AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Foundations: Scope: State Action

**Manhattan Community Access Corporation v. Halleck**, \_\_\_ U.S. \_\_\_ (2019)

*DeeDee Halleck and Jesús Papoleto Meléndez aired made a film claiming that Manhattan Neighborhood Network (MNN), which is part of the Manhattan Community Access Corporation, was neglecting East Harlem when operating public access cable channels. These channels were created when Time Warner and New York City made an agreement, required by state law, that in return for the right to operate a cable system in New York City, Time Warner would set aside certain channels for public access. New York City, in turn, gave MNN, a private nonprofit, the power to determine programming on public access channel. As a result of the controversy created by the Halleck/Meléndez film and other disputes, MNN temporarily forbade Halleck from using public access channels. Halleck sued, claiming that her constitutional rights under the free speech clause of the First Amendment as incorporated by the due process clause of the Fourteenth Amendment had been violated. She claimed the public access channels were a public forum operated by a state actor. The Manhattan Community Access Corporation responded that they were not a state actor and that public access channels are not public fora. The local district court dismissed the lawsuit, but that decision was reserved by the Court of Appeals for the Second Circuit. The Manhattan Community Access Corporation/MNN appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5-4 vote reserved the Second Circuit. Justice Brett Kavanaugh’s majority opinion held running a cable system was not the function performed traditionally by the state exclusively necessary to find MNN a state actor. Under what circumstances does Kavanaugh believe that private parties are state actors? Does Justice Elena Kagan’s dissent challenge Kavanaugh’s understanding or application of the state actor doctrine? Why does she believe New York City has a property interest in the public access channels and why does she think establishing a property interest important? Who has the better of the argument? Is this a fact-specific case as Kavanaugh suggests or do you detect more significant constitutional concerns behind the dispute between the conservative majority and liberal minority?*

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I34518d4090b911e98c309ebae4bf89b2&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I34518d4090b911e98c309ebae4bf89b2) delivered the opinion of the Court.

. . . .

Ratified in 1791, the First Amendment provides in relevant part that “Congress shall make no law ... abridging the freedom of speech.” Ratified in 1868, the Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable against the States: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ....” The text and original meaning of those Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental*abridgment of speech. The Free Speech Clause does not prohibit *private*abridgment of speech.

In accord with the text and structure of the Constitution, this Court's state-action doctrine distinguishes the government from individuals and private entities. By enforcing that constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty. . . . Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function, (ii) when the government compels the private entity to take a particular action, or (iii) when the government acts jointly with the private entity. . . .

Under the Court's cases, a private entity may qualify as a state actor when it exercises “powers traditionally exclusively reserved to the State.” It is not enough that the federal, state, or local government exercised the function in the past, or still does. . . . Rather, to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function. The Court has stressed that “very few” functions fall into that category.  Under the Court's cases, those functions include, for example, running elections and operating a company town. The Court has ruled that a variety of functions do not fall into that category, including, for example: running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity.

The relevant function in this case is operation of public access channels on a cable system. That function has not traditionally and exclusively been performed by government.

Since the 1970s, when public access channels became a regular feature on cable systems, a variety of private and public actors have operated public access channels, including: private cable operators; private nonprofit organizations; municipalities; and other public and private community organizations such as churches, schools, and libraries. . . . In short, operating public access channels on a cable system is not a traditional, exclusive public function within the meaning of this Court's cases.

. . . .

. . . . When the government provides a forum for speech (known as a public forum), the government may be constrained by the First Amendment, meaning that the government ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint, or sometimes even on the basis of content. By contrast, 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. The private entity may thus exercise editorial discretion over the speech and speakers in the forum. . . . Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor. After all, private property owners and private lessees often open their property for speech. Grocery stores put up community bulletin boards. Comedy clubs host open mic nights. . . .

If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum. Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether. . . .

. . . .

New York City's designation of MNN to operate the public access channels is analogous to a government license, a government contract, or a government-granted monopoly. But as the Court has long held, the fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor—unless the private entity is performing a traditional, exclusive public function. . . .

Numerous private entities in America obtain government licenses, government contracts, or government-granted monopolies. If those facts sufficed to transform a private entity into a state actor, a large swath of private entities in America would suddenly be turned into state actors and be subject to a variety of constitutional constraints on their activities.. . .

. . . .

