FIRST AMENDMENT—GOVERNMENT-OWNED BROADCASTERS RETAIN THE RIGHT TO CONTROL POLITICAL CANDIDATES' FIRST AMENDMENT RIGHT OF ACCESS TO SPONSORED DEBATES—*Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998).

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I. INTRODUCTION

One of the most important principles of the American Constitution is the freedom of all people to speak freely without the fear of retribution.[1] The First Amendment in the Bill of Rights provides the protection of free speech.[2] However, there is a deep division in First Amendment jurisprudence between the rights of a speaker to control speech and the rights of the audience or listeners to hear and to know.[3]

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* To my husband, Vahe, whose support and understanding were indispensable throughout this process.

[1] *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-90 (1963).

[2] *See* U.S. CONST. amend. I. The First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Id.

[3] *See* Jeffrey S. Hops, *Red Lion in Winter: First Amendment and Equal Protection Concerns in the Allocation of Direct Broadcast Satellite Public Interest Channels*, 6 COMM LAW OF CONSPECTUS 185, 185 (1998). Hops discussed the division within the First Amendment between free information flow on politically relevant matters and freedom of the press. *See id.* at 186. Furthermore, Hops described freedom of speech as a commodity which:

> is accomplished on a for-profit basis, with stockholders expecting a return on their investment. Owners of private media transmit what will attract audiences, regardless

This schism is especially great when the right of free speech involves political expression because such speech involves not only criticism of the government, but also ideas that can potentially reshape the nature of the government.[4] Political candidates, therefore, are afforded the greatest protection under the First Amendment.[5] Moreover, the Constitution also protects the press and provides it with wide journalistic discretion to report the truth.[6] The need to balance the rights of the speaker and the media's ability to retain its journalistic integrity has been the focus of a myriad of Supreme Court decisions.[7]

The most recent decision of the Court addressing the interests of the press against political access to speech is *Arkansas Educational Television Commission v. Forbes*.[8] In *Forbes*, the Court held that the political debates sponsored

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> of content's merit or contribution to democratic self-governance. At the same time, the Supreme Court has recognized harm to full and free information flows . . . as a justiciable First Amendment problem that may supersede market outcomes . . . . [In fact] constitutional scholars have acknowledged that the free market will not by itself always provide information necessary to ensure a robust marketplace of ideas.

Id.

[4] *See* Thomas F. Ackley, Note, *Political Candidates' First Amendment Rights Can Be Trumped by Journalists' Editorial Rights: Candidates Barred From Public Forum Television Debate in Marcus v. Iowa Public Television*, 31 CREIGHTON L. REV. 475, 475 (1998). In his note, Ackley discussed the holding in *Marcus v. Iowa Public Television*, 97 F.3d 1137 (1996), specifically how this decision was impacted by the Eighth Circuit's decision in *Forbes v. Arkansas Educ. Television Commission*. *See id.* at 505-16 (citing Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497 (8th Cir. 1996)[hereinafter *Forbes II*]). In *Forbes II*, the court held, on the basis that public broadcast-sponsored debates were a limited public forum, that the public broadcast facilities were mandated to accommodate all eligible political candidates in their debates. *See Forbes II*, 93 F.3d at 497. Ackley disagreed with the limited forum analysis that was derived by the *Forbes II* court and utilized by the *Marcus* court, on the basis that such a designation was contrary to guidelines provided by Supreme Court decisions. *See* Ackley, 31 CREIGHTON L. REV. at 512-16.

[5] *See* Ackley, *supra* note 4, at 475, 494-95. Ackley highlighted political cases such as *Elrod v. Burns* to support the proposition that the First Amendment rights of a person's political ideas and the expression of such ideas are "core activities guaranteed by the First Amendment." *See id.* at 495 (citing Elrod v. Burns, 427 U.S. 347, 356 (1976)).

[6] *See* Vincent Blasi, *The Checking Value in the First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523 (1977).

