and its shareholders), or at least to act in their own interests rather than those of their principal, and if not sufficiently constrained, may do so. In Lipton's mind, the villains are the activists, who are focused on quick profits to the detriment of the corporation. Recall in this regard the epithets flung at the corporate raiders of the 1980s, who are the precursors of present-day shareholder activists. For example, Harrison Williams, after whom the Williams Act is named, said in his initial attempts to get the Act passed: “In recent years we have seen proud old companies reduced to corporate shells after white-collar pirates seized control with funds from sources which are unknown in many cases, then sold or traded away the best assets, later to split up most of the loot among themselves.”²⁰ In this depiction, (heroic?) corporate managers were keeping the companies from being reduced to corporate shells, and keeping the companies' assets safe for their rightful owners, the shareholders. Lipton's negative view of activists is much in evidence in his discussion in the blog post excerpt below:

The Attack Devices Used by Activists

- aggressively criticizing a company's governance, management, business and strategy and presenting the activist's own recommendations and business plan;
- proposing a precatory proxy resolution for specific actions prescribed by the activist or the creation of a special committee of independent directors to undertake a strategic review for the purpose of “maximizing shareholder value.”²¹

Note the use of the term “attack” and the characterization of the activists' criticism as “aggressive” as well as the quotation marks (“sneer quotes”) around “maximizing shareholder value.”

At this juncture, we need to introduce a new concept: prototypes, which are exemplars of particular concepts.²² The preceding discussion of Bebchuk and Lipton's viewpoints depicted several prototypes of shareholder activists and corporate managers. Prototypes are pervasive: we all use prototypes as tools to understand the world. For instance, we

20. 111 CONG. REC. 28,257 (1965).

21. Martin Lipton et al., *Dealing with Activist Hedge Funds and Other Activist Investors*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 26, 2017), <https://corpgov.law.harvard.edu/2017/01/26/dealing-with-activist-hedge-funds-and-other-activist-investors/> [https://perma.cc/4KQ5-N2VM].

22. See generally STEVEN WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2003).

hear that a particular place is a popular holiday destination for college students during spring break, and we imagine the place full of drunken, late-night licentious partiers. Community members are apt to have similar prototypes as to matters relevant to the community. For example, a strong critic of government is apt to share with other like-minded people one prototype of a government official—maybe lazy, corrupt, or both—whereas someone who is far more optimistic about what government can and will do is apt to share with her community a far more charitable view of such officials. Similarly, a person who supports a strong safety net for people with low incomes probably has a different prototype of such people (say, trying the best they can under difficult circumstances) than does someone who opposes such a net (taking advantage of leisure and watching lots of daytime television, perhaps).

Let us return to the context of corporations, their managers, their shareholders, and other potential stakeholders. As noted above, the prototypes Lipton and Bebchuk each have of officers and directors (and activist shareholders) appear to be quite different. Lipton's prototypical directors and officers are doing the best they can to manage the corporation for its own benefit and the benefit of all the shareholders, and certainly not for themselves. Bebchuk's prototypes of directors and officers are rather more negative. My students generally share Bebchuk's prototypes, at least initially—they imagine executives sitting behind huge expensive desks gaming compensation formulas for their own benefit, and saintly shareholders frustrated in their attempts to call the directors and officers to account as they are rebuffed in their attempts to bring derivative suits. (In part, this is probably because students can summon up corporate executives far more readily than they can summon up shareholder activists. They hence generally have far fewer and far less-informed views about the latter.) What I am calling the Bebchuk prototype of corporate managers finds expression in this correspondence from Dan Loeb to Sotheby's CEO, depicting Sotheby's board as caricatured *homo economicus* pursuing zero or negative sum gains:

A review of the Company's proxy statement reveals a perquisite package that invokes the long-gone era of imperial CEOs: a car allowance, coverage of tax planning costs, and reimbursement for membership fees and dues to elite country clubs. . . . Typical of the egregious examples was a story we heard of a recent offsite meeting consisting of an extravagant lunch and dinner at a famous "farm-to-table" New York area restaurant where Sotheby's senior management feasted on organic delicacies and imbibed vintage wines at a cost to

shareholders of multiple hundreds of thousands of dollars. We acknowledge that Sotheby's is a luxury brand, but there appears to be some confusion—this does not entitle senior management to live a life of luxury at the expense of shareholders.²³

