Good Activist/Bad Activist: The Rise of International Stewardship Codes

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INTRODUCTION

Shareholder participation in corporate governance and investor activism are topics *du jour* in the United States and around the world. In the early part of the 20th century, Professors Berle and Means considered that shareholder participation was impossible in the transformed commercial world that they described in *The Modern Corporation and Private Property*.[1] This was a world characterized by dispersed and vulnerable shareholders, in which owners do not manage, and managers do not own, the corporation.[2] In such an environment, the goal of corporate law became one of protecting shareholder interests rather than providing shareholders with participation rights.

The structure of capital markets and profile of shareholders in the United States today is dramatically different from that time. The rise of institutional investors challenged the idea that the only possible paradigm in corporate law is one of shareholder protection. Shareholder participation in corporate governance is not only feasible but a contemporary reality.[3]

As this Article demonstrates, however, there are competing narratives about shareholders and their right to participate in corporate governance around the world. Although a negative view underpins much

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1. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

2. *Id.* at x.

3. *See* Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat* 31–34 (Eur. Corp. Governance Inst., Working Paper No. 343, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921692 [https://perma.cc/K36Q-LA7Y].

recent debate in the United States, a diametrically opposite view of shareholder power and activism has gained traction in many jurisdictions outside the United States.[4] This Article focuses on one manifestation of this positive view of shareholders, namely shareholder stewardship codes, which originated in the United Kingdom following the 2007–2008 global financial crisis and are now proliferating throughout the world.[5]

These competing narratives concerning the role of shareholders in corporate governance have significant regulatory implications. In particular, the narratives pose challenges to regulators, who attempt to differentiate between "good activists" and "bad activists."

I. EVOLVING OWNERSHIP PATTERNS AND COMPETING NARRATIVES CONCERNING SHAREHOLDER ENGAGEMENT

Ownership patterns in the United States today are very different from those when Berle and Means wrote *The Modern Corporation and Private Property*, in which they depicted shareholders as a dispersed group requiring legal protection due to their inability to act collectively.[6] By the 1990s, shareholder engagement in corporate governance and activism had become feasible[7] given the rise of powerful institutional investors.[8] The subsequent emergence of hedge funds revealed the possibility of new activist techniques and strategies.[9]

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4. *See generally* Jennifer G. Hill, *Images of the Shareholder–Shareholder Power and Shareholder Powerlessness*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 53–57 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

5. *See* ORG. FOR ECON. COOPERATION & DEV., G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE 31–32 (2015) [hereinafter OECD 2015]; Ruth Sullivan, *UK Seen as Model for Stewardship Guidelines*, FIN. TIMES (Aug. 1, 2010), https://www.ft.com/content/0e0bbc50-9c02-11df-a7a4-00144feab49a.

6. BERLE & MEANS, *supra* note 1, at 78. This ever-widening shareholder dispersion increased the danger of entrenched managerial power, effectively creating "ownerless corporations." *See* Andrew G. Haldane, Chief Economist, Bank of Eng., Speech "Who Owns A Company?" given at University of Edinburgh Corporate Finance Conference 8, 11 (May 22, 2015), http://www.bankofengland.co.uk/publications/Documents/speeches/2015/speech833.pdf [https://perma.cc/4H67-CJYB].

7. Marco Becht et al., *Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes UK Focus Fund*, 22 REV. FIN. STUD. 3093, 3119–21 (2009); Bernard S. Black & John C. Coffee Jr., *Hail Britannia?: Institutional Investor Behaviour Under Limited Regulation*, 92 MICH. L. REV. 1997, 2001–07 (1994); Stuart L. Gillan & Laura T. Starks, *The Evolution of Shareholder Activism in the United States*, 19 J. APPLIED CORP. FIN. 55 (2007).

8. Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 572–74 (1990).

9. William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1401–10 (2007); Alon Brav et al., *Hedge Fund Activism, Corporate Governance and Firm Performance*, 63 J. FIN. 1729, 1745–46 (2008); Brian R. Cheffins & John Armour, *The Past, Present and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 60–61 (2011); Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1029–43 (2007).

Today, financial institutions dominate the capital markets in many, but by no means all,[10] jurisdictions. In the United States, for example, institutional investor shareholding in the top 1,000 U.S. corporations, which stood at less than ten percent in the early 1950s, has now risen to over seventy percent.[11] This pattern is even more pronounced in the United Kingdom, where around ninety percent of shares are held by financial institutions, approximately half of which are non-U.K.-based.[12] There has also been massive growth in financial intermediation in Australia as a result of the introduction of a mandatory private pension (superannuation) system in the early 1990s, with Australian fund managers responsible for a fund pool of approximately A$3 trillion.[13] There have been analogous developments in major Asian financial centers, such as Hong Kong and Singapore.[14]

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10. In parts of Asia, for example, concentrated ownership, such as state-, family- or founder-owned companies, continues to be the dominant paradigm. There are also high levels of share trading by individuals. In Taiwan, for example, more than sixty percent of share trading is conducted by individuals, as opposed to institutional, investors. Christopher Chen, *Taiwan*, *in* CORPORATE GOVERNANCE IN ASIA (Bruce E. Aronson & Joongi Kim eds., forthcoming 2018).

11. Robert B. Thompson, *The Power of Shareholders in the United States*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 441, 447 (Jennifer G. Hill & Randall S. Thomas eds., 2015); Suneela Jain et al., The Conference Board Governance Center White Paper: What is the Optimal Balance in the Relative Roles of Management, Directors, and Investors in the Governance of Public Corporations? 9 (2014) (unpublished manuscript), http://tcbblogs.org/public_html/wp-content/uploads/The%20Conference%20Board%20Governance%20Center%20White%20Paper.pdf.

12. Paul Davies, *Shareholders in the United Kingdom*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 355, 356 (Jennifer G. Hill & Randall S. Thomas eds., 2015). On the changing nature of the U.K. shareholder structure, see generally ENERGY AND INDUSTRIAL STRATEGY COMMITTEE, CORPORATE GOVERNANCE: THIRD REPORT OF SESSION 2016–17, HC 702, §§ 13–16 (UK), https://publications.parliament.uk/pa/cm201617/cmselect/cmbeis/702/702.pdf [https://perma.cc/Y5BK-CUYJ]; *see also* Haldane, *supra* note 6, at 11 (noting that the fraction of shares held by individuals in the United Kingdom has dropped from around fifty percent in the 1960s to a little over ten percent today, and most of those individual holdings are now indirectly held through financial intermediaries). Ownership of shares by foreign investors is even higher in some other European jurisdictions, such as the Netherlands, where it has been estimated that foreign investors own over seventy percent of the equity market. *See* Sullivan, *supra* note 5.

13. *See, e.g.*, Press Release, Fin. Servs. Council, FSC Launches Internal Governance and Asset Stewardship Standard (July 19, 2017), https://www.fsc.org.au/_entity/annotation/86955911-0f6c-e711-8103-c4346bc5c274 [https://perma.cc/P5W2-2N3G]; AUSTL. GOV'T TREASURY, FINANCIAL SYSTEMS INQUIRY FINAL REPORT § 2 (2014), http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf [https://perma.cc/27Z5-UAXZ].

14. *See* Ernest Lim & Luh Luh Lan, The Role of Institutional Investors in Singapore and Hong Kong: Stewardship Codes and Ownership Engagement (unpublished manuscript) (presented at the Corporate Governance and Regulation: East Meets West Conference at the Univ. of Sydney (Aug. 17–18, 2017)). Professors Lim and Lan note that between 2007 and 2017, the number of mutual funds domiciled in Singapore and Hong Kong rose from 86 to 197 (Singapore) and from 61 to 323 (Hong Kong). *Id.* During the same period, assets under management of domiciled funds in each jurisdiction grew from $10 billion to $30 billion (Singapore) and from $19 billion to $92.4 billion (Hong Kong). *Id.* Nonetheless, many Asian markets, including Hong Kong, are dominated by family- and state-

These major capital market shifts, which Professors Gilson and Gordon have labeled "agency capitalism," have important implications for investor activism and regulation.[15] According to Gilson and Gordon, a feature of contemporary agency capitalism is that institutional investors are "sophisticated but reticent."[16] This means that, although these financial institutions are unlikely to initiate activist conduct, other more aggressive market players, such as hedge funds, may persuade them to join forces and engage in such conduct.[17]

As the profile of shareholders has changed, so too has their image, which has become increasingly ambiguous, particularly since the global financial crisis. Two competing narratives are apparent in current comparative corporate governance—these are the narratives of the "bad activist" versus the "good activist."

a. The Negative Narrative

A negative perception of investors, or at least certain types of investors, pervades much of the contemporary U.S. debate concerning the role of shareholders in corporate governance. This narrative portrays some shareholders as unfaithful participants in the corporate enterprise.[18] Time horizons play a significant role in the negative narrative, which also suggests that many investors are myopic and prone to destructive short-termism.[19] Proxy advisers are often tarred with the same brush.[20] According to Wachtell, Lipton, Rosen, and Katz, for example, hedge fund

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owned companies. *See* John Kong Shan Ho, *Bringing Responsible Ownership to the Financial Market of Hong Kong: How Effective Could It Be?*, 16 J. CORP. L. STUD. 437, 446–52 (2016).

15. Ronald J. Gilson & Jeffrey N. Gordon, *Agency Capitalism: Further Implications of Equity Intermediation*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 32 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

16. *Id.* at 33.

17. *Id.*

18. They are variously portrayed as predatory, disloyal, or both, to their ultimate beneficiaries. *See generally* Hill, *supra* note 4.

19. *See, e.g.*, Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 790–92 (2015); Lawrence E. Mitchell, *Protect Industry from Predatory Speculators*, FIN. TIMES (July 8, 2009), https://www.ft.com/content/fac881b6-6be5-11de-9320-00144feabdc0. The idea that activist shareholders are myopic and short-termist has exerted an increasingly powerful influence in U.S. corporate law literature. For a discussion of this literature, see generally Lucian Bebchuk et al., *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1093–96 (2015). For a recent challenge to the widely held view that the ideal shareholder is therefore a long-term investor, see Elisabeth de Fontenay, *The Myth of the Ideal Investor*, 41 SEATTLE. U. L. REV. 425 (2018).

20. *See, e.g.*, Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 484 (2014).

activists are "profoundly destructive to the long-term health of companies and the American economy."[21]

This view of shareholders gained ground as a result of the global financial crisis. Some commentators suggested, for example, that shareholders were "more instigators than victims" of flawed executive compensation schemes that prompted corporate managers to engage in excessive risk-taking.[22] The negative narrative of investors has also been an influential theme in the U.S. shareholder empowerment and proxy access debates.[23]

This negative perception of investors has important regulatory implications. It suggests that investor engagement in corporate governance and activism is dangerous, both to the corporation and to society as a whole. It flips the traditional Berle–Means goal of protecting shareholders on its head by suggesting that the modern goal of corporate law should be to protect the corporation from certain investors. A clear example of this approach is Martin Lipton's recommendation that any new U.S. legislation or regulation should include protection for companies against shareholder pressure.[24]

The negative narrative of shareholders is by no means restricted to the United States. In Germany in 2005, following the ouster of Werner G. Seifert from his position as Chief Executive Officer (CEO) of the German Stock Exchange, short-term shareholders, such as hedge funds, were described as "swarms of locusts."[25] In 2008, a senior member of Japan's

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21. *See* Martin Lipton, *Do Activist Hedge Funds Really Create Long-Term Value?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 22, 2014), https://corpgov.law.harvard.edu/2014/07/22/do-activist-hedge-funds-really-create-long-term-value/ [https://perma.cc/N5TU-JEPS].

