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ABSTRACT

Even casual watchers of T.V. crime dramas understand the Fourth Amendment's exclusionary rule. Under this rule, evidence obtained by the police in a search of a criminal suspect's premises that exceeds the scope of a judicial warrant is almost always inadmissible in the suspect's criminal trial. The rule is designed to deter unreasonable governmental intrusion into private affairs and applies without regard for the suspect's guilt or innocence. This Article proposes that the First Amendment includes an analogous rule against governmental censorship. Under this rule, content-based speech regulations exceed the legislature's speech rulemaking warrant and are almost always invalid. This rule is designed to deter governmental distortion of public discourse and applies without regard for whether the speech of the party challenging the regulation has been abridged in a specific instance. This Article further proposes that since the constitutional focus in a facial challenge to a content-based regulation is impermissible governmental rulemaking, rather than the speech acts of the party challenging the regulation, the Constitution's state action requirement is met inherently in such a challenge by the rulemaking acts of the legislature and any party whose speech may reasonably be abridged by such a regulation has Article III standing to challenge it. Finally, this Article proposes that the speech blocking immunity provisions of Section 230 of the Communications Decency Act are content-based regulations. As such, Congress is the relevant state actor in any facial challenge to these provisions, any party whose speech may reasonably be abridged by these provisions has Article III standing to challenge them, and these provisions are invalid for exceeding Congress's speech rulemaking warrant despite their noncompulsory administration by private operators of social media platforms.

* J.D., 1993, University of Southern California. Thanks to Professor Adam Lamparello for review of an earlier draft and insightful comments.

I. INTRODUCTION

Faced with a crackdown on speech by Big Tech, free speech advocates have scrambled for new lines of attack on Section 230 of the Communications Decency Act (CDA), which shields private providers of interactive computer services from civil liability for blocking user content.[1] The Constitution's state action requirement is widely believed to present an insurmountable obstacle to First Amendment challenges to Section 230 due to the statute's private administration. Theorizing how the state action imperative might be satisfied, Vivek Ramaswamy and Professor Jed Rubenfeld have opined that Section 230 and other congressional inducements to large technology companies to restrict

[1] Section 230 of the Communications Decency Act of 1996, codified as 47 U.S.C.A. § 230 (West 2022), is part of the Communications Act of 1934 as amended. It is also known as the Cox–Wyden Amendment. For a summary of the legislative process that led to Section 230's enactment, see Jeff Kosseff, *What's in a Name? Quite a Bit, If You're Talking About Section 230*, LAWFAREBLOG (Dec. 19, 2019, 1:28 PM), https://www.lawfareblog.com/whats-name-quite-bit-if-youre-talking-about-section-230.

speech have turned Google, Facebook, and Twitter into state actors who are subject to First Amendment constraints.[2] Professor Eugene Volokh has offered the more modest thesis that "[q]uestions under the First Amendment are presented when Congress [as it has done with Section 230] preempts state law that protects speech against private action, because the federal statute is the source of the power and authority by which any private rights are lost or sacrificed."[3] Justice Thomas, for his part, authored a recent concurrence lamenting that Congress gave Big Tech immunity without "corresponding responsibilities, like nondiscrimination" and signaled that the Supreme Court would inevitably have to grapple with how various legal doctrines intersect with online speech regulation.[4]

This Article accepts that state action is indispensable to a successful challenge to Section 230. But it differs on the threshold question: Who is the relevant actor for purposes of state action analysis? If, as Ramaswamy and Rubenfeld propose, the relevant actor is a private provider of interactive computer services who restricts speech under Section 230, establishing state action is an uphill battle, and a conclusion of the constitutionality of these speech blocking actions may well be inevitable. On the other hand, if the relevant actor is the governmental author of Section 230—Congress—the state action

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2 *See* Vivek Ramaswamy & Jed Rubenfeld, *Save the Constitution from Big Tech*, WALL ST. J. (Jan. 11, 2021, 12:45 PM), https://www.wsj.com/articles/save-the-constitution-from-big-tech-11610387105. Ramawsamy and Rubenfeld place reliance on the Court's declaration in *Norwood v. Harrison* that "[i]t is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." 413 U.S. 455, 465 (1973). The Court has made a similar pronouncement in the First Amendment context. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 77–78 (1990) ("What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly."). This Article contends that neither of these propositions is categorically true; however, the government is almost always prohibited from enacting *content-based* speech regulations that induce private parties to abridge constitutionally protected expression, which is what Section 230's speech blocking immunity provisions do.

3 Eugene Volokh, *Might Federal Preemption of Speech Protective State Laws Violate the First Amendment?*, VOLOKH CONSPIRACY (Jan. 23, 2021, 7:02 PM), https://reason.com/volokh/2021/01/23/might-federal-preemption-of-speech-protective-state-laws-violate-the-first-amendment/. Volokh cites *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225, 232 (1956), which stated as much. Taking a different tack, Professor Hamburger pointed out numerous instances of ambiguous language in Section 230 and suggested that constitutional problems might be avoided by interpreting this language narrowly. Philip Hamburger, *The Constitution Can Crack Section 230*, WALL ST. J. (Jan. 29, 2021, 2:00 PM), https://www.wsj.com/articles/the-constitution-can-crack-section-230-11611946851. Hamburger's commentary provoked a response from defenders of a broad construction of Section 230. *See* Berin Szoka & Ari Cohn, *The Wall Street Journal Misreads Section 230 and the First Amendment*, LAWFARE BLOG (Feb. 3, 2021, 3:43 PM), https://www.lawfareblog.com/wall-street-journal-misreads-section-230-and-first-amendment.

4 Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (Thomas, J., concurring). Justice Thomas cited Professor Volokh's thesis while brainstorming about how the First Amendment may constrain Big Tech's speech regulation. *See id.* at 1226–27.

requirement *is* satisfied and a conclusion of unconstitutionality of Section 230's speech blocking immunity provisions very likely attaches.

This Article further proposes that the relevant actor's identity turns on how one answers a second query: Are Section 230's speech blocking immunity provisions *content-based* regulations under the Court's free speech jurisprudence? The First Amendment embodies a censorship constraint that prohibits the government from enacting regulations that lend themselves to idea or viewpoint discrimination. The censorship constraint has led the Court to place limits on content-based speech rulemaking which legislatures must abide and challenger-friendly standards for adjudicating First Amendment challenges when legislatures do not abide by them.[5] Under this exceptional jurisprudence, constitutional injury is deemed inherent in content-based regulations and the rulemaking body that issued them is deemed to have caused this injury. Accordingly, if Section 230's speech blocking immunity provisions are content-based regulations, Congress has caused constitutional injury by issuing them and the state action requirement is satisfied by congressional action. If, on the other hand, these provisions are not content-based regulations, the private providers of interactive computer services who abridge speech under these provisions caused any alleged constitutional injury and the state action requirement is assessed by reference to private action. This Article contends that Section 230's speech blocking immunity provisions *are* content-based regulations. Therefore, Congress caused constitutional injury by enacting these provisions and the state action requirement is met by congressional action—that is to say, by *rulemaker* state action.[6]

The Court enforces limits on censorial speech rulemaking mainly by flagging two kinds of content-based regulations as suspicious: first, those that facially discriminate against speech based on its viewpoint, subject matter, function or purpose; and, second, those that are facially content-neutral but were adopted because of the government's disapproval of the speech that is regulated. The Court also applies its content-based jurisprudence to "standardless" licensing regulations that vest boundless discretion in administrators to license speech, effectively making these regulations a third class of content-based

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[5] The First Amendment imposes other constraints on the governmental rulemaker that have led the Court to adopt other judicial free speech rules, such as those governing content-neutral speech regulations. *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987). Analysis of these other constraints and rules and their intersection with Section 230 is beyond the scope of this Article.

[6] This is not the first publication to propose that Section 230's speech blocking immunity provisions are invalid content-based regulations. Professor Lamparello argued the point in a blog post. *See* Adam Lamparello, *Social Media, State Action, and the First Amendment*, APP. ADVOC. BLOG (Aug. 21, 2021), https://lawprofessors.typepad.com/appellate_advocacy/2021/08/social-media-state-action-and-the-first-amendment.html. However, Lamparello does not suggest the rulemaker state action thesis presented herein; he instead advocates the state action thesis that congressional inducements have transmuted large social media companies into state actors. *Id.*

regulation. The Court almost always subjects content-based regulations to strict scrutiny and, when it does, almost invariably finds them unconstitutional. Section 230 includes an explicit speech blocking immunity provision, Section 230(c)(2), which shields from civil liability providers of interactive computer services who restrict user speech within particular content categories, including "objectionable" material. Section 230 includes another provision, Section 230(c)(1), which a majority of lower courts have interpreted as an alternative speech blocking immunity provision giving providers of interactive computer services limitless discretion to restrict user speech without risk of civil liability. This Article contends that Section 230(c)(2), and Section 230(c)(1) under prevailing interpretations, are content-based regulations and invalid under the Court's special content-based jurisprudence.[7]

The Court's exceptional content-based jurisprudence extends beyond rulemaker state action and application of strict scrutiny. It also relaxes the injury-in-fact requirement of Article III standing to pave the way for facial challenges to content-based regulations. Under this relaxed injury-in-fact requirement, litigants have prevailed on facial challenges to content-based regulations without showing abridgment of their own constitutionally protected expression. Various theories have been espoused for entertaining facial challenges to content-based regulations brought by litigants who cannot demonstrate specific injury to their expressive rights. This Article proposes that the Court green-lights these challenges because members of society subject to content-based regulations predictably suffer inscrutable injuries traceable to the governmental rulemaker by the mere issuance of these regulations. These injuries come in two forms: first, the chilling effect inspired by these regulations, as their very existence predictably induces people within their reach to self-censor controversial ideas and viewpoints out of fear of reprisal; and second, surreptitious idea and viewpoint discrimination in the enforcement of these regulations that is not amenable to review. The Court has most clearly identified these inscrutable injuries in standardless licensing cases but has recognized that facially content discriminatory regulations raise analogous concerns.

The precise relationship between the First Amendment's censorship constraint and the Court's content-based jurisprudence has been debated extensively by constitutional theorists. Several models have emerged. The "motive-proxy" model explains the Court's content-based jurisprudence as a vehicle for attacking censorial governmental motives by proxy. The "rights-against-rules" model explains it as a vehicle for attacking regulatory texts that lend themselves to idea or viewpoint discrimination. The "chilling effect" model

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[7] Section 230(c)(1) has a plausible saving construction which excludes editorial decisions to block content from Section 230's immunity grant. *See infra* Parts IV.A & V.C. Under that construction, Section 230(c)(1) is constitutionally valid and shields providers of interactive computer services from civil claims arising from publishing user content, but not from civil claims arising from editorial decisions to block user content.

explains it as a vehicle for attacking regulations that predictably induce self-censorship of particular ideas or viewpoints. Despite differences on the margins, these models are in fundamental agreement that constitutional injury is inherent in content-based regulations and hold the governmental rulemaker, typically the legislature, accountable for this injury. The "rulemaker-as-wrongdoer" conception shared by these models provides normative and descriptive support for the three central attributes of the Court's special content-based jurisprudence: rulemaker state action, relaxed Article III standing, and strict scrutiny.

One objecting to the above analysis might persist in the view that the relevant actor in a challenge to Section 230 is a provider of interactive computer services who restricts speech under Section 230 and that such speech blocking is privately administered and noncompulsory. The speech abridgment about which the First Amendment is concerned, so this objection goes, arises from governmental reprisal—whether actual, threatened, or feared. Because Section 230 speech blocking is administered by private providers of interactive computer services who have a right to control expressive activity in their forums and is permissive rather than compulsory, so this objection concludes, users of these services who are blocked cannot satisfy the state action requirement necessary to prevail on constitutional challenges to these provisions and lack standing under Article III to challenge them. In this view, Section 230 speech blocking does not implicate the First Amendment, and federal courts are powerless to provide relief to those affected by it.[8]

But this objection neglects that the Court's exceptional content-based jurisprudence deems constitutional injury inherent in content-based regulations and holds the rulemaker—Congress in the case of Section 230—accountable for this injury. It is true that the state action doctrine requires litigants to prove that the government is responsible for their constitutional injury in order to prevail on constitutional challenges and that privately administered speech abridgment under noncompulsory regulations does not ordinarily constitute state action. It is also true that Article III standing normally requires that plaintiffs establish injury-in-fact traceable to unlawful acts of defendants in order to invoke federal jurisdiction. However, under the Court's special jurisprudence of content-based regulations, where the Court deems constitutional injury inherent in these regulations and blames the rulemaker for the offense, state action and Article III standing are analyzed by reference to governmental *rulemaking* acts. The private administration and noncompulsory status of content-based regulations are not germane to the state action and Article III standing inquiries because specific instances of speech abridgment under these regulations are downstream from the acts of the legislatures or other governmental rulemaking bodies that satisfy these

[8] This view animated the district court in its recent dismissal of former President Trump's lawsuit seeking reinstatement to Twitter and a declaratory judgment that Section 230's speech blocking immunity provisions are unconstitutional. *See generally* Trump v. Twitter, Inc., No. 21-CV-08378-JD, 2022 WL 1443233 (N.D. Cal. May 6, 2022).

requirements. Section 230's speech blocking immunity provisions, one of which grants civil immunity to private providers of interactive computer services who block users' constitutionally protected speech in certain content categories and the other of which under prevailing interpretations grants civil immunity to these providers to block user speech in any content category are, simply put, *content-based* regulations. Constitutional injury inheres in these provisions, Congress is held responsible for the injury and these provisions are constitutionally invalid.

In summary, the First Amendment embodies a censorship constraint limiting the government's power to enact regulations that lend themselves to idea or viewpoint discrimination. This constraint is foundational to the Court's exceptional content-based jurisprudence. This jurisprudence has several elements, including flagging content-based regulations as suspicious and applying challenger-friendly standards in the areas of state action, Article III standing, and judicial scrutiny. A properly informed court adjudicating a free speech challenge alleging that Section 230's speech blocking immunity provisions are content-based regulations would accept this contention, apply these challenger-friendly standards, and find these provisions unconstitutional.

