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Manhattan Community Access Corp. v. Halleck,139 S. Ct. 1921

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I. INTRODUCTION

"Anybody can get on television and there's nothing anybody can do about it."[1] Joe Winston, a Chicago-based public-access television host, used these words back in 1990 to explain to a bewildered viewer the concept of public-access television.[2] When discussing its impact Winston was quoted as saying, "the real world of public access cable is that it was the most useful to people who were completely disenfranchised from getting on television."[3] In contrast to the Big Three television networks (ABC, CBS, and NBC), public-access channels are "designated for noncommercial use by the public on a first-come, first-served, nondiscriminatory basis."[4] During the 1970's, the Federal Communications Commission (FCC) produced regulations requiring channels be set aside for the purpose of public-access.[5] That regulation was later found to be outside of the FCC's scope of authority.[6] The Cable Communications Policy Act of 1984 found the same conduct permissible if executed on the state or local levels.[7]

In the state of New York, there are three options for how channels are operated after being reserved for the purpose of public-access: (1) the cable operator (such as Time Warner) could operate them, (2) the local government (such as New York City) could operate them, or (3) the local government could designate a private entity to manage the public-access channels.[8] Regulations must be followed when channels are franchised out to separate entities.[9] The franchisee is only permitted to exercise editorial control to abide by federal or state laws prohibiting obscenity or like content, and the franchisee is obligated to follow the first-come, first-served rule.[10]

The issue in *Manhattan Community Access Corporation v. Halleck*[11] is whether Manhattan Neighborhood Network (MNN) was a state actor when it

1. The A.V. Club, *Wayne's World and the Democratization of TV from Public Access to YouTube*, YOUTUBE (Nov. 12, 2015), https://www.youtube.com/watch?v=s33A QrwCfrY&ab_ channel=TheA.V.Club.
2. *Id.*
3. *Id.*
4. *See* N.Y. COMP. CODES R. & REGS. tit. 16, § 895.4(a)(1) (2005).
5. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).
6. *Id.*
7. *See* 47 U.S.C. § 531(b) (1996).
8. N.Y. COMP. CODES R. & REGS. tit. 16, § 895.4(c)(1).
9. N.Y. COMP. CODES R. & REGS. tit. 16, § 895.4(d)(1).
10. N.Y. COMP. CODES R. & REGS. tit. 16, § 895.4(c)(8).
11. 139 S. Ct. at 1921.

operated the public-access channels delegated to them by the government and if so, whether MNN would be subject to the First Amendment's speech restraints.[12] A private entity will qualify as a state actor subject to the First Amendment if that private entity "performs a traditional, exclusive public function."[13] For this state action doctrine analysis, it is wholly irrelevant if the "government licenses, contracts with, or grants a monopoly to a private entity."[14] The freedom of speech clause of the First Amendment prohibits governmental abridgment of speech, not private abridgment.[15] The following are forms of speech generally not protected under the First Amendment: incitement, fighting words, obscenity, defamation, commercial speech, or instances where the speech is outweighed by a more compelling interest.[16]

II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

A. Facts

Time Warner was required under New York state law to set aside channels on its cable system for public-access use.[17] To abide by those rules, MNN was granted the right to operate Time Warner's public-access channels in Manhattan.[18] Since being established in 1992, MNN has expanded to seven channels that run content 24 hours a day out of two production facilities, and MNN's content is accessible online or by "600,000 cable subscribers."[19] In 2012, DeeDee Halleck and Jesus Papoleto Melendez, employees at MNN, created a 25-minute video which showed that the opening of MNN's second production facility was exclusively accessible by architects and donors, but not members of the community.[20] The film was submitted for airing on one of MNN's channels and ultimately was broadcast.[21] In response, Halleck was suspended from using the public-access forum.[22] Following an unrelated dispute with MNN, the pair was ultimately fully suspended.[23]