22. John C. Coffee, Jr., *Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 COLUM. L. REV. 795, 799 (2011).

23. *See* Hill, *supra* note 3; Jennifer G. Hill, *The Rising Tension Between Shareholder and Director Power in the Common Law World*, 18 CORP. GOVERNANCE: INT'L REV. 344 (2010).

24. Martin Lipton, *Will a New Paradigm for Corporate Governance Bring Peace to the Thirty Years' War*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 2, 2015), https://corpgov.law.harvard.edu/2015/10/05/will-a-new-paradigm-for-corporate-governance-bring-peace/ [https://perma.cc/LV93-CAJD].

25. *See* Franz Müntefering, Chairman of the Soc. Democratic Party, Speech "Freiheit und Verantwortung" at Friedrich Ebert Found. in Berlin (Nov. 19, 2004), http://www.franz-muentefering.de/reden/pdf/19.11.04.pdf [https://perma.cc/S4B9-RF39]; Mark Landler & Heather Timmons, *Poison Ink Aimed at 'Locusts,'* N.Y. TIMES (Mar. 31, 2006), http://www.nytimes.com/2006/03/31/business/media/poison-ink-aimed-at-locusts.html. The "swarms of locusts" metaphor is reminiscent of references in the U.S. context to hedge funds as "wolf packs." *E.g.*, John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 562–68 (2016); Carmen X. W. Lu, *Unpacking Wolf Packs*, 125 YALE L.J. 773, 773–77 (2016); Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1871–908 (2017).

Ministry of Economy, Trade and Industry (METI) described shareholders as greedy, "fickle," and "irresponsible," expecting high dividends while simultaneously shirking responsibility.[26] In Korea, corporate law amendments in 2007 imposed criminal sanctions on foreign investors seeking to exert an "influence on control" of Korean firms, and this concept extended to shareholder demands for higher dividends.[27] In 2015, an ultimately unsuccessful attempt by U.S. hedge fund Elliott Management to block a family-controlled acquisition of Samsung C&T in Korea provoked an anti-Semitic response, which was a shocking and extreme example of the view of foreign investors as predatory.[28]

Recent activist demands made against companies in the Asia-Pacific region have been variously described as bullying and short-termist,[29] dangerous to the industry, and attempting to manipulate the markets.[30] In

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26. These comments were made in response to pressure by the activist U.S. investment fund Steel Partners against the managers of Sapporo, a Japanese beer company, in which Steel Partners had a 19% stake. *Activist Investors in Japan: Samurai v Shareholders*, ECONOMIST (Feb. 14, 2008), http://www.economist.com/node/10698467 [https://perma.cc/J658-MGGA]. For discussion of subsequent difficulties experienced by Steel Partners in seeking to replace many of Sapporo's directors, see Michiyo Nakamoto, *Steel Partners Dealt Fresh Setback in Japan*, FIN. TIMES (Mar. 30, 2010), https://www.ft.com/content/d4322b14-3bd9-11df-9412-00144feabdc0.

27. Kon Sik Kim, *Dynamics of Shareholder Power in Korea*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 535, 540 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

28. *See* Ken Kurson, *Samsung Reacts to Observer, Deletes Anti-Semitic 'Vulture Man' Cartoons*, OBSERVER (July 15, 2015, 12:55 PM), http://observer.com/2015/07/breaking-samsung-reacts-to-observer-deletes-anti-semitic-vulture-man-cartoons/ [https://perma.cc/4TSZ-B6L5].

29. For example, Hong Kong's Bank of East Asia, which was the target of an activist campaign by Elliott Management, accused the hedge fund of "bullying tactics [that] only seek to serve their own short-term interests, and not the interests of the bank's shareholders as a whole." Alun John, *What is Bank of East Asia and Elliott's Dispute About?*, S. CHINA MORNING POST (July 18, 2017), http://www.scmp.com/business/banking-finance/article/2103138/what-bank-east-asia-and-elliotts-dispute-about [https://perma.cc/Y4KD-KWHH]; *see also* Mia Lamar, *Hedge Fund Elliott Calls on Bank of East Asia to Sell*, WALL ST. J. (Feb. 4, 2016), https://www.wsj.com/articles/hedge-fund-elliott-calls-on-bank-of-east-asia-to-sell-1454575546. Similarly, the general manager of a venerable Japanese company, Katakura Industries Co., described the suggestions of a Hong Kong-based activist hedge, Oasis Management Co., fund as "extremely short-term." Lisa Pham, *Activist Hedge Fund Battles 144-Year-Old Firm to Ditch Low-Return Ventures*, JAPAN TIMES (Apr. 4, 2017), https://www.japantimes.co.jp/news/2017/04/04/business/corporate-business/activist-hedge-fund-battles-144-year-old-firm-ditch-low-return-ventures/ [https://perma.cc/VS3S-D24C].

30. The actor George Clooney entered into debate about the activist campaign by Daniel S. Loeb against the Japanese company Sony, describing Mr. Loeb as a "carpet bagger" who was dangerous to the industry and trying to manipulate the market. Michael J. de la Merced, *George Clooney Rebuts Loeb's Critique of Sony*, N.Y. TIMES: DEALBOOK (Aug. 2, 2013), https://dealbook.nytimes.com/2013/08/02/george-clooney-rebuts-loebs-critique-of-sony/ [https://perma.cc/Z7AX-63MX]; *see* Nathan Vardi, *George Clooney Attacks Hedge Fund Billionaire Dan Loeb*, FORBES (Aug. 2, 2013), https://www.forbes.com/sites/nathanvardi/2013/08/02/george-clooney-attacks-hedge-fund-billionaire-dan-loeb/ [https://perma.cc/E5JS-RG9G].

the case of Elliott Management's "brazen foray"[31] against mining company BHP Billiton Ltd.,[32] Australia's Treasurer, Scott Morrison, weighed in on the debate, stating that one of Elliott Management's demands[33] would amount to a criminal offense and be contrary to the national interest.[34]

b. The Positive Narrative

There is, however, a powerful alternative narrative about shareholder activism in modern comparative corporate governance. This narrative, which is common outside the United States, views increased shareholder power and engagement in corporate governance in a distinctly positive light. According to this analysis, the problem during the global financial crisis was not too much shareholder pressure on management but too little. As John Plender lamented in relation to the crisis, "where were the shareholders?"[35]

Comments made in 2015 by Andy Haldane, Chief Economist at the Bank of England, reveal a positive narrative of shareholder engagement. According to Mr. Haldane:

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31. John Kehoe, *Elliott's BHP Billiton Hit Shows Activist Hedge Funds Target Australia*, AUSTL. FIN. REV. (Apr. 18, 2017), http://www.afr.com/business/elliotts-bhp-billiton-hit-shows-activist-hedge-funds-target-australia-20170416-gvlq3c [https://perma.cc/F2YZ-N64W]. The CEO of BHP Billiton Ltd. described Elliott Management's activist campaign against his company as "crude financial engineering." *Id.*

32. Prior to Elliott Management's campaign against BHP Billiton Ltd., shareholder activism in Australia had generally been limited to homegrown activist institutions, which tended to target small to medium companies for poor performance or corporate governance practices. *Id.*

33. Namely, Elliott Management's demand that BHP Billiton Ltd. collapse its dual British–Australian listing and to eliminate its listing on the Australian Securities Exchange (ASX). *See* Press Release, Hon. Scott Morrison MP, Treasurer of Austl.,Treasurer's Statement on Elliott's BHP Proposal (May 4, 2017), http://sjm.ministers.treasury.gov.au/media-release/041-2017/ [https://perma.cc/A2YP-Q2PL].

34. *See id.* According to the Treasurer, it would be "unthinkable that any Australian Government could allow this original Big Australian to head offshore." The rationale for Mr. Morrison's claim that this would also be illegal was the fact that in 2001 one of the protective conditions that the then-Treasurer of Australia, Peter Costello, imposed in agreeing to a merger between BHP Ltd. and Billiton Plc. was that BHP Billiton Ltd. should remain listed on the ASX. According to Mr. Morrison, if BHP Billiton Ltd. were to implement Elliott Management's demands contrary to the 2001 condition, this could constitute a criminal offence under Australia's Foreign Acquisitions and Takeovers Act of 1975, exposing both BHP Billiton Ltd. and its directors to liability. Following the comments by the Treasurer, Elliott Management proposed a new plan under which the dual listing would be collapsed into an Australian-listed, rather than a UK-listed, company. *See* Matthew Stevens, Opinion, *Elliott's BHP Billiton Assault Takes a Toxic Turn*, AUSTL. FIN. REV. (May 16, 2017), http://www.afr.com/business/elliotts-bhp-assault-takes-a-toxic-turn-20170516-gw650n [https://perma.cc/KUC9-M74Y].

35. John Plender, *Shut Out*, FIN. TIMES (Oct. 18, 2008), https://www.ft.com/content/fac648d6-9c76-11dd-a42e-000077b07658.

> One consequence of a more dispersed and disinterested ownership structure is that it becomes harder to exert influence over management, increasing the risk of sub-optimal decision-making. There is some empirical support for this hypothesis. For example, companies tend to have higher valuations when institutional shareholders are a large share of cashflow, perhaps reflecting their stewardship role in protecting the firm from excessive risk-taking.[36]

A positive view of shareholder engagement also underpinned several recommendations of the 2012 U.K. Kay Review,[37] which was established to review the impact of activity in U.K. equity markets on the long-term performance and governance of U.K. listed companies.[38] Although the Kay Review concluded that short-termism was indeed a problem in U.K. equity markets,[39] it also considered that increased shareholder engagement and collective action constituted one of the potential solutions to that problem. Specifically, the Kay Review recommended establishing an "investors' forum"[40] to promote enhanced collective engagement by institutional shareholders and to serve as a contact point between a company and its main shareholders for discussions of issues such as the appointment of a chairman and non-executive directors.[41] This approach to shareholder engagement is also supported by the Organization for Economic Co-operation and Development (OECD) under its *Principles of Corporate Governance*.[42]

This positive narrative treats investors as having an important participatory role in corporate governance, which is integral to

36. Haldane, *supra* note 6, at 11. Similarly, Denmark's Minister for Business and Growth, Troels Lund Poulsen, has spoken positively about increased shareholder engagement in corporate governance, stating "[i]t benefits Danish competitiveness if institutional investors use their influence and skills to help Danish companies operate in the best possible way." Rachel Fixsen, *Denmark to Draft Scheme Inspired by UK's Stewardship Code*, INVS. & PENSIONS EUR. (Jan. 28, 2016), https://www.ipe.com/news/esg/denmark-to-draft-scheme-inspired-by-uks-stewardship-code/10011667.fullarticle [https://perma.cc/5MBU-VZVM]. In accordance with this viewpoint, Ashley Alder, Chief Executive Officer of the Hong Kong Securities and Futures Commission and Chairman of IOSCO, has raised concerns about the disproportionate growth of passive investment funds, which may have little interest in holding boards accountable. *See* John Sedgwick, *Hong Kong Warns on Passive Governance Standards*, FIN. TIMES (Mar. 17, 2017), https://www.ft.com/content/ffb3b86c-096c-11e7-97d1-5e720a26771b.

