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## Corporations as Private Regulators

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## CORPORATIONS AS PRIVATE REGULATORS

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Wentong Zheng\*

### ABSTRACT

The growing trend of corporations imposing restrictions on suppliers, contractors, and customers beyond the requirements of existing laws requires rethinking the nature and impact of corporations' private regulatory power. This trend, which this Article refers to as "Corporations as Private Regulators" (CPR), represents a paradigmatic shift in how corporations participate in the making of public policies. This Article conceptualizes the corporate CPR power as the exercise of a right of refusal to deal with counterparties. This right of refusal could be theorized as a new form of property right, whose allocation has important implications for both rights and wealth. The Article further explores the possible legal responses to CPR under various approaches, including the status quo approach, the ad hoc approach, the antitrust approach, the general CPR law approach, the property approach, and the constitutional approach. Finally, the Article analyzes the advantages and disadvantages, as well as the theoretical and practical implications, of each approach. The insights garnered through these inquiries lay the foundation for systematically tackling the CPR power.

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\* Professor of Law, University of Florida Levin College of Law. I thank Jonathan Cohen, Bill Page, Robert Rhee, D. Daniel Sokol, Jenny Tucker, Michael Wolf, and participants in the University of Florida Business Law and Economics Workshop for discussions and comments. All errors and omissions are my own.

## INTRODUCTION

In August 2018, technology giant Microsoft made headlines by announcing that it would soon require its suppliers and contractors with more than fifty employees to offer workers at least twelve weeks of paid parental leave.<sup>1</sup> Microsoft's new policy closely mirrors a Washington state law requiring that workers in the state receive twelve weeks of paid family leave; it is an effort to extend that same level of benefit to workers outside of the company's home state.<sup>2</sup>

While groundbreaking for the world of paid family leave, Microsoft's move was only one example of an increasingly common trend of corporations weighing in on public policy through corporate action. Following the 2018 mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, Dick's Sporting Goods banned sales of assault-style weapons and raised the minimum age for purchase of firearms and ammunition in its stores to twenty-one.<sup>3</sup> Citigroup placed restrictions on their new retail business clients, prohibiting them from selling guns to customers who have not passed a background check and are under the age of twenty-one.<sup>4</sup> Bank of America announced that it would stop lending money to gun manufacturers that make military-style firearms for civilian use.<sup>5</sup> In addition to gun control, banks are taking meaningful action on immigration. In March 2019, JPMorgan Chase & Co. announced its plan to stop financing private operators of prisons and immigration detention centers.<sup>6</sup> JPMorgan's move was followed by Wells Fargo, which in the same month told Congress that it was exiting its business relationship with the private prison industry.<sup>7</sup>

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1. Lauren Weber, *Microsoft to Require Its Suppliers, Contractors to Give Paid Family Leave*, WALL ST. J. (Aug. 30, 2018, 5:54 PM), <https://www.wsj.com/articles/microsoft-to-require-its-suppliers-contractors-to-give-paid-family-leave-1535635800> [https://perma.cc/67SU-NCFJ] (reporting that Microsoft suppliers and contractors were given twelve months to implement the required benefit, capped at \$1,000 a week in compensation).

2. *Id.*

3. Julie Creswell & Michael Corkery, *Walmart and Dick's Raise Minimum Age for Gun Buyers to 21*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/business/walmart-and-dicks-major-gun-retailers-will-tighten-rules-on-guns-they-sell.html> [https://perma.cc/2CES-TX35].

4. James F. Peltz, *In a Rare Move, Corporate America Presses for Gun-Control Restrictions 'to Take a Stand'*, L.A. TIMES (May 3, 2018, 4:05 PM), <https://www.latimes.com/business/la-fi-companies-gun-control-20201027-story.html> [perma.cc/667G-BSLQ].

5. Tiffany Hsu, *Bank of America to Stop Financing Makers of Military-Style Guns*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/business/bank-of-america-guns.html> [https://perma.cc/VBB9-HWTA].

6. See David Henry & Imani Moise, *JPMorgan Backs away from Private Prison Finance*, REUTERS (Mar. 5, 2019, 8:42 PM), <https://www.reuters.com/article/us-jp-morgan-prisons/jpmorgan-backs-away-from-private-prison-finance-idUSKCN1QM1LE> [https://perma.cc/CX5Y-SAU7].

7. Morgan Simon, *In Wake of Wells Fargo Hearing, Private Prison Stocks Take Big Hit*, FORBES (Mar. 15, 2019, 4:39 PM), <https://www.forbes.com/sites/morgansimon/2019/03/15/in-wake-of-wells-fargo-hearing-private-prison-stocks-take-big-hit/?sh=178aco131a3b> [https://perma.cc/N2JX-8BWK].

As a final example, banks are facing increasing pressure from politicians and advocacy groups to stop funding oil pipelines, a major source of greenhouse gas emissions widely believed to cause climate change.<sup>8</sup> In March 2020, UBS Group said it would no longer finance certain fossil fuel projects, including new offshore oil projects in the Arctic, thermal coal mines, and oil sands on undeveloped lands.<sup>9</sup>

In a sense, this trend of corporate action on public policy issues is a continuation of the corporate social responsibility (CSR) movement that dates back to at least the 1950s.<sup>10</sup> As opposed to the traditional corporate model, CSR “refers to the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society.”<sup>11</sup> The earlier forms of CSR, however, featured mostly voluntary action on the part of willing corporations, be it charitable donations or corporate action to improve employee, customer, or shareholder relations.<sup>12</sup> For instance, during the civil rights movement, many corporations in the South hired and served African American employees and customers before the practice was widely accepted.<sup>13</sup> Another example is when corporations offered employment benefits to LGBTQ employees before they were legally required to do so.<sup>14</sup> These corporate actions were mostly voluntary, with little coercion involved.

By contrast, the recent corporate action on public policy issues heralds a fundamentally different mode of corporate activism. Instead of relying on voluntary action, corporations impose their preferred poli-

8. Lawmakers on the House Financial Services Committee discouraged financial industry executives from funding oil pipelines, among other activities that ran counter to their political preferences. See Zachary Warmbrodt, *Ocasio-Cortez, Other Democrats Squeeze Big Banks on Guns, Immigration, Climate*, POLITICO (Mar. 23, 2019 6:42 AM), <https://www.politico.com/story/2019/03/23/ocasio-cortez-banks-guns-immigration-climate-1289321> [https://perma.cc/UC8E-PDDK]. In March 2019, a group of climate change advocacy organizations released a report detailing funding by the world’s major banks for the fossil fuel sector. See RAINFOREST ACTION NETWORK, BANKTRACK, SIERRA CLUB, OIL CHANGE INT’L & HONOR THE EARTH, *BANKING ON CLIMATE CHANGE: FOSSIL FUEL FINANCE REPORT CARD 2019* (2019), [https://www.banktrack.org/download/banking\\_on\\_climate\\_change\\_2019\\_fossil\\_fuel\\_finance\\_report\\_card/banking\\_on\\_climate\\_change\\_2019.pdf](https://www.banktrack.org/download/banking_on_climate_change_2019_fossil_fuel_finance_report_card/banking_on_climate_change_2019.pdf) [https://perma.cc/K33J-NF8W]. The report called for the banks to “immediately halt all financing for the expansion of fossil fuels . . . .” *Id.* at 88.

9. Dieter Holger, *UBS Exits Arctic Oil, Coal Mines and Tar Sands Projects*, WALL ST. J. (Mar. 5, 2020, 5:46 PM), <https://www.wsj.com/articles/ubs-exits-arctic-oil-coal-mines-and-tar-sands-projects-11583447745> [https://perma.cc/9ZNY-RE6U].

10. For a history of the corporate social responsibility movement, see Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, in *THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY* 19 (Andrew Crane, Dirk Matten, Abigail McWilliams, Jeremy Moon, Donald S. Seigel eds., 2008), [https://dl.bsu.by/pluginfile.php/66249/mod\\_resource/content/1/A\\_History\\_of\\_Corporate\\_Social\\_Responsibility.pdf](https://dl.bsu.by/pluginfile.php/66249/mod_resource/content/1/A_History_of_Corporate_Social_Responsibility.pdf) [https://perma.cc/9H6D-TR4S].

11. *Id.* at 25 (citing HOWARD R. BOWEN, *SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN* 6 (1953)).

12. *Id.* at 28.

13. Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1541–42 (2018).

14. *Id.* at 1543–44.

cies on their suppliers, contractors, and customers. Parties on the receiving end of such corporate action are forced to either comply with the action or discontinue their business relationship with the corporation.<sup>15</sup> More importantly, this corporate action goes above and beyond the law—parties on the receiving end of such action are required to undertake activities not required by law, or barred from activities that they are legally entitled to do.<sup>16</sup> Through this kind of coercive action, corporations are assuming the role of regulators and are drastically changing the scope of permissible and impermissible business conduct in the marketplace.<sup>17</sup>

This scholarship is the first to discuss this new phenomenon—referred to as “Corporations as Private Regulators” (CPR) in this Article—which signifies a new mode of corporate participation in public policymaking in the United States. Traditionally, corporations affect public policy through lobbying or industry self-regulation.<sup>18</sup> Under either of these two modes, corporations attempt to capture, manipulate, or avoid the sovereign power of the government in an effort to shape public policy in their favor.<sup>19</sup> CPR, however, departs from these traditional modes by disregarding the sovereign power of the government and relying instead on corporations’ own private regulatory power.<sup>20</sup> This changing role of corporations in public policymaking is another manifestation of the complex relationships between private businesses and government in the modern economy. Whereas governments increasingly conduct business affairs as market participants, private businesses increasingly exercise power akin to the government’s regulatory power.<sup>21</sup>

Indicating the nuanced nature of corporations’ private regulatory power, many politicians decry corporations’ economic power in general but are nonetheless comfortable encouraging corporations to exercise their regulatory power—which is predicated upon their economic power—to achieve desired political outcomes.<sup>22</sup> Political convenience aside,

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15. Contractors who do not comply with Microsoft’s paid family leave policy, for example, will be denied the opportunity to do business with Microsoft. *See Weber, supra* note 1.

16. *Id.*

17. *See* MICHAEL P. VANDENBERGH & JONATHAN M. GILLIGAN, *BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE* 16 (2017) (“Corporations are regulators of their suppliers, of their borrowers, of their commercial tenants, and sometimes of their corporate customers.”).

18. For detailed discussions of these two modes of public policymaking by corporations, see *infra* Part I.

19. *See infra* Section I.A.

20. *See infra* Section I.B.

21. For an exploration of the relationships between private businesses and the government in a different context, see Wentong Zheng, *Untangling the Market and the State*, 67 *EMORY L.J.* 243 (2017).

22. On the 2020 campaign trails, presidential candidates competed with one another to offer the harshest proposals to curb corporations’ political power and monopoly power. *See* Sahil Kapur, *Democratic 2020 Hopefuls Compete on How to Bust Corporate Power*, *BLOOMBERG L. NEWS* (Apr. 1, 2019,

one reason for this apparent contradiction is that the consequences and broader implications of corporations' private regulatory power have not been thoroughly scrutinized.

This Article is a first step toward thoroughly understanding the CPR power and its broader implications for society. It argues that CPR represents a paradigmatic shift in how corporations participate in the making of public policies. Rather than merely lobbying or participating in industry self-regulation, corporations are directly setting policy agendas by leveraging their increasing economic power. The Article further conceptualizes CPR power as a right of refusal to deal with counterparties.<sup>23</sup> This right of refusal could be theorized as a new form of property right, whose allocation under the law has important implications for both rights and wealth. Finally, this Article discusses ways to allocate the right of refusal under different approaches: the status quo approach, the ad hoc intervention approach, the antitrust approach, the general CPR law approach, the property approach, and the constitutional approach. The Article concludes by analyzing the advantages and disadvantages, as well as the theoretical and practical implications, of each approach.

## I. CORPORATIONS AS PRIVATE REGULATORS: A NEW PARADIGM

Before corporations started exercising their private regulatory power, they had been content playing a secondary role in the making of public policy. Below, this Article traces the evolution of corporate participation in public policymaking, from lobbying and self-regulation to CPR.

### A. *Traditional Modes of Corporate Participation in Public Policymaking*

Traditionally, corporations play a secondary role in public policymaking through lobbying and industry self-regulation, both of which are predicated upon the sovereign power of the government, albeit in different ways.

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6:39 PM), [https://news.bloomberglaw.com/antitrust/democratic-2020-hopefuls-compete-on-how-to-bust-corporate-power?utm\\_source=rss&utm\\_medium=ATNW&utm\\_campaign=00000169-db09-de1e-aff9-ffc13850000](https://news.bloomberglaw.com/antitrust/democratic-2020-hopefuls-compete-on-how-to-bust-corporate-power?utm_source=rss&utm_medium=ATNW&utm_campaign=00000169-db09-de1e-aff9-ffc13850000) [<https://perma.cc/US5S-CC3Z>]. But many of them also prodded corporations to use their private regulatory power to pressure the firearms, private prison, and oil pipeline industries. See Warmbrodt, *supra* note 8.

23. In this Article, the term "counterparties" refers to the parties that corporations deal with in business transactions. Depending on the transaction, the counterparty may be a contractor, supplier, or customer.

