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Transnational Market Governance and Economic Citizenship: New Frontiers for Feminist Legal Theory

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TRANSNATIONAL MARKET GOVERNANCE AND ECONOMIC CITIZENSHIP: NEW FRONTIERS FOR FEMINIST LEGAL THEORY

Mary Condon & Lisa Philipps*

INTRODUCTION

Many states have embraced, in various intensities, the dogma of neoliberalism, using it as the touchstone for policy prescriptions ranging from the sale of state assets, the removal or reduction of welfare benefits, or even more radical structural adjustment programs. In our earlier work, we have charted the gendered implications of such doctrines for domestic policymaking and law in Canada, and other scholars have canvassed these themes in relation to Canada and elsewhere. *

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1. Political economist Isabella Bakker defines the major premises of neoliberalism as follows: “First, that the forms of institutions such as the state and market should reflect the motivation of individual self-interest. Second, that states should provide only a minimum of public goods, along the lines of the 19th-century ‘nightwatchman’ model . . . . And third, that the most efficient allocation of resources and maximization of utility occurs through markets.” Isabella Bakker, Neoliberal Governance and the New Gender Order, in 1 WORKING PAPERS 49-59 (1999). See also Stephen Gill, Globalization, Market Civilization, and Disciplinary Neoliberalism, 3 MILLENIUM 24 (1995); NEOLIBERALISM: A CRITICAL READER (Alfredo Saad-Filho & Deborah Johnston eds., 2005).


3. See JANINE BRODIE, POLITICS ON THE MARGINS: RESTRUCTURING AND
The assumption underlying our previous work was that neoliberal philosophy delegitimizes the project of “social citizenship,” in which the nation-state is assigned a central role in providing baseline economic security to all members of society. Neoliberalism instead privileges markets as the superior distributive mechanism for goods and services and it rests on a heightened responsibility imposed on individuals to manage their own welfare and well-being. We argued that all of this was very problematic from a gender point of view, creating increased economic disadvantage for many women and rendering much social policy immune to democratic accountability because it was being accomplished increasingly by way of market mechanisms. While feminist analysts have engaged vigorously with this development by uncovering the discriminatory effects of neoliberal policies in various state domestic contexts, less work has been done on the gendered implications of neoliberalism in the context of transnational economic governance, much of which takes place outside formal state institutions. This paper seeks to make a contribution to that task.

Specifically, we consider the possibilities for progressive resistance to the mantras of neoliberalism with its attendant policy implications in the international realm. In particular, we assess the capabilities of two interrelated frameworks, that of feminist legal theory on the one hand, and economic citizenship on the other, in providing the analytical tools for a response to neoliberalism as the dominant discourse shaping the governance of economies. This endeavor obviously requires some staking out of the intellectual ground we wish to till. Accordingly, we

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4. The evolution of social citizenship and critiques of this concept are discussed in more detail below, in the text accompanying notes 30-47.

will first consider the significant strengths and some limitations of feminist legal theory as a lens for studying markets and economies generally, so as to assess its potential for providing insights into the realm of transnational economic governance. We will then move to consider the evolving discourse of "economic citizenship" and citizenship more generally as a further pole of analysis, while interrogating the extent to which the discourse of economic citizenship might itself be gendered. Finally we make some tentative suggestions about how feminist legal theorists might begin to apply these insights by examining two disparate sites of transnational economic governance, involving international standard setting in the areas of mutual fund regulation and fiscal policy reform. Ultimately the goal is to build the capacities of feminist legal theory as a framework for critical analysis of economic and market processes.

I. A FEMINIST LEGAL THEORY TOOLKIT FOR THE STUDY OF ECONOMIC GOVERNANCE

Feminist legal theory is less thoroughly developed in relation to market processes and forms of governance than in relation to other areas such as reproductive rights, family relations, and constitutional equality rights. A notable exception to the relatively limited attention to market processes, of course, is the sophisticated feminist literature analyzing labor markets and their regulation. However, there are at least three enduring insights of feminist legal theory that could be used to lay the groundwork for a broader analysis of the international economic realm.

6. A recent effort to close this gap includes Fineman, supra note 3.
The first is its nuanced analysis of how the domain of the "private" is constructed through law. Feminist legal theory has been invaluable in exposing the incoherence, fungibility, and political effects of the attempt to draw a line between the "public" and the "private" realms and to impose more pervasive legal governance only on the "public" side. A number of feminist legal theorists have pointed out, in the context of the body, sexuality, and the family, that in mainstream legal analysis these boundaries are constantly shifting and porous. This is no less true, we suggest, for the legal construction of markets. Feminist critiques have pointed out that the constitutive role of law in markets has thus far not been on terms particularly friendly to women. In particular, they have shown how the neoliberal rhetorical claim about the need to free markets from regulatory intervention has been at best partial and at worst misleading. In fact, privatization policies in various jurisdictions, which shift the delivery of various forms of "social goods" to the market, are implemented and maintained by legal mechanisms. Just as in the previous transformation to industrial capitalism, states have actively engineered the global expansion and liberalization of markets. Much of this engineering takes distinctly legal forms, including international trade and investment treaties, domestic legislative and constitutional amendments, and executive orders and litigation, often designed to lock in neoliberal policy choices. This opens up the issue of the extent to which markets and "private" actors in them can be


9. See, e.g., Boyd, supra note 8; Roxanne Mykitiuk, Public Bodies, Private Parts: Genetics in a Post-Keynesian Era, in PRIVATIZATION, LAW AND THE CHALLENGE TO FEMINISM, supra note 2.


11. See PRIVATIZATION, LAW AND THE CHALLENGE TO FEMINISM, supra note 2.


rendered susceptible to governance through norms such as citizenship rights and practices that are associated with the public realm. 14

A predominant theme of this paper is the need to engage more thoroughly with the implications of the constitutive role of law in specific markets. In particular, legal regulation of markets can be of varying intensity, ranging from substantive command and control rules to more "decentered" forms of regulation such as codes of conduct, norms of self-governance, or requirements for transparency. 15 Feminist legal theorists have been at the forefront of the effort to tease out the implications of various forms and styles of legal regulation for women. 16 This enterprise is particularly important in the realm of transnational economic law, which is already associated with the "soft" end of the legal continuum. 17

The second enduring contribution is the feminist critique of "rational apathy" as a way of behaving in markets, to which feminist legal theorists have contributed in important ways. "Economic man" is a rational utility-maximizer who, in connection with economic and financial matters, has a narrow, consistent, and predictable range of interests. 18 In this world view, it is rational to be apathetic about how corporate or investment entities are run, because in the first place, the individual does not have a big enough stake for active


involvement in governance to make any difference. Relatedly, it is more rational to free ride on the knowledge and expertise of institutional investors who have greater capacity to monitor corporate entities. This assessment is subject to critique from a number of perspectives. One of these is the critique about "irrational apathy" from behavioral economics, most notably in the specific case of pension decision-making. This is the discovery that individual pension investors are psychologically disposed to stick with their original choices from a menu of investment options, when it might be more financially advantageous to revisit those decisions. Another is the feminist legal critique suggesting that active participation is a value to be supported for its own sake, as is the importance of making ethical judgments in a range of situations.

A third important recent contribution of feminist theory has been the recognition of the development of a new gender order based on material position. Thus, women as a group are not similarly situated with respect to the impact on them of neoliberal economic developments. This is true both among women in particular industrialized countries and between richer and poorer countries. There is no doubt that feminist legal


22. See Judy Fudge & Brenda Cossman, Introduction to PRIVATIZATION, LAW AND THE CHALLENGE TO FEMINISM, supra note 2, at 24-30.


theory has been part of bringing down legal barriers to the participation of women in various types of markets, notably labor markets, but we need to remain acutely aware of the unequal distribution of this heightened access to material resources, especially when we look across various jurisdictions.\textsuperscript{25}

This last point leads to a cautionary note about the limits of an analysis framed solely in Western-style feminist theorizing, and undergirds our proposal for a close look at new understandings of citizenship. Specifically, we see two major challenges in applying feminist legal theory to issues of global economic governance. The first is its historical tendency to focus on the nation-state as the source of regulation and the locus of claims-making about social citizenship rights. This approach fails to recognize the important components of economic policymaking, both domestic and international, that are no longer (solely) in the hands of state processes. We need to pay more attention to the detail of how international markets or economic processes are constructed outside of state forms of policymaking.\textsuperscript{26} This will help us to understand the implications for women of the formation of international markets, and to activate possibilities for resistance where unequal results are produced. In particular, we need to understand the variety of regulatory mechanisms used in the construction of these markets and processes, because they move far beyond traditional processes of legislation-making or litigation over contested rights-claims. To foreshadow a point we will make in more detail later in this paper, governance through norms of transparency is a significant feature of how international markets and actors operate. It is critical that feminists interrogate the meaning and enforcement of transparency norms being developed by market and other non-state actors.\textsuperscript{27}


