

SPEECH BALKANIZATION

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Abstract: The First Amendment’s application to the internet is in flux. Ambitious state legislation threatens to undermine social media platforms by splintering them state by state or by forcing them to adopt individual states’ regulatory preferences on a nationwide basis. To mitigate these risks, First Amendment doctrine needs an anti-balkanization principle—a presumption against skewing interstate speech channels along state lines. The Supreme Court has rejected patchwork regulatory regimes that imperiled interstate channels like newspapers, film distributors, and political conventions. But in these cases, the Court never adopted a consistent doctrinal approach to assessing the balkanization dangers that state-by-state regulation posed. And in other areas, patchwork regulation continues to subvert interstate channels.

The anti-balkanization principle offers a solution. It would call for explicit consideration in First Amendment analysis of the key national function served by interstate channels. This means courts would assess whether patchwork regulation would distort national discourse by fatally fracturing interstate channels or by forcing them to adopt an outlier state’s approach nationwide. Accounting for these threats would add a structural backstop to First Amendment doctrine, ensuring that otherwise valid state regulatory interests are measured against conflicting national interests. It would better align the First Amendment with the Constitution’s nation-building design and ends. And it could help resolve a major, looming balkanization hazard: state laws requiring social media platforms to carry content they would rather remove.

INTRODUCTION

In May 2023, Montana took the extraordinary measure of banning the social media platform TikTok.¹ Although the first state to entirely foreclose a platform from operating within its borders, Montana is one of many to aggres-

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¹ Ayana Archie, *Montana Becomes the First State to Ban TikTok*, NPR (May 18, 2023), <https://www.npr.org/2023/05/18/1176805559/montana-tiktok-ban> [<https://perma.cc/3M2G-YJVD>]. Montana’s Governor claimed the ban was necessary to protect residents’ data from surveillance by the Chinese government due to TikTok’s Chinese ownership. *Id.*

sively regulate social media in recent years.² Several states have passed age verification laws limiting minors' access to platforms without parental consent.³ In 2021 and 2022 alone, state legislators from thirty-four states introduced more than one hundred laws seeking to regulate how platforms moderate user content.⁴ Most prominent of these are the "must-carry" laws passed by Texas and Florida that require platforms to carry certain content that they would otherwise remove.⁵ Federal circuit courts of appeal have split on the constitutionality of these laws under the First Amendment.⁶ The U.S. Supreme Court will decide the issue this term.⁷

With state regulatory threats to social media platforms intensifying, it is worth reassessing how First Amendment doctrine protects interstate speech channels that provide common sources of information (like newspapers) or offer space for interstate dialogue (like political conventions). The First Amendment creates a national public square that requires functioning interstate channels.⁸ Scholars generally agree that the last century of free speech jurisprudence can be read as a story of nationalization, as First Amendment doctrine progressed

² Natasha Singer, Sapna Maheshwari & David McCabe, *As Red States Curb Social Media, Did Montana's TikTok Ban Go Too Far?*, N.Y. TIMES (Oct. 12, 2023), <https://www.nytimes.com/2023/10/12/technology/red-states-montana-tiktok-ban.html> [<https://perma.cc/C6NZ-X698>]. See generally J. SCOTT BABWAH BRENNEN & MATT PERAULT, *THE STATE OF STATE PLATFORM REGULATION* (2022), <https://techpolicy.unc.edu/wp-content/uploads/2022/12/The-State-of-State-Platform-Regulation.pdf> [<https://perma.cc/9KFJ-Z3SE>] (providing a synopsis of recent state legislation concerning social media platforms).

³ See, e.g., Makena Kelly, *Texas Bans Kids from Social Media Without Parental Consent*, THE VERGE (June 14, 2023), <https://www.theverge.com/2023/6/14/23760975/texas-ban-social-media-kids-louisiana-utah> [<https://perma.cc/HY4L-795X>] (outlining Texas's age verification law and noting that Utah and Louisiana passed similar laws); Natasha Singer, *Louisiana Passes Bill That Would Require Parental Consent for Kids' Online Accounts*, N.Y. TIMES (June 8, 2023), <https://www.nytimes.com/2023/06/08/business/louisiana-consent-minors-online.html> [<https://perma.cc/28JA-DMDA>] (outlining Louisiana's age verification law).

⁴ Rebecca Kern, *Push to Rein In Social Media Sweeps the States*, POLITICO (July 1, 2022), <https://www.politico.com/news/2022/07/01/social-media-sweeps-the-states-00043229> [<https://perma.cc/845F-GT2J>].

⁵ See Allison Dunn, *Texas Passes Social Media Censorship Law as Similar Measure Winds Through Florida Federal Court*, TEX. LAW. (Sept. 13, 2021), <https://www.law.com/texaslawyer/2021/09/13/texas-passes-social-media-censorship-law-as-similar-measure-winds-through-florida-federal-court/> [<https://perma.cc/WG3Z-MM7A>] (indicating that the purported goal of these laws is to prevent the censorship of conservative views).

⁶ See Adam Liptak, *Biden Administration Urges Justices to Hear Cases on Social Media Laws*, N.Y. TIMES (Aug. 14, 2023), <https://www.nytimes.com/2023/08/14/us/supreme-court-social-media-texas-florida.html> [<https://perma.cc/JPX2-7RPY>] (noting that the Eleventh and Fifth Circuits disagreed as to the constitutionality of such "must-carry" laws).

⁷ See *Moody v. NetChoice, LLC*, 216 L. Ed. 2d 1313 (2023) (mem.) (granting certiorari with respect to two questions presented in an amicus brief); *NetChoice, LLC v. Paxton*, 216 L. Ed. 2d 1313 (2023) (mem.) (same).

⁸ See *Thomas v. Collins*, 323 U.S. 516, 543 (1945) (lamenting that restraints on the freedom of speech, no matter how small, can have a deleterious effect on liberty).

to match a rapidly centralizing society.⁹ But there has been no systematic analysis of how the national interest in safeguarding interstate channels fits within that doctrine. Nationalization requires more than simply holding states to the same standard as the federal government. Older doctrines, developed for an era when most speech was local, were not always suited to resolve disputes involving state regulations of nationwide distributors. One state's law could increasingly distort the flow of information for everyone, sometimes in nonobvious ways.¹⁰

The Supreme Court thus faced a host of new issues that forced it to rework or extend doctrine to protect interstate channels. Its opinions across the First Amendment canon evince two primary concerns. One is fragmentation: the worry that a patchwork of state laws might render an interstate channel incapable of carrying out its basic function. In its freedom of association cases, the Court has rejected state attempts to control the delegate selection process for political party conventions because a lack of uniformity would have thwarted discussion and debate among state delegations.¹¹ On overbreadth grounds, it has struck down a regulatory scheme that would have rendered nationwide distribution impossible by subjecting distributors to an unnavigable maze of state laws.¹²

The other worry is that nationwide distributors will “level down” by adopting an outlier state's law to avoid compliance burdens. Leveling down allows the most restrictive state to effectively make national policy. In the realm of advertising, the Court has voided a state law that jeopardized national publications' ability to carry information about constitutionally protected activ-

⁹ For discussions on the nationalization of free speech and discourse, see, for example, Herbert Wechsler, *The Nationalization of Civil Liberties and Civil Rights*, 12 TEX. Q. NO. 2, at 11–13 (Supp. 1969); CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 33–66 (1969) [hereinafter BLACK, *STRUCTURE*]; Robert M. Cover, *The Left, the Right and the First Amendment: 1918–1928*, 40 MD. L. REV. 349 (1981); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1734 (1991); Lee C. Bollinger & Geoffrey R. Stone, *Dialogue*, in *THE FREE SPEECH CENTURY* 1, 9 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019); Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1643 (1999); Robert F. Nagel, *Nationalized Political Discourse*, 69 FORDHAM L. REV. 2057, 2057–59 (2001); CHARLES BLACK, *PERSPECTIVES IN CONSTITUTIONAL LAW* 90–92 (Robert A. Dahl ed., 1963) [hereinafter BLACK, *PERSPECTIVES*].

¹⁰ See Bollinger & Stone, *supra* note 9, at 9 (emphasizing that constitutionalizing libel law reflected the recognition that local speech limitations can have a negative effect on national speech).

¹¹ See, e.g., *Cousins v. Wigoda*, 419 U.S. 477, 483, 490 (1975) (considering whether state law supersedes national party conventions' delegate eligibility guidelines); *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 109 (1981) (considering whether Wisconsin can controvert national convention guidelines and mandate delegate vote allocation via state primary results).

¹² See *United States v. Stevens*, 559 U.S. 460, 464, 475–76, 482 (2010) (striking down a federal law outlawing portrayals of animal cruelty), *superseded by statute*, 18 U.S.C. § 48 (2010).

ities.¹³ In its obscenity cases, the Court has expressed skepticism toward laws forcing distributors to alter material disseminated nationwide in order to accommodate the least tolerant states' standards.¹⁴ And a similar apprehension over the distortionary effects of strict state defamation regimes helped drive the Court to constitutionalize libel law.¹⁵

The Court has not formally incorporated these concerns into First Amendment doctrine. It has never announced a unifying approach to reviewing restrictions that threaten interstate speech channels' ability to facilitate national discourse. Instead, the Court has proceeded piecemeal, insulating interstate channels on an ad hoc basis without any consistent mode of doctrinal analysis.¹⁶ In some cases, the Court has tinkered at doctrinal margins; in others, it has remade wide swaths of the common law. At times, it has not even addressed the interstate dynamics at play.

In this Article, I argue that First Amendment doctrine should recognize an anti-balkanization principle to more systematically account for the national interest served by interstate speech channels. By "balkanization," I mean state-by-state regulation that subverts or skews interstate channels, thus substantially dis-

¹³ See *Bigelow v. Virginia*, 421 U.S. 809, 811, 822, 829 (1975) (holding that a Virginia law prohibiting publications from encouraging or advertising abortion violates the First Amendment).

¹⁴ See, e.g., *Interstate Cir., Inc. v. City of Dallas*, 390 U.S. 676, 680, 683–84 (1968) (concerning a Dallas ordinance regulating film ratings).

¹⁵ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (applying constitutional limitations to libel actions).

¹⁶ See discussion *infra* Part II.C. As a result of this piecemeal approach, national discourse remains vulnerable to state-by-state subversion. Several Justices have written to express concerns of this nature in recent years. See, e.g., *Speech First, Inc. v. Sands*, No. 23-156, 2024 WL 899213, at *1 (U.S. Mar. 4, 2024) (mem.) (Thomas, J., joined by Alito, J., dissenting from the denial of certiorari) (noting a split among federal appellate courts on the constitutionality of bias-reporting protocols at state universities and worrying that "many of these universities face no constitutional scrutiny, simply based on geography"); *id.* at *3 ("This petition presents a high-stakes issue for our Nation's system of higher education. Until we resolve it, there will be a patchwork of First Amendment rights on college campuses: Students in part of the country may pursue challenges to their universities' policies, while students in other parts have no recourse . . ."); *Counterman v. Colorado*, 600 U.S. 66, 88 (2023) (Sotomayor, J., joined in part by Gorsuch, J., concurring) (registering concern that a recklessness standard for true threats will lead to inconsistent protection across jurisdictions for online speech) ("A jury's determination of when angry hyperbole crosses the line will depend on amorphous norms around language, which will vary greatly from one discursive community to another."); *id.* at 101 ("With obscenity, the ambiguity comes partly from the reliance on 'contemporary community standards' to define what is obscene. Such a standard is notoriously amorphous, and will change a great deal between communities and over time. The same chilling concerns apply to true threats." (quoting *Hamling v. United States*, 418 U.S. 87, 129 (1974))); *Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 346 (2019) (Alito, J., dissenting from the denial of certiorari) (arguing that leaving to the jury the determination of whether a statement is fact or opinion for purposes of defamation law risks creating conflicting approaches in different parts of the country, particularly in highly politicized cases) ("And when, as is often the case, allegedly defamatory speech is disseminated nationally, a plaintiff may be able to bring suit in whichever jurisdiction seems likely to have the highest percentage of jurors who are sympathetic to the plaintiff's point of view.").

rupting the interstate trade in ideas.¹⁷ The anti-balkanization principle would operate like other free speech principles, insofar as it would not enact an unyielding, hardline rule.¹⁸ Rather, it would serve as “strong background music of the First Amendment,” helping to guide courts conducting free speech analyses.¹⁹

That guidance would have courts explicitly consider how balkanization risks might impact national discourse. In other words, it would require a doctrinal check against laws that impair interstate channels on a state-by-state basis. This check could do meaningful work at the balancing stage of First Amendment analysis. In assessing proffered governmental interests in regulation, courts would ask whether advancing a given state interest contravenes any conflicting national interest by fragmenting or leveling down interstate channels.

The Supreme Court has at times deployed this type of structural inquiry; the anti-balkanization principle would formalize it. Adding a structural dimension to First Amendment doctrine would help resolve long-simmering balkanization quandaries that current doctrine has failed to settle. And it would better account for the interests of the speakers and listeners nationwide that interstate channels serve—interests neglected by an individual-rights approach focused solely on the owners of interstate channels.

The timing is ripe to reconsider how First Amendment doctrine protects national discourse because the longstanding equilibrium favoring interstate channels is coming unstuck. In recent years, elected officials, jurists, scholars, and commentators have called for more state control over interstate channels.²⁰

¹⁷ See also *Balkanize*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/balkanize> [<https://perma.cc/56R2-LF2T>] (defining “balkanize” as a verb meaning “to break up . . . into smaller and often hostile units”). “Principle,” borrowing from Vincent Blasi, means “a value proposition of sufficient generality and thrust that for a fair number of particular cases acceptance or rejection of the proposition constitutes a major variable in determining how the case is resolved.” Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 473 (1985); see also Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 583 (2004) (utilizing Vincent Blasi’s definition of “principle”).

¹⁸ See Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1637 (1987) (describing the chilling effect principle as the general idea “that free speech needs breathing room”); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335 (1991) (defining the persuasion principle as the proposition that “harmful consequences resulting from the persuasive effects of speech may not be any part of the justification for restricting speech”); Carpenter, *supra* note 17, at 583 (arguing that the anti-paternalism principle disfavors speech restrictions based on “the government’s belief that speaking or receiving the information in the speech is not in citizens’ own best interests”).

¹⁹ See Carpenter, *supra* note 17, at 584 (explaining the role of the anti-paternalism principle).

²⁰ See, e.g., Christopher Wolfe, *Originalist Reflections on Constitutional Freedom of Speech*, 72 SMU L. REV. 535, 541 (2019) (“[S]tate interests in a multitude of different areas of the law justify giving them more leeway in the regulation of speech.”); John O. McGinnis, *The Federalist Approach*

In addition to social media, primary targets include the press²¹ and abortion websites.²² The internet has amplified interstate speech threats by orders of magnitude. Much previously local speech now takes place in new and vast interstate forums—for example, nearly a quarter-billion Americans use social media.²³ Online forums are uniquely vulnerable to patchwork regulatory schemes that impose varying demands depending on where they are accessed. As one scholar notes, “[y]ou cannot have a state-by-state internet” in the contemporary world.²⁴

to the First Amendment, 31 HARV. J.L. & PUB. POL’Y 127, 127 (2008) (“[S]tates should have substantially more room for regulation to prevent what they regard as moral harms.”).

²¹ See, e.g., *Blankenship v. NBCUniversal, LLC*, 144 S. Ct. 5, 6 (2023) (Thomas, J., concurring) (mem.) (calling for the Supreme Court to reconsider *New York Times Co. v. Sullivan*); *Counterman v. Colorado*, 600 U.S. 66, 105–06 (2023) (Thomas, J., dissenting) (same); *Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr.*, 142 S. Ct. 2453, 2454 (2022) (Thomas, J., dissenting) (mem.) (same); *Berisha v. Lawson*, 141 S. Ct. 2424, 2424 (2021) (Thomas, J., dissenting) (mem.) (same); *id.* at 2429–30 (Gorsuch, J., dissenting) (same); *McKee v. Cosby*, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring) (mem.) (same); *Tah v. Glob. Witness Publ’g, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting in part) (same); see also David A. Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 OHIO ST. L.J. 759, 760 (2020) (expressing concern over the proliferation of inaccuracies spread on social media); David McGowan, *A Bipartisan Case Against New York Times v. Sullivan*, 1 J. FREE SPEECH L. 509, 509–10 (2022) (arguing that the actual malice standard overprotects speakers who, unlike established media firms, might not invest in standards of accuracy); Glenn Harlan Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465, 465 (2020) (considering critiques of the *Sullivan* holding and possible alternatives to a complete overruling); David A. Anderson, *Second Thoughts: A Response to David A. Logan’s Rescuing Our Democracy by Rethinking New York Times v. Sullivan*, 82 OHIO ST. L.J. ONLINE 23, 27 (2021), <https://kb.osu.edu/server/api/core/bitstreams/8f8afdaa-406b-487f-a94d-9e923cb7248a/content> [<https://perma.cc/FLN2-32SV>] (noting that, for the press, *Sullivan* weakened the disincentives of defamation law and further reduced defense costs); Carson Holloway, *Overturn New York Times v. Sullivan*, AM. CONSERVATIVE (Sept. 9, 2022), <https://www.theamericanconservative.com/overturn-new-york-times-v-sullivan/> [<https://perma.cc/CV3B-Y6SP>] (arguing that *Sullivan* enabled the media to defame “with near impunity”).

²² See, e.g., Adi Robertson, *Abortion Websites Would Be Blocked in Texas Under New Bill*, THE VERGE (Mar. 3, 2023), <https://www.theverge.com/2023/3/3/23622346/texas-bill-block-isp-access-abortion> [<https://perma.cc/PHD6-R8ND>] (discussing a Texas bill that would block access to websites that could aid an individual in acquiring abortion care, as well as sites simply concerning abortion); Scott Babwah Brennen, Matt Perault & Mary-Rose Papandrea, Opinion, *North Carolina’s New Abortion Law Is Also a Weapon Against Free Speech*, WIRED (July 18, 2023), <https://www.wired.com/story/north-carolinas-new-abortion-law-is-also-a-weapon-against-free-speech/> [<https://perma.cc/CHH2-7BFM>] (discussing a North Carolina law banning the advertising of abortifacients for sale).

²³ See *Social Media Fact Sheet*, PEW RSCH. CTR., <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/6WC2-EE7H>] (Jan. 11, 2022) (listing social media usage by various demographics and platform type).

²⁴ See Kern, *supra* note 4 (quoting Jeff Kosseff, a U.S. Naval Academy professor who teaches cybersecurity law).

Nonetheless, states are the primary actors responding to the growing appetite for interstate channel regulation.²⁵ State legislatures assumed a more prominent role in social legislation in recent years, as Congress has largely abdicated its dominant regulatory position.²⁶ Ambitious state laws targeting interstate channels are most frequently and easily passed in states under one-party government, the so-called “trifectas.”²⁷ And trifectas are proliferating—there are currently more states where one party controls every branch of government than at any point since 1947.²⁸ This is unlikely to change soon, as partisan geographic sorting by state is at its highest levels since the mid-1960s.²⁹ Simultaneously, partisan polarization has surged to an unprecedented degree,³⁰ upping the incentives to attack unpopular interstate channels.³¹ As a result of these marked sociopolitical shifts, most Americans are “extremely or very concerned” that their rights will differ based on their state of residence.³²

By mitigating these risks, the anti-balkanization principle would advance the First Amendment’s primary goal of enhancing democracy.³³ Our federal

²⁵ Ann E. Marimow & Cat Zakrzewski, *Landmark Texas, Florida Social Media Cases Added to Supreme Court Term*, WASH. POST (Sept. 29, 2023), <https://www.washingtonpost.com/politics/2023/09/29/supreme-court-social-media-florida-texas-google-facebook/> [https://perma.cc/KKG7-7SRN].

²⁶ Michael Wines, *As Washington Stews, State Legislatures Increasingly Shape American Politics*, N.Y. TIMES (Aug. 29, 2021), <https://www.nytimes.com/2021/08/29/us/state-legislatures-voting-gridlock.html> [https://perma.cc/2RSW-BUB5].

²⁷ See Cristiano Lima & Aaron Schaffer, *States Are Passing More Tech Laws When One Party Holds the Keys*, WASH. POST (Dec. 8, 2022), <https://www.washingtonpost.com/politics/2022/12/08/state-trifectas-have-been-more-effective-setting-rules-internet-researchers-found/> [https://perma.cc/534T-MSDM] (noting that twenty-three of the twenty-eight laws policing social media sites passed in 2021 and 2022 came from “trifecta” states in which one major political party controls both the state legislature and the governor).

²⁸ Rosie Ettenheim & Randy Yeip, *Midterm Elections Produce More States Controlled by One Party*, WALL ST. J. (Nov. 30, 2022), <https://www.wsj.com/articles/midterm-elections-produce-more-states-controlled-by-one-party-11669785444> [https://perma.cc/6Z8C-S7NX].

