

**“CAN YOU HEAR ME NOW...GOOD!”^{®1}
FEMINISM(S), THE PUBLIC/PRIVATE
DIVIDE, AND *CITIZENS UNITED V. FEC*²**

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I. INTRODUCTION

An important goal identified by early feminists was to challenge and even eliminate the distinction between the public and private spheres. Though by no means uniformly, these feminists rejected the liberal notion—broadly stated—that the public sphere (including governmental power) should not impinge on the private realm where “individuals are the final arbiters of their decisions.”³ The private sphere—idealized by the notions of hearth and home—denigrated and endangered women in part by isolating them and rendering them subject to male control, including by way of domestic violence. According to Raia Prokhovnik, feminist critiques regarded the public/private divide as “the source of women’s oppression, not only because the private realm is exempt from liberal principles and political accountability, but also because activity and work in the private realm are not valued like that in civil society.”⁴

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¹ “Can You Hear Me Now? Good.” Registration No. 2,829,096.

² *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

³ Raia Prokhovnik, *Public and Private Citizenship: From Gender Invisibility to Feminist Inclusiveness*, 60 FEMINIST REV. 84, 87 (Autumn 1998).

⁴ *Id.*

Under the slogan that “the personal is the political,”⁵ certain feminists called for the end to a sharply defined public/private distinction with the goal of ending the contemptuous, brutal treatment of women by men. As Carole Pateman famously declared in 1983, “[t]he dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about.”⁶

Indeed, feminists have shown over time and discipline exactly what the public/private distinction has meant for women. Sociologically, the divide has reflected and brought violence against them in the home and beyond. It has meant the devaluation of their domestic work. And it has objectified and repressed their sexuality. Politically, the distinction has stifled women’s voices in public discourse. Legally, it has legitimized discriminatory practices against them in their homes and in the marketplace—the latter an arena closely aligned with the anti-state perspective of the private sphere.

In response, prominent strands of feminism(s) attacked the public/private distinction in order to institute and advance women’s physical, psychological, political and economic safety and well being. But as feminists sought to challenge the public/private distinction by making the private more public, corporations (representing the hierarchical, male-dominated private sector that feminists were opposing) were also resisting the divide between public and private, but with a pernicious intent. Through lobbying, campaign contributions, sheer economic power, and most recently, by a largely unsolicited boost from the United States Supreme Court in *Citizens United v. FEC*, corporations have worked to privatize much of the public sphere—up to and including the electoral process in the United States. In short, while feminists rallied around the notion that the private is the public, large corporate interests were quietly insisting that the public is the private.

A central purpose of this essay is to critique *Citizens United*, and to explore how feminism(s) might respond to the decision and

⁵ The origin of the phrase “the personal is the political” has been traced to Carol Hanisch’s 1969 paper *The Personal is Political*. Hanisch confirms that she used the word “political” broadly, to refer to “power relationships, not [just] the narrow sense of electoral [sic] politics.” Carol Hanisch, Introduction, *The Personal Is Political*, 1 (Jan. 2006), <http://www.carolhanisch.org/CHwritings/PersonalisPol.pdf> (including both original article and 2006 Introduction; original article was first published in Carole Hanisch, *The Personal Is Political*, in NOTES FROM THE SECOND YEAR: WOMEN’S LIBERATION 76 (Shulamith Firestone ed., 1970)).

⁶ Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281, 281 (S.I. Benn & G.F. Gaus eds., 1983).

its privatization of the public electoral process. In *Citizens United*, a 5:4 majority of the U.S. Supreme Court ruled that restrictions on direct expenditures from corporate treasuries to support or oppose candidates for political office were unconstitutional restrictions on corporations' rights to free speech. According to the majority opinion, monetary contributions are a form of protected speech under the First Amendment, and that a corporation, and not a natural person, made the speech at issue was found to have no significance.⁷ In so ruling, the Court equated corporations with citizens and gave them exactly equivalent constitutional protection in relation to political expression.

We propose a two-pronged feminist attack against *Citizens United*. First, we advance the feminist strategy of recalibrating theory in light of what is happening 'on the ground', thereby identifying dangers facing women which emerge under new or modified guises—in this case, the privatization of the electoral process.⁸ To reveal the unsound foundations of *Citizens United*, we perceive an urgent need for aspects of feminism(s) to defend as distinct a robustly construed public domain.⁹ This will help to halt the usurpation of the public interest by private economic power. Second, we deploy feminism(s) well-known rejection of abstraction in favor of context. This too will castigate *Citizens United's* strategic refusal to make distinctions even when they are obvious and context would call for nothing less. As this essay will show, *Citizens United* propels its outcome by erasing tremendously significant legal distinctions—most crucially between living human beings and artificial legal entities. Upon putting in place the boldly and patently false premise that corporations and natural persons are overwhelmingly analogous, the Court goes on to deny the distinction between the

⁷ See *Citizens United*, 558 U.S. at 339-341.

⁸ See Mike McIntire & Nicholas Confessore, *Tax-Exempt Groups Shield Political Gifts of Businesses*, N.Y. TIMES, July 7, 2012, http://www.nytimes.com/2012/07/08/us/politics/groups-shield-political-gifts-of-businesses.html?_r=1&nl=todaysheadlines&emc=edit_th_20120708, for a discussion of how much corporate spending in the political arena has ramped up in light of *Citizens United*. In the elections since 2010, though for-profit corporations are not the largest donors to candidates or Super-Pacs, they are significant donors to non-profit corporations that advocate for issues closely aligned with candidates' positions.

⁹ The problem of a diminishing public space is widespread. As Janine Brodie notes, this “reprivatiz[ation]” of what was once public “create[s] new norms and expectations about what is ‘up for grabs’ in politics and, ultimately about the role of the citizen.” Janine Brodie, *Shifting the Boundaries: Gender and the Politics of Restructuring*, in *THE STRATEGIC SILENCE: GENDER AND ECONOMIC POLICY* 46, 56 (Isabella Bakker ed. 1994).

public sphere populated by citizens and the private sphere populated by corporate profit takers; between political self-expression and corporate spending; between individual suffrage and business transactions. By erasing distinctions, the Supreme Court elevated the private to an absurd and destructive level. This is because large and monied economic interests—many of which are advantaged by limited liability and large aggregations of capital—become the “loudest voice in town.”¹⁰ Such dominance comes at the obvious and lamentable expense of ordinary human persons, and is exacerbated for women and other disadvantaged groups.

The following essay is divided into several parts. Part II provides a brief account of feminist perspectives on the public/private distinction. Though an important early challenge for feminism(s) was to break down the barriers between public and private (because such distinctions isolated women in the private sphere and effected their subjugation), destruction of barriers can also exacerbate disadvantage depending on who is in charge of the exercise. In short, as this part illustrates, increasing privatization of the public sphere creates new vulnerabilities. With this context in place, Part III analyses the *Citizens United* case. It shows that the majority, by *completely* erasing the distinction between citizens and corporations, between the public and the private, has very much reduced the power of human beings to participate in the public sphere. This part also relies on the insights of feminism(s) to criticize the majority for strategically and wrongfully advancing abstraction over context. Part IV suggests some possible correctives to the Supreme Court majority's analysis, based on the insights of feminism(s) and progressive corporate law scholars. The essay concludes by calling for an enhanced feminist presence in defining the public realm and repelling a hostile corporate takeover of public space.

Feminists have historically fought against male power on a variety of fronts, but with few exceptions,¹¹ have been less inclined

¹⁰ William Patton & Randall Bartlett, *Corporate “Persons” and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494, 502 (1981).

¹¹ A representative sampling of the work of these authors includes: Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way Up From the Bottom (Line)*, 2 AM. U. J. GENDER & L. 1 (1994); Mary Condon, *Gendering the Pension Promise in Canada: Risk, Financial Markets and Neoliberalism*, 10 SOC. AND LEGAL STUD. 83 (2001); Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265 (2012); Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387 (1992); Kathleen A. Lahey & Sara W. Salter, *Corporate Law in Legal Theory and Legal Scholarship:*

to tackle issues of corporate structure and governance. This has left a treacherous lacuna. The outcome in *Citizens United* shows that a broader feminist strategy is required; one which increases its presence in corporate law critiques. Such a presence will help halt—or at least identify and decry—the advance of corporations at the expense of real citizens.