To be clear, this Article does not adopt the Ramaswamy-Rubenfeld position that congressional inducements to large technology companies have transmuted them into state actors. This Article instead contends that the Court, embracing its constitutional role as guarantor against overreach in governmental speech rulemaking that risks altering the mix of public discourse, has adopted special challenger-friendly rules for adjudicating challenges to content-based regulations issued by traditional state actors—Congress among them—that almost always result in invalidation of these regulations. Section 230's speech blocking immunity provisions are governed by this exceptional jurisprudence. The present proposal shares with Professor Volokh's proposal the identification of Congress as the relevant constitutional actor in a First Amendment challenge to Section 230's speech blocking immunity provisions, but parts company with him by contending that strict scrutiny applies to these provisions and that they are facially invalid without requiring the challenger to prove the loss of statutory or common law rights.

This Article unfolds from the general to the particular. Part II discusses the censorship constraint as a First Amendment limitation on the government's speech rulemaking authority, as opposed to a grant of an individual or societal right or privilege to speak. Part III discusses jurisprudential models explaining the Court's content-based jurisprudence as a vehicle for enforcing the censorship constraint against the governmental rulemaker. Part IV discusses challenger-friendly elements of the Court's content-based jurisprudence, including rulemaker state action, relaxed Article III standing, and strict scrutiny. Finally, Part V proposes that Section 230's speech blocking immunity provisions are content-based regulations and are invalid under the Court's content-based jurisprudence despite their private noncompulsory administration.

A comprehensive assessment of the judicial landscape in the absence of Section 230 speech blocking immunity is beyond the scope of this Article. In general, the status quo might prevail in terms of disfavoring civil claims arising from the *publication* of user content on social media platforms. Section 230(c)(1) under a saving construction might continue to shield platform operators from these claims.[9] Moreover, courts were reluctant to impose strict liability on internet publishers of third party content before the CDA was enacted.[10] On the other hand, a sea change might occur with regard to treatment of civil claims arising from editorial decisions to *block* user content. While social media platform operators could still "moderate" user content, Section 230 would no longer insulate them from adverse legal consequences. Statutory and common law rights of users would spring back into force and restrain platform operators.[11] These rights would include user protections against blocking decisions that involve defamation, misrepresentation, breach of contract, interference with business expectancy, and the like—and might even provide a guarantee of reasonable and nondiscriminatory access to dominant social media platforms that are "affected with a public interest."[12]

II. THE CENSORSHIP CONSTRAINT

A. First Amendment Origins

The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[13] This clause places an express limitation on a specific branch of the federal government

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9 *Id.*

10 *See, e.g.*, Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

11 *See* Volokh, *supra* note 3 ("[I]f the First Amendment blocks [congressional] preemption [of state law protections], that simply means that state law springs back into force and continues to restrain the private actors.").

12 *See* Joseph R. Grodin & Matthew O. Tobriner, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CAL. L. REV. 1247, 1249–50 (1967) (recounting the English common law tradition of imposing duties on private enterprises affected with a public interest to serve all customers on reasonable and nondiscriminatory terms); *see also* Tunku Varadarajan, *The 'Common Carrier' Solution to Social-Media Censorship*, WALL ST. J. (Jan. 15, 2021, 12:39 PM), https://www.wsj.com/articles/the-common-carrier-solution-to-social-media-censorship-11610732343 (interviewing Professor Richard Epstein about the merits of imposing these common law duties on social media giants). The phrase "affected with a public interest" traces to the English Chief Justice Matthew Hale's essay *De Portibus Maris*, written in about 1670 and published posthumously, where Lord Hale described the legal duty of English wharf operators to serve all customers on a reasonable and nondiscriminatory basis. *See* FRANCIS HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 77–78 (1787).

13 U.S. CONST. amend. I.

(Congress)[14] and a specific governmental act (lawmaking)[15] concerning regulations having a specific operational effect (the abridgment of speech).[16] Under a literal reading, congressional enactment of any regulation restricting speech violates the Free Speech Clause without regard for how such a regulation may be administered.

Looking to underlying values for practical limitations, a primary concern of the Free Speech Clause is safeguarding the search for truth against governmental control.[17] The First Amendment reflects the fundamental principle that, in the United States, "[t]he people . . . are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."[18] The First Amendment is therefore concerned not only with the extent to which regulations reduce the total quantity of speech but also the extent to which regulations distort public debate.[19] The imperative of unbiased public discourse means that the government cannot play favorites among ideas or viewpoints.[20]

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[14] *See* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 64 (1998) ("The First Amendment . . . proscribes legislative error about the moral relevance of speech and religion.").

[15] *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 248 (1994) ("[T]he First Amendment proscribes the making of any 'law' establishing religion or violating the freedom of speech, the press, or assembly.").

[16] *See* Reed v. Town of Gilbert, 576 U.S. 155, 167 (2015) ("[T]he First Amendment expressly targets the operation of the laws—*i.e.*, the 'abridg[ement] of speech'—rather than merely the motives of those who enacted them.").

[17] *See* Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 538 (1980) ("To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."); *see also Reed*, 576 U.S. at 174 (Alito, J., concurring) ("Content-based laws . . . present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth.").

[18] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 791 (1978).

[19] *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 (1983) ("[T]he first amendment is concerned, not only with the extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamentally—with the extent to which the law distorts public debate."); *see also* Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."); Consol. Edison Co. of New York, 447 U.S. at 537–38 ("If the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'").

[20] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 432 (1996) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1st ed. 1960)) ("To say that there is 'equality of status in the field of ideas' is to say that the government cannot regulate speech for such impermissible reasons.").

Thus, "the concept that government may restrict the speech of some elements of our society in order to enhance the voice of others is wholly foreign to the First Amendment"[21] and "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."[22] This Article refers to the First Amendment precept that governmental regulations must treat ideas and viewpoints evenhandedly as the censorship constraint.

B. Rulemaking Emphasis

An important attribute of the censorship constraint is that it restricts the government in its speech rulemaking role.[23] The Free Speech Clause itself identifies the lawmaking function as the proper focus.[24] The Court, for its part, has stated flatly that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"[25] and that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[26] The enactment of regulations that lend themselves to idea or viewpoint discrimination exceeds the government's speech rulemaking warrant and violates the First Amendment in much the same way that governmental searches exceeding the scope of judicial warrants violate the Fourth Amendment—the government's overreach means that complainants are entitled to relief without having to show that the government has sought to punish them for engaging in lawful or privileged conduct.[27]

The censorship constraint is not an absolute prohibition on idea and viewpoint discrimination through governmental rulemaking.[28] The salient point

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[21] Buckley v. Valeo, 424 U.S. 1, 48–49 (1976), *superseded by statute,* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81-116, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003).

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

[23] *See* Kagan, *supra* note 20 at 414 (arguing that the focus of the Court's First Amendment jurisprudence is sources and, more particularly, censorial governmental motives, rather than effects of governmental actions).

[24] *See* U.S. CONST. amend. I.

[25] Police Dep't. of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[26] Regan v. Time, Inc., 468 U.S. 641, 648–49 (1984).

[27] In this vein, Professor Fallon explained third party standing to mount First Amendment facial challenges to "overbroad" speech regulations by analogy to the Fourth Amendment's exclusionary rule, noting: "In challenging the introduction of evidence obtained through an unreasonable search or seizure, a defendant does not assert a personal right to the exclusion of probative evidence, but appeals to a judge-made doctrine developed to deter violations of others' constitutional rights." Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 870 (1991).

[28] *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 126–28 (1991) (Kennedy, J., concurring) (noting that content-based regulations of judicially

is that the censorship constraint involves a claim against the governmental rulemaker, whether a legislature or a regulatory agency, as opposed to a claim in favor of an individual or societal right to speak.[29] A First Amendment challenge rooted in violation of the censorship constraint involves a claim that the government in its rulemaking capacity has done something it constitutionally *cannot* do; not merely a claim that an individual has been impaired from doing something she constitutionally *can* do as a speaker or that society has been deprived of a level of public discourse that it constitutionally *can* demand.[30] The governmental acts under scrutiny in constitutional challenges asserting a violation of the censorship constraint are rulemaking acts—typically the issuance of speech regulations that are content discriminatory.[31] In these cases, the government as a rulemaker—not the government as a rule administrator, a private rule administrator, or an individual speaker—is the entity whose conduct is examined for constitutional conformance.

The censorship constraint's trained focus on the governmental rulemaker, rather than individual speakers, is perhaps best illustrated in the flag-burning case *Texas v. Johnson*.[32] There, Gregory Lee Johnson was convicted of burning the American flag in violation of a state statute proscribing flag desecration.[33] The Court held that Johnson's conviction offended the First Amendment.[34] Writing for the majority, Justice Brennan noted that the flag desecration statute under which Johnson was convicted was, as applied to him,[35] a content-based speech regulation—not a generally applicable criminal statute proscribing trespass, disorderly conduct, arson or the like.[36] Johnson's conviction thus violated the "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society

recognized low-value speech categories and content-based regulations justified by a compelling state interest are generally permissible—while disagreeing with the latter exception).

29 *See* Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1471, 1473, 1479, 1480–81, 1499–1501, 1505–10 (2013) (arguing that there is a clear mandate for judicial intervention in "chilling effect" cases only where negative First Amendment values against the governmental rulemaker are implicated).

30 *Id.*

31 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994) ("[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.").

32 491 U.S. 397 (1989).

33 *Id.* at 399.

34 *Id.*

35 The *Johnson* Court did not find the statute facially invalid because, as interpreted by Texas courts, the statute had application to non-expressive instances of flag desecration. *See id.* at 403. The Court's dicta a few years later in *R.A.V.* would suggest that a more expression-targeted regulation proscribing *dishonoring* rather than *desecrating* the flag would be facially invalid. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

36 *Johnson*, 491 U.S. at 411–12 & n.8.

finds the idea itself offensive or disagreeable."[37] Justice Scalia reiterated a few years later that the constitutional concern in flag burning cases is governmental rulemaking rather than individual conduct, writing for the Court that "burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not."[38]

The censorship constraint's "rulemaker centrism" is also evident in two landmark rulings, *Lakewood v. Plain Dealer Publishing Co.*[39] and *R.A.V. v. City of St. Paul*,[40]which convey that content discrimination risks embodied in regulations are the First Amendment's overriding free speech concern. In these cases, the Court rejected arguments that operation of the censorship constraint is contingent on the quantity or social value of restricted speech. Non-majority opinions in these cases proposed that since the government could have constitutionally proscribed more speech by enacting regulations that were less content discriminatory, its decision to proscribe less speech by issuing regulations that were more content discriminatory was permissible. On both occasions, the Court's majority rejected this "greater-includes-the-lesser" reasoning on the ground that the censorship constraint is concerned not with the amount or social import of speech affected by regulations, but whether the governmental actions taken exhibited evenhandedness in the treatment of ideas and viewpoints.

In *Lakewood*, a city ordinance authorized the mayor to grant or deny applications made by publishers for permits to place news racks on public property.[41] The ordinance allowed the mayor to subject granted permits to reasonable terms and conditions and required the mayor to provide an explanation for denying applications.[42] In an opinion authored by Justice Brennan, the Court found the ordinance facially invalid because it gave the mayor unbridled licensing discretion, thereby providing an opportunity for content and viewpoint discrimination.[43] The dissent objected on the basis that the city could have enacted a total ban on news racks, which would have been constitutional.[44] The Court rejected the dissent's thesis, stating:

> The key to the dissent's analysis is its "greater-includes-the-lesser" syllogism. But that syllogism is blind to the radically different constitutional harms inherent in the "greater" and

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37 *Id.* at 414.

38 *R.A.V.*, 505 U.S. at 385.

39 486 U.S. 750 (1988).

40 505 U.S. 377 (1992).

41 *Lakewood*, 486 U.S. at 753.

42 *Id.* at 753–54.

43 *See id.* at 752–72.

44 *See id.* at 772–99 (White, J., dissenting).

> "lesser" restrictions. Presumably, in the case of an ordinance that completely prohibits a particular manner of expression, the law on its face is both content and viewpoint neutral. In analyzing such a hypothetical ordinance, the Court would apply the well settled time, place, and manner test. In contrast, a law or policy permitting communication in a certain manner for some, but not for others, raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. As demonstrated above, we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because, without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker. Fundamentally, then, the dissent's proposal ignores the different concerns animating our test to determine whether an expressive activity may be banned entirely, and our test to determine whether it may be licensed in an official's unbridled discretion.[45]

R.A.V. involved a city ordinance proscribing cross burning that "arouses anger, alarm or resentment of others on the basis of race, color, creed, religion or gender."[46] The Minnesota Supreme Court interpreted the phrase "arouses anger, alarm or resentment in others" as limiting the reach of the ordinance to expressive conduct amounting to "fighting words,"[47] a judicially recognized category of low-value speech proscribable under the Court's prior ruling in *Chaplinsky v. New Hampshire*.[48] In an opinion authored by Justice Scalia, the *R.A.V.* Court found that even though the ordinance targeted expression within a proscribable category, the ordinance was facially invalid because it drew content distinctions within that category and thus made the category a "vehicle[] for content discrimination."[49] Two separate concurrences accused the majority of adopting a novel "underinclusiveness" prohibition under which legislatures seeking to regulate speech in a proscribable category had to either regulate all speech or no speech at all.[50] The majority rejected that characterization, retorting:

> The concurrences describe us as setting forth a new First Amendment principle that prohibition of constitutionally

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45 *Id.* at 762–64.

46 *R.A.V.*, 505 U.S. at 380 (citing ST. PAUL, MINN. CODE ANN. § 292.02 (1990)).

47 *Id.* at 380–81.

48 315 U.S. 568 (1942).

49 *R.A.V.,* 505 U.S. at 383–84.

50 *See id.* at 397–415 (White, J., concurring); *see also id.* at 416–36 (Stevens, J., concurring).