Lipton might seem to have the more obvious “illicit” (disingenuous) stake in his view, given his law firm's posture as a defender of management—or does he, given Bebchuk's long-standing investment in and identification of “shareholder rights,” including with respect to such matters as removal of staggered boards and maintaining the ten-day purchase window under Section 13(d) of the Securities Exchange Act of 1934?²⁴ (None of this is meant to suggest that the views at issue would not be sincerely held. Moreover, I use Lipton and Bebchuk here purely as stand-ins for views with which they have become associated.) For whom are the associated beliefs closer to the core, and for whom are they closer to the periphery? What are the associated beliefs? How much, for instance, do the beliefs have to do with the prototypes discussed above? (And where did the prototypes come from, and what would it take to change them?) How much do the beliefs have to do with the prototype-holder's views of human nature more broadly and the capabilities of government?

Might empirical evidence be forthcoming that would convince either side to abandon or even soften its position? It is possible, but it does not seem likely, at least any time soon.²⁵ An interesting debate is presently underway on the effects of staggered boards.²⁶ Until recently, it was commonly, and perhaps even generally, accepted that staggered boards were adopted to entrench management against takeover attempts. That they harmed companies (and hence shareholders) was strongly believed and generally borne out by some (most?) empirical evidence. After all, staggered boards, together with poison pills, serve as a potent takeover defense, and typically require a hostile acquirer to conduct two election fights in order to gain majority control of the board and thus be able to proceed with the takeover.

But recent work has found benefits to companies (and shareholders) from staggered boards. A presentation at Stanford's Business School

23. Email from Daniel S. Loeb, CEO, Third Point, to William F. Ruprecht, CEO, Sotheby's (Oct. 2, 2013), <http://www.sec.gov/Archives/edgar/data/823094/000119312513388165/d605390dex993.htm> [<https://perma.cc/427M-SQDB>].

24. Securities Exchange Act of 1934 § 13(d), 15 U.S.C. § 78(d) (2012).

25. I intentionally use the word “forthcoming” here as I do not want to make the strong claim that such evidence could never be accepted, but I do want to make the weaker claim that no evidence that is likely to be produced in the near term would do so.

26. See *infra* note 32.

concluded that “[w]hether staggered boards entrench management or empower a board to adopt a long-term horizon is unclear, [and that] [s]taggered boards appear to have a positive impact on companies with unrecognized potential resulting from proprietary knowledge, innovation, or business relationships.”²⁷ The evidence can be interpreted narrowly to leave much of the broader theory as to the prominence of the entrenchment threat intact (particular types of companies under particular circumstances benefit from staggered boards, but otherwise, the boards serve to entrench).²⁸ But broader interpretations are possible as well. Indeed, at this writing, the latest paper weighing in on the anti- and pro-staggered board empirical work finds that “a staggered board has no significant effect on firm value.”²⁹ Perhaps a result of this debate will be to bolster a middle ground identity, one which allows for more agnosticism as to which actor, as between company management and someone seeking to take over the company, is more apt to be behaving badly.³⁰

B. Shareholders’ Interests v. Stakeholders’ Interests

Let us move on to the second debate, as to whether corporations should be run solely in the interests of shareholders or whether other stakeholders’ interests should also be taken into account.

One interesting contrast is between arguments that on their face relate to values and arguments that on their face relate to facts. In the former category is the argument that the corporation belongs to its owners, the shareholders, and therefore should be run for their exclusive benefit. An opposing argument that also apparently relates to values is that the corporation gets the privilege of limited liability and other privileges from the government and society, and therefore has responsibilities to the

27. DAVID F. LARCKER & BRIAN TAYAN, STAGGERED BOARDS: RESEARCH SPOTLIGHT, CORP. GOVERNANCE RESEARCH INITIATIVE, STAN. GRADUATE SCH. BUS. (2015), <https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-research-spotlight-03-staggered-boards.pdf> [<https://perma.cc/9S4D-7WRX>].