Corporations devote massive amounts of resources to lobbying, their primary mechanism for affecting public policy. In 2018, lobbying spending in the United States reached \$3.42 billion, the highest since 2010.<sup>24</sup> Corporate lobbyists perform numerous functions aimed at influencing Congress and administrative agencies in drafting and enacting legislation and administrative rules.<sup>25</sup> Thanks to these activities, “[c]orporations have now fit their way into almost every process of American democratic policymaking.”<sup>26</sup> Through lobbying, corporations attempt to harness the government’s legislative and regulatory powers in service of their interests.<sup>27</sup> Corporations accomplish this goal primarily by hiring lobbyists who engage in the fine art of building relationships with politicians and stakeholders.<sup>28</sup> The hallmark of this process is persuasion, not coercion. Lobbying could be viewed as coercive to the extent that the lobbyist threatens to withhold campaign contributions unless policymakers support their preferred policy, but this coercion is exerted over politicians only, not directly over other corporations and the general public.

Another traditional way in which corporations influence public policy is industry self-regulation. Defined broadly, self-regulation occurs when corporations themselves design and enforce the rules or standards for acceptable or required behavior.<sup>29</sup> Among many variants of industry self-regulation, most prevalent are corporate codes of conduct, which proliferated in the 1990s amid increased societal emphases on corporate responsibility.<sup>30</sup> A 1999 Organization for Economic Co-

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24. Karl Evers-Hillstrom, *Lobbying Spending Reaches \$3.4 Billion in 2018, Highest in 8 Years*, OPENSECRETS (Jan. 25, 2019, 11:34 AM), <https://www.opensecrets.org/news/2019/01/lobbying-spending-reaches-3-4-billion-in-18/> [<https://perma.cc/NRE4-NA6B>].

25. LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 1–2 (2015).

26. *Id.* at 3.

27. Studies indicate that corporations that lobby and contribute to political campaigns pay lower taxes and experience fewer problems with regulatory agencies than corporations that are not politically active. See, e.g., Sanford Gordon & Catherine Hafer, *Flexing Muscle: Corporate Political Expenditures as Signals to the Bureaucracy*, 99 AM. POL. SCI. REV. 245 (2005); Brian Richter, Krislert Samphantharak & Jeffrey Timmons, *Lobbying and Taxes*, 53 AM. J. POL. SCI. 893 (2009).

28. See Maggie McKinley & Thomas Groll, *The Relationship Market: How Modern Lobbying Gets Done*, EDMOND J. SAFRA CTR. FOR ETHICS (Feb. 13, 2015), <https://ethics.harvard.edu/blog/relationship-market-how-modern-lobbying-gets-done> [<https://perma.cc/S2PN-8KCC>] (“Contrary to public misconception, the daily life of firm lobbyists is not filled with glamorous parties and smoke-filled backroom politicking where lobbyists engage in *quid pro quo* transactions of money for policy. Rather, as described, these firm lobbyists focus their professional attention on honing the fine art of building relationships, primarily with members of Congress and their staffs, but also with potential clients, coalitions, and other individuals and organizations related to their clients and issue areas.”).

29. VIRGINIA HAUFLE, *A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY* 8 (2001).

30. See RHYS JENKINS, U.N. RSCH. INST. FOR SOC. DEV., *CORPORATE CODES OF CONDUCT: SELF-REGULATION IN A GLOBAL ECONOMY* 1 (2001), <https://www.researchgate.net/profile/Rhys>

Operation and Development (OECD) study inventoried 233 corporate codes of conduct in OECD countries across a number of issue areas, including fair business practices, observance of rule of law, fair employment and labor rights, environmental stewardship, and corporate citizenship.<sup>31</sup> These corporate codes of conduct target a variety of audience-audiences by setting policies and guidelines for employees or business partners or stating the company's commitments to the general public.<sup>32</sup> Adopted by corporations voluntarily, these codes of conduct do not typically carry stringent enforcement measures.<sup>33</sup> Codes that do carry stringent enforcement measures tend to focus on the labor and environmental practices of foreign contractors or suppliers.<sup>34</sup>

A more potent form of industry self-regulation is exercised by self-regulatory organizations (SROs) which take on certain functions of a government agency. A primary example of an SRO is the Financial Industry Regulatory Authority (FINRA), which oversees broker-dealers on Wall Street.<sup>35</sup> SROs like FINRA do not exercise *private* regulatory power; whatever coercion they exert over their members is backed by the sovereign regulatory power of the government.<sup>36</sup> Even without formal gov-

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\_Jenkins2/publication/37150822\_Codes\_of\_Conduct\_Self\_Regulation\_in\_a\_Global\_Economy/links/5448d2f30cf2f14fb8144837.pdf [https://perma.cc/UXN7-3LN6].

31. See OECD, CODES OF CORPORATE CONDUCT: AN INVENTORY 8-10 (1999), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=td/tc/wp\(98\)74/final](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=td/tc/wp(98)74/final) [https://perma.cc/X5B7-SGEU].

32. See OECD, CODES OF CORPORATE CONDUCT: EXPANDED REVIEW OF THEIR CONTENTS 5 (2001), [https://www.oecd.org/daf/inv/investment-policy/WP-2001\\_6.pdf](https://www.oecd.org/daf/inv/investment-policy/WP-2001_6.pdf) [https://perma.cc/LLN3-YR4D].

33. Of the forty-five codes of conduct surveyed by the OECD that specifically target contractors and suppliers, seventy-one percent use on-site inspections to monitor performance. *Id.* at 26. Only forty-two percent of company codes, however, state prospective penalties or other consequences of non-observance for employees, business partners, or members of business associations. *Id.* at 27. Another survey of 132 corporate codes of conduct found that less than ten percent of company codes and five percent of codes adopted by business groups had some form of external monitoring. See Ans Kolk, Rob van Tulder & Carlijn Welters, *International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves?*, 8 *TRANSNAT'L CORPS.* 143, 169 tbl.4b (1999).

34. It is common practice for multinational corporations to adopt codes of vendor conduct in global procurement contracts. See Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 *AM. J. COMPAR. L.* 711, 714 (2009). These codes of vendor conduct typically refer to labor and environmental standards established through international conventions and laws of the multinational corporations' home countries. *Id.* at 720-22. Where the standards set forth in the codes of vendor conduct differ from the applicable laws in countries where suppliers operate their factories, the codes of vendor conduct typically choose the stricter standards. *Id.* at 722.

35. See Benjamin P. Edwards, *The Dark Side of Self-Regulation*, 85 *U. CIN. L. REV.* 573, 574-75 (2017). FINRA is so closely integrated into the U.S. securities regulatory regime that it acquires a quasi-governmental status. Among other things, FINRA enjoys absolute immunity for its regulatory functions, an ability to impose fees on members, and disciplinary power over its members. *Id.* at 583-84.

36. Membership in FINRA is no longer voluntary; it is required for all broker-dealer firms that are members of the New York Stock Exchange. See Order Approving Proposed Rule Change Relating to NYSE Rule 2, 72 *Fed. Reg.* 59129 (Oct. 12, 2007).



ernment-endorsement like in the case of FINRA, SROs conduct self-regulation as “a defense mechanism to prevent [government] regulation.”<sup>37</sup> Therefore, to the extent that SROs do exercise private regulatory power, such power is still exercised with the government’s sovereign regulatory power in mind.

### B. Corporations Are Becoming Private Regulators

The CPR model departs from the traditional modes of corporate participation in public policymaking in fundamental ways. Instead of attempting to capture or avoid the government’s sovereign regulatory power, the CPR model completely disregards such power and relies on a corporation’s private economic power instead. And instead of passively reacting to the government’s sovereign regulatory power, the CPR model features proactive corporate action in efforts to shape public policy. Finally, instead of focusing narrowly on a corporation’s own interests, financial or otherwise, the CPR model takes a broader view of corporate interests more closely aligned with societal interests on issues such as the environment and social justice.<sup>38</sup>

What brought about these fundamental shifts? The reasons for the rise of corporate private regulatory power are multifold. First, political polarization has made it very difficult for the government to effectively make public policies using its sovereign regulatory power. Polarization has characterized American political life for some time.<sup>39</sup> But polarization has increased enormously in the last decade in the United States and other countries due to highly partisan cable news networks, social media that curates what users see, and the rise of an anonymous internet that stifles in-person communication.<sup>40</sup> These factors have resulted in “an inability of political leaders to communicate constructively with each other even on some of the nation’s most pressing problems, such as healthcare and immigration.”<sup>41</sup> For example, in the first one hundred days of the 116th Congress elected in the 2018 midterm elections, only two pieces of legislation made it to Senate roll call votes and won ap-

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37. HAUFLE, *supra* note 29, at 22.

38. Examples of corporations taking a broader view of corporate interests on environmental and social justice issues include corporate actions over immigration and fossil fuels. *See, e.g.*, Henry & Moise, *supra* note 6; Holger, *supra* note 9.

39. Erik Cleven, Robert A. Baruch Bush & Judith A. Saul, *Living with No: Political Polarization and Transformative Dialogue*, 2018 J. DISP. RESOL. 53, 53 (2018).

40. Robert C. Bordone, *Building Conflict Resilience: It’s Not Just About Problem-Solving*, 2018 J. DISP. RESOL. 65, 65–66 (2018).

41. *Id.* at 65.

proval.<sup>42</sup> There have been efforts to bypass the legislative branch to make public policies, notably through executive and judicial actions.<sup>43</sup> But such actions raise thorny legal issues<sup>44</sup> and threaten deliberative democracy.<sup>45</sup>

While the nation's political power is increasingly divided, corporate power has risen in recent decades. In 2016, seventy-one out of the top one hundred revenue generators in the world were corporations, dominating the twenty-nine nations with enough state revenues (e.g., collected taxes) to make the list.<sup>46</sup> Twenty-seven U.S. firms made the top one hundred, more than from any other country.<sup>47</sup> The United States also boasts the largest corporation by revenue: Walmart.<sup>48</sup> Only nine countries generate more revenues than the Arkansas-based corporation.<sup>49</sup> Walmart's rise as an economic power lays the foundation for more aggressive forms of corporate activism.

Another factor contributing to the rise of the CPR model is increased consciousness of corporate social responsibility among stakeholders—shareholders, activists, consumers, and so on. For decades, stakeholders have been engaged in multi-pronged efforts—including protests, lawsuits, shareholder resolutions, dialogues, and legislative instruments—to pressure corporations into action on issues of public

42. Jordan Carney, *Legislation Slows to Crawl in Divided Washington*, HILL (Apr. 17, 2019, 6:39 PM), <https://thehill.com/homenews/senate/437657-legislation-slows-to-crawl-in-divided-washington> [https://perma.cc/7QJ8-GZ39].

43. An example of using executive actions to address a major policy issue is President Obama's decision to defer the deportation of undocumented immigrants who arrived in the United States as children. See Eyder Peralta, *Obama Goes It Alone, Shielding up to 5 Million Immigrants from Deportation*, NPR (Nov. 20, 2014, 6:00 PM), <https://www.npr.org/sections/thetwo-way/2014/11/20/36519963/obama-will-announce-relief-for-up-to-5-million-immigrants> [https://perma.cc/UZE5-M6MB]. President Obama cited the lack of congressional action on this issue as the reason for his executive order. *Id.* ("To those members of Congress who question my authority to make our immigration system work better, or question the wisdom of me acting where Congress has failed, I have one answer: Pass a bill."). An example of addressing a major policy issue through judicial actions was the U.S. Supreme Court's ruling in June 2020 to extend protection against workplace discrimination under the 1964 Civil Rights Act to gay and transgender workers. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

44. The legality of the President's executive orders has been the subject of numerous lawsuits. One study finds that the U.S. Supreme Court and the Court of the Appeals for the D.C. Circuit took up substantive legal issues related to an executive order in 152 cases between 1865 and 2013. See Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2084–87 (2015).

45. See David M. Driesen, *President Trump's Executive Orders and the Rule of Law*, 87 UMKC L. REV. 489, 489 (2019) ("[E]xecutive orders bear an uncomfortable resemblance to the decrees that dictators use to rule non-democratic countries.").

46. Milan Babic, Eelke Heemskerk & Jan Fichtner, *Who Is More Powerful—States or Corporations?*, CONVERSATION (July 10, 2018, 11:14 AM), <https://theconversation.com/who-is-more-powerful-states-or-corporations-99616> [https://perma.cc/562Y-V4QP].

47. *Id.*

48. *Id.*

49. *Id.*

concern.<sup>50</sup> In particular, the past decade or so has seen institutional stock investors increasingly focused on the financial implications of corporate action (or inaction) on environmental, social, and corporate governance issues (ESG).<sup>51</sup> Independent research groups score companies' ESG behaviors, and investors tend to favor firms receiving high scores on societal and environmental issues.<sup>52</sup> This form of investing is essentially a newer version of the CSR movement.<sup>53</sup>

The confluence of gridlocked politics, rising corporate power, and motivated stakeholders naturally pushed corporations to transform corporate activism from a voluntary model to a coercive one. Under the CPR model conceptualized by this Article, corporations are no longer secondary participants in public policymaking; they actively impose their policy preferences on suppliers, contractors, and customers. The power underlying the CPR model is economic in nature; corporations can act as private regulators because of their size and consequent market power.