37. THE KAY REVIEW OF UK EQUITY MARKETS AND LONG TERM DECISION-MAKING, FINAL REPORT (July 2012), http://www.ecgi.org/conferences/eu_actionplan2013/documents/kay_review_final_report.pdf [https://perma.cc/D8ZX-RLJ8].

38. *Id.* at 9.

39. *Id.*

40. *Id.* at 9, 13, 50–51.

41. *Id.* at 63.

42. OECD 2015, *supra* note 5.

accountability. It supports a radically different regulatory response to its negative counterpart, suggesting that shareholders should be granted stronger rights, encouraged to make greater use of their existing powers to engage with the companies in which they invest, or both.[43]

The positive narrative underpins several post-crisis reforms[44] that harness increased shareholder engagement as a regulatory technique in its own right.[45] One prominent example of this trend is "say on pay," which became a popular regulatory technique around the world following the crisis.[46] An advisory vote by shareholders on remuneration was introduced in the United States for the first time under the Dodd-Frank Act of 2010.[47] In jurisdictions such as the United Kingdom and Australia, which already had a non-binding "say on pay" vote for shareholders, the crisis led to a strengthening of shareholders' power in relation to executive pay. In the United Kingdom, shareholders now have an additional binding vote on remuneration policies.[48] In 2011, Australia introduced a distinctive form of "say on pay," the so-called "two strikes" rule.[49] Under this rule, a listed corporation that suffers two consecutive "strikes"—namely shareholder "no" votes of twenty-five percent or more on the annual directors' remuneration report—must put a "spill resolution" to its shareholders. If successful, this resolution requires all board members to submit to reelection by the company's shareholders within ninety days.[50] In Europe, the revised Shareholders' Rights Directive grants shareholders an *ex ante*

43. *See generally* Hill, *supra* note 4.

44. Some scholars have strongly criticized these reforms on the basis that they themselves constitute a kind of regulatory myopia. *See, e.g.*, Alan J. Dignam, *The Future of Shareholder Democracy in the Shadow of the Financial Crisis*, 36 SEATTLE U. L. REV. 639, 684 (2013) (referring to the myth of the good shareholder); *see also* Christopher M. Bruner, *Corporate Governance Reform in a Time of Crisis*, 36 J. CORP. L. 309, 310 (2011). According to Professor Bruner, "[I]t is surprising that policymakers . . . would seek to empower the very stakeholder group whose incentives are most skewed toward the kind of excessive risk-taking that led to the crisis in the first place." *Id.*

45. *See* Hill, *supra* note 4, at 64–68.

46. *See* Roberto Barontini et al., *Directors' Remuneration Before and After the Crisis: Measuring the Impact of Reforms in Europe*, *in* BOARDS AND SHAREHOLDERS IN EUROPEAN LISTED COMPANIES: FACTS, CONTEXT AND POST-CRISIS REFORMS 251 (Massimo Belcredi & Guido Ferrarini eds., 2013). *See generally* Randall S. Thomas & Christoph Van Der Elst, *Say on Pay Around the World*, 92 WASH. U. L. REV. 653 (2015).

47. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376 (2010).

48. *See* Enterprise and Regulatory Reform Act 2013, 2013 c. 24, § 6 (UK); *see also* DEP'T FOR BUS., INNOVATION & SKILLS, DIRS.' REMUNERATION REFORMS: FREQUENTLY ASKED QUESTIONS 4 (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/158048/13-727-directors-remuneration-reforms-faq.pdf [https://perma.cc/23T3-E6XG].

49. *Corporations Act 2001* (Cth) ss 250U–250W (Austl.).

50. *See* Hill, *supra* note 4, at 66–68.

vote on remuneration policy, which is in principle binding, and an *ex post* advisory vote on the remuneration report for the prior year. [51]

II. THE RISE AND RISE OF STEWARDSHIP CODES

Perhaps the clearest example of the influence of the positive narrative in comparative corporate governance, however, is the rise of stewardship codes, which first appeared in the aftermath of the global financial crisis. These codes indicate that, in some jurisdictions at least, the debate today is less about controlling shareholder power than about constraining board power by encouraging shareholders to exercise their legal rights and increase their level of engagement in corporate governance.[52] Stewardship codes reflect the view that engagement by institutional investors is an integral part of any corporate governance system.[53] They represent a generalized regulatory response to John Plender's global financial crisis lament—"where were the shareholders?"[54]

In 2010, the United Kingdom became the first jurisdiction to adopt a stewardship code,[55] following a recommendation of the 2009 Walker Review on corporate governance in financial institutions.[56] A revised version of the Code, which operates on a voluntary basis, was released in 2012.[57] The U.K. Stewardship Code made large claims, asserting, for example, that "the goal of stewardship is to promote the long term success

51. *See* Press Release, Eur. Comm. - Fact Sheet, Shareholders' Rights Directive Q&A (Mar. 14, 2017), http://europa.eu/rapid/press-release_MEMO-17-592_en.htm [https://perma.cc/FW4Y-H4H6].

52. Some stewardship codes, however, also include as part of their policy rationale the goal of strengthening the accountability of institutional investors or ensuring that institutional investors fulfill their fiduciary duty to their own investors and beneficiaries. *See, e.g.*, MINORITY S'HOLDER WATCHDOG GRP., MALAYSIAN CODE FOR INST. INV'R (2014) [hereinafter MSWG CODE], https://www.mswg.org.my/the-malaysian-code-for-institutional-investors [https://perma.cc/FDA2-ZZUK]; TAIWAN STOCK EXCHANGE, STEWARDSHIP PRINCIPLES FOR INST. INV'R 2 (June 30, 2016) [hereinafter TWSE 2016], http://cgc.twse.com.tw/static/stewardship_en.pdf [https://perma.cc/6BY3-BUFQ].

53. In South Africa, for example, it has been claimed that the introduction of a stewardship code, the Code for Responsible Investing in South Africa (CRISA), was a response to recognition that "there was a huge gap in the governance system because it failed to include institutional investors." Nina Röhrbein, *The Engaged Investor: The South African Code*, INV. & PENSIONS EUR. (Feb. 2011), https://www.ipe.com/the-engaged-investor-the-south-african-code/38951.fullarticle [https://perma.cc/4L6A-QL56].

54. *See* Plender, *supra* note 35.

55. FIN. REPORTING COUNCIL, THE U.K. STEWARDSHIP CODE (July 2010).

56. WALKER REVIEW, A REVIEW OF CORPORATE GOVERNANCE IN UK BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS, NATIONAL ARCHIVES UK (Nov. 26, 2009), http://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/walker_review_261109.pdf [https://perma.cc/4G5X-X2HV].

57. *See* FIN. REPORTING COUNCIL, THE U.K. STEWARDSHIP CODE (Sept. 2012) [hereinafter U.K. STEWARDSHIP 2012], https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf [https://perma.cc/574N-3X5K].

of companies"[58] and that "[e]ffective stewardship benefits companies, investors, and the economy as a whole."[59]

These claims proved alluring from a comparativist standpoint, providing clear incentives for transplantation.[60] Japan became an early adopter when, in 2014, it introduced its own version of the stewardship code. Many countries, particularly in Asia, have now jumped on the stewardship code bandwagon.[61]

The stewardship codes around the world emanate from different issuing bodies, and this can influence the effectiveness of a code.[62] There are at least three distinct categories of stewardship code. The first category comprises codes that have been issued by regulators or quasi-regulators on behalf of the government. Jurisdictions with stewardship codes of this type include: Denmark,[63] Hong Kong,[64] Kenya,[65] Japan,[66] Malaysia,[67]

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58. *Id.* at 1.

59. *Id.*

60. According to Professor Edward Rock, the allure of comparativism lies in the idea that "one can fruitfully transplant legal rules or institutions from one system to another . . . . The temptation is to try to get something for nothing, or at least at a discount." Edward B. Rock, *America's Shifting Fascination with Comparative Corporate Governance*, 74 WASH. U. L.Q. 367, 368 (1996).

61. *See* EY, Q&A ON STEWARDSHIP CODES 2 (Aug. 2017), http://www.ey.com/Publication/vwLUAssets/ey-stewardship-codes-august-2017/$FILE/ey-stewardship-codes-august-2017.pdf [https://perma.cc/MVZ6-UYV6]; OECD 2015, *supra* note 5, at 29–30; Sullivan 2010, *supra* note 5.

62. Lim & Lan, *supra* note 14.

63. *See* COMM. ON CORP. GOVERNANCE, STEWARDSHIP CODE (Nov. 29, 2016) (Den.), https://corporategovernance.dk/sites/default/files/erst_247_opsaetning_af_anbefalinger_for_aktivt_ejerskab_uk_2k8.pdf [https://perma.cc/V69D-B7VH].

64. SECS. & FUTURES COMM'N, PRINCIPLES OF RESPONSIBLE OWNERSHIP (Mar. 7, 2016) (H.K.), http://cgc.twse.com.tw/static/20160630/0000000054a7dce70155a09e021f001c_Stewardship%20Principles%20for%20Institutional%20Investors-20160630.pdf [https://perma.cc/Q5Q2-MSLQ]; *see* Kong Shan Ho, *supra* note 14, at 449 (noting that unlike western markets with dispersed ownership, the Hong Kong market is dominated by family-owned and state-owned companies, meaning that it may be more productive for investors to engage directly with controlling shareholders, rather than the board of directors); *see also* Lim & Lan, *supra* note 14 (highlighting differences between the powers of the regulatory authorities responsible for the U.K. Stewardship Code and Hong Kong's Principles of Responsible Ownership).

65. *See* The Capital Markets Act, No. 6016 (2017) KENYA GAZETTE No. 81 Cap. 485A (Kenya), http://kenyalaw.org/kenya_gazette/gazette/volume/MTUwOA--/Vol.CXIX-No.81 [https://perma.cc/NR3U-L34Q].

66. *See* COUNCIL OF EXPERTS ON JAPAN'S STEWARDSHIP CODE, PRINCIPLES FOR RESPONSIBLE INVESTORS: JAPAN'S STEWARDSHIP CODE 1–2 (Feb. 26, 2014) [hereinafter JAPAN STEWARDSHIP], http://www.fsa.go.jp/en/refer/councils/stewardship/20140407/01.pdf [https://perma.cc/ALN5-T49C].

67. *See* MSWG CODE, *supra* note 52.

Taiwan,[68] and Thailand.[69] In March 2017, the Insurance Regulatory and Development Authority (IRDA) became the first Indian regulator to promulgate such a code with the release of a draft mandatory Stewardship Code for insurance companies.[70] It is anticipated that this is the first step in the formulation of a generalized set of shareholder stewardship principles by a coalition of Indian regulators.[71]

A second category of stewardship codes, operating in some other countries, are those that have been initiated by various private industry participants.[72] South Korea is an interesting example of this type of code.[73] Although the South Korean regulator[74] sought to introduce its own stewardship code in 2015,[75] this attempt failed due to strong opposition from members of the business community, who claimed that such a code would diminish their autonomy and permit excessive interference in corporate management by institutional investors.[76] However, a private organization[77] subsequently intervened and successfully steered a voluntary stewardship code to adoption in December 2016.[78] Other

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68. *See* TWSE 2016, *supra* note 52; *Taiwan Stock Exchange Launches Stewardship Principles for Institutional Investors*, MONDOVISIONE (July 7, 2016), http://www.mondovisione.com/media-and-resources/news/taiwan-stock-exchange-launches-stewardship-principles-for-institutional-investor/ [https://perma.cc/D42C-T4NN].

