Diversity of Shareholder Stewardship in Asia: Faux Convergence

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ABSTRACT

Since the UK adopted the world's first stewardship code in 2010, stewardship codes have proliferated across Asia. Given the UK Code's prominence, it is tempting to assume that every other stewardship code performs the same function as the UK Code. This assumption belies the truth: all these codes—regardless of whether they have in fact drawn inspiration from the UK Code—have taken different trajectories due to each adopting its jurisdiction's distinctive institutional and legal context.

Using empirical evidence and in-depth case studies of stewardship in Japan and Singapore, this Article reveals how any reception of United Kingdom–style stewardship concepts is only skin deep. Even where the text of stewardship codes in Asia resemble the UK Code in form, their functional impact on corporate governance significantly departs from, or even runs counter to, the intended functions of the UK Code. This Article illustrates how stewardship codes in Asia have been used as a convenient vehicle for local governments and/or market players to achieve their own particular interests through an inexpensive,

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nonbinding, and malleable vehicle, the formal adoption of which sends a signal of "good corporate governance" to the rest of the world. While such practices explain and contextualize the widespread adoption of stewardship codes in Asia, they also compound the challenge of drawing positive or normative conclusions from this development. The observation advanced in this Article is important as leading corporate governance scholars, prominent international organizations, and market participants, have appeared content to draw such conclusions, unaware that stewardship codes generally do not fulfill a similar function to the UK Code in Asia.

This Article concludes by explaining how adopting globally recognized mechanisms of "good corporate governance" at a superficial formal level, and then altering their function to serve local purposes, appears to be a rising trend in corporate governance in Asia (and elsewhere). This phenomenon, which we coin "faux convergence," calls for the reexamination of important and impactful theories about corporate governance convergence. As an initial foray, this Article develops an expanded taxonomy of corporate governance convergence and lays the foundation for future research on "faux convergence."

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I. INTRODUCTION

When the United Kingdom enacted the world's first stewardship code[1] (UK Code) in 2010, the impetus behind it was clear. Institutional investors had come to hold a substantial majority of the shares in United Kingdom–listed companies.[2] However, most institutional investors lacked the incentive to use their shareholder power to monitor management.[3] In turn, they were branded as "rationally passive" shareholders.[4] As the theory goes, left unmonitored by institutional investors, who collectively controlled the United Kingdom's shareholder float, the management of United Kingdom–listed companies engaged in excessive risk-taking and short-termism, which were identified as significant contributors to the 2008 Global

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1. As originally conceived in the United Kingdom, a Stewardship Code is a set of principles that articulate how institutional investors should behave as stewards of the capital that they are responsible for investing on behalf of their ultimate beneficiaries.

2. *See Ownership of UK Quoted Shares: 2016*, UK OFFICE FOR NAT'L STATISTICS tbl. 4 (Nov. 29, 2017), https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2016/pdf [https://perma.cc/MQH7-KCS5] (archived Mar. 17, 2020) ("Beneficial ownership of UK shares by value") (reporting that as of Dec. 31, 2016, 12.3 percent of the beneficial ownership of UK-listed shares was held by individuals, 29.4 percent by institutional investors, 53.9 percent by foreign investors, and 4.3 percent others); *id*. at tbl. 5 ("Rest of the world holdings of UK quoted shares by beneficial owner") (reporting that of the shares held by beneficial owners in North America and the other parts of "Rest of the World", individuals held 1.4 percent and 1.2 percent, institutional investors 97.3 percent and 58.8 percent, and others 1.4 percent and 39.9 percent, respectively) (note that rounding errors exist); *see also* Paul Davies, *Shareholders in the United Kingdom*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 355, 357–60 (Jennifer G. Hill & Randall S. Thomas eds., 2015) [hereinafter Davies, *Shareholders*] (reporting older data).

3. *See* Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89, 96–100 (2017).

4. Ronald J. Gilson & Jeffery N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 895 (2013); Gerald F. Davis, *A New Finance Capitalism? Mutual Funds and Ownership Re-concentration in the United States*, 5 EUR. MGMT. REV. 11, 19–20 (2008).

Financial Crisis (GFC).[5] Thus, the original objective, or intended function, of the UK Code was to motivate institutional investors to become responsible and engaged shareholders.[6] Specifically, its aim was to incentivize institutional investors, through the use of soft law, to act as "good stewards" by exercising their control over listed companies through their collective voting rights—with the goal of mitigating the excessive risk-taking and short-termism by corporate management to avoid another financial crisis.[7]

Since the adoption of the UK Code in 2010, stewardship codes and similar initiatives have proliferated throughout Asia. Asia's largest developed economy (Japan), Asia's tiger economies (Hong Kong, Singapore, South Korea, and Taiwan), and two of Asia's most important high-growth economies (Malaysia and Thailand) have all adopted stewardship codes.[8] Asia's third largest economy (India) has recently adopted three different stewardship codes, which each target different segments of the financial industry.[9] Asia's largest economy (China) recently inserted provisions into its revised corporate governance code to promote shareholder stewardship among institutional investors.[10] In addition, several of Asia's most important developing economies (including Kazakhstan and the Philippines) have placed the creation of a stewardship code on their corporate governance reform agendas.[11]

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5. *See, e.g.*, Iris H.Y. Chiu & Dionysia Katelouzou, *From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?*, *in* SHAREHOLDER DUTIES 131, 131 (Hanne S. Birkmose ed., 2017); Brian R. Cheffins, *The Stewardship Code's Achilles' Heel*, 73 MOD. L. REV. 1004, 1005–06 (2010); Davies, *Shareholders*, *supra* note 2, at 373.

6. Cheffins, *supra* note 5, at 1014–15.

7. Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 506 (2018); Chiu & Katelouzou, *supra* note 5, at 135; Cheffins, *supra* note 5, at 1004–06.

8. *Prepping for the Trend: Stewardship Code Coming to Asia*, ISS CORP. SOLS. (2019), https://www.isscorporatesolutions.com/prepping-for-the-trend-stewardship-code-coming-to-asia/ [https://perma.cc/9WGJ-RMK3] (archived Feb. 14, 2020) [hereinafter *ISS Corporate Solutions*].

9. In India, stewardship codes have been issued by the insurance regulator for insurance companies, by the pension fund regulator for pensions, and, most recently, by the securities regulator for mutual funds and alternative investment funds. For a detailed analysis of these codes and stewardship in India, *see* Umakanth Varottil, *Shareholder Stewardship in India: The Desiderata*, *in* GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming 2021).

10. Katherine Sung, *Regime Change Begins at Home: China's New Governance Code*, GLASS LEWIS (Oct. 4, 2018), https://www.glasslewis.com/regime-change-begins-at-home-chinas-new-governance-code/ [https://perma.cc/96VG-H3P2] (archived Feb. 14, 2020).

11. *Responsible Shareholder Engagement—A Kazakh Stewardship Code*, CITY UK (Mar. 7, 2017), https://www.thecityuk.com/research/responsible-shareholder-engagement-a-kazakh-stewardship-code/ [https://perma.cc/Z77M-88L6] (archived Feb. 14, 2020); Securities and Exchange Commission, *Philippines Corporate Governance Blueprint 2015*, REPUBLIC OF THE PHIL. 20–21 (Oct. 29, 2015), http://www.sec.gov.ph/wp-

In this context, it appears that the proliferation of stewardship in Asia is a shining example of a successful corporate governance transplant from the United Kingdom to Asia and evidence of the corporate governance convergence theory. Indeed, one leading comparative corporate law professor recently declared that Asia has "jumped on the stewardship code bandwagon."[12] Two other leading UK law professors suggest that the widespread transplant of United Kingdom–style stewardship codes "is likely driven by the [same] common concerns shared by many jurisdictions."[13] It appears that other leading professors, market players, and international organizations view the spread of United Kingdom–style stewardship as one of the most significant developments in global corporate governance.[14] The assumption is that shareholder stewardship has been transplanted around the world based on the UK model and aims to solve the corporate governance problems that the UK Code was designed to address (i.e., to motivate institutional investors to monitor corporate management to prevent them from engaging in the type of excessive risk-taking and short-termism that led to the GFC and, more recently, to promote an Environmental, Social, and Governance (ESG) agenda).[15] This assumption seems reasonable, as all Asian jurisdictions that have adopted stewardship codes claim to have been inspired by the UK Code and, at least based on a superficial textual analysis, have generally used a similar instrument (stewardship principles) and broadly similar language in those principles.[16] At this high level of abstraction, it is not unreasonable to conclude, as many experts have, that the UK stewardship model has been transplanted to Asia.[17]

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content/uploads/2015/01/SEC_Corporate_Governance_Blueprint_Oct_29_2015.pdf [https://perma.cc/W9YL-HLTP] (archived Mar. 17, 2020).

12. Hill, *supra* note 7, at 507.

13. Chiu & Katelouzou, *supra* note 5, at 135.

14. *See infra* Part III.

15. *Id*. The recently issued UK Stewardship Code 2020 now contains provision on ESG. UK STEWARDSHIP CODE 2020, FIN. REPORTING COUNCIL 1, 15 (2020), https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Final2.pdf [https://perma.cc/F3F9-C776] (archived Mar. 17, 2020) ("Principle 7: Signatories systematically integrate stewardship and investment, including material environmental, social and governance issues, and climate change, to fulfil their responsibilities.").

16. For a more sophisticated textual analysis of stewardship codes, *see* Dionysia Katelouzou & Mathias Siems, *Textual Analysis & Networks*, *in* GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES, *supra* note 9. However, even based on this sophisticated textual analysis, which responsibly includes the caveat that it does not examine the functionality of stewardship codes, the overall textual similarities of stewardship codes in Asia – particularly commonwealth Asia – shines through. It should also be noted that this analysis explicitly does not include the Singapore Family Stewardship code because of its focus on family ownership and not institutional investors (i.e., due to its functional difference).

17. *See, e.g.*, *ISS Corporate Solutions*, *supra* note 8 ("Following the formal release of Stewardship Codes ("the Code") in Japan, Malaysia, Hong Kong, and Taiwan, three

However, drilling down deeper beyond the label of stewardship and a superficial textual analysis, it is clear that there are significant differences in the function of stewardship (i.e., its intended and actual impacts on each jurisdiction's corporate governance) between the United Kingdom and most Asian jurisdictions—and also *within* Asia. In fact, in some Asian jurisdictions, shareholder stewardship functions in a way that appears to run counter to the UK model.[18] As explained in this Article, the Japanese government adopted a stewardship code with the aim of reforming its traditional lifetime-employee, risk-averse, and stakeholder-oriented governance system towards a more shareholder-oriented, profit-maximizing, and less risk-averse governance system. In Singapore, its stewardship codes appear to be designed to entrench its successful state-controlled and family-controlled system of corporate governance.[19] These functions are alien to the UK model and demonstrate the diversity in the role played by stewardship codes within Asia.

The fact that stewardship fulfills different functions in Asia than in the United Kingdom should not surprise. Throughout most of Asia, controlling shareholders—often families, the state, or other affiliated or group corporations—have actual or *de facto* control over the corporate governance of most listed companies through their voting rights.[20] Asia's corporate controllers are similar to the United Kingdom's institutional investors in that they control the shareholder float in most listed companies in their jurisdictions.[21] However, the nature of Asia's corporate controllers is diametrically opposed to the United Kingdom's institutional investors with respect to the most important feature related to shareholder stewardship—Asia's corporate controllers are "rationally engaged shareholders,"[22] whereas the United Kingdom's institutional investors are "rationally passive

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other countries including Singapore, South Korea, and Thailand are following suit as a way of promoting sustainable growth as well as corporate and shareholder value by means of active voting and constructive engagement. The UK Code is modeled after by other codes, with nuanced differences.").

18. *See* discussion in *infra* Part IV.C.

19. *See* discussion in *infra* Part IV.B.

20. Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia – Complexity Revealed*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER, *supra* note 2, at 511, 512–15, 521–22 [hereinafter Puchniak, *Multiple Faces of Shareholder Power in Asia*] (discussing Japan). While Japan has been characterized as a dispersed shareholding jurisdiction, it has a number of unique characteristics that bring it closer to a block shareholding jurisdiction. *See* Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. PRIVATE EQUITY & VENTURE CAP. L. 125, 144–47 (2014) (explaining developments in Japan's cross-shareholding arrangements).

21. Goto, *supra* note 20, at 144–47. *See also infra* notes 24 & 41 and accompanying text (on Asia and the United Kingdom respectively).

22. *See, e.g.*, Puchniak, *Multiple Faces of Shareholder Power in Asia*, *supra* note 20 at, 526–32 (discussing private benefits of control accruing to controlling shareholders in Asian jurisdictions of China, Japan, and Singapore).

shareholders."[23] From this perspective, Asia does not lack "shareholder stewards" whereas the United Kingdom does. A related important observation is that although institutional investor ownership has been on the rise in most Asian jurisdictions, family and state-controlling shareholders continue to dominate public listed companies generally.[24] Accordingly, in most jurisdictions in Asia, institutional investors do not have the ability to control—or, perhaps more importantly, to threaten to change control of—most listed companies.

From an agency costs perspective, it is also well recognized that in most Asian jurisdictions the primary corporate governance problem is not the lack of engagement or managerial monitoring by those who control the shareholder float.[25] Rather, the problem is that the controlling shareholder is engaged and monitors management for their own interests, and not necessarily as a "good steward" for the benefit of minority shareholders, the environment, or society.[26] As a result, the problems that spawned the UK Code (i.e., excessive risk-taking and short-termism by unmonitored management), and the solution provided by the UK Code (i.e., to incentivize institutional investors to collectively make use of their control over the shareholder float) are largely absent in Asia. Rather, entrenched management backed by controlling or affiliated shareholders is the norm, and institutional shareholders (whether passive or active) most often lack the voting power to seize control.

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23. *See infra* Part II.

24. *See* Adriana De La Cruz et al., *Owners of the World's Listed Companies*, ORG. ECON. CO-OPERATION & DEV. CAPITAL MKT. SERIES 11–12, 13–16, 35, 37–38 (2019), http://www.oecd.org/corporate/ca/Owners-of-the-Worlds-Listed-Companies.pdf [https://perma.cc/JD7F-K4DV] (archived Mar. 17, 2020) (based on an analysis of selected listed companies); ERNEST LIM, A CASE FOR SHAREHOLDERS' FIDUCIARY DUTIES IN COMMON LAW ASIA 52–59 (2019); Puchniak, *Multiple Faces of Shareholder Power in Asia*, *supra* note 20, at 511, 514, 521–23 (explaining varieties of block shareholdings in China, Japan, and Singapore). While state and family controlling shareholders do not generally dominate listed companies in Japan, it is fair to say that institutional investors do not collectively exercise majority control over most listed companies. *See* Goto, *supra* note 20, at 144–45.

25. *See* Puchniak, *Multiple Faces of Shareholder Power in Asia*, *supra* note 20, at 524–26 (describing blockholders in Asia).

26. *See* LIM, *supra* note 24, at 41–42 ("If shareholders can exercise corporate powers for their own benefit at the company's expense, there is a greater risk of doing so by controlling shareholders in concentrated ownership jurisdictions. . . . I examine the concentrated ownership structure of the four common law jurisdictions in Asia and provide concrete examples of how controlling shareholders have engaged in extractions of private benefits of control to the detriment of the company."); *see also* Christopher C,H. Chen et al., *Board Independence as a Panacea to Tunneling? An Empirical Study of Related-Party Transactions in Hong Kong and Singapore*, 15 J. EMPIRICAL LEGAL STUD. 987, 988 (2018) ("Tunneling represents a form of agency costs. It poses a significant problem in the Far East, whose publicly listed companies are dominated by ownership concentration, thereby raising the possibility of extracting private benefits at the expense of the company."); Puchniak, *Multiple Faces of Shareholder Power in Asia*, *supra* note 20, at 526–27.

In this context, the original function of United Kingdom–style stewardship would appear to be largely irrelevant in Asia. This makes the purported meteoric rise of stewardship codes in Asia puzzling. Why has a UK corporate governance mechanism, designed for a problem that largely does not exist in Asia, which provides for a solution that is largely unavailable in Asia, been implemented throughout Asia? The short answer is that the rise of United Kingdom–style stewardship has generally occurred in Asia on a formal level (i.e., the adoption of broadly similar stewardship principles) but often not on a functional level (i.e., the intended or actual impact on corporate governance). In fact, surprisingly, this Article reveals that some of the intended and actual functions of stewardship codes in Asia significantly depart, or even run counter to, the intended functions of the UK Code.[27]

It appears that one of the many reasons for the popularity of stewardship codes in Asia is that they provide a convenient vehicle for local governments and/or market players to achieve their own particular interests through an inexpensive, nonbinding, and malleable vehicle. The formal adoption of stewardship codes also sends a signal of "good corporate governance"—as shareholder stewardship has established itself as an indicia or norm of "good corporate governance" around the world. While this makes the widespread adoption of stewardship codes in Asia understandable, it creates a problem in terms of drawing positive or normative conclusions from this development. This observation is important as leading corporate governance scholars, prominent international organizations, and market participants repeatedly draw such conclusions based on the erroneous assumption that stewardship codes generally fulfill similar functions across jurisdictions.[28]

Adopting globally recognized mechanisms of "good corporate governance" at a superficial formal level and then altering their function to serve local purposes appears to be a rising trend in corporate governance in Asia (and elsewhere).[29] This trend suggests that corporate governance convergence at a superficial (i.e., formal) level is occurring, but that corporate governance remains considerably local, path dependent, and, ultimately, divergent in practice.[30] This trend has been recently coined as "divergence within convergence" by Jeffrey Gordon,[31] who cites the recent research of two of the authors

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27. *See* discussion in *infra* Part IV.C.

