JAWBONING AS COLLABORATIVE GOVERNANCE

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When the government regulates conduct, it does not always do so directly. Increasingly, the government regulates conduct indirectly—by pressuring some intermediary to do the direct regulatory work for it. This form of indirect regulation has raised considerable concern in the context of speech regulation. Scholars and activists have sounded alarm bells that this form of indirect speech regulation, typically referred to as "jawboning," often violates the First Amendment because it allows the government to censor expression on the cheap. Indeed, during its 2024 term, the Supreme Court heard two different First Amendment jawboning cases. While one case, *Murthy v. Missouri*, was dismissed on standing grounds, the Court reaffirmed, in *NRA v. Vullo*, that coercive jawboning of protected expression violates the First Amendment.

Despite jawboning cases taking up a substantial portion of the Court's docket during its 2024 term, little scholarly discussion about jawboning can be found. The scholarly discussion of jawboning that does exist tends to converge on a standard picture—that jawboning is an inherent threat to freedom of expression and that it is, therefore, necessarily normatively undesirable. Thus, while scholars have identified possible perils of jawboning, practically no attention has been paid to the promises.

This Article rejects the standard picture. In a nutshell, this Article argues that we ought to be more ambivalent about jawboning, or, in other

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words, that whether jawboning is normatively desirable turns on a fine-grained contextual analysis that's glossed over by the standard picture.

But first, we must define "jawboning," as there is little consensus in the literature about what it even means for the government to jawbone. After surveying various conflicting definitions of jawboning, Part I defines jawboning as a triadic relationship between the government, an intermediary, and some third party, where (a) government official(s) communicate with a private intermediary (b) in a way that pressures—but does not persuade—the intermediary to do something that (c) influences the third party's conduct and where (d) the government official intends to target the third-party's conduct by means of its pressure on the intermediary.

Building on the definitional work in Part I, Part II situates jawboning in relation to the broader governance literature. Part II argues that jawboning is a form of collaborative or "new" governance—a public/private regulatory partnership designed to achieve some public regulatory objective. Jawboning is a "third way" between direct government regulation and pure private ordering.

After articulating a functionalist framework for evaluating jawboning, Part III explores the conditions under which jawboning, as a form of collaborative governance, is and is not normatively desirable. From this discussion, we see that the normative case for or against jawboning turns on a variety of contextual factors about the regulatory environment that are glossed over by the standard picture.

Having laid the descriptive and normative foundations, Part IV turns to First Amendment jawboning doctrine. After identifying two significant deficiencies in existing First Amendment jawboning doctrine, I propose that courts should analyze several factors presently excluded from First Amendment jawboning analysis: (1) the government's motive for jawboning; (2) the value of the targeted expression; and (3) the weakness of the intermediary and, relatedly, the intermediary's independent incentives to regulate third-party speech.

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Introduction

Since the Covid-19 pandemic and the 2020 U.S. presidential election, the government has been criticized for attempting to influence speech indirectly, namely, by pressuring or coercing some other entity, like a social media platform, to regulate that speech directly. This criticism of government "jawboning" reached a crescendo following the litigation of *Murthy v. Missouri*,[1] a sprawling case where various public and private plaintiffs challenged numerous government officials for exerting varying degrees of pressure on the social media platforms relating to Covid-19 and election misinformation.

Perhaps surprisingly, the Court most directly weighed in on the constitutionality of jawboning against speech not in *Murthy*, but in *NRA v. Vullo*,[2] a case in the same term where a state official pressured an insurance underwriter to stop doing business with the National Rifle Association (NRA) in exchange for prosecutorial leniency. In *Vullo*, the Court held that a government official cannot coerce an insurance underwriter through selective prosecution in order to punish or suppress the NRA's protected expression.[3]

At the same time, government jawboning has created considerable controversy outside of court. In what seems to be one of the most brazen and high-profile attempts to jawbone a disfavored speaker to date, FCC Chairman Brendan Carr threatened to wield the powers of the FCC against ABC and its parent company,

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[1] 603 U.S. 43, 50 (2024).

[2] 602 U.S. 175 (2024).

[3] *Id.* at 196.

Disney, if ABC and Disney did not pull Jimmy Kimmel off the air following Kimmel's monologue about the death of right-wing activist Charlie Kirk.[4] For a time, Carr's threats seemed to have succeeded. ABC and Disney promptly removed *Jimmy Kimmel Live!* from its regularly-scheduled time slot. However, after significant public (and internal) outcry about Disney's acquiescence to the Trump administration's clear attempt to silence a critic, Kimmel was back on the air mere days after he was removed.

Government jawboning, then, has become a prominent—and, at times, heavily criticized—feature of the modern regulatory environment. Despite the fact that jawboning has regularly been in the legal, if not the public, spotlight, the scholarly literature on jawboning is scant. In the literature that does exist, scholars often talk past one another because they operate under different conceptions of what it even means for the government to "jawbone." Nevertheless, free speech scholars seem to have converged around a standard picture about jawboning. On this standard picture, jawboning is an inherent threat to freedom of expression and should therefore be eradicated, as much as possible. The task, then, is to identify either legal or technical solutions to the jawboning problem.

This Article resists the standard picture. The Article makes the case that jawboning is just another species of the regulatory genus that scholars have termed "collaborative governance."[5] Understanding the way in which jawboning is just another form of collaborative governance, I argue, illuminates why we ought to be more ambivalent about jawboning, or, put differently, that whether jawboning is normatively desirable turns on a fine-grained contextual analysis that's typically papered over by the standard picture. As we will see, the formal structure of jawboning bears a striking resemblance to, among other things, hostile environment liability in anti-discrimination law[6] and inducement liability in copyright law.[7]

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[4] *See infra* text associated with notes 312–325.

[5] *See infra* Section II.A.

[6] *See infra* text associated with notes 97–102.

[7] *See infra* text associated with notes 258–268.

Moreover, understanding why jawboning is another form of collaborative governance exposes some significant deficiencies in the Supreme Court's First Amendment jawboning jurisprudence.[8]

The Article, thus, has descriptive, normative, and prescriptive ambitions. Descriptively, the Article presents and defends a definition of "jawboning" that will bring greater consistency and clarity to debates about jawboning. The Article then shows why jawboning, so defined, should be understood as another form of "collaborative governance." Normatively, the Article makes the case that we ought to be more ambivalent about jawboning, and it identifies a set of contextual factors that might make regulation by jawboning more normatively desirable and, conversely, a set of contextual factors that might make regulation by jawboning undesirable.

Prescriptively, the Article aims to address two notable deficiencies in the Supreme Court's First Amendment jawboning doctrine by drawing attention to several important factors presently excluded from First Amendment jawboning analysis. In light of the gap between coercion and persuasion, the Article observes that the line between constitutional and unconstitutional jawboning is *normative* rather than descriptive. And if the line between coercion and persuasion is normative rather than descriptive, the factors *Vullo* articulates for identifying unconstitutional coercion are incomplete.

The Article proceeds as follows. Part I attempts to bring greater clarity to the jawboning literature by presenting and defending a novel definition of "jawboning." Part I proposes that jawboning should be defined as a triadic relationship between the government, an intermediary, and some third party, where (a) government official(s) communicate with a private intermediary (b) in a way that pressures—but does not persuade—the intermediary to do something that (c) influences the third party's conduct and where (d) the government aims to target the third-party's conduct by means of its pressure on the intermediary.[9]

Following the definitional work in Part I, Part II contextualizes jawboning within the broader literature on governance. While jawboning is typically viewed only as a First Amendment problem, Part II argues that jawboning is actually just

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[8] *See infra* Section IV.A.

[9] *See infra* Section I.B.

another form of collaborative or "new" governance.[10] Jawboning is a public-private partnership between the government and the private intermediary that's oriented toward achieving some public regulatory objective. Jawboning is thus a "third way" between direct government regulation and pure private ordering. Conceptualizing jawboning as a form of collaborative governance helps explain why scholars and public commentators have generally come to agree that jawboning transparency and accountability mechanisms are principally important.[11]

Understanding that jawboning is a form of collaborative governance also enables us to unpack, in Part III, the circumstances under which jawboning is and is not normatively desirable. Starting from the insight that jawboning is just another regulatory tool in the government's toolkit, Part III begins by introducing a functionalist framework for evaluating jawboning.[12] Under the functionalist framework, whether jawboning is desirable turns on whether (1) the government's goal is desirable *and* (2) whether jawboning is the best tool to achieve that goal. As with all tools, the relevant question is not whether jawboning is perfect but rather whether jawboning is better than alternative regulatory approaches.[13]

The remainder of Part III explores the conditions under which question (2)—whether jawboning is the best regulatory tool—can be answered in the affirmative and in the negative. Jawboning might be preferable to direct government regulation or pure private ordering if: (1) we want to decentralize both public *and* private power; (2) we have low levels of trust in both the government *and* private ordering; (3) private parties have expertise, information, or technical means that are necessary to achieve public regulatory objectives; (4) the government has superior information about matters within the regulatory ambit of private parties; or (5) we want the government to regulate third-party conduct while also minimizing the "chilling effect."[14]

In contrast, jawboning might be inferior to direct government regulation or pure private ordering if: (1) we have high trust in the government but low trust in

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[10] *See infra* Section II.A.

[11] *See infra* Sections II.B–C.

[12] *See infra* Section III.A.

[13] *Id.*

[14] *See infra* Section III.B.

private ordering; (2) we have high trust in private ordering but low trust in the government; (3) intermediaries are very weak; or (4) government jawboning is accompanied by insurmountable transparency and accountability deficits.[15]

Having offered both a descriptive and normative account of jawboning, the Article then turns to First Amendment jawboning doctrine. Drawing on the preceding discussion, Part IV begins by identifying two significant problems with the Supreme Court's First Amendment jawboning doctrine.[16] *First*, because there is a gap between coercion and persuasion, jawboning doctrine provides courts with little guidance in cases where government pressure is intermediate between coercion and persuasion.[17] *Second*, the Supreme Court sometimes, but not always, considers the susceptibility of the intermediary to government pressure when deciding jawboning cases, thereby giving lower courts conflicting guidance in cases where the intermediary has independent incentives to regulate third-party conduct.[18]

In response to these problems with existing doctrine, Part IV proposes some preliminary solutions. At the outset, it observes that the constitutional distinction between (unconstitutional) coercion and (permissible) persuasion is *normative* rather than descriptive. In other words, the constitutional line between coercion and persuasion is drawn not on the basis of descriptive facts about the government's pressure, but on the basis of a normative assessment of the government's pressure, in light of First Amendment values.

If the line between coercion and persuasion is normative, then the coercion factors articulated in *Vullo* are incomplete. Part IV proposes that, in addition to the coercion factors articulated in *Vullo*, courts engaging in First Amendment jawboning analysis should also consider (1) the government's motive for jawboning; (2) the constitutional value of the targeted expression; and (3) the weakness of the intermediary and, relatedly, the intermediary's independent incentives to regulate third-party speech.

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[15] *See infra* Section III.C.

[16] *See infra* Section IV.A.

[17] *Id.*

[18] *Id.*

I. DEFINING JAWBONING

A. Existing Definitions of Jawboning

Litigation surrounding government efforts to regulate Covid-19 misinformation has recently thrust "jawboning" into the legal, if not the public, spotlight.[19] The term originally entered the American public lexicon in the mid-20th century as a charged description of the president's attempts to influence fiscal and labor policy.[20] While "jawboning" is still used to describe a government official's attempt to influence fiscal policy,[21] the term is more often invoked today to describe government efforts to suppress speech. In general, the term "jawboning" is typically used to identify certain forms of informal pressure that government officials exert on private parties to achieve some result that the government desires.[22]

However, beyond this general description, there exists little agreement on what, in particular, jawboning entails. As a result, scholars and public commentators debate both the harms of jawboning and whether particular government actions

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[19] *See, e.g.*, Children's Health Def. v. Meta Platforms, Inc., 112 F.4th 742, 785 (9th Cir. 2024) (Collins, J., concurring) ("The allegations here raise a plausible inference that Meta responded to such jawboning with appeasing efforts at modifying its policies and practices with respect to such speech.").

[20] *See* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 943 n.1 (1980) ("'Jawboning' became part of the political lexicon when President Kennedy sought to restrain prices and wages in the steel industry. . . . President Carter prefers the phrase 'moral suasion' to send the same message."); *see also 'Jawboning' Definition: Threat or Rational Talk*, N.Y. TIMES (May 27, 1970) ("The word "jawboning," as used by most Government officials and businessmen these days, refers to public exhortations and/or implied threats by the Administration as a means of convincing business or labor to adopt certain attitudes and policies.").

[21] *See, e.g.*, Leika Kihara & Yukiko Toyoda, *Japan Warns Against Excessive Yen Moves, Repeats Verbal Intervention*, REUTERS (Apr. 5, 2024), https://www.reuters.com/markets/asia/japan-warns-against-excessive-yen-moves-repeats-verbal-intervention-2024-04-05/ (describing public comments regarding the yen's volatility by Japan's Finance Minister as part of a "barrage of jawboning by Japanese policymakers"); Hannah Lang, *Dollar Dips While Jawboning Supports Yen*, REUTERS (Apr. 2, 2024), https://perma.cc/E9LP-EUNM (describing intervention by Japanese officials regarding the price of the yen as "jawboning"); Chris Matthews, *Despite Trump Jawboning, King Dollar Continues to Weigh on U.S. Companies*, MARKETWATCH (July 23, 2019), https://perma.cc/G9YP-K6R9 (describing public comments by President Trump about the Federal Reserve as jawboning).

[22] *See* Genevieve Lakier, *Enforcing the First Amendment in an Era of Jawboning*, 94 U. CHI. L. REV. 781 (2026).

amount to jawboning, all while operating under meaningfully different definitions of jawboning. Consider the differences between the following definitions of jawboning, found in dictionaries, public commentary, and academic scholarship:

1. "the use of public appeals (as by a president) to influence the actions especially of business and labor leaders";[23]
2. "a specific type of informal pressure by a government actor on a private entity: one that operates at the limit of, or outside, that actor's authority";[24]
3. "the use of official speech to inappropriately compel private action," which "occurs when a government official threatens to use his or her power—be it the power to prosecute, regulate, or legislate—to compel someone to take actions that the state official cannot";[25]
4. "informal government efforts to persuade, cajole, or strong-arm private platforms to change their content-moderation practices";[26]
5. a government actor's "using speech in an effort to persuade someone to act," which "rais[es] concerns that the government is not just persuading but effectively commanding";[27]
6. an "attempt to persuade or pressure by the force of one's position of authority";[28]
7. "when government authorities influence companies' social media policies";[29]

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[23] *Jawboning*, MERRIAM-WEBSTER (2026), https://perma.cc/M8RR-4N3U.

[24] Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 57 (2015).

[25] Will Duffield, *Jawboning Against Speech*, CATO INST. (Sept. 12, 2022), https://perma.cc/W36C-JSG4.

[26] Knight First Amendment Institute, *Jawboning: Call for Proposals*, (June 13, 2023), https://perma.cc/ZBH7-B8VF.

[27] Ori Lev, *Jawboning and the Limits of Government Advocacy*, LAWFARE (Apr. 11, 2024), https://perma.cc/2A7P-SJE9.

[28] Jeffrey Adam Sachs & Jeremey C. Young, *Jawboning: When Educational Censors Don't Bother Passing a Law*, PEN AM. (June 24, 2024), https://perma.cc/9JZ5-BCXL.

[29] David Greene, *When "Jawboning" Creates Private Liability*, ELEC. FRONTIER FOUND. (June 21, 2022), https://perma.cc/XFA5-AQKE.

8. "[a] government official . . . overtly or implicitly *threaten[ing]* to use formal power—be it the power to prosecute, investigate or legislate—to influence private actors, like social media companies, to take actions against our speech on the government's behalf";[30]
9. "government pressure to suppress constitutionally protected speech."[31]

From these disparate definitions, there exists enough agreement to identify the basic elements of jawboning. Stripped to its most basic elements, jawboning involves some sort of communication by one party to another for the purpose of influencing conduct. Call the entity or agent who initiates the communication the "source." Call the party whose conduct the source aims to influence the "target." And, where the source communicates with a party who is not the target, call that party the "intermediary." However, when we attempt to fill in the precise contours of the various elements, we immediately run into difficulties.

As can be deduced from the listed definitions, most commentators agree that the source of the communication must be a government official.[32] Yet, there is significant disagreement over what sorts of communications are involved in jawboning. All the definitions concur, either explicitly or implicitly, that the communication must exert some *pressure* on the intermediary. But there does not appear to be consensus on what kind of pressure the source must exert.[33] Some definitions imply that the pressure must constitute some kind of *threat* against the intermediary,[34]

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[30] NetChoice, *Behind the Scenes Insights from "JAWBONED: Miss Information vs. Free Speech"*, (Apr. 23, 2024), https://perma.cc/3KK5-RYQH.

[31] Alex Abdo, *A Free Speech View on the "Free Speech" Executive Order*, JUST SECURITY (Jan. 21, 2025), https://perma.cc/84E8-E49G.

[32] *But see* Katie Harbath & Matt Perault, *Jawboned*, KNIGHT FIRST AMENDMENT INST. (Oct. 4, 2023), https://perma.cc/XYV2-WQUN ("While we do focus on government-driven jawboning in this essay, we think that it is impractical to examine government practices in a vacuum without taking into account other sources of pressure on companies. The impact of government pressure was enhanced by the other sources of pressure in the ecosystem, such as pressure from civil society and the media. So in our view, a broad understanding of the term is important for evaluating how practitioners experience jawboning.").

[33] Note that, at this point, I am not discussing how First Amendment doctrine applies to jawboning. Rather, from the available literature, I am attempting to elucidate the concept "jawboning," to which the First Amendment may in certain circumstances apply.

[34] *See* Duffield, *supra* note 25; *see also* NetChoice, *supra* note 30.

whereas others state that *persuasion* exerts enough pressure on the intermediary to constitute jawboning.[35] Others are ambiguous.[36]

Similarly, there is disagreement regarding the nature of the intermediary. Some definitions are silent about the type of intermediary or about whether there must be an intermediary at all.[37] Others specify that the intermediary must be a *private* entity.[38] And others specify further that the intermediary must be a private *platform*.[39] There is also a lack of consensus regarding the purpose of jawboning. Some definitions are neutral regarding the type of conduct the source can aim to influence,[40] whereas others specify that the source must aim to suppress the target's *speech*.[41] One commentator even suggests that the source must aim to suppress *constitutionally protected* speech.[42]

Moreover, there is disagreement over whether the government (the source) must have authority to exert the relevant kind of pressure on the intermediary. While most definitions are silent on this issue, Derek Bambauer's definition of jawboning stipulates that the government's pressure must be "at the limit of, or outside, that actor's authority."[43] Under Bambauer's definition, jawboning occurs when "the state operates by threatening or imposing penalties that lack grounding

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[35] *See* Harbath & Perault, *supra* note 32; *see also* Lev, *supra* note 27; Sachs & Young, *supra* note 28.

[36] MERRIAM-WEBSTER, *supra* note 23; *see also* Bambauer, *supra* note 24; Greene, *supra* note 29; Abdo, *supra* note 31.

[37] *See* Duffield, *supra* note 25; *see also* Lev, *supra* note 27; Sachs & Young, *supra* note 28; Abdo, *supra* note 31.

[38] *See* Bambauer, *supra* note 24; *see also* NetChoice, *supra* note 30.

[39] *See* Harbath & Perault, *supra* note 32; *see also* Greene, *supra* note 29.

[40] *See* Bambauer, *supra* note 24; *see also* Duffield, *supra* note 25; Lev, *supra* note 27; Sachs & Young, *supra* note 28.

[41] *See* Harbath & Perault, *supra* note 32; *see also* Greene, *supra* note 29; NetChoice, *supra* note 30; Abdo, *supra* note 31.

[42] Abdo, *supra* note 31.

[43] Bambauer, *supra* note 24, at 57.

in law."[44] Contrast this with NetChoice's preferred definition, which stipulates that the government official must threaten to use "formal power."[45]

Most importantly for our purposes, there appears to be a lack of consensus regarding whether jawboning is what Bernard Williams calls a "thick concept"—a concept that contains both descriptive and evaluative content.[46] On one hand, "jawboning" might be evaluatively neutral; it might merely describe a specific way in which governments indirectly influence behavior. Some definitions listed above seem to fit this bill.[47] On the other hand, "jawboning" might be a *critical* thick concept—a concept that both describes a specific form of government influence and evaluates that form of influence negatively. If jawboning is a critical, thick concept, then labeling government action as "jawboning" both describes the action and criticizes it. Some of our definitions appear to have already baked in negative evaluative content.[48] Others are ambiguous; they include charged language, like "cajole" or "strong-arm," but refrain from explicitly condemning the behavior.[49]

B. Jawboning Defined

Real stakes attach to how we choose to define jawboning. For one thing, achieving conceptual clarity is necessary for good scholarship and productive dialogue. Scholars and civil society organizations who appear to disagree about jawboning might instead be talking past each other. As we have seen, "jawboning" can mean very different things when those who use the term have different ideas about the communication, the purpose, the intermediary, and the evaluative content required for government action to constitute jawboning.

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[44] *Id.* at 91.

[45] NetChoice, *supra* note 30.

[46] BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 216 (1985).

[47] *See* MERRIAM-WEBSTER, *supra* note 23; *see also* Sachs & Young, *supra* note 28; Lev, *supra* note 27; Greene, *supra* note 29.

[48] *See* Bambauer, *supra* note 24, at 57 (defining jawboning to include pressure outside the government official's authority); Duffield, *supra* note 25 (defining jawboning as involving "inappropriate[]" official speech); Abdo, *supra* note 31 (defining jawboning to include a First Amendment violation).

[49] *See* Knight First Amendment Institute, *supra* note 26; *see also* NetChoice, *supra* note 30.

However, if conceptual clarity were our only desideratum, it would not matter how we define jawboning; it would only be important for everyone to employ the same definition. But the precise definition of jawboning we adopt is also important. This Article argues that jawboning should be a purely descriptive concept. We should avoid smuggling evaluative content into the definition of jawboning. One problem with smuggling evaluative content into the definition of jawboning itself is that it then becomes unnecessary and uninteresting to evaluate instances of jawboning; instead, the task becomes labeling the indirect government regulatory actions we dislike as "jawboning."[50]

For example, Bambauer, who offers the most sophisticated account of jawboning to date, stipulates that a government official engages in jawboning when she exerts pressure that "operates at the limit of, or outside, that actor's authority."[51] In other words, jawboning occurs when "the state operates by threatening or imposing penalties that lack grounding in law."[52] Because Bambauer defines jawboning as government action that is not grounded in law or is at least at the limit of the official's authority, Bambauer's conclusion that "jawboning tends to lack legitimacy"[53] follows almost tautologically. The implicit, underlying premise that does all the critical work is that illegal (or borderline illegal) government activity tends to lack legitimacy.[54] If we accept the underlying premise, then Bambauer's definition of jawboning alone answers the question whether jawboning is normatively desirable.