69. *See* SECS. & EXCH. COMM'N, INVESTMENT GOVERNANCE CODE: I CODE FOR INSTITUTIONAL INVESTORS (No. AorSorPor, 39/2559) (2017) (Thai.), http://www.sec.or.th/TH/Documents/hearing/hearing_39_2559_en.pdf [https://perma.cc/2JSW-ATDA].

70. *See* Inst. Inv'r Advisory Servs., *Stewardship Code for India – IRDA Intensifies the Agenda* (Mar. 24, 2017) (India), https://docs.wixstatic.com/ugd/91c61f_b117c052c5ba4541b104f3569e3ae352.pdf [https://perma.cc/WAB3-CRNR].

71. The coalition of Indian regulators comprises the Securities and Exchange Board of India (Sebi); IRDA; and the Pension Fund Regulatory Development Authority. *See* Jayshree P. Upadhyay, *India to Draft Rules for Institutional Investors Voting on Company Matters*, LIVEMINT (Mar. 6, 2017), http://www.livemint.com/Companies/0teJ9go8GQPOOrxuAadTeJ/India-to-draft-rules-for-institutional-investors-voting-on-c.html [https://perma.cc/8UAX-AEMP].

72. EY, *supra* note 61, at 2.

73. *See* Mee-Hyon Lee, Introduction of the Stewardship Code in Korea (unpublished manuscript) (presented at the Corporate Governance and Regulation: East Meets West Conference at the University of Sydney on Aug. 17–18, 2017) (providing an overview of Korea's adoption of its Stewardship Code).

74. Korean Financial Services Commission.

75. Lee, *supra* note 73.

76. *See* Jung Suk-Yee, *Financial Services Commission Concentrating on Stewardship Code*, BUS. KOREA (Feb. 14, 2017), http://www.businesskorea.co.kr/english/news/money/17284-korean-stewardship-code-financial-services-commission-concentrating-stewardship [https://perma.cc/ZTH9-8RY4].

77. The private organization was the Korea Corporate Governance Service, which was founded in 2002. Its major founding members were the Korea Exchange, the Korea Financial Investment Association, the Korea Listed Companies Association, and the KOSDAQ Listed Companies Association. *See* Lee 2017, *supra* note 73, at 1.

78. There is increasing pressure for greater managerial transparency in South Korea as a result of the Choi Soon-sil scandal, which ultimately led to the 2017 impeachment of President Park Geun-

jurisdictions to adopt codes promulgated by industry players of this kind include South Africa[79] and Singapore.[80]

A third type of stewardship code encompasses codes that are initiated by investors themselves.[81] Investor-led codes, which exist in countries such as Australia,[82] Brazil,[83] Canada,[84] Italy,[85] the Netherlands,[86] and

hye Park. *Id.* at 1–2. Although Korea's Stewardship Code is a private initiative, Korea's Financial Services Commission has stated that it will introduce policies that provide incentives for institutional investors to adopt the code. *See* Lee Ho-Jeong, *FSC Pushes for Adoption of Stewardship Code*, KOREA JOONGANG DAILY (Feb. 14, 2017), http://koreajoongangdaily.joins.com/news/article/Article.aspx?aid=3029833 [https://perma.cc/8BGL-Q5CX].

79. *See* INST. DIRS. S. AFR., CODE FOR RESPONSIBLE INVESTING IN SOUTH AFRICA 2011, http://c.ymcdn.com/sites/www.iodsa.co.za/resource/resmgr/crisa/crisa_19_july_2011.pdf [https://perma.cc/FP26-QXTR].

80. The Singapore Stewardship Principles were issued through the Stewardship Asia Centre (SAC). In fact, the Singapore Stewardship Principles straddle all three categories of issuing body because the SAC includes both industry players and investment organizations and was established under the auspices of Temasek, Singapore's state-owned sovereign wealth fund. *See generally* Lim & Lam, *supra* note 14. There is no signatory requirement or "comply or explain" requirement under the Singapore Stewardship Principles. *Id.*

81. *See generally* EY, *supra* note 61, at 2.

82. *See, e.g.*, Fin. Servs. Council, *supra* note 13. Australia's Financial Services Council (FSC) released its *FSC Standard 23: Principles of Internal Governance and Asset Stewardship* in July 2017. Compliance with the code is mandatory for all FSC asset-manager members. This applies to approximately fifty funds management firms, which manage most of the A$2.8 trillion in funds under management in Australia. The code is voluntary for FSC members that outsource investment management decisions. *See* Zilla Efrat, *FSC Launches Asset Stewardship Code*, INV. MAG. (July 19, 2017), https://investmentmagazine.com.au/2017/07/fsc-launches-asset-stewardship-code/ [https://perma.cc/4PSE-MG5U].

83. ASSOCIAÇÃO DE INVESITDORES NO MERCADO DES CAPITAIS, AMEC STEWARDSHIP CODE (2016) (Braz.), https://en.amecbrasil.org.br/wp-content/uploads/2016/11/amec-apresentacao-Codigo-Stewardship_ingles.pdf [https://perma.cc/6R5W-A4FD]. The ICGN has described the focus on ESG integration under Principle 3 of the AMEC Stewardship Code as a particularly progressive feature of the Brazilian code. *See* Letter from Erik Breen, Chairman, ICGN Board, to Asscociacao de Investidores no Mercado de Capitals (AMEC), at 2 (July 2016), https://www.icgn.org/sites/default/files/ICGN%20response%20to%20AMEC%20stewardship%20code%20consultation%20July%202016.pdf [https://perma.cc/WB97-4AGP].

84. CANADIAN COAL. FOR GOOD GOVERNANCE, 2017 CCGG STEWARDSHIP PRINCIPLES, (May 2017) (Can.) [hereinafter CCGC 2017], http://admin.yourwebdepartment.com/site/ccgg/assets/pdf/stewardship_principles_public.pdf [https://perma.cc/T296-ZFNK].

85. *See, e.g.*, ASSOGESTIONI, ITALIAN STEWARDSHIP PRINCIPLES FOR THE EXERCISE OF ADMINISTRATIVE AND VOTING RIGHTS IN LISTED COMPANIES (2016) (It.), https://www.icgn.org/sites/default/files/Italian%20code.pdf [https://perma.cc/C5C4-DW82].

86. *See* EUMEDION, BEST PRACTICES FOR ENGAGED SHARE-OWNERSHIP (June 30, 2011) (Neth.), https://www.eumedion.nl/en/public/knowledgenetwork/best-practices/best_practices-engaged-share-ownership.pdf [https://perma.cc/NT5B-YWL2].

Switzerland,[87] reflect a strong self-regulatory approach.[88] In Canada, for example, although many public companies have a dominant or controlling shareholder, institutional investors have been highly influential in corporate governance matters.[89] The Canadian Coalition for Good Governance (CCGC), which comprises forty-nine of Canada's largest institutional investors,[90] publishes a set of principles relating to shareholder monitoring and engagement in investee companies.[91]

Stewardship codes can sometimes mutate by changing categories. In the United Kingdom, for example, the 2010 Stewardship Code effected a species-jump from the third category of investor-led code to the first category of regulator/quasi-regulator-sanctioned code.[92] The 2009 Walker Review recommended that the U.K. Financial Reporting Council should ratify an existing investor-led code and transform it into the new Stewardship Code.[93] The Walker Review anticipated that changing the issuing body would elevate the status of the Stewardship Code to equal that of the U.K. Combined Code.[94] The Walker Review's clear message was that regulator/quasi-regulator-sanctioned codes have more clout than investor-led codes.

Recent developments in the United States fall within the third category of investor-led codes. In January 2017, the Investor Stewardship

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87. In 2013, a group of institutional investors, proxy advisers, and business representatives adopted a set of stewardship guidelines. *See* SWISS ASS'N OF PENSION FUND PROVIDERS ET AL., GUIDELINES FOR INSTITUTIONAL INVESTORS GOVERNING THE EXERCISING OF PARTICIPATION RIGHTS IN PUBLIC LIMITED COMPANIES (2013) (Switz.), https://www.ethosfund.ch/sites/default/files/upload/publication/p432e_130121_Guidelines_for_institutional_investors.pdf [https://perma.cc/X292-67DC]. One of the participants, Ethos, which comprises 228 Swiss pension funds and tax-exempt institutions, states that its aim is to promote "socially responsible investment (SRI) as well as a stable and prosperous socio-economic environment that safeguards the interests of civil society today and in the future." *Id.*

88. *See, e.g.*, ASSOGESTIONI, *supra* note 85.

89. Andrew MacDougall et al., *Canada*, *in* THE CORPORATE GOVERNANCE REVIEW 77, 78 (Willem J.L. Calkoen ed., 6th ed. 2016). Shareholder engagement and investor activism is also on the rise in Canadian companies. *See id*. at 88. There has also been "a growing focus not only by boards but also long-term active institutional shareholders on the importance of taking a longer-term perspective and avoiding decisions motivated solely by short-term results." *Id*. at 90.

90. *Id.* at 78.

91. *See* CCGC 2010, *supra* note 84.

92. Fin. Reporting Council, *supra* note 55.

93. *See* WALKER REVIEW, *supra* note 56, Recommendations 16 and 17. The investor-led code appropriated by the U.K. Financial Reporting Council was the *Code on the Responsibilities of Institutional Investors*, published by the Institutional Shareholders' Committee (ISC) in November 2009, in response to mounting calls for institutional investors to hold companies to account. However, the origins of the U.K. Stewardship Code can be traced back even further to *The Responsibilities of Institutional Shareholders and Agents: Statement of Principles*, published by the ISC in 2002, and based upon the ISC's 1991 statement, *The Responsibilities of Institutional Shareholders in the UK*.

94. WALKER REVIEW, *supra* note 56, Recommendation 17.

Group (ISG), a coalition of some of the largest U.S.-based and international asset owners and managers,[95] released its *Framework for US Stewardship and Governance*.[96] The stewardship framework for institutional investors[97] and the corporate governance framework for listed U.S. companies[98] each include a set of six principles. The first tenet of the corporate governance principles is that "[b]oards are accountable to shareholders,"[99] and the first tenet of the stewardship principles is that "[i]nstitutional investors are accountable to those whose money they invest."[100] The corporate governance principles, in particular, send a strong message about the expectations of institutional investors in U.S.-listed companies today. These expectations, which include adoption of a "one share-one vote" structure, are as follows:[101] responsiveness to institutional investor concerns,[102] strong independent board leadership,[103] and management incentive structures that promote the company's long-term strategy.[104]

Although the ISG framework is voluntary, it has the backing of some of the world's largest asset managers, including founding members, such

95. The ISG comprises sixteen founding international institutional investors, which togther invest more than US$ 17 trillion in U.S. equity markets. *See* Inv. Stewardship Grp., *Corporate Governance and Stewardship Principles*, HARV. L. SCH. F. ON CORP. GOV. & FIN. REG. (Feb. 7, 2017), https://corpgov.law.harvard.edu/2017/02/07/corporate-governance-and-stewardship-principles/#more-78477 [https://perma.cc/4UBF-WSVR].