II. THE PUBLIC-PRIVATE DISTINCTION

What the public-private distinction means in context diverges widely within and between disciplines.¹² Feminist traditions are no different and it is certainly beyond the scope of this essay to offer a thorough accounting of scholarship in the area. We do, however, observe that the dichotomy itself has ancient roots in Western thought as a “binary opposition that is used to subsume a wide range of other important distinctions and that attempts...to dichotomize the social universe in a comprehensive and sharply demarcated way.”¹³ As Joan Landes notes:

Feminists did not invent the vocabulary of public and private, which in ordinary language and political tradition have been intimately linked. The term ‘public’ suggests the opposite of ‘private’: that which pertains to the people as a whole, the community, the common good, things open to sight, and those things that are accessible and shared by all. Conversely, ‘the private’ signifies something closed and exclusive, as in the admonition ‘Private property—no trespassing.’¹⁴

From a legal standpoint, privacy manifests itself as a boundary which the law (and its agents) cannot cross absent special circumstances. The contexts in which this boundary exists are numerous:

From Classicism to Feminism, 23 OSGOODE HALL L.J. 543 (1985); Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. FOR SOC. JUST. 457 (2002); Kellye Y. Testy, *Capitalism and Freedom—For Whom? Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87 (Autumn 2004).

¹² See Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 1, 7-34 (Jeff Weintraub & Krishan Kumar eds., 1997) (discussing four major ways in which the public-private distinction is approached but not claiming the list to be exhaustive).

¹³ *Id.* at 1.

¹⁴ Joan B. Landes, Introduction, in FEMINISM, THE PUBLIC AND THE PRIVATE 1, 1-2 (Joan B. Landes ed., 1998).

family law where judges have historically been reluctant to interfere with the relationships among family members,¹⁵ personal reproductive decisions where courts have carved out a zone of privacy into which the government's authority may not enter,¹⁶ and personal spaces which are not subject to government search absent a warrant or other public necessity.¹⁷

The public/private distinction also creates a boundary between government and the private sector of business, capital and markets. In this latter configuration, the reach of government, through law and regulation, is limited in its ability to affect transactions. Similarly, the judiciary classically takes a 'hands-off' approach to what market participants do by refusing, for example, to evaluate the fairness of a bargain.¹⁸ Frances Olsen characterized these different contexts in which the privacy boundary exists as the market/family dichotomy which separates the public world of work and commerce from the private world of the home, and the state/civil society dichotomy that distinguishes the state from the rest of the society-public, including individuals and nongovernmental

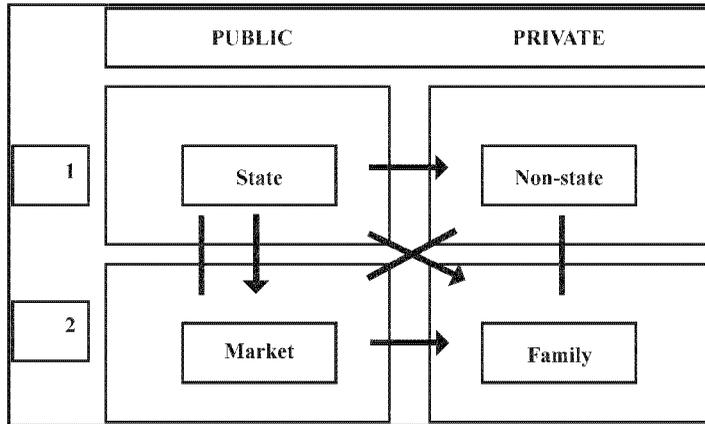
¹⁵ See Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?* 29 CARDOZO L. REV. 1487, 1494 (2008).

¹⁶ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

¹⁷ In *Kyllo v. United States*, the Supreme Court reiterated the long-standing principle that the Fourth Amendment draws "a firm line at the entrance to the house," beyond which the government may not enter without a warrant. 533 U.S. 27, 40 (2001) (quotation and citation omitted).

¹⁸ See Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 831-34 (1983) for a discussion of classical contract law's "tendency to regard contract as within the exclusive realm of private ordering."

groups.¹⁹ Darren Rosenblum depicts Olsen’s analysis in the following way:²⁰



In this model, the market is part of the public sphere while the family is the chief inhabitant of the private sphere. But the market is *also* represented with the family as a non-state entity. This is an important development in illustrating that the market’s reach in both the public and private spheres. According to Rosenblum the “use of ‘public/private’ suggests the dichotomy between state and non-state actors, as well as the market and the family.”²¹

Speaking generally, feminist jurisprudence rejected the public/private boundary as an acceptable rationale for legal action or inaction.²² Feminists argued that in a great many situations, the bound-

¹⁹ Frances E. Olsen, *International Law: Feminist Critiques of the Public Private Distinction*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* 157, 158 (Dorinda G. Dallmeyer ed., 1993).

²⁰ Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 *BERKELEY BUS. L.J.* 55, 70 (2009).

²¹ *Id.* at 69.

²² This is, in part, why many feminists rejected Hannah Arendt’s view of the public/private dichotomy. Arendt believed that our public interests as citizens are quite distinct from our private interests as individuals and that there was a particular space which she called the “space of appearance” where we engage our public interests and shared values. Interestingly, the financial domination of the public space enabled by *Citizens United* would have troubled Arendt, as her view of public space was a place where citizens would interact, exchange ideas, and each citizen would have an effective voice. See Maurizio Passerin D’Entrèves, *Public and Private in Hannah Arendt’s Conception of Citizenship*, in *PUBLIC AND PRIVATE: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES* 68, 69-71 (Maurizio Passerin d’Entrèves and Ursula Vogel eds., 2000) (discussing Hannah Arendt’s conception of the “space of appearance”).

ary disadvantages women and the institutions with which women are traditionally associated—such as the family—and privileges the group holding the most power in society, namely, white men, and the institutions they control: business organizations. This criticism of the dichotomy applied to both the market/family and the state/civil society constructs. In response to these insights, feminism(s) historically sought to break down the public/private divide in order to enhance scrutiny of the treatment of women. As Weintraub summarizes the matter, feminist challenges to the public/private divide traditionally included at least three overlapping arguments:

One is that the conceptual orientations of much social and political theory have ignored the domestic sphere or treated it as trivial. The second is that the public/private distinction itself is often deeply gendered, and in almost uniformly invidious ways. It very often plays a role in ideologies that purport to assign men and women to different spheres of social life on the basis of their 'natural' characteristics and thus to confine women to positions of inferiority. The third is that, by classifying institutions like the family as 'private' . . . the public/private distinctions often serve to shield abuse and domination within these relationships from political scrutiny or legal redress.²³

Indeed, some feminists—most notably Catherine MacKinnon—called for an end to the separation of public and private.²⁴ Associating the private realm with oppression, MacKinnon clearly stated: “This is why feminism has had to explode the private. This is why feminism has seen the personal as the political. The private is public for those for whom the personal is political. In this sense, for women there is no private, either normatively or empirically.”²⁵ As Ruth Gavison notes, for this strand of feminism, the aphorism that “the personal is the political” challenged the very existence of two distinct spheres. Within this context, Gavison observes:

The “personal” should not be allowed to stop conversations, critique, or accountability; the “personal” should not be seen as an improper theme for concern

²³ Weintraub, *supra* note 12, at 28-29.

²⁴ Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1, 1-2 (1992) (noting MacKinnon's challenge to the public/private distinction).

²⁵ CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 191 (1989); Gavison, *supra* note 24, at 2 (quoting the same from MacKinnon).

and possible public interference. It is against this background of *this* interpretation of “personal” that the slogan [“the personal is political”] should be understood . . . [For example,] [w]hen women are battered at home, it is not because each particular victim has triggered an unfortunate “individual” tragedy. . . . Social structures are involved, social structures which are not simply “natural.” They are person-made, and they benefit males.²⁶

The idea is that the boundary between public and private cannot be drawn because, as Jean Cohen sums up this strand, such boundaries work to “exclud[e], denigrat[e], and dominat[e]. . . those designated as ‘different’”²⁷ from the white, heterosexual male baseline.

But that said, other strands of feminism(s) have insisted on preserving the public/private dichotomy because the private sphere “may actually capture a difference that is meaningful to women’s experiences.”²⁸ As Martha Ackelsberg and Mary Lyndon Shanley observed in 1996 in relation to the public/private divide, feminists have also understood that women have an interest in privacy rights relating to a wide array of matters—from custody of their children, to reproductive freedoms, to choosing a life partner.²⁹ As another example in relation to violence against women, Higgins has more recently argued that recognizing the private sphere as distinct from the public sphere can be illuminating in terms of understanding both the harm experienced by women and how that harm should be addressed at an individual and policy level.³⁰

Other critiques illustrate how analysis of the public/private divide by certain strands of feminism(s) betrays bias—including that of race and class—which, egregious on its own footing, also

²⁶ Gavison, *supra* note 24, at 19-20.