. . . [B]eing regulated by the State does not make one a state actor. As the Court's cases have explained, the “being heavily regulated makes you a state actor” theory of state action is entirely circular and would significantly endanger individual liberty and private enterprise. The theory would be especially problematic in the speech context, because it could eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms. Not surprisingly, this Court has “never even hinted that regulatory control, and particularly direct regulatory control over a private entity's First Amendment speech rights,” could justify subjecting the regulated private entity to the constraints of the First Amendment.

. . . .

. . . . [T]the public access channels are not the property of New York City. Nothing in the record here suggests that a government (federal, state, or city) owns or leases either the cable system or the public access channels at issue here. Both Time Warner and MNN are private entities. Time Warner is the cable operator, and it owns its cable network, which contains the public access channels. MNN operates those public access channels with its own facilities and equipment. The City does not own or lease the public access channels, and the City does not possess a formal easement or other property interest in those channels. The franchise agreements between the City and Time Warner do not say that the City has any property interest in the public access channels. . . . It does not matter that a provision in the franchise agreements between the City and Time Warner allowed the City to designate a private entity to operate the public access channels on Time Warner's cable system. Time Warner still owns the cable system. And MNN still operates the public access channels. . . .

. . . .

Having said all that, our point here should not be read too broadly. Under the laws in certain States, including New York, a local government may decide to itself operate the public access channels on a local cable system (as many local governments in New York State and around the country already do), or could take appropriate steps to obtain a property interest in the public access channels. Depending on the circumstances, the First Amendment might then constrain the local government's operation of the public access channels. We decide only the case before us in light of the record before us.

. . . .

It is sometimes said that the bigger the government, the smaller the individual. Consistent with the text of the **Constitution**, the state-action doctrine enforces a critical boundary between the government and the individual, and thereby protects a robust sphere of individual liberty. Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise. We decline to do so in this case.

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I34518d4090b911e98c309ebae4bf89b2&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I34518d4090b911e98c309ebae4bf89b2), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I34518d4090b911e98c309ebae4bf89b2&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I34518d4090b911e98c309ebae4bf89b2), Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I34518d4090b911e98c309ebae4bf89b2&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I34518d4090b911e98c309ebae4bf89b2), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I34518d4090b911e98c309ebae4bf89b2&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I34518d4090b911e98c309ebae4bf89b2) join, dissenting.

. . . .

The channels are clearly a public forum: The City has a property interest in them, and New York regulations require that access to those channels be kept open to all. And because the City (1) had a duty to provide that public forum once it granted a cable franchise and (2) had a duty to abide by the First Amendment once it provided that forum, those obligations did not evaporate when the City delegated the administration of that forum to a private entity. Just as the City would have been subject to the First Amendment had it chosen to run the forum itself, MNN assumed the same responsibility when it accepted the delegation.

When a person alleges a violation of the right to free speech, courts generally must consider not only what was said but also in what context it was said.

On the one hand, there are “public forums,” or settings that the government has opened in some way for speech by the public (or some subset of it). The Court's precedents subdivide this broader category into various subcategories, with the level of leeway for government regulation of speech varying accordingly. But while many cases turn on which type of “forum” is implicated, the important point here is that viewpoint discrimination is impermissible in them all..

On the other hand, there are contexts that do not fall under the “forum” rubric. For one, there are contexts in which the government is simply engaging in its own speech and thus has freedom to select the views it prefers. In addition, there are purely private spaces, where the First Amendment is (as relevant here) inapplicable. The First Amendment leaves a private store owner (or homeowner), for example, free to remove a customer (or dinner guest) for expressing unwanted views. In these settings, there is no First Amendment right against viewpoint discrimination.

. . . .

This Court has not defined precisely what kind of governmental property interest (if any) is necessary for a public forum to exist. I assume for the sake of argument in this case that public-forum analysis is inappropriate where the government lacks a “significant property interest consistent with the communicative purpose of the forum.” Such an interest is present here. . . . New York State required the City to obtain public-access channels from Time Warner in exchange for awarding a cable franchise. The exclusive right to use these channels (and, as necessary, Time Warner's infrastructure) qualifies as a property interest, akin at the very least to an easement.

. . . .

“A common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property.” Rights to exclude and to use are two of the most crucial sticks in the bundle. . . . [T]here is no disputing that Time Warner owns the wires themselves.  If the wires were a road, it would be easy to define the public's right to walk on it as an easement. Similarly, if the wires were a theater, there would be no question that a government's long-term lease to use it would be sufficient for public-forum purposes. . . .

