

## ARTICLES

# Enforcing the First Amendment in an Era of Jawboning

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*First Amendment law tends to focus on the exercise of formal government power. Nevertheless, for over six decades now, it has been black letter law that the informal exercise of government power can violate the First Amendment when it creates what the Court described in *Bantam Books v. Sullivan* as an “informal system of censorship,” outside the reach of the formal system. Lower courts have been deeply divided, however, about what kinds of government actions create this kind of informal system. The Court’s recent decision in *NRA v. Vullo* should end this division. In *Vullo*, the Court held that officials engage in informal censorship whenever they intentionally use their informal power to evade the constraints that the First Amendment imposes on their formal powers. *Vullo* made clear, moreover, that the rule against this kind of informal censorship is a categorical one: Officials may never attempt to evade constitutional constraints on their power by threatening harm or promising benefits to private parties, no matter how severe, or insignificant, the harm or benefit they promise may be, or how effective. In this Article, I argue that the Court’s reaffirmation of the categorical nature of the First Amendment rule against informal censorship is a very good thing, and it comes at a critical time. But it is imperative that the significance of the decision is properly understood. To that end, the Article examines the muddled state of the doctrine prior to the decision, explains the significance of *Vullo*’s intervention, and explores its doctrinal and non-doctrinal implications going forward. The decision, I suggest, has profound implications for the continued vitality and independence of the democratic public sphere. But this will be true only if courts as well as other government institutions take steps to make the principles it announces meaningful.*

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## INTRODUCTION

First Amendment law tends to focus on the exercise of formal government power. To determine whether an individual's free speech, press, or associational rights have been violated, courts typically look at the formal legal framework that governs them and how that legal framework gets interpreted and enforced. It is easy enough to understand why this is the case. The most obvious and the most direct way in which the government creates the conditions under which you and I speak, listen, and associate is by creating legally enforceable rights and responsibilities. It is not the only way in which the government does so, however.

In a highly regulated state, government officials also often wield a great deal of informal power—informal power that they can use to shape the speech environment in a variety of ways. Even when they cannot enact laws or promulgate rules to regulate speech, officials can use the soft powers of their office to affect the choices that speakers and businesses that host and disseminate speech make. Officials can, for example, put pressure on media organizations not to publish information that they believe will harm national security by invoking their civic responsibilities.<sup>1</sup> They can take away valuable benefits from businesses that speak and associate in ways that they dislike.<sup>2</sup> They can threaten to

<sup>1</sup> *Infra* note 28 and accompanying text.

<sup>2</sup> *See, e.g.*, Exec. Order No. 14,263, 90 Fed. Reg. 15,615 (Apr. 9, 2025) (Addressing Risks from Susman Godfrey); Exec. Order No. 14,246, 90 Fed. Reg. 13,997 (Mar. 25, 2025)

investigate businesses that host what they believe to be harmful speech, or actually do so.<sup>3</sup> And they can use their bully pulpit to criticize businesses that express opinions they disagree with, or that associate with those who do.<sup>4</sup>

Much of this informal governmental action is and always has been thought to be entirely constitutional. It is viewed as part of the prerogatives of government office, and to the extent it is expressive, as a kind of government speech to which First Amendment constraints do not and should not apply. Indeed, there is no doubt that certain kinds of governmental pressure can further, rather than undermine, the democratic values that the First Amendment protects, by helping to ensure that the powerful and typically for-profit media and tech companies that exercise so much power over public discourse are responsive to public concerns.<sup>5</sup>

Nevertheless, sixty years ago, in *Bantam Books v. Sullivan*,<sup>6</sup> the Supreme Court held that the informal exercise of government power can violate the First Amendment when it creates what the Court described as a “system of informal censorship,” outside the reach of the formal system.<sup>7</sup> And as recently as 2024, the Court forcefully reaffirmed this holding. In *National Rifle Ass’n of America v. Vullo*,<sup>8</sup> a unanimous Court held that government officials may not intentionally use the threat of regulatory sanctions to pressure private companies into breaking ties with advocacy groups that the government officials dislike (in this case, the National Rifle Association) without violating the First Amendment’s guarantee of freedom of speech.<sup>9</sup> In reaching this conclusion, the Court reaffirmed the principle

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(Addressing Risks from Jenner & Block); Exec. Order No. 14,230, 90 Fed. Reg. 11,781 (Mar. 6, 2025) (Addressing Risks from Perkins Coie LLP).

<sup>3</sup> See, e.g., Juan Carlos Lara, *FCC Investigates SF Radio Station for ICE Reporting, Sparking Press Freedom Fears*, KQED (Feb. 6, 2025), <https://perma.cc/8V8Z-CRTH>; Brian Stelter, *The FCC’s Battle with CBS Over Its Harris Interview Is Raising Red Flags*, CNN (Feb. 3, 2025), <https://perma.cc/8ZN3-J9TN>.

<sup>4</sup> *Infra* note 253 and accompanying text.

<sup>5</sup> Daphne Keller, *Six Things About Jawboning*, KNIGHT FIRST AMEND. INST. BLOG (Oct. 10, 2023), <https://perma.cc/N35A-CU9L> (arguing that “State Actors Should Be Able to Yell at [social media] Platforms Without Violating the First Amendment” and that the “range of legitimate state communications to platforms might even include . . . ‘foreboding, inflammatory, and hyper-critical phraseology’ [because] . . . voters elect politicians to advance their stated policy goals” and “[i]t would be perverse and undemocratic if gaining office meant that an elected official could no longer give voice to those policies” (quoting *Missouri v. Biden*, 80 F.4th 641, 673 (5th Cir. 2023))).

<sup>6</sup> 372 U.S. 58 (1963).

<sup>7</sup> *Id.* at 71.

<sup>8</sup> 144 S. Ct. 1316 (2024).

<sup>9</sup> *Id.* at 1322.

that undergirds *Bantam Books*: namely, “that a government official cannot do indirectly what she is barred from doing directly.”<sup>10</sup>

It made clear that what the First Amendment rule against informal censorship (or what today tends to be referred to simply as “jawboning”) prohibits is the practice 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. *Vullo* makes clear, moreover, that the prohibition against constitutional evasion is categorical in its reach: that officials may *never* intentionally attempt to use their informal powers to evade constitutional constraint, and that this is true even when it is not at all clear that the attempt to evade the First Amendment will or did succeed.

In this Article, I argue that the Court’s muscular reassertion of a categorical rule against constitutional evasion in *Vullo* is a very good thing and comes at a critical time. The fact that jawboning involves the exercise of informal governmental power and therefore is much easier to hide from public scrutiny than formal action makes it difficult to say anything definitive about the scale of the phenomenon. But all the evidence suggests that jawboning is a significant tool of speech repression and one that has been wielded only increasingly aggressively in recent years.<sup>11</sup> Indeed, anxiety about how informal governmental censorship impacted the dissemination of information and opinion online reached a fever pitch during the COVID-19 pandemic.<sup>12</sup> And although that anxiety has dissipated somewhat now that the pandemic has ended, there is no reason to think that the problem of jawboning has gone away. To the contrary: All the evidence suggests that jawboning is an even more important tool of power in the new administration than in the last. Certainly, no administration before the current one has so aggressively used the threat of financial and regulatory harm to pressure private businesses—including universities, television networks, law firms, and large retail stores—into suppressing speech that the administration dislikes.<sup>13</sup> And because many of these pressure campaigns have

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<sup>10</sup> *Id.* at 1328.

<sup>11</sup> See *infra* notes 174, 301–02, and accompanying text.

<sup>12</sup> Evelyn Douek, *The Politics and Perverse Effects of the Fight Against Online Medical Misinformation*, 134 YALE L.J.F. 237, 237, 241 (2025) (noting that “[s]ocial media platforms’ moderation of medical misinformation [ ] emerged [during the pandemic] as one of the biggest political controversies of our time”).

<sup>13</sup> For a detailed account of the many pressure campaigns the administration has employed against universities, schools, law firms, retail businesses, and other private entities that engage in protected but disfavored prodiversity speech, see generally Sonja

succeeded, they are likely to only encourage further actions of this kind. We may be in the midst of a new era of jawboning, in other words.

The evident vulnerability of many private businesses to these kinds of pressure campaigns means that courts have a vital role to play in defending the independence of the public sphere against the practice of informal censorship. And *Vullo* gives them the mandate to do so. Prior to *Vullo*, many lower courts interpreted the First Amendment rule against informal censorship very narrowly to bar only certain kinds of government pressure campaigns—those that use such serious threats, as the Ninth Circuit put it recently, that they “overwhelm the private party and essentially compel the party to act in a certain way.”<sup>14</sup> This is a deeply problematic interpretation of the rule against jawboning, however, because it ignores the institutional incentives and power relationships that will frequently lead private businesses to comply with government pressure even when it isn’t so strong that it “overwhelms” the intermediary’s will in the eyes of the court. And it is an interpretation that *Vullo* clearly rejects. *Vullo* instead holds that government actors violate the First Amendment whenever they intentionally use threats of harm or promises of benefit to coerce the suppression of speech, regardless of the kinds of threats or promises they use to coerce, and regardless of the effectiveness of their actions.<sup>15</sup> The opinion thus articulates an approach to the constitutional analysis in jawboning cases that is much less likely to significantly underprotect important First Amendment interests than the approach that prevailed until now in many circuits. Or at least, it does so if it is interpreted properly.

Because the Court’s analysis in *Vullo* focused largely on the facts of the case before it and did not expressly disavow contrary lower court precedent, it is possible that the lower courts will not read the opinion as the game changer that it is. In this Article, I therefore demonstrate how significant the decision actually is by placing it in historical context. As I show, what on its face appears to be the *Vullo* Court’s straightforward reaffirmation of the 60-year-old principles laid down in *Bantam Books* in fact represents a decisive rejection of a significant body of lower court precedent that read those principles much more narrowly and formalistically, and in a far from categorical manner. I also explore what

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Starr & Genevieve Lakier, *The War on DEI as a Project of Constitutional Subversion*, 105 TEX. L. REV. (forthcoming 2026).

<sup>14</sup> O’Handley v. Weber, 62 F.4th 1145, 1158 (9th Cir. 2023).

<sup>15</sup> *Vullo*, 144 S. Ct. at 1332.

the Court's reaffirmation of a categorical rule against constitutional evasion suggests more concretely for the resolution of a number of the difficult doctrinal questions that have beset the jawboning cases in recent years.

Doing so is important for several reasons. The first and most practical reason to do so is to ensure that courts, as well as litigants and government officials themselves, recognize the categorical nature of the rule that the First Amendment erects against schemes of constitutional evasion. The governmental jawboning of speech represents a profound challenge to the American system of free expression. But for too long, the doctrinal rules that constrain it have been unclear. *Vullo* promises to bring greater clarity to the case law, but this will be true only if its significance is properly understood.

Recognizing the categorical nature of the rule against constitutional evasion is important for another reason as well: It suggests what other actors in the political system can and should be doing to protect the independence of the democratic public sphere from the exercise of informal power. The institutional incentives that make jawboning a powerful tactic of speech suppression also make it unlikely that all incidents of even strongly coercive informal pressure will make their way into court. This means that it cannot solely be the job of courts to tackle the problem of constitutional evasion. Other branches of government, other governments, and other actors have a role to play as well. But the constitutional and nonconstitutional solutions are not mutually exclusive. First Amendment law has played, and will almost certainly continue to play, an important role in articulating the normative principles that govern informal communications between the private and public sectors. At the same time, institutional reforms could make it easier for those impacted by coercive schemes of constitutional evasion to get their day in court. This Article therefore suggests how the doctrine can supplement, and be empowered by, legislative- and executive-branch reforms.

The Article proceeds in three parts. Part I describes the deeply contested constitutional landscape that plaintiffs who challenge informal government pressure campaigns on First Amendment grounds faced previously, given the divergence in how lower courts interpreted the *Bantam Books* decision. It describes, more specifically, the two quite different tests of unconstitutional coercion that lower courts relied upon to decide jawboning cases over the past five decades. Part II then explores the significance of the decision in *Vullo* for this contested and

confusing legal landscape and the merits of the decision. It argues that *Vullo*'s reaffirmation of a categorical test of unconstitutional coercion requires a significant change in how lower courts analyze jawboning cases. Finally, Part III examines the implications of the decision for a variety of the difficult questions that have bubbled up in the cases in recent years. It also suggests what other branches of government, and perhaps also other governments, could do to better vindicate the First Amendment principles that *Vullo* articulates and thereby ensure that the First Amendment's protection against informal censorship is not a mere "parchment barrier[ ]."<sup>16</sup>

### I. THE CONTESTED FIRST AMENDMENT LAW OF JAWBONING

In recent years, there has been an explosion of concern about the threat that what is often referred to as the government jawboning of speech poses to freedom of speech in the United States. Jawboning is a term that has been used for decades now to refer to efforts by government actors to use informal means to pressure others—usually private companies—into taking actions that those officials either cannot or do not want to compel them to take.<sup>17</sup> In the early 1960s, for example, President John F. Kennedy was accused of jawboning when he used the threat of antitrust investigations and the loss of valuable Pentagon contracts to pressure U.S. steel companies into abiding by an earlier agreement not to increase prices at a time of rising inflation.<sup>18</sup> Today, however, the term is primarily used to refer to efforts by government actors to pressure private speech intermediaries like the tech companies that control the social media platforms in which increasing numbers of Americans get their news and information into

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<sup>16</sup> Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON 269, 272 (Gaillard Hunt ed., 1900).

<sup>17</sup> See Derek Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 61 (2015) (defining jawboning to mean the "enforcement [of government dictates] through informal channels, where the underlying authority is in doubt"); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 943, 989 (1980) (describing "presidential 'jawboning'" as involving "situations [in which] the President may have the power to act directly, but he prefers for political reasons to cajole, persuade, or arbitrate").

<sup>18</sup> Professor Paul Verkuil asserted that it was this incident that made jawboning a "part of the political lexicon." Verkuil, *supra* note 17, at 943 n.1. For an in-depth discussion of the episode, see generally Theodore P. Kovaleff, *The Two Sides of the Kennedy Antitrust Policy*, 37 ANTITRUST BULL. 35 (1992).

suppressing speech that is viewed by those government officials as particularly harmful or important.<sup>19</sup>

Politicians, scholars, and public intellectuals of various political stripes have expressed significant alarm at the threat that this kind of “jawboning against speech” poses to the diversity of expression online.<sup>20</sup> During the COVID-19 pandemic, the legal scholar Philip Hamburger accused the Biden administration of “establish[ing] a vast system of [informal] censorship” online.<sup>21</sup> And a court argued that the sustained pressure the federal government placed on social media companies to deplatform or suppress anti-vaccine speech during this period constituted the “most massive attack against free speech in United States’ history.”<sup>22</sup>

Critics were not wrong to be concerned about the threat that the jawboning of social media companies posed to free speech values. Since the early twentieth century, the Court has made clear that one of the central goods the Speech Clause of the First Amendment is intended to safeguard is the independence of the democratic public sphere from governmental control. As the Court put it in *West Virginia State Board of Education v. Barnette*<sup>23</sup> in 1943, the First Amendment’s guarantee of free speech is intended to ensure that, in a democratic society like our own, “authority [ ] is . . . controlled by public opinion, not public opinion by authority.”<sup>24</sup> Efforts by government actors to limit the range of opinions speakers can express—about deadly viruses or anything else—on privately owned speech platforms obviously threaten this foundational democratic value, and this is true whether or not those efforts employ formal or informal means.

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<sup>19</sup> Critics have also accused officials of jawboning the platforms by placing informal pressure on them to *keep up* more speech. See Will Duffield, *Jawboning Against Speech*, CATO INST. (Sept. 12, 2022), <https://www.cato.org/policy-analysis/jawboning-against-speech> (noting as an example of jawboning a letter Republican Senator John Thune sent to Facebook that asked “leading requests” about the company’s exclusion of “conservative viewpoints [and] topics”). I discuss whether intentional efforts to coerce the promotion, rather than suppression, of speech can violate the First Amendment in Part II.B.2, but I otherwise assume, for the sake of simplicity and because this is the assumption that pervades the case law, that jawboning campaigns are speech suppressive rather than speech promoting.

<sup>20</sup> The phrase belongs to the Cato Institute’s Will Duffield. Duffield, *supra* note 19.

<sup>21</sup> Philip Hamburger & Jenin Younes, *The Biden Administration’s Assault on Free Speech*, WALL ST. J. (July 28, 2023), <https://www.wsj.com/opinion/the-biden-administrations-assault-on-free-speech-first-amendment-soical-media-platform-meta-facebook-twitter-files-99101669>.

<sup>22</sup> *Id.* (quotation marks omitted) (quoting *Missouri v. Biden*, 680 F. Supp. 3d 630, 707 (W.D. La. 2023), *aff’d in part, rev’d in part*, 83 F.4th 350 (5th Cir. 2023), *rev’d sub nom. Murthy v. Missouri*, 144 S. Ct. 1972 (2024)).

<sup>23</sup> 319 U.S. 624 (1943).

<sup>24</sup> *Id.* at 641.

What critics of the Biden administration got wrong was the assumption that the jawboning of social media companies posed an *unprecedented* threat to the independence of the democratic public sphere. The scale of the pressure campaign wielded against the social media companies during the pandemic may have been new, but this can be understood as a response to the incredible scale of the social media platforms themselves. Meanwhile, there is no reason to think that Biden-era jawboning was any more effective than earlier pressure campaigns. In fact, evidence suggests that efforts to jawbone the social media companies to suppress COVID-related medical misinformation were *less* effective than prior pressure campaigns.<sup>25</sup> And there have been many such campaigns. The jawboning of speech companies is not, it turns out, unique to the digital age. It is part of the history and tradition of speech regulation in this country.

Indeed, well before President Kennedy gave the famous “jawboning speech” in which he criticized the steel companies for their “wholly unjustifiable and irresponsible defiance of the public interest” and threatened them with legal and financial harm, police and prosecutors (and in some cases, specially created commissions in states and localities around the country) used similar threats of investigation, prosecution, and bad publicity to pressure booksellers into removing from their shelves salacious but not obviously obscene books and magazines that those officials believed unfit for public dissemination, and to pressure movie theaters out of showing movies.<sup>26</sup> These campaigns were so effective that they resulted in what one legal scholar described at the time as “virtual censorship over reading matter.”<sup>27</sup>

In the decades since, other government officials have used threats of regulatory or economic harm, or the withdrawal of

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<sup>25</sup> There is, for example, plenty of evidence of social media companies rejecting government requests to suppress or limit the dissemination of speech and of governmental frustration with the lack of response. See, e.g., Brief for the Petitioners at 32–34, *Murthy*, 144 S. Ct. 1972 (No. 23-411) (noting the mutual frustration between government officials and platform regulators produced by the failure of the large social media platforms to accede to many of the government’s suggestions and takedown requests). This is in contrast to the almost complete compliance of movie theaters and booksellers to the requests made by police and prosecutors during earlier jawboning campaigns. See *infra* notes 54–60. 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.

<sup>26</sup> John F. Kennedy, *News Conference 30, April 11, 1962*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-press-conferences/news-conference-30>. For discussion of these campaigns, see *infra* notes 50–61 and accompanying text.

<sup>27</sup> Note, *Regulation of Comic Books*, 68 HARV. L. REV. 489, 496 (1955).

valuable benefits, to pressure radio and television broadcasters, newspapers, billboard companies, and other businesses that host other people's speech (a group we can call simply "speech intermediaries") to take down speech that was, in their view, damaging to military morale,<sup>28</sup> or promoted the use of drugs,<sup>29</sup> or advertised out-of-state businesses,<sup>30</sup> or showed too much sex and violence,<sup>31</sup> or was too critical of their administration.<sup>32</sup> These pressure campaigns often succeeded in getting private companies to alter their practices—and often quite quickly. To give just one example, in 1971, the Federal Communications Commission (FCC) put pressure on the broadcast radio stations it regulated to stop the playing of songs that contained what it described as "drug-oriented song lyrics"<sup>33</sup> by posting a "Public Notice" that threatened, albeit in a somewhat cloaked manner, to take away the broadcast license of stations that played songs that "tend[ed] to promote or glorify the use of illegal drugs" on the air.<sup>34</sup> A few weeks later, the FCC's Bureau of Complaints and Compliance provided broadcasters a list of twenty-two songs that included, in its view, "so-called drug-oriented song lyrics."<sup>35</sup> Upon receipt of the list, and absent any other action on the part of the FCC, radio stations across the country pulled the songs on the list from circulation.<sup>36</sup> Some stations went so far as to "stop[ ] playing, regardless of subject or lyric, all the works of particular artists whose

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<sup>28</sup> KATHRYN J. MCGARR, CITY OF NEWSMEN: PUBLIC LIES AND PROFESSIONAL SECRETS IN COLD WAR WASHINGTON 79–83 (2022) (discussing episodes in which government intervention succeeded in pressuring newspapers to shelve articles believed to be harmful to military morale).

<sup>29</sup> *Yale Broad. Co. v. FCC*, 478 F.2d 594, 603 (D.C. Cir. 1973) (separate statement of Bazelon, C.J.) (describing the successful efforts by the FCC to get radio stations to stop playing songs that had what the FCC viewed as drug-positive lyrics).

<sup>30</sup> See generally *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003). For more discussion, see *infra* notes 130–43 and accompanying text.

<sup>31</sup> See generally *Writers Guild v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976). For more discussion, see *infra* notes 106–12 and accompanying text.

<sup>32</sup> See *infra* note 312.

<sup>33</sup> *Yale Broad.*, 478 F.2d at 603 (statement of Bazelon, C.J.).

<sup>34</sup> *In re License Resp. to Rev. Recs. Before Their Broad.*, 28 F.C.C.2d 409, 409 (1971) (asserting that a "pattern of [playing the songs] . . . raises serious questions as to whether continued operation of the station is in the public interest"). This threat was not toothless. During a congressional hearing, the Chairman of the FCC was asked what he would do if a radio station chose to play a song that "promote[d] the use of drugs in the unanimous judgment of the Commission." The Chairman responded that he "kn[ew] what [he] would do, [he] probably would vote to take the[ir] license away." *Yale Broad.*, 478 F.2d at 604 (statement of Bazelon, C.J.).

<sup>35</sup> *Yale Broad.*, 478 F.2d at 603 (statement of Bazelon, C.J.).

<sup>36</sup> *Id.*

views might lift the Commission’s eyebrow.”<sup>37</sup> The threat of license revocation was sufficient to prompt immediate compliance.

That radio broadcasters would be so immediately responsive to even vague threats from the officials who regulated them is a product, at least in part, of the economic incentives that motivate them. Broadcasters, like many other speech intermediaries, make money primarily from advertising.<sup>38</sup> This means that their economic incentives are typically to attract the broadest audience possible so that they can charge higher advertising rates—often by disseminating a wide variety of kinds of speech.<sup>39</sup> For these businesses, the cost of complying with a government request to stop playing one, two or even twenty-two songs—particularly if these songs are not at the top of the charts—will therefore be very minimal, if there is any cost at all.<sup>40</sup>

This is in contrast to companies that sell only a few kinds of goods at a competitive price, like the steel companies targeted by President Kennedy’s jawboning campaign. For these companies, the cost of complying with government demands to lower their prices may be quite significant, and the motivation to resist government pressure correspondingly strong. Indeed, even President Kennedy’s famous jawboning campaign ultimately failed for this reason. Less than a year after the President jawboned the companies into lowering their prices, all U.S. steel companies raised their prices again, and kept them raised.<sup>41</sup> Company executives evidently decided it was worth the risk to defy President Kennedy’s jawboning.

The same is much less likely to be true, however, when it comes to informal pressure campaigns directed at radio stations, booksellers, and social media platforms. These companies can easily pull down a tweet or stop playing a song or remove a few books from their shelves without having to alter their entire business model. Meanwhile, the cost of not complying with government pressure may be very significant. For businesses that

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<sup>37</sup> *Id.*

<sup>38</sup> See VICTOR PICKARD, *DEMOCRACY WITHOUT JOURNALISM* 12 (2019) (“The US press system . . . is extremely commercialized. Far more reliant on advertising revenue than most news industries around the world, US journalism is subject to unmitigated commercial pressures.”)

<sup>39</sup> EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 25–27 (1994).

<sup>40</sup> Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 29 (2006) (“Intermediaries are peculiarly susceptible to chill, for they often face cost and revenue structures quite different from those of first-party speakers.”).