²⁷ Jean L. Cohen, *Rethinking Privacy: Autonomy, Identity, and the Abortion Controversy*, in *PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY*, *supra* note 12, at 133, 134.

²⁸ Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 *CHI.-KENT L. REV.* 847, 861 (2000).

²⁹ Martha A. Ackelsberg & Mary Lyndon Shanley, *Privacy, Publicity, and Power: A Feminist Rethinking of the Public-Private Distinction*, in *REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY* 213, 213 (Nancy J. Hirschmann & Christine Di Stefano eds., 1996).

³⁰ See Higgins, *supra* note 28, at 862-66.

stunts analysis. For example, bell hooks points to how the private sphere can be a site of empowerment, stating:

Historically, African-American people believed that the construction of a homeplace, however fragile and tenuous (the slave hut, the wooden shack), had a radical political dimension. Despite the brutal reality of racial apartheid, of domination, one's homeplace was the one site where one could freely confront the issue of humanization, where one could resist.³¹

In another interpretation, feminists such as Carol Gilligan urge the infusion of private sphere values into the public consciousness. Thus, the "ethic of care" is a means of instilling the "feminine voice" into the predominantly abstract, hierarchical masculine public sphere.³²

Yet another strand finds utility in maintaining a public/private distinction but with a particular focus on the public sphere. Christine Sypnowich, for example, ardently defends the distinction. She agrees with feminists that the private sphere has, historically, been a sphere of oppression for women and minorities, but asserts that the rule of law is an "institution which helps ensure that we are accorded worth and dignity in the domain of the public, that we are included and counted as citizens. But the rule of law also seeks to leave us unimpeded and unseen in our particular personal domains, according us respect as private persons."³³

The foregoing selection of feminist analyses of the public/private divide suggests a diverse and productive community. It also suggests that the approaches which feminism(s) takes to the public/private dichotomy—even when opposed—are inherently driven by the context of the problem at hand. For example, when the issue is domestic violence against women and privacy is raised as a

³¹ bell hooks, *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* 42 (1990). More generally, feminists have expressed concern that the public/private analysis is exclusionary. As Susan Boyd expresses the matter: "[I]t has been shown that most feminist literature on the public private divide tends to identify gender as the primary cause of women's oppression, thereby diminishing the potential of an analysis that examines the role of race, culture, class, sexuality, and disability..." Susan B. Boyd, *Challenging the Public/Private Divide: An Overview*, in *CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW, AND PUBLIC POLICY* 3, 12 (Susan B. Boyd ed., 1997).

³² See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 173 (1982).

³³ Christine Sypnowich, *The Civility of Law Between Public and Private*, in *PUBLIC AND PRIVATE: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES*, *supra* note 22, at 93, 113.

block, a feminist response is to deny the legitimacy of the boundary between public and private because it is being used oppressively. And when a women’s right to choose a life partner is challenged by homophobia, feminism(s) will raise a woman’s right to privacy and private sphere rights to determine for oneself what constitutes family.³⁴

Returning to *Citizens United*, part of the context it reflects is that corporate private power has grown dramatically while public power has decreased. For example, over the course of the last century, many public functions have been privatized, from the U.S. war effort in Iraq³⁵ to the creation of whole communities by private corporations, such as Celebration, Florida.³⁶ Voucher programs to replace public delivery of services such as education,³⁷ and proposals to replace Social Security with individual savings accounts³⁸ and Medicare with private insurance plans³⁹ are further examples of the trend towards privatization. The public street corner, once the main site for public speech, is being replaced by the privately controlled Internet as the increasingly popular platform for public communication.⁴⁰ Indeed, Matthew Diller suggests “[p]rivatization may

³⁴ See Acklesberg & Shanley, *supra* note 29, at 225.

³⁵ T. Christian Miller, *Contractors Outnumber Troops in Iraq; The Figure, Higher Than Reported Earlier, Doesn't Include Security Firms. Critics Say the Issue is Accountability.*, L.A. TIMES, July 4, 2007, <http://search.proquest.com/docview/422208625?accountid=14512>.

³⁶ See *Tour of Celebration*, TOWN CENTER, CELEBRATION, FL, <http://www.celebrationtowncenter.com/tour-of-celebration-town-center> (last visited Oct. 14, 2012) (describing Celebration’s development under private companies); see also David Segal, *Our Town Inc.*, N.Y. TIMES, June 24, 2012, <http://search.proquest.com/docview/1021977532?accountid=14512> (describing the privatization of municipal functions in Sandy Springs, Ga.).

³⁷ See *Education Program: Publicly Funded School Voucher Programs*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/educ/school-choice-vouchers.aspx> (last visited Oct. 14, 2012) (describing state school voucher initiatives that use public funding to pay for private education through vouchers).

³⁸ See Social Security Personal Savings Guarantee and Prosperity Act of 2005, H.R. 1776, 109th Cong. (2005).

³⁹ See e.g., H.R. Con. Res. 34, 112th Cong. (2012) (as reported by H. Comm. on the Budget) (reporting the resolution for adoption of Rep. Paul Ryan’s budget proposal); H.R. Rep. No. 112-58, at 103-106 (2012) (accompanying H.R. Con. Res. 34 and describing the proposed privatization of Medicare).

⁴⁰ See Ronnie Cohen & Janine S. Hiller, *Towards a Theory of CyberPlace: A Proposal for a New Legal Framework*, 10 RICH. J.L. & TECH. 41 (2003) for a discussion of the movement of speech from the public to the private sphere, and the consequential regulatory shift from the First Amendment to contractual terms of use with internet service providers under a framework of private property rights.

be linked to the growing reality that governments are more at the mercy of markets than the other way around.”⁴¹

In the private sphere, the basic relationship between the provider and the recipient of goods or services is contractual. Private law controls the transaction, and thus, private interests may supersede the interests of the citizens for whom these benefits are obtained by the state. For example, in December 2011, the *New York Times* reported that increasingly, school lunch programs are using private food service companies who work with private food processors to supply school lunches.⁴² The allocation of agricultural surplus provided to the schools by the Department of Agriculture is turned over to food processors and then turned into products like chicken nuggets. Driven by the profit motive, the private sector over-processes food destined for children's lunches. The result is an inferior product, characterized by decreased nutritional value. In fact, according to the article, “[a] 2008 study by the Robert Wood Johnson Foundation found that by the time many healthier commodities reach students, ‘they have about the same nutritional value as junk foods.’”⁴³ As the story notes, the school lunch program becomes about profit maximization (a private sphere value) when it should be about health for school children (a public sphere value). We observe that this use of private power (the food processors and

⁴¹ Matthew Diller, *Introduction: Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 *FORDHAM URB. L.J.* 1307, 1309 (2001) (discussing the manner in which the government carries out its functions). For analysis of prison privatization as another example, see Sharon Dolovich, *State Punishment and Private Prisons*, 55 *DUKE L.J.* 437, 544 (2005):

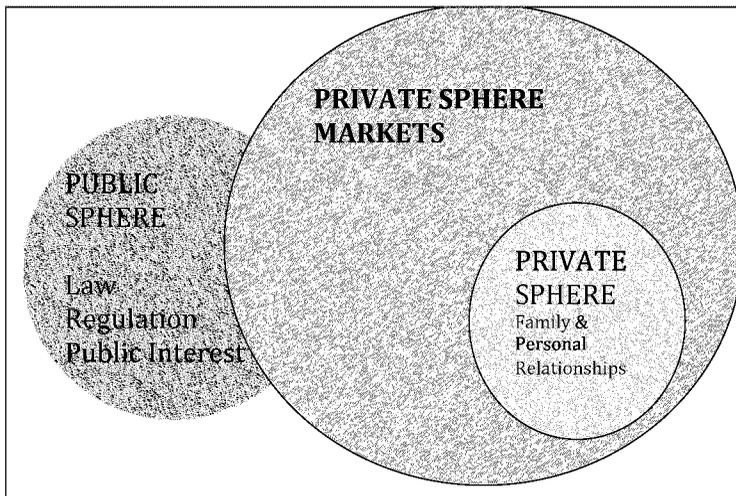
[T]he state's use of private prisons reflects a larger trend toward viewing incarceration in economic terms and regarding prison inmates as the economic units of a financial plan. If anything, private prisons appear to be the logical extension of this vision, which already informs myriad aspects of this country's criminal justice system, including the practice of prison administrators contracting out the provision of basic services to cut the cost of corrections; underinvestment in mechanisms for accountability and oversight; and the tendency of private prison providers, correctional officers, and the voters themselves to look to increased incarceration as the means to their financial well-being .

