First Amendment — Freedom of Speech — State Action — Manhattan Community Access Corp. v. Halleck

Inscribed into the keystone of the First Amendment is the axiom that the government may not discriminate against private speakers based on the viewpoints expressed in their speech.[1] Most of the Supreme Court's recent headline First Amendment cases have concerned what constitutes viewpoint discrimination,[2] who is a private speaker,[3] or what is speech.[4] Last Term, in *Manhattan Community Access Corp. v. Halleck*,[5] the Court weighed in on the rest of the axiom: Who is the government? The Court held that a private operator of a public access TV channel was not a state actor bound by the First Amendment, despite the government having designated the private entity as that operator and stripped it of all editorial discretion over the channel.[6] Although the Court's holding was narrow as applied to public access channels, the breadth of its property-interest reasoning could have startling impact in the cyber age, where public discourse increasingly depends on privately owned digital intermediaries.

This is a story about two higher powers: government and TV. With the Cable Communications Policy Act of 1984,[7] Congress gave state and local governments authority to set aside channels on their cable systems for public access.[8] New York did just that: today, the New York State Public Service Commission requires that cable-franchise agreements create channels dedicated to airing content submitted by the public.[9] Though privately owned, these "public access channels" must air submitted content on a first-come-first-serve basis.[10] Who maintains these public access channels? Under New York law, the locality can designate itself as the operator.[11] If it chooses, however, it may designate a private entity as the operator in its stead.[12] This case involved a designation.

Plaintiffs DeeDee Halleck and Jesus Papoleto Melendez produced programs for New York City–based public access channels, some of which were operated by the Manhattan Neighborhood Network, or MNN.[13]

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1 *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–29 (1995).

2 *See, e.g.*, Iancu v. Brunetti, 139 S. Ct. 2294, 2301 (2019); Matal v. Tam, 137 S. Ct. 1744, 1763 (2017).

3 *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245–50 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009).

4 *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018); United States v. Stevens, 559 U.S. 460, 472 (2010).

5 139 S. Ct. 1921 (2019).

6 *Id.* at 1934; *id.* at 1934–35 (Sotomayor, J., dissenting).

7 47 U.S.C. §§ 521–573 (2012).

8 *See id.* § 531(b).

9 *See* N.Y. COMP. CODES R. & REGS. tit. 16, §§ 895.1(f), 895.4(b) (2018).

10 *See id.* § 895.4(c)(4).

11 *Id.* § 895.4(c)(1).

12 *Id.*

13 *See Halleck*, 139 S. Ct. at 1927.

When New York City (the City) granted Time Warner a cable-franchise agreement, it arranged for Time Warner to give MNN, a private nonprofit corporation, startup capital and franchise fees so MNN could operate the public access channel required as a condition for the franchise agreement.[14] Not everyone approved of MNN. Plaintiffs thought that MNN was more interested in pleasing the City's elites than serving local residents, and they expressed as much in one of their films.[15] True polemicists, they submitted the film to MNN's public access channels and, per its first-come-first-serve mandate, MNN aired it.[16] After, and following an additional dispute between plaintiffs and MNN staff, MNN suspended plaintiffs from airing programs on the public access channels.[17] For both suspensions, MNN supplied viewpoint-neutral explanations,[18] which plaintiffs rebutted with allegations that MNN was punishing them for the views expressed in their film.[19]

Halleck and Melendez sued MNN alleging, via 42 U.S.C. § 1983,[20] that MNN had violated their First Amendment rights under the Free Speech Clause by banning them on account of their viewpoint from the public access channels.[21] There was just one problem (well, two): MNN was a private corporation, and the First Amendment constrains only government actors.[22] That didn't end the inquiry, however. The Supreme Court has identified three ways a private entity can become a state actor bound by the Constitution: (1) state compulsion to perform the challenged action; (2) state entwinement with the private entity in carrying out the entity's functions; and (3) state delegation of a public function to the private entity.[23] Plaintiffs rested their case on the last; they argued that MNN was a state actor because public access channels are public forums under First Amendment doctrine and regulating speech in such locations is traditionally an exclusive public function.[24]

The district court didn't buy it. Public access channels were not a designated public forum[25]: MNN was private; maintaining

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14 *See id.*; *id.* at 1935 (Sotomayor, J., dissenting).