<sup>41</sup> Kovaleff, *supra* note 18, at 49.

depend on sales to a broad consumer base, government actions that associate them with unpopular, controversial, or “indecent” speech can do great damage to their reputation and their ability to generate future profits.<sup>42</sup> And the same will often be true of those companies that support and enable these media businesses to operate (a group we might call “service intermediaries”).<sup>43</sup> Meanwhile, for the radio stations threatened by the FCC, the loss of a broadcast license could do ruinous harm to their business.

These features of the speech market mean that informal pressure can provide government officials a very powerful tool of censorship, particularly against certain kinds of businesses. And courts have long recognized as much. Since 1963, when the Supreme Court decided *Bantam Books*, it has been a black letter principle of First Amendment law that informal censorship can violate the free speech guarantee just as formal censorship can.<sup>44</sup>

Courts, including the *Bantam Books* Court, have also insisted, however, that not all informal government efforts to pressure private speakers or companies into suppressing speech constitutes the kind of informal censorship that violates the First Amendment. To the contrary: They have recognized that certain kinds of informal governmental pressure tactics can further First Amendment values, not just threaten them.<sup>45</sup> Jawboning is, after all, a kind of government speech. And like other kinds of government speech, government criticism of private businesses can and does contribute to the “uninhibited, robust, and wide-open” debate on public issues that the First Amendment protects,

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<sup>42</sup> Kreimer, *supra* note 40, at 29 (“Where the intermediary’s success depends on sales to a broad customer base, public association with controversial speech—much less active efforts to defend it—may be untenable.”); see also *Regulation of Comic Books*, *supra* note 27, at 496 (noting that a desire to “avoid adverse publicity” helps explain the “almost universal” compliance with police requests of comic book “dealers and distributors”).

<sup>43</sup> Courts have recognized as much. See *Backpage.com, LLC v. Dart*, 807 F.3d 229, 236 (7th Cir. 2015) (noting that the reason why credit card companies complied with a county sheriff’s demand that they stop providing services to a classified advertising website was due to “the potential cost to the . . . companies of criminal or civil liability and of negative press had the companies ignored [the defendant sheriff]”).

<sup>44</sup> *Bantam Books*, 372 U.S. at 67.

<sup>45</sup> *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 70 (2d Cir. 1999):

[J]ust as the First Amendment protects a legislator’s right to communicate with administrative officials to provide assistance in securing a publicly funded contract, so too does it protect the legislator’s right to state publicly his criticism of the granting of such a contract to a given entity and to urge to the administrators that such an award would contravene public policy. We see no basis on which X-Men could properly be found to have a constitutional right to prevent the legislators from exercising their own rights to speak.

particularly when it occurs in public.<sup>46</sup> To the extent that jawboning campaigns articulate widely shared criticisms of the media and tech companies that they target, they also might be thought to impose some measure of democratic accountability on the otherwise unaccountable private companies that control some of the most important democratic speech forums in contemporary society.

Informal government efforts to pressure private actors into suppressing speech can also further other, less free-speechy, values. Warnings from election officials or national security experts about the harms of publishing certain information or platforming particular speakers can help private companies make better decisions when it comes to the (electoral or national security–related) speech that flows through their platforms.<sup>47</sup> The same is true of information from law enforcement officers about the legal risks that companies face when they sell or disseminate potentially unlawful speech. In such cases, informal communications may achieve the deterrent effects of criminal law without the economic or emotional costs imposed by the criminal process.

In order not to entirely foreclose these important benefits, courts, including the *Bantam Books* Court, have insisted that the First Amendment prohibits only certain kinds of informal government pressure campaigns—those that pose a particularly marked threat to free speech values.<sup>48</sup> They have disagreed, however, about how to distinguish permissible acts of government from impermissible acts of informal censorship. Or at least, the lower courts have disagreed.

Because the Court failed to hear another First Amendment informal censorship case for over six decades after it decided *Bantam Books*, the lower courts were left to their own devices to make sense of the general principles that decision laid down. And, as I show in this Part, while some lower courts interpreted the decision in the spirit in which it was written—that is to say, they understood *Bantam Books* to authorize an expansive, anti-formalist, and context-sensitive analysis of when the exercise of informal power threatened the independence of the public sphere—other courts,

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<sup>46</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>47</sup> For example, government officials can help social media platforms more accurately identify election misinformation. See Brief of Amicus Curiae Brennan Center for Justice at NYU Law in Support of Defendants at 5–8, *Ayyadurai v. Galvin*, 2021 WL 9057491 (D. Mass. July 16, 2021) (No. 1:20-CV-11889-MLW) (defending the importance of this role). And national security officials have traditionally provided guidance to newspapers and other members of the press about the national security risks of material they are considering publishing. See *MCGARR*, *supra* note 28, at 79–81.

<sup>48</sup> *Bantam Books*, 372 U.S. at 71–72.

more concerned with protecting the prerogatives of government regulators, instead interpreted the decision much more narrowly and formalistically. The result was a confused and confusing body of First Amendment law, and one that, as I argue in Part II, failed to safeguard free speech values very effectively.

A. Bantam Books and the *Emergence* of Jawboning as a Constitutional Problem

Jawboning first emerged properly as an object of First Amendment constitutional concern in the late 1950s. That it did so was a consequence of two things: first, the increasingly expansive First Amendment doctrine that the Court was developing at the time; and second, the intense moral panic about juvenile crime that gripped much of the country after the FBI published crime statistics that revealed soaring rates of violent crime among teenagers.<sup>49</sup> As would be true of subsequent moral panics, many people blamed the problem of juvenile delinquency on the pop culture that teenagers consumed and sought to get those cultural products out of teenagers' hands.<sup>50</sup> But First Amendment law made it very difficult to formally ban the books, magazines, and movies that were blamed for the crisis. In a series of decisions it handed down over the course of the late 1940s and early 1950s, the Court insisted that the First Amendment protected trashy books, magazines, and films as much as it protected political oratory and fine literature.<sup>51</sup> And although in *Roth v. United States*,<sup>52</sup> the Court held that obscenity was constitutionally unprotected speech, it also defined obscenity narrowly to exclude any speech about sex that had some amount of social value.<sup>53</sup> These precedents made the use of state obscenity laws to get salacious books,

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<sup>49</sup> See generally Jason Barnosky, *The Violent Years: Responses to Juvenile Crime in the 1950s*, 38 *POLITY* 314 (2006).

<sup>50</sup> *Id.* at 315 (“There was strong support [during this period] for censorship of comic books, television, and movies—all of which many believed contributed to the juvenile crime problem.”).

<sup>51</sup> See, e.g., *Winters v. New York*, 333 U.S. 507, 510 (1948) (concluding that magazines devoted to salacious stories of true crime were “as much entitled to the protection of free speech as the best of literature” because “[w]hat is one man’s amusement, teaches another’s doctrine”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (recognizing that even blasphemous movies were entitled to constitutional protection because “motion pictures are a significant medium for the communication of ideas [and] [t]hey may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression”).

<sup>52</sup> 354 U.S. 476 (1957).

<sup>53</sup> *Id.* at 485, 487–88.

gruesome comics, and other allegedly criminogenic publications out of the public square difficult, time consuming, and uncertain.<sup>54</sup>

Frustrated with the many barriers that existing law imposed on the suppression of what they viewed as crime-encouraging filth, police, prosecutors, and members of the many state commissions that legislatures created to deal with the problem of juvenile delinquency turned to more informal methods.<sup>55</sup> They sent notices to booksellers and publishers to inform them of the titles of books and magazines that those officials had concluded were unsuitable for public consumption.<sup>56</sup> They visited local movie theaters to watch new movies before they started their run and “advise[d]” theater owners “either that the picture should not be shown or that specific deletions should be made.”<sup>57</sup> Sometimes, the officials added a warning that if the bookseller or theater owner did not comply with their requests they would be prosecuted for obscenity.<sup>58</sup> In other cases, however, they merely gave their “opinion” that the movie should not be shown or the book not sold and requested the retailer’s cooperation.<sup>59</sup> In both cases, however, these tactics tended to be extremely effective in achieving the suppression of the objectionable speech without anyone turning to the courts, or anyone expecting them to.<sup>60</sup> A 1958 article concluded that the “number of people whose reading material has been or is

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<sup>54</sup> Police officers acknowledged as much. See, e.g., *Investigation of Literature Allegedly Containing Objectionable Material: Hearings Before the H. Select Comm. on Current Pornographic Materials*, 82d Cong. 265 (1952) (testimony of Captain Louis L. Roos, Commanding Officer, Legal Bureau, Police Dep’t, N.Y.C.):

I can go out and pick any book that you might declare to be indecent or obscene, in violation of any State law, but how is suppression to be made with reference to law enforcement? I go to a particular place, I make the arrest, seize all the books he has, and it is going to take months and months before the criminal court is finished with him. What happens in the interim?

<sup>55</sup> For general descriptions of these jawboning campaigns, see *Regulation of Comic Books*, *supra* note 27, at 494–99; William J. Hempel & Patrick M. Wall, *Extralegal Censorship of Literature*, 33 N.Y.U. L. REV. 989, 998–1002 (1958); Note, *Entertainment: Public Pressures and the Law; Official and Unofficial Control of the Content and Distribution of Motion Pictures and Magazines*, 71 HARV. L. REV. 326, 344–45 (1957) [hereinafter *Public Pressures and the Law*].

<sup>56</sup> *Regulation of Comic Books*, *supra* note 27, at 494–95.

<sup>57</sup> *Public Pressures and the Law*, *supra* note 55, at 346.

<sup>58</sup> *Id.* at 345.

<sup>59</sup> *Id.*

<sup>60</sup> As observers noted at the time, even when they wielded threats of prosecution, police and prosecutors did not “expect to prosecute, and in fact prosecutions almost never occur[red].” *Regulation of Comic Books*, *supra* note 27, at 497; see also *Public Pressures and the Law*, *supra* note 55, at 346 (“Many officials frankly admit that their activity with regard to both motion pictures and magazines is extralegal and that their determinations would not be sustained in court were they ever tested.”).

controlled to some extent by police application of an obscenity standard which is at variance with the constitutional guarantees of free speech is quite large.”<sup>61</sup>

The widespread use of these methods to prevent the public dissemination of movies, books and magazines that were not at all obviously obscene raised serious First Amendment questions. All the same justifications that led the Court to conclude that indecent and criminogenic speech could not be banned unless it satisfied the narrow doctrinal definition of obscenity surely meant that police and prosecutors should not be able to use threats and intimidation to informally achieve the same result.

Nevertheless, there was a meaningful difference in how formal bans and these kinds of informal police tactics operated that made the constitutional questions they raised difficult ones—at least in the eyes of the judges first asked to analyze the constitutionality of these practices. Unlike criminal laws, these tactics did not *compel* compliance. Booksellers and film distributors could always go to court to defend their rights. Alternatively, they could wait to see if they were actually charged under state obscenity laws and raise a First Amendment defense to the prosecution then.

The fact that their targets retained a legal right to resist led some courts to conclude that police and prosecutors did not violate the First Amendment when they “advised” booksellers and retailers about problematic books or movies they disseminated or “cautioned them” to discontinue their dissemination, even when the result was to prevent future issues of those books and magazines from being distributed.<sup>62</sup> Other courts concluded that these kinds of police tactics did violate the constitutional rights of the distributor but that the violation was of the distributor’s right against the deprivation of their property without due process of law.<sup>63</sup> Still

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<sup>61</sup> Hempel & Wall, *supra* note 55, at 998–99; *see also Regulation of Comic Books, supra* note 27, at 496 (“Compliance by dealers and distributors has been almost universal, because of the implicit threat of prosecution, and the understandable desires to cooperate, avoid adverse publicity, and gain the practical advantages of working through negotiation.”).

<sup>62</sup> *Four Star Publ’ns, Inc. v. Erbe*, 181 F. Supp. 483, 489 (S.D. Iowa 1960) (“[N]othing prevents the current issues of these magazines from returning to the stands other than the risk that they might be in violation of the Iowa obscenity statute. But this is a risk incurred by the plaintiffs.”); *see also Pocket Books, Inc. v. Walsh*, 204 F. Supp. 297, 298–300 (D. Conn. 1962).

<sup>63</sup> *See, e.g., Kingsley Int’l Pictures Corp. v. Blanc*, 153 A.2d 243, 247–48 (Pa. 1959) (finding the jawboning campaign against a movie theater violated its property rights without due process of law); *Bantam Books, Inc. v. Melko*, 96 A.2d 47, 51 (N.J. Ch. 1953), *modified*, 103 A.2d 256 (N.J. 1954) (same); *New Am. Libr. of World Literature v. Allen*, 114 F. Supp. 823, 834 (N.D. Ohio 1953) (same).

other courts concluded that these kinds of tactics violated the First Amendment because, in practice, booksellers and other distributors could not refuse them.<sup>64</sup>

It was in this context of lower court uncertainty and disagreement that the Court decided *Bantam Books*. The case involved what by then was a relatively familiar fact pattern. A state commission, established by the Rhode Island legislature in 1956 to combat the problem of juvenile delinquency, decided, like commissions throughout the country, that the best way to promote its statutory mission was to get local bookshops to stop selling books and magazines that were unsuitable for minors.<sup>65</sup> The Commission did so by sending booksellers notices that listed the 106 books and magazines that members of the Commission had reviewed and found by a majority vote to be unsuitable for minors, and thanked the booksellers for their “cooperation in removing the listed and other objectionable publications from [their] newsstands.”<sup>66</sup> The notices also informed their recipients that an identical list of books had been sent to the local Chief of Police, “with the order that they are not to be sold, distributed or displayed to youths under eighteen years of age,” and that the Attorney General would act for the Commission “in case of non-compliance.”<sup>67</sup> In at least some instances, police officers also visited the targeted bookstores a few days after they received one of the notices, to learn what actions they had taken in response.<sup>68</sup> As was common in such cases, the booksellers that received these notices tended almost uniformly to remove the listed books from circulation, often immediately.<sup>69</sup> Indeed, the Commission was so successful in this respect that it declared in its annual report to the governor in 1960 that its actions were “largely responsible for the ‘new look’ on Rhode Island newsstands.”<sup>70</sup>

Trouble was on the horizon, however. A book distributor that received these notices and follow-up police visits, along with four of the publishers that published books listed in the Commission’s notices, challenged the constitutionality of the Commission’s actions in state court.<sup>71</sup> They argued that the Commission’s efforts to

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<sup>64</sup> *Sunshine Book Co. v. McCaffrey*, 168 N.Y.S.2d 268, 274 (N.Y. App. Div. 1957); *HMH Publ’g Co. v. Garrett*, 151 F. Supp. 903, 904 (N.D. Ind. 1957).

<sup>65</sup> *Bantam Books*, 372 U.S. at 59–61.

<sup>66</sup> *Id.* at 62 n.5.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 63.

<sup>69</sup> *Id.*

<sup>70</sup> Appellants’ Brief at 12, *Bantam Books*, 372 U.S. 58 (No. 118).

<sup>71</sup> *Bantam Books*, 372 U.S. at 61. The distributor was the only company that distributed the publishers’ books in Rhode Island. *Id.*

pressure book retailers into ceasing the dissemination of material that had not been determined to be obscene constituted a prior restraint of their speech, in violation of the First Amendment as well as the state constitution.<sup>72</sup>

The trial court that heard the case agreed that the actions of the Commission violated the First Amendment, but the Rhode Island Supreme Court reversed this part of the court's decision.<sup>73</sup> It held (just as other courts before it had held) that the Commission's actions did not constitute a prior restraint of speech because they did not in fact restrain anything.<sup>74</sup> Because the Commission had no power to actually prosecute the offending works, the Court found that book distributors had "impunity [to] refuse to respond to any [of its] suggestions"<sup>75</sup> and were not therefore "aggrieved by any deprivation of their constitutional right to distribute their books in this state."<sup>76</sup> Responsibility for the decision to remove the books from their bookshelves or catalogs lay with the private actors, who *chose* to respond to the Commission's requests in the manner that they did. After all, the Rhode Island Supreme Court noted, booksellers were "free to disregard [the Commission's] request for cooperation and if [they] did . . . [they] had nothing to fear except prosecution . . . . And even such fear would be groundless if the books in question were not obscene."<sup>77</sup>

In reaching this conclusion, the Rhode Island Supreme Court ignored what many legal scholars recognized at the time: namely, that book distributors did in fact have something to fear from prosecution even when they were very unlikely to be found guilty of distributing obscenity, given the terrible publicity and stink of criminality that merely being accused of violating the obscenity laws could create. As a comment published in *The University of Chicago Law Review* in 1954 put it, to explain why, although booksellers confronted with notices like the one the Rhode Island Commission sent out "[s]eemingly . . . [had] a choice . . . [to] submit to the police request or risk a court test on the obscenity of the publication," there was "in fact no real choice":

It is highly improbable that any bookseller or distributor would care to risk going to court. Proceedings to test the obscenity of a book are criminal in nature, and criminal

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<sup>72</sup> *Bantam Books, Inc. v. Sullivan*, 176 A.2d 393, 395 (R.I. 1961).

<sup>73</sup> *Id.* at 398.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 395–96.

<sup>76</sup> *Id.* at 397.

<sup>77</sup> *Bantam Books*, 176 A.2d at 397.

prosecutions are personally unpleasant. There is always the chance that a short jail term or heavy fine will be imposed. Moreover, the interest which a bookseller or distributor has in any one book is very small. He sells many books; refusal to sell a book upon the prompting of the local police does not place the seller at a competitive disadvantage toward other retailers or distributors, since all are subject to the same pressure . . . . [R]etailers . . . [also] can ill afford to chance the loss of public goodwill which a criminal prosecution may entail. An obscenity prosecution makes the seller appear to be a degrader of children and a panderer to the adolescent mind; the public will almost certainly condemn him.<sup>78</sup>

When it handed down its decision in the case, the U.S. Supreme Court embedded the social reality described in this passage into its analysis. It held that the actions of the Commission amounted to an unconstitutional prior restraint of speech, notwithstanding the fact that the Commission was limited only to what it described as “informal sanctions,” because “the record amply demonstrate[d] that the Commission deliberately set about to achieve the suppression of publications deemed ‘objectionable’ and succeeded in its aim.”<sup>79</sup> This was true, Justice William Brennan explained on behalf of the Court, even though the Commission could not formally dictate to the booksellers what they must do:

It is true . . . that [the plaintiff] was “free” to ignore the Commission’s notices, in the sense that his refusal to “cooperate” would have violated no law. But it was found as a fact . . . that [his] compliance with the Commission’s directives was not voluntary. People do not lightly disregard public officers’ thinly veiled threats to institute criminal proceedings against them if they do not come around, and [the plaintiff’s] reaction, according to uncontroverted testimony, was no exception to this general rule. The Commission’s notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications *ex proprio vigore*. It would be naïve to credit the State’s assertion that these blacklists are in the nature of mere legal

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<sup>78</sup> Comment, *Censorship of Obscene Literature by Informal Governmental Action*, 22 U. CHI. L. REV. 216, 220 (1954).

<sup>79</sup> *Bantam Books*, 372 U.S. at 67.

advice, when they plainly serve as instruments of regulation independent of the laws against obscenity.<sup>80</sup>

As this passage makes plain, in lieu of the Rhode Island Supreme Court's formalistic analysis of the character of the Commission's acts, the U.S. Supreme Court employed a self-consciously anti-formalist approach, one that, as Justice Brennan put it, "look[ed] through forms [of government action] to the substance" to determine when "informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."<sup>81</sup> Rather than focusing on what the Commission purported to do and the powers it formally possessed, the Court instead asked what the Commission was trying to do when it sent out the notices, what booksellers understood those notices to be telling them, and what the impact of those notices on their expressive practices were.<sup>82</sup> And it concluded that the fact that book distributors perceived themselves to have no choice but to comply with the Commission's requests was constitutionally significant, even if this perception was partly a product of factors (the business model of the bookselling business; the stigma associated with obscenity prosecutions) that the Commission did not create, because the Commission *intended* businesses to feel this way when it sent its notices to them.<sup>83</sup>

The Court recognized, in other words, that the Commission took advantage of the institutional context in which it operated to create a system of speech regulation that operated largely outside the courts. This mattered from a constitutional perspective because it meant that the result of the Commission's actions was likely to be the suppression of a great deal of constitutionally protected speech. Indeed, this was what the opinion described as the central "vice of the system" the Commission created: By exploiting what the Court in an earlier case had described as the "timidity" of booksellers when faced with the prospect of legal risk to "obviate[e] the need to employ criminal sanctions," it "eliminated the safeguards of the criminal process" and consequently "create[d] hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law"—hazards that the First Amendment simply could not tolerate.<sup>84</sup>

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<sup>80</sup> *Id.* at 68–69.

<sup>81</sup> *Id.* at 67.

<sup>82</sup> *Id.* at 68–69.

<sup>83</sup> *Id.* at 67.

<sup>84</sup> *Bantam Books*, 372 U.S. at 69–70. The Court described booksellers as timid in *Smith v. California*, 361 U.S. 147, 154 (1959).

The Court was careful to note that its conclusion that the Commission's actions violated the First Amendment did not mean that officials could never warn businesses that they might face legal peril if they continued to host or disseminate speech of a particular kind.<sup>85</sup> Nor did it mean, more specifically, that "law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws prohibiting obscenity."<sup>86</sup> As Justice Brennan wrote, "Where such [communication] is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms."<sup>87</sup> But where an official acted with what Justice Brennan described as a "coercive" as opposed to an "advisory" intent, and was successful in achieving the suppression of speech, the opinion made clear that he or she violated the First Amendment, even if, on its face, the government actor did no more than ask for the business owner's voluntary compliance, as occurred here.<sup>88</sup>

The opinion made clear furthermore that government officials who intentionally suppressed speech in this manner violated the First Amendment even when the speech the officials targeted was not itself constitutionally protected. Indeed, at no point in the pendency of the case did the Court bother to determine, or to ask any other factfinder to determine, whether and which of the books or magazines listed by the Commission in its notices were in fact obscene.<sup>89</sup> It did not matter. The constitutional sin committed by the Commission was that it engaged in behavior that, given the risk-averse tendencies of booksellers, was likely to result in the suppression of protected speech, not that it actually did.

The *Bantam Books* Court set out, in other words, what amounted to a prophylactic rule against informal censorship—To minimize the chances that officials would turn to what it viewed

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<sup>85</sup> *Bantam Books*, 372 U.S. at 71 ("In holding that the activities disclosed on this record are constitutionally proscribed, we do not mean to suggest that private consultation between law enforcement officers and distributors prior to the institution of a judicial proceeding can never be constitutionally permissible.")

<sup>86</sup> *Id.* at 71–72.

<sup>87</sup> *Id.* at 72.

<sup>88</sup> *Id.* at 69 n.9.

<sup>89</sup> Justice John Marshall Harlan II complained about this in his dissent. *Bantam Books*, 372 U.S. at 82 (Harlan, J., dissenting):

The effect of this holding is to cut into this effort of the State to get at the juvenile delinquency problem, without this Court or any other ever having concretely focused on whether any of the specific material called in question by the Commission is or is not entitled to protection under constitutional standards established by our decisions.

as constitutionally hazardous methods of speech suppression, the Court made it per se unconstitutional for officials to attempt to use their informal powers to coerce the suppression of speech, even when it turned out that the speech they were attempting to suppress was not in fact constitutionally protected. Indeed, after concluding that the Commission's actions constituted an informal prior restraint, the Court did not engage in any further balancing of means and ends. It did not ask, for example, whether the government's interest in preventing juvenile crime outweighed the "heavy presumption" that applied to prior restraints.<sup>90</sup> It simply declared the Commission's actions to be unconstitutional.<sup>91</sup> The strong suggestion here was that no amount of interest balancing could justify the intentional subversion of constitutional constraints that the Commission's informal system of regulation had created.<sup>92</sup>

The result was a relatively broad view of what kinds of informal pressure campaigns violate the First Amendment—albeit one that, because of its anti-formalist commitments, was not as broad as it could have been, in some respects at least. In an amicus brief it filed in the case, the Authors League of America argued that it should be unconstitutional under the First Amendment for any government official to disseminate a "blacklist[ ]" of objectionable publications like the one the Rhode Island Commission circulated because the inevitable effect of doing so would be to prevent the circulation of the books on the list.<sup>93</sup> The Authors League was surely correct in its prediction of the effect of this kind of blacklist. Nevertheless, the Court did not adopt the Authors League's suggested test, presumably because it was not ready to assume that all so-called blacklists were sent with a coercive intent.