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12. *Halleck*, 139 S. Ct. at 1926.
13. *Id.* at 1928.
14. *Id.* at 1931.
15. U.S. CONST. amend. I.
16. *Freedom of Speech Exceptions: Categories of Speech NOT Protected*, LAWSHELF EDUCATIONAL MEDIA, https://lawshelf.com/videos/entry/freedom-of-speech-exceptions-categories-of-speech-not-protected.
17. *Halleck*, 139 S. Ct. at 1927.
18. *Id.*
19. Manhattan Neighborhood Network, https://www.mnn.org/about (last visited Aug. 22, 2019).
20. *See* DeeDee Halleck, *The 1% Visits El Barrio; Whose Community?,* YOUTUBE (July 29, 2012), https://www.youtube.com/watch?v=QEbMTGEQ1xc.
21. *Halleck*, 139 S. Ct. at 1927.
22. *Id.*
23. *Id.*

B. Procedural History

Respondents Halleck and Melendez subsequently brought suit against MNN in the Southern District Court of New York.[24] The claim was that MNN violated the producers "free-speech rights when MNN restricted their access to the public access channels."[25] MNN moved to dismiss the claim on the basis that MNN was not a state actor and not subject to the First Amendment's restrictions.[26] The district court found MNN's argument persuasive and dismissed Respondents' claim.[27] Respondents then appealed that decision to the Second Circuit Court of Appeals which reversed the district court's ruling.[28] The majority opinion of the second circuit found the public-access channels to be a public forum for purposes of the First Amendment.[29] It was concluded that MNN was a state actor because "public forums are usually operated by governments."[30] The Supreme Court granted a writ of certiorari to address the inconsistent decisions from the lower courts.[31]

III. COURT'S DECISION AND RATIONALE

A. Majority Opinion by Justice Kavanaugh

Justice Kavanaugh delivered the opinion of the court, joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Thomas.[32] The majority concluded, after looking at the facts of the case with an eye to the state-action doctrine, that operation of television channels is not the perpetuation of conduct historically done by the state.[33] The Court held that since it is not a "traditional, exclusive public function," MNN remained a private actor and therefore was not bound by the First Amendment's speech strictures.[34] The Supreme Court reversed the second circuit's judgment, and the case was remanded for further proceedings.[35] On remand, the second circuit affirmed the Southern District of New York's initial decision to dismiss the matter.[36]

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24. *Id.*
25. *Id.*
26. *Halleck*, 139 S. Ct. at 1927.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Halleck*, 139 S. Ct. at 1927.
32. *See Manhattan Community Access Corp. v. Halleck*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/manhattan-community-access-corp-v-halleck/.
33. *Halleck*, 139 S. Ct. at 1926.
34. *Id.*
35. *Id.*
36. Halleck v. Manhattan Cmty. Access Corp., 744 F. App'x 41 (2d Cir. 2019).

The Supreme Court first contended with the Respondents' claim that MNN, a private entity, restricted their access to the public-access channels and therefore was exerting editorial discretion.[37] A private entity such as MNN would be restricted from engaging in this conduct if it qualified as a state actor bound by the First Amendment.[38] In Part II of the opinion, the Court gave three instances of when a private entity qualifies as a state actor.[39] One of those was the aforementioned "traditional, exclusive public function" example.[40] This language originated in *Jackson v. Metropolitan Edison Co*, decided in 1974.[41] While the present case has to do with public-access television, *Jackson* had to do with the operation of an electric utility corporation.[42] The majority argued that both cases are similar because they are both "heavily regulated, privately owned" entities.[43] In *Jackson*, Justice Rehnquist held that simply showing that a utility was heavily regulated with a partial monopoly was not sufficient for an application of the Fourteenth Amendment, which allows for the Bill of Rights to be applied to the states.[44] In *Halleck*, the majority acknowledged that MNN's operation of the public-access channels was heavily regulated by the state, however that was not sufficient to "convert the private entity into a state actor."[45] Therefore, the Court did not find the "first-come, first-served" language to be determinative here because of the conclusion that MNN was not a state actor.[46]

The Court then went on to discuss what a "traditional, exclusive public function" looks like in practice.[47] It is not that the federal, state or local governments exercised the function in the past or present.[48] Nor is it enough that the functions serve the public good or public interest.[49] The government must have traditionally and exclusively performed the function.[50] The case law reviewed by the majority showed "very few" functions have been exclusively performed by the state, while the state has historically performed many functions.[51] The only examples of exclusively performed state functions are running elections and operating a company town.[52] The Court