> proscribable speech cannot be "underinclusiv[e]," . . . —a First Amendment "absolutism" whereby "[w]ithin a particular 'proscribable' category of expression . . . a government must either proscribe *all* speech or no speech at all. That easy target is of the concurrences' own invention. In our view, the First Amendment imposes not an "underinclusiveness" limitation but a "content discrimination" limitation upon a State's prohibition of proscribable speech. . . .[51]

R.A.V. places the independence of the censorship constraint from the volume or social utility of regulated speech beyond question. Under *R.A.V.*'s decision rule, the mere whiff of governmental favoritism or hostility to ideas or viewpoints is fatal even to regulations that impair the expression of such little social value that the First Amendment otherwise pays it no regard. It is censorial governmental rulemaking that the censorship constraint forbids—and as a rulemaking constraint, it is not easily overcome.

III. MODELS OF CONTENT-BASED JURISPRUDENCE

The Court's primary instrument for enforcing the censorship constraint against the governmental rulemaker is its challenger-friendly content-based jurisprudence. Justice O'Connor acknowledged as much, writing that the exceptional jurisprudence governing content-based regulations, "reflects important insights into the meaning of the free speech principle—for instance, that content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate."[52] The Court's content-based jurisprudence has two basic elements: first, limits on content-based speech rulemaking that the government must abide by; and, second, challenger-friendly standards for adjudicating challenges when the government does not abide by them.

A. The Content-Based Framework

The Court recognizes two primary categories of content-based regulations. In the first category are regulations that facially discriminate against speech based on its viewpoint, subject matter, function, or purpose. In the second category are regulations that are facially content-neutral but were adopted because of the government's disapproval of the speech that is regulated.[53] The

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51 *Id.* at 387.

52 City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring).

53 Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015). The second category merges two categories treated separately by the Court in *Reed*: (1) facially content-neutral regulations that cannot be justified without reference to the content of the regulated speech; and (2) facially content-

Court also applies its content-based jurisprudence to regulations that repose unbounded discretion in administrators to license speech, making them a third category of content-based regulation in practice.[54] With the exception of regulations restricting certain judicially recognized categories of low-value speech in a viewpoint-neutral manner,[55] and in certain fields of regulatory endeavor,[56] the Court subjects content-based regulations to strict scrutiny.[57] Under strict scrutiny's exacting requirements, content-based regulations are presumptively invalid as a doctrinal matter[58] and almost always invalid in practice.[59] While it is widely understood that application of strict scrutiny is elemental to the Court's content-based jurisprudence, less appreciated is the

neutral regulations that were adopted by the government because of disagreement with the message conveyed by the regulated speech. *Id.* Both categories involve governmental disapproval of the regulated speech, the difference between them residing in whether disapproval is explicit or established by inference.

[54] *See* Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 763–64 (1988) ("[W]e have often and uniformly held that statutes or policies [vesting unbridled discretion in governmental officials to regulate speech] impose censorship on the public or the press, and hence are unconstitutional, because, without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker."); *cf. Lakewood*, 486 U.S. at 759 ("[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.").

[55] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that fighting words may be proscribed); *see, e.g.*, New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that child pornography may be proscribed); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that defamation injurious to private individuals may be proscribed short of strict liability); Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (holding that incitement may be proscribed); Roth v. U.S., 354 U.S. 476 (1957) (holding that obscenity may be proscribed).

[56] *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (applying an unspecified level of scrutiny in the context of radio broadcasting); *see also* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (plurality opinion) (applying an unspecified level of scrutiny in the context of cable TV broadcasting); Renton v. Playtime Theatres, 475 U.S. 41 (1986) (upholding a zoning ordinance restricting the location of adult movie theaters since the ordinance was not designed to suppress offensive speech but to combat harmful "secondary effects" of offensive speech); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980) (applying intermediate scrutiny to commercial speech regulation).

[57] *See Reed*, 576 U.S. at 165 ("A law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech.") (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)). *Reed* seemingly scrapped the "secondary effects" doctrine exempting content-based regulations of adult-oriented businesses from strict scrutiny if justified by a content-neutral governmental interest. *Reed* also calls into question the viability of other exceptions to strict scrutiny. *See infra* Part IV.A.

[58] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

[59] *See* Williams-Yulee v. Fla. Bar, 575 U.S. 445 (2014) ("We have emphasized that 'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest.").

challenger-friendly bent of the Court's content-based jurisprudence in other doctrinal areas, including state action and Article III standing.

The precise relationship between the censorship constraint and the Court's content-based jurisprudence has long been debated by constitutional theorists. Several models have been proposed, each having a certain descriptive and normative appeal. One is the motive-proxy model. Another, which a majority of the current Court appears to favor, is the rights-against-rules model. A third is the chilling effect model. While these models lead to different constitutional outcomes on the margins, they are in basic agreement that constitutional injury inheres in content-based regulations and hold the governmental rulemaker accountable for these injuries. The "rulemaker-as-wrongdoer" conception, common to these models, is vital to understanding why state action is deemed inherent and Article III standing is relaxed in challenges to content-based regulations.

B. The Motive-Proxy Model

The motive-proxy model explains the Court's content-based jurisprudence as a vehicle for attacking censorial governmental motives by proxy. One of the leading proponents of the model is Justice Kagan, who wrote extensively on the topic during her tenure as a professor. The model starts with the premise that rooting out censorial motives is the Court's overriding First Amendment concern. However, the Court views attempts to discover censorial motives through direct inquiry as impracticable. Thus, the Court has developed a set of proxy rules to ferret out censorial motives indirectly. One of these proxy rules calls for reviewing speech regulations for facial content discrimination and, where it is present, treating such regulations as constitutionally suspect.[60]

Justice Kagan's influential account of the motive-proxy model relies heavily on *R.A.V.* to defend the model's descriptive accuracy. She dismisses the possibility that the biasing effect on public discourse of the cross burning ordinance at issue in *R.A.V.* accounted for the Court's decision, stressing that the distortive impact of an ordinance proscribing bigoted "fighting words" is modest and that such an ordinance might have just as easily been understood as unskewing public discourse.[61] She also emphasizes that the *R.A.V.* Court made its concern with censorial motives "unusually evident in its opinion, all but proclaiming that sources, not consequences, forced this decision."[62]

A criticism of the motive-proxy model's descriptive power is rooted the Court's pronouncement in *United States v. O'Brien*[63] that "the purpose of

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60 *See* Kagan, *supra* note 20, at 413–15, 443–56.

61 *See id.* at 419–21.

62 *Id.* at 421.

63 391 U.S. 367, 383 (1968).

Congress . . . is not a basis for declaring . . . legislation unconstitutional."[64] Justice Kagan responds to this criticism by construing *O'Brien* as merely eschewing direct inquiries into legislative motive due to the likelihood that legislators will make pretextual statements and difficulties in gleaning a single purpose from the statements of many legislators. She insists that *O'Brien* is agnostic on the question of the Court's adoption of methods for detecting censorial governmental motive indirectly—and that the Court has done precisely that by announcing a rule that facially content-based regulations are presumptively invalid.[65]

Justice Kagan also offers a normative account of the motive-proxy model that goes beyond its general consistency with preserving unbiased public discourse. She argues that the model reflects the fundamental principle that the government has no legitimate interest in silencing ideas or viewpoints which challenge any official understanding of correctness or acceptability. Additionally, the model upholds the First Amendment value that government officials have no legitimate interest in either favoring speech that advances or disfavoring speech that threatens their self-interest, including their length of tenure in office.[66]

The "proxy" attribute of the motive-proxy model suggests room for flexibility in its application. Indeed, Justice Kagan proposes that, rather than an inviolable rule under which facially content discriminatory regulations are constitutionally suspect, exceptions should be made for unusually trustworthy regulations.[67] This flexibility is evident in Justice Kagan's jurisprudence. In *Reed v. Town of Gilbert*,[68] she found error in the Court's application of strict scrutiny to a facially content discriminatory sign ordinance on the thesis that when it is not "realistically possible" that a facially content discriminatory regulation is enacted with a censorial motive, "we may do well to relax our guard so that 'entirely reasonable' laws imperiled by strict scrutiny can survive."[69]

The motive-proxy model posits that the Court's content-based jurisprudence is concerned ultimately with correcting constitutional defects in the rulemaking process—even to the point of permitting exceptions to the rule that facially content discriminatory regulations are suspect where a censorial motive seems unlikely. As Justice Kagan characterizes the model, "The point of attention is neither the speaker nor the audience, but the governmental actor standing in the way of the communicative process."[70]

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64 *Id.* at 383.

65 *See* Kagan, *supra* note 20, at 413–15, 438–42.

66 *Id.* at 428–29.

67 *Id.*

68 576 U.S. 155 (2015).

69 *Id.* at 183 (Kagan, J., concurring) (quoting the majority opinion of Thomas, J., at 171).

70 Kagan, *supra* note 20, at 425–26.

C. The Rights-Against-Rules Model

The rights-against-rules model explains the Court's content-based jurisprudence as a vehicle for attacking regulatory texts that lend themselves to idea or viewpoint discrimination. The model is derivative of the general postulate that "*X*'s 'constitutional right' is a legal right to secure the invalidation of an invalid rule."[71] The model envisions the Court's role as that of a bulwark against unconstitutional predicates embodied in regulatory texts.[72] The model rejects the idea that illicit governmental motives are—or should be—the touchstone of the Court's constitutional jurisprudence. As one of the model's principal architects puts it: "False legislative beliefs should matter to reviewing courts just insofar as these beliefs lead legislatures to enact flawed outcomes, or partly constitute flawed outcomes (as in the case of stigma), or evidence flawed outcomes. They do not matter as such."[73] The model also spurns the conventional view that constitutional rights shield personal conduct outside of specific regulatory contexts.[74]

The rights-against-rules model describes the Court as intervening where a constitutional right demands a change to the predicate of a regulation—usually through the regulation's invalidation. This model views the Court's role in constitutional adjudication as that of a rule-repealing body having repeal authority roughly equivalent to that of rulemaking bodies such as legislatures and regulatory agencies. Mechanically, the Court discharges its rule-repealing duty by comparing the predicates embodied in regulatory texts against rule-validity schemata. In the free speech context, the applicable rule-validity schemata are composites of judicial free speech rules embodying liberty and

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[71] Adler, *supra* note 14, at 165. The accompanying quotation characterizes at a high level of generality what Professor Adler calls the derivative account of constitutional rights. Adler contends that the derivative account describes the Court's treatment of constitutional rights more accurately than the alternative direct account, which holds that constitutional rights privilege individual conduct. *Id.* at 91–112. Adler acknowledges that his derivative account shares with Professor Henry Paul Monaghan's influential earlier thesis in *Overbreadth*, 1981 SUP. CT. REV. 1 (1981), that "constitutional adjudication always and only involves judicial assessment of the predicate and history of rules against applicable rule-validity schema[ta]." Adler, *supra* note 14, at 160. However, Adler contends that Monaghan's prior thesis is deficient in claiming that litigants have a right to have their *conduct* judged in accordance with constitutionally valid rules since that assertion strays into the direct account. *Id.*

[72] *See id.* at 36 ("[C]onstitutional courts, in reviewing sanctions and duties, focus on the predicate and history of . . . textually defined deontic entities.").

[73] *Id.* at 120.

[74] *See id.* at 39–112 (rejecting the direct account of constitutional rights); *see also* Dorf, *supra* note 15, at 244–49 (rejecting the privileged-conduct-only view of constitutional rights as inconsistent with *Marbury v. Madison*). Adler contends that as-applied constitutional challenges to regulations are not truly conduct-shielding since courts engage in limited analyses of the conduct of litigants who bring as-applied challenges and those who prevail do not secure freedom from having the same conduct sanctioned under other regulations. Adler, *supra* note 14, at 37.

nondiscrimination principles—including the censorship constraint—that set the limits of speech rulemaking authority possessed by legislatures and regulatory agencies.[75]

The rights-against-rules model's free speech rule-validity schemata invalidate a speech regulation in two basic situations: first, where the regulation within its scope and without sufficient justification impairs expressive acts that are not harmful apart from their communicative impact, excepting certain low-value expressive acts;[76] and second, where the regulation embodies viewpoint discrimination.[77] Moreover, First Amendment prophylaxis suggests resolving uncertainties about whether these reasons are present in favor of more, rather than less, speech.[78] Combining these elements, the rights-against-rules model understands the Court's content-based jurisprudence as an instrument for attacking regulatory texts that embody idea or viewpoint discrimination—or at least lend themselves to that type of discrimination.

The Court's *Reed* decision is emblematic of the rights-against-rules model. The sign ordinance invalidated in *Reed* subjected temporary directional signs, ideological signs, and political signs to various restrictions based on their communicative impact.[79] The Court's majority deemed the ordinance a content-based regulation and applied strict scrutiny because the ordinance drew content distinctions on its face, without regard for whether the ordinance was enacted with a benign motive, backed by a content-neutral justification, or the particulars of the challenger's injury.[80] Writing for the Court, Justice Thomas stressed the need for applying strict scrutiny to all content-based regulations as a prophylactic measure on the grounds that "a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'"[81] The governmental rulemaker's non-censorial motives

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75 Adler, *supra* note 14, at 92–96, 120.

76 *See id.* at 99–112.

77 *See id.* at 112–21.

78 *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 688 (1978) (arguing for judicial resolution of uncertainties in favor of free speech since "an erroneous limitation of speech has . . . more social disutility than an erroneous overextension of freedom of speech."); see *also* Dorf, *supra* note 15, at 277–78 (arguing that "much of the justification for First Amendment rights is prophylactic" and that "[b]ecause we do not trust ourselves . . . to distinguish between good and bad ideas, we take the prophylactic measure of protecting all ideas."); *cf.* Fallon, *supra* note 27, at 884–85 ("Because discrimination based on the content of speech and association is constitutionally suspect, statutes that might mask such discrimination deserve to be treated as suspect also, even in cases in which the fact of discriminatory application is impossible to prove.").

79 Reed v. Town of Gilbert, 576 U.S. 155, 159–61 (2015).

80 *See id.* at 164–71.