The more significant problem with a critical, thick concept of jawboning is that it blinds us to the possibility that, under certain circumstances, jawboning could be

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[50] *See* Allen W. Wood, *Coercion, Manipulation, Exploitation*, *in* MANIPULATION: THEORY AND PRACTICE 20 (Christian Coons & Michael Weber eds., 2014) ("If we use these terms [coercion, manipulation, and exploitation] in moralized senses, all we can make of the claim that an act is wrong because it is coercive, manipulative, or exploitative is to take that claim as serving to categorize the kind of wrong under which (according to our attitudes, intuitions, or independent arguments) we have already decided the act falls.").

[51] Bambauer, *supra* note 24, at 57.

[52] *Id.* at 91.

[53] *Id.* at 93.

[54] *See id.* at 100 (arguing that jawboning fails the requirement that "the state's legal authority to demand removal or alteration of content [be] clearly delineated").

normatively desirable.[55] A critical concept closes our mind to the possible useful ends to which jawboning could be put. We begin to assume that the descriptive and evaluative content are necessarily connected when, in reality, the apparent connection is a function of our own conceptual engineering.[56] Indeed, in Part II, I'll argue that jawboning is an alternative regulatory model that, under certain circumstances, could be a means for achieving valuable ends.[57] But it is impossible to view jawboning in this light if we assume from the outset, by means of conceptual engineering, that jawboning is necessarily normatively undesirable.[58] With this conclusion in hand, I propose the following descriptive definition of jawboning:

> **Jawboning:** A triadic relationship between the government, an intermediary, and some third party, where (a) government official(s) communicate with a private[59] intermediary (b) in a way that pressures—but does not persuade—the intermediary to

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[55] *Cf.* Wood, *supra* note 50, at 20 (distinguishing between moralized and non-moralized concepts and suggesting that moralized concepts "may mislead us" because moralized concepts can be "commonly applied to behavior we *do not* regard as wrongful or immoral").

[56] *See generally* David J. Chalmers, *What Is Conceptual Engineering and What Should It Be?*, 63 INQUIRY 2902 (2020) (defining and discussing conceptual engineering); Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them to Be*, *in* ARGUING ABOUT SCIENCE (2003) (discussing how concepts like race and gender should be constructed).

[57] *See infra* Section II.A.

[58] *Cf.* Wood, *supra* note 50, at 20 ("Specifically, we do better with non-moralized concepts if we are considering cases where we are quite sure these concepts apply, but unsure, even so, whether we think the behavior is morally objectionable . . . .").

[59] As discussed in more detail below, there is at least one exception to this general rule—when one sovereign pressures another sovereign within a federated system of government.

> do something that (c) influences the third party's conduct[60] and where (d) the government official intends to target the third-party's conduct by means of her pressure on the intermediary.[61]

Note that this definition is not necessarily designed to capture all forms of "jawboning talk"—the myriad ways in which "jawboning" is used in public discourse. In particular, this definition conceives of jawboning as a triadic relationship between the government, an intermediary, and some third-party target.[62] In this way, the definition proposed here is *narrower* than many of the definitions canvassed above. For example, this definition does not perfectly capture the traditional use of "jawboning" to describe government officials' public statements designed to influence fiscal or labor policy,[63] unless we assume that the public itself is an intermediary that can influence the behavior of firms in the relevant sense.

Nevertheless, to define jawboning at a level of generality that covers all jawboning talk would preclude us from accounting for the distinctive characteristics of the jawboning phenomenon. Conceptual coverage comes at the cost of analytic precision. For example, if we were to follow the Merriam Webster dictionary in defining jawboning as "the use of public appeals (as by a president) to influence the actions

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[60] Note that I intentionally rule out dyadic accounts of "jawboning," where the government is taken to "jawbone" either an intermediary or an individual speaker irrespective of any third party. Dyadic regulation of this type is just standard direct government regulation. Such dyadic, direct regulation does not raise any special analytic complexities that warrant theoretical analysis. It should be analyzed in the same way as any other garden variety government regulation. By cabining "jawboning" to the tripartite relationship discussed above, I aim to highlight a distinctive and theoretically interesting way in which the government aims to regulate. I thank Derek Bambauer for pressing me to clarify this point.

[61] As discussed below, this definition is in no way limited to indirect efforts to silence or punish speech. Rather, it is also meant to cover the indirect regulation of non-expressive conduct. *See infra* Section I.B.2.

[62] *See* Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2014–15 (2018) (highlighting the tripartite structure of modern speech regulation).

[63] *See* Verkuil, *supra* note 20; *see also* MERRIAM-WEBSTER, *supra* note 23; *'Jawboning' Definition: Threat or Rational Talk*, *supra* note 20.

especially of business and labor leaders,"[64] it would be impossible to distinguish jawboning from garden variety government speech.[65]

The proposed definition takes a Goldilocks approach; it aims to strike a good balance between conceptual coverage and analytic precision. The definition is designed to cover most paradigmatic cases of jawboning while also highlighting the ways in which jawboning is a distinct phenomenon. For this reason, it is worth observing how my proposed definition departs from many of the other existing definitions along various dimensions.

1. The Communication

Regarding the communication, my proposed definition requires pressure—but does not require a threat—and excludes persuasion. Requiring an explicit threat would produce a jawboning concept that is radically under-inclusive.[66] It would exclude cases like *NRA v. Vullo*,[67] where the government offers the intermediary an inducement in order to influence third-party conduct. In *Vullo*, the Superintendent of the New York Department of Financial Services offered not to prosecute an insurance underwriter, Lloyd's, for certain regulatory infractions in exchange for Lloyd's' agreement to cease doing business with the NRA.[68] The Court found that Superintendent Vullo aimed to influence NRA conduct not by explicitly threatening Lloyd's with prosecution for regulatory infractions (of which Lloyd's was ostensibly guilty), but by offering Lloyd's a benefit, namely, a reprieve from prosecution in exchange for no longer associating with the NRA.[69] If *Vullo* is a paradigm

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[64] MERRIAM-WEBSTER, *supra* note 23.

[65] *See* Derek Bambauer, *The Jawboning Cases End with a Bang Disguised by a Whimper*, 2024 CATO SUP. CT. REV. 157, 171 ("Like private entities, the government is free to speak and to advocate for policy positions. Moral suasion differs from compulsion, and room for the former is required both by current First Amendment doctrine and the practical realities of governance.").

[66] *But see id.* ("Jawboning is in play if there is a plausible threat, whether direct or indirect, explicit or implicit, latent or implemented.").

[67] 602 U.S. 175 (2024).

[68] *Id.* at 183.

[69] *Id.* at 193 ("As alleged, Vullo's communications with Lloyd's can be reasonably understood as a threat or as an inducement. Either of those can be coercive.").

case of jawboning, then jawboning cannot be defined to require a threat.[70] As *Vullo* shows, the carrot can often be mightier than the stick.

In contrast, I exclude persuasion because its inclusion would make the jawboning concept radically over-inclusive, covering what we would ordinarily take to be government speech. For example, if the government successfully persuades parents to force their children to eat healthier food by running a targeted advertising campaign,[71] no one would say the government has engaged in jawboning. For another example, suppose that instead of offering not to prosecute Lloyd's for certain regulatory infringements in exchange for Lloyd's' disassociation with the NRA, Vullo made an impassioned speech to Lloyd's about their moral culpability in enabling

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[70] To be sure, in *Vullo* as in other contexts, inducements often function by offering a reprieve from some background threat. In *Vullo*, for example, the inducement was only valuable to Lloyd's because of the background threat of prosecution.

But while inducements and threats often travel together in this way, there remain important distinctions between inducements and threats. There is a meaningful difference, for example, between Vullo offering Lloyd's a reprieve from prosecution for an unrelated crime for which Lloyd's was guilty and (hypothetically) directly threatening to prosecute Lloyd's for doing business with the NRA. While both ultimately might be objectionable, the latter is more worrisome because the threat is entirely outside Vullo's regulatory authority, whereas the former is an instance of prosecutorial discretion.

Similarly, it is easy to imagine hypothetical jawboning cases that involve an inducement not made in the shadow of a background threat. Suppose, for example, that Vullo offered Lloyd's a valuable contract with New York City if it stopped doing business with the NRA, rather than offering not to prosecute Lloyd's for regulatory infractions. Here, there's clearly an inducement, but there does not appear to be any threat lurking in the background.

In any event, the argument here does not rely on any sharp distinction between threats and inducements. I claim only that threats are *not required* for jawboning, *insofar as* threats can be distinguished from inducements. This conclusion holds even if inducements are often offered in the context of a background threat, because an inducement can still exert pressure in the relevant sense even if the offeror does not make any background threat. I thank both Ashutosh Bhagwat and Derek Bambauer for discussion on this point.

[71] *See, e.g.*, *Be a Health Hero—Eat, Drink, Move Social Marketing Campaign*, SNAP-ED CONNECTION, https://perma.cc/MFS2-42CU ("The *Be a Health Hero—Eat, Drink, Move* multi-channel social marketing campaign uses clear and consistent messaging targeting healthy nutrition and physical activity behavior change through text messages, school and community posters and banners, educational reinforcements, healthy messaging boards, billboards, and other signage.").

gun-related deaths, thereby persuading Lloyd's to get out of the gun insurance business. As the Court intimates, this type of government persuasion would be completely constitutional.[72] In addition to being constitutional, such persuasion should not be characterized as jawboning.[73] Government persuasion of intermediaries is nothing more than run-of-the-mill government speech.[74]

Of course, we might often worry that claims of government persuasion are really a pretext for government pressure or coercion.[75] Intermediaries might want to save face by convincing the public that they were moved to action by the force of the government's reasoning rather than the force of its carrot or stick.[76] Consider

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[72] *Vullo*, 602 U.S. at 188 ("A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others. What she cannot do, however, is use the power of the State to punish or suppress disfavored expression.").

[73] *See* Bambauer, *supra* note 65, at 171 ("If the Surgeon General gives a speech noting false COVID-19 information on a social media platform and saying it ought to be removed, that's simply performing the job of being Surgeon General. Like private entities, the government is free to speak and to advocate for policy positions. Moral suasion differs from compulsion, and room for the former is required both by current First Amendment doctrine and the practical realities of governance.").

[74] *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977) ("The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways."); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary."); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 606 (1979) ("Government has legitimate interests in informing, in educating, and in persuading."); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2000) (arguing that government efforts to persuade citizens are "no less necessary or proper means, nor less practical, efficient, or effective").

[75] *See* Eugene Volokh, *The Future of Government Pressure on Social Media Platforms*, 5 J. FREE SPEECH L. 403, 412 (2024) ("One concern about government persuasion of intermediaries is that when the government *asks*, people who are subject to regulation by the government may hear this as *demanding*.").

[76] *See* Backpage.com v. Dart, 807 F.3d 229, 238 (7th Cir. 2015) ("[T]he target of the denunciation will be reluctant to acknowledge that he is submitting to threats but will instead ascribe his abandonment of the activity to his having discovered that it offends his moral principles."); Lakier,

again our alternative *Vullo* hypothetical where Vullo makes an impassioned speech rather than offering an attractive inducement. In a case like this, we might worry that the context of Vullo's speech makes it clear that the threat of prosecution is lurking if Lloyd's does not quickly change course. More generally, we might problematize the distinction between persuasion and pressure when the government speaks. If the government speaker has regulatory power over its audience, then government speech might implicitly carry the threat of "Be persuaded, or else."[77]

To be precise, there are stronger and weaker versions of the objection. The strong version holds that *all* government persuasion is really just another form of government pressure or coercion. The weak version, in contrast, holds that, in light of the relevant context, *some* government persuasion is also government pressure or coercion. Both the strong and weak versions of the objection assume that, at least in some cases, there exists no gap between government persuasion and pressure. The strong version claims that there is *never* a gap; the weak version claims that there is no gap in some cases.

For purposes of this Article, I assume that genuine government persuasion is possible—that there can be a gap between government pressure and persuasion. First Amendment doctrine has endorsed the notion that such a gap exists and thus rejects the strong version of the objection.[78] Without the gap, the distinction in *Bantam Books, Inc. v. Sullivan* and in *Vullo* between impermissible government coercion and permissible government persuasion would completely collapse.[79] Similarly, the *Vullo* Court's concession that a "government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of

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supra note 22, at 857 ("[T]here have been so few speech intermediaries who appear as plaintiffs in jawboning cases, even when they are so often the direct targets of government pressure campaigns.").

[77] *See* Volokh, *supra* note 75, at 412.

[78] *See Wooley*, 430 U.S. at 717; *see also Finley*, 524 U.S. at 598 (Scalia, J., concurring); *Vullo*, 602 U.S. at 188.

[79] 372 U.S. 58, 67 (1963); *see also Vullo*, 602 U.S. at 180 (interpreting *Bantam Books* to stand for the proposition that "[g]overnment officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors").

persuading others to follow her lead" would be senseless if a gap between coercion and persuasion did not exist.[80]

Though I assume here that a gap between coercion and persuasion can exist, I do not assume that there is a gap in every case. In other words, I accept the weak version of the objection. Depending on the context, persuasion can shade into pressure or coercion. As David Greene has observed, courts in jawboning cases must make highly contextual judgments about whether government speech is coercive or persuasive.[81] Government speech that appears persuasive to a third-party observer might be perceived as pressure or coercion by the target audience.

Courts have demonstrated sensitivity to the need for this type of contextual analysis in determining whether government communication is coercive. For example, in *Vullo*, Superintendent Vullo and Governor Andrew Cuomo published a press release where Vullo "'urged all insurance companies and banks doing business in New York'" to join those "'that have already discontinued their arrangements with the NRA.'"[82] On its face, the Vullo-Cuomo press release might be viewed as an attempt to persuade the insurance companies. However, sensitive to the context in which the press release was published, the Court instead concluded that the press release "reinforce[d] the NRA's First Amendment claim" that Vullo had engaged in unconstitutional coercion.[83]

Thus, when government persuasion shades into pressure or coercion, the government might be engaging in jawboning if the remaining conditions are met. My proposed definition of jawboning excludes only genuine instances of persuasion.

2. The Purpose

Unlike many of the definitions listed above, my proposed definition is neutral regarding the purpose of jawboning. While my focus in this Article will be on the ways in which jawboning is used for the purpose of suppressing speech, there is no principled reason to limit the definition of jawboning to include only those government communications designed to suppress speech. In principle, jawboning can be

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[80] *Vullo*, 602 U.S. at 188.

[81] David Greene, *In Jawboning Cases, There's No Getting Away from Contextual Analysis*, KNIGHT FIRST AMEND. INST. (Nov. 7, 2023), https://perma.cc/DMC6-FWQ6.

[82] 602 U.S. at 184.

[83] *Id.* at 193–94.

used for a variety of ends.[84] Defining jawboning only as a form of speech suppression again limits our imagination about the ends to which jawboning can be put.

3. The Intermediary

Finally, the proposed definition stipulates that the intermediary typically must be a *private* intermediary (with one notable exception), but the intermediary need not be a platform.[85] That the intermediary need not be a platform should be obvious. In *Vullo*, Superintendent Vullo jawboned the NRA by offering an inducement to Lloyd's in order to prevent Lloyd's from further doing business with the NRA. But Lloyd's is an insurance underwriter—not a platform. Again, if *Vullo* is a paradigm case of jawboning, jawboning cannot be limited to platforms.

Whether the intermediary must be private raises a more complicated set of issues. If the president pressures the Department of Justice to prosecute competitors of X for antitrust violations in order to influence users to social network on X rather than a competitor, does the president engage in jawboning? I am inclined to say that the president does not engage in jawboning. To be sure, the president's actions might be objectionable or constitutionally suspect, but it would be odd to say that the president has jawboned the social media users.

It would be odd, I submit, because we typically think that the government must speak with one voice.[86] The basic idea, attributable to Thomas Hobbes, is that the state can be a distinct corporate agent only if, on relevant matters, the state gives

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[84] *See infra* Section I.B.4..

[85] For purposes of this Article, I adopt Tarleton Gillespie's definition of platforms as "online sites and services that a) host, organize, and circulate users' shared content or social interactions for them, b) without having produced or commissioned (the bulk of) that content, c) built on an infrastructure, beneath that circulation of information, for processing data for customer service, advertising, and profit." TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 18 (2018).

[86] *See, e.g.*, Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) ("[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments . . . .").

only one authoritative pronouncement.[87] Building on Hobbes, Philip Pettit has recently argued that a law-governed state can exist only if the state "will address its citizens with a single voice."[88]

A cacophony of different voices undermines the state's ability to guide citizens' behavior, and it leaves citizens without a secure understanding of whether they are compliant with the state's directives.[89] The notion that the government must speak with one voice is often reflected in the law. For example, the idea underlies the government's deliberative process privilege for Freedom of Information Act requests.[90]

When the intermediary is public, government communication with the intermediary is part of the government's overarching deliberative process. When one government actor pressures another government actor (the intermediary) to do or say something, the government has not yet spoken—has not yet made an authoritative pronouncement—until the intermediary acts. Thus, government pressure of a government intermediary for the purpose of influencing third-party behavior is indistinguishable from direct government regulation or coercion. For this reason, if jawboning is to be distinguishable from direct government regulation, then jawboning can only involve government pressure of *private* intermediaries. Put another way, if jawboning refers to a form of indirect government regulation, then the

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[87] THOMAS HOBBES, LEVIATHAN 104 (1651) ("A multitude of men are made *one* person, when they are by one man, or one person, represented so that it be done with the consent of every one of that multitude in particular. For it is the *unity* of the representer, not the *unity* of the represented, that maketh the person *one*.").

[88] PHILIP PETTIT, THE STATE 100 (2023).

[89] *Id.* at 101.

[90] 5 U.S.C. § 552(b)(5); *see also* Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8–9 (2001) ("The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news . . . . "); N.Y. Times v. U.S. Dep't of Justice, 681 F. Supp. 3d 132, 148 (S.D.N.Y. 2023) ("It takes little imagination to see why 'reveal[ing] the personal views of some FBI staff rather than the ultimate policy determination of FBI about the form and content of the final letter' threatens to cause foreseeable harm in the context of proposed communications with a foreign government—where it is of course essential that the Government speak with one unified voice and that, when doing so, it have already benefited from a full airing of points of view among staff.").

intermediary typically must be private; otherwise, the government would be directly regulating third-party behavior.[91]

However, an important exception to the general rule that the intermediary must be private may exist in a federated system of government. In the United States, for example, a federal government official may very well jawbone a state government official if she pressures the state official for the purpose of influencing the behavior of some third parties.[92] Because the federal government and the states are distinct sovereigns,[93] federal government pressure of a state is not part of any one sovereign's deliberative process. Instead, the federal government speaks with one voice whenever it pressures the state to act. For this reason, it appears that the federal government can engage in jawboning whenever it pressures a state to regulate third-party behavior.[94]

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[91] *Cf.* Nat'l Urb. League v. Trump, 783 F. Supp. 3d 61, 104 (D.D.C. 2025) (holding that an executive order terminating federal funding for DEI-related projects was not unconstitutionally coercive under *Vullo*, in part, because the relevant provision of the executive order "tells *agencies* to cancel certain contracts and grants. And it does not purport to regulate private entities . . . .").

[92] *See* Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 578 (2012) (holding that, (a) while Congress can pressure states to adopt federal policies, Congress cannot under the Spending Clause coerce a state into adhering to federal policy, and that (b) this "is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own").

[93] *See, e.g.*, *In re* Tarble, 80 U.S. 397, 406 (1871) ("Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments.").

[94] *See* South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) ("When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. . . . Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact.").

4. Selected Applications

Before proceeding to Part II, I discuss how my proposed definition of jawboning would apply to two contemporary issues.

First, some scholars have noticed that the Department of Education's (DOE's) recent efforts to enforce Title VI can constitute jawboning.[95] Evelyn Douek and Genevieve Lakier observe that there is "good reason to worry that the DOE, in its recent efforts to enforce Title VI in the context of the campus protest movement, may be violating the important First Amendment rule against jawboning—that it may be leveraging its power to regulate discrimination on campuses to get universities to crack down on protected student and faculty speech by threatening them with legal sanctions or investigations if they do not comply."[96]

Douek and Lakier are correct that DOE might be jawboning universities whenever it pressures a university to address what DOE takes to be third-party discrimination on campus. But if Title VI creates a jawboning problem, the problem may not be limited to DOE's guidance documents or private meetings with university administrators, as Douek and Lakier suggest.

On the definition proposed here, federal anti-discrimination law, including Title VI, Title VII, and Title IX, is itself a form of jawboning when it is employed to target the discriminatory behavior of third parties. In such cases, the government communicates by statute with intermediaries subject to anti-discrimination law, such as universities and employers, in order to pressure the intermediary to prohibit and address proscribed discrimination, including the discriminatory harassment by third parties.[97]

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[95] Evelyn Douek & Genevieve Lakier, *Title VI as a Jawbone*, KNIGHT FIRST AMEND. INST. (Sept. 26, 2024), https://perma.cc/E6CS-LC9S.

[96] *Id.*

[97] Though he used different terminology, Jack Balkin made this same observation over a quarter century ago. Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 (1999) ("The argument that sexual harassment law produces unconstitutional employee censorship is actually an instance of a more general problem in free speech law—a phenomenon I call 'collateral censorship.' Collateral censorship occurs when one private party A has the power to control speech by another private party B, the government threatens to hold A liable based on what B says, and A then censors B's speech to avoid liability. The offending speech may be defamatory, obscene, fraudulent, or a violation of copyright. In most situations A has greater incentives to censor B than B has to self-censor. That is because B has an additional interest in promoting his or her own

Title VI,[98] Title VII,[99] and Title IX[100] have all been interpreted to forbid a "hostile environment," and covered entities can be liable for hostile environment harassment if they were deliberately indifferent to the discriminatory harassment of third parties or if they failed to take appropriate remedial steps. Thus, through hostile environment doctrine, Title VI, Title VII, and Title IX pressure covered intermediaries to take steps to limit discriminatory conduct by third parties.[101]

To be clear, other aspects of anti-discrimination law do not count as jawboning. When an employer is held liable for discriminating against its employee in violation of Title VII, for example, we have a standard case of direct government regulation. The relationship between the government and the employer is dyadic—the government targets the employer's discrimination for regulation.

In contrast, when the target of the regulation is not the employer's, but some third party's discriminatory actions, Title VII functions as a jawbone. The government targets the *third-party's* discriminatory behavior by threatening penalties *against the employer*. Thus, the relationship between regulator and regulated is triadic rather than dyadic. Rather than holding the discriminatory employee liable

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speech that A usually lacks. Hence A can be expected to censor B collaterally with little regard for the value of B's speech to B or to society at large.").