37. *Halleck*, 139 S. Ct. at 1928.
38. *Id.*
39. *Id.*
40. *Id.*
41. 419 U.S. 345, 352 (1974).
42. *Halleck*, 139 S. Ct. at 1932.
43. *Id.*
44. *Jackson*, 419 U.S. at 358; *See* U.S. CONST. amend. XIV.
45. *Halleck*, 139 S. Ct. at 1931.
46. *Id.* at 1932.
47. *Id.* at 1928.
48. *Id.*
49. *Id.* at 1928-29.
50. *Halleck*, 139 S. Ct. at 1929.
51. *Id.*
52. *Id.*

pointed out that many different actors have operated public-access channels since their inception.[53] Manhattan's own channels have been operated by private cable operators and private nonprofit organizations.[54] Therefore, the channels have not been exclusively operated by the government.[55]

In Part II, the Court criticized the assertion that the function at issue was not simply public-access channels, but rather the operation of a public forum in general.[56] The Court accepted that "[w]hen the government provides a forum for speech. . . the government may be constrained by the First Amendment."[57] Alternatively, "when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor."[58] Language from the precedential case supports the proposition that the government does not have a monopoly when it comes to providing means for debate.[59] The court said that "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally performed."[60] The majority opinion reiterated and affirmed this holding in the present case.[61]

Part III of the opinion addressed the Respondents' contention that the public-access channels were the property of the City of New York, not MNN or Time Warner.[62] The majority asserted that the City did not have a property interest in the channels.[63] Time Warner owned the cable network on which the public-access channels were located and MNN operated those channels.[64] There was no formal language anywhere in a written device stating "that the City has any property interest in the public access channels."[65] The Court also claimed that the channel producers complaint did not allege that the City had a property interest.[66] The dissent disagreed, claiming that Respondents' complaint did argue in favor of the existence of a property interest and even if it did not, that would not justify ruling in favor of a motion to dismiss.[67] The Court did concede that Time Warner was permitted by the City to lay cable along rights-of-way.[68] Instead of interpreting this to be a form of

53. *Id.*
54. *Id.* at 1929-30.
55. *Halleck*, 139 S. Ct. at 1930.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* (*See* Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976)).
60. *Halleck*, 139 S. Ct. at 1930.
61. *Id.* at 1931.
62. *Id.* at 1933.
63. *Id.*
64. *Id.*
65. *Halleck*, 139 S. Ct. at 1933.
66. *Id.*
67. *Id.* at 1942.
68. *Id.* at 1933.

property interest, the majority held strongly to the belief that something outside the state-action analysis would not alter the results of that examination.[69]

Toward the end of his opinion, Justice Kavanaugh warned against *Halleck* being "read too broadly."[70] The opinion did not support the proposition that the First Amendment can never apply to the operation of public-access channels.[71] The First Amendment would be applicable if the state itself were to operate the channels on the cable system or if the necessary steps were taken for the state to obtain a property interest in the channels.[72] The Court relied upon the case law and the present facts to reach this conclusion for this case only.[73] Therefore it appears that the Court's intent was to limit the potential ramification if the rules from this case were applied generally.

B. Dissent by Justice Sotomayor

Justice Sotomayor wrote a dissenting opinion, which was joined by Justices Breyer, Ginsburg, and Kagan.[74] The dissent concluded that MNN "stepped into the City's shoes" and therefore did qualify as a state actor and was subject to the restraints of the First Amendment.[75] The dissent did not agree with the majority's interpretation that this case was simply about a private entity that entered into the administration of a public-access channel.[76] It was, rather, about a third-party organization (MNN) being appointed by the government (New York City) to administer a public forum.[77] The dissent also asserted that the City did obtain a property interest in the channels when it granted the cable franchise to Time Warner.[78] Since New York City would have been bound by the First Amendment if it had operated the channels itself, it would not follow that First Amendment restraints become defunct by the simple transfer of responsibilities to a different entity.[79] The City had a duty to provide the public forum after the franchise was granted.[80] The dissent spoke of its fear of inevitable abuse that would emerge if the majority's interpretation became law.[81]

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69. *Id.* at 1933-34.
70. *Halleck*, 139 S. Ct. at 1934.
71. *Id.*
72. *Id.*
73. *Id.*
74. *See* SCOTUSBLOG, *supra* note 32.
75. *Halleck*, 139 S. Ct. at 1934.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 1936.
80. *Halleck*, 139 S. Ct. at 1936.
81. *Id.* at 1944.