²⁹ Ethan Kaplan, Jörg L. Spenkuch & Rebecca Sullivan, *Partisan Spatial Sorting in the United States: A Theoretical and Empirical Overview*, 211 J. PUB. ECON., May 25, 2022, at 6 fig.3. Partisan geographic sorting occurs when individuals of the same political ideology opt to live within the same geographic area. *Id.* at 1–2.

³⁰ Michael Dimock & Richard Wike, *America Is Exceptional in Its Political Divide*, PEW TR. MAG. (Mar. 29, 2021), <https://www.pewtrusts.org/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide> [https://perma.cc/QZG2-NPQV].

³¹ Cf. Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1300 (2019) (“In a nation divided between predominantly Republican ‘red’ states and predominantly Democratic ‘blue’ states, constitutional federalism principles are increasingly intersecting with matters of intense substantive controversy.”).

³² *Americans’ Dismal Views of the Nation’s Politics*, PEW RSCH. CTR. (Sept. 19, 2023), <https://www.pewresearch.org/politics/2023/09/19/americans-dismal-views-of-the-nations-politics/> [https://perma.cc/7JBX-55P6].

³³ For arguments that the First Amendment’s ultimate end is the facilitation of democratic self-government, see generally, for example, ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960); Robert H. Bork, *Neutral Principles and Some First*

system depends on the national discourse that interstate channels construct and maintain. Without interstate channels, vibrant national conversation and debate on political, economic, and social issues would be impossible.³⁴ Interstate channels are especially important in our hyper-nationalized political era because national issues also drive state and local elections.³⁵ Culturally, a pluralistic national community demands the cultivation of diverse interest groups that transcend state borders. Those borders must be permeable to the flow of ideas to allow such groups to thrive.³⁶ In fostering these values, interstate channels play a critical developmental function by nurturing a national electorate, a national economy, and a national society.

A long tradition dating back to the Founding era confirms the importance of interstate channels' nation-building function. Intercolony speech was an indispensable component of early nation-building efforts, driven by the circulation of newspapers subsidized by the U.S. Post Office.³⁷ And during the Interbellum period, two major interstate speech controversies highlighted balkanization threats to interstate channels. The first was censorship of out-of-state material by Southern states prohibiting the mailing of abolitionist literature into their territory.³⁸ The second involved Southern representatives stifling the right to petition Congress by barring abolition debates on the floors of Congress.³⁹ Balkanization concerns were thus front of mind for many Republicans during passage of the Fourteenth Amendment. The New Deal, which required forums for national dialogue to help centralize economic and political spheres, ultimately triggered the First Amendment's application to the states.⁴⁰

I expand on these themes below. Part I demonstrates the anti-balkanization principle's sturdy normative basis, rooted in interstate channels' advancement

Amendment Problems, 47 IND. L.J. 1 (1971); OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105–16 (1980).

³⁴ See BLACK, *PERSPECTIVES*, *supra* note 9, at 94 (emphasizing that a national government reliant upon consent of the governed needs some semblance of a right of discussion—even at the state level).

³⁵ See *infra* notes 78–82 and accompanying text.

³⁶ See Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1053 (2016) (indicating that freedom and democracy require ideas to readily permeate geographical borders).

³⁷ See RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* 31–32 (1995) (explaining that Congress's franking privilege and the postal system at large were key to keeping the citizenry apprised of public affairs).

³⁸ See generally MICHAEL KENT CURTIS, *FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* (2000) (examining the fight for free speech rights in the context of the slavery and abolitionist struggle).

³⁹ See generally DANIEL CARPENTER, *DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION, 1790–1870* (2021) (discussing the role of petitioning in the path toward heightened democratic enfranchisement).

⁴⁰ See Yassky, *supra* note 9, at 1734 (identifying the Supreme Court's effort to contemporaneously expand freedom of speech and federal power).

of national speech interests.⁴¹ Part II shows how the principle coheres with historical understandings of interstate channels as essential to constructing national political and cultural spheres.⁴² Part III excavates the principle's foundation from the Supreme Court's First Amendment jurisprudence, drawing from cases concerning association, overbreadth, advertising, obscenity, and defamation.⁴³ Part IV illustrates what the principle would add to free speech doctrine.⁴⁴ As a model, I use a looming interstate speech dispute: state must-carry laws that require social media platforms to carry content they would rather remove. These laws present hard questions from a balkanization perspective. On the one hand, Texas and Florida seek to ensure their residents' ability to participate in national discourse by preventing removal of certain content.⁴⁵ On the other, the laws could dramatically undermine and perhaps destroy the platforms' utility as forums for interstate speech.

The anti-balkanization principle would have required the Fifth Circuit Court of Appeals to consider such risks in its opinion upholding the Texas law. And the principle would counsel that those risks should weigh heavily against even legitimate state interests. This approach is preferable to the Eleventh Circuit's position, which held that Florida could never have a valid regulatory interest in preventing private censorship by platforms.⁴⁶ The anti-balkanization principle would protect national discourse while allowing—and in some circumstances, even encouraging—courts to uphold platform regulations that advance national speech interests.

I. JUSTIFYING THE ANTI-BALKANIZATION PRINCIPLE

This Part fleshes out the anti-balkanization principle's theoretical justifications. Adopting the principle would advance the Constitution's animating premise that we are first and foremost a single "People of the United States."⁴⁷ Interstate speech channels facilitate a national discourse: a shared stream of information and space for conversation across state borders. National discourse promotes national democracy, both political and cultural. And it advances fed-

⁴¹ See *infra* notes 47–98 and accompanying text.

⁴² See *infra* notes 99–172 and accompanying text.

⁴³ See *infra* notes 173–298 and accompanying text.

⁴⁴ See *infra* notes 299–405 and accompanying text.

⁴⁵ See *NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1205–07 (11th Cir. 2022) (detailing Florida's law aimed at preventing purported censorship of Florida residents on social media platforms), *cert. granted in part sub nom. Moody v. NetChoice, LLC*, 216 L. Ed. 2d 1313 (2023) (mem.), and *cert. denied sub nom. NetChoice, LLC v. Moody*, 144 S. Ct. 69 (2023) (mem.); *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445–46 (5th Cir. 2022) (detailing Texas's law that prohibits user censorship based upon their expressed viewpoint), *cert. granted in part*, 216 L. Ed. 2d 1313 (2023) (mem.).

⁴⁶ See *NetChoice, LLC*, 34 F.4th at 1228–29.

⁴⁷ U.S. CONST. pmb1.

eralism by providing information about national issues that drive local politics and by allowing residents of one state to share, compare, and contrast their state's policy approaches with residents of other states.

National speech considerations are particularly salient in the modern, digital communications era. Interstate channels guarantee speakers and listeners nationwide access to common sources of information and forums. Nonetheless, First Amendment doctrine does not fully account for the vital role that interstate channels play in constructing national discourse. Greater attention to this role is needed to vindicate the foundational First Amendment "assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."⁴⁸ Specific focus on the users that interstate channels serve would help safeguard pluralism in the national public square.

Section A of this Part highlights the nation-building role that interstate channels serve.⁴⁹ Section B discusses the interplay between free speech and federalism, insofar as a balance must be struck between state sovereignty and interstate channels.⁵⁰ Finally, Section C surveys how First Amendment doctrine is underequipped to manage the risks that balkanization poses to national discourse.⁵¹

A. First Amendment Statecraft

As "prime source[s] of national cohesion," interstate channels help manufacture an interconnected American state.⁵² They are a tool for crafting a powerful centralized government, a fully national economy, and a distinctive American society. Their critical nation-building function validates special attention to national speech interests in First Amendment analysis. By prioritizing the protection of interstate channels from state distortion, an anti-balkanization principle would help align the First Amendment with the Constitution's basic nationalizing ends.⁵³

⁴⁸ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁴⁹ See *infra* notes 52–67 and accompanying text.

⁵⁰ See *infra* notes 68–88 and accompanying text.

⁵¹ See *infra* notes 89–98 and accompanying text.

⁵² See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 n.15 (1969).

⁵³ See Gordon S. Wood, *Launching the "Extended Republic": The Federalist Era* (indicating that the Federalists' goal was to unite the people of disparate states to form one cohesive nation), in *LAUNCHING THE "EXTENDED REPUBLIC": THE FEDERALIST ERA 1, 6–7* (Ronald Hoffman & Peter J. Albert eds., 1996); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 364 (1986) (stating that early "American identity" was characterized by a widespread adoption of the values underlying American culture, such as "individualism, egalitarianism, nationalism, and tolerance of diversity").

In establishing a federal representative democracy, the Founders sought to correct the weaknesses of the loosely centralized Articles of Confederation.⁵⁴ The Constitutional Convention rejected the Antifederalists' New Jersey plan—which, like the Articles, placed the primary locus of power with the states—and adopted instead a national republic directly governing a national citizenry.⁵⁵ In this regard, “the Constitution exists to ensure that the national government has the authority to do everything that is part of creating a ‘more perfect Union’ and providing for ‘the general Welfare.’”⁵⁶ These goals required forging a strong national economy and a shared national democratic culture.⁵⁷

An anti-balkanization principle would vindicate these aims by calibrating doctrine to better nurture national discourse. Politically, national discourse is a prerequisite for a responsive national government. Federal elections require nationwide discussion on economic and social issues to reflect the will of a unified American electorate.⁵⁸ The process of constitutional amendment likewise requires vibrant interstate dialogue on issues that affect the entire country.⁵⁹ Protection of interstate channels facilitates the national deliberative process by ensuring that all ideas potentially germane to federal and constitutional politics can be disseminated and debated nationwide.⁶⁰

⁵⁴ See JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 28–33, 38 (1840) (listing and elaborating on the weaknesses of the Articles of Confederation).

⁵⁵ GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 547 (1969).

⁵⁶ ERWIN CHERMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY 53–54 (2018) (quoting U.S. CONST. pmbl.).

⁵⁷ See *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 157 (2023) (Alito, J., concurring in part and concurring in the judgment) (identifying “a fundamental aim of the Constitution: fostering the creation of a national economy and avoiding the every-State-for-itself practices that had weakened the country under the Articles of Confederation”); Wood, *supra* note 53, at 6–7 (referring to the Federalists’ goal of “[t]ying people together, creating social cohesiveness, making a single nation out of disparate sections and communities”); see also Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671, 684 (2005) (acknowledging that uniting American citizens via the social contract was necessary for the new American government’s success).

⁵⁸ See BLACK, PERSPECTIVES, *supra* note 9, at 94 (indicating that the Privileges or Immunities Clause acts as a reminder that the citizenry has the right to engage in activities necessary to maintain their relationship with the federal government); cf. *Trump v. Anderson*, No. 23-719, 2024 WL 899207, at *3 (U.S. Mar. 4, 2024) (holding that states may not enforce § 3 of the Fourteenth Amendment against federal officials) (“Because federal officers ‘owe their existence and functions to the united voice of the whole, not of a portion, of the people,’ powers over their election and qualifications must be specifically ‘delegated to, rather than reserved by, the States.’” (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 803–04 (1995))).

⁵⁹ See BLACK, PERSPECTIVES, *supra* note 9, at 94 (cautioning against state interference with speech critical of the government).

⁶⁰ Cover, *supra* note 9, at 379–80; cf. *Trump v. Vance*, 591 U.S. 786, 800 (2020) (“[T]he Constitution guarantees ‘the entire independence of the General Government from any control by the respective States.’” (quoting *Farmers & Mechs. Sav. Bank of Minneapolis v. Minnesota*, 232 U.S. 516, 521 (1914))).

National discourse also helps legitimize the extensive administrative state that drives contemporary national governance.⁶¹ National discussion and criticism maintain accountability over the undemocratic features of agencies not directly responsive to political checks.⁶² An informed populace exercises such oversight primarily through presidential and congressional elections, but also by participating in agency policymaking.⁶³ The populace offers input and voices dissent through formal mechanisms like notice and comment, as well as indirectly through public pressure campaigns.⁶⁴ Interstate channels make such participation possible.

Culturally, national discourse enables interests and identities to flourish beyond state lines—but only if everyone, regardless of residence, enjoys the capacity to engage in an interstate exchange of ideas.⁶⁵ What cultivates a national polity is “the ability of persons to speak to one another across the boundaries of divergent cultures.”⁶⁶ Cross-cultural dialogue assures mutual participation and influence in the formation of a democratic society.⁶⁷ Heterogenous inputs intermix to create a uniquely American culture, one forged by and accessible to all residents. By informing and hosting this dialogue, interstate channels form the connective tissue that binds together the American demos.

B. Anti-Balkanization and Federalism

When free speech and federalism values conflict in a way that substantially threatens interstate speech channels, the First Amendment must predominate to preserve national discourse. Of course, the First Amendment does not mandate absolute national uniformity in the regulation of interstate channels.⁶⁸ Be-

⁶¹ See Yassky, *supra* note 9, at 1736 (indicating that free speech acts as a check on the increase in federal power resulting from the administrative state).

⁶² For discussion on the problem of accountability and the administrative state, see generally JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978).

⁶³ Cf. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583–96 (1984) (discussing the administrative oversight functions of the President and Congress).

⁶⁴ See BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 160–61 (2019) (emphasizing the deliberative process as key to agency accountability).

⁶⁵ See Balkin, *supra* note 36, at 1054–55 (“[C]ultural democracy, like culture itself, does not conform to political boundaries.”).

⁶⁶ Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 634 (1990).

⁶⁷ Balkin, *supra* note 36, at 1054.

⁶⁸ See, e.g., Jennifer M. Kinsley, *The Myth of Obsolete Obscenity*, 33 CARDOZO ARTS & ENT. L.J. 607, 612–13 (2015) (discussing the states’ power to define and regulate obscenity); Alexandra M. Gutierrez, *The Case for a Federal Defamation Regime*, 131 YALE L.J.F. 19, 21 (2021), <https://www.yalelawjournal.org/forum/the-case-for-a-federal-defamation-regime> [<https://perma.cc/J89L-EPZC>]

cause the Constitution embraces federalism, states generally have wide latitude to control what happens within their borders.⁶⁹ So, for example, states regulate newspapers and film distributors with different defamation regimes and varying standards for what material is obscene.

Courts must be careful not to set the floor too high because state-by-state variation offers many benefits. It grants leeway for tailoring—crafting regulations targeted to fit distinct problems unique to certain communities in our heterogeneous nation.⁷⁰ And it enables local governments to respond to constituents faster and more flexibly than federal representatives can.⁷¹ But states cannot go too far lest they undermine interstate channels’ facilitation of the national political process and the creation of national democratic culture.⁷² In this sense, balkanization concerns impose a “structural preemption” that prevents states from regulating interstate channels in a way that would disrupt national democracy.⁷³ To assure horizontal comity, no single state can corrupt national discourse to the detriment of other states’ residents.⁷⁴

There is thus an obvious and longstanding tension between federalism and national free speech values. Setting a solid floor that accommodates both the preservation of local regulatory authority and the need for a common national conversation is a delicate exercise.⁷⁵ But this does not mean that the anti-balkanization principle and federalism are always at loggerheads. In fact, preventing balkanization in many ways promotes federalism values.⁷⁶

(recognizing that certain jurisdictions maintain defamation laws that are more protective of the press than others).

⁶⁹ See THE FEDERALIST NO. 45 (James Madison) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”).

⁷⁰ Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2120 (2014).

⁷¹ See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (explaining how a citizenry that can express displeasure with government by moving to a different state helps catalyze efficient local regulation).

⁷² Cf. Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 211 (2020) (“American commitment to national universal suffrage reflects our sense of ourselves as a single *democratic* country. But it also reflects a national identity as a *single* democratic country.”).

⁷³ See Cover, *supra* note 9, at 379–80 (arguing that Congress’s deliberative role requires the national public’s input and raising of opposing viewpoints).

⁷⁴ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (noting that one state cannot be allowed to control others in a nation of separate states that functions effectively).

⁷⁵ Cf. RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 150 (2021) (“[W]e must take care in specifying the balance struck between ensuring a national commitment to fundamental rights of citizenship and accommodating local variation in rights regulation.”).

⁷⁶ See *infra* notes 77–88 and accompanying text.

For example, national discourse facilitates state and local democracy.⁷⁷ Information from one state can bear directly on political issues in another state. How pigs are sheltered in Iowa, to take a recent example, can affect what pork products Californians want sold in their supermarkets.⁷⁸ And as politics in recent decades have nationalized, information about interstate political and cultural concerns increasingly shapes state and local disputes.

National issues drive not just federal elections, but state elections too.⁷⁹ Research demonstrates a century-long trend from elections centered on local candidates to elections focused primarily on national partisan identities.⁸⁰ For example, over the last generation, county-level results in midterm gubernatorial elections have increasingly tracked presidential results.⁸¹ This parity suggests state-level elections are largely driven by the same national issues that drive presidential elections.⁸² A robust flow of national information thus helps voters make state and local decisions.

Moreover, the interstate flow of information advances many of federalism's benefits. One laudable feature of federalism is that it allows for experimentation, whereby states can try new and creative approaches to regulating different types of speech.⁸³ Useful experimentation requires both an influx and outflux of information. Interstate channels allow one state's residents to learn what other states are trying, what has not yet been attempted, and what has already failed—as well as to communicate their own results to allow other states to adopt a successful model or to engage in experimentation.

Another advantage of federalism is that it allows citizens to vote with their feet by moving to states with policies that align with their preferences.⁸⁴

⁷⁷ See *infra* notes 78–82 and accompanying text.

⁷⁸ See *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 365–66 (2023) (addressing a California law that prohibits the sale of pork from pig farms that confine their pigs “in a cruel manner”).

⁷⁹ See DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED* 3–4 (Benjamin I. Page, Susan Herbst, Lawrence R. Jacobs & Adam Berinsky eds., 2018) (concluding that Americans, at large, are making federal and local voting decisions based on the same issues).

⁸⁰ *Id.* at 25–26, 34. Today “national and local politics are fought over related dimensions,” meaning that “national political divisions infuse subnational politics, and political engagement is primarily national in orientation.” *Id.* at 34.

⁸¹ *Id.* at 43. In 2014, partisan voting patterns in the twenty-eight gubernatorial races across the country nearly matched those of the preceding presidential election. *Id.* at 45.

⁸² *Id.* at 43. In one prominent example, Tennessee State Supreme Court justices running for retention in 2014 faced ads attacking them for having “advanced Obamacare in Tennessee,” even though they had heard no cases involving the Affordable Care Act. *Id.* at 1.

⁸³ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (warning that the states' role as regulatory laboratories is of great importance and that the Court should interfere in this process only when absolutely justified).

⁸⁴ See Ilya Somin, *Foot Voting, Federalism, and Political Freedom*, 55 *NOMOS* 83, 90–91 (2014) (detailing the benefits of “foot voting”).

This attribute of federalism incentivizes states to operate more efficiently in competing for residents.⁸⁵ Here, too, the benefit depends on access to comparative data about the laws and values of other states. Limiting access would hinder such movement. Likewise, expressive theories of federalism view decentralized decision-makers as utilizing formal state power to register protest against a prevailing broader consensus.⁸⁶ The act of “[d]issenting by deciding” allows citizens of one state to use policymaking as a megaphone to communicate to the rest of the country their divergence from national norms.⁸⁷ Such antagonistic decision-making communicates dissent only if information about a state’s decisions reaches other states.⁸⁸

C. Balkanization Risks to National Discourse

Despite the important role that interstate channels play in promoting national democracy and federalism, First Amendment doctrine is insufficiently attuned to balkanization risks that threaten these key functions. This failure is largely attributable to a broader underappreciation of third-party interests: the expressive needs of the speakers and listeners who use interstate channels to communicate. In cases concerning those channels, the modern First Amendment focuses instead on the autonomy rights of the property owners who control them. As a result, current doctrine does not always capture the systemic effects on national discourse that regulations might inflict.⁸⁹

One manifestation of this problem is balkanization. In various areas, states have struck different balances between the interests of interstate channel owners and other state regulatory goals, without considering speaker and listener interests as relevant parts of the equation. As a result, First Amendment doctrine does not always adequately solve for threats that state-by-state regulations pose to the proper functioning of interstate channels. For example, outlier state policies sometimes dictate how interstate channels operate nationally, to the detriment of users everywhere.

⁸⁵ See Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 149 (1992) (identifying federalism as a strong check on state government abuse).

⁸⁶ See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748–49 (2005) (highlighting the power of national minorities to form a majority in specific localities, thus allowing them to regulate in line with their viewpoint).

⁸⁷ *Id.* at 1763 (describing how both highly funded and unknown dissenters can amplify their concerns through state action).

⁸⁸ See *id.* at 1749, 1763 (arguing that visibility is key if “dissenting by deciding” is to meaningfully impact the democratic process).

⁸⁹ “Listeners” is used capaciously here to encapsulate the various ways in which information is received via interstate channels. It is thus meant to include “readers,” “viewers,” etc.

