

“Here Are Some Thoughts I Have”*

On Threats of Regulation and Other Forms of Bullying as a Governance Mechanism

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Abstract

Government by regulation is the normal way in which we do business in constitutional democracies. We meet in legislatures, through our representatives, in order to decide on public policy and the best course of action to meet our problems and challenges. When we reach a broad enough consensus, or when we are tired of talking and take a vote, we make laws and all sorts of rules destined to govern ourselves—that is, to define as clearly as possible what we owe to each other. Threats of regulation are part of that process. When our representatives, or their appointees, want a change in the world, they may threaten those subject to their jurisdiction with making new rules if they fail to change their ways. This traditional mechanism through which power is exercised poses challenges to the rule of law model of democratic rule-making, that assumes an accountable, transparent, and responsive legislature deliberating openly in front of the people themselves. Threats of regulation—or *jawboning*, as it has often been called—can escape some of the constraints of the rule of law model. Under certain circumstances, it may benefit regulators and those regulated alike. This paper conceptualizes threats of a regulation as a specific mechanism of power, that has a special salience on Internet governance. It proposes a concept broad enough to guide us in an empirical inquiry into these mechanisms in action.

Keywords regulation Internet governance jawboning freedom of expression threats

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Generally, it is not an unreasonable statement to affirm that companies dislike regulation: under the premises of capitalist free markets (assumed as generally true in the context of this paper), they can develop their business free of outside demands and constraints.¹ From this standpoint, regulation imposes on them duties and obligations that most companies would avoid if possible. Regulation, however, can have effects even when not fully materialized: regulatory threats may nudge companies in certain directions by tapping in their desire to prevent that regulation from becoming a reality.² Recent studies show how companies strive to stay ahead of the curve of proposed regulations³ and how threats of regulations operate ubiquitously across fields and industries as a nudging device to pressure companies into “voluntary schemes” of compliance with public officials’ desires and goals.⁴ By yielding to some of the demands of the would-be regulators, companies can appease some of the concerns of public officials in order to diminish their commitment to regulate them. Some evidence exists on this regard

¹ Gary S. Becker, *A Theory Of Competition Among Pressure Groups For Political Influence*, 98 THE QUARTERLY JOURNAL OF ECONOMICS 371–400 (1983).

² Michael Karanicolas, *Squaring the circle between freedom of expression and platform law*, 20 PITT. J. TECH. L. & POL’Y 177, 186 (2019).

³ Suzanne Chang, Joseph Kalmenovitz & Alejandro Lopez-Lira, *Follow the Pipeline: Anticipatory Effects of Proposed Regulations* (2023), <https://papers.ssrn.com/abstract=4360231> (last visited Apr 5, 2023).

⁴ Alison Linder, *Explaining Shipping Company Participation In Voluntary Vessel Emission Reduction Programs*, 61 TRANSPORTATION RESEARCH PART D: TRANSPORT AND ENVIRONMENT 234–245 (2017), <https://www.sciencedirect.com/science/article/pii/S1361920917305850> (last visited Apr 5, 2023); Jeroen Suijs & Jacco L. Wielhouwer, *Disclosure Policy Choices Under Regulatory Threat*, 50 THE RAND JOURNAL OF ECONOMICS 3–28 (2019), <https://onlinelibrary.wiley.com/doi/abs/10.1111/1756-2171.12260> (last visited Apr 5, 2023); Patrik Hall & Erik Hysing, *Advancing voluntary chemical governance? The case of the Swedish textile industry dialogue*, 62 JOURNAL OF ENVIRONMENTAL PLANNING AND MANAGEMENT 1001–1018 (2019); Jodi L. Short & Michael W. Toffel, *Making self-regulation more than merely symbolic: The critical role of the legal environment*, 55 ADMINISTRATIVE SCIENCE QUARTERLY 361–396 (2010); Thomas P Lyon & John W Maxwell, *Preempting Uncertain Regulatory Threats* (2004), <https://webuser.bus.umich.edu/tplyon/PDF/Working%20Papers/LyonMaxwellJRESept04.pdf> (last visited Apr 19, 2023); Dennis M. Patten & Greg Trompeter, *Corporate responses to political costs: an examination of the relation between environmental disclosure and earnings management*, 22 JOURNAL OF ACCOUNTING AND PUBLIC POLICY 83–94 (2003); John W. Maxwell, Thomas P. Lyon & Steven C. Hackett, *Self-regulation and social welfare: The political economy of corporate environmentalism*, 43 THE JOURNAL OF LAW AND ECONOMICS 583–618 (2000).

on environmental matters,⁵ on broadcasting,⁶ on the energy sector,⁷ on the ready-to-eat cereal market,⁸ on mining,⁹ on the Swedish textile industry's commitments to reduce the use of certain chemicals,¹⁰ on hedge funds,¹¹ among others. This dynamic is also present on Internet governance.¹²

While we are embarking on an empirical research on the matter, this paper theorizes *threats of regulation* as a specific form of governance, that taps on the regulatory power of the state but takes advantage of circumventing

⁵ Erin M. Reid & Michael W. Toffel, *Responding To Public And Private Politics: Corporate Disclosure Of Climate Change Strategies*, 30 STRATEGIC MANAGEMENT JOURNAL 1157–1178 (2009) (“...in the realm of public politics, threats of state regulations targeted at a firm’s industry as well as regulations targeted at other industries increase the likelihood that the firm will engage in such practices”); Madhu Khanna & Wilma Rose Q. Anton, *What is driving corporate environmentalism: Opportunity or threat?*, 9 CORPORATE ENVIRONMENTAL STRATEGY 409–417 (2002) (arguing that command and control systems have encouraged self-regulation); John W. Maxwell, Thomas P. Lyon & Steven C. Hackett, *Self-regulation And Social Welfare: The Political Economy Of Corporate Environmentalism*, 43 THE JOURNAL OF LAW AND ECONOMICS 583–618 (2000) (arguing that self-regulation on environmental issues has been in the past a strategy followed by companies to prevent political action against them).

⁶ Corinne Cooper, *Writers Guild of America, West, Inc. v. FCC: A First Amendment Blow to FCC Jawboning*, 20 ARIZ. L. REV. 315 (1978); Nancy Miller Lerner, *It’s All In the Family: Family Viewing and the First Amendment*, 7 N.Y.U. REV. L. & SOC. CHANGE 83 (1978); Paul Horwitz, *Regulating TV Violence: An Analysis of the Voluntary Code Regarding Violence in Television Programming*, 52 TORONTO FACULTY OF LAW REVIEW 345 (1993).

⁷ Melinda Acutt, Caroline Elliott & Terry Robinson, *Credible Regulatory Threats*, 29 ENERGY POLICY 911–916 (2001); Stephen Erfle, Henry McMillan & Bernard Grofman, *Regulation via threats: Politics, media coverage, and oil pricing decisions*, 54 PUBLIC OPINION QUARTERLY 48–63 (1990).

⁸ Ronald W. Cotterill, *Jawboning cereal: The campaign to lower cereal prices*, 15 AGRIBUSINESS: AN INTERNATIONAL JOURNAL 197–205 (1999).

⁹ Paul R. Verkuil, *Jawboning Administrative Agencies: Ex parte Contacts by the White House*, 80 COLUMBIA LAW REVIEW 943–989, 946 (1980).

¹⁰ Hall and Hysing, *supra* note 4.

¹¹ Suijs and Wielhouwer, *supra* note 4.