The right to convey expressive content using someone else's physical infrastructure is not new. To give another low-tech example, imagine that one company owns a billboard and another rents space on that billboard. The renter can have a property interest in placing content on the billboard for the lease term even though it does not own the billboard itself.

The same principle should operate in this higher tech realm. Just as if the channels were a billboard, the City obtained rights for exclusive use of the channels by the public for the foreseeable future; no one is free to take the channels away, short of a contract renegotiation. The City also obtained the right to administer, or delegate the administration of, the channels. The channels are more intangible than a billboard, but no one believes that a right must be tangible to qualify as a property interest. . . .

I do not suggest that the government always obtains a property interest in public-access channels created by franchise agreements. But the arrangement here is consistent with what the Court would treat as a governmental property interest in other contexts. New York City gave Time Warner the right to lay wires and sell cable TV. In exchange, the City received an exclusive right to send its own signal over Time Warner's infrastructure—no different than receiving a right to place ads on another's billboards. Those rights amount to a governmental property interest in the channels, and that property interest is clearly “consistent with the communicative purpose of the forum.”  Indeed, it is the right to transmit the very content to which New York law grants the public open and equal access.

. . . . [A] public forum exists only where the government has deliberately opened up the setting for speech by at least a subset of the public. . . . The requisite governmental intent is manifest here. . . . New York State regulations require that the channels be made available to the public “on a first-come, first-served, nondiscriminatory basis.”  The State, in other words, mandates that the doors be wide open for public expression. MNN's contract with Time Warner follows suit. . . . These regulations “evidenc[e] a clear intent to create a public forum.”

If New York's public-access channels are a public forum, it follows that New York cannot evade the First Amendment by contracting out administration of that forum to a private agent. When MNN took on the responsibility of administering the forum, it stood in the City's shoes and became a state actor. . . . When a government (1) makes a choice that triggers constitutional obligations, and then (2) contracts out those constitutional responsibilities to a private entity, that entity—in agreeing to take on the job—becomes a state actor. . .

. . . . The City could have done the job itself, but it instead delegated that job to a private entity, MNN. MNN could have said no, but it said yes. (Indeed, it appears to exist entirely to do this job.) By accepting the job, MNN accepted the City's responsibilities. The First Amendment does not fall silent simply because a government hands off the administration of its constitutional duties to a private actor.

. . . .

. . . MNN is not a private entity that simply ventured into the marketplace. It occupies its role because it was asked to do so by the City, which secured the public-access channels in exchange for giving up public rights of way, opened those channels up (as required by the State) as a public forum, and then deputized MNN to administer them. That distinguishes MNN from a private entity that simply sets up shop against a regulatory backdrop. To say that MNN is nothing more than a private organization regulated by the government is like saying that a waiter at a restaurant is an independent food seller who just happens to be highly regulated by the restaurant's owners.

. . . .

When the government hires an agent, . . . the question is not whether it hired the agent to do something that can be done in the private marketplace too. . . . The majority is surely correct that “when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment.” That is because the majority is not talking about *constitutional* forums—it is talking about spaces where private entities have simply invited others to come speak. A comedy club can decide to open its doors as wide as it wants, but it cannot appoint itself as a government agent. The difference is between providing a service of one's own accord and being asked by the government to administer a constitutional responsibility (indeed, here, existing to do so) on the government's behalf.

. . . . Imagine instead that a state college runs a comedy showcase each year, renting out a local theater and, pursuant to state regulations mandating open access to certain kinds of student activities, allowing students to sign up to perform on a first-come, first-served basis. After a few years, the college decides that it is tired of running the show, so it hires a performing-arts nonprofit to do the job. The nonprofit prefers humor that makes fun of a certain political party, so it allows only student acts that share its views to participate. Does the majority believe that the nonprofit is indistinguishable, for purposes of state action, from a private comedy club opened by local entrepreneurs?

. . .

This is not a case about bigger governments and smaller individuals, *ante*, at 1934; it is a case about principals and agents. New York City opened up a public forum on public-access channels in which it has a property interest. It asked MNN to run that public forum, and MNN accepted the job. That makes MNN subject to the First Amendment, just as if the City had decided to run the public forum itself.

. . . .