A second and related challenge in developing a feminist approach to transnational economic governance is to avoid intellectual and political imperialism. The "gender and development" movement has been criticized for its perceived advocacy of Western-style welfare state safety nets and greater incorporation into capitalist markets.28 Both of these moves, it is argued, purport to assert cultural dominance over other forms of community and social relations. Likewise, there is a danger that feminist analyses of law and governance will assume the superiority of Western gender norms over those in "other" cultures and societies, where social relations are too often presumed to be both static and more oppressive to women. As Deckha warns, "this investment in the colonialist construct of gender provides the rationale for exposing non-Western cultures and peoples to the social engineering efforts of Western political norms and institutions either through the partial absorption of Western gender norms or, if necessary, by cultural extinction."29 In light of this critique, feminist legal theorists who hope to contribute to progressive projects in the realm of global economic governance must be cognizant of the experiences and political ideals of women in different countries and regions. Specifically, it is important to engage in consciousness-raising about how the market engagements of Western women and men impact women in other jurisdictions and economic locations.

The particular strengths of feminist legal theory as an intellectual resource for developing alternatives to neoliberal models of economic governance lie, then, in at least three areas: understanding the legal construction of the "private," critiquing the precepts of "economic man" and "rational apathy," and analyzing the emergence of a new gender order characterized by greater inequalities among women both globally and locally. These strengths are qualified, we have argued, by a tendency within feminist legal theory to focus on traditional state-centered forms of regulation and by an ongoing struggle to avoid culturally imperialistic theorizing. We now turn to consider how ideas of economic citizenship may contribute to this discussion.

II. ECONOMIC CITIZENSHIP

Recent theoretical advances within the field of citizenship studies offer another set of insights about the governance of an increasingly market-oriented social order. In particular, this section assesses the potential of an emergent (and contested) discourse of economic citizenship to enhance accountability and social justice in the economic realm. Following an initial discussion of citizenship theory and its critics, we unpack the current discourse of economic citizenship into four key elements, examining each through the lens of feminist legal theory and gender orders.

A. Evolving Conceptions of Citizenship

Feminist theorists have often been skeptical about citizenship claims as a means of enhancing women's material conditions of life, given the gendered character of the state-subject relationship. In addition, post-colonial and critical race scholars have called attention to the normative presuppositions of Western concepts of citizenship and the denial of citizenship privileges to racialized, colonized, and foreign others. Despite the thoroughgoing critiques of citizenship and its exclusionary tendencies historically, it has enjoyed renewed interest since the mid-1990s as a powerful expression of claims for political recognition and inclusion by a variety of groups. In navigating this literature, it is important to keep in mind the distinction between citizenship as status and citizenship as practice. For lawyers, what counts is often the former, and law is a device for policing the boundaries of citizenship status. Citizens have rights, for example, to enter and leave a country as they please, to obtain a passport, and to vote in elections. On the other hand, the idea of citizenship as practice, or as a set of practices, is that a particular normative content can or should be ascribed to the indicia of citizenship and claims made on that basis. Thus for


T.H. Marshall, for example, "social citizenship" implied a right to a minimum level of economic security sufficient to permit meaningful participation in the life of a society. As Turner puts it:

[I]t seems to be important to emphasize the idea of practices in order to avoid a state and juridical definition of citizenship as merely a collection of rights and obligations. The word "practices" should help us to understand the dynamic social construction of citizenship which changes historically as a consequence of political struggles.

Despite the revitalization of citizenship studies over the past decade, it has continued to avoid, for the most part, the realm of markets and the economy. Since Marshall's groundbreaking work, it has addressed economic affairs primarily through the concept of social citizenship, the achievement of which has been understood as a function of state social policies in areas such as health, housing, welfare, and education. Yet feminist and other critical discussions of social citizenship have revealed the ways in which existing social policies fall short of Marshall's inclusive ideal. It is important here to avoid any false dichotomization of "social" versus "economic" regulation; social policy is clearly economic in that it addresses the distribution of resources and the adjustment of market outcomes to accommodate norms of equality and democracy. Meanwhile, economic policy has social effects. Consider, for example, the distributive consequences of tax concessions for capital gains, which are presented by policy makers as economic incentives for investment but which also reduce the share of the tax burden borne by the wealthy.

Unfortunately, claims for better social policy rarely directly address the operation of markets or the governance of market relations. This cabining of social policy is of course a major accomplishment of the ideological construction of the public/private divide.

Recent literature has begun, albeit barely, to ask how concepts of citizenship might apply to the domain of markets per se. This nascent theoretical development is responding to the declining "purchase" of conventional citizenship rights in a neoliberal context. As explained by Hindess:

[Political rights (such as they are) may remain but their scope is restricted as market regulation takes over from direct regulation by state agencies and the judgement of the market is brought to bear on the conduct of states, while the social rights of citizenship (where they exist) are pared back as provision through the market replaces provision directly or indirectly through the state.][35]

Accordingly, citizenship claims will rest on shrinking ground unless they can be extended to those areas of social life understood to be governed by market forces.

New attempts are thus being made to re-imagine the nature of citizenship in this changing political environment. Far from offering a coherent framework, the literature spans a wide array of perspectives that are more or less celebratory or critical of the neoliberal turn. Catchphrases such as "neoliberal citizenship," "market citizenship," "economic citizenship," "industrial citizenship," "enterprise citizenship," "corporate citizenship," "business citizenship," and "citizenship at work" sit in tension with each other, reflecting disparate visions of the social order.][36]

The term "economic citizenship discourse" is used here to capture this emerging field as a whole. This paper does not aim to propose a single definition or ideal version of economic citizenship, but rather to analyze how different elements of this discourse are at play in, or provide perspective on, the governance of economic affairs.

Developing the concept of citizenship to encompass markets poses some extreme challenges. Such an agenda may be seen to offend the basic liberal premise that politics should intrude as little as possible on economic choices and freedoms.][37]

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37. See SAMUEL BOWLES & HERBERT GINTIS, DEMOCRACY AND CAPITALISM (1986); Allan Hutchinson, Mice under a Chair: Democracy, Courts
If the objective is to bring greater accountability and social justice to the economic domain, there must be a recognition that markets and market institutions are subject to public norms of democracy and equality. As noted earlier, this is one place where feminist legal theory may provide a useful corrective through its insights about the contingent, ideological, and gendered nature of public/private distinctions.

Even if markets can be reconstructed as part of the public realm, though, there is a further need to redefine the role of the state as the locus of claims-making, a problem that citizenship theory shares with feminist legal theory. One of the ideological claims of neoliberalism is to diminish or at least radically alter the state's power to regulate markets. Within citizenship studies, some have argued that enforcement of citizenship rights must consequently evolve upward to the supra-national level, to new public or private institutions of governance. Others have sought to relocate state-like responsibilities within enlightened transnational corporations. Still others contest the alleged demise of the nation-state, arguing for the recognition that global neoliberalism is instantiated in state policy-making and therefore citizens should work through local governments to hold global market actors more accountable.

In addition to reconceptualizing the role of the state, a second challenge is to redefine the citizen as a creature of markets. Significant critical work has been done to analyze the realities of differential economic citizenship for individuals in varied social locations. This literature argues that discourses of market freedom and market discipline are reshaping the gender,
class, and racial orders of citizenship, both within nation-states and on an international scale. Alternatively, the discourse of economic citizenship is sometimes invoked to celebrate the power of individuals to harness and shape the market through their own choices, whether as entrepreneurs, consumers, or investors. The collective rights and power of labor are often strikingly absent from such pro-market versions of economic citizenship. Imagining the economic citizen also involves looking beyond individuals to consider whether the corporate actors that now dominate markets globally are to carry any of the rights or responsibilities of citizenship. Skeptics have raised doubts as to whether corporations as currently structured and governed are likely to assume such responsibilities voluntarily, and whether giving citizenship rights to corporate actors will correspondingly diminish the rights of other citizens.