The Court instead adopted an intent-based test for distinguishing permissible from impermissible informal pressure

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<sup>90</sup> *Id.* at 70 (majority opinion).

<sup>91</sup> *Id.* at 70–71.

<sup>92</sup> As Justice Brennan noted, prior restraints were permitted only when they "operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint." *Id.* at 70. But by definition, informal prior restraints lacked these features. *Id.*

<sup>93</sup> Brief of the Authors League of America, Inc. as Amicus Curiae at 7–8, *Bantam Books*, 372 U.S. 58 (No. 118):

[T]he publication of official lists of proscribed books by the State, or its agencies, will, without any accompanying threat of prosecution, limit the distribution of any book thus cited. . . . The First Amendment did not envisage, nor does it protect, official criticism by the State or any effort on its part to discourage its citizens from reading particular books.

campaigns. And it made clear that to determine whether an official acted with a constitutionally evasive intent, courts should examine the specific “factual situation” of each case, including the content of the government’s communications, the context in which they operated, and how they were likely to be received.<sup>94</sup> The result was a test of informal censorship that did not categorically prohibit all pressure campaigns that employed lists of disfavored books or magazines, but, because it focused on the motivations behind, rather than the form of, government action, could be applied to many different kinds of government actions, performed in many different regulatory contexts. This is certainly what the ensuing cases made clear.

#### B. The Intent-Focused Test of Jawboning

In the immediate aftermath of *Bantam Books*, a number of lower courts adopted the same anti-formalist, context-sensitive, and holistic analysis that the Court employed in *Bantam Books* to identify other instances in which officials imposed an informal prior restraint on speech. The result was decisions that found many different kinds of government officials, wielding many different kinds of informal pressure, to have violated the First Amendment anti-jawboning rule.

For example, in *Bee See Books, Inc. v. Leary*,<sup>95</sup> a federal district court held that the New York City Police Commissioner violated the First Amendment when he implemented a new policy that required uniformed police officers to stand all day in bookshops that sold racy books and magazines, purportedly so that they could more effectively uncover the under-the-table sales of unlawful hardcore pornography that the Police Commissioner claimed were taking place in these stores.<sup>96</sup> The court held that the Commissioner’s new policy amounted to an informal prior restraint even though the police officers stationed in the stores did not make any requests of the store owners or make any statements that could be interpreted as threats.<sup>97</sup> Instead, the officers

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<sup>94</sup> *Bantam Books*, 372 U.S. at 67 n.8 (refusing to reach a conclusion about the constitutionality of prior jawboning cases because “[n]one . . . presents the precise factual situation at bar”); *id.* at 68 (noting that “[t]he Commission’s notices, phrased virtually as orders, [were] reasonably understood to be such by the distributor [and] invariably followed up by police visitations”).

<sup>95</sup> 291 F. Supp. 622 (S.D.N.Y. 1968).

<sup>96</sup> *Id.* at 623, 627.

<sup>97</sup> *Id.* at 626 (“The constant presence of uniformed officers in plaintiffs’ book stores, in full view of patrons, is plainly a restraint on the distribution of the publications which plaintiffs sell.”).

refused to say anything of substance to anyone, even when asked.<sup>98</sup> They also were instructed by their superiors not to intervene in the operations of the stores *except* when they witnessed the sale of criminal obscenity.<sup>99</sup> On the face of it, the policy appeared to impact only the dissemination of unprotected speech.

Despite these facts, the district court concluded that the policy violated the First Amendment because it was motivated by a coercive intent and was coercive also in effect.<sup>100</sup> The primary evidence of the former was the fact that the officers were required to wear their uniforms when stationed in the bookstores.<sup>101</sup> As the court pointed out, if the purpose of the policy was to ferret out underground criminal activity, as the government claimed, it made no sense to require police officers to stand in the stores in uniform.<sup>102</sup> Instead, the court concluded that the true purpose of the new policy was to scare customers away from the bookstores, by suggesting implicitly “that any material sold in the stores [was] illegal and that any purchases [they made] [could] lead to prosecution.”<sup>103</sup> And the court found there to be plenty of evidence that this message was effective. Indeed, sales at the bookstores targeted by the new policy dropped precipitously after it was implemented—in some cases, overall sales declined by as much as 50%.<sup>104</sup>

Given this evidence of coercion, the court easily concluded that policy violated the rule set forth in *Bantam Books*. It noted that the restraints the policy imposed were “different from those in *Bantam Books*” but found that they were “no less effective”—and in fact, might be more effective, because they were “not directed at any specific publications but affect[ed] the whole stock on sale in these stores.”<sup>105</sup> In this way, the court extended the logic of *Bantam Books* to what we might call demand-side self-censorship (self-censorship by frightened customers), not just the supply-side self-censorship at issue in *Bantam Books* itself.

In other cases, courts extended the logic of *Bantam Books* in other ways. For example, in *Writers Guild v. FCC*,<sup>106</sup> a California

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<sup>98</sup> *Id.* at 623–24 (noting that “officers [ ] refused to explain their presence to store employees, simply stating they are there ‘under orders’”).

<sup>99</sup> *Id.* at 623.

<sup>100</sup> *Bee See Books*, 291 F. Supp. at 627.

<sup>101</sup> *Id.* at 626.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 627.

<sup>105</sup> *Bee See Books*, 291 F. Supp. at 627.

<sup>106</sup> 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated and remanded sub nom.* *Writers Guild v. Am. Broad. Co.*, 609 F.2d 355 (9th Cir. 1979). The case was vacated for lack of primary jurisdiction until the FCC could complete its own administrative proceedings for the case.

district court held that a pressure campaign waged by FCC Chairman Richard Wiley against the major television networks to get them to adopt a “Family Viewing Policy” that prohibited the broadcast of overly sexual or violent programming early in the evening constituted unconstitutional jawboning.<sup>107</sup> The court reached this conclusion even though the Chairman at no point threatened criminal penalties. Instead, he threatened the networks with the prospect of a FCC hearing on the topic of sex and violence on network television (a prospect that the Commissioner noted “the networks would not like”), or alternatively, a rulemaking to more closely link the renewal of stations’ broadcast licenses to their programming choices if they did not comply with his requests.<sup>108</sup>

The court found that, given how serious an economic hit stations would take if they did in fact lose their broadcast license, and the “persistent, pronounced, and unmistakable” pressure that Wiley placed on the network executives,<sup>109</sup> the Commission’s “public interest’ jawboning” was not only intended to but also had the effect of coercing the networks into adopting the policy that Chairman Wiley wanted—and that this was true even though network executives testified in court that the ultimate decision to adopt the policy was theirs, and theirs alone.<sup>110</sup> The “post hoc rationalizations” of the network executives, the court asserted, could not “be squared with the evidence accumulated by the plaintiffs” or by the “writings of [the FCC Chairman] made at the time of the decisionmaking process,” which revealed that “[t]he threat of regulatory action was not only a substantial factor leading to [the] adoption [of the Family Viewing Policy] but a crucial, necessary, and indispensable cause.”<sup>111</sup> And once it concluded as much,

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The Ninth Circuit did not reach the First Amendment claims. For further discussion, see *infra* text accompanying notes 126–29.

<sup>107</sup> *Writers Guild*, 423 F. Supp. at 1072:

The plaintiffs have evidenced a successful attempt by the FCC to pressure the networks and the [National Association of Broadcasters] into adopting a programming policy they did not wish to adopt. The plaintiffs have proven that the FCC formulated and imposed new industry policy without giving the public its right to notice and its right to be heard.

<sup>108</sup> *Id.* at 1105. Wiley personally believed that such a rulemaking would be unconstitutional but threatened it anyway. *Id.* at 1097.

<sup>109</sup> *Id.* at 1094.

<sup>110</sup> *Writers Guild*, 423 F. Supp. at 1097. The pronounced pressure campaign involved repeated phone calls with network executives, public speeches, exhortations to act, and the threats described above. For a full description of the campaign, see *id.* at 1097–1125.

<sup>111</sup> *Id.* at 1093–94.

the court had no trouble concluding that the Chairman's actions violated the First Amendment.<sup>112</sup>

Other courts extended the logic of *Bantam Books* even further. The Second Circuit held that threats of purely economic sanctions, not just threats of rulemaking that could impose economic costs, could be sufficient to violate the First Amendment prohibition against informal prior restraints if they ended up coercing the suppression of disfavored speech—and that this was true even when the government official issuing the threats lacked any direct regulatory authority over the target of the jawboning campaign. For example, in *Okwedy v. Molinari*,<sup>113</sup> the Second Circuit held that a religious group plausibly alleged that the Staten Island Borough President violated the First Amendment when he pressured a billboard company that had agreed to put up the group's homophobic religious billboards into taking the billboards down by sending the company a letter.<sup>114</sup> The letter stated that the plaintiffs' billboards "convey[ed] an atmosphere of intolerance which is not welcome in our Borough" and reminded the company's president that he "own[ed] a number of billboards on Staten Island [from which he] derive[d] substantial economic benefits."<sup>115</sup> Although the letter threatened no explicit sanctions—not even the prospect of regulatory reform at issue in *Writers Guild*, let alone the "thinly veiled threats" of criminal prosecutions presented by the notices in *Bantam Books*—the Second Circuit allowed the litigation to proceed to trial because it concluded that a reasonable jury "could find that [the] letter contained an implicit threat of retaliation" and the billboard company "could reasonably have feared that [the Borough President] would use whatever authority he d[id] have . . . to interfere with the 'substantial economic benefits' [the company] derived from its billboards in Staten Island."<sup>116</sup> The court rejected the government's argument that because the Borough President possessed no direct "decision-making authority over [the billboard company's] business," the letter could not as a matter of law

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<sup>112</sup> *Id.* at 1072:

The plaintiffs have evidenced a successful attempt by the FCC to pressure the networks and the [National Association of Broadcasters] into adopting a programming policy they did not wish to adopt. The plaintiffs have proven that the FCC formulated and imposed new industry policy without giving the public its right to notice and its right to be heard.

<sup>113</sup> 333 F.3d 339 (2d Cir. 2003).

<sup>114</sup> *Id.* at 340–41.

<sup>115</sup> *Id.* at 342.

<sup>116</sup> *Id.* at 344.

constitute an unconstitutional prior restraint.<sup>117</sup> A “public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff’s First Amendment rights,” the court asserted, “regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant’s direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form.”<sup>118</sup>

Courts also interpreted the First Amendment rule against informal prior restraints to prohibit *unsuccessful* jawboning campaigns. Key to the holding in *Bantam Books* was the Court’s conclusion that the pressure tactics of the Rhode Island Commission to Encourage Morality in Youth *did* successfully coerce the booksellers. But some lower courts insisted that it made no sense to extend protection against coercive government actions only to those who failed to resist. “It would indeed be ironic,” the Third Circuit held in *Trotman v. Board of Trustees of Lincoln University*,<sup>119</sup> “were we to hold that persons who are persevering and resolute, who overcome their inhibitions and fears to proceed on a course they believe constitutionally protected, would thereby lose the very protection which they rely on in asserting their rights.”<sup>120</sup>

The result of these and other decisions was to render constitutionally impermissible a wide range of government tactics and schemes. This is not to say that there were no limits to the reach of the anti-jawboning rule, as these courts understood it. Courts generally insisted, for one thing, that government communications had to either threaten the imposition of legal sanctions or constitute an “official pronouncement[.]” to raise a cognizable First Amendment claim under *Bantam Books*.<sup>121</sup> This meant that officials who spoke in their personal capacity and did not threaten the exercise of state power did not violate the First Amendment when they pressured private businesses into suppressing speech, even if they acted with the intent to suppress speech and were successful in that aim. In other respects, however, the anti-jawboning rule articulated in these cases was quite expansive. It

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<sup>117</sup> Brief for Appellee Guy Molinari at 12–15, *Okwedy*, 333 F.3d 339 (No. 01-7941).

<sup>118</sup> *Okwedy*, 333 F.3d at 344.

<sup>119</sup> 635 F.2d 216 (3d Cir. 1980).

<sup>120</sup> *Id.* at 227.

<sup>121</sup> *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983) (concluding that cognizable First Amendment issues can be raised when (1) “comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official’s request” or (2) “claimants [ ] can demonstrate that the distribution of items containing protected speech has been deterred by official pronouncements”).

applied to even quite thickly veiled threats (including, the Third Circuit suggested, unsuccessful ones) of economic as well as regulatory harm, made by many different kinds of government actors, sometimes with very little direct authority to back them up.

This relatively broad interpretation of the First Amendment rule against informal prior restraints was celebrated by some as a necessary means of protecting vulnerable expressive freedoms against government abuse.<sup>122</sup> But it was criticized by others for casting too wide a net and thereby making it too difficult for regulators to use informal pressure tactics to nudge private speakers and speech intermediaries into making public-regarding choices when their economic incentives would otherwise lead them another way.

On the Court, Justice John Marshall Harlan II prefigured this argument when he argued in his dissent in *Bantam Books* that the majority's conclusion that the Commission's actions violated the First Amendment overvalued the free speech interests of the booksellers and undervalued the state's legitimate interest in preventing juvenile delinquency.<sup>123</sup> Because booksellers could always establish the legality of their booklist if and when they were hauled into court, Justice Harlan argued that the Commission's actions imposed no significant constraint on their constitutionally protected expressive freedom. "Putting . . . distributors to the pain of vindicating challenged materials is not to place them under unusual hardship," he insisted.<sup>124</sup> It is instead "one of the painful obligations of citizenship."<sup>125</sup>

The Ninth Circuit expressed similar concerns about the breadth of the anti-jawboning rule that the district court relied on in the *Writers Guild* case.<sup>126</sup> Although the court noted that the "informal procedures" that Wiley had used to pressure the networks into adopting the Family Friendly Viewing Policy may have been coercive—and therefore presented "serious issues involving the Constitution, the Communications Act, and the [Administrative Procedure Act]"—it ultimately concluded that the question whether the Chairman's pressure campaign violated the First

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<sup>122</sup> Professor Henry Monaghan, for example, welcomed the decision in *Bantam Books* for recognizing that vindication of free speech values required not just substantive restraints on state action but procedural restraints as well. See Henry P. Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 521–22 (1970).

<sup>123</sup> *Bantam Books*, 372 U.S. at 76 (Harlan, J., dissenting).

<sup>124</sup> *Id.* at 82.

<sup>125</sup> *Id.* (quotation marks omitted) (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)).

<sup>126</sup> *Writers Guild*, 609 F.2d at 360.

Amendment was best decided in the first instance by the FCC itself.<sup>127</sup> Because it was the FCC, not the federal courts, that was entrusted with responsibility for maintaining “the delicately balanced system of broadcast regulation,” it was, the court argued, the FCC that had to determine in the first instance where “the line between permissible regulatory activity and impermissible ‘raised eyebrow’ harassment” should lie.<sup>128</sup> The court set the fox to guard the henhouse, in other words, because it worried that judicial enforcement of the anti-jawboning rule would undermine the FCC’s ability to effectively regulate the broadcast industry—the view here being, presumably, that some amount of intentional coercion was a legitimate mechanism of broadcast regulation. Indeed, the Ninth Circuit strongly suggested as much when it noted that what the district court cast as “serious misconduct” might in fact be “at worst, jawboning of the type often praised as effective leadership by those satisfied with its results.”<sup>129</sup>

These concerns about the constraints the intent-focused test of informal censorship placed on the ability of regulators to use their soft power to achieve important regulatory goals led some courts to ultimately develop a more restrictive and more formalistic interpretation of what *Bantam Books* held than the one relied upon by the courts above.

### C. The Sufficient-Quantum-of-Force Test

*Bantam Books* was a self-consciously anti-formalist decision. Nevertheless, in an effort to safeguard the ability of officials to use certain kinds of pressure tactics to push private businesses toward more public-regarding behavior, a number of courts began in the 1980s to interpret the decision in a more formalistic manner than the language in the opinion suggested that it should be understood. More specifically, they began to interpret the decision to require proof not only of coercive intent on the government’s part but also of the use of certain kinds of pressure tactics—those that resembled, in their form, the kinds of threats that the Rhode Island Commission employed.

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<sup>127</sup> *Id.* at 365.

<sup>128</sup> *Id.* (quoting David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 217).

<sup>129</sup> *Id.* at 364. To no one’s surprise, when the case came back to the FCC, the agency concluded that, because the networks “would not have been unable or unwilling to resist an effort by Wiley to have them do something which they otherwise did not want to do,” the Chairman’s actions raised no First Amendment concerns. *In re Primary Jurisdiction Referral of Claims Against Gov’t Defendant Arising from the Inclusion in the NAB Television Code of the “Family Viewing Policy,”* 95 F.C.C.2d 700, 705, 709 (1983).

The Third Circuit's 1984 decision in *R.C. Maxwell Co. v. New Hope*<sup>130</sup> is exemplary in this respect. In that case, the Third Circuit dismissed a First Amendment lawsuit that a billboard company brought against the New Hope Borough Council after the city manager "politely but firmly suggested" in a letter to the bank that owned the plot of land on which the plaintiff's billboards stood that the bank "remove the [plaintiffs'] unsightly billboards."<sup>131</sup> The letter also noted the possibility that, if the bank did not prove "interested in being responsive to this community," the Council might be forced to resort to costlier "legal procedures."<sup>132</sup> A follow-up letter asked for information about whether the bank was "in fact terminating the leases" for the billboard and noted that "this office would be the first to encourage a higher level of use for [the property]" but that "removal of the billboard would be . . . [a] positive statement for [the bank] to make."<sup>133</sup>

The Third Circuit dismissed the claims against the Council even though the evidence made clear that the bank agreed to terminate the billboard owner's lease upon receipt of the letter, and even though the bank manager testified under oath that a desire to remain in the "good graces" of the Council was a motivating factor behind the decision to do so—presumably so that the Council would approve the bank's plans to develop the 150-acre plot of land on which the billboard stood.<sup>134</sup> Despite these facts, and despite the language in the second letter that, as the dissent noted, "directly link[ed] the removal of the billboards to a receptive climate for and favorable action upon Citibank's future development plans for its real estate in the Borough,"<sup>135</sup> the Third Circuit concluded that the letters were not coercive in the way that *Bantam Books* required.<sup>136</sup>

To justify this conclusion, the Third Circuit did not argue that the coercive effect of the letter was unintended. It would have been hard to make such an argument. What else could have been the purpose of the letter, after all? Instead, the court argued that the threats the letter made were not sufficiently coercive to constitute an informal prior restraint because they did not impose

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<sup>130</sup> 735 F.2d 85 (3d Cir. 1984).

<sup>131</sup> *Id.* at 86. The billboards were unsightly, according to the letter, not only because they were too large but also because they advertised out-of-town businesses. *Id.* at 86 n.2.

<sup>132</sup> *Id.* at 86 n.2.

<sup>133</sup> *Id.* at 89 (Becker, C.J., dissenting).

<sup>134</sup> *R.C. Maxwell*, 735 F.2d at 87–89 (majority opinion).

<sup>135</sup> *Id.* at 90 (Becker, C.J., dissenting).

<sup>136</sup> *Id.* at 87–89 (majority opinion) (finding that the bank "readily agreed to remove the billboards" and that there was therefore no "state-coerced action").

the same kind of pressure that the Rhode Island Commission employed.<sup>137</sup> “The quantum of governmental authority brought to bear [in this case],” the Third Circuit argued, “was far less than that faced by Rhode Island’s booksellers.”<sup>138</sup> More specifically, “[w]hile the Commission in *Bantam Books* threatened criminal prosecution under existing criminal statutes, the Borough Council of New Hope could brandish nothing more serious than civil or administrative proceedings under a zoning ordinance not yet drafted.”<sup>139</sup> Moreover, the Third Circuit noted, “The Commission punctuated its letters with personal visits from uniformed police officers; the Borough Council only with additional correspondence.”<sup>140</sup> This meant, the court concluded, that the communications alleged in the case could not have “coerced” private action in the constitutionally relevant sense.<sup>141</sup>

The Third Circuit did not, in other words, engage in a holistic analysis of the facts and circumstances of the case in an effort to understand whether the letter was intended to coerce the bank to take down the billboards by threatening to withhold approval of its development project if it did not, and whether fear of those sanctions was what led the bank to act. Instead, the court categorically rejected the idea that this kind of letter, and these kinds of threats, could ever violate the First Amendment.

The opinion suggests that the Third Circuit narrowed the reach of the *Bantam Books* rule in this way because it believed a more expansive interpretation of the First Amendment rule against jawboning would undermine both effective governance and private autonomy. It did so because it regarded the letter as simply reflecting “the local community’s distaste for the billboards” and believed that it was “natural[ ]” that businesses were sensitive to this kind of collective distaste and, more generally, “sensitive to their images in the community.”<sup>142</sup> The Third Circuit concluded, “If we were to apply constitutional standards to every private action intended to conform to civic sentiment, we would erode the ambit of private action greatly.”<sup>143</sup> A narrow

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<sup>137</sup> *Id.* at 88–89.

<sup>138</sup> *Id.* at 88.

<sup>139</sup> *R.C. Maxwell*, 735 F.2d at 88.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 89.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (concluding that “Citibank’s desire to create a receptive climate for any future development plans [did] not rise to the level of state-coerced action” and therefore declining to address the question whether “the Borough Council was motivated by impermissible, content-based distinctions” when it wrote the letter).

interpretation of *Bantam Books* was necessary, in other words, to empower businesses to make choices for themselves.

Other courts interpreted *Bantam Books* in a similarly restrictive manner, and for similar reasons. For example, in *Penthouse International, Ltd. v. Meese*,<sup>144</sup> the D.C. Circuit dismissed a First Amendment claim brought by *Penthouse* and *Playboy* magazines against members of a special commission within the Department of Justice (DOJ) that had been convened by the Attorney General to examine the problem of pornography in the United States.<sup>145</sup> The magazines claimed that the commission violated their First Amendment rights when it sent a letter to 7-Eleven and other major retailers that informed them that they had been identified in expert testimony as “involved in the sale or distribution of pornography,” and offered them an opportunity to “respond to the allegations” before they were included in a list of “identified distributors” in its upcoming report.<sup>146</sup> Immediately after receiving this letter, many of these retailers, including 7-Eleven, stopped selling both magazines.<sup>147</sup> The magazines also alleged that some retailers, “out of an abundance of caution,” also temporarily suspended the sale of *American Photographer* and *Cosmopolitan* magazines because they contained photographs of women with bare breasts.<sup>148</sup>

Despite this evidence that the commission’s letter caused retailers to suppress speech—in part because some understood the letter to threaten them with criminal charges (a conclusion encouraged by the fact that it arrived on DOJ letterhead, used the term “allegations,” and instructed its recipients to contact an attorney associated with the commission if they had questions)<sup>149</sup>—and notwithstanding the district court’s conclusion that “the only purpose served by th[e] letter was to discourage distributors from selling the publications,”<sup>150</sup> the D.C. Circuit held that the letter did not and *could not* constitute an informal prior restraint. This was the case, it held, because the letter did not talk about criminal sanctions or threaten to “proscribe the distribution of the

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<sup>144</sup> 939 F.2d 1011 (D.C. Cir. 1991).

<sup>145</sup> *Id.* at 1012–14, 1020.

<sup>146</sup> *Id.* at 1013. Specifically, the letter stated that “The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.” *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Playboy Enters., Inc. v. Meese*, 639 F. Supp. 581, 584 (D.D.C. 1986).

<sup>149</sup> *Penthouse*, 939 F.2d at 1015.

<sup>150</sup> *Playboy*, 639 F. Supp. at 587.

publications” and therefore was not coercive in a constitutionally meaningful sense.<sup>151</sup>

In concluding that the letter could not have contained an implicit threat because the commission “had no [ ] tie to prosecutorial power nor authority to censor publications,” the D.C. Circuit acknowledged that the same lack of prosecutorial power was true of the commission in *Bantam Books*.<sup>152</sup> Nevertheless, it insisted that the cases were distinguishable because the Rhode Island Commission was specially charged by the legislature with the power “to investigate and *recommend the prosecution* of all violations” of the state obscenity laws, and stated as much in the notices it sent to booksellers.<sup>153</sup> This meant, the D.C. Circuit argued, that in *Bantam Books* “the plaintiff faced a genuine threat of prosecution,” in contrast to the plaintiffs here.<sup>154</sup>

In fact, there is nothing in Justice Brennan’s opinion in *Bantam Books* to suggest that the Court believed the targets of the Rhode Island Commission’s jawboning campaign faced a genuine threat of prosecution. To the contrary: As explained above, the Court viewed the central constitutional vice of the Rhode Island Commission’s actions to be that they were very unlikely to ever result in criminal prosecutions or to otherwise be tested in court.