¹² Michael Karanicolas, *Subverting Democracy to Save Democracy: Canada’s Extra-Constitutional Approaches to Battling Fake News*, AVAILABLE AT SSRN 3423092 (2019); Karanicolas, *supra* note 2; Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARVARD LAW REVIEW 2296–2342 (2014); Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51 (2015); Danielle Keats Citron, *Extremist Speech, Compelled Conformity, And Censorship Creep*, 93 NOTRE DAME L. REV. 1035 (2017); Ryan Hagemann, Jennifer Huddleston Skees & Adam Thierer, *Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future*, 17 COLO. TECH. L.J. 37–130 (2018); Paddy Leerssen, *The Soap Box as a Black Box: Regulating transparency in social media recommender systems*, 11 EUROPEAN JOURNAL OF LAW AND TECHNOLOGY (2020); Barrie Sander, *Democratic disruption in the age of social media: Between marketized and structural conceptions of human rights law*, 32 EUROPEAN JOURNAL OF INTERNATIONAL LAW 159–193 (2021); Justin Monahan, “Falsehood Flies, and the Truth Comes Limping after”: *Combating Online Disinformation in the Shadow of CUSMA*, 30 DALHOUSIE J. LEGAL STUD. 63 (2021); WILL DUFFIELD, *Jawboning Against Speech. How Government Bullying Shapes Rules on Social Media* (2022).

the constraints attached to it.¹³ This form of governance has been studied from a number of perspectives. It has been defended as specially useful in contexts of high uncertainty and very dynamic industries,¹⁴ but it has also been questioned in terms of its efficacy and potential arbitrariness¹⁵ as well as its constitutional standing when threats affect actors covered by constitutional protections that can be sidestepped in this way.¹⁶ While we share some of these concerns, our goal here is conceptual and thematic delimitation. We move forward in the following way.

In the first part, we conceptualize regulatory threats within a scale that goes from simple forms of verbal pressure (what is usually called jawboning) to actual legislative or administrative steps towards regulation (hearings, green or white papers, legislative inquiries, requests for information, formal letters, guidance documents, and so on). This taxonomy of actions that public officials can deploy offers a concept with enough room to accommodate actual practices efficiently. It provides a moving scale loosely based on the progress of the threatened regulation. We depart from a theoretical assumption: that words sometimes are just words, but when these are accompanied by specific administrative or legislative pre-regulatory acts, it is reasonably to conclude that public officials' commitment towards regulation is higher and—thus—that the potential nudging effects of threats are bigger. We can infer from this that we should expect higher levels of effectiveness in threats that show more commitment—accumulated in specific pre-regulatory steps—than on those that show less of it.

¹³ ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* (1994); Adrienne Héritier & Dirk Lehmkuhl, *Introduction: The Shadow of Hierarchy and New Modes of Governance*, 28 *JOURNAL OF PUBLIC POLICY* 1–17 (2008), <http://www.jstor.org/stable/40072033> (speaking of this power as “the shadow of hierarchy”); Hagemann, Huddleston Skees, and Thierer, *supra* note 12 at 53 (arguing that regulators can get what they want “without the fuss and mess of formal rulemaking”).

¹⁴ Tim Wu, *Agency Threats*, 60 *DUKE L.J.* 1841 (2011), <https://heinonline.org/HOL/Page?handle=hein.journals/duk1r60&id=1857&div=&collection=>; Stuart Brotman, *Communications Policy-Making at the FCC: Past Practices, Future Direction*, 7 *CARDOZO ARTS & ENT LJ* 55 (1988).

¹⁵ Jerry Brito, *Agency Threats and the Rule of the Law: An Offer You Can't Refuse*, 37 *HARV. JL & PUB. POL'Y* 553 (2014).

¹⁶ David L Bazon, *FCC Regulation of the Telecommunications Press*, 1975 *DUKE LAW JOURNAL* 213 (1975); Robert Corn-Revere, *Television Violence and the Limits of Voluntarism*, 12 *THE YALE JOURNAL ON REGULATION* 187 (1995); DUFFIELD, *supra* note 12.

The second section presents some evidence on regulatory threats in different settings. It shows how the threat of regulatory action has been a rather stable mechanism through which power is exercised, specially documented since the rise of the administrative state in the early 20th century. The section offers a brief literature review in order to highlight how different disciplines have studied threats for different reasons and from different perspectives; economists have looked at the practice in the context of income and inflation policies, and have been mainly concerned about its efficiency; administrative law scholars have focused on the use of the tool by presidents on independent administrative agencies (and the problems that arise from such use); and constitutional scholars have focused mostly on the constitutional problems that arise when the tool is used to regulate speech.

The third section discusses threats in the ICT sector, and offers reasons for the usefulness and benefits of an expanded concept that includes other legislative and administrative steps towards regulation, all the way up to formally introduced legislative bills. These, we believe, are a fundamental part of the complex fabric of actions that public officials have deployed in the last few years to push Internet companies towards stringent content moderation policies.¹⁷ These dynamics, of which we offer a few examples, are based on the broader dynamics of information flow controls at play in the Internet.¹⁸ The fourth section offers a brief conclusion and proposes an agenda for future research. It also discusses challenging methodological questions.

Threats of Regulation as a Mechanism

The law-and-order model of democratic decision-making stands for a very basic proposition: that we make rules through our representatives in a legislative process we use to reach basic political agreements that we lay down

¹⁷ Karanicolas, *supra* note 2; RAMIRO ÁLVAREZ UGARTE & AGUSTINA DEL CAMPO, *Fake news on the Internet: actions and reactions of three platforms* 44 (2021), https://www.palermo.edu/Archivos_content/2021/cele/papers/Fake-news-on-the-Internet-2021.pdf.

¹⁸ Jonathan Zittrain, *Internet Points of Control*, 44 BCL REV. 653 (2003); NATASHA TUSIKOV, *CHOKE-POINTS: GLOBAL PRIVATE REGULATION ON THE INTERNET* (1st edition ed. 2016); Balkin, *supra* note 12.

as legal rules destined to govern our conduct, by the sheer force of law's authority and by the enforcement mechanisms we set in place to deal with violators.¹⁹ This instrumentalist conception of the law sees it as an outcome of a process in which deliberation of proposed rules within a legislative assembly leads towards consensus or majority rule, and thus new rules and regulations are created. While the model has been more or less challenged by the rise of the administrative state,²⁰ it basically holds true for a large part of modern rule-making in a democratic society.

It does not, of course, capture all rule-making. It does not capture informal rules or institutions, the kind that emerges outside of the realm of the state or not through the formally established processes of rule-making.²¹ It does not capture supra-national rules (such as the ones created by regional bodies or through the treaty system of the United Nations) nor other forms of rule-making such as self-regulation, co-regulation, and so on.²² And the model does not capture the kinds of actions that generally leads towards regulation within the formal model itself. We mean by these the first steps that usually precede actual regulation: when a legislator launches an inquiry into an issue that is of concern, an administrative agency gathers information on an issue that falls within its jurisdiction, a legislator introduces a bill or announces she is working on a bill on a specific topic, and so on. These actions are generally covered by the press and subjected to broader debates, in which proponents defend their proposals and opponents oppose them.

It is in that context that threats of regulation should be conceptualized. What scholars have called in the past “jawboning” generally falls within this preliminary stage of the formal model of democratic rule-making²³.

¹⁹ Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIFORNIA LAW REVIEW 1319–1350, 1343 (2010); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (2nd edition ed. 2009); HUNT AND WICKHAM, *supra* note 13.

²⁰ ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010).

²¹ *INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA*, (Gretchen Helmke & Steven Levitsky eds., 2006).

²² Chris Mardsen, Trisha Meyer & Ian Brown, *Platform Values And Democratic Elections: How Can The Law Regulate Digital Disinformation?*, 36 COMPUTER LAW & SECURITY REVIEW 105373 (2020).

²³ Jawboning has been defined as “the use of the bully pulpit by government officials to induce changes in industry conduct” (Cotterill, *supra* note 8); “policymaking by intimidation” (RAYMOND E. OWENS & STACEY LEE SCHREFT, *Identifying Credit Crunches, Working Paper 93-02 7* (1993)); as “statements by

Its defining feature is the implied threat of the use of the state regulatory power. In order to be effective, threats of regulation do not need to be materialized. The threat itself can influence the conduct of private actors potentially subjected to regulation in a direction that appease the concerns of public officials so they feel that regulation is no longer necessary²⁴. While some see this mechanism as an “entirely novel way” of inducing regulatory changes,²⁵ we see it as part of the normal operation of the formal model of democratic rule-making, that grants some officials authority to enact rules but also contemplate formal or informal spaces in which those rules are imagined, proposed, or demanded.