A third fundamental question is what role law plays in framing or constituting different aspects of economic citizenship. As noted earlier, feminist legal theorists have traced the central role of law, in its various forms, in effecting the liberalization of markets and privatization of welfare responsibilities. It remains important, however, to examine the type and intensity of legal intervention that is chosen in particular contexts. Forms of intervention can be ranged along a continuum from more facilitative (such as providing tax incentives or requiring disclosure of information) to more coercive measures (such as imposing monetary or penal sanctions for failure to comply). For example, the case studies discussed later in this paper.


46. See Sally Wheeler, Inclusive Communities and Dialogical Stakeholders: A Methodology for an Authentic Corporate Citizen, 9 AUSTRALIAN J. CORP. L. (1998); Harry Arthurs, Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation, in LABOUR LAW IN AN ERA OF GLOBALIZATION (Joanne Conaghan et al. eds., 2002).
describe a noticeable international trend toward transparency-based norms in the areas of both fiscal policy and investment fund governance. While such rules may be presented as a means of improving accountability generally, they tend to focus on the transparency concerns of investors or credit rating agencies, not those of less powerful constituencies. Moreover, transparency rules reflect a choice not to impose more direct commands or limits on acceptable economic behavior. In addition, citizenship theory, like feminist legal theory, must include within its understanding of "law" the many informal, non-state, or supra-state governance mechanisms that are gaining importance in a globally integrated economy. These include everything from individual corporate codes of conduct to the articulation of "best practices" by international agencies and industry associations.

These questions about the new objects, subjects, and mechanisms of economic citizenship are pervasive throughout the literature. We now turn to the additional, daunting task of defining the substantive content of economic citizenship and whether this could be envisioned in a way that advances gender equality objectives.

B. Connecting Economic Citizenship and Feminist Legal Theory: Four Dimensions

There is not yet a fully articulated debate about the appropriate content of economic citizenship, either as to its normative aspirations or any associated legal rights and obligations. Instead, widely differing versions of economic citizenship co-exist within the discourse but tend not to engage with one another, and in many cases their substantive content remains implicit. For analytical purposes, it is helpful to identify four substantive dimensions within the current discourse, dimensions which admittedly overlap and interact with each other: (1) economic liberty, interpreted as the right to access markets; (2) economic security; (3) responsibilities of economic citizenship; and (4) participation in economic decision-making. Each of these elements is examined critically here through the lens of feminist legal theory.

1. Economic Liberty: Access to Markets

A predominant version of economic citizenship focuses on enhancing access to markets for labor, trade, and capital. A focal point of feminist citizenship theory has been to expose the gendered, racialized, and heavily qualified implementation of the right to enter waged labor markets. Kessler-Harris, for example, argues that the right to access paid work was only ever taken seriously for men in the U.S., and was always qualified for women by the importance placed upon their familial responsibilities in a range of labor laws and other public policies. One may also observe comparative differences across jurisdictions in terms of state support for women's access to labor markets. Two-tiered labor markets in turn generated two-tiered forms of social citizenship, because the best forms of social security were available only to those with good full-time jobs. Kessler-Harris observes that this not only created a deeply class-divided and racially-divided system of social citizenship depending on who enjoyed well-paid employment, but also had the effect of dividing women against each other because they obtained different citizenship rights depending on how they interacted with the labor market. This point has particular salience for developing a theory of economic citizenship that addresses gender, as it points to the vast differences among women in terms of their engagement with, and privilege in, a variety of markets. In fact, class polarization among women may be increasing as a few attain the highest tiers of the employment market, while many more have increasingly precarious jobs in the "flexible" and internationalized labor markets promoted by neoliberal policies.

As in many other strands of feminist theory, those concerned to enhance women's citizenship rights have often advocated measures to improve women's access to waged work. This enthusiasm for labor market access has been increasingly tempered, however, by a recognition of the oppressive work

49. See generally Hobson, supra note 24; Lewis, supra note 25.
conditions faced by many lower-income and racialized women, the false equality of paid work in the face of women’s continuing responsibility for the bulk of social reproductive labor, and the need to recognize unpaid caregiving as valuable form of participation in society and the economy. Thus, feminist scholars have criticized a neoliberal trend toward associating citizenship rights only with the control of market income, denying both social supports and political voice to those deemed overly dependent.

Feminist legal theory can contribute to these debates by analyzing in concrete, specific terms how law constructs different markets and gendered hierarchies of economic citizenship within them. A good example is Fudge’s work on recent reforms to employment standards laws, particularly the gendered implications of relaxing maximum work hour restrictions, in a context of increasing privatization of caregiving responsibilities within families. Legal feminists also need to scrutinize the various legislative reforms coming forward under the banner of work/family balance and valuing women’s unpaid labor. While feminist demands for action on unpaid caregiving have helped to stimulate these types of policy changes, when closely examined they tend to fall short of addressing gender equality concerns and indeed run the risk of undercutting women’s access to means of financial independence. Thus, Canada has introduced income-tax credits for caregivers that are available only as a reduction in tax liability for a household breadwinner, so they cannot be accessed directly by an unpaid caregiver or by low-income households. Similarly, Fudge has argued that

53. See generally Ruth Lister, Women, Economic Dependency and Citizenship, 10 J. SOC. POL. 445 (1990); Carole Pateman, Contributing to Democracy, 4 REV. CONST. STUD. 191 (1998); Philipps, supra note 2, at 60.
57. See generally Lisa Philipps, Taxing the Market Citizen: Fiscal Policy and
exempting small employers from new family leave provisions leaves out the very workers who most need help to bargain for such flexibility.\textsuperscript{58} And the shift from welfare to 'workfare' has made clear that unpaid caregiving is not valued for the lowest income households but rather is discouraged in favor of highly exploitive forms of market participation.\textsuperscript{59} A major challenge lies ahead to gender the analysis of a full range of economic laws. For example, recent work on the legal framework for corporate decision-making needs also to be further explored from a gender perspective.\textsuperscript{60}

Beyond labor market access is the question of liberalized capital, consumer, and credit markets and how these relate to the nature of citizenship. Allowing private actors to trade and invest more freely across borders has been advocated in terms of efficiency, but also sometimes in terms of promoting equal economic citizenship.\textsuperscript{61} Others take issue with this version of formal equality, arguing that international trade and investment agreements, and the legal measures needed to implement and enforce them locally, have either formally or informally constitutionalized a model of economic citizenship that privileges the property rights of investors over the democratic choices of local states and populations.\textsuperscript{62} These developments are intensified by the drive, promoted by entities such as the International Organization of Securities Commissions (IOSCO), to harmonize international investment standards. This issue is taken up in more detail in one of the case studies to follow.

The principle of open markets has also been criticized on the basis that it applies unequally to rich and poor nations.

\textit{Inequality in an Age of Privatization}, 63 L. & CONTEMP. PROB. 111 (2000); Philipps, \textit{supra} note 2.

58. Fudge, \textit{supra} note 54.


60. \textit{See} e.g., Bakan, \textit{supra} note 38; Mary Condon, \textit{Limited by Law? Gender, Corporate Law and the Family Firm, in Law as a Gendering Practice} (Dorothy Chunn & Dany Lacombe eds., 2000).


Hindess argues that Western citizenship norms have been foisted upon developing countries as a condition of accessing international markets for goods, services, capital, and credit, as well as international financial aid. Whereas previously developing countries were disciplined by the denial of citizenship rights, he asserts, now they are disciplined by development regimes that attempt to promote citizenship as a set of good governance practices that will create political stability and secure (or manufacture) consent to market reforms. A concrete example of this disciplining effect is explored in the second case study below on the promulgation of fiscal transparency codes by institutions like the International Monetary Fund (IMF), among others.

2. Economic Security

The notion of access to minimum levels of economic security so as to ensure participation in public life is, as was mentioned earlier, closely associated with Marshall, and expressed by him as the post-WWII idea of “social citizenship.” On this view, “the state should provide the social and educational resources for the making of citizens.” Marshall’s idea of social citizenship has been critiqued from a number of perspectives, including its neglect of gender as well as “the role of struggle and social movements in the development of rights.” Revisionist historians might also argue that Marshall’s ideal was not represented in the reality of how welfare states operated, especially in the North American context.