By interpreting *Bantam Books* to require this kind of a threat before informal communications could be found to be prior restraints, the D.C. Circuit significantly narrowed the reach of the earlier opinion and transformed it from a case about coercive intent into a case about “genuine” threats.<sup>155</sup> And it did so, the opinion strongly suggests, for the same reason that motivated the Third Circuit in *R.C. Maxwell*: namely, because the court believed that a more fulsome reading of the principle announced in *Bantam Books* would undermine the ability of government officials to put pressure on private businesses when they acted contrary to the public interest, including by threatening their reputation or by targeting

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<sup>151</sup> *Penthouse*, 939 F.2d at 1015:

The letter [the Commission] sent contained no threat to prosecute, nor intimidation of intent to proscribe the distribution of the publications. . . . It may well be that the Commission came close to implying more authority than it either had or explicitly claimed. Nevertheless—any misapprehensions of recipients notwithstanding—we do not believe that the Commission ever threatened to use the coercive power of the state against recipients of the letter.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 1014 (emphasis in original) (quotation marks omitted) (quoting *Bantam Books*, 372 U.S. at 60 n.1).

<sup>154</sup> *Id.* at 1015.

<sup>155</sup> *Id.* at 1015.

them in other ways. “We do not see why,” the D.C. Circuit wrote, “government officials may not vigorously criticize a publication for any reason they wish. . . . If the First Amendment were thought to be violated any time a private citizen’s speech or writings were criticized by a government official, those officials might be virtually immobilized.”<sup>156</sup>

The result of these and other decisions was a much more restrictive interpretation of the First Amendment anti-jawboning rule than the interpretation that underpinned the *Bee See Books* and *Writers Guild* cases, and one that strongly suggested that only certain kinds of government officials—those who had the power to actually institute prosecutions, or at least, to credibly threaten them—could impose an informal prior restraint on speech, and that they could do so only when they used a sufficient “quantum of governmental authority” to make it unreasonable to expect the private party to resist.<sup>157</sup>

In some cases, courts went even further: They interpreted the First Amendment anti-jawboning rule to apply only when the threat levied by the government official was so strong that it left its target with essentially no choice but to comply. To justify this reading of the rule, these courts turned not to *Bantam Books* but to another Supreme Court opinion, *Blum v. Yaretsky*,<sup>158</sup> written two decades later. *Blum* was not a jawboning or First Amendment case. It involved in fact a fundamentally different question than most jawboning cases do: namely, what constitutional standards apply when the government delegates authority for enforcing government programs like Medicaid to private parties—such as private nursing homes—but encourages those private parties to exercise that authority in particular ways, by making it more or less financially advantageous for them to do so.<sup>159</sup> Most jawboning cases do not involve an act of delegation—instead, a government official tells or “asks” a private speaker or intermediary to stop saying certain things, or certain kinds of things. There is ordinarily very little discretion in how to implement the request.

Nevertheless, the core question that *Blum* addressed—when can government officials be found constitutionally responsible for actions that cause private parties to deprive other private parties

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<sup>156</sup> *Penthouse*, 939 F.2d at 1115–16.

<sup>157</sup> *R.C. Maxwell*, 735 F.2d at 88.

<sup>158</sup> 457 U.S. 991 (1982).

<sup>159</sup> Indeed, the Court explicitly acknowledged in its opinion that the constitutional analysis would be different had the government “affirmatively command[ed]” the challenged private action. *Id.* at 1005; see also Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1422–23 (2003) (discussing *Blum* as a delegation case).

of constitutionally protected liberties?—has obvious resonances with the question posed by jawboning cases. And in the wake of the decision, lower courts relied upon the answer that *Blum* gave to that question—namely, that government officials can be responsible for the actions of a private party only when they exercise such significant “coercive power” or “significant encouragement” that they effectively dictate the outcome of the private party’s decision-making—to limit the reach of the First Amendment anti-jawboning rule.<sup>160</sup>

For an example of *Blum*’s impact on the jawboning case law, consider the opinion in *Abu-Jamal v. National Public Radio*.<sup>161</sup> In that case, the D.C. District Court, in an opinion affirmed by the D.C. Circuit, dismissed a complaint brought by the political activist and death row inmate Mumia Abu-Jamal that alleged that Abu-Jamal’s First Amendment rights were violated when members of Congress pressured National Public Radio (NPR) into canceling its plans to hire Abu-Jamal as a political commentator just hours before his first commentary was set to air by threatening the network’s future federal funding if it allowed this “convicted cop-killer” on the air.<sup>162</sup> At the time, the sudden suspension of Abu-Jamal’s commentaries set off a firestorm of controversy and charges of government censorship.<sup>163</sup> Nevertheless, the court dismissed the complaint because it found that, even if the plaintiffs’ allegations were true that members of Congress had threatened NPR with the loss of all future federal funding if it did not cancel its contract with Abu-Jamal, NPR could have resisted the

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<sup>160</sup> *Blum*, 457 U.S. at 1004, 1008, 1010 (holding that “a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State,” and concluding that that condition was not satisfied in the instant case because, to implement the government mandate, private actors made decisions “according to professional standards that are not established by the State,” and state regulations “do not dictate the decision to discharge or transfer in a particular case”).

<sup>161</sup> *Abu-Jamal v. Nat’l Pub. Radio*, 1997 WL 527349 (D.D.C. Aug. 21, 1997), *aff’d*, 159 F.3d 635 (D.C. Cir. 1998).

<sup>162</sup> 141 CONG. REC. S8080 (daily ed. June 9, 1995) (statement of Sen. Bob Dole); *see also* Brief for Appellants at 10 n.2, *Abu-Jamal*, 159 F.3d 635 (No. 97-7198) (discussing this congressional pressure).

<sup>163</sup> *See* Elizabeth Kolbert, *Public Radio Won’t Use Commentary by Inmate*, N.Y. TIMES (May 17, 1994), <https://www.nytimes.com/1994/05/17/us/public-radio-won-t-use-commentary-by-inmate.html> (describing the controversy). The decision had knock-on effects. *See Inmate Controversy Raises Issues of Censorship*, SOC’Y OF PRO. JOURNALISTS (Mar. 15, 1997), <https://perma.cc/2Y46-V36G> (describing the decision by Temple University to cancel its contract with Pacifica Radio after Pacifica decided to put Abu-Jamal on air and quoting the school’s vice president of public relations, who told the Philadelphia Inquirer that “what’s good enough for NPR is good enough for me”).

threat.<sup>164</sup> More specifically, the court found that, because none of the members of Congress who were alleged to have pressured NPR into canceling the broadcast had “any [formal] legal control over NPR’s actions,” and “the entire Congress controls [only] a small portion of [the] federal funding [that] NPR receives,” their threats did not leave NPR with “no choice but to act in a way compelled by the [government].”<sup>165</sup> Hence, under the state action test outlined in *Blum*, the court concluded that “NPR’s ‘choice in law’ not to air Jamal’s broadcast” could not be attributed to the government *even if* a jury found that the government pressure was the reason why NPR abruptly suspended its plans to air Abu-Jamal’s interview, and that this was what the lawmakers who made those threats intended.<sup>166</sup>

The court’s conclusion that the decision to take the interview off the air could not be state action because NPR retained some choice in the matter stands in marked contrast to the state action analysis in *Bantam Books*.<sup>167</sup> And it exemplified the inconsistency in how lower courts analyzed jawboning claims in the decades after *Bantam Books* was handed down. In one line of cases, the only factors that determined whether jawboning violated the First Amendment were the intent that motivated it and its effects. In the other line of cases, in contrast, the plaintiffs also had to show that the threats the government used to coerce the private party’s compliance possessed a sufficient quantum of force to deprive their target of the meaningful or reasonable ability to say no to the pressure.

Courts interpreted the jawboning precedents in these very different ways because of what appeared to be their deeply held, but divergent, views about whether government officials could ever use the carrots and sticks they possessed by virtue of their office to pressure private actors into making more public-regarding choices with respect to the speech they associated themselves with or hosted. *Bantam Books* suggested that the answer to this

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<sup>164</sup> *Abu-Jamal*, 1997 WL 527349, at \*7.

<sup>165</sup> *Id.* at \*6–7.

<sup>166</sup> *Id.* at \*6. Some lawmakers definitely took credit for the decision. Senator Bob Dole, leader of the campaign against the Abu-Jamal interviews, boasted on the floor of Congress that “if it had not been for Members of Congress . . . [the American people] would have been hearing this cop killer on National Public Radio with commentaries.” 141 CONG. REC. S8081 (daily ed. June 9, 1995) (statement of Sen. Bob Dole).

<sup>167</sup> *Bantam Books*, 372 U.S. at 58, 69 n.9 (finding state action because, even if “in carrying on the function of censor, the Commission may have been exceeding its statutory authority,” the government’s communications to the booksellers were not “purely advisory” but rather “coercive in purport”).

question was no. Decisions like *R.C. Maxwell*, *Penthouse*, and the Ninth Circuit’s decision in the *Writers Guild* case suggest instead that the answer to this question was sometimes yes: Jawboning of this kind was a legitimate tool of government, so long as it wasn’t so coercive that it left its target with no “reasonable” opportunity to resist. Opinions like *Okwedy* and *R.C. Maxwell* reflect, in other words, strikingly different views of how the balance between public and private power should be struck when it comes to the regulation of speech in the democratic public sphere.

Nevertheless, despite the significant differences in how courts viewed the constitutional interests at stake in jawboning cases—and, consequently, the rules they relied upon to decide them—the decisions rarely acknowledged the inconsistencies in the case law and certainly did not attempt to reconcile them. The result was a confused and confusing body of law that made it very difficult to understand what the First Amendment rule against informal censorship actually required.

This became crystal clear when, in the 2000s, users of social media began to bring First Amendment lawsuits against officials—or in some cases, social media companies who they claimed suppressed their speech due to government coercion—and courts applied very different rules to resolve their claims. It was at this point that, six decades after it decided *Bantam Books*, the Supreme Court finally decided to weigh in once again on the question of how the First Amendment applies to informal government pressure campaigns. The result was a bracing reaffirmation of the anti-formalist, intent-focused approach to the analysis of jawboning campaigns.

## II. THE *VULLO* RESET

For decades, the disagreement and uncertainty that characterized the lower courts’ First Amendment jawboning cases simmered at a low boil. It persisted, but no one really seemed to notice or care very much. As the First Amendment extended its reach over ever more kinds of formal government actions, the constraints it imposed on informal governmental action attracted little attention. Although informal censorship cases continued to make their way through the courts, few law review articles were written on the topic.<sup>168</sup> Nor was there much public debate about the government’s power to jawbone.

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<sup>168</sup> Judge David Bazelon wrote a terrific article in 1975 that examined what he described as the “raised eyebrow” pressure campaigns the FCC wielded against broadcast media. Bazelon, *supra* note 128, at 216. And scholars wrote intermittently about the

All of this changed with the emergence of the internet and the development of the vast digital speech forums we know today. The low barriers to entry to these forums and their increasing economic, political, and cultural importance to public life in the United States, when combined with the many roadblocks that the First Amendment imposed on the government's ability to formally regulate speech on private property, generated significant concern as early as the mid-2000s about the possibility that officials would turn to informal methods to try to prevent the dissemination of what they considered to be harmful speech online. Professor Seth Kreimer, for example, argued in 2006 that, in response to the "Internet's resistance to direct regulation of speakers and listeners," government actors had begun to "enlist private actors . . . as proxy censors to control the flow of information."<sup>169</sup> And several years later, Professor Jack Balkin identified governmental "co-optation" of private power as one of the "hallmarks of [ ] speech regulation" in the digital public sphere.<sup>170</sup>

Concern with this kind of proxy censorship only intensified in later years, particularly after conservative politicians came to believe that far-right speakers were being particularly targeted by the policing of speech online.<sup>171</sup> At first, this speech policing was blamed on the liberal bias of the tech companies, but after President Joe Biden took office in 2020, politicians and others

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jawboning of nonmedia businesses. *See generally, e.g.,* Verkuil, *supra* note 17. Other than these pieces, however, there were very few, if any, scholarly articles that explored the First Amendment problem of jawboning until a rash of articles in the early 2000s, when scholars like Seth Kreimer and Yochai Benkler began to explore how informal governmental pressure was used to regulate speech on social media companies. *See generally* Kreimer, *supra* note 40; Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 340 (2011). Despite Judge Bazelon's very serious concerns with FCC jawboning of speech, First Amendment scholars appear to have been remarkably uninterested in the problem.

<sup>169</sup> Kreimer, *supra* note 40, at 14.

<sup>170</sup> Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2298 (2014); *see also* Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 S.M.U. L. REV. 27, 28–29 (2019) (describing how "[i]n the last several years, providers of Internet communication services have come under increasing pressures from governments across the world to police speech and privacy online"); Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power over Online Speech* 5 (Hoover Inst., Aegis Series Paper No. 1902, 2019) ("Jawboning by politicians and regulators, paired with 'voluntary' self-regulation by platforms, has effectively transformed the landscape for online speech over the past decade."); Bambauer, *supra* note 17, at 61 (expressing alarm that jawboning "is on the rise . . . [as a result of] a libertarian trend in Internet regulation that constrains more formal actions").

<sup>171</sup> *See* Evelyn Douek & Genevieve Lakier, *First Amendment Politics Gets Weird: Public and Private Platform Reform and the Breakdown of the Laissez-Faire Free Speech Consensus*, U. CHI. L. REV. ONLINE (June 6, 2022), <https://perma.cc/ZZ4X-9DPT>.

began to argue that it was at least partly the consequence of government coercion.<sup>172</sup> The result was to transform the previously unexciting doctrinal question of what constitutes informal censorship into front-page news.<sup>173</sup>

It was in this fraught political context that courts witnessed first a trickle and then a flood of First Amendment jawboning lawsuits, many brought by social media users who believe their speech had been suppressed by the platforms as a result of the new “censorship industrial complex” they saw evidence of all around them.<sup>174</sup> And, entirely predictably, given the state of the case law prior to the emergence of the social media platforms, courts called to analyze these claims employed inconsistent and divergent tests.

Some courts employed a broad intent-focused test of jawboning to resolve these claims. For example, in *Backpage.com, LLC v. Dart*,<sup>175</sup> the Seventh Circuit held that the Cook County Sheriff, Thomas Dart, violated the First Amendment when he wrote a

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<sup>172</sup> For a good example of the claims that began to be made in the wake of President Biden’s election, see generally SENATE COMM. ON THE JUDICIARY, THE CENSORSHIP-INDUSTRIAL COMPLEX: HOW TOP BIDEN WHITE HOUSE OFFICIALS COERCED BIG TECH TO CENSOR AMERICANS, TRUE INFORMATION, AND CRITICS OF THE BIDEN ADMINISTRATION (2024).

<sup>173</sup> See, e.g., Kate Conger & Sheera Frenkel, *Twitter Is Said to Have Struggled over Revealing U.S. Influence Campaign*, N.Y. TIMES (Dec. 22, 2022), <https://www.nytimes.com/2022/12/22/technology/twitter-military-influence-campaign.html>; Michael M. Grynbaum, *Elon Musk, Matt Taibbi, and a Very Modern Media Maelstrom*, N.Y. TIMES (Dec. 8, 2022), <https://www.nytimes.com/2022/12/04/business/media/elon-musk-twitter-matt-taibbi.html>.

<sup>174</sup> See, e.g., *Kennedy v. Warren*, 66 F.4th 1199, 1205 (9th Cir. 2023) (describing a suit against Senator Elizabeth Warren for allegedly attempting to pressure Amazon into suppressing a publication on COVID-19); *O’Handley v. Weber*, 62 F.4th 1145, 1154 (9th Cir. 2023) (describing a suit against the California Office of Elections Cybersecurity for allegedly pressuring Twitter to take down one of the plaintiff’s posts); *Missouri v. Biden*, 662 F. Supp. 3d 626, 639 (W.D. La. 2023) (describing a suit against defendants for allegedly pressuring Facebook to censor disinformation in Spanish); *Ass’n of Am. Physicians & Surgeons, Inc. v. Schiff*, 23 F.4th 1028, 1031 (D.C. Cir. 2022); *Trump v. Twitter Inc.*, 602 F. Supp. 3d 1213, 1218 (N.D. Cal. 2022); *Changizi v. Dep’t of Health & Hum. Servs.*, 602 F. Supp. 3d 1031, 1038 (S.D. Ohio 2022); *Hart v. Facebook Inc.*, 2022 WL 1427507, at \*1 (N.D. Cal. May 5, 2022); *Informed Consent Action Network v. YouTube LLC*, 582 F. Supp. 3d 712, 716 (N.D. Cal. 2022); *Children’s Health Def. v. Facebook Inc.*, 546 F. Supp. 3d 909, 928 (N.D. Cal. 2021); *Daniels v. Alphabet Inc.*, 2021 WL 1222166, at \*1 (N.D. Cal. Mar. 31, 2021); *Doe v. Google*, 2021 WL 4864418, at \*4 (N.D. Cal. Oct. 19, 2021), *aff’d*, 2022 WL 17077497 (9th Cir. Nov. 18, 2022); *Rogalinski v. Meta Platforms, Inc.*, 2022 WL 3219368, at \*3 (N.D. Cal. Aug. 9, 2022); *Doe v. Google LLC*, 2021 WL 4864418, at \*4 (N.D. Cal. Oct. 19, 2021); *Rock the Vote v. Trump*, 2020 WL 6342927, at \*5 (N.D. Cal. Oct. 29, 2020); *Google, Inc. v. Hood*, 822 F.3d 212, 218 (5th Cir. 2016); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015). The quoted language comes from *Hearing on the Weaponization of the Federal Government: Hearing Before the Select Subcomm. on the Weaponization of the Fed. Gov’t of the H. Comm. on the Judiciary*, 118th Cong. 10 (2023) (statement of Michael Shellenberger, Co-founder, Public, a Substack publication).

<sup>175</sup> 807 F.3d 229 (7th Cir. 2015).

letter to two credit card companies that provided payment-processing services to the classified ads website, Backpage.com, that strongly urged those companies to sever all ties with the website because it facilitated what the letter claimed to be the “growth” of sex trafficking in the United States.<sup>176</sup> Dart and his staff followed up on the letter with phone calls that warned executives at the two companies that if they did not immediately cease their association with Backpage.com, Dart would hold a press conference in which he would “point[ ] out [their] ties to sex trafficking.”<sup>177</sup> It was at this point that both of the credit card companies targeted by Dart decided to stop providing their services to Backpage.com.<sup>178</sup> On these facts, the Seventh Circuit concluded that Dart’s actions coerced the credit card companies in an effort to suppress Backpage.com’s speech, in violation of the First Amendment.<sup>179</sup>

The Seventh Circuit concluded that Sheriff Dart engaged in unconstitutional jawboning even though executives at the credit card companies denied that they were coerced by him and even though the sheriff never credibly threatened the companies with criminal prosecution, or any other serious legal sanction.<sup>180</sup> In his letter to the companies, Dart did remind the companies of their duty under federal law to file “‘Suspicious Activity Reports’ . . . in cases of human trafficking and sexual exploitation of minors.”<sup>181</sup> He also cited the federal money laundering statute, which the Seventh Circuit interpreted as “intimating that the credit card companies could be prosecuted for processing payments made by purchasers of the ads on Backpage that promote unlawful sexual activity, such as prostitution.”<sup>182</sup> But Dart did not possess any power to prosecute these crimes, or any special authority to recommend that the federal government prosecute these crimes. Nor did Dart invoke any laws that he *did* have the authority to prosecute. The threat he proffered was therefore very far from the “genuine threat of

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<sup>176</sup> *Id.* at 232–33.

<sup>177</sup> *Id.* at 233 (emphasis omitted).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*:

Visa and MasterCard were victims of government coercion aimed at shutting up or shutting down Backpage’s adult section . . . when it is unclear that Backpage is engaged in illegal activity, and if it is not then the credit card companies cannot be accomplices and should not be threatened as accomplices by the sheriff and his staff.

<sup>180</sup> *Backpage.com*, 807 F.3d at 233.

<sup>181</sup> *Id.* at 232.

<sup>182</sup> *Id.*

prosecution”<sup>183</sup> that the D.C. Circuit read *Bantam Books* to require.<sup>184</sup> Nevertheless, the Seventh Circuit found Dart’s actions to be unconstitutional because they were intended to coerce the credit card companies into severing their ties with the website by threatening them with the imposition of legal as well as reputational harm if they did not comply, and these threats were reasonably understood as such by their targets. On its reading of *Bantam Books*, this is all the court interpreted the First Amendment bar on informal prior restraints to require.<sup>185</sup> Indeed, like the Third Circuit, the Seventh Circuit insisted that it did not matter whether Dart’s threats actually succeeded.<sup>186</sup> What mattered was that he attempted to evade the constitutional constraints on his power—in other words, that he engaged in constitutional evasion.

Other courts interpreted the First Amendment anti-jawboning rule much more narrowly. For example, in *Informed Consent Action Network v. YouTube LLC*,<sup>187</sup> a district court in Northern California dismissed claims that members of Congress, including Congressman Adam Schiff, unconstitutionally pressured social media companies into suppressing the plaintiff organization’s vaccine-skeptical videos by writing public letters to company executives that asked them pointed questions about their medical misinformation policies and by making public speeches in which they threatened to limit or entirely remove the companies’ statutory immunity to suit under § 230 of the Communications Decency Act.<sup>188</sup> The court found that the plaintiff’s First Amendment arguments failed as a matter of law because none of the members of Congress identified in the lawsuit “ha[d] any legal control over [the defendant’s] actions”—that is to say, they could not prosecute the platforms criminally, or exercise authority over them in any other direct ways.<sup>189</sup> For this reason, the court concluded, just as the *Abu-Jamal* court had, that

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<sup>183</sup> *Penthouse*, 939 F.2d at 1015.

<sup>184</sup> The Seventh Circuit acknowledged as much. *Backpage.com*, 807 F.3d at 234:

It’s unlikely that credit card companies would be prosecuted as aiders and abettors of Backpage, any more than the landlord of premises occupied by Backpage would be; but obviously credit card companies don’t like being threatened by a law-enforcement official that he will sic the feds on them, even if the threat may be empty.

<sup>185</sup> *Id.* at 235.

<sup>186</sup> *Id.* at 231 (“[A] threat is actionable and thus can be enjoined even if it turns out to be empty—the victim ignores it, and the threatener folds his tent. But the victims in this case yielded to the threat.”).

<sup>187</sup> 582 F. Supp. 3d 712 (N.D. Cal. 2022).

<sup>188</sup> *Id.* at 716 (citing 47 U.S.C. § 230(e)(1)).

<sup>189</sup> *Id.* at 723 (emphasis omitted) (quotation marks omitted) (quoting *Abu-Jamal*, 1997 WL 527349, at \*6).

“[t]he publicly expressed views of individual members of Congress—regardless of how influential—do not constitute ‘action’ on the part of the federal government.”<sup>190</sup> The court also expressed great skepticism about the idea that “an act against a private entity’s economic interest” would ever be sufficient to “demonstrate[ ] government compulsion.”<sup>191</sup> This simply wasn’t the kind of coercion, it suggested, that the First Amendment forbade.

