

THE MAXIMANDS OF CORPORATE GOVERNANCE: A THEORY OF VALUES AND COGNITIVE STYLE

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ABSTRACT

This article considers the raison d'être of corporations as it is reflected in the maximands of corporate governance. The debate over stockholders' versus stakeholders' interests as such maximands has been raging for decades. Advances in economic theory have not only failed to resolve this debate but have established that the problem is graver than what many may have estimated. This article turns this debate on its head: Instead of asking "What" or "Whose" interests corporations should maximize, the real question is, "Why is this debate taking place at all?" Aiming to extend current economic analyses of the maximands issue, this article puts forward a new theory about the factors that determine these maximands. Recent advances in psychological research point to value emphases at the individual and societal levels and to the need for cognitive closure as such factors. The theory proposes the notion of value complexity as an organizing element that may associate certain value emphases with cognitive style. Overall, this theory provides explanations for various sticky points in the stockholder-stakeholder debate in the United States and in international settings, identifies gaps in other theoretical accounts, and generates testable hypotheses for empirical research. Extant evidence supports this theory.

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I. INTRODUCTION

For nearly a century now, lawyers and scholars in other fields have been debating the question, "Whose interests should corporate fiduciaries maximize?" Michael Jensen, one of the founding fathers of modern corporate governance theory, recently argued that "200 years' worth of work in economics and finance indicates that social welfare is maximized when all firms in an economy maximize total firm value," which is defined as the value of equity plus other financial claims.¹ Others, however, call for "corporate social responsibility," holding that in addition to shareholders' interests, corporate officers must give weight to the interests of other corporate and societal constituencies. The latter are commonly called "stakeholders." The list of such potentially eligible stakeholders includes creditors, employees, customers, local communities, and the environment. This stockholder-stakeholder debate has reached such scope that some critics remarked, not entirely without merit, that these issues have now been debated *ad nauseam*.²

This article asks a new question that turns this debate on its head. Rather than asking "What" or "Whose" interests corporations should maximize, the inquiry becomes "Why is this debate taking place at all?" Unearthing the roots of the stockholder-stakeholder debate has become crucial not only in the United States but in many other countries as well. Prominent international bodies and numerous national ones have promulgated codes of principles for optimal corporate governance. These codes invariably call for giving priority to shareholders' interests while acknowledging the interests of other stakeholders³—yet they give no guidance as to how this target can be met.

This article maintains that two hundred years has not been enough to resolve the debate over the maximands of corporate governance.⁴ Its goal is twofold—both constructive and critical. In the constructive mode, this article advances a new theory on the maximands of corporate

¹Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 7 EUR. FIN. MGMT. 297, 302 (2001). Versions of this article appeared in BREAKING THE CODE OF CHANGE 37 (Michael Beer & Nithan Nohia eds., 2000); UNFOLDING STAKEHOLDER THINKING 65 (Joerg Andriof et al. eds., 2002); 14 J. APPLIED CORP. FIN. 8 (2001); 12 BUS. ETHICS Q. 235 (2002)..

²Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1195 (1999) ("For centuries legal, political, social, and economic commentators have debated corporate social responsibility *ad nauseam*..")

³See *infra* Part V.B.

⁴The use of the term "maximand" in this context follows FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 35-39 (1991).

governance that identifies crucial but heretofore neglected elements that engender this problem. In the critical mode, this article advances a new reading of existing analyses of corporate constituencies as corporate governance maximands.

Theoretical analyses have thus far failed to provide a satisfactory answer to the maximands problem. A careful reading of the seminal debate between Adolf Berle and E. Merrick Dodd indeed shows that several commentators may have misinterpreted this debate. Contrary to common belief, this article shows that Berle agreed with Dodd that the interests of non-shareholder constituencies should be advanced by corporate fiduciaries in tandem with shareholders' interests. Their disagreement revolved around whether and how this task could be implemented. Both scholars, however, were unable to answer these questions. As it happens, the legal literature has made very little progress since Berle first identified this implementation problem in the early 1930s.

The traditional law and economics perspective holds that in determining the maximands of the corporation, exclusive priority should be given to its residual claimants. This, in essence, is the basis for Jensen's view, in addition to other important commentators.⁵ This principle appears elegant and appealing at first glance. At each point in time, one only needs to identify the corporate constituency that holds the residual claim on the corporation. This residual claim should be the maximand for corporate fiduciaries. By definition, there can only be a single residual claimant—shareholders in the regular course of business and creditors during insolvency.

This position, however, does not, in reality, hold true. The fundamental flaw in this back-of-the-envelope economic analysis lies in its reliance on the notion of the residual claim. This concept is easy to grasp and employing it is largely consistent with central doctrines of corporate law. Yet this analysis hides an implicit assumption, namely, that apart from the residual claim all other claims on the corporation—or, more accurately, the interests of other stakeholders—are fixed and well defined. Hence, these other claims are assumed away from the analysis such that only the residual claim remains to be maximized. This assumption, however, is unrealistic. A more sensible analysis—reflected in modern economic theory of the firm—acknowledges that the corporate enterprise comprises several constituencies whose interests are both interdependent and indeterminate. As a result, legitimate *bona fide* disputes can arise with regard to the scope of entitlements in particular situations. As these

⁵See *infra* Part III.E.1.

interests may be conflicting with each other, e.g., those of shareholders, creditors, and employees, when the firm faces financial or business hardship, corporate decision makers are forced to consider them all simultaneously. In fact, these interests must be reconciled on an on-going basis if the firm is to keep functioning.

The corporate governance problem is therefore not one of maximizing over a single factor (the maximand). Rather, it calls for optimizing over several factors simultaneously. Two hundred years' worth of work in economics and finance is of little help for this task. Ironically, it is not even needed. Even high school level calculus provides that one cannot maximize an expression with more than a single unknown variable. In a rare treatment of this subject by economists, Erik Berglöf and Ernst-Ludwig von Thadden opine that the economic approach to corporate governance should be generalized to a model of multilateral interactions among a number of different stakeholders. Such a model must also take into account how a country's legal and political system affects this delicate balance.⁶ Important as it may be, these scholars argue, shareholder protection may not be sufficient for sustainable economic development, especially in transition economies.⁷

Economic theory currently fails to offer a framework for dealing with multiple stakeholders of firms that are run by agents. Recent advances in behavioral economics may bring some progress in this regard. But, as Berglöf and von Thadden note, in order to fully generalize the economic analysis of interactions between different stakeholders, this analysis has to integrate factors that operate at the societal level in addition to the individual level. Law and politics are two such factors. Culture is another factor that is regularly mentioned in the comparative branch of the stockholder-stakeholder debate. Yet societal-level analysis is an aspect about which current economic theory faces significant challenges.

Every theory of corporate governance is, at heart, a theory of power. In this view, the corporation is a nexus of power relationships beyond being a nexus of contracts. The corporate setting is rife with agency relationships in which certain parties have the ability (power) to unilaterally affect the interests of other parties notwithstanding preexisting contractual arrangements. In the present context, corporate fiduciaries are entrusted

⁶Erik Berglöf & Ernst-Ludwig von Thadden, *The Changing Corporate Governance Paradigm: Implications for Developing and Transition Economies*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 135, 139 (Boris Pleskovic & Joseph E. Stiglitz eds. 1999).

⁷*Id.* Berglöf and von Thadden further note, in the wake of the financial crises in Asia and Latin America, that protecting foreign investors has its limits, as international portfolio investment is a highly volatile source of funds and cannot be the centerpiece of a development program.

with the power to weigh and prefer the interests of certain constituencies to the interests of others (beyond their own self-interest). Given the current limitations of economic theory, progress in the analysis of the maximands of corporate governance may be achieved by drawing on additional sources of knowledge. This article points out certain branches of psychology as such sources.

The psychological study of reasoning by policy and decision makers in the presence of conflicting considerations, or interests, reveals that such reasoning varies systematically. Prominent factors found to be relevant in this regard are people's cognitive styles (i.e., their typical modes of handling information) and in particular, people's relative need for cognitive closure—to wit, their desire to put an end to deliberation and reach an answer, *any* answer.⁸ These factors in turn correlate with people's political views. Meanwhile, another branch of psychology has established that people from different cultures also differ in cognitive styles—among other things, in the treatment of contradiction and their modes of assigning responsibility. Finally, in yet another field of psychology, universal models of values at the individual and cultural levels have been advanced and validated. All of these advances seem to be taking place independently of one another and an integrative view of these issues has not been explicated.

The theoretical framework developed in this article is based on an integration of the insights suggested by these psychological studies. The psychological analysis thus complements the standard economic analysis of the maximands of corporate governance. The present theory yields specific, testable hypotheses in regards to both the micro level (individual persons or corporations) and the macro level (national and international). At the micro level, effective corporate governance requires corporate fiduciaries to first overcome their self-interest and second, to constantly coordinate the interests of several constituencies. Especially in pressing times, such as during economic downturns or in the face of a hostile takeover bid, some managers may prove better than others in performing this task. These managers will exhibit a lesser need to reach cognitive closure; they will tend to be of a liberal more than conservative or libertarian persuasion;⁹ their individual values will emphasize openness to change more than conservation, and self-transcendence more than self-

⁸See *infra* Part II.C.1.

⁹These titles of political inclinations have special meanings in American politics and may connote different meaning in other countries. They are used here for presentation convenience only. Moreover, as will be made clear below, it may be problematic to use only a single dimension—e.g., left vs. right—to classify ideological positions. See *infra* note 48 and accompanying text.

enhancement.¹⁰ Other managers would exhibit the opposite qualities more. Furthermore, a continuum of management styles exists between these two extremes. It must be stressed from the outset that these hypotheses do not imply that the former type of managers would do a better managerial job than the latter. The opposite probably would be true in many cases. The point is that certain management styles would vary systematically in accordance with managers' personal characteristics.

Further insights on these issues may be gained by conducting a comparative analysis of national corporate governance regimes. In contemplating which line of action to choose, corporate decision makers in the U.S. may consider what the law says and also how the media and public opinion would respond to their action. They are likely to prefer steps that are publicly palatable. When faced with a similar situation, however, German or Korean managers may take different lines of action in light of differences between the social environments within which they operate. Assuming the latter managers are equally attentive to the tastes of the public palate, the German and Korean styles of corporate governance may give greater weight to non-shareholder constituencies compared with the typical American style.

Stated more generally, managerial action will be affected by what is considered right, legitimate, or desirable in a specific society. This type of analysis is related to, but conceptually different than, the above reference to managers' individual values. In this context, issues are analyzed at the general societal level. Social scientists refer to what is considered good, right, or desirable in the society as "culture." It follows that managers in similar situations may reach different decisions depending on the culture in which they operate. At a more fundamental level, the law, social norms, and public views are likely to reflect the general culture of each country.

While some readers at this point might consider the propositions set forth as intuitive and self-evident, it should be stressed that this is entirely not the case. This article in fact challenges common wisdom at a number of levels. To begin, the above propositions reconcile and integrate conflicting theories in current corporate governance research. As a normative matter, the analysis proposed in this article vindicates Berle's position, that American managers should focus on maximizing shareholder wealth. The present analysis clarifies, however, that such a norm is justified only as a second-best policy in a particular national setting—specifically, in the U.S.

¹⁰The concepts mentioned in the text are terms of art. For definitions and theoretical analysis, see *infra* Part II.B.1

More generally, these assertions expand the boundaries of the emerging strand of behavioral law and economics and their application to corporate governance. These propositions are presented here as testable hypotheses that can be empirically confirmed or refuted. The theory advanced in this article thus suggests a new framework for the assessment of foreign corporate governance systems. This theory also lends itself to the design and implementation of corporate governance reforms by countries and international bodies alike.

This article proceeds as follows. Part II lays the foundations for the present theory. After reviewing basic concepts in the theories of values and cognitive styles, this Part integrates them, relying on the notion of "value complexity." It then applies the integrated framework to the problem of corporate governance maximands. Part III revisits the American stockholder-stakeholder debate. This new reading of the debate highlights the implementation problem that has bedeviled all proponents of multiple constituencies as maximands from Dodd to contemporary scholars. Part IV seeks to generalize the scope of discussion by looking into the field of management studies, which is a discipline that has been largely ignored by most legal commentators. In comparison to legal scholarship, writers in this field have made progress that deserves attention and analysis in the context of the present theory. Part V further extends the analysis by providing a comparative perspective on the maximands problem. This Part critically reviews recent trends of convergence and harmonization in corporate governance reform and points out their failure to meaningfully address the maximands problem. Part VI concludes.

II. FOUNDATIONS FOR A NEW THEORY

A. *Foreword*

Many corporate governance scholars contend that corporate decision makers cannot systematically implement the task of advancing the interests of non-shareholder constituencies in conjunction with shareholders' interests.¹¹ To some, the lack of clearly defined implementation methods implies that managers should focus only on shareholder value maximization. Others are seemingly unfazed by this implementation problem. Proponents of both extremes, however, put their heads in the sand. The needs and claims of non-shareholder constituencies must be addressed if the firm is to continue functioning, and managers and policy

¹¹For a detailed exposition of this claim, see *infra* Part III.

makers can use better advice than to simply deal with problems on an *ad hoc* basis.¹² The need to better understand the mechanisms underlying the maximands of corporate governance becomes more pressing with the globalization of financial markets. Firms and countries alike, both developed and developing, are urged to improve their corporate governance. But today, this injunction is narrowly construed as a call for improving public/minority shareholder protection from the opportunism of managers and controlling shareholders.

The goal of this Part is to advance a systematic framework for the analysis of the maximands of corporate governance. The foundations of this framework are drawn from psychological theories that bear on the central controversies in the stockholder-stakeholder debate—primarily the problem of dealing with competing claims and the managerial confusion they can entail. Using psychology as the underlying discipline of the present theory has the advantage of allowing one to address these issues at both the individual and societal level and to identify factors that operate at both levels. This framework lends itself to deriving testable hypotheses and, where available, empirical evidence will be presented.