A central issue for this paper is Marshall’s view of the state as the primary guarantor of social rights. In an era of state retrenchment and restructuring, this role has been considerably eroded, at least in relation to individuals who rely on public services, though arguably states have taken on a new role in

63. Hindess, supra note 35.
64. Id.
66. Id. at 6.
68. See generally Brenda Cossman, Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project, in Privatization, Law,
guaranteeing economic security to corporate interests protected under international agreements and domestic laws. Citizenship theory must contend with these developments on two levels. The first is to analyze the trend within the state to align public services and programs more closely with market imperatives, and how this is changing the nature of social citizenship. The second and more novel challenge is to consider whether claims for baseline economic security must reach beyond the state to address corporations or market institutions more directly. Thus, to what extent can firms or other market institutions be expected to redress the increasing economic insecurity caused by the retrenchment of the state, for example, by providing pension guarantees or health benefits?

With regard to the first of these issues, it must be acknowledged that welfare state programs have long referenced the market in a variety of ways. The most generous and least stigmatized benefits have always been conditional upon participation in labor markets, as is the case in Canada in relation to employment insurance, maternity, and parental leave coverage, and much pension provision. This system has been criticized for perpetuating inequalities, especially gender inequalities, given the more equivocal relationship to the full-time labor market of women who engage in caregiving. Feminist researchers have documented the relations of dependency promoted by welfare states in which women accessed social security indirectly through dependence on a male breadwinner, or else settled for second-class benefits in the form of welfare. Apart from the adverse material consequences, the discursive effect of this dependency is that eligibility for such benefits is not tied to more encompassing notions of political

AND THE CHALLENGE TO FEMINISM, supra note 2.

69. See, e.g., Gillian Calder, Recent Changes to the Maternity and Parental Leave Benefits Regime as a Case Study: The Impact of Globalization on the Delivery of Social Programs in Canada, 15 CANADIAN J. WOMEN & L. 342 (2003); Condon, supra note 2; Kessler-Harris, supra note 25.

citizenship, but rather to narrower thresholds of labor market participation, or even employment with specific employers.

A hallmark of neoliberalism has been to require the welfare arm of the state to act more like the market in its activities, with the actual delivery of state-provided benefits being accomplished in some cases by private corporations and religious organizations.\textsuperscript{71} The delivery of benefits by the state is now considered less legitimate than if they are provided by private market transactions.\textsuperscript{72} Legal feminists have tracked the specific implications of recent waves of welfare state restructuring with particular attention to their gendered impact.\textsuperscript{73} For example, Smith has documented the coercive and racialized sexual regulation of poor women accomplished by recent reforms to welfare legislation in the U.S.\textsuperscript{74} In Canada, changes to the funding arrangements of the Canada Pension Plan have permitted riskier forms of market investment, and the U.S. has debated shifting to a system of individualized retirement accounts. The gendered implications of these reforms have just begun to be analyzed.\textsuperscript{75}

Without diminishing the importance of this work, we observe that critiques of neoliberal social security reform retain the state as their main focus, in keeping with the traditional orientations of both citizenship studies and feminist legal theory. A key question moving forward is whether and how claims for baseline economic security could reach further into markets. As the state continues to retrench or reshape,\textsuperscript{76} we argue it is time to consider more specifically the potentially fractured, uneven, and gendered provision of benefits by the market, and the implications of the neoliberal approach to economic security for particular versions of economic citizenship.\textsuperscript{77} As Siltanen puts it:

\begin{itemize}
    \item \textsuperscript{71} See generally Brodie, supra note 43; Hindess, supra note 35.
    \item \textsuperscript{72} See generally R. Ericson et al., \textit{The Moral Hazards of Neo-Liberalism: Lessons from the Private Insurance Industry}, 29 ECON. \& SOC. 532 (2000).
    \item \textsuperscript{73} See, e.g., McCluskey, supra note 3.
    \item \textsuperscript{74} Anne Marie Smith, \textit{The Sexual Regulation Dimension of Contemporary Welfare Reform: A Fifty State Overview}, 8 MICH. J. GENDER \& L. 121 (2001).
    \item \textsuperscript{75} See, e.g., Condon, supra note 2; Condon, supra note 19; Warren, supra note 23.
    \item \textsuperscript{76} See generally J. Braithwaite, \textit{The New Regulatory State and the Transformation of Criminology}, 40 BRIT. J. CRIM. 222 (2000).
    \item \textsuperscript{77} See generally PIERRE BOURDIEU, \textit{ACTS OF RESISTANCE: AGAINST TYRANNY OF THE MARKET} (1998).
\end{itemize}
We must see social citizenship as an issue within the 'market,' not just outside of it... responsibility for the delivery of social citizenship is broader than a state-individual relationship... It is to insist that our claims for a decent life are as relevant in our relationships with employers, banks, insurance companies, retailers, service providers, family members and neighbours... as they are in our relationships with national, provincial and municipal governments.  

From a feminist legal theory perspective, we suggest that as governments turn to market instruments to deliver economic security, we must not only analyze the state's changing role but must also turn our gaze to the policies of market and economic institutions such as investment dealers, stock exchanges, corporate management, and industry associations. The challenge that this presents in a context of transnational corporate activity is, of course, not to be underestimated.

3. Responsibilities of Economic Citizenship  

A number of commentators have noted that neoliberal discourse emphasizes individual citizens as bearers of obligations rather than rights. Thus, Lister points out in relation to "current meanings of citizenship," "heavily influenced by the New Right in the United States, the emphasis is on replacing the language of entitlement with that of obligation" or a "softer version" that emphasizes "responsibility discharged through neighbourliness, voluntary action and charity."  

The market citizen is a gender-neutral creature who is as self-reliant and entrepreneurial as possible and who participates in self-governance via norms of risk management. We have made the point in previous work that this picture of the market citizen is inherently gendered.

However, attention is also needed to the ways in which economic citizenship discourse is expanding the notion of who is a citizen beyond the individual. Ideas of corporate citizenship are increasingly invoked, both by corporations themselves and

78. Janet Siltanen, supra note 67, at 407-08.  
79. Lister, supra note 53, at 453-54.  
80. See Scott, supra note 42; see also generally Nikolas S. Rose, Powers of Freedom: Reframing Political Thought (1999).  
82. Philipps, supra note 2; Condon, supra note 2.
by those who would reform corporate "behavior," to convey a sense of the obligations that should be undertaken by corporate actors.\textsuperscript{83} Interestingly, Whitehouse argues that recourse to new ideas of corporate citizenship represents a dilution of older notions of corporate social responsibility (CSR), which had their heyday in the 1970s.\textsuperscript{84} She argues that this is problematic precisely because the newer set of ideas emphasizes the use of voluntary initiatives on the part of economic actors rather than more coercive regimes of regulation, which were advocated for by those promoting a corporate social responsibility agenda.\textsuperscript{85} This argument resonates with more generalized claims about the shift away from command-and-control types of legal regulation towards more "decentered" forms of regulation that emphasize strategies of self-regulation, best practices, and voluntary codes.\textsuperscript{86}

On the other hand, Power argues that while the critical discourse of CSR has been transformed or even diluted by large corporate organizations, "somewhere between corporate fears of loss in the face of legal liability and hope in the form of enhanced reputation,"\textsuperscript{87} its internalization within these large organizations has become increasingly possible. This is because of the rise in risk-management discourses within corporations represented by the more fine-grained management of "the routines and habits of organizational life" which are capable of including CSR objectives in their ambit.\textsuperscript{88} At the same time, it must be acknowledged that the impact of globalization on corporate activity has been to attenuate traditional forms of domestic legal regulation, with the implication that corporations are increasingly free to choose the intensity of the citizenship obligations they are prepared to undertake. Indeed the increased "hollowing out" of Canadian corporations has had a


\textsuperscript{85} Id. at 300.

\textsuperscript{86} See, \textit{e.g.}, Black, supra note 15; Mary Condon, \textit{Technologies of Risk? Regulating Online Investing in Canada}, 26 \textit{L. & Pol'y} 411 (2004).


\textsuperscript{88} Id. at 147.
detrimental effect on the extent to which they assume local citizenship responsibilities, for example, in the form of charitable donations.\textsuperscript{89}

A central issue for feminist legal theory is to investigate how law and the public/private divide that it polices, disciplines or protects different economic interests. For example, the introduction of more severe penalties for welfare fraud has had particular effects on low-income households headed by women.\textsuperscript{90} By contrast, there is an ongoing debate as to whether the "responsibilities" of corporate citizenship, however robust, should be voluntarily implemented by organizations themselves or should be impressed on corporations by more traditional forms of legal regulation.\textsuperscript{91} In practice, the compromise has often been for the state to regulate, but only to the extent of requiring transparency of corporate decisions.\textsuperscript{92} A contrast can be observed, then, between the disciplining effect of individual market citizenship and the more voluntary and disclosure-oriented tone of corporate citizenship discourse.\textsuperscript{93} This contrast harkens back to the continuum noted earlier between facilitative and coercive versions of the legal constitution of economic citizenship, a point pursued in the case studies below.

\begin{flushleft}
92. Braithwaite & Drahos, supra note 47, at 56.
\end{flushleft}
4. Participation in Economic Decision-making

The final element at play in economic citizenship discourse is the question of how and when citizens are to participate in the governance of markets. A striking aspect of neoliberalism is the discourse of inevitability—the notion that "economic forces cannot be resisted." Yet participation in economic governance is critical precisely because so many more policy choices are being characterized as economic in nature or constrained by economic imperatives.