In Part I, the dissent argued that MNN was incorporated for the specific purpose of operating the Manhattan channels and therefore was not involved in business prior to incorporation.[82] MNN received financial capital for startup purposes, as well as franchisee fee funds, from Time Warner.[83] In their complaint, Respondents alleged that MNN was a "public forum," that the City had "delegated control of that public forum to MNN," and that MNN had engaged in viewpoint discrimination.[84]

The dissent confidently and succinctly repeated the original conclusion of the second circuit when stating "[t]he channels are clearly a public forum."[85] This dissent argued in favor of this view because of the City's property interest in the channels and New York's regulations requiring the channels be made accessible to all.[86]

The dissent then asserted that both the context and the actual content of the speech, the reasonable critique of an exclusionary practice by the channel operators, need to be considered when understanding a potential violation of the right of free speech.[87] There is an argument to be made that the government opened a setting for speech by the public.[88] Under the Supreme Court decision *Good News Club v. Milford Central School*,[89] viewpoint discrimination is always impermissible when it is the product of government action in a setting opened up to the public for speech, without regard to the setting at issue.[90] Viewpoint discrimination "has [been] used to identify government laws, rules, or decisions that favor or disfavor one or more opinions on a particular controversy."[91] For speech on purely private property and government speech, viewpoint discrimination is allowed and "commonplace."[92] Since Respondents alleged viewpoint discrimination, whether that was impermissible or not would be highly dependent upon whether the public-access channels were public forums or purely private

82. *Id.* at 1935.
83. *Id.*
84. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, Halleck v. The City of New York, Et Al., No. 15 Civ. 8141 (WHP), 2016 WL 9115140 (S.D.N.Y.).
85. *Halleck*, 139 S. Ct. at 1936.
86. *Id.*
87. *Id.*
88. *Id.*
89. 533 U.S. 98 (2001).
90. *Halleck*, 139 S. Ct. at 1936.
91. Marie A. Failinger, *Viewpoint Discrimination in Free Speech Cases*, CIVIL LIBERTIES IN THE UNITED STATES (Sept. 24, 2012), https://uscivilliberties.org/themes/4667-viewpoint-discrimination-in-free-speech-cases.html#targetText=Viewpoint%20discrimination %20is%20the% 20term,opinions% 20on%20a%20particular%20controversy.
92. *Halleck*, 139 S. Ct. at 1937.

property.[93] Government speech was not suggested by any party and was quickly dismissed.[94]

The dissent, in discussing the governmental property interest, found that the exclusive right of New York City to use the public-access channels and Time Warner's infrastructure was a property interest.[95] These exclusive rights were the result of Time Warner's acceptance of the cable franchise.[96] Justice Sotomayor observed that in *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*,[97] a plurality of justices found a similar interest to be a property interest.[98] While the dissent did not dispute that the property had always belonged to Time Warner, "[t]he right to convey expressive content using someone else's physical infrastructure is not new," and therefore even with no physical possession, the city could still have a property interest.[99] There is an example given in the dissent of an owner of a billboard and a person who rents space on that billboard.[100] When a person rents space on the billboard, the owner never loses ownership, but the renter would have an easement interest in that property.[101] While the public-access channels differ from the billboard in terms of tangibility, that has never been a required aspect of having a property interest.[102] The dissent concluded that given the facts of the relationship between the cable provider and the City, the "exclusive right to send its own signal over Time Warner's infrastructure" constituted a property interest.[103]