15 *See* Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300, 303 (2d Cir. 2018).

16 *See id.*

17 *Halleck*, 139 S. Ct. at 1927.

18 According to MNN, Halleck's suspension resulted because the film violated MNN's content restrictions barring harassments or aggravated threats toward staff, while Melendez's suspension was a sanction for a prior physical altercation with MNN's executive director. *See Halleck*, 882 F.3d at 303.

19 *See id.*

20 42 U.S.C. § 1983 (2012).

21 Halleck v. City of New York, 224 F. Supp. 3d 238, 239 (S.D.N.Y. 2016).

22 *Id.* at 243.

23 *Id.* at 244 (quoting Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008) (quoting Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001))).

24 *Id.*

25 *See id.* at 246. The Supreme Court has recognized three types of forums: private, traditional public, and designated public forums. *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018).

entertainment facilities was not traditionally an exclusive sovereign power; and the Second Circuit had analogously held that maintaining leased access channels does not amount to state action.[26] As a result, maintaining the channels did not turn MNN into a state actor bound by the First Amendment.[27] The district court granted defendants' motion to dismiss.[28]

A divided Second Circuit panel reversed in relevant part.[29] Writing for the majority,[30] Judge Newman held that MNN was a state actor because public access channels were public forums.[31] In reaching this conclusion, he considered the Supreme Court's lengthy discussion of this very question in two separate opinions in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[32] Justice Kennedy would have found public access channels to be designated public forums by government contract.[33] Justice Thomas considered the matter a simple question of property: governments do not have a sufficient property interest in public access channels for those channels to qualify as public forums.[34] The Second Circuit found Justice Kennedy's position persuasive, as "[a] public access channel [was] the electronic version of the public square."[35] Plus, New York required public access channels as a matter of law, and New York City appointed the channels' operator itself.[36] Together, those factors turned the public access channels into

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Private forums, such as state prison driveways, are locations where the government has substantial leeway under the First Amendment to pass content-neutral laws regulating speech because these locations do not serve as places for the open exchange of ideas. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); Adderley v. Florida, 385 U.S. 39, 41–42 (1966). By contrast, parks, roads, and other traditional public forums have a long history of being open to the public for the free exchange of ideas, such that the government has little capacity to regulate speech in those locations without violating the First Amendment. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009). Public access channels are not traditional public forums; that honor is reserved for such public places as have existed from time immemorial. *See Perry*, 460 U.S. at 45. The government can also open spaces that are not traditional public forums but that nonetheless function as spaces dedicated to the open exchange of ideas, such as a government-operated theater. *See* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975). The government has as little capacity as with traditional public forums to regulate speech in these "dedicated" public forums. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799–800 (1985).

26 *Halleck*, 224 F. Supp. 3d at 246–47 (quoting Loce v. Time Warner Entm't Advance/Newhouse P'ship, 191 F.3d 256, 267 (2d Cir. 1999)).

27 *Id.* at 247.

28 *Id.*

29 Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300, 301–02 (2d Cir. 2018).

30 Judge Lohier joined Judge Newman's panel majority opinion.

31 *Halleck*, 882 F.3d at 301–02.

32 518 U.S. 727 (1996); *Halleck*, 882 F.3d at 305–06.

33 *Denver Area*, 518 U.S. at 791–94 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

34 *Id.* at 829–31 (Thomas, J., concurring in the judgment in part and dissenting in part).

35 *Halleck*, 882 F.3d at 306.

36 *Id.*

public forums.[37] And because governments ordinarily operate public forums, operating the channels turned MNN into a state actor bound by the First Amendment.[38]

Judge Jacobs dissented on this point, arguing that although operating a public forum would turn MNN into a state actor, it was not a state actor because it was operating an *entertainment facility* — not a public forum.[39] Circuit precedent supported this conclusion, already having established that leased access channels are not public forums sufficient to turn a private entity into a state actor.[40]

The Supreme Court reversed. Writing for the majority,[41] Justice Kavanaugh held that MNN was not a state actor subject to First Amendment viewpoint-neutrality constraints.[42] After reaffirming the three traditional means by which a private entity can be a state actor, he identified the public function test as the relevant question: Did MNN perform a power traditionally *and* exclusively performed by the government?[43] Almost nothing could satisfy this test; precedent was mostly limited to the functions of running elections or a company town.[44] Against this meager precedent stood a swath of cases where the Court held that entities performing functions serving the public good or the public interest were not performing public functions.[45] Here, the relevant function was the operation of public access channels on a cable system, and the Court swept away plaintiffs' claim that this function was public: since the birth of public access channels, a variety of private and public actors have operated them.[46]