28. *See* discussion in *infra* Part II.

29. *See* Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy*, *in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, COMPARATIVE AND CONTEXTUAL APPROACH 89, 131–32 (Dan W. Puchniak et al. eds., Cambridge Univ. Press 2017).

30. *Id.*

31. Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 29 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) ("There has been convergence in many of the

on the "varieties of independent directors in Asia" as evidence of this trend.[32]

The proliferation of "stewardship" throughout Asia also adds a new layer of gloss to Ronald Gilson's impactful observation about the difference between formal convergence and functional convergence.[33] At first blush, the rise of stewardship in Asia would seem to challenge Gilson's observation that functional convergence is likely to develop before formal convergence because formal convergence is costly.[34] In Asia, it appears that, at least superficially, "stewardship" has been formally adopted and that this formal convergence has been rapid and inexpensive—yet functional convergence has not occurred as stewardship has functioned to serve divergent local objectives and interests.[35] However, a careful reading of Gilson's work suggests that he was not contemplating the type of *superficial* formal convergence that has occurred with stewardship in Asia and appears to be increasingly common in other areas of corporate governance.[36] In turn, as explained in detail in Part V below, rather than challenging Gilson's theory, the rise of stewardship in Asia (and possibly other similar

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formal governance rules but local applications reveal considerable divergence."); *id.* at 30 ("In 2017, it would also be right to add the role of 'global governance,' the effort to set standards flowing from supranational public institutions [in promoting convergence]."); *id.* at 32 ("Section 4 looks at evidence of divergence, particularly 'divergence within convergence,' which seems to describe the general state of play."); *id.* at 41 ("Divergence takes two forms: The first is a non-following of the convergent norm—for example, not requiring independent directors. The second, far more common, is divergence within the convergent norm: "divergent convergence." Evidence of both forms of divergence is found in the OECD Corporate Governance Factbook (2017), a readily accessible current guide to worldwide corporate law and governance."); *id.* at 43 ("Do these divergent elements within a convergent practice matter? The evidence is 'yes, they should.' First, the particulars of a reform can determine whether it is "high impact" or not."); *id.* at 44 ("A more radical version of 'divergence within convergence' is advanced in a recent volume on independent directors in Asia, which argues both that (1) independent directors are 'ubiquitous' in Asia, found in higher proportion across more firms than in the 'West,' and that (2), functionally, there are 'varieties' of independent directors in Asia, differing substantially from the US variant and differing even within Asia. Adoption of a transplant, particularly under pressure of foreign investors or global governance institutions, does not determine how the new institution will function. That emerges over time, as the transplant is contextualized within the local ecology, and can lead to significant divergence in practice.").

32. *See generally* Puchniak & Kim, *supra* note 29.

33. Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 356 (2001) [hereinafter Gilson, *Globalizing Corporate Governance*] ("In this essay, I have surveyed three kinds of corporate governance convergence: *functional convergence*, when existing governance institutions are flexible enough to respond to the demands of changed circumstances without altering the institutions' formal characteristics; *formal convergence*, when an effective response requires legislative action to alter the basic structure of existing governance institutions.").

34. *Id.* at 338 ("Functional convergence is likely the first response to competitive pressure because changing the form of existing institutions is costly.").

35. *See infra* Part V.

36. *See infra* Part V.

corporate governance developments in Asia) likely adds a new category, "faux convergence," to Gilson's helpful convergence taxonomy.[37] Recognizing and understanding this type of "faux convergence" is important as it presents challenges for comparative corporate governance research and calls into question the utility of efforts by organizations such as the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD), and the World Bank to promote global/universal mechanisms for "good" corporate governance.[38]

The balance of this Article will proceed as follows. Part II provides a concise overview of the rise of stewardship in the United Kingdom and explains how the UK stewardship code model is assumed to be the global model. Part III explains why an examination of stewardship in Japan and Singapore provides valuable insights into Asia. In Part IV, the Japan and Singapore case studies will be used to demonstrate how different they are from the United Kingdom and each other in the way they function. Part V will discuss the implications of these case studies for the comparative corporate governance convergence debate, and Part VI provides a brief conclusion.

II. STEWARDSHIP'S RISE IN THE UNITED KINGDOM AND SPREAD ACROSS THE GLOBE

The "Anglo–American"[39] corporate governance model based on the Berle-Means paradigm of widely dispersed shareholders has been disrupted by the rise of institutional investors.[40] Today, a modest

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37. *See infra* Figure 1.

38. *See infra* Part V.

39. That this term has become entrenched in comparative corporate governance discourse is demonstrated by a Google search of the term "Anglo-American corporate governance" performed on July 24, 2019, which produced 18,900 results. The label of "Anglo-American" label is often used as shorthand for the idea that corporate governance systems in the United Kingdom and the United States have certain characteristics in common. These include: 1) widely-held and liquid shareholdings; 2) a one-tier (unitary) model of the board of directors; 3) a so-called "common law" origin; and 4) an overall orientation that may be termed shareholder primacy. Although substantial differences (such as in shareholder power) between the two systems exist in both law and practice, we take the position that "Anglo-American" remains a useful point of departure when describing the shareholder landscape and context that underlies much of the comparative corporate law discourse – but which is quite distinct from the situation in almost every other jurisdiction. For an account and explanation of key differences between the US and the UK corporate governance systems, *see* CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER (Cambridge Univ. Press 2013).

40. *See, e.g.*, BRIAN R. CHEFFINS, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED 345–70 (2008) (describing the factors underlying the rise of institutional investors in the UK); Bernard S. Black & John C. Coffee Jr., *Hail Britannia?: Institutional Investor Behaviour Under Limited Regulation*, 92 MICH. L. REV.

number of institutional shareholders collectively hold enough shares to exercise effective control over the majority of listed companies in the United Kingdom[41] and the United States.[42] This phenomenon of increasingly concentrated shareholding poses a fundamental challenge to the defining tension (or agency cost problem) between shareholders and managers that is fundamental to Anglo–American corporate governance discourse.[43] Concentration of voting power within relatively few institutional investors makes it *theoretically* possible for them to play a critical role in reducing shareholder–manager agency costs by acting as collective "good stewards" of their investee companies through the exercise of their voting rights.[44]

Yet left to their own devices, however, institutional investors seemed to do nothing of the sort. Memorably dubbed "the sleeping giants of British corporate life,"[45] institutional shareholders have by and large adopted a policy of passivity.[46] Notwithstanding the above,

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1997, 2001–07 (1994) (describing the institutionalization of British capital markets with comparisons to the US).

41. *See* De La Cruz et al., *supra* note, 24 at 37–38 (based on an analysis of 482 listed companies representing sixty-three percent of total market capitalisation in the United Kingdom, finding that institutional investors held 63 percent of market capitalisation weighted ownership); Davies, *Shareholders*, *supra* note 2, at 357–59. For latest available figures, *see Ownership of UK quoted shares: 2016*, *supra* note 2.

42. *See, e.g.*, Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 725–26 (2019) ("Over the last fifty years, institutional investors have come to hold a majority of the equity of U.S. public companies. From 1950 to 2017, the institutional ownership of corporate equity increased tenfold, from 6.1 percent to 65 percent. As a result, institutional investors now control a large majority of the shares of public companies and have a dominant impact on vote outcomes at those companies."); Ronald J. Gilson & Jeffrey N. Gordon, *The Rise of Agency Capitalism and the Role of Shareholder Activists in Making It Work*, 31 J. APPLIED CORP. FIN. 8, 11 (2019) (reporting that "by 2009, institutional investors held just over fifty percent of all U.S. public equities, and seventy-three percent of the equity of the 1,000 largest U.S. corporations."); De La Cruz et al., *supra* note 24, at 37–38 (based on an analysis of 622 listed companies representing thirty-one percent of total market capitalisation in the United States, finding that institutional investors held seventy-two percent of market capitalisation weighted ownership).

43. Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy*, 119 COLUM. L. REV. 2029, 2048–57 (2019) [hereinafter Bebchuk & Hirst, *Index Funds*] (explaining why institutional investors generate distinctive agency costs); John C. Coates IV, *The Future of Corporate Governance Part I: The Problem of Twelve* 2–5 (Harv. Public Law Working Paper No. 19–07, 2019) (explaining how the US approach to agency costs has or needs to evolve in response to institutional investors).

44. *See* Bebchuk & Hirst, *Index Funds*, *supra* note 43 (arguing that index fund managers have incentives to underinvest in stewardship and defer excessively to corporate managers). *But see* Edward B. Rock & Marcel Kahan, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders* 33–34, 42–44 (N.Y.U. Law & Econ. Research Working Paper No. 18–39, 2019) (arguing that index fund managers have incentives to invest in acquiring company-specific information and engage in company-specific analysis).

45. *See* DAVID KYNASTON, CITY OF LONDON: THE HISTORY 434 (2002).

46. *See* Bebchuk, Cohen & Hirst, *supra* note 3, at 96–100 (offering economic reasons for passivity); Bebchuk & Hirst, *Index Funds*, *supra* note 43, at 2050–57

the expectation—or wishful thinking—that institutional investors would in fact exercise their power as "stewards" persisted among regulators, policymakers, and scholars alike for decades.[47] However, it was the GFC that caused the United Kingdom to place a greater emphasis on shareholder stewardship and to make it a pillar of its corporate governance model.[48]

As a response to the excessive risk-taking and short-termism by listed company management that contributed to the GFC, the UK Code aimed to create incentives for institutional investors to step up and play a preventative role.[49] Although the UK Code initially took the form of a voluntary, opt-in "comply or explain" regime,[50] it was subsequently made mandatory for every United Kingdom–authorized asset manager in December 2010 to disclose whether they choose to

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(explaining why index funds have incentives to underinvest in stewardship and defer excessively to management); CHEFFINS, *supra* note 40, at 377–81 (discussing a mix of economic and political reasons for passivity); *see also* Gilson & Gordon, *supra* note 4, at 890–91 (explaining disincentives arising from agency costs of agency capitalism); *id.* at 889, 895 (arguing that both investment managers and asset owners are "rationally reticent" in the sense that while they would not on their own initiative on governance issues but would be responsive to proposals from others).

47. *See, e.g.*, Arad Reisberg, *The UK Stewardship Code: On the Road to Nowhere?*, 15 J. CORP. LEGAL STUD. 217, 223–25 (2015) (describing the 'alleged success' of the UK Code put forward by regulators since its inception); Rock & Kahan, *supra* note 43, at 33–34, 42–44 (arguing that index fund managers have incentives to monitor management).

48. For a concise summary of pre-GFC attempts at addressing stewardship, *see* Cheffins, *supra* note 5, at 1007–09.

49. Arad Reisberg, *The Role of Institutional Shareholders: Stewardship and the Long/Short-Term Debate*, *in* THE LAW ON CORPORATE GOVERNANCE IN BANKS 100, 113–14 (Iris H.Y. Chiu et al. eds., 2015).

50. For the original 2010 Code, *see* UK STEWARDSHIP CODE, FIN. REPORTING COUNCIL (July 2010), https://www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf [https://perma.cc/8NB4-GLQC] (archived Feb. 15, 2020). That this was meant to be opt-in comply-or-explain – meaning that the targets of the Code were free to neither comply nor explain by simply not opting-in to the Code – can be inferred from the implementation report released at the same time. *See* IMPLEMENTATION OF THE UK STEWARDSHIP CODE, FIN. REPORTING COUNCIL 2 (July 2010), https://www.frc.org.uk/getattachment/34d58dbd-5e54-412e-9cdb-cb30f21d5074/Implementation-of-Stewardship-Code-July-2010.pdf [https://perma.cc/7YWZ-X6HM] (archived Feb. 15, 2020) ("The FSA will shortly begin consultation on proposals to introduce a requirement for authorised asset managers to disclose whether or not they comply with the Code. In the meantime, the FRC would strongly encourage all institutional investors to publish by the end of September 2010 a statement on their website of the extent to which they have complied with the Code, and to notify the FRC when they have done so."). *See also id.* at 5 ("The Code is addressed in the first instance to those firms who manage assets on behalf of institutional investors. The FSA is expected to begin consultation in July 2010 on proposals to introduce a "comply or explain" disclosure requirement that would apply to those firms authorised by the FSA to manage assets on behalf of institutional investors. The FRC expects those firms to disclose on their websites to what extent they have complied with the Code, and how they have done so."). The use of the words "strongly encourage" and "expects" reveal that the regime was not intended—at least upon inception of the UK Code—to be mandatory. *Id.* at 2, 5.

comply or explain.[51] Later, in a bid to "improve the quality of reporting against the Code, encourage greater transparency in the market and maintain the credibility of the Code," the Financial Reporting Council (FRC) conducted a grading exercise (called "tiering") by which they classified UK Code signatories into three "tiers" according to the quality of their statements on their approaches to stewardship and, where they have departed from the code, their explanations for doing so.[52] The FRC subsequently removed the lowest Tier 3 category in August 2017,[53] but in the process about twenty out of the forty asset managers graded as Tier 3 removed themselves as UK Code signatories.[54]

Despite these changes in the form of implementation, what the UK Code has been consistently criticized for has been its failure to provide adequate incentives to motivate institutional shareholders to act as "good stewards."[55] As Lucian Bebchuk, Alma Cohen, and Scott Hirst argue in an article that has gained significant attention, asset managers (who compete fiercely on relative performance) have almost no incentives to engage actively with investee company management.[56]

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51. UK STEWARDSHIP CODE 2020, *supra* note 15 ("Asset managers are required under the FCA Conduct of Business Sourcebook (COBS) to develop and explain how they have implemented an engagement policy for their listed equity investments, including how they monitor investee companies, their voting behaviour and their use of proxy advisors."); FINANCIAL CONDUCT AUTHORITY, CONDUCT OF BUSINESS SOURCEBOOK, r. 2.2.3 (Feb. 2020): "Disclosure of commitment to the Financial Reporting Council's Stewardship Code. A *firm*, other than a *venture capital firm*, which is *managing investments* for a *professional client* that is not a natural person must disclose clearly on its website, or if it does not have a website in another accessible form: (1) the nature of its commitment to the Financial Reporting Council's Stewardship Code; or (2) where it does not commit to the Code, its alternative investment strategy." [https://perma.cc/H7FW-9HGN] (archived Feb. 24, 2020). Curiously, but no direct reporting obligations as to compliance with the UK Code was imposed on foreign investors notwithstanding their dominating presence in the UK's public equity markets.

52. TIERING OF SIGNATORIES TO THE STEWARDSHIP CODE, FIN. REPORTING COUNCIL (Nov. 14, 2016), https://www.frc.org.uk/news/november-2016/tiering-of-signatories-to-the-stewardship-code [https://perma.cc/2A4F-FDNR] (archived Feb. 20, 2020).

53. FRC REMOVES TIER 3 CATEGORISATION FOR STEWARDSHIP CODE SIGNATORIES, FIN. REPORTING COUNCIL (Aug. 3, 2017), https://www.frc.org.uk/news/august-2017/frc-removes-tier-3-categorisation-for-stewardship [https://perma.cc/2LUP-L6XH] (archived Feb. 20, 2020).

54. *Id.*

55. The UK Code's lack of coercive force has since been and continues to be a source of much criticism. *See* Cheffins, *supra* note 5, at 1025 ("Correspondingly, even if the Stewardship Code fails to fulfil the objectives of its proponents, without additional study it would be unwise to replace its mixed comply-or-explain and voluntary approach with mandatory regulation designed to foster shareholder activism."); Reisberg, *supra* note 47, at 240–41 (discussing the lack of an enforcement mechanism for the Stewardship Code).

56. *See* Bebchuk, Cohen & Hirst, *supra* note 3, at 96–100 (neither passively nor actively managed mutual fund managers have incentives to engage in stewardship than would be portfolio value-maximizing); *id.* at 102–03 (investment managers have active disincentives to oppose management).

From this perspective, stewardship codes are unlikely to have a significant impact without addressing the incentive deficit for "stewards,"[57] regardless of whether their objective is to build long-term value, act in the public interest, or something else.

What began as a code for a single country (the United Kingdom) quickly took on a life of its own in spite of detractors.[58] As Jennifer Hill pertinently observed, the UK Code's bold claims that "[s]tewardship aims to promote the long term success of companies . . . [and] [e]ffective stewardship benefits companies, investors and the economy as a whole"[59] "proved alluring from a comparativist standpoint, providing clear incentives for transplantation."[60] At least formally, it appears that the UK Code sparked a global stewardship movement, with broadly similar codes and other initiatives now existing in at least eighteen jurisdictions over five continents—with many other jurisdictions also placing shareholder stewardship on their corporate governance reform agendas.[61]

Yet amidst all this activity, what is conspicuously missing is any serious attempt to identify the precise actors in each national corporate governance context and define the subject(s) and goal(s) of stewardship in each. Put simply, the question that has not yet been fully explored is: What is the intended and actual function(s) of stewardship in Asian jurisdictions, and does this depart from the original UK stewardship model? Instead, what largely prevails is an implicit assumption that the intended and actual functions of "stewardship" in Asia has been (and is) similar to the United Kingdom.

Two leading United Kingdom–based scholars, who have been active in United Kingdom and European stewardship discourse, have

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57. *Id.* at 108 ("stewardship codes putting forward aspirations, principles, or guidelines are likely to have less of an impact than if investment managers had appropriate incentives.").

58. *See supra* note 55 and accompanying text; *see also* Owen Walker, *Beacon of British stewardship needs a brighter flame*, FIN. TIMES (Jan. 27, 2019), https://www.ft.com/content/1a3a57be-5c15-3e03-bae0-10bd5804bf20 [https://perma.cc/JY7A-7VB3] (archived Apr. 2, 2020).