Consider the right of publicity. In recent years, disparities in the right's definition across states have expanded, leading to a spike in litigation.⁹⁰ As a result, "[t]he tort's jagged and unpredictable reach chills speech in extensive and immeasurable ways."⁹¹ First Amendment doctrine lacks a mechanism to account for the discursive harms caused by the perplexing patchwork of conflicting state law. The result is that:

[T]he chaos persists, as does uncertainty as to which state's law applies and what it entails. Such confusion broadens the scope of the right of publicity as a practical matter. Without clear answers to the most basic questions about when a use of another person's identity is unlawful or which law applies, the most expansive publicity laws often control creative decisions, and thereby limit speech.⁹²

This variation might be justifiable when considered only against the autonomy rights of interstate channel owners. After all, there are important countervailing privacy interests implicated in right of publicity cases that some states might weigh more heavily than others. Further, the First Amendment historically has accommodated privacy interests in calibrating protections for speakers.⁹³ But accounting for the interests of listeners nationwide might reasonably shift the calculus, at least insofar as one state's right of publicity law operates to undermine national discourse.⁹⁴ First Amendment doctrine should capture this broader panoply of interests.

There are two ways to respond to the dangers that accompany the balkanization of free speech rights. One corrective option would be to simply ratchet up First Amendment rights for interstate channel owners across the board,

⁹⁰ See Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 TEX. L. REV. 1083, 1098 (2023) (noting that the scope of the right of publicity "varies sharply from state to state" and that this disparity sometimes allows the most restrictive state to dictate what information interstate channels can distribute nationally); Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 90 (2020) (reporting an expansion in right of publicity cases and a subsequent increase in litigation).

⁹¹ Post & Rothman, *supra* note 90, at 91.

⁹² JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 96 (2018).

⁹³ See, e.g., *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 729–30, 737 (1970) (weighing heavily the homeowner's privacy interest when considering a law that prohibited the mailing of lewd advertisements upon the homeowner's request not to receive such advertisements).

⁹⁴ See Post & Rothman, *supra* note 90, at 168–69 ("That nonobscene speech about a public figure released through a news outlet could be stripped of the protections of public discourse because of its offensive or indecent character is inconsistent with canonical and explicit Supreme Court precedents, like *Texas v. Johnson* or *Cohen v. California*. Yet it is undeniable that at the margins such anomalous cases exist, seemingly with the Court's own blessing.").

leaving them essentially immune to regulation.⁹⁵ But maxing out protections for interstate channels forecloses regulation that would promote the nationwide exchange of ideas by advancing speakers' and listeners' interests.⁹⁶ While "it has been largely assumed that full protection will necessarily follow" for third parties when channel owners' rights are protected, "that assumption is not always accurate."⁹⁷ A more sensitive inquiry would address balkanization risks that undercut interstate channels' democracy-enhancing function while leaving room for regulation supporting that function. This second approach is discussed in-depth in Part IV.⁹⁸

II. SITUATING THE ANTI-BALKANIZATION PRINCIPLE

History confirms that balkanization is antithetical to the nation-building function that interstate channels have long served. Interstate channels played a pivotal part during each of the First Amendment's formative eras: the Founding, the Civil War, and the New Deal. Section A of this Part discusses how national magazines and newspaper exchanges fostered the unifying sentiment that drove the Revolution and seeded the growth of a shared national identity in the country's early years.⁹⁹ Section B of this Part examines the controversies during the Interbellum period over Southern attempts to undermine the Post Office, abolitionist publishers, and debate on the floor of Congress.¹⁰⁰ These disputes shaped understandings of the freedom of speech as necessarily national during debates over the Fourteenth Amendment. Last, Section C of this Part explores how the nationwide discussion on economic legislation and social matters that accompanied the New Deal spurred application of the First Amendment's protections against state regulations that restricted interstate dialogue.¹⁰¹ At each of these junctures, interstate channels figured heavily in the development of a national system of free expression to match increasingly national interests.

⁹⁵ This approach was advocated by Justices Black, Douglas, and Goldberg in concurring opinions in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Sullivan*'s response to the balkanization threats posed by Alabama courts' interpretation of the state's libel law is discussed below in notes 271–298 and their accompanying text.

⁹⁶ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373–75, 390 (1969). As the Court once acknowledged in upholding regulation of interstate channels, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Id.* at 390.

⁹⁷ RonNell A. Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 500 (2019).

⁹⁸ See discussion *infra* Part IV.

⁹⁹ See *infra* notes 102–127 and accompanying text.

¹⁰⁰ See *infra* notes 128–142 and accompanying text.

¹⁰¹ See *infra* notes 143–172 and accompanying text.

A. Intercolony Speech Channels

The widespread interchange of information across colonies (and later states) played a crucial role in building a cohesive American union. This role was not initially appreciated as a constitutional matter. By its own terms, the First Amendment does not apply to the states.¹⁰² And in its early understanding, Federalist opponents of the Alien and Sedition Acts espoused a view of the First Amendment under which the federal government had no power to regulate speech while states had broad latitude to govern speech.¹⁰³ So uniformity in the regulation of national speech distributors was not a prevalent constitutional concern in the country's early years.

Nonetheless, the diffusion of information as a means of building a national political and cultural identity predated the Revolution. Some of America's earliest magazines enjoyed robust intercolony circulations.¹⁰⁴ For example, the popular *American Magazine and Monthly Chronicle* claimed a readership that spanned throughout British America during its post-French and Indian War run.¹⁰⁵ By the 1760s, the burgeoning colonial postal system had emerged as an organ for dispersing news and sentiment of political agitation against the British monarchy.¹⁰⁶ Although newspapers of the time had a necessarily limited geographic reach, editors of colonial newspapers frequently reprinted speeches or proclamations from other colonies.¹⁰⁷

It also was common for publishers to reprint articles from other papers, a sort of precursor to the cooperative distribution model that would dominate the

¹⁰² U.S. CONST. amend. I (limiting the prohibition of laws restricting the freedoms of speech and religion to "Congress").

¹⁰³ See Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 561–70 (2019) (outlining the Federalist and Republican arguments opposing the Alien and Sedition Acts).

¹⁰⁴ See HEATHER A. HAVEMAN, *MAGAZINES AND THE MAKING OF AMERICA: MODERNIZATION, COMMUNITY, AND PRINT CULTURE, 1741–1860*, at 4–25 (2015) (discussing the growth of the American magazine industry and its ability to report on societal changes in both descriptive and prescriptive manners). Amongst the widely distributed magazines included Benjamin Franklin's *General Magazine and Historical Chronicle* and Andrew Bradford's *American Magazine and Monthly Chronicle*, which sought to "do equal justice to the affairs of every colony" and was "designed for the equal Use of every Colony, and not for the Service of one in Particular preferable to another." *Id.* at 37 (quoting *American Magazine* (1757–58) and Andrew Bradford, respectively).

¹⁰⁵ JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 77 (2018).

¹⁰⁶ RICHARD B. KIELBOWICZ, *NEWS IN THE MAIL: THE PRESS, POST OFFICE AND PUBLIC INFORMATION, 1700–1860S*, at 23 (Jon L. Wakelyn ed., 1989) (quoting Letter from John Holt to John Adams (1776)); see also Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 680 n.31 (2007) (citing Letter from John Holt, *supra*).

¹⁰⁷ See STEPHEN D. SOLOMON, *REVOLUTIONARY DISSENT: HOW THE FOUNDING GENERATION CREATED THE FREEDOM OF SPEECH* 69 (2016) (noting that these reprints sometimes led local papers as the featured item on the first page).

twentieth century.¹⁰⁸ Aiming to foster the spread of extralocal information, postmasters allowed publishers to exchange papers via mail with other publishers free of charge.¹⁰⁹ Reports of the colonial protests against the Stamp Act kicked the practice into overdrive.¹¹⁰ Because the primary protests took place in Boston, numerous papers in other colonies reprinted stories by the *Boston Gazette*.¹¹¹ These republications created a ripple effect, stirring readers elsewhere to protest local tax and stamp distributors.¹¹²

The members of the First Continental Congress were acutely aware of the connective potential of shared speech channels. In its “Letter to the Inhabitants of the Province of Quebec,” written in 1774, the Congress drew particular attention to the way a free press spread “ready communication of thoughts between subjects, and its consequential promotion of union among them.”¹¹³ The letter’s author, John Dickinson, had seen the enormous impact of his own intercolony writings.¹¹⁴ His “Letters from a Farmer in Pennsylvania” were distributed widely in the late 1760s and mobilized continent-wide sentiment against the Townshend Acts.¹¹⁵ Only the extraordinary virality of Thomas Paine’s *Common Sense*, which set the colonies on the path to independence in 1776, had broader impact.¹¹⁶

Intercolony communication thus played a major role in fueling the Revolutionary War.¹¹⁷ It also contributed to the Revolution’s success by galvanizing the colonists behind a common cause. Newspaper editors ramped up their interchanges during the war: Pennsylvanians read accounts of mock funerals for

¹⁰⁸ *Id.* For a brief explanation of the twentieth century cooperative model, see *Associated Press v. United States*, 326 U.S. 1, 3–4 (1945).

¹⁰⁹ JOHN, *supra* note 37, at 32; Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2310 n.41 (2021); Desai, *supra* note 106, at 691.

¹¹⁰ *See, e.g.*, SOLOMON, *supra* note 107, at 58 (noting the extensive republication of *Boston Gazette* articles).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See* Letter from the Continental Congress to the Inhabitants of the Province of Quebec (Oct. 26, 1774) (listing the key rights that would undergird the new American form of government), in 1 J. CONT’L CONG. 1774–1789, at 105, 107–08 (Worthington Chauncey Ford ed., 1904).

¹¹⁴ *See generally* JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES (1768) (providing a compilation of John Dickinson’s letters), in THE WRITINGS OF JOHN DICKINSON: POLITICAL WRITINGS 1764–1774 (Paul Leicester Ford ed., Philadelphia, Hist. Soc’y of Pa. 1895).

¹¹⁵ ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789, at 160–62 (C. Vann Woodward ed., 1982); *Letters from a Farmer in Pennsylvania*, DELAWARE.GOV, <https://history.delaware.gov/john-dickinson-plantation/dickinsonletters/pennsylvania-farmer-letters/> [<https://perma.cc/U53D-2FHP>].

¹¹⁶ *See generally* ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA (1976) (exploring Paine’s career and impact on the American Revolution); THOMAS PAINE, COMMON SENSE (Rimington & Hooper 1928) (1776).

¹¹⁷ Desai, *supra* note 106, at 680–81.

King George III held in Georgia, Virginia papers reproduced accounts of New Yorkers' and New Jerseyans' independence celebrations, a Charleston publication reported Philadelphians' 1779 Fourth of July festivities, and Philadelphia papers gave readers accounts from Richmond and Trenton.¹¹⁸ Undoubtedly, newspaper reproduction of stories from other colonies boosted national support for the Revolutionary cause.¹¹⁹

Having observed the critical role of intercolony communication to the Revolution, the Founders deemed interstate speech channels imperative to the new nation's success. In a 1787 address, Benjamin Rush argued that it was "absolutely necessary that knowledge of every kind, should be disseminated through every part of the United States."¹²⁰ This meant that, "[f]or the purpose of diffusing knowledge, as well as extending the living principle of government to every part of the United States—every state—city—county—village—and township in the Union, should be tied together by means of the Post-Office."¹²¹ James Madison surmised in 1791 that "[w]hatever facilitates a general intercourse of sentiments . . . [such as] a free press, and particularly a *circulation of newspapers through the entire body of the people* . . . is equivalent to a contraction of territorial limits, and is favorable to liberty."¹²² To that end, Congressman Elbridge Gerry urged the House of Representatives "to adopt measures by which the information, contained in any one paper within the United States, might immediately spread from one extremity of the continent to the other."¹²³

A central project of the nation's first several decades was thus the establishment of a "national market for information" that connected the young country's widely dispersed population.¹²⁴ As Senator John Calhoun mused in 1817, the goal was to "conquer space" such that "a citizen of the West will read the news of Boston still moist from the press."¹²⁵ The press and the post

¹¹⁸ David Waldstreicher, *Rites of Rebellion, Rites of Assent: Celebrations, Print Culture, and the Origins of American Nationalism*, 82 J. AM. HIST. 37, 50 (1995).

¹¹⁹ *Id.*

¹²⁰ Benjamin Rush, Address to the People of the United States (Jan. 1787), https://archive.csac.history.wisc.edu/Benjamin_Rush.pdf [<https://perma.cc/89QM-S2EU>]; see also Desai, *supra* note 106, at 685 (highlighting the role of Benjamin Rush in championing the U.S. Post Office as a key vehicle for educating the citizenry).

¹²¹ Rush, *supra* note 120.

¹²² James Madison, *Public Opinion*, NAT'L GAZETTE, Dec. 19, 1791, quoted in VINCENT BLASI, IDEAS OF THE FIRST AMENDMENT 209 (Thomson West 2d ed. 2006).

¹²³ 3 ANNALS OF CONG. 289 (1791), quoted in Lakier, *supra* note 109, at 2311.

¹²⁴ JOHN, *supra* note 37, at 13, 37; see also Desai, *supra* note 106, at 695 (quoting JOHN, *supra* note 37, at 37).

¹²⁵ ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM: ON FREE SPEECH IN AN ELECTRONIC AGE 77 (1983) (quoting Sen. John C. Calhoun).

were no less than “the nerves of the body politic.”¹²⁶ They allowed interstate special interest communities to develop and thrive.¹²⁷ Although the First Amendment’s protections did not yet apply against the states, the Founders understood the importance of interstate speech to the development of national democracy.

B. Interbellum Censorship

Two prominent controversies during the period between the Founding and the Civil War helped to cultivate a growing conviction that, when in conflict, the preservation of national discourse must generally take precedence over state regulatory interests. The first was the uproar around antislavery literature that abolitionists in Northern states mailed into Southern states.¹²⁸ In the early 1800s, abolitionist organizations undertook “the great postal campaign” by bulk-printing antislavery publications and sending them into Southern states.¹²⁹ Southern states responded by outlawing the criticism of slavery, while Southern grand juries indicted distributors of antislavery material.¹³⁰ Southern state governments then sought to enforce their censorship laws in the North by passing resolutions demanding that Northern state governments suppress abolitionist speech and extradite offending publishers.¹³¹ In one prominent case, the Governor of New York denied such a request by the Governor of Alabama.¹³²

The second controversy stemmed from what was seen as Southern sabotage of a primary forum of interstate discourse at the time: the floor of the House of Representatives. Abolitionists in the North had begun flooding Congress with petitions to end slavery in the District of Columbia.¹³³ Seeing the issue as a microcosm of the broader debate about slavery nationwide, influential Southern representatives moved in 1836 to head off the discussion before it began.¹³⁴ They tabled the petitions, ensuring that they could not be brought to

¹²⁶ *Id.* (quoting Sen. John C. Calhoun).

¹²⁷ See Peter J. Wosh, *Going Postal*, 61 AM. ARCHIVIST 220, 224–25 (1998) (describing how the mail system gave rise to the publication of “[s]pecialized periodicals . . . along political, occupational, fraternal, reform, and religious lines”).

¹²⁸ See CURTIS, *supra* note 38, at 131 (nothing that the free speech rights of abolitionists were a major political question of the time period).

¹²⁹ WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 172–73 (1977).

¹³⁰ CURTIS, *supra* note 38, at 131, 134 (explaining that the publisher of the *Liberator* was indicted in North Carolina).

¹³¹ WIECEK, *supra* note 129, at 179–80.

¹³² *Id.* at 178–79.

¹³³ See CARPENTER, *supra* note 39, at 308 (listing the states that submitted petitions, the number of petitions, and the number of signatures).

¹³⁴ See *id.* at 311 (explaining that the Pinckney Committee was formed to determine the appropriate treatment for all slavery petitions).

the floor for debate.¹³⁵ This practice continued until 1844, implementing an effective “Gag Rule” and infuriating Northerners because it cramped their ability to communicate with their representatives and to have their views heard by the representatives of other free states.¹³⁶

Republicans assumed that abolition would end interstate censorship and interference, expanding the freedoms of speech and press for both Black and white Americans.¹³⁷ Representative Green C. Smith of Kentucky argued in 1865 that “the Constitution will not become fully established until the man from Massachusetts can speak out his true opinions in the State of South Carolina, and the man of Mississippi shall be heard without interruption in Pennsylvania.”¹³⁸ When supporters introduced the Fourteenth Amendment in Congress the next year, its chief architect, John Bingham, echoed those sentiments. When he said that the Amendment’s Privileges or Immunities Clause forbade state actions that deprived citizens of the freedoms of speech and press,¹³⁹ his statement was understood as a direct rebuke of the South’s censorship of anti-slavery literature.¹⁴⁰

Some historians have thus argued that “a primary purpose” of the Fourteenth Amendment was to prevent states from abridging national discourse as they had leading up to the war.¹⁴¹ This interpretation finds support in the statements of many Republican representatives in speeches backing the Amendment’s passage and decrying the interstate censorship that had plagued the Interbellum South.¹⁴² The role of these controversies in the passage of the Fourteenth Amendment helped crystalize the importance of interstate channels to the nation-building project facing a reconstructing country.

¹³⁵ *Id.*

¹³⁶ Garrett Epps, *The Antebellum Political Background of the 14th Amendment*, in INFINITE HOPE AND FINITE DISAPPOINTMENT: THE STORY OF THE FIRST INTERPRETERS OF THE FOURTEENTH AMENDMENT 11, 21 (Elizabeth Reilly ed., 2011).

¹³⁷ ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 92–93 (2019).

¹³⁸ CONG. GLOBE, 38th Cong., 2d Sess. 237 (1865).

¹³⁹ FONER, *supra* note 137, at 171.

¹⁴⁰ See Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1, 21–22 (1968) (arguing that Republicans believed Southern anti-slavery censorship enabled the development of sufficient support for secession).

¹⁴¹ See, e.g., Michael Kent Curtis, “Free Speech” and Its Discontents: The Rebellion Against General Propositions and the Danger of Discretion, 31 WAKE FOREST L. REV. 419, 434–35 (1996) (arguing that the Fourteenth Amendment framers sought to prevent speech restriction perpetrated by states); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND CONSTRUCTION* 137–62 (1998) (discussing the issues and ideas underpinning the Fourteenth Amendment).

¹⁴² See Avins, *supra* note 140, at 18–21 (listing numerous Republican speakers and their criticism of anti-speech regulations). This interpretation also coheres with the basic notion that the Reconstruction Amendments “were specifically designed as an expansion of federal power and an intrusion on state sovereignty.” *City of Rome v. United States*, 446 U.S. 156, 179 (1980).

C. *New Deal Nationalism*

The Supreme Court's incorporation of the First Amendment's protections against the states in response to the New Deal demonstrates the importance of interstate channels to nation-building. Despite strong support for nationwide free speech among many Republicans during the passage of the Reconstruction Amendments, it was not until 1925, in *Gitlow v. New York*, that the Court indicated that the First Amendment's freedoms might apply against the states.¹⁴³ Although the Court had ruled against *Gitlow*, it had introduced the possibility of a unified national discourse.¹⁴⁴ Scholars immediately recognized the anti-balkanizing potential in the Court's suggestion—Zechariah Chafee speculated that the First Amendment would eventually operate to “prevent a checker-board nation.”¹⁴⁵

The Court undertook the process of incorporation in full force the next decade, as President Franklin D. Roosevelt greatly expanded the national government and national economy. The New Deal achieved the project of nationalization that the Civil War had launched, creating a need for national discourse on the robust federal legislation and agencies that had displaced state law as the primary driver of American government.¹⁴⁶ The New Deal's undemocratic concentration of power in the administrative state was thus counterbalanced by newly recognized national speech rights that protected the national political process.¹⁴⁷ Incorporation operated on the core insight that “the profoundly essential institution of free discussion must be preserved from state interference, that its protection was a necessary condition of national life.”¹⁴⁸ Interstate channels informed and hosted the interstate conversations that structured national life.

This vision of incorporation animates the Court's pathbreaking decision in *Hague v. Committee for Industrial Organization* in 1939.¹⁴⁹ The case involved a crucial early forum for national discourse: public parks. The mayor of

¹⁴³ See Avins, *supra* note 140, at 18–21 (identifying prominent Reconstruction-era Republicans who believed the right to free speech was enforceable via the Privileges or Immunities Clause); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming that the right to free speech cannot be abridged by the states under the Fourteenth Amendment's Due Process Clause).

¹⁴⁴ Zechariah Chafee Jr., *The Gitlow Case*, NEW REPUBLIC, July 1, 1925, reprinted in ZECHARIAH CHAFEE JR., *THE INQUIRING MIND* 106 (1928); *Gitlow*, 268 U.S. at 672.

¹⁴⁵ CHAFEE, *supra* note 144, at 106.

¹⁴⁶ See Yassky, *supra* note 9, at 1734, 1736 (quoting President Roosevelt's concern that expanded federal power could be corrupted).

¹⁴⁷ See *id.* at 1736 (“Free speech absolutism aims to forestall such shackles by protecting the distribution of political resources against government manipulation.”).