[98] *See, e.g.*, Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty., 334 F.3d 928 (10th Cir. 2003); Blunt v. Lower Merion Sch. Dist., 767 F.3d 247 (3d Cir. 2014); *see also Section VI—Proving Discrimination—Intentional Discrimination*, U.S. DEP'T OF JUST. (2017), https://perma.cc/W7W5-7ZHG.

[99] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) ("Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

[100] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999) ("We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does.").

[101] Hostile environment liability for third-party discrimination is thus a good example of why jawboning can involve purposes other than suppressing speech. In the hostile environment context, anti-discrimination law is targeted at preventing both discriminatory expression *and* discriminatory conduct. For example, both verbal threats and unwanted physical touching will give rise to hostile environment liability under Title IX.

directly, the government aims to regulate their behavior indirectly, namely by threatening the employer with liability.[102]

Second, President Trump's threats to withhold federal funding from schools and universities is a form of jawboning.[103] To date, Trump has targeted Columbia University,[104] the University of Pennsylvania,[105] Brown University,[106] Princeton University,[107] Harvard University,[108] and all public schools,[109] among others. Thus

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[102] *Id.*

[103] Note that because Title VI is the claimed legal basis for withholding federal funding from universities, there is some overlap between the two examples. *See* Kate Andrias et al., *A Title VI Demand Letter That Still Violates Title VI (and the Constitution)*, KNIGHT FIRST AMEND. INST. (June 23, 2025), https://perma.cc/B4P8-77YU. *But see* American Association of University Professors v. DOJ, No. 25-cv-2429, 2025 WL 1684817, at *15 (S.D.N.Y. June 16, 2025) (suggesting in dicta that Title VI is not the "sole and exclusive legal tool" available to the president to combat antisemitism). However, the two examples still demonstrate different jawboning levers. In hostile environment cases, the pressure applied to the covered entity comes from the specter of legal liability. In the university funding cases, in contrast, the pressure arises from the threat of losing federal funds.

[104] *Columbia University Caves to Demands to Restore $400m from Trump Administration*, THE GUARDIAN (Mar. 21, 2025, at 17:44 ET), https://perma.cc/CX8M-LPSH.

[105] Alana Wise, *Trump Suspends $175 Million in Funding to University of Pennsylvania over Trans Athletes*, NPR (Mar. 20, 2025, at 15:26 ET), https://perma.cc/U5M2-NYAM.

[106] Sareen Habeshian, *Trump Admin to Pull $510 Million in Funding from Brown University*, AXIOS (Apr. 3, 2025), https://perma.cc/H7GA-SKD7.

[107] Alan Blinder & Anemona Hartocollis, *Trump Pauses Dozens of Federal Grants to Princeton*, N.Y. TIMES (Apr. 25, 2025).

[108] Alan Blinder, Stephanie Saul & Anemona Hartocollis, *Trump Administration Will Review Billions in Funding for Harvard*, N.Y. TIMES (Mar. 31, 2025).

[109] Michael C. Bender, *Trump Administration Threatens to Withhold Funds From Public Schools*, N.Y. TIMES (Apr. 3, 2025).

far, Columbia,[110] Brown,[111] the University of Pennsylvania,[112] and the University of Virginia[113] have agreed to settle with the Trump administration. The structure of the threats is as follows: The Trump administration threatens to withhold funds from a university unless the university changes internal policies the administration disfavors. These threats do not merely purport to change how universities comport themselves; they also aim indirectly to change the behavior of students and faculty.

The threat against Columbia University, for example, was designed to limit the ability of students to protest on campus.[114] Early signs suggest the Trump administration's threats have worked.[115] On March 21, 2025, in an effort to restore federal funding,[116] Columbia agreed to, among other things, hire 36 "special officers" to remove from campus and arrest individuals "when appropriate."[117] Columbia also prohibited the use of face coverings in protests and prohibited protests "in places where academic activities take place."[118] In addition, if an individual protesting on campus fails to show their university ID to police, they "will be subject to discipline,

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[110] Office of the President, *Our Resolution with the Federal Government*, COLUMBIA UNIV., https://perma.cc/N7F5-JV5A.

[111] *Agreement with Federal Government to Restore Brown Research Funding, Resolve Compliance Reviews*, BROWN (July 30, 2025), https://perma.cc/Q6GA-GVWN.

[112] *U.S. Department of Education Announces the University of Pennsylvania Has Entered into a Resolution Agreement to Resolve Its Title IX Violations*, U.S. DEP'T OF EDUC. (July 1, 2025), https://perma.cc/NM39-6UBC.

[113] *The Justice Department Announces Agreement with University of Virginia*, U.S. DEP'T OF JUST. (Oct. 22, 2025), https://perma.cc/P8AE-W4E4.

[114] *DOJ, HHS, ED, and GSA Announce Initial Cancellation of Grants and Contracts to Columbia University Worth $400 Million*, U.S. GEN. SERVS. ADMIN. (Mar. 7, 2025), https://perma.cc/G3FC-AUS5.

[115] Sharon Otterman & Troy Closson, *Columbia Displays More Aggressive Posture in Dealing With Demonstrators*, N.Y. TIMES (Apr. 4, 2025).

[116] Much federal funding was restored after Columbia agreed to abide by their March 21 and pay $200 million in fines. *See* Office of the President, *Our Resolution with the Federal Government*, COLUMBIA UNIV., https://perma.cc/84D9-PMZJ.

[117] *Sharing Progress on Our Priorities*, COLUMBIA OFF. OF THE PRESIDENT (Mar. 21, 2025), https://perma.cc/8MEY-FAS3.

[118] *Id.*

being escorted off campus, and detention for trespass where appropriate."[119] Though some of the Trump administration's threats appear to be aimed at directly regulating Columbia's own behavior, others clearly are designed to chill campus protests indirectly.[120]

The Trump administration also used the threat of withholding Columbia's funding to indirectly influence what faculty and students can study. The administration demanded that the small Middle Eastern Studies Department at Columbia be placed on academic receivership, a rare step that takes a presumptively dysfunctional department out of the hands of faculty governance.[121] In response, Columbia appointed a senior vice provost to conduct a "thorough review" of its Middle Eastern Studies curriculum.[122]

5. Conclusion

As this discussion shows, government officials engage in jawboning to achieve a variety of different goals. Once one understands how jawboning works, one begins to see it everywhere.[123] But if we assume from the outset that jawboning is confined to an objectionable form of speech regulation on social media platforms, we then fail to see how jawboning is, in fact, pervasive in our modern regulatory environment. In this vein, Part II aims to contextualize jawboning by explaining how it fits within the broader category of collaborative governance.

II. JAWBONING AS COLLABORATIVE GOVERNANCE

Part I defined jawboning as a type of indirect government regulation where the government aims to change third-party behavior by pressuring a private intermediary to do something, rather than regulating the third party directly. In this Part, I argue that jawboning is a form of "collaborative governance"—a public-private

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[119] *Id.*

[120] *See* Matt Lavietes & Tyler Kingkade, *At Columbia University, Trump's Crackdown Chills a Fervent Campus*, NBC NEWS (Mar. 27, 2025, at 10:51 ET), https://perma.cc/98MX-ZNGP.

[121] Troy Closson, *Why Trump's Ultimatum to Columbia Could Upend Higher Education*, N.Y. TIMES (Mar. 20, 2025).

[122] Emma Tucker & Gloria Pazmino, *Columbia University Makes Policy Changes in Dispute over Federal Funding*, CNN (Mar. 23, 2025), https://perma.cc/7SC9-8JWL.

[123] *Cf.* Balkin, *supra* note 97, at 2298 (arguing that collateral censorship is ubiquitous).

regulatory partnership designed to promote some public regulatory agenda.[124] Like other forms of collaborative governance, jawboning exists on a spectrum between direct government regulation and pure private ordering.[125] Put differently, jawboning is a tool in the government's toolkit for achieving public regulatory objectives—a tool that relies on private parties (rather than the government itself) to engage in direct regulation. As with any tool, jawboning can be used for good or bad ends, and it can be used in ways that are more or less legitimate.

This Part draws on collaborative governance scholarship to uncover what makes jawboning a distinctive type of regulatory tool. After showing how jawboning is just another form of collaborative governance or "new governance," I catalogue scholarly critiques of collaborative governance and show how those same critiques reappear in jawboning scholarship, which is precisely what we would expect if jawboning is a form of collaborative governance.

A. Jawboning Is Collaborative Governance.

Collaborative governance, also referred to as "new governance,"[126] involves the use of public-private partnerships, whether formal or informal, to achieve public regulatory objectives.[127] Collaborative governance is a form of regulation intermediate between direct government regulation and pure private ordering.[128] Some ex-

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[124] Margot E. Kaminski, *Binary Governance: Lessons from the GDPR's Approach to Algorithmic Accountability*, 92 S. CAL. L. REV. 1529, 1559 (2018) ("Collaborative governance, or 'new governance,' deploys private-public partnerships towards public governance goals.").

[125] *See* Emily S. Bremer, *Private Complements to Public Governance*, 81 MO. L. REV. 1115, 1117 (2016) (illustrating public-private regulatory hybrids on a spectrum between government regulation and private governance); *see also* Kaminski, *supra* note 124, at 1559 (arguing that collaborative governance "exists on a spectrum between traditional command-and-control regulation and private ordering, and may employ significant aspects of each").

[126] Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 373 (2004).

[127] *See* Kaminski, *supra* note 124, at 1559; *see also* Orly Lobel, *New Governance As Regulatory Governance*, *in* THE OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur ed., 2012); Bremer, *supra* note 125, at 1118–20.

[128] Kaminski, *supra* note 124, at 1559–60.

amples of collaborative governance from the administrative law context include negotiated rulemaking,[129] incorporation by reference of privately created standards into public regulations,[130] audited self-regulation,[131] and "second-order regulatory agreements."[132] Collaborative governance represents a middle ground between top-down regulation and no government regulation at all.[133]

Within the collaborative governance spectrum, there can be a greater or lesser degree of government involvement.[134] As collaborative governance becomes more government-dominated, it begins to shade into direct government regulation.[135] In contrast, as government involvement decreases, collaborative governance begins to shade into laissez-faire, pure private ordering.[136] Between these two poles exist what can be characterized as true "public-private hybrids."[137] In addition, at any point along this spectrum, government involvement with the private party can be more or less formal. As Margot Kaminski observes, "[t]he toolkit of collaborative gov-

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[129] *See generally* Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985).

[130] *See* Bremer, *supra* note 125, at 1119.

[131] *Id.*

[132] Second-order regulatory agreements are "agreements entered into between regulated firms and other private actors in the shadow of public regulations." Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2030–31 (2005).

[133] Lobel, *supra* note 127, at 65; *see also* Lobel, *supra* note 126, at 443 ("The governance model should thus be understood as an attempt to envision a third way between state-based, top-down regulation and a single-minded reliance on market-based norms; between centralized command-and-control regulation and individual free contract. It aims to transcend the conceptual dichotomies of regulation and deregulation; of legal directive and spontaneous market behavior.").

[134] Bremer, *supra* note 125, at 1116–22.

[135] *Id.* at 1117–18.

[136] *Id.* at 1120–22.

[137] *Id.* at 1118–20.

ernance ranges from formal delegation to the private sector on one end—for example, in the form of government-certified codes of conduct—to informal convening, nudging, and 'responsive regulation' on the other."[138]

Jawboning is a form of collaborative governance.[139] Rather than pursuing regulatory objectives via direct government regulation and rather than abdicating regulatory prerogatives to pure private ordering, the government allows private intermediaries to directly influence third-party behavior. The government then stands in as a backstop by applying sporadic pressure to influence how the intermediary regulates the third party. The government "stays significantly involved as a backdrop threat to nudge private sector involvement . . . and as a hammer that can come down to enforce compliance."[140] In sum, jawboning involves a "shift[] from [the government] commanding private actors to structuring both collaboration with and delegation to them."[141]

Content moderation on social media platforms offers an especially clear example of how jawboning can involve a true public-private regulatory partnership. Early on in their lifecycle, social media platforms independently developed content moderation policies to regulate the "staggering amount of content on their platforms."[142] Documenting how platform immunity under § 230 of the Communications Decency Act[143] gives platforms expansive discretion to moderate content

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[138] Kaminski, *supra* note 124, at 1561–62; *see also* Lobel, *supra* note 126, at 388 ("Some Renew Deal scholars depict governance processes as informalization, while others, including myself, prefer to describe degrees and variations of formality.").

[139] *Cf.* Hannah Bloch-Wehba, *Jawboning in the Era of New Governance*, KNIGHT FIRST AMEND. INST. (Oct. 13, 2023), https://perma.cc/DG34-QS9K (observing how the rise of new governance complicates First Amendment jawboning doctrine). Note that while Bloch-Wehba perceptively observes that the rise of new governance methods complicates any straightforward application of the *Bantam Books* test to modern social media jawboning, she does not argue, as I do here, that jawboning itself is a form of new governance.

[140] Kaminski, *supra* note 124, at 1561.

[141] *Id.* at 1564.

[142] Murthy v. Missouri, 603 U.S. 43, 50 (2024) (internal quotation omitted).

[143] 47 U.S.C. § 230.

however the platform sees fit,[144] Kate Klonick memorably described social media platforms as the "New Governors" of online speech.[145] Platforms, Klonick argued, "are part of a new triadic model of speech that sits between the state and speakers-publishers. They are private, self-regulating entities that are economically and normatively motivated to reflect the democratic culture and free speech expectations of their users."[146]

However, as the Covid-19 pandemic and 2016 and 2020 United States presidential elections demonstrated the harmful effects of malicious and misleading social media content,[147] the government began to get into the content moderation business.[148] Beginning around 2020, various government actors communicated with social media platforms regarding their content moderation policies as applied to Covid-19 and election misinformation.[149] White House officials "peppered Facebook (and to a lesser extent, Twitter and YouTube) with detailed questions about their policies, pushed them to suppress certain content, and sometimes recommended policy changes."[150] White House officials also publicly called for social media platforms to ramp up their regulation of Covid-19 misinformation, hinting that the White House would pursue legal reform if the platforms failed to act.[151]

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[144] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1603–09 (2018).

[145] *Id.* at 1603.

[146] *Id.*

[147] *See, e.g.*, Brief of American Academy of Pediatrics, American Medical Association, American Academy of Family Physicians, American College of Physicians, and American Geriatrics Society as Amici Curiae Supporting Petitioners, at 18–25, Murthy v. Missouri, 603 U.S. 43 (No. 23-411) (arguing that misinformation about vaccines threatens public health).

[148] *See Murthy*, 603 U.S. at 51 ("Over the past few years, various federal officials regularly spoke with the platforms about COVID–19 and election-related misinformation. Officials at the White House, the Office of the Surgeon General, and the Centers for Disease Control and Prevention (CDC) focused on COVID–19 content, while the Federal Bureau of Investigation (FBI) and the Cybersecurity and Infrastructure Security Agency (CISA) concentrated on elections.").

[149] *Id.* at 51–53.

[150] *Id.* at 51–52.

[151] *Id.* at 52.

Similarly, Surgeon General Vivek Murthy requested information on platforms' content moderation policies and made public calls for platforms to "avoid amplifying misinformation."[152] In addition, the CDC provided platforms with information about Covid-19 misinformation through monthly meetings and frequent reports.[153] The FBI also communicated with platforms about election-related misinformation, especially misinformation that was part of a foreign influence campaign.[154]

Thus, by 2021 it became clear that social media platforms were no longer entirely self-regulating. While they might have been the New Governors of online speech for a time, social media platforms, by 2021, had become the *Co-Governors* of online speech. Crucially, though, as the record in *Murthy* demonstrates, content moderation had not become another instance of top-down government regulation.[155] Instead, content moderation was a collaborative enterprise, with the government often providing platforms with valuable information to help platforms enforce *their own* content moderation policies.[156] Indeed, the plaintiffs in *Murthy* lacked standing, in large part, because the "platforms moderated similar content long before any of the Government defendants engaged in the challenged conduct . . . [a]nd platforms continued to exercise their independent judgment even after communications with the [government officials] began."[157]

To be sure, the government officials, especially the White House officials and Surgeon General Murthy, pressured platforms to change their content-moderation

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[152] *Id.*

[153] *Id.*

[154] *Id.* at 53.

[155] Of course, the government would clearly violate the First Amendment were it to try to moderate content on private social media platforms directly. *See* Moody v. NetChoice, LLC, 603 U.S. 707, 731 (2024) ("[T]he First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude.").

[156] *See* Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 542 (2022) ("The standard picture depicts platforms as standalone institutions and does not account for the extent to which platforms increasingly cooperate with each other and with governments. This kind of collaboration has dramatically increased in the last half decade.").

[157] *Murthy*, 603 U.S. at 60.

policies.[158] But this fact alone does not render platform governance non-collaborative. The relationship between co-governors need not be toothless to be collaborative.[159]

In sum, content moderation of Covid-19 and election misinformation was a form of collaborative governance between social media platforms and the government. Platforms independently developed, applied, and enforced their own content-moderation policies. The government stood in as a backstop. Sporadically, the government provided information to platforms and, at times, pressured platforms to change their content-moderation policies to promote the public good. But, at all times, the platforms themselves retained the authority to amend, apply, and directly enforce content-moderation rules against third-party users.

As with collaborative governance generally, when the government exerts a higher degree of pressure on private intermediaries, jawboning shades into direct government regulation. The greater the degree of government pressure, the more we can properly label the government pressure as "coercion."[160] The less pressure the government exerts on the private intermediary, the more jawboning shades into pure private ordering. On the model of jawboning presented here, when the government engages in mere persuasion, we are outside the realm of jawboning and in the realm of pure private ordering. In the realm of pure private ordering, the government stands in the same position as any other private speaker in the marketplace of ideas—the government can achieve its desired ends only by the persuasive force of its reasoning:[161]

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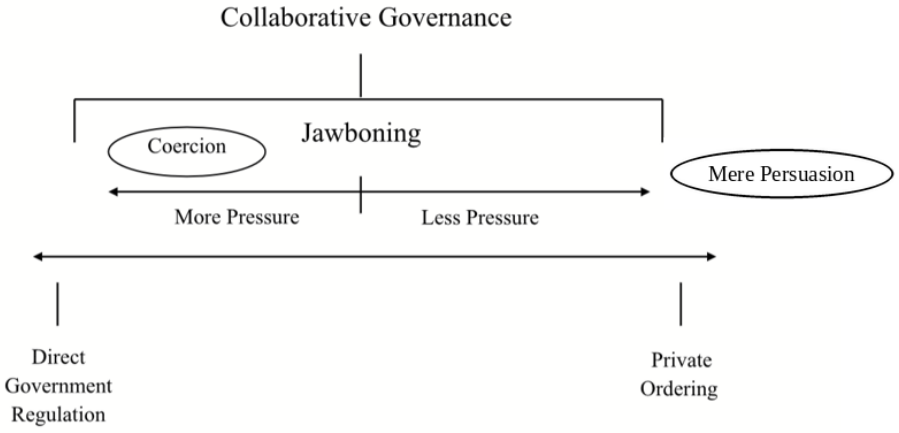
[158] *See id.* at 51–53; *see also id.* at 73 ("*Second*, the plaintiffs and the dissent suggest that the platforms continue to suppress their speech according to policies initially adopted under Government pressure. That may be true.") (citation omitted).

[159] Kaminski, *supra* note 124, at 1561.

[160] NRA v. Vullo, 602 U.S. 175, 180 (2024).

[161] *See supra* Section I.B.1.

Figure 1



B. The Promises and Perils of Collaborative Governance

Thus far in this Part, I have argued that jawboning is a form of collaborative governance. In this Section, I highlight what scholars have identified as the promises and perils of collaborative governance. Unpacking the costs and the benefits of collaborative governance generally will pave the way for Part III's normative analysis of jawboning.

The theory and practice of collaborative governance grew out of a context of increasing consensus that both top-down government regulation and pure private ordering were often inadequate to solve new complex regulatory problems.[162] The basic idea behind collaborative governance is that private actors can help fill in gaps in the government's regulatory capacity.[163] Regulatory problems might "require

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[162] Lobel, *supra* note 127, at 68–69 ("Traditional command-and-control regulation has long been the subject of scholarly critique for its inefficiencies and frequent failures. At the same time, widespread inadequacies of market self-ordering are also well-documented. . . . Both in practice and in theory, policymakers and scholars are focusing their attention on new governance as a set of legal strategies outside the traditional command-and-control toolbox that has the potential to increase the effectiveness and legitimacy of social regulation.").

[163] *See id.* ("[T]he new governance model involves increased participation of non-state actors because it challenges the conventional assumptions that the regulatory policymaking powers of administrative agencies are based on their superior knowledge, information, and expertise.").

specialized experience or knowledge that exists outside of government."[164] Or private actors might have access to resources the government lacks—resources which are necessary to enforce compliance.[165] In other words, by collaborating with private parties, the government can regulate behavior that would otherwise be beyond its reach.

Regulatory capacity is increased by collaborative governance, in part because collaborative governance decentralizes and disperses power. Orly Lobel notes that the new governance model "advocates a movement downward and outward—a transfer of responsibilities to the states and localities and to the private sector, including private businesses and nonprofit organizations."[166] This decentralization, Lobel argues, contributes to increased participation, diversity, and experimentation and to improved information-sharing relationships.[167]

In addition, because private actors are often able to address problems more "nimbly, efficiently, and cost-effectively,"[168] government collaboration with private parties can make regulation both more effective and more cost-effective. Relatedly, eschewing top-down government regulation in favor of collaboration with nimbler private actors can help regulators respond more adeptly to rapid technological changes or to changes in the economy.[169]

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[164] Bremer, *supra* note 125, at 1123.

[165] Kaminski, *supra* note 124, at 1562.

[166] Lobel, *supra* note 126, at 381.

[167] *Id.* at 382.

[168] Bremer, *supra* note 125, at 1123.

[169] *See* Kenneth A. Bamberger & Deirdre K. Mulligan, *New Governance, Chief Privacy Officers, and the Corporate Management of Information Privacy in the United States: An Initial Inquiry*, 33 L. & POL'Y 477, 480 (2011) (observing that "uniform, static, approaches to regulation are particularly inapt to contexts characterized by rapid changes in technology and market infrastructure"); Lobel, *supra* note 126, at 408 ("A governance approach is further needed to address a rapidly changing environment in which flexibility and adaptability are key to remaining competitive in the new global market. Technological innovations as well as unpredictable strains of heightened competition require constant change and adaptation.").

But collaborative governance is not without potential problems. Like pure private ordering, collaborative governance is vulnerable to capture and corruption.[170] Delegating more power to private parties (rather than engaging in top-down government regulation) brings about a "shift[] in power allocation."[171] Collaborative governance can thus become "a way for powerful companies to cement their power and evade regulation and oversight."[172] Moreover, as regulatory channels become more complex and as governance structures become increasingly interdependent, it becomes more difficult for the public to trace decision-making power and authority.