In yet other cases, courts, clearly sympathetic to the vocal criticisms levied in the political arena against the Biden administration’s jawboning campaigns, interpreted the *Bantam Books* anti-jawboning rule much more expansively than it had previously been interpreted. Specifically, in *Missouri v. Biden*,<sup>192</sup> the Fifth Circuit held that takedown requests made by the FBI to social media companies were coercive for the sole reason that the FBI was the “lead law enforcement, investigatory, and domestic security agency for the executive branch” and therefore possessed a kind of “inherent authority” that made it reasonable to view even politely worded requests as coercive in nature.<sup>193</sup> In effect, the Fifth Circuit held that blacklists—at least when issued by an institution like the FBI—were per se unconstitutional, just as the Authors League had argued in *Bantam Books*.<sup>194</sup>

The Fifth Circuit also held that evidence that government officials coerced the cooperation of the private parties was not in fact a prerequisite to a jawboning claim, as almost all courts up until that point had assumed.<sup>195</sup> The Court invoked language from *Blum v. Yaretsky* (which previously, recall, had been used to narrow the reach of the anti-jawboning rule, not expand it) to conclude that officials might have also violated the First Amendment when they provided guidance to private speech intermediaries that then became the basis of private decision-making, even absent any evidence that they used carrots or sticks to compel the private companies to comply.<sup>196</sup> The Fifth Circuit found, for example, that the Centers for Disease Control and Prevention (CDC) violated the First Amendment when it provided advice to social

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<sup>190</sup> *Id.* (alteration in original) (quoting *Daniels*, 2021 WL 1222166, at \*6).

<sup>191</sup> *Id.*

<sup>192</sup> 83 F.4th 350 (5th Cir. 2023).

<sup>193</sup> *Id.* at 388.

<sup>194</sup> See Brief of the Authors League of America, Inc. as Amicus Curiae, supra note 93, at 2 (arguing that “the publication and distribution of the Commission’s lists is, *per se*, a restraint on free speech prohibited by the First Amendment”).

<sup>195</sup> *Missouri v. Biden*, 83 F.4th at 380–81.

<sup>196</sup> *Id.* at 374 (noting that “coercion and significant encouragement” are “two distinct means of” holding officials responsible for the private suppression of speech).

media companies about what constituted health misinformation that those companies subsequently relied on to remove speech from their platforms—and that this was true even if the CDC, in providing that advice, did not act coercively.<sup>197</sup>

The result of these and other decisions was an extraordinarily broad range of views and doctrinal possibilities when it came to the First Amendment law of jawboning—and ultimately, the Supreme Court intervened. After decades of avoiding the issue, the Court agreed to decide in the same term two cases that raised the question of how the First Amendment applies to informal governmental pressure campaigns. The first of these cases was *National Rifle Ass'n of America v. Vullo*; the second was *Missouri v. Biden*, which once it reached the Court was renamed *Murthy v. Missouri*.<sup>198</sup> Although the Court ended up dismissing *Murthy* on standing grounds (as discussed in Part III), in *Vullo*, the Court not only reached the First Amendment merits of the case but also enthusiastically reaffirmed the approach to the problem of jawboning articulated in *Bantam Books*. The opinion thus appeared to end the debate over how the First Amendment rule against informal censorship should be interpreted, even if it also left a number of important questions unanswered. In this Part, I explain what *Vullo* held, its limits, and the merits of that holding.

#### A. *Vullo's* Principles

*Vullo* provided the Court with an excellent opportunity to weigh in on the question that was central to the disagreement in the lower courts about the meaning of the First Amendment anti-jawboning rule. This is because the kinds of pressure tactics alleged in the case were quite different from those at issue in *Bantam Books* and, in many respects, considerably less forceful. This meant that the case could not be resolved on its merits without providing an answer to the question that was the cause of so much disagreement: Does the First Amendment prohibit *all* informal communications between government officials and private actors that reflect a (reasonably intelligible) speech-suppressive intent? Or does it instead prohibit only certain kinds of schemes of constitutional evasion—those that are so forceful in the tactics they employ that their targets cannot reasonably resist them? This was, essentially, the question that the case teed up. And because the case came to the Court at the motion to dismiss stage, it teed it up

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<sup>197</sup> *Id.* at 389–90.

<sup>198</sup> 144 S. Ct. 1972 (2024).

cleanly. Because the Court was tasked with deciding merely whether the plaintiff's allegations were *plausible*, it did not have to deal with messy questions of evidence and proof.<sup>199</sup> It could instead focus exclusively on the doctrinal principles that applied.

The facts of the case, as alleged in the complaint, were these: After being tipped off by a whistleblower that Carry Guard, an insurance policy that the National Rifle Association (NRA) offered to its members, violated several New York laws, Maria Vullo, Superintendent of the New York State Department of Financial Services (DFS), began investigating three insurance companies that provided Carry Guard, or underwrote it, to see if other NRA-branded policies they offered violated the law in similar ways.<sup>200</sup> This investigation ramped up or, perhaps more accurately, transformed in character, after a lone gunman killed eighteen students and teachers at Marjorie Stoneman Douglas High School in Florida in early 2018.<sup>201</sup> Many blamed the NRA for preventing the enactment of gun safety measures that could have prevented the massacre, and in New York, as in many states, government officials took steps to limit what they viewed as the NRA's pernicious political power so that a similar shooting would not happen as easily again.

Vullo, for her part, participated in this broader effort by doing what she could to publicly and privately pressure the insurance companies she regulated to not only stop carrying Carry Guard and other policies that violated New York law but also stop providing any "affinity" (i.e., NRA-branded) insurance at all.<sup>202</sup> Privately, Vullo met with representatives of one of the insurance companies under investigation and promised its officers that if they stopped providing affinity insurance for the NRA, she would not go after them for the "array of technical regulatory infractions" they had incurred in other (non-gun-related) areas of their business.<sup>203</sup> Publicly, Vullo issued two guidance letters that praised the "'social backlash' against the NRA and other groups 'that promote guns that lead to senseless violence,'" and she warned insurance companies and banks that operated in the state of the "risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion

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<sup>199</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.")

<sup>200</sup> *Vullo*, 144 S. Ct. at 1322–23.

<sup>201</sup> *Id.* at 1323.

<sup>202</sup> *Id.* at 1323–24.

<sup>203</sup> *Id.* at 1323.

organizations.”<sup>204</sup> The letters also encouraged regulated institutions to “review any relationships they have with the NRA or similar gun promotion organizations,” and to “take prompt actions to manag[e] these risks and promote public health and safety.”<sup>205</sup>

The same day Vullo issued these documents, Governor Andrew Cuomo issued a press statement that echoed and expanded upon her warnings. In his press statement, Governor Cuomo emphasized again the administration’s belief that companies should “consider whether [ ] [their] ties [to the National Rifle Association and other similar organizations] harm their corporate reputations and jeopardize public safety.”<sup>206</sup> The press statement also approvingly noted the “number of businesses [that] have ended relationships with the NRA following the . . . school shooting in order to realign their company’s values,” including businesses regulated by the New York DFS.<sup>207</sup> And the following day, Cuomo reiterated the call he made in the press statement in a tweet.<sup>208</sup> “The NRA is an extremist organization,” Cuomo tweeted. “I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public.”<sup>209</sup>

These public and private efforts to pressure financial companies in New York into severing their ties with the NRA apparently succeeded. Soon after the private meeting, one of the insurance companies targeted by Vullo’s investigation allegedly informed the NRA that it would have to “drop” the organization for “fear of ‘losing [its] license’ to do business in New York,” and soon thereafter, the organization declared via tweet that it would stop providing any NRA-endorsed insurance programs.<sup>210</sup> Several weeks after Vullo issued the guidance documents, the two other insurers targeted by her investigation also agreed to stop providing any affinity insurance for the NRA.<sup>211</sup> Other companies also

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<sup>204</sup> *Id.* at 1324 (quotation marks omitted) (quoting the guidance letters).

<sup>205</sup> *Vullo*, 144 S. Ct. at 1324 (alteration in original) (quotation marks omitted) (quoting the guidance letters).

<sup>206</sup> *Governor Cuomo Directs Department of Financial Services to Urge Companies to Weigh Reputational Risk of Business Ties to the NRA and Similar Organizations*, N.Y. STATE DEP’T OF FIN. SERVS. (Apr. 19, 2018), <https://perma.cc/F5XC-NNB7>.

<sup>207</sup> *Id.*

<sup>208</sup> Governor Andrew Cuomo (@NYGovCuomo), X (Apr. 20, 2018) [hereinafter *Cuomo Tweet*], <https://perma.cc/BD2E-W9T3>.

<sup>209</sup> *Vullo*, 144 S. Ct. at 1324 (quoting *Cuomo Tweet*, *supra* note 208).

<sup>210</sup> Brief for Petitioner National Rifle Association of America at 8, *Vullo*, 144 S. Ct. 1316 (No. 22-842).

<sup>211</sup> *Id.* at 10–11. As the NRA noted in its brief, the consent agreements that the companies entered into at this time “allowed the insurers to provide coverage to the NRA itself, or to assist the NRA in procuring corporate coverage, but forbade [them] from ‘enter[ing] into any agreement or program with the NRA to underwrite or participate in *any* affinity-type

stopped doing business with the NRA. The NRA alleged that, soon after the press statement and guidance documents were published, multiple banks withdrew bids they had earlier submitted to the organization and that it had trouble finding other insurance companies that were willing to work with it, given the obvious regulatory risks.<sup>212</sup>

It was at this point that the NRA filed suit in federal court, claiming that Cuomo and Vullo's actions violated its First Amendment rights by unconstitutionally coercing financial institutions in New York to stop associating with it because of the pro-gun message it communicated.<sup>213</sup> In response, the government defendants filed a motion to dismiss, in which they argued that nothing Vullo or Cuomo were alleged to have said or done established a plausible claim of unconstitutional coercion.<sup>214</sup>

Given the doctrinal landscape described in Part I, the government's motion had a great deal of precedential support. After all, Vullo never explicitly threatened the insurance companies with prosecution or threatened "to proscribe the distribution of [ ] publications."<sup>215</sup> Nor was the implicit threat of regulatory sanctions that the documents communicated necessarily something Vullo could easily make good on. Failure to adequately consider reputational risk was cited as a problem in recent regulatory proceedings that DFS brought against other financial institutions in New York, but no law explicitly prohibits financial institutions from failing to manage their reputational risk.<sup>216</sup> Therefore, even were the insurance companies targeted by the letter to defy its recommendation to sever their associations with the NRA, it was not obvious that Vullo could bring regulatory proceedings against them. Meanwhile, in the private meetings she held with insurers, Vullo allegedly offered the companies a grant of *leniency* if they severed ties with the NRA.<sup>217</sup> She offered them, in other words, an inducement, not a threat. The pressure campaign thus appeared to lack that "quantum" of force that many courts had previously

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insurance program involving *any* line of insurance." *Id.* (alterations and emphasis in original) (quoting settlement agreements in the record).

<sup>212</sup> *Id.* at 12.

<sup>213</sup> Nat'l Rifle Ass'n of Am. v. Cuomo, 350 F. Supp. 3d 94, 104 (N.D.N.Y. 2018).

<sup>214</sup> *Id.*

<sup>215</sup> *Penthouse*, 939 F.2d at 1015.

<sup>216</sup> Brief for Respondent at 48, *Vullo*, 144 S. Ct. 1316 (No. 22-842) (noting that "[o]perating with reputational risk is not illegal under New York law and cannot serve as the basis for a standalone enforcement action").

<sup>217</sup> Nat'l Rifle Ass'n of Am. v. Vullo, 49 F.4th 700, 713 (2d Cir. 2022).

interpreted the First Amendment rule against informal prior restraints to require.

This is certainly what the Second Circuit concluded when it ruled on the defendants' motion. Although the district court dismissed Governor Cuomo from the suit on Eleventh Amendment grounds, it found that the NRA's complaint could proceed.<sup>218</sup> But the Second Circuit reversed.<sup>219</sup> It held that, even if all the allegations about Vullo in the NRA's complaint turned out to be true, they did not make out a plausible claim of unconstitutional coercion.<sup>220</sup> The fact that neither of the guidance letters explicitly "refer[red] to any pending investigations or possible regulatory action" but instead used only "even-handed" and "nonthreatening" language meant, the court held, that even if "some may have perceived [Vullo's] remarks as threatening"—as the evidence suggests some clearly did—these statements could not have constituted "unconstitutional threats or coercion."<sup>221</sup> The Second Circuit also rejected the possibility that Vullo's offer to one of the insurers to not enforce their other regulatory infractions if they agreed to stop providing affinity insurance to the NRA was coercive. The fact that some of the policies did in fact violate New York law, a fact the insurers did not contest, made it, the court held, "only natural" that Vullo would "take steps—including investigating, negotiating, and resolving apparent violations—to enforce the law."<sup>222</sup> "Her actions," the court concluded, "were plainly reasonable."<sup>223</sup>

The Supreme Court, however, disagreed. In a 9–0 decision, it held that the NRA did in fact make out a plausible First Amendment claim, notwithstanding the indirectness of Vullo's threats and the fact that the strongest cudgel she possessed was the promise *not* to impose regulatory sanctions rather than to impose them.<sup>224</sup> In reaching this conclusion, the Court reaffirmed what *Bantam Books* first

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<sup>218</sup> Nat'l Rifle Ass'n of Am. v. Cuomo, 525 F. Supp. 3d 382, 411 (N.D.N.Y. 2021). The NRA did not appeal Cuomo's dismissal from the case.

<sup>219</sup> *Vullo*, 49 F.4th at 707.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 717–18. For evidence that some did view these statements as threatening, see Brian Knight, *Is New York Using Bank Regulation to Suppress Speech?*, FINREGRAG (Apr. 22, 2018), <https://perma.cc/Z9HE-G43Z> (noting that Vullo and Cuomo's request to New York financial institutions to reconsider their relationship with the NRA "could easily be construed [as] a thinly veiled threat"); Neil Haggerty, *Gun Issue Is a Lose-Lose for Banks (Whatever Their Stance)*, AM. BANKER (Apr. 26, 2018), <https://www.americanbanker.com/news/gun-issue-is-a-lose-lose-for-banks-whatever-their-stance> ("The guidance appeared somewhat benign . . . . But bankers say such regulatory guidelines are frustratingly vague, and can effectively compel institutions to cease catering to legal businesses.").

<sup>222</sup> *Vullo*, 49 F.4th at 719.

<sup>223</sup> *Id.*

<sup>224</sup> *Vullo*, 144 S. Ct. at 1332.

asserted six decades earlier but what in the interim period many lower courts appeared to have forgotten: namely, that the analysis of informal censorship should be an anti-formalist, context-sensitive inquiry, focused above all else on the question of the government's intent. "Ultimately," Justice Sonia Sotomayor asserted on behalf of the unanimous Court, "*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 [in order] to punish or suppress disfavored speech on her behalf."<sup>225</sup> What mattered was the intent of the government's actions, not their form.

The Court's insistence that what the First Amendment rule against informal censorship prohibits is the practice of constitutional evasion, not just the communication of explicit or "genuine" threats, led it to analyze the NRA's allegations quite differently than the Second Circuit had in a number of respects. First, it led the Court to focus much less exclusively on the content of Vullo's public and private statements, and to focus much more on the institutional and political context in which they were made, so that it could better understand what led Vullo to make those statements.<sup>226</sup> The Second Circuit had insisted, in its analysis of Vullo's actions, that her public and private statements "sp[oke] for themselves."<sup>227</sup> But the Court rejected the idea that the meaning of those statements could be determined so decisively, particularly given the significant power that Vullo possessed over the companies she addressed. As Justice Sotomayor noted, as superintendent of DFS, "Vullo could initiate investigations and refer cases for prosecution."<sup>228</sup> She could also "notice civil charges and . . .

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<sup>225</sup> *Id.* at 1328.

<sup>226</sup> *Id.* at 1328–30. Justice Neil Gorsuch wrote a separate concurrence to emphasize the importance of this kind of contextual analysis in jawboning cases and to criticize the formalism and decontextualized nature of the lower court's approach. *Id.* at 1333 (Gorsuch, J., concurring) (criticizing "the Second Circuit's decision to break up its analysis into discrete parts and 'tak[e] the [complaint's] allegations in isolation' . . . [for] contribut[ing] to its mistaken conclusion that the [NRA] failed to state a claim" (first and second alterations in original) (quoting *id.* at 1330 (majority opinion))).

<sup>227</sup> *Vullo*, 49 F.4th at 716 ("Vullo's words in the Guidance Letters and Press Release speak for themselves, and they cannot reasonably be construed as being unconstitutionally threatening or coercive."); *id.* at 718:

[T]he Consent Decrees speak for themselves—they explained the violations of law and, contrary to the NRA's assertions, did not require the companies to sever ties with the NRA. Rather, they explicitly permitted the companies to continue to do business with the NRA, assuming of course the programs did not violate New York law.

<sup>228</sup> *Vullo*, 144 S. Ct. at 1329.

enter into consent decrees [with financial institutions] that impose significant monetary penalties.”<sup>229</sup> Vullo possessed, in other words, more power than the Rhode Island Commission had. This mattered, the Court explained, because it made it “less likely [that her audience would] feel free to disregard [her] directive” than they would if the same words had been employed by a different, less powerful speaker.<sup>230</sup>

The Court’s reframing of the constitutional harm at issue in the case also led it to categorically reject the idea that it mattered at all to the First Amendment analysis that, in her private meeting with the insurers, Vullo allegedly offered leniency rather than a threat of greater regulatory or financial pain. Both threats and inducements, Justice Sotomayor noted, “can be coercive.”<sup>231</sup> Therefore, she asserted, “[t]he Constitution does not distinguish between ‘comply or I’ll prosecute’ and ‘comply and I’ll look the other way.’”<sup>232</sup> It didn’t matter, in other words, what form the coercive offer took; what mattered was that it was *intended* to pressure private actors into doing what the official was not permitted herself to do, and understood as such.

For similar reasons, the Court also rejected the idea that it mattered whether Vullo’s jawboning campaign targeted protected speech. The Second Circuit had strongly suggested in its opinion in the case that jawboning campaigns trigger First Amendment scrutiny only when they target speakers who engage in protected expression.<sup>233</sup> But Justice Sotomayor’s opinion reaffirmed what *Bantam Books* had made clear six decades earlier: that nothing turns on the constitutional status of the speech or action that is the target of the jawboning campaign.<sup>234</sup> The Court consequently rejected Vullo’s argument that because the intermediaries targeted by her communications were insurance companies, not speakers themselves, her actions did not implicate the First

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 1328.

<sup>231</sup> *Id.* at 1329.

<sup>232</sup> *Id.* (alteration in original) (quotation marks omitted) (quoting Brief for the United States as Amicus Curiae Supporting Neither Party at 18 n.7, *Vullo*, 144 S. Ct. 1316 (No. 22-842)).

<sup>233</sup> *Vullo*, 49 F.4th at 715 (holding that “government officials . . . may not encourage [the] suppression of *protected* speech in a manner that ‘can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow’” (emphasis added) (quoting *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983))).

<sup>234</sup> *Vullo*, 144 S. Ct. at 1331 (noting that “[n]othing in [*Bantam Books*] turned on the distributor’s compliance with state law,” and that the opinion instead “held that the commission violated the First Amendment by invoking legal sanctions to suppress disfavored publications, some of which *may or may not* contain protected speech” (emphasis added)).

Amendment. Because the alleged purpose of Vullo's campaign was to suppress the NRA's "gun-promotion advocacy," it did not matter whether the businesses Vullo targeted engaged in protected expressive activity or did not.<sup>235</sup> Nor did it matter that the regulatory infractions Vullo threatened to pursue reflected actual lawbreaking on the companies' part. "[A]lthough Vullo can pursue violations of state insurance law," Sotomayor noted, "she cannot do so in order to punish or suppress the NRA's protected expression."<sup>236</sup> What mattered ultimately to the constitutional analysis was Vullo's intent. Actions that a government official could pursue for legitimate ends became unconstitutional when motivated by a constitutionally evasive intent.

For similar reasons, also, the Court made clear that officials can violate the First Amendment anti-jawboning rule when they attempt to coerce the private suppression of speech but fail. "Considerations like . . . what reaction follow[s]" an official's informal pressure campaign, Justice Sotomayor noted, "are just helpful guideposts in answering the question whether an official seeks to persuade or, instead, to coerce," but are not themselves dispositive of the constitutional question.<sup>237</sup> In other words, like the Third and Seventh Circuits before it, the Court interpreted *Bantam Books* to mean that informal acts of governmental coercion violate the First Amendment even when they do not actually cause the suppression of any speech.

The result was an even broader interpretation of the rule against informal censorship than *Bantam Books* had articulated. To be sure, it was not as broad as it could have been. The Court could have employed the approach adopted by the Fifth Circuit in *Missouri v. Biden* and rejected altogether the idea that a finding of coercion was necessary to make out an unconstitutional jawboning claim. Instead, it doubled down on the importance of coercion to the constitutional analysis in jawboning cases but employed a much more expansive view of what kinds of informal communications can coerce than even *Bantam Books* had. It is hard to overstate the significance of this fact. After years of uncertainty in the lower courts about what the First Amendment rule against informal prior restraints forbids, *Vullo* provides a clear answer. To show that government officials unconstitutionally coerce the private suppression of speech or association, plaintiffs in First Amendment cases no longer need to show that those

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 1328.

officials made genuine threats of criminal prosecution or regulatory sanction, or otherwise used such serious force as to “remove [the] decision” about what to do about the disfavored speech “from the sphere of private choice.”<sup>238</sup> What they need to show instead is only that the officials engaged in “conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action” and that they did so “in order to punish or suppress the plaintiff’s speech” or association.<sup>239</sup>

In holding as much, the *Vullo* Court rejected the idea that the use of threats—or their constitutional equivalent, inducements—to pressure private actors into suppressing or punishing speech could *ever* be a legitimate exercise of government power.<sup>240</sup> It recognized that officials could violate the First Amendment even when they used evenhanded and nonthreatening language to coerce. And it implicitly cast doubt on the holdings in cases such as *R.C. Maxwell*, *Penthouse*, and *Abu-Jamal*.

As I argue in what follows, it is very good that the *Vullo* Court clarified the doctrine in this way. This is not only because murky doctrinal rules pose, in their own right, a significant First Amendment problem, but also because the lower courts were wrong to conclude that a rule against only genuine or explicit threats, and only threats of a certain kind (those that possessed a sufficient quantum of force), is sufficient to protect the independence of the democratic public sphere from practices of constitutional evasion. The lower courts were also wrong to assume that an intent-focused rule like the one articulated in *Bantam Books* and reaffirmed in *Vullo* imposes too great a cost on the expressive freedom and effectiveness of government regulators. The lower courts got the balance between government power and private freedom wrong, in other words, when it comes to the jawboning of speech, and *Vullo* helps reset that balance—at least if its implications and limitations are properly understood.

## B. *Vullo*’s Merits

As the previous Section explains, the Court’s unanimous opinion in *Vullo* reaffirms what *Bantam Books* first suggested:

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<sup>238</sup> *Informed Consent Action Network*, 582 F. Supp. 3d at 722 (quoting *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963)).

<sup>239</sup> *Vullo*, 144 S. Ct. at 1328.

<sup>240</sup> *Id.* at 1326 (noting that “[a]t the heart of the First Amendment’s Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society” and that government officials consequently cannot “use the power of the State to punish or suppress disfavored expression”).

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. *Vullo* reaffirms, in other words, that the rule applies even when the speech targeted by the government's threats turns out to be constitutionally unprotected, and even when the coercive pressure the official brings to bear is not so great that it couldn't reasonably be resisted, and even when the attempt to coerce ultimately fails. In all these cases we might plausibly say that the government's actions did not in fact *cause* the suppression of protected speech, either because there was no protected speech to worry about or because the independent actions of a third party (the compliant speech intermediary, for example) cut the causal chain.<sup>241</sup> Yet *Vullo* makes clear that those actions nonetheless violate the First Amendment, so long as the threats they communicate are reasonably intelligible as to their audience when viewed in the rich sociological context in which they are received.

The Court's reaffirmation of the categorical nature of the rule against constitutional evasion should be regarded as a very good thing when considered in light of the interests and values that the First Amendment protects. The use of these kinds of categorical or prophylactic rules in constitutional law is sometimes controversial because they permit courts to limit governmental power even when the Constitution does not strictly require it.<sup>242</sup> If we think that the First Amendment prohibits only government actions that cause the suppression of protected speech, we might think that a strictly intent-based test of informal censorship like the one *Vullo* relied upon goes too far. And indeed, this view appears to be what underlies the holdings in the *Abu-Jamal*, *Penthouse*, and *R.C. Maxwell* cases.

But prophylactic rules are a common, even ubiquitous, feature of First Amendment doctrine.<sup>243</sup> What they reflect is the

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<sup>241</sup> Indeed, in criminal law, the general rule is that an actor cannot be liable for criminal harms that they intended to bring about if the independent (i.e., freely chosen) acts of another break the causal chain. See WAYNE R. LAFAVE, *CRIMINAL LAW* 336–37 (4th ed. 2003). It is this notion of responsibility that decisions such as *Abu-Jamal* and *R.C. Maxwell* appear to rely upon.

