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LIGHTS, CAMERA, STATE ACTION: *MANHATTAN COMMUNITY ACCESS CORP. V. HALLECK*

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"I am continuing to monitor the censorship of AMERICAN CITIZENS on social media platforms. This is the United States of America—and we have what's known as FREEDOM OF SPEECH! We are monitoring and watching, closely!!"
—President Donald J. Trump[1]

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† Senior Articles Editor, *Cardozo Law Review*. J.D. Candidate, Benjamin N. Cardozo School of Law, May 2021; B.A., Lehigh University, May 2011. I would like to thank William Lesser for bringing this topic to my attention, and the Turbo Team for making school tolerable, if not fun. I wish to also thank my Note Advisor, Professor David Rudenstine, as well as my Note Editor from Volume 41, Yael Ben Tov. I have nothing but the utmost praise for Leah Murphy and Avi Rosskamm of *Cardozo Law Review de•novo* for doing an outstanding job editing this Note and pointing out my shockingly broad use of adverbs. I want to give a shout out to my awesome wife Abby for being by my side throughout everything, and to my parents and brother for listening to me talk about this constantly. Finally, I dedicate this to the memory of my Grandfather, Mike Leifer, who always told me I would succeed in law school.

1 Donald J. Trump (@realDonaldTrump), TWITTER (May 3, 2019, 6:55 PM), https://twitter.com/realDonaldTrump/status/1124447302544965634 [https://perma.cc/PX5N-PXBY].

INTRODUCTION

On May 28, 2020, President Trump signed an executive order to combat what he perceived as "[o]nline platforms . . . engaging in selective censorship."[2] Issued two days after Twitter's labeling of his

[2] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020) (speculating that "[t]he growth of online platforms in recent years raises important questions about applying the ideals of the First Amendment to modern communications technology").

tweets regarding mail-in ballots[3] as containing "unsubstantiated claim[s],"[4] this order represented a marked reversal from his previous views regarding what he perceived to be overly expansive First Amendment protections.[5] The suggestion that this could be a First Amendment issue appeared unfounded, as Justice Kavanaugh had recently written the majority opinion in *Manhattan Community Access Corp. v. Halleck*,[6] a decision that largely foreclosed the possibility of First Amendment claims against platforms such as Twitter. Although the substance of the executive order[7] related to § 230(c) of the Communications Decency Act,[8] the message the President was sending was clear: First Amendment requirements should apply to content providers, precedent be damned.[9]

It is a well-established rule that constitutional constraints governing public entities do not extend to private actors[10]—until they do.[11] If this

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3 Two of the President's tweets were flagged with a link to "[g]et the facts about mail-in ballots." Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 8:17 AM), https://twitter.com/realDonaldTrump/status/1265255835124539392 [https://perma.cc/9ARK-T5HW] ("There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed. The Governor of California is sending Ballots to millions of people, anyone. . . . ."); Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 8:17 AM), https://twitter.com/realDonaldTrump/status/1265255845358645254 [https://perma.cc/L5LA-SBKK] (". . . .living in the state, no matter who they are or how they got there, will get one. That will be followed up with professionals telling all of these people, many of whom have never even thought of voting before, how, and for whom, to vote. This will be a Rigged Election. No way!").

4 *Trump Makes Unsubstantiated Claim that Mail-In Ballots Will Lead to Voter Fraud*, TWITTER (May 26, 2020), https://twitter.com/i/events/1265330601034256384 [https://perma.cc/7NP4-GUB7]. In the days following the 2020 presidential election, over one third of Trump's tweets were flagged. Bethany Dawson, *More Than a Third of Trump's Tweets Have Been Flagged for Disinformation Since Election Day*, INDEP. (Nov. 7, 2020 10:01 PM), https://www.independent.co.uk/news/world/americas/us-election-2020/trump-tweet-misinformation-twitter-b1672933.html [https://perma.cc/KPW3-TBHR].

5 Michael M. Grynbaum, *Trump Renews Pledge to 'Take a Strong Look' at Libel Laws*, N.Y. TIMES (Jan. 10, 2018), https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html [https://perma.cc/GZ54-P6Y7] ("'We are going to take a strong look at our country's libel laws, so that when somebody says something that is false and defamatory about someone, that person will have meaningful recourse in our courts,' Mr. Trump said . . . .").

6 Manhattan Cmty Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).

7 Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020) (directing several agency heads to petition the FCC to clarify § 230 of the Communications Decency Act).

8 47 U.S.C. § 230(c) (2018).

9 Exec. Order No. 13,925, 85 Fed. Reg. 34,079.

10 *See, e.g.*, United States v. Stanley, 109 U.S. 3, 10–11 (1883) (holding that in the context of the Fourteenth Amendment, "[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope").

11 *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946) (holding that a town owned by a corporation could be liable for First and Fourteenth Amendment violations, despite being private property).

principle seems unclear, it is largely due to the piecemeal jurisprudence that defines the "state action" doctrine.[12] This doctrine applies when courts hold that a private actor is subject to constitutional constraints by virtue of the quasi-public role they have willingly accepted.[13] In these situations, constitutional protections—and the resulting 42 U.S.C. § 1983 actions—may be available to those who demand relief.[14] While questions of what entails a "state action" loom in the face of closely intertwined private and public actors, *Halleck* simplifies the inquiry[15] with an updated definition of the types of private functions that now qualify as state action.[16]

Under the revised doctrine, constitutional protections are only afforded when private action is of a "traditional, exclusive" public nature.[17] This narrowed scope will likely reduce frivolous litigation but will also usher in unwanted side effects.[18] Specifically, the *Halleck* decision failed to account for the increased role that private entities have in the public sphere.[19] This uncertain future, coupled with the Court splitting along a partisan 5-4 line—further politicizing the doctrine[20]—leaves one wondering if it was correctly decided. Justices Kavanaugh and Sotomayor disagreed about the facts of the case and reached very different conclusions about how to apply past precedent in the face of these divergent possibilities.[21] What should have been an easy case—at

12 For a brief discussion on many of the previous state action cases see generally Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1929 (2019) (outlining a series of previous Supreme Court decisions that constituted the state action doctrine).

13 *Marsh*, 326 U.S. at 508–09.

14 42 U.S.C. § 1983 (2018).

15 *Halleck*, 139 S. Ct. at 1928–29 ("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." (internal citations omitted)).

16 *Id.* at 1930 ("In short, merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.").

17 *Id.* This phrase is repeated eleven times throughout the opinion. *See generally id.*

18 *Id.* at 1945 (Sotomayor, J., dissenting) ("Even so, the majority's focus on *Jackson* [*v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)] still risks sowing confusion among the lower courts about how and when government outsourcing will render any abuses that follow beyond the reach of the Constitution.").

19 *See infra* Section IV.B.

20 One of the previous controlling cases, *Jackson*, 419 U.S. 345, had a conservative tilt but was not split exactly on party lines as Justice Blackmun joined the majority.

21 *Halleck*, 139 S. Ct. at 1934 (Sotomayor, J., dissenting) ("The Court tells a very reasonable story about a case that is not before us.").

least in the eyes of the district court applying the previous standard[22]—instead became another step in the Court's conservative realignment. As Justice Stevens wryly noted in a footnote to *Burnham v. Superior Court*,[23] "[p]erhaps the adage about hard cases making bad law should be revised to cover easy cases."[24]

This Case Note argues that under the new standard, situations may arise where public actors can divest themselves of certain activities in order to circumvent constitutional protections traditionally afforded to their conduct. This Case Note proceeds in five parts. Part I summarizes the background and prior caselaw which formed *Halleck*'s backbone.[25] Part II discusses the procedural history of *Halleck*, leading to the battle before the Supreme Court.[26] Part III analyzes the Supreme Court's decision, including Justice Sotomayor's scathing dissent.[27] Finally, Part IV discusses the implications of the decision, and what can be expected from a Court keen to whittle away at an already weakened doctrine.[28]

I. BACKGROUND & PRIOR LAW

Under § 1983, plaintiffs can seek recourse against a non-federal entity when they have been deprived of their civil rights.[29] As the Constitution does not apply to private actors, this cause of action is extremely limited and can typically only be used when the deprivation of

22 The district court conceded that there was no clear precedent as to whether a public access channel was a public forum, but after examining the precedent concluded that the state action requirement was not met. Halleck v. City of New York, 224 F. Supp. 3d 238, 247 (S.D.N.Y. 2016) ("In short, because Plaintiffs cannot establish that MNN was operating a public forum, they fail to plead that MNN was a state actor under Section 1983. Accordingly, Plaintiffs' First Amendment claim is dismissed.").