Those spaces are the ones that allow regulatory threats to happen. They are a form of pressure, as when “A tries to make a course of action more desirable by promising or threatening contingent rewards or punishments.”²⁶ But in the case of threats of regulation, the punishment is something that falls within the public official’s prerogatives. They need not be explicit—threats can be implied. This is so because those subject to the state regulatory authority adapt their behavior to anticipate potential regulatory action,

policymakers that threaten possible action, as opposed to announcing actual action” (Philip J. Weiser, *Introduction: A Regulatory Regime for the Internet Age*, 3 J. ON TELECOMM. & HIGH TECH. L. 1 (2004)), as “the threat of future regulation” (DAPHNE KELLER, *Who do you sue? State and Platform Hybrid Power Over Online Speech* 40 5 (2019)), as “informal means of persuasion and coercion, including the threat of regulation, to persuade platforms to adopt certain policies” (Leerssen, *supra* note 12), and—more generally—as something that conveys “the sense of something vaguely illicit insofar as they rely on a surreptitious form of influence that draws its strength from an asymmetric power relationship between the government and the citizen” (Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE LAW JOURNAL 899–970, 923 (1998)). Will Duffield considered that “[c]olloquially, jawboning is used to describe inappropriate demands made of private actors by government officials. However, as a matter of law, jawboning requires an explicit threat” (DUFFIELD, *supra* note 12 at 2).

²⁴ This is similar to Guy Halfteck’s definition. See Guy Halfteck, *Legislative Threats*, 61 STANFORD LAW REVIEW 629–710 (2008), <https://www.jstor.org/stable/40379695> (last visited Apr 5, 2023), 632 (“...legislative threats encompass threats exerted by one or more legislators ... according to which the legislator will exercise his legislative mandate and enact adverse legislation in order to regulate the conduct in question, unless the threat recipients alter their behavior to bring it in line with the legislator’s demands. Implicit in the threat is the inverse promise that the legislator will forgo the threatened legislation if, and only if, the threat recipients duly meet such expectations. Under certain conditions, legislative threats induce entities to modify their conduct and abandon targeted practices, averting the risk and consequences of the threatened legislation”).

²⁵ *Id.* at 636.

²⁶ Jan Potters & Frans Van Winden, *Modelling political pressure as transmission of information*, 6 EUROPEAN JOURNAL OF POLITICAL ECONOMY 61–88, 62 (1990).

and thus are likely to respond to an array of signals coming from public officials.²⁷ Thus, we believe we should study this dynamic by focusing on all sorts of signs of regulation-to-come, which leads us to a definition that is broader than alternative accounts²⁸. In that sense, we define a *threat of regulation* as any kind of public or private utterance or action by public officials who hold regulatory power over others in which they express, suggest, or imply, clearly or veiledly, their desire to see their subject's conduct move in a particular direction. The regulatory response to a failure to comply needs not to be explicit, but it could be seen as implied in the very dynamics of policy making at play.

The definition is broad because it follows how threats operate in practice based on the most detailed accounts produced through judicial inquiries.²⁹ Words signalling a desire for a change of conduct can be uttered in private settings (meetings) or through private communications (calls, emails). They can also be uttered publicly, in speeches, conferences, through press releases, and so on. Sometimes these words precede formal actions on the part of regulators that can be seen as *pre regulatory steps*. This is what happens when a regulatory body launches a call for comments on a policy proposal, when the head of an administrative agency informs the public that is launching an inquiry into an issue that concerns her, when a legislator publicly presents a bill she is working on, when a legislative committee decides to hold hearings on certain topics, when it sends a letter of concern to a corporation that has behaved irregularly, and so on. Because normally these steps precede actual regulation, they can be read as a threat of regulation by persons or organizations potentially subjected to it.³⁰

This broad description captures a continuum of actions that are part of

²⁷ Chang, Kalmenvitz, and Lopez-Lira, *supra* note 3 at 1 (arguing that “firms strive to stay ahead of the curve and prepare for future regulatory developments, long before the proposed regulations are finalized and codified”); Halftack, *supra* note 24 at 662 (discussing the idea of preemption involved in threatening dynamics).

²⁸ In particular, *see* Halftack, *supra* note 24 (*supra* note 24) and Wu, *supra* note 14, 1844 (limiting his conceptualization of threats to actions that do “not simply express opinions or report on an issue”).

²⁹ C.D. Cal., Writers Guild of America, West, Inc. v. FCC, 423 F. Supp 1064 (1976), <https://law.justia.com/cases/federal/district-courts/FSupp/423/1064/2393546/> (last visited Feb 23, 2023); D.J. Terry A. Doughty, Missouri v. Biden (2023).

³⁰ Chang, Kalmenvitz, and Lopez-Lira, *supra* note 3.

the mechanism being conceptualized.

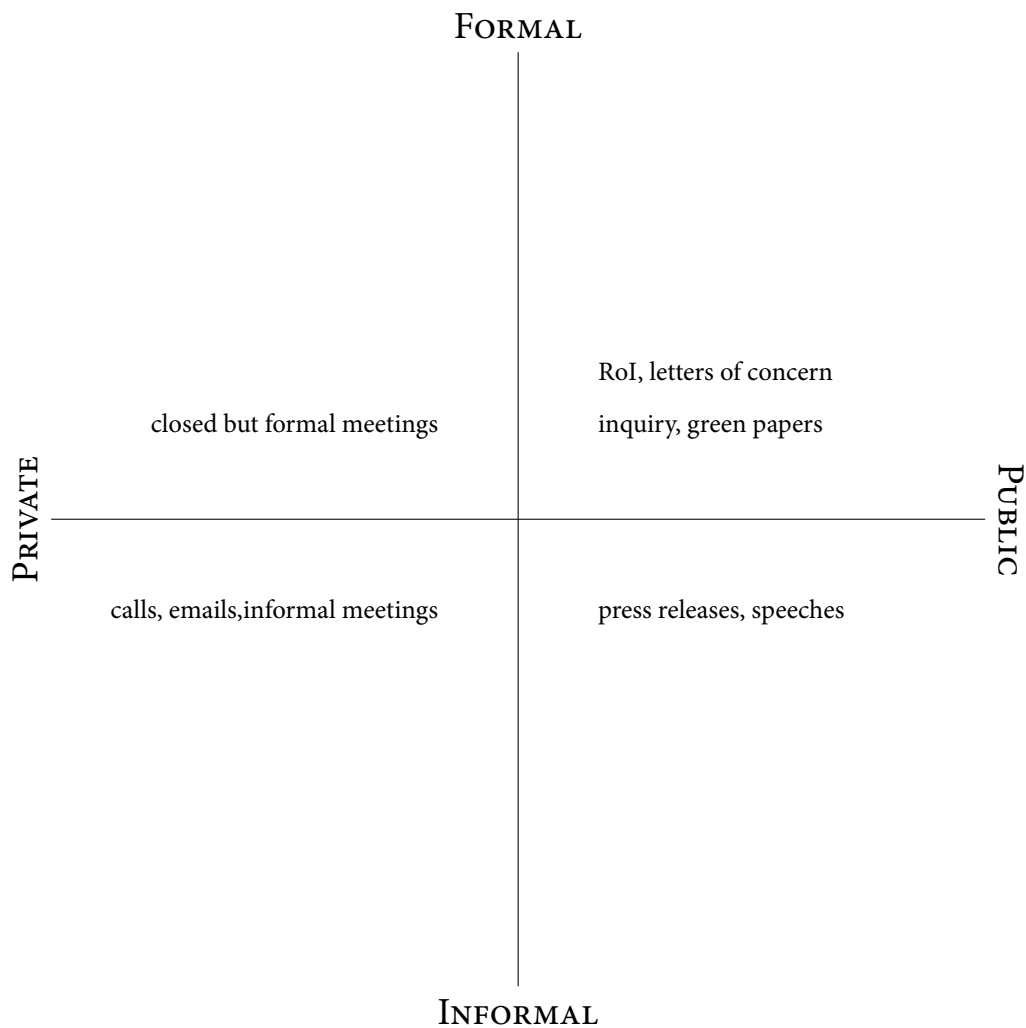


Figure 1. Threat compass

We propose a two-axis compass as a rough guide to describe these actions (Figure 1). On the one hand, the private/public distinction serves the purpose of describing the extent to which the action can be seen from the outside world. The more private it is, the less likely it will enter public debate. The public nature of the action can also be reasonably inferred to imply a higher level of commitment on the part of public officials (even though this is not necessarily so). On the other, the informal/formal divide also captures a relevant difference. Informal contacts between public officials and subjects (individuals or corporations) under their hypothetical regulatory power are the bread and butter of the administrative state. But sometimes

those contacts occur in formal settings, such as e.g. working groups, periodic and formal meetings that are part of an ongoing public policy process, and so on. Again, the more formal the setting the more likely it is to enter public debate. These differences are important for theoretical and practical reasons. From a theoretical point of view, the visibility of these events seems important for how policy making is supposed to happen in a democratic community. The open legislature (with open debates, open and public meetings, and so on) offers the regulatory ideal. From a practical perspective, the difference is relevant because as we move further towards the upper-right quarter of the compass events become more “observable” through research. On the contrary, events in the lower-left quarter are less transparent and—thus—less observable through normal research techniques.