28. See generally *id.*; K.J. Martin Cremers & Simone M. Sepe, *The Shareholder Value of Empowered Boards*, 68 STAN. L. REV. 67 (2016) (finding that staggered boards can increase firm value); Yakov Amihud, Markus M. Schmid & Steven Davidoff Solomon, *Settling the Staggered Board Debate*, U. PA. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3034492## (finding that staggered boards have no significant effect on firm value). The debate rages on, with papers taking any of the three sides in the debate (value detracting, value adding, or no effect on value).

29. Amihud, Schmid & Davidoff Solomon, *supra* note 28, at 3.

30. Another interesting development in this regard is a new paper by Goshen and Squires that takes into account principal costs as well as agency costs in appraising corporate governance. See Zohar Goshen & Richard Squires, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767 (2017).

government and society, as government and society (and social pressure?) may reasonably define. The latter position may be used to justify the pursuit of long-term approaches that may not yield short-term financial payoffs.³¹

The same (opposing) conclusions can be reached by using “facts” (with, of course, some embedded values). Corporations work best when they are run exclusively in shareholders’ interests because in principle, all shareholders have at least one common interest (more money), and navigating different and potentially competing claims allows for costly conflict that has no principled resolution and puts decision-makers in needless peril. Given that everyone agrees that companies should not be run for their agents (the directors and officers), an exclusive focus on shareholder interests is best situated to prevent that. An opposing view, citing “facts,” is that corporations that privilege shareholders’ interests over others’ interests do not do better financially than those that take into account other stakeholders’ interests as well.³² And again, taking others’ interests into account is not infrequently tied to a longer-term perspective.

It is far easier to imagine debating the factual propositions in the above paragraph than the more value-based propositions in the preceding one. But even the factual propositions are not *easy* to debate. Consider how difficult it would be to resolve the issue definitively. We can never run “perfect” experiments—two identical worlds, different only in what we want to test. There are strong disagreements even as to what the facts “are” and no obvious way to resolve them. Interestingly, what we “should” do—and why—may be being decided independently of the debate. As a society, it seems that we have moved closer to favoring solicitousness to other stakeholders, and insofar as corporations consider their reputations

31. In “The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth,” Lipton makes the connection explicit. Martin Lipton et al., *Corporate Governance: The New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 11, 2017), <https://corpgov.law.harvard.edu/2017/01/11/corporate-governance-the-new-paradigm/> [https://perma.cc/7YFV-2XPP].

32. Consider in this regard the arguments as to this final proposition in Lynn Stout’s book, *The Shareholder Value Myth*, that “there is a remarkable lack of persuasive empirical evidence to demonstrate that either corporations, or economies, that are run according to the principles of shareholder value perform better over time than those that are not.” LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 8 (2012). Stout adds, “Worse, when we look at macroeconomic data—overall investment returns, numbers of firms choosing to go or remain public, relative economic performance of ‘shareholder-friendly’ jurisdictions—it suggests shareholder value dogma may be economically counterproductive.” Lynn A. Stout, *The Shareholder Value Myth*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 26, 2012), <https://corpgov.law.harvard.edu/2012/06/26/the-shareholder-value-myth/> [https://perma.cc/4P9V-LKCN].

to require some level of such solicitousness, that position may rule the day.³³ Indeed, corporations' overall competition with one another may now even be including competition over corporate social responsibility (CSR). This is quite a transformation from CSR's earlier association with touchy-feely tree huggers. There is even a Sustainability Accounting Standards Board, modeled after the Financial Accounting Standards Board, to ensure rigor in the field.³⁴