Section B reviews dimensional theories of values at the individual and societal levels. Section C reviews recent advances in the study of cognitive styles within and across cultures with a special focus on the need for cognitive closure. A new integrative framework for discussing these issues is then offered. Section D implements this framework to the subject of corporate governance maximands. Section E sets forth supportive evidence.

B. *The Value Dimension Framework*¹³

The core concept in the present discussion is values. Values are defined as conceptions of the desirable that guide the way social actors (e.g., organizational leaders, policy makers, individual persons) select actions, evaluate people and events, and explain or justify their actions and

¹²See *infra* Part III.E.3.

¹³This Section draws on Peter B. Smith & Shalom H. Schwartz, *Values*, in 3 HANDBOOK OF CROSS-CULTURAL PSYCHOLOGY 77 (2d ed., John W. Berry et al. eds, 1997), and Shalom H. Schwartz, *Cultural Value Differences: Some Implications for Work*, 48 APPL'D PSYCHOL. INT'L REV. 23 (1999). Because the current study employs the framework developed by Schwartz, only this model is described in detail. For a review of theories that draw on the individualism/collectivism dimension developed by Geert Hofstede and Harry Triandis, see Smith & Schwartz, *supra*, at 88-91. This dimension, however, was first formulated in a cultural-level context.

evaluations.¹⁴ In this view, values are trans-situational criteria or goals (e.g., security, wealth, justice), ordered by importance as guiding principles in life. Values are not objective, cold ideas. Rather, when values are activated, they become infused with feeling. The trans-situational nature of values means that values transcend specific actions and contexts. Obedience, for example, is relevant at work or in school, in sports or in business, with family, friends, or strangers.

The ways that societal institutions (e.g., family, educational, economic, political, religious) function, their goals and their modes of operation express cultural value priorities. Because cultural value priorities are shared, role incumbents in social institutions (e.g., leaders in governments, teachers in schools, executive officers of corporations) can draw upon them to select socially appropriate behavior and to justify their behavioral choices to others (e.g., to go to war, to punish a child, to fire employees). The explicit and implicit value emphases that characterize a culture are imparted to societal members through everyday exposure to customs, laws, norms, scripts, and organizational practices that are shaped by and express the prevailing values.¹⁵

Thus, values are featured at two distinct levels of analysis: individual and societal (or cultural). These values are considered in step.

1. The Individual Level

A theory-driven analysis of values begins with identifying the fundamental issues facing people that define the human condition. Milton Rokeach provided a clear definition of values as guiding principles in life and proposed a list of values that was supposed to be universal, comprehensive, and exhaustive.¹⁶ Shalom Schwartz and Wolfgang Bilsky analyzed cross-national data based on a survey instrument developed by Rokeach and confirmed the existence of certain value types in each

¹⁴See generally Clyde Kluckhohn et al., *Value and Value Orientations in the Theory of Action*, in TOWARD A GENERAL THEORY OF ACTION 388 (Talcott Parsons & Edward A. Shils eds., 1951) (defining values and value orientations and demonstrating how they operate in society); MILTON ROKEACH, *THE NATURE OF HUMAN VALUES* (1973) (developing a systematic 'value approach' to the problems of society); Shalom H. Schwartz, *Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries*, in 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1 (Mark P. Zanna ed. 1992) (exploring value priorities in different contexts).

¹⁵See PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (Richard Nice trans., 1972); Hazel Rose Markus & Shinobu Kitayama, *A Collective Fear of the Collective: Implications for Selves and Theories of Selves*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 568 (1994).

¹⁶ROKEACH, *supra* note 14, at 5-17.

country.¹⁷ Thereafter, Schwartz advanced a comprehensive model of individual-level values that represent universal requirements of human existence (biological needs, coordination of social interaction, group functioning) as motivational goals. Schwartz extended the Rokeach value inventory with values drawn from other cultures, including Asian and African ones.¹⁸ Out of fifty-six items included in this inventory, forty-five have been shown to have equivalent content meaning across cultures.¹⁹ Table 1 provides definitions of the ten values types distinguished by Schwartz and the value items that reflect them.

Table 1. The Schwartz Individual-Level Value Types

Self-Direction	Independent thought and action-choosing, creating, exploring (creativity, freedom, independent, curious, choosing own goals)
Stimulation	Excitement, novelty and challenge in life (daring, a varied life, an exciting life)
Hedonism	Pleasure and sensuous gratification for oneself (pleasure, enjoying life)
Achievement	Personal success through demonstrating competence according to social standards (successful, capable, ambitious, influential)
Power	Social status and prestige, control or dominance over people and resources (social power, authority, wealth)

¹⁷See Shalom H. Schwartz & Wolfgang Bilsky, *Towards a Universal Psychological Structure of Human Values*, 53 J. PERSONALITY & SOC. PSYCHOL. 550, 568 (1987); Shalom H. Schwartz & Wolfgang Bilsky, *Towards a Theory of Universal Content and Structure of Values: Extensions and Cross-Cultural Replications*, 58 J. PERSONALITY & SOC. PSYCHOL. 878 (1990).

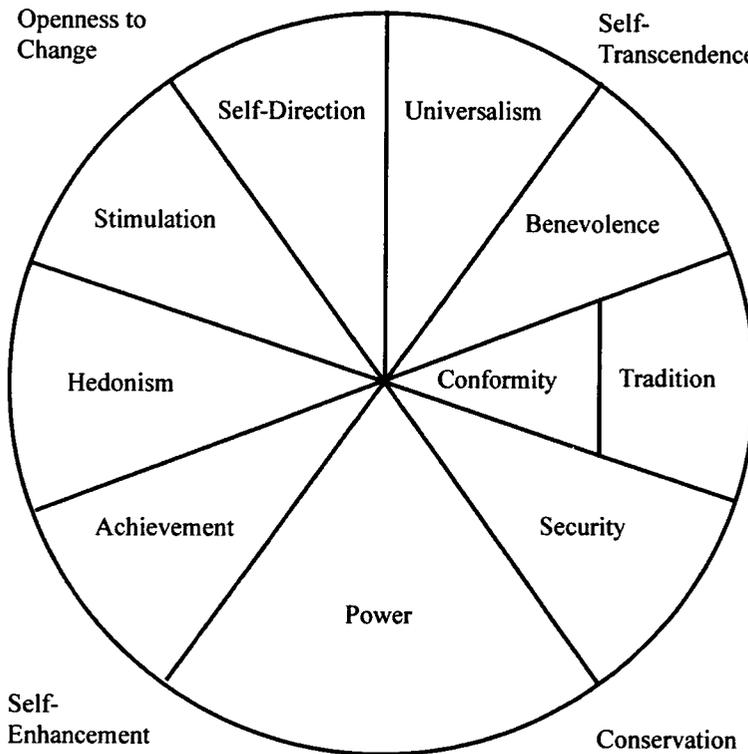
¹⁸See Schwartz, *supra* note 14; Shalom H. Schwartz et al., *Extending the Cross-Cultural Validity of the Theory of Basic Human Values with a Different Method of Measurement*, 32 J. CROSS-CULTURAL PSYCHOL. 519 (2001).

¹⁹For instance, "curious" has an equivalent meaning across cultures even if people from various cultures differ in the importance they ascribe to it as a guiding principle. See Schwartz, *supra* note 14; Shalom H. Schwartz, *Are There Universal Aspects in the Structure and Content of Human Values?* 50 J. SOC. ISSUES 19 (1994). For this survey, Schwartz also created versions of this inventory in other languages using procedures that ensured their language-equivalence.

Security	Safety, harmony and stability of society, of relationships and of self (family security, national security, social order, clean, reciprocation of favors)
Conformity	Restraint of actions, inclinations and impulses likely to upset or harm others and violate social expectations or norms (self-discipline, obedient, politeness, honoring parents and elders)
Tradition	Respect, commitment and acceptance of the customs and ideas that traditional culture or religion provide (accepting my portion in life, humble, devout, respect for tradition, moderate)
Benevolence	Preservation and enhancement of the welfare of people whom one is in frequent personal contact (helpful, honest, forgiving, loyal, responsible)
Universalism	Understanding, appreciation, tolerance and protection for the welfare of all people and for nature (broadminded, wisdom, social justice, equality, a world at peace, a world of beauty, unity with nature, protecting the environment)

An interesting feature of Schwartz's individual-level model is the structural interrelations among value types. These value types can be drawn as segments of a circle. Figure 1 depicts this spatial arrangement. Adjacent value types are conceptually close to one another whereas opposing value types express conceptually diametrical goals in life. Thus, individual persons that put a high emphasis on values of universalism (social justice, equality) would also tend to emphasize benevolence values (helpful, honest, etc.). Respectively, people that emphasize universalism and benevolence would tend to de-emphasize values that belong to opposing value types (e.g., achievement versus benevolence).

Figure 1. The Structure of Relations Among Individual Values



Multidimensional scaling analysis²⁰ has revealed that the values of the ten value types distinguished by Schwartz are organized along two bipolar orthogonal dimensions. These dimensions reflect a higher level of conceptual commonality among value types. One dimension, entitled Self-enhancement versus Self-transcendence, opposes power and achievement values to universalism and benevolence values.²¹ The dimension of Openness to change versus Conservation opposes self-direction and stimulation to security, conformity, and tradition values. Hedonism values share elements of both Openness to change and Self-enhancement.²² In

²⁰For more detail on the empirical methods used in cross-cultural psychological research, see Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147, 173-75 (2001).

²¹The names of value dimensions are capitalized throughout to notify that these are terms of art whose definitional meaning might differ from the common usage of these words.

²²See Smith & Schwartz, *supra* note 13, at 87-88.

sum, the Schwartz model provides a nearly universal description of the content and structural relations of human values at the individual level.²³

2. The Cultural Level

Cross-cultural psychologists have made considerable progress over the last two decades toward developing a universal analytical framework for comparing cultures.²⁴ Defined in subjective terms, culture is the values, orientations, and underlying assumptions that are prevalent among the members of a society.²⁵ A common postulate in cross-cultural psychology is that all societies confront similar basic issues or problems when regulating human activity. The cultural responses to the basic problems that societies face are reflected, among other things, in prevailing value emphases of individuals.²⁶ Because values vary in importance, it is possible to characterize societies according to the relative importance attributed to these values in the society using dimensional models. This yields unique cultural profiles for societies or countries.²⁷

The importance of the distinction between the individual and the societal levels of analysis cannot be overstated. At the individual level, the relative importance of values for the individual person is analyzed, given the general challenges that he or she faces in conducting his or her life. At the societal level of analysis, the societal responses to challenges that societies face are sought. Although societies do not make conscious decisions or choices, they do struggle with the need to ensure subsistence

²³There is now substantial supportive evidence that the Schwartz model indeed reflects a universal structure of human values. See Wolfgang Bilsky & Mareike Koch, *On the Content and Structure of Values: Universals or Methodological Artefacts?* in SOCIAL SCIENCE METHODOLOGY IN THE NEW MILLENNIUM (Jörg Blasius et al. eds. 2002); Shalom H. Schwartz et al., *Extending the Cross-Cultural Validity of the Theory of Basic Human Values with a Different Method of Measurement*, 32 J. CROSS-CULTURAL PSYCHOL. 519 (2001).

²⁴The text only summarizes the core features of the two leading models in this field. For a general accessible introduction to cross-cultural psychology and additional sources, see Licht, *supra* note 20. For further detail, see Schwartz, *supra* note 13.

²⁵This definition is similar to that adopted in studies of the effects of societal development; see, e.g., CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS (Lawrence E. Harrison & Samuel P. Huntington eds., 2000), and widespread in cross-cultural psychology, e.g., HANDBOOK OF CROSS-CULTURAL PSYCHOLOGY (John Berry et al. eds., 2d ed. 1997).

²⁶See, for instance, ROKEACH, *supra* note 14; FLORENCE R. KLUCKHOHN & FRED L. STRODTBECK, VARIATIONS IN VALUE ORIENTATIONS (1961).

²⁷In this article the words "cultural" and "societal" are used interchangeably because the present focus is on national societies. It is possible, however, to implement the value dimension framework to study sub-national groups. See Heather M. Coon & Markus Kemmelmeier, *Cultural Orientations in the United States: (Re-)examining Differences Among Ethnic Groups* 32 J. CROSS-CULTURAL PSYCHOL. 348 (2001).

and to establish social order, etc.—some societies more successfully than others. To illustrate the distinction, it may be noted that giving high priority to both authority and humility would be incompatible at the individual level: one cannot conduct one's life simultaneously seeking authority and trying to be humble in the same situation.²⁸ At the cultural level, however, these values are compatible. "The societal system will run more smoothly if people accept authority as a desirable basis for organizing human relations *and* humility as the appropriate response toward those with greater authority."²⁹

Thus, the "players" at the two levels of analysis are different, as are the problems they face and the answers they give to these problems. In comparing cultures, cross-cultural psychologists take advantage of the fact that general societal orientations, namely, culture, are reflected in value preferences of individual persons and compare differences in *average* value preferences across societies.³⁰

In the wake of his joint work with Bilsky, Schwartz developed a cultural level theory during the 1990s and validated it in survey data that covered some 55,000 respondents in sixty-seven nations.³¹ Schwartz derives three bipolar cultural value dimensions from three basic issues he identifies as confronting all societies: Embeddedness/Autonomy, Hierarchy/Egalitarianism, and Mastery/Harmony.³² In coping with these issues, societies exhibit greater or lesser emphasis on the values at one pole of each dimension.³³ Seven value orientations on which cultures can be compared derive from the analysis of the bipolar dimensions.³⁴ The theory also specifies the structure of relations among these types of values.³⁵ Table 2 provides definitions of the cultural value dimensions distinguished by Schwartz. Figure 2 presents graphically the relations among the value dimensions and orientations.

²⁸Smith & Schwartz, *supra* note 13, at 82-83.

²⁹*Id.* at 83 (emphasis added).

³⁰PETER B. SMITH & MICHAEL HARRIS BOND, *SOCIAL PSYCHOLOGY ACROSS CULTURES* 48-49 (2d ed. 1998)

³¹See Schwartz, *supra* note 13.