81 *Id.* at 171 (O'Connor, J., concurring) (quoting City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994)). Justice Kagan's concurrence in *Reed* is accepting of a prophylactic in the Court's content-

could not save the content-based ordinance in question since "future government officials may one day wield such statutes to suppress disfavored speech."[82] The *Reed* Court announced a bright line test for determining whether a regulation qualifies as a content-based regulation. In step one, a court determines whether the regulation draws a content distinction on its face. If so, the regulation is content-based, and the inquiry is over. Only if the regulation does not draw a facial content distinction does a court proceed to inquire, in step two, whether the regulation is content-based for another reason such as a censorial motive or the absence of a content-neutral justification.[83]

Reed established the primacy of the rights-against-rules model in the current Court's content-based jurisprudence. The Court affirmed that censorial governmental motive is not the *sine qua non* of the Court's content-based jurisprudence[84] and that courts have no flexibility to subject content-based regulations to relaxed scrutiny where such a motive seems unlikely. Instead, the probe into motive is an independent inquiry that courts only conduct where regulations are not content discriminatory on their face. Where regulations are facially content discriminatory and do not fall within a viable exception,[85] they are constitutionally suspect and presumptively invalid.

It bears noting that *Reed*'s bright line rule can be justified without resort to First Amendment prophylaxis. The reason for a prophylactic rule where content-based regulations are concerned is that doubt as to whether these regulations risk suppressing particular ideas or viewpoints should be resolved in favor of more speech. However, Justice Alito's concurrence in *Reed* proposes that *all* content-based regulations carry the risk of idea and viewpoint suppression since such regulations favor entrenched views over novel ones in particular topical or subject areas. Thus, "[c]ontent-based laws . . . present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth."[86] Justice Kagan's separate concurrence in *Reed* sounds a similar, although less definitive note, stating that "subject-matter restrictions, even though viewpoint-neutral on their face, may

based jurisprudence. She notes that "[t]o do its intended work, . . . the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints." *Id.* at 183 (Kagan, J., concurring). Her difference with the *Reed* majority lies not in the need for a buffer zone to safeguard against viewpoint discrimination, but its extent.

82 *Id.* at 167.

83 *Id.* at 165–68.

84 *Id.* at 165.

85 The Court has in the past excepted from strict scrutiny facially content discriminatory regulations within certain content categories. *See supra* notes 55–56 and accompanying text. The extent to which these exceptions remain viable after *Reed* is an open question. *See infra* Part IV.A.

86 *Reed*, 576 U.S. at 174 (Alito, J., concurring).

'suggest[ ] an attempt to give one side of a debatable public question an advantage in expressing its views to the people.'"[87] If the notion that all content-based regulations lend themselves to idea and viewpoint discrimination due to status quo bias takes hold in the Court, a version of the rights-against-rules model that does not rely on First Amendment prophylaxis will suffice to explain the Court's content-based jurisprudence.

The rights-against-rules conception of the Court's content-based jurisprudence, which holds sway with the current Court, has support in originalist and textualist accounts of the Constitution. This gives the model normative force under a popular sovereignty rationale.[88] Hamilton's roadmap to constitutional interpretation in *Federalist No. 78* states that judicial review involves comparing "particular act[s] proceeding from the legislative body" with provisions of the Constitution for irreconcilable variance.[89] Chief Justice Marshall declared more succinctly in *Marbury v. Madison*[90] that "a law repugnant to the constitution is void."[91] And the First Amendment, by its very terms, proscribes making any law abridging the freedom of speech. The original understanding and text of the Constitution, as well as the Court's most revered constitutional ruling, align with the basic claim of the rights-against-rules model that constitutional rights—including free speech rights—are legal rights to secure the invalidation of unconstitutional rules.

Like the motive-proxy model, the rights-against-rules model explains the Court's content-based jurisprudence as a constraint on governmental speech rulemaking rather than an instrument to vindicate individual or societal speech interests. With its emphasis on attacking unconstitutional predicates embodied in regulatory texts, the model is "perched . . . between outcome theories and process theories" of regulatory enactment.[92]

D. The Chilling Effect Model

The chilling effect model explains the Court's content-based jurisprudence as a vehicle for attacking regulations that predictably induce self-

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87 *Id.* at 182 (Kagan, J., concurring) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 (1978)).

88 *See generally* Michael O'Shea, *Normative Foundations of Originalism*, L. AND LIBERTY (Jul. 22, 2019), https://lawliberty.org/forum/normative-foundations-of-originalism/ ("An originalist approach, by focusing on the linguistic and social understandings available at the time of ratification, can claim special advantages in the effort to keep the content of constitutional law in the hands of the constitutional subject, the people.").

89 Dorf, *supra* note 15, at 247–48 (quoting THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

90 5 U.S. (1 Cranch) 137 (1803).

91 *Id.* at 177.

92 Adler, *supra* note 14, at 120.

censorship of particular ideas or viewpoints. In the free speech realm, a "chilling effect" is the self-censorship by private parties of constitutionally protected expression as a consequence of governmental action.[93] The chilling effect is concerned with the suppression of expression not through specific deterrence but through general deterrence.[94] A chilling effect inheres in regulations whose very existence predictably induces members of the public to curtail or alter their constitutionally protected expressive activities out of fear of governmental or private reactions or a simple desire to follow rules.[95]

The chilling effect model accepts that the Court will not intervene to stop every instance of self-censorship inspired by a regulation.[96] Instead, the model expects the Court to intervene where a regulation predictably induces self-censorship *and* the government exceeded its speech rulemaking authority by issuing it. The Free Speech Clause advances positive values—that is, individual interests in engaging in constitutionally protected speech acts and societal interests in open and unbiased public discourse. The Free Speech Clause also furthers negative values—that is, interests in preventing the government from breaching certain constitutional boundaries in its regulation of speech. The chilling effect model explains the Court as interventionist where a regulation offends positive free speech values by inviting self-censorship and negative free

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93 *See* Youn, *supra* note 29, at 1474 ("[A] First Amendment chilling effect . . . occurs when a governmental action has the indirect effect of deterring a speaker from exercising her First Amendment rights."); Schauer, *supra* note 78, at 693 ("A chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity."). The phrase "chilling effect" made its Court debut in *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539, 556–57 (1963), although Justice Frankfurter first referred to "chill" eleven years prior in *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring), and the Court showed awareness of the concept of chill even before that. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940).

94 *See* Dorf, *supra* note 15, at 262 ("[I]f citizens believe that a statute prohibits activity protected by the First Amendment, they will censor themselves."); Youn, *supra* note 29, at 1474–75 ("A given law may lead to a particular consequence for an expressive act . . . . Fear of that consequence may, in turn, deter the speaker from exercising her expressive rights.").

95 *See Thornhill*, 310 U.S. at 97 ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion . . . . A like threat is inherent in a penal statute . . . which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants . . . are permitted to challenge a statute . . . because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."); Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 129 (1992) ("[T]he very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court.").

96 *See* Younger v. Harris, 401 U.S. 37, 50 (1971) ("The existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action.").

speech values because the government went beyond its speech rulemaking warrant by enacting it.[97] Where that is the case, the Court is "generally content . . . to give the benefit of the doubt to the speaker, not to the state."[98] On the other hand, where a regulation engenders self-censorship, but the government did not stray from its speech rulemaking directive through its issuance, the Court is reluctant to intervene for lack of a clear mandate.[99] The First Amendment's censorship constraint severely limits the governmental rulemaker's power to enact speech rules that fail to treat ideas and viewpoints evenhandedly. The chilling effect model thus explains the Court as invalidating most content-based regulations because those regulations outstrip the government's rulemaking authority by predictably inspiring self-censorship of particular ideas or viewpoints.

At this juncture, one might fairly argue that the chilling effect model is superfluous. The chilling effect model characterizes the Court as invalidating regulations that intrude both on positive free speech values by predictably inducing self-censorship and negative free speech values because the government has exceeded its speech rulemaking authority by enacting them. Since, so the argument goes, the government's abuse of its speech rulemaking warrant is a sufficient condition for judicial intervention, the self-censorship prediction adds nothing to the constitutional calculus, and the chilling effect model resolves to the rights-against-rules model.

This argument has superficial appeal. The chilling effect model shares with the rights-against-rules model the view that *ultra vires* governmental speech rulemaking holds the key to judicial intervention.[100] Both models also accept that speech rulemaking that lends itself to idea or viewpoint discrimination is almost always outside of the governmental rulemaker's purview. Nonetheless, the chilling effect model's conditioning of judicial intervention on a prediction that a regulation will inspire self-censorship serves a valuable "rule training" purpose, ensuring that the Court's free speech rules fully and properly account for regulatory speech effects. Indeed, the Court has often employed the self-censorship prediction as a rule training tool in difficult cases.

The chilling effect model's self-censorship prediction is particularly adept at free speech rule training because it illuminates the general deterrent effects of speech regulations. Speech regulations can abridge speech in two distinct ways: specific deterrence and general deterrence. Speech regulations

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97 *See* Youn, *supra* note 29, at 1499–1500, 1507–10 ("[B]oth a negative-rights and a positive-rights account of free expression provide a normative mandate for judicial intervention in governmental chill cases.").

98 *Id.* at 1511.

99 *See id.*

100 *See id.* at 1499–1501 (arguing that the government-as-regulator's violation of a constitutional rule in the sense used in Professor Adler's rights-against-rules formulation is an essential element for judicial intervention under the "government chill" model).

abridge speech through specific deterrence when they induce actual reprisals against individual speakers. For example, the government may sanction an individual speaker for violating a criminal speech regulation.[101] Specific deterrent effects of speech regulations are highly visible since they involve concrete speech acts and reactions. However, speech regulations can also abridge speech through general deterrence, such as when they induce members of the public to suppress speech to avoid reprisal (i.e., self-censorship). For example, members of the public may refrain from constitutionally protected speech to avoid the risk that the government will sanction them for violating an overbroad criminal speech regulation.[102] General deterrent effects of speech regulations are less visible than specific deterrent effects since the former do not involve concrete speech acts and reactions but rather forbearance from speech acts out of feared reactions. The chilling effect model's self-censorship prediction usefully inquires about this more subtle—but often more widespread—form of speech abridgment. Moreover, within the general deterrence rubric, speech regulations can motivate two distinct types of actors—governmental and private—to exact reprisals against would-be speakers. The self-censorship prediction does not confine its inquiry to self-censorship induced by governmental actors but considers self-censorship precipitated by private actors as well.

The chilling effect model and its self-censorship prediction shed light on two questions of particular concern to the constitutionality of Section 230's speech blocking immunity provisions. First, should the Court treat facially content-neutral regulations vesting boundless discretion in administrators to license speech with the same hostility as it treats facially content-based regulations? Second, should the Court treat content-based regulations administered by private entities with the same hostility that it treats content-based regulations administered by governmental entities?

1. The Chilling Effect and Standardless Licensing Regulations

The Court has invoked the chilling effect model to answer the first question in the affirmative. The Court applies its challenger-friendly content-based jurisprudence to standardless licensing regulations—facially content-neutral regulations that give administrators unbridled discretion to license speech—treating these regulations as content-based regulations for all intents and purposes. Standardless licensing regulations are not flagged by the Court's primary free speech rules governing content-based regulations since they are neither facially content discriminatory nor by necessity enacted with a censorial

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[101] *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (reviewing an appeal of a criminal conviction of an individual speaker a under cross-burning ordinance).

[102] *See* Virginia v. Hicks, 539 U.S. 113, 119 (2003) ("[T]he threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.").

motive. Yet the chilling effect model's self-censorship prediction detects problems in the unchecked authority these regulations repose in administrators to decide who may and who may not speak, which predictably induces the public to curb the expression of particular ideas and viewpoints. The chilling effect model thus flags standardless licensing regulations as false positives under the Court's content-neutral jurisprudence and designates them for review under the Court's content-based jurisprudence.

Thornhill v. Alabama[103] foreshadowed the Court's use of the chilling effect model to substantiate hostile treatment of standardless licensing regulations. At issue in *Thornhill* was an Alabama law that criminalized picketing for the purpose of interfering with a lawful business. Byron Thornhill joined a picket line near the premises of his former employer. He was arrested and fined.[104] The Court held the statute facially invalid. Analogizing the anti-picketing statute to a standardless licensing scheme, Justice Murphy described the general deterrence of constitutionally protected expression as inherent in the mere existence of the statute:

> Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas . . . . [The rule] derives from an appreciation of the character of the evil inherent in a licensing system . . . . It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion . . . .A like threat is inherent in a penal statute . . . which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship . . . .Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes

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103 310 U.S. 88 (1940).

104 *See id.* at 91–92 & n.1.

> the limits of permissible conduct and warns against transgression.[105]

Taking up *Thornhill*'s mantle, the Court's *Lakewood* majority invoked the chilling effect model's self-censorship prediction to firmly ensconce standardless licensing regulations in its content-based jurisprudence. Highlighting the risks of idea and viewpoint discrimination in a city ordinance giving its mayor limitless discretion to grant and deny news rack licenses that compelled invalidation of the ordinance, Justice Brennan wrote for the Court:

> It is not difficult to visualize a newspaper that relies to a substantial degree on single issue sales feeling significant pressure to endorse the incumbent Mayor in an upcoming election, or to refrain from criticizing him, in order to receive a favorable and speedy disposition on its permit application. Only standards limiting the licensor's discretion will eliminate this danger by adding an element of certainty fatal to self-censorship.[106]

The *Lakewood* Court proceeded to establish a clear nexus between standardless licensing regulations and content-based regulations, rooted in the censorship constraint. The Court noted:

> [W]e . . . have considered on the merits facial challenges to statutes or policies that embodied discrimination based on the content or viewpoint of expression, or vested officials with open-ended discretion that threatened the same, even where it was assumed that a properly drawn law could have greatly restricted or prohibited the manner of expression or circulation at issue.[107]

The Court additionally stressed that "a law permitting communication in a certain manner for some but not for others raises the danger of content and viewpoint censorship . . . ."[108] The unmistakable implication of *Lakewood*, gleaned from applying the chilling effect model's self-censorship prediction in a free speech rule training exercise, is that facially content-neutral regulations granting administrators limitless discretion to license speech carry the same risks of idea and viewpoint discrimination as facially content-based regulations.

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105 *Id.* at 97–98.

106 *Lakewood*, 486 U.S. at 757–58.

107 *Id.* at 766.

108 *Id.* at 751.