96. *See* Abe M. Friedman, *Investor Coalition Publishes US Stewardship Code*, HARV. L. SCH. F. ON CORP. GOV. & FIN. REG. (Feb. 9, 2017), https://corpgov.law.harvard.edu/2017/02/09/investor-coalition-publishes-u-s-stewardship-code/ [https://perma.cc/4ZNT-H9E4]; *see also* Amanda White, *Top US Funds Embrace Stewardship Code*, TOP 1000 FUNDS.COM (Feb. 17, 2017), https://www.top1000funds.com/analysis/2017/02/17/top-us-funds-embrace-stewardship-code/ [https://perma.cc/4HME-Y34Q] (describing the adoption of the frameworks on stewardship and corporate governance in the United States as "long overdue").

97. *See* INV. STEWARDSHIP GRP., THE PRINCIPLES: STEWARDSHIP FRAMEWORK FOR INSITUTIONAL INVESTORS (Jan. 2017) [hereinafter ISG STEWARDSHIP PRINCIPLES], https://www.isgframework.org/stewardship-principles/ [https://perma.cc/X8SA-3K6F].

98. *See* INV. STEWARDSHIP GRP., CORPORATE GOVERNANCE PRINCIPLES FOR US LISTED COMPANIES: CORPORATE GOVERNANCE FRAMEWORK FOR US LISTED COMPANIES (Jan. 31, 2017) [hereinafter ISG CORPORATE GOVERNANCE PRINCIPLES], https://www.isgframework.org/corporate-governance-principles/ [https://perma.cc/F8EY-TFZC].

99. *Id.* Principle 1.

100. *Id.* Principle A.

101. *See id.* Principle 2; *cf.* Eleanor Bloxham, *Snap Shouldn't Have Been Allowed to Go to the Public Without Voting Rights*, FORTUNE (Mar. 4, 2017), http://fortune.com/2017/03/03/snap-ipo-non-voting-stock/ [https://perma.cc/2LZN-6R5S] (Snap Inc.'s recent IPO, which included non-voting shares, was offered to the public).

102. *See* ISG CORPORATE GOVERNANCE PRINCIPLES, *supra* note 98, Principle 3.

103. *See id.* Principle 4.

104. *See id.* Principle 6.

as BlackRock, State Street Global Advisors, and Vanguard.[105] BlackRock, in particular, is taking an increasingly active stewardship role on the international stage. In January 2017, BlackRock, which is estimated to be one of the top three shareholders in every company listed on the FTSE index, wrote to the chairmen of over 300 U.K. companies to announce that it would vote against executive pay increases unless they were linked to strong and sustainable long-term corporate performance.[106] According to BlackRock, executives should not be rewarded for short-term rises in share price,[107] and should only be granted increases in pay that are commensurate with increases received by rank-and-file employees.[108] BlackRock's head of corporate governance stated that failure by U.K. companies to comply with these demands would "call into question the quality of the board."[109] Several U.K. companies have responded by reducing CEO pay.[110] A corporate governance report of the U.K. House of Commons in early 2017 described these developments as "encouraging."[111]

A common theme in contemporary international stewardship codes, regardless of their issuing body, is the need for long-term investment horizons. As Australia's Financial Services Council recently stated when issuing its new *Governance and Asset Stewardship Standard*, "[g]ood

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105. The other thirteen founding members of the ISG are CalSTRS; Florida State Board of Administration; GIC Private Limited (Singapore's Sovereign Wealth Fund); Legal and General Investment Management; MFS Investment Management; MN Netherlands; PGGM, Royal Bank of Canada Global Asset Management; TIAA Investments; T. Rowe Price Associates, Inc.; ValueAct Capital; Washington State Investment Board; and Wellington Management. *Leading Investors Launch Historic Initiative Focused on U.S. Institutional Investor Stewardship and Corporate Governance*, BUS. WIRE (Jan. 31, 2017), http://www.businesswire.com/news/home/20170131005949/en/Leading-Investors-Launch-Historic-Initiative-Focused-U.S [https://perma.cc/X58E-P2HP]; *see* White, *supra* note 96. Interestingly, the ISG *Framework for US Stewardship and Governance* has the backing not only of institutional investors but also some activist hedge funds, such as ValueAct Capital and Trian Partners.

106. *See* Aimee Donellan & Simon Duke, *BlackRock Lays Down the Law to Chairmen*, SUNDAY TIMES (Jan. 15, 2017), https://www.thetimes.co.uk/article/blackrock-lays-down-the-law-to-chairmen-78cssq2lj.

107. *Id.*

108. *See* Angela Monaghan, *World's Largest Fund Manager Demands Cuts to Executive Pay and Bonuses*, GUARDIAN (Jan. 16, 2017), https://www.theguardian.com/business/2017/jan/15/blackrock-demands-cuts-to-executive-pay-and-bonuses [https://perma.cc/T8S2-6FKW].

109. Donellan & Duke, *supra* note 106.

110. Interestingly, the pressure to reduce executive pay has coincided with an increase in female CEOs. For example, it has been reported that Emma Walmsley, who became CEO of pharmaceutical giant GlaxoSmithKline in April 2017, will receive a significantly reduced pay package compared to her predecessor, Sir Andrew Witty. *See* Sarah Neville, *New GSK Boss to be Paid Less Than Predecessor*, FIN. TIMES (Mar. 15, 2017), https://www.ft.com/content/dca9329c-08cd-11e7-97d1-5e720a26771b.

111. BUS., ENERGY & INDUSTRIAL STRATEGY COMM., *supra* note 12, at 24.

stewardship supports companies with productive use of capital to generate long-term sustainable returns with the potential for societal gains."[112]

III. THE U.K. AND JAPANESE STEWARDSHIP CODES: SIMILARITIES, DIFFERENCES, AND REGULATORY IMPLICATIONS

Many of the stewardship codes that now operate around the world are based on the 2012 U.K. Stewardship Code,[113] the 2014 Japanese Stewardship Code, or both.[114] Although these two codes share many common features, there are also intriguing differences in their approach to shareholder stewardship.

The U.K. Stewardship Code consists of seven principles[115] and operates on a "comply or explain" basis.[116] The Code applies primarily to institutional investors and includes both asset owners and asset managers with equity holdings in U.K. listed companies,[117] but it also extends to service providers such as proxy advisers and investment consultants.[118] The adoption of the Stewardship Code represented a shift away from the

112. *See* Fin. Servs. Council, *supra* note 13.

113. *See* U.K. STEWARDSHIP 2012, *supra* note 57.

114. JAPAN STEWARDSHIP, *supra* note 66; *see* OECD 2015, *supra* note 5, at 29; EY, *supra* note 61, at 2 ; Sullivan, *supra* note 5.

115. U.K. STEWARDSHIP 2012, *supra* note 57, at 6–10. Under these principles, institutional investors should

> (1) publicly disclose their policy on how they will discharge their stewardship responsibilities; (2) have a robust policy on managing conflicts of interest in relation to stewardship which should be publicly disclosed; (3) monitor their investee companies; (4) establish clear guidelines on when and how they will escalate their stewardship activities; (5) be willing to act collectively with other investors where appropriate; (6) have a clear policy on voting and disclosure of voting activity; (7) report periodically on their stewardship and voting activities.

Id. at 5.

116. The "comply or explain" regulatory model derives from the report by the 1992 *Committee on the Financial Aspects of Corporate Governance*, chaired by Sir Adrian Cadbury, in the United Kingdom. *See* FIN. REPORTING COUNCIL, DEVELOPMENTS IN CORPORATE GOVERNANCE AND STEWARDSHIP 2016, 4 (Jan. 2017), https://www.frc.org.uk/getattachment/ca1d9909-7e32-4894-b2a7-b971b4406130/Developments-in-Corporate-Governance-and-Stewardship-2016.pdf [https://perma.cc/Z7EK-6YRH]. In the context of the U.K. Stewardship Code, the "comply or explain" model requires that signatories to the code who choose not to comply with one or more of its principles should provide "meaningful explanations" for this non-conformity. *See* U.K. STEWARDSHIP 2012, *supra* note 57, at 4.

117. The U.K. Stewardship Code describes "asset owners" as including "pension funds, insurance companies, investment trusts and other collective investment vehicles", and states that, as providers of capital, these institutions "set the tone" for stewardship. "Asset managers" are those institutions with day-to-day investment management responsibility, and are, according to the Financial Reporting Council, "well positioned to influence companies' long-term performance." U.K. STEWARDSHIP 2012, *supra* note 57, at 1.

118. *Id.* at 2.

hands-off approach to corporate governance traditionally taken by U.K. institutional investors.[119] The Code is aspirational in nature.[120] It states that institutional investors, as providers of capital, "set the tone" for stewardship.[121] One of the Code's underlying premises is that institutional shareholders have a non-delegable responsibility to engage with the companies in which they invest.[122] This effectively parallels the views of U.S. Justice Brandeis, who wrote, over a century ago, that it is the shareholder's "business and his obligation to see that those who represent him carry out a policy which is consistent with the public welfare".[123]

The U.K. Stewardship Code encourages institutional investors to exercise their stewardship responsibilities in a variety of hands-on ways—through voting, monitoring, and engaging in "purposeful dialogue" with companies about matters including strategy, performance, risk and corporate governance (including culture and executive pay).[124] Some international codes, such as South Africa's *Code for Responsible Investing* (CRISA)[125] and the International Corporate Governance Network's *Global Stewardship Principles*,[126] go further than the U.K. Code on which

119. Brian R. Cheffins, *The Stewardship Code's Achilles Heel*, 73 MOD. L. REV. 1004, 1004–05 (2010).

120. Some scholars, however, have argued that, as a concomitant of their growing power, activist investors should be subject to strict legal rules analogous to those that apply to directors and company officers. *See* Iman Anabtawi & Lynn A. Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255 (2008). However, aspirational standards also play an important role in relation to directors' conduct under Delaware law. *See, e.g.*,); In re The Walt Disney Co. Derivative Litigation, 907 A.2d 693,752 (Del. Ch. 2005); Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519, 537–38 (2012).

121. U.K. STEWARDSHIP 2012, *supra* note 57, at 1.

122. *See* U.K. STEWARDSHIP 2012, *supra* note 57, at 2; Kate Burgess, *Myners Lashes Out at Landlord Shareholders*, FIN. TIMES (Apr. 22, 2009), https://www.ft.com/content/c0217c20-2eaf-11de-b7d3-00144feabdc0; Jennifer Hughes, *FSA Chief Lambasts Uncritical Investors*, FIN. TIMES (Mar. 11, 2009), https://www.ft.com/content/9edc7548-0e8d-11de-b099-0000779fd2ac.

123. Louis D. Brandeis, *The Curse of Bigness*, *in* MISCELLANEOUS PAPERS OF LOUIS D BRANDEIS, 75 (Osmond K. Fraenkel ed., 1935).