23 495 U.S. 604 (1990).

24 *Id.* at 640 (Stevens, J., concurring in the judgment).

25 *See infra* Part I.

26 *See infra* Part II.

27 *See infra* Part III.

28 *See infra* Part IV.

29 42 U.S.C. § 1983 (2018) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."). The remedy available for federal violations is the *Bivens* action, a cause of action that has seen its availability to wronged parties narrow since not long after its inception. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735 (2020) (refusing to extend *Bivens* remedies to cross-border shootings).

civil rights has been perpetrated by a public entity.[30] This was confirmed in 1883 when the Supreme Court held in *United States v. Stanley*[31] that there was a "state action" requirement for claims regarding deprivation of civil rights, and that the government had to be involved in the deprivation for a claim to proceed.[32] The definition of what exactly constitutes "state action" has evolved throughout the twentieth century, and a series of cases have expanded the doctrine to encompass instances where private entities stepped into the types of roles traditionally taken on by the government.[33]

A. *Early History of the State Action Doctrine*

The Supreme Court shaped the state action doctrine with several decisions determining the type of private conduct that may subject a private actor to a civil rights claim.[34] Beginning in 1927, the Supreme Court decided a sequence of cases regarding political party primary elections. The first case, *Nixon v. Herndon*,[35] does not directly implicate the doctrine, but lays the groundwork for future cases.[36] In *Nixon*, the Supreme Court held that a Texas law preventing eligible voters from voting in the Texas Democratic Party's primary on the basis of race was unconstitutional.[37] In response, Texas passed a statute allowing political parties to determine who was eligible to vote in their primaries.[38] Accordingly, in 1932, the Texas Democratic Party once again found itself in the Supreme Court defending its racist policies.[39] The new statute effectively had the same impact as the previous one, but rather than

30 *See, e.g.*, Terry v. Adams, 345 U.S. 461, 485 (1953) (Minton, J., dissenting) ("For, after all, this Court has power to redress a wrong under [the Fifteenth] Amendment only if the wrong is done by the State. That has been the holding of this Court since the earliest cases."); Kevin L. Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 329–31 (1990).

31 United States v. Stanley, 109 U.S. 3 (1883).

32 *Id.* at 52 ("In the absence of State laws or State action adverse to such rights and privileges, the nation may not actively interfere for their protection and security, even against corporations and individuals exercising public or *quasi*-public functions.").

33 Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1929 (2019) (listing a series of cases regarding state action).

34 *Id.*

35 Nixon v. Herndon, 273 U.S. 536 (1927).

36 The case dealt primarily with a challenge to Texas law which would allow for violations of the Fifteenth Amendment, rather than a specific entity's liability. *Id.*

37 *Id.* at 540–41 ("The important question is whether the statute can be sustained. But although we state it as a question the answer does not seem to us open to a doubt. We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth.").

38 *See* Nixon v. Condon, 286 U.S. 73, 81–82 (1932).

39 *Id.*

directly authorizing racial discrimination, it passed the power to discriminate to the political parties, which were free to set the requirements for voting in their primaries.[40] The Court once again held that this scheme was unlawful, and the Texas Democratic Party had impermissibly discriminated against potential voters when it prevented someone from voting in the primary on the basis of race alone.[41]

This was, regretfully, not the conclusion of discrimination by the Texas Democratic Party, whose scheme of withholding absentee ballots on the basis of race was upheld in the 1935 decision, *Grovey v. Townsend*.[42] The victory was short-lived; nine years later the Court overturned *Grovey* and held that a Democratic primary restricting participation based on race was prohibited under the Fifteenth Amendment.[43] In the absence of an enabling statute by the Texas legislature, the Court held that racial discrimination was impermissible—even by a private party—when it arose from activities that had traditionally been administered by the state, such as elections.[44] The Party had effectively become a state actor by administering the election, and therefore had to comply with all of the constitutional requirements that a public election would face.[45] In 1953, the Court held once more that the Fifteenth Amendment applied to a private political party conducting elections that restricted membership based on race.[46] Foreshadowing the future narrowing of the doctrine, Justice Minton dissented as he did not believe the actions of a private political party constituted state action.[47]

In the 1946 *Marsh v. Alabama*[48] decision, the Court explored the concept of state action as it related to the freedom of speech in an artificial public square. In *Marsh*, the plaintiff, Grace Marsh, handed out religious

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40 *Id.*

41 *Id.* at 89 ("With the problem thus laid bare and its essentials exposed to view, the case is seen to be ruled by *Nixon* v. *Herndon* . . . . Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black.").

42 Grovey v. Townsend, 295 U.S. 45 (1935) (holding that a failure to provide an absentee ballot for a party primary on the basis of race did not constitute state action).

43 Smith v. Allwright, 321 U.S. 649, 659–66 (1944) (noting that the *Grovey* Court considered the discrimination to be a lawful determination of party membership, rather than a violation of the Constitution).

44 *Id.* at 663–66.

45 *Id.* at 664 ("If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment." (citation omitted)).

46 Terry v. Adams, 345 U.S. 461 (1953).

47 *Id.* at 490–91, 494 (Minton, J., dissenting) (disagreeing with the majority as the actions taken by the party did not rise to the level of what he considers state action).

48 Marsh v. Alabama, 326 U.S. 501, 505–09 (1946).

materials in what appeared to a public area of town.[49] She was subsequently arrested per an Alabama trespassing law.[50] Yet, the town was owned entirely by a corporation, and none of the land was a public space.[51] The Court held that because the land was open to the public, and was in no way restricted by the company owning the property, it had effectively been transformed into a public square.[52] Accordingly, the First and Fourteenth Amendments would apply to the company's conduct, which abridged Marsh's speech.[53]

B. *Justice Rehnquist Turns the Tide*

In 1974, the Supreme Court decided *Jackson v. Metropolitan Edison Co.*,[54] which became the controlling case governing state action claims against a private actor. The controversy arose when a privately-owned utility company—chartered by the state of Pennsylvania—turned off a customer's power due to continued nonpayment.[55] The plaintiff, Catherine Jackson, sued the power company on the theory that by turning off power without a hearing, it had deprived her of the rights guaranteed under the Due Process Clause of the Fourteenth Amendment.[56] Then-Associate Justice Rehnquist wrote in a 6-3 decision that the State of Pennsylvania was not connected to the respondent's actions to the extent that disabling one's utilities without a pre-deprivation hearing would be a violation of the Fourteenth Amendment.[57]

Justice Douglas's dissent in *Jackson* warned of a future where a public entity could act "in cahoots" with a private group, and thus allow that private group to "perpetrate an injury" with limited recourse, at least as far as the Constitution was concerned.[58] Douglas believed that the

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49 *Id.* at 503.

50 *Id.* at 503–04.

51 *Id.* at 504.

52 *Id.* at 507–08.

53 *Id.* ("Whether a corporation or a municipality owns or possesses the town, the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town.").

54 Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

55 *Id.* at 346–47.

56 *Id.* at 347–48.

57 *Id.* at 358–59 ("[T]he State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for purposes of the Fourteenth Amendment.").

58 *Id.* at 363–64 (Douglas, J., dissenting) ("Section 1983 was designed to give citizens a federal forum for civil rights complaints wherever, by direct or indirect actions, a State, acting 'in cahoots' with a private group or through neglect or listless oversight, allows a private group to perpetrate an

majority opinion would pave the way for the government to coordinate with a private entity in order to circumvent constitutional protections.[59] Justice Marshall wrote a separate dissent, writing that the electric company had become too closely intertwined with the state for its activities to not constitute state action.[60] Therefore, the majority's decision in *Jackson* represented a serious departure from previous state action jurisprudence.[61]

C. *Justice Rehnquist Changes the Game*

Two years later, Justice Rehnquist applied his logic from the *Jackson* decision to narrow the state action doctrine once more.[62] In *Flagg Bros.*, the Court held that a warehouse threatening to sell furniture—taken during an eviction—due to nonpayment (pursuant to New York law) was not state action.[63] The case arose when the plaintiff, Shirley Brooks, was evicted from her apartment in Mount Vernon, New York, and her furniture was taken to a warehouse owned by Flagg Brothers, Inc. under the direction of the sheriff.[64] Based on Brooks's nonpayment, Flagg Brothers threatened to sell Brooks's furniture to recoup their losses.[65] The Second Circuit held that executing a lien had traditionally been a function of the sheriff, and therefore, the state action requirement was met.[66] On appeal, Justice Rehnquist disagreed, and reversed the Second Circuit's decision,[67] finding that very few actions were exclusively reserved to the government.[68] Despite the warehouse effectively stepping in for the government to enforce the lien, Justice Rehnquist once again narrowed the state action doctrine.[69]

Justice Marshall's dissent in *Flagg Bros.* presents a very different view of the case before the Court.[70] Invoking *Jackson*, Justice Marshall

injury. The theory is that, in those cozy situations, local politics and the pressure of economic overlords on subservient state agencies make recovery in state courts unlikely.").