59. THE UK STEWARDSHIP CODE, FIN. REPORTING COUNCIL 1 (Sept. 2012), https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf [https://perma.cc/4F2B-FLFC] (Archived Feb. 15, 2020).

60. Hill, *supra* note 7, at 506–07.

61. *See ISS Corporate Solutions*, *supra* note 8 ("Following the formal release of Stewardship Codes ("the Code") in Japan, Malaysia, Hong Kong, and Taiwan, three other countries including Singapore, South Korea, and Thailand are following suit as a way of promoting sustainable growth as well as corporate and shareholder value by means of active voting and constructive engagement. The UK Code is modeled after by other codes, with nuanced differences."); *see also Q&A on Stewardship Codes*, ERNST & YOUNG (Aug. 2017), https://www.ey.com/Publication/vwLUAssets/ey-stewardship-codes-august-2017/$FILE/ey-stewardship-codes-august-2017.pdf [https://perma.cc/9PLQ-PCST] (archived Feb. 15, 2020); Kerrie Waring, *Investor stewardship and future priorities*, ETHICAL BOARDROOM (2017), https://ethicalboardroom.com/investor-stewardship-and-future-priorities/ [https://perma.cc/E9GJ-VFMF] (archived Feb. 15, 2020).

readily assumed that stewardship globally is the same as stewardship in the United Kingdom and is driven by the same factors as in the United Kingdom:

> However, the [UK] Code has since taken its place in the transnational governance space and inspired international developments in the institution of Stewardship Codes in many other countries, including the Netherlands, Switzerland, Japan and Malaysia . . . the gradual internationalisation of soft law governance obligations of stewardship on the basis of the UK Stewardship Code is likely to be driven by the common concerns shared by many jurisdictions with listed markets in relation to the increasing presence of institutional investors (especially foreign ones) in their markets and the potentially active role they can play.[62]

Scholars in the United States have also been content to proceed based on a monolithic view of stewardship based on the UK model. Jeffrey Gordon has identified a global shift away from "efficiency" and towards political and social "stability" as the end goal of corporate governance.[63] Among those interested in stability are large institutional investors due to their diversified portfolios and long-term horizons, as well as "global governance"[64] institutions.[65] Together with resistance against short-termist hedge funds, Gordon points to the global stewardship movement as a manifestation of the increasing concern with stability.[66] Gordon's vision of stewardship—as promoting long-term shareholder value and as a bulwark against short-term

62. Chiu & Katelouzou, *supra* note 5, at 135. *See also* Iris H.Y. Chiu, *Learning from the UK in the Proposed Shareholders' Rights Directive 2014? European Corporate Governance Regulation from a UK Perspective*, 114 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 121, 150–51 (2015) ("Further a number of authoritative bodies such as the Italian stock exchange and the Swiss International Investor Association have adopted and adapted the Code, as well as the Japanese National Pension Fund and Malaysian stock exchange. The Japanese Code is remarkably similar to the UK's except that it emphasises the constructive dialogue between investors and companies, in the tradition of communitarian harmony important to Japanese tradition, and it compels investors to engage in an in-depth knowledge of investee companies in order to support engagement. . . . The Malaysian Institutional Investor Code to drive Stewardship . . . is also remarkably similar to the UK Code except that institutional investors are to explicitly consider corporate governance and sustainability (environmental, social and governance) issues in their engagement.").

63. "This is demonstrated by the growing global governance movement for 'Stewardship Codes' and the concerted campaign against the purported 'short-termism' of hedge funds." Gordon, *supra* note 31, at 54. Interestingly, Gordon also suggests "family shareholding groups," especially those planning for future generations, value stability. *Id.*

64. Such as the International Monetary Fund, the World Bank, and the Organization for Economic Co-operation and Development. *See id.* at 45.

65. *Id.* at 54.

66. *Id.*

hedge fund activism—exemplifies the conventional understanding of global stewardship based on the UK model.[67]

Reports in the popular press almost uniformly assume that stewardship movements across the world follow the UK model closely.[68] What is more troubling is the fact that the OECD, a key actor in global governance, has done largely the same.[69] In the *G20/OECD Principles of Corporate Governance*, institutional shareholders are called on to "disclose their policies with respect to corporate governance," and the adoption of voluntary stewardship codes was cited in connection.[70] By the time the *OECD Survey of Corporate Governance Frameworks in Asia* was released in 2017, stewardship had become yet another box to tick, nestled under "[e]xercising voting rights" as a subset of "[g]overnance-related responsibilities of

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67. *See also* Gilson & Gordon, *supra* note 4 (premising its argument on "rationally reticent" institutional shareholder behaviour, the solution to which is arbitrage by a class of actors specializing in activism).

68. *See, e.g.*, Fiona Reynolds, *Stewardship codes guide best practice*, INV. MAGAZINE (Sept. 2017), https://www.investmentmagazine.com.au/2017/09/stewardship-codes-guide-best-practice/ [https://perma.cc/W43N-T345] (archived Feb. 15, 2020) ("Australia can then join a long list of countries that have already developed stewardship codes in recent years, including the UK, Italy, Denmark, Switzerland, the Netherlands, the European Union, the US, Canada, Japan, Hong Kong, Philippines, South Korea, Malaysia, Taiwan, Thailand, Brazil and Singapore. // For many countries, stewardship codes can help foster sustainable, long-term growth and attract foreign investors which feel that stewardship codes can help ensure better corporate governance."); Schroders, *Schroders sees wide adoption of stewardship codes in Asia*, ASIAN INV'R (July 16, 2018), https://www.asianinvestor.net/article/schroders-sees-wide-adoption-of-stewardship-codes-in-asia/445470 [https://perma.cc/B9HK-ESWV] (Archived Feb. 15, 2020) ("[The UK Stewardship Code] sets the standard for investors in terms of monitoring and engaging with companies that improve corporate governance. . . . Asia is one region where these standards have been widely adopted. . . . Elsewhere, Singapore, Taiwan and Australia have their own versions, in response to a clear sign from regulators that they want investors to hold companies to account and encourage better performance."); Amanda White, *Top US funds embrace stewardship code*, TOP1000FUNDS (Feb. 17, 2017), https://www.top1000funds.com/2017/02/top-us-funds-embrace-stewardship-code/ [https://perma.cc/27RT-R7HM] (archived Feb. 15, 2020) ("Six of the 14 countries that have developed stewardship codes since 2014 are in Asia, the PRI states. Codes have typically been modelled after the UK Stewardship Code; they set out principles that aim to improve engagement between investors and companies to help improve long-term, risk-adjusted returns."); Masayuki Yuda, *Shareholders find their voice at Japan's annual meetings*, NIKKEI ASIAN REV. (July 12, 2018), https://asia.nikkei.com/Business/Business-trends/Shareholders-find-their-voice-at-Japan-s-annual-meetings [https://perma.cc/8VHX-Z46F] (archived Feb. 15, 2020) ("Modeled on British versions, these initiatives [the Japanese corporate governance and stewardship codes] are shaking things up."); Walker *supra* note 58 ("[The UK Code] turned the UK into a leader in corporate oversight but it has since been overtaken by foreign imitators. . . . Many countries have followed the UK's lead, with more than 20 codes in place.").

69. ORG. ECON. CO-OPERATION & DEV., G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE 29–30 (2015), https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1581819735&id=id&accname=guest&checksum=AB7DD38F2DDFE7061573FE766D969722 [https://perma.cc/W3YP-BQMW] (archived Feb. 15, 2020).

70. *Id.*

institutional investors."[71] Despite observing in an earlier section that thirteen out of the fourteen Asian jurisdictions surveyed had concentrated shareholding structures,[72] nowhere in this document was the importance (or lack thereof) of "institutional investors" explained nor "stewardship" defined nor its function explained with respect to each jurisdiction's context. The irresistible inference is that the authors had, consciously or not, implicitly assumed that all these stewardship-implementing jurisdictions understood stewardship in the same way because their stewardship codes were all seemingly modeled on the UK Code.

Even sophisticated governance and legal professionals are not immune to the uniform stewardship assumption.[73] A recent example is Ernst & Young's (EY) *Q&A on Stewardship Codes*.[74] EY cannot be faulted for clarity, as it states clearly its view of what stewardship codes are[75] and how they are applied, following the orthodoxy set by the UK Code.[76] Yet there is nothing in the document to suggest that the existence of shareholders other than institutional investors—or the role of institutional investors in corporate governance—is contemplated.

Another telling example comes from Institutional Shareholder Services, the world's leading proxy advisory firm:[77]

> Following the formal release of Stewardship Codes ("the Code") in Japan, Malaysia, Hong Kong, and Taiwan, three other countries including Singapore, South Korea, and Thailand are following suit as a way of promoting sustainable

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71. ORG. ECON. CO-OPERATION & DEV., OECD SURVEY OF CORPORATE GOVERNANCE FRAMEWORKS IN ASIA 27 (2017), https://www.oecd.org/daf/ca/OECD-Survey-Corporate-Governance-Frameworks-Asia.pdf [https://perma.cc/9RCE-UXHG] (archived Feb. 15, 2020).

72. *Id*. at 5–6. The exception was Mongolia, on which nothing was said about shareholding structure other than that a majority of listed companies may be considered non-state-owned. *Id*. at 6. Of the thirteen concentrated shareholding jurisdictions, only China was identified as having substantial institutional investor ownership (at 19.86 percent). *Id*. at 5.

73. *See, e.g.*, Ruth Sullivan, *UK seen as model for stewardship guidelines*, FIN. TIMES (Aug. 1, 2010), https://www.ft.com/content/0e0bbc50-9c02-11df-a7a4-00144feab49a [https://perma.cc/HH4J-V5D4] (archived Mar. 17, 2020) ("Ms. Waring believes it is too early to expect consistency between different stewardship or governance codes. But sharing basic principles on voting, monitoring and disclosure, as recommended by the ICGN, would provide a good shared basis, she says, adding: 'The UK code could well be a model [for other countries]')." Kerrie Waring was then COO at the International Corporate Governance Network. *Id.*

74. *See Q&A on Stewardship Codes, supra* note 61.

75. *Id*. at 2 ("[Stewardship] codes . . . aim to clarify basic governance expectations and responsibilities in ways that enhance the quality of investor-company dialogue and contribute to the long-term success of companies.").

76. *Id*. ("Stewardship codes typically apply to institutional investors . . . . Most stewardship codes are voluntary. This means institutional investors are encouraged to become code signatories and to disclose their commitment to the code's principles, where relevant.").

77. *ISS Corporate Solutions*, *supra* note 8.

growth as well as corporate and shareholder value by means of active voting and constructive engagement. The UK Code is modeled after by other codes, with nuanced differences.[78]

Even actors personally involved in implementing stewardship projects in their respective jurisdictions can portray themselves as following in the United Kingdom's footsteps without interrogating the fundamentals of what stewardship means for their respective contexts. In their 2016 book *Inspiring Stewardship*, Didier Cossin and Ong Boon Hwee[79] declared:

> Led by the development in the United Kingdom of a stewardship code in 2010, a number of other countries are developing similar codes (Japan, Singapore, South Africa, and others) to address this area and to define the scope of these responsibilities of ownership.[80]

There is an element of irony in this characterization; as shall be seen later, the intended and actual functions of Singapore's own stewardship code ultimately turned out to be little like the United Kingdom's.[81] In fact, in many respects, the manner in which stewardship functions in Singapore has turned the UK model of stewardship on its head—and, in many important respects, functions differently from any other jurisdiction in Asia.[82]

There are exceptions to the overall tendency to characterize stewardship in other jurisdictions as essentially the same as in the United Kingdom, of which Hill's 2018 article is a notable example. While noting that "[s]tewardship codes reflect the view that engagement by institutional investors is an integral part of any corporate governance system"[83] and that many Asian and other jurisdictions have "jumped on the stewardship bandwagon,"[84] Hill proceeds to classify stewardship codes into three major categories by their source[85] and discusses key differences between the UK and

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78. *Id*.

79. They are respectively a business school professor, and a former brigadier-general in the Singapore armed forces as well as the CEO of the body that created Singapore's stewardship code. The story of Singapore's stewardship code is set out in full in Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret*, 53 VAND. J. TRANSNAT'L L. 967 (2020) and summarized in Part IV.B below.

80. *See* DIDIER COSSIN & ONG BOON HWEE, INSPIRING STEWARDSHIP 46 (2016).

81. *See* discussion in *infra* subpart IV.B. (noting the dissimilarities between Singapore's stewardship code and the United Kingdom's).

82. *See infra* subpart IV.B. (discussing the features that are distinctive to Singapore's stewardship code).

83. Hill, *supra* note 7, at 506.

84. *Id*. at 507.

85. *See id*. (regulatory- or quasi-regulator-issued); *id*. at 508 (private industry actors); *id*. at 509 (investors).

Japanese codes.[86] Although Hill correctly identifies the difference in policy objectives between the two codes,[87] she does not go so far as to consider the alternative possibility that stewardship itself means different things in these two jurisdictions. In a subsequent article, Hill summarized recent developments in Asia as follows: "Japan adopted its own Stewardship Code, based on the U.K. model, in 2014, and many other Asian jurisdictions have now followed suit."[88]

Similarly, while there is clear awareness in the *ICGN Global Stewardship Principles* that "there are different models of corporate finance and ownership of listed companies around the world" and "[family or state owned corporate models] can differ in very basic principles such as shareholder primacy versus stakeholder primacy, and may require deeper consideration in terms of how stewardship can be effectively applied,"[89] there is no further consideration of whether stewardship itself can stand as a more-or-less singular concept when applied to clearly different jurisdictional contexts.

Is the basic stewardship problem as understood in the UK stewardship discourse necessarily shared by the other jurisdictions that now form part of the global stewardship movement? First consider the hard facts. Most listed companies in jurisdictions other than the United Kingdom (or United States) are under the *de facto* (if not outright *de jure*) control of families, states, or other corporations that are controlling blockholders.[90] Given the dominance of controlling

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86. *See id*. at 513–22 (comparing and contrasting the features of the stewardship codes in Japan and the United Kingdom).

87. *See id*. at 520 ("A central policy factor underpinning the U.K. Stewardship Code was the need for effective risk control in the post-crisis era. The Japanese version, however, was far more focused on arresting declining profitability, unlocking value, and increasing investor returns.").

88. Jennifer Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, 2019 U. ILL. L. REV. 507, 516 (2019).

89. INTERNATIONAL CORPORATE GOVERNANCE NETWORK, ICGN GLOBAL STEWARDSHIP PRINCIPLES – GLOBAL STEWARDSHIP PRINCIPLES AND ENDORSERS 23 (2016), https://www.icgn.org/sites/default/files/ICGNGlobalStewardshipPrinciples.pdf [https://perma.cc/NSR4-PRPT] (archived Feb. 3, 2020).

90. *See, e.g.*, De La Cruz et al., *supra* note 24, at 11–12, 37–38 (2019) (reporting data about types of investors based on an analysis of selected listed companies in Asia and countries other than the US and UK). While state and family controlling shareholders do not generally dominate listed companies in Japan, it is fair to say that institutional investors do not collectively exercise majority control over most listed companies. *See* Goto, *supra* note 20, at 144–45 (analyzing data from the Tokyo Stock Exchange regarding the types of investors in the exchange); *see also* Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States*, 22 REV. FIN. STUD. 1377, 1405–06 (2009) ("First, although many believe that the United States has diffuse ownership, the evidence is to the contrary. Among a representative sample of U.S. public firms, 96 percent of them have blockholders. These blockholders in aggregate own an average of 39 percent of the common stock. Second, although virtually all commentators believe that ownership in the United States is more diffuse than elsewhere, again the evidence is to the contrary. The ownership concentration of U.S. firms is similar to like-sized firms elsewhere. On a country-by-country basis, the United States falls in the middle of the pack.").

shareholders in many jurisdictions, institutional shareholders control only a minority of the total voting power of listed companies. Consequently, institutional shareholders in most jurisdictions have little power to cause a change in corporate control or make a credible threat to do so.

Given these facts, instead of an "absent" steward, the principal corporate governance problem in these jurisdictions may be better characterized as the risk of an entrenched controlling shareholder using their very real power not to discharge the function of a steward, but rather to extract private benefits of control at the minority shareholders' expense.[91] Why would a jurisdiction like that possibly jump on the stewardship bandwagon? Or is something else going on under the innocuous label of "stewardship"?

On the other hand, even in the relatively uncommon case of a jurisdiction without a predominance of controlling block shareholders, it is not necessarily the case that substantial shareholders behave passively and fail to engage in corporate governance. In fact, active shareholders may well take—under at least some conditions—a promanagement, pro-long-term position even at the cost of immediate short-term disadvantage. An example would be long-term stable shareholders rallying to the defense of incumbent management against a concerted attack by a short-termist hostile raider in Japan.[92] Why would substantial, yet dispersed, shareholders ever do this? And why would such a jurisdiction introduce what would seem at first glance to be a United Kingdom–style stewardship code? The next Part answers these questions through a pair of case studies: Japan and Singapore.

III. STEWARDSHIP THROUGH ASIAN LENS(ES): THE CONTRIBUTION OF JAPAN AND SINGAPORE CASE STUDIES

As demonstrated in Part II above, despite the appearance of a "global" stewardship movement, the reality of stewardship as it has manifested in each jurisdiction implementing it—or considering it—is much more complex. To make the case for Asia, this Article examines two case studies, each featuring one Asian jurisdiction.

Japan and Singapore have been selected for this Article for several reasons. First, Japan and Singapore are both leading economies in

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91. *See* Puchniak, *Multiple Faces of Shareholder Power in Asia*, *supra* note 20, at 526–27 (observing that extraction of private benefits of control in Asia may take a different form from the Anglo-American paradigm).