³²*Id.*

³³*Id.*

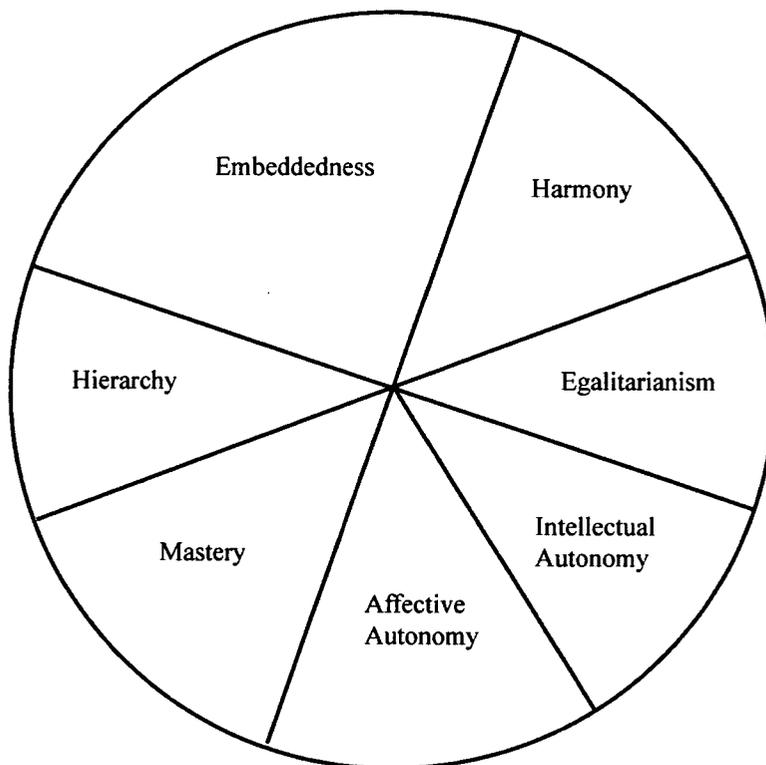
³⁴*Id.*

³⁵See Schwartz, *supra* note 13.

Table 2. The Schwartz Cultural-Level Value Dimensions

Embeddedness/Autonomy	This dimension concerns the desirable relationship between the individual and the group. Embeddedness represents a cultural emphasis on maintenance of the status quo, propriety, and restraint of actions or inclinations that might disrupt the solidary group or the traditional order. The opposite pole describes cultures in which the person is viewed as an autonomous, bounded entity who finds meaning in his or her own uniqueness.
Hierarchy/Egalitarianism	This dimension refers to guaranteeing responsible behavior that will preserve the social fabric. Hierarchy represents a cultural emphasis on obeying role obligations within a legitimately unequal distribution of power, roles, and resources. Egalitarianism represents an emphasis on transcendence of selfish interests in favor of voluntary commitment to promoting the welfare of others.
Mastery/Harmony	This dimension refers to the relation of humankind to the natural and social world. Mastery stands for a cultural emphasis on getting ahead through active self-assertion whereas Harmony represents an emphasis on fitting harmoniously into the environment.

Figure 2. The Structure of Relations Among Cultural Orientations



Another pioneering and still influential dimensional framework for characterizing cultures was advanced by Geert Hofstede.³⁶ His framework is widely used today in studies on management and accounting.³⁷ Hofstede

³⁶See GEERT HOFSTED, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* (2d ed. 2001) [hereinafter HOFSTED, *CULTURE'S CONSEQUENCES*]; GEERT HOFSTED, *CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* (1980) [hereinafter HOFSTED, *CULTURE'S CONSEQUENCES* 1980]; GEERT HOFSTED, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* (1991) [hereinafter HOFSTED, *SOFTWARE OF THE MIND*].

³⁷See Peter B. Smith, *The End of the Beginning?*, 1 INT'L J. CROSS-CULTURAL MGMT. 21 (2001). See also RICHARD MEAD, *INTERNATIONAL MANAGEMENT: CROSS-CULTURAL DIMENSIONS* (2d ed. 1998) (drawing on Hofstede's theory); STEPHEN P. ROBBINS & MARY COULTER, *MANAGEMENT* 125-29 (6th ed 1999) (arguing that "[t]he most valuable framework to help managers better understand differences between national cultures was developed by Geert Hofstede"); Greame Harrison & Jill L. McKinnon, *Cross-Cultural Research in Management*

identified four—and later, five—value dimensions: Individualism/Collectivism, Power Distance, Uncertainty Avoidance, Masculinity/Femininity,³⁸ and Long-term Orientation.³⁹ Table 3 provides definitions of the cultural value dimensions distinguished by Hofstede.

Table 3. The Hofstede Cultural-Level Value Dimensions

Individualism/Collectivism	Valuing loosely knit social relations in which individuals are expected to care only for themselves and their immediate families versus tightly knit relations in which they can expect their wider in-group (e.g., extended family, clan) to look after them in exchange for unquestioning loyalty.
Power Distance	Accepting an unequal distribution of power in institutions as legitimate or illegitimate.

Control System Design: A Review of the Current State, 24 ACTG ORG. & SOC. 483 (1998) (drawing on Hofstede's theory). Hofstede's work has also stirred objections on various grounds over the years. For a review and discussion of common objections, see HOFSTEDE, CULTURE'S CONSEQUENCES, *supra* note 36, at 73; *see also* Ulrich Schimmack et al., Individualism: A Valid and Important Dimension of Cultural Differences (Working Paper 2002), available at <http://www.erin.utoronto.ca/~w3psyuli/msIndividualism.pdf>.

³⁸This label has elicited negative responses. Writing originally in 1980, Hofstede was well aware of the problems of attributing certain qualities to particular genders. He nonetheless kept this dimension, arguing that it reflects a positive reality that is independent of its normative undesirability. HOFSTEDE, CULTURE'S CONSEQUENCES 1980, *supra* note 36, at 277-78. In the 2001 edition, Hofstede follows the modern distinction between *sex* and *gender* and uses the latter term when referring to social function. HOFSTEDE, CULTURE'S CONSEQUENCES, *supra* note 36, at 280. For further discussions, see GEERT HOFSTEDE ET AL., MASCULINITY AND FEMININITY: THE TABOO DIMENSION OF NATIONAL CULTURES (1998).

³⁹This value dimension was not included in Hofstede's original study. It was added later, in HOFSTEDE, SOFTWARE OF THE MIND, *supra* note 36, at 14-15, in light of a study led by Michael Bond who named it "Confucian work dynamism." *See Chinese Values and the Search for Culture-Free Dimensions of Culture: The Chinese Cultural Connection*, 18 J. CROSS-CULTURAL PSYCHOL. 143 (1987). Notwithstanding its apparent link to Asian cultures it is arguably a universal dimension. Data for this dimension cover a smaller set of countries and it is not commonly used in the literature.

Uncertainty Avoidance	Feeling uncomfortable or comfortable with uncertainty and ambiguity and therefore valuing or devaluing beliefs and institutions that provide certainty and conformity.
Masculinity/Femininity	Valuing achievement, heroism, assertiveness, and material success versus relationships, modesty, caring for the weak, and interpersonal harmony.
Long-Term Orientation	Having a long-term time orientation; emphasizing Confucian work ethics such as thrift and persistence.

Based on their value priorities, countries can further be classified into cultural regions. Hofstede's analysis yielded the following regions: Anglo, Germanic, Nordic, two Latin regions, two Asian regions (one consisting only of Japan), and Near Eastern.⁴⁰ Schwartz identified six cultural groups of nations: English-speaking, West European, East European, Far Eastern, Latin American, and African.⁴¹ A broader, more recent sample suggests that the Far Eastern cultural region comprises two sub-regions: South Asian and Confucian.⁴²

C. Cognitive Styles, Complexity, and Values

1. The Need for Cognitive Closure and Complexity

One of the basic tasks that people constantly face is to acquire and construct knowledge. The cognitive processes of knowledge acquisition are the subject of an ever-growing collection of psychological literature. Among the factors that influence these processes is the need for cognitive

⁴⁰HOFSTEDE, CULTURE'S CONSEQUENCES 1980, *supra* note 36, at 333-36. Note that the classification into more and less economically developed cultural regions dates from 1980.

⁴¹Schwartz, *supra* note 13, at 35-39.

⁴²Shalom H. Schwartz, Relations of Culture to Social Structure, Demography and Policy in the Study of Nations, Invited lecture delivered at the 25th International Congress of Applied Psychology, Singapore (July 2002) (on file with author). The Confucian region consists of China, Hong Kong, Taiwan, South Korea, Singapore, and Japan—though Japan differs somewhat from the others.

closure, defined by Arie Kruglanski as "the desire for a definite answer on some topic, *any* answer as opposed to confusion and ambiguity."⁴³ The need for cognitive closure is primarily motivational. That is, "need" denotes a motivational tendency or proclivity rather than a tissue deficit.⁴⁴ Cognitive closure is a goal that can bias individuals' choices when they are faced with the need to acquire new knowledge (including updating existing knowledge) in order to make decisions. This is because cognitive processes are costly: they take time and entail mental effort. Achieving cognitive closure is thus accompanied by positive affective reaction, and vice versa, when the attainment of closure is threatened.⁴⁵

The need for cognitive closure concept is close to similar constructs advanced earlier by psychologists such as closed mindedness,⁴⁶ certainty vs. uncertainty orientation, and need for cognition.⁴⁷ These constructs have been strongly associated with political conservatism—defined as general resistance to change and endorsement of inequality—in light of a wide array of psychological theories that relate political conservatism with "a generalized susceptibility to experiencing threat or anxiety in the face of uncertainty."⁴⁸ The need for cognitive closure involves tendencies to

⁴³ARIE W. KRUGLANSKI, LAY EPISTEMICS AND HUMAN KNOWLEDGE: COGNITIVE AND MOTIVATIONAL BASES 14 (1989).

⁴⁴Arie W. Kruglanski & Donna M. Webster, *Motivated Closing of the Mind: "Seizing" and "Freezing,"* 103 PSYCHOL. REV. 263, 264 (1996).

⁴⁵Lucia Mannetti et al., *A Cross-Cultural Study of the Need for Cognitive Closure Scale: Comparing Its Structure in Croatia, Italy, USA and the Netherlands,* 41 BRIT. J. SOC. PSYCHOL. 139, 140 (2002).

⁴⁶See MILTON ROKEACH, THE OPEN AND THE CLOSED MIND (1960).

⁴⁷Kruglanski & Webster, *supra* note 44, at 264. Sorrentino and Roney trace the possible roots of certainty/uncertainty orientation to people's early childhood development. RICHARD M. SORRENTINO & CHRISTOPHER J.R. RONEY, THE UNCERTAIN MIND: INDIVIDUAL DIFFERENCES IN FACING THE UNKNOWN 7 (2000) ("From a psychodynamic [approach], the [certainty-oriented person] likely did not make it through the oral, anal, and phallic stages of development very successfully. Consequently, this person developed a basic mistrust in the world, a lack of a sense of autonomy, and a desire to adhere to predictable and familiar worlds."); see also Richard M. Sorrentino & Judith-Ann C. Short, *Uncertainty Orientation, Motivation, and Cognition, in THE HANDBOOK OF MOTIVATION AND COGNITION: FOUNDATIONS OF SOCIAL BEHAVIOR* 379, 400 (Richard M. Sorrentino & E. Tory Higgins eds., 1986) (same, but without reference to the phallic stage). Sorrentino and Roney note that even without reliance on "the excessive baggage of Freudian and Eriksonian thought that many find unpalatable today," early childhood development probably accounts for certainty versus uncertainty orientation. SORRENTINO & RONEY, *supra*, at 157-58. These authors further speculate that these orientations might be related to inborn dispositions. Under either theory, such orientation would be difficult to alter in adult age. *Id.*

⁴⁸John T. Jost et al., *Political Conservatism as Motivated Social Cognition,* 129 PSYCHOL. BULL. 339, 347 (2003) (citing Glenn D. Wilson, *A Dynamic Theory of Conservatism, in THE PSYCHOLOGY OF CONSERVATISM* 257, 259 (Glenn D. Wilson ed., 1973) (emphasis omitted)) [hereinafter Jost et al., *Political Conservatism*]. For a critique on this general thesis and a forceful rejoinder, see, respectively, Jeff Greenberg & Eva Jonas, *Psychological Motives and*

"seize" and "freeze" upon information that is readily accessible (simply stated: stick to what first comes to mind). Notwithstanding its motivational nature, this phenomenon is therefore also referred to as a cognitive style because it relates to modes of handling information.⁴⁹ Individuals differ from one another in their stable degree of preference for closure and across situations to the extent which they are open to novel information and willing to invest the cognitive effort required for adjusting their knowledge base.⁵⁰

Kruglanski, Webster, and Klem have developed and validated a scale (survey questionnaire) for measuring the degree of individual need for cognitive closure.⁵¹ Statistical analysis revealed that the scale items point

Political Orientation—The Left, the Right, and the Rigid: Comment on Jost et al. (2003), 129 PSYCHOL. BULL. 376 (2003); John T. Jost et al., *Exceptions That Prove the Rule—Using a Theory of Motivated Social Cognition to Account for Ideological Incongruities and Political Anomalies: Reply to Greenberg and Jonas (2003)*, 129 PSYCHOL. BULL. 383 (2003). Notwithstanding the fact that it summarizes research of several decades, Jost et al.'s article raised vocal objections from right-wing groups shortly after its publication in the summer of 2003. See, e.g., Vicki Haddock, *The Right Stuff: Getting in Touch with the Mussolini Inside: A Trip Inside the Conservative Mind is a Perilous Journey Indeed*, THE SAN FRANCISCO CHRONICLE, Aug. 3, 2003, at D2; Byron York, *The "Conservatives Are Crazy" Study: Paid For by Taxpayers*, THE NAT'L REV. ONLINE (Aug. 1, 2003), at <http://www.nationalreview.com/york/york080103.asp>; David Fein, *Psychological Study Links Hitler to Reagan, Limbaugh*, at <http://www.crosswalk.com/news/1211434.html> (visited Dec. 20, 2004).