<sup>242</sup> Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 457–60 (1998) (discussing the critique of prophylactic constitutional doctrines).

<sup>243</sup> David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 198 (1988) (“Not just arguably peripheral doctrines . . . but the most significant aspects of first

Court's recognition, in a variety of different contexts and circumstances, of how difficult it can be to figure out when exactly government actors actually violate the various obligations that the Speech Clause imposes—in particular, the duty to operate neutrally in the marketplace of ideas—and its attempt to fashion rules that take account of the limits of judicial factfinding.<sup>244</sup> The prophylactic rules that give force to the modern First Amendment allow courts, in other words, to protect speakers and listeners against what Justice Brennan described in *Bantam Books* as “gravely damaging yet barely visible encroachments” on the health and vitality of the system of free expression.<sup>245</sup>

This kind of prophylactic protection is particularly important when it comes to encroachments on freedom of speech that are carried out by informal methods. When government officials act formally—by means of legislation or regulation or executive order and the like—they are ordinarily subject to all kinds of transparency mandates. Laws need to be published; regulations are subject to extensive notice and comment requirements under the Administrative Procedure Act;<sup>246</sup> trials are required by the Constitution to be open to public view.<sup>247</sup> But when officials pick up the phone, or meet with lobbyists, or write letters to private companies, similar transparency obligations do not attach. This means, as a practical matter, that it will be much harder for courts to know when officials use these kinds of informal mechanisms to punish disfavored speakers, or to otherwise viewpoint discriminate, than when they use formal means to do so. In this context, a categorical rule—a rule that provides more predictable relief and establishes clearer norm of behavior—is obviously preferable to a rule that asks courts to determine whether the “quantum” of force an official brought to bear was

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amendment law can be seen as judge-made prophylactic rules that exceed the requirements of the ‘real’ first amendment.”).

<sup>244</sup> *Id.* at 200 (arguing that the justification for prophylactic rules is that they work “to reduce the likelihood that the authorities . . . will violate the law, and [ ] to improve a reviewing court’s chances of identifying violations where they occur”); see also Dorf & Sabel, *supra* note 242, at 456:

Because it will too often be impossible to discern the legislature’s actual motives and because of the risk that the Court’s own views of the value of speech would infect case-by-case balancing, the Court uses content-discrimination as a proxy for what may be its ultimate concern: regulations that strike at speech because it expresses a disfavored view.

<sup>245</sup> *Bantam Books*, 372 U.S. at 66.

<sup>246</sup> 5 U.S.C. §§ 551–559.

<sup>247</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

sufficient, or that prohibits only pressure campaigns that happen to target what is in fact protected speech.

Meanwhile, because jawboning campaigns frequently reflect, as well as help shape, popular sentiments about unpopular speech—as certainly was true of the jawboning campaign out of which *Bantam Books* emerged<sup>248</sup>—a requirement that the plaintiff prove that it was the official's actions that *caused* the private company to suppress the speech can allow badly intentioned actors to evade responsibility so long as they can sow doubt about whether it was fear of reprisal or fear of public backlash that led the private company to act. By making the question of whether the private company targeted by the jawboning campaign complied a factor courts can look to, in an attempt to understand what the official actually communicated, but not a prerequisite to the finding of a constitutional violation, the decision in *Vullo* makes it harder for officials to engage in this kind of game playing.

Of course, to say that government officials violate the First Amendment even when they coerce the suppression of speech by means of quite modest, or quite vague and uncertain, threats and inducements is not to say that the businesses who comply with these kinds of jawboning schemes bear no moral responsibility for their actions. Justice Harlan certainly had a point when he argued in his *Bantam Books* dissent that businesses targeted by coercive jawboning campaigns have a responsibility, as members of the democratic political community, to resist.<sup>249</sup> And, as I argue in Part III, there are steps that private businesses can and should take to inoculate themselves against this kind of government pressure.

Whether businesses take these steps should not impact the constitutional question of whether the official who forced them to do so violated the First Amendment, however. This is because, while questions of private moral responsibility can and should play a role in the delimitation of rights and duties in other areas

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<sup>248</sup> For discussion of the close relationship between the public and governmental campaigns to rid bookstores of material that was harmful to teenagers, see *Public Pressures and the Law*, *supra* note 55, at 347 (noting that “[m]ost local officials are sincerely convinced that obscenity is a social evil which leads to depraved conduct, particularly among the young, and that it must be suppressed even if dubious means have to be employed,” but “[t]hose who doubt that the problem assumes such serious proportions are nevertheless subject to repeated pressures from highly vocal groups whom they cannot easily ignore”); *Regulation of Comic Books*, *supra* note 27, at 494–95 (noting that “moves against objectionable comic books . . . [were] undertaken by public officials acting informally, sometimes in concert with private citizens” and that in many cases “public officials [] act[ed] on the basis of . . . lists [of objectionable materials] prepared by private groups”).

<sup>249</sup> *Bantam Books*, 372 U.S. at 82 (Harlan, J., dissenting).

of law, they are not the primary concern of the First Amendment. What the First Amendment's Speech Clause is primarily intended to do is to enable the "uninhibited, robust, and wide-open" debate on public issues that is believed to be necessary for democratic self-government to function properly.<sup>250</sup> The great insight of the modern cases is that, in order to achieve this goal, courts need to protect not only morally upright actors but also those who are not morally responsible.<sup>251</sup> The First Amendment protects the system of free expression as it is, not as we would like it to be. And in the system of free expression as it is, speech intermediaries do not always—or in fact often—defend the expressive rights of their users and customers.<sup>252</sup> It should not matter then to the constitutional analysis if private actors who are targeted by schemes of constitutional evasion *could* have resisted them, or *should* have resisted them as an ethical matter, if in the world in which we actually live (a world made up of flawed and self-interested people), they are unlikely to do so. And the decision in *Vullo* makes clear that in fact it does not matter.

In practical effect, this means that the test of informal censorship that *Vullo* articulates will limit the "ambit of private action," to some extent, just as the Third Circuit argued it might in *R.C. Maxwell*.<sup>253</sup> More specifically, it will make it harder for businesses to choose to comply with jawboning campaigns when it is in their economic interest to do so. But there is no reason why the First Amendment should care about this kind of self-interested, corporate decision-making. What the First Amendment protects is the right of private businesses to make their own expressive decisions—to judge the value, or lack thereof, of the speech they host and disseminate according to their own standards—not the right of companies to make a cost-benefit calculation of whether it is worth giving up their expressive freedom in order to curry

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<sup>250</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>251</sup> *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (protecting the speech of a fascist agitator on the grounds that the "function of free speech under our system of government is to invite dispute" and "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

<sup>252</sup> Keller, *supra* note 170, at 2 (noting the tendency of many social media platforms to act in "anticipatory obedience" to government dictates).

<sup>253</sup> *R.C. Maxwell*, 735 F.2d at 89; *see also Bantam Books*, 327 U.S. at 81 (Harlan, J., dissenting) (arguing that the informal action does not amount to "an unconstitutional restraint upon freedom of expression" so long as "the courts [remained] open to [those] affected, and [ ] any material [targeted by the pressure campaign], however questionable, may be freely sponsored, circulated, read, or viewed until judicially condemned").

favor with powerful officials.<sup>254</sup> And when it comes to this kind of editorial freedom, a prophylactic test of jawboning can only expand the ambit of private action by limiting the ability of government officials to pressure companies into substituting those officials' value judgments for their own.

Nor is a narrower, less categorical version of the rule against informal censorship necessary to protect the expressive freedom of government officials or to ensure the effective operation of the regulatory state. As Part I makes clear, their belief to the contrary was what led many courts to embrace a very narrow interpretation of the First Amendment anti-jawboning rule in the decades prior to *Vullo*.<sup>255</sup> And *Vullo* for her part made a similar argument to explain why the Court should dismiss the NRA's complaint against her. She argued that a finding for the NRA would "wreak havoc at all levels of government" and "chill speech necessary for a functional government" by leaving regulators uncertain about when and how they could permissibly criticize the choices made by businesses they regulated.<sup>256</sup>

It is certainly possible that a broader test of unconstitutional jawboning could have this result. For example, the "significant encouragement" test that the Fifth Circuit employed in *Missouri v. Biden* would almost certainly make it unconstitutional for officials to successfully persuade private companies of the merits of taking down particular kinds of speech or speech acts, when they use informal methods to do so.<sup>257</sup> As Professor Ashutosh Bhagwat noted, "Under the 'significant encouragement' test, if the FBI identifies a social media account as an ISIS front, informs the hosting platform of this, and successfully urges them to shut down the account, the FBI has violated the First Amendment."<sup>258</sup> While close cooperation between government and private speech intermediaries clearly poses dangers of all sorts to the independence of the marketplace of ideas, by allowing the de facto substitution of government decision-making for private decision-

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<sup>254</sup> As the Court noted in the same term it decided *Vullo*, what the First Amendment protects is the right of "private part[ies]" to make "expressive choices" without being "overrid[den]" by the government. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2402 (2024).

<sup>255</sup> *Supra* Part I.C.

<sup>256</sup> Brief for Respondent at 50, *Vullo*, 144 S. Ct. 1316 (No. 22-842) ("If a reference to reputational risk in a non-binding industry letter rises to the level of coercion, it is difficult to imagine any critical statement that could not be deemed at least plausibly coercive and therefore sufficient to overcome a motion to dismiss.").

<sup>257</sup> *Missouri v. Biden*, 83 F.4th at 374–75.

<sup>258</sup> Ashutosh Bhagwat, *Persuasion or Coercion? The Fifth Circuit's Muddled View of Missouri v. Biden*, KNIGHT FIRST AMEND. INST. BLOG (Sept. 15, 2023), <https://perma.cc/2B8P-KKHN>.

making, it seems quite obvious that a blanket ban on this kind of communication would significantly impact the operation of the regulatory state as we know it today and render unconstitutional a great deal of government speech that is not in fact an attempt to evade the Constitution.

But this is not what the test that the Court relied on in either *Bantam Books* or *Vullo* requires. Rather than prohibiting government criticism or advice to private speech intermediaries per se, it prohibits only criticism or advice that helps create what Justice Brennan described in *Bantam Books* as a “system of informal censorship” beyond the reach of the laws.<sup>259</sup> And what makes government action regulatory is (1) the articulation of a rule that individuals must obey and (2) the enforcement of that rule by means of penalties, or the threat of penalties.<sup>260</sup> In practice, this means that government officials must do or say something to indicate to the target of their campaigning that sanctions, or the withdrawal of benefits that they could otherwise receive, will be predicated on the private party’s compliance with the regulator’s wishes. The Rhode Island Commission acted in a regulatory manner because it articulated a rule (don’t sell these books) that it enforced by means of the threat of sanctions (a criminal referral to the state attorney general). *Vullo* also acted in a regulatory fashion—at least as alleged in the NRA’s complaint—when she commanded the insurers to stop providing affinity insurance to the NRA and coupled that command with the threat of vigorous enforcement of their otherwise petty regulatory infractions if they did not comply. But government officials who merely criticize, but do not command and attach sanctions to that command, do not engage in informal regulation of this kind.

Hence it is simply not the case that, as the D.C. Circuit argued, a prophylactic rule against informal coercion will “virtually immobilize[ ]” the government.<sup>261</sup> Even after *Vullo*, government officials retain a great deal of freedom to exhort, criticize, and even impugn the character of private speakers, organizations, and businesses within their jurisdiction or under their control. There is no reason why a state governor could not condemn the NRA as a “trash organization”—as Governor Gavin Newsom did in 2023, without facing any legal consequence—so long as there

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<sup>259</sup> *Bantam Books*, 372 U.S. at 71.

<sup>260</sup> See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 81 (3d ed. 2012) (“[U]nder . . . the basic or primary type [of legal rule], human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of [this] [ ] type impose duties [to obey].”).

<sup>261</sup> *Penthouse*, 939 F.2d at 1016.

was no legal stick or penalty that the governor attached to that critique.<sup>262</sup> Similarly, there is no reason why a president could not accuse the social media platforms of killing people by permitting too much harmful medical misinformation to run rampant on their platforms—as President Biden did during the COVID-19 pandemic—so long as he does not accompany that claim with either explicit or implicit threats of economic or regulatory harm.<sup>263</sup>

It is true that the *Vullo* Court’s context-sensitive approach to the analysis of the communications at issue in the case makes it possible that even statements that do not on their face appear to contain a threat could be interpreted to contain one. But this does not mean that virtually anything government officials say or do can be interpreted coercively. The Court was clear that the plausibility of the NRA’s claims did not stem merely from Vullo’s criticism of the organization but instead from what were alleged to be not-terribly-cloaked promises to use her regulatory discretion to punish or reward businesses that did not disassociate from the organization.

Nor does the context-sensitive approach that the *Vullo* Court employed mean that any efforts by regulators to provide guidance to those they regulate about their legal risks and liabilities will be interpreted as an act of unconstitutional evasion. To the contrary: 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. An important factor in the Court’s conclusion in *Bantam Books* that the notices the Rhode Island Commission sent to booksellers were intentionally coercive was their failure to include any information about why the Commission believed that the 106 books and magazines included on the list could not lawfully be distributed to juveniles.<sup>264</sup> The fact that “[p]ublications [were] listed as ‘objectionable’ without further elucidation,” Justice Brennan noted in his opinion, “left [distributors] to speculate” about the legal basis of the Commission’s actions, and deprived them of the ability to evaluate the

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<sup>262</sup> Louis Casiano, *California Gov. Newsom Lashes Out at ‘Trash Organization’ NRA After Second Amendment ‘Hypocrisy’ Accusation*, FOX NEWS (Jan. 25, 2023), <https://perma.cc/W6X7-VK9P>.

<sup>263</sup> Zolan Kanno-Youngs & Cecilia Kang, *‘They’re Killing People’: Biden Denounces Social Media for Virus Disinformation*, N.Y. TIMES (July 19, 2021), <https://www.nytimes.com/2021/07/16/us/politics/biden-facebook-social-media-covid.html>.

<sup>264</sup> *Bantam Books*, 372 U.S. at 71.

Commission's claims for themselves.<sup>265</sup> The content of Vullo's guidance documents may have been similarly problematic. The failure in those documents to "tak[e] the threat of enforcement off of the table" led at least one commentator to conclude when they were published that Vullo and Cuomo "want [businesses] to think there is a potential the government will come after them if they don't end their relationships with groups like the NRA."<sup>266</sup>

This means that, under the *Vullo* test, government officials should be able to exhort, advise, and inform the businesses they regulate about the legal, social, or political repercussions of their expressive choices without significant fear of constitutional litigation, so long as they engage in this exhortation, advice giving, and information dissemination in a way that reminds both them and those they address of the fundamental rule that the jawboning cases establish. The rule they establish is, namely, that under the First Amendment, officials possess no informal power whatsoever to *make* private actors alter their speech-regulating choices, either by scaring them into compliance or by threatening them with retribution if they do not comply. Making this fundamental feature of the relationship clear will not always be a simple thing to do, given the power asymmetry that often exists between government officials and those they regulate. This asymmetry means that the audience to these kinds of governmental advice-giving communications may be particularly sensitive to what the Court described, in a somewhat different context, as "intended" but only vaguely stated "implications" of what the officials say—just as the opinion in *Vullo* acknowledges.<sup>267</sup>

To inoculate themselves against claims of jawboning and to ensure that their guidance is not interpreted to mean things they do not intend, government officials may have to provide those they communicate with more information than they otherwise would have about the reasoning that led them to reach the legal conclusions they now seek to communicate (why do they think the

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<sup>265</sup> *Id.*

<sup>266</sup> Knight, *supra* note 221.

<sup>267</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (noting that, because of the economic relationship between them, employees have a "tendency . . . to pick up intended implications" of employers' communications "that might be more readily dismissed by a more disinterested ear"); *Vullo*, 144 S. Ct at 1328:

The power that a government official wields, while certainly not dispositive, is relevant to the objective inquiry of whether a reasonable person would perceive the official's communication as coercive. 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.

speech is unlawful? what are the relevant legal codes?) and about the scope of their official powers (what do they actually possess the authority to do?). In this respect, a more vigorous anti-jawboning rule may in practice limit the total expressive freedom of government officials to address those they regulate in vague and scary ways. But it is not at all clear why this would be a bad thing when considered in light of the values the First Amendment protects. Indeed, one might think of it as one of the necessary disciplines of governance in a democratic state.

It is possible, of course, that the knowledge that their guidance could, if phrased poorly, expose them to a First Amendment lawsuit might dissuade some regulators from speaking, thereby exposing regulated parties to more legal uncertainty than otherwise might have been the case. This chilling effect will only have bite, however, in cases in which it is possible that a jury could conclude that the speech-suppressive effects of the guidance were *intentional*, rather than an unintended effect. Nevertheless, it is true that a prophylactic jawboning rule may have costs, as prophylactic rules tend to. But these costs need to be assessed against the benefits that the rule will provide. And those benefits are significant.

Critics of the *Bantam Books* test have tended to minimize the harms that result from government communications that suggest that their author possesses more authority than she actually does.<sup>268</sup> But in a system in which private citizens are accustomed to complying with legal authority absent any strongly coercive mandate to do so, what judges have described as merely “[i]nept phrases” can in fact shape the nature of the relationship between the government and the private sector in profound ways—and, indeed, are often intended to do so.<sup>269</sup> One need consider only the alacrity with which radio stations responded to the FCC’s list of problematically drug-oriented songs to recognize how effectively government actors can use hints and nudges to bring about the

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<sup>268</sup> See, e.g., *Bantam Books*, 372 U.S. at 74–75 (Clark, J., concurring in the result) (criticizing the majority for “creat[ing] the proverbial tempest in a teapot . . . from certain inept phrases in the [Commission’s] notices”); *id.* at 77 (Harlan, J., dissenting) (agreeing that “the tenor of some of the Commission’s letters and reports is subject to serious criticism” but concluding that “these are things which could surely be cured by a word to the wise”); *Penthouse*, 939 F.2d at 1015 (“It may well be that the Commission came close to implying more authority than it either had or explicitly claimed. Nevertheless—any misapprehensions of recipients notwithstanding—we do not believe that the Commission ever threatened to use the coercive power of the state against recipients of the letter.”).

<sup>269</sup> *Bantam Books*, 372 U.S. at 75 (Clark, J., concurring in the result).

ensorship of speech, particularly when they wield significant power over those they address.<sup>270</sup>

Indeed, what makes the categorical test that *Vullo* articulates a better approach than the narrower test that the Third Circuit, the D.C. Circuit, the Ninth Circuit, and the Second Circuit at times employed is the fact that, unlike those other, narrower approaches, it recognizes what Professor Yochai Benkler described as the “deep vulnerability of the checks imposed by the First Amendment in the context of a public sphere built entirely of privately-owned infrastructure.”<sup>271</sup> It recognizes, in other words, the fact that in a public sphere that is owned and operated by many different kinds of for-profit private companies with varying degrees of investment in and association with the speech they help to disseminate, government officials possess a great deal of leverage to informally suppress speech or speakers they do not like by pressuring one or another of the many links in the chain that enable the system to operate.

In her opinion, Justice Sotomayor acknowledged this concern explicitly. She noted, for example, that pressure campaigns like the one the Court confronted—pressure campaigns targeted at service intermediaries—raise heightened “constitutional concerns” because they “allow[ ] government officials to ‘expand their regulatory jurisdiction to suppress the speech of organizations that they have no direct control over.’”<sup>272</sup> Justice Sotomayor noted also that this expansion in jurisdiction was troubling not only because it undermined the political judgment that motivated the decision to vest that official with so much power, but also because it could be so effective in coercing the suppression of speech.<sup>273</sup> By targeting the financial institutions that enabled the NRA to carry out its political agenda, Justice Sotomayor noted, *Vullo* was able to much more easily harm the NRA than had she targeted the NRA itself.<sup>274</sup> This is because, as Justice Sotomayor put it, “intermediaries will often be less invested in the speaker’s message” than the speaker will be and therefore “less likely to risk the regulator’s ire.”<sup>275</sup>

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<sup>270</sup> *Yale Broad. v. FCC*, 478 F.2d 594, 603 (D.C. Cir. 1973) (separate statement of Bazelon, C.J.).

<sup>271</sup> Benkler, *supra* note 168, at 340.

<sup>272</sup> *Vullo*, 144 S. Ct. at 1332 (quoting Brief for First Amendment Scholars as Amici Curiae Supporting Petitioner at 8, *Vullo*, 144 S. Ct. 1316 (No. 22-842)).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* (quotation marks omitted) (quoting Brief for First Amendment Scholars as Amici Curiae Supporting Petitioner at 8, *Vullo*, 144 S. Ct. 1316 (No. 22-842)).

The rule set forth in *Vullo* can be understood, therefore, as a direct response to what First Amendment scholars have long argued is a very significant vulnerability in the functioning of the modern system of free expression: what Seth Kreimer has described as the “peculiar[ ] susceptib[ility]” of speech intermediaries to chill.<sup>276</sup> By making clear that the First Amendment prevents *all* intentional governmental efforts to coerce private entities into suppressing speech or punishing disfavored speakers, *Vullo* makes it easier not only for intermediaries to challenge speech-suppressive government actions, but also for the speakers whose speech is suppressed to do so. It articulates an approach to the informal censorship analysis that is therefore much less likely to significantly underprotect the important speaker and listener interests that are imperiled by what to all accounts appears to be the quite common, and quite successful, tactic of jawboning speech. Or at least it does so if properly understood. In the next and final Part, I sketch out some of the specific implications of the decision for jawboning cases.

### III. MAKING THE CATEGORICAL RULE MEANINGFUL

As the previous Part argues, the opinion in *Vullo* should be understood to make a significant intervention in the jawboning case law—albeit an intervention that, for the most part, merely reaffirms the correctness of the approach to the constitutional analysis of informal pressure campaigns that the Court first employed over sixty years ago in *Bantam Books*. That the *Vullo* Court returned the doctrine to where it started is no small thing, however, given how far some of the lower court decisions had strayed from the doctrine’s anti-formalist origins.

It is not inevitable, however, that courts will recognize the significance of the decision. This is because Justice Sotomayor wrote the majority opinion in a manner that focused rigorously on the facts of the case and at no point suggested that the Court was doing anything other than merely restating settled doctrine. In future cases, then, it is entirely possible that the decision could be interpreted very narrowly to stand for little more than its facts (much as *Bantam Books* was, in certain circuits at least). Indeed, at least one commentator has already proffered an interpretation of the opinion that reads it in this very narrow way.<sup>277</sup>

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<sup>276</sup> Kreimer, *supra* note 40, at 29–30.

<sup>277</sup> Derek Bambauer, *The Jawboning Cases End with a Bang Disguised by a Whimper*, 2023–2024 CATO SUP. CT. REV. 157, 157–58 (noting that “[c]ommentators had

In this Part, I suggest why this would be a mistake by exploring the implications of the principles the decision relies upon for the resolution of jawboning cases going forward. As I show, the core principle that *Vullo* articulates—namely, that it is never permissible for government officials to attempt to “do indirectly what [they are] barred from doing directly”<sup>278</sup>—has all kinds of implications for the vexed factual questions that the jawboning cases raise. Specifically, it suggests that courts should recognize that a much wider array of kinds of threats and jawboning campaigns can violate the First Amendment than they have recognized before. In what follows, I explore what this would mean for some of the more fact-specific questions that have arisen in recent years.