59 *Id.*

60 *Id.* at 369 (Marshall, J., dissenting) ("[W]e have consistently indicated that state authorization and approval of 'private' conduct would support a finding of state action.").

61 *See generally id.*

62 *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

63 *Id.*

64 *Id.* at 153.

65 *Id.*

66 *Id.* at 154–55 (citing Brooks v. Flagg Bros., Inc., 553 F.2d 764, 770–71 (2d Cir. 1977)).

67 *Id.* at 157 ("Thus, the only issue presented by this case is whether Flagg Brothers' action may fairly be attributed to the State of New York. We conclude that it may not.").

68 *Id.* at 158 (noting that "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State'").

69 *Id.*

70 *Id.* at 167 (Marshall, J., dissenting).

addressed the difficulty in determining what constitutes a power "*traditionally* exclusively reserved to the State."[71] Justice Marshall argued in favor of the view endorsed by the Second Circuit, which held that the execution of a lien has traditionally and exclusively been performed by a sheriff.[72] When Flagg Brothers threatened to execute the lien, they were acting in place of the sheriff.[73] Therefore, the state action requirement was met.

D. *The Court Remains Undecided About Public Access Channels*

One of the first nationwide attempts to mandate the creation of public access channels came from FCC rulemaking, which required television providers—such as cable companies—with more than 3,500 subscribers to provide a public access channel.[74] When a cable provider challenged the FCC's authority to promulgate such a rule, the Supreme Court initially upheld the regulation as a proper use of the agency's power.[75] Several years later, a second decision featuring the same parties largely overturned the first.[76] Writing for the majority, Justice White held that although the FCC had the power to establish this regulation under the Communications Act of 1934,[77] it could not regulate cable companies as common carriers.[78] Therefore, the rule requiring carriers to broadcast public access channels was struck down.[79] In response, Congress amended the Communications Act with the new provisions authorizing states to direct cable franchisees to create public access channels.[80] The providers of these channels would have no editorial control over the content, so long as the material being broadcast was not obscene.[81]

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71 *Id.* (citation omitted).

72 *Id.* at 167–68 (quoting Blye v. Globe-Wernicke Realty Co., 300 N.E.2d 710, 713–14 (N.Y. 1973)).

73 *Id.* at 168 ("By ignoring this history, the Court approaches the question before us as if it can be decided without reference to the role that the State has always played in lien execution by forced sale. In so doing, the Court treats the State as if it were, to use the Court's words, 'a monolithic, abstract concept hovering in the legal stratosphere.' . . . The state-action doctrine, as developed in our past cases, requires that we come down to earth and decide the issue here with careful attention to the State's traditional role." (internal citation omitted)).

74 47 C.F.R. § 74.1111(a) (1970) (revised as 47 C.F.R. § 76.201(a) (1973), repealed at 39 Fed. Reg. 43,302 (1974)); United States v. Midwest Video Corp. (Midwest I), 406 U.S. 649, 672 (1972).

75 *Midwest I*, 406 U.S. at 672.

76 FCC v. Midwest Video Corp. (Midwest II), 440 U.S. 689 (1979).

77 Pub. L. No. 75-97, 50 Stat. 189 (codified as amended at 47 U.S.C. §§ 151–646 (2018)).

78 *Midwest II*, 440 U.S. at 703–04, 708–09.

79 *Id.* at 708–09.

80 Cable Communications Policy (Cable) Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 2782 (codified as 47 U.S.C. § 531 (1988)).

81 *See* Halleck v. City of New York, 224 F. Supp. 3d 238, 240 (S.D.N.Y. 2016).

In 1996, the Supreme Court addressed whether a public access channel constituted a public forum in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[82] In *Denver Area*, a plurality of the court led by Justice Breyer held that a cable provider censoring certain content it deemed inappropriate was not state action.[83] The Court fell short of reversing the D.C. Circuit's decision and held that public access channels were public forums.[84] In his concurrence, Justice Kennedy strongly disagreed with the majority's decision not to address the matter of state action.[85] In his—and Justice Ginsburg's—view, a public access channel is a public forum, and therefore meets the state action requirement required for the suit to proceed.[86]

II. FACTS & PROCEDURAL HISTORY OF *HALLECK*

A. *Background*

Under New York regulations, cable operators of a certain size must provide a public access channel.[87] As outlined by the Cable Act, these public access channels are prohibited from exercising any editorial control over the content, apart from the same limited exceptions surrounding obscene (and other unprotected) speech.[88] After entering into a franchise agreement with Time Warner, the Manhattan borough president assigned control of the public access channel to Manhattan Neighborhood Network (MNN), operated by Manhattan Community Access Corp.[89] According to the New York regulation, material must be broadcast on a first-come, first-served basis, and the channel could only

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82 Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 737–42 (1996).

83 *Id.* at 737.

84 *Id.* at 733 ("We conclude that the first provision—which *permits* the operator to decide whether or not to broadcast such programs on *leased* access channels—is consistent with the First Amendment."); *id.* at 737.

85 *Id.* at 780–82 (Kennedy, J., concurring in part, concurring in the judgment, and dissenting in part).

86 *Id.* at 783 ("Access channels, however, are property of the cable operator, dedicated or otherwise reserved for programming of other speakers or the government. A public access channel is a public forum, and laws requiring leased access channels create common-carrier obligations. When the government identifies certain speech on the basis of its content as vulnerable to exclusion from a common carrier or public forum, strict scrutiny applies.").

87 Halleck v. City of New York, 224 F. Supp. 3d 238, 240 (S.D.N.Y. 2016).

88 *Id.* (limiting the editorial decisions a public access station may make to "measures as may be authorized by Federal or State law to prohibit obscenity or other content unprotected by the First Amendment of the United States Constitution" (quoting N.Y. COMP. CODES R. & REGS. tit. 16, § 895.4(c)(8)–(9))).

89 *Id.* at 239–40.

exercise extremely limited editorial control to prohibit unprotected speech.[90]

B. *Bad Blood Boils, "Barrio" Beef Brings Ban*

Although the station was designated for use by anyone in the community, problematic figures soon emerged, and tensions grew between MNN and community activists DeeDee Halleck and Jesus Papoleto Melendez.[91] For instance, in 2011 Halleck was prevented from attending a board meeting when she was "locked out" by the staff.[92] In 2012, a separate argument led to the MNN station director throwing papers at Melendez.[93] After not being invited to a gala held for the station's donors at a new building close to where Melendez lived, the pair produced a film critical of the station, titled: "The 1% Visits El Barrio; Whose Community?"[94] Despite pushback from the station to prevent it from being broadcast, the film was aired on MNN several months later.[95] As the film was a direct attack on the station and its employees, Halleck received a temporary suspension, and Melendez received a lifetime suspension from airing any further content on the station.[96] Even after Halleck's ban was lifted, she was unable to re-air the film—despite the first-come, first-served policy—owing to Melendez's lifetime ban.[97]

Halleck and Melendez sued both New York City and MNN in federal court, alleging that MNN had violated their First Amendment rights when they were prevented from both airing their film and utilizing the station's resources.[98] The district court dismissed the First Amendment claim against the City, as the City itself was too far removed from the process of banning the content to be liable.[99] This would typically end the suit due to the state action requirement of a First Amendment claim, as MNN is a private entity.[100] However, the plaintiffs

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90 *Id.* at 240.

91 *Id.* at 240–42.

92 S.M., *The Supreme Court Takes a Public-Access TV Case*, ECONOMIST (Oct. 17, 2018), https://www.economist.com/democracy-in-america/2018/10/17/the-supreme-court-takes-a-public-access-tv-case [https://perma.cc/K5ZP-M7AW].