A thorny issue, which the various authors, *supra* note 48, abstract from, and this article will follow suit, is the validity of classifying political ideologies and orientations along a unidimensional left-right or conservative-liberal continuum. Philip Tetlock has argued that "it [was] impossible to [create] a psychometrically defensible one-dimensional measure of ideology." Tetlock empirically derives two such dimensions: high/low traditional conservatism and high/low market libertarianism. Philip E. Tetlock, *Cognitive Biases and Organizational Correctives: Do Both Disease and Cure Depend on the Politics of the Beholder?*, 45 ADMIN. SCI. Q. 293 (2001) (citing HERBERT MCCLOSKEY & ALIDA BRILL, *THE DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES* (1983); Donald R. Kinder, *Opinion and Action in the Realm of Politics*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 778 (D. Gilbert et al. eds., 4th ed. 1998)). Shalom Schwartz similarly notes that "students of politics have identified two major dimensions of political ideology on which parties in various countries are differentiated." Shalom Schwartz, *Value Priorities and Behavior: Applying a Theory of Integrated Value Systems*, 8 ONTARIO SYMP. ON PERSONALITY AND SOC. PSYCHOL.: THE PSYCHOL. OF VALUES I, 10 (Clive Seligman et al. eds., 1996). One is concerned with civil liberties and law and order; the other with economic issues.

⁴⁹See John T. Jost et al., *Effects of Epistemic Motivation on Conservatism, Intolerance, and Other System-Justifying Attitudes*, in SHARED COGNITION IN ORGANIZATIONS: THE MANAGEMENT OF KNOWLEDGE 91, 93 (Leigh L. Thompson et al. eds., 1999); Kruglanski & Webster, *supra* note 44, at 267.

⁵⁰See Kruglanski & Webster, *supra* note 44, at 264.

⁵¹Arie W. Kruglanski et al., *Motivated Resistance and Openness to Persuasion in the Presence or Absence of Prior Information*, 65 J. PERSONALITY & SOC. PSYCHOL. 861 (1993); Donna M. Webster & Arie W. Kruglanski, *Individual Differences in Need for Cognitive Closure*, 67 J. PERSONALITY & SOC. PSYCHOL. 1049 (1994).

to five factors representing this concept: preference for order and structure, preference for predictability, decisiveness of judgment and choices, discomfort with ambiguity, and closed-mindedness.⁵² Recent research shows that the need for cognitive closure as captured by the Kruglanski and Webster scale exhibits a similar dimensional structure in samples from the United States, Croatia, Italy, and The Netherlands,⁵³ and, separately, among Hong Kong Chinese.⁵⁴ Using this scale, Kruglanski, Webster, and colleagues have demonstrated that the need for cognitive closure produces similar consequences whether this need is evoked situationally (e.g., by time pressure or by ambient noise), or as an individual personality characteristic.⁵⁵

Thus, the evidence shows that the need for cognitive closure is a universal trait but that its actual manifestations vary among individuals and across situations. Research in another field of psychology, judgment and decision making, may be helpful in identifying the factors that influence this variation. The pivotal observation here is that cognitive processes are taxing for individuals. This is strongly evidenced by the phenomenon of cognitive heuristics, which allow for fast and frugal reasoning albeit at the price of systematic errors.⁵⁶ Human decision strategies change depending on a number of factors, including the decision's perceived importance, motivation, time pressure, and the complexity of the decision. Payne, Bettman, and Johnson have emphasized the role of minimizing the cognitive effort involved in decision making. They have argued that

⁵²See Kruglanski et al., *supra* note 51.

⁵³Mannetti et al., *supra* note 45. Note that as this analysis was conducted at the individual level, its findings do not indicate that people from different cultures exhibit similar levels of need for closure—only that the need for cognitive closure is a construct that could be applied cross-culturally. Mannetti et al. argue, however, that the scale items that reflect the decisiveness subdimension are probably susceptible to Western cultural bias that values quick decision making. *Id.* at 152-53. For an application of the need for closure scale in Germany without reporting on subdimensional structure, see Markus Kemmelmeier, *Need for Closure and Political Orientation Among German University Students*, 137 J. SOC. PSYCHOL. 787 (1997).

⁵⁴See Chi-yue Chiu et al., *Motivated Cultural Cognition: The Impact of Implicit Theories on Dispositional Attribution Varies as a Function of Need for Closure*, 78 J. PERSONALITY & SOC. PSYCHOL. 247 (2000).

⁵⁵For further discussion and concentration of references, see Jost et al., *Political Conservatism*, *supra* note 48, at 348.

⁵⁶See GERD GIGERENZER ET AL., *SIMPLE HEURISTICS THAT MAKE US SMART* (1999) (presenting a collection of studies demonstrating how heuristics ("cognitive biases") can enable both living organisms and artificial systems to make smart choices, judgments, and predictions by employing bounded rationality).

complex decisions involving many alternatives are more taxing and lead people to adopt simplifying heuristics.⁵⁷

In the economics literature, Sonsino and colleagues have documented what they call "complexity-aversion," or "negative complexity effects in choice with uncertainty."⁵⁸ In particular, they show that more complex alternatives are less likely to be chosen, and that noise in the choice process increases with complexity.⁵⁹ Cognitive complexity was studied earlier in connection with individuals' political ideology. As defined by Tetlock, individuals' integrative complexity refers to the extent of differentiation among multiple perspectives or dimensions and the higher order integration or synthesis of these differentiated components.⁶⁰ In political decision making of voters, cognitive heuristics are at times employed by almost all voters, and they are particularly likely to be used when the choice facing voters is complex.⁶¹

Taken together, this evidence points to the likely connection between complexity and the need for cognitive closure—namely, more complex tasks entail greater cognitive effort, which more strongly invokes the need for cognitive closure. Research in cultural psychology supports this proposition in demonstrating that when the level of need for cognitive closure rises, people are more likely to fall back on "standard solutions" to problems suggested by their culture.⁶² In ambiguous, complex social interactions, culture provides easily accessible heuristics for reaching satisfactory solutions.⁶³ These solutions differ systematically, though, with people's culture.⁶⁴

⁵⁷JOHN W. PAYNE ET AL., *THE ADAPTIVE DECISION MAKER* 29-41 (1993); see also James R. Bettman et al., *A Componential Analysis of Cognitive Effort in Choice*, 45 *ORG. BEHAVIOR & HUMAN DECISION PROCESSES* 111 (1990).

⁵⁸See Doron Sonsino et al., *The Complexity Effects on Choice with Uncertainty—Experimental Evidence*, 112 *ECON. J.* 936, 937 (2002).

⁵⁹See *id.*; see also Doron Sonsino & Marvin Mandelbaum, *On Preference for Flexibility and Complexity Aversion—Experimental Evidence*, 51 *EXPERIMENTAL EVIDENCE, THEORY AND DECISION* 197 (2001) (showing that increasing the number of options produces a negative complexity effect).

⁶⁰See Philip E. Tetlock, *Cognitive Style and Political Belief Systems in the British House of Commons*, 46 *J. PERSONALITY & SOC. PSYCHOL.* 365 (1984); Philip E. Tetlock, *Cognitive Style and Political Ideology*, 45 *J. PERSONALITY & SOC. PSYCHOL.* 118 (1983).

⁶¹See Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 *AM. J. POL. SCI.* 951 (2001).

⁶²See *infra* note 64.

⁶³*Id.*

⁶⁴See Ho-Ying Fu & Michael W. Morris, *Which Romans Do "as Romans Do"? Individual Differences in Conformity to Cultural Conflict Resolution Scripts*, (Working Paper 2002), available at http://gobi.stanford.edu/researchpapers/detail.asp?Paper_No=1660 (showing that both American and Chinese subjects with higher levels of need for cognitive closure tended to rely

Examination of the content of the need for closure construct suggests that it is closely related to the Conservation versus Openness to change dimension.⁶⁵ The subscales that are captured in Kruglanski and Webster's scale and the items that reflect them overlap conceptually with the values of security, tradition, and conformity in Schwartz's model on the one hand versus self-direction and stimulation values on the other hand.⁶⁶ The emphasis on preserving the status quo—whether real or an imaginary ideal thereof (consider "preserving family values")—is especially clear in such value items as respect for tradition, honoring parents and elders, and social order. The preference for certainty over ambiguity and change is also reflected in seemingly innocuous value items like cleanliness, which conveys a sense of clarity.⁶⁷

The need for closure may also be related to the Self-enhancement versus Self-transcendence dimension. Self-transcendence, reflected in values of benevolence and universalism, calls for considering multiple others in addition to considering oneself. To the extent that values participate significantly in affecting behavioral choices, people who see merit in multiple considerations would exhibit lesser need to reach cognitive closure, and vice versa for individuals who are higher on power and achievement values. Studies done by Philip Tetlock and colleagues indirectly support these hypotheses and the association of higher need for cognitive closure with political conservatism.⁶⁸ Studies by Schwartz and colleagues demonstrate relations of value priorities to behavior, some of it

more on their cultures' (different standard scripts for dispute resolution); Chiu et al., *supra* note 54, at 256 ("What cultural knowledge provides to the individual is a set of highly accessible cognitive tools that can be applied to a problem to reach a quick interpretation and articulation of one's answer.") Note that these findings also corroborate the evidence that individuals' behavior tends to comply with their values. See *infra* note 69 and accompanying text.

⁶⁵See *supra* Table 1, notes 17-19 and accompanying text.

⁶⁶Kruglanski & Webster, *supra* note 44.

⁶⁷*Cf.* Jost et al., *Political Conservatism*, *supra* note 48, at 346.

⁶⁸See, e.g., Tetlock, *supra* note 48; Philip E. Tetlock, *The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model*, in 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 331 (Mark P. Zanna ed., 1992); Philip E. Tetlock et al., *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCHOL. 632 (1989). For further discussion, see Jennifer S. Lerner & Philip E. Tetlock, *Accountability and Social Cognition*, in ENCYCLOPEDIA OF HUMAN BEHAVIOR (V.S. Ramachandran ed., 1994); Philip E. Tetlock & Jennifer S. Lerner, *The Social Contingency Model: Identifying Empirical and Normative Boundary Conditions on the Error-and-Bias Portrait of Human Nature*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 571 (Shelly Chaiken & Yaacov Trope eds., 1999).

directly relevant to the liberal-conservative distinction.⁶⁹ Further research of this subject is clearly warranted.

The above findings and observations suggest that the need for cognitive closure can be more systematically related to Schwartz's universal model of individual value dimensions. This article proposes that the notion of complexity may be a helpful organizing element for this purpose. In line with research on complexity and cognitive effort, greater complexity is associated with a greater number of relevant elements worthy of consideration and higher uncertainty and ambiguity. Values, therefore, may differ in the level of complexity they feature. Values whose subject is multifaceted or involves multiple issues (persons, entities, etc.), or is more ambiguous, may be deemed more complex, and vice versa. In this view, Openness to change and Self-transcendence may be considered more complex than Conservation and Self-enhancement, respectively.

It follows that adhering to values of the former two dimensional poles entails greater cognitive complexity than adhering to values of the latter poles. Hence, compliance with higher-complexity values would be more likely to induce a need for cognitive closure in individuals. After all, if the need for cognitive closure can vary as a function of internal individual traits and external environmental circumstances, one may be justified in expecting similar variance as a function of the object of behavior—specifically, a function of the complexity of values that underlie such behavior.

2. Cognitive Styles Across Cultures

For several decades, most psychologists have assumed that basic cognitive processes are universal; that every human being is equipped with

⁶⁹See Anat Bardi & Shalom H. Schwartz, *Values and Behavior: Strength and Structure of Relations*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 1207 (2003); Marina F. Barnea & Shalom H. Schwartz, *Values and Voting*, 19 POLITICAL PSYCHOL. 17 (1998); Schwartz, *supra* note 48. To be sure, the path from values to behavior is complicated and involves several mediating factors. One would be misguided to expect a unique deterministic link between values and behavior—in the least, because many values that belong to opposing value types are viewed positively by many people (see Table 1), such that contradicting values may be activated as a matter of course. Cf. Connie M. Kristiansen & Alan M. Hottel, *Morality and the Self: Implications for When and How of Value-Attitude-Behavior Relations*, 8 ONTARIO SYMP. ON PERSONALITY AND SOC. PSYCHOL.: VALUES 77 (Clive Seligman et al. eds., 1996) (questioning the causal relations between values and behavior); Kwok Leung et al., *How to Explain Cross-Cultural Differences: Values, Valences, and Expectancies?*, 1 ASIAN J. PSYCHOL. 70 (1995) (discussing mediating factors).

the same set of attentional, memorial, learning, and inferential procedures.⁷⁰ "Cognitive scientists' endorsement of the . . . universalistic position was . . . encouraged by the analogy between the human mind and the computer: brain = hardware, cognitive procedures . . . = operating principles and factory-installed software."⁷¹ According to Nisbett and Norenzayan, "[t]he heuristics and biases movement started by [Amos] Tversky and [Daniel] Kahneman encouraged the view that procedures such as judgment of probability by the representativeness heuristic and judgment of frequency by the availability heuristic, were primary, universal, and difficult to alter."⁷²

Evidence that has accumulated mostly since the late 1990s now casts doubt on the universality assumption about cognitive processes. Among other things, studies indicate that cognitive styles differ markedly across cultures. That is, people from different cultures perceive, understand, and judge the world in systematically different ways. Cultural differences in cognitive processes are further tied to cultural differences in basic assumptions about the nature of the world.⁷³ Nisbett and Norenzayan argue that cultural practices encourage and sustain certain kinds of cognitive processes, which then perpetuate these cultural practices.⁷⁴

The vast majority of empirical studies compared Western subjects (mostly American) with East Asian subjects (mostly Chinese and

⁷⁰This is only one basic assumption of several. The literature on culture and cognition is outpouring. For sample reviews, on which the following paragraphs draw liberally, see Alan Page Fiske et al., *The Cultural Matrix of Social Psychology*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 915 (Daniel T. Gilbert et al., 4th ed. 1998); Richard E. Nisbett & Ara Norenzayan, *Culture and Cognition*, in STEVENS' HANDBOOK OF EXPERIMENTAL PSYCHOLOGY: MEMORY AND COGNITIVE PROCESS 561 (Douglas Medin ed. 3d ed. 2002); Richard E. Nisbett et al., *Cultures and Systems of Thought: Holistic versus Analytic Cognition*, 108 PSYCHOL. REV. 291 (2001); Kaiping Peng et al., *Culture and Human Inference*, in THE HANDBOOK OF CULTURE AND PSYCHOLOGY 245 (D. Matsumoto ed. 2001).