92. *See* Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 36, 38 (2018) (discussing the *Bulldog Sauce* case); *id.* at 30–31 (discussing *Livedoor*); *see also* Dan W. Puchniak, *The Efficiency of Friendliness: Japanese Corporate Governance Succeeds Again Without Hostile Takeovers*, 5 BERKELEY BUS. L.J. 195, 246–50 (2008) (discussing the Oji Paper incident).

Asia, which at various times have been potential models of corporate governance for the region and the world—and have, on a number of metrics, reached the zenith of economic performance in modern times.[93] For this reason, they both have often been featured in leading comparative corporate law and governance scholarship.[94] Second, they

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93. Through the postwar period, Japan has been a leading economy in Asia and the world, and a model of corporate governance for countries such as the United States, *see, e.g.*, Puchniak, *Multiple Faces of Shareholder Power in Asia*, *supra* note 20, at 521 (observing how in four post-war decades, Japan transformed itself from a country decimated by war to having a GNP per person in 1988 that was higher than that of the United States); *see also* Dan W. Puchniak, *The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law Asian-Pacific Law & Policy Journal*, 9 PAC. L. & POL'Y J. 7, 17–18 (2007) [hereinafter Puchniak, *Japanization of American Corporate Governance*] (observing how in the 1980s and early 1990s Japan was seen as having a world-leading corporate governance model). Singapore's economy is one of the most competitive, dynamic, and wealthy in the world. *See* Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMP. L. 265, 298 (2017) (collecting sources demonstrating the robustness of Singapore's economy). Singapore's model of corporate governance has been considered by the Chinese government for adoption in the reform of their state-owned enterprises. *See, e.g.*, Tan Cheng Han et al., *State-Owned Enterprises in Singapore: Historical Insights into a Potential Model for Reform*, 28 COLUM. J. ASIAN L. 61, 62–63 (2015) (observing that the Chinese government decided that by 2020, the Singapore GLC Model would be replicated in China 30 times over); *see also e.g.*, Gabriel Wildau, *China deploys state enterprises to economic stimulus effort*, FIN. TIMES (June 21, 2016), https://www.ft.com/content/3d10e5cc-3754-11e6-a780-b48ed7b6126f [https://perma.cc/2REW-XMZF] (archived Feb. 3, 2020) (describing China's strategy regarding the use of state-owned enterprises); *From SOE to GLC*, ECONOMIST (Nov. 23, 2013), https://www.economist.com/finance-and-economics/2013/11/23/from-soe-to-glc [https://perma.cc/HKR6-576H] (archived Feb. 3, 2020) (reporting that the Chinese Government is following the Temasek model).

94. For analyses by leading corporate law scholars featuring Japan, *see, e.g.*, JOHN ARMOUR ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (3d. ed. 2017); John Armour et al., *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 219, 221–23 (2011) (assessing the emergence of the hostile takeover mechanism in Japan, as well as the United States and the United Kingdom); Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171, 2172–77 (2005) (discussing the increased occurrence of hostile takeovers in Japan in the early 2000s); Yoshiro Miwa & J. Mark Ramseyer, *The Fable of the Keiretsu*, 11 J. ECON. & MGMT. STRATEGY 169, 169–72 (2002) (analyzing the validity of the concept of the keiretsu in Japanese economics); Goto, *supra* note 20, at 126–28 (examining the extent and consequences of the rights of the shareholders of Japanese corporations); *see also* Alan K. Koh, *Appraising Japan's Appraisal Remedy*, 62 AM. J. COMP. L. 417, 418–21 (2014) (exploring the law of the shareholder remedy of appraisal in Japan). Japan has also found a following even amongst scholars who do not otherwise have special training or expertise in that jurisdiction. *See, e.g.*, Ronald J. Gilson & Mark J. Roe, *The Political Economy of Japanese Lifetime Employment*, *in* EMPLOYEES AND CORPORATE GOVERNANCE 239–307 (Margaret M. Blair & Mark J. Roe eds., 1999) (discussing Japanese corporate governance extensively). Analyses featuring Singapore are comparatively more recent. *See, e.g.*, CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM 125–48 (2008) (assessing economic growth in Singapore); Tan et al., *supra* note 93, at 61–65 (assessing the features of the Singapore model of corporate law); Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment in Controlled Companies: The Case of Singapore, in* RESEARCH HANDBOOK OF SHAREHOLDER POWER

are both developed countries, which makes comparing them easier, as issues arising in developing economies and developmental states can further complicate already complex comparative analyses.[95] Third, Japan and Singapore present the opportunity to examine stewardship within Asia along several interesting and important dimensions, which allow the authors to consider how certain legal, economic, institutional, and cultural factors may impact the functioning of stewardship in Asia. Indeed, Japan and Singapore have clear differences in terms of their size, geography (north versus south), legal traditions (civil/United States–mixed versus commonwealth), shareholding structure (dispersed/stable-cross shareholder dominated versus state/family block shareholder dominated), institutional architectures, and business cultures.

Japan, at first glance, seems an unlikely candidate for United Kingdom–style stewardship, with a largely civil law-based legal tradition and a recent history rich in United States–inspired transplants.[96] Even if a United Kingdom–style stewardship code were to be implemented in Japan, it would seem more prudent to expect differences in implementation and results than otherwise. Yet its nominally dispersed shareholding structure[97]—which distinguishes it from insider-blockholder-dominated Asia and bears some resemblance to the Anglo–American dispersed-shareholder model—and the presence of passive institutional shareholders suggests that it is one of the few (if not only) places in Asia where United Kingdom–style stewardship might plausibly take root. As shown below in Part IV, this was not to be, and not for reasons attributable to legal tradition—but more likely due to Japan's political environment, corporate governance system, and business culture. Japan thus illustrates powerfully how a *formally* similar dispersed shareholding structure, but a very different political economy, corporate governance system, and business culture may nonetheless yield a competing vision of stewardship that all but turns the original concept on its head.

Singapore is a commonwealth jurisdiction with a legal tradition and corpus of commercial law that continues to this day to bear

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573 (Jennifer G. Hill & Randall S. Thomas eds., 2015); Puchniak & Lan, *supra* note 93, at 266–72 (discussing the relatively unique nature of Singapore's Americanesque independent director structure in its corporate governance regime).

95. *See* Alan K. Koh & Samantha S. Tang, *The Future of* The Anatomy of Corporate Law *for Asia: A Forward Looking Critique*, 12 ASIAN J. COMP. L. 197, 198–99 (2017) (noting Japan's classification as a developed economy, and declaring that Singapore has a "developed, first-world capitalist economy").

96. *See* ICHIRO KAWAMOTO, YASUHIRO KAWAGUCHI & TAKAYUKI KIHIRA, CORPORATIONS AND PARTNERSHIPS IN JAPAN 80–93 (2012) (discussing the history of Japanese corporate law); HIROSHI ODA, JAPANESE LAW 12–33 (3d ed. 2009) (discussing the history of modern Japanese law in general.

97. *See* Puchniak, *Multiple Faces of Shareholder Power in Asia*, *supra* note 20, at 521.

substantial similarity to the United Kingdom.[98] One might be tempted to speculate that importation and implementation of United Kingdom–style stewardship would be relatively straightforward. Yet Singapore is broadly a typical Asian (ex-Japan) jurisdiction where listed companies are ordinarily dominated by blockholders such as family groups, and in the case of many of its largest companies, the Singapore state itself.[99] These contrasting features offer the opportunity to examine if and how United Kingdom–style stewardship, which is premised on dispersed shareholding, might work under a different shareholder environment. Singapore's case may also yield partial insights for other jurisdictions in Commonwealth Asia, such as Malaysia, Hong Kong, and India—jurisdictions sharing certain similarities in their commonwealth legal tradition and family/state-dominated block-shareholder structures.[100] However, Singapore also has a unique institutional architecture that has successfully placed constraints on the state from using its controlling power to extract wealth-reducing private benefits of control from Singapore's largest companies and has resulted in the state indirectly functioning as an engaged shareholder steward at the core of Singapore's economic success.[101] While understanding this institutional architecture and the unique role of the Singapore state in corporate governance is critical for properly understanding the function—or, perhaps more accurately, lack thereof—of Singapore's stewardship code, it also suggests that the Singapore stewardship story (like Singapore's highly successful economy) may be exceptional, and thus difficult to replicate.

From this perspective, even the best comparative case study has its limits. As illustrative as two case studies might be, more would be even better—at least to a point. The authors acknowledge that it may be preferable—at least in terms of scope of coverage—to engage in a larger-scale study in which experts from a range of jurisdictions

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98. Dan W. Puchniak & Umakanth Varrotil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 17 BERKELEY BUS. L.J. 1, 16–17 (2020). ("The most likely explanation is that all our jurisdictions have similar formal legal rules because of their shared Commonwealth legal heritage. Singapore, Hong Kong, India and Malaysia traditionally sought guidance on matters of corporate law reform from other Commonwealth jurisdictions, especially the United Kingdom. The few cases decided by the Privy Council on corporate law matters continue to be cited by courts in these jurisdictions even after Privy Council appeals for commercial cases were formally abolished. There is general empirical evidence that courts in Commonwealth Asia stand out among the common law jurisdictions that have ceased appeals to the Privy Council for their propensity to cite UK jurisprudence even after the judicial link was severed.").

99. On Singapore's shareholder landscape, *see* Puchniak & Tang, *supra* note 79, at 13–18 (detailing Singapore's corporate structure regime).

100. Puchniak & Varrotil, *supra* note 98.

101. *See generally* Puchniak & Lan, *supra* note 93, at 329–33 (describing the features of Singapore's regulatory scheme that has prevented the extraction of private benefits).

provide a larger number of national reports from which a general report can be compiled. This is, in fact, currently underway,[102] and there may well be other interesting findings when this is completed. Within the limits of one Article, and the jurisdictions in which the authors have in-depth knowledge and a high level of expertise, the goals of this Article must necessarily be more modest. However, at this juncture, where stewardship has generally been considered to perform a similar function in Asia as in the United Kingdom, this Article suggests the findings from these case studies are significant.[103] Finally, as elaborated on in Part V below, Japan and Singapore illustrate powerfully a phenomenon that the authors have coined "faux convergence" and broaden the conventional understanding of convergence—and divergence—in legal phenomena in an age of relentless transplants.

IV. THE MANY FACES OF STEWARDSHIP: TWO ASIAN CASES

A. *Japan: Stewardship against Management and in Service of Shareholder Oriented Objectives*

1. The Problem: Perception of Poor Corporate Performance under Lifetime-Employee-Dominated Management Backed by Stable Shareholders

To understand how the impetus behind Japan's adoption of the Japanese Stewardship Code (Japan Code) is distinct from the United Kingdom, the Japanese corporate governance context must be understood on its own terms.[104] In recent years, an increasingly popular view within Japan is that Japanese enterprises—including

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102. The "Global Shareholder Stewardship Project," led by Dionysia Katelouzou and Dan W. Puchniak, is aimed precisely at this goal. *See The Global Shareholder Stewardship Project*, EUROPEAN CORP. GOVERNANCE INST. (2019), https://ecgi.global/content/global-shareholder-stewardship-project [https://perma.cc/AVU7-S9CB] (archived Feb. 3, 2020) (listing information about the Global Shareholder Stewardship Project).

103. *See infra* Part IV.C (noting the differences between Asian stewardship codes and the United Kingdom's).

104. While this Article will not go into the details, readers may find the following articles helpful as recent overviews of Japan's corporate landscape: Gen Goto, *The Outline for the Companies Act Reform in Japan and Its Implications*, 18 J. JAPANESE L. 13, 14–17 (2013) (examining the Japanese Company Act's first reform); Souichirou Kozuka, *Reform after a Decade of the Companies Act: Why, How, and to Where?*, 19 J. JAPANESE L. 39, 49–50 (2014) (assessing possible reforms to the Japanese Companies Act); Hatsuru Morita, *Reforms of Japanese Corporate Law and Political Environment*, 19 J. JAPANESE L. 25 (2014) (describing the reforms corporate law in Japan has gone through).

listed firms—have performed poorly, with low return on equity,[105] low productivity,[106] and a lack of concentration on core competencies.[107] Many of Japan's listed companies have accumulated vast cash reserves that have been perceived as underutilized.[108] Cash-rich Japanese companies have come under significant pressure from foreign investors and some domestic shareholders to either invest their cash reserves, or return them to shareholders.[109] Corporate Japan's reluctance to put capital to more aggressive use has not only kept returns on equity low, but has arguably depressed economic growth as well.[110] This is arguably because Japanese companies have failed to maximize capital productivity by investing in research and development that would lead to innovative technologies, increase labor productivity, or otherwise put their resources to more profitable use.[111] Japan's problems are, in turn, intertwined with Japan's institutional and economic environment.

Two features of Japan's corporate culture have reinforced risk-averse tendencies of many listed companies. First, lifetime-employee-dominated management remains a key feature in many of Japan's listed companies.[112] Given that insolvency proceedings would likely

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105. *See, e.g.*, ITO REVIEW OF COMPETITIVENESS AND INCENTIVES FOR SUSTAINABLE GROWTH – BUILDING FAVORABLE RELATIONSHIPS BETWEEN COMPANIES AND INVESTORS: FINAL REPORT, MINISTRY OF ECON., TRADE & INDUS. 7–9 (Aug. 2014), https://www.meti.go.jp/english/policy/economy/corporate_governance/pdf/FRIR.pdf [https://perma.cc/7F7N-BWZV] (archived Feb. 3, 2020) [hereinafter ITO REVIEW FINAL REPORT] (noting widespread capital inefficiency for Japanese companies).

106. *See, e.g.*, Kawakita Hidetaka (川北英隆), Kigyono Rieki Kouzou to Kabuka no Teimei (企業の利益構造と株価の低迷) [Structure of Japanese Companies' Profits and Sluggish Stock Price], NLI Research Institute Report 20-23 (2012), https://www.nli-research.co.jp/files/topics/39658_ext_18_0.pdf?site=nli [https://perma.cc/2WPF-B2TV] (archived Feb. 3, 2020) (describing perceived inefficiency in Japanese enterprises); MIYAGAWA TSUTOMU (宮川努), SEISANSEI TO WA NANIKA: NIHON KEIZAI NO KATSURYOKU WO TOINAOSU (生産性とは何かー日本経済の活力を問いなおす) [WHAT IS PRODUCTIVITY?: REVISITING THE VITALITY OF JAPANESE ECONOMY] (2018).

107. *See, e.g.*, TOYAMA KAZUHIKO (冨山和彦), SENTAKU TO SHASHŌ: "KAISHA NO JUMYŌ 10-NEN" JIDAI NO KIGYŌ SHINKARON (選択と捨象 「会社の寿命 10 年」時代の企業進化論) [SELECTING AND DISCARDING: THE THEORY OF EVOLUTION OF CORPORATIONS IN AN ERA IN WHICH CORPORATIONS WOULD EXIST ONLY FOR 10 YEARS] 66–69 (2015).

108. *See, e.g.*, Ishika Mookerjee et al., *Japan Companies Are Sitting on Record $4.8 Trillion in Cash*, BLOOMBERG (Sept. 3, 2019), https://www.bloomberg.com/news/articles/2019-09-02/japan-s-companies-are-sitting-on-record-4-8-trillion-cash-pile [https://perma.cc/63NN-Z2HE] (archived Feb. 3, 2020) (reporting that cash holdings of Japan-listed firms have more than tripled since March 2013 to ¥506.4 trillion).

109. *See id.* (reporting investor-side criticism); *see also* MURAKAMI YOSHIAKI (村上世彰), SHŌGAI TŌSHIKA (生涯投資家) [A LIFETIME INVESTOR] 206–07 (2017).

110. *See, e.g.*, ITO REVIEW FINAL REPORT, *supra* note 105, at 7–9 (discussing Japanese companies' capital inefficiency).

111. *Id.*

112. *See* Časlav Pejović, *Changes in Long-term Employment and Their Impact on the Japanese Economic Model: Challenges and Dilemmas*, 19 J. JAPANESE L. 51, 66–68 (2014) (describing lifetime employment's effect on Japanese labor and corporate

result in dire consequences for both managers and employees—large-scale staff retrenchment—lifetime employee-managers have significant incentives to build up strong cash reserves to fend off the specter of insolvency.[113] However, cash-rich companies with low share prices, as is the case for many Japanese listed companies, would ordinarily be targets for hostile takeovers.[114] Hostile takeovers are similarly catastrophic for Japanese lifetime employee-managers, whose incentives and economic situations are extremely different from American corporate executives.[115] The market for corporate control should have restrained Japanese companies from amassing massive cash reserves. But Japanese firms have little to fear; unlike in the United States, hostile takeovers in Japan have been practically nonexistent so far.[116]

The absence of hostile takeovers[117] can be explained by the second key feature of Japanese corporate governance: stable shareholders. "Stable shareholders" are a subset of Japan's dispersed shareholders

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governance); Sayuri A. Shimoda, *Time to Retire: Is Lifetime Employment in Japan Still Viable?*, 39 FORDHAM INT'L L.J. 753, 779–81 (2016) (explaining the effects of lifetime employment on internal company affairs).

113. *See infra* notes 128–132 and accompanying text (discussing the potential effects of insolvency on lifetime employees).

114. Puchniak & Nakahigashi, *supra* note 92, at 9 ("[O]stensibly depressed share values create a mirage of attractive hostile takeover targets in Japan which disappear when the 'true value' of shares in listed companies in Japan is properly understood."); *see also* Alan K. Koh et al., *Land of the Falling "Poison" Pill: Understanding Defensive Measures in Japan on Their Own Terms*, 41 U. PA. J. INT'L L. (forthcoming 2020) (noting the lack of a hostile takeover market in Japan despite seemingly ideal conditions).