93 *Id.*

94 DeeDee Halleck, *The 1% Visits El Barrio; Whose Community?*, YOUTUBE (July 29, 2012), https://www.youtube.com/watch?v=QEbMTGEQ1xc [https://perma.cc/2LC8-GZZ8]. The trial court referred to the film as "The 1% Visits the Barrio." *Halleck*, 224 F. Supp. 3d at 241.

95 DeeDee Halleck, *supra* note 94; S.M., s*upra* note 92.

96 *Halleck*, 224 F. Supp. 3d at 241–42.

97 *Id.* at 242.

98 *Id.* at 239.

99 *Id.* at 243 (citing Jersawitz v. People TV, 71 F. Supp. 2d 1330 (N.D. Ga. 1999)).

100 *See id.*

alleged that MNN was effectively a state actor, as the public access channel was a public forum.[101] The court discussed several prior cases,[102] and ultimately rejected this argument, concluding that MNN was not a state actor.[103] Accordingly, the First Amendment claims the plaintiffs brought against MNN were not actionable.[104]

C. *The Second Circuit Disagrees*

On appeal, the Second Circuit reversed the district court's dismissal in favor of MNN.[105] Citing heavily from *Denver Area*, the Second Circuit wrote that a public access channel was a public forum, and remanded the case for further proceedings.[106] Specifically, they adopted Justice Kennedy's concurrence in *Denver Area* that a public access channel is effectively the electronic equivalent of a public square.[107] Therefore, it would constitute a public forum when applying the state action doctrine.[108] The court noted that lower courts were split as to whether a public access channel was a public forum, and that the D.C. Circuit had already held that it was not.[109] Although the D.C. Circuit case had been partially overturned in *Denver Area*, Justice Breyer declined to comment on whether a public access channel was a public forum.[110] Therefore, this portion of the ruling was intact at the time of the Second Circuit decision. The Second Circuit, however, agreed with the district court that the City was too far removed from the action, and therefore, they upheld the dismissal in favor of New York City.[111]

Judge Jacobs concurred with the judgment that the City was not liable for the plaintiffs' claims but dissented with regards to MNN.[112] He specifically disagreed with the majority's view that a public access

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101 *Id.* at 244 (arguing that "the regulation of free speech in a public forum is a traditional and exclusive public function").

102 *Id.* at 245 (citing Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996)).

103 *Id.* at 247 ("In short, because Plaintiffs cannot establish that MNN was operating a public forum, they fail to plead that MNN was a state actor under Section 1983.").

104 *Id.* at 239.

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

106 *Id.* (citing *Denver Area*, 518 U.S. 727).

107 *Id.* at 306 (citing *Denver Area*, 518 U.S. at 793–94) ("A public access channel is the electronic version of the public square.").

108 *Id.*

109 *Id.* at 307–08 (citing All. for Cmty. Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995), *aff'd in part, rev'd in part sub nom.* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727 (1996)).

110 *Denver Area*, 518 U.S. at 749.

111 *Halleck*, 882 F.3d at 308.

112 *Id.* at 309–10 (Jacobs, J., concurring in part and dissenting in part).

channel is a public forum.[113] As such, MNN could not be a state actor.[114] He also speculated that the *Denver Area* Court would have likely not found a public access channel to be a public forum had the majority chosen to discuss the issue.[115] Noting that only Justice Ginsburg had joined Justice Kennedy's concurrence, he reasoned that it was not appropriate for the Second Circuit to endorse the view taken by a minority of the Supreme Court when it was likely that the full Court would not have agreed.[116] This concurrence was an interesting signal that future appeals might be decided on traditionally partisan lines, as the judges in favor of state action were appointed by democrats, whereas Judge Jacobs was appointed by George H.W. Bush.[117]

D. *A Newly Elevated Justice Kavanaugh Comes to MNN's Rescue*

The Second Circuit's decision widening the state action doctrine triggered a split between the Second and D.C. Circuits, as the D.C. Circuit's previous holding that public access channels did not qualify as state actors was not reversed by the *Denver Area* Court.[118] Despite being decided in 1992, the Court's composition in *Denver Area*[119] offered limited, though valuable, insight on how the Court might decide *Halleck*, should certiorari have been granted in early 2018. Of the *Denver Area* Court Justices still on the bench in 2018, Justices Kennedy and Ginsburg were strongly in favor of a public access channel being a public forum, while Justice Thomas was strongly opposed.[120] Justice Breyer was undecided on the matter in *Denver Area*, as the majority declined to comment on the D.C. Circuit's determination.[121] It appears from the votes for Justice Thomas's dissent opposing a finding of state action—which was joined by Chief Justice Rehnquist and Justice Scalia—that the notion that a public access channel is not a public forum subject to First Amendment protections is generally in line with conservative

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113 *Id.* at 312.

114 *Id.* at 311–12.

115 *Id.* at 313.

116 *Id.*

117 *Second Circuit Judges*, U.S. CT. APPEALS FOR SECOND CIR., http://www.ca2.uscourts.gov/judges/judges.html [https://perma.cc/6K6Q-Z6HK] (showing the years each judge was appointed to the court).

118 All. for Cmty. Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995), *aff'd in part, rev'd in part sub nom.* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727 (1996).

119 *Denver Area*, 518 U.S. at 727–31.

120 *See generally id.*

121 *Id.* at 749 ("For three reasons, however, it is unnecessary, indeed, unwise, for us definitively to decide whether or how to apply the public forum doctrine to leased access channels.").

jurisprudence, which strongly favors deregulation.[122] As Justice Kennedy felt otherwise, an early case similar to *Halleck* might have been decided 5-4 in favor of the plaintiffs, with Kennedy acting as the swing vote.[123] While this might have made for an interesting possibility (that is, yet another "conservative" case where Kennedy breaks from his party's traditional views), any potential hope of a victory via this path was lost on June 27, 2018, when Justice Kennedy announced his retirement.[124] At the first Supreme Court conference following Justice Kavanaugh's confirmation, the Supreme Court granted certiorari to MNN's appeal.[125]

E. *A Skeptical Justice Breyer Makes the Case About Hot Dogs*

Towards the start of the arguments Justice Breyer was quick to become involved in questioning, though his inquiry seemed tangential at times. For instance, he asked a series of questions regarding the editorial control a station may exercise over programing related to hot dogs.[126] During these arguments, MNN argued that although the station's content is typically broadcast on a first-come, first-served basis, the channel does exercise some editorial discretion when required.[127] For instance, it reserves the right to adjust the programing schedule based on both the suitability of the content in a specific time slot and the relevance of the content as it relates to other programming.[128] This is contrary to the New

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122 S.L.S., Comment, *Pluralism on the Bench: Understanding* Denver Area Educational Telecommunications Consortium v. FCC, 97 COLUM. L. REV. 1182, 1192 (1997).

123 Despite being a common occurrence, Justice Kennedy disliked the notion that he was the Court's swing vote. Bill Hutchinson & Stephanie Ebbs, *Anthony Kennedy, Crucial Supreme Court Swing Vote, Retiring After 3 Decades*, ABCNEWS (June 27, 2018, 3:17 PM), https://abcnews.go.com/US/supreme-court-justice-anthony-kennedy-retiring/story?id=55052718 [https://perma.cc/DKZ9-K47T] ("While Kennedy became known for his so-called 'swing votes,' he hated the term.").

124 Letter from Associate Justice Anthony M. Kennedy, Supreme Court of the U.S., to President Donald J. Trump (June 27, 2018), https://www.supremecourt.gov/publicinfo/press/Letter_to_the_President_June27.pdf [https://perma.cc/376C-F5KF].

125 Amy Howe, *Justices Take on One New Case*, SCOTUSBLOG (Oct. 12, 2018, 3:52 PM), https://www.scotusblog.com/2018/10/justices-take-on-one-new-case [https://perma.cc/4KKU-E9CS].

126 Transcript of Oral Argument at 24–25, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019) (No. 17-1702) [hereinafter *Halleck* Transcript] ("You see, I have a simple factual question. Tomorrow I want to go and interrupt somebody who's in the subway discussion. As soon as he's finished, I want to discuss New York and hot dogs, okay?"). After dominating much of MNN's time during oral arguments, Justice Breyer did not contribute to either the opinion or dissent, despite having authored the majority opinion in *Denver Area*. *See generally Halleck* Transcript; Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727 (1996).

127 *Halleck* Transcript, *supra* note 126, at 26.