⁴² Lucy Komisar, *How the Food Industry Eats Your Kid's Lunch*, *N.Y. TIMES*, Dec. 3, 2011, <http://www.nytimes.com/2011/12/04/opinion/sunday/school-lunches-and-the-food-industry.html?pagewanted=all>; see also *California Food Policy Advocates & Samuels & Associates*, *THE FEDERAL CHILD NUTRITION COMMODITY PROGRAM* (2008), available at <http://rwjf.org/content/dam/farm/legacy-parents/rwjf31564> (discussing the impact of the program on the nutritional quality of school meals).

⁴³ Komisar, *supra* note 42.

distributors) in the public sphere has a very real and negative effect on families who are at the center of the private sphere. Liz Kruger, an advocate for the poor in New York City, takes the position that: “there is something fundamentally wrong with having a for profit model for delivery of human services. Companies decide to stop unprofitable ventures. However, you still have to deliver the human services. What happens if there is no infrastructure left because you contracted out: the company either makes money and leaves the market, or does not make money and leaves, or violates the rules and is asked by government to leave. There is no infrastructure in place to continue to deliver those services.”⁴⁴

As more governmental functions are transferred from the public to the private side of the boundary, government’s influence and effectiveness are diminished and private sector power is augmented. As corporations grow in size and wealth, they overwhelm the family and the public sphere. In light of this reality, an updated version of Olsen’s public/private model depicted *supra* might look as follows, thereby illustrating the massive increase in the market aspect of the private sphere:



This is some of the inheritance reflected in and advanced by *Citizens United*: corporate privatization of the public sphere on every front including the electoral process. Consequently, we identify as a clear negative the collapse of any distinction between public and private though this may seem somewhat ironic from the

⁴⁴ *Privatization in Practice: Human Services*, 28 FORDHAM URB. L.J. 1435, 1451 (2001) (panel discussion).

perspective of certain strands of early feminism. From that vantage point, the threat to women was from the very distinction between public and private. Now the threat emerges from *elimination* of that distinction. As will be explored *infra*, part of a feminist rebuttal to *Citizens United* calls for a return to context—corporations are *not* citizens—and a reclaiming of the public sphere as distinct. This is not to suggest that *Citizens United* will be easily overturned or corporate power will fade away. But it is to suggest an aspect of the reply given by feminism(s) and the foundations of a resounding denunciation.

III. CITIZENS UNITED AND THE IMPORTANCE OF CONTEXT

In 2010, the United States Supreme Court decided the case of *Citizens United v. Federal Election Commission*. It ruled that restrictions in the *Bipartisan Campaign Reform Act* of 2002 (“BCRA”) on direct expenditures of funds from for-profit corporate treasuries to support or oppose candidates for political office were unconstitutional restrictions on corporations’ rights to free speech.⁴⁵ As will be discussed, the Court removed restrictions on corporate donations to the electoral process thereby significantly extending private power into the public sphere and it reached this result by refusing to account for either the context out of which the case arose or the treacherous consequences that would result. This strategy of de-contextualization, in turn, commercializes and monetizes political speech by extending it—without restriction or calibration—to economic vehicles.

By way of contrast, an emphasis on context has been a tremendously important element of how feminism(s) approach legal problems. Professors Martha Minow and Elizabeth Spelman, for example, argue that “justice is more likely to be served when judges attend to the specific contexts in which their judgments are rendered.”⁴⁶ They define context as a “readiness, indeed an eagerness, to recognize patterns of differences that have been used historically to distinguish among people, among places, and among problems.”⁴⁷ An important background insight such feminists deploy is

⁴⁵ See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 913 (2010).

⁴⁶ Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1598-99 (1990).

⁴⁷ *Id.* at 1600. See also Barbara Ann White, *Feminist Foundations for the Law of Business: One Law and Economics Scholar’s Survey and (Re)view*, 10 UCLA WOMEN’S L.J. 39, 50 (1999) (noting that “contextual analysis recognizes that the prevailing social paradigm may not be meaningful for those individuals whose voices are excluded” (emphasis omitted)).

that context acts as the tool for unmasking the masculine bias in seemingly neutral legal rules, and for accounting for women’s experiences in understanding the particular consequences of applying legal rules.

On a related front, Katharine Bartlett uses the term “feminist practical reasoning”⁴⁸ to describe a method of legal analysis that “builds upon the ‘practical’ in its focus on the specific, real-life dilemmas posed by human conflict—dilemmas that more abstract forms of legal reasoning often tend to gloss over.”⁴⁹ This method gives greater attention to context and individual circumstances, rather than ignoring them in favor of reaching some form of “abstract justice.”⁵⁰

Deploying these kinds of feminist methods, commentators such as Steven Friedland have noted that certain Supreme Court justices such as Justice O’Conner—not coincidentally the first female Supreme Court justice—pay particular attention to context in arriving at a given decision while other justices neglect to do so. This impacts the quality of the opinions rendered. As Friedland notes in his analysis of *Washington v. Glucksburg*,⁵¹ (a case which concerned a constitutional challenge to the state of Washington’s ban against assisted suicide), there is a marked contrast between the abstract approach taken by Chief Justice Rehnquist and the pragmatic reasoning of Justice O’Conner. Friedland states:

Importantly, Chief Justice Rehnquist minimized the significance of entire groups of fact through a categorical assertion about the law. . . Justice O’Connor . . . negotiated a pragmatic understanding of fact in justifying the outcome on a practical level . . . [She] not only uses such facts, but bases her avoidance of the constitutional claim on the issue of [the facts about] pain and palliative care. . . .⁵²

Indeed, Justice O’Conner begins her concurrence with attention to context and individual experience: “Death will be different for

⁴⁸ Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 854 (1990).

⁴⁹ *Id.* at 850.

⁵⁰ *Id.* at 849.

⁵¹ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁵² Steven I. Friedland, *The Centrality of Fact to the Judicial Perspective: Fact Use in Constitutional Cases*, 35 Conn. L. Rev. 91, 125-27 (2002); *see also* Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 Harv. L. Rev. 10, 48-49 (1987) (“Justice O’Connor’s more significant contribution may lie in her hint at a common approach to religious, racial and gender

each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions. Some will seek medication to alleviate that pain and other symptoms.”⁵³ While agreeing with the Chief Justice that there is no general right of assisted suicide, Justice O’Connor also showed her understanding of and sensitivity to the reality in which families and caregivers find themselves by stating that “dying patients . . . can obtain palliative care, even when doing so would hasten their deaths.”⁵⁴ Thus, she reaches the same conclusion as the majority, not by insisting on a bright line between Constitutional mandates concerning the continuation of life and all other possibilities, but by recognizing that each of us will have particular circumstances that may not fit such a bright line rule. Justice O’Connor’s analysis is vastly superior to the alternative and a judicial emulation of her approach is much more likely to forge the right result going forward.

As the foregoing analysis suggests, feminism(s) know that acontextual and abstract judicial decisions jeopardize a just result because there is no realistic attention paid to what is actually at issue and what is actually at risk. And this is precisely where the majority decision in *Citizens United* falters and fails. As the following discussion will illustrate, the decision is fuelled by abstraction, acontextuality, and a concomitant refusal to respect even the most obvious of distinctions.

The *Citizens United* case was brought by the non-profit organization Citizens United to obtain a declaratory judgment that the corporation’s airing of a documentary within 30 days of the impending primary could not be constitutionally prohibited.⁵⁵ The documentary visited critical focus on Hillary Clinton, a candidate in the democratic presidential primary. In a move that the dissent

based differences. Although it is an apparent aside, Justice O’Connor has in the past implicitly made an important intellectual—and normative—move: she has suggested that insights about one area of difference may be relevant and instructive to other areas of difference. Those who understand invidious messages about race or sex might thus borrow those understandings in thinking about religion. We learn by importing understandings from one context to another. Thus, in her awareness of the potential analogies across differences, and in her sensitivity to contrasting perspectives, Justice O’Connor effectively challenges the often unstated assumption that the observer can be free from a perspective. In her retention of the language of objectivity, however, she reiterates that assumption.” (footnotes omitted).