2. The Chilling Effect and Privately Administered Content-Based Regulations

The Court has not answered the second question—whether privately administered content-based regulations should be treated with the same hostility as governmentally administered ones—as definitively. However, the Court has applied the chilling effect model to elucidate the related notion that regulations that predictably inspire self-censorship of particular ideas and viewpoints out of fear of private reactions are constitutionally suspect. Consider *Miami Herald Publishing Co. v. Tornillo*.[109] At issue in *Tornillo* was Florida's "right-of-reply" statute, which granted political candidates criticized by any newspaper the right to have their responses to the criticisms published by the newspaper. The *Herald* ran two editorials critical of Pat Tornillo, a candidate for the Florida House of Representatives, and refused to print his replies. Tornillo filed a civil suit against the *Herald* seeking declaratory relief and money damages.[110] Tornillo argued that the statute did not abridge the *Herald*'s speech since it "has not prevented the Miami Herald from saying anything it wished"—arguing essentially that the statute lacked specific deterrent effects.[111] The Court nonetheless held the statute facially invalid in a unanimous decision. Writing for the Court, Chief Justice Burger rejected Tornillo's argument by emphasizing the statute's general deterrent effects. The Chief Justice opined that "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers."[112] While the statute did not prevent the *Herald* from speaking, it nonetheless "exact[ed] a penalty on the basis of the content of a newspaper" due to its predictable inducement of a newspaper's self-censorship out of feared private reactions, including demands to publish editorial replies and civil lawsuits.[113] The Chief Justice concluded that

> [f]aced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.[114]

Nor is *Tornillo* an outlier in finding regulations that inspire self-censorship of particular ideas and viewpoints out of feared private reactions

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109 418 U.S. 241 (1974).

110 *See id.* at 243–44.

111 *Id.* at 256 (quoting Brief for Appellee at 5).

112 *Id.*

113 *Id.*

114 *Id.* at 257.

constitutionally problematic. In *Buckley v. Valeo*,[115] the Court held that minor political parties may obtain First Amendment as-applied exemptions from compelled disclosure regulations if there is "a reasonable probability that the compelled disclosure . . . will subject [their contributors] to threats, harassment, or reprisals from either Government officials *or private parties*."[116] The Court took an even more aggressive stance against compelled disclosure regulations in a recent term, holding that such regulations are facially invalid if they fail to meet certain governmental rulemaking standards due to their capacity to spark ideologically motivated private reprisals. Thus, in *Americans for Prosperity Foundation v. Bonta*,[117] the Court invalidated a California statute requiring tax-exempt organizations to disclose their donors, holding that compelled disclosure regulations must comply with the constitutional rule of narrow tailoring to an important governmental interest due to the potential for such disclosures to chill the First Amendment rights of donors. Writing for the Court, Chief Justice Roberts concluded that the "dragnet" for sensitive donor information cast by the California statute was not narrowly tailored to the state's investigative interests, recounting that petitioners introduced evidence that they and their supporters were subjected to private reprisals in the form of bomb threats, protests, stalking and physical violence and that such risks are heightened in the Information Age.[118] *Bonta* leaves little room for doubt that the current Court will flag for heightened scrutiny regulations that create reasonable fears of ideologically driven reprisals for engaging in protected First Amendment activities, regardless of whether the would-be instigators of these reprisals are governmental or private actors.

In short, the chilling effect model elicits that while judicial intervention hinges on governmental *issuance* of a regulation abridging speech, it does not require that such a regulation abridge speech through governmental *administration*. The Court has on occasion described the chilling effect in terms of the tendency of speech regulations to engender self-censorship out of fear of governmental sanction.[119] However, the Court has made clear that the First Amendment also does not countenance regulations that induce self-censorship to avert hostile private reactions.

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115 424 U.S. 1 (1976).

116 *Id.* at 74 (emphasis added); *see also* Brown v. Socialist Workers Comm., 459 U.S. 87, 91 (1982) (granting the Socialist Workers Party a First Amendment exemption from campaign disbursement disclosure laws under the *Buckley* formulation on a record of "substantial evidence of both governmental and private hostility toward and harassment of SWP members and supporters").

117 Am. For Prosperity Found. v. Bonta, No. 19-251, slip op. (S. Ct. 2021).

118 *See id.* at 14–17.

119 *See* Sec'y of Maryland v. Munson Co., 467 U.S. 947, 956 (1984) ("[W]here a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity.").

So how does the chilling effect model square the state action circle? How can the Court's decision to intervene in *Tornillo* and *Bonta*, where First Amendment activity was impaired by private actors, be reconciled with the state action doctrine? The answer is clear: The state actors in these cases were the Florida and California legislatures, which exceeded their rulemaking warrants by enacting regulations that predictably suppressed First Amendment activity on the basis of the ideas and viewpoints expressed.[120] A few years back, a thoughtful commentator on the chilling effect landscape opined that "[i]n most areas of constitutional law, . . . private reactions do not affect the constitutionality of a governmental action. Chilling effect doctrine creates an exception: It expands the category of constitutionally cognizable injuries to encompass claims of deterrence, whether that deterrence results from governmental or private actions . . . ."[121] That analysis is almost correct. The chilling effect model does account for the deterrence of First Amendment pursuits out of fear of private reprisals. However, the constitutionally cognizable injury in a chilling effect case is not the deterrence of First Amendment activity linked to private reactions but the government's *ultra vires* rulemaking. Specific instances of private reprisal have no constitutional bearing on the state action inquiry under the chilling effect model; such particulars only have constitutional import to the judicial prediction downstream of state action as to whether the challenged regulation will abridge constitutionally protected expression. In short, it is legislative overreach—not private reactions—which causes the constitutionally cognizable injury and is the basis for state action in First Amendment chilling effect cases.

Although the chilling effect model derives its name from regulatory speech effects, the chilling effect model—like the motive-proxy model and the rights-against-rules model—understands the Court's content-based jurisprudence as fundamentally a constraint on the governmental rulemaker. The normative case for the chilling effect model is the same one that underpins the rights-against-rules model. The chilling effect model merely appends to the rights-against-rules model a free speech rule training tool which allows the Court to make a broad accounting of regulatory speech effects including self-censorship induced by fear of private reactions. Since the free speech chilling effect arises from a judicial prediction that the very existence of certain speech regulations will inhibit constitutionally protected expression, the legislative author and issuer of these regulations is the model's natural and proper focus.

IV. CHALLENGER-FRIENDLY ELEMENTS OF CONTENT-BASED JURISPRUDENCE

While the motive-proxy, rights-against-rules, and chilling effect models of the Court's content-based jurisprudence quibble on the margins, they are in

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120 First Amendment constraints apply to state governments via the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652 (1925).

121 Youn, *supra* note 29, at 1475.

basic agreement that constitutional injury inheres in content-based regulations due to risks of idea and viewpoint suppression—and identify the legislature or other governmental rulemaker as the culprit. These consensus attributes of content-based regulations have led the Court to adopt a special challenger-friendly jurisprudence that governs attacks on such regulations. By far the best-known feature of this jurisprudence is the application of strict scrutiny. However, the Court's content-based jurisprudence includes less heralded elements that impact constitutional outcomes in a variety of cases—including prospective challenges to Section 230. Among these unsung aspects are rulemaker state action and relaxed Article III standing rules for entertaining facial challenges.

The case that perhaps best displays the full complement of elements of the Court's challenger-friendly content-based jurisprudence—even if unwittingly—is the Warren Court's decision in *Lamont v. Postmaster General*.[122] At issue in *Lamont* was a federal statute requiring the Post Office to detain unsealed mail from foreign countries that postal employees determined to be "communist political propaganda" unless the addressee requested delivery of this mail after being notified of its detention. The lead plaintiff was an addressee of mail impounded under this facially viewpoint discriminatory statute who wished to receive such mail without requesting it.[123] In an opinion written by Justice Douglas, the *Lamont* Court aptly pinpointed the wrongdoer in the dispute as Congress for its enactment of a viewpoint discriminatory statute, noting: "Here the Congress—expressly restrained by the First Amendment from 'abridging' freedom of speech and of press—is the actor."[124] With the offender and offense correctly identified as the legislature and issuance of a content-based regulation, the majority breezed past any concerns about standing or the propriety of a facial challenge. The Court found that the fact that the plaintiffs' own speech had not been abridged did not bar standing by invoking the novel constitutional thesis that recipients of communications have First Amendment rights.[125] Entertaining the plaintiffs' facial challenge without elaboration, the

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[122] 381 U.S. 301 (1965). The *Lamont* Court did not explicitly state that it was applying content-based jurisprudence to the statute in question since content-based jurisprudence had not yet coalesced into a formal set of judicial rules. *See* Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1278–79 (2007) (tracing the strict scrutiny test applied in free speech cases to the Warren Court's conjunction in the 1960s of earlier decisions).

[123] *Lamont*, 381 U.S. at 302–05.

[124] *Id.* at 306.

[125] *See id.* at 304. Justice Brennan felt compelled to address the standing issue in a concurring opinion, where he noted:

> These might be troublesome cases if the addressees predicated their claim for relief upon the First Amendment rights of the senders. To succeed, the addressees would then have to establish their standing to vindicate the senders' constitutional rights . . . as well as First Amendment protection for political propaganda prepared and printed abroad by or on behalf of a foreign government . . . . However, those questions are not before us, since the

Court proceeded to rule that the statute was facially invalid on the constitutionally groundbreaking notion that it created a "reverse" chilling effect—self-censorship by addressees who would predictably refrain from receiving constitutionally protected ideas and viewpoints out of fear of governmental reprisal:

> We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda." The regime of this Act is at war with the "uninhibited, robust, and wide-open" debate and discussion that are contemplated by the First Amendment.[126]

In the decades since *Lamont*, one facet of the Court's content-based jurisprudence—strict scrutiny—has become well defined as the Court has articulated and conjoined various doctrinal rules and fine-tuned them through exposure to the rigors of various fact patterns.[127] However, two other dimensions of the Court's content-based jurisprudence—rulemaker state action and relaxed rules for Article III standing to mount facial challenges—remain less well understood.

A. Strict Scrutiny

Content-based regulations are almost always subject to strict scrutiny.[128] Strict scrutiny requires the government to prove that a content-based regulation furthers a compelling governmental interest and is narrowly tailored to achieve

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> addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment 'necessarily protects the right to receive it.'

Id. at 307–08 (Brennan, J., concurring) (quoting Martin v. Struthers, 319 U.S. 141, 143 (1943)).

126 *Id.* at 304.

127 *See generally* Fallon, *supra* note 122.

128 *See supra* notes 55–57 and accompanying text.

that interest for the regulation to avoid an unconstitutional fate.[129] Content-based regulations are rarely narrowly tailored and thus almost always invalid.[130]

The application of strict scrutiny to content-based regulations has historically been subject to a few exceptions. Content-based regulations burdening certain judicially recognized categories of low-value speech in a viewpoint-neutral manner have evaded strict scrutiny.[131] The Court has also applied less exacting scrutiny to content-based regulations of commercial speech, licensed broadcasting, and adult-oriented businesses.[132]

Reed calls these historical exceptions into serious question.[133] The *Reed* Court announced a "clear and firm rule" of subjecting content-based regulations to strict scrutiny.[134] If this rule is applied faithfully by the Court, content-based regulations that predictably abridge speech will be subject to strict scrutiny as a categorical matter.[135] A literal interpretation of *Reed* perhaps goes too far and certain traditional exceptions to strict scrutiny of content-based regulations remain viable.[136] However, at a minimum, *Reed*'s bright line test creates tension

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[129] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

[130] *See supra* note 59 and accompanying text; *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992) ("The existence of adequate content-neutral alternatives . . .'undercut[s] significantly' any defense of . . . a [facially content-based] statute.") (quoting Boos v. Berry, 485 U.S. 312, 339 (1988)).

[131] *See supra* note 55 and accompanying text.

[132] *See supra* note 56 and accompanying text. However, the Court has applied strict scrutiny to content-based regulations of the Internet. *See* Reno v. ACLU, 521 U.S. 844 (1997) (applying strict scrutiny to a content-based criminal regulation barring Internet providers from transmitting indecent material to minors since special factors justifying relaxed scrutiny of licensed broadcasting regulations are not present in cyberspace).

[133] *See generally* David L. Hudson Jr., *The Content-Discrimination Principle and the Impact of* Reed v. Town of Gilbert, 70 CASE W. RSRV. L. REV. 259 (2019) (describing how *Reed*'s facial content discrimination strict scrutiny trigger threatens relaxed scrutiny of commercial speech regulations and the "secondary effects" doctrine).

[134] *See supra* notes 79–84 and accompanying text.

[135] *See* Genevieve Lakier, Reed v. Town of Gilbert, Arizona*, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 33 (2016) (analogizing *Reed*'s categorical hostility to facial content distinctions to the Fourteenth Amendment's like treatment of facial racial distinctions under the suspect classification test).

[136] For example, one can imagine that regulations carefully targeting judicially recognized categories of low-value speech remain exempt from strict scrutiny on the ground these categories are generally outside the First Amendment's purview.

with these exceptions that will have to be resolved.[137] And maybe the *Reed* Court meant precisely what it said.[138]

The exemption from strict scrutiny of content-based regulations of licensed broadcasting began to be questioned even before *Reed*. Consider the 1996 case of *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*,[139] which may hold clues to how the current Court would scrutinize a First Amendment challenge to Section 230. *Denver Area* involved a facial challenge to a privately administered content-based federal regulatory regime that used incentives to nudge cable operators to block sexually explicit programming. At issue was the constitutionality of three provisions of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, two of which interworked to induce cable operators to block sexually explicit programming. Section 10(a) gave cable operators the option to either allow or block sexually explicit programming on leased channels. Section 10(b) required cable operators who opted to allow sexually explicit programming on leased channels to put the programming on a single channel and block that channel unless a subscriber requested access to that channel in writing. Section 10(b) thus imposed special burdens on cable operators who chose to allow, rather than block, sexually explicit programming on leased channels. Taken together, Sections 10(a) and (b) effectuated a regulatory scheme by which Congress enticed cable operators to block sexually explicit programming on leased channels but did not compel them to do so. Section 10(c), for its part, gave cable operators the option to either allow or block sexually explicit programming on public access channels.[140] Cable programmers and viewers challenged the regulatory scheme.[141]

Faced with the question of the applicable level of scrutiny, the *Denver Area* Court fractured. Eschewing any "rigid single standard,"[142] the plurality opinion written by Justice Breyer and joined by Justices Stevens, O'Connor, and Souter conducted a "balanc[ing] of competing interests,"[143] finding that determining conformity of the provisions with the First Amendment required scrutiny "to assure that [the provisions] properly address[] an extremely important problem, without imposing, in light of relevant interests, an

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137 *See* Hudson, *supra* note 133, at 279 (describing lower court decisions noting tension between the "secondary effects" doctrine and *Reed*).