128 *Id.*

York State's authorizing regulation, under which a station may exercise almost no editorial control over the content.[129]

During her line of questioning, Justice Sotomayor distinguished what she perceived the facts of the case to be with the cases petitioners relied on in support of their proposition.[130] Telegraphing her dissent, she questioned whether any past cases were relevant.[131] In her view, past cases should not apply, as the state seemed to have specifically designated the channel as a public forum, and therefore precedent did not matter, as MNN had agreed to those terms.[132] Newly elevated Justice Kavanaugh appeared to take a dim view of the idea that MNN was a public forum. He interrupted the respondent's attorney to note that in order for there to be state action, the activity must be something that has "traditionally[,] exclusively been a public function."[133] He pushed back on the idea that operating a channel would entail a public function and likened it more to a utility.[134] Accordingly, under the logic presented by Justice Kavanaugh, the station would not pass the public function test, despite being regulated under the New York statue.[135]

The respondents also confirmed that the basis for it being a public forum is that it must accept content on a first-come, first-served basis; if the channel had discretion, then it would not be a public forum.[136] Specifically, a similar authorizing statute in California does not have the same requirement,[137] and therefore, it would not be a public forum under this test.[138] By the conclusion of oral arguments, some Justices, such as Kavanagh and Sotomayor, had made their views and votes clear.[139] Despite being so vocal during the arguments, Justice Breyer was far more inscrutable.[140]

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129 N.Y. COMP. CODES R. & REGS. tit. 16, § 895.4 (2020).

130 *Halleck* Transcript, *supra* note 126, at 27–28.

131 *Id.* (Sotomayor, J.) ("But none of those cases involved the state or the government designating something a public forum. They've involved traditional public forums. That's a different issue.").

132 *Id.* at 27–28.

133 *Id.* at 39–40.

134 *Id.* at 41–42.

135 *Id.* at 42.

136 *Id.* at 46.

137 Although the specific California statute was not mentioned during oral argument, *see id.* at 48, the California statute governing the creation public access channels is silent on whether content must be first-come, first-served. *See* CAL. PUB. UTIL. CODE § 5870 (West 2020).

138 *Halleck* Transcript, *supra* note 126, at 48.

139 *See generally id.*

140 *Id.*

III. ANALYSIS OF *HALLECK*

A. *The First Amendment Applies to Only Government Action, Not Private Entities*

In a 5-4 decision authored by Justice Kavanaugh (joined by Chief Justice Roberts, and Justices Thomas, Alito, and Gorsuch), the Court held that MNN—and by extension, any public access channel—is not a state actor simply because it broadcasts content to the public.[141] At the outset of the majority opinion, Justice Kavanaugh invoked the longstanding precedent that constitutional protections only apply to actions taken by government actors, rather than private individuals.[142] Borrowing heavily from then-Justice Rehnquist's language in *Jackson*,[143] the Court announced a bright-line test to define when private conduct qualifies as state action: the new inquiry asks whether the activity in question constitutes "a traditional, exclusive public function."[144] This exact phrase, punctuation and all, appears eleven times in the majority opinion and serves as a clear indication that this is the new test lower courts should use to examine state action.[145] Although *Jackson* used similar language, such as "powers traditionally exclusively reserved to the State,"[146] this is the first time the exact phrase "traditional, exclusive public function" has been used.[147] Justice Kavanaugh's adherence and

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141 Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) ("Under the state-action doctrine as it has been articulated and applied by our precedents, we conclude that operation of public access channels on a cable system is not a traditional, exclusive public function. Moreover, a private entity such as MNN who opens its property for speech by others is not transformed by that fact alone into a state actor."); *id.* at 1928 ("The producers have advanced a First Amendment claim against MNN. The threshold problem with that First Amendment claim is a fundamental one: MNN is a private entity."); *id.* at 1930 ("[A]ccording to the producers, operation of a public forum for speech is a traditional, exclusive public function. That analysis mistakenly ignores the threshold state-action question."); *id.* at 1932 ("Here, therefore, the City's designation of MNN to operate the public access channels on Time Warner's cable system does not make MNN a state actor.").

142 *Id.* at 1926.

143 Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) ("We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State.").

144 *Halleck*, 139 S. Ct. at 1926.

145 *Id.* (repeating the importance of an action being a "traditional, exclusive public function").

146 419 U.S. at 352.

147 Although similar language appears in several other decisions relating to state action, the inclusion of the comma seems to be a new development. *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 294 (2001) ("It said the District Court was mistaken in seeing a symbiotic relationship between the State and the Association, it emphasized that the Association was neither engaging in a traditional and exclusive public function nor responding to state compulsion, and it gave short shrift to the language from *Tarkanian* on which the District Court relied.").

further development of Rehnquist's opinion in *Jackson* sends a clear message of his reverence for the late Chief Justice's jurisprudence.[148] Clearer still is his message that as the role of government continues to evolve, indications of state action will remain stagnant.[149]

B. *No State Action, as Public Access Channels Are Not a "Traditional, Exclusive Public Function"*

Justice Kavanaugh next discussed three situations where state action by a private actor can be found.[150] The first arises when a public actor meets the aforementioned "traditional, exclusive public function" inquiry.[151] The second arises "when the government compels [a] private entity to take a particular action."[152] The third arises "when the "government acts jointly with the private entity."[153] Because the latter two types of activity were not alleged by the plaintiffs, the only possible option that could be met was the first—MNN could be liable for a § 1983 action under the theory that it had taken on a function traditionally and exclusively carried out by the government.[154] Justice Kavanaugh concluded that because public access channels are neither traditionally nor exclusively a government function, there is no merit to the plaintiff's claim, and MNN could not be liable for a deprivation of the plaintiff's civil rights.[155]

Furthermore, MNN's establishment of a public forum was not enough to satisfy the requirements of state action.[156] The majority noted that although providing a public forum is traditionally a government function, it is not exclusive to public entities.[157] There are many situations where a private actor may create a public forum—such as a comedy club hosting an open mic night, or a grocery store hanging a bulletin board—

148 *Halleck*, 139 S. Ct. at 1928–29.

149 *Id.* ("It is not enough that the federal, state, or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good or the public interest in some way. 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.").

150 *Id.* at 1928.

151 *Id.* (citing *Jackson*, 419 U.S. at 352–54).

152 *Id.* (citing Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982)).

153 *Id.* (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–42 (1982)).

154 *Id.*

155 *Id.* at 1929 ("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.").

156 *Id.* at 1930.

157 *Id.*

but may still be able to restrict the content as it sees fit.[158] The majority warned that should these examples constitute state action, private property owners could be subject to unlimited First Amendment liability.[159] Although New York City may have authorized the creation of the station, this would be no different than if the City had simply licensed it as part of a regulatory scheme.[160] Further, the Court previously held that a regulatory scheme does not constitute state action.[161] If the Court overruled past precedent to endorse the view that merely complying with licensing constituted state action, administrability problems could abound.[162] For instance, private actors restricting the content of a bulletin board would constitute a deprivation of civil rights.[163] The majority concluded that because the facts so closely aligned with past cases implicating licensing, the Court should adhere to the *Jackson* precedent, and not break any new ground in expanding the doctrine.[164] Although remedies under state law may remain available to the plaintiffs, there was no First Amendment violation.[165]

C. *Justice Sotomayor Presents an Alternative View Supported by Alternative Facts*

From the first line of her dissent, Justice Sotomayor proclaimed that she viewed the facts of the case to be different than those presented by the majority.[166] She believed that the facts showed that the public function test was satisfied, and as such, MNN should have been treated as a public forum subject to First Amendment protections.[167] The dissent presented two arguments regarding why the First Amendment should have applied to MNN's conduct.[168] First, in mandating the creation of a public access channel, the government had effectively created an easement.[169] This retained property right ensured that a channel such as MNN should be

158 *Id.*

159 *Id.* at 1930–31.

160 *Id.* at 1931–32.

161 Jackson v. Metro. Edison Co., 419 U.S. 345, 357–58 (1974).

162 *Halleck*, 139 S. Ct. at 1931–32.

163 *Id.*

164 *Id.* at 1932–33.

165 *Id.* at 1933.

166 *Id.* at 1934 (Sotomayor, J., dissenting) ("The Court tells a very reasonable story about a case that is not before us. I write to address the one that is. This is a case about an organization appointed by the government to administer a constitutional public forum.").