[7] *See, e.g*, Turner Broad. Sys., Inc. v. Federal Communication Comm'n, 512 U.S. 622 (1994); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[8] 523 U.S. 666 (1998) [hereinafter *Forbes*].

by a state-owned television station qualified as a non-public forum.[9] Consequently, the station's exclusion of the political candidates was reasonable because it was based upon a viewpoint-neutral exercise of its journalistic freedom of expression.[10]

This Note will first review the facts and procedural history of *Forbes*. It will then examine the history of broadcasting regulation and the Court's application of First Amendment law to political speech within the broadcast media. Subsequently, this note will provide an analysis of the Court's approach in classifying the state-owned station's debates as non-public fora and the Court's ultimate decision that the exclusion of qualified political candidates, such as Forbes, was reasonable. Ultimately, the author will agree that the Court was correct in deeming the television-sponsored debates as a non-public forum. Likewise, the author will also conclude that the Court reached a valid decision by disallowing Forbes access to the television-sponsored debates. However, this piece will conclude that the Court's lack of clear guidelines for restricting access to debates, sponsored by public broadcasters, will lead only to further confusion.

II. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Ralph Forbes ("Forbes"), an independent candidate during the 1992 election for the Arkansas Third Congressional District, filed a claim on October 19, 1992, after being denied permission to participate in a debate sponsored by the Arkansas Educational Television Commission ("AETC").[11] Claiming that his right to participate was guaranteed under the First Amendment, Forbes sought injunctive and declaratory relief against AETC, as well as damages.[12]

The AETC is an Arkansas state agency that owns and operates a network of five noncommercial television stations.[13] AETC is operated by an eight-member panel that is appointed by the Governor for a term of eight years.[14]

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[9] *See id.* at 680.

[10] *See id.* at 682-83.

[11] *See id.* at 671.

[12] *See id.*

[13] *See id.* at 669.

[14] *See* ARK. CODE ANN. §§6-3-102(a)(1),(b)(1) (WESTLAW through 1999 Reg. Sess.).

Members of AETC are prohibited from holding any other state or federal position, with the exception of teaching positions, to ensure that their programming decisions are insulated from political pressures.[15]

AETC staff began planning a debate format for the November 1992 elections in the Spring of 1992.[16] The televised debate format consisted of five, one-hour debates, including one debate for the Senate election and one for each of the four congressional elections in Arkansas.[17] After consulting with Bill Simmons, Arkansas Bureau Chief for the Associated Press, regarding the debate format, the AETC staff decided that time constraints mandated the limitation of debate participation to major party candidates or other candidates with strong public support.[18] Based on this decision, on June 17, 1992, AETC invited only the Republican and Democratic candidates for Arkansas' Third Congressional District to participate in the debates[19] scheduled for October 22, 1992.[20]

On August 24, 1992, two months after AETC extended the original invitations for debate participation, Forbes wrote to the AETC requesting permission to participate in the debate.[21] Forbes, who had previously sought, without success, a number of elected offices in Arkansas,[22] had barely qualified on the ballot for that district.[23] AETC denied Forbes' request on the basis that "'[the]

Each member must be a resident and qualified elector of Arkansas and at least one member must be appointed from each of the congressional districts. *See id.*

[15] *See* ARK. CODE ANN. §§6-3-102(a)(3) (WESTLAW through 1999 Reg. Sess.).

[16] *See Forbes*, 523 U.S. at 670.

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *See Forbes*, 523 U.S. at 684-85 (Stevens, J., dissenting). Forbes had been a contender for the Republican nomination for Lieutenant Governor in 1986 and 1990. "Although he was defeated in the run-off election . . . he had received 46.88% of the statewide vote and had carried 15 of the 16 counties within the Third Congressional District by absolute majorities." *Id.* (Stevens, J., dissenting).