138 *But see* City of Austin v. Reagan Nat'l Advert. of Austin, L.L.C., No. 20-1029, slip op. (S. Ct. 2022) (declining to apply *Reed*'s strict scrutiny edict to a municipal regulation limiting "off-premises" signs even though determining that a sign is off-premises requires consideration of its content and purpose).

139 518 U.S. 727 (1996) (plurality opinion).

140 *See id.* at 734–35.

141 *See id.* at 790 (Kennedy, J., concurring in part and dissenting in part).

142 *Id.* at 742.

143 *Id.* at 740.

unnecessarily great restriction on speech."[144] In a partial concurrence, Justice Kennedy, joined by Justice Ginsburg, criticized the plurality's *ad hoc* balancing approach and said that the traditional strict scrutiny governing content-based regulations should apply.[145] In another partial concurrence, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, found that the challengers, who were not cable operators, lacked standing to challenge Sections 10(a) and (c) since their speech was not abridged by those noncompulsory provisions.[146] As for compulsory Section 10(b), they agreed with Justices Kennedy and Ginsburg that strict scrutiny applied, but found that the provision passed that exacting test.[147] Thus, a majority of the justices called for applying strict scrutiny to at least one of the provisions, even though none of these justices was in the plurality.

Perhaps more important than the level of scrutiny applied in *Denver Area*, however, was the pragmatic result the Court reached. The compulsory or noncompulsory status of the provisions and the fact that the private entities (i.e., cable operators) administered the speech abridgment complained of were not ultimately dispositive of constitutionality. Seven of the nine justices voted to uphold noncompulsory Section 10(a) whereas six voted to strike compulsory Section 10(b) and five voted to strike noncompulsory Section 10(c).[148] Moreover, while the justices' myriad opinions addressed the constitutionality of Section 10(a) and Section 10(b) separately and under different standards, the consequence of the decision was to allow the cable operators to block indecent speech while removing the governmental incentive to do so—a speech-enhancing outcome not lost on Justice Breyer. Writing for the plurality, he noted that

> [t]he 'segregate and block' requirement's [i.e., Section 10(b)'s] invalidity does make a difference . . . to the effectiveness of the permissive 'leased access' provision, § 10(a). Together [Sections 10(a) and (b)] told the cable system operator: Either ban a 'patently offensive' program or 'segregate and block' it. Without the 'segregate and block' provision, cable operators are afforded broad discretion over what to do with a patently offensive program, *and because they will no longer bear the costs of segregation and blocking if they refuse to ban such*

144 *Id.* at 743.

145 *See id.* at 782–83, 805 (Kennedy, J., concurring in part and dissenting in part).

146 *See id.* at 819–24 (Thomas, J., concurring in part and dissenting in part).

147 *See id.* at 832.

148 *Id.* at 728–31.

> *programs, cable operators may choose to ban fewer programs*.[149]

A plausible reading of *Denver Area* is that, regardless of whether strict scrutiny or a less exacting standard applies in a facial challenge to a privately administered content-based federal regulatory regime that provides incentives to nudge private entities to block offensive but constitutionally protected speech, the Court will remove those incentives—thereby negating the government's overstep of its rulemaking authority in issuing a content-based regulation that predictably induces abridgment of speech.[150] In a challenge to a federal regulatory regime such as Section 230 brought outside the context of licensed broadcasting in the post-*Reed* era, that speech-protective outcome seems even more likely.

One might interject that *Reed* and *Denver Area* are inapposite to any challenge to Section 230 because those cases did not involve regulation of private social media platforms. Private social media platforms are purely private forums to which members of the public have no First Amendment right of access, so this argument goes, and owners of these platforms have a right to control expressive activity within them.[151] But this argument conflates two issues. Even where private forum owners have an absolute right to control expressive activity on their forums, that unqualified right does not enlarge the government's speech rulemaking warrant. The First Amendment's censorship constraint deprives the governmental rulemaker of the authority to enact content-based regulations which tend to suppress constitutionally protected speech, whether through governmental or private administration.[152] The fact that owners of private social media platforms have an unconditional right to block speech on these platforms, where extant, does not grant the government license to issue regulations

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[149] *See id.* at 767 (internal quotation marks omitted, emphasis added).

[150] As Justice Brennan once noted, "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." Lamont v. Postmaster Gen., 381 U.S. 301, 309 (1965) (Brennan, J., concurring).

[151] *See* Manhattan Cmty. Access Corp. v. Halleck, No. 17-702, slip op. at 9 (S. Ct. 2019) ("[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor."); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (holding that the First Amendment does not prevent private shopping center owners from prohibiting the distribution of handbills on the center's premises); *cf.* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) (holding that cable programmers' and cable operators' transmission of original programming and exercise of editorial discretion is protected by the First Amendment).

[152] *See* Smith v. California, 361 U.S. 147, 154 (1959) (finding that regulations which "tend to restrict the public's access to. . . [speech] . . . which the State could not constitutionally suppress directly" constitute "a censorship affecting the whole public, hardly less virulent for being privately administered.").

conferring legal benefits on them for exercising that right in a content discriminatory manner.[153]

B. Rulemaker State Action

The state action doctrine requires litigants to prove that the government is responsible for their constitutional injury in order to prevail on a constitutional challenge.[154] Acts of private parties are normally attributed to the state only if compelled by the government; noncompulsory private acts do not ordinarily constitute state action.[155] Challenges brought under the Free Speech Clause are subject to the state action requirement.[156]

Cursory review of this state action rule trilogy might lead one to conclude that a litigant whose speech is abridged by a private act taken under a noncompulsory regulation cannot prevail on a First Amendment challenge due to a lack of state action. But matters are not so simple, as shown in *Denver Area*. While the private party's act in such a dispute undeniably contributes to the abridgment of the litigant's speech, it is not necessarily the *sole* contributor. If the government exceeded its speech rulemaking warrant in enacting the noncompulsory regulation, the government is also a contributor. Indeed, the legislature or other governmental rulemaker which engaged in extra-constitutional rulemaking is held responsible for the constitutional injury in that circumstance. Content-based regulations are almost always the product of overreach in governmental rulemaking.[157] Therefore, the state action requirement in First Amendment challenges to content-based regulations—whether such regulations are compulsory or noncompulsory—is almost always satisfied by *rulemaker* state action.

Court precedent articulating that rulemaker state action inheres in content-based regulations is somewhat scant. This is perhaps unsurprising since

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153 *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 383-84 (1992) (holding that the government cannot make otherwise proscribable speech categories "vehicles for content discrimination.").

154 *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) ("The Constitution's protections of individual liberty and equal protection apply in general only to action by the government.").

155 *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("[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."); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 165 (1978) ("[T]he State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in § 7-210 permits but does not compel . . . ."); Adikes v. SH Kress & Co., 398 U.S. 144, 170 (1970) ("[A] State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act."). Beyond governmental compulsion, state action exists where a private entity performs a traditional, exclusive public function or acts jointly with the government. *Halleck*, slip op. at 6.

156 *See Halleck,* slip op. 5 ("[T]he Free Speech Clause prohibits only governmental abridgment of speech. The Free Speech Clause does not prohibit private abridgment of speech.").

157 *See supra* Part III.

the tradition of governmental administration of regulations obviates the need to search for alternative sources of state action in most cases. Even so, *Lamont* explicitly recognized that Congress is a relevant state actor when it issues content-based regulations.[158] And, more recently, a majority of the Court reasoned in *Denver Area* that Congress is a relevant state actor where a facial challenge is brought against a content-based federal regulatory regime that incents private entities to block speech.

Indeed, *Denver Area* illustrates, in a single precedent, both rulemaker state action and the constitutional infirmity of content-based regulations that induce private parties to block speech. Before the case reached the Court, the D.C. Circuit Court of Appeals, in an *en banc* decision,[159] upheld the constitutionality of both Section 10(a) and Section 10(b) of the Cable Television Consumer Protection and Competition Act of 1992, which interworked to nudge cable operators to block sexually explicit programming. Addressing these provisions individually, the *en banc* panel found that, since Section 10(a) was noncompulsory, the cable operators who opted to block sexually explicit programming under this provision were not state actors[160] and that Section 10(b), although compulsory, survived strict scrutiny.[161] In rejecting the First Amendment challenge to Section 10(a) for want of state action, the panel followed a formidable precedential line holding that acts of private entities taken under noncompulsory regulations do not ordinarily constitute state action.[162] However, Chief Judge Wald took the majority to task in an insightful dissent that recognized that the majority's state action focus was misplaced and that the Court's precedents drawing the compulsory/noncompulsory distinction were inapposite. The Chief Judge noted that since Sections 10(a) and 10(b) were *content-based* regulations, Congress exceeded its speech rulemaking authority by issuing them and was the relevant state actor in the case:

> [P]etitioners do not seek to apply First Amendment standards to the "actions taken by cable operators with respect to indecent programming . . . ." Instead, they mount a direct facial challenge to a federal statute and implementing regulations which have the avowed purpose and effect of restricting communication of a content-defined class of constitutionally-protected speech. The majority's . . . analysis thus asks, and answers, the wrong question. The core question here is not whether the cable

158 *See supra* note 124 and accompanying text.

159 Alliance for Cmty. Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995) (en banc), *aff'd in part, rev'd in part sub nom.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (plurality opinion).

160 *See id.* at 123.

161 *See id.* at 129.

162 *See id.* at 113–21; *see supra* note 155 for a sampling of cases in this precedential line.

> operators' private decisions implicate state action; whatever the answer to that question, we have state action in the government's own ban-or-block scheme, which is what is at issue here.[163]

The Supreme Court sided with Chief Judge Wald on the state action question. In the splintered ruling, six of the nine justices opined that in a facial challenge to a privately administered content-based federal regulatory scheme such as Section 10, Congress is a relevant state actor. Justice Breyer, in the plurality opinion joined by Justices Stevens, O'Connor, and Souter, wrote: "Although the [circuit] court said that it found no 'state action,' . . . it could not have meant that phrase literally, for, of course, petitioners attack (as 'abridg[ing] . . . speech') a congressional statute—which, by definition, is an Act of 'Congress.'"[164] Justice Kennedy was less circumspect in his partial concurrence joined by Justice Ginsburg, noting: "Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted. The plurality at least recognizes this as state action . . . ."[165] And, as discussed earlier, the Court pragmatically upheld Section 10(a) while striking Section 10(b), allowing cable operators to block indecent speech while removing the governmental incentive to do so.[166]

While *Lamont* and *Denver Area* provide explicit support for the thesis that *ultra vires* governmental rulemaking supplies the requisite state action in First Amendment challenges to content-based regulations, the concept also has support in chilling effect cases such as *Tornillo* and *Bonta*. In these cases, litigants prevailed in facial challenges to regulations that suppressed First Amendment activity by inspiring private reactions. These litigants could not have prevailed on their constitutional challenges unless a state actor contributed to that suppression. The state action hole could only have been filled by the state legislatures, which exceeded their First Amendment rulemaking warrants by enacting regulations that fueled the private reactions. In *Tornillo*, the Florida legislature outstripped its speech rulemaking authority by issuing a content-based "right-of-reply" statute.[167] In *Bonta*, the California legislature exceeded its First Amendment rulemaking warrant by issuing an overreaching donor disclosure law.[168]

The Court's recent decision in *Manhattan Community Access Corp. v. Halleck*[169] does not undermine the rulemaker state action premise. In *Halleck*, the Court rejected for want of state action a challenge to editorial decisions made

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163 *Id.* at 132 (Wald, C.J., dissenting) (quoting the majority opinion at 113).

164 *Denver Area*, 518 U.S. at 737.

165 *Id.* at 782 (Kennedy, J., concurring in part and dissenting in part).

166 *See supra* notes 148–150 and accompanying text.

167 *See supra* notes 109–114 and accompanying text.

168 *See supra* notes 117–118 and accompanying text.

169 No. 17-702, slip op. (S. Ct. 2019).

by a private nonprofit corporation that operated public access channels not to air certain content on those channels, expressing that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[170] The insurmountable state action problem that the *Halleck* plaintiffs faced was that the private editorial decisions abridging their speech were not traceable to content-based regulation. Unable to show that the government had overstepped by enacting a regulation beyond its speech rulemaking power, the *Halleck* plaintiffs were forced to resort to as-applied challenges to the actions of a private entity, which are insufficient to establish state action absent special circumstances.[171]

In summary, the state action inquiry in a free speech challenge brought by a litigant whose speech is abridged by a private act taken under a regulation asks two questions. The first question is whether the government exceeded its speech rulemaking authority in issuing the regulation. Only if the government did not overstep its rulemaking bounds does the inquiry proceed to the second question, which is whether the government is otherwise responsible—due to compulsion or other special circumstances—for the private act. The government almost always violates its speech rulemaking mandate when it issues content-based regulations. Thus, rulemaker state action customarily attaches in challenges of content-based regulations and the second question is not reached.

C. Relaxed Article III Standing

Article III standing requires that a plaintiff suffer injury-in-fact traceable to unlawful acts of a defendant in order to invoke federal jurisdiction.[172] Injury-in-fact means concrete harm.[173] A party whose constitutionally protected speech is abridged at the hands of the government suffers concrete harm.[174]

One may conclude from Article III standing's injury-in-fact requirement that litigants must suffer governmental abridgment of their constitutionally protected speech in a specific instance to mount a free speech challenge in federal court. But that is not the case. As the Court is fond of saying, "First Amendment freedoms need breathing space to survive."[175] Litigants have prevailed in federal

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170 *Id.* at 10.

171 *See supra* note 155 and accompanying text.

172 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). The injury-in-fact requirement stems from the case-or-controversy limitation on the exercise of federal judicial power. *See* U.S. CONST. art. III, § 2.