Meaningfully vindicating the principle that *Vullo* articulates will also, however, require changes in more than First Amendment doctrine. There is no question that courts can and should do more than they have done in the past to protect speakers and listeners—and all members of the democratic political community, really—against schemes of constitutional evasion. But the very same factors that make jawboning such a powerful mechanism of speech suppression make it unlikely that even the strongest doctrinal protections will be sufficient on their own to effectively safeguard free speech interests against this kind of constitutional evasion. This is because there are procedural constraints that will limit the ability of those impacted by jawboning to get relief in court. More generally, there are limits on what passive institutions like the courts can do about a practice that is as “barely visible” as jawboning often is.<sup>279</sup>

Other actors therefore need to help bolster protections for the public sphere against the kind of constitutional evasion that *Vullo*, like *Bantam Books* before it, recognizes as inconsistent with core free speech values. In what follows, I sketch out some of the steps that lawmakers could take, not so much to act independently of the courts as to help courts more effectively protect

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hoped that the Court would establish an analytical framework to evaluate when jawboning violates the First Amendment” but that they were “disappointed, although not necessarily surprised,” when “[t]he Court disposed of *Vullo* on procedural grounds”). In fact, *Bantam Books* was criticized at the time in a similar manner. *Bantam Books*, 372 U.S. at 75 (Clark, J., concurring in the result) (“[A]fter all this expostulation the Court . . . drops a demolition bomb on ‘the Commission’s practice’ without clearly indicating what might be salvaged from the wreckage.”). In both cases, these criticisms significantly understate the significance of the theoretical framework that the opinions provide but are clearly a response to the highly context-sensitive and fact-specific nature of the majority analyses.

<sup>278</sup> *Vullo*, 144 S. Ct. at 1328.

<sup>279</sup> *Bantam Books*, 372 U.S. at 66.

the independence of the democratic public sphere against the threat of informal censorship. These ideas are necessarily tentative and brief. But they suggest what it could look like to meaningfully enforce a categorical rule against constitutional evasion in an age of aggressive government jawboning.

#### A. Enforcing the Principle Doctrinally

The decision in *Vullo* has immediate implications for how courts analyze claims of informal censorship. Most obviously, it makes clear that courts should analyze these claims in a much more holistic and context-sensitive way than many had been wont to do thus far. *Vullo* recognizes, and requires lower courts to recognize, that officials can engage in constitutional evasion even when they speak in an “even-handed [and] nonthreatening” tone and even when they purport to merely be carrying out their regulatory responsibilities.<sup>280</sup> And it strongly suggests that courts should analyze jawboning claims with an understanding of the political-economic framework in which they operate—that is to say, that courts should recognize how sensitive the recipients of government communication can be even to subtle threats and inducements when the official wields considerable power over them and should interpret the plausibility of a threat or inducement from the perspective of the listener.

These direct implications of the decision are significant in their own right. If embraced by the lower courts, they would result in a much more speaker-protective body of jawboning case law than existed prior to *Vullo*. They are not the only implications that can be drawn out from the opinion, however.

Instead, the opinion’s embrace of a categorical rule against intentional acts of constitutional evasion suggests not only that courts should approach the First Amendment analysis in a somewhat different manner. It also suggests that courts should expand their view of what kinds of government actors, and what kinds of government acts, can informally impose prior restraints on speech in violation of the First Amendment. After all, if 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, then it makes little sense to limit the reach of the anti-jawboning rule to only certain kinds of formal relationships and certain kinds of threats—namely, those that have been recognized so far in the case law. In this

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<sup>280</sup> See *Vullo*, 49 F.4th at 717.

Section, I explore what this would look like more concretely, with respect to some (but certainly not all) of the specific questions that have arisen in jawboning cases in recent years.

1. Who can unconstitutionally coerce?

One of the most contested questions to arise in the jawboning cases in recent years has been the question of what kinds of government officials can properly be accused of attempting to create the kind of informal system of censorship that the First Amendment forbids. As Part I suggests, the archetypal defendants in jawboning cases are members of the executive branch—mayors, for example, or borough presidents, or FCC commissioners, or financial regulators, like Vullo herself. This is because these officials are entrusted with the responsibility to enforce the law and are typically also vested with a great deal of discretion in how they do so. They therefore are the government actors who most easily can—and, the cases suggest, who most often do—use informal threats or promises to jawbone. It makes good sense, therefore, that they are the most common defendants in jawboning cases.

But what about members of the legislative branch? Because legislators are entrusted with the power to make new laws, rather than to apply the existing laws to specific actors, they tend to have less opportunity to jawbone, and perhaps less inclination to do so as well. The legislative task is, after all (or is supposed to be), a general one: to determine the “rights, duties, and relations of persons” of all members of a class—typically prospectively—rather than to determine the privileges and penalties of any particular individuals.<sup>281</sup> Nevertheless, as the *Abu-Jamal* case indicates, there can be situations in which lawmakers are moved, by either moral urgency or political expediency, to use their bully pulpit and their capacity for future action to pressure private companies or speakers into suppressing speech. For example, during the Biden administration, members of Congress frequently and often very publicly criticized social media companies for their content moderation choices, and at times they paired these criticisms with threats of sanctions ranging from criminal prosecution to regulatory reform.<sup>282</sup> During the second Trump administration, members of Congress have expressed similarly sharp criticisms

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<sup>281</sup> *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 952 (1983).

<sup>282</sup> For cases challenging these actions on First Amendment grounds, see *Ass'n of Am. Physicians & Surgeons v. Schiff*, 23 F.4th 1028, 1031 (D.C. Cir. 2022); *Changizi v. Dep't of Health & Hum. Servs.*, 602 F. Supp. 3d 1031, 1038 (S.D. Ohio 2022); *Informed Consent Action Network*, 582 F. Supp. at 715.

of the universities that they claim fail to do enough to suppress student protest—and here too, they have paired those criticisms with threats of potential criminal investigation if not more.<sup>283</sup>

Courts have often dismissed these lawsuits without permitting them to proceed to discovery or trial because they have found that the speech of members of Congress simply cannot operate as an “instrument[ ] of regulation independent of the law[ ].”<sup>284</sup> Different courts have provided different arguments for why not. Some courts have held that the public speech of individual legislators simply does not constitute state action for First Amendment purposes. Others have held that legislators do not wield the kind of power that can make informal communications coercive.

The district court in *Informed Consent Action Network* made the first argument. Because “individual members of Congress lack” the capacity to “exercise [ ] legal authority [over] or [make] [ ] threat[s] of criminal prosecution,”<sup>285</sup> the court asserted, “[t]he publicly expressed views of individual members of Congress—regardless of how influential—do not constitute ‘action’ on the part of the federal government” and therefore cannot be used to show that the lawmaker violated the plaintiff’s First Amendment rights.<sup>286</sup>

The Ninth Circuit made the second argument, in *Kennedy v. Warren*,<sup>287</sup> to justify its decision to dismiss a complaint against Senator Elizabeth Warren that accused the Senator of unconstitutionally coercing Amazon into censoring a book about the COVID-19 pandemic by warning it of potential (albeit vague) legal consequences if it did not stop promoting the book, and other dangerous examples of “COVID-19 misinformation,” on its website.<sup>288</sup> Because Warren was only “one member of a legislature who is removed from the relevant levers of power,” the Ninth Circuit found that “it would have been unreasonable [ ] for Amazon to believe that a single member of Congress could bring to bear coercive government power against it for promoting books on its platform.”<sup>289</sup>

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<sup>283</sup> See, e.g., Letter from Tim Walberg, Chairman, House Comm. on Educ. & the Workforce, to Univ. of Ill. Coll. of Med. (Aug. 25, 2025) (available at <https://perma.cc/UE4B-8T3Y>); Letter from John Moolenaar, Chairman, House Select Comm. on the CCP, Tim Walberg, Chairman, House Comm. on Educ. & the Workforce & Elise Stefanik, Chairwoman, House Republican Leadership, to Harvard Coll. (July 30, 2025) (available at <https://perma.cc/B3GS-XXPN>).

<sup>284</sup> *Bantam Books*, 372 U.S. at 69.

<sup>285</sup> *Informed Consent Action Network*, 582 F. Supp. 3d at 723.

<sup>286</sup> *Id.* (alteration in original) (quotation marks omitted) (quoting *Daniels v. Alphabet Inc.*, 2021 WL 1222166, at \*6 (N.D. Cal. Mar. 31, 2021)).

<sup>287</sup> 66 F.4th 1199 (9th Cir. 2023).

<sup>288</sup> *Id.* at 1210.

<sup>289</sup> *Id.* The court noted also that “Senator Warren’s lack of unilateral regulatory authority distinguishes this case from *Bantam Books*.” *Id.* Of course, as discussed above, the

The Court's analysis in *Vullo* strongly suggests that neither argument has any merit. With respect to the first argument, the opinion affirms that the state action at issue in unconstitutional coercion cases is not the exercise of legal authority or the threat of criminal sanctions per se, but instead the effort by a government official to use the threatened exercise of state power to coerce private actors into suppressing or punishing speech. As Justice Sotomayor put it in her opinion, the "application of state power which [courts] are asked to scrutinize" in jawboning cases is the attempt by a government official "to suppress a speaker's particular views."<sup>290</sup> There is no reason to think that members of Congress or other legislatures cannot act on the basis of this kind of viewpoint discriminatory intent.

*Vullo* also strongly suggests that the Ninth Circuit was wrong to conclude, on the basis of no more than Senator Warren's status as a member of Congress, that (in *Vullo*'s terms) her letter did not "reasonably . . . convey a threat of adverse government action."<sup>291</sup> This may seem like a counterintuitive conclusion to draw from the opinion, given how important it was to the Court's analysis in *Vullo* that *Vullo* possessed direct regulatory authority over the businesses she addressed, as Senator Warren certainly did not. But the opinion in *Vullo* makes evident the Court's recognition that government power exists on a continuum and that in all jawboning cases, courts should not treat the *nature* of the official's position as dispositive but should instead recognize how (greater or lesser) power asymmetries can affect the sensitivity of audiences to the subtle hints and suggestions that canny officials can use to convey their meaning.<sup>292</sup>

Applying this kind of analysis to jawboning cases against members of Congress—or, for that matter, any other legislative

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Rhode Island Commission did not possess anything like unilateral regulatory authority over the booksellers they communicated with.

<sup>290</sup> *Vullo*, 144 S. Ct. at 1326 (quotation marks omitted) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958)). This accords entirely with the state action analysis in *Bantam Books*, 372 U.S. at 65 n.6 (extending standing to the publishers of the prohibited books even though they were not the entities directly targeted by the Rhode Island Commission's pressure campaign on the grounds that, because they had the strongest economic incentive to sue, if publishers were not "permitted to sue, infringements of freedom of the press may too often go unremedied").

<sup>291</sup> *Vullo*, 144 S. Ct. at 1328.

<sup>292</sup> *Id.*:

The power that a government official wields, while certainly not dispositive, is relevant to the objective inquiry of whether a reasonable person would perceive the official's communication as coercive. 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.

defendants—would mean rejecting the idea that legislators can never violate the First Amendment rule against informal coercion. Instead, it would require courts to examine in such cases the precise nature of the power that the legislator wields and, in particular, what kinds of discretionary power he or she possesses. As Judge David Bazelon noted long ago, it is the vast amount of discretion that executive branch officials possess when it comes to the enforcement of the law that gives them so much power to “apply sub silentio pressure against speech.”<sup>293</sup> This is why defendants in jawboning cases tend to be executive branch officials, and particularly executive branch officials who possess significant discretionary power—police officers, prosecutors, FCC commissioners, small-town mayors, and the like.<sup>294</sup>

While in many cases, members of the legislative branch will not possess the same kind of discretion—and therefore will be in almost no position to credibly promise or threaten speakers who displease them with regulatory or economic harm—this will not always be true. Committee chairs, for example, wield significant power to control the congressional agenda.<sup>295</sup> They can threaten to hold a hearing, or to introduce a bill, that a private actor really does not want. Lawmakers may also possess, by virtue of their committee assignment, significant power to influence the allocation of government funds. (Consider in this respect Senator Bob Dole’s threats to limit NPR’s federal funding if it did not comply with his demands.)<sup>296</sup> And lawmakers who are in the congressional majority might be able to threaten to vote for a profit-harming regulatory reform. These threats may not in all cases be plausible enough to establish that the lawmaker who wielded them actually intended them to coerce cooperation rather than to score political points. But in some cases, they may be.<sup>297</sup>

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<sup>293</sup> Bazelon, *supra* note 128, at 215 (arguing that it is the “wide-ranging and largely uncontrolled administrative discretion” granted to the FCC by federal law that “has been used, as we might expect . . . , to apply sub silentio pressure against speech in [many different] instances” and listing examples).

<sup>294</sup> See *supra* Part I.

<sup>295</sup> See Jonathan S. Gould, *Rethinking Swing Voters*, 74 VAND. L. REV. 85, 122 (2021) (“Party leaders, committee chairs, and subcommittee chairs wield significant power in two respects: they control legislative agendas, and they can reward or punish rank-and-file legislators.”).

<sup>296</sup> 141 CONG. REC. S8081 (daily ed. June 9, 1995) (statement of Sen. Bob Dole).

<sup>297</sup> In some of these cases, the lawmakers’ actions may not be susceptible to First Amendment challenge because of the immunity they receive under the Speech and Debate Clause. See generally *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491 (1975). But the Court has recognized that the Speech and Debate Clause does not invest members of Congress “with a “general” power to inquire into private affairs.” *Id.* at 504 n.15 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 173 (1927)). Instead, the Speech and Debate Clause

This context-sensitive and case-specific approach to the analysis of unconstitutional coercion claims means not only that courts are wrong to conclude that legislators can never be defendants in jawboning lawsuits but also that the Fifth Circuit was wrong when it made a similarly categorical judgment in *Missouri v. Biden* about the coercive nature of the FBI's communications to social media companies. The Fifth Circuit's conclusion that requests the FBI made to social media companies to take down particular posts or tweets, although not "plainly threatening in tone or manner," were nevertheless coercive because, as "the lead law enforcement, investigatory, and domestic security agency for the executive branch[,] . . . the FBI wielded [ ] authority over the platforms,"<sup>298</sup> is plainly inconsistent with the assertion in *Vullo* that "[t]he power that a government official wields," although "relevant to the objective inquiry of whether a reasonable person would perceive the official's communication as coercive," is "not dispositive."<sup>299</sup>

It may certainly be the case—indeed *Vullo* suggests it is—that when a powerful law enforcement agency warns about the dangerous national security harms that a given speaker or speech act poses, what appears to be a gentle request can be taken very seriously. Nevertheless, more has to be shown to establish that FBI agents intended for their communications to be coercive than the mere fact that they communicated with private speech intermediaries about speech on their platform. What did they say? How did they say it? And how was it understood? These are the questions that should be central to the jawboning analysis after *Vullo*. And this is true when it comes to jawboning by all kinds of government actors, no matter where they sit in the separation of powers.

## 2. What kinds of threats can coerce?

Another question simmering in the background of many of the jawboning cases relates to the kinds of threats that can be understood as coercive for First Amendment purposes. As the discussion above makes clear, *Vullo* rejects the conclusion that many courts had previously reached that, in order to violate the First Amendment, government officials must credibly threaten the

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protects only "legitimate" legislative activity. *Id.* at 503. Hence, there is a wide range of legislative speech acts that will not be immunized by the Speech and Debate Clause.

<sup>298</sup> *Missouri v. Biden*, 83 F.4th at 388.

<sup>299</sup> *Vullo*, 144 S. Ct. at 1328; *Missouri v. Biden*, 83 F.4th at 364–65.

targets of their jawboning with criminal prosecution or some other severe legal penalty. *Vullo* makes clear that indirect threats of civil liability, as well as promises of leniency, are sufficient to render an official's actions plausibly coercive. And its analysis is entirely consistent with the Second Circuit's conclusion in *Okwedy* that threats of economic harm, when they involve the exercise of government power, also are sufficient to state an unconstitutional coercion claim. Indeed, the opinion cites *Okwedy* approvingly.<sup>300</sup>

This is an important point to emphasize, given the extent to which the federal government, under the control of President Donald Trump, has aggressively used the threat of economic harm—in particular, the loss of federal funding—to pressure private universities, schools, media companies, and other institutions into suppressing speech that it dislikes. Consider for example the threats the administration issued against Columbia and other universities.<sup>301</sup> Prior to *Vullo*, it would not have been at all clear that this kind of threat constituted jawboning. Is the threatened loss of federal funds the same quantum of force as the threat of criminal prosecution for disseminating obscenity? The opinion in *R.C. Maxwell* certainly suggests that it isn't.

After *Vullo*, however, there is no question that this kind of threat is sufficient to make out a jawboning claim. This fact strongly suggests that the Trump administration's threat of the loss of federal funds to coerce universities like Columbia into changing how they regulate student speech and how they teach about controversial topics, and the administration's similar efforts to pressure private law firms into choosing different clients and cases than they have in the past, represent quite blatant acts of unconstitutional jawboning—as indeed some plaintiffs have argued, sometimes successfully, in court.<sup>302</sup>

Somewhat trickier questions are raised by cases in which a government official uses her bully pulpit to shame and condemn a speaker or business who speaks in ways she dislikes. As the discussion in Part I makes clear, the threat of bad publicity can be extremely effective in coercing compliance with government

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<sup>300</sup> *Vullo*, 144 S. Ct. at 1328 (citing *Okwedy*, 333 F. 3d at 344).

<sup>301</sup> See Starr & Lakier, *supra* note 13 (manuscript at 10–18) (describing these pressure campaigns).

<sup>302</sup> See, e.g., *Susman Godfrey LLP v. Exec. Off. of the President*, 789 F. Supp. 3d 15, 37 (D.D.C. 2025), *appeal docketed*, No. 25-5310 (D.C. Cir. Aug. 26, 2025); *Jenner & Block LLP v. U.S. Dep't of Just.*, 784 F. Supp. 3d 76, 105–08 (D.D.C. 2025), *appeal docketed*, No. 25-5265 (D.C. Cir. July 22, 2025); *Perkins Coie LLP v. U.S. Dep't of Just.*, 783 F. Supp. 3d 105, 140–41 (D.D.C. 2025), *appeal docketed*, No. 25-5241 (D.C. Cir. July 2, 2025).

demands. And there is plenty of evidence that government officials intentionally take advantage of companies' fears of bad publicity to make their jawboning campaigns more effective. Sheriff Dart, for example, did not rely solely on letters and phone calls to pressure the credit card companies into cutting ties with Backpage.com. He also threatened the companies, most directly, with a press conference whose tone, members of his staff informed company executives, "w[ould] change considerably if [they] s[aw] fit to sever ties with Backpage and its imitators."<sup>303</sup> (It was in response to this threat that employees of one of the credit card companies accused the sheriff of engaging in conduct that looked a lot like "black-mail.")<sup>304</sup> Similarly, it is hard to see what purpose the letter the commission sent to retailers in *Playboy Enterprises, Inc. v. Meese*<sup>305</sup> could have had but to use the threat of bad publicity to discourage its recipients from selling *Playboy* and *Penthouse* magazines.<sup>306</sup>

Nevertheless, despite plenty of evidence that threats of negative publicity can be—and in fact have been—intentionally wielded by government actors to coerce private businesses into suppressing speech or disassociating themselves from disfavored speakers, courts have been reluctant to recognize these kinds of threats as the kind of informal governmental action that can impose a prior restraint. In *Backpage.com*, for example, the Seventh Circuit, despite noting the motivating force of the sheriff's threat of bad press on the credit card companies' decision-making, nevertheless rested its constitutional finding on the far more attenuated threat of a criminal referral that it read the sheriff's jawboning campaign to imply.<sup>307</sup> And of course, in the *Penthouse* case, the

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<sup>303</sup> *Backpage.com*, 807 F.3d at 233 (noting also that staff working for the sheriff told the company executives that they "would need to know tonight if [the company had pulled its business from the website] so that we can ensure the Sheriff's messaging celebrates Visa's change in direction as opposed to pointing out its ties to sex trafficking" (emphasis in original)).

<sup>304</sup> *Id.* at 233.

<sup>305</sup> 639 F. Supp. 581 (D.D.C. 1986).

<sup>306</sup> *Id.* at 587:

[T]he [Commission's] letter [did] not appear to be in furtherance of the work of the Commission. This being so, it can be argued that the only purpose served by that letter was to discourage distributors from selling the publications; a form of pressure amounting to an administrative restraint of the plaintiffs' First Amendment rights.

<sup>307</sup> See, e.g., *Backpage.com*, 807 F.3d at 234 ("[O]bviously credit card companies don't like being threatened by a law-enforcement official that he will sic the feds on them, even if the threat may be empty."); *id.* at 235 ("In his public capacity as a sheriff of a major county . . . Sheriff Dart is not permitted to issue and publicize dire threats against credit card companies that process payments made through Backpage's website, including threats of prosecution . . . , in an effort to throttle Backpage.").

D.C. Circuit vigorously rejected the idea that the threat of negative publicity could ever be found to be sufficiently coercive to impose an informal prior restraint. “As part of the duties of their office,” the D.C. Circuit insisted, “officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate.”<sup>308</sup>

This reluctance to recognize that threats of bad publicity can serve as unconstitutional “instruments of regulation” clearly reflects judicial anxiety about the impact that a contrary rule could have on the ability of government officials to use their bully pulpit to prod powerful private companies into more public-regarding choices than those companies would otherwise make. And this concern is well-taken: Clearly the jawboning rule should not be interpreted so expansively as to prevent government officials from being able to criticize the bad, but perhaps not unlawful, behavior of private companies, including when that behavior involves speech or its regulation. Given the constraints imposed on the state’s ability to directly coerce speech suppression, the use of social sanctions to impose costs on those who make what appear to others to be bad or immoral choices represents an important means of norm enforcement. Moreover, by criticizing the actions of private businesses—including private businesses that disseminate or host speech—officials can enrich the public conversation, focus broader popular dissatisfaction, and add useful expertise. They contribute, in other words, to what the Court has at times suggested to be the central purpose of the First Amendment: namely, ensuring “the widest possible dissemination of information from diverse and antagonistic sources.”<sup>309</sup>

But the fact that officials must be free to publicly condemn actions they have no power to regulate does not mean that using the threat of public condemnation to *coerce* private cooperation is a legitimate, or democracy-promoting, act. Nor does it mean that a First Amendment rule that prohibits these kinds of threats would impinge excessively on legitimate government critique. As discussed in the previous Part, even were threats of using the bully pulpit to blacken a company’s name recognized as the kind of threat that the rule against informal censorship prohibits, government officials would remain entirely free to drag that company’s name through the mud (or at least, as free as the libel and

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<sup>308</sup> *Penthouse*, 939 F.2d at 1015.

<sup>309</sup> *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

defamation laws allow). What they would not be permitted to do is exploit private actors' concern with their public reputation to avoid having to actually do the dragging. Nor could they condition the cessation of this kind of public criticism on compliance with their demands.

This kind of demand—do what I say or I will start or keep talking—not only doesn't add much to public debate; it detracts from it, by allowing officials to intimidate private companies without opening themselves up to the criticism or pushback that might follow were they to actually hold a press conference or make public claims about the wrongfulness of the companies' actions. This was certainly true of Sheriff Dart's jawboning campaign. The effectiveness of his private "blackmail" prevented him from ever having to publicly defend his farfetched claim that, by providing payment processing services to Backpage.com, the credit card companies could be held criminally liable as abettors to sex trafficking.<sup>310</sup> Similarly, because its threats worked, the DOJ commission defendant in the *Playboy* case did not have to explain why, when compiling its list of identified pornographers, it relied upon the unsubstantiated testimony of one witness out of two hundred—Reverend Donald Wildmon, the Executive Director of the National Federation for Decency—to include 7-Eleven in the list of identified distributors.<sup>311</sup>

There would thus be little democratic cost to recognizing that the threats of holding a press conference, or of otherwise using the governmental bully pulpit to shame and denigrate a private speaker or speech intermediary, are the kinds of state action to which the First Amendment anti-jawboning rule applies. Recognizing as much would also enable courts to more effectively protect against what the history of jawboning in the United States suggests is an extremely powerful technique of constitutional evasion.

### 3. Keeping up versus taking down.

Another important question that the opinion in *Vullo* does not directly address but that it nevertheless suggests an answer to is whether government officials violate the First Amendment when they coerce private actors to disseminate or amplify speech, rather than to suppress or disfavor it. There are plenty of examples of this kind of speech-promoting jawboning. For example, officials in the Nixon White House attempted to pressure executives

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<sup>310</sup> *Backpage.com*, 807 F.3d at 233.