¹⁴⁸ Louis L. Jaffe, *In Defense of the Supreme Court's Picketing Doctrine*, 41 MICH. L. REV. 1037, 1042 (1943).

¹⁴⁹ See 307 U.S. 496, 518 (1939) (plurality opinion) (affirming the lower court's decree with modifications).

Jersey City, New Jersey, Frank Hague, closed the city's public spaces to national labor organizers as part of his pitch to attract businesses.¹⁵⁰ The city denied meeting permits to out-of-staters seeking to come to Jersey City to organize workers and deliver pro-labor speeches in parks. Prominent politicians like Senator William Borah of Idaho—as well as Mayor Fiorello La Guardia and Governor Thomas Dewey of New York—all faced bans.¹⁵¹ Police shut down Jerry O'Connell, a Montana Congressman, who tried to speak without a permit.¹⁵² The permitting law thus allowed Hague to prevent national labor organizers from addressing local workers.¹⁵³

Hague's tactics were not subtle: police detained so-called “inva[ders]”¹⁵⁴ and deported them via ferry boats to New York.¹⁵⁵ The most notable deportee was Norman Thomas, leader of the national Socialist Party. Thomas had traveled to New Jersey to speak at a May Day Eve rally of party members.¹⁵⁶ His forced ferry ride out of the state evoked outrage in national publications and spurred simmering anti-Hague forces to action.¹⁵⁷ To quell the firestorm, Hague delivered a nationwide radio broadcast defending his anti-Communist policy.¹⁵⁸ In response, he received messages of approval from nearly each state in the country, spanning as far as California.¹⁵⁹ Keeping national organizers out of New Jersey was a decidedly national issue.¹⁶⁰

The Supreme Court invalidated the permitting ordinance.¹⁶¹ Justice Owen Roberts's plurality opinion for four Justices repudiated a decades-old precedent

¹⁵⁰ LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* 226 (2016).

¹⁵¹ *Id.* at 236; *William E. Borah*, BRITANNICA, <https://www.britannica.com/biography/William-E-Borah> [<https://perma.cc/QH9S-N7HD>] (Jan. 15, 2024).

¹⁵² *Hague Undisturbed by the C.I.O. Suit*, N.Y. TIMES, Jan. 9, 1938, at 28, <https://timesmachine.nytimes.com/timesmachine/1938/01/09/356955952.html?pageNumber=28> [<https://perma.cc/U7TP-KPA8>].

¹⁵³ *See* WEINRIB, *supra* note 150, at 226 (tracing how Hague utilized the police to silence labor organizers through the permitting law).

¹⁵⁴ Russell B. Porter, *Hague Police Head Backs 'Ejections'*, N.Y. TIMES, June 9, 1938, at 8, <https://timesmachine.nytimes.com/timesmachine/1938/06/09/98148723.html?pageNumber=8> [<https://perma.cc/KZ78-UCU5>].

¹⁵⁵ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 501 (1939) (plurality opinion).

¹⁵⁶ WEINRIB, *supra* note 150, at 236.

¹⁵⁷ *See id.* at 236–37 (noting that individuals of all political beliefs voiced criticism of Hague's actions, and that Arthur T. Vanderbilt represented Norman Thomas free of charge in the challenge against Hague's policies).

¹⁵⁸ *Hague Rally to Air His Stand Tonight*, N.Y. TIMES, Jan. 6, 1938, at 8, <https://timesmachine.nytimes.com/timesmachine/1938/01/06/96772106.html?pageNumber=8> [<https://perma.cc/SJ7B-MTM2>].

¹⁵⁹ *C.I.O. Starts Suit to Test Hague Ban*, N.Y. TIMES, Jan. 8, 1938, at 1, <https://timesmachine.nytimes.com/timesmachine/1938/01/08/96772590.html?pageNumber=1> [<https://perma.cc/SHJ3-8QWT>].

¹⁶⁰ *See id.* (reporting on the C.I.O. lawsuit as raising major constitutional issues likely to face Supreme Court review, and on country-wide support of Hague's speech).

¹⁶¹ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 518 (1939) (plurality opinion).

in which the Court had approved near-plenary authority for local governments to regulate speech in public spaces.¹⁶² The plurality rejected that approach, holding that the government lacks absolute proprietary authority in spaces long dedicated to public discussion.¹⁶³ Hague's arbitrary denial of permits for speeches in parks thus could not stand.¹⁶⁴

Roberts's opinion is remarkable because, unlike the other early opinions applying free speech protections against the states, it tackled head-on the structural issue of how to reconcile competing state and national speech interests in the regulation of interstate channels.¹⁶⁵ Roberts relied on the Fourteenth Amendment's Privileges or Immunities Clause to apply free speech principles to the ordinance.¹⁶⁶ He noted that passage of the Fourteenth Amendment rendered national citizenship primary and state citizenship secondary.¹⁶⁷ The pro-labor speeches suppressed by Hague aimed to inform New Jersey residents of federal law—the National Labor Relations Act—and related matters.¹⁶⁸ The ordinance offended free speech principles because it allowed local officials to arbitrarily suppress discussion of matters of national importance.¹⁶⁹ Shutting down a forum for critical interstate dialogue undermined the national interest in the nationwide exchange of ideas.¹⁷⁰

Roberts's Privileges or Immunities approach never commanded a majority. The Court instead followed *Gitlow* in incorporating free speech protections

¹⁶² See *id.* at 514–15 (distinguishing the case from *Davis v. Massachusetts*); *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897) (likening a municipality's right to exclude speech in public areas to that of a homeowner's right to exclude).

¹⁶³ *Hague*, 307 U.S. at 515–16; see also Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1722 (1987) (illuminating the Court's reasoning in *Hague* by identifying the Court's interest in distinguishing *Davis*).

¹⁶⁴ *Hague*, 307 U.S. at 516.

¹⁶⁵ See *id.* at 512 (explaining that the Fourteenth Amendment did not create rights but protected existing rights).

¹⁶⁶ *Id.* The Court had not yet settled on the precise mechanism in the Fourteenth Amendment by which the freedom of speech applied to the states—*Gitlow* had suggested but not confirmed that it was the Due Process Clause. 268 U.S. 652, 666 (1925). In his concurrence, Justice Stone agreed that the ordinance was constitutionally defective, but argued that the Due Process Clause was the proper vehicle for rejecting it. *Hague*, 307 U.S. at 518–19 (Stone, J., concurring).

¹⁶⁷ *Hague*, 307 U.S. at 510 (plurality opinion). A complex jurisdictional question necessitated this holding, and Roberts's free speech analysis seemed to flow naturally from it. See *id.* Roberts's argument is consistent with the modern understanding that “the Fourteenth Amendment ‘expand[ed] federal power at the expense of state autonomy’ and thus ‘fundamentally altered the balance of state and federal power struck by the Constitution.’” See *Trump v. Anderson*, No. 23-719, 2024 WL 899207, at *2 (U.S. Mar. 4, 2024) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996)).

¹⁶⁸ *Hague*, 307 U.S. at 501, 512.

¹⁶⁹ *Id.* at 516.

¹⁷⁰ See *id.* at 513 (discussing the right to meet and confer with fellow citizens as essential to the status of citizenship).

via the Due Process Clause one year later.¹⁷¹ That choice left explicit consideration of structural conflict between state and national speech interests on the cutting room floor. But Roberts's opinion most closely hit on the primary socio-constitutional developments driving incorporation. Balkanization was no longer tenable in a fully nationalized country.¹⁷²

III. EXCAVATING THE ANTI-BALKANIZATION PRINCIPLE

The Supreme Court's cases reviewing restrictions on interstate channels reveal the seeds of an anti-balkanization principle. The Court has rejected state laws that have threatened to undermine interstate channels. When necessary, the Court has expanded the bounds of First Amendment protection to safeguard national discourse. And when state interests have conflicted with countervailing national speech interests, the Court has shown little solicitude even for valid state goals. These cases form the foundation of an anti-balkanization principle.

A conceptual analogy for the principle's purview is the Dormant Commerce Clause, under which the Court reviews state incursions that threaten to balkanize the national economic marketplace.¹⁷³ To prevent the national economy from fracturing into a league of antagonistic units,¹⁷⁴ the Court has "expressed special concern" for the instrumentalities of interstate transportation, like trains or trucks.¹⁷⁵ The Court has struck down state laws that substantially interfere with instrumentalities without compelling justification.¹⁷⁶ The Court has thwarted these balkanization threats because an effective system for trans-

¹⁷¹ See *Schneider v. New Jersey*, 308 U.S. 147, 160 & n.8 (1939) (citing *Gitlow* in support of the Court's decision to incorporate the First Amendment against the states).

¹⁷² See, e.g., *Thomas v. Collins*, 323 U.S. 516, 520–21, 543 (1945) (overturning a restraining order enforcing a Texas law that restricted the ability of national labor leader R.J. Thomas to give speeches in the state soliciting union membership).

¹⁷³ See *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179–80 (1995) (describing the Dormant Commerce Clause's "purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole"), *superseded by statute*, ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified as 49 U.S.C. § 14505).

¹⁷⁴ See *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979) (identifying a major concern of the Constitutional Convention in preventing state "economic Balkanization" that was prevalent prior to the Constitution's ratification).

¹⁷⁵ See, e.g., *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 763–82 (1945) (trains); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523–30 (1959) (trucks); *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 380 (2023) (noting this "special concern" in past precedent).

¹⁷⁶ See *Ross*, 598 U.S. at 379 n.2 (citations omitted) (indicating that the common thread among such decisions was the impediment of interstate commerce).

porting goods is necessary for building and maintaining a collective national culture.¹⁷⁷

In doing so, the Court has focused on two basic concerns. One is fragmentation: differing state laws might prove so problematic as to render instrumentalities unable to perform their basic function in interstate commerce. Compliance with a patchwork of inconsistent regulations is often either impossible due to direct conflict between regulations or unrealistic due to intractable coordination problems, both of which threaten the efficacy of the entire network.¹⁷⁸ The other concern is leveling down. Burdensome state laws might in many cases allow the most restrictive states to set national policy, as companies seek to avoid the exorbitant compliance costs of altering instrumentalities on a state-by-state basis. The Court has suggested that both fragmentation and leveling down are antithetical to national interests.¹⁷⁹

To avert these risks, the Court has asked whether differing state laws “undermined a compelling need for national uniformity in regulation.”¹⁸⁰ Thus, Virginia could not require interstate buses to racially segregate passengers, in part because the state-by-state patchwork of conflicting and differing requirements made the “cumulative effects” of compliance “impracticable.”¹⁸¹ A “single, uniform rule” was thus required to protect the national interest in interstate travel.¹⁸² Likewise, Illinois could not (without a “compelling” reason) mandate that all trailer trucks passing through the state be equipped with a unique mudflap.¹⁸³ Illinois’ law would have conflicted with Arkansas’ mudflap law and seriously hindered transporters’ ability to use the same trailer in different states.¹⁸⁴ Nor could Arizona unduly limit the number of cars on trains passing through it

¹⁷⁷ See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1184 (1986).

¹⁷⁸ See *Bibb*, 359 U.S. at 527–30 (explaining that Illinois’ mudflap law would undermine the efficiency of trucking operations, insofar as carriers would have to modify their logistics model to avoid hooking up to and driving trailers with illegal mudflaps through the state).

¹⁷⁹ See *S. Pac. Co.*, 325 U.S. at 773 (holding that a state’s limit on a train’s length would impede Congress’s goal of maintaining efficient railroads, as trains would either have to be reconfigured before entering the state, or all trains would abide by the shortest length limit to prevent the reconfiguration issue).

¹⁸⁰ *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997); see also *Morgan v. Virginia*, 328 U.S. 373, 385 (1946) (noting that the Court reviews state regulations of interstate transportation to determine whether they “so infringe[] the requirements of national uniformity as to be invalid”); cf. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 128 (1978) (explaining that the Court has occasionally preempted an entire industry from local regulation “when a lack of national uniformity would impede the flow of interstate goods”); *Ross*, 598 U.S. at 379 n.2 (quoting *Exxon Corp.*, 437 U.S. at 128).

¹⁸¹ See *Morgan*, 328 U.S. at 381–82, 385 (explaining that eighteen states outlawed segregation on motor carriers, and that definitions and requirements varied in the ten states that required it).

¹⁸² *Id.* at 386.

¹⁸³ *Bibb*, 359 U.S. at 529–30.

¹⁸⁴ *Id.* at 523.

when doing so would inflict massive costs and inefficiencies.¹⁸⁵ Arizona's law would have forced railway transportation services to break down and reconstruct trains each time they entered or left the state, forcing services to adopt Arizona's approach nationwide.¹⁸⁶

In reviewing restrictions on interstate channels under the First Amendment, the Court has shown the same two basic concerns as in its Dormant Commerce Clause cases: fragmentation and leveling down. The Court has not adopted a systematic approach to these problems in the speech context. But in various areas, the Court has ruled to protect interstate channels against them. At times, the Court's opinions have explicitly engaged with the threat that fragmentation and leveling down pose to national discourse; at others, the worry has been implicit in the Court's ruling or reasoning.

Section A of this Part discusses how the Court has approached fragmentation in the context of freedom of association cases and overbreadth challenges.¹⁸⁷ Section B of this Part provides an overview of the Court's leveling-down concerns through its commercial advertising, obscenity, and libel decisions.¹⁸⁸

A. Fragmentation

The Court has rejected patchwork regulatory approaches that jeopardized interstate channels by imposing differentiation where uniformity was needed. Concern that state-by-state regulation would prevent interstate channels from carrying out their basic function is seen most clearly in freedom of association cases addressing regulations of national political party conventions and in an overbreadth case reviewing regulations of magazine and video distributors.¹⁸⁹

1. Association

The need for national uniformity drove the Court's 1975 decision in *Cousins v. Wigoda*, sustaining the associational rights of a slate of delegates to the Democratic National Convention (DNC) against a challenge from a competing slate.¹⁹⁰ The Court rejected Illinois' attempt to impose heterogeneity on the Democratic National Party's delegate selection process for the 1972

¹⁸⁵ *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 773, 783–84 (1945).

¹⁸⁶ *Id.* at 773.

¹⁸⁷ See *infra* notes 189–227 and accompanying text.

¹⁸⁸ See *infra* notes 228–298 and accompanying text.

¹⁸⁹ See *infra* notes 190–227 and accompanying text.

¹⁹⁰ See 419 U.S. 477, 490–91 (1975) (holding that the national convention's role in presidential candidate selection would be impeded by Illinois' statutory scheme).

DNC.¹⁹¹ Preserving uniformity protected the DNC's function as a host of interstate discourse vital to national democracy.¹⁹²

The DNC is the Democrats' quadrennial affair where delegates sent from each state select a presidential nominee.¹⁹³ The event gained national notoriety for its disastrous 1968 gathering in Chicago, where national broadcast cameras captured Richard J. Daley's Chicago Police Department officers savagely beating throngs of protestors.¹⁹⁴ Chaos also reigned on the convention floor, as delegate disputes persistently upended proceedings.¹⁹⁵ There were fifteen disputes from thirteen different states (a convention record), mainly over equity in the delegate selection process.¹⁹⁶

To prevent similar disarray at future conventions, the Democrats instituted a series of delegate selection reforms designed to expand diversity in delegate representation.¹⁹⁷ Seeking to increase representation of women, African Americans, Latin Americans, and young voters,¹⁹⁸ the Democrats declared that private caucuses would select each state's delegation to the 1972 DNC.¹⁹⁹ In response, Daley pushed legislation through the Illinois State House that required national parties to seat delegates at their conventions in accordance with popular state elections.²⁰⁰ Daley then deployed his political machine to ensure

¹⁹¹ *Id.* at 491.

¹⁹² *See id.* at 487–90 (explaining that imposition of a heterogeneous delegate selection process would jeopardize the convention's interstate coalition-building ability).

¹⁹³ Michael Levy, *Democratic National Convention*, BRITANNICA, <https://www.britannica.com/topic/Democratic-National-Convention> [<https://perma.cc/DZA2-C3KM>] (Dec. 19, 2023). Nominating conventions have changed substantially in the last half century. Today, they are typically mere formalities whose primary function is public relations. In the 1980s, conventions still meaningfully decided parties' presidential tickets, a process dependent on "consultations" and "debates." *See* Adam Nagourney & Matt Flegenheimer, *Both Parties Wonder: How Much Do Conventions Even Matter Anymore?*, N.Y. TIMES (May 4, 2020), <https://www.nytimes.com/2020/05/04/us/politics/democratic-republican-convention.html> [<https://perma.cc/4J5B-5VYH>] (quoting Walter F. Mondale, Democratic presidential candidate nominated at the 1984 Democratic National Convention).

¹⁹⁴ *See 1968 Democratic Convention*, HISTORY, <https://www.history.com/topics/1960s/1968-democratic-convention> [<https://perma.cc/2SUX-F2QD>] (Nov. 10, 2020) (detailing the police's violent interaction with the protestors).

¹⁹⁵ *See* HEATHER HENDERSHOT, WHEN THE NEWS BROKE: CHICAGO 1968 AND THE POLARIZING OF AMERICA 81 (2022) (highlighting repeated delegate challenges).

¹⁹⁶ *Id.*

¹⁹⁷ Warren Weaver Jr., *Panel Denies Convention Seats to 59 Daley Delegates*, N.Y. TIMES, July 1, 1972, at 1, <https://timesmachine.nytimes.com/timesmachine/1972/07/01/91334756.html?pageNumber=1> [<https://perma.cc/N3JQ-6MSY>].

¹⁹⁸ *Id.*

¹⁹⁹ *See Cousins v. Wigoda*, 419 U.S. 477, 479–80 (1975) (noting that a private caucus selected the Cousins delegates).

²⁰⁰ *Wigoda v. Cousins*, 302 N.E.2d 614, 618 (Ill. App. Ct. 1973), *rev'd*, 419 U.S. 477 (1975); *see* Larry Peitzman, *The Supreme Court and the Credentials Challenge Cases: Ask a Political Question, You Get a Political Answer*, 62 CALIF. L. REV. 1344, 1345 (1974) (recognizing that Daley's efforts effectively excluded McGovern's delegates from the selection process in Illinois).

that his delegates won the Illinois elections, effectively foreclosing support in the Illinois delegation for leftwing candidate George McGovern.²⁰¹

An alternate slate of Illinois delegates selected by the party's prescribed private caucus method challenged Daley's block (Wigoda delegation), demanding that party officials seat it at the 1972 DNC.²⁰² The Democrats' Credentials Committee sided with the alternate slate, a group supporting McGovern and led by the Reverend Jesse Jackson (Cousins delegation).²⁰³ Two days prior to the convention's kickoff, Daley's Wigoda delegation sought and received an injunction from an Illinois court that enjoined the Cousins delegation from acting as delegates at the Convention.²⁰⁴ The Cousins delegation ignored the injunction, and the party seated them at the Convention.²⁰⁵

The Supreme Court ruled in their favor, too, dissolving the injunction.²⁰⁶ It stressed that "[d]elegates perform a task of supreme importance to every citizen of the Nation regardless of their State of residence."²⁰⁷ The injunction could not stand because this crucial interstate dialogue demanded uniformity easily undone by a patchwork of state regulation.²⁰⁸ The Court explained:

If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result. Such a regime could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates—a process which usually involves coalitions cutting across state lines.²⁰⁹

²⁰¹ Peitzman, *supra* note 200, at 1345.

²⁰² *See Cousins*, 419 U.S. at 478–81 (discussing the conflict between the Cousins and Wigoda delegates); Weaver, *supra* note 197 (reporting on the seating of the Cousins delegates).

²⁰³ *Cousins*, 419 U.S. at 479–80; Weaver, *supra* note 197; John Kifner, *Pyrrhic Victory Is Seen in Mayor Daley's Ouster*, N.Y. TIMES, July 12, 1972, at 18, <https://timesmachine.nytimes.com/timesmachine/1972/07/12/80796440.html?pageNumber=18> [<https://perma.cc/PT2R-P239>]. The rebuke of Daley was "startling" because "no one could recall a Democratic leader of comparable power being turned away from a convention with all his followers." Weaver, *supra* note 197.

²⁰⁴ *Cousins*, 419 U.S. at 480.

²⁰⁵ *Id.* at 481.

²⁰⁶ *Id.* at 491. The Court held that the Cousins delegation and the Democratic National Party had First Amendment associational rights implicated by the injunction. *Id.* at 489.

²⁰⁷ *Id.* at 489.

²⁰⁸ *Id.* at 490.

²⁰⁹ *Id.* (internal citation and quotation marks omitted) (quoting *Wigoda v. Cousins*, 342 F. Supp. 82, 86 (N.D. Ill. 1972)).