Moving on from the "factual" positions, what about the "values" positions? There might be arguments based on history—limited liability has worked very badly with financial institutions³⁵—or on legislative history. But mostly, views based on values positions are hard to change. There are many associated beliefs—for instance, beliefs about caveat emptor, the extent to which people can and should be responsible for themselves, and about the extent to which citizens of a society have duties to the broader society and each other—that will affect a person's conclusions. These associated beliefs are also not readily amenable to productive argument. People may simply disagree as a matter of first principle and have no way to resolve the disagreement. ("Anyone can rise." "Easy for you to say, look at the advantages you have had." "But Smith was a boat person and came up from nothing and he . . .").³⁶ These associated beliefs also tend to be associated with a person's group and community. Consider the ethos in banks in the years preceding the financial crisis that permitted banks to engage in bad conduct. Bankers'

33. I was told by the head of corporate social responsibility at a major corporation that corporations were indeed competing in this regard, and that in their "community," the widely held norm had become that resources should be devoted to corporate social responsibility. Relatedly, Brian Bix directs me to Guido Calabresi's *The Future of Law and Economics: Essays in Reform and Recollection*. GUIDO CALABRESI, *THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION* (2016). Calabresi discusses a practice among Minneapolis companies: that the businesses would give at least 5% to charitable causes, and new business owners who did not meet this expectation would be shunned from high society. *Id.* at 108–09.

34. Might the more extreme profit maximizers have felt some degree of ambivalence that they managed to resolve by eagerly accepting that profit maximization now requires a concern for reputation in the corporate social responsibility sphere as well as other more traditional spheres?

35. See generally CLAIRE A. HILL & RICHARD W. PAINTER, *BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT* (2015).

36. Intuition and research support the existence of differing perspectives. Some research suggests reasons for the differences. See Shai Davidai & Thomas Gilovich, *The Headwinds/Tailwinds Asymmetry: An Availability Bias in Assessments of Barriers and Blessings*, 111 J. PERSONALITY & SOC. PSYCHOL. 835 (2016) (arguing that people are far more aware of obstacles they face (headwinds) than they are of forces propelling them towards their destination or goals (tailwinds)). Perhaps research like this can persuade, if not "prove to," people who (a) downplay the role good fortune has played for them that they may be giving themselves too much credit for what they have achieved and, conversely, (b) exaggerate the role bad fortune has played for them that they may be excusing themselves too readily.

peer groups had collective narratives that permitted peer group members to conclude that they were good people notwithstanding that they were selling low-quality securities to people they encouraged to tune out the truthful caveats in the offering documents that gave the banks legal cover.

C. Finance Theory v. Short-Termism

What about the third debate?³⁷ I start with an introductory point using two examples. The first example is academics' long-standing attempts to determine why capital structure matters—for instance, why companies use secured debt. If one were to ask lawyers and bankers on Wall Street this question, one would be (and I was) met with bewilderment. The bewilderment would not be eased if one were to further explain (as I did) that Modigliani and Miller's Capital Structure Irrelevance theorem has demonstrated that—without some sort of explanation (that theorists would accept)—using particular ways to finance oneself could not add value any more than a hungry Yogi Berra would get more pizza by asking the delivery person to cut the pizza into more slices. The second example is the jubilant reaction I have seen to a recent paper, *Replicating Anomalies*;³⁸ a paper that provides some support and vindication for orthodox theory as to market efficiency. The authors “attempted to replicate the entire published anomalies literature in finance and accounting” and found that “capital markets are more efficient than previously reported.”³⁹ They concluded that “[t]he anomalies literature is infested with widespread p-hacking,”⁴⁰ that is, “selecting sample criteria and test procedures until insignificant results become significant”⁴¹ or more colloquially, “trying multiple things until you get the desired result.”⁴²

These examples provide some indication of attachment to theory in general and to the particular theories at issue. Far be it from me to say that people should be agnostic about their theories—they adopted the theories

37. The arguments in this Section are adapted from Claire A. Hill & Brett H. McDonnell, *Short and Long Term Investors (and Other Stakeholders Too): Must (and Do) Their Interests Conflict?*, in RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 396 (Claire A. Hill & Steven Davidoff Solomon eds., 2016).