124. U.K. STEWARDSHIP 2012, *supra* note 57, at 1, 6.

125. ESG factors are front and center of CRISA, which is based on the U.K. Stewardship Code. Principle 1 of CRISA states that "[a]n institutional investor should incorporate sustainability considerations, including ESG, into its investment analysis and investment activities as part of the delivery of superior risk-adjusted returns to the ultimate beneficiaries". *See* INST. OF DIR. S. AFR., *supra* note 79, Principle 1. The focus on ESG under this Code also reflects the United Nations's *Principles for Responsible Investment*. *See id.* at 4.

126. *See* INT'L CORP. GOVERNANCE NETWORK, ICGN GLOBAL STEWARDSHIP PRINCIPLES, Principle 6 (2016), https://www.icgn.org/sites/default/files/ICGNGlobalStewardshipPrinciples.pdf [https://perma.cc/HZR9-P77J] ("Promoting long-term value creation and integration of environmental, social and governance (ESG) factors.").

they are modelled[127] by emphasizing the role of institutional investors in promoting environmental, social and governance (ESG) policies.

Despite the U.K. Stewardship Code's strong claims about its beneficial qualities,[128] not all commentators are equally sanguine. Some scholars have raised doubts about the Code's philosophical foundations,[129] while others have suggested the Code's effectiveness may be compromised by its voluntary "comply or explain" nature.[130] Another possible obstacle to its success is the relatively low level of equity held by domestic institutional investors in U.K.-listed companies today.[131]

Notwithstanding these concerns, the proclaimed economic benefits of the U.K. Stewardship Code were sufficiently tempting to prompt its transplantation in Japan in 2014, as part of a broad suite of monetary and fiscal policy reforms adopted by the Abe government.[132] The goal of these reforms, colloquially known as "Abenomics," was to improve corporate productivity and "earning power,"[133] thereby benefiting the entire

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127. *See* Catherine Howarth, *Institutional Investors are the Ghosts at the AGM Feast*, FIN. TIMES (May 15, 2017), https://www.ft.com/content/c9c3a6dc-30e4-11e7-9555-23ef563ecf9a (criticizing the absence of any reference to oversight of social and environmental risks under the U.K. Stewardship Code). Note, however, that the U.K. Financial Reporting Council has stated that, as part of its recent tiering exercise, many signatories to the U.K. Stewardship Code chose to include more information about ESG matters in their statements, even though the U.K. Code does not explicitly refer to ESG. *See* FIN. REPORTING COUNCIL, *supra* note 116, at 25, 27.

128. U.K. STEWARDSHIP 2012, *supra* note 57, at 1.

129. Professor Alan Dignam has argued, for example, that the stewardship movement is a dangerous and misguided development because it mischaracterizes shareholders as passive and blameless in the global financial crisis. *See* Dignam 2013, *supra* note 44; *see also* Bruner 2011, *supra* note 44, at 310.

130. Cheffins, *supra* note 119, at 1013–14; Eva Micheler, *Facilitating Investor Engagement and Stewardship,* 14 EUR. BUS. ORG. L. REV. 29, 45 (2013); *see also* Howarth, *supra* note 127 (complaining that large investors, which still predominantly vote with management, "face no meaningful sanction" if they fail to act as responsible stewards under the Code).

131. Cheffins, *supra* note 119, at 115; Davies, *supra* note 12, at 356. Nonetheless, the Financial Reporting Council has indicated that it considers the quality and quantity of stewardship to have improved markedly since the Stewardship Code was introduced in 2010. *See* FIN. REPORTING COUNCIL, *supra* note 116, at 24. In 2016, the Financial Reporting Council placed more pressure on signatories in relation to their stewardship responsibilities by undertaking a "tiering exercise." This exercise publicly ranked U.K. Stewardship Code signatories into three tiers, serving as a means of encouraging signatories to reaffirm their commitment to stewardship and provide high quality explanations of their stewardship engagement. *See generally id.* at 24. According to the Financial Reporting Council, the number of signatories in the highest ranking, Tier 1, has increased significantly as a result of the exercise. *Id.* at 26.

132. *See* JAPAN STEWARDSHIP, *supra* note 66.

133. *See* Nicholas Benes, *Corporate Governance Reform in Japan*, ETHICAL BOARDROOM (Apr. 15, 2015), https://ethicalboardroom.com/corporate-governance-reform-in-japan/ [https://perma.cc/W52X-AT9Q].

Japanese economy.[134] Japan's Stewardship Code fell within Abenomics' "third arrow,"[135] which included a number of other significant corporate governance reforms.[136] The ultimate policy goal of the "third arrow" reforms was not solely to benefit shareholders, but to distribute the rewards of improved profitability to corporate stakeholders generally, via expanded employment opportunities, increased wages, and higher dividend payments.[137]

Contrary to popular Western belief, shareholders in Japan possess relatively strong legal rights.[138] They include statutory rights to alter the corporate constitution without board consent; to elect directors by majority vote in both contested and uncontested board elections; and to nominate directors on the company's ballot.[139] Although Japan is a civil law

134. *See* PRIME MINISTER OF JAPAN AND HIS CABINET, JAPAN REVITALIZATION STRATEGY 2 (June 2014), https://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/honbunEN.pdf [https://perma.cc/6TYS-WD27]; Societé Generale, *A New Dawn Rising for Japan's Stocks?*, BARRONS (June 4, 2015), http://www.barrons.com/articles/a-new-dawn-rising-for-japanese-stocks-1433386067.

135. Namely the *Japan Revitalization Strategy*. The other two arrows for economic revitalization were (i) aggressive monetary policy; and (ii) flexible fiscal policy, including public works spending. *See Reform in Japan: The Third Arrow*, ECONOMIST (June 26, 2014), https://www.economist.com/news/leaders/21605905-shinzo-abe-has-best-chance-decades-changing-japan-better-he-seems-poised [https://perma.cc/PGA8-A96F]; *see also* G20 AUSTL., COMPREHENSIVE GROWTH STRATEGY: JAPAN 2014, at 2–6 (2014), http://g20.org.tr/wp-content/uploads/2014/12/g20_comprehensive_growth_strategy_japan.pdf [https://perma.cc/2C74-BK2W].

136. These reforms included the introduction of a Corporate Governance Code. *See* JPX TOKYO STOCK EXCHANGE, JAPAN'S CORPORATE GOVERNANCE CODE, SEEKING SUSTAINABLE CORPORATE GROWTH AND INCREASED CORPORATE VALUE OVER THE MID-TO LONG-TERM (June 1, 2015), http://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jdy-att/20150513.pdf [https://perma.cc/2WRZ-NQX2]. The reforms also sought to increase the number of outside directors. *See* Kazuaki Nagata, *New Rules are Pushing Japanese Corporations to Tap More Outside Directors*, JAPAN TIMES (Apr. 27, 2015), https://www.japantimes.co.jp/news/2015/04/27/reference/new-rules-pushing-japanese-corporations-tap-outside-directors/ [https://perma.cc/WBJ2-D9AN]. The reforms also introduced a new stock index, the JPX-Nikkei 400, with entry requirements of superior profits and governance practices. *See JPX-NIKKEI 400*, JAPAN EXCH. GRP. (July 29, 2016), http://www.jpx.co.jp/english/derivatives/products/domestic/jpx-nikkei400options/index.html [https://perma.cc/VJR3-EE4G]; *Corporate Governance in Japan: A Revolution in the Making*, ECONOMIST (May 3, 2014), https://www.economist.com/news/business/21601557-long-last-japanese-firms-seem-be-coming-under-proper-outside-scrutiny-revolution [https://perma.cc/K78D-G9TN]Benes, *supra* note 133; PRIME MINISTER OF JAPAN AND HIS CABINET, *supra* note 134, at 107.

137. PRIME MINISTER OF JAPAN AND HIS CABINET, *supra* note 134, at 35.

138. *See* Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. BUS. & ENTREPRENEURIAL L. REV. 125 (2014); *see also* Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 DEL. J. CORP. L. 189 (2000). This was not always the case. According to Franks et al., in the first half of the 20th century, Japan had weak legal protection, accompanied by dispersed ownership. However, in the second half of the century, after World War II, Japan was characterized by strong legal rights and consolidated, interlocking share ownership. *See* Julian Franks et al., *The Ownership of Japanese Corporations in the 20th Century*, 27 REV. FIN. STUD. 2580.

139. *See generally* Goto, *supra* note 138.

jurisdiction, these shareholder rights closely parallel those in some common law jurisdictions, such as the United Kingdom, Canada, and Australia.[140] Also, staggered boards are ineffective in these jurisdictions because shareholders have an absolute right to remove public company directors from office at any time.[141] Many of the statutorily protected shareholder rights in these jurisdictions are, however, absent, or available by private ordering (such as in the United States under Delaware law.[142]

In spite of the existence of strong shareholder rights in Japan, investor activism there has historically been rare, fraught with difficulty,[143] and viewed with suspicion.[144] The most significant constraint on institutional investor activism was the existence of cross-shareholding (*kabushiki mochiai*),[145] which insulated management from outside shareholder influence. Some scholars have viewed cross-shareholding as the functional equivalent of U.S.-style poison pills.[146]

Japan's "third arrow" reforms were considered to be revolutionary in terms of their potential effect on corporate governance and shareholder activism.[147] The Stewardship Code, in particular, deliberately created a

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140. See generally Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp's Migration to Delaware*, 63 VAND. L. REV. 1 (2010) for a discussion of Anglo–Australian shareholder rights compared to shareholder rights under Delaware law. For a comparative description of shareholder rights under Canadian law and Delaware law, see MacDougall et al., *supra* note 89, at 86–88.

141. The statutory right to remove directors from office by ordinary resolution cannot be altered in the constitution or by agreement. *See* Companies Act, 2006 c. 46 § 168(1) (U.K.); Canada Business Corporations Act, R.S.C. 1985 c. C-44, § 109(1) (Can.); Ontario Business Corporations Act, R.S.O. 1990 c. B. 16, § 122(1) (Ontario); Corporations Act 2001 § 203D (Austl.). A controversial provision of the UK Corporate Governance Code, Principle B.7.1, further provides that all directors of FTSE 300 companies should be subject to annual election by shareholders. *See* FIN. REP. COUNCIL, THE UK CORPORATE GOVERNANCE CODE Principle B.7.1 (Sept. 2014), https://www.frc.org.uk/getattachment/59a5171d-4163-4fb2-9e9d-daefcd7153b5/UK-Corporate-Governance-Code-2014.pdf [https://perma.cc/2D4W-BY5T].

142. See Goto, *supra* note 138, at 128–39, for a detailed comparative analysis of shareholder rights in Japan and Delaware.

143. *See, e.g.*, T. Boone Pickens, *The Heck With Japanese Business – Texas Entrepreneur Not Interested in Competing with a Cartel System*, SEATTLE TIMES (June 9, 1991), http://community.seattletimes.nwsource.com/archive/?date=19910609&slug=1287976.

144. Ben McLannahan, *Japan Investors Face UK-Style Financial Code*, FIN. TIMES (Dec. 26, 2013), https://www.ft.com/content/b104a886-6e36-11e3-8dff-00144feabdc0.

145. *See* Goto, *supra* note 138, at 126, 128.

146. Takaaki Eguchi & Zenichi Shishido, *The Future of Japanese Corporate Governance: Japan's Internal Governance and Development of Japanese-Style External Governance Through Engagement*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 552, 559–60 (Jennifer G. Hill & Randall S. Thomas eds., 2015); CURTIS MILHAUPT & KATHARINA PISTOR, LAW & CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 102 (2008); David Skeel, *Governance in the Ruins*, 122 HARV. L. REV. 696, 707 (2008).