The dissent pointed out the potential creation of a public forum by "the government . . . deliberately open[ing] up the setting for speech by . . . the public."[104] Therefore, a setting which would not traditionally be a public forum can be transformed into a public forum by the policy, the governmental practice, and the nature of the property.[105] The dissent pointed to the state regulations mandating that the channels be "on a first-come, first-served, nondiscriminatory basis" to support the proposition that governmental intent was present.[106] During oral arguments, MNN admitted that there was no

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. 518 U.S. 727 (1996).
98. *Halleck*, 139 S. Ct. at 1937.
99. *Id.* at 1938.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Halleck*, 139 S. Ct. at 1939.
104. *Id.*
105. *Id.*
106. *Id.*

process by which the videos were reviewed before being put on the air.[107] The dissent found MNN's conduct to have followed the regulation and to show "intent to create a public forum".[108]

Justice Sotomayor acknowledged the parallels between the present case and *West v. Atkins*,[109] in which the issue was whether a doctor hired by the state to provide medical care to state-held prisoners was a state actor.[110] The Court determined that the doctor was a state actor because the state was required to provide that medical care and once hired, the doctor was "clothed with the authority of state law."[111] The Court in *Atkins* repeated the same concern the present dissent had of the government's ability to evade its obligations to perform specific functions; the city could "contract out all services which it is constitutionally obligated to provide."[112]

The dissent asserted that principles laid out in *West* resolved the present case.[113] The facts and setting differ but "the legal features are the same."[114] The City made a choice that triggered constitutional obligations by franchising out to a third party with the imposition of regulations existing.[115] The City granted the right to operate the channels to MNN, which "could have said no, but. . .said yes."[116] By accepting the job from New York City, MNN tacitly took on the responsibilities that came with the job.[117] The application of the *West* test showed MNN to be a state actor.[118]

Despite the majority's "case-specific qualif[ying]" language, the dissent asserted that the majority decision was incorrect in two ways.[119] The first error was the conclusion that the City did not have a property interest.[120] The majority acknowledged that Time Warner owned the cable networks and that there was no reason to think that the government ever leased or owned either the cable network or the channels.[121] The dissent claimed that if there was a question about the existence of a property interest, the proper course of action would have been to vacate and remand, as opposed to dismissing in the pretrial stage.[122] Therefore, even if there was not an easement, the dissent

107. *Id.*
108. *Halleck*, 139 S. Ct. at 1939.
109. 487 U.S. 42 (1988).
110. *Halleck*, 139 S. Ct. at 1940.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Halleck*, 139 S. Ct. at 1940-41.
116. *Id.* at 1941.
117. *Id.*
118. *Id.* at 1939-40.
119. *Id.* at 1941.
120. *Halleck*, 139 S. Ct. at 1941.
121. *Id.*
122. *Id.* at 1942.

believed that the majority should have "vacate[d] and remand[ed] for the lower courts to consider [the property] matters more fully."[123]

Lastly, Justice Sotomayor challenged the majority's assertion that this case was an example of a private entity already in the marketplace and bound by government regulations.[124] The dissent argued that MNN was not a typical private entity existing in the marketplace which stumbled upon this opportunity.[125] Rather, MNN existed to fill the role of operator of the public-access channels on behalf of the government as required by regulation.[126] The dissent found that the majority improperly utilized the public function test in this case.[127]

IV. ANALYSIS

A. Introduction

The topic of public-access television is a relatively new constitutional issue and not a commonly arising issue at that. The last major Supreme Court case addressing public-access television was *Denver Area* decided in 1996.[128] There were a majority decision, two concurrences, and three concurrences in part and dissents in part.[129] The Court's split on the topic of public-access television in *Halleck* was reached via a 5-4 decision.[130] It is notable to mention the narrow split between the two sides of the Court because since 2000, a unanimous vote is far more common than a 5-4 split.[131] The split in *Halleck* seems to convey that there are legitimate arguments that can be made on both sides of whether public-access television is bound by the First Amendment, and an analysis of the factors shaping those differences of opinion is crucial to understanding how the two sides of the Court arrived at their conclusions.