The rise of CPR raises a host of challenging questions. What does it mean for the allocation of rights in society? To what extent should rules governing the government's regulatory power be modified to account for this new class of private regulators? And what legal instruments might be available to deal with CPR? Below, this Article attempts to answer these questions.

## II. CONCEPTUALIZING CPR

To understand the nature and scope of CPR, it is imperative to conceptualize it within the broader context of allocation of rights. As discussed below, exercising CPR power is essentially exercising the right of refusal to deal with counterparties. This right of refusal can be theorized as a new form of property right, whose allocation has important implications for both rights and wealth.

### A. *Right of Refusal: A New Property*

First, this Article distinguishes between two forms of CPR: proactive CPR and reactive CPR. As a definitional matter, corporations can

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50. Robin Broad & John Cavanagh, *The Corporate Accountability Movement: Lessons & Opportunities*, 23 FLETCHER F. WORLD AFFS. 151, 156–58 (1999).

51. See Georg Kell, *The Remarkable Rise of ESG*, FORBES (June 26, 2018, 10:09 AM), <https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/#1ab9882e1695> [https://perma.cc/WZ52-VHYE].

52. See *id.*

53. See *id.*

be viewed as exercising proactive CPR power when they initiate the action at issue. For example, Microsoft exercised its CPR power proactively when it cut off its contractors for failing to offer the same paid family leave benefits as required under Washington state law.<sup>54</sup> By contrast, when corporations exercise their CPR power in response to demands from contractors or customers, they exercise CPR power reactively. When a cakeshop refused to provide a wedding cake to a gay couple because of the owner's religious beliefs, the shop exercised reactive CPR, as it was responding to the couple's request for a cake.<sup>55</sup>

But whether proactive or reactive, CPR is about allocating among different entities or individuals in society a right of refusal to deal with counterparties. When a corporation is allocated this right of refusal by law, the corporation is entitled to refuse to do business with entities or individuals not complying with the corporation's corporate policy<sup>56</sup> or which are the corporation's targets for social change.<sup>57</sup> Whether wielded proactively or reactively, the nature and effect of CPR power is indeed the same; the corporation is simply exercising the right of refusal it is allocated, with the result of denying its counterparty the opportunity to do business with the corporation.<sup>58</sup>

Within the current legal framework, however, society explicitly allocates this right of refusal in some, but not all, matters. Generally speaking, the law explicitly denies corporations a right of refusal when its exercise would impinge upon citizens' fundamental rights. A prominent example of such denial is Title II of the Civil Rights Act of 1964, which prohibits the denial of goods or services to customers at places of public accommodation on the ground of race, color, religion, or national origin.<sup>59</sup> Similarly, state anti-discrimination laws deny a right of re-

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54. Weber, *supra* note 1.

55. This is the factual setup in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, where the United States Supreme Court held that the Colorado Civil Rights Commission violated the cakeshop owner's rights to free exercise of religion when it exhibited hostility toward religious beliefs in ruling that the bakeshop violated Colorado's anti-discrimination law. *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1720 (2018).

56. Contractors that do not meet Microsoft's requirement on paid family leave fall under this category. See Weber, *supra* note 1.

57. See, e.g., Holger, *supra* note 9 (denying borrowers from the fossil fuel industry as a means of supporting environmental sustainability).

58. To see the substantive similarity of these two scenarios, consider two thought experiments. First, a corporation announces a new policy of not serving gay customers. In this scenario, the corporation is exercising its CPR power proactively. Second, a gay customer approaches a corporation, which refuses to serve the customer. In the latter scenario, the corporation is exercising its CPR power reactively. But in both scenarios, the gay customers would likely feel equally aggrieved. And of course, both scenarios are predicated upon the corporation being allocated the right of refusal when it comes to gay customers.

59. See 42 U.S.C. § 2000a(a) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin.").

fusal by extending legal protection to additional protected classes such as sexual orientation and gender identity.<sup>60</sup>

On certain matters, the law grants fundamental rights to citizens, but only against the government or actors sufficiently connected to the government. This is the case under U.S. law for rights mandated by the U.S. Constitution.<sup>61</sup> As an example, when a bank stopped lending money to two doctors because they owned an abortion clinic, the doctors could not assert a cause of action against the bank based on the constitutional right to abortion.<sup>62</sup> Instead, they had to claim that the bank's action constituted statutorily-prohibited discrimination against their ethnic origin and religion, which had more permissive views on abortion.<sup>63</sup>

On most matters, however, the law does not explicitly allocate the right of refusal at all. Underlying these matters is the assumption that where private actors are concerned, "everything which is not forbidden is allowed."<sup>64</sup> Therefore, Microsoft could refuse to do business with contractors that do not comply with its paid family leave policy,<sup>65</sup> because no law prevents it from doing so.

But by not explicitly depriving corporations of the ability to impose conditions on its dealings with suppliers, contractors, and customers, the law is indeed allocating the right of refusal to corporations, albeit implicitly. When the corporation's counterparties cannot seek legal recourse against the conditions forced upon them, the effect is the same as an explicit allocation of a right of refusal to the corporation.<sup>66</sup> This

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60. For detailed discussions of state anti-discrimination laws, see JEROME HUNT, CTR. FOR AM. PROGRESS ACTION FUND, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES: STATE NONDISCRIMINATION POLICIES FILL THE VOID BUT FEDERAL PROTECTIONS ARE STILL NEEDED (2012), [https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state\\_nondiscrimination.pdf?\\_ga=2.233559005.291583336.1636748938-1985086353.1636748938](https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf?_ga=2.233559005.291583336.1636748938-1985086353.1636748938) [https://perma.cc/U2LK-J3AX].

61. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) ("Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints.").

62. See *Why Did Bank Stop Lending Money to 2 Indian Doctors Who Own Abortion Clinic?*, OUTPATIENT SURGERY (Mar. 13, 2012), <http://www.outpatientsurgery.net/news/2012/03/13/why-did-bank-stop-lending-money-to-2-indian-doctors-who-own-abortion-clinic> [https://perma.cc/LDX4-98W8].

63. *Id.*

64. See John Laws, *The Rule of Reason—An International Heritage*, in JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE 247, 256 (Mads Andenas & Duncan Fairgrieve eds., 2000).

65. Weber, *supra* note 1.

66. The Supreme Court would have explicitly allocated a right of refusal to the bakeshop in *Masterpiece Cakeshop* had it held that it would violate a corporation's constitutional right to free speech and free exercise of religion to apply Colorado's public accommodation law to compel the bakeshop to sell the plaintiffs the wedding cake. But the Supreme Court chose to decide the case on a narrower ground. See Erwin Chemerinsky, *Not a Masterpiece: The Supreme Court's Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, AM. BAR ASS'N, <https://www.americanbar.org/groups>

legal limbo therefore enables corporations to assert their CPR power, either proactively or reactively.

This right of refusal, allocated by the government's legal rules, or the lack thereof, is not unlike the vast amounts of wealth created by the government in the forms of benefits, contracts, and subsidies. In the tradition of Charles Reich, who famously argued that government-created wealth was "taking the place of traditional forms of wealth,"<sup>67</sup> this right of refusal could be likened to a new form of property right, as it confers a valuable right on its recipients. Through the ability to choose its counterparties using the criteria it sets, a corporation can derive financial benefits for itself and its investors.<sup>68</sup> For example, this right of refusal allows a corporation to manage its public image in a way that contributes to its bottom line.<sup>69</sup>

Like other government-created wealth, the right of refusal differs in fundamental ways from physical property, which underpins the traditional notion of property. As Charles Reich observes, the new, government-created property "does not provide the security that owning a home or land might give a person."<sup>70</sup> Instead, it is embedded in vast networks of human organizations and institutions and "may be taken away, regulated, or subjected to conditions."<sup>71</sup> Viewed in this light, the right of refusal is even newer than the new property that Reich elucidated. Like Reich's new property, the right of refusal is a social construct. But even more so than Reich's new property, the right of refusal is completely predicated upon the positions of individuals or entities in society in relation to others. Without social relationships, this even newer property would not exist, let alone carry pecuniary value.

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/crsj/publications/human\_rights\_magazine\_home/the-ongoing-challenge-to-define-free-speech/not-a-masterpiece/ [https://perma.cc/LQQ6-7UKH].

67. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

68. See JEAN-PASCAL GOND, NIAMH O'SULLIVAN, RIENEKE SLAGER, MIKAEL HOMANEN, MICHAEL VIEHS & SZILVIA MOSONY, HOW ESG ENGAGEMENT CREATES VALUE FOR INVESTORS AND COMPANIES 7–12 (2018), <https://www.unpri.org/download?ac=4637> [https://perma.cc/SJ66-LCRP] (discussing the mechanisms through which ESG engagement creates value for corporations and investors).

69. For example, in September 2018, Nike announced that it chose Colin Kaepernick—who became a controversial figure after kneeling during the national anthem at NFL games to protest police brutality—as one of the athletes helping commemorate the thirtieth anniversary of Nike's "Just Do It" slogan. Alex Abad-Santos, *Why the Social Media Boycott over Colin Kaepernick Is a Win for Nike*, VOX (Sept. 6, 2018, 10:47 AM), <https://www.vox.com/2018/9/4/17818148/nike-boycott-kaepernick> [https://perma.cc/3ALV-8UH6]. Nike reportedly assessed the negative responses it might receive for its Kaepernick decision and concluded that the rewards of sponsoring Kaepernick would outweigh the cost. See *id.* Nike's strategy paid off, as shown by its stellar earnings in the first quarter since its Kaepernick decision. See Soo Youn, *Nike Sales Booming After Colin Kaepernick Ad, Invalidating Critics*, ABC NEWS (Dec. 21, 2018, 5:45 PM), <https://abcnews.go.com/Business/nike-sales-booming-kaepernick-ad-invalidating-critics/story?id=59957137> [https://perma.cc/YRH7-XQG8].

70. Charles A. Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295, 296 (1990).

71. *Id.* at 295–96.

### B. Allocating the Right of Refusal

Once the right of refusal is viewed through the lens of property rights, the next immediate question is how this right ought to be allocated. This question has both positive and normative aspects. The positive aspect examines the mechanisms through which to allocate the right, while the normative aspect queries how the right of refusal ought to be allocated as a substantive matter. This Part discusses the positive question, and Part III takes up the normative one.

Starting with the positive question, this Article argues that the right of refusal can be allocated through three mechanisms: constitutional allocation, statutory allocation, and judicial allocation. As its name suggests, constitutional allocation involves explicit constitutional provisions allocating the right of refusal. The proposed federal Equal Rights Amendment (ERA), for instance, would have explicitly denied businesses a right of refusal to deal with counterparties on the basis of sex.<sup>72</sup> This allocation, however, would have applied only to businesses sufficiently connected with the government, as is the case with most federal constitutional requirements.<sup>73</sup> After federal ERA adoption failed,<sup>74</sup> many states passed their own ERAs.<sup>75</sup> Some of these states explicitly made their ERAs applicable to private businesses.<sup>76</sup> Under these ERAs, corporations cannot reject suppliers, contractors, or customers on the basis of sex.<sup>77</sup>

The second mechanism for allocating the right of refusal is through explicit statutory provisions, the most notable example of which is the Civil Rights Act of 1964.<sup>78</sup> The advantages of statutory allocation over constitutional allocation are twofold. First, while legislative acts themselves are subject to constitutional limits, statutory allocation generally faces fewer legal constraints than constitutional allocation does; stat-

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72. The proposed federal ERA states: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." See Alex Cohen & Wilfred U. Codrington III, *The Equal Rights Amendment Explained*, BRENNAN CTR. FOR JUST. (Jan. 23, 2020), <https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained> [<https://perma.cc/Q894-XQCL>]. The amendment passed Congress in 1972 but was not ratified by the necessary number of states under the original deadline set by Congress. *Id.*

73. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) ("[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.") (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972)).

74. See Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1202 (2005).

75. See *id.* at 1229–30.

76. For example, Montana's ERA explicitly applies to private actors, and Rhode Island's applies to "persons doing business with the state." *Id.* at 1229 (quoting R.I. CONST. art. I, § 2).

77. *Id.*

78. See *supra* note 58 and accompanying text.

utes can—and often do—apply directly to private businesses without any regard for the state action requirement which constrains constitutional avenues. Second, statutory allocation is relatively easier to use than constitutional allocation as it requires only majority votes by the legislature, rather than the higher threshold required for constitutional amendments.<sup>79</sup> Therefore, compared to constitutional allocation, statutory allocation provides a more flexible, cost-effective method for allocating the right of refusal.

The third allocation mechanism is through judicial decisions. To some extent, both constitutional and statutory allocations rely on courts to define their exact contours. For instance, does the Equal Protection Clause of the Fourteenth Amendment deny a right of refusal on the basis of sex?<sup>80</sup> Does the Civil Rights Act of 1964 deny a right of refusal on the basis of sexual orientation and gender identity?<sup>81</sup> Questions like these require courts to step in, unless unambiguous answers are provided through constitutional amendments or legislation. But courts become separate allocators of the right of refusal when no constitutional or statutory provision addresses the specific issue. For example, if a contractor sues Microsoft for denying it business opportunities because of its non-compliance with Microsoft's paid family leave policy,<sup>82</sup> courts must decide whether such denial is legal, without assistance from specific constitutional or statutory provisions. Courts will have to pass judgment on these issues on common law grounds, or by referencing constitutional or statutory provisions originally intended for other issues.