⁵³ *Glucksberg*, 521 U.S. at 736 (O’Connor, J., concurring).

⁵⁴ *Id.* at 738.

⁵⁵ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 321 (2010) (also seeking injunctive relief).

describes as “unusual and inadvisable”⁵⁶ the Court, on its own motion, scheduled a re-argument of the case to consider whether the provisions of campaign laws restricting a range of corporate political activities, violated the First Amendment to the United States Constitution by abridging the speech rights of corporations.⁵⁷ In a five to four decision, the Court concluded that they did. According to the Court, whether the speech was made by a corporation or a natural person mattered not: corporations and natural persons were jurisprudentially identical in relation to this aspect of the First Amendment.⁵⁸ *Citizens United’s* extension of corporate personhood into the political arena has been widely and roundly criticized, first by the strong dissent of four of the Supreme Court Justices,⁵⁹ and subsequently by numerous legal scholars.⁶⁰

First and foremost, the majority in *Citizens United* was intent on dissolving the line or distinction between the public sphere—comprised of living, breathing citizens—and the private sphere of market activity dominated by corporations. The goal was to transform economic vehicles into American citizens entitled to fulsome and unfettered political expression. There are many examples of

⁵⁶ *Id.* at 396 (Stevens, J., concurring in part and dissenting in part).

⁵⁷ *Id.* at 322 (majority opinion).

⁵⁸ *Id.* at 342-43.

⁵⁹ *Id.* at 393-479 (Stevens, J., concurring in part and dissenting in part) (joined by Justices Ginsburg, Breyer, and Sotomayor).

⁶⁰ A representative sampling of a growing body of articles critical of the case include: Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 4 (2012) (positing that the most significant consequences of *Citizens United* will be the “doctrinal consequences for the definition of corruption as a basis for campaign finance regulation” and the substantial narrowing of the definition of corruption such that it no longer provides a rationale for limitations on campaign spending that amount to anything less than a quid pro quo transaction); Jessica A. Levinson, *We the Corporations?: The Constitutionality of Limitations on Corporate Electoral Speech After Citizens United*, 46 U.S.F. L. REV. 307 (2011) (arguing, contrary to the *Citizens United* holding, that the government has a compelling interest in regulating corporate speech and proposing a regulatory distinction between for-profit and non-profit corporations); Daniel R. Ortiz, *Recovering the Individual in Politics*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 263, 287 (2012) (lamenting the Court’s finding that a corporation is an “expressive association” thereby “squeeze[ing] the individualist view completely out of the First Amendment”); Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575 (2012) (addressing the dilution of citizenship rights of individual citizens); Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507 (2012) (arguing that the Court’s decision sets the stage for corporate domination of the political system).

this exercise throughout the majority's opinion, with the following statement being one of the more dramatic iterations:

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.⁶¹

Through the rhetoric of linkage, the majority creates in one sentence an indelible identification amongst citizens, associations of citizens, and corporations. Corporations are seen, at bottom, as simply associated citizens; they must have unfettered speech because anything less is to limit the speech of citizenry. Later in the judgment, the Court is even more direct, referring to corporations in America as “millions of associations of citizens”⁶² and observing how the challenged law penalizes “certain disfavored associations of citizens—those that have taken the corporate form. . . .”⁶³ In this way, market-players in the private sphere are ushered into the public realm holus bolus and untethered from regulatory oversight. The moment that profit-seeking economic vehicles are analogized to living citizens is the moment when the absolutely crucial distinction between corporate and individual campaign spending is crushed. When the majority referred to the “‘open marketplace’ of ideas,”⁶⁴ they were, apparently, speaking literally.

While there is room for debate on this point, it would seem that in the examples given above, the court is relying on the “aggregate” view of the corporation, a perspective which sees “the corporation as an aggregate of its members or shareholders.”⁶⁵ The notion, aptly summarized by Reuven Avi-Jonah in another context, is for the court to “look through the corporation to its members”⁶⁶ and put the emphasis “entirely on the shareholders, not on the corporation itself.”⁶⁷ This aggregate view is in distinction to the artificial entity theory (which sees the corporation as “a creature of the

⁶¹ 558 U.S. at 349.

⁶² *Id.* at 354.

⁶³ *Id.* at 356.

⁶⁴ *Id.* at 354 (citing *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

⁶⁵ Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 Wis. L. REV. 999, 1001 (2010).

⁶⁶ *Id.* at 1008.

⁶⁷ *Id.* at 1035.

State”)⁶⁸ and the real entity theory (which regards the corporation as “a separate entity controlled by its managers”).⁶⁹ In the examples above, the majority is not treating the corporation as a separate legal entity (which could therefore be subject to a different set of rules concerning electoral donations from that of individuals) but as a symbol or avatar for all the shareholders standing behind it.

Following this analysis of the decision, the court falls into theoretical inconsistency when, in other passages, it treats the corporation as a separate legal entity. For example, as Avi-Yonah observes, the majority in *Citizens United* clearly deploys the real entity theory when it stated that the statutory permissibility of a Political Action Committee or “PAC”⁷⁰ fails to obviate the limit (or “ban”) on corporate speech because “[a] PAC is a separate association from the corporation.”⁷¹ As Avi-Yonah notes: “This assertion can only be made under the real entity view because under the aggregate view both the corporation and the PAC are owned by the same ultimate shareholders...”⁷² Beyond this, the majority expressly rejected the argument advanced by the government that limiting corporate independent expenditures but permitting PACs is a way of protecting dissenting shareholders. In response, the Court tersely invoked *Bellotti*'s⁷³ conclusion that dissenters who disagree with the proposed corporate political message can correct the situation “through the procedures of corporate democracy.”⁷⁴

⁶⁸ *Id.* at 1001.

⁶⁹ *Id.*

⁷⁰ Regulation of political contributions by corporations and labor unions under 2 U.S.C. § 441(b) recognized committees commonly known as Political Action Committees or “PACs?” According to Professor Richard Briffault,

Although *Citizens United* referred to a PAC as ‘a separate association from the corporation,’ legally it is entirely controlled by the corporation that creates it. The corporation selects its officers and staff and, most importantly, the corporation can determine which candidates the PAC supports and how much money it can spend with respect to each of those candidates. The PAC is the corporation’s legally authorized campaign spending alter ego, although it can spend only what it raises in voluntary donations from corporate stockholders and personnel, not from the corporation’s general treasury.

Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance after Citizens United*, 20 CORNELL J.L. & PUB. POL’Y. 643, 647-48 (2011) (footnotes omitted).

⁷¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 37 (2010).

⁷² Avi-Yonah, *supra* note 65, at 1040.

⁷³ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁷⁴ *Citizens United*, 558 U.S. at 362 (quoting *Bellotti*, *supra* note 73, at 794).

The majority's conclusion at this point is that the corporation is *not* simply the sum of its shareholders.

It would seem that that the Court is actually relying on more than one conceptualization of the corporation⁷⁵ depending on the argument it would like to succeed. On the one hand, the aggregate view of the corporation is *rejected* when the government offers it as a reason why the regulatory limits on corporate speech are constitutional to protect the rights of dissenting shareholders. On the other hand, the same view is *accepted* when the Court wants to cast the corporation as a structured assembly of individuals – that is, it is the aggregate of its membership. And in the majority's hands, both approaches advance privatization of the public sphere. An amorphous theoretical stance becomes a marshalling strategy which drives this conclusion: there are no relevant differences between the corporation and the individual or between corporate and individual campaign spending. As a result and as summarized by the dissent, the majority concluded that “the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation.”⁷⁶

Beyond this, and as Michael Kent Curtis notes, the Court is mistaken when it regards the corporation as an association of shareholders which, when it speaks, is subject to “control by citizen shareholders.”⁷⁷ Directors and executives decide when a corporation will speak and what it will say.⁷⁸ Dissenting shareholders from this speech have little to no recourse, contrary to the majority's extraordinarily general assertion to the contrary. A derivative action is possible but only to prevent future political speech and

⁷⁵ For discussion, see Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 531-34 (2011) (discussing shareholder derivative suits and shareholder proxy proposals as examples of mechanisms by which corporations recognize conflicting and diverse voices among shareholders). Note that Avi-Yonah regards the Court's reasoning as reflective of the real entity view of the corporation. Avi-Yonah, *supra* note 65, at 1040.