It should be noted that other forms of pressure exist that should not be confined with regulatory threats. This happens when the person expressing a desired conduct by others has no actual state power over those whose conduct she wishes to see changed.³¹ Power dynamics may exist in those situations because, *alas*, power is everywhere.³² But it is a kind of power that is not directly linked to the state and its institutions. It is the power of ghosting someone (friends and lovers hold this power over their friends and partners), the power parents have over their children (that may include very concrete threats and punishments), the power that big corporations have over smaller companies feeding their supply chain (which may impose conditions without meaningful negotiations), the power advertisers have over media outlets, and so on. These relationship of power may allow for effective threats as a mechanism of governance, but they lack the specificity of the coercive power of the state which is unique. This presence is useful to disregard, for the time being, the use of these threats that we could call, for instance, non-regulatory threats. But we should keep them in mind because they are, too, a source of power dynamics on Internet governance.

³¹ POWER, (Steven Lukes ed., 1986).

³² HUNT AND WICKHAM, *supra* note 13.

The History of Threats of Regulation and Their Problems

As we mentioned before, threats of regulation should be seen as normal within democratic politics. These imply communications between different actors, often in public. This dynamic is embedded in the very structures of modern constitutional governance: we elect representatives, who consider issues in open legislative assemblies. Committees hold public hearings, debates are open to the public and broadcasted, and so on. These features of the legislative branch are somewhat present in the judiciary (records are public, hearings are open to the public, appellate oral arguments are publicized, and so on) and the executive. The latter, having experienced a more-than-a-century old process of expansion and enlargement,³³ has incorporated procedures that seek to achieve accountability, are outward-looking and generally promote participation and transparency.³⁴

These structures were set to promote public debate over public policy and regulation. Those campaigning for a specific policy often speak to other policy-makers seeking to garner their support, but also to the people at large, in meetings, rallies, through the media, on the Internet, and so on. Those who opposed those policies do the same. *Doing politics is talking*. And it is through these verbal, but also non-verbal communicative acts, that power is often exercised. As Daphne Keller put it, the “congressman who tells a CEO that she ‘had better do something or we’re going to pass a law and you won’t like it’ is following a time-honored tradition.”³⁵ It is not a bug of the system, but a feature: we expect new rules and regulations to be discussed in front of the people in which name the governing is done in a democratic society.

However, policy ideas—new rules and regulations—often emerge in settings that are excluded from the gaze of citizens: in meetings between legislators and their staff, in coordinating committees of congressional parties, in board meetings of regulatory agencies, in private meetings between state

³³ POSNER AND VERMEULE, *supra* note 20.

³⁴ Richard B Stewart, *Administrative Law in the Twenty-First Century*, 78 *NEW YORK UNIVERSITY LAW REVIEW* 437–460, 448–449 (2003); William Funk, *Public Participation And Transparency In Administrative Law. Three Examples As An Object Lesson*, 61 *ADMIN. L. REV.* 171 (2009).

³⁵ KELLER, *supra* note 23 at 5.

and corporate officials, and so on. These spaces may or may not leave a paper trail, but generally the public has no access to them.³⁶ To an extent here lies the problem posed by regulatory threats: insofar as they are effective, they may yield regulatory results before formal processes are initiated, which frustrates the goals of transparency, accountability, and participation mentioned before. The “shadow of hierarchy” the state is able to cast on those who hear its desires expressed in these informal ways may be enough to push individuals and firms into compliance, an effective albeit undesirable result if that what is being asked is illegal, illegitimate, or outside the scope of the public official’s jurisdiction.³⁷ Threats are prone to be abused and no adequate remedies exist to tame them.³⁸

These objections do not stand in the way of the ubiquitous use of the mechanism. Researchers have consistently found the effective use of threats to pressure individuals and firms in all sorts of settings: pension funds administrators to invest in housing,³⁹ price-setting actors amidst inflation,⁴⁰ publicly-owned companies under the command-and-control of the Securities and Exchange Commission (SEC),⁴¹ electric companies deciding on the price of utilities,⁴² banks deciding on interest rates amidst a steep political crisis,⁴³ directors at companies that were undesirably interlocked,⁴⁴ or pru-

³⁶ Bambauer, *supra* note 12 at 103 (“...jawboning operates offstage and is hard to detect”).

³⁷ Brito, *supra* note 15; Bambauer, *supra* note 12 at 55.

³⁸ *But see* Bambauer, *supra* note 12 at 105 (proposing partial remedies in the face of challenges).

³⁹ A Schotland, *Private Pension Funds: A Guide For Modern Investments*, 59 *THE GEORGETOWN LAW JOURNAL* 355 (1970).

⁴⁰ Robert W Fisher, *Labor and the Economy in 1969*, *MONTHLY LABOR REVIEW* 30–43 (1970); Gottfried Haberler, *Incomes Policy and Inflation: Some Further Reflections*, 62 *THE AMERICAN ECONOMIC REVIEW* 234–241 (1972); Gardner Ackley, *Implications for Policy: A Symposium*, 1978 *BROOKINGS PAPERS ON ECONOMIC ACTIVITY* 507, 508 (1978) (posing interesting critiques of the model); Andrew H. Bartels, *The Office of Price Administration and the legacy of the New Deal, 1939-1946*, 5 *THE PUBLIC HISTORIAN* 5–29 (1983).

⁴¹ Robert J Hipple & Donald R Harkelroad, *Anomalies of SEC Enforcement: Two Areas Of Concern*, 24 *EMORY LAW JOURNAL* 696, 697 (“At least two explanations for the use of jaw-boning speeches have been that (1) the Staff wishes to test the waters of a new proposal before formally proposing it for consideration, and (2) the Staff wishes to establish certain rules without going through the requirements of the Administrative Procedure Act”) (1975).

⁴² Paul L. Joskow & Paul W. MacAvoy, *Regulation and the Financial Condition of the Electric Power Companies in the 1970's*, 65 *THE AMERICAN ECONOMIC REVIEW* 295–301, 296 (1975).

⁴³ Amihai Glazer & Henry McMillan, *Pricing by the Firm Under Regulatory Threat*, 107 *THE QUARTERLY JOURNAL OF ECONOMICS* 1089–1099, 1097–1098 (1992).

⁴⁴ Cynthia A. Jorgensen & James J. Clark, *Interlocking Directorates and Section 8 of the Clayton Act*, 44

dential regulators pressuring banks to disinvest in fossil-fuel,⁴⁵ and so on⁴⁶. While most research has been centered in the United States, these mechanisms have been found in use on gas price control policies in Spain,⁴⁷ in the Swedish textile industry,⁴⁸ and in India's Internet governance politics.⁴⁹

Some see benefits in threats under specific settings. For instance, researchers on the Environmental Protection Agency (EPA) and the Securities Exchange Commission (SEC) have found that when official pressure is exercised, some forms of "voluntary" regulation are more likely to be adopted.⁵⁰ Similarly, companies may act even when pre-regulatory steps have not been taken, but when competing actors are perceived to be organizing to ask for regulation deemed undesirable.⁵¹ Furthermore, in environmental matters the existence of a legal environment committed to enforcing regulations has been found to be relevant for pushing companies into voluntary agreements, formally outside the scope of formal enforcement authorities.⁵² In these cases, pressure on an industry or a handful of relevant companies within it may yield better results than regulation itself.⁵³

Besides its effectiveness, others have argued that the tools encourage a

ALB. L. REV. 139 (1980).

⁴⁵ Darren Sinclair, *Speak loudly and carry a small stick: Prudential regulation and the climate, energy, and finance nexus*, in *CRIMINOLOGY AND CLIMATE* 47–75 (2020).