Patchwork state legislation posed an intractable problem—harmony was necessary for the functioning of the convention deliberation process.²¹⁰ As the Court noted, a pivotal aspect of convention floor discourse involved brokering deals and forming multistate coalitions.²¹¹ And the potential for disharmony in the wake of the bitter dispute between Daley’s and Jackson’s factions was apparent.²¹² The Court noted that several delegations selected according to state law had been refused seating in recent years (including 1968), creating tumult.²¹³ Deliberation would suffer if some states’ delegations were seen as flouting convention rules or if their makeup did not represent the diversity of voices that the Democrats saw as critical to selecting a nominee. These risks were not conjectural. As one New York delegate griped, “[e]ither we’re going to be a party with rules for everyone or a party with rules for everyone but Richard J. Daley.”²¹⁴

Doctrinally, the Court focused on the competing state and national interests in the case. It held that Illinois’ otherwise valid interest in protecting the integrity of its electoral process was insufficient to justify the injunction. The Court reasoned that the vital national interest in parties selecting national candidates without interference trumped any state interest at stake.²¹⁵ Because

²¹⁰ See *id.* (noting how divergent state legislation on delegate procedure could spoil the ability of the National Party Convention process to function).

²¹¹ *Id.*

²¹² See *id.* (emphasizing the danger of making the national convention more fractious, thereby impairing the convention’s key democratic function of candidate selection).

²¹³ *Id.* at 490 n.10.

²¹⁴ Weaver, *supra* note 197. Further bolstering that its reasoning hinged on the need for uniformity, the Court explicitly left open the possibility of a different outcome regarding congressional regulation of conventions. *Cousins*, 419 U.S. at 484 n.4; see also *id.* at 497 n* (Powell, J., concurring in part and dissenting in part) (“Congressional regulation of national conventions or state regulation of state primaries or conventions for state offices raises different considerations requiring a wholly different balance.”).

²¹⁵ *Cousins*, 419 U.S. at 490. As the Court put it, “[t]he Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State.” *Id.*; see also *Trump v. Anderson*, No. 23-719, 2024 WL 899207, at *6 (U.S. Mar. 4, 2024) (“[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest.” (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983))). In *Anderson*, the Court applied this principle in holding that a state statute imposing an early filing deadline on independent candidates for President violated the First Amendment. 460 U.S. at 795. In highlighting the pitfalls of state interference with the national electoral process, the Court pointed to the detrimental effect that state exclusion of independent candidates would have on national discourse. *Id.* at 794 (“By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically, political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have, in time, made their way into the political mainstream.”).

vindicating Illinois' interest would subvert the greater national interest, the state's interest could not be deemed compelling.²¹⁶

The Court reaffirmed the *Cousins* ruling in 1981 in *Democratic Party of the United States v. Wisconsin ex rel. La Follette*.²¹⁷ The Court again ruled for the Democrats over a state attempt to control DNC procedure.²¹⁸ Relying on *Cousins*, the Court rejected the state's attempt to bind DNC delegates to voting in accordance with Wisconsin's open primary.²¹⁹ It reiterated that a state could not disrupt the DNC's ability to dictate who was included in DNC deliberations, and that Wisconsin's law would "distort its collective decisions—thus impairing the party's essential functions."²²⁰ If delegates were required to vote in accordance with Wisconsin's election, the discussion on the convention floor would be meaningless as to those delegates' votes.²²¹ Given the Court's solicitude in *Cousins* for the DNC as a forum of interstate discourse, it is unsurprising that Wisconsin's delegate voting law met the same fate as Illinois' delegate selection law.

2. Overbreadth

Fragmentation concerns also led the Court to strike down a regulatory scheme that would have prevented nationwide distributors from disseminating material nationally. In 2010, in *United States v. Stevens*, the Court sustained an overbreadth challenge to a federal law that criminalized depictions of animal cruelty by incorporating state-level restrictions.²²² The law created a regulatory scheme under which the definition of animal cruelty depended on whether the depiction at issue showed conduct that was illegal in the state in which its "creation, sale, or possession" took place.²²³ In rejecting the law, the Court relied on distributors' inability to comply with the scheme's complicated mish-mash of state laws.

More precisely, the Court worried that allowing each state to extend the reach of its laws to the rest of the nation would confound content producers

²¹⁶ *Id.* at 491.

²¹⁷ 450 U.S. 107, 121 (1981) (citing *Cousins*, 419 U.S. 477).

²¹⁸ *Id.* at 126.

²¹⁹ *Id.* at 121, 126 (citing *Cousins*, 419 U.S. 477).

²²⁰ *Id.* at 122; see also *Trump*, 2024 WL 899207, at *6 (disfavoring "state-by-state resolution" of issues related to presidential selection that "would be quite unlikely to yield a uniform answer consistent with the basic principle that 'the President . . . represent[s] all the voters in the Nation.'" (quoting *Anderson*, 460 U.S. at 795)).

²²¹ See *Democratic Party of the U.S.*, 450 U.S. at 120 (explaining that the issue was not whether Wisconsin could run an open primary, but whether the primary results could bind the delegate's voting at the convention in violation of convention rules).

²²² 559 U.S. 460, 464–65, 467, 482 (2010), *superseded by statute*, 18 U.S.C. § 48 (2010).

²²³ *Id.* at 465 (quoting 18 U.S.C. § 48(c)(1) (2006)).

with “a bewildering maze of regulations” from all the other states.²²⁴ The Court focused on the many ways in which laws regulating the treatment of animals differed from one state to the next.²²⁵ It emphasized that views about animal cruelty widely diverge from state to state, meaning that the scheme would allow less tolerant states to potentially punish material like educational hunting videos distributed from more lenient states.²²⁶ This left distributors with a daunting (if not impossible) task to ensure that their magazines and videos complied with the multitude of complex laws regulating the treatment of animals in all states in which they distributed.²²⁷ Fragmentation would have undermined their basic ability to disseminate speech nationwide.

B. Leveling Down

In other First Amendment realms, the Court has raised the related but distinct concern of leveling down. The Court has worried that patchwork regulation might impose excessive compliance costs on interstate channels due to the complexity of tailoring national speech operations state by state. Such costs might force interstate channels to adopt the most restrictive state’s approach on a nationwide basis. The Court has confronted this issue in advertising, obscenity, and libel cases involving newspapers and pornographers.²²⁸

1. Advertising

Leveling-down concerns featured prominently in the Supreme Court’s 1975 opinion in *Bigelow v. Virginia*, recognizing protection for commercial advertising.²²⁹ The Court rejected a law that allowed Virginia to block information in a newspaper about constitutionally protected out-of-state activity. Specifically, the case concerned a Virginia law that prohibited publications promoting abortion.²³⁰ The Court ruled that the First Amendment protected a

²²⁴ See *id.* at 476 (emphasizing the compliance burdens of the statutory scheme).

²²⁵ See *id.* at 476–77 (utilizing the variance in state hunting laws as an example of how unwieldy the statutory scheme could be).

²²⁶ See *id.* at 476 (comparing the law of D.C. (which banned hunting) with the laws of states that promoted hunting and related media).

²²⁷ See *id.* (noting the difficulties that publishers would face in adhering to the laws of nearly fifty-six distinct jurisdictions); *cf.* *Trump v. Anderson*, No. 23-719, 2024 WL 899207, at *7 (U.S. Mar. 4, 2024) (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment) (rejecting as unconstitutional “a chaotic state-by-state patchwork, at odds with our Nation’s federalism principles”).

²²⁸ See *infra* notes 229–298 and accompanying text.

²²⁹ See 421 U.S. 809, 828–29 (1975) (holding that commercial speech merits First Amendment protection). A more fulsome articulation of the basis for protecting commercial advertising would follow a year later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* See generally 425 U.S. 748 (1976).

²³⁰ *Bigelow*, 421 U.S. at 811.

Virginia newspaper's right to publish advertisements for abortions in New York.²³¹ At the time the case was brought, abortion was illegal in Virginia but legal in New York.²³²

The ad announced that fact and stated that New York residency was not required to obtain an abortion there.²³³ It then listed the contact information of a New York referral agency and explained that the agency would confidentially make appointments for clients at accredited healthcare facilities and would provide information and counseling to help facilitate the process.²³⁴ Because abortion was illegal in Virginia, the statute's only practical application was to ads from other states, like New York, where abortion was legal.²³⁵ The Court had previously ruled that commercial advertising received little if any constitutional protection.²³⁶ But facing Virginia's outright attempt to cut off its residents from out-of-state information, the Court shifted gears and ruled for the newspaper.²³⁷ The Court held that Virginia could not ban publications from publishing information about activities legal in other states.²³⁸

In reaching its decision, the Court raised the specter of the law's adverse impact on nationwide publications. The law risked interrupting the flow of information in and beyond Virginia by forcing national distributors to adopt Virginia's policy nationwide. Underscoring the leveling-down threat to national discourse, the Court wrote:

²³¹ *Id.* at 829.

²³² *Id.* at 812, 813 n.3. Although the case was decided in 1975 (two years after the Court's 1973 case *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022)), the facts giving rise to it had taken place before the Court held that abortion was constitutionally protected. *See Bigelow*, 421 U.S. at 811–12 (explaining that the advertisement at issue was published on February 8, 1971).

²³³ *Bigelow*, 421 U.S. at 812.

²³⁴ *Id.*

²³⁵ *Id.* at 813 n.3. Advertisements for criminal activity receive no First Amendment protection. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976).

²³⁶ *See* *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that the government may burden or completely preclude commercial advertising in public spaces), *overruled by Va. State Bd. of Pharmacy*, 425 U.S. 748 (1942).

²³⁷ *See Bigelow*, 421 U.S. at 824–25.

²³⁸ *Id.* at 825. The Court first focused on the interests of Virginians. Because Virginia could neither regulate the agency's New York operations nor ban Virginians from traveling to New York for its services, Virginia likewise could not insulate Virginians from information about the services. *Id.* at 824. The Court stressed that the ads conveyed information from New York that was relevant to a wide audience in Virginia—and not just pregnant Virginians seeking abortions. *Id.* at 822. Also relevant were the interests of Virginia voters. Virginians might learn something through such advertisements about the abortion regimes of other states, which could influence Virginia policy by helping citizens' reform efforts. *Id.* Keeping citizens in the dark about activities outside state borders insulated proponents of Virginia's abortion ban from informed criticism by opponents seeking to use other states as a model for reform in Virginia. *Id.*

If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper or containing articles on the general subject matter to which the advertisement referred. Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning.²³⁹

After this excerpt, the Court cited a portion of its 1974 opinion in *Miami Herald Publishing Co. v. Tornillo*, voicing concerns over the self-censorship pressures created by Florida's right-of-reply law.²⁴⁰ That law required newspapers to provide page space for replies to negative commentary, and the Court in *Tornillo* had expressed worry that the law would incentivize newspapers to avoid certain types of adversarial coverage so as to avoid triggering the right-of-reply.²⁴¹ Its worry in *Bigelow* bore a striking similarity. The Court understood that a web of hostile state laws regulating abortion advertisements would likely force national publications to stop carrying ads nationwide. Virginia and like-minded states could thus effectively legislate speech for the entire country. Virginians and non-Virginians alike would be left in the dark.

Doctrinally, the Court responded in various ways. One was by extending protection to a class of speech—commercial advertising—that had lacked protection under the First Amendment.²⁴² Another was in finding that Bigelow's speech interest was "augmented" given his status as a newspaper distributor and editor.²⁴³ The Court explained that the law's negative effect on the nationwide circulation of ideas posed an elevated threat to the First Amendment.²⁴⁴

2. Obscenity

The Court's obscenity cases show similar concerns over interstate channels leveling down. For decades, the Court has struggled to account for differences in values and tastes inherent in a large, heterogeneous country.²⁴⁵ Level-

²³⁹ *Id.* at 828–29 (footnote omitted) (citing *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257–58 (1974)).

²⁴⁰ *Id.* at 829 (citing *Tornillo*, 418 U.S. at 257–58); see *Tornillo*, 418 U.S. at 257 (expressing concern that newspaper editors would forgo publication of controversial topics to ensure compliance and limit liability).

²⁴¹ *Tornillo*, 418 U.S. at 244, 257.

²⁴² See *Bigelow*, 421 U.S. at 825.

²⁴³ *Id.* at 828.

²⁴⁴ *Id.* at 828–29.

²⁴⁵ See *Interstate Cir., Inc. v. City of Dallas*, 390 U.S. 676, 704–05 (1968) (Harlan, J., concurring in part and dissenting in part) (describing the Court's obscenity jurisprudence as reflecting "a variety

ing-down threats have proven worrisome because they jeopardize the speech interests of the national public, not just those of producers.²⁴⁶ State restrictions on magazines or movies based on sexually explicit material have long risked cutting off regions and classes of people from national culture.²⁴⁷ Chafee lamented in 1954 that state censorship of movies would inevitably have spillover effects, as it was difficult at the time for distributors to show different versions of the same film in a given territory.²⁴⁸ They would thus scrub controversial scenes from a film so they could show it in all states in the territory.²⁴⁹ Censorship by any state in that territory would thereby change what moviegoers in adjacent non-censoring states saw in their theaters.²⁵⁰

The Court engaged with this concern about nationwide distribution in multiple cases. In 1962, in *Manual Enterprises, Inc. v. Day*, it decried the “intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency.”²⁵¹ The Court gave more attention to the problem in its 1968 decision, *Interstate Circuit, Inc. v. Dallas*, wherein it considered a vague Dallas obscenity ordinance.²⁵² Because other places around the country were adopting legislation similar to Dallas’s ordinance, its vagueness would make it difficult for nationwide distributors to discern what could be shown where.²⁵³ This complexity might cause them to “choose nothing but

of views among the members of the Court unmatched in any other course of constitutional adjudication”); *see also* *Roth v. United States*, 354 U.S. 476, 491 (1957) (addressing the constitutionality of obscenity laws that criminalized distribution of “obscene or indecent” material); *Manual Enters., Inc. v. Day*, 370 U.S. 478, 479 (1962) (reviewing the U.S. Post Office’s decision to refuse shipment of “obscene” magazines); *Memoirs v. Massachusetts*, 383 U.S. 413, 417, 420–21 (1966) (plurality opinion) (reversing the state court’s finding of obscenity where the lower court failed to consider the book’s social value outside of its sexual nature).

²⁴⁶ *See* FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 187–88 (1982) (observing that national “publishers [changing] their publications to remove legitimate uses of nudity, sexual references or coarse language . . . entails serious free speech problems, especially under those justifications for freedom of speech that stress the interests of the recipient or the interests of society at large, rather than merely the interests of the speaker”).

²⁴⁷ *See id.* (arguing that such restrictions trigger First Amendment concerns because they could limit the audience that could consume said magazines or movies or result in publishers censoring their own content to ensure its wider reach).

²⁴⁸ ZECHARIAH CHAFEE JR., *FREEDOM OF SPEECH IN THE UNITED STATES* 540–41 (1954).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 541.

²⁵¹ 370 U.S. 478, 488 (1962) (citing *Butler v. Michigan*, 352 U.S. 380 (1957)).

²⁵² *See* 390 U.S. 676, 683–84 (1968) (invalidating a Dallas ordinance that fined movie distributors that failed to place notices on films deemed unsuitable for certain audiences).

²⁵³ *Id.* at 684.

the innocuous” for inclusion in their films.²⁵⁴ The Court therefore struck down the ordinance.²⁵⁵

But the Court has shown less concern for the leveling-down problem in cases where distributors could easily limit where their materials were sent. One example is the 1974 decision, *Hamling v. United States*, in which the Court upheld a conviction for the mailing of an obscene magazine.²⁵⁶ The Court held that the lack of a uniform national standard did not prejudice magazines that mailed subscriptions to different locales around the country.²⁵⁷ In dissent, Justice Brennan speculated that distributors would sanitize their materials to meet the most restrictive jurisdiction’s standards.²⁵⁸ He reasoned that it would be hard for distributors to determine varying and confusing standards all around the country, exposing them to costly, time-consuming litigation.²⁵⁹ The Court’s majority did not engage on the issue, presumably unmoved because national magazines have clear control over where they mail their publications.

The Court was more forthright with this reasoning in its 1989 opinion in *Sable Communications of California, Inc. v. FCC*. That decision upheld an FCC regulatory scheme that required national dial-a-porn operators to conform to the community standards of each of the states from which it received calls.²⁶⁰ The Court reasoned that the burden on Sable was insufficient to invalidate the scheme because the company was not forced to adopt the standard of the most restrictive state.²⁶¹ Instead, it could tailor its messages state-by-state with only moderate additional expenditures, such as by hiring an operator or by reaching an agreement with the telephone carrier to screen and block calls from states where the company’s content was illegal.²⁶²

How *Hamling* and *Sable* apply to internet communications, which can be more difficult to tailor state-by-state, remains uncertain. In its 1997 opinion in *Reno v. ACLU*, the Court noted in passing that applying a “community standards” approach “to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 690.

²⁵⁶ 418 U.S. 87, 91, 96–97 (1974).

²⁵⁷ *Id.* at 106.

²⁵⁸ *See id.* at 144 (Brennan, J., dissenting) (lamenting that distributors will have to conform to the standards of every locality in which they do business).

²⁵⁹ *Id.*

²⁶⁰ *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 122–25 (1989). The Court invalidated the regulation as it applied to indecent material while upholding the ban on “obscene interstate commercial telephone messages.” *Id.* at 117.

²⁶¹ *See id.* at 125–26 (emphasizing that Sable had the power to choose what content to include in its messages and what localities it wanted to serve).

²⁶² *Id.* at 125.

likely to be offended by the message.”²⁶³ The Court returned to the question but failed to resolve it in *Ashcroft v. ACLU*, a fractured 2002 decision concerning how unique features of the internet bear on the leveling-down problem.²⁶⁴ The Court held that the Child Online Protection Act’s application of community standards to the internet did not render it facially overbroad, based on circumstances particular to the law.²⁶⁵

Nevertheless, a majority of Justices across several opinions echoed *Reno*’s skepticism that community standards could constitutionally be applied to internet communications. That the sender had no control over where their materials were viewed proved a major sticking point for several Justices.²⁶⁶ For example, Justice Breyer noted in his partial concurrence that “[t]he technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious” and that “these special difficulties” distinguish internet cases from *Hamling* and *Sable*.²⁶⁷ Justice Kennedy similarly worried that a community standards test for national online distributors would force them to level down to the most restrictive state’s standard.²⁶⁸ He argued that “it is neither realistic nor beyond constitutional doubt for Congress, in effect, to impose the community standards of Maine or Mississippi on Las Vegas and New York.”²⁶⁹ Although the Court did not reach consensus on this point, the concerns raised by various Justices are consistent with leveling-down concerns found in earlier obscenity cases like *Interstate Circuit* and *Manual Enterprises, Inc.* Despite a longstanding lower court split in interpreting *Ashcroft*, the Court has not returned to the issue of whether a national standard is required to prevent online distributors from leveling down.²⁷⁰

²⁶³ 521 U.S. 844, 877–78 (1997).

²⁶⁴ 535 U.S. 564, 565–66, 577–79 (2002) (indicating that Parts I, II, and IV constituted a majority opinion, whereas Part III-B was supported by a plurality, and Parts III-A, III-C, and III-D received only minority support).

²⁶⁵ See *id.* at 577–79 (noting that the Child Online Protection Act applies to a narrow category of material, which counters the overbreadth challenge).

²⁶⁶ See *id.* at 565, 577–79 (noting how Justices O’Connor, Breyer, Kennedy, Souter, Ginsburg, and Stevens all wrote or joined opinions voicing doubts over the application of community standards to the internet).

²⁶⁷ *Id.* at 590–91 (Breyer, J., concurring in part and concurring in the judgment) (first citing *ACLU v. Reno*, 217 F.3d 162, 175–76 (3d Cir. 2000), *vacated*, *Ashcroft*, 535 U.S. 564 (2002); then citing *Sable Commc’ns of Cal., Inc.*, 492 U.S. 115; and then citing *Hamling v. United States*, 418 U.S. 87 (1974)).

²⁶⁸ *Id.* at 597 (Kennedy, J., concurring in the judgment).

²⁶⁹ *Id.*

²⁷⁰ Compare *United States v. Kilbride*, 584 F.3d 1240, 1253–54 (9th Cir. 2009) (concluding that “a national community standard must be applied in regulating obscene speech on the Internet” based on the reasoning of a majority of Justices across split opinions in *Ashcroft*), with *United States v. Little*, 365 F. App’x 159, 164 (11th Cir. 2010) (refusing to adopt *Kilbride* and instead applying community standards to internet communications).

3. Libel

Although less explicit in *New York Times Co. v. Sullivan*, the Court's groundbreaking 1964 libel decision, balkanization concerns can be gleaned from the context in which the case was decided.²⁷¹ The Court's opinion did not cut to the heart of the case: that Alabama sought to stymie a national newspaper's criticism of a state official for his failure to enforce the Constitution's guarantee of racial equality.²⁷² In *Sullivan*, the Court "play[ed] Hamlet with only oblique reference to the Prince of Denmark" by resolving the case without confronting "the substantial national political interest . . . being infringed" by Southern states.²⁷³ Yet the impact of that interest on the Court's decision is apparent.