For these reasons, proponents and critics of new governance stress the need for both transparency and accountability mechanisms.[173] Lobel notes that new governance "embraces the essential significance of transparency and information disclosure."[174] At the same time, Lobel argues that transparency is not a panacea—"information is not worth much if there are insufficient means to use it, sort it, make sense of it, apply it, and upgrade it."[175] In other words, because disclosure of information alone can be "debilitating and counterproductive,"[176] information disclosures must be structured so as to make genuine oversight and monitoring possible.

In addition to calls for greater transparency, scholars emphasize the need for mechanisms to ensure accountable decision-making. Accountability, Margot Kaminski argues, is the "central problem of collaborative governance."[177] Generally,

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[170] *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 55 (1992) ("The very conditions that foster the evolution of cooperation are also the conditions that promote the evolution of capture and indeed corruption.").

[171] Lobel, *supra* note 126, at 460.

[172] Kaminski, *supra* note 124, at 1566.

[173] *See, e.g.*, Bremer, *supra* note 125, at 1124 ("[A] private governance system should be transparent, so that both its participants and products are knowable to a public that may be affected by that system. Rules to ensure opem1ess and participation by a balanced range of affected interests may similarly be necessary to preserve legitimacy and protect the substantive validity of a private governance regime").

[174] Lobel, *supra* note 126, at 454.

[175] *Id.*

[176] *Id.*

[177] Kaminski, *supra* note 124, at 1566.

accountability requires "checks on decision making intended to channel discretion so as to promote both effective and legitimate regulatory decisions."[178] Accountability is important, in large part, because it is necessary to ensure that officials wielding public power can be held responsible by the voting public for the uses and misuses of their power.[179] Because new governance regulatory structures can be complex and dynamic (and therefore difficult for the public to monitor), scholars observe a need for "systemic accountability"—multiple accountability mechanisms that produce oversight throughout all stages of governance.[180]

C. Critiques of Jawboning

If jawboning is a form of collaborative governance, we should expect to see similar calls for jawboning transparency and accountability. And this is precisely what we find. The jawboning literature abounds with calls for improved jawboning transparency and accountability.

Most commentators begin by lamenting that, when jawboning is deployed to target speech on social media platforms, jawboning is speech-suppressive.[181] Platforms, it is often argued, are the "weakest link" in the chain of communication, and

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[178] Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 404 (2006) (internal quotations omitted).

[179] *See* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1751 (2021) (arguing that political accountability "ensure[s] that agency actions are publicly acceptable, not just legally permissible, or at least that the decisionmakers bear consequences if their decisions are not"). There is a separate question whether a private intermediary itself also must be accountable, in some sense, to the people. In this Article, I do not wish to take a stance on this additional question, but I will note that there are both stronger and weaker versions of an answer in the affirmative. Weakly, one might think the market *already* functions as an accountability mechanism for private firms, as private firms are accountable to their shareholders and, indirectly, their consumers. More strongly, one might think that firms must be held accountable in some additional way, where the possible institutional instantiations of this additional accountability mechanism are many and varied.

[180] Kaminski, *supra* note 124, at 1568–69.

[181] *See, e.g.*, Bambauer, *supra* note 24, at 86 (arguing that social media platforms, if jawboned, are especially likely to censor users' speech). *But see* Duffield, *supra* note 25 (observing that the government can also engage in jawboning to *compel* speech).

this supposedly makes platforms a ripe target for government censorship.[182] The basic thought is that platforms derive little benefit from protecting any one user's speech against government censorial efforts, compared with the risks of government sanction.[183] This gives platforms an "economic bias towards censorship."[184] In addition, because it might be difficult and costly for platforms to distinguish between protected and unprotected speech, platforms might unwittingly do "collateral damage to protected expression" in an effort to stave off government regulation.[185]

But the fact that jawboning might causally contribute to greater speech suppression is not determinative of whether jawboning is normatively objectionable. More speech is not always desirable. As Robert C. Post observes, we "never value speech *as such*."[186] Instead, speech is valuable only to the extent it serves the values of the relationships within which the speech is uttered[187] or to the extent it promotes individual self-determination.[188] Arguably, certain forms of speech, such as

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[182] Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 27–33 (2006).

[183] *Id.* at 28 ("To be sure, every prospect of liability or other sanction can chill speech, but intermediaries have a peculiarly fragile commitment to the speech that they facilitate. In networked environments, revenue from the marginal customer brings only a small payoff, a benefit that can easily be dwarfed by threatened penalties—or even by the threat of official displeasure.").

[184] Bambauer, *supra* note 24, at 86.

[185] Kreimer, *supra* note 182, at 30.

[186] Robert C. Post, *The Unfortunate Consequences of a Misguided Free Speech Principle*, 5 J. FREE SPEECH L. 295, 298 (2024) (emphasis in original).

[187] *Id.*

[188] *See generally* SUSAN HOFFMAN WILLIAMS, TRUTH, AUTONOMY, AND SPEECH: FEMINIST THEORY AND THE FIRST AMENDMENT (2004); SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW (2014).

hate speech[189] and misinformation,[190] can even set back free speech values. The regulation of such speech may be necessary to maintain a public sphere that reliably promotes free speech values.

Even if implicitly, scholars and commentators have recognized that the normative case for or against jawboning does not turn on whether jawboning produces more or less speech. Commentators tend to argue that the most significant problems associated with jawboning center around jawboning transparency and accountability. Derek Bambauer, for example, argues that the "largest legitimacy challenge for jawboning is accountability."[191] Genevieve Lakier contends that the harm of jawboning is the harm of "constitutional evasion: the purposeful use of informal governmental power to evade the constraints that the First Amendment imposes on the government's formal powers."[192]

Unsurprisingly, then, the most common refrain in the jawboning literature is that transparency and accountability mechanisms are important—if not the best—solutions to the jawboning problem. Besides "normative labeling,"[193] Bambauer suggests that the most promising proposal for constraining jawboning is to require internet firms to adopt internal and external transparency mechanisms.[194] Lakier too calls for government transparency mandates and disclosure requirements for businesses targeted by government jawboning, and she interprets *Vullo* to establish a categorical prohibition against officials attempting to circumvent the First Amendment's accountability mechanisms.[195]

Will Duffield, one of the harshest critics of jawboning, argues that mandatory disclosure requirements would be preferable to an outright prohibition on jawboning, in part because "disclosure requirements can be implemented without drawing

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[189] *See* Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312, 317 (1998) (arguing that there does not exist an autonomy-based defense of hate speech because hate speech threatens the autonomy of its target).

[190] *See generally* Daniel Browning, *False Speech*, SOC. THEORY & PRACTICE (forthcoming 2027) (manuscript on file with author).

[191] Bambauer, *supra* note 24, at 99.

[192] Lakier, *supra* note 22, at 784.

[193] Bambauer, *supra* note 24, at 115.

[194] *Id.* at 112–15.

[195] Lakier, *supra* note 22, at 861–63.

hard lines between acceptable and unacceptable government messages."[196] Duffield then proceeds to draft a model "Social-Media Censorship Transparency Act," which, among other things, mandates detailed reports whenever a government official requests that a platform deny services based on a user's protected expression.[197]

In a similar vein, FIRE argues that "Congress should mandate that government agencies disclose their communications with social media platforms when those communications seek to pressure a platform to restrict user speech."[198] And former tech platform employees Katie Harbath and Matt Perault suggest that the president should promulgate an executive order that, among other things, requires government requests for platforms to remove content to be submitted through a formal channel.[199] They also propose that tech platforms should have access to formal mechanisms to report government jawboning.[200]

In sum, calls for greater transparency and accountability pervade the jawboning literature. If jawboning is a form of collaborative governance, then this is precisely what we should expect. Collaborative governance mechanisms can be complex, dynamic, and, at times, opaque. For these reasons, transparency and accountability mechanisms are often necessary to ensure collaborative governance promotes the public good rather than the private ends of regulated private parties or partisan government actors. Conceptualizing jawboning as a form of collaborative governance sheds light on why scholars and commentators have converged around advocacy for accountability and transparency-promoting mechanisms.

III. WHEN, IF EVER, IS JAWBONING NORMATIVELY DESIRABLE?

In Part II, we saw that jawboning is a form of collaborative governance—a public/private regulatory partnership to achieve a public regulatory objective. Part III

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[196] Will Duffield, *Toward a Jawboning Transparency Act*, KNIGHT FIRST AMEND. INST. (Oct. 19, 2023), https://perma.cc/YB7S-D49T.

[197] *Id.*

[198] *What Is Jawboning? And Does It Violate the First Amendment?*, FIRE, https://perma.cc/63JT-2KFS.

[199] Harbath & Perault, *supra* note 32.

[200] *Id.*

explores the normative implications of conceptualizing jawboning as a form of collaborative governance. Section A begins by observing that jawboning is one of many tools the government can use to achieve its goals, and it proposes a functionalist framework for normatively evaluating government jawboning. On the functionalist framework, what matters normatively is (1) the objective jawboning is used to achieve and (2) whether jawboning is the best tool to achieve that objective. The remainder of Part III is devoted to outlining some preliminary answers to question (2). Section B discusses stylized circumstances where jawboning might be the best regulatory tool. In contrast, Section C identifies several stylized circumstances where the government generally ought to refrain from jawboning, regardless of the goal it seeks to achieve.

A. A Functionalist Framework for Evaluating Jawboning

In the previous Part, I showed how jawboning is a form of collaborative governance. Jawboning is one of many tools in the government's toolkit for achieving regulatory objectives. Now, suppose the government jawbones. How should we evaluate whether the government's jawboning was normatively justifiable? Or suppose the government is considering achieving some regulatory goal by jawboning. How should the government decide whether it ought to achieve its ends by jawboning?

In this Section, I articulate a functionalist framework for evaluating instances of jawboning.[201] On the functionalist approach, we must evaluate jawboning just as we evaluate the use of any regulatory tool. Broadly speaking, it's part of the nature of tools that they can be used for good or bad ends. Hammers, for example, can be used to build houses for the needy or to maliciously mash someone's fingers. Legal positivism has long been animated by the intuition that law too is a tool that can be

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[201] The functionalist framework has obvious affinities with early 20th century functionalist legal theorists. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 841 (1935) ("Intellectual clarity requires that we carefully distinguish between the two problems of (1) objective description, and (2) critical judgment, which classical jurisprudence lumps under the same phrase. Such a distinction realistic jurisprudence offers with the double-barreled thesis: (1) that every legal rule or concept is simply a function of judicial decisions to which all questions of value are irrelevant, and (2) that the problem of the judge is not whether a legal rule or concept actually exists but whether it ought to exist. Clarity on two fronts is the result. Description of legal facts becomes more objective, and legal criticism becomes more critical.").

used for good or for ill.[202] As Scott J. Shapiro observes, "the law is, in the end, an instrument. And like all instruments, it can be used for good or bad purposes."[203]

Like the hammer (or, for that matter, the law), jawboning is a tool that can be used for good or for ill. Thus, one dimension along which we must evaluate instances of jawboning is the particular end for which jawboning is used. Just as it's generally objectionable to use a hammer to mash someone's fingers and generally good to use a hammer to build a house for the needy, specific instances of jawboning also must be evaluated on the basis of the regulatory objective for which jawboning is used. If the regulatory end is objectionable, then the use of jawboning to achieve that end is presumptively objectionable. And if the regulatory end is normatively desirable, then it might be desirable to use jawboning to achieve that end.

This brings us to the second dimension along which to evaluate instances of jawboning. Suppose the government aims to achieve some desirable objective. It does not automatically follow that it's desirable to use jawboning to achieve this valuable end. For any given end, there will be better or worse tools to achieve that end.[204] A hammer is a quite good tool for building houses for the needy—or for mashing fingers—but a quite poor tool for scrambling an egg. Writing about law as a tool, Shapiro similarly observes that "as with all instruments, there are correct and incorrect ways to use the law; if we use it incorrectly, it will not do what it is supposed to do."[205]

The same is true of jawboning. Jawboning is a particular form of collaborative governance that can be employed to achieve various regulatory ends. Whether jawboning is the right tool for the job will depend on the relevant socio-political con-

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[202] *See* David Plunkett, *Legal Positivism and the Moral Aim Thesis*, 33 OXFORD J. LEG. STUD. 563, 592 (2013) (noting that the metaphor that law is a tool "has motivated many to legal positivism").

[203] SCOTT J. SHAPIRO, LEGALITY 399 (2011).

[204] The functionalist account I present here draws on Aristotle's functionalist approach to ethics. *See* ARISTOTLE, NICOMACHEAN ETHICS 1098a (3d ed. 2019) ("Now we say that the function of a kind of thing, such as a harpist, is the same in kind as the function of an excellent individual of the kind, such as an excellent harpist. . . . Now each function is completed well by being completed in accord with the virtue proper to that kind of thing.").

[205] SHAPIRO, *supra* note 203, at 399.

text, the various incentives that will be created, and the particular ends the government wants to achieve. It also depends on whether jawboning is likely to create negative externalities not engendered by other forms of regulation. Thus, whether jawboning would be the most *effective* way to achieve a regulatory objective is not necessarily determinative of whether jawboning is the best regulatory tool. For example, certain forms of jawboning, especially "private jawboning,"[206] can come with transparency and accountability costs.[207] To the extent that these transparency and accountability deficits could not be eliminated,[208] transparency and accountability costs should be factored into our assessment of whether jawboning is the best regulatory tool.[209]

In summary, on the functionalist approach, two questions are relevant for any normative evaluation of jawboning:

1. What does the government aim to achieve by jawboning, and is that goal desirable?
2. Supposing the end is desirable, is jawboning the best tool to achieve that end?

Curiously, though, these normative questions are almost never directly raised and are even more rarely discussed in detail in the literature on jawboning. Rather than being viewed as a possible *solution* to problems or as a distinctive type of tool, jawboning is instead viewed as a problem to be solved in its own right.[210] Commentators typically begin by observing that "[j]awboning is an everyday practice in the

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[206] *See* Ashutosh Bhagwat, *The Bully Pulpit or Just Plain Bully: The Uses and Perils of Jawboning*, 22 FIRST AMEND. L. REV. 292, 306–12 (2023) (distinguishing public jawboning from private jawboning and arguing that private jawboning, but not public jawboning, can be unconstitutionally coercive).

[207] *See supra* Section II.C.

[208] *See* Duffield, *supra* note 196; Matt Perault, *Trust the Process*, KNIGHT FIRST AMEND. INST. (Nov. 27, 2023), https://perma.cc/7S7F-MMTL.

[209] *See infra* Section III.C.3.

[210] *See, e.g.*, Jameel Jaffer, *Does the First Amendment Bar Government Officials from Browbeating Social Media Platforms?*, KNIGHT FIRST AMEND. INST. (Jan. 26, 2024), https://perma.cc/LW4X-U2ZM; Lakier, *supra* note 22; Bambauer, *supra* note 24; Derek E. Bambauer, *Be Careful What You Ask For*, KNIGHT FIRST AMEND. INST. (Oct. 30, 2023), https://perma.cc/6Q8P-XGUQ.

relationship between government officials and tech companies."[211] They then proceed to discuss both how jawboning threatens the First Amendment rights of speakers and what should be done about the jawboning problem.[212]

This Article calls for a course correction. While we should take seriously the variegated critiques of jawboning, it is a mistake to view jawboning only as a problem to be solved. Once jawboning is framed as a distinctive First Amendment issue (rather than just another form of collaborative governance), we begin to view jawboning only as a threat to free speech rather than as a possible tool to achieve useful policy goals.

Instead, scholars should consider the relative costs and benefits of regulation by jawboning. We must query under which circumstances jawboning might be the best tool to achieve regulatory objectives and, conversely, under which circumstances jawboning is likely to be a poor fit for the job.[213] In addition, scholars should not avoid weighing in on the substantive regulatory objectives to which jawboning is put. Those ends might be objectionable as a matter of morality or justice, or they might be inconsistent with constitutional values.[214]

Thus, the functionalist framework rejects a categorical approach to evaluating jawboning. We should assume neither that jawboning is always objectionable nor that it is always good. Instead, the functionalist approach necessitates answering both normative questions to determine whether, in a particular context, government jawboning should be permitted or forbidden.[215]

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[211] Perault, *supra* note 208.

[212] *See, e.g.*, Duffield, *supra* note 196 ("Although jawboning is increasingly accepted as a real problem, there is little agreement as to how it should be prevented.").

[213] *Cf.* Lobel, *supra* note 127, at 66 ("Under the lens of new governance, the regulatory process consists of a wide range of tools, each with its comparative advantages and costs.").

[214] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 384 (1992) (reasoning that the government violates the First Amendment when it regulates speech because of hostility to the speaker's message, even if the speech is not covered by the First Amendment); *see also generally* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

[215] *Cf.* Greene, *supra* note 81 (arguing that jawboning cases unavoidably require the court to engage in fine-grained contextual analysis).

To answer the first normative question (whether the government's objective is desirable), one must evaluate the objective with reference to some set of relevant moral, political, or constitutional values. It is beyond the scope of this Article to articulate any theory of value or justice by which to evaluate government objectives.[216] However, the following sections will attempt to make some headway in answering the second normative question—whether jawboning is the best tool to achieve regulatory objectives.

Before moving forward, it is imperative to stress that the normative analysis in the remainder of this Part is not intended to be a commentary on legal doctrine. First Amendment jawboning doctrine will be the subject of Part IV. In this Part, by contrast, the normative analysis is designed to help guide recommendations for First Amendment doctrine.[217] Before we can make judgments about what First Amendment jawboning doctrine should be, we must first determine whether jawboning is something we should want to permit.

B. When to Regulate by Jawboning

In Part II, we established that jawboning is a form of collaborative governance. As a form of collaborative governance, jawboning is another tool in the government's toolkit to achieve regulatory objectives. Like any tool, we must query under what circumstances jawboning is likely to be the best tool for the job and, conversely, under what circumstances jawboning is likely to be undesirable. Might any circumstances exist where it would be preferable for the government to regulate by jawboning? In this Section, I highlight five general, stylized circumstances in which we might prefer jawboning over the regulatory alternatives.

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[216] Thus, I do not reach any final conclusions in this Article on whether it's permissible for the government to use jawboning, for example, to restrict harmful speech, such as misinformation or hate speech, as each of these issues would require their own separate normative analysis. For an autonomy-based argument that (at least some) misinformation ought to be regulated, see Browning, *False Speech*, *supra* note 190.

[217] *See* Seana Valentine Shiffrin, *Methodology in Free Speech Theory*, 97 VA. L. REV. 549, 550 (2011) ("Without the guidance of a background ideal theory (whether implicit or explicit), sifting through the tradition to separate out the chaff and to resolve conflicts within it seems prone to reflect features such as the frequency or recentness of citation, the path dependency of what is litigated, and what repression has been tolerated and not yet challenged or upended. These features are often morally arbitrary and thus ill-suited to bear much weight.").

Before proceeding to the analysis, a word of caution is in order. Under the functionalist framework, we must evaluate both (1) the government's objective and (2) whether jawboning is the best tool to achieve that objective, in order to determine whether jawboning is normatively desirable in that particular case. This Section, along with the following Section, discusses only question (2)—whether jawboning is the right tool to achieve an otherwise laudable objective. Yet, the normative desirability of the government's objective itself is a *necessary condition* for the normative desirability of jawboning to achieve that objective. If the government's goal is objectionable, then it is objectionable for the government to achieve that goal either directly or indirectly.

For example, even if we cannot identify any instrument-based reasons to object to the government's jawboning of universities to curtail protest activities on campus, this jawboning is objectionable because such government interference with universities violates both deep First Amendment values and core principles of academic freedom.[218] When we analyze jawboning in contexts like these, it's worth pausing to reflect on whether our objections to the government's jawboning are ultimately traceable to the government's goal itself, rather than to the fact that the government aims to achieve this objectionable goal by jawboning.

1. Decentralizing Public and Private Power

First, jawboning might be a preferable method of regulation if we want to decentralize both public *and* private regulatory power. At its core, jawboning disperses power.[219] When the government engages in jawboning, it eschews direct regulation. Rather than bringing the full power of the state to bear on the regulatory target, the state instead channels that power through a private intermediary. The government aims to regulate the target's behavior indirectly by pressuring the private intermediary to regulate the target in a certain way. When the government jawbones, it also eschews pure private ordering. Regulatory decisions are not left to the exclusive discretion of private parties.

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[218] *See, e.g.*, Jameel Jaffer, Alex Abdo, Katy Glenn Bass, Nadine Farid Johnson, & Larry Siems, *What the Columbia Settlement Really Means*, KNIGHT FIRST AMEND. INST. (Aug. 4, 2025), https://perma.cc/DR95-KYY9.

[219] *See supra* Section II.B; *cf.* Lobel, *supra* note 126, at 381 (arguing that decentralization of power is a hallmark of new governance).

In sum, the jawboning regulatory model involves direct influence by a private intermediary, with sporadic, indirect pressure from the government. Thus, when the government regulates by jawboning, power is dispersed between the intermediary, who retains direct regulatory power, and the government, who tempers the intermediary's direct regulatory power by selectively applying pressure.[220]

In contrast, when the government does not regulate by jawboning (or some other form of collaborative governance), regulatory power is often *centralized*. When the government engages in top-down, direct regulation, regulatory power resides solely in the hands of the government.[221] When the government does not regulate at all, regulatory power often resides solely in the hands of a small set of powerful private firms.[222]

For example, suppose the government wants to suppress harmful vaccine misinformation on Facebook.[223] Setting aside First Amendment doctrine for now, in a world without jawboning, there are two possible ways the government could attempt to regulate the misinformation. First, the government could try to regulate the misinformation directly, perhaps by attaching civil[224] or criminal[225] penalties to publishing the misinformation. Second, the government could do nothing and, instead, rely on private social media platforms to regulate misinformation at their

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[220] *See supra* Section II.A.

[221] Centralized government power may be less objectionable to the extent that the government's regulatory power is the product of democratic will. *See generally* SEANA VALENTINE SHIFFRIN, DEMOCRATIC LAW (2021). Regulation explicitly authorized by statute has superior democratic credentials to regulation not explicitly grounded in a duly enacted statute. Thus, the argument in this sub-section may not apply to contexts where congress has enacted a comprehensive regulatory scheme. In these contexts, the concentration of public regulatory power can be seen as the product of democratic will and, for this reason, a lesser threat to personal freedom. Many thanks to Genevieve Lakier for raising this issue.

[222] As will be discussed in Section III.C.4, industry concentration can make government pressure much more coercive and thereby make jawboning undesirable as a tool.

[223] *See, e.g.*, Murthy v. Missouri, 603 U.S. 43 (2024).