The quality of political citizenship in relation to economic governance has long been notoriously thin. Regulatory processes are vulnerable to capture by those with concentrated interests, ample resources, and the ability to participate in prevailing technocratic discourses of economic policy. By contrast, it has been easy to sideline social justice advocates who speak for more dispersed material interests and who adopt other economic rationalities or have other forms of expertise. This raises a general issue of identifying the preconditions for effective economic citizenship; for example, sufficient levels of economic literacy to engage in detailed reform debates and fully understand the distributive implications of technical proposals. It also illustrates for social justice advocacy groups the tension between working within dominant discourses or attempting to advance alternative understandings of the economy.

A particular challenge is to increase the participation of women in market governance and to problematize the use of gender-blind analytic frameworks by economic policymakers. Here, the discourse of rational apathy, which would valorize the individual's passivity in relation to her/his investments, runs up against the value of informed and ethical participation. Added to this is the problem of women's unequal access to organizational and technical resources, and the scale of this barrier multiplies when action must be coordinated across international borders. An important issue is how feminist legal experts can work with grassroots political feminists towards democratic ends. While those with professional training may have the best chance of impacting the policy process because they can frame their arguments in the language of orthodox

economic knowledge, this may be far removed from the practical concerns and alternative economic literacies of community advocates. A further issue is to design modes of political action and participation that are not dominated by class-privileged women and their concerns. This once again highlights the importance of developing concepts of economic citizenship that take account of gender, race, and class.

Feminist legal theorists need also to consider the effectiveness of different modes of participation. A basic distinction can be drawn between approaches that seek to use markets or market institutions themselves as levers for increasing accountability, and those that work through more traditional government regulation or supra-national governance institutions. The first model addresses questions of participation by construing market choice as the new politics. In neoliberal versions of this approach, individuals contribute to the best possible allocation of resources to meet human needs simply by exercising their talents and expressing their preferences in the market. Thus, Schumacher and Hutchinson use the phrase “economic citizenship” to refer generally to the enhanced autonomy and capacity of individuals to participate in free enterprise.95 Similarly, Braithwaite and Drahos describe middle-class investors as a “mass public” that has forced corporations to become more transparent and accountable through informed decision-making about which shares or mutual funds will provide the best return, or which investment advisors to trust with their savings.96

More progressive versions of this argument emphasize the responsibilities of consumers and investors to exert market pressure on corporations to change unjust or harmful business practices, for example through consumer boycotts, shareholder activism, ethical investing, or targeted consumption of “fair trade” goods.97 Some of these issues are currently being considered in the debate about using employer-sponsored pension funds for socially responsible ends.98 Such pensions, of

95. See generally Schumacher & Hutchinson, supra note 44.
96. Braithwaite & Drahos, supra note 47, at 60.
98. See, e.g., ROBIN BLACKBURN, BANKING ON DEATH OR INVESTING IN LIFE: THE HISTORY AND FUTURE OF PENSIONS (2002).
course, represent private market benefits as a consequence of specific types of labor market participation. Thus, it is proposed that employees should use their pension funds to create the "opportunity to shape the pattern of investment and business practice in their region and in the wider economy of which it is a part." Proponents of socially responsible activity by pension funds are more or less radical in the goals they seek to achieve with such a program, ranging from modest insertions of ethical awareness or "screening" into the decision-making of pension funds, all the way to Blackburn's more generalized strategies of using "self-managed social funds" to "complement other progressive anti-capitalist strategies." Blackburn argues that by "employing large assets in a responsible way," pension funds could "complement and complete that 'socialisation of the market' argued for by Diane Elson." He argues that "the workers and citizens should, collectively, take over capitalist institutions and not only run them but subordinate them to new rules of management and investment." Ultimately, such strategies would undoubtedly have to overcome the significant coordination problems of collective action.

While such strategies may be quite effective to alter corporate behavior in particular cases, their overall potential as a means of subjecting economic power to democratic control is less clear. Some have argued these approaches are inherently limited by a lack of coordination, the difficulty of sustaining high levels of public awareness of corporate misbehavior in myriad locations around the world, and the fact they can be effectively employed only by those with some measure of resources such as middle class consumers in developed countries. This point underlines the need for collaboration among feminists in rich and poor countries in choosing which campaigns and modes of activism to pursue.

A question that could be tackled through the lens of feminist legal theory is how law frames and regulates the possibilities for political action within the sphere of the market.

99. Id. at 498-99.
100. Id. at 524.
101. Id.
102. Id. at 526.
In the context of pension fund activism in relation to their underlying corporate investments, for example, the constitutive role of law is accomplished through a variety of legal doctrines. These include particular meanings of fiduciary duty, the "prudent person" rule, and other constraints on the formulation of investment policies. It is noteworthy that the U.K. in 2000 amended its pensions regulations to require pension funds to disclose whether they have a policy with respect to socially responsible investing. Advocates of a more progressive approach by employer-sponsored funds to investment decision-making also need to address the policy question of whether their goals are best accomplished by pension funds pressuring their investment targets to act in a certain way, or by using regulation more directly to set standards for the activities of commercial corporations.

In contrast to those who focus on market-based inputs to economic decision-making, other commentators examine instead how more traditional forms of political citizenship could be developed to boost democratic participation in the governance of economic affairs at national and international levels. At the most general level, Beneria identifies the need for a worldwide democratic debate about the proper goals of economic policy, suggesting that while feminists have been effective in certain local struggles, they have yet to translate their role to the global level. Sassen makes the case that notwithstanding the effects of globalization, participation in economic governance might be most effectively pursued through nation-states. Since states have shown a capacity to adjust their practices and policies to global pressures and neoliberal discourses, she argues, this same capacity might be developed to provide national-level channels for people to hold global economic actors accountable. By working through states, economic governance may be

109. Sassen, supra note 41.
democratized without the need to wait for a global state or set of supra-national citizenship institutions.

Yet as Schneiderman points out, states have often acted as the frontline defenders of market reforms in the face of popular democratic resistance. The solution to this conundrum may lie in avoiding monolithic reliance on any one institution, and instead promoting cooperative action and networking among different state and civil society agencies interested in promoting democratization of economic governance, at both national and supra-national levels. Working from the interrelated perspectives of feminist legal theory and economic citizenship, we turn now to briefly discuss two different examples of transnational economic governance. Our purpose here is to flag commonalities and tensions across different ways of governing global economic processes, in terms of the forms of economic citizenship they call into being and the intensity of the legal regulation involved.

III. FIRST CASE STUDY: INTERNATIONAL ECONOMIC GOVERNANCE OF MUTUAL FUNDS

There are a number of issues involving the internationalization of capital-raising and securities markets that could be assessed from the point of view of their susceptibility to feminist analysis and economic-citizenship-type interventions. Examples might include the impact of structural adjustment policies promulgated by the IMF and international institutional investors with negative effects for local populations subject to them, or the international spreading of the gospel of Anglo-American-style corporate governance in the wake of scandals like Enron, which give a heightened role to activism by institutional investors. But the focus of this case study of international economic governance is on the contemporary role of the International Organization of Securities Commissions (IOSCO)

110. Schneiderman, supra note 13.
111. Muetzelfeldt & Smith, supra note 39.
in actively setting standards for the operation of mutual funds, or as they are known internationally, collective investment schemes (CISs).

In general, a mutual fund or collective investment scheme is a vehicle for pooling investment by an open-ended number of investors. The value of each person's investment is computed by reference to a proportionate interest in the entire portfolio of assets or investments made by the fund. The investor devolves the responsibility for investing to the expertise of the fund's managers, and because her capital is pooled with others, she is able to take advantage of diversification and other risk management strategies that might be less feasible individually. In many jurisdictions, individual investment in mutual funds has become increasingly important to retirement well-being as both state and employer funding of pension schemes has declined or been reshaped in accordance with employer concerns about exposure to open-ended pension obligations.