Montgomery Police Commissioner L.B. Sullivan launched the litigation, suing four ministers and the *New York Times* over an advertisement the paper ran nationally.²⁷⁴ The advertisement sought funding for the defense of Martin Luther King Jr. and other Civil Rights advocates, and it contained various factual inaccuracies regarding police activity in Montgomery in response to Civil Rights activism.²⁷⁵ Some of the inaccuracies seemed quite minor—such as that King was arrested seven times instead of four—but they were no doubt inaccurate and unquestionably violated Alabama's libel law.²⁷⁶

So the Court constitutionalized wide swaths of libel law to protect the advertisement.²⁷⁷ It made major doctrinal changes: raising the mens rea standard for public official libel to recklessness, requiring a clear and convincing showing of recklessness, and allowing judicial review of constitutional facts.²⁷⁸ These innovations reflected a skepticism of state jurors, who had proved all too

²⁷¹ See generally 376 U.S. 254 (1964) (establishing the standard for libel of a public official).

²⁷² See BLACK, STRUCTURE, *supra* note 9, at 47 (emphasizing that *Sullivan* dealt with a factual situation of national import that colored the Court's opinion even without the Court's explicit reference).

²⁷³ See *id.* (explaining that his characterization applied to the Court's other Civil Rights era First Amendment decisions, including the 1963 case of *NAACP v. Button*, 371 U.S. 415 (1963)).

²⁷⁴ *Sullivan*, 376 U.S. at 256.

²⁷⁵ *Id.* at 257–58. For example, the ad incorrectly alleged that officers had ringed the campus and padlocked the dining hall at Alabama State University in response to students' protests at the State Capitol. *Id.* at 259.

²⁷⁶ *Id.* at 259, 263; see Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 200 (indicating that libel's defense of truth requires high levels of accuracy).

²⁷⁷ See HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 62–63 (Jamie Kalven ed., 1988) (outlining the impact of the *Sullivan* decision on libel law and free speech rights generally).

²⁷⁸ *Sullivan*, 376 U.S. at 279–80, 285–86.

likely to elevate local prejudices over national interests.²⁷⁹ In some of the most celebrated language in the First Amendment canon, the Court underscored the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”²⁸⁰

Commentators have long argued that Alabama’s ability to stifle national conversations about the need for federal legislation to address racial injustice drove the Court’s ambitious overhaul of libel law.²⁸¹ After all, the Court’s holding that the advertisement was not “of and concerning” Sullivan offered an independent ground for its decision and rendered needless the Court’s major reformation of libel law.²⁸² Moreover, the massive five hundred thousand dollar judgment—only one piece of a broader Southern litigation strategy against Northern media—left the clear impression that the state was acting maliciously to punish the paper for damning coverage.²⁸³

The real target of the lawsuit was “the American press as an agent of democratic change.”²⁸⁴ The *Times*’s Civil Rights coverage had galvanized national sentiment against segregation.²⁸⁵ It had facilitated the Civil Rights Movement’s activities in Southern states by inspiring donations and volunteer support from Northern audiences.²⁸⁶ There was little doubt the case was brought to intimidate and deter the press from covering the Civil Rights Movement.²⁸⁷

The concern about Alabama’s attempt to silence national criticism came through clearest in Justice Hugo Black’s concurrence.²⁸⁸ As an Alabama native

²⁷⁹ See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1280–81 (1992) (highlighting the benefit of a tenured judge, free from the pressure of public opinion). For commentary on the irony of this skepticism given that the First Amendment was originally intended to empower local juries to protect the freedom of speech, see Campbell, *supra* note 103, at 568–69.

²⁸⁰ *Sullivan*, 376 U.S. at 270 (first citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); and then citing *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

²⁸¹ See *infra* notes 282–287 and accompanying text.

²⁸² See *Sullivan*, 376 U.S. at 267, 289 (explaining that a finding that the libelous statement was “of and concerning” the plaintiff was necessary for liability to attach).

²⁸³ See ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 35 (1991) (explaining that another \$500,000 verdict in Alabama had already been entered against the *Times*, and that three more suits seeking similar amounts from the paper were pending). A similar strategy was waged against CBS, which was on the hook for \$1.5 million in damages. *Id.* at 36. For commentary on the Southern litigation strategy, see Christopher W. Schmidt, *New York Times v. Sullivan and the Legal Attack on the Civil Rights Movement*, 66 ALA. L. REV. 293, 305–06 (2014).

²⁸⁴ LEWIS, *supra* note 283, at 42.

²⁸⁵ See David A. Anderson, *Wechsler’s Triumph*, 66 ALA. L. REV. 229, 248 (2014) (positing that it is generally accepted that press coverage was essential to the Civil Rights Movement).

²⁸⁶ *Id.*

²⁸⁷ LEWIS, *supra* note 283, at 35.

²⁸⁸ See *Sullivan*, 376 U.S. at 294 (Black, J., concurring) (highlighting the serious threat that this case and its massive judgement imposed on national news media’s coverage of the Civil Rights Movement).

who represented the state in the Senate before joining the bench, Black was perhaps better positioned than the other members of the Court to address the elephant in the room.²⁸⁹ He noted that Alabama sought to punish “so-called ‘outside agitators,’ a term which can be made to fit papers like the *Times*, which is published in New York.”²⁹⁰ And he cited the five hundred thousand dollar verdict as “dramatic proof” that the case “threaten[ed] the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials.”²⁹¹

More specifically, the worry was that news organizations would level down to avoid such verdicts. A lack of uniformity could have dampened important national discourse by forcing the *Times* and other national papers to tamp down their coverage to avoid the most restrictive laws in the most hostile parts of the country. This result was intolerable because “[y]ou cannot have a democratic polity and a national debate about race when Alabama can shut down the *New York Times*’s or the national media’s coverage of the issue.”²⁹² In other words, Alabama’s censorship threatened to deprive the entire country of democratically pertinent information.²⁹³ *Sullivan* thus demonstrated how libel law “cries out for some uniformity” to protect nationwide distributors.²⁹⁴

Contemporary reports in local publications demonstrate the leveling-down threat the case posed.²⁹⁵ One local headline described the suit as a “For-

²⁸⁹ See generally VIRGINIA VAN DER VEER HAMILTON, *HUGO BLACK: THE ALABAMA YEARS* (1972) (discussing Justice Black’s early life and career in Alabama).

²⁹⁰ *Sullivan*, 376 U.S. at 294 (Black, J., concurring). The term carried a particular connotation in Montgomery, where three years earlier *Sullivan* had allowed Klan members to viciously beat out-of-state Freedom Riders unimpeded by police as the Riders departed their bus. In response to the ensuing national outcry that led the Department of Justice to file suit against the city, *Sullivan* had quipped: “We all sincerely regret that this happened here in Montgomery. It could have been avoided had outside agitators left us alone.” SAMANTHA BARBAS, *ACTUAL MALICE: CIVIL RIGHTS AND FREEDOM OF THE PRESS IN NEW YORK TIMES V. SULLIVAN* 138–39 (2023). Black’s use of the term encapsulated how the suit fit into the state’s larger attack on out-of-state criticism.

²⁹¹ *Sullivan*, 376 U.S. at 294 (Black, J., concurring).

²⁹² Akhil R. Amar, *Will the Brennan Legacy Endure?*, 43 N.Y.L. SCH. L. REV. 177, 190 (1999). But see Schmidt, *supra* note 283, at 325–33 (arguing that scholars have overestimated the impact of the South’s libel-law offensive against Northern publications on those papers’ ability to cover the Civil Rights Movement).

²⁹³ See Bollinger & Stone, *supra* note 9, at 9 (“[C]ensorship anywhere effectively became censorship everywhere.”).

²⁹⁴ See David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 553 (1991) (explaining that much speech in modern America is not solely intrastate); see also Daniel J. Hemel & Ariel Porat, *Free Speech and Cheap Talk*, 11 J. LEGAL ANALYSIS 46, 51 (2019) (noting that defamation law is ill-fitted for state-by-state experimentation because “the flow of individuals and information across jurisdictional lines potentially contaminates the results from defamation law ‘experiments’”).

²⁹⁵ See Anderson, *supra* note 285, at 248 (indicating that exorbitant libel verdicts likely had a chilling effect on coverage of Civil Rights issues); LEWIS, *supra* note 283, at 35.

midable Legal Club to Swing at Out-of-State Press.”²⁹⁶ The *Alabama Journal* wrote that the judgment would force “reckless publishers of the North . . . to make a re-survey of their habit of permitting anything detrimental to the South and its people to appear in their columns.”²⁹⁷ And Grover Hall Jr. of the *Montgomery Advertiser* admonished that “[t]he Republic paid a dear price once for the hysteria and mendacity of abolitionist agitators,” a reference to the publishers the South sought to silence in the Interbellum.²⁹⁸ Contemporary observers plainly understood that Alabama sought to dictate the terms of speech nationwide.

IV. APPLYING THE ANTI-BALKANIZATION PRINCIPLE

Fostering national discourse demands increased attention to balkanization because state-level restrictions on interstate channels are expanding rapidly. Explicitly incorporating balkanization concerns into free speech analysis can help shore up First Amendment doctrine against the risks posed by this expansion. Section A of this Part discusses how application of the anti-balkanization principle would help guide court discretion in cases dealing with regulation of interstate channels.²⁹⁹ As the previous Part demonstrates, the Supreme Court’s attention to two general concerns—fragmentation and leveling down—gives the anti-balkanization principle shape. The Court’s heightened sensitivity to these risks offers a framework for a more explicit assessment of balkanization threats. Section B of this Part then shows how an anti-balkanization principle would benefit First Amendment jurisprudence, using as a model state must-carry laws requiring social media platforms to host certain content.³⁰⁰ Such laws could impair platforms’ function as vital forums of interstate dialogue, and embracing the principle could help resolve these cases and others without foreclosing future regulation that advances national speech interests.

A. Anti-Balkanization’s Contours

The anti-balkanization principle would operate in the same way that other free speech principles do: as “strategic protection” against threats to First Amendment values.³⁰¹ Rather than displacing formal doctrine, free speech principles serve as guideposts meant to help inform judges’ decisions. Take the

²⁹⁶ LEWIS, *supra* note 283, at 35 (quoting the *Montgomery Advertiser*).

²⁹⁷ *Id.* at 34.

²⁹⁸ *Id.* at 11.

²⁹⁹ See *infra* notes 301–308 and accompanying text.

³⁰⁰ See *infra* notes 309–405 and accompanying text.

³⁰¹ See *Counterman v. Colorado*, 600 U.S. 66, 75 (2023) (explaining that certain “strategic protection[s]” (such as adding elements to a *prima facie* case) reduce the chilling effect of speech-restrictive causes of action, thus protecting First Amendment interests (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974))).

“chilling effect” principle, which “mandates the formulation of legal rules that reflect our preference for errors made in favor of free speech.”³⁰² Based on that principle, the Court recently held that true-threat analysis requires a subjective intent standard as well as an objective one.³⁰³ The principle thus provided instruction on calibrating true-threat doctrine to serve First Amendment goals.³⁰⁴

The Court has also relied on established principles in evaluating the legitimacy of governmental interests. It has “consistently vindicate[d]” the persuasion principle—the notion that “harmful consequences resulting from the persuasive effects of speech may not be any part of the justification for restricting speech.”³⁰⁵ Similarly, it has hewed to the anti-paternalism principle that “prevents the state from adopting an information-denying strategy to achieve what it thinks are citizens’ best interests.”³⁰⁶ These principles guide court discretion by limiting the universe of permissible state regulatory interests.³⁰⁷

The anti-balkanization principle would operate similarly, giving structure to the assessment of risks to interstate channels. More specifically, it would have courts explicitly consider how risks of fragmentation or leveling down might impact national discourse. This analysis would slot into the current doctrinal framework at the balancing stage, ensuring that otherwise valid state regulatory interests are measured against countervailing national speech interests. Finding that a law would substantially hamper national interests by fragmenting or leveling down an interstate channel would generally—although not necessarily—invalidate the law. The Court has at times employed this approach, as seen in cases like *Cousins v. Wigoda*; an anti-balkanization principle would systematize it.³⁰⁸

Explicit examination of balkanization risks to national discourse would add a structural component to First Amendment doctrine. An analytical focus solely on the individual rights of interstate channels overlooks the interests of

³⁰² Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 688 (1978).

³⁰³ See *Counterterm*, 600 U.S. at 72, 78–79 (holding that there must be sufficient evidence demonstrating that the defendant acted recklessly in true-threat cases).

³⁰⁴ See *id.* at 80 (balancing free speech interests and the need to protect against genuine threats through the lens of the chilling effect principle).

³⁰⁵ Strauss, *supra* note 18, at 335, 338.

³⁰⁶ See *Carpenter*, *supra* note 17, at 617 (listing anti-paternalism decisions).

³⁰⁷ See *id.* at 584 (indicating that the anti-paternalism principle is useful for determining whether the state’s purported interest in regulating speech is constitutionally appropriate).

³⁰⁸ See *supra* notes 190–221 and accompanying text (discussing *Cousins v. Wigoda*, 419 U.S. 477 (1975), in the freedom of association context); cf. *Trump v. Anderson*, No. 23-719, 2024 WL 899207, at *6 (U.S. Mar. 4, 2024) (rejecting state enforcement of § 3 of the Fourteenth Amendment because “[t]he ‘patchwork’ that would likely result from state enforcement would ‘sever the direct link that the Framers found so critical between the National Government and the people of the United States’ as a whole.” (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 (1995))).

speakers and listeners whom those channels serve. Interstate channels have enormous power over speech nationwide, and states might have strong justifications for checking abuses of that power that impair their residents' ability to speak or listen. Under current doctrine, courts face a dilemma in cases where such state justifications conflict with national interests—where protecting one state's residents comes at the cost of subverting other states' residents' ability to speak and listen. In these cases, accepting the state's interest as valid ignores serious harms to national discourse. But rejecting it as categorically invalid precludes the prospect of valuable regulation in future cases where state and national interests might align. The anti-balkanization principle offers a third option, one sensitive to both the primacy of national discourse and the substantial public interest in curbing unfettered private control over the public square.

B. Social Media “Must-Carry” Laws

The stakes of balkanization are perhaps highest when it comes to state regulation of social media platforms. Platforms are the modern public square, hosting interstate dialogue essential to national democracy.³⁰⁹ As the Court has acknowledged, “the most important places (in a spatial sense) for the exchange of views” in modern America are “the ‘vast democratic forums of the Internet’ in general, and social media in particular.”³¹⁰ Indeed, half of Americans now regularly get their news from social media platforms.³¹¹ Nationwide movements like Black Lives Matter and #MeToo started and grew on platforms.³¹²

³⁰⁹ There are, of course, differences between platforms and nominating conventions or newspapers. Floor debate over a party's presidential ticket or news coverage of mass political movements will often be more directly linked with self-governance than the average social media post, which is statistically likely to be apolitical. See Colleen McClain, *70% of U.S. Social Media Users Never or Rarely Post or Share About Political, Social Issues*, PEW RSCH. CTR. (May 4, 2021), <https://www.pewresearch.org/short-reads/2021/05/04/70-of-u-s-social-media-users-never-or-rarely-post-or-share-about-political-social-issues/> [<https://perma.cc/G3TE-REHD>] (reporting survey results that 74% of Republicans and 66% of Democrats almost never post political content on social media). But the fact that much content on platforms is not expressly political does not lessen the importance of platforms' role as forums for national discourse.

³¹⁰ *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (internal citation omitted) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

³¹¹ See *Social Media and News Fact Sheet*, PEW RSCH. CTR. (Nov. 15, 2023), <https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/> [<https://perma.cc/WEW3-Z272>] (indicating that 19% of adults often consume news on social media, and another 31% do so sometimes).

³¹² See, e.g., Jamillah Bowman Williams, Naomi Mezey & Lisa O. Singh, *#BlackLivesMatter—Getting from Contemporary Social Movements to Structural Change*, 12 CALIF. L. REV. ONLINE 1, 3, 14 (2021), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3405&context=facpub> [<https://perma.cc/34JP-N3DJ>] (describing how movements, such as #BlackLivesMatter, #MeToo, and #OccupyWallStreet, developed and grew online).

And marginalized communities use social media to forge connections, cultivate common identities, and advance group interests across state lines.³¹³

Greater sensitivity to balkanization threats would call for more concrete inquiries into how laws regulating platforms might interfere with the platforms' ability to function as forums for national discourse. Such laws potentially present an untenable choice between fragmenting vital interstate channels or allowing individual states "to make national internet policy."³¹⁴ Courts evaluating such laws should ask, for example, whether the laws would splinter the internet along state lines, breaking up the borderless conversation that defines social media. Raising these kinds of questions in doctrinal analysis would ensure a more informed evaluation of how state laws affect the national interest in robust nationwide dialogue.

Most of the recently enacted state laws regulating social media platforms have a clear balkanizing valence. Shutting Montana residents off from the rest of the country on TikTok triggers immediate balkanization warning bells. More complex are the must-carry provisions governing content moderation enacted by Florida and Texas. Unlike most state regulations of social media, they do not seek to shield residents from harmful content. The Texas and Florida laws differ in their particulars, but both serve the same basic purpose: preventing social media platforms from removing content or users because of viewpoint. In other words, the platforms must host speech they would otherwise take down.

Florida's law curtails platforms' ability to remove or lessen the visibility of posts by or about political candidates or by news organizations.³¹⁵ It also requires platforms to moderate content "in a consistent manner" and permits only one change to their relevant terms of service related to content moderation every thirty days.³¹⁶ And it mandates that platforms allow users a certain level of control over content moderation and give notice and an explanation if

³¹³ See, e.g., David L. Stamps, *Black Audiences' Identity-Focused Social Media Use, Group Vitality, and Consideration of Collective Action*, 99 JOURNALISM & MASS COMM'N Q. 660, 669 (2022) ("An increasing number of Black individuals utilize social media to build community, share group-based history and information, join coalitions, and each may contribute to forming and safeguarding racial identity."); Ellen Selkie et al., *Transgender Adolescents' Uses of Social Media for Social Support*, 66 J. ADOLESCENT HEALTH 275, 275 (2020) ("Social media platforms represent hubs of community for transgender adolescents. These communities provide emotional, appraisal, and informational support that transgender youth may not otherwise be able to access.").

³¹⁴ See Kate Klonick, Opinion, *The Future of Online Speech Shouldn't Belong to One Trump-Appointed Judge in Louisiana*, N.Y. TIMES (July 13, 2023), <https://www.nytimes.com/2023/07/13/opinion/federal-judge-biden-social-media.html> [<https://perma.cc/HF8S-FH3P>] (recognizing that states are moving to regulate social media platforms, albeit in vastly different manners, in the wake of Congress's failure to pass legislation).

³¹⁵ FLA. STAT. §§ 106.072(2), 501.2041(1)(c)–(h) (2023).

³¹⁶ *Id.* § 501.2041(2)(b)–(c).

a platform removes or restricts a user's content.³¹⁷ The Eleventh Circuit Court of Appeals held that these provisions violate the platforms' First Amendment rights of editorial discretion in their speech products.³¹⁸

The Fifth Circuit Court of Appeals came out the other way, upholding Texas's broader law against a First Amendment challenge.³¹⁹ That law forbids platforms to take action against any post based on a user's viewpoint, any viewpoint expressed in the post, or the user's location in Texas.³²⁰ It also requires notice and opportunity for an appeal whenever a platform removes or restricts a user's content.³²¹ The section applies to any users who live in Texas, conduct business in Texas, share expression with someone in Texas, or receive expression from someone in Texas.³²² Accordingly, the Texas law could govern a significant number of users outside the state.³²³ The law exempts a few categories of content, such as unlawful expression and certain material relating to sexual exploitation, but largely binds platforms' hands.³²⁴ The Court will decide the constitutionality of the content moderation provisions in Florida's and Texas's laws in its current term.³²⁵

Subsection 1 of this Section discusses the perils of platform balkanization that accompany patchwork laws on content moderation.³²⁶ Subsection 2 explains how an anti-balkanization principle is preferable to the approach taken by the Eleventh Circuit, which leaves interstate channels essentially immune from

³¹⁷ See *id.* § 501.2041(2)(d)–(g) (setting forth requirements for taking down a user's posts and requiring certain metrics to be disclosed upon request). The law also imposes other requirements not relevant here, such as disclosure requirements. For a discussion of the free speech implications of those requirements, see Daphne Keller, *Platform Transparency and the First Amendment*, 4 J. FREE SPEECH L. 1 (2023).

³¹⁸ *NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022), *cert. granted in part sub nom.* *Moody v. Netchoice, LLC*, 216 L. Ed. 2d 1313 (2023) (mem.), and *cert. denied sub nom.* *NetChoice, LLC v. Moody*, 144 S. Ct. 69 (2023) (mem.).

³¹⁹ See *NetChoice, LLC v. Paxton*, 49 F.4th 439, 450–69 (5th Cir. 2022) (reversing the district court's injunction), *cert. granted in part*, 216 L. Ed. 2d 1313 (2023) (mem.).