⁷¹Nisbett & Norenzayan, *supra* note 70, at 561 (citing Ned Block, *The Mind as the Software of the Brain*, in 3 THINKING: AN INVITATION TO THE COGNITIVE SCIENCE 377 (Edward E. Smith & Daniel N. Osherson eds., 2d ed., 1995)). Note, anecdotally, that Hofstede considered culture to be the software of the mind. HOFSTEDE, *SOFTWARE OF THE MIND*, *supra* note 36.

⁷²Nisbett & Norenzayan, *supra* note 70, at 561-62 (citations omitted). For law-oriented discussions, see Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Justin D. Levinson & Kaiping Peng, *Different Torts for Different Cohorts: A Cultural Psychological Critique of Tort Law's Actual Cause and Foreseeability Inquiries*, 13 S. CAL. INTERDISC. L.J. 195 (2004). See also Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (discussing law and economics analysis in light of actual human behavior).

⁷³See, e.g., Tanya Menon et al., *Culture and the Construal of Agency: Attribution to Individual versus Group Dispositions*, 76 J. PERSONALITY & SOC. PSYCHOL. 701 (1999).

⁷⁴Nisbett & Norenzayan, *supra* note 70, at 562.

Korean).⁷⁵ For instance, Americans were more inclined to assign causality and responsibility to individual group members in agency situations, while the Asians were more inclined to assign causality to attributes of the group as a whole.⁷⁶ In explaining causes of behavior, Asians more than Americans placed credence on situational and interactional factors.⁷⁷ Asians were also better able than Americans at recognizing the influence of situational constraints on individual behavior: Americans were more susceptible to the fundamental attribution error.⁷⁸ On the other hand, Asians were more susceptible to the hindsight bias, believing that they could have predicted outcomes that in fact one could not have predicted.⁷⁹ This finding may stem from the fact that in analyzing a situation, Asians consider more factors as relevant than Americans do.⁸⁰

To conceptualize the differences between subjects' cultures, cultural psychologists draw on the distinction between conceptions of the self as independent versus interdependent, suggested by Hazel Markus and Shinobu Kitayama.⁸¹ In this view, the Western construal of the self is characterized by a sense of autonomy and distinctiveness from others.⁸² In the East Asian construal of the self, one's identity is diffused socially across significant others in one's in-group.⁸³ These polar views are close to the polar orientations on Schwartz's Autonomy/Embeddedness dimension.⁸⁴ They are also reminiscent of, but not identical to, Hofstede's and Harry

⁷⁵*Id.*

⁷⁶Menon et al., *supra* note 73.

⁷⁷Ara Norenzayan et al., *Cultural Similarities and Differences in Social Inference: Evidence from Behavioral Predictions and Lay Theories of Behavior*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 109 (2002).

⁷⁸Incheol Choi & Richard E. Nisbett, *Situational Salience and Cultural Differences in the Correspondence Bias and Actor-Observer Bias*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 949 (1998). Originally thought to be a universal phenomenon, the fundamental attribution error, also known as the correspondence bias, is people's tendency to consistently ignore external situational explanations in favor of internal dispositional explanations. This means that people are more likely to conclude that something about the person caused her behavior rather than something about the situation, even when the situation already provides an adequate explanation. See Lee Ross, *The Intuitive Psychologist and His Short-Comings: Distortions in the Attribution Process*, in 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 184 (Leonard Berkowitz ed. 1977).

⁷⁹Incheol Choi & Richard E. Nisbett, *The Cultural Psychology of Surprise: Holistic Theories and Recognition of Contradiction*, 79 J. PERSONALITY & SOC. PSYCHOL. 890 (2000).

⁸⁰Incheol Choi et al., *Culture and Judgment of Causal Relevance*, 84 J. PERSONALITY & SOC. PSYCHOL. 46 (2003).

⁸¹Hazel R. Markus & Shinobu Kitayama, *Culture and the Self: Implication for Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224 (1991).

⁸²*Id.*

⁸³Peng et al., *supra* note 70, at 248.

⁸⁴See *supra* notes 31-35 and accompanying text; Figure 2.

Triandis' Individualism/Collectivism distinction.⁸⁵ Explanations for these and many other striking cultural differences in cognitive styles call upon differences in reasoning traditions that go back to ancient times—possibly to the era of Confucius and Aristotle.⁸⁶

Compared with other aspects of cognition, relatively less attention so far has been paid to the need for cognitive closure across cultures. It is now assumed that in addition to individual characteristics and environmental factors, culture may also affect the level of people's need for cognitive closure. This hypothesis is inspired by Hofstede's Uncertainty Avoidance dimension.⁸⁷ It should be emphasized, however, that the need for cognitive closure construct applies at the individual level, not the societal level.⁸⁸ Societies do not perform cognitive processes and they cannot experience a need for cognitive closure in the sense defined by Kruglanski as "a desire for a definite answer . . . any answer."⁸⁹

Preliminary evidence suggests that people in different cultures vary in their typical level of need for cognitive closure. Chiu and his colleagues administered the Kruglanski and Webster scale to Hong Kong Chinese and to non-Asian Americans.⁹⁰ They found that compared to the Chinese participants, Americans participants scored lower on the subscales that reflect preference for predictability, discomfort with ambiguity, and closed-mindedness.⁹¹ Americans scored higher on the subscale of decisiveness; "they had a greater preference for a quick and confident decision on one best solution to a problem."⁹² This finding, the authors argue, is in line with broader views in the cultural psychology literature on cognitive styles.⁹³

Compared with Western systems of thought, the East Asian systems of thought (as conceptualized in this literature) are more holistic. According to Nisbett et al., the holistic approach, as opposed to the Western analytic thought, puts "an emphasis on change, a recognition of contradiction and of the need for multiple perspectives, and a search for the "Middle Way" between opposing propositions."⁹⁴ East Asian subjects have

⁸⁵See HARRY C. TRIANDIS, *INDIVIDUALISM AND COLLECTIVISM* (1995).

⁸⁶See Fiske et al., *supra* note 70, at 322-24.

⁸⁷See Jost et al., *Political Conservatism*, *supra* note 48, at 348 (citing Hofstede).

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰Chiu et al., *supra* note 54, at 249-50.

⁹¹*Id.* at 252.

⁹²*Id.* On the relations between these subscales, see *supra* note 53.

⁹³See *id.* at 252-53.

⁹⁴Nisbett et al., *supra* note 70, at 293.

been found to be more tolerant to apparent contradictions and in fact exhibit a clear preference for contradicting, dialectical statements.⁹⁵ The metaphor of cultures as "systems of thought" vividly captures this pattern.⁹⁶

3. Cultural Orientations, Complexity, and Need for Closure

The aforementioned evidence raises the question of whether we should expect a systematic relationship to exist between cultural orientations and societal stances toward cognitive closure. In line with the proposition regarding the individual level, this article proposes that such relationships are to be expected, and argues that these relationships may be better understood in light of the notion of complexity. At the societal level, cultural orientations too may be considered more complex if adherence to their values necessitates consideration of a greater number of relevant factors or should be more nuanced. The discussion now examines which cultural orientations may be considered more cognitively demanding to comply with.

In this analysis, Embeddedness and Egalitarianism imply greater complexity. Social appropriateness in high Embeddedness societies depends on preserving relationships with numerous others, the Confucian ideal of social structure that rests on the "Five Relationships" being a prime example.⁹⁷ In contrast, the focus of Autonomy is primarily on the thoughts and feeling of the individual. The thoughts and feelings of others are of secondary importance. Stated otherwise, an East Asian likely has many more "significant others" than a Western person. The literature on the Asian holistic, multifaceted system of thought extends this pattern to non-human contexts as well. Conducting one's life in an ideal-type Confucian society thus may be more cognitively demanding.

Egalitarianism similarly implies greater complexity than Hierarchy. Egalitarianism emphasizes the moral equality of people such that numerous societal members or groups are seen as relevant factors for decision. An egalitarian cultural orientation therefore appears more cognitively demanding as it invites deliberation over pros and cons and weighing of multiple claims. Speedy attainment of cognitive closure may be detrimental to this process and may therefore be discouraged in egalitarian

⁹⁵See Kaiping Peng & Richard E. Nisbett, *Culture, Dialectics, and Reasoning about Contradiction*, 54 AM. PSYCHOLOGIST 741 (1999).

⁹⁶See Nisbett et al., *supra* note 70.

⁹⁷Formulated by classical Chinese philosophers, this concept states that there should be affection between father and son, righteousness between ruler and minister, attention to their separate functions between husband and wife, proper order between old and young, and faithfulness between friends.

cultures. In contrast, Hierarchy connotes a clear social order in which people know their place relative to one another and can more easily ascertain whose judgment should prevail in social interactions. Hierarchy simplifies things considerably by legitimizing what comes from above.

The Harmony/Mastery dimension may be more ambiguous in terms of its complexity. Harmony appears to entail greater complexity than Mastery in that Harmony expresses an integrative view of the natural and social world. People in societies that place much emphasis on Harmony are encouraged to internalize this view and subject their desires to some general order that they need to comprehend. In contrast, Mastery calls on people to change things at their own initiative, thus implying less consideration for others. The latter orientation, however, entails greater uncertainty to which people are expected to adjust.

Societies whose cultural orientations are more complex should develop means for accommodating the greater cognitive load that these orientations impose on societal members. As cultures evolve over generations, they may adopt strategies for allowing societal members to optimize the cognitive effort required for complying with their values.⁹⁸ One strategy for facilitating optimization of cognitive effort bears on the payoffs from engaging in it by individuals. Along this line, cultures may develop social norms that encourage or discourage speedy attainment of cognitive closure. Thus, people who live in societies characterized by high-complexity cultural orientations would be socially rewarded for their ability to withstand the enhanced need for cognitive closure (and vice versa). This social esteem would compensate people for the potential disutility of the extended cognitive process.⁹⁹ Because multifacetedness and ambiguity are inherent to the promotion of societal values, it may not be surprising if satisfying the desire for cognitive closure would be perceived as immature in these cultures.

An alternative strategy for dealing with greater complexity is, simply put, to lower the pressure. When a particular culture puts greater emphasis on values, whose promotion typically entails greater cognitive effort, societal members may develop a cognitive style that, on average, gives lesser importance to reaching cognitive closure. In contrast, societies whose values generally call for narrowing the focus of attention will also

⁹⁸The text anthropomorphizes cultures but it should be obvious that cultures do not consciously choose strategies. This usage, however, is common shorthand for non-human players.

⁹⁹See generally Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (proposing a model of social norms based on costless social esteem and opprobrium).

socialize their members to be intolerant to lengthy and convoluted reasoning.

Finally, cultures could develop institutions that reduce the uncertainty and ambiguity perceived by societal members (perhaps irrespective of the complexity of cultural orientations). This is the thrust of Hofstede's Uncertainty Avoidance dimension.¹⁰⁰ Such mechanisms can take on various forms, from inhibiting multiple choices to setting fixed scripts for social functions to encouraging deference to seniors and so forth. Schwartz's model of cultural value dimensions does not feature a close parallel to Uncertainty Avoidance although low Harmony is somewhat close to low Uncertainty Avoidance.¹⁰¹

The strategies postulated above operate in opposite directions. The upshot is that greater complexity of a society's cultural orientations does not necessarily entail that its members will on average exhibit higher levels of need for cognitive closure. Every society may have a normal distribution of individuals with high and low need for cognitive closure and average levels could vary in accordance with different cultural profiles.¹⁰² Yet the extant evidence from Chiu and his colleagues remains suggestive at this stage.¹⁰³ Although we have a fair picture of the working of the need for closure within cultures, more cross-cultural analysis that employs careful standardization is warranted.¹⁰⁴

¹⁰⁰HOFSTEDE, *CULTURE'S CONSEQUENCES*, *supra* note 36, at 153-212; HOFSTEDE, *SOFTWARE OF THE MIND*, *supra* note 36, at 109-37.

¹⁰¹Schwartz notes:

Harmony might seem to overlap conceptually with uncertainty avoidance, since both idealize an harmonious order. However, harmony stresses that people and nature should exist comfortably together without assertion of control. In contrast, uncertainty avoidance emphasizes controlling ambiguity and unpredictability through institutions and beliefs that provide certainty. Harmony and uncertainty avoidance share about 6% of their variance.

Shalom H. Schwartz, *Mapping and Interpreting Cultural Differences around the World*, in *COMPARING CULTURES* (Henk Vinken et al., eds. 2004).

¹⁰²It is implicitly assumed here that genetic differences that may affect the average level of need for cognitive closure do not exist among societies. Relaxing this assumption does not alter the analysis although it would be relevant to actual average levels, of course.

¹⁰³See Chiu et al., *supra* note 54.

¹⁰⁴On standardization in cross-cultural research, see Ronald Fischer, *Standardization to Account for Cross-Cultural Response Bias: A Classification of Score Adjustment Procedures and Review of Research in JCCP*, 35 *J. CROSS-CULTURAL PSYCHOL.* 263 (2004); Ulrich Schimmack et al., *Individualism: A Valid and Important Dimension of Cultural Differences* (Working Paper 2002), available at <http://www.erin.utoronto.ca/~w3psyuli/msIndividualism.pdf>.

