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The Beginning of Herstory for Corporate Law

Kellye Y. Testy¹

It is early 2001. Two leading corporate scholars together declare the “end of history for corporate law.”² For them, American style corporate governance—grounded in neo-classical economics and revolving on the axis of shareholder primacy—has so far eclipsed any competing models that there is nothing left to talk about. The triumph of free-market capitalism is assured, both in developed and developing nations.

Forward to September 11, 2001. Al Qaeda terrorists level the World Trade Center’s twin towers, damage the Pentagon, crash yet another jet into Pennsylvania farm land, and kill thousands who had gone to work thinking that tomorrow would be hump day. “The terrorists had launched a direct attack on the American system. Their actions expressed not only disregard for human life, but also disdain for the foundations of American government, law, and our capitalist methods of production, distribution, and exchange.”³ In addition to the tremendous human tragedy of 9-11, the attacks also deepened an economic downturn in the United States, triggering widespread corporate layoffs, cutbacks, and a steep decline in stock prices.

Forward now to December 2, 2001. Despite reporting over \$100 billion in revenues on its 2000 10-K, the Enron corporation files for bankruptcy, the largest ever recorded—at least until July when WorldCom followed suit and broke Enron’s infamous record.⁴ In their wake, a wave of corporate accounting and self-dealing scandals followed, further shaking the capital markets and pushing the economy deeper into recession. Company after company “restated” earnings and battled multiple investigations and lawsuits, as did their accountants and investment bankers. Few were immune from the effects of “Enronitis.” Even the goddess of domesticity, Martha Stewart, was caught in the undertow of corporate wrongdoing when she dumped 4,000 ImClone Systems shares just ahead of a large downward stock-price slide;⁵ and Wall Street’s own deity, Harvey Pitt, was cast asunder after failing to

disclose that the man he supported to head corporate clean-up efforts was already knee-deep in boardroom muck.⁶

And so it seems that if indeed the end of history for corporate law has come, something else needs to be written in its place. Herstory, perhaps?

In *The Gender Implications of Corporate Governance Change*, Janis Sarra presents what has until now seemed oxymoronic to many: a feminist economic analysis of corporate governance in the global marketplace.⁷ In so doing, she joins a growing chorus of corporate governance scholars who are seeking to advance an alternative vision to the neoclassical, shareholder-centered model that is not only dominant in the United States, but is also widely exported—even to nations that do not share similar institutional configurations that support such a model.⁸ This diverse group of scholars—whose approaches have been labeled variously as “progressive,” “communitarian,” and “socio-economic,”—do not view the above events of 2001-02 as aberrations in an otherwise solid American political and corporate landscape. Instead, these scholars see these events as the expected by-products of a post-Reagan political economy that has celebrated self-interest, undermined the rule of law, and drastically widened societal wealth inequalities by any reliable measure. For them, the case has yet to be made that shareholder wealth maximization equates with anything but—*shareholder* benefit, much less *societal* benefit.⁹

What Sarra’s work adds to this chorus is an explicit and extensive consideration of the many ways that gender is ignored or minimized in corporate governance decisions and debates. She summarizes: “Most theoretical approaches to corporate governance are modelled on strong historical notions of property and thus on a particular distribution of economic power that is highly gendered within the marketplace. They generally fail to articulate and value the experience and contributions of women to the economic and social life of corporations, and thus the distributive effects of various governance models.”¹⁰

More specifically, Sarra highlights the normative values at work in several key pillars of corporate law that are often seen as value-free: the nexus-of-

contracts approach to the firm, shareholder primacy, and economic efficiency. She then goes on to call for increased attention to women's roles as investors and workers in corporations, and for more racial and gender diversity on corporate boards. Finally, she demonstrates that a feminist analysis of corporate governance can also be an economic analysis. The two work together to maximize the wealth of the enterprise, and in turn, all of its constituents.

Were Sarra's points taken to heart as corporate governance reform efforts get underway in the aftermath of the events of 2001-02, not only would women be better off, but society as a whole would benefit as well. Feminist legal theory—as Sarra likely would agree—has never been directed solely at making a special case for women. Instead, it charts an alternative normative vision of the relationship between life and law, one grounded on the value of equality and dedicated to human flourishing. And as recent events have convincingly shown, when it comes to corporate governance, that new vision is both long overdue and sorely needed.

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² Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

³ Faith Stevelman Kahn, *Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud, and September 11, 2001*, 76 TUL. L. REV. 1579, 1580–81 (2002). See also Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287 (2000) (proposing that democratic governance and market capitalism are not necessarily convergent).

⁴ James K. Glassman, *When Trust Collides With Risk*, WASH. POST, Dec. 9, 2001, at H01; James Rowley et al., *WorldCom Former Officers Surrender to FBI in New York*, BLOOMBERG NEWS, Aug. 1, 2002.

⁵ Ben White & Brooke A. Masters, *SEC Staff Endorses Charging Stewart*, WASH. POST, Oct. 22, 2002, at A01.

⁶ David S. Hilzenreth & Mike Allen, *Besieged Pitt Quits as SEC Chairman*, WASH. POST, Nov. 6, 2002, at A02.

⁷ Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457 (2002).

⁸ See LAWRENCE MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICAN'S NEWEST EXPORT (2001).

⁹ See, e.g., Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227 (2002), and sources cited therein. See generally Socio-Economics and Corporate Law Symposium: The New Corporate Social Responsibility, 76 TUL. L. REV. 1187 (2002).

¹⁰ Sarra, at 460.