[23] *See id.* at 670. Forbes was certified as an independent candidate to appear on the ballot for Arkansas' Third Congressional District after he obtained 2,000 signatures. *See*

viewers would be best served by limiting the debate' to the candidates" who had already been invited.[24]

B. PROCEDURAL HISTORY

Forbes commenced an action in the United States District Court for the Western District of Arkansas against AETC on October 19, 1992, seeking injunctive and declaratory relief as well as damages.[25] Forbes claimed that he should have been allowed to participate in the debate pursuant to the First Amendment and the Federal Communications Act of 1934, 47 U.S.C.A. § 315.[26] On October 20, 1992, the district court denied Forbes' request for a preliminary injunction to mandate his inclusion in the debates.[27] The United States Court of Appeals for the Eighth Circuit affirmed the district court's decision on October 22, 1992.[28]

Forbes amended his complaint on November 2, 1992, one day before the

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ARK. CODE ANN. §7-7-103(c)(1) (WESTLAW through 1999 Reg. Sess.).

[24] *Forbes*, 523 U.S. at 671. Susan Howarth, AETC's Executive Director, denied Forbes' request for a debate appearance in a letter dated September 4, 1992. *See id.*

[25] *See id.* The decision of the district court was handed down without an opinion. *See* Forbes v. Arkansas Educational, 995 F.2d 226 (8th Cir. Oct. 22, 1992) (TABLE No. 92-3374).

[26] *See Forbes*, 523 U.S. at 671. 47 U.S.C. § 315 provides legally qualified candidates with limited right of access to television air-time. *See* Communications Act of 1934, 47 U.S.C.A. § 315 (West, WESTLAW through 1999 P.L 106-73). Specifically, section 315 states that a holder of a broadcasting licensee "shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station" and that the broadcaster "shall have no power of censorship over the material broadcast." 47 U.S.C.A. § 315(a).

[27] *See* Forbes v. Arkansas Ed. Television Network Found., 22 F.3d 1423, 1426 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 500 (1994) (hereinafter *Forbes I*). *See also Forbes*, 995 F.2d at 226 (affirming the district court's denial of Forbes' request for an injunction to Forbes).

[28] *See id. See also Forbes I*, 22 F.3d at 1427 (citing *Forbes v. Arkansas Educational*, 995 F.2d at 226). Both the district court judge and the panel of the Eighth Circuit Court of Appeals declined Forbes' request for injunction on the basis that *DeYoung v. Patten* was controlling Eighth Circuit precedent and therefore, mandated that the Forbes' injunction request be denied. *See id.* (citing DeYoung v. Patten, 898 F.2d 628, 632 (8th Cir. 1990)). The Court in *DeYoung* had held that "[a] political candidate does not have a 'constitutional right of broadcast access to air his views.'" *DeYoung*, 898 F.2d at 632 (quoting Kennedy for President Comm. v. FCC, 636 F.2d 417, 430-31 (D.C. Cir. 1980)).

November elections, by joining two private television stations, KHBS-TV and KHOG-TV, the American Broadcasting Company, and its agent Darrel Cunningham, as defendants.[29] In the amended complaint, Forbes alleged that the private stations had violated the Federal Communications Act,[30] by refusing to air one of his anti-abortion campaign ads.[31] Other violations alleged by Forbes included criminal conspiracy,[32] violations of the Public Health and Welfare, Civil Rights Act,[33] and the Federal Communications Act.[34] The district court, in an unreported opinion, denied Forbes' request for a preliminary injunction.[35]

Forbes then filed a petition for a rehearing on the question of the preliminary injunction.[36] On December 22, 1992, the Eighth Circuit, sitting *en banc*, held that the issue of granting Forbes' request for a preliminary injunction was moot, but that Forbes' underlying case, which demanded relief in the form of

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[29] *See Forbes I*, 22 F.3d. at 1427.

[30] *See* 47 U.S.C.A. §315. The Communications Act of 1934 provides administrative remedies to candidates for public office and prohibits publicly owned stations from censoring material broadcast of candidates by providing that these stations provide equal time to candidates pursuant to the statutes' fairness doctrine. *See id.* The *Forbes I* court held that Forbes did not have a private right of action to enforce 47 U.S.C.A. § 315, and therefore, Forbes should have brought his claim before the Federal Communications Commission. *See Forbes I*, 22 F.3d at 1427.