Viewing the right of refusal as a property right begs the question whether the initial allocation of the right matters. In a seminal article, Ronald Coase proposed that in the absence of transaction costs, the initial allocation of an entitlement does not matter from an efficiency point of view.<sup>83</sup> This is because the party who would benefit more from an alternative allocation of the entitlement would compensate the current entitlement holder and still be better off.<sup>84</sup> According to Coase, regardless of the initial allocation of the entitlement, market negotiations

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79. See U.S. CONST. art. V.

80. The Fourteenth Amendment of the U.S. Constitution does not explicitly reference sex discrimination. Courts have interpreted such discrimination to be subject to an "intermediate scrutiny" standard, which requires proof that sex-based classifications serve important governmental objectives and substantially advance those objectives. See Wharton, *supra* note 73, at 1211–12.

81. Cf. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

82. See Weber, *supra* note 1.

83. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

84. *Id.*



will lead to the entitlement going to the party who values it the most.<sup>85</sup> If Coase is correct, then it does not matter how the right of refusal is initially allocated, for the parties involved can simply negotiate away the right if doing so would result in so-called Pareto improvement, that is, someone will be better off and no one will be worse off.<sup>86</sup>

Although Coase could be correct in theory, many hurdles prevent Coaseian bargaining from reallocating the right of refusal and ensuring the most efficient outcomes. The most obvious hurdle, which is also the most potent criticism of Coase's theory in general, is that in reality, transaction costs are always non-negligible.<sup>87</sup> Zero transaction costs in a perfect Coaseian world would require "both perfect knowledge and the absence of any impediments or costs of negotiating,"<sup>88</sup> which are certainly not realistic under most circumstances.

But when it comes to the right of refusal, one particular problem stands in the way of Coaseian bargaining: the difficulty of ascertaining the monetary value of the right of refusal. For many individuals, the right of refusal is a matter of right and wrong, and its value cannot be simply reduced to a dollar figure. Take the issue at hand in *Masterpiece Cakeshop*, for example. The gay couple denied service by the cakeshop incurred a minimal monetary loss, as they could likely buy a wedding cake from another bakeshop without too much difficulty. For them, it was more a matter of principle, and they would likely be unable to attach a dollar figure to the legal right to purchase a wedding cake from the cakeshop of their choice. It would also be difficult for the couple to attach a dollar figure to the cost of being discriminated against. The same goes for the cakeshop owner, who probably would be hard pressed to say for how much more money he would be willing to give up his right of refusal. When both sides do not consider a right to be measurable by money, market-based bargaining will not provide a solution to the efficient allocation of the right.

Even if the monetary value of the right of refusal could be easily ascertained, the asymmetry in the financial resources of parties that are most often involved in allocation of the right may make it impractical to conduct effective bargaining. Allocation of the right of refusal often pits individuals or small businesses with limited means against corporate giants with essentially unlimited financial resources. So even if individuals or small businesses value the right of refusal (or the right to *not* be

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85. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094 & nn. 10 & 12 (1972).

86. Reza Dibadj, *Weasel Numbers*, 27 CARDOZO L. REV. 1325, 1329 (2006).

87. Indeed, Coase himself recognized that the assumption of zero transaction costs was unrealistic. See Ronald H. Coase, *The Institutional Structure of Production* 10–11 (Univ. of Chi. L. Sch., Occasional Paper No. 28, 1992).

88. Calabresi & Melamed, *supra* note 85, at 1095.

refused) more than their corporate counterparties do, they may not have deep enough pockets to effectuate the ostensibly efficient transfer of the right of refusal. For example, contractors denied business opportunities with Microsoft<sup>89</sup> may not have enough financial resources to purchase a waiver from Microsoft, even if a waiver would cost them less than providing the required family leave coverage.

Finally, the initial allocation of the right of refusal matters not just for efficiency purposes, but for distributional purposes as well. Were it possible for the right of refusal to be reallocated to achieve the most efficient outcomes, the right's initial allocation remains relevant because it may affect the distribution of wealth among the parties involved.<sup>90</sup> Even if the initial allocation could be bargained away, the entity initially allocated the right will determine who needs to pay whom for the exercise or non-exercise of the right.<sup>91</sup> In his original analysis, Coase opined that at least in a tort setting, the initial allocation of entitlements affects the distribution of wealth, even though it does not affect economic efficiency.<sup>92</sup> Scholars subsequently refined Coase's original analysis and suggested that in a contract setting, where all terms of the contract are negotiable, the initial allocation of entitlements should not affect the distribution of wealth, because the parties involved will account for that entitlement allocation in their contractual negotiations, cancelling out its effects on wealth distribution.<sup>93</sup> The reason for this conclusion, according to Stewart Schwab, is that "[w]hen a legal rule regulates only one term of a multifaceted bargain and allows parties voluntarily to reassign the entitlement, the law's power over the distribution of wealth between the parties is limited."<sup>94</sup>

Therefore, whether the initial allocation of the right of refusal affects the distribution of wealth depends on whether the attribute on which the right of refusal is based is one being negotiated. In the case of Microsoft and its contractors, whether the contractors provide paid family leave is just one of many facets of the contract negotiations. If Microsoft is allocated the right of refusal and requires contractors to provide paid family leave as a condition of doing business with Mi-

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89. Weber, *supra* note 1.

90. For an analogous setting, where the ownership of a right is determined by a court, Professor Harold Demsetz observes that "[t]here can be little doubt that a specific court decision will alter the distribution of wealth between the contending parties; that, after all, is the main motivation for litigation." Harold Demsetz, *Wealth Distribution and the Ownership of Rights*, 1 J. LEGAL STUD. 223, 224 (1972).

91. See Calabresi & Melamed, *supra* note 85, at 1098–1101.

92. The example used by Coase concerns straying cattle destroying crops growing on neighboring land, posing a quintessential tort question of whether the cattle owner should be liable for damages to the crops. See Coase, *supra* note 83, at 2–8.

93. Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 262 (1987).

94. *Id.*

crosoft, contractors may attempt to adjust other terms of the contracts, e.g., by charging Microsoft a higher price for their services than they otherwise would. Whether the contractors are capable of extracting a higher price from Microsoft depends on the industry structure—that is, whether the contractors are price takers or price setters.<sup>95</sup> To the extent that the contractors have market power and can pass on the cost of providing paid family leave to Microsoft, wealth will be redistributed from Microsoft to the contractors' employees, leaving the financial positions of the contractors unchanged. If, however, the contractors lack market power and must themselves absorb the cost of paid family leave, wealth will be redistributed from the contractors to their employees, leaving Microsoft's financial position unchanged.

In a different setting, where the right of refusal is based on an unchangeable attribute, the parties involved cannot adjust other terms of their dealings to compensate for the change in their financial positions caused by the exercise of the right of refusal. For example, when Dick's Sporting Goods prohibits the sale of firearms to customers under age twenty-one,<sup>96</sup> customers cannot negotiate with Dick's over other terms of their transactions, because age is not a term within the customers' control to change, and customers below age twenty-one are disqualified from further negotiations. Allocating the right of refusal to Dick's in such a setting has real redistributive effects, with customers suffering a loss of wealth in the form of denied purchase opportunities.

### III. LEGAL RESPONSES TO CPR

As discussed above, CPR power is akin to a property right allocated explicitly or implicitly under the law. And the initial allocation of the right to exercise CPR power is crucial for determining the rights and obligations of different entities and individuals, as well as for distributional purposes. But these points only beg the central question: What should society do with the corporate CPR power? In other words, how should society allocate the right of refusal?

This Article explores answers to this question under various approaches: the status quo approach, the ad hoc approach, the antitrust approach, the general CPR law approach, the property approach, and the constitutional approach. This Article does not intend to settle on a specific approach; instead, the goal is to analyze the theoretical and practical implications of each approach and provide insights for future policy deliberations.

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95. See WILLIAM A. MCEACHERN, *ECONOMICS: A CONTEMPORARY INTRODUCTION* 212 (2009) (setting forth the distinction between price takers and price makers).

96. Peltz, *supra* note 4.

### A. Status Quo Approach

One potential response to corporations' rising CPR power is to maintain the status quo, that is, to allow corporations to freely exercise their CPR power except when it encroaches upon rights protected under federal or state law. Maintaining the status quo on CPR power, however, should not be equated with not allocating the power at all. Instead, the status quo approach simply allocates the right of refusal the way it is currently allocated. So, at least implicitly, this approach favors corporations by granting them the right of refusal in the vast majority of cases.

The strongest support for the status quo approach lies with its arguably positive effect in facilitating political action and promoting policy experiments. Because of political gridlock, many important public policy issues remain unresolved, particularly at the federal level.<sup>97</sup> Allowing corporations to assume policymaking roles is one way to bypass the gridlock and take action on these issues. For instance, allowing banks to deny funding for fossil fuel projects will at least incrementally slow down carbon emissions and address challenges posed by climate change, no matter how small the banks' role might be. Furthermore, leaving aside questions about the desirability of the policies pursued by corporations, having an additional venue—corporations—for experimenting with novel public policies is itself an advantage, as this Article posits. In this respect, corporations are not unlike state governments,<sup>98</sup> which have been hailed as laboratories of democracy in a federalist system of governments. As Justice Brandeis famously put it, “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . . and try novel social and economic experiments without risk to the rest of the country.”<sup>99</sup> This logic holds true for policy experiments by corporations to an even larger degree, as the voluntary action of a select few corporations tends to have more isolated impact than if the same action were mandated by the government for all entities. Experimenting with new public policies at the corporate level allows society to implement controversial public policies on a more controlled basis, build consensus, and pave the way for eventual legislation or regulation. For instance, corporations were early leaders in providing LGBTQ workers with employment benefits before such benefits became legally required.<sup>100</sup>

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97. See *supra* notes 39–42 and accompanying text.

98. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

99. *Id.*

100. See Lin, *supra* note 13, at 1543–44. For example, I.B.M. provided healthcare coverage to same-sex couples. *Id.* at n.29.

The main argument against the status quo approach is that it does not sufficiently protect citizens' rights, which, outside of the immediate categories recognized under existing laws, could be encroached upon by corporations' exercise of their CPR power. Proponents of the status quo approach might counter that the curtailment of rights is not as significant as it appears to be, because those who are adversely affected by the corporate CPR power can always turn to other corporations for similar business opportunities. Furthermore, the argument goes, market competition would reign in overzealous corporate behavior in the first place.<sup>101</sup>

The problems with these potential counterarguments are twofold. First, it is disingenuous to suggest that the corporate CPR power could be easily eschewed. Today, corporations' growing power leads to corporate policies' unprecedented influence over the daily lives of citizens.<sup>102</sup> It used to be the case that the government, with its vast resources and absolute sovereign power, exerted the largest influence over citizens' lives.<sup>103</sup> But with the advent of the modern economy, and particularly the internet age, corporations are amassing increasingly large amounts of resources, comparable to those of sovereign governments.<sup>104</sup> Particularly when a corporation possessing a dominant market position exercises its CPR power, there may be few alternatives to which the rejected counterparties can turn.<sup>105</sup> As a result, it appears inevitable that CPR power will severely limit the economic choices of counterparties. For instance, when Dick's Sporting Goods raised the minimum age for purchasing firearms and ammunition in its stores,<sup>106</sup> it undoubtedly lim-

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101. For example, if the twelve-week paid family leave required by Microsoft of its contractors was considered too extreme, contractors would cease to do business with Microsoft, forcing it to modify its policy.

102. For instance, social media companies have an outsized influence on citizens' daily lives. "[T]wo-thirds of all Americans with internet access are users of a social network website." Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 122 (2014). Facebook alone "has over 800 million users worldwide and can receive 500 million site visits a day." *Id.* at 122–23.

103. It is for this reason that various mechanisms for checking the government's power are devised under constitutional and other laws to ensure that the government carries out this influence in a fair and equitable way. Among such mechanisms are the constitutional rights specified in the Bill of Rights. Another mechanism involves the procedural requirements for government regulations under the Administrative Procedures Act. *See* Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237, 5 U.S.C. §§ 551–559.

104. *See* Babic et al., *supra* note 46.

105. For example, after Amazon Web Services terminated its web hosting services for the social media website Parler over its alleged role in inciting the January 6, 2021, attacks on the U.S. Capitol, Parler suffered weeks-long service disruption before it was able to secure services from another provider and resume operations with limited functionality in February 2021. *See* Paul Ziobro, *Parler Files New Lawsuit Against Amazon, Alleging Anticompetitive Conduct*, WALL ST. J. (Mar. 3, 2021, 12:38 PM), <https://www.wsj.com/articles/parler-files-new-lawsuit-against-amazon-alleging-anticompetitive-conduct-11614793091> [https://perma.cc/55Y7-V9TF].