³²⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002(a) (West 2023). The term "expression" is defined as "any word, music, sound, still or moving image, number, or other perceivable communication." *Id.* § 143A.001(2).

³²¹ See TEX. BUS. & COM. CODE ANN. §§ 120.101–.104 (West 2023) (outlining the procedural complaint system required of social media platforms).

³²² TEX. CIV. PRAC. & REM. CODE ANN. § 143A.004(a)–(b).

³²³ See *id.*

³²⁴ See *id.* § 143A.006 (providing a list of exemptions from the statute's censorship ban).

³²⁵ The Court has already weighed in once on the case, vacating the Fifth Circuit's stay of the district court's ruling in the platforms' favor. See *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1715–16 (2022) (mem.). Justices Alito, Gorsuch, Thomas, and Kagan dissented from that order. *Id.* at 1716 (Alito, J., dissenting). As of March 2024, the Fifth Circuit's ruling against the platforms is stayed, pending the Court's decision on the merits. *Id.* at 1715–16 (majority order).

³²⁶ See *infra* notes 329–362 and accompanying text.

regulation.³²⁷ Subsection 3 considers how anti-balkanization goals might affirmatively support certain kinds of regulation that encourage national discourse.³²⁸

1. Platform Balkanization

The aforementioned laws pose many balkanization risks that should factor into First Amendment analysis.³²⁹ The platforms and amici raised these risks in challenging the laws before the Supreme Court and Fifth and Eleventh Circuits.³³⁰ Yet those courts gave no consideration to the possibility that a patchwork approach to content moderation could remake or even break the platforms.

One way they might have done so would have been in evaluating Texas's and Florida's proffered interests in their laws. The Supreme Court took this approach in *Cousins*, balancing "Illinois' interest in protecting the integrity of its electoral process" against the law's detriment to convention floor dialogue.³³¹ But, for example, the Fifth Circuit took no account of any countervailing national interest in the platforms' function as forums for national discourse in holding that Texas had an important interest "in protecting the free exchange of ideas and information in [Texas]."³³² The anti-balkanization principle would require such consideration: asking whether, as with the convention in *Cousins*, inconsistent laws could subvert the platforms' ability to host interstate exchanges of ideas.³³³ An assessment of Texas's interest would include

³²⁷ See *infra* notes 363–397 and accompanying text.

³²⁸ See *infra* notes 398–405 and accompanying text.

³²⁹ See, e.g., Mack DeGeurin, *We Could Soon Open a Pandora's Box of Impossible Speech Laws*, GIZMODO (Feb. 23, 2023), <https://gizmodo.com/texas-and-florida-bills-impossible-speech-laws-coming-1850115791> [<https://perma.cc/YX96-L4XK>] (quoting John Morris, the Principal of U.S. Internet Policy and Advocacy at the Internet Society, speculating that the laws "would undermine a core benefit of the Internet—that people can engage with a huge diversity of other people").

³³⁰ See, e.g., Brief for Respondents at 32–33, *NetChoice, LLC, v. Moody*, 144 S. Ct. 69 (2023) (mem.) (No. 22-277) (indicating that thirty-four jurisdictions introduced social media regulations, which pose significant balkanization risks for the internet); Brief of Amici Curiae Floor64, Inc., in Support of Plaintiffs-Appellees at 29–31, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178) (discussing the internet's susceptibility to balkanization because of its inherent interstate nature, and the subsequent "race to the bottom" that would occur as additional states pass regulations).

³³¹ See *Cousins v. Wigoda*, 419 U.S. 477, 489–91 (1975) (noting that the national interest in the successful selection of presidential nominees exceeded Illinois' interest in determining how convention delegates were selected).

³³² *Paxton*, 49 F.4th at 482 (quoting HB 20's legislative findings). Although the panel found that the laws do not trigger the First Amendment, it conducted an intermediate scrutiny analysis as an alternative argument and found that the law satisfied it. See *id.* at 482–85 (holding that the law did not suppress speech and that the Texas legislature was not motivated by improper interests).

³³³ See *Cousins*, 419 U.S. at 490–91 (emphasizing that the law in question would impact key aspects of the convention—resolving internal disputes and promoting cross-state dialogue to facilitate nominee selection).

determining whether its law would undermine the “pervasive national interest” in protecting platforms as sites of conversations that propel democracy.³³⁴

There is reason to think that an examination of the Texas and Florida laws would show that they undercut social media platforms’ ability to host and maintain interstate dialogue. As experts note, a “central feature[]” of platforms is that they “offer a single product experience across state borders, and users are able to send and receive information seamlessly from one place to another.”³³⁵ Fragmentation is thus a major concern. A patchwork approach to regulating content moderation could balkanize the experience of being online because Texas’s and Florida’s laws could establish different versions of the internet in different states.³³⁶

Using Twitter or TikTok in California might look dramatically different in Texas.³³⁷ In states with must-carry laws, feeds would be inundated with material currently heavily moderated by platforms: racism, violence, Holocaust denial, advocacy of suicide and anorexia, bullying, etc.³³⁸ This content could come to dominate feeds in states like Texas that bar platforms from moderating based on viewpoint. Meanwhile, in other states, moderation practices would remain largely the same, with platforms removing or deprioritizing users and content that violate their standards.³³⁹

³³⁴ See *id.* (identifying the convention’s role of selecting executive office candidates as a “pervasive national interest”).

³³⁵ Brennen et al., *supra* note 22.

³³⁶ See, e.g., Jonathan Chang & Kimberly Atkins Stohr, *How a Texas Law Could Impact First Amendment Rights and Content Moderation Online*, WBUR (Sept. 30, 2022), <https://www.wbur.org/onpoint/2022/09/30/how-a-texas-law-could-impact-first-amendment-rights-and-content-moderation-online> [<https://perma.cc/CSW4-5FZF>] (quoting Professor Alan Rozenshtein of University of Minnesota Law School) (“[I]t’s not clear how you could have a patchwork system of state regulations on these big platforms [T]here’s no obvious way for platforms to run different moderation systems for different users without potentially breaking up the platforms into state-based versions, or possibly even having the platforms just withdraw from some jurisdictions.”).

³³⁷ See Meghan McCarty Carino & Daniel Shin, *How Two Cases Headed to the Supreme Court Could Change the Internet*, MARKETPLACE (Jan. 27, 2023), <https://www.marketplace.org/shows/marketplace-tech/how-two-cases-headed-to-the-supreme-court-could-change-the-internet/> [<https://perma.cc/2UYF-XXDN>] (quoting Daphne Keller, Director of the Program on Platform Regulation at Stanford’s Cyber Policy Center) (“[I]f we really did have a world where states can make laws like this, we would have a profoundly different internet, because platforms would have to apply different speech rules in different states.”).

³³⁸ See Daphne Keller, *Lawful but Awful? Control Over Legal Speech by Platforms, Governments, and Internet Users*, U. CHI. L. REV. ONLINE (June 28, 2022), <https://lawreviewblog.uchicago.edu/2022/06/28/keller-control-over-speech/> [<https://perma.cc/7ENQ-TGMY>] (noting that legislators often mistakenly assume that offensive speech is unlawful, meaning that must-carry laws are often overinclusive).

³³⁹ See Charlie Warzel, *Is This the Beginning of the End of the Internet?*, THE ATLANTIC (Sept. 28, 2022), <https://www.theatlantic.com/ideas/archive/2022/09/netchoice-paxton-first-amendment-social-media-content-moderation/671574/> [<https://perma.cc/9LW5-SYMZ>] (quoting Mike Masnick,

The everyday experience of using social media could therefore differ radically depending on where one logs in.³⁴⁰ The difference would become more pronounced nationwide if, as expected, more states adopt laws in line with Texas and Florida.³⁴¹ This prospect raises obvious balkanization concerns.³⁴² The platforms' utility as hosts of interstate dialogue depends on a shared common experience across state lines; that utility will be decimated if feeds vary drastically across states.³⁴³ As one commentator puts it, Americans would "have to decide whether they want to live on a red internet, or a blue one."³⁴⁴

More dramatically, Texas's and Florida's laws might render platforms incapable of operation in their current forms. The platforms have argued that creating different content moderation protocols for different states is technologically impossible.³⁴⁵ One complicating issue concerns the limits of geolocation technology, which platforms would presumably use to implement the laws. Such technology poses particular difficulties for mobile applications.³⁴⁶ A declarant for Facebook stated in the Texas case that the platform "would not be able to change systems in that nature" and would thus be unable "to go for-

CEO of Floor64, observing that the laws would create "potential situations where companies would have to say, '[o]kay, we're kicking off this neo-Nazi, but he's allowed to stay on in Texas'").

³⁴⁰ See *Don't Let Texas Break the Internet, TechFreedom Urges Supreme Court*, TECHFREEDOM (May 18, 2022), <https://techfreedom.org/dont-let-texas-break-the-internet-techfreedom-urges-supreme-court/> [<https://perma.cc/4HMJ-UHDT>] (quoting Corbin K. Barthold, Director of Appellate Litigation at TechFreedom) ("If HB 20 is left to stand . . . this much is clear: it will end with the Internet fragmenting into a patchwork of different state-by-state experiences.").

³⁴¹ See *The Speech Police Are Coming for Social Media*, THE ECONOMIST (May 29, 2023), <https://www.economist.com/international/2023/05/29/the-speech-police-are-coming-for-social-media> [<https://perma.cc/8KMX-C2D3>] (quoting Professor Evelyn Douek of Stanford Law School) ("If the Court opens up the door to regulation in this space, many [states] will jump at the opportunity.").

³⁴² Cf. Mark A. Lemley, *The Splinternet*, 70 DUKE L.J. 1397, 1399 (2021) ("The balkanization of the internet is a bad thing, and we should stop it if we can.").

³⁴³ See, e.g., Kern, *supra* note 4 (quoting Professor Jeff Kosseff) ("When you step back and look at the possibility of having 50 different state laws on content moderation—some of which might differ or might conflict—that becomes a complete disaster."); Chang & Stohr, *supra* note 336 (worrying that convoluted, patchwork regulations would cause platforms to pull out of certain states altogether).

³⁴⁴ Casey Newton, *State Tech Laws Are Dividing the Internet into Blue and Red*, PLATFORMER (Apr. 17, 2023), <https://www.platformer.news/p/state-tech-laws-are-dividing-the> [<https://perma.cc/3FSR-FDWH>].

³⁴⁵ See Brief of Appellees at 56, *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178) (noting that the trial court determined that legal compliance could be impossible).

³⁴⁶ Cf. Goldsmith & Volokh, *supra* note 90, at 1086 (arguing that the constitutionality of state regulation of social media platforms should turn on reasonable efforts at using geolocation to vary services by state, even if such technology is imperfect). Effective geo-blocking requires access to a mobile phone's GPS location—information typically not accessed by mobile applications and violative of user privacy. Moderated Content, *MC Weekly Update 4/17: TikTok Boom!*, STAN. L. SCH. (Apr. 18, 2023), <https://law.stanford.edu/podcasts/mc-weekly-update-4-17-tiktok-boom/> [<https://perma.cc/ATW7-EGDT>]. Accordingly, to utilize functional geo-blocking, mobile applications must write significant amounts of new code and subsequently minimize user privacy. *Id.*

ward with compliance in a meaningful way.”³⁴⁷ The platforms have voiced this concern publicly as well.³⁴⁸

The Fifth and Eleventh Circuits also gave no consideration to the leveling-down risks posed by the laws. In the face of daunting compliance issues, platforms might adopt Texas’s and Florida’s must-carry requirements nationwide. Experts have cautioned that even if a patchwork approach to social media regulation is technically possible, it would be practically infeasible.³⁴⁹ And there is much precedent for platforms simply opting to moderate more or less content when doing so would let them avoid expensive or complicated regulatory burdens.³⁵⁰

Texas’s and Florida’s laws present a nuanced leveling-down question because they are arguably speech-enhancing.³⁵¹ Consequently, the platforms would be leveling up rather than leveling down because they would be hosting speech that they currently remove. As more speech is generally better under the First Amendment, leveling up might not raise the same free speech worries as leveling down.³⁵²

But adopting Texas’s and Florida’s laws nationwide may not in fact lead to more speech on platforms. Under a must-carry regime, platforms counterintuitively might end up moderating much more content than they otherwise

³⁴⁷ Brief of Appellees, *supra* note 345, at 56.

³⁴⁸ See Elizabeth Dwoskin, *Tech Companies Are Gaming Out Responses to the Texas Social Media Law*, WASH. POST (Oct. 1, 2022), <https://www.washingtonpost.com/technology/2022/10/01/texas-social-media-impact/> [<https://perma.cc/UK8-LG6K>] (quoting Carl Szabo, Vice President and General Counsel for plaintiff NetChoice) (contending that “what Texas and Florida are essentially doing is asking platforms to square a circle”).

³⁴⁹ See, e.g., Keller, *supra* note 338 (“Platforms can in principle try to restrict speech based on a speaker’s or reader’s geographic location. Such geotargeting isn’t perfect, though, and it won’t help if state laws claim extraterritorial effect—as Texas’s does, granting rights to anyone who ‘does business’ in the state. The disruptions, logistical snarls, and uncertainty of this fifty-state solution would be a meaningful problem, and not just for platforms.”).

³⁵⁰ See, e.g., Kelvin Chan, *Europe’s Sweeping Rules for Tech Giants Have Kicked In. Here’s How They Work*, ASSOCIATED PRESS, <https://apnews.com/article/digital-services-act-social-media-regulation-europe-26d76cc4785df1153669258766cc6387> [<https://perma.cc/YE9N-3FNN>] (Aug. 25, 2023) (noting that American platforms including Wikipedia and Snapchat have made global policy changes related to content moderation in response to Europe’s Digital Services Act).

³⁵¹ See *NetChoice, LLC v. Att’y Gen. of Fla.*, 34 F.4th 1196, 1205–07 (11th Cir. 2022), *cert. granted in part sub nom. Moody v. NetChoice, LLC*, 216 L. Ed. 2d 1313 (2023) (mem.), and *cert. denied sub nom. NetChoice, LLC v. Moody*, 144 S. Ct. 69 (2023) (mem.); *NetChoice, LLC v. Paxton*, 49 F.4th 439, 445–46 (5th Cir. 2022), *cert. granted in part*, 216 L. Ed. 2d 1313 (2023) (mem.); see also *Interstate Cir., Inc. v. City of Dallas*, 390 U.S. 676, 683–84 (1968) (discussing leveling down in the context of filmmaking as triggering stronger free speech interests than if the leveling-down question were not implicated).

³⁵² See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (stating that the appropriate counter to nefarious speech is contrary speech, such that legislative speech restrictions should be reserved for serious circumstances).

would.³⁵³ For example, platforms required to moderate in a viewpoint-neutral manner may take down all discussion of racism if their only other option is to host pro-racist content in addition to anti-racist content.³⁵⁴ Financial incentives might well require them to do so, as advertisers (whose revenue drives most platforms' business models) are unlikely to willingly associate their brands with discriminatory or otherwise repulsive content.³⁵⁵ The laws could thus empower individual states to remove all discussion of the nation's most pressing issues from key interstate forums, an outcome at odds with cases like *Bigelow*,³⁵⁶ *Interstate Circuit*,³⁵⁷ and *Sullivan*.³⁵⁸

And even if the laws do not lead to less speech on platforms in an absolute sense, they could unilaterally refashion platform discourse in a manner that constricts the diversity of online viewpoints. Empirical research suggests that much of the speech that Texas's and Florida's laws would force back onto platforms would drive away other speech.³⁵⁹ For example, studies have shown

³⁵³ See Kyle Langvardt & Alan Z. Rozenshtein, *The Government's First Amendment Interest in Ensuring Free Expression on Private Platforms*, LAWFARE (Sept. 11, 2023), <https://www.lawfaremedia.org/article/the-government-s-first-amendment-interest-in-ensuring-free-expression-on-private-platforms> [<https://perma.cc/M5ET-PHW2>] (examining potential outcomes of poorly drafted legislation, such as a platform's use of categorical bans, litigation forcing moderation, and user exodus based on diminished customer experience).

³⁵⁴ See *id.* (noting that categorical bans may satisfy viewpoint-neutrality mandates).

³⁵⁵ Greg McFarlane, *How Facebook (Meta), X Corp (Twitter), Social Media Make Money from You*, INVESTOPEDIA, <https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twttr-lnkcd-fb-goog.aspx> [<https://perma.cc/2X22-CAGJ>] (Dec. 2, 2022); see Marimow & Zakrzewski, *supra* note 25 (expressing concern that unmoderated offensive speech on platforms could drive advertisers away).

³⁵⁶ See *Bigelow v. Virginia*, 421 U.S. 809, 828–29 (1975) (holding that Virginia could not outlaw newspaper advertisements for abortion services that were legal in another state, as the Court was concerned that upholding such a law might empower Virginia to engage in national censorship).

³⁵⁷ See *Interstate Cir., Inc. v. City of Dallas*, 390 U.S. 676, 683–84 (1968) (expressing concern over the serious leveling-down risks posed by the proliferation of film classification regulations).

³⁵⁸ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 294 (1964) (Black, J., concurring) (opining that unchecked libel law is hostile toward the media's ability to disseminate competing viewpoints and act as a check on politicians).

³⁵⁹ See, e.g., ACTALLIANCE, DANCHURCHAID, ONLINE HARASSMENT AND CENSORSHIP OF WOMEN HUMAN RIGHTS DEFENDERS 15 (Feb. 2023), <https://www.noedhjaelp.dk/wp-content/uploads/sites/2/2023/03/dca-onlineharassmentandcensorship-report-2023-web.pdf> [<https://perma.cc/7Q6V-5986>] (“Out of the 356 surveyed women above 18 years of age, 148 of them had experienced cyberviolence within the past year. 18% of those exposed had withdrawn from social media as a result.”); KIRSTEN ZEITER, SANDRA PEPERA & MOLLY MIDDLEHURST, NAT’L DEMOCRATIC INST., TWEETS THAT CHILL: ANALYZING ONLINE VIOLENCE AGAINST WOMEN IN POLITICS 4 (2019), <https://www.ndi.org/sites/default/files/NDI%20Tweets%20That%20Chill%20Report.pdf> [<https://perma.cc/XL92-TATC>] (“[T]he digital world has also become a forum for disinformation, hate speech, abuse, and harassment targeting politically-active women. This online violence against women in politics . . . creates a hostile environment that causes women to self-censor, be silent, or otherwise withdraw from online political discourse.”); Ruogu Kang, Laura Dabbish & Katherine Sutton, *Strangers on Your Phone: Why People Use Anonymous Communication Applications*, 19 ACM CONF. ON COMPUT.-

that exposure to hate speech causes users to leave social media, particularly users from marginalized communities.³⁶⁰ By forcing users in all states to see content they would rather avoid, the laws might be less speech-enhancing than speaker-discriminating. If so, it would be detrimental to national discourse to permit Texas and Florida to deprive users nationwide of the choice to engage in the type of curated discussion they might prefer.

Taking stock of fragmentation and leveling-down risks posed by Texas's and Florida's laws requires recognition of the obvious: Texans and Floridians are Americans, too. As national citizens, they enjoy the political and cultural benefits of national discourse. It is difficult to see how Texas would be advancing Texans' freedom of speech if its law undermined all Texans' ability to discuss pressing issues on social media. Notwithstanding this concern, the state's interest in promoting free speech within its borders would not justify undercutting free speech nationwide. Such an outcome would create a regime in which other states could set national speech policy in manners detrimental to Texans.

This is not to say that consideration of national interests automatically tilts the First Amendment analysis in the platforms' favor. Questions about how much feeds would vary by state and about platforms' ability to implement laws are deeply empirical. State-by-state differentiation could prove minimal and feasible. To avoid a balkanized online experience, platforms might have the technical capacity to allow users in all states to opt into content moderation practices, giving users the choice to restore a uniform interstate feed.³⁶¹ Texas's law permits users to voluntarily select the platforms' moderated version, which could lessen the law's balkanization threat.³⁶² And to avoid thorny problems related to geolocation technology, platforms could peg content moderation to physical addresses provided by users. Fidelity to an anti-balkanization principle would require courts to make context-specific factual findings such as these in weighing risks to national discourse.

SUPPORTED COOP. WORK & SOC. COMPUTING 359, 367 (2016), <https://dl.acm.org/doi/pdf/10.1145/2818048.2820081> [<https://perma.cc/74M3-C2DK>] ("However, vulgarity, explicit sexual language, spam, and harsh replies showed some negative effects on the community. Sometimes these types of content made people leave the app.").

³⁶⁰ ACTALLIANCE, *supra* note 359, at 15; ZEITER ET AL., *supra* note 359, at 4; Kang et al., *supra* note 359, at 367; *see also* Alexandra A. Siegel, *Online Hate Speech* (listing the numerous impacts of internet hate speech on marginalized groups), in *SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD AND PROSPECTS FOR REFORM* 56, 68 (Nathaniel Persily & Joshua A. Tucker eds., 2020).