⁷⁶ *Citizens United*, 558 U.S. at 414 (Stevens, J., concurring in part and dissenting in part).

⁷⁷ Michael Kent Curtis, *Citizens United, Davis v. FEC, and Arizona Free Enterprise in Context: Lochner on Steroids and Democracy on Life Support*, 29 (Wake Forest Univ. Legal Studies, Working Paper No. 2029209, Apr. 5, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029209.

⁷⁸ Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010) (“Under existing law, a corporation's decision to engage in political speech is governed by the same rules as ordinary business decisions, which give directors and executives virtually plenary authority.”) (cited by Curtis, *supra* note 77, at 29).

only if the speech were to constitute a breach of fiduciary duty or other wrong.⁷⁹ As the dissent in *Citizens United* notes, such minority challenges are “so limited as to be almost nonexistent” given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule.⁸⁰ Other options for the disgruntled include voting out the board or selling their shares⁸¹ but these are simply not realistic.⁸² Dissenting shareholders by definition lack the voting power to prevail and there may be no viable way for dissenters to actually dispossess themselves of the shares in question.⁸³ Moreover, as Professor Benjamin Sachs points out, many shareholders who are public employees—state, local, and federal—are required to participate in pension plans. These shareholders have no access to dissenters’ rights, cannot sell their shares, nor even choose the managers who speak on behalf of the corporations in which the plan invests.⁸⁴ The majority’s abstract reference to “procedures of corporate democracy”⁸⁵ is self-serving, superficial and glib. It is utterly divorced from the context of being a minority shareholder and what that means practically speaking.

In contrast to the majority, the dissent consistently regards the corporation as distinct from its shareholders and is therefore more readily able to see the tremendous differences between a corporation and a human being. A particularly descriptive analysis is offered by Justice Stevens:

The fact that corporations are different from human beings might seem to need no elaboration, except that the

⁷⁹ See Tucker, *supra* note 75, at 533.

⁸⁰ *Citizens United*, 558 U.S. at 477 (Stevens, J., concurring in part and dissenting in part)..

⁸¹ *Id.* at 477-78 (Stevens, J., concurring in part and dissenting in part) (criticizing the majority’s reliance on these procedures and suggesting that shareholder options are in fact quite limited).

⁸² See *id.*

⁸³ Levinson, *supra* note 60, at 352, notes, for example, that many shareholders hold stock through intermediaries and have “little control over their shares.” Beyond this, even if a shareholder disagrees with the message, the damage is done before the shareholder can sell, and, in any event, the sale may result in tax penalties. *Id.*

⁸⁴ See Benjamin I. Sachs, *How Pensions Violate Free Speech*, N.Y. TIMES, July 12, 2012, http://www.nytimes.com/2012/07/13/opinion/under-citizens-united-public-employees-are-compelled-to-pay-for-corporate-political-speech.html?_r=2&nl=opinion&em. Professor Sachs states that this “consequence of *Citizens United* is perverse: requiring public employees to finance corporate electoral spending amounts to compelled political speech and association, something the First Amendment flatly forbids.” *Id.*

⁸⁵ *Citizens United*, 558 U.S. at 362 (quoting Bellotti, *supra* note 73, at 794).

majority opinion almost completely elides it...Unlike natural persons, corporations have “limited liability” for their owners and managers, “perpetual life,” separation of ownership and control, “and favorable treatment of the accumulation and distribution of assets... that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments.” Unlike voters in U.S. elections, corporations may be foreign controlled. Unlike other interest groups, business corporations have been “effectively delegated responsibility for ensuring society’s economic welfare”; they inescapably structure the life of every citizen. “[T]he resources in the treasury of a business corporation,” furthermore, “are not an indication of popular support for the corporation’s political ideas.” “They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.”⁸⁶

Likewise, in the words of Stevens J., “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires...[T]hey are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”⁸⁷ All this stands as an eloquent rebuttal to the analysis of the majority.

On a related front, and as William Patton and Randall Bartlett observed in a 1981 law review article, “corporations as such, do not speak or think or have ideas. Corporate actions are the *medium* of expression of those *natural* persons who control them.”⁸⁸ That is, corporate managers articulate their political views through the corporate vehicle that they control. On this basis, when the majority in *Citizens United* ignores the line between public and private by admitting corporations as fully unregulated citizens, it is actually conferring “a special state-created mechanism for speaking”⁸⁹ on those individuals behind the corporation. Therefore the problem is not merely that corporations do not speak. It is that, based on the majority’s analysis, some people get to speak twice—once as

⁸⁶ *Id.* at 465 (Stevens, J., concurring in part and dissenting in part) (internal citations omitted).

⁸⁷ *Id.* at 466.

⁸⁸ Patton & Bartlett, *supra* note 10, at 498 (emphasis in original).

⁸⁹ *Id.*

the individual speaking for himself and once as a corporate officer or director speaking for the corporation. As Charles Lindblom observes: “[t]he effect of granting the enterprise a citizen’s right...is to confer great special powers on groups of enterprise executives, who can make use of corporate assets and personnel in addition to exercising the rights and powers they enjoy as individual citizens.”⁹⁰

A related point is that when corporate electoral speech is curtailed, the marketplace of ideas is not actually deprived of content, contrary to the majority view. This is because, as Levinson notes, “each individual member of a corporation, whether that corporation is a Fortune 500 or a small closed corporation, is free to speak as much as she wants without the use of the corporate form. Electioneering communications by individuals are unlimited.”⁹¹ As the dissent in *Citizens United* concludes, the rules restricting corporate speech affect only the medium by which ideas are expressed. The rules do “not prevent anyone from speaking in his or her own voice.”⁹²

The majority’s drive to eliminate context, and its refusal to attach significance to obvious differences between citizen and corporation, lead to the creation of an impoverished, homogenous public sphere. The result is that financially powerful people can amplify their voices at the expense of the under-resourced whose voice may not be heard at all. As the dissent states:

[T]here are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations “unfai[r] influence” in the electoral process and distort public debate in ways that undermine rather than advance the interests of listeners. The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match.”⁹³

Far from enhancing the public sphere by ostensibly inviting in more voices, the majority is actually stamping out diversity by

⁹⁰ CHARLES E. LINDBLOM, *THE MARKET SYSTEM: WHAT IT IS, HOW IT WORKS, AND WHAT TO MAKE OF IT* 239 (2002).

⁹¹ Levinson, *supra* note 60, at 340 (footnotes omitted).

⁹² *Citizens United*, 558 U.S. at 466 (Stevens, J., concurring in part and dissenting in part).

⁹³ *Id.* at 469 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

privileging the words of the wealthy.⁹⁴ As a result, “democratic dialogue is degraded”⁹⁵ and democracy itself is damaged.

Clearly, the majority’s most egregious error in *Citizens United* was to refuse to distinguish between individual and corporate speech based on there being no essential distinction between citizens and corporations. But the strategy of refusing to make distinctions is repeated throughout the judgment and, in so doing, is highly biased in favor of abstraction and one that thematically rejects context and consequences. For example, in contrast to the fundamental principle of judicial restraint that consciously endeavors to find the narrowest basis for a decision⁹⁶ the majority in *Citizens United* looked for broad rules, repelling all and every alternative basis to decide the case. It therefore rejected an argument made in an *amicus* brief that would have reduced the reach of the *Bipartisan Campaign Reform Act of 2001* (“BCRA”) to the benefit of Citizens United. That is, the brief argued that the *BCRA* definition of public transmission—a transmission that “[c]an be received by 50,000 or more persons”—be construed as requiring a “plausible likelihood that the communication will be viewed by 50,000 or more potential voters.”⁹⁷ The latter, more reticent approach to triggering the Act’s application would have exempted Citizens United. But such a strategy was turned down because, according to the Court, “[i]n addition to the costs and burdens of litigation, this [approach] would require a calculation as to the number of people a particular communication is likely to reach, with an inaccurate estimate potentially subjecting the speaker to criminal sanctions.”⁹⁸

Next, the Court refused to decide the case based on the type of media, stating “[w]e must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.”⁹⁹ Third, the Court refused to make a distinction between for-profit and not-for-profit corporations with regard to political expenditures. That is, it could have concluded, on a *de minimus* basis, that Citizens United was essentially a not-for-profit corporation and therefore not caught by the *BCRA*. Indeed, most of Citizens United’s fund-

⁹⁴ Cf. Curtis, *supra* note 77, at 13 (discussing the ecology of freedom of speech and democracy in these terms).