106. Peltz, *supra* note 4.

ited the choices of its customers, as those who were under age twenty-one could not make purchases from Dick's that were perfectly legal for them to make elsewhere. Given current industry conditions, those customers can probably go somewhere else to purchase firearms and ammunition.<sup>107</sup> But as corporations grow, one could imagine a scenario where customers might be deprived of meaningful venues to purchase those firearms and ammunition. Furthermore, even if individual corporations exercising CPR power are not large enough to force counterparties to comply with their corporate policies, they could potentially deprive counterparties of meaningful market choices if they, as a group, adopt the same corporate policies. Indeed, the very rationale for corporate actions on public policy belies this "harmless CPR" argument. The reason why politicians and activists urge corporate actions through CPR is because they believe it is an effective tool in addressing public policy concerns.<sup>108</sup>

The second problem with the status quo approach centers on rights. Even if the exercise of CPR power has no notable impact on economic outcomes due to market competition, its impact on the legal rights of the rejected counterparties cannot be ignored. It is one thing for legislatures, regulators, or courts to curtail rights through deliberative processes, but it is another thing for corporations to do so in a process subject to few, if any, legal constraints.<sup>109</sup> It is dubious, from a rights perspective, to cede essentially lawmaking authority to corporations, regardless of economic outcomes. For example, when Dick's Sporting Goods raised the minimum age for purchasing firearms to twenty-one,<sup>110</sup> its policy went above the requirement under federal law for certain types of firearms.<sup>111</sup> While customers might easily go elsewhere to

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107. Indeed, Dick's itself predicted that it would lose some of its customers over its tougher gun sales policy. See Kevin McCoy, *Dick's Sporting Goods CEO Expects to Lose Customers over Company's Tougher Gun Rule*, USA TODAY, <https://www.usatoday.com/story/money/retail/2018/03/13/dicks-sporting-goods-shares-tumble-dismal-holiday-sales/419388002/> [<https://perma.cc/WZ7S-NLK2>] (Mar. 13, 2018, 4:21 PM).

108. For example, activists who stage sit-ins to protest banks' fossil fuel investments believe that such protests are effective tools in addressing the climate crisis. See Lennox Yearwood Jr. & Bill McKibben, *Want to Do Something About Climate Change? Follow the Money*, N.Y. TIMES (Jan. 11, 2020), <https://www.nytimes.com/2020/01/11/opinion/climate-change-bank-investment.html> [<https://perma.cc/Y64F-NH57>].

109. This sentiment was echoed by German Chancellor Angela Merkel, who objected to Twitter's and Facebook's bans of U.S. President Donald Trump from their platforms following the siege of the U.S. Capitol on January 6, 2021. Birgit Jennen & Ania Nussbaum, *Germany and France Oppose Donald Trump's Twitter Exile*, MSN (Jan. 11, 2021), <https://www.msn.com/en-us/news/world/trumps-twitter-exile-spurs-opposition-from-germany-france/ar-BB1cEw3X> [<https://perma.cc/EH2E-VU7M>]. A spokesperson for the Chancellor stated that "[r]ights like the freedom of speech 'can be interfered with, but by law and within the framework defined by the legislature—not according to a corporate decision.'" *Id.*

110. Peltz, *supra* note 4.

111. The federal minimum age for purchasing long guns, including rifles and shotguns, is eighteen. 18 U.S.C. § 922(b)(1); see also *Minimum Age to Purchase & Possess*, GIFFORDS L. CTR.,

purchase firearms, their legal rights, granted under federal law,<sup>112</sup> are restricted by Dick's decision to raise the minimum age.

One might contend that it is not inherently wrong to allow corporations to deny counterparties certain rights granted under the law. But that is precisely the question: Should society grant corporations such power and have them serve the role of regulators? This Article does not take an affirmative stance on this question. Rather, it discusses the circumstances under which society might find it objectionable to allow corporations to exercise the CPR power, and what options might be available to address those objections. In the following Section, this Article goes beyond the status quo to conduct a systematic examination of how society might allocate the right of refusal. It lays out several alternative approaches to the status quo, inquires into the advantages and disadvantages of the different approaches, and discusses their implications for how society might want to regulate the CPR power. Some of these approaches may not be feasible—at least not under the current legal frameworks. But at this point, it is important that scholars and policymakers not be constrained by feasibility. CPR is a radical departure from past paradigms and handling it may require radical solutions as well.

### B. *Ad Hoc Approach*

This Article now turns to the ad hoc approach to dealing with CPR, which closely resembles current practices. This approach reallocates the right of refusal on an ad hoc, case-by-case basis. Under this approach, legislatures or regulatory agencies enact new laws or regulations outlining whether and when corporations are allowed to exercise CPR power, but only on *specific* issues. One basic form of this ad hoc approach is to allocate the right of refusal in a way that favors a particular side of a political issue. A more refined form of the ad hoc approach deals with the right of refusal in a more neutral manner that cuts across the political spectrum. As is detailed below, this neutral form of the ad hoc approach offers a longer-term—yet more difficult to achieve—solution to the CPR problem.

The ad hoc approach differs from the status quo approach in that it does not take the current allocation of the right of refusal for granted. Instead, it recognizes the potential problems with the corporate CPR power and attempts to change its allocation through ad hoc intervention. Yet the ad hoc approach is still similar to the status quo approach

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<https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/minimum-age/> [https://perma.cc/XD9R-YQTQ].

112. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

because it resolves the CPR problem only in a piecemeal manner. Indeed, it is the cumulative effect of ad hoc interventions—designed to solve one issue at a time—that resulted in the CPR power status quo.

The main advantage of the ad hoc approach is that it is perhaps the most realistic option for dealing with CPR. Tackling CPR one issue at a time, when there is a perceived urgent need for a solution, offers a good way to address the problem at hand while gradually building consensus on a comprehensive solution to the CPR problem. The main disadvantage of the ad hoc intervention approach, however, is that it tends to politicize the process for allocating the right of refusal.

A crude form of the ad hoc approach is little more than an exercise in raw political power, where forces pushing for legislative, regulatory, or judicial solutions to the CPR problem are aligned purely along ideological lines. For example, in response to banks' efforts to curb lending to gun-related businesses, gun owner advocacy groups reportedly tried to enlist the help of lawmakers to pressure banks into changing policy.<sup>113</sup> John Velleco, director of government operations at Gun Owners of America, encouraged lawmakers to withdraw support from Dodd-Frank reform unless the reform legislation included an amendment preventing future action by banks against gun manufacturers, distributors, and purchasers.<sup>114</sup> Michael Piwowar, former Republican commissioner with the Securities and Exchange Commission, warned banks that the policy choices they make regarding gun control may put Republican support for easing derivative regulations at risk in the future.<sup>115</sup> The downsides of this crude form of the ad hoc approach are twofold. First, an over-politicized process for allocating the right of refusal inevitably taints the legitimacy of any eventual solution to the CPR problem. Second, an ideology-based solution to the CPR problem necessarily depends upon the political winds at the time. As politics change over time, a solution found in a politicized process is likely to be short-term.

By contrast, a more refined form of the ad hoc approach still deals with the CPR problem on a case-by-case basis, but in a manner that does not favor one side of the political aisle. A notable example of this neutral form of the ad hoc approach is a proposed regulation from the Office of the Comptroller of the Currency (OCC) aimed at ensuring equal access to financial services by all lawful businesses.<sup>116</sup> Proposed by

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113. See Alan Rappeport, *Banks Tried to Curb Gun Sales. Now Republicans Are Trying to Stop Them*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/politics/banks-gun-sales-republicans.html> [https://perma.cc/JV35-LU5F].

114. *Id.*

115. *Id.*

116. Fair Access to Financial Services, 85 Fed. Reg. 75261 (Nov. 25, 2020) (to be codified at 12 C.F.R. pt. 55).



the Trump administration, the regulation would implement the Dodd-Frank Act's non-discrimination principle requiring individuals to be treated fairly by national banks and federal savings associations.<sup>117</sup> The OCC cited efforts by banks to deny certain categories of customers access to financial services as a result of pressures from both the for-profit and nonprofit sectors of the economy.<sup>118</sup> The proposed regulation would, among other things, require a covered bank to make financial services available to all persons in the geographical market it serves, and to "not deny any person a financial service except to the extent justified by such person's quantified and documented failure to meet quantitative, risk-based standards established in advance by the covered bank."<sup>119</sup> If promulgated, the proposed regulation would put limitations on banks that try to exclude entire industries from financing.<sup>120</sup> The OCC halted this proposal after President Biden took office in January 2021.<sup>121</sup>

Although the OCC was motivated primarily by concerns about the fossil fuel industry's lack of access to financing, it drafted the proposed regulation using neutral language that applies equally to all industries, despite different political implications.<sup>122</sup> It requires, therefore, a level of bipartisan support to implement this approach. Granted, this approach is far more difficult to deliver than its purely partisan counterpart,<sup>123</sup> but once delivered, a solution under this approach is likely to be more durable.

The neutral form of the ad hoc approach holds the greatest promise as an aspirational yet feasible option to address the CPR problem. When the CPR power is perceived as too threatening to citizens' rights, a strong argument could be made that the government should step in and enact legislation or regulations to mandate what corporations should or should not do on a particular CPR issue. Under the neutral form of the ad hoc approach, these government mandates are devised

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117. *Id.* at 75262.

118. *Id.* at 75263. According to the OCC, there have been calls for boycotts of banks that serve certain industries, and some banks have refused to provide services to those industries. *Id.* Those industries include, among others, family planning, private prisons, large farming and agriculture, and infrastructure. *Id.*

119. *Id.* at 75265.

120. Rachel Frazin, *Trump Banking Proposal on Fossil Fuels Sparks Backlash from Libertarians*, HILL (Nov. 29, 2020, 8:00 AM), <https://thehill.com/policy/finance/527552-trump-banking-proposal-fossil-fuels-backlash-libertarians> [<https://perma.cc/2XWN-ZTJQ>].

121. News Release, Off. of the Comptroller of the Currency, OCC Puts Hold on Fair Access Rule (Jan. 28, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-14.html> [<https://perma.cc/H7ZZ-9AZT>].

122. Indeed, this proposal is often referred to as a "banking proposal on fossil fuels." See Frazin, *supra* note 120.

123. For example, the OCC's banking proposal, which favors the fossil fuels industry championed by the Republican Party, has elicited resistance from GOP lawmakers who worried that the same rule could be used to ensure access to financing for the family planning industry. *Id.*

in a non-political manner to ensure neutrality. From a substantive point of view, the government mandates may coincide with what corporations would have decided to do on their own, but the point is to replace corporate power, which is subject to few constraints, with government power, which is accountable to the public.<sup>124</sup>

A good example of what the neutral form of the ad hoc approach could accomplish can be found in the regulation of social media content. In the United States, social media providers, e.g., Twitter, Facebook, and Google, have the sole power to decide what content to allow on their platforms.<sup>125</sup> The Supreme Court recognized that “social media users employ [social media] websites to engage in a wide array of protected First Amendment activity.”<sup>126</sup> Social media users, however, are unable to challenge social media companies’ decisions to restrict or ban certain content or users based on the First Amendment because these constitutional protections, as with all constitutional protections, generally apply only to government actions, not actions of private parties.<sup>127</sup> Users could sue social media companies for their decisions to publish or not publish certain content on statutory or common law grounds, such as unfair competition, tortious interference of contractual relationships, breach of contracts, defamation, and negligence.<sup>128</sup> Many of these lawsuits, however, are barred by Section 230 of the Communications Decency Act, which grants broad immunity to providers of interactive computer services.<sup>129</sup> As a result, social media providers are free to decide, on their own, what speech is allowed or not allowed on their platforms. One of the highest-profile decisions by social media providers to restrict online speech in recent years was Twitter’s decision to permanently ban then-President Trump from its platform in the wake of the January 6, 2021, Capitol insurrection.<sup>130</sup>

In moderating content, social media sites are essentially deciding whether to exercise their CPR power to refuse to deal with users or con-

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124. Above all, exercise of government power is subject to constitutional constraints. See *infra* note 191 and accompanying text. In democratic societies, government power is also subject to democratic constraints.

125. For example, the decision to ban former President Trump from its platform was made by Facebook alone, and the company’s independent oversight board subsequently upheld the decision. See Jeff Horwitz, *Trump’s Ban from Facebook Is Upheld, but Panel Orders Review*, WALL ST. J. (May 5, 2021, 7:35 PM), <https://www.wsj.com/articles/donald-trumps-facebook-ban-is-upheld-by-oversight-board-11620220252> [<https://perma.cc/FEE3-BURS>].

126. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017).

127. See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972).

128. For detailed discussions of these claims, see VALERIE C. BRANNON, CONG. RSCH. SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 9–10 (2019), <https://crsreports.congress.gov/product/pdf/R/R45650/2>.