There are really two stories in relation to international economic governance to be told by way of this brief case study. One is about the role played by IOSCO generally in economic governance, and the other is about the development of international understandings of how CISs should operate. In both cases, the question addressed is the susceptibility of either IOSCO generally, or norms about the operation of CISs more specifically, to the implications of specific forms of economic citizenship discourse. Our starting point is that IOSCO is the single institution identified with the attempt to harmonize standards and regulation of securities markets in hundreds of countries. IOSCO has over 170 members, who are mostly representatives of domestic securities market regulators. It operates largely through a low-visibility committee structure, on which are represented member regulators of key securities markets. These committees formulate consultation documents which eventually result in IOSCO-sanctioned principles or standards of regulation in various substantive subject areas of securities law. IOSCO standards are increasingly becoming a

powerful benchmark of how domestic regulators are expected to
govern, and indeed conformity to IOSCO standards is
increasingly the platform of mainstream academic and
policymaker critiques of the regulatory efforts of domestic
securities regulators.115

While IOSCO's beginnings are rather murky, it has grown
to have a powerful role in articulating expectations for how
national regulators are expected to govern their domestic
securities markets. In this sense, it is a hard organization to
place on the traditional public/private divide. Insofar as the
regulation of capital markets is a "public" preoccupation in
many countries, IOSCO is engaged in "public" regulation, and
its members are typically public domestic regulatory agencies.
However, it does not have the international status of
organizations like the United Nations or even the World Trade
Organization. It clearly operates according to very low
standards of "public" accountability.116 As an organization, it is
financed by the relatively modest contributions of its members.

There are a number of other interesting things about
IOSCO from the point of view of its susceptibility to economic
citizenship interventions. First, and obviously, it has no robust
independent enforcement role and operates only by consensus of
its members. It therefore acts according to a "decentred" mode
of legal regulation.117 However, it has played an important role
in providing benchmarks for international co-operation by
promulgating a Multilateral Memorandum of Understanding
which has some thirty country signatures, as well as coordinating
the signing of bilateral Memoranda of Understanding especially
between countries with "developed" and "emerging" markets.
Furthermore, it has recently become more aggressive in
promoting cross-border enforcement of domestic securities law
by announcing that it is prepared to publish the names of

115. See, e.g., International Money Fund, Canada: Report on the
Observance of Standards and Codes—Fiscal Transparency Module (March
visited Dec. 20, 2005).

116. See David Zaring, International Law by other Means: The Twilight
Existence of International Financial Regulatory Organizations, 33 TEX. INT'L

117. See generally Teubner, supra note 15; Black, supra note 15; Kingsford-
Smith, supra note 15.
offshore financial centers that do not cooperate with cross-border investigations. Second, its standard-setting enterprise has been conducted under a significant veil of secrecy, so that it is difficult for feminists or others to interrogate the norms that form the basis of its standard-setting enterprise. In response to criticism about this opacity, it has recently adopted a "consultation policy and procedure." This policy indicates that IOSCO will maintain "a flexible approach" to public consultations and will take a number of factors into account in determining whether or not to seek "public comment from the international financial community." It indicates that IOSCO will generally attempt to "consult the full spectrum of the international financial community" and in appropriate cases may seek input from "groups, working groups, entities or associations" that are specifically affected by the issue being examined. This makes clear that, despite the possibility of increased transparency about how IOSCO develops its standards, it will ultimately retain control of when a public consultation process will be mobilized, and individual investors or the public generally will need to be organized into specific and recognizable entities in order to be involved in the process.

More specifically, the reason for examining CISs has to do with their interesting social location in relation to countries of the North and countries of the South. In the former, we have noted that mutual funds have a significant role to play as providers of retirement well-being in an increasingly privatized retirement system. They are particularly important for women working in Western countries where the availability of employer-sponsored pension plans for other than full-time work is shrinking. Even where employer-sponsored pensions are still available, they increasingly take the form of so-called defined

120. Id. at 3.
121. Id.
122. See generally Kung, supra note 113.
contribution pensions, which do not promise a particular pension value upon retirement. Many such pension schemes offer employees the opportunity to make their own investment choices, often from a menu of various mutual fund products. Yet in relation to countries of the South, there is a sense that catering to the interests of mutual funds or CISs from “developed” countries—which are looking for reliable capital markets and robust enforcement mechanisms for their international financial transactions—comes at the expense of home-grown forms of “social citizenship” or social relations in those countries which might otherwise de-emphasize the need to court international capital or favor robust democratic control over the operation of local capital markets. Thus, the operations of investment funds assist in a concrete fashion to instantiate an unequal transnational gender order.

One issue for feminist legal theory that flows from this inequality problem is whether the changing forms of legal regulation of mutual funds might or might not allow investors in Western countries to express an expanded sense of “economic citizenship” to include solidarity with the populations where the mutual fund’s foreign investment takes place. Again, it is worth noting the example of recent changes to British pension regulations, which now require pension funds to disclose “the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention, and realization of investments.”\(^{123}\)

Meanwhile, IOSCO has been active in establishing standards for CISs. Two areas of that activity will be briefly considered here: first, its evolving approach to the internal governance of CISs, and second, IOSCO’s views on the role that could be played by CISs in the corporate governance of the firms in which they invest.

A. Standard-Setting in Relation to Internal Governance

For some time IOSCO has been concerned about the issue of conflicts of interest exhibited by operators of CISs. Examples of this concern may be found in the May 2000 report of IOSCO’s Technical Committee.\(^{124}\) Here, the committee tends to rely on a

\(^{123}\) SI 1999, \textit{supra} note 107.
\(^{124}\) \textit{See generally} Report of the Technical Committee of the International
combination of the fiduciary responsibility of the CIS operator and disclosure of information about the existence of conflicts. Thus, the report indicates that “[r]eliance on general principles is generally premised on the assumption that prescriptive standards are more likely to lead to a check-list approach relating to compliance and also, the emergence of avoidance mechanisms by CIS operators and their affiliates.”

This decentered approach to norm generation retained significant autonomy for the operators of CISs and something of a lack of confidence in IOSCO’s ability to engineer cultures of compliance within these organizations.

More recently, IOSCO has promulgated a consultation report prepared by IOSCO’s standing committee on investment management concerning governance of CISs. Comments on this report are solicited from the “international financial community.”

While canvassing the diverse legal structures framing the operation of CISs in a variety of jurisdictions, the report places great importance on the role of “independent entities” to act from an “outside perspective” so as to protect CIS investors from “divergent behaviors of the CIS operator.”

Again, the committee does not propose prescriptive standards on the basis that this might lead to avoidance mechanisms. Notably, there is a complete absence of discussion about having actual investors participate in this oversight role. In Canada, this possibility has been summarily dismissed as inconsistent with the desire for investors to act according to models of “rational apathy.”

Here there is perhaps a role for feminists to support


125. Id. at 15-16.
127. Id. at 3.
128. Id. at 10.
greater opportunities for individual investors to participate in the governance of CISs, while acknowledging the risks of participation on an "investment" basis as opposed to a more generally "public" basis.

B. Role of CISs in External Corporate Governance

With respect to CISs' exercise of their shareholder power over the entities in which they invest, there are clear signs of a movement away from the traditional economic perspective of the value of passivity and the exercise of the "exit" option as a sign of dissatisfaction with corporate management. In this context, "rational apathy" may be on the defensive despite a strong rearguard action mounted by the trade associations representing mutual funds in the U.S. and Canada.\textsuperscript{130} IOSCO's clear support of CIS practices in relation to corporate governance, especially in connection with the exercise of shareholder voting rights by CISs, is couched in the language of the need for greater transparency so as to allow individual investors to make "informed investment decisions."\textsuperscript{131} Incidentally, this development demonstrates the contingency of the concept of a fiduciary duty. Formerly, such duties would have weighed against exercising voting rights on the basis that they distracted investment managers from their core obligations. Now, the same duty may require these voting rights to be exercised as a means of pursuing shareholder value. The question here is how far this can be pushed by investment activists in the direction of establishing norms of ethical corporate decision-making in a global context.
IV. SECOND CASE STUDY: TRANSNATIONAL GOVERNANCE OF FISCAL LAW AND POLICY

This case study examines the interaction of states and international agencies in constructing new norms of “fiscal transparency” to promote disclosure through budget processes of specific information about government’s fiscal policy objectives and performance. In principle, improved fiscal transparency could be consistent with a progressive version of economic citizenship in which a better-informed public can effectively scrutinize and participate in debates around budget policy as a key element of state-centered economic governance. Yet it is important to interrogate the new standards to determine how the “public” is conceived for this purpose and what forms of accountability are being promoted. This brief discussion will focus in particular on whether fiscal transparency rules create any new avenues for confronting the unequal, gendered impacts of tax and expenditure policies. It concludes that while there is latent potential to apply transparency norms for such purposes, their primary use in practice has been to impose stronger market discipline on public spending, subordinating equity objectives to the achievement of lower deficits and debt, and the promotion of investment-friendly fiscal climates.