The following analysis focuses on several fundamental ideas the Court considered in reaching the decision in *Halleck*: how a private entity qualifies as a state actor, and when exactly a government has attained a property interest in private property. There is also a discussion about the impact of this Court's decision. The analysis points to the existence of an implied

123. *Id.*
124. *Id.*
125. *Halleck*, 139 S. Ct. at 1942-43.
126. *Id.* at 1943.
127. *Id.*
128. *Id.* at 1937.
129. *See generally Denver Area*, 518 U.S. at 727.
130. *See* SCOTUSBLOG, *supra* note 32.
131. Sarah Turberville & Anthony Marcum, *Those 5-to-4 Decisions on the Supreme Court? 9 to 0 is Far More Common*, THE WASHINGTON POST (June 28, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/?noredirect=on.

property interest, as well as an unintended, detrimental impact on the freedom of speech.

B. Discussion

1. State Actor

The central finding that guided the majority was that MNN was not a state actor subject to the restraints of the First Amendment.[132] Early on in the history of this country, the First Amendment was understood to prohibit only the abridgment of speech by the government and its agents, not private entities.[133] Constitutional law expert Gillian E. Metzger has said, "[t]he underlying presumption is that cases where private actors wield public power are rare and occur mainly when the government tries to hide behind private surrogates whom it controls."[134] This proposition was bolstered by the Supreme Court's finding in *Halleck* that there are few instances in which a private entity becomes a state actor and many times when one will not.[135] The latter portion of the quotation appears to support an argument made in the dissent, which contended "that private actors who have been delegated constitutional responsibilities like this one should be accountable to the Constitution's demands."[136]

When addressing whether the City delegated a public function to MNN, the majority pointed to the fact that the regulatory language regarding public-access television placed an obligation upon franchisees and not municipalities.[137] The obligation would not be imposed upon the government, as it was in the *West* case, which was shown to be unsuitable for comparison.[138] The interpretation that no actual obligation was placed upon the state weighs in favor of the Petitioners and the majority.

2. Governmental Property Interest

In *Halleck*, the majority opinion did not find New York City to have a formal easement or any property interest in the public-access channels.[139] The franchise agreement between the City and the cable provider permitted the City to select a private entity to operate the public-access channels.[140] The majority concluded that the franchise agreement never expressed any

132. *Halleck*, 139 S. Ct. at 1926.
133. U.S. CONST. amend. I.
134. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).
135. *Halleck*, 139 S. Ct. at 1929.
136. *Id.* at 1944-45.
137. *Id.* at 1926.
138. *Id.* at 1929 n.1.
139. *Id.* at 1933.
140. *Halleck*, 139 S. Ct. at 1933.

property interest possessed by the City.[141] If any institution was granted a property interest in the channels, it would be MNN because they were expressly granted "jurisdiction" over the channels.[142] The majority relied upon Justice Thomas' concurrence in *Denver Area* which stated, "[o]ur public forum cases have involved property in which the government has held at least some formal easement or other property interest permitting the government to treat the property as its own."[143]

The dissent drew upon the *Denver Area* case to support the view that the government at least had an easement.[144] Five of the Justices in that case found the interest there to be an easement and centered around public-access channels.[145] While Justice Breyer did not ultimately conclude the channels to be a public forum, he did find the reservation of the channels to be like a public easement.[146] The dissent found two sticks of the well-known bundle that constitute property interests: the right to use and the right to exclude.[147] The dissent would, based on this language, likely agree with the argument that while there may not have been any express language granting an easement in the franchise agreement, there was an implied easement of use and exclusion on the part of the City in relation to the public-access channels.

3. Impact of the Decision

Due to the proliferation of streaming media services, such as Netflix, Hulu, and Disney Plus, it was possible that a case focusing on public-access television would have a narrow impact.[148] This is not the case. This is supported by the fact that the Alliance for Community Media still represents over "3,000 Public, Educational and Governmental (PEG) access organizations."[149] Some of the types of programs that MNN has produced include a comedy showcase, interviews of presidential hopefuls, a series discussing legal issues facing African Americans, a weekly program permitting NYC elected officials to update the public about local affairs, and a broadcast of daily mass at St. Patrick's Cathedral.[150] It remains the law of the land that state and local governments may establish requirements in