⁴⁶ A different use of the term "jawboning" is its use to describe the pressure exerted by the executive on independent administrative agencies. See Verkuil, *supra* note 9; C. M. III Butler, *Political Pressure and Administrative Decisionmaking Evolving Regulatory Scene - 1983: Gas and Electric Industries*, 1983 PUB. UTIL. L.: ADDRESSES DELIVERED 26–32 (1983); Kenneth Culp Davis, *Presidential Control of Rulemaking*, 56 TUL. L. REV. 849 (1981); Alan B. Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 TUL. L. REV. 879 (1981).

⁴⁷ Jordi Perdiguer, *Precios de la gasolina bajo amenaza regulatoria* (2004).

⁴⁸ Hall and Hysing, *supra* note 4.

⁴⁹ Michael Karanicolas, *Authoritarianism as a Service: India's Moves to Weaponize Private Sector Content Moderation with the 2021 Information Technology Rules*, 17 INDIAN J. L. & TECH. 25 (2021), <https://heinonline.org/HOL/Page?handle=hein.journals/indiajoula17&id=209&div=&collection=>.

⁵⁰ Maxwell, Lyon, and Hackett, *supra* note 5; Werner Antweiler, *How Effective Is Green Regulatory Threat?*, 93 AMERICAN ECONOMIC REVIEW 436–441 (2003) (offering a similar theory on induced but voluntary self-regulation); Lawrence Susskind & Laura Van Dam, *Squaring Off at the Table, Not in Courts*, July 1986 TECH. REV. (1986); Maxwell, Lyon, and Hackett, *supra* note 4; Patten and Trompeter, *supra* note 4; Suijs and Wielhouwer, *supra* note 4.

⁵¹ Lyon and Maxwell, *supra* note 4.

⁵² Short and Toffel, *supra* note 4.

⁵³ Suijs and Wielhouwer, *supra* note 4 at 5.

kind of “negotiated” regulation that yields better outcomes.⁵⁴ This is the core of Timothy Wu’s argument to defend agency threats as a form of governance in conditions of “high uncertainty.”⁵⁵ For Wu, regulation through threats is better than the alternative of bad regulation (that happens when agencies make decisions based on insufficient or inadequate information) or no intervention at all⁵⁶. Similarly, Guy Halfteck considered that the use of threats “reduces transaction costs and facilitates regulatory bargaining” and “may result in superior regulatory measures, capable of dealing with the underlying policy concerns in a functionally effective and welfare-enhancing manner.”⁵⁷

Critics of threats point out that through them regulators can bypass limits and constraints involved in formal processes of rule-making.⁵⁸ For these critics, regulation-through-threat deprives substantial outcomes from legitimacy,⁵⁹ “dishonors our system of limited government,”⁶⁰ and pose “serious concerns about sacrificing fairness and accountability.”⁶¹ But in the United States it was when administrative agencies come close to the First Amendment protections on freedom of expression that the practice has been accused of being decisively unconstitutional. This peculiar intersection between a regulatory practice and speech deserves a closer look.

In 1975, for instance, judge David Bazelon questioned the use of “raised eyebrows” tactics to pressure broadcasters who are both vulnerable to the Federal Communications Commission’s (FCC) jurisdiction but also protected by the First Amendment.⁶²

⁵⁴ Brotman, *supra* note 14; Justin Hurwitz, *Regulation as Partnership*, 3 JOURNAL OF LAW AND INNOVATION 1 (2019).

⁵⁵ Wu, *supra* note 14 at 1842.

⁵⁶ Wu, *supra* note 14, 1842-1843. *But see* Brito, *supra* note 15 (arguing that this is a false dilemma).

⁵⁷ Halfteck, *supra* note 24.

⁵⁸ Ackley, *supra* note 40; Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the like: Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE LAW JOURNAL 1311 (1992), <https://www.jstor.org/stable/1372817?origin=crossref> (last visited Apr 5, 2023); Lars Noah, *Administrative Arm-twisting In The Shadow Of Congressional Delegations Of Authority*, WIS. L. REV. 873 (1997); Bambauer, *supra* note 12.

⁵⁹ Ackley, *supra* note 40 at 508.

⁶⁰ Anthony, *supra* note 58 at 1312.

⁶¹ Noah, *supra* note 58 at 941.

⁶² Bazelon, *supra* note 16 at 216.

“The methods of communicating these pressures are by now familiar to FCC practitioners: the prominent speech by a Commissioner, the issuance of a notice of inquiry, an official statement of licensee responsibility couched in general terms but directed against specific programming, setting the licensee down for a hearing on ‘misrepresentations,’ forwarding listener complaints with requests for a formal response to the FCC, calling network executives to ‘meetings’ in the office of the Chairman of the FCC or of some other Executive Branch officials, compelled disclosure of future programming on forms with already delineated categories and imposing specific regulatory action on a particularly visible offender against this background. All these actions assume their *in terrorem* effect because of the FCC power to deny renewal of broadcast licenses or to order a hearing on the renewal application.”⁶³

In *Writers Guild of America, West, Inc. v. Federal Communication Commission (FCC)*, a District Court found that the FCC’s attempt to jawbone broadcasters into complying with their request for establishing a “voluntary” family-hour scheme violated the First Amendment rights of those subject to the FCC’s authority.⁶⁴ The case is interesting for many reasons, but one of them is how the pattern of actions that constituted an illegitimate form of threat came up only after discovery—that is, after a substantial amount of evidence had been gathered in the course of formal judicial proceedings.

The case involved a policy adopted by the National Association of Broadcasters Television, which included in its code of conduct a rule according to which entertainment programming “inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour.”⁶⁵ For the plaintiff’s, this policy violated their First Amendment right to freedom of expression as well as the Federal Communications Act

⁶³ *Id.* at 216.

⁶⁴ C.D. CAL., *supra* note 29.

⁶⁵ Lerner, *supra* note 6 at 83.

of 1934 and the Administrative Procedure Act. The District Court agreed with them. For the Court, the adoption of the policy was “an unlawful restraint on free speech in violation -of the first amendment because it was implemented as a result of government pressure exerted through the FCC and not as an independent decision reached by individual licensees.”⁶⁶

The decision frames the constitutional problem of jawboning as one involving the betrayal of fundamental legal principles of the administrative state. For the Court, the FCC “formulated and imposed new industry policy without giving the public its right to notice and its right to be heard.”⁶⁷ Furthermore, the government pressure on private actors was seen as one of the reasons why the proposed regulation, even if it was adopted voluntarily, should be regarded as void for not allowing the individual judgment of broadcasters to flow freely, in accordance with the statutes’ intention.⁶⁸

“If government intervenes in the future to control entertainment programming on television, it shall do so not in closed-door negotiating sessions but in conformity with legislatively mandated administrative procedures. If the government has any power to regulate such programming, it must be exercised by formal regulation supported by an appropriate administrative record, not by informal pressure accompanied by self-serving and unconvincing denials of responsibility. In short, the family hour may or may not be desirable. Censorship by government or privately created review boards cannot be tolerated.”⁶⁹

The decision was bold, in the sense that it had to fight back the somewhat reasonable claims made by defendants, who denied that suggestions made by public officials could be considered the cause of “voluntary” policies. In that sense, the FCC’s Chairman Richard Wiley denied that his thoughts could have such an influence: “I didn’t tell them that these were the steps they ought to take. I told them: ‘Here are some thoughts I have.’ Perhaps they had others.’ ... No, I didn’t say that these suggestions should be

⁶⁶ *Id.* at 84.

⁶⁷ C.D. CAL., *supra* note 29 at 1072.

⁶⁸ *Id.* at 1073.