147. Benes, *supra* note 133; *Corporate Governance in Japan*, *supra* note 136.

"warmer climate" for foreign investors and shareholder activists,[148] in accordance with the view that activism can be beneficial to underperforming companies.[149] Since the introduction of the Code, there has been a rise in the number of shareholder-initiated proposals,[150] and foreign investors have had an increasing influence on voting results.[151] Activism to date has typically been harnessed to end "corporate cash-hoarding," which was prevalent in many Japanese companies.[152]

The jury is still out on whether the Japanese Stewardship Code will ultimately achieve its policy objectives. Sign-on to the Japanese Stewardship Code has been uneven among market participants. Although more than 150 asset managers have signed on to the Code,[153] corporate pension funds have all but ignored it. Some commentators claim that the absence of major Japanese companies, such as Toyota, Panasonic and Sony, from the list of signatories threatens the viability of the Code.[154]

148. Ben McLannahan, *Japanese Reformists Face Challenge Over Shake-Up of Corporate Governance Laws*, FIN. TIMES (May 25, 2014), https://www.ft.com/content/e1e9babc-dff7-11e3-b709-00144feabdc0; *see* SADAKAZU OSAKI, NOMURA RES. INST., KEYS TO SUCCESS OF JAPANESE STEWARDSHIP CODE 5 (July 4, 2014), https://www.nri.com/~/media/PDF/global/opinion/lakyara/2014/lkr2014199.pdf [https://perma.cc/U5PL-R99F].

149. This view has been expressed in relation to some recent activist shareholder campaigns in Australia. *See, e.g.*, Tony Boyd, *Ardent Board Under Pressure as Shareholders Revolt*, AUSTL. FIN. REV.: CHANTICLEER (July 7, 2017, 6:26 PM), http://www.afr.com/brand/chanticleer/ardent-board-under-pressure-as-shareholders-revolt-20170706-gx6fkp [https://perma.cc/V7HW-4DS9]. Boyd described the campaign against Ardent Leisure as "a textbook example of shareholder activism at its best." *Id.*; *see also* Glenda Korporaal, *Gary Weiss's Ariadne Attacks Ardent Leisure Board*, AUSTL. BUS. REV. (July 7, 2017), http://www.theaustralian.com.au/business/companies/gary-weisss-ariadne-attacks-ardent-leisure-board/news-story/d3e9526d86c8da8dd62a67de2c1c57e2; Tony Boyd, *BHP on Track to Shed Its Chronic Underperformance*, AUSTL. FIN. REV.: CHANTICLEER (Aug. 22, 2017), http://www.afr.com/brand/chanticleer/bhp-on-track-to-shed-its-chronic-underperformance-20170822-gy1rno.

150. *See* Ben McLannahan, *Shareholder Activism Extends Reach Across Japanese Boardrooms*, FIN. TIMES (June 23, 2014).

151. *See* Kenta Kurihara, *Japan's Shareholder Meetings: New Governance Code Ups Pressure on Management*, NIKKEI ASIAN REV. (June 9, 2015), https://asia.nikkei.com/Business/Trends/New-governance-code-ups-pressure-on-management [https://perma.cc/78Q3-KDC5].

152. Megumi Fujikawa & Eric Pfanner, *In Japan, Dividends, Buybacks Take the Stage: Shareholders Grow More Active: Companies Respond*, WALL ST. J. (June 25, 2014), https://www.wsj.com/articles/in-japan-dividends-buybacks-take-the-stage-1403711174.

153. *See* COUNCIL OF EXPERTS ON THE STEWARDSHIP CODE, PRINCIPLES FOR RESPONSIBLE INSTITUTIONAL INVESTORS, JAPAN'S STEWARDSHIP CODE 1 (May 29, 2017), http://www.fsa.go.jp/en/refer/councils/stewardship/20170529/02.pdf [https://perma.cc/3NBA-SJGY] (revised Stewardship Code with tracked changes from the 2014 version).

154. *See* Leo Lewis, *Secom Breaks Ranks to Highlight Reform Failures of Japan Inc.*, FIN. TIMES (May 24, 2017), https://www.ft.com/content/3ad40558-3fac-11e7-9d56-25f963e998b2; Leo Lewis, *Companies Fail to Buy into Japan's Stewardship Code*, FIN. TIMES (Oct. 23, 2016), https://www.ft.com/content/138e73b4-98d3-11e6-8f9b-70e3cabccfae; *see also* Leo Lewis, *Japan's Missing Shareholder Activism*, FIN. TIMES (Apr. 10, 2017), https://www.ft.com/content/67599fde-1dce-11e7-b7d3-163f5a7f229c (describing Japan's corporate governance reforms as looking "wobbly

Recent amendments to the Code are aimed at addressing these and other concerns about the Code's effectiveness.[155] For example, some of these new provisions place increased pressure on asset owners themselves to undertake stewardship, rather than merely relying on asset managers.[156]

The 2012 U.K. Stewardship Code and its Japanese counterpart share many common features in terms of regulatory structure, design, and content. Both Codes are voluntary and regulator-initiated, and both adopt a principles-based "comply or explain" approach, which, although a familiar feature of U.K. corporate governance, was entirely new to Japan.[157] The Codes apply to all listed companies in each jurisdiction, and include not only asset owners and asset managers[158] but also proxy advisers.[159] Finally, although recognizing that investors play an important accountability role, both Codes stress that this does not entitle them to manage the company's affairs.[160]

In spite of these broad similarities, there are also some fundamental differences between the 2012 U.K. Stewardship Code and the 2014 Japanese Stewardship Code. For a start, they constituted regulatory

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of late"); *cf.* Leo Lewis, *Underperforming Companies Face Intense AGM Season*, FIN. TIMES (June 25, 2017), https://www.ft.com/content/0d3bd186-5972-11e7-9bc8-8055f264aa8b; Leo Lewis, *Japanese Investors' Pitchfork Moment*, FIN. TIMES (June 19, 2017), https://www.ft.com/content/88fd8a46-54d4-11e7-9fed-c19e2700005f (suggesting that underperforming Japanese companies are increasing vulnerable to institutional investors, who are themselves subject to growing pressure to hold corporate management to account).

155. *See generally* COUNSEL OF EXPERTS ON THE STEWARDSHIP CODE, *supra* note 153.

156. *See id.* Principles 1-3, 1-5. Other notable changes are the introduction of greater specificity into some principles (see, for example, Principle 2 dealing with management of conflicts of interest by institutional investors) and a new recommendation for institutional investors to disclose how they voted on all proposals of their investee companies. *Id.* at Principles 5-3. It appears that the new provision relating to disclosure of voting records is already having an impact. A recent survey of ninety-six companies from the Nikkei Stock Average found that 67% of them saw a decline in "yes" votes for proposals to appoint new senior managers. *See Japan's Corporate Governance Gets Some Long Over-due Scrutiny*, NIKKEI ASIAN REV. (July 6, 2017), https://asia.nikkei.com/magazine/20170706/On-the-Cover/Japan-s-corporate-governance-gets-some-long-overdue-scrutiny [https://perma.cc/4XCJ-QZJ3].

157. *See* JAPAN STEWARDSHIP, *supra* note 66, at 4, 13; OSAKI, *supra* note 148, at 2–3.

158. The U.K. Stewardship Code applies equally to asset owners and asset managers. *See* U.K. STEWARDSHIP 2012, *supra* note 57, at 2. However, see Howarth, *supra* note 127, for criticism of this aspect of the U.K. Code in the light of the different roles and responsibilities of asset owners and asset managers. Although Japan's Stewardship Code also applies to both asset owners and asset managers, it outlines different expectations for each group. *See* JAPAN STEWARDSHIP, *supra* note 66; COUNSEL OF EXPERTS ON THE STEWARDSHIP CODE, *supra* note 153.

159. *See* U.K. STEWARDSHIP 2012, *supra* note 57, at 2; JAPAN STEWARDSHIP, *supra* note 66, at 3. The 2017 revisions to the Japanese Stewardship Code contain a new provision aimed specifically at proxy advisors, which requires them, *inter alia*, to "dedicate sufficient management resources to ensure sound judgement in the evaluation of companies." *See* COUNSEL OF EXPERTS ON THE STEWARDSHIP CODE, *supra* note 153, at Principle 5-5.

160. U.K. STEWARDSHIP 2012, *supra* note 57, at 1; JAPAN STEWARDSHIP, *supra* note 66, at 2.

responses to quite different policy problems. A central policy factor underpinning the U.K. Stewardship Code was the need for effective risk control in the post-crisis era.[161] The Japanese version, however, was far more focused on arresting declining profitability, unlocking value, and increasing investor returns.[162] Reflecting these goals, the mantras of "sustainable growth" and "medium to long-term corporate value" recur throughout the Japanese Code.[163] Another difference relates to ESG issues. Unlike the U.K. Code, the Japanese specifically refers to ESG as a relevant factor for investors monitoring the companies in which they invest.[164]

The most significant differences between the two Codes, however, relate to the issue of investor activism. First, the Codes take divergent approaches to activism intensity. The kind of shareholder engagement envisaged by the 2014 Japanese Stewardship Code is relatively gentle. For example, the Code urges institutional investors to engage in "constructive dialogue"[165] with management, rather than intervention.[166] In spite of this consensus-style language in the Japanese Code, however, the clear message of the Code is that there must be more active communication

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161. WALKER REVIEW, *supra* note 56, at 6, 12, 24–25.

162. *See* Chie Aoyagi & Giovanni Ganelli, *Unstash the Cash! Corporate Governance in Japan* (IMF Asia Pacific Department, Working Paper 14/140, 2014), https://www.imf.org/external/pubs/ft/wp/2014/wp14140.pdf [https://perma.cc/MX56-S3SW]; Benes, *supra* note 133; Fujikawa & Pfanner, *supra* note 152. There were also concerns about the passivity of institutional investors in relation to the 2011–2012 Olympus accounting scandal. *See* Bruce E. Aronson, *The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground Between the Board Monitoring Model and Management Model?*, 30 PAC. BASIN L. REV. 93, 106–14 (2012); *Corporate Governance in Japan*, *supra* note 136.

163. *See generally* JAPAN STEWARDSHIP, *supra* note 66. For example, "stewardship responsibilities" are defined in the code to refer to "the responsibilities of institutional investors to enhance the medium- to long-term investment return for their clients and beneficiaries." *Id.* at 1. The code also includes Principle 7 (which has no complement in the U.K. code), stating that

> [t]o contribute positively to the sustainable growth of investee companies, institutional investors should have in-depth knowledge of the investee companies and their business environment and skills and resources needed to appropropriately engage with the companies and make proper judgments in fulfilling their stewardship activities.

Id. at 6, 13; *see also* COUNSEL OF EXPERTS ON THE STEWARDSHIP CODE, *supra* note 153, Principle 4-2.

164. *See* JAPAN STEWARDSHIP, *supra* note 66, at 9. Whereas Japan's 2014 Stewardship Code refers to "risks arising from social and environmental matters", this wording has been changed in the 2017 revisions to "risks *and opportunities* arising from social and environmental matters" [emphasis added]. *See* COUNCIL OF EXPERTS ON JAPAN'S STEWARDSHIP CODE, *supra* note 153, at 12.