The formation of fiscal policy via the annual budget, and its implementation through tax bills and other legislation, remains a signature function of nation-state governments. Despite the cross-border character of much economic activity and the potential for transnational actors to avoid tax by shifting investments or income among jurisdictions, international coordination of substantive tax rules has proved challenging in light of the complexity of national tax systems and the conflicting interests of countries competing for investment and revenues. In addition, market-friendly tax reforms have encountered significant political resistance, especially in developing and transition countries, leading reformers to retreat toward more procedural types of “good governance” reform such as the improvement of tax administration.


133. See Miranda Stewart, Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries 44 HARV.
promote fiscal transparency internationally are an example of this trend.

The issue of fiscal transparency began to attract wide attention in the mid-1990s following a series of government corruption scandals and financial crises in Asia and elsewhere.\(^\text{134}\) In addition, some commentators argued that improved transparency rules would be preferable to hard fiscal limits such as balanced budget and spending cap laws, which constrain governments' flexibility to respond to changing economic conditions and are highly susceptible to avoidance through creative interpretation, accounting and forecasting.\(^\text{135}\) New Zealand enacted fiscal transparency legislation in 1994,\(^\text{136}\) followed by Australia\(^\text{137}\) and the U.K.\(^\text{138}\) in 1998. Recently, the province of Ontario, Canada has replaced its balanced-budget legislation with a new Fiscal Transparency and Accountability Act.\(^\text{139}\) The U.S. has so far failed to act upon IMF recommendations that it enact fiscal transparency rules.\(^\text{140}\)

International agencies have encouraged these developments by promulgating formalized standards for fiscal transparency and urging states to adopt these into their laws or budget practices.\(^\text{141}\) The IMF has been especially activist, publishing


\(^\text{137}\) Charter of Budget Honesty Act 1998 No. 22 (Austl.).


\(^\text{141}\) See, e.g., OECD, OECD BEST PRACTICES FOR BUDGET
dozens of reports on the extent to which individual countries comply with its Code of Good Practices on Fiscal Transparency (IMF Code). The stated purposes of the IMF Code are to enable "better-informed public debate about the design and results of fiscal policy, make governments more accountable for the implementation of fiscal policy, and thereby strengthen credibility and public understanding of macroeconomic policies and choices." It is positioned as part of the agency's larger "good governance" initiative and is intended to "facilitate surveillance of economic policies by country authorities, financial markets, and international institutions."

The IMF Code takes as its starting point the basic precepts of liberal democratic government and the rule of law. Thus, countries are to have clear rules for the conduct of government activities, its relationships with the private sector and with other public institutions such as the central bank, and relationships among different branches of government. Taxes should be authorized explicitly by law, budget laws should govern the expenditure of public funds, and public servants should be governed by clear criteria for exercising administrative discretion and by ethical standards of conduct. The IMF Code then goes on to prescribe in some detail the types of information that governments should disclose within their budget processes.

Several themes can be observed in the IMF's disclosure standards. First, they seek to discourage concealment of

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142. See generally OECD BEST PRACTICES FOR BUDGET TRANSPARENCY, supra note 141. These reports cover a wide range of countries from the most industrialized to developing and transition economies. They are available at http://www.oecd.org/dataoecd/33/13/1905258.pdf (last visited Dec. 20, 2005).
144. Id.
145. IMF, REVISED CODE OF GOOD PRACTICES ON FISCAL TRANSPARENCY, supra note 141, at § 1.1.
146. Id. at § 1.2; see also id. at § 3.3.
liabilities or risks on the one hand, or assets on the other. For example, budget documents are to cover not only central government operations but the entire public sector (including, for example, state owned agencies and enterprises) and should disclose any major fiscal risks, contingent liabilities, and tax expenditures (that is, tax concessions to particular groups or activities). They must also disclose major fiscal aggregates such as total debt, financial assets, revenues, expenditures, borrowing, and the amount of any deficit or surplus.

A second theme of the IMF Code is to encourage critical evaluation of fiscal performance. Thus, governments are required to state the objectives of their fiscal policy and then report regularly on results achieved. In particular, they must assess the "sustainability" of their fiscal plans and should disclose fiscal performance for the previous two years and projections for the two years following the budget. The Organisation for Economic Co-operation and Development (OECD) has emphasized sustainability even more strongly than the IMF, urging governments to produce a long-term budget report that lays out "the budgetary implications of demographic change, such as population ageing and other potential developments over the long term (10-40 years)." The reason for promoting multi-year and long-term budgeting is "generally to increase discipline over government expenditures," by showing that current spending commitments will cost more in the future and may be unsustainable in the longer term.

The final theme worth noting in the international codes is their emphasis on ensuring the integrity of fiscal data. For example, the IMF Code calls upon governments to state the macroeconomic assumptions and accounting methods upon

147. Id. at §§ 2.1.1, 3.2.4.
148. Id. at §§ 2.1.3, 3.1.5.
149. See generally id. at § 3.2.
150. Id. at §§ 3.1.1, 3.2.2, 3.4.1, 3.4.3.
151. Id. at § 3.1.1.
152. Id. at § 2.1.2.
153. OECD, supra note 141, at § 1.7.
which budgets are based\textsuperscript{155} and to have government accounts and fiscal data audited by independent bodies.\textsuperscript{156} The OECD calls specifically for a rigorously audited pre-election fiscal report.\textsuperscript{157}

The forms of transparency being promoted by these international agencies are unobjectionable in themselves, at least within a liberal framework of democratic accountability. Yet they are also selective. They foreground certain measures of fiscal openness and performance, in particular the need to sustain a balanced budget, and remain conspicuously silent on others. Most importantly, the international standards do not require analysis or publication of data on the distributive implications of the budget, the impact of fiscal policy on different population sectors, on economic inequality, or on rates of low income. Instead, they focus on aggregate measures such as total revenue and total spending on programs, which tend to obscure differences within the population. Further, they do not require governments to engage in any particular form of public consultation process or to disclose who participated in pre-budget discussions with government officials. These omitted aspects of transparency are likely of most relevance to constituencies that are marginalized within the economy or economic governance processes.

By contrast, the types of information flow promoted by the international codes are of strong interest to relatively empowered market actors. Indeed, the strategy underlying the IMF initiative has been to strengthen market incentives for budget transparency by informing lenders and investors about the extent to which particular jurisdictions fall short of its standards.\textsuperscript{158} While assessments are officially voluntary,\textsuperscript{159}

\begin{itemize}
\item \textsuperscript{155} IMF, \textit{Revised Code of Good Practices on Fiscal Transparence}, \textit{supra} note 141, at §§ 3.1.3, 4.1.2.
\item \textsuperscript{156} Id. at § 4.2.
\item \textsuperscript{157} OECD, \textit{supra} note 141, at § 1.6.
\item \textsuperscript{159} IMF, \textit{Manual on Fiscal Transparence}, \textit{supra} note 141, at 2. The IMF website further states that "[r]eports summarizing countries' observance of these standards are prepared and published at the request of the member country." IMF, Reports on the Observance of Standards and Codes (ROSCs), at www.imf.org/external/np/rosc/rosc.asp (last visited Dec. 20, 2005).
\end{itemize}
countries seeking better access to international capital markets or other economic opportunities such as accession to the European Union, are under pressure to invite this form of monitoring.\textsuperscript{160} The IMF recently surveyed major institutional lenders, investment banks, and credit rating agencies and found that its fiscal transparency reports are in fact relied upon by many private sector analysts, especially in the U.S., to gauge country risk and guide investment decisions.\textsuperscript{161} Based on these results, an IMF Working Paper recommended ways the IMF Code could be made more useful to these audiences.\textsuperscript{162}

It also noted that pension fund managers and private consultants have adapted the IMF Code to conduct their own risk assessments in jurisdictions where the IMF has not yet reported.\textsuperscript{163} This example nicely illustrates a point made earlier in the paper about the fluid nature of the public/private distinction that historically has limited citizenship claims within the economic realm. While Petrie characterizes fiscal transparency standards to be an "international public good,"\textsuperscript{164} clearly they are being designed in tandem with the private sector, in large part to suit its needs.