⁹⁵ *Id.* at 19.

⁹⁶ See *Citizens United*, 559 U.S. at 398-99 (Stevens, J., concurring in part and dissenting in part).

⁹⁷ *Id.* at 323 (majority opinion) (internal quotation and citation omitted) (emphasis added).

⁹⁸ *Id.* at 324.

⁹⁹ *Id.* at 326.

ing came from its private donors who are presumably aligned with its positions only a small percentage of its funding came from for-profit corporations. In refusing to apply a *de minimus* standard to the corporation at bar, the Court stated: “[w]e decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject.”¹⁰⁰ In this way, the Court summarily dismissed significant distinctions between for-profit and non-profit corporations. The reality is that many non-profit corporations are established for the very purpose of aligning the interests of their private donors with positions on public issues¹⁰¹ whereas for-profit corporations are interested maximizing the investments of shareholders and returning profits in the form of increased value to shareholders.

The Court also had the opportunity to rely on Federal Election Commission regulations¹⁰² as they apply to requests for advisory opinions to manage a *de minimus* exception that would cover non-profits that receive a small percentage of their funding from for-profit organizations. Again the Court found that to act on a case by case basis was simply too complex and burdensome. In short, such a regulatory requirement amounted to a prior restraint on speech.¹⁰³ And in a catch-all rejection of context in favor of a broad, abstract rule, the Court determined that “[t]here are short timeframes in which speech can have influence” and thus, there is no time to litigate the particulars of each case.¹⁰⁴

Feminism(s)—with its focus on context—can easily see through all of this and delineate the serious problems inherent in the Court’s approach. As explained above, the majority’s strategy is to deny distinctions and to deny the possibility that distinctions could ever be constitutionally made. The majority guts the

¹⁰⁰ *Id.* at 329.

¹⁰¹ Levinson, *supra* note 60, at 353 (“[w]hen . . . non-profit corporations speak, the corporations’ electoral speech can be traced to the speech of the members of the corporation”).

¹⁰² 11 C.F.R. §112.4 (2012).

¹⁰³ See *Citizens United*, 558 U.S. at 335 (finding that the FEC would in effect be making such case by case determinations because most speakers would seek advisory opinions).

¹⁰⁴ *Id.* at 334.

legislation in question and transfers ownership of the public realm to private, monied, financial interests.

Indeed, granting unlimited free speech rights to all corporations regardless of their source of funding provides a second avenue for corporate interests to dominate the political discourse. As reporters Mike McIntire and Nicholas Confessore of the *New York Times* observed:

Two years after the Supreme Court's *Citizens United* decision opened the door for corporate spending on elections, relatively little money has flowed from company treasuries into "super PACs," which can accept unlimited contributions but must also disclose donors. Instead, there is growing evidence that large corporations are trying to influence campaigns by donating money to tax-exempt organizations that can spend millions of dollars without being subject to the disclosure requirements that apply to candidates, parties and PACs.¹⁰⁵

This lack of scrutiny creates a tremendous danger by allowing corporations to essentially have it both ways. It is having it both ways when corporations are accorded the power to give unlimited financial donations in a political context but are not simultaneously required to disclose their large, monied presence in the debate at issue. In arguing for disclosure of donors to tax exempt organizations, Alex Engler, of the Georgetown Public Policy Review, notes that Super-PACs and their sister tax-exempt organizations account for a large market share of political contributions, and their dual structure that offers donor anonymity is an "appealing choice for... corporate interests that want to avoid political fallout."¹⁰⁶

In short, *Citizens United* manifests an egregious decision inexorably propelled by an egregious judicial strategy. To conclude that corporations have the First Amendment rights of an individual citizen, the Court had to erase a host of distinctions that would point in the opposite direction. This erasure includes: the distinction between corporate aggregations of wealth from many people and the wealth of individuals (because the Court disregards the nature of the speaker altogether); the distinction between managers who make decisions to expend funds from the corporate treasury and corporation itself (because the corporation's right to speak is

¹⁰⁵ McIntire & Confessore, *supra* note 8.

¹⁰⁶ Alex Engler, *Sunshine for the Super PAC: The DISCLOSE Act Would Eliminate Anonymous Donors*, GEORGETOWN PUB. POL'Y REV. (2012), available at <http://gppreview.com/2012/04/05/sunshine-for-the-super-pac/>.

disconnected from those who control the content and dissemination of the message); the distinction between media corporations and other corporations (because the Court refused to recognize the historic role of the media which stand in a special relationship to the First Amendment); and the distinction between banning speech and merely regulating it.¹⁰⁷ The stripped down, abstract universe that the majority generates inexorably produces a privatized public sphere, that is a sphere that the Court places in the hands of private economic interests. Those whose voices have been historically marginalized—including women’s voices—will be excluded from the political and policy making arena more than ever before.

IV. FEMINIST RESPONSES TO CITIZENS

Criticism of the ruling in *Citizens United* was immediate and quickly abundant. Two commentators in particular, Atiba Ellis and Robin West, illustrate how the tools of feminism (which *inter alia* illuminate the underlying domination that abstraction serves to perpetuate) are central to understanding the impact of *Citizens United* and how it can be redialed.

Ellis cites two consequences of the *Citizens United* decision to clothe corporations with political personhood. First, as already noted in the previous section, the ruling gives corporations the opportunity to exercise unprecedented, unlimited influence and control over the country’s political discourse.¹⁰⁸ Second, the corporate dominance created by *Citizens United* will affirm the relative power of historically privileged white males over other groups.¹⁰⁹ Ellis concludes that “[t]his new era of corporate rights dominating the rights of natural persons may lead to a new period of tiered legal personhood in our democracy, an outcome that is inconsistent with the vision of rights under our modern Constitution.”¹¹⁰ In addition to this, she notes that *Citizens United* requires us to consider the interrelationship of ideas that deserve further exposition, including the interrelationship between the mobilization of capital and the protection of status.¹¹¹ When viewed through the lens of the public/

¹⁰⁷ As the dissent notes, “the majority invokes the specter of a ‘ban’ on nearly every page of its opinion. This characterization is highly misleading, and needs to be corrected.” *Citizens United*, 558 U.S. at 416 (Stevens, J., concurring in part and dissenting in part) (internal citation omitted).

¹⁰⁸ See Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 745-46 (2011).

¹⁰⁹ See *id.* at 747-49.

¹¹⁰ *Id.* at 726.

¹¹¹ *Id.* at 745 n.132.

private dichotomy, Ellis's criticisms of *Citizens United* very much resonate. They illustrate that the public/private divide has been breached—though not in the way that feminists like MacKinnon, discussed earlier, had argued for. Instead of making the private the public to reduce the oppression of women, *Citizens United* makes the public into the private so as to serve corporate purposes. It pushes a traditionally public arena, the electoral college, into the private realm. *Citizens United* portends that the oppression that characterized women's experiences in the private sphere can now be more readily imposed in the public sphere by those who can economically dominate it. The private is now the public.

Similarly and in light of *Citizens United*, Robin West calls for a revitalization of the rights critique that characterized critical legal theory,¹¹² including feminist theory, until the early 1990s.¹¹³ Like Ellis, West sees the decision in *Citizens United* as an example of subordination of the powerless by the powerful.¹¹⁴ When the U.S. Supreme Court granted electioneering communication rights to corporations, this did not make corporations merely equal to human speakers. Rather, the newly vested corporate right to political speech exists in relation of the speech rights of others whose ability to speak is vastly underfunded and who have diminished or no political access. Though there is no reference to the public/private distinction in her article, West offers an approach that is implicitly consistent with the public private analysis offered here. In short, when the public sphere is dominated by powerful private interests, the distinction between public and private dissolves. This leaves women and other disadvantaged groups highly vulnerable.

A third theorist, Michael Siebecker, proposes to respond to *Citizens United* with a new discourse theory of the firm.¹¹⁵ Siebecker recognizes the increasing corporate dominance that is likely to result from *Citizens United*,¹¹⁶ predicting that “the ability to direct

¹¹² Critical legal theories, described by Ellis, see the law as the outgrowth of power relationships in society, and a tool for those with power to maintain it at the expense of those who are powerless. Ellis, *supra* note 108, at 722 n.23.

