

Control Over Communication

Control over communication is rightly seen as the keystone as to who controls the civil population. The gatekeepers to the media control public opinion.

From the time that cave people drew pictures of hunters on the interior walls of their hideouts, homo sapiens have been conveying messages about their lifestyle, desires, needs and wants. Whether it is portraying the takedown of a now extinct animal which might make a tasty meal or determining control of the internet, communication is the key to the community.

The United States Supreme Court, Justice Brett Kavanaugh writing for the majority, recently addressed the question as to whether a private non-profit corporation is a state actor when it operates public access channels. In other words, does the First Amendment restrict a private company's exercise of editorial discretion over the speech on public access channels which it is given the right essentially to dominate? The Court answered a resounding "Yes."

The operation of public access channels on a cable system is not, ruled the Court, an exclusive public function. In operating the public access channels, the private non-profit corporation is considered a private actor not a state actor. Therefore, the First Amendment has no role in constraining editorial discretion.

The question is, who gave the right to run the public access channels? The public access channels on Time Warner's cable system in Manhattan are operated by a private non-profit corporation known as MNN. Does the fact that a private entity is given the right to control public access mean that the First Amendment is washed away like the sand at high tide?

Time Warner must, according to the law, set aside some channels on its cable system for public access. New York City designated a private non-profit corporation named Manhattan Neighborhood Network (MNN) to operate Time Warner's public access channels in Manhattan.

The Government which **is** subject to the First Amendment turned over a responsibility (“delegation” in the words of the law) to a private company. That private company then put on a cloak of invincibility permitting it to narrowly escape the First Amendment.

The First Amendment governs what the **government** may or may do. However, there are times when a private entity is given such power that it is really a stand in for the state. This is more likely the case in the context of the military and other services traditionally delivered by the government. How about communication? In the United States, we have public broadcasting, but typically cable is a private function.

Operating a TV station, determined the Court, is not a power “traditionally exclusively reserved to the State.” The Court relied upon a long litany of precedent to make that determination.

Notwithstanding the importance of communication, it is not a function that has traditionally been reserved to the state. There is something just a bit absurd about that conclusion, given that every political candidate attempts to control us utilizing public communication. In this case, it was New York City that demanded public access rights for small cable companies and permitted control to reside in the hands of a private entity.

The Court found that “operating public access channels on a cable system is not a traditional, exclusive public function within the meaning of the Court’s cases.” Slip Opinion Page 8 of 19. Those who argued in opposition noted that operation of public access channels on a cable system is more like a public forum, such a street corner. Is the public access cable right akin to a private but regulated utility company? Regulation by the state does not make one a state actor. There is something different about communication in terms of its power to influence and alter public opinion in contradistinction to providing electrical power.

Justice Sotomayor, Ginsburg, Breyer, and Kagan dissented. This case was the classic line up of liberal versus conservative. The dissenters argued that the channels are clearly a public

forum. The City of New York requires that public access channels be opened and provided a franchise to a private company.

One Justice likened the private company's agreement to reserve public access channels to the retention of a public easement, such as the dedication of land for streets and parks. Clearly, we live in a society where the government has intruded to every component of our being. At what point does the government determination as to who should operate public communication, and under what circumstances, implicate traditional First Amendment rights?

The larger question is whether the Constitution applies where the government enables and empowers private companies to run the show? The majority is persuaded by the fact that communication is not a traditional public function and the dissenters say that the right to operate a cable company is akin to a street corner huckster preaching the value of communism, fascism or some other political viewpoint.

Behind the entire public access cable argument stands the reality that the entire system would not exist without government blessing. When the government has such a quintessential role, who will regulate the regulators? Can the government escape constitutional restrictions by permitting a gigantic public corporation to do the government's bidding?

As we have seen in our own country, and in other nations, the evisceration of civil rights and liberties is a slippery slope. It is easy to justify throwing away constitutional rights based upon a technicality as utilized here that communication is somehow not a traditional government function.

CAR/srb