The Court similarly dispensed with the real issue in the case: the public-forum question. Plaintiffs argued that MNN was a state actor not because it operated public access channels per se, but rather because it operated a public forum for speech — a function traditionally and exclusively governmental.[47] The Court reversed the order of operations and held that MNN was not operating a public forum because it was not a state actor.[48] Put simply, opening up private property to others'

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[37] *Id.*

[38] *Id.* at 306–07.

[39] *Id.* at 311 (Jacobs, J., concurring in part and dissenting in part).

[40] *Id.* at 311–12. Judge Lohier also wrote separately to address Judge Jacobs's dissent, noting how easily speech suppression could result from calling a function entertainment rather than political speech — a distinction without basis in First Amendment doctrine anyhow, given that art enjoys constitutional protection. *Id.* at 309 (Lohier, J., concurring).

[41] Joining the opinion was Chief Justice Roberts, along with Justices Thomas, Alito, and Gorsuch.

[42] *Halleck*, 139 S. Ct. at 1926.

[43] *Id.* at 1928–29.

[44] *Id.* at 1929 (collecting cases).

[45] *Id.* (collecting cases).

[46] *Id.* at 1929–30.

[47] *Id.* at 1930.

[48] *Id.*

speech does not turn the property into a public forum because an entity can open a public forum only if it is already a state actor.[49] A contrary rule would strip private property owners of editorial liberties by subjecting them to the First Amendment whenever they opened their property for speech.[50] The Court in *Hudgens v. NLRB*[51] denied such subjection, and the *Halleck* Court reaffirmed that holding.[52]

MNN also did not become a state actor through designation as the operator by the City.[53] The Court has long held that contract and licensing agreements do not make a private entity a state actor unless the designated function is both traditionally and exclusively governmental.[54] As already demonstrated, operating a public access channel was not such a function.[55]

Finally, aside from the public function test, plaintiffs also failed to persuade the Court that the franchise agreement created for the City a property interest in the public access channels.[56] If the City had held such a property interest, it might have opened the channels as public forums when it required the creation of channels it was authorized to operate.[57] But the franchise agreement failed to identify a new property interest, and allowing the City to designate a private entity as operator of the public access channel was irrelevant to the question of property interests.[58] Instead, what mattered was that the channels were owned by a private entity, Time Warner, and operated by a private entity, MNN.[59] Having rejected the last of plaintiffs' arguments that the public access channels were public forums, the Court remanded the case for the inevitable dismissal of plaintiffs' First Amendment claims.[60]

Justice Sotomayor dissented,[61] arguing that the majority erred in both its property analysis and its public function analysis.[62] Time Warner owned the channels to which the City obtained an exclusive right of access through the franchise agreement.[63] That was a significant property interest.[64] State laws then created for the City a duty to maintain the channels on a first-come-first-serve basis, which turned them into a

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49 *Id.*
50 *Id.* at 1930–31.
51 424 U.S. 507 (1976).
52 *Halleck*, 139 S. Ct. at 1931 (quoting *Hudgens*, 424 U.S. at 517).
53 *Id.*
54 *Id.* at 1931–32.
55 *Id.* at 1930.
56 *Id.* at 1933.
57 *Id.*
58 *Id.*
59 *Id.* at 1933–34.
60 *Id.* at 1934.
61 Joining her dissent were Justices Ginsburg, Breyer, and Kagan.
62 *Halleck*, 139 S. Ct. at 1934 (Sotomayor, J., dissenting).
63 *Id.* at 1937.
64 *Id.*

designated public forum.[65] Putting aside the Court's erroneous conclusion that MNN was not operating a public forum because it was not a state actor,[66] Justice Sotomayor concluded by identifying two extraneous flaws in the majority opinion. First, it settled the property question as a matter of law, even though the issue depended on facts undetermined on a motion to dismiss.[67] Second, it treated an entity created to oversee a forum for speech as though the entity made a private choice to enter a marketplace subject to government regulation.[68] By ignoring this governmental connection, the majority showed governments a clear path to escaping their constitutional obligations.[69]

The dissent properly criticized the conclusion of the majority's property-interest analysis, but it is the breadth of that analysis that most threatens long-settled First Amendment precedent. To be sure, the *Halleck* holding is narrow, dependent on an idiosyncratic state statute. But the Court reached that result by looking for a government property interest. This property-interest approach carries broad implications as speech moves online, where property interests are confused and government censorship occurs through private intermediaries. Confining *Halleck* to its facts is therefore necessary to preserve the function of the First Amendment as a protector of open, and increasingly cyber, discourse.