⁶⁹ *Id.* at 1073.

adopted. I said, ‘Here are some thoughts I have. Perhaps you have others. Could we discuss these, and could we discuss others..’⁷⁰

The story that comes out of the decision is far more complex. The District Court found that the FCC’s suggestions, passed casually to industry executives, was responding to congressional concerns on violence on TV, and Chairman Wiley’s approach was in fact responsive to his belief that the government had no role to play with regard to that issue.⁷¹ To an extent, the decision’s description of the evidence shows an appointed public official negotiating the pressure he was getting from Congress.⁷² Chairman Wiley was channeling that pressure in a way that would encourage voluntary private action that would answers those demands and appeases the concerns that nurtured them. Words may very well be just words, but when uttered by public officials, they carry implicit weight. The Court in *Writers Guild* found that Chairman Wiley had issued “not very veiled threats” of “action which he himself believed to be unconstitutional”⁷³ and had suggested—to the press—that public hearings may take place upon failure to act.⁷⁴ In response, network executives made proposals in order to appease those concerns and avoid the “time and trouble” that formal action would entail.⁷⁵

“The episode richly illustrates the general approach taken by the Chairman throughout. He did not want to ‘threaten’ anyone. At the same time, he wanted the networks to know that if something constructive in the eyes of Congress, the FCC, and the public were not done, the FCC would be compelled to take some sort of action. He felt that FCC action of any type at the very least raised serious constitutional questions and would strongly prefer as a matter of policy that the FCC do nothing. But if the networks were to be so unwise as not to act, the Commission (probably but not necessarily with his support) would be forced by the circumstances (which he had

⁷⁰ *Id.* at 1092.

⁷¹ *Id.* at 1094–1097.

⁷² *Id.* at 1099.

⁷³ *Id.* at 1100–1101.

⁷⁴ *Id.* at 1105.

⁷⁵ *Id.* at 1102.

created) to take action. Thus Wiley could offer ‘suggestions’ initially caring little about the specifics of the response but requiring that something constructive with public visibility be accomplished. On some occasions, he viewed himself not as personally threatening anyone but rather as offering advice as a friend concerning the consequences which would follow if constructive action were not taken. On other occasions in the heat of the campaign, he would deliberately threaten. Sometimes he would repudiate ‘threats.’ The bottom line, however, remained the same, in substance if not in tone ‘Do something to curb ‘offensive’ material or we, the FCC, will be forced to take action.’⁷⁶

The facts in *Writers Guild* show a text-book definition of what a threat of regulation looks like in the real world. The First Amendment concerns raised by judge Warren were seconded by scholars at the time⁷⁷ and were supported by existing case-law that questioned the use of official prerogatives to silence or to threaten protected speech [ussc_bantman1963]. And they have been a source of persistent concern by others who have always found that the threatening powers of the FCC poses specific constitutional problems because of the FCC direct and indirect impact on speech.⁷⁸ But the case did not make good law. The decision was vacated by the 9th Circuit Court of Appeals, that found that the district judge “should not have thrust itself so hastily into the delicately balanced system of broadcast regulation. Because the ‘line between permissible regulatory activity and impermissible ‘raised eyebrow’ harassment of vulnerable licensees’ is so exceedingly vague ... it is important that judicial attempts to control these techniques be sensitive to ‘the particular regulatory context in which it occurs, the interests affected by it, and the potential for abuse.’”⁷⁹

⁷⁶ *Id.* at 1106–1107.

⁷⁷ Cooper, *supra* note 6; Lerner, *supra* note 6.

⁷⁸ Corn-Revere, *supra* note 16; Karanicolas, *supra* note 12 at 216 (“However, in the context of restrictions on speech, this tactic can be problematic, insofar as it removes any opportunity to question whether the new rules are consistent with bedrock freedom of expression principles, since traditional avenues of judicial appeal do not apply in the same way to private sector enforcement decisions”).

⁷⁹ 9thCir, *Writers Guild of America, West, Inc. v. FCC*, 609 F.2d 355, 365 (1979), <https://law.justia.com/cases/federal/district-courts/FSupp/423/1064/2393546/> (last visited Feb

Threatening the Internet

Threats of regulation on Internet Service Providers (ISPs) have always had a fundamental role in Internet governance.⁸⁰ This is not a bug, but a feature of how the Internet is regulated in the United States. Section 230 of the Communications Decency Act of 1996 (CDA) provides immunity to internet intermediaries for content produced by third parties, a legal protection that stands in the way of formal legislative action.⁸¹ The mechanism was designed to encourage the development of an industry without the risk of liability for third party content and in order to allow services to set their own standards for users content.⁸² Section 230 was intended to create a dynamic of self-regulation that—since then—has been the main mechanism through which the flow of information on the Internet has been regulated.

The stage was set, then, for the dynamics of regulatory threats to unfold. By establishing through a statute the principle that intermediary companies will not be held liable for content produced by their users, Congress was guaranteeing immunity for moderation decisions. But Congress also retained the power to eliminate or reform Section 230, and make content moderation more onerous. Section 230 laid the groundwork for self-regulation to flourish, but it also locked in a tempting path through which public officials could channel demands on how that self-regulation should happen. This can be generalized in the following way: all exercises of legislative power carry with them the implicit threat of revision, and thus opens up a powerful channel of communication between regulators and those regulated. This is the foundation of regulatory threats as conceptualized in this paper.

Hence, in the United States, all Internet companies are subject to the pressures and demands that can threaten with legal change. If such change is deemed by them undesirable, their incentives is to cooperate to appease the regulator's concerns. This, along with the Internet's architecture of end-to-

23, 2023).

⁸⁰ Bambauer, *supra* note 12.

⁸¹ *Id.* at 61–65.

⁸² JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 64 (2019).

end intelligence, puts them in the situation of points of control⁸³ or choke-points⁸⁴ over which governments can exert “New School” modes of control over speech,⁸⁵ that engender collateral censorship, public private co-operation and co-optation and new forms of digital prior restraints.⁸⁶ As Bambauer puts it, “Internet platforms face structural incentives to knuckle under government jawboning over content.”⁸⁷ One of the most cited examples that pits unsuccessful formal action against successful informal pressure was the SOPA/PIPA bills. While these were defeated in Congress, some of its provisions were later adopted voluntarily by major Internet companies in what Natasha Tusikov called “secret handshake deals”⁸⁸ that were “driven underground.”⁸⁹

But the dynamic is present everywhere. Barrie Sander has found that “the adoption by Facebook, Microsoft, Twitter and YouTube of a shared industry database of hashes for terrorist content appears to have been timed to diminish the prospect of future regulation that was feared might follow the European Commission’s critical review of their compliance with the Code of Conduct on Countering Illegal Hate Speech Online.”⁹⁰ The hearings called by the United States Congress on the fall of 2017 over disinformation and its perceived effects on the 2016 electoral process can also be seen as part of these threatening tactics.⁹¹ As Justin Hurwitz puts it, “the theory is simple: because no CEO likes to testify before Congress, spending time forced to answer questions intended to embarrass them and their company (to use one example), CEOs will conduct the company’s business to avoid such experiences.”⁹² Senator Dianne Feinstein was straightforward in those

⁸³ Zittrain, *supra* note 18.

⁸⁴ TUSIKOV, *supra* note 18.

⁸⁵ Balkin, *supra* note 12.

⁸⁶ Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARVARD LAW REVIEW 526, 542–543 (2022).

⁸⁷ Bambauer, *supra* note 12 at 87.

⁸⁸ NATASHA TUSIKOV, *CHOKEPOINTS: GLOBAL PRIVATE REGULATION ON THE INTERNET* (1st edition ed. 2016).

⁸⁹ Bambauer, *supra* note 12 at 53.

⁹⁰ Barrie Sander, *Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation*, 43 FORDHAM INT’L L.J. 939–1006, 952 (2020).

⁹¹ ÁLVAREZ UGARTE AND DEL CAMPO, *supra* note 17 at 33–34.

⁹² Hurwitz, *supra* note 54 at 32.

hearings: “You’ve created these platforms and now they are being misused, and you have to be the ones to do something about it, or we will.”⁹³

Micheal Karanicolas has described how the Canadian government threatened Internet companies with regulation, even though it expected—from them—some form of “voluntary” action.⁹⁴ Primer Minister Justin Trudeau stated that lack of compliance with these desires could lead to “meaningful financial consequences.”⁹⁵ Around that time, Canada hosted a meeting by the International Grand Committee on Big Data, Privacy, and Democracy, which Karanicolas correctly reads as part of the broader pressuring effort.⁹⁶ He also found that when public officials raise questions over content moderation and mix them with antitrust concerns, the tactic seems to be more effective.⁹⁷ In Brazil, the Electoral Court asked for and got a good working relationship with Internet companies in the context of the election disinformation crisis of 2018, a kind of cooperation that companies were used to providing in more menacing contexts.⁹⁸

One of the latest examples of this dynamic in action was captured in the *Missouri v. Biden* district court decision of July 2023.⁹⁹ In the decision, the judge issued an injunction against the federal government to prevent them from talking with social media companies, after finding a stable pattern of pressure and coercion that may constitute illegitimate state action in violation of the First Amendment. The decision is noteworthy because it is based on the discovery stage of formal judicial proceedings, a kind of inquiry through which many of the most informal steps through which threats can

⁹³ DUFFIELD, *supra* note 12 at 9.