[224] *See, e.g.*, Daniel E. Rauch, *Defamation as Democracy Tort*, 172 U. PA. L. REV. 1453, 1521 (2024) (arguing that changing the actual malice rule for defamation of public figures can reduce misinformation).

[225] *See, e.g.*, United States v. Alvarez, 567 U.S. 709 (2012) (striking down a federal statute that criminalized making false statements about receiving military honors).

whim.[226] In both cases, power is centralized in the hands of the government or in the hands of powerful[227] social media platforms, respectively.

The idea that personal rights and freedom are best protected by dispersing and decentralizing power animates our constitutional structure and tradition.[228] Core American constitutional values, such as the separation of powers, checks and balances, and federalism, are all grounded in the conviction that power is better shared than amassed.[229] Moreover, the idea that power is better dispersed than centralized has a storied intellectual pedigree. It received its most influential statement from Montesquieu, who argued that to prevent abuses of power that threaten individual liberty, "power should be a check to power."[230] Montesquieu's influence reverberates throughout the Federalist Papers, especially Federalist 51, where Madison makes the case for a system of separation of powers motivated by the Montesquieuan insight that "[a]mbition must be made to counteract ambition."[231]

In sum, if it's generally better to decentralize and disperse power than to allow power to become concentrated, then we have some reason to prefer regulation by jawboning to direct regulation or no regulation at all.

It might be rebutted that jawboning is a general threat to liberty to the extent that jawboning enables the government to regulate, or at least influence, behavior that the government is prohibited from regulating directly.[232] For example, in the

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[226] *See generally* Klonick, *supra* note 144 (describing the development of platforms' content moderation policies).

[227] *See generally* Lina M. Khan, *Sources of Tech Platform Power*, 2 GEO. L. TECH. REV. 325 (2017) (identifying the sources of tech platforms' power).

[228] *See*, *e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 223 (2020) (stating that the Framers' "solution to governmental power and its perils was simple: divide it").

[229] *See, e.g.*, Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 33 (2010) ("Federalism and the separation of powers have long been considered complementary strategies for diffusing national power—one vertical, one horizontal.").

[230] BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 150 (Colonial Press 1899) (1748).

[231] THE FEDERALIST No. 51 (James Madison).

[232] A related objection is that jawboning is necessarily objectionable because (at least coercive) jawboning enables the government to circumvent limits on the government's regulatory authority by allowing the government to take an end-run around the First Amendment. For a view along these lines, see Lakier, *supra* note 22. While this objection has intuitive appeal, I am skeptical of its force

Facebook vaccine misinformation hypothetical, the First Amendment bars the government from attaching criminal penalties to the mere utterance of vaccine misinformation, absent some legally cognizable harm[233] or other limiting features in the criminal statute.[234] If the government could circumvent the First Amendment's prohibition against directly regulating the vaccine misinformation (at least in certain ways) by jawboning, then jawboning might threaten personal freedom—here, the freedom to say false things about vaccines.[235] In other words, this objection postulates that the choice is between freedom and regulation—not between centralized and dispersed power.

The weakness of this objection lies in its failure to see that private governance sans government pressure can also threaten personal freedom.[236] When the government does not—or may not—regulate speech or conduct, typically this does not entail that the speaker or actor exercises unconstrained freedom. The absence of government speech regulation is not pure freedom from regulation. Rather, in modern capitalist economies, the absence of government regulation typically entails the presence of private governance.[237]

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in the context of a normative analysis of jawboning, for the entire question we are asking in this Part is: what should be outside the limits of the government's authority and, more specifically, does/when does jawboning fall inside or outside that line? In this way, the authority objection begs the essential question in a normative assessment of jawboning. I thank an anonymous reviewer for asking me to address this objection more directly.

[233] United States v. Alvarez, 567 U.S. 709, 719 (2012) (plurality opinion).

[234] *Id.* at 736 (Breyer, J., concurring) ("The statute before us lacks any such limiting features. It may be construed to prohibit only knowing and intentional acts of deception about readily verifiable facts within the personal knowledge of the speaker, thus reducing the risk that valuable speech is chilled.").

[235] Lakier, *supra* note 22, at 833 ("This kind of prophylactic protection [against constitutional evasion] is particularly important when it comes to encroachments on freedom of speech that are carried out by informal methods.").

[236] *See, e.g.*, ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 37–49 (2017) (analogizing the private government of the workplace to a dictatorship); CHIARA CORDELLI, THE PRIVATIZED STATE (2020) (developing an account of how privatization and the concentration of private power threatens personal freedom).

[237] *See generally* CORDELLI, *supra* note 236, at 5 (documenting and critiquing the "increasing dispersion of political power at the domestic level, through systematic processes of privatization and outsourcing" on grounds that this privatization threatens personal freedom).

And private governance sans government pressure, at least in some cases, could very well constitute a greater threat to personal freedom than either direct or indirect government regulation.[238] Indeed, there is little reason to believe that unconstrained private governance will promote either personal freedom or public values.[239] For example, returning to the Facebook vaccine misinformation hypothetical, the alternative to government jawboning is independent governance by platforms. While there is some evidence that social media platforms were at least at one point internally motivated by free speech values,[240] there is no general reason to believe that social media platforms, left to their own devices, would regulate speech on their platform in a way that is conducive to a healthy public sphere or in a way that promotes free speech values, even if competition might make platforms somewhat responsive to user preferences.[241]

2. Regulation as a Function of Trust in Public and Private Actors

Second, jawboning might be preferable when we don't trust the government to regulate directly, but we also cannot trust private ordering to produce outcomes congruent with the public good. Jawboning, as we have seen, is a "third way" to achieve public regulatory objectives. As a form of collaborative governance, jawboning inhabits the space between direct regulation and pure private ordering.

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[238] Of course, this is not to deny the fact that government power is, at least in certain respects, more extensive and absolute than private power. The government can send in the troops, throw people in jail, and unleash state-sanctioned violence, whereas private firms generally may not. Generally, then, private power, even if aggregated, rarely is equivalent to public power. That said, there are still cases where government regulation of private power can function to promote personal freedom, despite the public/private power asymmetry.

[239] Observe here that jawboning is not limited to cases where the government aims to influence speech or conduct *by limiting it*. Rather, the government can also jawbone to promote certain speech or conduct. For example, if a government official pressures Facebook to water down its content moderation policies because the government, say, wants Facebook users to express a more diverse array of viewpoints on the platform, that is just as much jawboning as when the government pressures Facebook with an eye towards reducing misinformation.

[240] Klonick, *supra* note 144.

[241] *See* Jack M. Balkin, *To Reform Social Media, Reform Informational Capitalism*, *in* SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 233–34 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022) ("Only a handful of social media companies dominate online discourse. In addition, the business models of social media companies give them incentives to act irresponsibly and amplify false and harmful content.").

And, as we have just seen, jawboning disperses power among public and private actors. Thus, jawboning (or other forms of collaborative governance) might be preferable to either direct regulation or pure private ordering if the following conditions hold: (1) We want to achieve public regulatory objectives, (2) our trust in government is low, and (3) our trust in pure private ordering is also low.

Generally, as illustrated in Figure 2 below, the best governance regime for a particular regulatory objective may very well be a function of our trust in various public and private actors. If our trust in government is high and our trust in private ordering is also high (cell 1), then it likely does not matter much what form regulation takes—or, at least, we must appeal to considerations other than trust to differentiate among forms of governance. If trust in government is low but trust in private ordering is high (cell 2), then we are better off allowing the market and private parties to determine regulatory outcomes.[242] If our trust in government is high but our trust in private ordering is low (cell 3), then we have general reasons to prefer direct government regulation.[243] Finally, if trust in government *and* trust in private ordering is low (cell 4), jawboning—or another form of collaborative governance—is preferable, at least along the trust dimension, to top-down government regulation and pure private ordering.[244]

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[242] *See, e.g.*, Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1140–43 (1996) (discussing the conditions under which private ordering is preferable to central planning and observing that, in general, "private ordering is justified because it provides a more efficient allocation of capital and labor than central planning").

[243] *See* Lobel, *supra* note 127, at 71 (observing that "centralized systems of control can indicate mistrust").

[244] It should be stressed that, by mapping trust as a high/low binary, the argument in this subsection elides important complexities. It might be the case, for example, that, even though we distrust private ordering, our trust in government nevertheless is so low that jawboning is worse than pure private ordering. Indeed, this very well may describe our current moment. In addition, by conceptualizing "government" as a monolithic entity, this sub-section does not analyze intra-governmental checks and balances that might influence our trust in government. For example, for structural reasons, we might distrust the executive but simultaneously trust the judiciary to reign in the executive's worst abuses of power. This subsection glosses over this additional layer of complexity. For these reasons, this sub-section is only meant to provide a useful heuristic, rather than a final analysis.

Figure 2

	High Trust in Government	Low Trust in Government
High Trust in Private Ordering	1: Any	2: Private Ordering
Low Trust in Private Ordering	3: Top-down Government Regulation	4: Jawboning (Collaborative Governance)

3. Regulatory Capacity, Expertise, and Private Information

Third, jawboning is preferable to direct regulation when the government lacks the ability, expertise, or information to regulate conduct directly. Suppose we trust the government to pursue regulatory objectives in the public interest and are, thus, in cell 1 or cell 3 of Figure 2. Jawboning (or other forms of collaborative governance) might still be preferable to direct government regulation if the government lacks the means to pursue its objectives effectively.[245]

The government might lack the technical means to regulate conduct. Public regulators might be under-staffed and under-funded. Or the conduct might occur at such scale and intensity that traditional regulatory techniques are unsuitable. Even if it has the technical means to regulate conduct, the government might nevertheless lack the expertise requisite to do so effectively and efficiently.[246] Relatedly, private parties might have access to important information the government lacks,[247] making information sharing crucial for effective governance.

Consider, for example, content posted on social media platforms. The rise of digital social media platforms has brought about a structural transformation of the

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[245] *See supra* Section II.B.

[246] *See* Kaminski, *supra* note 124, at 1535 ("Collaborative governance is generally described as better suited for regulating highly complex systems that create hard-to-calculate risks, change too quickly for traditional regulatory approaches, and involve technical and industry expertise that regulators and legislators are unlikely to have.").

[247] *See* Lobel, *supra* note 127, at 66 (arguing that the "new governance model involves increased participation of non-state actors because it challenges the conventional assumptions that the regulatory policymaking powers of administrative agencies are based on their superior knowledge, information, and expertise").

public sphere.[248] Whereas in the past people were only able to speak to mass audiences through highly selective intermediaries like newspapers or book publishers,[249] users today can upload a nearly unlimited amount of content to the internet, and this content has the capacity to reach millions. On YouTube alone, users post over 500 hours of content every minute.[250]

Without the cooperation of platforms, it simply would not be possible for government regulators to monitor the amount of content on YouTube for illegal content like child pornography—not to mention all the content posted on other major social media platforms. Instead of trying to police social media platforms for illegal content on its own, governments rely on the social media platforms themselves to identify, report, and remove illegal content.[251] Governments have come to rely increasingly on platforms' superior information and technical capabilities to monitor and regulate harmful and illegal content. Jack M. Balkin observes that "[a]s social media and search engine companies develop governing bureaucracies and algorithms, nation-states seek to harness that capacity to accomplish the nation-state's governance goals."[252]

In Europe, for example, the Digital Services Act requires online platforms to develop mechanisms to allow users and "trusted flaggers" to identify and report illegal content,[253] such as hate speech, for removal.[254] In addition, "very large platforms"—platforms reaching more than 10% of European consumers—are obligated to share data with the government and academic researchers.[255] Balkin notes

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[248] *See* Jürgen Habermas, *Reflections and Hypotheses on a Further Structural Transformation of the Political Public Sphere*, 39 THEORY, CULTURE & SOC'Y 145 (2022).

[249] *See generally* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (1989).

[250] *YouTube for Press*, YOUTUBE OFF. BLOG, https://perma.cc/W3DB-3M8K.

[251] *See* Klonick, *supra* note 144, at 1636–37 (discussing how social media platforms rely on moderation algorithms to identify child pornography before it is posted to the platform).

[252] Balkin, *supra* note 97, at 2029.

[253] *See The Digital Services Act*, EUROPEAN COMM'N, https://perma.cc/A3M6-VV4S.

[254] For the Code of conduct on countering illegal hate speech online, see *Commission Welcomes the Integration of the Revised Code of Conduct on Countering Illegal Hate Speech Online into the Digital Services Act*, EUROPEAN COMM'N (Jan. 19, 2025), https://perma.cc/Y4MZ-5DWS.

[255] *The Digital Services Act*, *supra* note 253.

that the NetzDG, the German predecessor to the EU Digital Services Act,[256] "is just collateral censorship—a nation-state puts pressure on digital-infrastructure companies to block, take down, and censor content by end users."[257] Put into this Article's framework, the NetzDG's and the Digital Services Act's regulatory approach is just another form of jawboning—the indirect regulation of third-party conduct by means of pressuring an internet intermediary via legal sanctions.

Copyright law provides another apt example of how jawboning can be a useful way to regulate conduct that would otherwise be outside the government's reach.[258] Ordinarily, copyright infringers themselves face liability for their infringement.[259] In the internet age, however, "the number of computer-based infringers is so large that copyright holders cannot find and sue them all."[260] Thus, the traditional method of protecting copyright holders from infringement—subjecting infringers to legal liability—would not adequately protect the rights of copyright holders in the digital age.

Copyright law's first solution to this problem is to hold intermediaries liable for enabling or inducing third-party infringement, under certain circumstances.[261] In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, for example, the Supreme Court held that "[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct

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[256] *See* Lisa-Maria Neudert, *Reclaiming Digital Sovereignty: Policy and Power Dynamics Behind Germany's NetzDG*, 14 J. INFO. POL'Y 417, 419 (2024) (observing that the EU Digital Services Act "effectively repeal[ed] NetzDG" in Germany but also that NetzDG had paved the way for the Digital Services Act).

[257] Balkin, *supra* note 97, at 2030.

[258] I thank Derek Bambauer for the example.

[259] Alfred C. Yen, *Third-Party Copyright Liability After* Grokster, 91 MINN. L. REV. 184, 186 (2011).

[260] *Id.*

[261] Secondary liability for copyright infringement is limited. Merely selling a device that is capable of enabling copyright infringement does not automatically render the seller liable for contributory infringement, so long as the device is "capable of substantial non-infringing uses." Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

infringement while declining to exercise a right to stop or limit it."[262] When a defendant distributes a product or service and takes active steps to encourage others to use their product or service for direct infringement, such as through advertising, the defendant can be held liable for copyright infringement under an inducement theory.[263]

In expanding secondary copyright liability to cover intermediaries who induce third parties to engage in direct infringement,[264] the Court acknowledged that it was going beyond the four corners of the Copyright Act. While the Court conceded that "'[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,'" it nevertheless asserted that the Court may impose secondary liability because "doctrines of secondary liability emerged from common law principles and are well established in the law."[265]

Grokster is an example of how jawboning can be used to regulate behavior that would otherwise be outside the government's reach.[266] Rather than trying to hold every direct infringer liable for copyright infringement, the Court instead goes beyond the text of the Copyright Act to pressure intermediaries, via the threat of legal sanction, to take steps to prevent their products or services from being used for infringement by third parties.[267]

Copyright law's second solution to the problem of mass internet-based infringement is the DMCA's notice and takedown mechanism. Under the DMCA, online service providers can be shielded from liability for third-party infringement if the provider implements an effective notice and takedown system for aggrieved

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[262] 545 U.S. 913, 930 (2005) (internal citation omitted).

[263] *Id.* at 936.

[264] *See* Yen, *supra* note 259, at 189 ("*Grokster* is not a simple case. It initially appears to complicate matters by endorsing inducement without explicitly resolving the conflicts in existing law. However, careful analysis of the conflicting theories that animate copyright liability shows that *Grokster* created an improved framework for future construction of third-party copyright liability.").

[265] *Grokster*, 545 U.S. at 930 (quoting *Sony*, 464 U.S. at 434).

[266] *But see* Cox Commc'ns, Inc. v. Sony Music Ent., 146 S. Ct. 959, 968 (2026) (holding that ISPs are not contributorily liable under *Grokster* for user copyright infringement).

[267] In this way, inducement liability for intermediaries in copyright law functions similarly to hostile environment liability for employers in anti-discrimination law. *See supra* Section I.B.4.

rightsholders.[268] Unlike *Grokster* liability, which is a form of judicial jawboning, the DMCA's notice and takedown system is a form of congressional jawboning. Via the DMCA, congress pressures online service providers voluntarily to take down allegedly infringing content, where the pressure, as in *Vullo*, comes in the form of an inducement—immunity from liability—rather than a threat.

4. Government Information Sharing

Fourth, jawboning might be preferable to pure private ordering when the *government* has superior information or special expertise compared to private parties.[269] In effect, this is just a corollary to the last point, so we need not dwell on it for long. Suppose our trust in government is low but we nevertheless want to achieve public regulatory objectives. Despite our low levels of trust in government, the government might nevertheless possess superior information on the particular regulatory matter than private parties.[270] The government might, for example, have national security-related information that private parties could not obtain.[271] If we want regulation to track the public interest, then we should want private parties to base their regulatory decisions on the best possible information. That is, we have reason to want the government to share information with private parties.

Of course, a further step is required to get from information sharing to jawboning, for there can be government information sharing with private parties without any government pressure. For example, during the Covid-19 pandemic, Facebook, along with other major social media platforms, solicited the CDC for "authoritative

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[268] *See* 17 U.S.C. § 512; see also *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, U.S. COPYRIGHT OFF., https://perma.cc/4PV6-QKZF.

[269] *See supra* Section II.B.

[270] *See, e.g.*, Daron Acemoglu, Mikhail Golosov & Aleh Tsyvinski, *Markets Versus Governments*, 55 J. MONETARY ECON. 159, 161 (2008) ("We believe that modeling the costs resulting from the self-interested behavior of the government is essential because centrally-operated mechanisms concentrate enforcement power and information in the hands of a decision maker ('government' or 'politician'). This decision maker is supposed to collect information and then redistribute resources on the basis of this information. But as the power to redistribute resources and information become centrally concentrated, it also becomes difficult to ensure that the government (and the politicians) entrusted with the allocation of resources do not use their power for their own benefits.").

[271] *See generally* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1405–08 (2009) (comparing the executive's and judiciary's relative access to superior information). Thanks to Ashutosh Bhagwat for suggesting this example.

information about the virus that it could post on the platform" and for information regarding whether specific claims about the virus and vaccine were false.[272] In addition, the CDC notified Facebook about misinformation trends on its platform,[273] and even hosted regular meetings with the platforms to inform them about the misinformation trends.[274] Thus, in the Covid-19 misinformation context, it seems that the platforms voluntarily sought out the CDC's expertise and guidance.[275] This type of voluntary information sharing is certainly a form of collaborative governance, but it is not jawboning.

Jawboning, then, is desirable on the government information-sharing dimension when (a) the government possesses superior information *and* (b) private parties are unable or unwilling to account for the government's superior information voluntarily. For example, the government might possess foreign intelligence to which private parties do not have access and which private parties would not seek out voluntarily. Under these circumstances, it might be necessary for the government to apply some pressure to the private parties to induce them to account for the government's information in their regulatory decisions.

5. Minimizing the Chilling Effect

Finally, in some circumstances, jawboning might be preferable to direct government regulation when the government wants to regulate speech or conduct without creating a significant chilling effect on other speech or conduct. Direct government regulation via criminal or civil penalties is a blunt force tool. When the government attaches criminal or civil penalties to certain speech or conduct, the law might unwittingly sweep within its ambit lawful speech or conduct that is close to the lawful/unlawful line.

The chilling effect is most often discussed in the First Amendment free speech context. Much First Amendment doctrine proceeds on the assumption that the specter of criminal or civil liability produces a "chilling effect" on protected

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[272] Murthy v. Missouri, 603 U.S. 43, 53 (2024).

[273] *Id.* at 66.

[274] *Id.* at 53.

[275] *See id.* at 67 (concluding that "[g]iven the loose match between the policy and the posts, it is hard to call it 'likely' that Facebook was enforcing the CDC's preferences rather than its own").

speech.[276] The basic idea is that, because legal rules and standards are often vague, open-textured, and imprecise, the fear of criminal or civil sanction will lead speakers to self-censor some lawful, protected speech in order to avoid the risk of liability.[277] It is often thought that speakers, either unsure whether their speech falls within the proscribed category or worried that a court erroneously will find their lawful speech to be unlawful, will opt for the risk-averse strategy of avoiding any speech that is close to the lawful/unlawful line.[278]

While judicial and academic discussion about the chilling effect lives mostly in First Amendment doctrine, there is no principled reason to think that the chilling effect applies only to speech.[279] On the standard picture, there are two drivers of the chilling effect: (1) the open-textured and indeterminate nature of legal rules and standards, along with the fact that the legal process is prone to error and (2) risk aversion or "fear" on the part of regulated parties that they might be subject to legal sanction, even erroneously.[280]

Notice that neither driver is peculiar to speech; both are equally applicable to conduct. To be sure, we might have stronger reasons to care about people self-censoring lawful speech for fear of sanction than we do about people refraining from

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[276] *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 685 (1978) ("[T]he concept of the chilling effect has grown from an emotive argument into a major substantive component of first amendment adjudication. Its use accounts for some very significant advances in free speech theory, and, in fact, the chilling effect doctrine underlies the resolution of many cases in which it is neither expressed nor clearly implied.").

[277] *Id.*

[278] *See, e.g.*, Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1637 (2012) ("On the chilling effect account . . . [a]llowing liability for all [defamatory] statements might deter true speech because people might hesitate to speak unless they are certain about the truth of their statements. Protected, true speech will thus be 'chilled' by the regulation of unprotected, false speech.").

[279] *Cf.* Schauer, *supra* note 276, at 689 ("The penalty for homicide is expected to deter people from murdering, thus ideally "chilling" that violent and harmful activity.").

[280] *See id.* at 695 ("[I]ndividuals who 'know' that their conduct is not proscribed by the regulating rule must, if rational, consider the possibility that a court will find otherwise. This possibility may be translated into a fear-a fear that lawful conduct may nonetheless be punished because of the fallibility inherent in the legal process.").

engaging in lawful conduct. But the difference between these cases can't be explained by reference to chill. The difference can only be explained, if at all, because we value speech differently than we value conduct.[281]

If direct government regulation by means of criminal or civil penalties carries a latent risk of chilling lawful speech and conduct, then regulation by jawboning (or some other form of collaborative governance) can be a way of tempering chilling effects. Because jawboning achieves regulatory objectives through direct regulation by a private party (with only indirect pressure from the government), jawboning, by definition, does not put regulated third parties at risk of civil or criminal sanction. If the fear of sanction is the primary driver of the chilling effect,[282] then, all else equal, jawboning tends to create less of a chilling effect than direct government sanction.[283]

Return, again, to our Facebook vaccine misinformation hypothetical. Imagine two possible scenarios: (1) Congress passes a statute criminalizing knowingly uttering false statements about the Covid-19 vaccine that cause some form of tangible harm to others;[284] and (2) various executive branch officials pressure social media

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[281] *See*, *e.g.*, JOHN STUART MILL, ON LIBERTY, UTILITARIANISM, AND OTHER ESSAYS 19, 34–35 (2d. ed. 2015) (articulating epistemic reasons to value speech more than conduct); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011) (articulating democratic reasons to value speech more than conduct); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2010) (articulating autonomy reasons to value speech more than conduct). *But see* Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427 (2015) (teasing out the difficulties with maintaining a coherent speech/conduct distinction).