Halleck rightly asserted its narrowness.[70] The Court lingered on the specific elements of public access television,[71] the importance of which has diminished and will continue to do so.[72] Indeed, the Court's holding is directly applicable only in states that share New York's failure to formally recognize government property interests in public access channels.[73] Along with New York, there are only two such states[74] — both of which can escape *Halleck* by amending their property laws.[75] Moreover, the Court dealt with just one branch of state action doctrine and applied the

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[65] *Id.* at 1939.

[66] *Id.* at 1939–41.

[67] *Id.* at 1941–42.

[68] *Id.* at 1942–45.

[69] *Id.* at 1944.

[70] *Id.* at 1934 (majority opinion) (noting the Court's "point here should not be read too broadly").

[71] *Id.* at 1929–30.

[72] *See* Tabatha Abu El-Haj, *The Possibilities for Responsive Party Government*, 119 COLUM. L. REV. ONLINE 123, 125 (2019), https://columbialawreview.org/content/the-possibilities-for-responsive-party-government [https://perma.cc/HNZ9-FJQR].

[73] *Halleck*, 139 S. Ct. at 1934 ("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 . . . , 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.").

[74] *See* Brief for Respondents at 30, *Halleck*, 139 S. Ct. 1921 (No. 17-1702).

[75] *See Halleck*, 139 S. Ct. at 1934.

settled test, leaving the rest untouched.[76] The narrowness of *Halleck*'s holding is consistent with the Court's approach to the constitutionality of medium regulations generally. The Court has resisted analogizing between different media. The same First Amendment editorial right, for example, has undergone different constitutional analyses according to whether the regulation at issue applied to radio,[77] newspapers,[78] letters,[79] or cable television.[80] In short, the Court has tailored its analysis to the nature of the speech medium and refrained from strict constitutional rules binding future media.[81] *Halleck* should be no different.

Read broadly, however, *Halleck* could support a new property-based orientation to the state action requirement of forum analysis. Such an orientation would disregard the material conditions of the speech medium in favor of whether the property belongs to the government.[82] Although not all constitutional rules are equally broad or abstract,[83] constitutional reasoning will necessarily reach beyond the scope of a given case.[84] Interpreting *Halleck* to have adopted a property-based approach is plausible. Why were MNN's public access channels not a public forum? There was no government property interest. Why did designation not make MNN a state actor? The franchise agreement was a government contract, not a government property interest. Without "any formal easement or other property interest in [the] channels,"[85] the First Amendment could not bind the operators. Citing to Justice Thomas's *Denver Area* opinion at each step,[86] *Halleck* suggests the property-interest rule has found favor with five Justices.

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[76] Whether the Court actually applied settled law demands attention beyond the scope of this Comment. But it is worth noting that the Court announced the public function test as whether the private entity performed a function "traditionally *and* exclusively" performed by the government, *id.* at 1929 (emphasis in original), while citing precedents that identify the rule as whether the private entity performed a function that was "traditionally the *exclusive* prerogative of the State," Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)). But a function that is traditionally the exclusive prerogative of the state need not be traditionally *and* exclusively a prerogative of the state. Thus, *Halleck* may have silently turned a one-part public function test into a two-part test so stringent that even managing political primaries may struggle to satisfy it. *Cf.* Smith v. Allwright, 321 U.S. 649, 663–65 (1944).

[77] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390–92 (1969).

[78] *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

[79] *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 17–18 (1986).

[80] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656–57 (1994).

[81] *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 776–77 (1996) (Souter, J., concurring).

[82] *See id.* at 826–27 (Thomas, J., concurring in the judgment in part and dissenting in part).

[83] *See* Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 20–21 (1996).