Interestingly, the survey also consulted civil society organizations about their use of IMF fiscal transparency reports. It found that while a few non-governmental organizations are pursuing issues of budget transparency, they either have not utilized the IMF Code or have found it necessary to augment it with standards concerning the degree of citizen participation in budget processes.\textsuperscript{165} This result was viewed as unsurprising because "the [IMF] has not actively publicized [the Code] among civil society groups, the content and language in fiscal [reports] is highly technical, and the [IMF] may be regarded as an unlikely source of such information."\textsuperscript{166} These findings


\textsuperscript{161} See generally Petrie, supra note 158.

\textsuperscript{162} See id. at 14-16, 22-24.

\textsuperscript{163} See id. at 8.

\textsuperscript{164} Id. at 14, 21.

\textsuperscript{165} See id. at 16-21.

\textsuperscript{166} Id. at 19.
illuminate both the partiality of existing fiscal transparency norms and the possibility of rethinking them to address a wider array of interests.

Some of the fiscal transparency laws enacted at the domestic level take modest steps in this direction. For example Ontario’s Fiscal Transparency and Accountability Act requires the government to publicize information on pre-budget consultations with the public, including key issues to be addressed in the next budget, and information on how to participate. In addition, the Ontario law gives some space to equity concerns by stating that the principles of responsibility, flexibility, equity, and transparency are to govern fiscal policy in the province. The U.K. Code for Fiscal Stability establishes five such principles: transparency, stability, responsibility, fairness, and efficiency.

It must be noted, however, that both jurisdictions have placed a generational spin on the meaning of equity for these purposes. In the U.K., “fairness” is defined to mean that “so far as reasonably practicable, the Government shall seek to operate fiscal policy in a way that takes into account the financial effects on future generations, as well as its distributional impact on the current population.” Ontario defines “equity” to mean that the “impact on different groups within the population and on future generations should be considered.” These phrases echo the sustainability concerns of the international codes, linking the concept of equity back to the need for fiscal discipline. They draw implicitly on the concept of “generational accounting,” a method of fiscal policy analysis in which expenses and revenues are projected out over the very long term and allocated among different age groups within the population. The OECD has lauded this methodology, claiming it will show that in most of its member countries “a continuation of current tax and spending policies generally implies that present generations are living at

167. FTAA, supra note 139, at c. 27, § 6(2).
168. Id. at § 2 (emphasis added).
171. FTAA, supra note 139, at § 2.
172. OECD, supra note 151, at 13-18.
the expense of future generations. . . ." Thus, generational accounting is presented as a means of building political consensus around the need for social spending restraint.174

It is also significant that neither Ontario nor the U.K. mandates disclosure of any concrete information on the achievement of equity or fairness objectives. Both set out detailed requirements for reporting of updated data on fiscal aggregates, including multi-year comparisons and projections, on a prescribed schedule throughout the year. However, none of these requirements address distributive concerns directly, nor will they be of much use to government or civil society analysts interested in this dimension. In particular, fiscal transparency laws do little to encourage analysis of the gender impacts of budgetary decisions.

Feminist political economists have been at the forefront of research on the gendered assumptions and effects of fiscal policy. They have argued that the gender blindness of mainstream economic analysis has resulted in policies that are not only inequitable but inefficient, often undermining the achievement of governments' own stated objectives.175 While a full discussion of this literature is beyond the scope of the current paper, two of its central insights are directly relevant to our critique of prevailing norms of fiscal transparency. The first is that aggregate economic and fiscal data fail to capture crucial differences in the position of men and women in the economy, for example in terms of their paid labor force participation, the levels of income they derive from different sources, the amount and type of taxes they pay, and the extent to which they access different public services and benefits.176 Accordingly, the gendered implications of a change in the tax mix or in program spending will be obscured from view unless policy makers and

173. Id. at 13.
174. See id. at 18.
the public have access to gender disaggregated data and analysis.

The second key insight from feminist political economy is that economic policy should take into account the household sector, not only as a consumer of goods produced by the private market and the state, but as a producer in its own right supplying essential inputs to the other sectors. Budget documents generally account only for costs and revenues that are monetized, an approach that implicitly treats unpaid labor as a kind of inexhaustible natural resource that can be drawn down as needed to produce a functioning labor force and to maintain the social framework for economic activity. Thus, a balanced budget ostensibly can be achieved simply by shifting costs away from the state to the household sector, where they are treated as free. This approach hides the costs imposed on households, primarily on women, in the form of lost opportunities for income generation as well as the out-of-pocket costs of caregiving. It also fails to recognize that the supply of women's unpaid labor has limits and cannot be extended infinitely without the investment of budgetary resources in household supports. Indeed, Palmer has argued that offloading responsibilities to families and communities imposes a highly non-transparent tax on women, in the form of additional unpaid work they must perform before they can access the labor market. It must be recognized that despite much common ground, there is no one settled vision of the ideal economic order in this literature. Feminists continue to struggle with how to balance the pursuit of market access with the valuation of caregiving work, and to question whether market relations could be transformed along more cooperative lines.

These insights have been applied in a number of policy projects on gender-responsive budgeting (GRB). These have


sometimes been conducted by feminist NGOs providing commentary or advice to government policy makers, while in other cases governments have integrated GRB into their internal budgeting processes. At the international level, the Commonwealth Secretariat has coordinated a major initiative on GRB, advocating and providing practical advice to member governments interested in applying it in their own budget processes. One experienced GRB advocate has observed that these projects must negotiate a tension between the views of expert feminists who have relevant academic or policy training, and those of grassroots organizers who tend to have a more pragmatic view of what constitutes meaningful change in the interests of women.

The GRB movement serves as one example of an attempt to construct alternatives to a dominant neoliberal version of economic citizenship, and illustrates some of the challenges involved in such an exercise. There is scope for feminist legal theory to make a contribution here by connecting the insights of GRB to a concrete analysis of international standards and laws relating to fiscal transparency. There is already a substantial body of feminist scholarship on the domestic taxation laws of various nations. Some of this literature has foregrounded the


182. See Donna St. Hill, United Kingdom: A Focus on Taxes and Benefits, in Gender Budgets Make More Cents, supra note 180.

183. The bulk of this scholarship has so far been produced in the U.S., Canada, and Australia. For a sampling, see the articles published in the symposium Taxing Women: Thoughts on a Gendered Economy, in 6 S. Cal. Rev. L. & Women's Stud. (1997), as well as the symposium on critical tax theory in 76 N.C. L. Rev. 1519-888 (1998); see also Judith Grbich, The Tax Unit
interaction of gender with race, class, sexuality, disability, and age in shaping the implicit assumptions and the impact of tax rules. However, with few exceptions, the connections between globalization and fiscal policy have not yet been considered from a feminist perspective. This case study suggests that fiscal transparency codes may provide one entry place for such work.

CONCLUSION

This discussion of feminist legal theory’s potential contribution to discussions of transnational economic governance leads us to three concluding observations. First, the two case studies side by side demonstrate that the state plays a different role in each, with different opportunities for feminist intervention. The state’s role is less contested in fiscal policy than it is in securities regulation, though we have also shown that states may be more or less sovereign over their fiscal choices depending on their position within international capital markets.


These contrasts highlight the need for feminist legal theory to take a fine-grained approach that considers the specific dynamics and constituencies at play in different areas of economic governance, rather than attempting to resolve in universal terms questions about the role of the state versus private or international institutions in bringing about reforms.

A second contribution is that the paper confirms the need for feminist legal theory to take a broad view of ‘law’ as it works to apply its insights in the context of economic globalization. In particular it must search out at the supra-national level the informal instruments and quasi-public institutions that are shaping economic law at the level of individual states. These are now part of the essential context for understanding legal developments within individual countries and sub-national jurisdictions. Finally, the paper demonstrates that looking at the international level can reveal areas of potential common interest among women in multiple countries, but also calls for clear sightedness about the different and sometimes conflicting interests of women in various national, cultural, and class locations. There is obviously a continuing role for work that focuses on specific legal issues in a single jurisdiction. However, the methodologies and assumptions of such work should now be changing to incorporate a new consciousness about the intrinsic links and tensions between Western gender equality projects and the preoccupations and material situation of women elsewhere. This lesson may be especially salient for feminist work in the area of economic governance, where domestic legal developments are increasingly driven by the pressures and opportunities of globally-integrated markets.