³⁶¹ *See* Dwoskin, *supra* note 348 (detailing different compliance methods that platforms have considered).

³⁶² *See* TEX. CIV. PRAC. & REM. CODE ANN. § 143A.006(b) (West 2023) (authorizing users to permit content moderation by platforms).

2. The Limits of Absolute Platform Autonomy

The Eleventh Circuit took a blunter approach in striking down Florida's law. It categorically rejected any governmental interest in legislation that encroaches on platforms' editorial function for the purpose of enhancing users' speech interests.³⁶³ The Supreme Court has granted similarly expansive protection to certain other types of interstate channels, such as newspapers. In 1974, the Court in *Tornillo* struck down Florida's right-of-reply statute despite the Florida Supreme Court's holding that the law furthered the "broad societal interest in the free flow of information to the public."³⁶⁴ The Supreme Court held that newspapers enjoy unbridled autonomy in matters of editorial discretion, including what material to include in publications.³⁶⁵ Giving platforms analogous total control over content moderation decisions would insulate them from laws like Texas's and Florida's without need for reference to an anti-balkanization principle.

But categorically barring the government from regulating speech on platforms jeopardizes important First Amendment goals. As forums for national discourse, platforms fulfill a different role than instrumentalities like newspapers: they are a space where all voices can be heard on (more or less) equal terms, not a "coherent speech product" designed primarily to convey a publisher's particular message.³⁶⁶ This distinction justifies differences in regulatory flexibility. Platforms' unchecked private power to exclude viewpoints from national conversation poses genuine threats to a robust system of free expression. Scholars have long argued that First Amendment doctrine should be sensitive to such threats.³⁶⁷ The anti-balkanization principle would give courts the

³⁶³ *NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1228–29 (11th Cir. 2022), *cert. granted in part sub nom.* *Moody v. NetChoice, LLC*, 216 L. Ed. 2d 1313 (2023) (mem.), and *cert. denied sub nom.* *NetChoice, LLC v. Moody*, 144 S. Ct. 69 (2023) (mem.). *But see* Rebecca J. Hamilton, *Platform-Enabled Crimes: Pluralizing Accountability When Social Media Companies Enable Perpetrators to Commit Atrocities*, 63 B.C. L. REV. 1349, 1352, 1363–66 (2022) (arguing in favor of legal accountability for platforms that enable crimes by failing to adequately moderate content, as well as by utilizing an algorithm that pushes inflammatory content).

³⁶⁴ *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244–45, 258 (1974) (quoting *Tornillo v. Mia. Herald Publ'g Co.*, 287 So. 2d 78, 82 (Fla. 1973), *rev'd*, 418 U.S. 241).

³⁶⁵ *Id.* at 258.

³⁶⁶ Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 405–06 (2021).

³⁶⁷ *See, e.g.*, Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1423 (1986) (arguing that the dominant autonomy-centric conception of free speech "ignores the manifold ways that the state participates in the construction of all things social and how contemporary social structure will, if left to itself, skew public debate"); Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1318–22 (2020) (critiquing "the Court's increasing tendency . . . to construe the First Amendment as a grant to speakers of almost-absolute freedom to use the expressive resources that they happen to possess or control for whatever purposes they desire").

doctrinal tools necessary for preserving national discourse while leaving room for regulations that promote a cohesive and pluralistic public square.

There is a precedential foundation for such sensitivity. In the realm of broadcasting, the Court has upheld regulations similar to the statute it struck down in *Tornillo*—most notably a must-carry law aimed at cable providers.³⁶⁸ In two opinions in 1994 (*Turner I*) and 1997 (*Turner II*) in *Turner Broadcasting System, Inc. v. FCC*, the Court approved a federal law that required cable providers to devote channels to local broadcast stations.³⁶⁹ The law's effect was to force national providers to show some different content in different states.³⁷⁰ Because the law was aimed at mitigating cable companies' unfair competition practices rather than forcing the companies to carry any particular content, the law itself was content-neutral and thus subject to intermediate scrutiny.³⁷¹ The Court held in both *Turner I* and *Turner II* that Congress passed the law to advance important interests, including one in "promoting the widespread dissemination of information from a multiplicity of sources."³⁷² This interest alone was sufficiently important to justify the law.³⁷³ And the Court found that the law's impact on cable providers was minimal because it involved only a few channels—a tiny fraction of cable providers' programming bandwidth.³⁷⁴ The law thus served local speech interests without posing a serious risk to national discourse.

The Eleventh Circuit's opinion striking down Florida's must-carry law treated platforms like newspapers rather than like cable providers. The court held that platforms have absolute autonomy in their content moderation decisions. It found that Florida lacked any legitimate interest in protecting politicians' and journalists' access to social media because the platforms are privately owned.³⁷⁵ And it deemed the platforms' control over content moderation

³⁶⁸ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 372, 390 (1969) (valuing viewers' and consumers' access to information over broadcasters' editorial discretion); see also *Tornillo*, 418 U.S. at 244 (discussing the right-of-reply statute).

³⁶⁹ *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 185 (1997); *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 626–27, 668 (1994) (upholding the law against a facial challenge but remanding it for further development of the factual record).

³⁷⁰ See *Turner I*, 512 U.S. at 630–32 (explaining the must-carry law at issue).

³⁷¹ *Id.* at 652, 662.

³⁷² *Id.* at 662–63; *Turner II*, 520 U.S. at 189–90.

³⁷³ See *Turner II*, 520 U.S. at 189–90 (listing the government's three interests and noting that the Court "decided [in *Turner I*], and now reaffirm[s], that *each* of those is an important governmental interest") (emphasis added).

³⁷⁴ See *id.* at 214 (noting that only approximately 5.5% of cable carriers had to drop a program to comply with the must-carry requirements).

³⁷⁵ See *NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1228 (11th Cir. 2022) (holding also that social media platforms are not gatekeepers of information in the same way that cable broadcasters are), *cert. granted in part sub nom.* *Moody v. NetChoice, LLC*, 216 L. Ed. 2d 1313 (2023) (mem.), and *cert. denied sub nom.* *NetChoice, LLC v. Moody*, 144 S. Ct. 69 (2023) (mem.).

decisions impervious to regulation, based largely on the Supreme Court's pronouncement in *Buckley v. Valeo* in 1976 that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."³⁷⁶ The Eleventh Circuit reasoned that platforms' editorial rights could not be restricted regardless of whether they might unfairly limit access to national discourse: "Put simply," it wrote, "there's no legitimate—let alone substantial—governmental interest in leveling the expressive playing field."³⁷⁷

This reasoning is difficult to reconcile with *Turner I* and *Turner II*'s recognition of a substantial governmental interest in "promoting the widespread dissemination of information from a multiplicity of sources."³⁷⁸ That interest was precisely one of leveling the playing field. The government restricted cable providers' speech rights by forcing them to carry local broadcast stations to preserve the valuable speech of those local stations.³⁷⁹ Its aim was clearly consistent with First Amendment values.

The Eleventh Circuit distinguished *Turner I* on the grounds that the decision turned on the cable companies' gatekeeping role over programming appearing on subscribers' televisions.³⁸⁰ Because the cable companies own the cable networks that transmit programming to the subscribers' televisions, they have virtually total control over programming access.³⁸¹ The Eleventh Circuit emphasized that social media platforms lack such control.³⁸² It found that Florida's law advanced no substantial interest because political candidates and journalists have alternative ways to communicate with the public, like, *inter alia*, personal websites, television, and email.³⁸³ And it deemed irrelevant the prospect that these alternatives might be less effective channels than social

³⁷⁶ *Id.* (citation omitted); *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

³⁷⁷ *NetChoice, LLC*, 34 F.4th at 1228. "At the end of the day, preventing 'unfair[ness]' to certain users or points of view isn't a substantial governmental interest; rather, private actors have a First Amendment right to be 'unfair'—which is to say, a right to have and express their own points of view." *Id.* (quoting *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

³⁷⁸ See *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 662 (1994) (listing the three government interests the must-carry law served); *Turner II*, 520 U.S. at 189–90 (reaffirming the three government interests the must-carry law served).

³⁷⁹ See *Turner I*, 512 U.S. at 630–32, 634 (detailing the must-carry laws and their goal of correcting the broadcast industry's anti-competitive behavior that reduced access to free local channels).

³⁸⁰ *NetChoice, LLC*, 34 F.4th at 1228 (citing *Turner I*, 513 U.S. at 623). Florida did not argue that its law would survive heightened scrutiny, so the Eleventh Circuit undertook its analysis without the benefit of briefing. See *id.* (indicating that Florida's argument rested entirely on its claim that the law does not implicate the First Amendment).

³⁸¹ *Turner I*, 512 U.S. at 656.

³⁸² *NetChoice, LLC*, 34 F.4th at 1228 (citing *Turner I*, 513 U.S. at 623).

³⁸³ *Id.*

media platforms for the dissemination of speech.³⁸⁴ It found wholly invalid any interest Florida might have in ensuring widespread access to politicians' and journalists' speech, or in "leveling the expressive playing field," because Florida sought to curtail platforms' editorial discretion.³⁸⁵

But this cribbed reading of *Turner I* is incompatible with the Court's reasoning in the *Turner* decisions. The Court plainly held in both cases that cable providers' editorial discretion rights were not absolute. It made clear that the governmental interest in ensuring a broad range of voices in national discourse is a "purpose of the highest order, for it promotes values central to the First Amendment."³⁸⁶ It underscored that access to diverse information "has long been a basic tenet of national communications policy."³⁸⁷ And it concluded that Congress had legitimate reason to impose a must-carry mandate simply because broadcast is "an important source of information to many Americans," and even "[t]hough it is but one of many means for communication."³⁸⁸

The Court's logic was not limited to cable providers' bottleneck control over access to television stations. In *Turner II*, the Court explicitly rejected the dissent's argument that the only legitimate interest Congress could have in its law was the prevention of anti-competitive behavior stemming from cable providers' bottleneck control.³⁸⁹ The Court also dismissed as inadequate an alternative regulatory proposal targeted directly at the bottleneck problem because that proposal insufficiently served Congress's broader goal of ensuring access for all viewers to diverse sources of information.³⁹⁰

Justice Breyer's concurrence in *Turner II* is telling on this point. He provided the fifth vote in holding that the government's access-to-diverse-information interest was sufficiently important to justify the regulatory

³⁸⁴ See *id.* at 1228–29 (stating that even if these other channels are not as "effective" as social media, Florida still did not maintain a "substantial (or even legitimate) interest" in limiting the ability of platforms to moderate content).

³⁸⁵ See *id.* at 1228.

³⁸⁶ *Turner I*, 512 U.S. at 663; see *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 190 (1997) (citation omitted).

³⁸⁷ *Turner I*, 512 U.S. at 663 (citations omitted); *Turner II*, 520 U.S. at 192 (citations omitted).

³⁸⁸ *Turner II*, 520 U.S. at 194 (first citing *Turner I*, 512 U.S. at 663; and then citing *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 783 (1978)).

³⁸⁹ *Id.* (citations omitted).

The dissent proceeds on the assumption that must-carry is designed solely to be (and can only be justified as) a measure to protect broadcasters from cable operators' anti-competitive behavior. Federal policy, however, has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation.

Id. (citation omitted).

³⁹⁰ *Id.* at 221.

scheme.³⁹¹ And he expressly refused to join the Court's opinion insofar as it turned on anti-competitive behavior, leaving that interest with the support of only a plurality of the *Turner II* Court.³⁹² As he explained, the regulatory scheme "extract[ed] a serious First Amendment price" by suppressing cable companies' speech.³⁹³ Nonetheless, because the policy sought "to facilitate the public discussion and informed deliberation, which . . . democratic government presupposes and the First Amendment seeks to achieve," the price was worth paying.³⁹⁴ Broadcast television is "an essential part of the national discourse," so the government could restrict the voices of cable providers in order to ensure that more voices were heard.³⁹⁵

The Eleventh Circuit's blanket rejection of Florida's interest is troubling in light of the *Turner* decisions. The problem with Florida's law is not that it mandates that social media platforms advance the speech and listening interests of users, but that it risks undermining platforms' key interstate function of facilitating national discourse to the detriment of users everywhere. The Eleventh Circuit's reasoning would forbid even targeted legislation that vindicates central free speech values without risking severe balkanization—legislation that, like that at issue in the *Turner* cases, implicates only a narrow band of speech.³⁹⁶ That might include, for example, a narrower version of Florida's law that procedurally limited platforms' ability to remove posts by candidates for office in a short window prior to an election.³⁹⁷ The anti-balkanization principle would allow courts to avoid the pitfalls of the Eleventh Circuit's absolutist approach. It would give courts flexibility to protect national discourse without

³⁹¹ *Id.* at 226 (Breyer, J., concurring in part).

³⁹² *Id.* at 225; *see id.* at 184 (syllabus) (indicating that Justices Rehnquist, Stevens, Souter, and Kennedy formed the plurality).

³⁹³ *Id.* at 226 (Breyer, J., concurring).

³⁹⁴ *Id.* at 227 (citing *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)).

³⁹⁵ *See id.* at 194, 224–25 (majority opinion).

³⁹⁶ *See NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196, 1228–29 (11th Cir. 2022) (finding no compelling state interest in facilitating the spread of diverse information or in expanding the speech rights of many by restricting the speech rights of some), *cert. granted in part sub nom. Moody v. NetChoice, LLC*, 216 L. Ed. 2d 1313 (2023) (mem.), and *cert. denied sub nom. NetChoice, LLC v. Moody*, 144 S. Ct. 69 (2023) (mem.); *Turner II*, 520 U.S. at 185 (concerning cable broadcasting); *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 626 (1994) (same); Langvardt & Rozenshtein, *supra* note 353 ("This view stacks the deck so heavily in favor of the platforms that virtually no direct regulation of platform moderation decisions could ever be constitutional.").

³⁹⁷ Justin Hendrix, *Experts Debate Social Media and the First Amendment*, TECH POL'Y PRESS (Sept. 27, 2023), <https://techpolicy.press/experts-debate-social-media-and-the-first-amendment/> [<https://perma.cc/9SRE-ETAA>] (quoting Jameel Jaffer, Executive Director of the Knight First Amendment Institute at Columbia University) ("[T]he best version of the Florida law would say, 'A couple of weeks before elections, the big social media companies can take down political candidates' posts only according to, say, published procedural rules that are applied generally and not just to political candidates or to a particular subset of political candidates.'").

precluding future regulation of interstate channels that advances speech and listening interests nationwide.

3. Anti-Balkanization as Regulation-Reinforcing

In addition to leaving latitude for courts to uphold certain speech-enhancing regulations, the anti-balkanization principle could also operate to affirmatively support regulation that ameliorates balkanization risks. Balkanization considerations are not inherently deregulatory, even if they typically operate as such. At times, the Court has used the threat of balkanization as justification for upholding restrictions. It has permitted extensive federal regulations of interstate speech when the regulations improved the nationwide flow of information, at least in the realm of broadcasting.³⁹⁸

In 1943, in *NBC v. United States*, the Court rejected NBC's challenge to the Federal Communications Commission's comprehensive, content-based regulatory scheme for broadcast networks.³⁹⁹ The scheme's rules forbade stations to engage in behavior antithetical to the public interest.⁴⁰⁰ One such rule banned "exclusive affiliation" clauses, contractual agreements between networks and local stations that prevented the stations from carrying another network's programming.⁴⁰¹ Because some networks were unavailable in some places, such clauses foreclosed many communities from listening to nationwide broadcasts like the 1939 World Series, a program the Court deemed "of outstanding national interest."⁴⁰² The Court held that the rule did not violate NBC's First Amendment rights.⁴⁰³

One provision of Texas's law provides a template for how the anti-balkanization principle could be regulation-reinforcing as to must-carry mandates. The provision prevents platforms from restricting a user's ability to make or view posts based on the user's location in Texas.⁴⁰⁴ Its function in the Texas law is seemingly only instrumental, an attempt to ensure that platforms

³⁹⁸ Broadcast media receives lesser protection under the First Amendment than other forms of media due to the scarcity of broadcast frequencies. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386–90 (1969) (providing a brief explanation as to why the government can and does restrict broadcasting frequency access). This differential treatment has been much maligned in the literature. See, e.g., POOL, *supra* note 125, at 149 ("To the detriment of freedom, however, neither the option of common carriage nor that of the market was chosen for radio and television policy.").

³⁹⁹ 319 U.S. 190, 198–209, 227 (1943).

⁴⁰⁰ See *id.* at 199 (condemning anticompetitive activity as contrary to the public interest).

⁴⁰¹ *Id.* at 198–200.

⁴⁰² *Id.* at 199. Ohio listeners might not have minded: the Yankees swept the Reds and outscored them 20–8 over the four-game series. *1939 World Series*, BASEBALL ALMANAC, <https://www.baseball-almanac.com/ws/yr1939ws.shtml> [<https://perma.cc/G7WY-HZAT>].

⁴⁰³ *NBC*, 319 U.S. at 226–27.

⁴⁰⁴ TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002(a) (West 2023).

do not avoid compliance with the law's other must-carry requirements by simply shutting off services to all Texans. But as a standalone law, the provision would clearly cohere with anti-balkanization goals.

Consider the following hypothetical. An erratic entrepreneur owns both a trucking business and social media platform. The entrepreneur's trucking company is denied a permit for a novel transport route connecting Chicago with Nashville by Kentucky state officials. As retribution for the permit denial, the entrepreneur prevents anyone in Kentucky from posting on his social media platform. In response, Kentucky passes a law mirroring the Texas law's provision, barring all platforms from restricting users based solely on their location in Kentucky.

The anti-balkanization principle would counsel in favor of upholding the law against a First Amendment challenge. To be sure, it would impose a strong limitation on the ability of platforms to moderate content as they might wish. But that limitation would be in the service of national discourse, ensuring that no state is cut off from a key forum of interstate dialogue. It would serve the same nation-building function as the FCC's rule banning "exclusive affiliation" clauses that the Court upheld in *NBC*.⁴⁰⁵ The anti-balkanization principle would therefore enhance Kentucky's regulatory interest.

CONCLUSION

Just over a year ago, a member of Congress sparked a news cycle with a social media post calling for a "national divorce."⁴⁰⁶ The post envisioned a country separated into two partisan sets of states.⁴⁰⁷ A poll conducted in the wake of the post found that thirty-four percent of Americans agreed we "need a national divorce."⁴⁰⁸ Other recent polls have found that approximately twenty to thirty percent of Americans support a legal decoupling along partisan lines.⁴⁰⁹ These followed a 2021 poll in which forty-one percent of Biden voters

⁴⁰⁵ See 319 U.S. at 198–200, 226–27 (banning exclusive affiliation contracts to ensure that information on matters of national interest is accessible to the public at large).

⁴⁰⁶ See Shannon Pettypiece, *Marjorie Taylor Greene Calls for a 'National Divorce' Between Liberal and Conservative States*, NBC NEWS (Feb. 20, 2023), <https://www.nbcnews.com/politics/congress/marjorie-taylor-greene-calls-national-divorce-liberal-conservative-sta-rcna71464> [<https://perma.cc/94M9-JR5C>].

⁴⁰⁷ *Id.*

⁴⁰⁸ David French, Opinion, *Take Threats of 'National Divorce' Seriously*, N.Y. TIMES (Mar. 5, 2023), <https://www.nytimes.com/2023/03/05/opinion/national-divorce-civil-war.html> [<https://perma.cc/7YHG-SM3F>].

⁴⁰⁹ Nicholas F. Jacobs, *Seeing Red and Blue: Assessing How Americans Understand Geographic Polarization, Secession, and the Value of Federalism*, PUBLIUS: J. FEDERALISM, Sept. 12, 2023, at 1, 19; Margaret Talev, *Two Americas Index: 20% Favor a "National Divorce,"* AXIOS (Mar. 16, 2023), <https://www.axios.com/2023/03/16/two-americas-index-national-divorce> [<https://perma.cc/QYC6-7KBL>].

and fifty-two percent of Trump voters favored liberal or conservative states seceding.⁴¹⁰ Sentiments of disunion—political and cultural balkanization—have gained traction unseen in a generation.

The anti-balkanization principle is a bulwark against these impulses. It situates the First Amendment within the Constitution's unifying design.⁴¹¹ The nationwide interchange of ideas has forged national cohesion since before the Founding. First Amendment doctrine should better promote the core nation-building function that interstate speech channels serve.

⁴¹⁰ UVA Ctr. for Pol., *New Initiative Explores Deep, Persistent Divides Between Biden and Trump Voters*, SABATO'S CRYSTAL BALL (Sept. 30, 2021), <https://centerforpolitics.org/crystalball/articles/new-initiative-explores-deep-persistent-divides-between-biden-and-trump-voters/> [<https://perma.cc/TN3S-V9Q5>].

⁴¹¹ Cf. *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979) (explaining (in reference to the Commerce Clause) that “the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation” was “a central concern of the Framers” and “an immediate reason for calling the Constitutional Convention”).