[84] *See* Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746–47 (1993).

[85] *Halleck*, 139 S. Ct. at 1933 (quoting *Denver Area*, 518 U.S. at 828 (Thomas, J., concurring in the judgment in part and dissenting in part)).

[86] *See id.* at 1931 n.3, 1932–33.

This doctrinal shift could have significant ramifications in the digital age, given the complexity of applying traditional property concepts to the digital world.[87] Cable channels may once have been the electronic equivalent of the soapbox, but that position is now proudly held by the Internet[88] — a speech medium that relies on intermediating platforms.[89] Government is moving online,[90] and public officials nationwide are facing First Amendment challenges to their practice of blocking users from their social media pages based on viewpoint.[91] Clear examples of government censorship, these are easy First Amendment cases rendered incomprehensible when the question becomes whether the pages implicate government property.[92] Take Facebook. A private entity owns the platform, while the government user owns the content she posts and thereby licenses Facebook to access, manipulate, and sell.[93] Whether the official owns the personalized page, which is the forum in question, is unclear.[94] She retains the authority to exclude other users, but Facebook can also exclude *her*.[95] Perhaps Facebook has granted her an in personam license to use the page,[96] but such a proposition would be difficult to square with her ability to exclude, qua the central stick in property's bundle.[97] Maybe she uses the page through a tenancy at will by leasing the page from Facebook, with both parties enjoying a revocable property interest in the page.[98] But the interest in a Facebook page differs from, for example, the lease in *Southeastern Promotions, Ltd. v. Conrad*,[99] given that pages cost nothing to "lease" and occupancy does not stop others from opening a page.

Because the Internet property analysis is so awkward, lower courts have avoided it — a practice that *Halleck* throws into question. For eighty years,

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87 *See* Joshua A.T. Fairfield, *Bitproperty*, 88 S. CAL. L. REV. 805, 810 (2015); Juliet M. Moringiello, *False Categories in Commercial Law: The (Ir)relevance of (In)tangibility*, 35 FLA. ST. U. L. REV. 119, 122–25 (2007).

88 *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735–37 (2017).

89 *See* Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 702 (2010).

90 *See* Brief of the Knight First Amendment Inst. at Columbia Univ. as Amicus Curiae in Support of Respondents at 4–10, *Halleck*, 139 S. Ct. 1921 (No. 17-1702).

91 *See, e.g.*, Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 239 (2d Cir. 2019); Davison v. Randall, 912 F.3d 666, 672–73 (4th Cir. 2019).

92 *See* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1996 (2011).

93 *See Terms of Service*, FACEBOOK, https://www.facebook.com/terms.php [https://perma.cc/8GLV-GWDC] [hereinafter *Facebook Terms of Service*].

94 *See Davison*, 912 F.3d at 682 & n.4.

95 *See Facebook Terms of Service*, *supra* note 92; *cf.* Carpenter v. United States, 138 S. Ct. 2206, 2259 (2018) (Alito, J., dissenting) (noting that "[i]t would be especially strange" to find a property right in a digital medium where the individual lacks the right to exclude others).

96 *Cf.* Marrone v. Washington Jockey Club, 227 U.S. 633, 636–37 (1913); Wood v. Leadbitter (1845) 153 Eng. Rep. 351, 354–55.

97 *See* Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 977 (2004).

98 *See* Dickman v. Comm'r of Internal Revenue, 465 U.S. 330, 336–37 (1984).

99 420 U.S. 546 (1975).

the Court has recognized that forum analysis applies if the government owns *or controls* the regulated space.[100] Courts tasked with determining whether public officials' social media pages are public forums have thus ignored the unhelpful property analysis and have asked whether the official controlled the social media page.[101] But *Halleck* suggests that control is no longer enough to create a public forum.[102] If read too broadly, *Halleck* could impose a property-interest rule that would complicate an otherwise simple doctrine for protecting Internet speech and would turn on arbitrary ownership clauses buried in platforms' adhesion terms of service.[103]