<sup>311</sup> *Playboy*, 639 F. Supp. at 583–85.

at the major television networks to air more stories that expressed a positive view of the administration or that included its spokesmen and defenders by threatening them with the loss of presidential favor, or potentially antitrust investigations, if they disregarded these requests.<sup>312</sup> When he was first in office, President Trump made similar demands of the social media companies, whom he accused of “totally silenc[ing] conservative[ ] voices.”<sup>313</sup> The President threatened to “strongly regulate, or close [the companies] down” if necessary to prevent them from discriminating in this way.<sup>314</sup> And more recently, plaintiffs in *Missouri v. Biden* accused the Biden administration of violating their First Amendment rights not only when they attempted to get social media companies to take down speech that was critical of the administration but also when they “coerced or significantly encouraged the social-media companies into disseminating information that was favorable to the administration”—for example, posts that promoted the administration’s public health messaging and other speech of that kind.<sup>315</sup>

Thus far, no court has weighed in on whether this kind of speech-promoting jawboning raises the same kinds of First Amendment concerns as jawboning that attempts to limit the dissemination of speech. (The Fifth Circuit declined to address this

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<sup>312</sup> On one occasion, for example, a White House aide conveyed to the television networks the President’s “request” that they provide “equal time to counter [critical] commentary” about President Richard Nixon’s (ultimately unsuccessful) decision to nominate Clement Haynsworth to the Supreme Court. Memorandum from J.S. Magruder, Special Assistant to the President, to H.R. Haldeman, White House Chief of Staff (Oct. 17, 1969), in Bazelon, *supra* note 128, at 247, 250. On another occasion, a White House aide reported obtaining “unanimous agreement” from the television executives he met with “that the President’s right of access to TV should in no way be restrained” and that the executives agreed with the White House that when “the President speaks as President . . . there is no obligation for presenting a contrasting point of view under the Fairness Doctrine.” Memorandum from Chuck Colson, Special Counsel to President Nixon, to Herb Klein, White House Director of Communications (Sept. 25, 1970), in Bazelon, *supra* note 128, at 244. That neither the White House aides nor the network executives understood these requests to be purely voluntary was made crystal clear in the memos that reported on them. *See id.* at 246:

The networks badly want to have these kinds of discussions which they said they had had with other Administrations but never with ours. They told me any time we had a complaint about slanted coverage for me to call them directly. . . . In short, they are very much afraid of us and are trying hard to prove they are “good guys.”

<sup>313</sup> Ironically enough, President Trump made the assertion about social media companies “totally silenc[ing] conservative[ ] voices” on Twitter (now styled X) itself. *See* Donald J. Trump (@realDonaldTrump), X (May 27, 2020), <https://perma.cc/3UNS-ZLSQ>.

<sup>314</sup> *Id.*; *see also* Shannon Bond & Avie Schneider, *Trump Threatens to Shut Down Social Media After Twitter Adds Warning to His Tweets*, NPR (May 27, 2020), <https://perma.cc/F677-SPAF>.

<sup>315</sup> *Missouri v. Biden*, 83 F.4th at 389 n.19.

part of the plaintiffs' lawsuit when it resolved *Missouri v. Biden*; and the Supreme Court didn't address it either when it took the case on appeal.)<sup>316</sup> And the precedents do not make it at all clear how they should. This is because, other than *Missouri v. Biden*, there have been virtually no lawsuits in which speakers or speech intermediaries have challenged jawboning of this kind. Perhaps as a result, the opinions that have been handed down in First Amendment jawboning cases have tended to assume that the problem with informal coercion is that it is either intended to, or does in fact result in, the suppression of speech. This is certainly what the *Bantam Books* Court assumed.<sup>317</sup> And the same has tended to be generally true of the cases that follow from *Bantam Books*.<sup>318</sup>

It would be a mistake, however, to conclude from its absence from the cases that jawboning that seeks to promote rather than suppress speech is beyond the scope of First Amendment concern. This is because, as the Court's compelled speech cases make clear, the First Amendment protects the right of speakers *not* to speak, and speech intermediaries *not* to disseminate speech, just as surely as it protects the right of speakers to speak and speech intermediaries to disseminate speech that they wish to disseminate. As the Court put it in *Wooley v. Maynard*<sup>319</sup> in 1977, "the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all."<sup>320</sup>

The First Amendment protects both of these rights because courts have recognized that both when they speak and when they choose not to speak, individuals exercise the kind of expressive autonomy that is crucial to the operation of the marketplace of ideas. Ideas win or lose in what Justice Oliver Wendell Holmes called the "free trade in ideas" in part by succeeding or failing to

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<sup>316</sup> *Id.* See generally *Murthy*, 144 S. Ct. 1972.

<sup>317</sup> *Bantam Books*, 372 U.S. at 66–67 (reversing the Rhode Island Supreme Court because "the record amply demonstrates that the Commission deliberately set about to achieve the *suppression* of publications deemed 'objectionable' and succeeded in its aim" (emphasis added)).

<sup>318</sup> See, e.g., *Backpage.com*, 807 F.3d at 231 ("The First Amendment forbids a public official to attempt to *suppress* the protected speech of private persons by threatening that legal sanctions will at his urging be imposed unless there is compliance with his demands." (emphasis added)); *Okwedy*, 333 F.3d at 340–41 ("[A] public-official defendant who threatens to employ coercive state power to *stifle* protected speech violates a plaintiff's First Amendment rights even if the public-official defendant lacks direct regulatory or decision-making authority over the plaintiff." (emphasis added)).

<sup>319</sup> 430 U.S. 705 (1977).

<sup>320</sup> *Id.* at 714.

convince participants to disseminate them.<sup>321</sup> Governmental mandates to speak in certain ways undermine this process of selection and winnowing, just as much as governmental mandates to stop speaking do. Nor can efforts to coerce speech be so easily pried apart from efforts to suppress it, given the inevitable scarcity of time and attention that plagues the operation of the public sphere even in a digital era—that is to say, even when there is infinite space to speak (but not infinite audiences to listen). In such a context, state actions that result in the prioritization of certain speakers or voices will in most cases also result in the relative deprioritization of their competitors.

For these reasons, courts have made quite clear that officials may not in many circumstances use their formal powers to coerce the dissemination of speech.<sup>322</sup> Under the principles articulated in *Vullo*, they should therefore recognize that government officials may not use their informal powers to achieve the same end. Officials can request and encourage speech providers to promote certain kinds of speech, but they cannot promise a benefit—or threaten a penalty—in an effort to coerce the speech intermediary to cooperate with that request without raising the same concerns of constitutional evasion that speech-suppressive jawboning campaigns raise. The result in both cases is the kind of governmental interference with the “thinking process of the community” that the First Amendment forbids.<sup>323</sup>

This is not to say that there will be no differences between speech-suppression and speech-promotion jawboning claims. For one thing, it may be much harder to find plaintiffs with standing to challenge these kinds of jawboning campaigns. This is because, while it is easy enough to understand how a speech-suppressive jawboning campaign causes injury to the speaker whose speech it ends up suppressing, what speaker could challenge a speech-promoting campaign? Hence, these kinds of suits are likely to proceed only if the intermediary itself brings them; something that

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<sup>321</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>322</sup> Frederick Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433, 450–51 (1977):

Since the first amendment does not assure that everyone has a right to speak whenever or wherever he chooses, or to force others to listen to his ideas or contribute use of property to their support, the courts in upholding the private right to select among sources of information and ideas do no more than enforce the ground rules of public debate and protect an element of first amendment freedom as important as the right to speak.

<sup>323</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1960).

many intermediaries will be loath to do (for the reasons discussed earlier). Here, as elsewhere, the economic and political incentives that undergird the public sphere may limit the usefulness of First Amendment doctrine as a constraint on informal threats and coercion, as I discuss in more detail in the next Section. In principle, though, there is no reason to limit the First Amendment anti-jawboning rule solely to informal efforts by government actors to take speech down. In the perhaps rare case in which a company is willing to defend itself against government coercion, it should be able to do so.

#### B. Shoring Up the Power of the Courts

As the previous Section lays out, *Vullo* articulates a conception of the First Amendment rule against informal censorship that, if interpreted in a principled manner, should result in a body of free speech law that extends much more protection to those impacted by schemes of constitutional evasion than has been the case to date. In this respect, it promises to more effectively protect speakers and listeners against the threat that informal censorship poses to the independence of the democratic public sphere.

There are limits to what any substantive doctrine can accomplish, however. *Vullo*, like *Bantam Books* before it, reflects the Court's attempt to construct a body of free speech law that recognizes and is thus able to respond to the actual incentives and power relationships that structure the American system of free expression. But the power asymmetry between government regulators and private businesses that *Vullo* attempts to safeguard speakers against also likely limits the willingness of those impacted by government jawboning to take advantage of the doctrinal protections that the decision provides. In particular, the power that government regulators possess to approve mergers, conduct tax audits, launch investigations, or in other ways make life difficult for businesses they target will make it very often simply not worth it for those targeted by informal governmental pressure to challenge that behavior in court, no matter how favorable the doctrinal rules under which they bring suit may be.

This helps explain why there 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. In the *Writers Guild* case, for example, it wasn't the network executives whom Wiley repeatedly met with, and whom he threatened with regulatory proceedings and the loss of their network's broadcast licenses, who challenged the FCC's actions; it

was instead an organization that represented writers who work on shows that were affected by the adoption of the Family Viewing Policy.<sup>324</sup> Similarly, in *Backpage.com*, it was not the credit card companies whom Sheriff Dart tried to “blackmail” who went to court but the website he attempted to shut down that did so.<sup>325</sup> And of course, in *Vullo*, it was not the insurance companies or banks that Vullo regularly interacted with who challenged her exercise of regulatory authority but the NRA that did so.<sup>326</sup>

The unwillingness of the direct targets of government jawboning to challenge the government’s actions poses all kinds of problems for a court-centered response to the problem of constitutional evasion. For one thing, it makes it likely that many instances of jawboning will never make their way to the courts because no one other than the official and the company she coerces will know that speech was suppressed because of the involvement of the government. Even in cases where the reporter or user or website knows enough to suspect that official action was at play, they may not know anything specifically about what the government actor said or did, or how the private party responded, and therefore may have difficulty alleging sufficient facts to survive a motion to dismiss.<sup>327</sup> This helps explain why so many of the recent jawboning cases have failed at this stage.<sup>328</sup>

Even in cases where plaintiffs are able to plausibly state a claim to relief, their lack of knowledge about what specifically occurred may make it impossible to establish their standing. This is particularly true after the Court’s decision in its second jawboning case of the 2024 Term, *Murthy v. Missouri*. *Murthy* involved a sprawling set of allegations of unconstitutional jawboning, brought by a range of both government and private plaintiffs, against officials in the Biden White House, the FBI, the CDC, and

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<sup>324</sup> *Writers Guild*, 423 F. Supp. at 1072.

<sup>325</sup> *Backpage.com*, 807 F.3d at 237. The credit card companies appeared entirely content to go along with the sheriff’s pressure campaign. *Id.* at 236 (noting the economic concerns that led the companies to “knuckl[e] under to the [sherriff’s] threats with such alacrity”).

<sup>326</sup> *Vullo*, 144 S. Ct. at 1324–25.

<sup>327</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“To survive a motion to dismiss, a . . . plaintiff [must] plead [ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”). Indeed, the only reason the NRA was able to make some of the factual allegations in its complaint was because of information it received from a “confidential [ ] source.” Danny Hakim, *After NRA’s Supreme Court Win, a Dispute over Key Facts*, N.Y. TIMES (Dec. 9, 2024), <https://www.nytimes.com/2024/12/09/us/nra-supreme-court.html>. Most victims of informal censorship will obviously not have access to this kind of information.

<sup>328</sup> Indeed, virtually every one of the cases cited *supra* note 174 was dismissed prior to discovery.

a number of other federal agencies.<sup>329</sup> The case was poorly argued and involved highly spurious fact finding by the lower courts. This may explain why the same Court that was so willing in *Vullo* to articulate a broad view of the First Amendment anti-jawboning rule was also willing, by a vote of 6–3, to summarily dismiss the plaintiffs’ claims on standing grounds.<sup>330</sup> By doing so, the Court was able to avoid dealing with the complex substantive questions it raised. Indeed, the majority opinion didn’t even cite *Bantam Books*, let alone *Vullo* (which was decided several months earlier).<sup>331</sup>

Nevertheless, despite its failure to engage in any way with the First Amendment precedents, the decision in *Murthy* will almost certainly make it harder for plaintiffs who want to challenge coercive jawboning schemes to establish that they have standing to sue. This is because, in cases where the constitutional injury that an individual seeks to redress in court is the suppression of their speech by a coerced third party, *Murthy* makes clear that the speaker must provide evidence that the informal pressure campaign *specifically* caused the suppression of their speech in order to establish the traceability that Article III standing requires.<sup>332</sup> The Fifth Circuit had reached a contrary conclusion because it had adopted a much more probabilistic approach to the traceability analysis.<sup>333</sup> But the Court rejected the idea that evidence that government pressure made it more likely that the plaintiff’s speech was taken down was sufficient to establish Article III standing. What was needed, Justice Amy Coney Barrett asserted on behalf of the Court, was evidence of “specific causation.”<sup>334</sup> In holding as much, the opinion appeared to reintroduce into jawboning cases the very causation requirement that *Vullo* just a few months earlier had dispensed with—albeit as a jurisdictional requirement rather than as a requirement of First Amendment doctrine.

In fact, this causation requirement won’t apply to all plaintiffs who bring jawboning claims. Nothing in *Murthy* suggests that the businesses who are *directly* targeted by informal

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<sup>329</sup> *Murthy*, 144 S. Ct. at 1988.

<sup>330</sup> *Id.* at 1993–94.

<sup>331</sup> See Evelyn Douek & Genevieve Lakier, *Lochner.com?*, 138 HARV. L. REV. 100, 144–47 (2024) (discussing the background of the case).

<sup>332</sup> *Murthy*, 144 S. Ct. at 1987 (“The primary weakness in the record of past restrictions is the lack of specific causation findings with respect to any discrete instance of content moderation.”).

<sup>333</sup> *Missouri v. Biden*, 83 F.4th at 370–71 (affirming the district court’s conclusion that “the social-media platforms’ censorship decisions were likely attributable at least in part to the platforms’ reluctance to risk the adverse legal or regulatory consequences that could result from a refusal to adhere to the government’s directives”).

<sup>334</sup> *Murthy*, 144 S. Ct. at 1987.

government pressure need to show that the pressure caused them to do or not do anything in order to establish their standing. This is because, in such cases, the injury for which the plaintiff seeks relief is not the suppression of their speech but the threatened interference with their editorial autonomy. And as *Vullo*, like earlier cases, makes clear, this threat does not need to be successful to violate the First Amendment. Hence, after *Murthy*, direct causation will only be something that some kinds of jawboning plaintiffs must prove. But for those plaintiffs—the most likely actual plaintiffs—establishing this kind of causation, on the basis of imperfect knowledge and prior to discovery, may often be extremely difficult to do.

*Murthy* also makes clear that plaintiffs who seek injunctive relief for the indirect suppression of their speech will be able to demonstrate the redressability that Article III standing requires only if they can show that the speech intermediary that hosts their speech will experience continuing pressure by government officials to suppress it, or has no reason of its own to moderate their speech, independent of the government pressure.<sup>335</sup> But this will also often be very difficult to prove. The fact that the government acted coercively in the past is no proof that it will act coercively in the future, even if this history tips the scales in that direction. Meanwhile, the intermingling of popular and governmental pressure to censor that so often occurs will make it quite easy for speech intermediaries like the social media platforms to come up with other reasons why they demoted the disfavored speech than that they did so in response to government pressure.

The tricky procedural problems that face plaintiffs in jawboning lawsuits, and that almost certainly limit the number of those plaintiffs to begin with, mean that properly vindicating the principles that *Vullo* announces—ensuring, in other words, that government officials cannot in practice exercise the informal censorial power than in theory the First Amendment forbids—requires more than simply better doctrine. It almost certainly also requires regulatory interventions—and perhaps also self-regulatory reforms—to make it harder for government officials to rely upon the silence of those they jawbone to hide their schemes of constitutional evasion from the courts, and to make it easier for those impacted to get into court.

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<sup>335</sup> *Id.* at 1995 (“[W]ithout evidence of continued pressure from the defendants, it appears that the platforms remain free to enforce, or not to enforce, those policies—even those tainted by initial governmental coercion.”).

First Amendment scholars and advocates have recognized as much and proposed a number of reforms to increase the transparency of informal government–private speech intermediary communications. For example, advocates at a number of civil liberties organizations have drafted model legislation that would require federal government officials who communicate with social media companies about speech that those companies host or disseminate to publicly disclose that the communication occurred, as well as other facts about it—for example, what the official asked or told the private company to do about the speech and the “rationale” for the communication.<sup>336</sup> A bill introduced into Congress in 2023 by Republican lawmakers imposed similar obligations. It prohibited any federal officials from “influencing or coercing” the removal or suppression of lawful speech from any social media platform, except for a valid law enforcement or national security reason, and in cases where there was a justification for the government act, it required the official who engaged in it to provide that reason and details about what occurred to a number of congressional committees and the head of her department.<sup>337</sup>

These draft bills are a good start. There is no reason why communications between government officials and private speech intermediaries need to be as cloaked in secrecy as they have traditionally been—although there is also no reason to think that transparency is only necessary when officials communicate with social media companies (as these bills suggest). Nevertheless, proponents of these reforms are certainly correct that a requirement for more transparency on the part of government officials—not only federal officials but also state officials—could help not so much supplant the role of the courts in defending the independence of the democratic public sphere against schemes of constitutional evasion as provide those impacted by informal government action the kind of information they would need if they were to challenge it in court, or anywhere else for that matter.

But government transparency mandates are not all that could or should be done to better vindicate the categorical principle against constitutional evasion. Federal or state lawmakers

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<sup>336</sup> See generally, e.g., John Coleman, *Government Transparency Is Critical When It Comes to Fighting Censorship*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (July 11, 2024), <https://perma.cc/44EK-GS55>; Will Duffield, *Toward a Jawboning Transparency Act*, KNIGHT FIRST AMEND. INST. BLOG (Oct. 19, 2023), <https://perma.cc/Y2Y7-KEUM>; Andrew Grossman & Kristin Shapiro, *Shining a Light on Censorship: How Transparency Can Curtail Government Social Media Censorship and More* (Cato Inst., Briefing Paper No. 168, 2023).

<sup>337</sup> Protecting Speech from Government Interference Act, H.R. 140, 118th Cong. § 2(g)(1) (2023).

could also impose disclosure obligations on the *businesses* targeted by jawboning rather than, or in addition to, the government actors themselves. Corporate disclosure has been a fraught but important mechanism by which legislators have in recent years attempted to ensure that control over the powerful entity that is the corporation is not used in ways that threaten the public welfare. For example, the Corporate Transparency Act,<sup>338</sup> enacted by Congress in 2021, imposes new reporting obligations on corporations in an effort to combat the serious public welfare offenses that are corruption and fraud.<sup>339</sup> There is no reason why similar kinds of reporting obligations could not be employed in response to the serious threat to the public welfare that is coercive jawboning.

Equally importantly, Congress could authorize damage awards for First Amendment claims against federal officials. When it enacted 42 U.S.C. § 1983, Congress authorized those injured by state officials' violations of their First Amendment rights to go to court to recover compensatory as well as punitive damages.<sup>340</sup> But no corresponding right has ever been extended to those harmed by federal officials' violations of the First Amendment.<sup>341</sup> This is a significant problem when it comes to enforcing the rule against constitutional evasion, given the enormous discretionary power that federal agencies, like the FCC, and officials, like those in the executive branch, possess over speech. The lack of a right to statutory damages for those impacted by coercive federal jawboning not only disincentivizes suit—what after all will be the point if the harm occurred in the past, as will usually be the case, and the only available remedy is an injunction?—but also makes it harder for plaintiffs to establish their standing to sue under the rules set out in *Murthy*.<sup>342</sup> Congress could help with both problems by creating a statutory right to damages for schemes of constitutional evasion, if it so desired.

In addition, both government actors and private businesses could use self-regulation to help inoculate themselves against the seductive attractions of a scheme of constitutional evasion. Government agencies could, for example, impose greater constraints than many have employed so far on how their employees speak to

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<sup>338</sup> Pub. L. No. 116-283, §§ 6401–6403, 134 Stat. 4604 (2021).

<sup>339</sup> *Id.*

<sup>340</sup> See 42 U.S.C. § 1983.

<sup>341</sup> The Supreme Court has also refused to recognize an implied right to damages under the *Bivens* rule. *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012) (citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)).

<sup>342</sup> Indeed, in her opinion, Justice Barrett was quite explicit about the higher hurdle that the nature of the relief being sought in the case imposed. *Murthy*, 144 S. Ct. at 1987.

private businesses about potentially dangerous or unlawful speech that they host or disseminate. Indeed, the FBI has done just this. Before the Court even decided the claims against it in *Murthy*, the FBI issued new guidelines that were designed to ensure that officers did not violate constitutional norms or principles when they communicated with officials at the social media companies by requiring those officials to make more explicitly clear to platforms the persuasive as opposed to coercive nature of their advice and information.<sup>343</sup> Whether these guidelines will survive the change in administration is an open question; but they demonstrate how government actors could, to some degree, formalize the exercise of informal power. Private speech intermediaries could for their part also formalize to some degree informal communications with government actors, by providing more internal constraints on the ability of decision-makers to act on governmental advice and pressure.

Finally, and perhaps most importantly, lawmakers could and perhaps should limit the discretion that executive branch officials possess to impose regulatory harms on speech and service intermediaries. After serving on the federal court that hears most appeals of FCC actions, the D.C. Circuit, Judge Bazelon concluded that the primary problem with how the FCC wielded power was the “wide-ranging and largely uncontrolled administrative discretion” that it possessed to benefit or harm—including by denying broadcast licenses to—television and radio broadcasters.<sup>344</sup> Similar kinds of discretion underpin many of the jawboning campaigns described in this Article; hence thought could be put into means by which the administrative discretion that agencies like the FCC possess could be limited, or at least subjected to more procedural constraints, in order to make it harder for officials to weaponize that discretion to censor and control.

More, obviously, could and should be said about all these reforms. But the crucial point for this Article is that the Court’s reaffirmation in *Vullo* of the categorical nature of the constitutional rule against informal censorship should not be taken as the end of the matter—the answer that solves the problem of jawboning. As I have argued elsewhere, vindicating the values that the First Amendment protects has never been, and likely could never be, a

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<sup>343</sup> Matt Perault, *The FBI Leads the Way on Jawboning Governance*, LAWFARE (Sept. 3, 2024), <https://perma.cc/W22S-XH26>.

<sup>344</sup> Bazelon, *supra* note 128, at 215.

solely court-centric project.<sup>345</sup> And it should not be a solely court-centric project in this context either—perhaps especially so.

What decisions like *Vullo* do is articulate the values and the principles that are supposed to govern and underpin the American system of free expression. But it is up to all of us—not just courts but state and federal government officials, private institutional actors, and targeted speakers—to make those norms and principles meaningful, both by standing on our rights when they are trampled on and by reforming our institutional and regulatory practices to lessen the risk that government officials will be able to use their official and unofficial powers to evade the First Amendment's guarantees.

### CONCLUSION

The threat that the jawboning of speech poses to the independence of the democratic public sphere has never been more evident than it is today. We likely no longer need to worry, in the short term at least, about the prospect of concerted federal pressure being brought to bear against social media companies that host too much health-related misinformation on their sites. But the Trump administration has made quite plain that it intends to use all the powers available to it, both formal and informal, to enforce ideological conformity and discipline the public sphere. And so far, its threats of harm appear to be succeeding to an extraordinary degree in causing private institutions, including institutions (such as universities and law firms) that enjoy extremely strong First Amendment protections, to suppress their own or others' speech.

In this context, it is vitally important to understand the significant limits that the First Amendment imposes on the power of officials to threaten, intimidate, or otherwise coerce the suppression of speech and association. This Article has suggested what those are, and how the *Vullo* decision reaffirms and extends them. But as it also argues, the existence of a strong rule is not all that is required to ensure that in this democratic society, it is in fact, and not just in theory, authority that is controlled by public opinion, not the other way around.<sup>346</sup>

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<sup>345</sup> See generally Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021).

<sup>346</sup> *Barnette*, 319 U.S. at 641 (“We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.”).

Although it is unlikely right now that federal lawmakers will take aggressive steps to reinforce the principle that *Vullo* articulates, state lawmakers can and should take steps to protect private institutions in their states from government jawboning, and in future years, lawmakers at all levels and in all parties should think seriously about what reforms they can make to defend the independence of the public sphere against schemes of informal censorship. The alternative is a body of free speech law in which the protection the First Amendment provides is merely formal.