¹¹³ Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713 (2011); accord Ellis, *supra* note 108, at 722 n.23 (“the jurisprudential ramifications of *Citizens United* should be viewed through the lenses of Critical Legal Studies (CLS) and, more specifically, Critical Race Theory (CRT) and Feminist Legal Theory”).

¹¹⁴ West, *supra* note 113, at 723 (“[i]t is hard to doubt that . . . extending speech rights to corporations to influence political elections subordinates individual to corporate interests”).

¹¹⁵ Michael R. Siebecker, *A New Discourse Theory of the Firm After Citizens United*, 79 GEO. WASH. L. REV. 161 (2010).

¹¹⁶ *Id.* at 169-179. Siebecker is also responding to a new SEC Rule 14a-11

corporate decisions represents the ability to control political life.”¹¹⁷ With regard to the relative effectiveness of the public and private spheres of influence, Siebecker argues that “the private boardroom rather than the public forum represents the relevant battlefield for determining the most important aspects of our lives.”¹¹⁸

The discourse theory attempts to move the principles of public participation to the corporation to address public issues. The theory focuses on the effectiveness of organizational structures that affect society, which requires communicative actions with full, fair and free participation through procedures that make the outcomes legitimate.¹¹⁹ According to Siebecker, discourse theory protects individual rights by encouraging participation and providing a sense of fairness, for example, by giving shareholders the right to include their nominees for directors in corporate proxy materials.¹²⁰ Increased private power requires increased private democracy.

Siebecker believes that applying a discourse theory to public decision making will justify limitations on the effects of *Citizens*.¹²¹ But in doing so, he brings into sharp focus the very problem that the case has created. Discourse theory falls short because it requires those opposed to *Citizens United* to cede so much ground, including the ongoing privatization of the public sphere. For this reason, discourse theory cannot be the only front upon which to resist *Citizens*. The power structure it reflects and advances must also be attacked. If not, discourse theory becomes an apology for the perpetuation and expansion of the power of a white male dominated corporate hierarchy.

It is well known that the power structure of corporate America is not female friendly by any means. For example, a 2008 study sponsored by Ernst & Young¹²² found that:

In 2008, women held 15.7 percent of corporate officer positions at *Fortune* 500 companies; in 2007, this number

that gives shareholders access for corporate proxy for nominating directors, as required by Dodd-Frank. *Id.* at 210. While this increased shareholder participation is important to the discourse theory, it is outside the scope of this essay.

¹¹⁷ *Id.* at 165.

¹¹⁸ *Id.* at 169.

¹¹⁹ *Id.* at 199.

¹²⁰ *Id.* at 204, 228-29. In July, 2011 the D.C. Circuit vacated a rule that would have made such proxy access for qualifying shareholders mandatory. See *Business Roundtable v. SEC*, 647 F.3d 1144, 1156 (D.C. Cir. 2011).

¹²¹ Siebecker, *supra* note 115, at 197-98.

¹²² 2008 *Catalyst Census of Women Corporate Officers and Top Earners of the Fortune 500*, CATALYST (Dec. 2008), available at <http://www.catalyst.org/>

was 15.4 percent. Women held 6.2 percent of top earner positions; in 2007, this number was 6.7 percent. The number of companies with no women corporate officers increased from 74 in 2007 to 75 in 2008. The number of companies with three or more women corporate officers also increased from 203 in 2007 to 206 in 2008.¹²³

Another study of public corporations in Georgia found that fewer than 10% of seats on boards are held by women¹²⁴ and fewer than 10% of executive officers are women.¹²⁵ The situation for women of color is even more egregious. One study in 2011 showed that approximately 71% of Fortune 500 companies had no women of color serving on their boards, and that overall, only 3% of directors of the remaining 30% were women of color.¹²⁶

The very large absence “of women’s participation at senior levels of corporate decision making,” observes Janis Sarra, “means an important set of governance perspectives is lost.”¹²⁷ It also means that women’s voices will continue to be lost as corporations decide how to deploy their recently acquired “citizenship” power. Women’s issues in the public sector are likely to get even less attention. To the extent that these issues get attention, the corporate view will not necessarily reflect the perspective of women affected by the policy.

A feminist response to *Citizens United* is now even more urgent in light of the recent ruling in *American Tradition Partnership, Inc., v. Bullock*.¹²⁸ In this 2012 decision, the U.S. Supreme Court refused an opportunity to reconsider *Citizens United*, and instead, expanded its reach into the states. The majority, in a *per curiam* opinion, again refused to consider the particular context of the case, rejecting out of hand Montana’s argument that given the

publication/283/2008-catalyst-census-of-women-corporate-officers-and-top-earners-of-the-fortune-500.

¹²³ *Id.*

¹²⁴ *More Than Half-A Milestone: 2011 Board of Directors Annual Study*, BOARD OF DIRECTORS NETWORK (Oct. 14, 2011), http://www.boarddirectorsnetwork.org/docs/2011_study.pdf.

¹²⁵ *Id.*

¹²⁶ *Women on Boards*, CATALYST (Aug. 2012), <http://www.catalyst.org/publication/433/>. Catalyst is a non-profit organization that supports and promotes opportunities for women in business (www.catalyst.org). See generally Seletha R. Butler, *All on Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA. L. & BUS. REV. 61 (2012) (arguing the necessity of diversity in leadership of U.S. companies and suggesting solutions for building diverse boards of directors).

¹²⁷ Sarra, *supra* note 11, at 485.

¹²⁸ 132 S. Ct. 2490 (2012) (*per curiam*).

state’s unique history in relation to political corruption, the State had a compelling interest in limiting independent expenditures by corporations.¹²⁹

V. BRIEF CONCLUSIONS

Citizens United offers a high water mark in privatizing the public sphere and refusing to consider its tangible consequences. Obsessed with the analogy of citizens and corporations, the Supreme Court refused to see obvious distinctions and assess context. In this way, the Court extended private market power into the public sphere, giving corporate interests the opportunity to financially dominate America’s political process, both federally and at the state level.

Feminism(s) reply to the majority decision is simple: a just decision is stifled by a series of abstractions. Context must be considered at the front end of the analytic exercise and this would require the majority to acknowledge facts that distinguish corporations from other speakers; non-profit from for-profit corporations; associations of individuals and entities that are separate from the individuals who own them. Context must also be considered at the back end so that what emerges is a sensible appreciation of what privatizing the public sector would actually mean. Unwilling to explore this terrain, the majority refused to acknowledge these obvious conclusions: privatization diminishes the agency of human citizens whose voices in the public debate are not amplified by huge aggregations of wealth, and privatization further diminishes the power of under represented groups who do not participate to the same extent as white males in the corporate board room and whose voices are now even more muted. Privatization kills the public sphere.

One historic challenge for feminists has been to break down the barrier between public and private, in order to remove the shield of privacy from the systemic domination of women. In the wake of *Citizens United*, feminists face a new challenge: to reclaim the public from the private corporate interests and make it distinct again.

Until now, none of the commentators on *Citizens United v. FEC* have viewed the case in the context of the public/private dichotomy that is at the core of feminist jurisprudence. It is our hope that this essay can begin to fill that void and that, beyond this, feminism(s) in its various fora and manifesting all its perspectival

¹²⁹ *Id.* at 2491 (Breyer, J., dissenting).

diversity will demand that the public sphere be returned to the living and breathing citizens of America. We join Mae Quinn in imagining “a feminist future [in which our work is] both more practical and more radical—in a way that abdicates absolute definitions, seeks to bridge divides, and provides some semblance of substantive justice for individual people in their individual lives.”¹³⁰ Feminisms(s) have the insights and methodologies to speak out against privatization and the corporate domination of public policy debates. This is also part of the way forward.

¹³⁰ Mae C. Quinn, *Feminist Legal Realism*, 35 HARV. J.L. & GENDER 1, 55 (2012). On a related front, Barbara Ann White has advocated the application of feminist analysis to problems that were not considered traditional feminist concerns. She wrote:

It is evident then that feminist analysis can address issues far broader than solely women's concerns. It is also clear that feminist analysis is not limited to gender concerns, group disenfranchisement, or analyses of patriarchal hierarchy and dominance... [An analysis of the works of feminist scholars addressing business law issues] [s]hows that the principles of feminist reasoning—recognizing the excluded voice, the perspective of the other, dichotomization of social order into different spheres—can be used to uncover core problems in business law that have nothing to do with traditional gender issues.

White, *supra* note 47, at 96-97.