D. Values, Cognitive Styles, and Corporate Governance

Corporate governance is the framework that defines the division of power in the corporation. This division of power in turn determines the division of wealth created by the corporation. Oftentimes, the regulation of power in the corporation—either of managers or controlling shareholders—is subsumed under the rubric of "accountability." For instance, the OECD Principles of Corporate Governance define the role of the board in terms of accountability to the company and the shareholders.¹⁰⁵ In the context of the maximands of corporate governance, the debate is framed as accountability only to shareholders versus accountability to multiple constituencies or stakeholders. The latter may also be called "accountees." In addition to identifying the parties who owe accountability and those to whom accountability is owed, a full description of accountability relationships also must specify the content of the duties it entails.

In social psychology, "[accountability] refers to the implicit or explicit expectation of decision makers that they may be called upon to justify their beliefs, feelings, and actions to others [It is] a universal feature of social life that inevitably arises from the norm-enforcement needs of groups and organizations."¹⁰⁶ Societies establish accountability systems in order to cope with common problems in group life. Accountability practices are crucial for establishing social order in that they serve as a feedback mechanism between parties to power relationships in rule and norm enforcement. In other words, accountability is "the social psychological link between individual decision makers on the one hand and social systems on the other."¹⁰⁷ The concept of accountability is deeply rooted in English traditions.¹⁰⁸ Nevertheless, it is now commonly being

¹⁰⁵ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD PRINCIPLES OF CORPORATE GOVERNANCE (2004), available at <http://www.oecd.org/dataoecd/32/18/31557724.pdf> [hereinafter OECD 2004 PRINCIPLES] (according to Principle VI, "[t]he corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders") The original 1999 version of the OECD Principles used identical language. See AD HOC TASK FORCE ON CORPORATE GOVERNANCE, OECD PRINCIPLES OF CORPORATE GOVERNANCE, DOCUMENT SG/CG (99) 5, 9 (1999) [hereinafter OECD 1999 PRINCIPLES]. For a critical analysis of the OECD Principles, see *infra* note 364 and accompanying text.

¹⁰⁶Lerner & Tetlock, *supra* note 68, at 1.

¹⁰⁷*Id.* at 1-2 (discussing G.R. SEMIN & A.S.R. MANSTEAD, THE ACCOUNTABILITY OF CONDUCT: A SOCIAL PSYCHOLOGY ANALYSIS (1983)).

¹⁰⁸See Amir N. Licht, Accountability and Corporate Governance (Working Paper 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=328401; Mel Dubnick, *Clarifying Accountability: An Ethical Theory Framework*, in PUBLIC SECTOR ETHICS: FINDING

used as a general term to describe who should bear responsibility and to whom that responsibility is directed.¹⁰⁹

In the Anglo-American legal and political tradition, accountability entails promoting the accountee's interests, transparency and reporting, and liability to make amends for misdeeds.¹¹⁰ American courts have used strong language to describe their loathing of people in fiduciary relationships who derive private benefits from their power position without making full disclosure to their accountees.¹¹¹ The precise scope of the accountability duties owed by corporate fiduciaries may differ from those of other actors in fiduciary relationships, but the deep suspicion towards transactions that involve conflict of interest is a dominant feature of American corporate law.¹¹² As Part III demonstrates, the entire stockholder-stakeholder debate revolves around the permissible use of power in the relations of corporate constituencies. This debate is less about the need to overcome fiduciaries' self-interest (over which there is

AND IMPLEMENTING VALUES 68, 69 (Charles Samford et al. eds. 1998).

¹⁰⁹See Licht, *supra* note 108. For a representative description of public sector accountability in the United States, see Barbara S. Romzek & Melvin J. Dubnick, *Accountability*, in 1 THE INTERNATIONAL ENCYCLOPEDIA OF PUBLIC POLICY AND ADMINISTRATION 6 (Jay M. Shafritz ed., 1998).

A relationship in which an individual or agency is held to answer for performance that involves some delegation of authority to act . . . [which performance is] expected by some significant "other" . . . accountability is a generic form of social relationship found in a variety of contexts [A]ccountability does not necessarily imply the existence of democracy; rather, it suggests any form of governance conducted through some delegation of authority.

Id.

¹¹⁰See Licht, *supra* note 108.

¹¹¹Consider Judge Cardozo's famous admonition in *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928):

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Id. (internal citation omitted)

¹¹²For a thorough review, see ROBERT C. CLARK, *CORPORATE LAW* 160-80 (1986).

consensus) than about reconciling the conflicting interests of several constituencies by corporate fiduciaries.¹¹³

The current theoretical framework highlights the strength with which these basic issues are tied to psychological and cultural elements. Accountability regimes that regulate the exercise of power in corporations are determined by a host of factors ranging from legal rules to court decisions to social norms. Every time decision makers face a situation that is not directly and exhaustively governed by legal rules or court decisions, they would fall back on social norms and on their sense of what is appropriate or at least acceptable. None of these factors can sensibly be assumed to be immune to the impact of politics and culture and, more fundamentally, the psyche of the people involved. The aforementioned theory and evidence suggest that people tend to behave in consonance with their values. Pressure to reach decisions rises in tandem with the need for cognitive closure. The pressure also rises when the situation is vague, when several options need to be weighed against one another, and when decision makers expect to be held accountable for their decisions. When under increased pressure to reach a decision, people resort to their shared implicit cultural knowledge.

The upshot of this reasoning is that accountability mechanisms may look and function in fundamentally different ways according to the personal characteristics of the people involved and to the social environment (country) in which they interact. To get a flavor of this contextuality, briefly consider the typical Anglo-American version of accountability in corporate settings, which is explored in more detail below. Through its focus on conflicts of interest, this accountability style strongly resonates with the Autonomy orientation that perceives individuals as socially alienated from one another. The Anglo-American accountability also echoes with Hierarchy in that it presupposes power relationships between the accountable and the accountee,¹¹⁴ hence, its legitimation of certain economic outcomes of power differences in the corporation and curbing

¹¹³Melvin Eisenberg makes a similar distinction between "self-interest" and "positional conflict." See MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS, CASES AND MATERIALS 707 (8th ed. 2000).

¹¹⁴As originally noted by R.H. Coase, in *The Nature of The Firm*, 4 *ECONOMICA* 386 (1937), reprinted in 4 *J.L. ECON. & ORG.* 3 (1988), and later elaborated on by OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985), hierarchy is the constitutive feature of the firm as opposed to market-based transactions. In this view, the dividing line between the market and the firm is delineated according to the relative transaction costs entailed by performing a task in each of the former. *Id.* Although hierarchy in firms (and other organizations) is inevitable, societal stances may vary in what regards the desirability of its outcomes (e.g., economic inequality). The Schwartz cultural-level dimension of Hierarchy-Egalitarianism refers to such differences in societal emphases. Schwartz, *supra* note 42, at 8.

others. By narrowing its focus to a single accountee, this governance norm facilitates the functioning of corporate fiduciaries with higher levels of need for cognitive closure.

It follows, however, that managers with lower-than-average need for cognitive closure whose individual value emphases give greater weight to complex values, may feel overly restrained by such a norm. At the societal level, public opinion in societies that score higher on Embeddedness or Egalitarianism may consider Anglo-American accountability as anti-social because the latter expresses different views on the proper place of individuals in society and on proper social structures. Thus, the very notion of "conflict of interest" takes on a different meaning in a high Embeddedness society, in which the individual self is perceived as an interdependent entity in a large array of other social members. As a result, basic institutions from the standard American corporate governance toolkit, e.g., the independent director, may be incompatible with East Asian corporate governance systems, or would at least produce different outcomes.¹¹⁵ These differences may also have far-reaching implications on corporate decisions, because managers appear to be very attentive to public opinion.¹¹⁶

Granted, economic incentives to individuals and nations alike also factor into determining the structure of corporate governance. For instance, financial markets exert pressure on corporations and decision makers generally to protect the interests of investors of capital, namely, shareholders and creditors. It would be a mistake, however, to consider market forces as exogenous. Economic forces and the signals they convey to corporate and political decision makers through market prices are endogenous to corporate governance. Nevertheless, subject to these restraints, there is ample room for decision makers to take different actions as long as they can reasonably justify them to themselves and to their surrounding social environment.

1. Testable Hypotheses

At this point it is possible to generate testable hypotheses about the relations between values, need for cognitive closure, and corporate

¹¹⁵See Amir N. Licht, *Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 BERKELEY J. INT'L L. 195 (2004).

¹¹⁶See Alexander Dyck & Luigi Zingales, *The Corporate Governance Role of the Media* (CRSP Working Paper No. 543, 2002), available at http://papers.ssrn.com/paper.taf?abstract_id=335602 (providing evidence that media affects companies' policy toward the environment and the amount of corporate resources that are diverted to the sole advantage of controlling shareholders).

governance. Specifically, the foregoing theoretical discussion suggests several hypotheses concerning the maximands of corporate governance and the endorsement of shareholder value versus the maximand of multiple constituency interests. The reasoning behind these hypotheses is simple and follows closely from the discussion above. Few and relatively straightforward as these hypotheses may be, the subsequent parts will show that their implications have been hotly debated for decades without showing signs of reaching resolution.

- The first main hypothesis concerns the individual level. In this context, policy makers and people in decision-making positions in corporations are expected to be more receptive to multiple-constituency corporate governance the more they emphasize the values of Openness to change versus Conservation and, to a lesser extent, values of Self-transcendence versus Self-enhancement. Vice versa for shareholder value maximization.
- A corollary hypothesis is that people's endorsement of multiple-constituency corporate governance would decrease as their level of need for cognitive closure increases.
- Another corollary hypothesis predicts that endorsement of multiple-constituency corporate governance would correlate positively with liberal political persuasion whereas endorsement of shareholder-oriented corporate governance would correlate positively with political conservatism.
- The second main hypothesis concerns the societal level. Here it is expected that societies that put greater emphasis on Embeddedness and Egalitarianism will have corporate governance systems that are more stakeholder-oriented. The same may be true for societies that place emphasis on Harmony. In contrast, societal emphases on Autonomy together with Hierarchy, and perhaps Mastery, would be accompanied by stronger endorsement of shareholder value maximization.

E. Some Evidence

Empirical evidence that bears directly on the issues raised here, albeit limited at this stage, is consistent with the above hypotheses. In this Section, the concentration is on the available evidence. Together with additional evidence, it will be put in more detailed context in subsequent parts.

First, the individual level will be discussed. A study by Tetlock investigated the relations between American managers' political positions and need for cognitive closure versus their views on a variety of organizational problems.¹¹⁷ Among other things, subjects were presented with scenarios that confronted shareholders' versus multiple stakeholders' interests as the goal of corporations. Traditional conservatives and modern libertarians ranked high on the need for cognitive closure scale and were also more favorable to management that endorsed accountability to shareholders only. Lower scorers on these scales praised management that endorsed the pluralistic regime of accountability to stakeholders. Follow-up in-depth interviews with participants provided further support to the quantitative statistical results.¹¹⁸

Analysis at the societal level is based on comparative studies. A well-known survey by Charles Hampden-Turner and Fons Trompenaars has found suggestive evidence for significant relations between culture and stakeholder issues.¹¹⁹ These researchers surveyed international managers from several countries and asked them about their attitudes toward corporate profit.¹²⁰ Specifically, managers were asked "to choose one of the following as an accurate statement of the proper goals of a company: (a) The only real goal of a company is making profit. (b) A company, besides making profit, has a goal of attaining the well-being of various stakeholders, such as employees, customers, etc."¹²¹ Four English-speaking

¹¹⁷Tetlock, *supra* note 48.

¹¹⁸Tetlock, *supra* note 48, at 319. Tetlock vividly summarizes these interviews: [C]onservatives, both authoritarian and libertarian, understood stakeholder concerns and the necessity of taking them into account as a means to the end of profit maximization. But they feared that egalitarian efforts to promote the stakeholder vision rested on a fundamental misunderstanding both of human nature and of capitalism that would impair long-term growth by enmeshing corporate executives in ever more elaborate webs of communitarian regulations ("You can't do anything until the local politicians, labor unions, environmentalists, minority-rights activists, and other assorted opportunists have all had their palms crossed with silver.") and by creating an inexhaustible source of excuses for poorly performing managers to put off long-suffering shareholders. As one freshly minted M.B.A. pontificated, "The stakeholder model aggravates the principal-agent problem at the heart of corporate capitalism—it gives agents too much wiggle room to evade their responsibility to promote the principal's interest."

Id.

¹¹⁹CHARLES HAMPDEN-TURNER & FONS TROMPENAARS, *THE SEVEN CULTURES OF CAPITALISM* 31-34 (1993).

¹²⁰*Id.* at 32.

¹²¹This question essentially replicates the famous "Friedman Doctrine," which stated that "the social responsibility of business is to increase its profits." See *infra* note 197 and accompanying text.

countries ranked highest in endorsing profit-only goal (i.e., shareholder value) among the twelve countries represented in this study, with the United States ranking at the top of the list.¹²² In contrast, Germany, France, Singapore, and Japan ranked lowest.¹²³

Lilach Sagiv and Shalom Schwartz have reanalyzed data compiled by Hampden-Turner and Trompenaars on managers' preferences about solving social dilemmas in organizations.¹²⁴ Specifically, managers who analyze phenomena into parts (i.e., items, tasks, numbers, units, points, specifics) were differentiated from those who integrate and configure such details into whole patterns, relationships and wider contexts.¹²⁵ As hypothesized by Sagiv and Schwartz and in line with the above hypothesis on complexity, managers in nations with cultures that emphasize Harmony tended to choose the integrating option over the analyzing option for solving social dilemmas.

III. THE AMERICAN DEBATE REVISITED

The most puzzling feature of the stockholder-stakeholder debate is its longevity. American courts adjudicated the core issue—namely, the supremacy of shareholders' interest in the corporation—during the 1910s. The scholarly debate between Adolf Berle and Merrick Dodd is often said to have been "settled" during the 1930s, arguably in favor of Dodd's view.¹²⁶ The discord over this issue resurfaced repeatedly, however, as scholars, courts, and legislators continued to address it. At the beginning of the new century, exchanges between holders of the two views continue unabated, perhaps with greater intensity than ever before.