167 *Id.*

168 *Id.*

169 *Id.* at 1934–35, 1937.

classified as a public forum.[170] Second, New York could not avoid constitutional protections simply by contracting the administration of a public forum to a private company.[171]

D. *A Property Interest Was Created and Retained by New York City*

The first argument is that an electronic property interest was retained by New York City, which ensured that the public access channel constituted a public forum.[172] Comparing this interest to more tangible property interests, Justice Sotomayor noted that this would be no different than if New York City had licensed a private company to place a billboard, but mandated what the content of that billboard would be.[173] New York State law gave the City the right to bargain with the company to operate a station under the terms specified in the contract, and these terms ensured that the City retained an implied property interest which could make the station liable.[174] Justice Sotomayor also noted that under this policy, the government would not have a property interest in all public access channels—only channels where the City had specifically bargained for these rights under an agreement with a cable company.[175] Accordingly, New York City had the exclusive right to create a public access channel, it retained this property interest when it authorized the channel, and therefore, the channel was a public forum.[176] This is supported by the State's mandate that all content be broadcasted on a first-come, first-served basis.[177]

In Part III of the majority opinion, Justice Kavanaugh addressed the dissent directly and held that New York City had no property interest in

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170 *Id.* at 1937 ("The last time this Court considered a case centering on public-access channels, five Justices described an interest like the one here as similar to an easement. Although Justice Breyer did not conclude that a public-access channel was indeed a public forum, he likened the cable company's agreement to reserve such channels 'to the reservation of a public easement, or a dedication of land for streets and parks, as part of a municipality's approval of a subdivision of land.'" (quoting Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 760–61 (1996))).

171 *Id.* at 1939–40 ("When MNN took on the responsibility of administering the forum, it stood in the City's shoes and became a state actor for purposes of 42 U.S.C. § 1983.").

172 *Id.* at 1937.

173 *Id.* at 1938–39.

174 *Id.* at 1937, 1939.

175 *Id.* at 1939 ("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.").

176 *Id.*

177 *Id.* ("New York State regulations require that the channels be made available to the public 'on a first-come, first-served, nondiscriminatory basis.'" (citing N.Y. COMP. CODES R. & REGS. tit. 16, § 895.4(c)(4), (8)–(9) (2020))).

the public access channels.[178] He considered the City to be essentially a middleman between MNN and Time Warner—both private companies—and wrote that because the agreement between Time Warner and New York City never addressed a property interest, none was present.[179] He did note that the property interest argument may be possible depending on state law, or the specific structure of a deal, and is not specifically foreclosed by the opinion.[180]

E. *New York City's First Amendment Obligations Transferred When It Delegated the Work to a Private Entity*

Justice Sotomayor's second argument considered that a public access channel run directly by New York City would unquestionably be a public forum and that the City "cannot evade the First Amendment" by assigning the administration of a public forum to a private entity.[181] She cited *West v. Atkins*,[182] where a unanimous Court held that because North Carolina was required to provide prisoners with medical care, failure to properly treat a prisoner—even by an outside doctor—constituted state action.[183] Following this logic, the City had a constitutional obligation to protect free speech, and this obligation did not extinguish because the City was no longer the administrator of the station.[184] In Justice Sotomayor's view, the protection had been delegated to the station through the contract with the City.[185] Therefore, the station had a duty to comply with the First Amendment and ensure the public could use the resources guaranteed by the City when it authorized the creation of the

178 *Id.* at 1933 (majority opinion) ("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. To reiterate, nothing in the franchise agreements suggests that the City possesses any property interest in Time Warner's cable system, or in the public access channels on that system.").

179 *Id.* at 1933–34.

180 *Id.*

181 *Id.* at 1939–40 (Sotomayor, J., dissenting).

182 West v. Atkins, 487 U.S. 42 (1988).

183 *Halleck*, 139 S. Ct. at 1940 (Sotomayor, J., dissenting) (citing *West*, 487 U.S. 42).

184 *Id.* ("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 for purposes of § 1983.").

185 *Id.* at 1941 ("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." (internal citation omitted)).

station.[186] She disagreed with the majority that MNN had simply entered the marketplace and was subject to regulations (rather than obligations) of the City, which would not constitute state action per *Jackson*.[187] Rather, MNN was offered a specific job, which carried certain requirements—when MNN willingly entered into a contract with the City,[188] MNN had stepped into the City's shoes so long as it used the power delegated to it.[189] Given her view that the facts presented by the majority were not accurate, Justice Sotomayor would have found in favor of Melendez and Halleck.[190]

F. *A Narrow Decision*

The facts of *Halleck*—at least those presented as true by the majority[191]—indicate that this should have been a relatively easy decision.[192] The categorization of a public access channel was still an open question from *Denver Area*, but the general precedent for what constituted state action had been defined by previous cases.[193] In a decision Justice Kavanaugh effectively labeled as narrow, the Court provided a clear answer to *Denver Area*'s unresolved question.[194] Yet,

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186 *Id.*

187 *Id.* at 1942 ("More fundamentally, the majority's opinion erroneously fixates on a type of case that is not before us: one in which a private entity simply enters the marketplace and is then subject to government regulation. The majority swings hard at the wrong pitch.").

188 *Id.* at 1945 ("It was asked to do a job by the government and compensated accordingly.").

189 *Id.*

190 *Id.*

191 *Id.* at 1933 (majority opinion) ("The short answer to that argument is that 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. . . . 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. To reiterate, nothing in the franchise agreements suggests that the City possesses any property interest in Time Warner's cable system, or in the public access channels on that system.").

192 In that the facts presented seem to fall squarely into the *Jackson* framework, as outlined by the majority. *Id.*

193 *See id.* at 1928–29 (outlining previous state action jurisprudence).

194 *Id.* at 1934 ("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

per Justice Sotomayor's dissent, this is not a narrow decision, but instead a departure from previous cases.[195]

The facts of *Halleck* made it an easy case for the Court to reshape the state action doctrine: the plaintiffs were banned because their offensive conduct had made them toxic to a channel that was designed for community use.[196] It is difficult to argue that their belligerent actions warranted anything less than a ban from airing a highly critical documentary or any other inflammatory content.[197] And yet, if the plaintiffs were protected by the First Amendment, MNN would have no choice but to put up with their conduct.

Controversial speech, no matter how outrageous, is protected.[198] The view endorsed by the dissent is in line with this—although MNN may not have supported Halleck and Melendez's programming, they were compelled to broadcast the film given their position as administrators.[199] The majority avoided this thorny issue by adopting the view that a public access channel is more like a grocery store bulletin board than a private election.[200] Just as nobody would question a grocery store's ability to police content on their property, so should the channel have the right to prevent problematic users from taking advantage of the community service it provides.[201]

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before us in light of the record before us."). Justice Sotomayor disagreed with this assessment, writing, "[w]hile the majority emphasizes that its decision is narrow and factbound, that does not make it any less misguided." *Id.* at 1945 (Sotomayor, J., dissenting) (internal citation omitted).

195 *See, e.g.*, *id.* at 1943 ("The Court made clear in *West* [*v. Atkins*, 487 U.S. 42 (1988)] that the rule did not reach further, explaining that 'the fact that a state employee's role parallels one in the private sector' does not preclude a finding of state action. When the government hires an agent, in other words, the question is not whether it hired the agent to do something that can be done in the private marketplace too. . . . The majority consigns *West* to a footnote, asserting that its 'scenario is not present here because the government has no [constitutional] obligation to operate public access channels.'" (last alteration in original) (citations ommited)).

196 *See supra* Section II.B.

197 Complaint at 11, Halleck v. City of New York, 224 F. Supp. 3d 238 (S.D.N.Y 2016) (No. 15-cv-08141) [hereinafter *Halleck* Complaint] (outlining a pattern of conduct which the station considered harassment).

198 Snyder v. Phelps, 562 U.S. 443, 458 (2011) ("What Westboro said, in the whole context of how and where it chose to say it, is entitled to 'special protection' under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.").

199 *Halleck* Complaint, *supra* note 197, at 4–5 (noting that content had to be broadcast on a first-come, first-served basis).

200 *Halleck*, 139 S. Ct. at 1930 (majority opinion) ("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.").