[282] *See* Schauer, *supra* note 276, at 689 ("Although an individual's decision not to engage in certain behavior may be influenced by a wide range of stimuli, in law the acknowledged basis of deterrence is the fear of punishment-be it by fine, imprisonment, imposition of civil liability, or deprivation of governmental benefit.").

[283] To be clear, the point here is *not* that there is no chilling effect associated with jawboning. The claim is that, all else equal, jawboning will create less of a chilling effect on third parties than would directly imposing criminal or civil liability on third parties.

[284] Set aside for the moment the question whether such a statute would be permissible under *United States v. Alvarez*, 567 U.S. 709 (2012).

platforms to remove false, harmful vaccine content by either changing or enforcing their existing content moderation policies.[285]

Bracketing other virtues and vices of the regulatory schemes, it seems clear that the statute in Scenario 1 is much more likely to chill social media users' speech than the jawboning in Scenario 2. In Scenario 1, social media users face the risk of criminal sanction for speaking about the vaccine, which might create a large chilling effect on vaccine-related discourse, including much discourse that would not fall within the statute's ambit. By contrast, in Scenario 2, a social media user does not face any comparable risks. At worst, a user's account might be suspended, or, more likely, her post would be removed or contextualized. I don't mean to suggest that these are not real costs to a user or that the prospect of having one's account suspended would not create *any* chilling effect. Rather, I make the more modest, comparative claim that jawboning in this context is likely to chill much less than a criminal statute.

Nevertheless, there are two qualifications one must bear in mind. First, that some regulatory approach creates less of a chilling effect than another is not determinative regarding whether we ought to prefer that approach to the alternative, all things considered. As Fred Schauer observes, the whole point of some uncontroversial statutes, like homicide statutes, is to chill homicide-related activity.[286] In the homicide context, the statute's chilling effect is a feature—not a bug.

Second, as suggested above, both jawboning and pure private ordering can also create chilling effects. As noted, the prospect of having one's Facebook account suspended could plausibly create a meaningful chilling effect on a Facebook user's speech. Though it seems clear that, in the general case, jawboning and private ordering will create less of a chilling effect than government sanction, it would be necessary in particular cases to conduct a fact-intensive inquiry to determine which form of regulation is likely to create a greater chilling effect.

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In evaluating jawboning, this Article employs a functionalist approach. On the functionalist approach, whether jawboning is desirable turns on whether (1) the government's goal is desirable *and* (2) whether jawboning is the best tool to achieve

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[285] Of course, these are the basic facts of *Murthy*.

[286] Schauer, *supra* note 276, at 689.

that goal. As with all tools, the relevant question is not whether jawboning is perfect but rather whether jawboning is better than alternative regulatory approaches. This Section has discussed the circumstances under which question (2) can be answered in the affirmative—stylized circumstances in which jawboning might be preferable to direct government regulation or pure private ordering.

C. When Not to Regulate by Jawboning

In this Section, I discuss four stylized circumstances under which question (2) must be answered in the negative—circumstances where jawboning likely will not be preferable to direct government regulation or pure private ordering.

1. Low Trust in Private Ordering but High Trust in Government

First, direct government regulation is preferable to jawboning when we have a high degree of trust in the government but a low degree of trust in private ordering. As we saw in cell 3 of Figure 2 (p. 1298), when we trust the government and distrust private ordering, we have some general reason to prefer direct government regulation over jawboning.[287] Direct government regulation puts power in the hands of the government, who we by stipulation trust to regulate in the public interest, and correspondingly takes power out of the hands of private parties, who we by stipulation distrust to regulate in the public interest. Under these conditions, note that even though we have reason to prefer direct government regulation to jawboning, we also have reason to prefer jawboning to pure private ordering.

2. Low Trust in Government but High Trust in Private Ordering

Second, pure private ordering is preferable to jawboning when we have a high degree of trust in private ordering but a low degree of trust in the government. This is cell 2 of Figure 2. If we trust private ordering to promote the public interest and we distrust the government, then we have reason to prefer pure private ordering to jawboning. Pure private ordering may also be preferable to jawboning under circumstances where, even though our trust in private ordering is low, we strongly distrust the government. Again, though, under these circumstances, we should generally prefer jawboning to direct government regulation.

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[287] *See* Lobel, *supra* note 127, at 71.

3. Transparency and Accountability

Third, jawboning might be inferior to both direct government regulation and pure private ordering if the jawboning is systematically hidden from public view. What Ashutosh Bhagwat describes as "private jawboning"[288]—government pressure via private communications rather than public comments—generally creates transparency and accountability concerns. Justice Sotomayor observed in *Vullo* that when "a government official makes coercive threats in a private meeting behind closed doors, the 'ballot box' is an especially poor check on that official's authority."[289]

As we saw earlier in Part II, because jawboning is a form of collaborative governance, it is especially susceptible to transparency and accountability deficits.[290] Collaborative governance mechanisms can be complex and dynamic, which contributes to their opacity. As Justice Sotomayor recognized, these transparency and accountability problems are exacerbated when government pressure is hidden from public view. If official actions are hidden from public view, then the people are unable to hold the correct elected officials accountable for those actions.[291] Concerns like these are what led Derek Bambauer to argue that "largest legitimacy challenge for jawboning is accountability."[292]

While the transparency and accountability concerns about jawboning are real, they are not necessarily dispositive in any normative analysis of jawboning. Jawboning is not always non-transparent or un-accountable. What Bhagwat calls "public jawboning"[293]—government officials pressuring intermediaries in the public sphere—can score highly in both transparency and accountability. For example,

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[288] Bhagwat, *supra* note 206, at 306.

[289] NRA v. Vullo, 602 U.S. 175, 198 (2024).

[290] *See supra* Section II.C.

[291] Accountability of government (especially of the executive branch) to the people has a been a pinnacle concern of the Roberts Court. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010); Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020); Gundy v. United States, 588 U.S. 128, 155–56 (2019) (Gorsuch, J., dissenting) (arguing that Congress must also be made accountable to the people).

[292] Bambauer, *supra* note 24, at 99.

[293] Bhagwat, *supra* note 206, at 306.

President Biden's public admonition that platforms are "killing people"[294] because of their Covid-19 content moderation policies was quite transparent, and it was also clear whom the public should hold accountable for pressuring platforms. As Bhagwat argues, "when officials publicly press action upon private persons or entities, they are fully politically accountable for their speech, which is an important deterrent to misconduct."[295]

In addition, as we have seen, jawboning can occur through official government actions, like executive orders or guidance documents,[296] and even through law, such as federal anti-discrimination law and copyright law.[297] When the government jawbones through official channels, jawboning is far less susceptible to transparency and accountability critiques.

Moreover, myriad proposals have been introduced to mitigate jawboning's transparency and accountability deficits. As we saw earlier,[298] Will Duffield has proposed a model "Social-Media Censorship Transparency Act," which would require detailed reporting whenever a government official requests that a platform deny services based on a user's protected expression.[299] Similarly, FIRE suggests that "Congress should mandate that government agencies disclose their communications with social media platforms when those communications seek to pressure a platform to restrict user speech."[300] And Katie Harbath and Matt Perault advocate for an executive order that requires government requests for platforms to remove content to be submitted through a formal channel and that gives platforms formal mechanisms to report government jawboning.[301]

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[294] Zolan Kanno-Youngs & Cecilia Kang, *'They're Killing People': Biden Denounces Social Media for Virus Disinformation*, N.Y. TIMES (July 19, 2021).

[295] Bhagwat, *supra* note 206, at 309.

[296] *See* Douek & Lakier, *supra* note 95.

[297] *See supra* Sections I.B.4, III.B.3. *But see* Bambauer, *supra* note 24, at 57 (stipulating that a government official jawbones only when the government pressure is at the limit of or beyond the official's authority).

[298] *See supra* Section II.C.

[299] Duffield, *supra* note 196.

[300] *What Is Jawboning?*, *supra* note 198.

[301] Harbath & Perault, *supra* note 32.

These proposals, if successful, could temper jawboning transparency and accountability problems while leaving room for the government to regulate by jawboning. If, however, the transparency and accountability deficits associated with jawboning are insurmountable, and if the deficit is so great that it interferes with the people's capacity for self-government, then there is a good reason for the government to refrain from regulating by jawboning

4. Weak Intermediaries

Finally, jawboning might be particularly problematic if the intermediary is extremely weak or vulnerable to government pressure. If the intermediary is unable or unwilling to resist government pressure at least to some degree, then, in effect, jawboning becomes a second, more insidious form of direct government regulation. Under these circumstances, jawboning becomes a mask for direct government regulation. What looks like a public/private regulatory partnership, in reality, is the government pulling all the strings.[302]

Before proceeding further, it is necessary to specify with greater precision what it means for an intermediary to be "weak" in the relevant sense. When the government jawbones, the government transforms some private party into an *agent* of the government, at least to some degree. As we saw in Part II, when it jawbones, the government employs the private party's regulatory capacity to achieve public regulatory objectives. "Weakness", as I will use the term here, is best conceived as a measure of the degree to which the intermediary is made to be a true agent of the government.

A true agent acts only in the interests of the principal and is fully responsive to the principal's commands.[303] When the principal says "Jump!", the true agent responds, "How high?". In other words, a true agent acts only on the principal's reasons—she is *controlled* by the principal.[304] But not all agents are so responsive to

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[302] *See* Bambauer, *supra* note 24, at 85–88.

[303] *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (defining agency as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and *subject to the principal's control*, and the agent manifests assent or otherwise consents so to act") (emphasis added).

[304] *Id.*

the directives of their principal(s).[305] For example, my senators are my agents in congress, where they act on my behalf, but they often act against my interests and are certainly not at all responsive to my commands.[306]

Conceptualized in this way, "weakness" is a matter of degree. An intermediary is weaker to the extent that it acts (or is likely to act) like a true agent of the government. Correlatively, an intermediary is less weak to the extent it is less likely to be fully controlled by the government. Any number of factors could be relevant to determining whether an intermediary is weak in this sense. A non-exhaustive list of factors include whether the government has legal authority to regulate the intermediary on related or unrelated matters (and to what extent);[307] whether the intermediary is a sophisticated actor with access to expertise; whether the intermediary is wealthy enough to fund protracted legal battle(s) with the government; whether the intermediary lacks resources to pay government-imposed sanctions;[308] whether the intermediary has legal duties to act on behalf of other principals (like shareholders or a board of governors); whether the intermediary has resources and/or leverage to lobby[309] or otherwise influence the government; whether resistance to the government's directives, even if successful, would imperil the intermediary's projects

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[305] *See id.* cmt. b (noting that the Restatement's definition of agency "excludes cognate relationships in which, although the legal consequences of one person's actions are attributed to another person, one or more of the defining elements of agency are not present").

[306] *See* Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1629–35 (1999) (discussing the principal-agent problems inherent in representative democracies).

[307] *See* NRA v. Vullo, 49 F.4th 700, 715 (2d Cir. 2022) (identifying the "existence of regulatory authority" as one factor in a multi-factor test for determining whether the government engaged in unconstitutional coercion).

[308] *See* Serena Mayeri & Amanda Shanor, *Antidiscrimination as Pretext: The Assault on Equality and Constitutional Democracy*, 40 CONST. COMMENT. (forthcoming 2026) (manuscript on file with author) (arguing that the Trump administration regulates dissenting speech and conduct by threatening huge sanctions against intermediaries, like universities, who do not comply).

[309] *See, e.g.*, Reilly Steel, *Lobbying Against Enforcement*, 44 YALE J. ON REG. (forthcoming 2026), https://papers.ssrn.com/abstract=5005959 (showing how corporations use campaign contributions to lobby against government enforcement).

or mission;[310] conversely, whether compliance with the government's directives would be relatively costless to the intermediary; whether the intermediary has widespread public support; and whether (and to what degree) the intermediary relies on continued government support or funding.[311]

As suggested by the sheer number of relevant factors, the weakness analysis can be highly complex. For example, the second Trump administration's recent attempt to take Jimmy Kimmel's late night show off the air demonstrates the complex interplay between many of the factors listed above. Following Kimmel's monologue about the assassination of Charlie Kirk, ABC (and parent company Disney) briskly pulled Jimmy Kimmel's show off the air.[312]

Just a few hours before Disney and ABC executives decided to pull the cord on Kimmel, FCC Chairman Brendan Carr appeared on a conservative podcast and warned ABC and other media companies that "[w]e can do this the easy way or the hard way."[313] Carr also called on licensed broadcasters to "push back on" networks and "preempt" content that does not serve local communities.[314] Shortly thereafter, Nexstar, which owns many local ABC affiliate stations, announced that it would "preempt 'Jimmy Kimmel Live!' for the foreseeable future."[315] Sinclair, the largest

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[310] *See, e.g.*, Sharon Otterman, *Columbia Walked a Tightrope on Its Way to a $200 Million Settlement with Trump*, N.Y. TIMES (July 25, 2025) (detailing how Columbia's board of trustees viewed a settlement with the Trump administration as necessary to protect Columbia's core academic mission).

[311] *See* Evelyn Douek, *Federal Funding as a Jawbone*, KNIGHT FIRST AMEND. INST. (June 10, 2025), https://perma.cc/E2W3-AF99 ("This is why the funding power is an especially effective jawbone—because once the threat is made, even once, the intermediary institution understands that its long-term financial health is at risk.").

[312] Jeremy Barr & Scott Nover, *ABC Takes Jimmy Kimmel off the Air over Remarks on Charlie Kirk's Killing*, WASH. POST (Sept. 17, 2025).

[313] *Id.*

[314] John Koblin, Michael M. Grynbaum & Brooks Barnes, *ABC Pulls Jimmy Kimmel Off Air for Charlie Kirk Comments After F.C.C. Pressure*, N.Y. TIMES (Sept. 17, 2025).

[315] *Nexstar ABC Affiliates To Preempt "Jimmy Kimmel Live!" Indefinitely Beginning Tonight*, NEXSTAR MEDIA GRP., INC. (Sept. 17, 2025), https://perma.cc/X7WP-HQNS.

ABC affiliate in the United States, quickly followed suit, announcing its intent to preempt Jimmy Kimmel Live! indefinitely.[316]

Initially, the Kimmel saga might appear replete with weak intermediaries who quickly cowed to an official's thinly veiled threats to revoke broadcasting licenses. However, closer investigation reveals that there was more to the story. Nexstar, for example, was in the process of finalizing a multi-billion dollar acquisition of a rival, which required the regulatory approval of none other than Brendan Carr's FCC.[317] Disney, for its part, was seeking regulatory approval from the Department of Justice for a mega deal between Disney-owned ESPN and the National Football League.[318] Disney also reportedly faced a barrage of concerns from advertisers who feared conservative backlash and from employees who reported receiving threats following the monologue.[319]

Indeed, pressure from viewers is what appears to have led Disney to reinstate Kimmel's show a mere five days after taking it off the air.[320] Disney faced significant boycotts from consumers,[321] who canceled subscriptions to Disney products in droves.[322] Disney also received staunch criticism from celebrities and politicians on both sides of the aisle.[323]

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[316] *Sinclair Says Kimmel Suspension Is Not Enough, Calls on FCC and ABC to Take Additional Action*, SINCLAIR (Sept. 17, 2025), https://perma.cc/Z4RS-8JTL.

[317] Benjamin Mullin, *TV Giant Nexstar Agrees to Acquire a Rival, Tegna, for $6.2 Billion*, N.Y. TIMES (Aug. 19, 2025).

[318] Jody Godoy, Dawn Chmielewski & Jody Godoy, *ESPN-NFL Deal Faces Regulatory Hurdles*, REUTERS (Aug. 7, 2025, at 09:37 ET), https://www.reuters.com/legal/litigation/espn-nfl-deal-faces-regulatory-hurdles-2025-08-07/.

[319] John Koblin, Brooks Barnes, Benjamin Mullin & Michael M. Grynbaum, *Disney Pulled Jimmy Kimmel as Pressure Built on Multiple Fronts*, N.Y. TIMES (Sept. 18, 2025).

[320] *Read ABC's Full Statement on Reinstating Jimmy Kimmel*, PBS NEWS (Sept. 22, 2025, at 16:10 ET), https://perma.cc/8TXY-NEKX.

[321] Henry Chandonnet & James Faris, *'We Vote with Our Dollars': People Are Boycotting Disney and Canceling Their Streaming Subscriptions*, BUS. INSIDER (Sept. 19, 2025, at 15:45 ET), https://perma.cc/Z72F-8E7A.

[322] Eric Columbus, *How the FCC Chair Unplugged Jimmy Kimmel—and Why It Didn't Last*, LAWFARE (Dec. 11, 2025, at 13:00 ET), https://perma.cc/CRS4-QC3D.

[323] *Id.*

For our purposes, the Kimmel jawboning saga demonstrates the complexity of analyzing whether a given intermediary is likely to be weak in the face of government pressure. Take Disney, for example. On one hand, Disney is a massive corporation that has significant resources to fend off any government pressure. In addition, Disney must be responsive, at least to some degree, to its consumers, who, as we saw, penalized Disney for taking Kimmel off the air. On the other hand, the fact that Disney is a massive, consolidated firm means that Disney needs regulatory approval from the government to complete transactions across its various subsidiaries.[324] This enables the government to dangle a regulatory carrot (such as a promise to approve an acquisition) in exchange for censoring disfavored expression.[325]

On the whole, Disney does not appear to be an extremely weak intermediary that is entirely unable or unwilling to resist government pressure. But, as we have seen, that does not mean Disney is completely immune from government pressure—quite the opposite. Some of the features that give Disney the power to resist the government (consolidation, for example) also give Disney strong incentives to comply with the government's directives. While the weakness analysis is complex and highly fact-intensive, Part IV will argue that courts cannot avoid analyzing the susceptibility of an intermediary to government pressure in its constitutional jawboning analysis.

In sum, whether an intermediary is extremely weak matters significantly to any normative analysis of jawboning. Government jawboning of an extremely weak intermediary creates additional transparency and accountability deficits by masking what is, in substance, direct government regulation.[326] In addition, an extremely weak intermediary is unable to decentralize or check government power, which, as noted in the previous Section, can be one of the key benefits of regulation by jawboning. When evaluating jawboning, scholars and courts alike should analyze whether the intermediary is weak or, instead, whether the intermediary is able and willing to resist government pressure.

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[324] *See* Daniel Browning, *Jawboning Late Night: A Lesson in How Corporate Consolidation Creates Free Speech Problems*, BALKINIZATION (Sept. 22, 2025), https://perma.cc/NU38-TWLC.

[325] *Id.*

[326] *See infra* Section III.C.

IV. TOWARDS A WORKABLE FIRST AMENDMENT JAWBONING RULE

Thus far, this Article has argued that jawboning is another form of collaborative governance. Taking on board the insight that jawboning is a form of collaborative governance, we then explored some preliminary normative considerations regarding whether jawboning is likely to be the best way to regulate third-party conduct. The top-line takeaway from this discussion is that the answer to the question of whether jawboning is likely to be the best regulatory tool is highly context-dependent. Normatively, we gloss over important nuances if we assume that jawboning is always objectionable (or desirable).

This final Part shifts focus to First Amendment jawboning doctrine. Given the descriptive analysis of jawboning as a form of collaborative governance and the normative analysis of jawboning offered in the prior Parts, how should courts articulate First Amendment limits on government jawboning?

This Part argues that existing First Amendment jawboning doctrine suffers from two notable deficiencies. After explaining where First Amendment jawboning doctrine goes wrong, this Part proposes a set of preliminary doctrinal fixes. In determining whether government jawboning is unconstitutional, courts should take into account several factors presently ignored by constitutional jawboning doctrine: the government's motive for jawboning, the value of the targeted expression, and the intermediary's vulnerability to government pressure.

A. The Limitations of First Amendment Jawboning Doctrine

Part II showed how jawboning is just another form of collaborative governance. Conceptualizing jawboning as a form of collaborative governance helps explain key features of First Amendment jawboning doctrine. It explains why the government violates the First Amendment whenever it coerces a private intermediary for the purpose of suppressing some third party's disfavored speech.[327] Government coercion of a private intermediary can become functionally indistinguishable from direct government suppression of disfavored speech.[328] It also explains why government persuasion of private intermediaries to suppress speech does not raise any First Amendment concerns.[329] Mere government persuasion inhabits the realm of

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[327] NRA v. Vullo, 602 U.S. 175, 190 (2024).

[328] *Id.*

[329] *Id.* at 188.

pure private ordering, where the government *qua* speaker occupies the same position as any other private speaker.[330] The government can determine outcomes only to the extent its reasoning is persuasive. Under these circumstances, the government speaks, but the state does not act.

However, conceptualizing jawboning as a form of collaborative governance also exposes some notable weaknesses in First Amendment jawboning doctrine. These weaknesses will be the focus of this Section. *First*, because there is a considerable gap between coercion and persuasion,[331] jawboning doctrine provides courts with little guidance in cases where government pressure is intermediate between coercion and persuasion. *Second*, the Supreme Court sometimes—but not always—considers the susceptibility of the intermediary to government pressure when deciding jawboning cases, thereby giving lower courts conflicting guidance in cases where the intermediary has independent incentives to regulate third-party expression.

1. The Coercion/Persuasion Gap

In *NRA v. Vullo*, the Supreme Court held that government jawboning is unconstitutional when it coerces an intermediary to censor a third party's protected expression.[332] While coercion is on the wrong side of the constitutional line, persuasion is not. Government officials, the Court held, do not violate the First Amendment by persuading an intermediary to censor a third party's expression.[333] Thus,

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[330] *See supra* Section II.A.

[331] *Id.*

[332] 602 U.S. 175, 190 (2024) ("Ultimately, *Bantam Books* stands for the principle that a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf.") (referencing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67–69 (1963)).