141. *Id.*
142. *Id.*
143. *Denver Area*, 518 U.S. at 828 (Thomas, J., concurring in judgment in part and dissenting in part).
144. *Halleck*, 139 S. Ct. at 1937.
145. *Id.*
146. *Id*.
147. *Id.* at 1937-38.
148. Andrew Liptak, *The MPAA Says Streaming Video Has Surpassed Cable Subscriptions Worldwide*, THE VERGE (Mar. 21, 2019), https://www.theverge.com/2019/3/21/18275670/mpaa-report-streaming-video-cable-subscription-worldwide.
149. *About*, ALLIANCE FOR COMMUNITY MEDIA – NORTHWEST REGION, https://acmnwr.org/about/.
150. *See Programs*, MNN (Last visited August 18, 2019), https://www.mnn.org/watch/programs.

franchising agreements that channels be set aside and reserved for public, educational, or governmental use only.[151]

One concern for the continued existence of these channels is funding.[152] The same act of Congress that established public-access channels also included language that allowed cities to bill cable providers five percent of their gross revenues.[153] The money collected from that five percent was used to support local public-access channels.[154] A new rule set forth by the FCC in August 2019 allows "cable providers to deduct in-kind services and equipment" from the five percent cap.[155] Some fear that this rule will reduce monetary support and harm the channels' economic viability.[156] While traditional cable services have been losing subscribers, there were still over 74,000,000 at the end of 2018.[157] In spite of current issues that may prove foreboding for their long-term existence, today, this type of channel continues to exist.

The majority attempted to minimize the reverberations of the holding by specifying that this case be read narrowly with careful regard to the facts.[158] The dissent expressed the belief that doing this was prudent, but warned of the potential for confusion "about how and when government outsourcing will render any abuses that follow beyond the reach of the Constitution."[159] Specifically the dissent worried about abuses that would "sow confusion" in the lower courts.[160] It would be impractical to expect there would be no ripples as a result of the Court's holding because lower courts that read the decision may find the argument persuasive. In fact, the case has already been cited in the Eastern District of Pennsylvania in support of the proposition that "extensive government regulation does not transform a private entity into a state actor."[161] The majority's effort to minimize did not succeed.

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151. Act of October 30, 1984, Pub. L. No. 98–549, 98 Stat 2779.

152. Ernesto Aguilar, *At a Time When Local Information is Needed, FCC Vote Endangers Public-Access Stations*, CURRENT (August 5, 2019), https://current.org/2019/08/at-a-time-when-local-information-is-needed-fcc-vote-endangers-public-access-stations/.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Todd Spangler, *Cord-Cutting Sped Up in 2018: Biggest Pay-TV Ops Shed 3.2 Million Subscribers Last Year*, VARIETY (Feb. 13, 2019), https://variety.com/2019/biz/news/cord-cutting-2018-accelerate-us-pay-tv-subscribers-1203138404/.

158. *Halleck*, 139 S. Ct. at 1934.

159. *Id.* at 1945.

160. *Id.*

161. Egli v. Chester Cty. Library Sys., 394 F. Supp. 3d 497 (E.D. Pa. 2019).

V. CONCLUSION

The Supreme Court's decision in *Halleck* has the potential to stifle the voices of those who come first and therefore, under regulation, deserve to be served and permitted to express their perspectives. This potential has been given fuel by the binding authority SCOTUS decisions have upon lower courts.[162] MNN will not be bound by the First Amendment and therefore will be permitted to engage in viewpoint discrimination.[163] DeeDee Halleck and Jesus Papoleto Melendez will not have any further recourse because of the majority's holding.[164] At least in Manhattan, this case stands for the proposition that if you criticize MNN, an entity selected by the City of New York to operate public-access channels, and if MNN wants to ban you from speech in the future, there will be no constitutional remedy. This effectively grants MNN carte blanche to ban any and all speech it has animus toward with no justification required. "Anybody can get on television and there's nothing anybody can do about it."[165] This confident and optimistic language of the 1990's no longer holds true in Manhattan.

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162. *Id.*
163. *Halleck*, 139 S. Ct. at 1934.
164. *Id.* at 1926.
165. The A.V. Club, *supra* note 1.