173 *See* Transunion L.L.C. v. Ramirez, No. 20-297, slip op. at 1 (S. Ct. 2021) ("To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing.").

174 *See id.* at 9.

175 Americans for Prosperity Foundation v. Bonta, No. 19-251, slip op. at 19 (S. Ct. 2021) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

court on facial challenges to speech regulations without suffering *any* cognizable abridgment of their constitutionally protected speech.[176] Various theories have been espoused by the Court and constitutional theorists in support of relaxation of the injury-in-fact requirement in facial challenges to speech regulations, including allowing litigants to represent societal interests against overbroad regulations that inspire a chilling effect,[177] a right to have one's conduct judged by constitutionally valid rules,[178] a right of listeners to receive open and unbiased discourse,[179] and English "public right" practice at the time of the Constitution was adopted permitting challenges to governmental actions brought in the public

[176] *See* Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750,755–56 (1988) ("Recognizing the explicit protection accorded speech and the press in the text of the First Amendment, our cases have long held that, when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license."); New York v. Ferber, 458 U.S. 747, 768 n.21 (1982) (dictum) ("A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face."); Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980) ("Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court."); Lamont v. Postmaster General, 381 U.S. 301, 307–08 (1965) (Brennan, J., concurring) (addressee had First Amendment standing to challenge statute requiring postal addressee to request delivery of international mail detained by the federal government as "communist political propaganda").

[177] *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."); *see also* Massachusetts v. Oakes, 491 U.S. 576, 584 (1989) (plurality opinion) ("Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression. An overbroad statute is . . . subject to invalidation notwithstanding the defendant's unprotected conduct out of solicitude to the First Amendment rights of parties not before the court."); Sec'y of Maryland v. Munson Co., 467 U.S. 947, 956 (1984) ("Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.").

[178] *See generally* Monaghan, *supra* note 71; Dorf, *supra* note 15; Adler, *supra* note 14; Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000).

[179] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756–57 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. . . .If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees."); *see generally* Note, *Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1749 (2010).

interest.[180] Still, most of these theories accept that Article III standing's injury-in-fact requirement demands that litigants have some "real-world" connection to a speech regulation in order to facially challenge it.[181]

Fortunately, there is no need here to delve too deeply into the thicket of Article III standing theory. The Court has in practice relaxed Article III standing's injury-in-fact requirement in two ways that ease the burden on litigants who mount facial challenges to content-based regulations. First, the Court has held that concrete non-speech harms traceable to speech regulations satisfy the injury-in-fact requirement in facial challenges to speech regulations.[182] Second, *Lakewood* and other standardless licensing cases,[183] as well as First Amendment overbreadth doctrine, indicate that litigants who have not suffered concrete harm have Article III standing to facially challenge content-based regulations provided their expressive activity is within reach of these regulations.[184]

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[180] *See* Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969) (arguing that Article III standing is discretionary with the courts since "[p]ublic suits instituted by strangers to curb action in excess of jurisdiction were well established in English law at the time Article III was drafted").

[181] *See* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 178 (2012) ("To win a federal lawsuit, a plaintiff needs both a legal harm (cause of action) and an injury-in-fact ("real-world harm," however the Court decides to measure that)."); Dorf, *supra* note 15 at 294 ("[A]ny constitutional challenge to a statute . . . is as-applied in the sense that adjudication in federal court . . . requires that the statute be applied to the litigant to create a case or controversy."); Note, *supra* note 179 at 1766–67 (arguing that prudential standing limitations restrict access to federal courts to "suitably adverse plaintiff[s]"). *But see* Adler, *supra* note 14 at 122 ("I believe, in truth, that Article III does not require X to secure an improvement in her own legal position (that is, judicial relief from a sanction or duty) for a court to invalidate rule R at X's instance."); Berger, *supra* note 180 at 840 (arguing based on originalism for discretionary "stranger" Article III standing to vindicate public interests).

[182] *See Munson*, 467 U.S. at 954–59 (for-profit fundraising agency's loss of business traceable to a statute that limited the administrative expenses charities could incur in fundraising had standing to facially challenge the statute). The *Munson* Court purported that the litigant's ability to properly frame legal issues and present them with the requisite adversarial zeal presents a prudential limitation on standing beyond Article III. *Id.* at 955–56. However, where a facial challenge is concerned, the litigant's individual status and conduct are not at issue and constitutional adjudication simply involves comparing the predicates embodied in the regulatory text against applicable rule-validity schemata. *See supra* Part III.C. Since the litigant's individual circumstances are not germane to a facial challenge, there seems little legal reason to favor one facial challenger over another.

[183] *E.g.*, Freedman v. Maryland, 380 U.S. 51 (1965); Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992).

[184] Relaxed Article III standing and facial challenges go hand-in-glove where content-based regulations are concerned. Both are animated by the fact that content-based regulations cause constitutional injury by their very existence in the form of predictable self-censorship of constitutionally protected expression by members of society within reach of these regulations. A challenge to such regulations is necessarily facial rather than as-applied. *See* Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988) ("[The] evils [of self-censorship] engender

1. Lakewood and "Subject To" Standing

In *Lakewood*, the Court held that litigants who are "subject to" regulations that vest unfettered discretion in administrators to license expression have Article III standing to facially challenge these regulations without having been denied—or even having applied for—a license.[185] In relaxing Article III's injury-in-fact requirement to allow litigants whose expressive activity is merely within the ambit of standardless licensing regulations to facially attack them, the *Lakewood* Court reasoned that such regulations violate the censorship constraint by lending themselves to idea and viewpoint discrimination in two inscrutable ways that make as-applied challenges untenable: First, by inducing self-censorship, where parties within reach of these regulations suppress or alter their constitutionally protected expression of ideas and viewpoints to avoid reprisal by the administrator; and second, by allowing the administrator to surreptitiously disfavor particular ideas and viewpoints in enforcing these regulations.[186]

The Court has never addressed head-on whether *Lakewood*'s relaxation of the injury-in-fact requirement to allow facial challenges by litigants who are "subject to" standardless licensing regulations extends to attacks on content-based regulations in general. But there are reasons to expect that the Court would welcome that extension. First, the *Lakewood* Court explicitly linked standardless licensing regulations and regulations that embody content discrimination for purposes of First Amendment analysis.[187] Second, the Court's precedents bear out that the constitutional problems with standardless licensing regulations and other types of content-based regulations are animated by common concerns. In this regard, *Lakewood*'s self-censorship rationale for allowing "subject to" facial challenges was revived in *Reno v. ACLU*,[188] where litigants successfully challenged a facially content discriminatory regulation in Section 223 of the CDA, with the Court admonishing: "[T]he CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."[189] More recently, *Lakewood*'s discriminatory enforcement rationale for allowing "subject to" facial challenges was echoed by the *Reed* Court, which explained the need for a "clear and firm rule" of strict scrutiny for facially content discriminatory regulations because "future government officials may one day wield such statutes to suppress disfavored speech."[190] Third, at least one circuit has extended

identifiable risks to free expression that can be effectively alleviated only through a facial challenge.").

185 *See Lakewood*, 486 U.S. at 755–56.

186 *See id.* at 757–59.

187 *See supra* note 107 and accompanying text.

188 521 U.S. 844 (1997).

189 *Id.* at 871–72.

190 *See* Reed v. Town of Gilbert, 576 U.S. 155, 167 (2015).

Lakewood's relaxed Article III injury-in-fact requirement beyond standardless licensing regulations and allowed "subject to" facial challenges to other types of regulations that lend themselves to viewpoint suppression. Thus, in *Southworth v. Board of Regents of University of Wisconsin System*,[191] the Seventh Circuit held that college students had Article III standing to attack a mandatory fee system without alleging viewpoint discrimination in a specific instance "[g]iven that the risks which the Supreme Court sought to protect against in adopting the unbridled discretion standard are risks to the constitutional mandate of viewpoint neutrality."[192]

2. First Amendment Overbreadth

A relaxed Article III injury-in-fact requirement allowing litigants whose expressive activity is within reach of content-based regulations to facially challenge these regulations can be deduced independently from the Court's First Amendment overbreadth doctrine. That doctrine allows litigants who have a "real-world" connection to overbroad regulations that predictably inspire self-censorship of constitutionally protected speech to represent societal interests by facially attacking them.[193] Overbroad regulations come in two forms: First, those that have a substantial number of unconstitutional applications judged in relation to their plainly legitimate sweep; and, second, those that have no plainly legitimate sweep.[194] Virtually all content-based regulations fit one of these two definitions. Content-based regulations that target speech in a judicially recognized low-value speech category but are substantially overinclusive[195] meet the first definition. Content-based regulations that target speech in other than a low-value speech category[196] or that target speech in a low-value speech category

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191 307 F.3d 566 (7th Cir. 2002).

192 *Id.* at 579.

193 *See supra* note 177 for a sampling of cases in this precedential line. The Court's overbreadth pronouncements have occurred most frequently in cases where facial challenges to criminal speech regulations were brought by criminal defendants whose own speech was not privileged. *E.g.*, New York v. Ferber, 458 U.S. 747 (1982); Broadrick v. Oklahoma, 413 U.S. 601 (1973). However, the Court has often allowed interested parties whose expressive rights are threatened by overbroad content-based regulations to facially challenge these regulations in a pre-enforcement context. *E.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (plurality opinion); Reno v. ACLU, 521 U.S. 844 (1977).

194 Americans for Prosperity Found. v. Bonta, No. 19-251, slip op. at 15–16 (S. Ct. 2021).

195 *See Reno*, 521 U.S. at 874 ("Given the vague contours of the coverage of the statute [proscribing transmission of 'indecent' and 'patently offensive' material to children over the Internet], it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad.").

196 *See* Lamont v. Postmaster Gen., 381 U.S. 301, 305–07 (1965) (finding a federal statute targeting "communist political propaganda" facially invalid).

in a viewpoint discriminatory manner[197] satisfy the second definition. That leaves immune from First Amendment overbreadth—and its relaxed injury-in-fact requirement—only the relatively small subset of content-based regulations that target speech in a low-value speech category and are neither substantially overinclusive nor viewpoint discriminatory.

To be sure, the "breathing space" required by the First Amendment is not infinite. The Court has been hesitant to relax the Article III injury-in-fact requirement in challenges to generally applicable regulations that do not directly implicate First Amendment activity.[198] Article III standing to attack such regulations ordinarily requires plaintiffs to show concrete harm in the form of governmental abridgment of their constitutionally protected speech in a specific instance.[199] The reason for the Court's friendlier treatment of facial challenges to content-based regulations than generally applicable regulations that do not target expression was succinctly stated in *Lakewood*:

> [L]aws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship. For example, a law requiring building permits is rarely effective as a means of censorship. To be sure, on rare occasion an opportunity for censorship will exist, such as when an unpopular newspaper seeks to build a new plant. But such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse. And if such charges are made, the general application of the statute to areas unrelated to expression will provide the courts a yardstick with which to measure the licensor's occasional speech-related decision.[200]

In the alternative language of First Amendment overbreadth, generally applicable regulations that do not target expression are not overbroad since they do not have a substantial number of unconstitutional applications judged in relation to their plainly legitimate sweep.

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197 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 n.3 (1992) (opining that a city ordinance proscribing "fighting words" in a viewpoint discriminatory manner "was 'overbroad' in restricting more speech than the Constitution permits . . . because it is content based.").

198 *See* Laird v. Tatum, 408 U.S. 1, 13–15 (1972) (holding that a plaintiff who could not show concrete harm lacked standing to challenge an Army surveillance system on a chilling effect theory).

199 *See id.* at 13–14 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of future specific harm." (quoting United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89 (1947)).

200 Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750,761 (1988).

In summary, the Court's desire to give the First Amendment "breathing space" has led the Court to relax Article III standing's injury-in-fact requirement in facial challenges to speech regulations. One important way the injury-in-fact requirement has been relaxed is by allowing litigants who are "subject to" standardless licensing regulations, that is, whose expressive activity is within reach of these regulations, to facially challenge them without showing their speech has been abridged in a specific instance. Logical extension of the Court's Article III standing rules for standardless licensing regulations to other regulations that lend themselves to viewpoint discrimination, as well as application of the Court's First Amendment overbreadth doctrine, suggest that a litigant whose expressive activity has not been abridged in a specific instance but is within the ambit of a content-based regulation has Article III standing to facially challenge it.

V. APPLICATION OF CONTENT-BASED JURISPRUDENCE TO SECTION 230

This Article now considers how a properly informed federal court would treat a facial challenge to Section 230's speech blocking immunity provisions brought by a user of interactive computer services.

A. Section 230's Speech Blocking Immunity Provisions

Section 230 includes two putative speech blocking immunity provisions: Section 230(c)(2)[201] and Section 230(c)(1).[202]

Section 230(c)(2) provides civil immunity to providers of interactive computer services arising from actions taken in good faith to restrict access to offensive material on the Internet. Section 230(c)(2) includes subparagraphs (A) and (B). Subparagraph (A) provides:

> No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

Subparagraph (B) extends this speech blocking immunity to entities that provide technical means to restrict access to the material described in subparagraph (A).[203]

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201 47 U.S.C.A. § 230(c)(2) (West 2022).

202 *Id.* § 230(c)(1).

203 Subparagraph (B) includes an apparent drafting error. Its extension of blocking immunity to technology providers refers to material described in "paragraph (1)" when subparagraph (A) was likely meant. *See* Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1173 n.5 (9th Cir. 2009) ("We

In addition to Section 230(c)(2)'s explicit immunity grant, a majority of courts have interpreted Section 230(c)(1), read in tandem with Section 230(e)(3), as providing a civil immunity grant in relation to speech blocking that operates independently of Section 230(c)(2).[204] Section 230(c)(1) provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230(e)(3) provides, in relevant part: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Reading these sections together, and adopting an expansive definition of "publishing" that includes "editing . . . and deciding whether to publish or to withdraw from publication third-party content,"[205] these courts have interpreted Section 230(c)(1) as shielding providers of interactive computer services from civil liability under state and local laws where the cause of action arises from the blocking of any speech for any reason.[206]

The prevailing interpretation of Section 230(c)(1) as an independent immunity grant is not universally accepted. While commentators favoring that reading of Section 230 argue that Congress intended through Sections 230(c)(1) and 230(c)(2) to provide "belt-and-suspenders protection,"[207] at least one court has refused to construe Section 230(c)(1) as an independent source of speech blocking immunity on the ground that construction renders Section 230(c)(2), and its more exacting standard for immunity, a nullity.[208] The Trump Administration sided with the latter view and petitioned the Federal

take it that the reference to the 'material described in paragraph (1)' is a typographical error, and that instead the reference should be to paragraph (A), i.e., § 230(c)(2)(A). Paragraph (1) pertains to the treatment of a publisher or speaker and has nothing to do with 'material,' whereas subparagraph (A) pertains to and describes material.").