115. It has been observed that in the US, listed company managers have vastly different economic incentives because they may enjoy windfalls and the prospect of employment at other listed firms in the case of successful hostile takeovers, whereas Japanese listed company managers may risk losing even modest sums of retirement money (which may not receive the legally-required shareholder approval were the hostile acquirer successful), and their re-employment opportunities are much more limited. *See* Fujinawa Ken'ichi (藤縄憲一), *Tekitai-teki Baishū to Taikō-saku wo meguru Giron ni tsuite* (敵対的買収と対抗策を巡る議論について) [*On the Debate Surrounding Hostile Acquisitions and Their Countermeasures*], RESEARCH INST. OF ECON., TRADE & INDUS. (Feb. 13, 2006), https://www.rieti.go.jp/jp/events/bbl/06021301.html [https://perma.cc/Z43M-3W7B] (archived Feb. 3, 2020) (noting the differences in the consequences of hostile takeovers that occur in American and Japanese corporations).

116. Puchniak & Nakahigashi, *supra* note 92, at 5–8 (discussing the dearth of hostile takeovers in Japan); *see also* Koh et al., *supra* note 114 (observing that "not a single hostile takeover has ever succeeded in Japan.").

117. "We define a successful hostile takeover as one where 1) the bid is unsolicited and actively opposed by incumbent management; 2) the bid satisfies the mandatory bid rule trigger (*i.e.* aimed at acquiring at least two-thirds' of the company's shares); 3) the bid achieves its objectives; and 4) and the bidder replaces incumbent senior management, including the board. This excludes management-initiated leveraged buyouts (MBOs), and partial offers in which the bidder intended only to secure a less than two-thirds' stake in the company." Koh et al., *supra* note 114, at Part III. For an account of shareholder activism short of hostile takeovers, *see generally* JOHN BUCHANAN ET AL., HEDGE FUND ACTIVISM IN JAPAN: THE LIMITS OF SHAREHOLDER PRIMACY 153–211 (2012) (detailing the nature of hedge fund activism in Japan).

who are "sympathetic 'insider(s)' that generally refrain from taking action detrimental to the incumbent management because of their existing business relationships with the company."[118] These domestic stable shareholders have supported management against hostile acquirers even when doing so came at a financial cost, as was the case in the *Livedoor* and *Bulldog Sauce* cases.[119] Further, stable shareholders often voted in favor of "poison pill" adoption and renewal.[120] The traditional hostility to hostile acquirers shared by stable shareholders and lifetime-employee management has functioned as a powerful shield against hostile takeover attempts thus far.[121]

With powerful incentives for lifetime employee-managers to behave excessively conservatively, and without a market for corporate control or an effective alternative such as shareholder activism[122] to discipline them for doing so, there is a spreading perception that the employee-dominated governance in Japan's listed companies must be shaken up.[123] Japan's key corporate governance challenges are

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118. Ronald J. Gilson, *Reflections in a Distant Mirror: Japanese Corporate Governance Through American Eyes*, 1998 COLUM. BUS. L. REV. 203, 209 n.19 (1998); Koh et al., *supra* note 114, at Part III.

119. For the judgments, *see* Tokyo Kōtō Saibansho [Tokyo High Ct.] Mar. 23, 2005, 1173 HANREI TAIMUZU [HANTA] 125 (*Livedoor*) and Saikō Saibansho [Sup. Ct.] Aug. 7, 2007, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2215 (*Bulldog Sauce*). *See also supra* note 92 (listing sources discussing the *Livedoor* and *Bulldog Sauce* cases).

120. *See* Koh et al., *supra* note 114, at Part III (noting that stable shareholders often act against their interests by approving defensive measures).

121. *See id*. (discussing the aversion that stable shareholders and lifetime-employee management in Japan have to hostile takeovers).

122. Activism by foreign and domestic hedge funds against Japanese firms is well-documented. *See generally* JOHN BUCHANAN ET AL., *supra* note 127, at 1–7 (discussing broad themes of the history of hedge fund activism in Japan). The effect of such activism on Japanese firms is disputed. *See, e.g.*, John Buchanan, Dominic H. Chai & Simon Deakin, *Unexpected Corporate Outcomes from Hedge Fund Activism in Japan*, SOCIO-ECON. REV. tbl. 4 (2018) (finding generally that hedge fund activism in Japan does not have the anticipated effects expected from analogous hedge fund activism in the United States); Tanaka Wataru & Goto Gen, *Nihon ni okeru Akuthibizumu no Chōkiteki Eikyō* (日本におけるアクティビズムの長期的影響) [*The Long-term Effects of Hedge Fund Activism in Japan*] (2018), http://www.jsda.or.jp/about/kaigi/chousa/JCMF/gototanakaronbun.pdf [https://perma.cc/BAU7-ZUP5] (archived Apr. 2, 2020).

123. *See, e.g.*, ITO REVIEW FINAL REPORT, *supra* note 105, at 2 ("It has often been asserted that Japanese management, in comparison to their US and European counterparts, are not distracted by the short-term fluctuations of capital markets and operate their businesses with a long-term perspective. Large and continuous spending on R&D and capital investment, long-term employment practices, and investments in personnel training have all been cited as evidence of this. However, it is questionable whether truly innovative management decisions, from the perspective of driving long-term sustainable growth, have been made within companies whose management have relatively short tenures and which lack discipline towards capital efficiency and corporate value creation. There is also a hypothesis that the continuously low profitability of Japanese companies is a result of Japan's short-term management style, which would be in contrast to that of US and European counterparts."). The Ito Review

therefore not the same concerns behind the original UK Code—that is, restraining excessive managerial risk-taking and shareholder short-termism. Rather, the exact opposite appears to be true: Japan's conservative managers are shying away from the risks entailed in putting their cash reserves to productive use, for fear of endangering the long-term financial survivability of the company and the welfare of their employees.[124]

Apart from the corporate governance and institutional environment, scholars and business insiders have offered two persuasive explanations for managerial conservatism.[125] First, in Japan's deflationary environment, the opportunity cost of holding cash is low given that other uses (e.g., investment) are unprofitable.[126] If managers perceive that Japan's economic recovery is unlikely to be long lasting, they may also be reluctant to invest their company's cash reserves.[127] Second, and potentially most importantly, Japanese companies may have accumulated large cash reserves as a hedge against ruinous insolvency proceedings.[128] Where a company enters

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is the report of a working group led by Professor Kunio Ito and was commissioned by the Ministry of Economy, Trade and Industry of Japan.

124. Ironically, this approach is arguably at odds with the long-term success of their companies, and potentially even Japan's economy as a whole. *See id.* (noting that the short-term management style in Japanese firms may lead to low profitability and a lack of innovative ideas aimed towards long-term growth).

125. *See* Chie Aoyagi & Giovanni Ganelli, *Unstash the Cash! Corporate Governance Reform in Japan* 6 (Int'l Monetary Fund, Working Paper No. 140, 2014) https://www.imf.org/external/pubs/ft/wp/2014/wp14140.pdf [https://perma.cc/U7YK-8LW4] (archived Feb. 4, 2020) (discussing Japan's deflationary economic environment); Nobuyuki Kinoshita, *Legal Background to the Low Profitability of Japanese Enterprises* 22 (Ctr. on Japanese Econ. & Bus., Working Paper No. 316, 2013), https://academiccommons.columbia.edu/doi/10.7916/D8RB7D0X [https://perma.cc/3BND-7T3L] (archived Feb. 4, 2020) (discussing cash reserves as a means of weathering bankruptcy); Haruhiko Kuroda, Governor of the Bank of Japan, Speech at the International Monetary Fund's 2019 Michel Camdessus Central Banking Lecture, Overcoming Deflation: Japan's Experience and Challenges Ahead (July 22, 2019) (transcript available at the International Monetary Fund website) (discussing deflation in Japan).

126. That Japan has been experiencing mostly deflation for decades is not open to serious question. *See, e.g.*, Kuroda, *supra* note 125, at 2–5 (discussing the deflation Japan has experienced since the 1990s)s. Kuroda is the Governor of the Bank of Japan, Japan's central bank.

127. Aoyagi & Ganelli, *supra* note 125, at 6 ("entrenched deflationary expectations are likely to be an important determinant of large cash holdings in Japan. A deflationary environment lowers the opportunity cost of holding cash for both managers and shareholders. As stressed by Bank of Japan (BoJ) Governor Kuroda in a recent speech, deflation encourages holding cash over alternative more productive uses of resources. Even though recent developments suggest that Japan has made progress towards reviving growth and exiting deflation, if firms do not believe that the recovery is long-lasting and that there are profitable investment opportunities, they can be reluctant to reduce their cash holdings.").

128. Kinoshita, *supra* note 125, at 22 ("The most plausible measure for an enterprise to avoid business reorganization is building a strong cash reserve. In other words, cash reserves and bankruptcy protection are two alternatives for a distressed

insolvency proceedings, senior managers and ordinary employees alike potentially face extremely unpalatable consequences, as they both face a higher risk of losing their jobs.[129] Regulations against unfair dismissal for permanent "lifetime" employees[130]—the core of the Japanese "company community"[131]—are significantly relaxed when insolvency proceedings are launched.[132] To avoid frustrating the fundamental expectations of key lifetime employees (i.e., lifetime employment itself in the historic absence of an external labor market),[133] companies have ample incentives to maintain cash reserves defensively.

Corporate Japan's conservatism and mediocre performance would, whether justly or unjustly, come to be attributed to its employee-centric corporate governance system supported by dependable stable shareholder allies.[134] This cozy arrangement would

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enterprise. As the management body of an enterprise counts backward from this substitution, as they do in everyday business, a rigorous bankruptcy mechanism presses them to dig a deeper trench by having greater cash reserves."). Kinoshita was at the time of writing an Executive Director of the Bank of Japan.

129. *See* Kinoshita, *supra* note 125, at 24–26 (discussing the effect of bankruptcy procedures on management and employees).

130. On lifetime employment, *see generally* Pejović, *supra* note 112, at 51–54 (giving an overview of lifetime employment).

131. On this concept, *see* Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and their Solutions*, 25 DEL. J. CORP. L. 189, 203–04 (2000) (discussing the positive and integral effect lifetime employment has on the Japanese "Company Community").

132. Kinoshita, *supra* note 128, at 26 (noting that the lessening of employee dismissal restrictions during bankruptcy puts employees at greater risk of losing their jobs in that period).

133. On the lack of external labor markets as the "dark side" of lifetime employment, *see* Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508, 508–16 (1999) (explaining the function of external labor markets and how they become scarce as a consequence of lifetime employment). More recently, however, lateral hiring has increased. *See, e.g.*, Megumi Fujikawa, *Japanese Workers Call It Quits on a Firm Tradition: The Job for Life*, WALL ST. J. (Apr. 11, 2018), https://www.wsj.com/articles/japanese-workers-call-it-quits-on-a-firm-tradition-the-job-for-life-1523439004 [https://perma.cc/XSD4-4SCK] (archived Feb. 4, 2020) (reporting increased fluidity in the Japanese job market).

134. *See, e.g.*, Ronald J. Gilson, *From Corporate Law to Corporate Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE, *supra* note 31, at 10–12 (discussing briefly the features of Japanese corporate governance); Philip Brasor, *Debating the Merits of Lifetime Employment*, JAPAN TIMES (Nov. 1, 2014), https://www.japantimes.co.jp/news/2014/11/01/national/media-national/debating-merits-lifetime-employment/ [https://perma.cc/GRW2-6MAS] (archived Feb. 17, 2020) (reporting that the lifetime employment system is not based on skills or productivity and could drag down the performance of a company); *In Japan*, *a New Kind of Business School is Retraining Jaded Salarymen*, ECONOMIST (Dec. 20, 2016), https://www.economist.com/business/2016/12/20/in-japan-a-new-kind-of-business-school-is-retraining-jaded-salarymen [https://perma.cc/BJ55-5DB9] (archived Feb. 5, 2020) (noting the increased interest in second careers in Japan); Yasuhiro Arikawa et al., *Corporate Governance, Employment, and Financial Performance of Japanese Firms: A Cross-country Analysis* 19–20 (Research Inst. of Econ., Trade & Indus. Discussion

find itself in the gunsights of the Liberal Democratic Party (LDP)–led national government headed by Prime Minister Abe Shinzo.[135]

2. The Liberal Democratic Party Administration's Grand Design

Towards the end of Abe's second term as Prime Minister, the Abe administration introduced its "Japan Revitalization Strategy" in June 2013 to snap Japan out of its decades of deflation, and to achieve a vibrant economy that will register over 2 percent labor productivity improvement in the medium to long term, around 3 percent nominal gross domestic product (GDP) growth, and around 2 percent real GDP growth, on average, over the next ten years.[136] The Japan Revitalization Strategy is designed to be one of the three policy "arrows" of "Abenomics" and takes the form of major structural reforms to Japan's economy.[137] The Abe administration's expectations for managers of Japanese firms are set out in the 2014 version of the Revitalization Strategy document:

> What should be done to increase Japanese companies' earning power, in other words, medium to long-term profitability and productivity and to pass the fruits of such increase on to the people (households) evenly? First, it is important to strengthen the mechanism to enhance corporate governance and reform corporate managers' mindset so that they will make proactive business decisions to win in global competition for the purpose of attaining targets including globally-compatible level in return on equity. Particularly, companies that have achieved the highest earnings in several years should be encouraged to proactively use their earnings for new capital investment, bold business realignment, mergers and acquisitions, and other deals, instead of accumulating internal reserves.[138]

Although not expressly stated, it is implicit but widely acknowledged that the employee-centric form of corporate governance prevalent in Japanese firms is blamed for corporate Japan's perceived malaise.[139] It is in a bid to change this *status quo* that the Abe administration sought to enlist the aid of institutional shareholders:

> At the same time, banks, institutional investors and other financial players must maintain healthy tension with companies and play positive roles in creating

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Paper No. 18-E-084, 2018), (Japanese firms underperform US firms because of Japan's lifetime employment system and insider-dominated boards).

135. *See* Prime Minister of Japan and His Cabinet, Japan Revitalization Strategy – Japan is Back 2–3 (2013) (describing Prime Minister Abe's plan to stimulate economic growth in Japan).

136. *See id.* at 2 (describing the objectives of the strategy).

137. *See id.* at 1 (discussing the Abe administration's "three prongs of economic revival" and the Revitalization Strategy's role as the third of them).

138. *See* Prime Minister of Japan and His Cabinet, Japan Revitalization Strategy Revised in 2014 – Japan's Challenge for the Future 5 (2014) (discussing strategies to increase profitability).

139. *See, e.g.*, KAZUHIKO, *supra* note 107, at 25–28.

> values in the long term and improving their "earning power." Among them, banks and trading houses must promote return-oriented risk money provision, including contributions to private-sector equity and mezzanine finance investment through funds, and offer good judgments and advice with a view to supporting companies' business restructuring. Institutional investors, including those managing public and quasi-public funds, are called on to appropriately manage their investment portfolios and proactively perform their governance functions as investors.[140]

The ultimate goal is to "allow corporate earnings to expand further, bringing about a true virtuous cycle where the fruits of the breakaway from deflation will be returned finally to the people through various channels including increases in employment opportunities, wages and dividends."[141] In sum, corporate governance reforms—including the Japan Code—that were subsequently initiated should be understood as a state-led attempt at promoting shareholder-oriented corporate governance for the purpose of changing the traditional stakeholder-oriented governance system of Japanese companies so as to improve productivity and corporate value.[142] Now that the context has been set out, it is time to move onto the details of the Japan Code in the next subpart.

3. Japanese Stewardship Code

The Japan Code was first drafted by the Council of Experts on the Stewardship Code (Council of Experts)[143] organized by the Financial Services Agency of Japan (FSA). A government agency that regulates the banking, securities, investment, and insurance sectors,[144] the FSA keeps track of the implementation of the Japan Code by institutional investors and maintains an updated list of signatories on its website.[145]

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140. Japan Revitalization Strategy Revised in 2014, *supra* note 138, at 6.

141. *See id.* (stating the anticipated effects of the Revitalization Strategy).

142. *See* Gen Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan*, 15 BERKELEY BUS. L.J. 365, 396–97 (2019) [hereinafter Goto, *The Logic and Limits of Stewardship Codes*] (discussing the effects and perceived goals of Japan's Stewardship Code, particularly compared to the United Kingdom's code); Sadakazu Osaki, *The New Stewardship Code in Japan: Comparison with the UK Code and its Implementation*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE CASE OF JAPAN 101, 110 (Hiroshi Oda ed., 2018) ("The Japanese Stewardship Code was introduced by the government in order to promote economic recovery through increased corporate profitability, the latter to be achieved by enhancing effective corporate governance.").

143. *See The Council of Experts on the Stewardship Code*, FIN. SERVS. AGENCY, https://www.fsa.go.jp/en/refer/councils/stewardship/index.html (last visited Mar. 17, 2020) [https://perma.cc/UU2T-KTQZ] (archived Feb. 5, 2020) (compiling documents related to the activities of the Council of Experts on the Stewardship Code).

144. *See, e.g.*, Kin'yū-chō Secchi Hō (金融庁設置法) [Act for the Establishment of the Financial Services Agency], Law No. X of XXXX, arts. 3, 4 (Japan).

145. *Stewardship Code: 280 institutional investors have signed up to the Principles for Responsible Institutional Investors as of March 13, 2020*, FIN. SERVS. AGENCY, https://www.fsa.go.jp/en/refer/councils/stewardship/20160315.html (last visited Mar. 24, 2020) [https://perma.cc/5U7B-K3L3] (archived Apr. 2, 2020).