201 *Id.*

G. *Justice Kavanaugh Makes His Mark*

The opinion largely synthesizes the sometimes wavering history of the state action doctrine into the easy to remember magic words Justice Kavanaugh continually repeated.[202] His strong adherence to past precedent resulted in an extremely compelling opinion, especially when viewed separately from the dissent.[203] Although Justice Kavanaugh's "traditional, exclusive" language is a new addition, he does not appear, at first glance, to have rewritten the doctrine in a meaningful way.[204] After all, previous state action claims could only arise under very limited situations, many of which were addressed in *Halleck*.[205] In dismissing the initial suit, the district court found that this was close enough to *Denver Area* to warrant dismissal.[206] Justice Kavanaugh perhaps unnecessarily oversimplified the analysis, and his willingness to distill a complicated doctrine into a simple phrase now ensures that it will only cover a limited number of functions—though this seems to be by design.[207] The majority's repeated reminder of the importance of tradition[208] represents a quasi-originalist line of thinking that appears to foreclose the state action doctrine's applicability to functions that a public entity may adopt moving forward.

One of the interesting aspects of this case is the stark contrast between the majority opinion and the dissent—not just as a matter of law, but as it pertains to the facts of the case before the Court.[209] The majority's willingness to set aside facts that would have worked in the plaintiff's favor[210] seems to indicate just how keen Justice Kavanaugh was to change the law and announce a new test of his own. A final factor that likely played a role in the makeup of the majority's composition was Justice Kavanaugh's uncited paraphrase of Dennis Prager towards the

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202 That is, the instance that the "traditional, exclusive public function" framework is the new bright line rule. *See generally id.*

203 *Id.* at 1934 ("Under the text of the Constitution and our precedents, MNN is not a state actor subject to the First Amendment.").

204 *Id.*

205 *Id.* at 1929. ("The Court has stressed that 'very few' functions fall into that category.").

206 Halleck v. City of New York, 224 F. Supp. 3d 238, 245–47 (S.D.N.Y. 2016).

207 It is difficult to tell how significant the outcome will be, however, as this doctrine was already limited to so few functions. *See Halleck*, 139 S. Ct. at 1929 ("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." (citations omitted)).

208 *Id.*

209 *Compare id.* at 1933–34 (majority opinion), *with id.* at 1934 (Sotomayor, J., dissenting). This is particularly interesting as this comes from a motion to dismiss and should be viewed through the lens of the facts alleged by the plaintiff. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662 (2009).

210 *Id.* at 1934 (majority opinion).

conclusion of the decision.[211] Both the *Denver Area* decision and the line of questioning Justice Breyer adopted during oral arguments indicate that he was undecided as to whether the creation of a public access channel constituted state action.[212] The majority may have been able to bring more votes to their side had Justice Kavanaugh not included such overtly pro-federalist society language favoring a limited government.[213] Any additional vote from the traditionally left-leaning justices was entirely unnecessary, however, as a 5-4 decision on partisan lines is no less binding than any other majority.

IV. ARGUMENT

A. *The Future of the State Action Doctrine*

In the short time since it was decided, *Halleck* has already been cited in two high-profile cases protecting Google from § 1983 actions brought against them—one from Tulsi Gabbard and the other from *Halleck*-influencer Dennis Prager.[214] Both cases paint *Halleck* as the definitive decision on state action, yet neither required the rule established in *Halleck* to reach its conclusion.[215] Under pre-*Halleck* Ninth Circuit precedent, an internet platform is not transformed into a state actor by simply hosting speech.[216] A court relying on previous decisions would likely have reached the same result in either of these cases, without needing to rely on the narrowed doctrine.[217]

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211 *Id.* ("It is sometimes said that the bigger the government, the smaller the individual."). Although Justice Kavanaugh does not attribute this phrase, it is strikingly similar to one of Dennis Prager's aphorisms, "the bigger the government becomes, the smaller the individual citizen becomes." Dennis Prager, *The Bigger the Government, the Smaller the Citizen*, REAL CLEAR POL. (Sept. 1, 2019), https://www.realclearpolitics.com/articles/2009/09/01/the_bigger_the_government_the_smaller_the_citizen_98114.html [https://perma.cc/24JL-2VPG].

212 Denver Area Educ. Telecomm. Consortium, Inc. v. FCC., 518 U.S. 727 (1996); *Halleck* Transcript, *supra* note 126, at 24–25.

213 *See, e.g.*, *Frequently Asked Questions*, FEDERALIST SOC'Y, https://fedsoc.org/frequently-asked-questions [https://perma.cc/5UAN-5R9A] ("[The Federalist Society] is an organization of 60,000 lawyers, law students, scholars, and other individuals who believe and trust that individual citizens can make the best choices for themselves and society. It was founded in 1982 by a group of law students interested in making sure that the principles of limited government embodied in our Constitution receive a fair hearing.").

214 Prager Univ. v. Google LLC, 951 F.3d 991 (9th Cir. 2020); Tulsi Now, Inc. v. Google, LLC, No. 19-CV-6444, 2020 WL 4353686 (C.D. Cal. Mar. 3, 2020). There is some irony as Dennis Prager was responsible for the language used by the majority in *Halleck*, and yet was a victim of its outcome.

215 *Prager Univ.*, 951 F.3d 991; *Tulsi Now*, 2020 WL 4353686.

216 *Prager Univ*., 951 F.3d at 997 (quoting Howard v. Am. Online Inc., 208 F.3d 741, 754 (9th Cir. 2000)).

217 *Id.* at 997–98; *Tulsi Now*, 2020 WL 4353686, at *1–2.

A recent Leading Case from the *Harvard Law Review* suggests the possibility of a property interest as being an important aspect of the decision.[218] Although Justice Kavanaugh disagreed with Justice Sotomayor that a property interest was retained by New York City, he did not foreclose this from being an indication of state action in future circumstances.[219] Should a municipality wish to create a situation wherein a public access channel must comply with the requirements of the First Amendment, it could ensure that the authorization or contract includes explicit reference to any property interest that may be retained.[220] While this interpretation may be possible, it appears more likely that the mention of property interests was a platitude by the majority to not completely ignore Justice Sotomayor's alarm.[221] This outcome would almost certainly not be viable as it is unlikely that a private television station would be interested in purposefully opening themselves up to § 1983 suits if they accidentally censored content.

B. *A Narrow Decision?*

Justice Kavanaugh's "traditional, exclusive public function"[222] test simplifies a previously complex state action inquiry and will likely reduce potentially frivolous litigation against private entities. Yet this advantage comes at a steep price—although Justice Kavanaugh is careful to note how narrow his opinion is, *Halleck*'s impact on public administration cannot be understated, as the decision will shape the way public actors structure future deals.[223] Armed with a handbook on how to avoid litigation, public actors can now take advantage of the decision to

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218 Leading Case, Manhattan Community Access Corp. v. Halleck, 133 HARV. L. REV. 282, 288 (2019).

219 Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1934 (2019) ("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.").

220 *Id.*

221 *Id.* at 1933 (noting that both the plaintiff and the dissent addressed the question of property rights).

222 *Id*. at 1934.

223 *Halleck* has already been cited as the controlling case on state action in over forty lower court rulings. *See, e.g*., Grant v. Brooklyn Veterans Hosp., No. 19-CV-4875, 2019 WL 6254625, at *2 (E.D.N.Y. Nov. 21, 2019) (outlining the new test as established in *Halleck*).

circumvent constitutional protections.[224] Thanks to *Halleck*, Justice Douglas's fear of a government and a private entity acting "in cahoots" is more plausible than ever.[225] After this decision, a government entity could contract out work in fields that are not traditional and exclusive public functions to avoid facing repercussions for actions that may not comply with constitutional requirements.[226] The next major case that involves state action will likely build on this and might implicate rights or services beyond a local TV station. Consider the increasingly popular concept of municipal broadband.[227] If a state actor had authorized a private company to administer a public broadband network beyond a mere licensing scheme, § 1983 actions might have been possible under the *Jackson* framework.[228] However, under *Halleck*, this remedy would no longer be available as the administration of municipal broadband is neither a traditional nor exclusive function of the government.[229] Accordingly, a city could (for instance) authorize a municipal broadband network and outsource the administration of the network to a third party, which would have carte blanche to censor content as it saw fit.

This could be avoided had the Court adopted Justice Sotomayor's view, wherein New York City's involvement in creating the channel was enough to constitute state action, regardless of how traditional the function implicated was.[230] She anticipated a future where a government entity would be able to contract out certain functions to escape liability

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224 *Halleck*, 139 S. Ct. at 1944 (Sotomayor, J., dissenting) ("But two dangers lurk here regardless. On the one hand, if the City's decision to outsource the channels to a private entity did render the First Amendment irrelevant, there would be substantial cause to worry about the potential abuses that could follow. Can a state university evade the First Amendment by hiring a nonprofit to apportion funding to student groups? Can a city do the same by appointing a corporation to run a municipal theater? What about its parks?").