165. The reference to "constructive dialogue" is replicated throughout Japan's Corporate Governance Code. *See* JPX TOKYO STOCK EXCHANGE, *supra* note 136.

166. JAPAN STEWARDSHIP, *supra* note 66, at 10. The Japanese Stewardship Code did, however, contemplate that institutional investors might wish to exchange views with other shareholders. *Id.* at 13.

between the board and shareholders,[167] and an end to the "quiet-life equilibrium"[168] of many Japanese companies.[169]

The U.K. Stewardship Code, on the other hand, is far less ambiguous in its approach to activism intensity. It provides a clear framework for the escalation of activist conduct, if the board of directors is unresponsive to shareholder concerns. The U.K. Code states that institutional investors should establish guidelines as to "when and how" they will intensify pressure on management. Principle 4 of the Code lists various escalating actions that institutional investors might use. These include expressing their concerns at additional meetings with management or through the company's advisers; making public statements prior to shareholder meetings; and requisitioning shareholder meetings to remove directors from office.[170] Shareholders have statutorily entrenched rights under U.K. corporate law to convene meetings,[171] as well as an absolute right to remove directors from office at any time.[172]

In the U.S. context, the tone used in the new ISG stewardship principles[173] falls somewhere between the Japanese and U.K. approaches. At first sight, the ISG stewardship principles appear to be close to the Japanese model, adopting consensus-style language, which urges institutional investors to attempt to resolve differences with management in a "constructive and pragmatic manner."[174] Yet, the stewardship principles also foreshadow stronger action by investors, *à la* the U.K. model, if management is unresponsive to their concerns.[175] The ISG stewardship principles, particularly in combination with the complementary ISG corporate governance principles,[176] clearly indicate that constructive and pragmatic engagement will have its limits.

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167. Eguchi & Shishido, *supra* note 146, at 564.

168. *Id. See generally* Marianne Bertrand & Sendhil Mullainathan, *Enjoying the Quiet Life? Corporate Governance and Managerial Preferences*, 111 J. POL. ECON. 1043, 1047 (2003).

169. Eguchi & Shishido, *supra* note 146, at 559, 564. *See* Attracta Mooney, *Japanese Asset Managers Will Reveal AGM Votes*, FIN. TIMES (June 4, 2017), https://www.ft.com/content/478ad316-4782-11e7-8d27-59b4dd6296b8.

170. U.K. STEWARDSHIP 2012, *supra* note 57, at 8.

171. *See* Companies Act, 2006 c. 46, §§ 303–305 (U.K.).

172. *See id.* § 168(1) (U.K.).

173. ISG STEWARDSHIP PRINCIPLES, *supra* note 97.

174. *Id.* Principle E ("Institutional investors should address and attempt to resolve differences with companies in a constructive and pragmatic manner."). Principle E.2 ("Institutional investors should engage with companies in a manner that is intended to build a foundation of trust and common understanding.").

175. *See id.* Principle E.4 ("Institutional investors should disclose, in general, what further actions they may take in the event they are dissatisfied with the outcome of their engagement efforts.").

176. ISG CORPORATE GOVERNANCE PRINCIPLES, *supra* note 98.

A second major difference between the Codes relates to collective activism. Consistent with its consensus-style approach to shareholder engagement, the 2014 Japanese Stewardship Code contains no principle endorsing collective activism, although the Code's 2017 revisions now contemplate at least some form of collaborative engagement between institutional investors.[177] In contrast, several principles in the U.K. Stewardship Code refer to, and implicitly support, collective activism by institutional investors. For example, one of the enumerated ways in which investors can increase pressure on management under Principle 4 is by "intervening jointly with other institutions on particular issues."[178] Principle 5 states further that "[i]nstitutional investors should be willing to act collectively with other investors where appropriate."[179] In fact, institutional investors in the United Kingdom have a long history of engaging in coordinated action, not only to influence management of investee companies directly, but also to influence the setting of legal rules that determine the balance of power between shareholders and management.[180] The Financial Reporting Council has also encouraged greater collaboration between international and U.K.-based institutional investors, possibly as an antidote to the low level of equity held by domestic institutional investors.[181] This suggests a form of "transnational agency capitalism," where global institutional investors may be willing to follow the lead, and join forces with, more aggressive local investors.[182]

In the United States, the ISG's new stewardship principles are more tentative and ambiguous than the U.K. Stewardship Code. Although the new ISG stewardship principles refer to collaboration between

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177. *See* COUNSEL OF EXPERTS ON THE STEWARDSHIP CODE, *supra* note 153, at 13. A newly-introduced Principle 4-4 states that "[i]n addition to institutional investors engaging with investee companies independently, it would be beneficial for them to engage with investee companies in collaboration with other institutional investors (collective engagement) as necessary." *Id.*

178. U.K. STEWARDSHIP 2012, *supra* note 57, at 8.

179. *Id.*

180. *See* Davies, *supra* note 12, at 355.

181. *See, e.g.*, FIN. REPORTING COUNCIL, DEVELOPMENTS IN CORPORATE GOVERNANCE 2013: THE IMPACT AND IMPLEMENTATION OF THE UK CORPORATE GOVERNANCE AND STEWARDSHIP CODES 23 (Dec. 2013), https://www.frc.org.uk/getattachment/9b72fe39-dabd-46ec-9692-973e6ed6c033/Developments-in-Corporate-Governance-2013.pdf [https://perma.cc/53V6-5CM9]; *see also* Cheffins, *supra* note 119; Davies, *supra* note 12, at 356.

182. On the implications of agency capitalism generally, see Gilson & Gordon, *supra* note 15; Ruth Sullivan, *Traditional Investors Adopt Harder Line: The Big Picture*, FIN. TIMES (May 6, 2013), https://www.ft.com/content/62d5ea16-b253-11e2-a388-00144feabdc0. A good example of what might be termed "transnational agency capitalism" occurred in Taiwan in 2012, where a group of domestic investors appealed to international fund managers to help them remove Chen Chin-jing, chairman of China Petrochemical Development Corporation, from office. *See* Robin Kwong, *Taiwan Investors Try to Unseat Chairman*, FIN. TIMES (May 7, 2012), https://www.ft.com/content/d4d3a330-9812-11e1-ad3e-00144feabdc0?mhq5j=e6.

institutional investors, this collaboration appears to be directed at encouraging the adoption and implementation of corporate governance/stewardship principles, rather than engaging in collective activism per se.[183]

One of the regulatory implications of collective activism is that it may create a tension between corporate governance principles and takeover rules. Many jurisdictions restrict shareholders from "acting in concert" under their respective takeover regimes.[184] Some regulators have sought to defuse this tension by favoring coordinated shareholder conduct[185] over takeover rules.[186] Other regulators have attempted the difficult task of differentiating between "good" and "bad" collective activism, with the aim of encouraging the former and deterring the latter control-seeking type of activism.[187] In the United States, however, former SEC Chair Mary Jo White considered that regulators should take an agnostic stance on whether particular activists, and activist campaigns, are "good" or "bad." Instead, she asserted that the role of regulators should merely be to ensure that shareholders have sufficient information and that "all play by the rules."[188] Yet another regulatory approach is to equate long-term corporate commitment with "good" activism and, on that basis, restrict the legal rights of short-term shareholders. The SEC's ill-fated

183. *See* ISG STEWARDSHIP PRINCIPLES, *supra* note 97, Principle F.

184. Eguchi & Shishido, *supra* note 146, at 565.

185. *See, e.g.*, EUROPEAN SECS. & MKTS. AUTH., PUBLIC STATEMENT, INFORMATION ON SHAREHOLDER COOPERATION AND ACTING IN CONCERT UNDER THE TAKEOVER BIDS DIRECTIVE – 1ST DIRECTIVE (June 20, 2014), https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-677.pdf [https://perma.cc/Y5W3-VFRC]. European Securities and Markets Authority's (ESMA) public statement adopts a broad interpretation of the ways in which shareholders may wish to cooperate. It states, for example, that shareholder cooperation can include discussion of matters to be raised with the board, making representations to the board, and tabling or voting together on resolutions. It also acknowledges that shareholders may want to engage cooperatively in relation to a wide range of issues, including board composition, directors' remuneration, and corporate social responsibility. *Id.* at 3.1.

186. ESMA's public statement articulates the clear policy position that European national takeover rules "should not be applied in such a way as to inhibit such cooperation." *Id.* at 3.2. It also provides a "White List" of shareholder activities. *Id.* at 1.5, 4. According to ESMA, when shareholders cooperate to engage in any activities specified in the White List, "that cooperation will not, *in and of itself*, lead to a conclusion that the shareholders are acting in concert." *Id.* at 4.1.

187. For example, Australia's business conduct regulator, the Australian Securities and Investments Commission (ASIC), has made such an attempt. *See* AUSTL. SECS. & INV. COMM'N, REGULATORY GUIDE 128 COLLECTIVE ACTION BY INVESTORS (2015), http://download.asic.gov.au/media/3273670/rg128-published-23-june-2015.pdf [https://perma.cc/6VNY-FQV4].

188. Mary J. White, Chair, SEC, Speech, A Few Observations on Shareholders in 2015, at 2 (Mar. 19, 2015), https://www.sec.gov/news/speech/observations-on-shareholders-2015.html [https://perma.cc/VPP9-3ZZ5].

attempt to introduce a proxy access rule[189] provided an example of the use of shareholding periods as a filtering device to determine which shareholders be accorded participatory rights in corporate governance. The requirement of a three-year holding was a direct response to concerns that the proxy access rule might be used by short-term (aka "bad") activists.[190] The SEC stated that it believed this holding period requirement "reflects our goal of limiting use of the rule to significant long-term holders."[191]

CONCLUSION

There is a Manichean divide in international corporate governance today when it comes to shareholder engagement and activism. These positive and negative narratives of shareholder influence have important regulatory consequences.

The idea that activist shareholders are short-termist and that activism is dangerous to corporations and society as a whole is a powerful theme in contemporary U.S. corporate law literature. Some of the regulatory implications of this model are that shareholders' participatory rights in corporate governance should be limited, and that an important goal of corporate law is to protect the corporation from certain investors.

However, a very different paradigm is emerging in many other countries. In these jurisdictions, shareholder participation is actively encouraged, with institutional investors viewed as a central accountability mechanism and as integral to long-term sustainable corporate profitability. Far from being treated as part of the problem, institutional investors and shareholder activism are increasingly viewed as part of the solution.

The recent proliferation of stewardship codes reflects this emerging paradigm. This trend signals the growing importance of institutional investors in a globalized investment world. Stewardship codes have come late to the United States, in the form of the 2017 ISG stewardship principles, but they have not arrived in a vacuum. These codes are part of a sustained international push for greater investor involvement in corporate governance. They also exemplify the increasing globalization of corporate governance itself, which will inevitably result in calls for stronger shareholder participation rights and higher levels of investor engagement in the United States.

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189. *See* James D. Cox & Benjamin J. C. Baucom, *The Emperor has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811 (2012).

190. *See* SEC, Facilitating Shareholder Director Nominations, Final Rule, 75 Fed. Reg. 56,668, 56,697-98 (Sept. 16, 2010); Bebchuk et al., *supra* note 19, at 1088.

191.75 Fed. Reg. at 56,698.