Against a backdrop of complex, interconnected, and simultaneous activities by various interest groups,[146] the first version of the Japan Code was introduced in 2014.[147] The Council of Experts Concerning Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code,[148] also organized by FSA jointly with the Tokyo Stock Exchange, reviewed the state of implementation of the two codes, and subsequently recommended that the Japan Code be revised.[149] A second version of the Japan Code was introduced following revisions by the Council of Experts on May 29, 2017.[150]

The Japan Code was introduced to apparently encourage institutional shareholders to act as good stewards to prioritize the enhancement of "the medium-to long-term investment return for their clients and beneficiaries (including ultimate beneficiaries) by improving and fostering the investee companies corporate value and sustainable growth through constructive engagement or purposeful dialogue based on in depth knowledge of the companies and their business environment."[151] In emphasizing the importance of long-term profit and the interests of ultimate beneficiaries, the purpose of the Japan Code seems, on its face, to be consistent with the UK Code.[152]

However, the purpose of the Japan Code is rather less prosaic when considered in light of Japan's corporate governance and economic context: its goal no less than the fundamental alteration of the relationship between domestic institutional investors and company management. Domestic institutional investors have been criticized for enjoying a cozy relationship with lifetime-employee managers,[153] such that institutional investors were content to receive lower returns on their investments, even though doing so arguably came at the expense of the ultimate beneficiaries. The Japan Code is thus intended to

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146. For an account in English, *see* Goto, *The Logic and Limits of Stewardship Codes*, *supra* note 142, at 387–92 (discussing the circumstances surrounding the development of the first Japan Code).

147. *See id.* at 368 n.2 (stating the timing of the Japan Code's introduction).

148. *See The Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code*, FIN. SERVS. AGENCY, https://www.fsa.go.jp/en/refer/councils/follow-up/index.html (last visited Mar. 17, 2020) [https://perma.cc/YDZ7-THU3] (archived Feb. 5, 2020) (collecting documents relating to the activities and functioning of the Council of Experts).

149. *See* Goto, *The Logic and Limits of Stewardship Codes*, *supra* note 142, at 368 n.2 (acknowledging the 2017 revision to the Japan Code).

150. *See id*. (noting the 2017 Japan Code revision).

151. *See* PRINCIPLES FOR RESPONSIBLE INSTITUTIONAL INVESTORS (JAPAN'S STEWARDSHIP CODE), FIN. SERVS. AGENCY 2 (Feb. 26, 2014), https://www.fsa.go.jp/en/refer/councils/stewardship/20140407/01.pdf [https://perma.cc/5M32-T97Z] (archived Apr. 2, 2020) [hereinafter JAPAN'S STEWARDSHIP CODE 2014] (defining "stewardship responsibilities in the context of the Code); *see* Goto, *The Logic and Limits of Stewardship Codes*, *supra* note 142, at 386–87 (summarizing briefly the priorities of the Code's preface).

152. *See* Goto, *The Logic and Limits of Stewardship Codes*, *supra* note 142, at 371 (comparing the prefaces of the Japanese and UK stewardship codes).

153. *See id.* at 395 (noting examples of such criticism).

encourage domestic institutional investors to pursue higher returns for their beneficiaries by exerting more pressure on management through "constructive engagement."[154] In addition, the Japan Code requires that passive funds actively engage with investee companies and exercise their voting rights.[155] As this is arguably not in the interests of beneficiaries of passive funds, the better explanation is that it is part of the Abe Administration's policy design to transform the orientation of the Japanese corporate governance system.[156]

To be clear, the Japan Code does not—expressly or implicitly—contemplate United States–style hedge fund activism from Japan's institutional investors and, in fact, does not require institutional investors to make any specific demands of management.[157] However, given the existing political and economic context, one might reasonably conclude that domestic institutional investors would be expected to exert pressure on management to use existing cash reserves more effectively to boost corporate earnings and productivity. This would be consistent with the prevailing criticism of Japanese companies and with the Abe administration's stated economic goals.[158]

At present, the Japan Code—or at least part of it—appears to have had a limited, but nonetheless significant, impact on institutional investor behavior. Since it was revised in 2017, the Japan Code has required institutional investors that have signed up to the code to disclose their voting records by individual agenda item, and where the investor declines to disclose their voting reasons, to "proactively

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154. *See* JAPAN'S STEWARDSHIP CODE 2014, *supra* note 151, at 4 (discussing the role of constructive engagement, also defined as purposeful dialogue, in the Code and its aims); *see also* Goto, *The Logic and Limits of Stewardship Codes*, *supra* note 142, at 386–87 (noting the Code's goal of higher returns).

155. PRINCIPLES FOR RESPONSIBLE INSTITUTIONAL INVESTORS (JAPAN'S STEWARDSHIP CODE), FIN. SERVS. AGENCY 13 (May 29, 2017), https://www.fsa.go.jp/en/refer/councils/stewardship/20170529/01.pdf [https://perma.cc/62ST-ENEF] (archived Apr. 2, 2020) [hereinafter REVISED STEWARDSHIP CODE] (tasking institutional investors to be proactive in their level of engagement and voting to increase medium- to long-term growth).

156. *See* Goto, *The Logic and Limits of Stewardship Codes*, *supra* note 142, at 403–04 (discussing how the Code's assignment of active engagement responsibilities to institutional investors may cut against the interest of the firms' ultimate beneficiaries, namely clients).

157. *See id.* (noting the discretion the Code gives to institutional investors to determine how to pursue their activism).

158. *See id.* (discussing the aims of the Abe administration as demonstrated by the Code); Hideaki Miyajima & Takuji Saito, *Corporate Governance Reforms under the Abenomics: the Economic Consequences of Two Codes*, *in* THE POLITICAL ECONOMY OF THE ABE GOVERNMENT AND ABENOMICS REFORMS §§ 3.1–3.2 (Takeo Hoshi & Phillip Y. Lipscy eds., Cambridge University Press, forthcoming) (discussing the Japan Code's effect on institutional investor behavior and the expectation that reforms under Abenomics through the Stewardship Code and the Corporate Governance Code would "improve the attractiveness of the Japanese stock market").

explain" and give reasons for doing so.[159] This disclosure requirement was initially rejected by the Council of Experts when the original 2014 code was drafted, but was ultimately introduced over the objections of various listed companies and institutional investors.[160] Despite this, since the new disclosure requirement went into effect, almost all major trust banks, insurance companies, and investment advisors have since complied with the disclosure requirement—with few, if any, opting against disclosure—apparently under strong pressure from the FSA.[161] The stated rationale for the disclosure requirement was to "enhanc[e] visibility for institutional investors";[162] presumably to increase transparency for ultimate beneficiaries and to ensure that asset managers took appropriate actions to manage conflicts of interest.[163]

The disclosure requirement appears to have had some tangible effect on institutional investor behavior on at least one corporate governance issue: there is some evidence that the disclosure requirement has substantially reduced support for the Japanese "poison pill."[164] Given the practical absence of hostile takeovers in Japan, the Japanese "poison pill" was of questionable utility and

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159. *See* REVISED STEWARDSHIP CODE, *supra* note 155, at 15 (laying out voting disclosure requirements for institutional investors). This is discussed in Goto, *The Logic and Limits of Stewardship Codes*, *supra* note 142, at 401–03.

160. *See* Goto, *The Logic and Limits of Stewardship Codes*, *supra* note 142, at 393 n.131, 402 (noting the addition of Guidance 5-3 despite opposition).

161. *See* Nihon Keizai Shimbun (日本経済新聞), *Nihon Seimei to Kinyūchō, Giketsuken Kōshi no Kaiji de Niramiau* (日本生命と金融庁、議決権行使の開示でにらみ合う) [*Nippon Life Insurance at Odds with Financial Services Agency on Disclosure of Voting Results*], NIKKEI (Jan. 31, 2018), https://www.nikkei.com/article/DGXMZO26191040W8A120C1X12000/ [https://perma.cc/C66N-EHCX] (archived Feb. 5, 2020); Nihon Keizai Shimbun (日本経済新聞), *Nissei, Giketsuken Kōshi wo Kobetsu Kaiji* (日生、議決権行使を個別開示) [*Nippon Life Insurance To Disclose Its Individual Voting Records*], NIKKEI (Jan. 21, 2019), https://www.nikkei.com/article/DGXMZO40269240R20C19A1EE9000/ [https://perma.cc/6JZQ-DFRV] (archived Feb. 5, 2020).

162. REVISED STEWARDSHIP CODE, *supra* note 155, at 15 (Guidance 5-3).

163. "The revised code, however, decided to override such objections and to introduce this requirement in order to enhance the transparency of the stewardship activities of asset managers and to eliminate concerns on conflicts of interest of asset managers who belong to financial conglomerates." Goto, *The Logic and Limits of Stewardship Codes*, *supra* note 142, at 393 n.131 (citing REVISED STEWARDSHIP CODE, *supra* note 155, at 15 n.15) ("Some concern has been expressed that company-specific voting disclosure on an individual agenda item basis may result in attracting excessive attention solely to the results of 'for' or 'against', and it may prompt mechanical voting by institutional investors. However, it is important that asset managers enhance the transparency of their activities to their ultimate beneficiaries of the assets they manage. Furthermore, it is important that asset managers, who often belong to financial groups, disclose company-specific voting records on an individual agenda item basis in order to eliminate concerns that they may not take appropriate actions to manage conflicts of interest.").

164. *See* Koh et al., *supra* note 114, at 45–48 (noting how the disclosure requirement disincentivizes the maintenance of defensive measures).

effectiveness.[165] Insofar as the disclosure requirement appears to have effectively discouraged institutional investors from making voting decisions that were not at least defensible from a commercial perspective, the Japan Code arguably represents a step towards greater accountability from institutional investors. Yet, perhaps paradoxically from the United Kingdom's perspective, the Japan Code seems to promote, or at least incentivize, a more arguably short-termist orientation among institutional investors that emphasizes short-term share prices—a feature that places it in stark contrast to the UK Code's image of the long-term-oriented enlightened shareholder.[166]

One might reasonably question why the Abe administration elected to use the medium of a "stewardship code" to implement its desired corporate governance changes. Japan is a civil law jurisdiction, whereas the concept of a stewardship code was introduced by the United Kingdom, a common law jurisdiction. The answer may lie with the mutable nature of stewardship, which enabled Japan to introduce the idea that institutional investors should be loyal to the interests of beneficiaries, without triggering technical discussions on the precise elements of fiduciary duties and the legal consequences of their breach.[167] Further, the idea of a soft law "code" may also have been appealing to Japanese policymakers, as soft law codes need not be put through the full legislative process in order to be implemented. On this point, soft law codes to some extent resemble [168] *gyōsei shidō* (administrative guidance[169]) that was once prevalent, but which has since gone out of favor.

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165. *See id.* at 27–32 (discussing the lack of a hostile takeover market in Japan and puzzling over the continued use of defensive measures like the poison pill).

166. On the connection between the U.K. Code and enlightened shareholder value, *see* Iris H.Y. Chiu, *Institutional Shareholders as Stewards: Toward a New Conception of Corporate Governance*, 6 BROOK. J. CORP., FIN. & COM. L. 387, 398 (2012) ("It is arguable that the Stewardship Code's preference for the 'long-term horizon' of institutional shareholders is consistent with the 'enlightened shareholder value' rhetoric championed by policy-makers in the reforms leading up to the Companies Act.").

167. *See* Goto, *The Logic and Limits of Stewardship Codes*, *supra* note 142, at 370 nn.13–14 and accompanying text (discussing the avoidance of the use of the term "fiduciary" in stewardship codes in order to broaden the number of actors the codes cover).

168. Milhaupt made a similar observation. *See* Curtis J. Milhaupt, *Evaluating Abe's Third Arrow: How Significant are Japan's Recent Corporate Governance Reforms?*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE CASE OF JAPAN, *supra* note 142, at 65, 73 ("Perhaps 'soft law' is expanding as an approach to corporate governance reform because it is in the DNA of Japanese regulators and policy makers . . . . Has 'administrative guidance' been resurrected in the twenty-first century Japan as 'soft law'?").

169. A classic scholarly definition of administrative guidance is "[a]dministrative activities which administrative organs provide to other parties without legal binding force but in expectation of specific actions (either feasance or non-feasance) in order to realize an administrative aim." Hiroshi Shiono, *Administrative Guidance in Japan (Gyosei-Shido)*, 48 INT'L REV. ADMIN. SCI. 239, 239–40 (1982). *Cf.* the legal definition as

B. *The Singapore Case Study: Similar Name, Divergent Functions*[170]

1. Stewardship as a Mechanism for Signaling and Maintaining the *Status Quo*

In contrast with the United Kingdom or Japan, there is nothing to suggest that the Singapore Stewardship Code—released in November 2016—was adopted in response to any systemic economic problem. Rather, the point of departure is that Singapore already had in place a successful corporate governance system built on two types of controlling blockholders: family-controlling shareholders and the state's investment arm, Temasek Holdings (Temasek).[171] The problem of rationally passive institutional investors holding substantial equity stakes in listed companies and failing to rein in managerial risk taking and short-termism—which gave rise to the UK Code in 2010[172]—has never existed in Singapore. To the contrary, in Singapore's successful state-controlled and family-controlled system of corporate governance, almost all listed companies have had, and continue to have, an engaged "shareholder steward" in the form of a controlling shareholder.[173] Contrary to the conventional (Anglo–American) wisdom, as Singapore has transformed from a developing, to developed, and now to a world leading economy, its shareholder landscape has become even more concentrated, with institutional investors having minimal influence in its corporate governance system.[174]

In this context, it would seem that the UK Code would be entirely unsuitable for transplant into Singapore. With a successful corporate

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provided in the Administrative Procedure Act: "guidance, recommendations, advice, or other acts by which an Administrative Organ may seek, within the scope of its duties or processes under its jurisdiction, certain action or inaction on the part of specified persons in order to realize administrative aims, where the acts are not Dispositions". Gyōsei tetsuduki-hō (行政手続法) [Administrative Procedure Act], Law No. 88 of 1993, art. 2(vi) (translation from Japanese Law Translation).

170. *See generally* Puchniak & Tang, *supra* note 79 (demonstrating how Singapore has inverted the model of investor stewardship adopted by the UK and arguing that Singapore's stewardship code provides a model for corporate governance in Asia).

171. *See id*. at Part III.B (arguing that the Singapore Stewardship Code reinforces an already successful corporate governance system). For a rich description of family controlling shareholders and Temasek in Singapore's corporate governance environment, *see id*. at Parts IV and II.B respectively.

172. See *supra* Part II; *see also* Puchniak & Tang, *supra* note 79, at Part II.A (giving background on the creation of the UK Code).

173. *See* De La Cruz et al., *supra* note 24, at 12, 36–37 (based on an analysis of 195 listed companies representing eighty-three percent of total market capitalisation in Singapore, finding that institutional investors held twelve percent of market capitalisation weighted ownership); Tan et al., *supra* note 93, at 91 (stating that running controlled companies efficiently serves Temasek's long-term interests); Lan & Varottil, *supra* note 94, at 575–78 (noting that most countries outside the US and UK are "dominated by companies with concentrated shareholding").

174. *See* Puchniak & Tang, *supra* note 79, at Part II (identifying differences between shareholders in the UK and Singapore).

governance system designed to have the state indirectly act as a long-term engaged shareholder steward in state-controlled companies, and family owners acting as long-term engaged stewards in family firms, it would seem that Singapore had little need for a mechanism to create long-term engaged shareholder stewards—which is precisely what the original UK Code was designed to do.[175] Further, the idea at the core of the UK Code is that institutional shareholders have the potential to become effective shareholder stewards because collectively they have control over a majority of the voting rights in most of the United Kingdom's listed companies.[176] Therefore, as the theory goes, if the UK Code could harness market forces to incentivize them to act as "good stewards," institutional investors would have the legal voting rights to carry out this laudable objective.[177]

Singapore's shareholder landscape stands in stark contrast to the United Kingdom's: institutional investors only constitute a small minority of shareholders in most listed companies, and therefore lack any real power in the face of large dominant state or family-controlling shareholders.[178] There is research by leading corporate governance experts—including some from Singapore—showing that institutional shareholders are seen to play a negligible role in Singapore corporate governance, especially when contrasted with the dominant role of state and family-corporate controllers.[179] In this light, the striking similarity between the texts of the seven core principles in the UK Code and Singapore Stewardship Code is puzzling.[180] Why has a UK corporate governance mechanism, designed for a problem that does not exist in Singapore, which provides for a solution that is unavailable in Singapore, been implemented in Singapore?[181]

Dan Puchniak and Samantha Tang's recent in-depth analysis of stewardship in Singapore provides an answer to this puzzle.[182] They demonstrate that the adoption of a United Kingdom–style code in Singapore is a product of regulatory design for the purpose of

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175. *See supra* Part II; *see also* Puchniak & Tang, *supra* note 79, at Part I (noting that the UK Code was a response to apathetic institutional investors).

176. *See id*.

177. *See* Puchniak & Tang, *supra* note 79, at Part V (noting that both the UK Code and Singapore Stewardship Code promote the use of "collective voting power to monitor management").

178. *See generally* Lan & Varottil, *supra* note 94 (explaining that Singapore's corporate governance challenges generally arise from Singapore's concentrated shareholding landscape).

179. *See supra* note 173 and accompanying text.

180. Katelouzou & Siems, *supra* note 16.

181. The authors are unable to identify any statement from Stewardship Asia or in the Singapore Stewardship Code describing the relationship between the UK Code and the Singapore Stewardship Code. Some scholars have observed that the Singapore Stewardship Code may be characterized as being "inspired" by the UK Code. *See, e.g.*, LIM, *supra* note 24, at 280.