⁹⁴ Karanicolas, *supra* note 12 at 218; Niva Elkin-Koren, *Government–Platform Synergy And Its Perils*, in *CONSTITUTIONALISING SOCIAL MEDIA*, 185 (Edoardo Celeste, Amélie Heldt, & Clara Iglesias Keller eds., 2022) (discussing the case of *Adalah v Cyber Unit* in Israel, where government flagging that led to private removal decisions was subjected to a constitutional challenge).

⁹⁵ Karanicolas, *supra* note 12 at 218.

⁹⁶ *Id.* at 218.

⁹⁷ Michael Karanicolas, *Too Long; Didn't Read: Finding Meaning in Platforms' Terms of Service Agreements*, 52 U. TOL. L. REV. 1, 8 (2021).

⁹⁸ Gustavo Ferreira Santos, *Social media, disinformation, and regulation of the electoral process: a study based on 2018 Brazilian election experience*, 7 REV. INVESTIG. CONST. 429–449 (2021), <http://www.scielo.br/j/rinc/a/smjsTVv5BVxHr5Dy74xN9pR/abstract/?lang=en> (last visited Apr 24, 2023).

⁹⁹ D.J. TERRY A. DOUGHTY, *supra* note 29.

be issued can come to light. Indeed, the decision mostly discusses memos and emails between public and corporate officials discussing—mainly—Internet companies moderation decisions in the context of the Covid-19 pandemic of 2020 and 2021.

“...Plaintiffs argue that Defendants have threatened adverse consequences to social-media companies, such as reform of Section 230 immunity under the Communications Decency Act, antitrust scrutiny/enforcement, increased regulations, and other measures, if those companies refuse to increase censorship. Section 230 of the Communications Decency Act shields social-media companies from liability for actions taken on their websites, and Plaintiffs argue that the threat of repealing Section 230 motivates the social-media companies to comply with Defendants’ censorship requests...”¹⁰⁰

What these documents reveal, in the narrative developed by Judge Doughty, is a tense relationship between public and corporate officials in which the former ask for specific forms of content moderation, in this case, amidst a pandemic and in order to combat misinformation and disinformation that was perceived—by the officials themselves—as problematic from the point of view of the policies developed to deal with the pandemic. This relationship is one of collaboration (“partnership” and “working together” are usual ways in which officials think about their relationship) but it also deeply affected by the “shadow of hierarchy” the state is capable of casting upon those who interacts with it.¹⁰¹ Hence, public officials can informally warn that they are “internally ... considering our options on what to do about it...”¹⁰² or can signal frustration by shifting blame on companies for not doing enough.¹⁰³ At a press conference, White House Press Secretary Jen Psaki reminded social media companies of “legal consequences” if they fail to moderate content more aggressively, while at the same time reminding companies that the President also supports “better privacy pro-

¹⁰⁰ *Id.* at 8.

¹⁰¹ Héritier and Lehmkuhl, *supra* note 13.

¹⁰² D.J. TERRY A. DOUGHTY, *supra* note 29 at 14.

¹⁰³ *Id.* at 15. (“I care mostly about what actions and changes you are making to ensure you’re not making our country’s vaccine hesitancy problem worse”).

tections and a robust anti-trust program. So, *his view is* that there's more that needs to be done to ensure that this type of misinformation; disinformation; damaging, sometime life-threatening information, is not going out to the American public."¹⁰⁴

The relationship is hardly equal, something that comes up in the tone with which public officials speak to corporate officers¹⁰⁵ and how corporate officials respond.¹⁰⁶ Conversations include specific policy or technical proposals issued by public officials¹⁰⁷ and actual policy changes by companies that are, presumably, the outcome of these conversations.¹⁰⁸ Informal channels of communications are often complemented by formal action, such as the Request for Information (RFI) issued by the Office of the Surgeon General issued on March 3, 2022.¹⁰⁹ Similarly, meetings can take place in more formal settings that try to navigate the public / private divide.¹¹⁰

To an extent, this narrative shows a kind of “negotiated” regulation that many have defended on substantial grounds, for it—arguably—yields better outcomes.¹¹¹ This is the core of Timothy Wu’s argument to defend agency

¹⁰⁴ *Id.* at 22. (emphasis added).

¹⁰⁵ *Id.* at 23. (“Are you guys fucking serious? I want an answer on what happened here and I want it today”).

¹⁰⁶ *Id.* at 29. (“Clegg of Facebook reached out to attempt to request ‘de-escalation’ and ‘working together’ instead of the public pressure”).

¹⁰⁷ *Id.* at 34. (“...including product changes, changing algorithms to avoid amplifying misinformation, building in ‘frictions’ to reduce the sharing of misinformation, and practicing the early detection of misinformation super-spreaders, along with other measures...”).

¹⁰⁸ *Id.* at 36. (“Clegg even sent a follow-up email after the meeting ... Clegg also reported that Facebook had ‘expanded the group of false claims that we remove, to keep up with recent trends of misinformation that we are seeing.’ Further, Facebook also agreed to ‘do more’ to censor COVID misinformation, to make its internal data on misinformation available to federal officials, to report back to the Office of the Surgeon General, and to ‘strive to do all we can to meet our ‘shared’ goals”).

¹⁰⁹ Office of the Surgeon General, *Impact of Health Misinformation in the Digital Information Environment in the United States Throughout the COVID-19 Pandemic Request for Information (RFI)* (2022), <https://www.federalregister.gov/documents/2022/03/07/2022-04777/impact-of-health-misinformation-in-the-digital-information-environment-in-the-united-states> (last visited Sep 5, 2023); D.J. TERRY A. DOUGHTY, *supra* note 29 at 38.

¹¹⁰ D.J. TERRY A. DOUGHTY, *supra* note 29 at 111 (“According to DiResta, head of [the Election Integrity Partnership], the EIP was designed ‘to get around unclear legal authorities, including very real First Amendment questions that would arise if CISA or the other government agencies were to monitor and flag information for censorship on social media’”).

¹¹¹ Brotman, *supra* note 14; Hurwitz, *supra* note 54.

threats as a form of governance in conditions of “high uncertainty.”¹¹² For Wu, regulation through threats is better than the alternative of bad regulation (that happens when agencies make decisions based on insufficient or inadequate information) or no intervention at all ¹¹³. Similarly, Guy Halfteck considered that the use of threats “reduces transaction costs and facilitates regulatory bargaining” and “may result in superior regulatory measures, capable of dealing with the underlying policy concerns in a functionally effective and welfare-enhancing manner.”¹¹⁴ The *Missouri v. Biden* decision obviously proposes limits to the use of the mechanism at least when it comes to limiting the free flow of information on the Internet.

Conclusion and Further Research

In this paper we have offered a conceptualization of regulatory threats as a form of governance. The practice has a long history and can be seen as part of the formal model of democratic rule-making that most societies have embraced. Our conceptualization stands out as broader when compared to accounts offered before: we believe that this is necessary to accommodate the kinds of words and deeds that these kinds of pressure adopt in the real world, and that cases such as *Writer's Guild* and *Missouri v. Biden* so clearly reveal. Unlike Wu, we do not feel that threats should exclude opinions or reports.¹¹⁵ We believe that under certain conditions, formal opinions or reports could be reasonably read as pre-regulatory steps that may feed on a previous explicit or veiled threat of action, and—thus—should be included in a working definition of threats. Unlike Halfteck, we talk about threats of regulation rather than legislation (for the simple yet important point that lots of the threatening is done outside of Congress, through administrative agencies operating independently).¹¹⁶ The point is minor but significant. And finally, unlike Bambauer, we prefer not to use a normatively charged taxonomy (organized around the level of compulsion involved in the pres-

¹¹² Wu, *supra* note 14 at 1842.