Moreover, the property-interest approach ignores the nature of contemporary speech regulation. Two models of censorship dominate the Internet: one seen and one subtle. When Congress has sought to directly regulate speech online, the Court has been unimpressed.[104] Instead of this "direct" censorship, the logic of Internet speech better lends itself to a more pernicious practice of "collateral censorship" wherein government encourages intermediaries to censor users on its behalf.[105] The Internet is the bottleneck of all bottlenecks; billions of speakers rely on just a few "points of control"[106] — internet service providers and speech platforms whose underlying code and architecture invisibly moderate, influence, and guide our online behavior.[107] And while private parties own those points of control, governments' attempts to achieve desired downstream effects by acting on intermediaries are ubiquitous.[108] These attempts include everything from intermediary copyright liability[109] and mandatory filters[110] to compelled disclosures of user data.[111] When the government pressured credit card companies to stop processing donations to WikiLeaks after the Manning leaks to starve the

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100 *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

101 *See, e.g.*, Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 234–36 (2d Cir. 2019); Davison v. Randall, 912 F.3d 666, 682–85 (4th Cir. 2019); One Wis. Now v. Kremer, 354 F. Supp. 3d 940, 954 (W.D. Wis. 2019).

102 *Halleck*, 139 S. Ct. at 1932–33.

103 *See* Lidsky, *supra* note 92.

104 *See* Ashcroft v. ACLU, 542 U.S. 656, 666 (2004); Reno v. ACLU, 521 U.S. 844, 874 (1997).

105 *See* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2309 (2014). Collateral censorship has also been called "soft censorship," *see, e.g.*, Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 868 (2012), and "censorship by proxy," *see, e.g.*, Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 17 (2006).

106 *See* Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653, 688 (2003).

107 *See* LAWRENCE LESSIG, CODE VERSION 2.0, at 4–8 (2006).

108 *See* Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 J. INFO. TECH. 75, 86 (2015).

109 *See* Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1003 (2008).

110 *See* Balkin, *supra* note 105, at 2320–22.

111 *See* Joshua Brustein, *Tech Giants, Like Telecoms, Have Been Sharing with the NSA*, BLOOMBERG BUSINESSWEEK (June 6, 2013, 8:26 PM), https://www.bloomberg.com/news/articles/2013-06-06/tech-giants-like-telecoms-have-been-sharing-with-the-nsa (last visited Sept. 28, 2019).

website of funding, it was engaged in collateral censorship;[112] when the Senate threatened Facebook with regulation if it failed to self-regulate,[113] it was engaged in collateral censorship. These practices act on private intermediaries, but they target downstream-user speech by inducing intermediaries to alter their speech-governing models.[114] Private parties may be pressing the buttons and writing the codes that censor, but government actors are pulling their strings and telling them how to operate their speech platforms. Is pulling those strings state action? On a broad reading of *Halleck*, the answer is "no"; the censoring parties are private, and regulation does not make property public.[115] Yet the effect on speech is intended, evident, and pervasive. In short, whether courts will read *Halleck* broadly to impose a property inquiry on forum analysis of Internet speech regulation is the question on which the future of free speech depends.

Running through *Halleck* is a concern about the government growing too large and the individual too small.[116] Once upon a time, that framing might have been the correct way to characterize the problem of protecting free speech. But that time has passed. Where it purported to keep the government small, *Halleck* instead kept small the amount of governance that the Constitution protects individuals against. Today, speech regulation principally comes through government manipulation of intermediaries with the aim of deterring and preventing speech by the intermediaries' downstream users.[117] *Halleck* suggests such one-link-removed collateral censorship is not subject to the Constitution. So the Court can applaud itself for setting aside restrictions on township signs[118] or sales of pharmaceutical data.[119] But these are distractions, far from the frontiers where First Amendment freedoms matter. In fact, the relevance of the First Amendment as a tool for protecting open discourse is diminishing.[120] Read broadly, *Halleck* could hasten this diminishment. Everything else aside, that is reason enough to read *Halleck* narrowly, confined to the receding world of public access television.

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112 *See* Bambauer, *supra* note 105, at 892.

113 *See Mark Zuckerberg Testimony: Senators Question Facebook's Commitment to Privacy*, N.Y. TIMES (Apr. 10, 2018), https://nyti.ms/2GMDpW5 [https://perma.cc/HDX9-RURB].

114 *See* Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 314 (2011).

115 *See* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999).

116 *See Halleck*, 139 S. Ct. at 1934.

117 *See* Balkin, *supra* note 105, at 2300.

118 *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2232 (2015).

119 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 579–80 (2011).

120 *See* Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 581 (2018).