182. *See generally* Puchniak & Tang, *supra* note 79 (exploring similarities and differences between the UK Code and the Singapore Stewardship Code).

signaling.[183] Consistent with other recent corporate governance reforms, the adoption of a stewardship code that superficially mirrors the text of the UK Code is driven by Singapore's desire to send a signal that it is part of the global shareholder stewardship movement—which has become an important indicia of good corporate governance.[184] From this perspective, Singapore's superficial adoption of a United Kingdom–style stewardship code makes perfect sense. This regulatory strategy is consistent with Singapore's history of signaling compliance with global norms of good corporate governance, while functionally maintaining the uniqueness of its successful corporate governance system.[185]

However, if one drills down beyond a superficial textual analysis of the seven principles in the Singapore Stewardship Code, its unique local characteristics become clear.[186] An important feature that distinguishes the Singapore Stewardship Code from the UK Code is that it was not launched or promoted by a government regulatory body, but rather by an ostensibly private entity called "Stewardship Asia."[187] The fact that a nongovernment entity launched and promoted the Singapore Stewardship Code may appear to make Singapore similar to jurisdictions like the United States where institutional investors have established a private entity to launch and promote market-based, ground-up, stewardship principles.[188] However, Puchniak and Tang's detailed analysis of public company records, press statements, and business journalism reveals that although Stewardship Asia is a private entity, it is far from a market-based initiative without government involvement.[189] To the contrary, their research demonstrates that Stewardship Asia is intimately connected to the Singapore government through Temasek:

> Temasek funds Stewardship Asia, Stewardship Asia is part of the Temasek group, and [] Temasek had a hand in Stewardship Asia's early efforts at drafting and promoting the Singapore Stewardship Code. Temasek indirectly funds Stewardship Asia through the Temasek Trust, Temasek's philanthropic arm.

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183. *See id.* at Part I (noting that Singapore uses "halo signaling" to show conformance with "Anglo-American-cum-global norms of 'good' corporate governance" while retaining their traditional model of corporate governance).

184. *See id.*

185. *See* Puchniak & Lan, *supra* note 93, at 288–89, 332 (showing that Singapore has successfully performed similar signaling in the past).

186. *See* Puchniak & Tang, *supra* note 79 (arguing that, while the Singapore Stewardship Code initially appears weak, it actually reinforces Singapore's successful corporate governance system).

187. For a detailed description of the relationship between Stewardship Asia and Temasek, *see id.*

188. *See id.* (explaining that the Singapore Stewardship Code allows investors to set their own standards for stewardship); *see also* Hill, *supra* note 7, at 506–13 (identifying the US stewardship code as investor-led).

189. *See* Puchniak & Tang, *supra* note 79 (describing the relationship between Temasek and Stewardship Asia).

> The Temasek Trust 'manages 19 philanthropic endowments and gifts from Temasek and other donors', and provides a 'sustainable 4% endowment funding rate' for entities that it supports, which includes Stewardship Asia.[190]

The fact that Stewardship Asia is a *de facto* arm of Temasek is significant. Temasek is the controlling shareholder of most of Singapore's largest listed companies.[191] As such, the entity that designed and promotes the Singapore Stewardship Code (i.e., Stewardship Asia) is an "arm of Singapore's most powerful controlling shareholder: the Singapore government through its wholly-owned holding company Temasek."[192] When viewed in this light, one would expect that the Singapore Stewardship Code would be designed to maintain the *status quo* for Singapore's successful state-controlled and family-controlled system of corporate governance. Similarly, one would also expect that the seven principles in the Singapore Stewardship Code would not be enforced in a way to bring about intense market pressure by institutional investors with the hope of challenging incumbent management or the existing controllers—which is the goal of the UK Code.

Indeed, Puchniak and Tang's detailed analysis of how the Singapore Stewardship Code has been designed to function reveals that it is clearly not intended to disrupt the *status quo*.[193] Rather, a granular analysis of the Singapore Stewardship Code reveals that it has been designed to be a mechanism for entrenching Singapore's "successful state-controlled and family-controlled system of corporate governance"[194]—something which would be "beyond the wildest imaginations of the original architects of the UK Code."[195]

There are three features in the design of the Singapore Stewardship Code that render it "toothless" and distinguish it from the

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190. *Id.* Stewardship Asia was founded in 2011 as the Stewardship and Corporate Governance Centre, which was a Temasek-led initiative. *See* Ho Ching, CEO, Temasek Holdings Private Ltd., Luncheon Remarks at Stewardship Asia 2018 Roundtable (June 4, 2018) (transcript available at Temasek.com) (discussing Temasek's role as a steward); *see also* Ravi Menon, Managing Dir., Monetary Auth. of Sing., Address at the Securities Investors Association 4th Asian Investors' Corporate Governance Conference: Corporate Governance—Going Beyond the Rules (Oct. 1, 2012) (transcript available with the Bank for International Settlements) (discussing the role of corporate governance in Singapore).

191. ISABEL SIM ET AL., NAT'L UNIV. OF SING. BUS. SCH., THE STATE AS SHAREHOLDER: THE CASE OF SINGAPORE 6, 23–24 (2014), https://bschool.nus.edu.sg/cgio/wp-content/uploads/sites/7/2018/10/SOE-The-State-as-Shareholder-2014.pdf [https://perma.cc/QBZ3-CYE4] (archived Feb. 6, 2020) (identifying Temasek's holdings).

192. TEMASEK REV., TEMASEK OVERVIEW 42–43 (2019), https://www.temasekreview.com.sg/downloads/Temasek-Review-2019-Overview.pdf [https://perma.cc/DA97-QPSJ] (archived Feb. 6, 2020).

193. *See* Puchniak & Tang, *supra* note 79 (describing the relationship between Temasek and Stewardship Asia).

194. *Id.* at Part V.

195. *Id.*

UK Code and other similar codes. First, in stark contrast to the UK Code and many other codes, the Singapore Code does not have any mechanism to monitor if institutional investors that have "signed up" to the Code have in fact complied with the Code.[196] There is thus no mechanism to determine if institutional investors have complied with the Singapore Stewardship Code, or to enforce compliance where institutional investors fall short.[197]

Second, the Singapore Code fails to articulate a singular model of stewardship with which investors should comply.[198] The idea behind the UK Code and other codes it has inspired is that a code sets out distinct expectations that serve as a common yardstick or measure of "good stewardship."[199] This yardstick is essential for the market to apply pressure to institutional investors to move towards an agreed singular standard of good stewardship. In stark contrast, the guidance to the Singapore Code states that investors can "'satisfy *themselves* that they adhere to *their own* stewardship approach in carrying out investment activities."[200] Stated differently, each institutional investor can adopt their own vision of shareholder stewardship and still claim compliance with the Singapore Stewardship Code.[201]

Third, as a natural corollary of the fact that there is no single model, the Singapore Code does not employ a "comply or explain" approach.[202] There is no forum in which the "explain" part of "comply or explain" can be performed.[203] The preamble makes it clear that the Singapore Stewardship Code is not based on a comply or explain model, as the Code states that the "level of commitment [to the principles] are matters that are left to each individual investor to adopt, on a wholly voluntary basis."[204]

Viewed through a UK lens, the fact that the Singapore Stewardship Code lacks almost any "bite" as a tool for disrupting the

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196. *See id.* at III.A("there is no effective way of determining which institutional investors in Singapore have decided to be governed by the Singapore Code.").

197. *See id.* (stating that the Singapore Code does not identify the investors which it governs).

198. *See generally* Puchniak & Tang, *supra* note 79 (noting that the Singapore Stewardship Code allows investors to set their own benchmarks for corporate governance).

199. *See id*. at Part III.A (noting that the UK Stewardship Code requires institutional investors to explain any deviations from the code).

200. STEWARDSHIP ASIA CTR., SINGAPORE STEWARDSHIP PRINCIPLES FOR RESPONSIBLE INVESTORS 6 (Nov. 2016), https://www.stewardshipasia.com.sg/sites/default/files/Section%202%20-%20SSP%20(Full%20Document).pdf [https://perma.cc/6KG3-TH4N] (archived Mar. 18, 2020) [hereinafter SINGAPORE CODE] (emphasis added).

201. *See* Puchniak & Tang, *supra* note 79, at Part III.A.

202. *See id.* (stating that the Singapore Code does not provide a forum to offer explanations for deviance from the code).

203. *See id.* (explaining that the Singapore Stewardship Code relies on guidance rather than enforcement mechanisms).

204. SINGAPORE CODE, *supra* note 200, at 3.

status quo, and is primarily a signaling device, may be seen at best as a failure or at worst a corporate governance sham.[205] Puchniak and Tang argue that this misses the point.[206] Singapore has an institutional architecture that has ensured that state and family controllers' normally function as good stewards—vitiating the need for institutional shareholders to act as good stewards and suggesting that the *status quo* should be maintained (not disrupted).[207] As such, by introducing a stewardship code that does not effectively encourage institutional investor activism, and maintains the *status quo* for controlling shareholders, the Singapore Stewardship Code has reinforced Singapore's successful corporate governance system—while at the same time signaling its compliance with the global shareholder stewardship movement.[208]

2. The Curious Case of the Singapore Family "Stewardship" Code

Singapore's stewardship story would take a curious turn.[209] Almost two years after Stewardship Asia released the Singapore Stewardship Code, a second "stewardship code" would see the light of day in October 2018.[210] The "Stewardship Principles for Family Businesses" (Family Code) is, as of October 2019 and to the best of the authors' knowledge, the only example of its kind anywhere in the world.[211] On the surface, Singapore's Family Code appears to bear some broad textual similarities to the 2012 version of the UK Code: it employs the word "stewardship," and has seven principles.[212] But any resemblance to the UK Code ends there. Puchniak and Tang's analysis reveals three significant functional differences between Singapore's Family Code and the UK Code that make the Family Code truly *sui generis*.

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205. *See* Puchniak & Tang, *supra* note 79, at III.B (acknowledging that observers could see the Singapore Code as merely publicity).

206. *Id.*

207. *See id.* (stating that Temasek and family controlling shareholders "effectively controlled the problem of systematic wealth-reducing private benefits of control").

208. *See id.* (noting that the Singapore Code embraces the unique institutional architecture of corporate governance in Singapore).

209. Most of this subpart IV.B.3 draws on Puchniak & Tang, *supra* note 79.

210. *See generally* STEWARDSHIP ASIA CTR., STEWARDSHIP PRINCIPLES FOR FAMILY BUSINESSES (2018), https://www.stewardshipasia.com.sg/sites/default/files/SSP-brochure-0913_approved%20for%20printing.pdf [https://perma.cc/5JD3-4KZB] (archived Apr. 2, 2020) [hereinafter FAMILY CODE] (delineating principles of stewardship for family businesses).

211. Puchniak & Tang, *supra* note 79, at Part IV.A.

212. The 2012 version of the UK Code that was in force at the time the Singapore Family Code was developed had only seven principles. UK STEWARDSHIP CODE, FIN. REPORTING COUNCIL (2012), https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf [https://perma.cc/HK3X-B4WB] (archived Feb. 8, 2020).

First, the Family Code does not contemplate any collective action or intervention by institutional investors; in fact, there is not a single mention of institutional investors at all.[213] The only "external" intervention mentioned in the Family Code is by professional advisers or management—who are, by definition, in a position subordinate to the family owners.[214] Rather, Singapore's Family Code is addressed to "family businesses."[215] While it is far from clear who precisely *in* a family business is the Family Code's intended addressee,[216] the context of the code suggests that it is addressed to family shareholders and managers of family companies. The fact that institutional investors are not within the scope of the Family Code sets it apart from every other stewardship code—which are expressly directed towards, and contemplate action by, institutional investors.[217] It is worth reiterating that the UK Code is addressed to institutional investors and that collective action and intervention by institutional investors in relation to the management of investee companies is a core feature of the UK Code.[218] The complete absence of institutional investors—and of any "external" intervention that would disrupt the family-controller *status quo*—from the Family Code demonstrates that it is functionally different from the UK Code and existing stewardship codes generally.

Second, Singapore's Family Code seeks to maintain the corporate governance *status quo* for family companies by entrenching control by existing family shareholders and management.[219] The Family Code does not envision any change from family control to outsider, nonfamily control. Rather, the premise is that bringing in outsiders perpetuates and sustains the family business. This in effect all but expressly endorses the continuation of the *status quo* of family ownership. This

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213. *See* Puchniak & Tang, *supra* note 79.

214. FAMILY CODE, *supra* note 210, at 7 ("[e]xternal professional help such as consultants can help FBs put together a more robust succession plan").

215. *See id.* at 1 ("Stewardship is particularly pertinent to family businesses (FBs), which form a key component of economic activity around the world . . . For our purpose here, we broadly define FBs to include companies with the presence of family members as shareholders as well as board members and managers who are able to influence strategic decisions. We use the term FBs to include family companies, family firms and organisations.").

216. The closest may be "owners and employees." *See id.* at 4 ("Successful and enduring FBs [family businesses] build a culture that instils the ownership mentality. Owners and employees take responsibility and action as well as develop a sense of collective pride to forge proactive and integrative solutions to complex problems and dynamic situations.") (emphasis added).

217. *See* Hill, *supra* note 7, at 506 ("engagement by institutional investors is an integral part of any corporate governance system.").

218. *See* UK STEWARDSHIP CODE 2020, *supra* note 15, at 17–19 ("Principle 9: Signatories engage with issuers to maintain or enhance the value of assets" and "Principle 10: Signatories, where necessary, participate in collaborative engagement to influence issuers.").

219. *See* Puchniak & Tang, *supra* note 79, at III.A ("the Singapore Code is not designed to significantly alter the status quo").

is particularly evident from Principle 7 of the Family Code, which states: "[b]e mindful of succession."[220] In family businesses, a succession plan is "crucial" because "succession frequently affects the family dynamics and survivability of the business."[221] The elaborations reveal the Family Code's recognition of the importance of not only grooming internal successors from within the family,[222] but also the value of merit,[223] external expertise,[224] and intergenerational cooperation.[225] Principle 7 clearly conveys the overarching premise of the Family Code: promoting the long-term success of business by—and while—entrenching existing control by family shareholders.[226] In contrast, while the UK Code was also intended to promote a long-term orientation to investment and stakeholder interests, the UK Code aimed to achieve this by fundamentally disrupting the prevailing corporate governance *status quo* in transforming passive institutional investors into shareholders that would actively monitor management.[227] Thus, the concept of "stewardship" undergirding the Family Code has a substantially different orientation from other stewardship codes because the Family Code was designed to maintain the *status quo*—control by family shareholders and management—rather than to disrupt it.

Finally, the Family Code was designed not only for Singapore family companies but also as a model for corporate governance in family companies in Asia. This is evident from Stewardship Asia's efforts to promote the Family Code in countries such as China, Indonesia, Japan, the Philippines, and Thailand, as well as the involvement of businesses from a range of Asian jurisdictions.[228] The very fact that the Singapore entity promoting the Family Code was named "Stewardship *Asia*" rather than "Stewardship *Singapore*" also demonstrates that Singapore's stewardship codes were not merely developed for domestic consumption, but rather to be "exported" to

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220. FAMILY CODE, *supra* note 210, at 7.

221. *Id.*

222. *See id.* ("Assess the capabilities and character of potential family successors . . . Adopt a more holistic view of succession, which encompasses household and family succession.").

223. *See id.* ("honouring meritocracy").

224. *See id.* ("Keep an open mind towards including external expertise in both the aspects of successors and succession. External successors can bring new perspectives, competencies and networks. External professional help such as consultants can help FBs put together a more robust succession plan.").

225. *See id.* ("Create a healthy environment where the older and younger generations can exchange views with veracity. Gradually, the younger generation should be given more opportunities to make strategic decisions as they acquire more competencies.").

226. *See id* (promoting efficient succession plans for family businesses).

227. *See* discussion *supra* Part II.

228. FAMILY CODE, *supra* note 210.

function as a corporate governance model for the region.[229] In contrast, there is no suggestion that the UK Code was initially developed for any purpose other than solving what regulators perceived to be a domestic corporate governance challenge.[230] The UK Code was therefore most likely never intended nor designed to be exported as a corporate governance model for jurisdictions around the world. By creating the world's first stewardship code targeted at family businesses for "export" to Asia, Singapore has not only seized the initiative in establishing itself as a leader in this space in Asia and perhaps also the world but also functionally diverged from the (at least initially) domestic orientation of the UK Code.

C. *Stewardship Codes in Asia as a Challenge to United Kingdom–Defined "Global" Stewardship*

A superficial textual analysis of the Japan Code would likely lead to the reasonable conclusion that Japan has broadly adopted the UK stewardship model. However, an in-depth analysis of Japan's political economy, corporate governance system, and business culture reveals the reasons why the intended and actual function of stewardship in Japan dramatically departs from the UK model. In fact, functionally, the version of "stewardship" implemented in the Japan Code turns the long-termist, managerial risk-moderating concept of "stewardship" employed in the UK Code on its head. In so doing, the Japan Code demonstrates the vulnerability—or flexibility—of United Kingdom–style "stewardship" to being subverted—or at least used—for completely different ends.[231]

Thus, while the Japan Code bears superficial similarities to the UK Code in terms of form, it is in function a very different animal. It is also notable that the Japan Code seems to have achieved a small level of practical success whereby requiring institutional investors to disclose their voting records has led at least some of them to exert pressure on a few investee companies to remove their Japanese "poison

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229. *See* Puchniak & Tang, *supra* note 79, at Part III.C (noting that one goal of releasing the stewardship code through Stewardship Asia is to maintain Singapore's position "as an Asian and global corporate governance leader").