¹¹³ Wu, *supra* note 14, 1842-1843. *But see* Brito, *supra* note 15 (arguing that this is a false dilemma).

¹¹⁴ Halfteck, *supra* note 24.

¹¹⁵ Wu, *supra* note 14 at 1844.

¹¹⁶ Halfteck, *supra* note 24.

asuring and the extent to which public officials have authority to do so).¹¹⁷

We have also offered a theoretically sound moving scale based on the informal or formal and private and public settings in which regulatory threats occur. This scale starts with private requests issued in informal settings (such as a call, or an email), but moves towards public settings and formalization (public speeches, actual administrative actions such as letters of concern or requests of information, and so on). It is one thing for a public official to express some desire in a closed meeting, than from the same public official insisting on it through a series of them or launching a public call for comments on a proposed policy change. The consistent repetition of desires increase the seriousness of the threat, and—arguably—its effectiveness. Those threats sometimes move from a realm of mere desires into pre-regulatory measures and—eventually—actual regulation.

This paper has sought to contribute to the literature that has found jawboning both pervasive and problematic, but its main goal is to guide an empirical inquiry. In that sense, we have refrained from engaging the legal argument that claims that jawboning may violate the First Amendment under the circumstances advanced by the district judges both in *Writer's Guild* and *Missouri v. Biden*. We have pointed out, though, that neither of these cases are good law. One was vacated by the Court of Appeals, and the other is currently under review. For what its worth, we accept the view that the “line between permissible regulatory activity and impermissible ‘raised eyebrow’ harassment ... is ... exceedingly vague.”¹¹⁸

The question that most interest us in this research project, and towards which this paper contributes, is how to gather enough information to make that line drawing possible or easier. The conceptual effort here then must be seen as a necessary step towards a comparative empirical inquiry. How can we better understand how regulatory threats operate in practice? What motivates public officials using the mechanism for Internet governance purposes? What kinds of effects do threats seek to achieve — are these structural, company-wide changes (as in e.g., new rules nor modifications to terms of services) or issue specific (e.g., to increase moderation of certain

¹¹⁷ Bambauer, *supra* note 12 at 87.

¹¹⁸ 9THCIR, *supra* note 79 at 365.

contents)? How do threatening dynamics change when regulation changes? For instance, it is likely that the relationship between European regulators and Internet companies has been deeply affected by the Digital Services Act (DSA), and it is also likely that this relationship will change in the future (where regulatory *threats* will be complemented by *enforcement* threats). How do countries with diminished *de facto* jurisdiction use threats in their relationship to companies, and how do the latter respond? To what extent are partnerships or informal working relationships affected by the existence—diminished or not—of the state's threatening power?

To answer these questions we need better descriptions of how threats operate on the ground. As researchers, we are simply incapable of developing research methods that can imitate the power judicial discovery has to penetrate the private realm of communications between public and private officials. But even though regulatory threats do operate “offstage” and are thus “hard to detect,”¹¹⁹ some of their forms can be observable. This is what happens when we move further way from the lower-left quadrant of Figure 1 (informal and private settings) and we move further towards the upper-right quadrant. In the latter case, we can find actions that can fit the definition and are easy to gather, such as e.g. bills (probably the ultimate form of regulatory threat). Similarly, it is also easy to document formal changes to terms of service (ToS) or community guidelines of Internet intermediary companies¹²⁰. This approach of *actions* by public officials and *reactions* by corporations is useful to develop correlation analyses and—more modestly—case studies of jawboning in action. We are seeking to build a database that brings together these two kinds of events, taking stock of projects in which CELE has already been involved¹²¹. But several methodological challenges and open questions remain.

On one hand, the broad conceptualization we propose makes distinguishing between regulatory threats and normal processes of rule-making impossible or very difficult¹²². This is an important concern, but I find it

¹¹⁹ Bambauer, *supra* note 12 at 103.

¹²⁰ This has been done by CELE's project Letra Chica, available at <https://letrachica.digital/>.

¹²¹ Besides Letra Chica, our main input at this stage is the Observatorio Legislativo, available at <https://observatoriolegislativocele.com/>

¹²² I am indebted for this observation to Agustina Del Campo and Christian Perrone

misguided—it translates a normative concern (when *threatening* is bad or should be forbidden or remedied) into an empirical question. It should be recalled that in our conceptualization, regulatory threats is a *normal* mechanism of governance that stands on a very general principle that can be found everywhere (all rules are subject to potential future rule change). The objection then is inapposite, for it rejects an empirical premise on normative grounds. (Arguably, to succeed it should reject the empirical claim on empirical grounds and e.g., show that regulatory threats are unusual or a deviation of normal processes of governance).

On the other hand, our comparative interest poses challenges of its own. We want to understand how regulatory threats happen around the world, and not only in the United States (where most of the jawboning debate and documentation has been produced). But the taxonomy of threats proposed in Figure 1 is necessarily contextual. Informal and formal avenues of communication may differ, formal settings are obviously of different kinds, pre-regulatory steps are determined by local law and legal culture, and so on. Furthermore, access to the public information that would allow us to gather enough examples of *actions* would be unequal across countries and this would obviously weaken strong comparative analyses (such as e.g., one that would try to measure the causal effect of certain official actions correlated to certain private reactions). But even a limited effort at documentation such as the one we are embarking in could provide the stage to launch further research endeavors in the form of detailed case-studies.

How information is gathered is also challenging, because of the disparity we expect to find between the lower-left and upper-right quadrants of our proposed taxonomy. While it is fairly easy to gather a complete list of bills introduced on a time period and code them as constituting a threat of regulation against Internet companies, other actions by public officials can be gathered much less consistently. The extent to which this affects the usefulness of the database remains an open question. One way of dealing with this problem would be to narrow down our research, from all kinds of regulatory threats to specific categories (e.g., those threats related to disinformation in electoral periods) and in limited time-periods.

A different kind of question that must be addressed is related to the use-

fulness of the inquiry. In this paper we have argued that regulatory threats are ubiquitous and a rather normal mechanism of governance in the administrative state. And even though we have developed a neutral approach that does not censure the mechanism in and of itself, the normative question is inescapable. We believe that problems arise in two scenarios of regulatory threats. First, when public officials seek to achieve informally what they could not achieve through formal procedures of rule-making (either because veto players would raise their voice and exercise their prerogative, because what they demand falls outside their jurisdiction, or because what they want to achieve is impermissible or illegal). Second, when they seek to achieve informally what they *could* achieve through the formal procedure (but find the informal path more expedient). In the first case, we are talking about actions that would be *illegal*, and regulatory threats are a way—then—of getting away with violating the law. In the second case, we are talking about actions or decisions that would be legal but that are less *legitimate* because they have been adopted in a way that prevented the participation of others, something that formal processes of rule-making usually seek to guarantee. These normative concerns that judge *threats* as bad should be weighed against the arguments developed by those who find that negotiated forms of regulation are normatively appealing.¹²³

The inquiry will be useful to address these normative problems. By gaining a more detailed account of how threats operate in different settings, the empirical inquiry could contribute to make better normative assessments. These should be based on a stronger empirical footing, but the legal arguments to be developed will likely need to explore uncharted waters. In that sense, relying on the rationale of *Writers' Guild* and *Missouri v. Biden* is not very promising. First, because these cases are not settled law and neither of them have passed the scrutiny of appellate jurisdiction. Second, because the First Amendment is not a useful ground for comparative exercises. As a freedom of expression clause, it is rather exceptional. Most countries around the world, including the ones we will be researching, assume less categorical approaches to freedom of expression and embrace balancing and proportionality analyses. These could offer a much more fruitful

¹²³ Wu, *supra* note 14; Brotman, *supra* note 14; Halfteck, *supra* note 24.

avenue to assess the normative problems of threatening, for at the end of the day what distinguishes a threatening pattern that is a vehicle for violating the law from the normal operation of rule-making procedures in a democratic society is something in between the *I know it when I see it* approach and clear, categorical conceptualizations. A nuanced assessment of conditions coming out of documented case studies can show when regulators go too far in ways that we should find impermissible. They would also help us better assess the perils of informal rule-making, even when the output is not illegal *per se*. The end of the road will not produce, I venture to predict, a clear delimiting line but rather a set of principles or criteria that we should consider when judging one of the main mechanisms of governance of both the last century and our current informational ecosystem.