This Part provides a new reading of the debate over the maximands of corporate governance. By critically reviewing the intellectual history of the central positions made in this debate, this Part will identify the issues over which there is wide consensus and, more importantly, which issues remain unresolved. This Part will then demonstrate how the theoretical

¹²²*Id.*

¹²³Ranking in the middle were Italy, Sweden, the Netherlands, and Belgium. *Id.* Unfortunately, a more recent version of this study does not report results for this question. See FONS TROMPENAARS, RIDING THE WAVES OF CULTURE: UNDERSTANDING DIVERSITY IN GLOBAL BUSINESS (1997).

¹²⁴Lilach Sagiv & Shalom H. Schwartz, *A New Look at National Culture: Illustrative Applications to Role Stress and Managerial Behavior*, in HANDBOOK OF ORGANIZATIONAL CULTURE AND CLIMATE 417 (Neal M. Ashkanasy et al. eds. 2000) (referring to HAMPDEN-TURNER & TROMPENAARS, *supra* note 119, at 10-11).

¹²⁵*Id.*

¹²⁶*See infra* Part III.B.

framework put forward in Part II improves our understanding of this controversy. Following an analysis of the landmark decision in *Dodge v. Ford Motor Co.*¹²⁷ in Section A, Section B derives new insights from the details of the Berle-Dodd dialogue. Sections C and D briefly review the (non)development of the stockholder-stakeholder debate from the 1950s through the 1990s. Section E takes a more theory-oriented perspective and reviews the development of analyses from traditional economic ideas, to progressive views, to recent hierarchical models of the corporation. Section F connects the debate to the theoretical framework as outlined in Section E.

A. *Dodge v. Ford Motor Co.*

In the summer of 1915, the board of directors of the Ford Motor Company approved a plan to expand the company's production capacity to 1 million cars annually.¹²⁸ The plan also called for a reduction in the price of a Model T car from \$440 to \$360 although the market apparently could sustain the higher price even if for a lower volume.¹²⁹ It was further decided not to distribute as dividends rather huge funds that the company had earned, but to invest them back in the business. Mr. Henry Ford, the founder, controlling shareholder, and dominant figure in the company, declared that his ambition was "to spread the benefits of this industrial system to the greatest possible number, to help [people] build up their lives and their homes."¹³⁰ In 1919, the Supreme Court of Michigan, in a suit brought by the Dodge brothers as minority shareholders, emphasized that it had "no doubt that certain sentiments, philanthropic and altruistic,

¹²⁷170 N.W. 668 (Mich. 1919).

¹²⁸*Id.* at 683.

¹²⁹*Id.*

¹³⁰*Id.* Henry Ford had expressed these views repeatedly. In his memoirs, Ford had said: I don't believe we should make such an awful profit on our cars. A reasonable profit is right, but not too much. I hold that it is better to sell a large number of cars at a reasonable small profit. . . . I hold this because it enables a larger number of people to buy and enjoy the use of a car and because it gives a larger number of men employment at good wages. Those are the aims I have in life.

HENRY JONES FORD, *MY LIFE AND WORK* (1922), available at <http://www.webroots.org/library/usabios/mlawhf03.html> (visited Dec. 20, 2004). See also JAMES C. COLLINS & JERRY I. PORRAS, *BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES* 55 (1997); ALLAN NEVINS & FRANK E. HILL, *FORD: EXPANSION AND CHALLENGE, 1915-1933*, at 97 (1957) (citing an interview in the *Detroit News* in which Ford made similar statements). On Ford's religious upbringing and personality, see generally NEIL BALDWIN, *HENRY FORD AND THE JEWS: THE MASS PRODUCTION OF HATE* (2001); *Henry Ford and the Model T* in DANIEL GROSS ET AL., *FORBES@ GREATEST BUSINESS STORIES OF ALL TIME* (1996), available at <http://www.wiley.com/legacy/products/subject/business/forbes/ford.html>.

credible to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company."¹³¹

The *Dodge* court was not impressed by these sentiments, however. In what has become a definitive exposition of shareholders' status in the corporation for years to come, the court said:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes.¹³²

The proposition that shareholders are the primary beneficiaries of the corporation and hence, that fiduciary duties run to them in conjunction with the corporation, is now widely accepted. This proposition is traditionally interpreted as calling on corporate fiduciaries to maximize shareholder value.¹³³ It is often referred to by shorthand as the "shareholder primacy norm" or the "shareholder wealth maximization norm." While being widely cited and compelling in its rhetoric, the ruling in *Dodge* only marks the beginning of the discussion. It does not reflect current legal doctrines in the U.S. nor does it fully comport with subsequent theoretical analyses.

Strictly speaking, in terms of the black-letter law concerning the maximands of corporate governance, only a few courts have read *Dodge* as saying what countless law review articles have cited it as saying. In Delaware, both the supreme court and the court of chancery cited this case as demonstrating a possible relief to minority shareholders who are oppressed by the controlling shareholder or management through

¹³¹*Dodge*, 170 N.W. at 684.

¹³²*Id.* The court held that it was the directors' duty to distribute a very large sum of money to stockholders. It therefore affirmed the lower court's decree to fix and determine a specific amount to be distributed to stockholders. *Id.* at 685. The company had to pay about \$19 million in dividends. In response to the court decision Mr. Ford bought out the holdings of all minority shareholders, including the Dodges.

¹³³*See, e.g.*, MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 97 (1995) (noting that corporate law scholars "generally agree . . . that management's principal fiduciary duty is to maximize the return to the common shareholders"); D. Gordon Smith, *The Shareholder Primacy Norm*, 32 J. CORP. L. 277, 278 (1998) ("Corporate directors have a fiduciary duty to make decisions that are in the best interests of the shareholders.").

withholding of dividends.¹³⁴ The courts of Michigan, where *Dodge* originated, also consider *Dodge* a standard case of management discretion.¹³⁵ One Michigan court in fact noted that *Dodge* was *not* a case of action against shareholders' interests.¹³⁶

Doubtless, reading *Dodge* as a minority rights case would be correct. In a thorough discussion of *Dodge*, D. Gordon Smith maintains that this is how the case should be understood.¹³⁷ Smith correctly notes that the *Dodge* court emphasized Henry Ford's position as a controlling stockholder in the sentence immediately preceding its statement of the shareholder primacy norm.¹³⁸ Yet such a reading clearly would also be partial—obscuring more than it revealed. If *Dodge* had been merely a case of majority-minority relationships in the corporation it would not have gained the pride of place it has among the seminal authorities on U.S. corporate law.¹³⁹

¹³⁴See *Hall v. John S. Isaacs & Sons Farms, Inc.*, 163 A.2d 288, 295 (Del. 1960) (citing *Dodge*, 170 N.W. at 668), for the proposition that

[i]f the plaintiffs are able to establish as the fact that money is available in the corporations which should be paid out in dividends, and that the management willfully refuses to do so in order to freeze out the minority interest, then upon such a showing the extraordinary relief of a direction to management to declare and pay a dividend might become available to them.

Blackwell v. Nixon, No. 9041, 1991 Del. Ch. LEXIS 150, at *12 (Del. Ch. Sept. 26, 1991), reprinted in 17 DEL. J. CORP. L. 1083, 1090 (1992) ("[I]f this were merely a dividend case, they would have to establish that the directors set dividends at an amount so low as to be oppressive, a gross abuse of discretion, or the product of bad faith. Few, if any, cases have involved a set of facts egregious enough to meet that standard."). Cf. *Dodge v. Ford Motor Co.* 170 N.W. 668 (Mich. 1919).

¹³⁵See *Lytle v. Malady*, 566 N.W.2d 582, 593 n.25 (Mich. 1997) (citing *Dodge* for the proposition that courts should be reluctant to second-guess management in its day-to-day operations, e.g., with regard to payment of dividends).

¹³⁶See *Miller v. Magline, Inc.*, 256 N.W.2d 761, 772 (Mich.Ct. App. 1977) ("Moreover, in the *Dodge* case the Court assumed that the expansion policy was in the best interest of the company and its shareholders, but concluded that it did not justify a withholding of dividends.").

¹³⁷Smith, *supra* note 133, at 279.

[T]he shareholder primacy norm was first used by courts to resolve disputes among majority and minority shareholders in closely held corporations. Over time this use of the shareholder primacy norm has evolved into the modern doctrine of minority oppression. This application of the shareholder primacy norm seems incongruous today because minority oppression cases involve conflicts among shareholders, not conflicts between shareholders and nonshareholders.

Id.

¹³⁸*Id.* at 319.

¹³⁹It should be noted that in order to be considered a "seminal authority on U.S. corporate law," as I claim that *Dodge* is, a case need not be uncontroversial nor does it have to reflect common legal practice. Quite the contrary is true. To become a seminal precedent a case has to address a core problem in a systematic way while being coherent with the general legal body to which it belongs. Prominent examples include the decisions in *Smith v. Van Gorkom*, 488 A.2d

The strength of the ruling in *Dodge* and the explanation for its longevity both lie in its being paradigmatic of *bona fide* conflicts of interest among several corporate constituencies. There have been a number of more recent judicial and legislative actions in which interests of non-shareholder constituencies were invoked, e.g., with regard to anti-takeover statutes and court rulings on anti-takeover defense tactics.¹⁴⁰ Yet none of these contexts exhibits the type of dilemma that *Dodge* poses with comparable clarity. In the former cases there often exists an overriding concern about insiders' self-interest—a lingering suspicion that stakeholders only serve as a pretext or camouflage for incumbent management that want to entrench themselves to the detriment of public shareholders. *Dodge*, in contrast, is free of this concern. The court believed that Henry Ford, in his capacity as the company's dominant decision maker, was genuinely motivated by a desire to distribute the fruits of the company's success to non-shareholder constituencies.

B. *The Berle-Dodd Dialogue*

Dodge was a legal reflection of its political and economic era. Within a decade of the case, America would slump into the Great Depression. The level of new car sales that was reached in the 1920s would be regained only in the late 1950s, after the New Deal and the Second World War. Meanwhile, a seminal scholarly exchange had unfolded between two law professors, Adolf A. Berle of Columbia Law School and E. Merrick Dodd of Harvard Law School. Like the court's statements in *Dodge*, the positions that were articulated in this dialogue remain definitive and continue to dominate current discussions. Understanding the original positions in this exchange is key to understanding contemporary positions as well. The following paragraphs revisit Berle and Dodd aiming to identify the historical intellectual roots of the maximands of corporate governance.

Berle fired the opening shot in a 1931 article titled "Corporate Powers as Powers in Trust."¹⁴¹ "It is the thesis of this essay," Berle stated, "that all powers granted to a corporation or to the management of a corporation... are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears."¹⁴² At first

858 (Del. 1985) (directors' duty of care), and *Perlmann v. Feldman*, 219 F.2d 173 (2d Cir. 1955) (sharing of control premium upon sale of control).

¹⁴⁰For a discussion, see *infra* Part III.D.

¹⁴¹A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

¹⁴²*Id.* at 1049.

blush, Berle's claim reads like a restatement of *Dodge*, yet it is not. Noting that "through the very nature of the corporate entity, responsibility goes with power,"¹⁴³ Berle conducted a survey of powers granted under contemporary law either to corporations or to corporate officers, and showed that all of them are governed by equitable fiduciary duties akin to those that are owed by trustees to a *cestui que* trust.

The central insight and the recurring theme in Berle's article pertain to the content and legal nature of the fiduciary duties—not to the identity of the beneficiaries thereof (i.e., the accountees in the accountability relationship). To be sure, Berle did cite *Dodge*. But *Dodge* was cited as supporting authority only to the proposition that "[t]he power to declare or withhold dividends must be so used as to tend to the benefit not only of the corporation as a whole but also of all of its shareholders to the extent that this is possible."¹⁴⁴ In other words, the issue at bar was the relationship between majority and minority shareholders rather than between shareholders and other constituencies as competing accountees.¹⁴⁵

It was actually Dodd who defined the debate over the maximands of corporate governance as we know it. In his 1932 article "For Whom Are Corporate Managers Trustees?,"¹⁴⁶ Dodd turned the limelight on the beneficiaries of managers' duties and away from the legal nature of these duties, agreeing with Berle on the latter issue, namely, that the trusteeship principle should apply to such duties.¹⁴⁷ Citing *Dodge*, Dodd acknowledged that legal doctrine of his time considered the sole function of the corporation to be the making of profit for its stockholders such that they are the beneficiaries of the business and the people who carry it on.¹⁴⁸ Dodd nevertheless believed that this situation was undesirable. Writing in

¹⁴³*Id.* at 1050.

¹⁴⁴*Id.* at 1060.

¹⁴⁵When Berle mentions the "general good of the community," he does so to indicate Henry Ford's personal whims as a controlling shareholder. Berle, *supra* note 141, at 1061. In a similar vein, Berle cites *Channon v. Channon Co.*, 218 Ill. App. 397 (Ill. App. Ct. 1920) as an example of a case where a majority shareholder was directed to declare dividends after he, as the father of the family, withheld them because he thought that other shareholders who were members of the family needed discipline. Berle, *supra* note 141, at 1061 n.31.

¹⁴⁶E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

¹⁴⁷Dodd writes: "The present writer is thoroughly in sympathy with Mr. Berle's efforts to establish a legal control which will more effectively prevent corporate managers from diverting profit into their own pockets from those of stockholders, and agrees with many of the specific rules which latter deduces from his trusteeship principle." *Id.* at 1147.