230. *See* Reisberg, *supra* note 47, at 220–23 (discussing the history of the UK Code in the context of the corporate governance challenges thrown up by the Global Financial Crisis in the UK, and observing that "[a]gainst the bedrock provided by the [Corporate Governance Code], it is no surprise that the introduction of the [Stewardship Code] in the UK in July 2010 was *closely followed around the world*" (emphasis added), but not stating that the UK Code was developed to be "exported" around the world); *see also* Cheffins, *supra* note 5, at 1009–13 (2010) (explaining the development of the UK Code in light of domestic developments).

231. Note also that the UK Code itself was based on an older document premised on a pro-beneficiary philosophy. *See* Goto, *The Logic and Limits of Stewardship Codes*, *supra* note 142, at 376–78. In subverting the UK Code, the Japan Code may perhaps be characterized as a case of poetic justice.

pills."[232] While the full extent of the functional impact of the Japan Code is still to be determined, there is the prospect that corporate Japan, absent the "poison pill" and in the wake of rapidly changing circumstances, has perhaps become a more friendly environment for United States–style shareholder activism.[233]

In contrast with malaise-stricken Japan, Singapore entered the stewardship era with a well-oiled corporate governance system built upon state and family-shareholder control in listed companies.[234] Singapore's two stewardship codes have been designed and implemented as a package of solutions to forestall—and preempt—any chance of ill-informed outsiders creating problems in its listed companies and to promote the success of family businesses. Neither the Singapore Stewardship Code nor the Family Code impose any pressure or obligation on existing controllers—state and family shareholders—to undertake any reform. Neither code bows to nor adds to the global market's clamor for more, and where necessary, stronger engagement by institutional investors. Instead, Singapore's response is that of containment, by giving its implicit blessing to institutional shareholder passivity and withholding any explicit encouragement of shareholder activism.[235] Moreover, both codes go even further by designing corporate governance mechanisms that support the entrenchment of these controllers and management—which is diametrically opposed to the UK stewardship model of disrupting a risky *status quo* by creating incentives for institutional investor driven change.

Finally, the *function* of the two Singapore codes is that of "halo signaling" compliance with the international, Anglo–American, norm of shareholder stewardship equating to good corporate governance—while simultaneously maintaining Singapore's existing successful system of corporate governance built upon continued control by state and family controlling shareholders.[236] Singapore's focus on continuity rather than change stands in stark contrast to the aim of the UK Code, which was to transform passive institutional investors into shareholders that would actively campaign for the company's long-term interests. By implicitly allowing institutional investors to remain passive, Singapore's Stewardship Code and Family Code place the burden of securing the company's long-term interests on the incumbent, entrenched shareholder controllers. The fact that the Singapore codes are designed to preserve the corporate governance *status quo* also sets it apart from Japan's Stewardship Code, which was

232. Koh et al., *supra* note 114.
233. *See id*.
234. *See* Puchniak & Tang, *supra* note 79, at Part I (noting that Singapore "regularly ranks as a global leader for its efficient business regulation and good corporate governance.").
235. *See id.*
236. *See id.*

introduced as part of a set of political reforms aimed at transforming the corporate governance system. In addition, the aim of Singapore's Family Code to be exported to Asia, and thus perhaps make Singapore the standard bearer for a new Asian model of good corporate governance, sets it apart from any other stewardship code which the authors are aware of.

Despite substantial differences between themselves, the Singapore Codes and the Japan Stewardship Code share a single striking similarity: these codes all depart from the UK paradigm of stewardship. As the analysis in this Part has established, these departures are not by accident or coincidence, but rather are the product of deliberate and multifaceted policy choices. That two developed, yet different, Asian jurisdictions independently and spontaneously "hopped onto the stewardship bandwagon" while heading off in diverging policy directions should be recognized for what they are: bold—if implicit—symbols of resistance against and ambivalence in the face of the UK stewardship model.

Finally, notwithstanding the superficial convergence in the "form" of adopting a "stewardship code" and the lingo of "stewardship," the *divergence* in the *functions* that these codes were designed to achieve in reality prompts a further, more fundamental question in corporate governance: What do scholars really mean by "convergence" and "divergence"?

V. "FAUX CONVERGENCE": EXPANDING THE COMPARATIVE TAXONOMY

The days of leaders in the field predicting the "end of history" in the evolution of corporate governance,[237] or that the world will converge on an Anglo–American inspired dispersed shareholder model,[238] are long gone. Rather, as Asia has become the world's engine of economic growth, the rise of state-owned-enterprises and family-controlled firms has defined corporate governance in the new millennium.[239] Concomitantly, the United Kingdom and United States have witnessed the precipitous decline of the archetypical dispersedly held Berle-Means corporation, with the reconcentration of shareholdings in the hands of institutional investors.[240] As a result, rather than jurisdictions converging on a common Anglo–American

237. A phrase made infamous by Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001).

238. *See* Puchniak, *Japanization of American Corporate Governance*, *supra* note 93, at 22–24 (showing the convergence debate assumed that the endpoint of convergence is dispersed shareholding).

239. *See, e.g.*, Koh & Tang, *supra* note 95, at 198–99; Puchniak & Tang, *supra* note 79.

240. *See supra* note 2 and accompanying text; *see also* Gilson & Gordon, *supra* note 4, at 863–65.

inspired dispersed shareholder model, a persistent diversity and continuous evolution in shareholder structure appears to be the order of the day.

In a similar vein, within many other important areas of potential corporate governance convergence (e.g., board structure, codetermination, takeover regulation, and enforcement of minority shareholders' rights) significant divergence continues to persist. Even in the European Union (EU), which has made a concerted effort for decades to promote corporate law harmonization in its single market, there remains many important areas of corporate law and governance upon which jurisdictions diverge.[241] There is little reason to think that the next few decades will be any different, suggesting that significant jurisdiction-specific variations in important areas of comparative corporate law and governance will remain.

However, as insightfully observed by Jeffrey Gordon, a "global governance" movement has brought about a remarkable level of formal convergence in certain areas.[242] Various initiatives, led primarily by the IMF, OECD, and World Bank, have created various "tools" of features that are required for jurisdictions to be considered to have "good corporate governance."[243] The promotion of these "tools" in various ways has resulted in the widespread adoption of certain features deemed to be indicia of "good corporate governance" around the world.[244]

Arguably, the most prominent examples of this have been the adoption of independent directors and codes of corporate governance.[245] Based on a simple box-ticking exercise, their global proliferation as legal transplants is staggering.[246] According to hand-collected data by Dan Puchniak and Lan Luh Luh, as of 2017, codes of corporate governance have been adopted in at least eighty-seven jurisdictions, and every code of corporate governance ever written—which number at least 245 as many jurisdictions have released several updated versions—mentions "independent directors."[247] Indeed, the

241. *See* Gordon, *supra* note 31, at 51–53 (showing how European Union-led convergence efforts failed in the face of entrenched national identities).

242. *See id.* at 44–45 ("Rather, this widespread adoption of corporate governance reforms has been stimulated through what might be thought of as global governance, in which the main actors have been the IMF, the World Bank, and the OECD.").

243. *Id.* at 47–49.

244. *See id*.

245. *See generally* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., 2017); Puchniak & Lan, *supra* note 93; Umakanth Varottil, *Proliferation of Corporate Governance Codes in the Backdrop of Divergent Ownership Structures*, COMPETITION & CHANGE (2018), https://journals.sagepub.com/doi/10.1177/1024529418813832 [https://perma.cc/Y9J5-EUWA] (archived Feb. 8, 2020).

246. Puchniak & Lan, *supra* note 93, at 266–72.

247. *See id.*

authors are unaware of any major jurisdiction which has not claimed to adopt "independent directors" in its corporate governance regime.

However, upon closer examination, this impressive level of corporate governance convergence is not what it appears at first sight. As Dan Puchniak and Kon Sik Kim explain, despite boards around the world increasingly *labelling* their directors as "independent," the functions that they perform (e.g., monitoring management; monitoring controlling shareholders; acting as government lobbyists; or acting as a conduit for government influence in SOEs) differ significantly among jurisdictions, which makes comparing them tantamount to comparing apples and oranges.[248] How can one compare an "independent director" in a Korean chaebol whose main function is to be a government lobbyist to subvert the Korean anticorruption rules, with one in an archetypical Berle-Means company in the United States who is expected to mitigate the collective action problems of dispersed shareholders? The answer is: it is impossible.[249]

This type of superficial convergence, in which convergence occurs in name only, is "faux convergence." It is "faux" because what appears to be convergence based on the adoption of a tool of good corporate governance in name only may, upon closer examination, have been the adoption of a different tool with different functions—resulting in divergence rather than convergence. Although the global rise of stewardship is still in its relatively early stages, the evidence in this Article suggests that it may be the next significant example of faux convergence.

As this Article has demonstrated, merely knowing that Japan and Singapore have a stewardship code reveals little about the impact that it is intended to have, or actually has, on each country's corporate governance. Indeed, assuming that Japan and Singapore have converged on the UK model of corporate governance merely because they have both adopted stewardship codes would clearly be erroneous. Similarly, assuming that the adoption of stewardship codes by Japan and Singapore makes them more similar to each other is also misleading. The fact is that in the United Kingdom, Japan, and Singapore, the intended and actual function of their Stewardship Codes differ significantly—with differences that often run counter to each other.

The increasing presence of faux convergence has several practical and theoretical implications for comparative corporate governance. From a practical perspective, it suggests that efforts by the IMF, OECD, World Bank and others to promote a common "toolbox" of mechanisms for good corporate governance may have deleterious consequences. Such efforts may cause governments to waste valuable

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248. *See* Puchniak & Kim, *supra* note 29, at 131–32.
249. *See id.*

resources on the superficial adoption of tools for good corporate governance, rather than allocating them to directly addressing their actual jurisdiction-specific corporate governance problems. This is because faux convergence increases the pressure on jurisdictions to formally converge on established norms of good corporate governance. As these areas of faux convergence develop, they may also result in the misallocation of capital as investors (surprisingly) appear to rely on evidence of the adoption of certified tools of "good corporate governance" as an important metric in their allocation of capital. Not having independent directors, a code of corporate governance, or stewardship code in name may perversely make a jurisdiction a less attractive place to invest because it is seen to not be part of the "good corporate governance" club. Further, the existence of faux convergence presents a significant hurdle for comparative corporate law researchers who may assume that the widespread adoption of common tools of "good corporate governance" suggests a global trend in how corporate governance functions—when in fact it does not. This can happen to even the most seasoned experts, who are aware of the pitfalls of such assumptions. This seems, ironically, to have been the case in Jeffrey Gordon's insightful article on convergence and persistence in which he appears to assume that the jurisdiction's which have adopted stewardship codes aim to enhance the voice of long-term, stable, institutional investors—congruent with the aim of the UK Code.[250] As this Article has demonstrated, this assumption is erroneous.

From a theoretical perspective, the ramifications of faux convergence challenge some widely accepted ideas about convergence theory. It is often assumed that "national elites may defend [their] domestic corporate governance regime"[251] as they may extract rents from it. However, it appears that with faux convergence the opposite may be true. In the case of faux convergence, elites can maintain or reinforce their jurisdiction's existing corporate governance system or use the superficially adopted corporate governance tool for a function that serves their own purpose—while, at the same time, signaling their adoption of "good corporate governance." As explained above in the case of Singapore, the government adopted toothless stewardship codes which reinforced the dominance of a highly successful state-controlled and family-controlled system of corporate governance, while sending a signal of "good corporate governance" to the market.[252] In Japan, the LDP was able to use stewardship to execute its political agenda to serve as one of Prime Minister Abe's famous three arrows, while sending a signal of "good corporate governance" reform to the market.[253] The

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250. *See* Gordon, *supra* note 31, and accompanying text.
251. *See id.* at 29.
252. *See* discussion in *supra* Part IV.B.
253. It is worth noting that Japanese policy makers may have misunderstood the intention of their UK counterparts and thought that shareholder-oriented corporate

manner in which faux convergence can serve the interests of entrenched elites may help explain why some of these tools of "good corporate governance" have proliferated so widely. It should also be noted that these entrenched elites may be maintaining a successful system (e.g., Singapore) or attempting to fix a broken one (e.g., Japan). The point is not to make a normative claim that faux convergence will necessarily have deleterious consequences. To the contrary, in Singapore the early evidence is of success, and in Japan there also seems to be indications of its positive impact.[254] Rather, this helps explain a potential motivation for—and channel through which—globally certified mechanisms of "good corporate governance" are adopted on a superficial formal level, with extremely different intended and actual functions in practice.

At first blush, faux convergence also presents a challenge to Ronald Gilson's observation that functional convergence—rather than formal convergence—is "likely the first response to competitive pressure because changing the form of existing institutions is costly."[255] An example that Gilson[256] used to illustrate his point was the functional convergence in Germany, Japan, and the United States in terms of the time it takes for companies to replace underperforming senior management. Although for path-dependent reasons the three countries have formally maintained their unique systems of corporate governance, to succeed all three countries needed to find ways within their existing systems to solve the problem of managerial underperformance.

There is little doubt that Gilson's observation is correct when formal convergence requires making substantive changes to existing institutions. However, in the case of faux convergence existing institutions can be maintained or reinforced because the superficial level of convergence may occur in name only. As such, faux convergence may occur even when a jurisdiction's system of corporate governance is already functionally competitive because the jurisdiction can maintain its effectively functioning system while still superficially altering its form. One can imagine smaller jurisdictions—or even larger jurisdictions that cannot create global corporate governance norms—do this to merely be part of the "good corporate governance" club. Alternatively, countries may opt for faux convergence if they are

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governance, which Japan was trying to promote by its stewardship code, was the "good" corporate governance championed by the UK Code. *See* Goto, *The Logic and Limits of Stewardship Codes*, *supra* note 142, at 390. If this was the case, it means that there was no divergence between the LDP's political agenda and the signal it was sending to the market.

254. *See supra* discussion in Part IV.C.

255. Gilson, *supra* note 33, at 338.

256. *See id.* at 337 (demonstrating that "[e]mpirical studies demonstrate functional but not formal convergence" in German, Japanese, and American corporate governance).

not functionally competitive as it is a way to feign being part of the "good corporate governance" club without actually making functional changes, which may dislodge elites or rent seekers. Much more empirical work must be done to determine the result of such strategies. Regardless of this, however, the authors suggest that faux convergence is a real phenomenon that does not fit into Gilson's formal versus functional taxonomy and should be added as another type of convergence.[257]

Finally, the idea of faux convergence fits well with Gordon's recent observation of a rise in "divergence within convergence."[258] The nature of faux convergence lends itself to "divergence within convergence" as the convergence that occurs is merely at a superficial level. Therefore, by definition, faux convergence begets divergence in practice.

Figure 1: Varieties of Convergence in Corporate Law

		Convergence on Legal Form	
		Yes	No
Convergence on Function	Yes	Formal Convergence (Gilson)	Functional Convergence (Gilson)

257. *See infra* Figure 1 below for a visual summary of the expanded convergence taxonomy.

258. *See* Gordon, *supra* note 31, at 29 ("There has been convergence in many of the formal governance rules but local applications reveal considerable divergence."); *id.* at 30 ("In 2017, it would also be right to add the role of 'global governance,' the effort to set standards flowing from supranational public institutions [in promoting convergence]."); *id.* at 32 ("Section 4 looks at evidence of divergence, particularly 'divergence within convergence,' which seems to describe the general state of play."); *id.* at 41 ("Divergence takes two forms: The first is a non-following of the convergent norm—for example, not requiring independent directors. The second, far more common, is divergence within the convergent norm: 'divergent convergence.' Evidence of both forms of divergence is found in the OECD Corporate Governance Factbook (2017), a readily accessible current guide to worldwide corporate law and governance."); *id.* at 43 ("Do these divergent elements within a convergent practice matter? The evidence is 'yes, they should.' First, the particulars of a reform can determine whether it is 'high impact' or not."); *id.* at 44 ("A more radical version of 'divergence within convergence' is advanced in a recent volume on independent directors in Asia, which argues both that (1) independent directors are 'ubiquitous' in Asia, found in higher proportion across more firms than in the 'West,' *and* that (2), functionally, there are 'varieties' of independent directors in Asia, differing substantially from the US variant and differing even within Asia. Adoption of a transplant, particularly under pressure of foreign investors or global governance institutions, does not determine how the new institution will function. That emerges over time, as the transplant is contextualized within the local ecology, and can lead to significant divergence in practice.").

	No	Faux Convergence (form at a superficial level)	No Convergence

VI. CONCLUSION

It is a historical fact that the first stewardship code was created in the UK in 2010. Since then, a litany of jurisdictions across Asia have claimed to have adopted United Kingdom–inspired stewardship codes. Upon first inspection, these codes appear to normally contain the same seven principles as the UK Code. Thus, it makes perfect sense that corporate governance scholars, experts, and pundits would assume that the UK stewardship model has been transplanted to Asia.

However, as this Article's Japan and Singapore case studies reveal, the reality is much more complex. Jurisdictions appear to have seized upon the malleable concept of stewardship as a cost-effective way to achieve their own local goals, while simultaneously sending a signal of good corporate governance through the act of adopting a stewardship code. From a practical perspective, this makes it impossible to draw normative conclusions (based on Anglo–American values) about a country's corporate governance by merely knowing whether or not they have adopted a code—local knowledge and context is key.

From a broader theoretical perspective, stewardship is just the latest example of an intriguing emerging phenomenon in global corporate governance: developments that appear at first glance to be convergence but which reveal themselves upon deeper analysis to be faux convergence—superficial convergence in form but divergence in function. The hope is that this Article will lay the foundation for further research on the cause and implications of this phenomenon and that it will be a reminder that to achieve true understanding in comparative corporate governance there is always a need for local knowledge, context, and expertise.