225 Jackson v. Metro. Edison Co., 419 U.S. 345, 363–64 (1974) (Douglas, J., dissenting); *Halleck*, 139 S. Ct. at 1941 (Sotomayor, J., dissenting) ("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." (internal citation omitted)).

226 *Halleck*, 139 S. Ct. at 1941.

227 Eric Griffith, *Cheap and Fast Municipal ISPs Are Blocked in Almost Half of the US*, PCMAG (May 18, 2020), https://www.pcmag.com/news/cheap-and-fast-municipal-isps-are-blocked-in-almost-half-of-the-us [https://perma.cc/LB8T-94K2] (noting that there are 331 municipal broadband networks in the United States according to one count). For an interactive map of municipal broadband networks see *Community Network Map*, INST. FOR LOC. SELF-RELIANCE, https://muninetworks.org/communitymap [https://perma.cc/9SDR-8953].

228 *Jackson*, 419 U.S. 345 (finding that a regulatory scheme alone was not enough to constitute state action).

229 *Halleck*, 139 S. Ct. at 1934 (majority opinion) ("Operating public access channels on a cable system is not a traditional, exclusive public function. A private entity such as MNN who opens its property for speech by others is not transformed by that fact alone into a state actor.").

230 *Id.* at 1945 (Sotomayor, J., dissenting).

or navigate around certain constitutional requirements, and crafted a preemptive response to combat this situation.[231] If Justice Kennedy had remained on the Court, *Halleck* may have been decided differently,[232] and fears of a future where public actors can contract around constitutional violations would be unfounded.[233]

When the case was first taken up, there was apprehension that a ruling in favor of Halleck and Melendez could mean that internet platforms and social media networks would be unable to censor any content on their platforms, as they would be creating electronic public squares.[234] Nevertheless, Twitter's decision to make an editorial comment regarding the President's remarks on mail-in ballots would likely not have constituted a violation under Justice Sotomayor's framework,[235] as Twitter has not contracted with the government to run its forum, and there is no retained property right. In this instance, Twitter would be properly categorized as being akin to a grocery store bulletin board; a classification that is not appropriate (at least in Justice Sotomayor's view) for a public access channel chartered by the city.[236]

C. *State Action for Thee, Not for Me*

During his tenure, President Trump has faced a great deal of litigation.[237] One such case arose from the President blocking users with opposing viewpoints on Twitter, ensuring that neither would see each other's tweets and responses, at least when logged in.[238] The district court in *Knight First Amendment Institute at Columbia University v. Trump* held that by blocking the plaintiffs, the President had infringed their First

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231 *Id.* at 1940 (noting that prior to this decision, "[w]hen 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 for purposes of § 1983").

232 *See supra* Section II.D.

233 *See Halleck*, 139 S. Ct. at 1940 (addressing those fears).

234 Tucker Higgens, *Supreme Court Agrees to Hear a Case that Could Determine Whether Facebook, Twitter and Other Social Media Companies Can Censor Their Users*, CNBC (Oct. 16, 2018, 1:24 PM), https://www.cnbc.com/2018/10/16/supreme-court-case-could-decide-fb-twitter-power-to-regulate-speech.html [https://perma.cc/DY8U-4UV6].

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

236 *See supra* Section III.B.

237 Peter Baker, *Trump is Fighting so Many Legal Battles, It's Hard to Keep Track*, N.Y. TIMES (Nov. 6, 2019), https://www.nytimes.com/2019/11/06/us/politics/donald-trump-lawsuits-investigations.html [https://perma.cc/7NDR-JB96].

238 Jeffrey Toobin, *Trump's Twitter Blockees Go to Court*, NEW YORKER (Mar. 19, 2018), https://www.newyorker.com/magazine/2018/03/26/trumps-twitter-blockees-go-to-court [https://perma.cc/8G64-PSVQ].

Amendment rights.[239] A three-judge panel on the Second Circuit affirmed the decision,[240] and en banc review was denied.[241]

On August 20, 2020, Trump petitioned the Supreme Court for certiorari.[242] In his petition, he invoked *Halleck* to support the argument that he is not a state actor when using his personal Twitter account.[243] His tweets, however, seem to suggest a belief that Twitter is violating the First Amendment when they flag his tweets as unsubstantiated.[244] This leads to the apparent suggestion—at least when comparing the petition with Trump's tweets—that the President is not a state actor, but Twitter is. The Court has yet to reach a decision on the petition, leaving the future of the Knight First Amendment Institute's victory at the Second Circuit, and the scope of *Halleck*, unwritten.

CONCLUSION

Although Justice Kavanaugh's opinion is well reasoned and grounded in strong precedent, it dangerously lays the groundwork for future decisions by drawing a clear line on what constitutes state action. The decision is especially problematic considering the majority and dissent's disagreement on the facts surrounding the case.[245] Justice Kavanaugh further widens the gulf by glossing over the legitimate concerns presented by Justice Sotomayor.[246] The overly narrow rule

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239 Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 577 (S.D.N.Y. 2018), *aff'd*, 928 F.3d 226 (2d Cir. 2019). The court determined that although "the interactive space of a tweet sent by @realDonaldTrump is not a traditional public forum," it was a "designated public forum," which was "subject to the same limitations as that governing a traditional public forum." *Id.* at 574–75 (citations omitted).

> In sum, we conclude that the blocking of the individual plaintiffs as a result of the political views they have expressed is impermissible under the First Amendment. While we must recognize, and are sensitive to, the President's personal First Amendment rights, he cannot exercise those rights in a way that infringes the corresponding First Amendment rights of those who have criticized him.

Id. at 577.

240 Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019).

241 Knight First Amendment Inst. at Columbia Univ. v. Trump, 953 F.3d 216, 217 (2d Cir. 2020) (denying en banc review).

242 Petition for Writ of Certiorari, Trump v. Knight First Amendment Inst. at Columbia Univ., No. 20-197 (U.S. Aug 20, 2020).

243 *Id.* at 12–13 ("Here, those requirements are not satisfied: The President's use of his own property (his personal Twitter account) in a manner available to all private citizens (applying Twitter's blocking function) does not constitute state action to which the First Amendment applies.").

244 *See* Trump, *supra* note 1; TWITTER, supra note 4.

245 Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1934 (2019).

246 This can be inferred in light of Sotomayor's view that the facts are so different from those presented by the majority. *Id.* (Sotomayor, J., dissenting).

appears to allow for situations where a public entity can contract with private parties to purposefully circumvent constitutional protections that would ordinarily apply.[247] Justice Sotomayor makes a compelling case for MNN to be considered a state actor, but her dissent would expand the liability a private entity could face for civil rights violations in the course of ordinary business, which could have a chilling effect on businesses.[248] The application of both the majority and dissent present serious issues, and there was likely a more sustainable opinion that could have been written somewhere in the middle. Given his invocation of Conservative aphorisms,[249] however, it appears that Justice Kavanaugh perhaps cared less about striking the consensus the Court reached in *Denver Area*, and was instead looking to make his mark on the judiciary and build on the legacy of Chief Justice Rehnquist.[250] What comes next is anybody's guess—Rehnquist used his own words from *Jackson* as a sword to narrow the doctrine once more in *Flagg Bros*.[251] If Justice Kavanaugh follows the playbook of his "first judicial hero,"[252] it stands to reason that he might use the logic of *Halleck* to issue a new decision with broader implications, which could lead to a further reduction in the remedies available to those who have been wronged.

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247 *Id.*

248 *Id.* at 1945.

249 *See supra* note 211 and accompanying text.

250 *See supra* Section III.A.

251 *See, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978).

252 Robert Barnes & Ann E. Marimow, *On Abortion and Other Issues, Kavanaugh's Heroes Are More Conservative than Kennedy*, WASH. POST (July 15, 2018, 6:40 PM), https://www.washingtonpost.com/politics/courts_law/on-abortion-and-other-issues-kavanaughs-heroes-are-more-conservative-than-kennedy/2018/07/15/04a3975c-86ad-11e8-8553-a3ce89036c78_story.html [https://perma.cc/27TH-YZYC].