129. See 47 U.S.C. § 230.

130. Sarah E. Needleman, *Twitter Bans President Trump’s Personal Account Permanently*, WALL ST. J. (Jan. 8, 2021, 11:47 PM), <https://www.wsj.com/articles/twitter-says-it-is-permanently-suspending-account-of-president-trump-11610148903> [<https://perma.cc/2ZLE-UXC3>].

tent they deem objectionable. In these decisions, social media sites are guided by their sense of corporate social responsibility, as well as economic incentives to align corporate policies with users' speech and community norms.<sup>131</sup> From a substantive point of view, the content decisions made by social media providers may very well coincide with societal interests.<sup>132</sup> But the fact that corporations, and corporations alone, have the power to make those decisions might raise concerns. In February 2021, nine of the world's largest technology companies formed the Digital Trust & Safety Partnership to establish an industry framework for handling harmful content and conduct online.<sup>133</sup> This move, however, only attempts to develop industry-wide best practices and still puts the power to make content decisions in the hands of corporations themselves.<sup>134</sup>

The European approach to online speech regulation offers a clear contrast to the U.S. approach. After Twitter permanently banned then-President Trump's personal account in January 2021, German Chancellor Angela Merkel called the decision "problematic."<sup>135</sup> Her spokesman explained that "governments, not private companies, should decide on any limitations to freedom of speech."<sup>136</sup> In Germany and other E.U. member states, various laws and regulations require social media platforms to remove certain content or face significant fines.<sup>137</sup> To Europeans, "[t]he fact that a CEO can pull the plug on POTUS's loudspeaker without any checks and balances is perplexing."<sup>138</sup>

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131. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1625–30 (2018).

132. For instance, Facebook has a "community standard" against hate speech, defined by the company as "a direct attack against people—rather than concepts or institutions—on the basis of what we call protected characteristics: race, ethnicity, national origin, disability, religious affiliation, caste, sexual orientation, sex, gender identity and serious disease." *Facebook Community Standards, Objectionable Content, Hate Speech*, Ch. III, Sec. 12, FACEBOOK, [https://www.facebook.com/communitystandards/objectionable\\_content](https://www.facebook.com/communitystandards/objectionable_content) [<https://perma.cc/L29W-R7K9>].

133. Margaret Harding McGill, *Tech Giants List Principles for Handling Harmful Content*, AXIOS (Feb. 18, 2021), <https://www.axios.com/tech-giants-list-principles-for-handling-harmful-content-5c9cfba9-05bc-49ad-846a-bafo1abf5976.html> [<https://perma.cc/3JLK-NHW4>]. The nine companies are Facebook, Google, Microsoft, Twitter, Discord, Pinterest, Reddit, Shopify, and Vimeo. *Id.*

134. *See id.*

135. Ryan Browne, *Germany's Merkel Hits out at Twitter over "Problematic" Trump Ban*, CNBC (Jan. 11, 2021, 11:21 AM), <https://www.cnbc.com/2021/01/11/germanys-merkel-hits-out-at-twitter-over-problematic-trump-ban.html> [<https://perma.cc/252V-3KH4>].

136. *Id.*

137. Natalia Drozdiak & Ben Brody, *U.S., EU Part Ways in Regulating User Content on Social Media*, BLOOMBERG (June 9, 2020), <https://www.bloomberg.com/news/articles/2020-06-09/u-s-eu-part-ways-in-regulating-user-content-on-social-media> [<https://perma.cc/87GT-P69Z>].

138. Silvia Amaro, *Trump's Social Media Bans Are Raising New Questions on Tech Regulation*, CNBC (Jan. 11, 2021, 6:33 AM), <https://www.cnbc.com/2021/01/11/facebook-twitter-trump-ban-raises-questions-in-uk-and-europe.html> [<https://perma.cc/6UFU-T8D5>] (quoting Thierry Breton, the EU Commissioner for the Internal Market).

The E.U. approach to online content moderation is an example of the neutral form of the ad hoc approach. In enacting laws and regulations that regulate how social media sites moderate user content, the government is replacing CPR power with its own regulatory power, which is subject to democratic and constitutional constraints.<sup>139</sup> This is not to say that the task is easy. Indeed, a federal law that regulates the content policies of social media sites might itself raise constitutional concerns.<sup>140</sup> All of these concerns are factors to consider when the legislature weighs whether and how to allocate the right of refusal on the issue of online speech. Once a legislative solution is found, social media sites will no longer exercise CPR power when they moderate user content. Instead, they will act pursuant to government mandates, which ideally reflect society's preferences, instead of individual social media sites', with respect to online speech.

### C. Antitrust Approach

Another option for dealing with CPR is to resort to existing antitrust laws and proscribe corporations' use of CPR power when the use would restrict or impede competition. Take the gun control policy example again. In April 2018, Senator John Kennedy questioned then-Consumer Financial Protection Bureau (CFPB) Acting Director Mick Mulvaney during a Senate Banking Committee Hearing about banks' gun control policies; Mulvaney responded that so long as there were no antitrust violations, the CFPB would hesitate to intervene because consumers have choices in the market and can choose to do business with other financial institutions.<sup>141</sup> This antitrust approach would use existing antitrust laws as the basis for allocating the right of refusal.

Under antitrust laws, "[i]n general, any business—even a monopoly—may choose its business partners."<sup>142</sup> However, when a firm acquires a dominant market position, a firm's refusal to deal with a com-

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139. When social media sites are required to act by laws or regulations, there will be sufficient state action to implicate the First Amendment. BRANNON, *supra* note 128, at 16 n.157.

140. Some federal courts have ruled that online search results and search engines' decisions about whether to run advertisements are speech protected by the First Amendment. *Id.* at 22. However, courts have not dealt with the broader question of whether social media sites' content moderation policies are protected speech, in part because Section 230 of the Communications Decency Act shielded social media sites from lawsuits raising that question. *Id.*

141. See *The Consumer Financial Protection Bureau's Semi-Annual Report to Congress: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 115th Cong. 115–305 (2018) (statement of Mick Mulvaney, Acting Director, CFPB), <https://www.govinfo.gov/content/pkg/CHRG-115shrg31195/html/CHRG-115shrg31195.htm> [<https://perma.cc/5FY7-D8CP>] (providing testimony concerning the policies set forth by Bank of America and Citigroup) [hereinafter *CFPB Semi-Annual Report*].

142. *Refusal to Deal*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal> [<https://perma.cc/MWJ3-757W>].

petitor may lead to antitrust liability. In a seminal 1912 decision, the Supreme Court required a group of rail carriers to provide competing companies with equal access to their bridge and terminal facilities.<sup>143</sup> Since then, federal courts have recognized a duty to deal with competitors under Section 2 of the Sherman Act, the primary federal antitrust statute in the United States.<sup>144</sup> As courts attempt to determine when a firm with market power violates antitrust law by refusing to do business with other firms, the focus is on how the refusal to deal helps the monopolist maintain its monopoly, or allows the monopolist to use its dominant position in one market to attempt to monopolize another market.<sup>145</sup>

A corporation can violate antitrust laws by refusing to deal with customers or suppliers if such refusal has the effect of preventing them from dealing with a competitor. For example, in *Lorain Journal Co. v. United States*, a town's only newspaper refused to carry advertisements from companies that also ran ads on a local radio station.<sup>146</sup> The newspaper monitored the radio ads and terminated its ad contracts with any business that ran ads on the radio.<sup>147</sup> The Supreme Court found that the newspaper's refusal to deal with businesses using the radio station strengthened its dominant position in the local advertising market and threatened to eliminate the radio station as a competitor.<sup>148</sup>

In U.S. antitrust law, under a doctrine often referred to as the "essential facilities" doctrine, a monopolist found to own "a facility essential to other competitors" is required to provide reasonable use of that facility, unless some aspect of it precludes shared access.<sup>149</sup> To win an essential facilities claim, a plaintiff is required to establish "(1) control of the essential facility by a monopolist; (2) a competitor's inability to practically or reasonably duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors."<sup>150</sup> In the 2004 case of *Verizon Communications, Inc. v. Trinko*, the Supreme Court added a fifth element to the essential facilities doctrine: the absence of oversight from a regulatory agency

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143. *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 409–11 (1912).

144. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (holding that defendant's refusal to deal with plaintiff was an attempt to exclude rivals on some basis other than efficiency and therefore illegal under Section 2 of the Sherman Act). For more discussions of the refusal to deal doctrine, see Brett M. Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1 (2008).

145. FED. TRADE COMM'N, *supra* note 142.

146. *Lorain J. Co. v. United States*, 342 U.S. 143, 148–49 (1951).

147. *Id.* at 149.

148. *Id.* at 152–54.

149. Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1190–91 (1999).

150. *MCI Comm'ns Corp. v. AT&T*, 708 F.2d 1081, 1132–33 (7th Cir. 1983).

with power to compel access.<sup>151</sup> At the same time, the Supreme Court in *Trinko* reaffirmed the general rule that businesses can refuse to deal with their competitors.<sup>152</sup> The Supreme Court noted that “we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors.”<sup>153</sup>

It is clear from the above discussions that under antitrust laws, a right of refusal to deal with suppliers, contractors, and customers is the norm, not the exception. And two stringent conditions must be met for the exception to apply. First, the defendant must possess market power.<sup>154</sup> Second, the refusal to deal must have the effect of helping the firm maintain its monopoly or allowing the firm to leverage its monopoly in one market to attempt to monopolize another market.<sup>155</sup> These two stringent conditions make it unlikely that antitrust laws will provide an appropriate basis for allocating the right of refusal in connection with CPR power. As discussed earlier, the CPR power’s allocation is not solely about economic outcomes. From a rights perspective, the outcome is the same regardless of the size of the corporation that refuses to deal with a supplier, contractor, or customer. Antitrust law’s focus on dominant firms, therefore, does not provide a perfect match with CPR power.

The more fatal flaw of using antitrust law to regulate CPR power, however, is its focus on competition. A firm could be held liable under antitrust laws if it refuses to deal with a supplier, contractor, or customer, but only if the purpose or effect of the refusal to deal is to impede competition and maintain monopoly.<sup>156</sup> For example, a firm could refuse to deal with a customer who insists on dealing with a competitor of the firm. That kind of refusal to deal is proscribed by antitrust law when it leads to consolidation of the firm’s dominant market position.<sup>157</sup>

But there is no guarantee that a corporation adversely affects competition when it exercises its CPR power. The nature of CPR is such that corporations contemplate accomplishing various social, political, and economic goals, such as paid family leave, gun control, immigration, and climate change.<sup>158</sup> If pursuit of these goals does impede competition, it is mere coincidence. For example, a wholesaler could sincerely believe that small-scale retailers are inefficient and

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151. *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 414–15 (2004).

152. *Id.* at 408.

153. *Id.* at 411.

154. FED. TRADE COMM’N, *supra* note 142.

155. *Id.*

156. *Id.*

157. *See, e.g., Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (“[T]he monopolist’s conduct must be irrational but for its anticompetitive effect.”).

158. *See, e.g., supra* notes 1–10 and accompanying text.

should not exist. The wholesaler could implement a policy of selling to small-scale retailers at a higher price than it offers to large-scale retailers as a way of promoting what it believes to be social welfare. While this policy's purpose is not competition, it has the effect of impeding competition between small retailers and large ones who are able to purchase from the wholesaler at a lower price. Under antitrust law, this differential treatment is illegal as it impedes downstream competition.<sup>159</sup> But it will be rare for a corporation's exercise of CPR power to implicate antitrust laws, and even if it does, it is only coincidental.<sup>160</sup>

In theory, antitrust law could be expanded to deal with non-price competition, which includes practices related to the exercise of CPR power. In antitrust law, non-price competition refers to "activities by firms or corporations that shift their demands for products, their own and those of their rivals."<sup>161</sup> It is common for firms to compete through non-price strategies, including "differences in level of quality, provision of service, novelty of innovation, method of distribution, and provision of information."<sup>162</sup> The 2010 Horizontal Merger Guidelines have long recognized that "[e]nhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation."<sup>163</sup> It has also been suggested that certain non-price competition strategies in areas such as privacy "can lead to a reduction in the quality of a good or service, which is a standard category of harm that results from market power."<sup>164</sup>

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159. The Robinson-Patman Act, adopted in 1936, was designed to protect small businesses from being driven out of the marketplace by prohibiting price discrimination that favors one competitor over another. See 15 U.S.C. § 13.

160. For example, in January 2021, the social media site Parler filed a lawsuit against Amazon in federal court after the latter suspended its web hosting account following the January 6, 2021, Capitol riot. See Complaint, Parler, LLC v. Amazon Web Servs., Inc., No. 21-cv-00031 (W.D. Wash. Jan. 11, 2021). Parler alleged, among other things, that Amazon conspired with its competitor, Twitter, to remove a major player from the social media market in violation of Section 1 of the Sherman Act. *Id.* at 13–14. The court, however, denied the plaintiff's motion for preliminary injunction, stating that "Parler has failed to do more than raise the specter of preferred treatment of Twitter by AWS." Parler, LLC v. Amazon Web Servs., Inc., 514 F. Supp. 3d 1261, 1267 (W.D. Wash. 2021).

161. Michael Spence, *Non-Price Competition*, 67 AM. ECON. REV. 255, 255 (1977).

162. GREG GUNDLACH, NON-PRICE EFFECTS OF MERGERS: A PRIMER 3 (2016), [https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Gundlach-2016-NON-PRICE-EFFECTS-OF-MERGERS.-A-PRIMER\\_0-1.pdf](https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Gundlach-2016-NON-PRICE-EFFECTS-OF-MERGERS.-A-PRIMER_0-1.pdf) [<https://perma.cc/Q2ZX-2CRS>].

163. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf> [<https://perma.cc/9FB4-DRE9>].

164. Peter Swire, *Protecting Consumers: Privacy Matters in Antitrust Analysis*, CTR. FOR AM. PROGRESS (Oct. 19, 2007, 9:00 AM), <https://www.americanprogress.org/issues/economy/news/2007/10/19/3564/protecting-consumers-privacy-matters-in-antitrust-analysis/> [<https://perma.cc/P3KA-7UN4>].

Along this line, efforts have been made to link certain problems caused by the exercise of CPR power to antitrust abuses. In June 2020, Google pulled its advertisements from the right-leaning website ZeroHedge and threatened to pull its advertisements from another right-leaning website, The Federalist, over derogatory or offensive comments in their comments sections.<sup>165</sup> In a September 2020 congressional hearing, Senator Mike Lee of Utah, chair of a Senate judiciary subcommittee on antitrust, asserted that Google's actions might be proof of possible antitrust violations.<sup>166</sup>

While it is theoretically possible to characterize CPR-caused problems as non-price effects of market power and therefore bring the matter within the purview of antitrust laws, there are practical difficulties with such efforts. As Geoffrey Manne and Ben Sperry have argued, it can be extremely difficult to distinguish anticompetitive quality effects from simultaneous price effects, as “[q]uality-adjusted price is usually the touchstone by which antitrust regulators assess prices for competitive effects analysis.”<sup>167</sup> More importantly, “there is no easy way to understand what consumer welfare means” in situations involving CPR power where “one group’s preferences need to come at the expense of another’s . . . .”<sup>168</sup> Therefore, from a practical point of view, using antitrust laws to control CPR power remains an elusive goal.

#### D. General CPR Law Approach

In light of the antitrust approach’s deficiencies, another option for dealing with CPR is to enact a general CPR law that prohibits corporations with a dominant market position from refusing to deal with counterparties for reasons that go beyond what is required or prohibited under existing federal or state laws. This approach essentially prohibits a corporation from exercising CPR power if it is considered “too big.” Under this approach, a large bank cannot cut off funding for abortion clinics if abortion is legal under existing laws. A large corporation also

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165. Josh Rivera, *Google Pulls Its Ads from ZeroHedge, Warns The Federalist About Dangerous and Derogatory Speech*, USA TODAY (June 16, 2020, 5:52 PM), <https://www.usatoday.com/story/tech/2020/06/16/google-demonetizes-zerohedge-warns-federalist/3200491001/> [https://perma.cc/3MMP-V3NV].

166. Lee Davidson, *Mike Lee Says Google's Anti-Conservative Bias Is a Sign It Is a Monopoly*, SALT LAKE TRIB. (Sept. 15, 2020, 6:37 PM), <https://www.sltrib.com/news/politics/2020/09/15/mike-lee-says-googles/> [https://perma.cc/YZX4-M7PD].

167. Geoffrey A. Manne & R. Ben Sperry, *The Problems and Perils of Bootstrapping Privacy and Data into an Antitrust Framework*, CPI ANTITRUST CHRON., May 2015, at 3, <https://laweconcenter.org/wp-content/uploads/2017/09/bootstrapping-privacy.pdf> [https://perma.cc/9XLL-SCKC].

168. See Ben Sperry, *How Does Antitrust Measure Nonprice Effects Like Political Bias?*, TRUTH ON THE MARKET (Sept. 17, 2020), <https://truthonthemarket.com/2020/09/17/how-does-antitrust-measure-nonprice-effects-like-political-bias/> [https://perma.cc/7GJD-GA94].



cannot require its contractors to provide paid family leave if existing laws do not require the contractors to do so. In other words, large corporations are obligated to conform their corporate policies to what is required or prohibited under existing laws.

This approach, which this Article dubs the “general CPR law approach,” is built upon the antitrust approach. Like the antitrust approach, this approach imposes liability on a corporation only when it has a dominant market position. This is a necessary compromise between two competing considerations: economic outcomes and rights. An ideal solution to CPR should treat it as a rights issue, as CPR is inherently about rights of competing counterparties. But a strictly rights-based approach would impose a cost on society that may not be justified by its benefit. Prohibiting every corporation, large or small, from imposing conditions on its transactions with counterparties that go beyond existing laws, would radically depart from the current practice and would raise serious issues about implementation. In addition, when a corporation is not large, the economic impact of its exercise of CPR power is likely minimal, as its counterparties could always turn to other corporations for business.<sup>169</sup> As a compromise, the general CPR law approach seeks to limit CPR power only when it is likely to have some material economic impact.<sup>170</sup>

Under the general CPR law approach, one central question is how to define the threshold for a dominant market position. No matter how this threshold is defined, a certain degree of arbitrariness is inevitable. But generally speaking, the CPR law could again borrow from antitrust law on this question. Determining the threshold entails analyzing two issues: the definition of a relevant market and the measurement of market power. Antitrust law has developed rather sophisticated meth-

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169. This is echoed by Mick Mulvaney, who stated before a congressional hearing that as long as consumers are aware and have the ability to make real decisions, he does not see a role for government intervention in the marketplace. See *CFPB Semi-Annual Report*, *supra* note 141 and accompanying text.

170. In the OCC’s recent fossil fuel banking proposal, the OCC highlighted the economic impact of the CPR practices of OCC-regulated banks due to their dominant market position. See *Fair Access to Financial Services*, 85 Fed. Reg. 75261, 75264 (Nov. 25, 2020) (to be codified at 12 C.F.R. pt. 55). The dominant market position of the large bank population is clear when all OCC-regulated institutions with assets of \$100 billion or more are considered. *Id.* Together, these banks account for approximately fifty-five percent of the total assets and deposits of all U.S. banks and hold approximately fifty percent of the dollar value of outstanding loans and leases in the United States. *Id.* In light of this market position, a decision by one or more of these banks not to provide a person with fair access to financial services could have a significant effect on that person, the nation’s financial and economic systems, and the global economy. This effect is all the more likely if the financial service at issue is not available on reasonable terms elsewhere. See *Fair Access to Financial Services*, *supra*.

odologies for both issues.<sup>171</sup> It should be noted, however, that the general CPR law should not simply copy antitrust law's approach to determining dominant market position. Antitrust law makes its determinations from the perspective of competition, which is not the focus of the general CPR law. Since the general CPR law cares about the size of a corporation because of its impact on choice, the general CPR law should conduct its analysis of the corporate size from the point of view of choice.

Compared to the ad hoc approach outlined above, the general CPR law approach has one main advantage; that is, it does not require case-by-case deliberations on the right of refusal's allocation. Since this approach requires legislation on CPR power without reference to specific issues, the underlying political forces are less likely to be aligned along party or ideological lines. The process for enacting the general CPR law is therefore less politicized. The main strength of this approach, however, is also its main weakness, as this approach is inflexible and cannot offer targeted solutions to CPR power on particular issues. For instance, under the general CPR law, Microsoft would be prohibited from requiring paid family leave from its contractors.<sup>172</sup> UBS would not be allowed to refuse to lend to clients in the fossil fuel industry.<sup>173</sup> The general CPR law approach would stand in the way if society desired varied solutions to these two issues.

### E. Property Approach

Another approach to dealing with CPR power is to restrict it under the law of property. This approach is predicated upon limitations courts have placed on the common law right to exclusion in the name of accommodating higher societal interests. By appropriately broadening the societal interests considered important enough to warrant restrictions on the right to exclusion, this approach could provide an effective remedy against CPR power which relies on the use of property law—at least in the traditional sense.

The common law has long recognized a right to exclude others from one's property.<sup>174</sup> According to the Supreme Court, the right to exclude others is “one of the most essential sticks in the bundle of rights that

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171. See generally OECD, ROUNDTABLE ON MARKET DEFINITION: NOTE BY THE UNITED STATES (2012), [https://www.ftc.gov/system/files/attachments/us-submissions-oced-2010-present-other-international-competition-fora/062012market\\_definition\\_us.pdf](https://www.ftc.gov/system/files/attachments/us-submissions-oced-2010-present-other-international-competition-fora/062012market_definition_us.pdf) [<https://perma.cc/SR22-L9DM>].

172. See Weber, *supra* note 1.

173. See Holger, *supra* note 9.

174. For discussions of the evolution of the right to exclude in early English and American common law, see Marc S. Schechter, Note, *Uston v. Resorts International Hotel: An Unwarranted Intrusion on the Common Law Right of Exclusion*, 20 CAL. W. L. REV. 511, 512–13 (1984).

are commonly characterized as property . . . .<sup>175</sup> This right to exclusion, however, is subject to exceptions when the owner makes the property available for public use and members of the public, while on the property, exercise a right protected by federal or state constitutions.<sup>176</sup> The fact that the property is privately owned does not necessarily pose a hurdle to restricting the right to exclusion. As the Supreme Court acknowledged, “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”<sup>177</sup>

If the right to exclude others from private property is curtailed only by overriding constitutional or statutory rights, the additional value of this approach in controlling CPR power is limited, as it requires preexisting constitutional or statutory rights. However, there are no inherent reasons why this approach should be limited to scenarios where there are overriding constitutional or statutory rights at issue. In the seminal case of *Uston v. Resorts International Hotel*, the Supreme Court of New Jersey applied this property approach to a scenario absent any constitutional or statutory rights overriding the common law right to exclusion.<sup>178</sup> In *Uston*, the defendant hotel barred the plaintiff from playing blackjack in its casino solely because he was a professional card counter.<sup>179</sup> The New Jersey Casino Commission ruled that the defendant casino “enjoys a common law right to exclude anyone it chooses, as long as the exclusion does not violate state and federal civil rights laws.”<sup>180</sup> Upon appeal, the New Jersey Supreme Court held that the defendant casino had no authority to exclude the plaintiff for card counting.<sup>181</sup> In so doing, the New Jersey Supreme Court deviated from earlier cases where courts limited the common law right to exclude only when the public entered the property to engage in activities protected by constitutional or statutory rights.<sup>182</sup> In *Uston*, the plaintiff’s right to enter the defendant’s casino was not protected by New Jersey statute, the federal

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175. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

176. *See, e.g., PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (holding that a California state constitutional provision requiring privately owned shopping centers to permit the exercise of rights of free expression and petition does not amount to an unconstitutional infringement of property rights under the Takings Clause).

177. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

178. *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370 (N.J. 1982).

179. *Id.* at 371. Card counters “keep track of the playing cards as they are dealt and adjust their betting patterns when the odds are in their favor.” *Id.*

180. *Id.* at 372.

181. *Id.* at 376.

182. *See, e.g., Marsh*, 326 U.S. at 509 (holding that a state cannot impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town); *State v. Schmid*, 423 A.2d 615, 629, 632–33 (N.J. 1980) (holding that Princeton University did not have a right to exclude members of the public who wished to enter the University’s premises and exercise their constitutionally protected right of expression).

constitution, or the state constitution.<sup>183</sup> But nonetheless, the New Jersey Supreme Court limited the casino's right to exclude the plaintiff.<sup>184</sup> The court held that since the defendant granted the right of access to their property to the general public, they have no right to exclude members of the public unreasonably.<sup>185</sup> Instead, "they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises."<sup>186</sup>

When this property approach is expanded, as in *Uston*, to include scenarios where CPR power is exercised to exclude a counterparty who does not already enjoy constitutional or statutory protection, it offers a promising way to deal with CPR power that relies on the corporation's use of its property. For example, this approach could potentially apply to hotel chains' refusals to let immigration authorities use their rooms as backup immigration detention facilities.<sup>187</sup> Although it is far from certain that a court will find such refusals unreasonable, at least this property approach provides a venue for certain CPR power to be addressed without the legislative process. This approach, however, appears unsuitable for CPR power that is not predicated upon the use of property. It is a stretch, for example, to argue that Microsoft is exercising its right to exclude its contractors from its "property" when it refuses to do business with contractors who do not comply with its paid family leave policy. It is a closer call whether corporations that open up their "digital property" for use by the general public (e.g., social media sites) fit within this property framework.<sup>188</sup>

### E. Constitutional Approach

One final option for dealing with CPR is a constitutional approach, under which corporations' dealings with counterparties are, just like the government's, made subject to certain kinds of discipline under

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183. The plaintiff in *Uston* entered the defendant casino to play blackjack using the method of card counting. *Uston*, 445 A.2d at 371.

184. *Id.*

185. *See id.* at 374–75.

186. *Id.*

187. Certain major hotel chains headquartered in the Washington, D.C. area, including Marriott and Choice Hotels, reportedly pledged not to allow Immigration and Customs Enforcement (ICE) agents to use its hotel rooms as backup detention centers for immigrants targeted in ICE's immigration raids. See Jessica Campisi, *Major Hotel Chains Pledge Not to Let ICE Use Rooms as Backup Immigration Detention Facilities*, HILL (July 12, 2019), <https://thehill.com/blogs/blog-briefing-room/news/452851-major-hotel-chains-pledge-not-to-let-ice-use-rooms-as-backup> [https://perma.cc/7LEM-24P6].