[333] *Id.* at 188 ("A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others. What she cannot do, however, is use the power of the State to punish or suppress disfavored expression.").

in both *Vullo* and its predecessor, *Bantam Books*,[334] the Court established a doctrinal binary (coercion/persuasion) for evaluating the constitutionality of government jawboning.[335]

However, as suggested in Part II, there is a sizable gap between coercion and persuasion.[336] Government pressure admits of many degrees that are not sufficiently oppressive or constraining to constitute coercion. Indeed, in other contexts, the Supreme Court has observed that government pressure is not necessarily coercive.[337] For example, in its Spending Clause cases, the Court has distinguished between pressure and coercion.[338] In that line of cases, the Court also has observed that pressure and coercion exist along a spectrum, the distinction between which is only a matter of degree.[339]

In the Spending Clause cases, the Court has taken different approaches to identifying where to draw the line between pressure and coercion. In *Charles C. Steward Machine Co. v. Davis*, Justice Cardozo suggested that the distinction between (illegitimate) coercion and (permissible) pressure is *normative* rather than descriptive—the federal government coerces a state when the state acts under pressure

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[334] *See* Bhagwat, *supra* note 206, at 303 (arguing that *Bantam Books* "provides no support for a finding of a constitutional violation based on government persuasion alone").

[335] *See* Lakier, *supra* note 22, at 831–32 ("[T]he Court's unanimous opinion in *Vullo* reaffirms what *Bantam Books* first suggested: namely, that the First Amendment rule against schemes of informal censorship is a prophylactic, or what we might also describe as a categorical, rule that prohibits all efforts by government actors to coerce the private suppression of speech or to force private parties to disassociate from disfavored speakers."); *id.* at 838 ("As *Bantam Books* first made clear, officials who seek to influence the expressive choices of private actors retain a great deal of power to inoculate themselves against constitutional attack by making clear to those they address their advisory or persuasive, as opposed to coercive, intentions.").

[336] *Cf.* Volokh, *supra* note 75, at 412 ("[T]he coercion/persuasion line is often hazy.").

[337] I am indebted to Keith Whittington for this point.

[338] South Dakota v. Dole, 483 U.S. 203, 211 (1987) ("Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'") (quoting Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

[339] *Charles C. Steward Mach. Co.*, 301 U.S. at 590 ("[T]he location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact.").

"akin to *undue* influence."[340] In contrast, in *South Dakota v. Dole*, the Court suggested that pressure transforms into coercion when the pressure leaves the target with no other choice but compliance with the coercer's directives.[341] More recently, in *NFIB v. Sebelius*, the Court held that conditions on federal funding do not unconstitutionally coerce states where the state retains a "*legitimate choice* whether to accept the federal conditions in exchange for federal funds."[342] The Court held further that merely creating incentives for states to comply with federal directives is not necessarily coercive.[343]

At the same time, much non-coercive government pressure cannot be characterized as mere persuasion.[344] The basic problem is that the Court in both *Bantam Books*[345] and *Vullo*[346] drew a sharp distinction between coercion and persuasion. The Court created a doctrinal binary (coercion/persuasion) when, in reality, "coercion and persuasion exist along a spectrum."[347] Between coercion and persuasion

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[340] *Id.* (emphasis added).

[341] *Dole*, 483 U.S. at 210 ("The Court found no violation of the State's sovereignty because the State could, and did, adopt 'the 'simple expedient' of not yielding to what she urges is federal coercion. The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.'") (quoting Oklahoma v. U.S. Civ. Serv. Comm'n, 330 U.S. 127, 142 (1947)); *cf.* Wood, *supra* note 50, at 21 ("According to the account I develop here, I am coerced to do something when I either do not choose to do it or if, when I do choose to do it, I do it because I have *no acceptable alternative*.").

[342] 567 U.S. 519, 578 (2012) (emphasis added).

[343] *Id.* at 577 ("Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when 'pressure turns into compulsion,' the legislation runs contrary to our system of federalism.") (quoting *Charles C. Steward Machine Co.*, 301 U.S. at 590).

[344] *See Dole*, 483 U.S. at 211 (stating that the denial of federal funding can become unconstitutional compulsion).

[345] NRA v. Vullo, 602 U.S. 175, 188 (2024) ("In *Bantam Books*, this Court explored the distinction between permissible attempts to persuade and impermissible attempts to coerce.").

[346] *Id.* at 191 ("Considerations like who said what and how, and what reaction followed, are just helpful guideposts in answering the question whether an official seeks to persuade or, instead, to coerce.").

[347] Brief of the Knight First Amendment Institute at Columbia University as Amicus Curiae Supporting Neither Party at 17, Murthy v. Missouri, 603 U.S. 43 (2024) (No. 23-411).

exist varying degrees of government pressure that can be classified neither as coercion nor as persuasion.[348] At least arguably,[349] the Fifth Circuit's "significant encouragement" test for unconstitutional jawboning was designed to be more responsive to the prevalence of non-coercive and non-persuasive government pressure.[350]

For example, suppose that instead of explicitly offering not to prosecute Lloyd's for regulatory infractions if Lloyd's agreed not to do business with the NRA, Superintendent Vullo offered to say nice things about Lloyd's at her next press conference. Or suppose Superintendent Vullo instead hinted that she would view Lloyd's more favorably if it ceased underwriting gun insurance policies but without ever making any clear threats or offering any explicit inducement.

I am inclined to think that each of the two hypotheticals does not involve mere government persuasion. In both cases, hypothetical Vullo exerts some non-persuasive pressure on Lloyd's. In the language of *Sebelius*, hypothetical Vullo creates incentives for Lloyd's to comply. However, unless we adopt an extraordinarily expansive definition of "coercion,"[351] it also seems doubtful that either hypothetical involves government coercion in a literal sense.[352]

Coercion exists along two axes.[353] On the first axis is the content of the threat or inducement. A threat or inducement can exert more or less pressure on the target

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[348] *See, e.g.*, Gideon Yaffe, *Indoctrination, Coercion and Freedom of Will*, 67 PHIL. PHENOMENOLOGICAL RSCH. 335 (2003) (distinguishing between coercion and indoctrination but arguing that both are forms of manipulation that can be freedom-undermining).

[349] Genevieve Lakier, *Jawboning as a Problem of Constitutional Evasion*, Knight First Amend. Inst. (Oct. 13, 2023), https://perma.cc/RAC6-UGAQ.

[350] Missouri v. Biden, 83 F.4th 350, 374–76 (5th Cir. 2023) (per curiam).

[351] For one such expansive account of coercion, see generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

[352] *But see* Lakier, *supra* note 22, at 853 (arguing that it is unconstitutionally coercive for a government official to "condition the cessation of public criticism on compliance with their demands").

[353] *See* Scott A. Anderson, *The Enforcement Approach to Coercion*, 5 J. ETHICS & SOC. PHIL. 1, 18 (2010) ("[A] threat's significance would seem to depend on the conjunction of two factors: the threat's credibility (the likelihood that the threatener can and will execute the threat) and the magnitude of the harm or disadvantage threatened.").

depending on the content of the threat/inducement.[354] Generally, a threat/inducement constitutes coercion only if the threatened or promised consequence would make the target substantially better off if she were to comply with the coercer's demand.[355] Thus, either the threat must be sufficiently dis-appealing or the inducement must be sufficiently appealing for there to be coercion.[356] On the second axis is the probability of the threat or inducement occurring.[357] Generally, a threat or inducement can be coercive only if it is sufficiently likely that the threatened outcome will occur if the coercee does not give in to the coercer's demands.[358] In other words, the promised threat or inducement must be sufficiently credible to constitute coercion.[359]

Our two hypotheticals appear to fail on at least one of the two axes. In the first case (where Vullo offered to say nice things), the inducement seems sufficiently credible, but it's not clear that the inducement would be sufficiently appealing. Lloyd's might reasonably conclude that it would be more profitable to continue working with the NRA than to receive Vullo's public adulation. In the second case (where Vullo merely hinted she would look favorably on Lloyd's), we might question both whether the inducement is sufficiently credible and whether it's sufficiently appealing. The credibility is questionable because hypothetical Vullo merely

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[354] *See* Bhagwat, *supra* note 206, at 310 ("The first and most obvious, of those [considerations for determining unconstitutional coercion] is the nature, seriousness, and explicitness of the threats made by the jawboning public official to the private party whose conduct they seek to influence.").

[355] *See* Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440 (Sidney Morgenbesser, Patrick Suppes & Morgan White eds., 1969) (articulating the canonical contemporary account of coercion). *But see* Wood, *supra* note 50, at 21 ("I don't think it's really coercion unless all the alternatives but one have been rendered unacceptable.").

[356] *See* Bambauer, *supra* note 65, at 174 ("Low-probability consequences may be a powerful threat if the potential outcome is severe . . . .").

[357] *See, e.g.*, Scott A. Anderson, *Coercion*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., 2023), https://perma.cc/8B5R-TW5R (noting that "the possibility and usefulness of issuing threats depends in general on the likelihood that such threats can be executed successfully, without the coercer suffering a cost comparable to that of the coercee").

[358] *Cf.* NRA v. Vullo, 602 U.S. 175, 191–92 (2024) ("Generally speaking, the greater and more direct the government official's authority, the less likely a person will feel free to disregard a directive from the official.").

[359] *See* Nozick, *supra* note 355 (arguing that a threat must be credible to be coercive).

hints at the possibility of favorable treatment rather than offering a specific benefit.[360] The appeal is also questionable because it is not clear what benefit Vullo's favor would provide.

Though the two hypotheticals do not involve coercion, they involve pressure that goes beyond mere persuasion. Hypothetical Vullo does not attempt to influence Lloyd's behavior by engaging the rational faculties of Lloyd's' representatives—i.e., by providing pressure-independent reasons for action.[361] Instead, hypothetical Vullo aims to influence Lloyd's' behavior by dangling a carrot, or, as the Supreme Court put it in *Sebelius*, by creating incentives for Lloyd's to comply.

Of course, these hypothetical cases are artificially constructed and oversimplified. The key point, though, is that there are many situations, like the two hypotheticals, where the government pressure is neither coercive nor persuasive—but rather somewhere in the middle. President Biden's public statement that social media platforms were "killing people"[362] by allowing Covid-19 vaccine misinformation to spread provides a good, real-world example of government pressure intermediate between coercion and persuasion.[363] President Biden's charged comment was not mere persuasion; Biden did not, after all, offer any well-reasoned argument to persuade the public that platforms were, in fact, killing people.[364] But it would also be quite a stretch to say that Biden's comment was coercive.[365] Biden did not make any

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[360] *See* Bhagwat, *supra* note 206, at 310 (noting that "it seems self-evident that a finding of coercion should be more likely the more plausible, serious, and explicit the threat").

[361] *See generally* Michael Cholbi, *Paternalism and Our Rational Powers*, 126 MIND 123 (2017) (distinguishing between persuasion and paternalism on grounds that persuasion works by engaging one's rational faculties). *But see generally* George Tsai, *Rational Persuasion as Paternalism*, 42 PHIL. PUB. AFF. 78 (2014) (arguing that rational persuasion can sometimes be paternalistic).

[362] Kanno-Youngs & Kang, *supra* note 294.

[363] Brief of the Knight First Amendment Institute at Columbia University as Amicus Curiae Supporting Neither Party at 21, Murthy v. Missouri, 603 U.S. 43 (2024) (No. 23-411) (noting that, under the *Bantam Books* coercion test, "it's not entirely clear whether the statement was coercive").

[364] *But see id.* (arguing that President Biden's comment "could easily have been understood as an effort to persuade the public of the moral culpability of the platforms rather than to strong-arm the platforms into taking any specific action").

[365] *But see* Murthy v. Missouri, 603 U.S. 43, 108 (2024) (Alito, J., dissenting) (arguing that Biden's "killing people" comment, among other things, was a "virtual demand[]"); Lakier, *supra*

clear threat, offer any inducement, or request any specific change in conduct from the platforms.[366] In short, there was no real "threat of adverse government action."[367]

After *Vullo*, the constitutional status of non-coercive, non-persuasive government pressure remains unclear.[368] While *Vullo* may settle the question in clear cases where government pressure can be easily identified as coercion or persuasion, it leaves courts without clear guidance in cases where government pressure occupies the space between coercion and persuasion.

The Court's coercion/persuasion binary and the ensuing doctrinal uncertainty are likely to create real problems in future cases.[369] To apply *Vullo*'s coercion test to future cases, courts will be forced to lump varying degrees of government pressure into either the coercion bucket or the persuasion bucket.[370] Serious problems will arise in cases where governance takes the form of a public-private hybrid—where

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note 22, at 852–53 (arguing that it is unconstitutionally coercive for a public official to use public condemnation as a means to produce compliance).

[366] *See* Children's Health Def. v. Meta Platforms, Inc., 112 F.4th 742, 760 (9th Cir. 2024) (holding that the government must induce the intermediary to implement a specific policy for there to be coercion); Consortium for Indep. Journalism, Inc. v. United States, No. 23 CIV. 7088, 2025 WL 919504, at *13 (S.D.N.Y. Mar. 26, 2025) (interpreting *Vullo* to require an explicit threat of adverse action to support a finding of coercion).

[367] NRA v. Vullo, 602 U.S. 175, 191 (2024).

[368] *See* Bambauer, *supra* note 65, at 158 (arguing that *Vullo* and *Murthy* "did not set out a methodology for evaluating future jawboning cases, and Justice Neil Gorsuch wrote a concurrence in *Vullo* suggesting that the Court would be unwise to do so—the courts will evidently know jawboning when they see it"). *But see* Lakier, *supra* note 22, at 844 (arguing that "what distinguishes an informal prior restraint from a permissible, even valuable, act of government speech is not the form the speech act takes but the intent that motivates it").

[369] *See* Bambauer, *supra* note 65, at 170 ("[T]he lack of a clear test for jawboning liability makes defending against [covert jawboning] schemes difficult. Trial courts will have to reason from basic, core First Amendment principles to distinguish coercion from persuasion, without much in the way of guidance from the Supreme Court to assist them in that difficult task.").

[370] *See, e.g.*, *Consortium for Indep. Journalism, Inc.*, 2025 WL 919504, at *13 (limiting "coercion" under *Vullo* to cases where there is: (1) a threat of criminal prosecution; (2) a threat of civil or regulatory sanctions; or (3) a threat of "other significant monetary penalties").

the degree of government pressure hews closer to the median between direct government regulation and pure private ordering.[371]

In sum, the Court in *Vullo* failed to fully appreciate that jawboning is a form of collaborative governance. Like any form of collaborative governance, jawboning admits of varying degrees of government pressure, much of which cannot be classified as either coercion or persuasion. The result is that *Vullo*'s coercion test likely will prove to be either over-inclusive or under-inclusive in different cases, depending on whether a judge approves or disapproves of the government's regulatory rationale.[372]

2. Intermediaries

Relatedly, as we saw in Section III.C.4, not every intermediary is equally susceptible to government pressure. Some intermediaries are both able and willing to resist government pressure, whereas others are extremely weak and vulnerable. When an intermediary is extremely weak, government jawboning is *prima facie* objectionable because what appears in form to be collaborative governance is instead the government pulling all the strings.[373]

Though at times only implicitly, the Supreme Court's analysis in jawboning cases often has turned on whether the intermediary was weak in the face of government pressure. However, as will be discussed below, the Court's failure to analyze

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[371] *See, e.g.*, *Children's Health Def.*, 112 F.4th at 760 ("CHD has not alleged facts that allow us to infer that the government coerced Meta into implementing a specific policy. Instead, it cites statements by Members of Congress criticizing social media companies for allowing 'misinformation' to spread on their platforms and urging them to combat such content because the government would hold them 'accountable' if they did not. . . . [T]hose statements do not establish coercion because they do not support the inference that the government pressured Meta into taking any specific action with respect to speech about vaccines. . . . If Meta implemented its policy [to regulate misinformation] at least in part to stave off lawmakers' efforts to regulate, it was allowed to do so without turning itself into an arm of the federal government.").

[372] *Compare* Chicago Women in Trades v. Trump, 773 F. Supp. 3d 592, 607 (N.D. Ill. 2025) (a Clinton appointee holding that an executive order terminating DEI-related grants was unconstitutionally coercive under *Vullo*), *with* Nat'l Urb. League v. Trump, 783 F. Supp. 3d 61, 104–05 (D.D.C. 2025) (a Trump appointee holding that an executive order terminating DEI-related grants was *not* unconstitutionally coercive under *Vullo*).

[373] *See supra* Section III.C.4.

the weakness of the intermediary in one of its most recent jawboning cases, *Vullo*, creates a puzzle for the Court's jawboning jurisprudence.

The Court's very first jawboning case, *Bantam Books v. Sullivan*, provides a good example of the government jawboning an extremely weak intermediary.[374] The basic facts of *Bantam Books* are as follows. The Rhode Island legislature established the Rhode Island Commission to Encourage Morality in Youth, which was tasked with ensuring, among other things, that printed items did not contain obscene materials or other content that would corrupt the youth.[375] The Commission created a list of what it deemed by majority vote to be objectionable publications and sent that list to distributors and to the local police.[376] Along with the list, distributors were sent notices which stated that the distributors' "cooperation in removing the listed and other objectionable publications from your news[s]tands will be appreciated. Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department."[377] The notices also warned that the list of objectionable publications had been sent to the local chiefs of police. In addition, the police would often visit distributors shortly after they received the notice to determine whether the distributor had complied with the notice.[378]

Rhode Island's campaign to pressure distributors not to sell "objectionable" content turned out to be quite effective. The distributor-plaintiff in *Bantam Books* testified that it would "not fill pending orders for such publications and would refuse new orders. [The plaintiff] instructed his field men to visit his retailers and to pick up all unsold copies, and would then promptly return them to the publishers."[379] The Rhode Island Superior Court found that the effect of the notices was to cause distributors "by reason of such intimidation and threat of prosecution, (a) to refuse to take new orders for the proscribed publications, (b) to cease selling any of

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[374] 372 U.S. 58 (1963).

[375] *Id.* at 59.

[376] *Id.* at 62–63.

[377] *Id.* at 62 n.5.

[378] *Id.* at 63.

[379] *Id.*

the copies on hand, (c) to withdraw from retailers all unsold copies, and (d) to return all unsold copies to the publishers."[380]

The Supreme Court held that the Commission's notices were unconstitutional because they were part of a "system of informal censorship" that, in effect, "subject[ed] the distribution of publications to a system of prior administrative restraints."[381] In reaching this conclusion, the Court observed that the distributor-plaintiff's "compliance with the Commission's directives was not voluntary."[382] The distributor, Justice Brennan noted, could "not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them."[383] The logic of *Bantam Books*, thus, turned in part on the distributor's inability to resist threats of criminal prosecution. In other words, it turned on the fact that a small, local distributor is a *weak intermediary* in the face of government pressure of the sort at issue in the case.

It was precisely on this point that Justice Harlan dissented in *Bantam Books*. Distributors who wish to protest the Commission's notices, Harlan objected, "may test the Commission's views by way of a declaratory judgment action or suit for injunctive relief or by simply refusing to accept the Commission's opinion and awaiting criminal prosecution in respect of the questioned work."[384] For Justice Harlan, distributors were not so weak that they were unable to resist pressure from the Commission; rather, if distributors disagreed with the Commission's determination that a publication was obscene, the distributor could challenge the determination in court.

Contrast the facts in *Bantam Books* with the facts of *Murthy v. Missouri*.[385] In *Murthy*, various government actors pressured large social media platforms to moderate false Covid-19-related content.[386] Justice Barrett held that the social media

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[380] *Id.* at 64.

[381] *Id.* at 69–71.

[382] *Id.* at 68.

[383] *Id.*

[384] *Id.* at 78–79 (Harlan, J., dissenting).

[385] 603 U.S. 43, 50 (2024).

[386] *Id.* at 50–53.

user-plaintiffs in *Murthy* lacked standing, in large part, because the platforms retained the ability to exercise independent judgment in the face of government pressure. The platforms, Justice Barrett wrote, "continued to exercise their independent judgment even after communications with the defendants began."[387] While Justice Barrett stressed the fact that "the platforms had independent incentives to moderate content and often exercised their own judgment,"[388] it must also be emphasized that the platforms were able to exercise independent judgment *because* platforms hold significant power in the modern networked political economy.[389] Indeed, it's one thing to have independent incentives but quite another thing for those incentives to guide one's practical reasoning.[390]

Thus, the platforms in *Murthy* could act on their independent incentives only because the platforms possessed ample resources and influence to resist government pressure, at least to some extent.[391] In contrast, the small distributor in *Bantam Books* was unable to act on its own independent economic incentives to keep books on the shelves because the distributor lacked the resources and the political capital to make any independent choices regarding the "objectionable" publications. The fact that the intermediary was weak in *Bantam Books* and not weak in *Murthy* helps explain why the Court found unconstitutional coercion in the former case but dismissed the latter on standing grounds.[392]

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[387] *Id.* at 60.

[388] *Id.*

[389] *See generally* RASMUS KLEIS NIELSEN & SARAH ANNE GANTER, THE POWER OF PLATFORMS: SHAPING MEDIA AND SOCIETY (2022).

[390] For example, I might have independent incentives to mow the lawn. But if someone puts a gun to my head and says, "Mow the lawn, or else I'll shoot!," my own independent incentives would play virtually no role in my practical reasoning about whether I will mow the lawn. Even a simple example like this shows that one can be coerced into doing something even if one has independent reasons to do it.

[391] *See* Lakier, *supra* note 22, at 789 n.25 ("The failure of the Biden's administration[] to more effectively compel may reflect the relative size and power of the targeted businesses. Whatever the cause, the result was what appears to be a very mixed record of success when it came to COVID-era jawboning.").

[392] *See* Bambauer, *supra* note 65, at 158 (arguing that "the Court's standing analysis in *Murthy* is, in fact, an assessment of the merits of the plaintiffs' claims: Whether an alleged jawboning victim has standing is inextricably linked to the substantive First Amendment analysis"). *But see Murthy*,

However, the Court has not always been careful to analyze the weakness of the intermediary in determining whether the government has engaged in unconstitutional jawboning. In *Vullo*, the intermediary, Lloyd's of London, is also a large and wealthy corporation.[393] The Court held, on the facts alleged, that Superintendent Vullo unconstitutionally coerced Lloyd's by offering an inducement, despite the fact that the regulatory infractions Vullo offered not to prosecute likely would not have put Lloyd's in a precarious financial predicament in the same way criminal sanctions might have threatened the continued existence of the distributor in *Bantam Books*. In *Vullo*, the fact that Superintendent Vullo had regulatory authority over Lloyd's and the fact that Vullo's communications could be perceived to convey a threat were held to be jointly sufficient for a finding of unconstitutional coercion.[394]

In light of the Court's analysis in *Bantam Books* and *Murthy*, *Vullo* creates a puzzle for the Court's jawboning jurisprudence. While the presence of platforms' independent incentives was a significant factor in Justice Barrett's holding that the *Murthy* plaintiffs lacked standing, the Court in *Vullo* never even considered the fact that Lloyd's too may have had independent incentives to stop doing business with

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603 U.S. at 79 (Alito, J., dissenting) ("This evidence was more than sufficient to establish Hines's standing to sue . . . and consequently, we are obligated to tackle the free speech issue that the case presents. The Court, however, shirks that duty and thus permits the successful campaign of coercion in this case to stand as an attractive model for future officials who want to control what the people say, hear, and think.").