38. Kewei Hou, Chen Xue & Lu Zhang, *Replicating Anomalies* (Nat'l Bureau of Econ. Research, Working Paper No. 23394, 2017), <http://www.nber.org/papers/w23394>. I ask that readers believe my observation as to the reaction to the article on my authority, but if the readers do not, they should just ignore this example.

39. *Id.* at 31.

40. *Id.* at Abstract.

41. *Id.* at 4.

42. Tania Lombrozo, *Science, Trust and Psychology in Crisis*, NPR (June 2, 2014, 11:28 AM), <http://www.npr.org/sections/13.7/2014/06/02/318212713/science-trust-and-psychology-in-crisis> (quoting Uri Simonson).

because they believed them, and being completely open to being wrong about everything all the time would be paralyzing. But in my view, it cannot be that people are constantly being sufficiently “scientific” that they are as open to moving on as they think and say they are. What I describe here are not just individual dynamics. People who think “those on Wall Street who do these deals do not really understand what they are doing—we, the theorists, know better” (and they may be right—I take no position on this) stick together, as correct-thinking folk.

In our article *Short and Long Term Investors (and Other Stakeholders Too): Must (and Do) Their Interests Conflict?*, Brett McDonnell and I

focus[ed] on an issue presented somewhat by corporate raiders but a bit more acutely by shareholder activists: the strategy of pursuing the ‘quick buck.’ Orthodox theory holds that the highest ‘bucks’ should not necessarily be the ‘quickest’—that is, that markets correctly value a company’s prospects, no matter how far in the future they are. Of course, given the time value of money, a long-term prospect has to be much better than a short-term one to be worthwhile. But the argument made with respect to activists, and to a lesser but still considerable degree corporate raiders, was that cost-cutting was being encouraged even if doing so saved less than the discounted value foregone.

This argument is not consistent with orthodox theory. . . . [O]rthodox corporate finance theory strongly suggests that there should be no difference between the interests of short-term and long-term shareholders. However, there are some debatable steps in this logic. Let us pause to reflect on several of those steps. This will help us see where the logic could fail.

[We first consider various orthodox explanations, which largely do not work since they all hold that arbitrage should correct mispricings. Then, we step outside the orthodox model and consider layers of agency costs.]

. . .

. . . In this explanation, a company’s managers are being bad agents because, in order to keep their jobs, they respond to activist pressure to cut immediate costs and not invest in the firm’s future prospects. The activist pressure reflects that the activists’ source of funding are concerned that the activists might be bad agents, and are only willing

to provide funding if the activists can show results, and do so quickly. (And, complementarily, the activist pressure, whether or not it is fueled by the activists' funders' pressure, reflects the concern that managers not showing quick results could be bad agents enriching themselves, or simply incompetent. Indeed, the activists' funders might also be concerned about the activists' incompetence.)⁴³

Here, we start to have an explanation as to why “quick results” must be achieved.⁴⁴ Investors cannot reliably tell the difference between good and bad money managers, and assume a money manager is bad unless she can prove otherwise quickly. And, again, quickly is the key, since at any point in time the money manager is vying with others for investors' funds. As above, we need to complement this account with one that explains why arbitrage would be limited: why wouldn't arbitrageurs bid up the price of companies pursuing long-term strategies so that they come to be priced “correctly”?

Here, we can add a few elements that might explain limits of arbitrage in this context. Both relate to Knightian uncertainty—for this purpose, that there may be no good way to quantify within a tractable range the probabilities of possible outcomes of a long-term investment.⁴⁵

The debate here is between theorists whose theories tell them that investors should not—both in the descriptive and normative sense—unduly discount future earnings and others who feel that a short-term outlook often does recommend different strategies, and that those strategies are bad in the long term, certainly for society and in many cases for shareholders as well. Consider all the identity underpinnings, or meta-

43. See Hill & McDonnell, *supra* note 37, at 397–402.

44. A leading classic explanation of limits to arbitrage relies on limits in the willingness of investors to lend capital to arbitrageurs. See Andrei Shleifer & Robert W. Vishny, *The Limits of Arbitrage*, 52 J. FIN. 35 (1997). We build on this insight.

45. FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 19–20 (1921).

Uncertainty must be taken in a sense radically distinct from the familiar notion of Risk, from which it has never been properly separated. The term “risk,” as loosely used in everyday speech and in economic discussion, really covers two things which, functionally at least, in their causal relations to the phenomena of economic organization, are categorically different. . . . The essential fact is that “risk” means in some cases a quantity susceptible of measurement, while at other times it is something distinctly not of this character; and there are far reaching and crucial differences in the bearings of the phenomenon depending on which of the two is really present and operating. . . . It will appear that a measurable uncertainty, or “risk” proper, as we shall use the term, is so far different from an unmeasurable one that it is not in effect an uncertainty at all. We shall accordingly restrict the term “uncertainty” to cases of the non-quantitative type.

Id. (emphasis omitted).

arguments, at issue here. These include that the views of inhabitants of the relevant “real world” do not count for much because theory sets up a presumption that survives unless rebutted, and the theorists decide whether a rebuttal passes muster. (And how would a debate about this be resolved? Who could be convinced of the other’s position, and how?) Some people also hold the view—evident especially in the early debates on enactment of the Williams Act as discussed above—that the continuing life of a corporation is a good thing, such that dismantling it is almost an act of violence: the identity of “defender of the corporation” is much at the fore in Williams’s remarks in the Williams Act debates.⁴⁶ There are multiple debates here, some of which relate to first principles held in one’s core, as a matter of identity, and many of which are not otherwise amenable to straightforward argumentation.

CONCLUSION

I have argued that debates as to short- versus long-term investors are not wholly, or perhaps even principally, conducted on the merits. I have described orthogonal factors—factors that do not directly bear on the substance of debates—that influence those debates. (It is tempting to say that the factors “complicate” the debates, but to do so risks falling into the trap I am trying to elucidate—what is the simpler alternative?) My hope is that this description can lead to a greater understanding of what might change minds—and as importantly—what might not. Might people be able to agree on what would constitute persuasive, or even dispositive, evidence *ex ante* and design tests accordingly? Among the areas ripe for further exploration are differing prototypes that different people hold, not just about managers, shareholder activists, and other shareholders, but also about the various types of stakeholders and their interests. Also notable is the weight different people accord to theory in general and to particular theories. I have argued that these views are not alterable in any simple way because they are part of the person’s identity or web of beliefs. People have sufficient stake in their beliefs that abandoning them, even in the face of considerable “evidence,” is often not straightforward.

This Essay has both a specific and a more general aim. The specific aim is to show the extent to which identity may be affecting and in some cases proving an obstacle to constructive debate as to long-term versus short-term investor time horizons, not to speak of arriving at a consensus on what is happening and what should happen.

46. See *supra* text accompanying note 20.

The more general and radical aim is to suggest that arguments over policies would be more productive if they were more focused on persuasion and less on “proof.”⁴⁷ None of this is to say that one ought not to try to prove things. But given people’s prior beliefs, their reasonable view that those prior beliefs are justified, and how difficult “real” proof is, moving the debate forward may best be accomplished by diversifying the approaches one takes.⁴⁸

47. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 5, 13 (1981).

48. The terminology of philosophical art is coercive: arguments are *powerful* and best when they are *knockdown*, arguments *force* you to a conclusion, if you believe the premisses you *have to* or *must* believe the conclusion, some arguments do not have much *punch*, and so forth. A philosophical argument is an attempt to get someone to believe something, whether he wants to believe it or not. A successful philosophical argument, a strong argument, *forces* someone to a belief. . . . Why are philosophers intent on forcing others to believe things? Is that a nice way to behave toward someone?

Id. at 4–5. To the response that Nozick is just talking about theoretical and not empirical arguments, I would point out that empirical arguments are not that qualitatively different from the types of arguments Nozick discusses. That reasonable people are disagreeing about empirical arguments means that such arguments are not, to use another physical metaphor, “slam-dunks,” so that Nozick’s point about coercion stands.