188. The argument is that once social media sites invite the general public to use their property (computer servers, etc.), they have no rights to unreasonably exclude people. *Cf. Uston*, 445 A.2d at 374–75.

constitutional law. As discussed below, this approach is radical, but not inconceivable.

One of the most fundamental issues in constitutional law is “the scope of application of individual rights provisions and, in particular, their reach into the private sphere.”<sup>189</sup> With respect to individual rights, it is generally believed that both the U.S. Constitution’s text and case law make it clear that the Constitution binds only governmental actors, not private individuals.<sup>190</sup> Under this “state action” doctrine, a plaintiff has standing to sue over a constitutional right only if they can establish that a government actor (federal, state, or local government or agency) was responsible for the violation.<sup>191</sup> In comparative constitutional literature, this state action requirement is labeled “vertical effect,” meaning that constitutional rights regulate only the conduct of government actors in their dealings with private parties.<sup>192</sup> The idea behind the vertical approach is “the perceived desirability of a public-private division in the scope of constitutional rights, leaving the private sphere free from constitutional regulation.”<sup>193</sup>

Thanks to its state action requirement, U.S. constitutional law generally has difficulties reaching private corporations. Courts, however, have attempted to attribute certain actions of private corporations to the government to bring those actions within the scope of constitutional constraints. The Supreme Court has evaluated the relationship between government and private actions under numerous and sometimes overlapping standards. For instance, the Court has held that a private party is considered a state actor when the government is “significantly involved” in the actions of the defendant.<sup>194</sup> The Court has also stated that “governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints.”<sup>195</sup> Similarly, when a private party invokes the power of the judicial system to enforce a contract, its action constitutes state action.<sup>196</sup> Additionally,

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189. Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387, 388 (2003).

190. *Id.*

191. *See, e.g.*, *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (“It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”).

192. Gardbaum, *supra* note 189, at 388.

193. *Id.* at 394.

194. *See, e.g.*, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972).

195. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

196. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 19–20 (1948) (holding that the enforcement of restrictive covenant by state court constitutes state action); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982) (“[State action is present] when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute.”).

when a private party invades the rights of others, it is a state actor if it is coerced, encouraged, or influenced by the government to do so.<sup>197</sup> Forming a partnership with the government in a joint venture is also state action.<sup>198</sup> Finally, governance of a private organization by public officials acting in their official capacity renders the organization a state actor.<sup>199</sup> Given these different standards, it could be said that “there are no generally accepted formulas for determining when a sufficient amount of government action is present in a practice to justify subjecting it to constitutional restraints.”<sup>200</sup>

Even with all the above legal maneuvers, a large percentage of corporate actions remain outside any meaningful constitutional constraints because they do not fall within these exceptions to the state action doctrine. Yet from a rights perspective, it does not matter whether a government actor or a private one is depriving a right.<sup>201</sup> Indeed, nowadays, thanks to the vast resources amassed by corporations, restrictions imposed by private actors have the potential to be more impactful on citizens’ lives than restrictions imposed by the government.<sup>202</sup>

A natural response to corporations’ increasing power is to continue tinkering with existing constitutional law norms in an effort to subject at least certain forms of corporate actions to constitutional discipline. Take the regulation of online speech, for example. At present, social media sites in the United States enjoy unbridled discretion in regulating content on their own platforms.<sup>203</sup> Absent direct legislation or regulations on the issue, one way to establish some legal constraints on social media sites is through constitutional law—by treating them as state actors.

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197. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (“The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.”).

198. See, e.g., *Burton*, 365 U.S. at 725 (“The State has so far insinuated itself into a position of interdependence with *Eagle* that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so ‘purely private’ as to fall without the scope of the Fourteenth Amendment.”).

199. See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 299–300 (2001) (finding a nominally private statewide secondary school athletic association to be a state actor in part because the association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling).

200. See Robert J. Glennon Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment “State Action” Requirement*, 1976 SUP. CT. REV. 221, 221.

201. See Scott E. Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?*, 17 HASTINGS CONST. L.Q. 139, 141–42 (1989).

202. See, e.g., Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 141 (2014) (“[Social network websites] are in many senses public spaces, and they have more power to censor public communications than many governmental actors.”).

203. See Horwitz, *supra* note 125.

It has been suggested that social media sites could be likened to company-owned towns, which are considered state actors in certain scenarios.<sup>204</sup> It is doubtful, however, that this effort will be successful under the current constitutional law jurisprudence. The Supreme Court has treated certain company-owned towns as state actors. In *Marsh v. Alabama*, the Supreme Court held that residents of a company-owned town were entitled to First Amendment protections when distributing religious literature on the streets and sidewalks of the town.<sup>205</sup> The Court indicated that privately-owned property may be limited by constitutional and statutory rights once it is opened to use by the general public.<sup>206</sup>

Scholars have suggested that the Supreme Court's holding in *Marsh* should be read expansively to treat social media sites as state actors. Jonathan Peters argues that the Court in *Marsh* held that "a company town and a public municipality were functional equivalents, such that the company town had to comply with First Amendment requirements."<sup>207</sup> According to Peters, this rule "is suitable for the digital world because it recognizes that private property can take on public characteristics . . . ."<sup>208</sup> Similarly, Benjamin Jackson argues that social media sites perform a public function by "providing a space that has the *primary* purpose of serving as a forum for public communication and expression, that is *designated* for that purpose, and that is *completely open* to the public at large."<sup>209</sup> Therefore, according to Jackson, social media sites "can be held to be state actors even under a narrow view of the public function exception."<sup>210</sup>

However, courts do not appear supportive of the idea of treating corporations as state actors under an expansive public function test. At least one federal district court has rejected the argument that a private corporation is the equivalent of a state actor simply because it operates its property to serve a function that is traditionally the province of the state.<sup>211</sup> This stance is consistent with the Supreme Court's holding in *Lloyd Corp. v. Tanner* that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes."<sup>212</sup>

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204. BRANNON, *supra* note 128, at 23.

205. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

206. *Id.* at 506.

207. Jonathan Peters, *The "Sovereignty of Cyberspace" and State Action: The First Amendment's Application (or Lack Thereof) to Third-Party Platforms*, 32 BERKLEY TECH. L.J. 989, 1023 (2017).

208. *Id.*

209. Jackson, *supra* note 102, at 146.

210. *Id.* at 147.

211. See, e.g., *Prager Univ. v. Google LLC*, No. 17-cv-06064, 2018 U.S. Dist. LEXIS 51000, at \*25–27 (N.D. Cal. Mar. 26, 2018).

212. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972).

In a 2017 case, *Packingham v. North Carolina*, the Supreme Court made a statement that appears to suggest a shift in its state action jurisprudence.<sup>213</sup> In that case, the Court struck down a North Carolina law that prohibited a registered sex offender from accessing any “commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.”<sup>214</sup> In so holding, the Court calls cyberspace “the most important place[] (in a spatial sense) for the exchange of views . . .”<sup>215</sup> and the “modern public square.”<sup>216</sup> The Court’s reference to cyberspace as the modern public square may suggest that it is now open to the idea of treating social media sites as state actors. However, at least one federal court ruled that this language in *Packingham* should not be interpreted to address the question of whether social media sites ought to be treated as state actors for First Amendment purposes.<sup>217</sup>

At present, it will be difficult to impose meaningful constitutional constraints on corporations by tinkering with the existing state action jurisprudence. There are no principled reasons, however, why “infringements of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government.”<sup>218</sup> A bold yet theoretically possible solution would be to abandon the state action requirement altogether. Indeed, scholars have called for rethinking the state action doctrine long before the CPR power exposed the doctrine’s limitations.<sup>219</sup> As Erwin Chemerinsky argues, the state action requirement has become outdated.<sup>220</sup> Limiting constitutional protection to governmental actions originally made sense because it was believed that common law protected people from infringement of their rights by private actors; but nowadays, individuals possess many rights not protected by common law.<sup>221</sup> In addition, the state action requirement is inconsistent with several potential theoretical bases for rights protection.<sup>222</sup> Chemerinsky advocates for eliminat-

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213. *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

214. *Id.* at 1733 (quoting N.C. GEN. STAT. ANN. § 14–202.5(a), (e) (2015)).

215. *Id.* at 1735.

216. *Id.* at 1737.

217. *See* Prager Univ. v. Google LLC, No. 17-cv-06064, 2018 U.S. Dist. LEXIS 51000, at \*24 (N.D. Cal. Mar. 26, 2018) (“*Packingham* did not, and had no occasion to, address whether private social media corporations like YouTube are state actors that must regulate the content of their websites according to the strictures of the First Amendment.” (emphases omitted)).

218. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985).

219. *See, e.g.*, Harold W. Horowitz, *The Misleading Search for “State Action” Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 UNIV. PA. L. REV. 473 (1962); Glennon & Nowak, *supra* note 200; Chemerinsky, *supra* note 218.

220. Chemerinsky, *supra* note 218, at 505–06.

221. *Id.*

222. *Id.* at 519–35. The theories considered, but rejected, by Chemerinsky as providing a potential basis for the state action requirement include positivism, natural law, and consensus. *Id.*



ing the state action requirement from American law.<sup>223</sup> According to Chemerinsky, “[t]he effect of discarding the concept of state action is that the Constitution would be viewed as a code of social morals, not just of governmental conduct, bestowing individual rights that no entity, public or private, could infringe without a compelling justification.”<sup>224</sup>

Constitutions around the world and at the state level also indicate that the state action requirement is not an inevitability. Many other countries embrace the so-called “horizontal effect,” meaning that constitutional rights regulate relationships between private individuals.<sup>225</sup> At the state level, fourteen states have adopted Equal Rights Amendments (“ERAs”) to their state constitutions, which were inspired by the failed effort to pass a federal ERA to provide protection against sex discrimination.<sup>226</sup> Some of these states expressly apply their ERAs to private parties.<sup>227</sup> The language of individual state ERAs varies considerably with regard to whether their reach is limited to state action. For instance, Montana’s ERA expressly provides that “[n]either the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of [their] civil or political rights on account of . . . sex . . . .”<sup>228</sup> Louisiana’s ERA has a separate provision prohibiting sex discrimination by all actors operating public accommodations.<sup>229</sup>

In sum, while corporations are generally not subject to constitutional constraints, their rising economic power urges reevaluation of this approach. Short of a constitutional amendment, a radical departure from the state action requirement might not be feasible within the current constitutional law framework. But the possibility of this constitutional approach ought to be kept open as society weighs all options to address the CPR power.

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223. *Id.* at 550.

224. *Id.*

225. See Gardbaum, *supra* note 189, at 388. The horizontal effect has been adopted in many places, including Canada, the European Union, Germany, Ireland, and South Africa. *Id.* However, it has been argued that U.S. constitutional law is indeed more “horizontal” than it appears to be and provides ample avenues to affect relationships between private individuals. *Id.* at 389.

226. These states are: Alaska, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Virginia, and Washington. See Wharton, *supra* note 74, at 1201 & n.1.

227. See, e.g., MONT. CONST. art. II, § 4; LA. CONST. art. I, § 12.

228. MONT. CONST. art. II, § 4.

229. LA. CONST. art. I, § 12 (“In access to public areas, accommodations, and facilities, every person shall be free . . . from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition.”).

## CONCLUDING REMARKS

The trend of corporations imposing restrictions on suppliers, contractors, and customers beyond the requirements of existing laws requires new thinking about corporations' private regulatory power. As corporations control increasing amounts of resources vital to citizens' livelihoods and rights, the traditional dichotomy surrounding the public-versus-private regulatory power is no longer adequate. In many respects, corporations today function like governments, with their decisions affecting the rights of citizens in the same way government decisions do. Leaving corporations' private regulatory power alone simply because it is "private" increasingly stands on untenable grounds.

As the foregoing discussions demonstrate, there are no perfect solutions to the CPR problem. Tackling the problem within the existing legal framework faces serious limitations. Whether antitrust, property, or constitutional law, existing laws do not provide a natural fit for corporations exercising CPR power. A general CPR law that would prohibit large corporations from exercising CPR power on any issues is too inflexible to be practicable. For the time being, an ad hoc approach that allocates the right of refusal on a case-by-case basis appears to be the most realistic way to discipline the CPR power.

Of course, before deciding how to deal with the CPR power, society must first decide a threshold question: whether the CPR power is a problem to begin with. If society does not consider corporations wielding CPR power to be problematic and desires that corporations exercise that power, society more likely than not will embrace the status quo. If society considers the CPR power a threat to citizens' rights, it is conceivable that society will gravitate toward reformed legal arrangements in effort to reign in the CPR power. The greater the threat society considers the CPR power to pose, the more radical the legal solution society will be willing to adopt. On the far end of this spectrum is a completely revamped constitutional order under which private corporations are made subject to constitutional constraints.

This Article is a first attempt at a comprehensive analysis of the corporate private regulatory power and how it should be conceptualized in relation to property rights. It explores various options for dealing with the corporate private regulatory power, ranging from incremental changes to the status quo, to complete revamps of the constitutional order. Some of these approaches may not be feasible within existing legal frameworks, but the insights garnered through these inquiries lay the foundation for systematically tackling the corporate private regulatory power.