¹⁴⁸*Id.* at 1146. Dodd, however, stresses that "[n]either the language of the opinion nor the relief granted necessarily involves an unqualified acceptance of the maximum-profit-for-stockholders formula." *Id.* at 1158 n.31.

the midst of great economic and social upheaval in America, Dodd appears to have been deeply moved by the Great Depression and the budding New Deal.¹⁴⁹ In the reformed economy, he prophesied, there would be "modifications of the maximum-profit-for-the-stockholders-of-the-individual-company formula."¹⁵⁰

A close reading of Dodd makes it abundantly clear that his prediction, that managers will come to consider the interests of employees, consumers, and the general public in addition to stockholder's interests, was never more than wishful thinking. Support for Dodd's belief that the American society was heading in this direction is found in opinions made by a few prominent figures in the business community of the time.¹⁵¹ Dodd interpreted these sporadic statements as harbingers of an emerging, more general trend in American society toward greater concern for non-stockholder constituencies.¹⁵²

Yet beside Dodd's unmistakable enthusiasm about these statements, he was quite inconsistent as to *why* such trend would likely succeed. Dodd cites the view that taking employees and consumers into account will increase stockholders' long-run profits (namely, efficiency concerns); but he also asserts that managers who have power over the lives of others very well may "come to feel as strong a community of interest with their fellow workers as with a group of investors" (namely, ethical concerns).¹⁵³ At bottom, the justification for taking other constituencies into account depends on the recognition of corporations as public entities, rather than private property of their stockholders. At the same time, such recognition is a necessary condition for including other constituencies in managers' considerations.

Just as Dodd never challenged Berle's original argument, Berle, in responding to Dodd's article,¹⁵⁴ did not really dispute Dodd's theoretical position.¹⁵⁵ Nevertheless, Berle literally lashed out at Dodd for making a

¹⁴⁹Dodd makes references to "the present time," "recent economic events," "contemporary discussion of the need for planned economic order," and so forth. *See*, respectively, *id.* at 1148, 1151, & 1152.

¹⁵⁰Dodd, *supra* note 146, at 1152.

¹⁵¹Dodd cites extensively from an address by Owen D. Young, an executive officer of the General Electric Company (GE) and formerly a practicing lawyer, from GE's President Swope, and from Dean Donham of the Harvard Graduate School of Business Administration. *Id.* at 1154-56.

¹⁵²*Id.* at 1156.

¹⁵³*Id.* at 1156-57.

¹⁵⁴A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

¹⁵⁵*Id.* at 1366 ("As a matter of economics and social theory, Professor Dodd's argument is not only sound but familiar.").

fallacious move from the normative to the descriptive.¹⁵⁶ Desirable as it may be in theory, social responsibility was not in fact pursued by corporations and corporate insiders, nor could it be pursued. This implementation problem, Berle believed, is insurmountable, as there is no mechanism that could enforce social responsibility on corporations.¹⁵⁷

The conclusion, averred Berle, is grim but inevitable:

Now I submit that you can not [sic] abandon emphasis on "the view that business corporations exist for the sole purpose of making profits for their shareholders" until such time as are to be prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.¹⁵⁸

During his exchanges with Dodd, Berle was already engulfed in his collaborative study with Gardiner Means that would yield their seminal book, *The Modern Corporation and Private Property*.¹⁵⁹ In this book, Berle and Means empirically documented the actual separation between American shareholders' ownership of corporate stocks on the one hand and control over Corporate America on the other. The result was effective control residing in the hands of managers, who used it to benefit themselves and controlling shareholders. Berle and Means called for conceiving corporations as public again.¹⁶⁰ They wrote that "by surrendering control and responsibility over the active property, [shareholders] have surrendered the right that the corporation be operated in their sole interest. . . . They have placed the community in a position to demand that the modern corporation should serve not alone the owners or the control but all society."¹⁶¹

¹⁵⁶*Id.* at 1367-68.

¹⁵⁷*Id.* at 1367.

This is the real justification for Professor Dodd's argument. But it is theory, not practice. The industrial "control" does *not* now think of himself as a prince; he does *not* now assume responsibilities to the community; his bankers do *not* now undertake to recognize social claims; his lawyers do *not* advise him in terms of social responsibility. Nor is there any mechanism now in sight enforcing accomplishments of [Dodd's] theoretical function."

Id.

¹⁵⁸Berle, *supra* note 154, at 1367.

¹⁵⁹ADOLPH A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed. 1933).

¹⁶⁰*Id.* at 356.

¹⁶¹*Id.* at 355-56.

Berle and Means' position looks strikingly similar to Dodd's position, which Berle so forcefully criticized in his note of the same year,¹⁶² leaving several commentators puzzled by Berle's position. William Bratton, in an appraisal of *The Modern Corporation and Private Property* at the turn of the millenium, points out this apparent inconsistency and writes that "Berle appears to have been of two minds on the matter."¹⁶³ Several decades earlier, Joseph Weiner also argued that Berle was offering contradictory resolutions to the corporate governance problem and was in fact changing positions on managerial accountability to shareholders or community.¹⁶⁴

Although Bratton is willing to forgive Berle for this inconsistency,¹⁶⁵ this article would argue that no such forgiveness is called for, as there is no incoherence in Berle's writings.¹⁶⁶ In writing his note on Dodd and his book with Means, Berle was fully aware of the need to protect both stockholders and stakeholders from those in positions of power over their interests—the constituency that Berle and Means dubbed "control." The bulk of Berle and Means' opus is dedicated to a positive analysis of the separation between ownership and control in American corporations.¹⁶⁷ Their normative analysis is mostly confined to a small number of pages in the closing chapter.¹⁶⁸ More than seventy years after its publication, this chapter's policy analysis remains as fresh and compelling as ever.

¹⁶²See *supra* notes 155-59 and accompanying text.

¹⁶³William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 761 (2001).

¹⁶⁴Wilber G. Katz, *Responsibility and the Modern Corporation*, 3 J.L. & ECON. 75 (1960); Joseph L. Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 COLUM. L. REV. 1458 (1964).

¹⁶⁵Bratton, *supra* note 163, at 761-62.

Berle also can be forgiven this inconsistency. His indecision reflects the ambivalence displayed in corporate law commentary ever since. The public-regarding approach persists as a minority view. Each generation raises anew the same questions about corporate accountability because corporations continue to bear importantly on our social and political lives, and external regulation can never bring corporate results and perceived social goals into congruence. At the same time, no advocate of enhanced responsibility has ever successfully confronted and disposed of the counterargument Berle made in the debate with Dodd.

Id. (footnotes omitted).

¹⁶⁶As a technical matter, one may note that *The Modern Corporation and Private Property* is repeatedly cited in Berle's article. See Berle, *supra* note 154, at 1366 n.4, 1367 n.7, & 1369 n.9.

¹⁶⁷BERLE & MEANS, *supra* note 159, at 352-57.

¹⁶⁸*Id.* The very limited scope dedicated to normative analysis may be explained by the fact that the writing of *The Modern Corporation and Private Property* was commissioned and financed by grant from the Social Science Research Council of America. For a historiography of this project, see Bratton, *supra* note 163.

Having established the factual separation of ownership from control and the concomitant concentration of power in the hands of "control," Berle and Means set out to outline different ways in which this power could be regulated in capitalist countries in the future.¹⁶⁹ Traditionally, two possible ways are (1) to provide legal protection to public shareholders through the trusteeship,¹⁷⁰ and (2) to give the groups in control powers which are absolute and not limited by any implied obligation with respect to their use.¹⁷¹ Of these two alternatives, the former is said to be the lesser of two evils.¹⁷² Berle and Means did not stop there, however. They instead point out a third possibility—the one cited above, under which the "control groups have, rather, cleared the way for the claims of a groups far wider than either the owners or the control," to wit, all society.¹⁷³ Should this "third way" be implemented, Berle and Means claimed, in contrast to the ruling in *Dodge*, courts would approve of managerial programs that benefited employees and communities at the expense of shareholders and bondholders.¹⁷⁴

In contrast with Dodd, however, Berle (writing both alone and with Means) was fully aware that such a social arrangement would entail formidable implementation problems. Berle and Means do not hide their preference for this "third way." Yet they are very careful to note that it would require specifying the claims of the community "with clarity and force."¹⁷⁵ Only "[w]hen a convincing system of community obligations is worked out and is generally accepted . . . the passive property right of today

¹⁶⁹BERLE & MEANS, *supra* note 159, at 353-54 ("How will this demand [for regulation of power in corporations] be made effective? To answer this question would be to foresee the history of the next century.").

¹⁷⁰*Id.* at 354. This strategy is described in more detail in an earlier chapter titled *Corporate Powers as Powers in Trust*, *id.* at 247-76, which draws on Berle's article of the same title. Berle, *supra* note 141.

¹⁷¹BERLE & MEANS, *supra* note 159, at 354.

¹⁷²*Id.* at 355.

¹⁷³*Id.* at 355.

¹⁷⁴*Id.* at 355-56

Should the corporate leaders, for example, set forth a program comprising fair wages, security to employees, reasonable service to their public, and stabilization of business, all of which would divert a portion of the profits from the owners of passive property, and should the community generally accept such a scheme as a logical and human solution of industrial difficulties, the interests of passive property owners would have to give way. Courts would almost of necessity be forced to recognize the result, justifying it by whatever of the many legal theories they might choose.

Id. at 356.

¹⁷⁵BERLE & MEANS, *supra* note 159, at 356.

must yield before the larger interests of society."¹⁷⁶ Until such system is devised, and since effective legal protection of all stakeholders is infeasible (at least at the time), the law should concentrate on protecting stockholders through the accountability mechanism of trusteeship.¹⁷⁷ The interests of non-stockholder constituencies may receive protection through other means.¹⁷⁸

The dialogue between Berle and Dodd largely subsided after 1932 but did not fully end. In a review of *The Modern Corporation and Private Property*, Dodd conceded that regulation of management conduct would require strong legal measures.¹⁷⁹ In another lesser-known article,¹⁸⁰ however, Dodd seems to have tried to deflect Berle's arguments using reasoning somewhat similar to Berle's. Dodd too noted that the major

¹⁷⁶*Id.*

¹⁷⁷*Id.* at 355.

Choice between strengthening the rights of passive property owners, or leaving a set of uncurbed powers in the hands of control therefore resolves itself into a purely realistic evaluation of different results. We might elect the relative certainty and safety of a trust relationship in favor of a particular group within the corporation, accompanied by a possible diminution of enterprise. Or, we may grant the controlling group free rein, with the corresponding danger of a corporate oligarchy coupled with the probability of an era of corporate plundering.

Id. Berle, *supra* note 154, at 1371-72.

The shareholder who now has a primary property right over residual income after expenses are met, may ultimately be conceived of as having an equal participation with a number of other claimants But it is one thing to say that the law must allow for such developments. It is quite another to grant uncontrolled power to corporate managers in the hope that they will produce that development Meanwhile, as lawyers, we had best be protecting the interests we know, being no less swift to provide for the new interests as they successively appear.

Id.

¹⁷⁸Increased government regulation could serve such purpose. Whether regulation can be relied on to deliver effective protection to stakeholders is beyond the scope of this study. See Amir N. Licht, *International Diversity in Securities Regulation: Roadblocks on the Way to Convergence*, 20 CARDOZO L. REV. 227, 259-63 (1998) (arguing that the Securities Acts of 1933 and 1934 defused the debate over the nature of the corporation as a public or private entity). Whatever position one may hold about the role of regulation, it cannot affect the insight that establishing legal fiduciary duties to several constituencies faces serious implementation problems.

¹⁷⁹E. Merrick Dodd, Jr., *The Modern Corporation and Private Property*, 81 U. PA. L. REV. 782, 785 (1933) (reviewing ADOLPH A. BERLE, JR., *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) ("If corporations generally are to be conducted in such manner as to give due regard to the interests of all classes in society, including wage earners and consumers as well as investors and management, it is primarily through legislation that the change can be brought about.").

¹⁸⁰E. Merrick Dodd, Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194 (1934).

problem for social regulation of corporate managements had to do with implementation. Legal enforcement alone, he argued, cannot ensure managements' loyalty to stockholders if the legal rules are not in congruence with their professional ethics and, more generally, with socially-approved goals.¹⁸¹ In this respect, advancing the interests of employees, consumers, and the general community appeared to Dodd to be "less abnormal" than shareholder value maximization.¹⁸² Dodd, however, failed to furnish any new evidence that could support his belief, that trusteeship for absentee investors, "is an ideal that is losing ground in the community generally."¹⁸³

Oddly, twenty years after their dialogue unfolded, Berle stated that events had settled the argument in Dodd's favor.

Twenty years ago, the writer had a controversy with the late Professor E. Merrick Dodd, of Harvard Law School, the writer holding that corporate powers were powers in trust for shareholders while Professor Dodd argued that these powers were held in trust for the entire community. The argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention.¹⁸⁴

The immediate reason that led Berle to concede defeat was the ruling in *A.P. Smith Manufacturing Co. v. Barlow*,¹⁸⁵ in which a corporate

¹⁸¹*Id.* at 199.

[T]he endeavor to write that ideal [of stockholder profit maximization] into law [gives] much reason to fear that the law will have to depend for its effectiveness primarily upon external compulsion rather than upon the internal harmony between the legal rules and the natural impulses of the group which is expected to govern its conduct thereby.

Dodd may thus be considered an early precursor of the social norms scholarship on corporate governance. See generally Symposium, *Norms and Corporate Law*, 149 U. PA. L. REV. 1607 (2001) (exploring the renewed interest in the roles of norms in corporate law).

¹⁸²Dodd, *supra* note 180, at 203 ("Service to one's fellow workers, to those who have need of one's products, or to the social and political community of which one is a member would seem a less abnormal aim than vicarious profit-seeking.")

¹⁸³*Id.* at 207. In this article, *id.* at 206, the author only repeats the references he made in Dodd, *supra* note 146.

¹⁸⁴ADOLF A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954), cited in A.A. Sommer, Jr., *Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33, 37-38 n.14 (1991); see also Adolf A. Berle, *Corporate Decision-Making and Social Control*, 24 BUS. LAW. 149, 150 (1968) ("Pragmatically, Professor Dodd won the debate. I was not convinced as a matter of doctrine that social responsibility should not be left to government—but there was no doubt that the event conformed rather to his prediction than to mine.")

¹⁸⁵98 A.2d 581 (N.J. 1953).