204 Barnes v. Yahoo!, 570 F.3d 1096, 1100–02 (9th Cir. 2009), *as amended* (Sept. 28, 2009); Domen v. Vimeo, Inc., 433 F. Supp. 3d 592, 600 (S.D.N.Y. 2020) ("There are two types of immunity provided under Section 230 of the CDA—*i.e.*, 'publisher' immunity under Section 230(c)(1) and immunity to 'police content' under Section 230(c)(2). The Court finds that Plaintiffs' claims are preempted under both (c)(1) and (c)(2)."); Ebeid v. Facebook, Inc., No. 18-CV-07030-PJH, 2019 WL 2059662, at *5 (N.D. Cal. May 9, 2019) ("[D]efendant's decision to remove plaintiff's posts undoubtedly falls under 'publisher' conduct."). *But see* E-ventures Worldwide, L.L.C. v. Google, Inc., No. 2:14-CV-00646-FtM-PAM-CM, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017) (declining to apply Section 230(c)(1) to a publisher's action in removing content since "interpreting the CDA this way results in the general immunity in (c)(1) swallowing the more specific immunity in (c)(2)" and rendering "the good-faith requirement superfluous.").

205 *Barnes*, 570 F.3d at 1102; *see also* Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (listing "deciding whether to publish, withdraw, postpone or alter content" as examples of "a publisher's traditional editorial functions").

206 *See* Fair Hous. Council of San Fernando Valley v. Roommates.Com, L.L.C., 521 F.3d 1157, 1170–71 (9th Cir. 2008) ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.").

207 Szoka, *supra* note 3.

208 *See E-ventures*, 2017 WL 2210029, at *3.

Communications Commission to promulgate regulations construing Section 230(c)(1) in a manner that does not render Section 230(c)(2) superfluous.[209] However, the Biden Administration reversed course.[210]

This Article proposes that Section 230's explicit speech blocking immunity provision, Section 230(c)(2), and judicially recognized alternative speech blocking immunity provision, Section 230(c)(1), are content-based regulations under prevailing interpretations and are unconstitutional based on the exceptional challenger-friendly jurisprudence governing challenges to such regulations.

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[209] *See Petition for Rulemaking of the National Telecommunications and Information Administration In the Matter of Section 230 of the Communications Act of 1934* (Jul. 27, 2020), https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf.

[210] *See* Jeffrey Neuburger, *The President Revokes Prior Administration's Executive Order on CDA Section 230*, JDSUPRA (May 18, 2021), https://www.jdsupra.com/legalnews/the-president-revokes-prior-2555615/.

B. Section 230(c)(2) Is an Unconstitutional Facially Content Discriminatory Regulation

Section 230's explicit speech blocking immunity provision, Section 230(c)(2), is content discriminatory on its face. Section 230(c)(2) grants civil immunity to private providers of interactive computer services who block "material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . ." Under *Reed's* bright line rule, which aligns with the rights-against-rules model of constitutional adjudication, Section 230(c)(2) falls within the "commonsense meaning of the phrase 'content-based' [which] requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."[211]

Challenges to content-based regulations such as Section 230(c)(2) benefit from the Court's challenger-friendly content-based jurisprudence. This exceptional jurisprudence has three main elements: rulemaker state action, relaxed Article III standing to bring facial challenges, and application of strict scrutiny.

The state action doctrine is not an obstacle to a facial challenge of Section 230(c)(2). Congress's issuance of content-based regulations exceeds its speech rulemaking warrant. This congressional overreach provides the state action required to prevail on a constitutional challenge to Section 230(c)(2) in the form of *rulemaker* state action under the explicit holdings of *Lamont* and *Denver Area* and the implicit teachings of chilling effect cases such as *Tornillo* and *Bonta*. The private administration and noncompulsory status of Section 230(c)(2) are not germane to the state action inquiry because specific instances of speech abridgment under Section 230(c)(2) are downstream from the *ultra vires* congressional rulemaking that satisfies the state action requirement. Specific speech blocking acts by private providers of interactive computer services are immaterial to the state action inquiry; such acts have relevance only to the inquiry downstream of state action which makes a judicial prediction as to whether Section 230(c)(2) burdens constitutionally protected expression—and only bolster the conclusion that it does.

Article III standing is likewise not an obstacle to a facial challenge to Section 230(c)(2). Relaxed Article III standing allowing litigants whose expressive activity is "subject to" content-based regulations to facially attack these provisions is supported by the logical extension of standardless licensing cases such as *Lakewood* and application of First Amendment overbreadth doctrine. Users of interactive computer services whose speech has been or might realistically be blocked by private providers of these services can therefore mount a facial challenge to Section 230(c)(2) in federal court. Even users of these services whose speech may not realistically be blocked may have standing to

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211 Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

facially challenge Section 230(c)(2) on the ground that the statute's very existence predictably induces viewpoint-based self-censorship of constitutionally protected speech to avoid reprisal by private providers of these services.

Strict scrutiny applies to Section 230(c)(2) as a content-based regulation. Strict scrutiny requires the federal government to prove that the provision furthers a compelling governmental interest and is narrowly tailored to achieve that interest. The federal government could assert that Section 230(c)(2) serves a compelling interest in protecting children from harmful materials.[212] However, the Court has made clear that the governmental interest in protecting children from harmful materials is not narrowly tailored if it broadly suppresses expression between adults.[213] Section 230(c)(2), by granting civil immunity to private providers of interactive computer services who block "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" material, even if constitutionally protected, broadly suppresses speech between adults. The government could also assert that Section 230(c)(2) serves a compelling interest in fostering the growth of the Internet.[214] However, the Court has already found that argument "singularly unpersuasive" in the context of the CDA given the Internet's explosive growth and the constitutional presumption that content-based regulations are more likely to stifle than enhance the flow of ideas.[215] As Justice Stevens wrote for the Court in *Reno*:

> As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[216]

Even if a court were to find *Reed* inapposite to Section 230(c)(2)—and it is not clear why it would—an analogy to *Denver Area*'s privately administered content-based federal regulatory scheme should lead a properly informed court to negate the government's overstep of its rulemaking authority in enacting a content-based regulation that incents private abridgment of speech by invalidating Section 230(c)(2) and thereby removing the incentive.

Accordingly, a properly informed court adjudicating a facial challenge to Section 230(c)(2), brought by a litigant whose expressive activity is within reach of this provision, would entertain such a challenge, apply the Court's

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212 Reno v. ACLU, 521 U.S. 844, 875 (1997).

213 *See id.*

214 *See id.* at 885.

215 *Id*.

216 *Id.*

challenger-friendly content-based jurisprudence, and find this provision unconstitutional.

C. Section 230(c)(1) Is an Unconstitutional Standardless Licensing Regulation

Section 230's judicially recognized alternative speech blocking immunity provision, Section 230(c)(1), is also a content-based regulation under its prevailing interpretation. Most courts that have considered the matter have construed Section 230(c)(1) as granting providers of interactive computer services civil immunity in connection with any speech blocking these providers conduct on their platforms. As interpreted by these courts, Section 230(c)(1) is a standardless licensing regulation that vests unbridled discretion in administrators—in this case private providers of interactive computer services who "moderate" speech—to license speech.

The chilling effect model of First Amendment jurisprudence and its self-censorship prediction compel the conclusion that Section 230(c)(1) is a standardless licensing regulation under this prevailing interpretation. In *Lakewood*, the Court reasoned that licensing regulations which lack standards, although facially content-neutral, violate the censorship constraint by lending themselves to idea and viewpoint discrimination in two inscrutable ways: First, by inducing self-censorship, where parties within reach of these regulations suppress or alter the expression of ideas and viewpoints to avoid reprisal by the administrator; and second, by allowing the administrator to surreptitiously disfavor particular ideas and viewpoints in enforcing these regulations. Realizing that these First Amendment harms differ from those that animate hostility to facially content discriminatory regulations only in terms of visibility, the *Lakewood* Court concluded that standardless licensing regulations should be treated with the same hostility as regulations that are explicitly content discriminatory. As Justice Brennan wrote for the *Lakewood* Court:

> [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.[217]

While perhaps not at its zenith, a similar danger of content and viewpoint censorship attaches when a governmental regulation permits communication in a certain manner for some, but not for others, and leaves the determination of who may and may not speak to a *private* official. That is the effect of Section 230(c)(1)'s putative civil immunity grant, which incents the speech

[217] Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 751 (1988).

administrators of the Information Age—not small-town mayors but internet titans operating social media platforms used by hundreds of millions of people—to block speech they dislike. Like the news rack licensing ordinance in *Lakewood*, Section 230(c)(1) inspires self-censorship by users of interactive computer services who refrain from expressing controversial ideas and viewpoints to avoid reprisal by internet speech "moderators" who have virtually limitless power to block or disfavor speech on their platforms, often without creating a reviewable record.

This leads us back to the state action and Article III standing questions. The standardless licensing ordinance in *Lakewood* was a compulsory regulation administered by a governmental official that engendered speech abridgment in a public forum. Section 230(c)(1) is noncompulsory, privately administered, and induces speech abridgment in private forums. Do these differences matter to the state action and Article III standing inquiries? Perhaps surprisingly, the answer is "no." Under the Court's special content-based jurisprudence, which logically extends to standardless licensing regulations, the Court deems constitutional injury inherent in the regulatory enactment and blames the rulemaker for the offense. In challenges to standardless licensing regulations, state action and Article III standing are analyzed by reference to *ultra vires* governmental rulemaking. The noncompulsory status, private administration, and private nature of the forums in which speech abridgment occurs under these regulations are not germane to the state action and Article III standing inquiries since specific instances of speech abridgment under these regulations are downstream from extra-constitutional governmental rulemaking acts that satisfy these constitutional requirements. As noted by Justice Kennedy, state action resides where "Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted."[218] Congress's enactment of Section 230(c)(1), as that provision is interpreted by a majority of lower courts, exceeded Congress's speech rulemaking warrant by providing private providers of interactive computer services an inducement to censor speech they disfavor, leaving this speech vulnerable to private censorship via direct blocking as well as self-censorship. As with Section 230(c)(2), this congressional overreach provides the state action required to mount a constitutional challenge to Section 230(c)(1) in the form of rulemaker state action and triggers relaxed Article III standing allowing users of interactive computer services within the reach of this provision to attack it facially.

To be sure, the prevailing interpretation of Section 230(c)(1) as a speech blocking immunity provision is not compelled. If "publisher" is construed to not include the function of making editorial decisions to block content, the provision merely shields providers of interactive computer services from civil liability for

[218] Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 781 (1996) (plurality opinion) (Kennedy, J., concurring in part and dissenting in part).

posting and hosting user content on their platforms and presumably passes constitutional muster. However, a majority of lower federal courts that have visited the question so far have found Section 230(c)(1) immunity as protective of editorial decisions to block content. If that interpretation persists, Section 230(c)(1) is a standardless licensing regulation. Rulemaker state action and relaxed Article III standing attach and the provision is subject to strict scrutiny under the Court's content-based jurisprudence. Strict scrutiny requires the federal government to prove that Section 230(c)(1) furthers a compelling governmental interest and is narrowly tailored to achieve that interest for the provision to survive. Section 230(c)(1) fails that exacting test for the same reasons Section 230(c)(2) does.

VI. CONCLUSION

The First Amendment embodies a censorship constraint that prohibits the government from enacting regulations that lend themselves to idea or viewpoint discrimination. The censorship constraint has led the Court to place limits on content-based speech rulemaking which legislatures must abide and challenger-friendly standards for adjudicating First Amendment challenges when legislatures do not abide by them. Under this exceptional jurisprudence, constitutional injury is deemed inherent in content-based regulations and the rulemaking body that issues such regulations is deemed to have caused this injury. Section 230's speech blocking immunity provisions are subject to the Court's content-based jurisprudence. Section 230 includes an explicit speech blocking immunity provision, Section 230(c)(2), that shields providers of interactive computer services who block speech within particular content categories, including "objectionable" material, from civil liability. This is a facially content discriminatory regulation and is subject to the Court's content-based jurisprudence. Section 230 includes another provision, Section 230(c)(1), which a majority of lower courts have interpreted as an alternative speech blocking immunity grant giving providers of interactive computer services unbridled discretion to block speech without risk of civil liability. So interpreted, Section 230(c)(1) is a standardless licensing regulation and is also subject to the Court's content-based jurisprudence.

Private noncompulsory administration of Section 230(c)(2) and Section 230(c)(1) do not rescue these provisions from the Court's content-based jurisprudence. State action and Article III standing under this exceptional jurisprudence are analyzed by reference to governmental rulemaking acts. The private noncompulsory administration of these regulations is not germane to the state action and Article III standing inquiries because specific instances of speech abridgment under these regulations are downstream from the governmental rulemaking acts that satisfy these requirements.

Under the Court's content-based jurisprudence, strict scrutiny applies to Section 230(c)(2) and Section 230(c)(1). Strict scrutiny requires the federal government to prove that these provisions further a compelling governmental

interest and are narrowly tailored to achieve that interest. Both provisions fail that exacting test and are therefore unconstitutional.

More generally, the First Amendment's censorship constraint places a nearly inviolable prohibition on governmental content-based speech rulemaking. Special challenger-friendly standards apply in facial challenges to content-based regulations for that reason. Rulemaker state action means that private noncompulsory administration of these regulations does not immunize them from this exceptional jurisprudence. Any litigant whose speech is within reach of these regulations has Article III standing to challenge them facially in federal court. The fate of content-based regulations is left ultimately to the rigors of strict scrutiny—an exacting standard once famously described as "'strict' in theory and fatal in fact."[219]

[219] Gerald Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).