[393] In 2023, for example Lloyd's reported a profit of £5.9bn. *See Lloyd's Reports Outstanding Performance in 2023 Results*, LLOYD'S (Mar. 28, 2024), https://perma.cc/5444-RT35.

[394] *Vullo*, 602 U.S. at 191–94; *Murthy*, 603 U.S. at 99–100 (Alito, J., dissenting) ("The principle recognized in *Bantam Books* and *Vullo* requires a court to distinguish between permissible persuasion and unconstitutional coercion, and in *Vullo*, we looked to three leading factors that are helpful in making that determination: (1) the authority of the government officials who are alleged to have engaged in coercion, (2) the nature of statements made by those officials, and (3) the reactions of the third party alleged to have been coerced.").

the NRA.[395] Lloyd's stopped doing business with the NRA, after all, shortly after the mass shooting at Parkland High School.[396]

In sum, Justice Sotomayor in *Vullo* treated Lloyd's like the distributor in *Bantam Books* (who had independent incentives to resist the government but could not act on those incentives) rather than like the platforms in *Murthy* (who had independent incentives to regulate third-party speech but also had the power to resist government pressure). Whereas *Bantam Books* and *Murthy* suggest that courts must look at the context to determine whether the intermediary is weak in the face of government pressure, *Vullo*, by contrast, suggests that courts should look only to whether the government actor possessed regulatory authority and to whether the communication could be perceived to convey a threat.[397] This inconsistency further threatens to make First Amendment jawboning doctrine unpredictable and incoherent in practice.[398]

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[395] The Court's failure to consider independent incentives in *Vullo* could have an alternative formalist, procedural explanation. *Vullo* came to the court on a 12(b)(6) motion to dismiss for failure to state a First Amendment claim, where the Court assumed the underlying facts stated in the complaint to be true. *See Vullo*, 602 U.S. at 181. The case did not come to the Court under a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, where the Court could have considered standing. Had standing been litigated in *Vullo*, it is possible that the Court would have considered whether Lloyd's had independent incentives to stop doing business with the NRA and, consequently, whether the NRA had standing to sue.

Recall, though, that *Murthy* and *Vullo* were decided in the same term, so the independent incentive analysis from *Murthy* was not available to Vullo's counsel. In any event, I think it's unlikely that the procedural posture impacted the outcome or analysis of *Vullo*, as compared with *Murthy*. If the Court harbored any doubt about the NRA's standing, along the lines of *Murthy*, it could have ordered supplemental briefing on that issue. I thank Eugene Volokh for suggesting this alternative procedural explanation.

[396] *See* Brief for Respondent at 42, NRA v. Vullo, 602 U.S. 175 (No. 22-842) ("Putting aside wholly 'conclusory statements,' *Iqbal,* 556 U.S. at 663, every instance the NRA describes of a bank or insurer cutting ties with it occurred in the immediate wake of Parkland or in response to DFS's investigation of concededly illegal conduct. These 'obvious alternative explanation[s]' render the NRA's claims of coercion implausible.").

[397] *See Vullo*, 602 U.S. at 191–94 (analyzing coercion by looking at (1) Vullo's regulatory authority; (2) the content of Vullo's communication with Lloyd's; and (3) Lloyd's' reaction to Vullo's communication).

[398] Take, for example, *Children's Health Def. v. Meta Platforms, Inc.*, where the Ninth Circuit had to apply both *Vullo* and *Murthy* to determine whether the government coerced Facebook to

B. Filling in the Gaps

In the prior Section, we identified two central problems with First Amendment jawboning doctrine. *First*, existing doctrine creates a coercion/persuasion binary. After *Vullo*, coercing an intermediary to restrict a third party's protected expression violates the First Amendment, whereas persuading an intermediary to restrict a third party's expression does not.[399] The problem is that, as a descriptive matter, there is a large gap between coercion and persuasion. Many forms of government pressure exist somewhere in the space between coercion and persuasion.[400] Thus, *Vullo*'s coercion rule provides lower courts with little guidance in future jawboning cases where coercion is not blatant or where the government does not clearly aim to persuade the intermediary.[401]

Second, the Supreme Court's trio of jawboning cases—*Bantam Books*, *Vullo*, and *Murthy*—together offer conflicting guidance to lower courts.[402] On one hand, *Bantam Books* and *Murthy* suggest that lower courts should consider the weakness of the intermediary, along with the intermediary's independent incentives to regulate speech, in determining whether the speaker has a viable First Amendment claim.[403] On the other hand, *Vullo* suggests that lower courts should not consider the intermediary's independent incentives to regulate the speech at issue and

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take down misinformation. Despite clear evidence of government pressure in the form of threats by members of Congress to hold Meta "accountable" if it did not take steps to combat misinformation, the Ninth Circuit held that the government did not coerce Meta to take down any misinformation because (a) the government did not ask Meta to implement a "specific policy" and (b) the officials did not explicitly threaten specific penalties or offer Meta an explicit inducement. 112 F.4th 742, 756–61 (9th Cir. 2024). The Ninth Circuit's method of cabining of *Vullo* initially might appear arbitrary and contrived. However, the court's approach begins to make more sense when we appreciate that the court had to find some way to square the Supreme Court's approach in *Murthy*, which turned on platforms' independent incentives to moderate misinformation, and the Supreme Court's approach in *Vullo*, which completely ignored the intermediary's independent incentives.

[399] *See supra* Section IV.A.1.

[400] *Id.*

[401] *See* Bambauer, *supra* note 65, at 170.

[402] *See supra* Section IV.A.2.

[403] *Id.*

should instead focus only on the government official's regulatory authority and the content of her threat or inducement.[404]

1. Filling the Coercion/Persuasion Gap

These problems with existing First Amendment jawboning doctrine inform the set of preliminary doctrinal reforms proposed here.[405] In light of the first problem—the coercion/persuasion gap—it becomes quite clear that the Supreme Court's line between (unconstitutional) coercion and (permissible) persuasion is best understood as *normative* rather than descriptive. In other words, the constitutional line between coercion and persuasion is drawn not on the basis of descriptive facts about the government's pressure, but on the basis of a normative assessment of the government's pressure, in light of First Amendment values.[406]

If the line between unconstitutional coercion and permissible persuasion is normative rather than descriptive, then pressure that is not, strictly speaking, coercive can still be a constitutional violation.[407] In addition, non-persuasive government pressure is not necessarily a constitutional violation.[408] Indeed, were non-persuasive government pressure necessarily a First Amendment violation after *Vullo*,

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[404] *Id.*

[405] I emphasize here that the doctrinal proposals in this Section are somewhat preliminary. In addition, due to space constraints, I leave important issues and nuances unaddressed. In future work, I hope to devote more, careful attention to First Amendment jawboning doctrine. In particular, I am interested in exploring what lessons First Amendment jawboning doctrine can take from the Supreme Court's analysis of coercion in its Spending Clause cases.

[406] In this respect, *Vullo's* coercion/persuasion test bears a resemblance to the "undue influence" test from *Charles C. Steward Mach. Co. v. Davis*, which similarly drew a normative—rather than a descriptive—line between unconstitutional coercion and permissible pressure on states. 301 U.S. 548, 590 (1937).

[407] *Cf.* Volokh, *supra* note 75, at 414–16 (suggesting, by analogy to the Fourth Amendment, that non-coercive—even persuasive—efforts to restrict speech via jawboning might violate the First Amendment). In my view, while the Fourth Amendment caselaw may be suggestive, it should not be dispositive in the First Amendment context, as the First Amendment implicates a different set of constitutional values than the Fourth. That said, Volokh's underlying intuition that non-coercive government pressure can run afoul of the First Amendment seems directionally correct.

[408] *But see* Lakier, *supra* note 22, at 829 (arguing that, in *Vullo*, the Court "rejected the idea that it mattered whether Vullo's jawboning campaign targeted protected speech").

many official actions that seem clearly constitutional at present would suddenly become vulnerable to First Amendment challenge. Consider cases where a government official pressures someone to stop violating the law rather than immediately arresting or sanctioning them.[409] For example, suppose a police officer urges a trespassing protestor, on threat of arrest, to protest in an adjacent public street rather than on private property. Such an admonition clearly does not seem to fall within the First Amendment's sweep,[410] but, on a descriptive reading of *Vullo*'s coercion rule, the officer's threat would appear to violate the First Amendment because it is an informal coercive threat.[411]

The conclusion that non-persuasive government pressure is not necessarily a constitutional violation also comports with the central normative takeaway of Part III, which is that government jawboning is not necessarily undesirable. If that analysis is correct, we have good reason to want a First Amendment jawboning rule that is not over-inclusive—that does not categorically hold government jawboning to be a First Amendment violation.

Instead, what matters in First Amendment jawboning analysis is whether the government's pressure of an intermediary influences a third party's expression in a manner that offends core First Amendment values.[412] Recognizing that the line between coercion and persuasion is normative thus shifts focus away from a descriptive analysis of whether the official's communication could be perceived as "coercive" in some literal sense, which Justice Jackson rightly criticized in her *Vullo* concurrence.[413]

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[409] I thank Eugene Volokh for this example.

[410] *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298–99 (1984) (holding that expression is subject to reasonable time, place, and manner regulations).

[411] For a descriptive reading of *Vullo*'s coercion rule, see Lakier, *supra* note 22, at 831–32 ("[T]he Court's unanimous opinion in *Vullo* reaffirms what *Bantam Book*s first suggested: namely, that the First Amendment rule against schemes of informal censorship is a prophylactic, or what we might also describe as a categorical, rule that prohibits all efforts by government actors to coerce the private suppression of speech or to force private parties to disassociate from disfavored speakers.").

[412] *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255 (1994) (arguing that "First Amendment analysis is relevant only when the values served by the First Amendment are implicated").

[413] *See Vullo*, 602 U.S. at 200 (Jackson, J., concurring) ("Coercion of a third party can be the means by which the government violates the First Amendment rights of another. But the fact of

Moreover, if the line between coercion and persuasion is normative rather than descriptive, then *Vullo*'s coercion factors are incomplete. Recall that *Vullo* instructs courts to look at the following factors to determine unconstitutional coercion: the government official's regulatory authority (or lack thereof), the content of any threat or inducement, and the intermediary's reaction to the threat or inducement.[414] To be sure, these factors are important for identifying the degree of pressure the government exerts over the intermediary. However, because the line between coercion and persuasion is normative rather than descriptive, these factors alone are insufficient to determine whether the government pressure at issue violates the First Amendment.[415] In other words, these factors alone cannot establish a First Amendment violation, even if they can show literal coercion.[416]

What, then, is missing from the *Vullo* factors? I propose that courts in jawboning cases should also consider, directly or indirectly, the government's motive for jawboning and the value of the targeted expression. I discuss each proposal in turn.

First, courts should consider, directly or indirectly, the government's motive for jawboning.[417] For example, when the government pressures an intermediary for

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coercion, without more, does not state a First Amendment claim. Rather, in addition to finding that the government has crossed a line from persuasion to coercion, courts must assess how that coercion actually violates a speaker's First Amendment rights.").

[414] *Id.* at 191–94; *see also* Bambauer, *supra* note 65, at 171–79 (arguing that "[o]nce the recipient establishes that a threat was made, courts should assess two factors together: whether the actor making the threat is authorized to regulate the speech at issue in some fashion, and how much power the actor has to carry the threatened consequences into effect"). *But see Vullo*, 602 U.S. at 199 (Gorsuch, J., concurring) (arguing that multifactor jawboning tests are mere "guideposts" and "nothing more").

[415] *See Vullo*, 602 U.S. at 200 (Jackson, J., concurring) (stressing "the important distinction between government coercion, on the one hand, and a violation of the First Amendment, on the other").

[416] *Id.* at 201 ("The existence of an allegation of government coercion of a third party thus merely invites, rather than answers, the question whether that coercion indirectly worked a violation of the plaintiff's First Amendment rights.").

[417] *See* Kagan, *supra* note 214, at 414 (arguing that First Amendment doctrine "has as its primary, though unstated, object the discovery of improper governmental motives").

the purpose of showing "hostility—or favoritism—towards the underlying message expressed"[418] by the third-party speaker, the government's jawboning presumptively violates the First Amendment.[419] By contrast, when the government jawbones not because of hostility or favoritism to the underlying message, but because the targeted expression creates some concrete, cognizable harm, jawboning may be less likely to run afoul of the First Amendment.[420]

Indeed, the government's motive analysis may help explain why hostile environment liability in anti-discrimination law and secondary liability for copyright infringement, for example, do not violate the First Amendment, despite being a form of indirect pressure.[421] Structurally, hostile environment liability in anti-discrimination law and inducement liability in copyright are nearly identical to the sort of government jawboning at issue in *Vullo* and *Bantam Books*.[422]

In both sets of cases, a government official (e.g., a judge, an executive branch official, or a state official) pressures an intermediary (e.g., an employer or an insurance company) for the purpose of interfering with some third party's expression (e.g., a discriminatory employee, a copyright infringer, or the NRA's gun-related advocacy). To the extent that there is a constitutional difference between these

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[418] R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

[419] *See Vullo*, 602 U.S. at 190 ("Ultimately, *Bantam Books* stands for the principle that a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party *to punish* or suppress *disfavored speech* on her behalf.") (emphasis added).

[420] *See* Bambauer, *supra* note 65, at 177 (arguing that "some deference seems due when the government articulates a reasonable, grounded threat to the polity that is separate from the speech at issue itself," such as in the context of Covid-19 misinformation and national security).

[421] *See* Balkin, *supra* note 97, at 2306 (arguing that Congress has the power, consistent with the First Amendment, to make employers liable for hostile environments for the purpose of promoting substantive equality in the workplace).

[422] *See supra* Sections I.B.4 and III.B.3; *see also* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1809 (1992) ("Harassment law suppresses speech not by directly penalizing employees who say offensive things, but by threatening employers with liability if they do not punish such employees themselves. This indirect speech restriction is every bit as potent as a direct one. Companies, fearing liability, implement policies prohibiting a particular kind of speech and providing for disciplinary measures. Employees, fearing discipline, avoid expressing the proscribed speech.").

cases, the difference must be that the government may, consistent with the First Amendment, interfere with at least some expression for the purpose of preventing discrimination[423] and copyright infringement[424] but not for the purpose of suppressing a disfavored message.[425]

Finally, analyzing the government's motive would also help First Amendment jawboning analysis track our normative assessment of jawboning. Most directly, the motive analysis would track the first prong of the functionalist framework: whether the government aimed to achieve a permissible goal in jawboning.[426] But

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[423] *See* Volokh, *supra* note 422, at 1846 (arguing that some hostile environment law is justified by the state's weighty interest in securing equality in the workplace); Balkin, *supra* note 97, at 2306 ("Together the employer and employees construct the opportunity that women have in the workplace, creating a single, undifferentiated harm to workplace opportunity. Congress has a right to prevent this result. Title VII gives women and minorities an equal right to pursue work and an equal right to work-place opportunities.").

[424] *See generally* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970) (examining potential conflicts between copyright infringement liability and the First Amendment).

[425] An objector might argue that the cases are better distinguished by the fact that, in both the hostile environment and the copyright infringement context, a statute is on the books that authorizes the government pressure at issue. Whereas, in both *Vullo* and *Bantam Books*, there was no such statutory scheme. That response will not do the trick, however. First, neither hostile environment liability nor inducement liability in copyright are compelled by the text of the underlying statutes. *See, e.g.*, Volokh, *supra* note 422, at 1798–1800. Indeed, the Supreme Court in *Grokster* explicitly conceded that it was going beyond the four corners of the Copyright Act. MGM Studios, Inc. v. Grokster, 545 U.S. 913, 930 (2005). Thus, both hostile environment liability and inducement liability are best seen as exercises of judicial discretion. And there's no principled reason to believe that judges cannot jawbone just like any other government official.

Second, and more to the point, the anti-coercion rule from *Bantam Books* and *Vullo* is *constitutional*. Thus, if (a) hostile environment liability and inducement liability were compelled by the underlying statute and (b) the coercive pressure exerted by the statute is unconstitutional, then the statute itself would be unconstitutional under *Bantam Books* and *Vullo*. *See* Volokh, *supra* note 422, at 1818 ("The Court has frequently recognized that the government's imposition of civil liability for speech is just as much state action as a direct speech restriction would be. The government simply cannot avoid First Amendment scrutiny by using the threat of legal liability to coerce a private party into implementing the speech restriction on its behalf.").

[426] *See supra* text accompanying notes 201–216.

it could also allow courts to indirectly track our level of trust in government.[427] Where trust in government is low,[428] courts could adopt a rebuttable presumption that the government harbored an illicit motive in jawboning. Conversely, where trust in government is high,[429] courts could adopt a rebuttable presumption that the government acted with a permissible motive.[430]

Second, courts should consider the value of the third party's expression.[431] *Vullo* itself suggests that, in First Amendment jawboning cases, courts must analyze both the government's intent *and* whether the targeted speech is protected by the First Amendment. The Court held that "although Vullo can pursue violations of state insurance law, she cannot do so *in order to punish or suppress* the NRA's *protected* expression."[432]

Where the government does not harbor an illicit motive[433] or create a *de facto* system of prior administrative restraints,[434] the government does not violate the

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[427] *See supra* Section III.B.2.

[428] *Id.*

[429] *See supra* Section III.C.1.

[430] I acknowledge that this discussion is cursory and leaves many questions unanswered. How do we distinguish between good and bad motives? Even when we can distinguish between good and bad motives, in principle, how should courts draw this distinction in practice? These are important—and difficult—questions that I, regrettably, do not have space to answer fully in this Article. In future work, I hope to devote more careful attention to First Amendment jawboning doctrine.

[431] *See* Bambauer, *supra* note 65, at 177 ("[T]he subject matter involved in alleged jawboning likely matters and probably should.").

[432] NRA v. Vullo, 602 U.S. 175, 196 (2024) (emphasis added); *see also id.* at 200 (Jackson, J., concurring) ("[I]n addition to finding that the government has crossed a line from persuasion to coercion, courts must assess how that coercion actually violates a speaker's First Amendment rights."). *But see* Lakier, *supra* note 22, at 829 (arguing that "the Court also rejected the idea that it mattered whether Vullo's jawboning campaign targeted protected speech").

[433] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 384 (1992) (reasoning that the government violates the First Amendment when it regulates speech because of hostility to the speaker's message, even if the speech is not covered by the First Amendment).

[434] *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (holding that Rhode Island violated the First Amendment because Rhode Island, in effect, subjected the "distribution of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations

First Amendment when it jawbones for the purpose of interfering with a third party's conduct or unprotected speech. Moreover, where the targeted speech lacks First Amendment value, the government may be due greater leeway in regulating the expression. For example, because the "dangers of suppressing valuable ideas are lower where . . . the regulations concern false statements about easily verifiable facts,"[435] the government, at least in practice, may receive greater deference in regulating certain false statements of fact than it would in regulating true statements.[436] This too may help explain why the various *Murthy* plaintiffs lacked standing to sue.[437]

2. Accounting for Intermediaries' Incentives

In deciding jawboning cases, courts also should consider the intermediary's independent incentives to regulate third-party speech. Where the intermediary has independent incentives to regulate third-party speech, it becomes more doubtful that government's pressure caused any resulting restrictions on speech.[438] However, when analyzing independent incentives, courts also should be careful to assess the weakness of the intermediary and its vulnerability to government pressure. A weak intermediary will be unable or unwilling to resist government pressure, even

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that such publications may lawfully be banned"); *Vullo*, 602 U.S. at 201 (Jackson, J., concurring) (arguing that the First Amendment violation in *Bantam Books* was the creation of a system of prior administrative restraints on publication and that *Bantam Books* "does *not* hold that government coercion alone violates the First Amendment").

[435] United States v. Alvarez, 567 U.S. 709, 732 (2012) (Breyer, J., concurring in the judgment); *id.* at 722 (plurality opinion) ("[R]eject[ing] the notion that false speech should be in a general category that is presumptively unprotected.").

[436] *Id.* at 731–32 (Breyer, J., concurring in the judgment) (applying intermediate scrutiny, rather than strict scrutiny, to a statute prohibiting certain false statements of fact); Bambauer, *supra* note 65, at 177 ("Pressure about speech related to COVID-19 seems similar to pressures about speech related to national security matters. In that context, the government formally operates under the same First Amendment standards as in all other contexts, but informally it enjoys more relaxed judicial scrutiny. The Constitution is not a suicide pact, and some deference seems due when the government articulates a reasonable, grounded threat to the polity that is separate from the speech at issue itself.").

[437] *See* Bambauer, *supra* note 436, at 158 (observing that "the Court's standing analysis in *Murthy* is, in fact, an assessment of the merits of the plaintiffs' claims: [w]hether an alleged jawboning victim has standing is inextricably linked to the substantive First Amendment analysis").

[438] *See* Murthy v. Missouri, 603 U.S. 43, 73 (2024).

if it has independent incentives not to interfere with third-party speech.[439] In contrast, a strong intermediary may be able to resist government pressure when its independent incentives do not align with the government's demands. Put differently, a strong intermediary is more likely to act in accordance with its independent incentives irrespective of government pressure. Thus, as a general rule, the fact that an intermediary has independent incentives to regulate the speech at issue should be legally significant for First Amendment standing,[440] but only when the intermediary is not too weak to resist government pressure.

As we saw earlier, the Court in both *Bantam Books* and *Murthy* implicitly took into account the weakness of the intermediary in determining whether the plaintiff(s) could state a claim for a First Amendment violation.[441] Moreover, in *Murthy*, the Court's standing analysis turned largely on the intermediary's independent incentives to regulate third-party expression.[442] In *Vullo*, however, the Court entirely ignored the intermediary's independent incentives,[443] thereby giving lower courts conflicting guidance on how to handle cases where the intermediary has independent incentives to regulate third-party expression.

Conclusion

Jawboning is a form of collaborative governance. Conceptualizing jawboning as a form of collaborative governance yields important descriptive, normative, and prescriptive upshots. Descriptively, we can better appreciate the way in which jawboning functions as a distinctive type of regulatory tool. Normatively, we see that the desirability of jawboning as a tool is highly context dependent. And prescriptively, we see that First Amendment jawboning doctrine should take into account several factors presently excluded from constitutional analysis.

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[439] *See supra* Section III.C.4.

[440] *See Murthy*, 603 U.S. at 61.

[441] *See supra* Section IV.A.2.

[442] *Murthy*, 603 U.S. at 60.

[443] *See* Brief for Respondent at 42, NRA v. Vullo, 602 U.S. 175 (No. 22-842).