[31] *See id.*

[32] *See id.* The Eighth Circuit affirmed the district court's dismissal of Forbes' conspiracy claim on the basis that the Complaint "contained only vague allegations of conspiracy that failed to state a [proper conspiracy] claim under 42 U.S.C. § 1985." *Id.* (citing 42 U.S.C. § 1985 (West, WESTLAW through 1999 Pub. L. 106-73)).

[33] *See id.* at 1428. The Eighth Circuit agreed with the district court's "ruling that [Forbes'] failure to allege racial discrimination bar[ed] his claim under § 1981." *Id.* (citing 42 U.S.C. § 1981 (West, WESTLAW through 1999 Pub. L. 106-73)).

[34] *See id.* at 1428. The Court of Appeals for the Eighth Circuit also dismissed Forbes' equal access claim under 47 U.S.C.A. § 315 on the basis that Forbes did not have a private right of action. *See id.* Furthermore, the Eighth Circuit refused to utilize section 1983 to enforce Forbes' claims under the Communications Act, § 315. *See id.* (citing 42 U.S.C. § 1983 (West, WESTLAW through 1999 Pub. L. 106-73)).

[35] *See Forbes v. Arkansas Educational*, 995 F.2d 226, 226 (1992) (affirming the district court's denial of Forbes' request for a preliminary injunction).

[36] *See* Forbes v. Arkansas Educ. Television Comm'n Network Found., 982 F.2d 289 (8th Cir. Dec. 22, 1992).

money damages, was ripe for judgment.[37] The court of appeals remanded the case back to the District Court for the Western District of Arkansas with instructions to vacate the district court order, denying Forbes' preliminary injunction on the merits, and affirming the dismissal of the preliminary injunction, on the basis that the preliminary injunction was moot.[38]

The District Court for the Western District of Arkansas, in an unreported opinion, once again dismissed Forbes' claims on the basis that Forbes had failed to state a claim.[39] On appeal, the Eighth Circuit, in *Forbes I*, affirmed the district court's dismissal of the statutory claims based upon Forbes failure to state a claim.[40] However, the Eighth Circuit decided to review Forbes' First Amendment claim on the basis that "Forbes did allege a First Amendment violation well enough to survive a motion to dismiss."[41] Disagreeing with its previous position regarding a public television station's coverage of a candi-

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[37] *See id.*

[38] *See id.*

[39] *See Forbes I*, 22 F.3d at 1427 (relying on FED. RULES CIV. PROC. 28 U.S.C.A. Rule 12(b)(6)). The Eighth Circuit in the *Forbes I* decision, stipulated that the basis for the earlier rulings that dismissed Forbes' request for a preliminary injunction, "was that *DeYoung v. Patten* . . . was controlling [c]ircuit precedent and directly in point against Forbes." *Id.* (citing *DeYoung v. Patten*, 898 F.2d 628, 628 (1990)). On the basis of *DeYoung*, the district court held that Forbes "had no right to access to the public airways, that no implied right of action exists under the Communications Act, and that section 1983 cannot be used to enforce the rights granted by 47 U.S.C. § 315." *Id.* (citing *DeYoung*, 898 F.2d at 628).

[40] *See id.* at 1427-28. The Eighth Circuit in *Forbes I* reviewed the unpublished decision of the District Court for the Western District of Arkansas wherein Chief Judge, H. Franklin Waters, dismissed all of Forbes' statutory and constitutional claims pursuant to defendants' Rule 12(b)(6) motion for failure to state a claim. *See id.* Specifically, the district court held that

> Forbes had no First or Fourteenth Amendment right to appear in a television debate, that he had no personal claim or cause of action under 47 U.S.C. § 315 to appear on television, that he failed to state a claim under 42 U.S.C. § 1981 . . . [and] that the complaint contained only vague allegations of conspiracy that failed to state a claim under 42 U.S.C. § 1985.

Id. at 1427. *See also supra* notes 30-35 and accompanying text.

[41] *See Forbes I*, 22 F.3d at 1428. The Eighth Circuit disagreed with the district court's basis for dismissing Forbes' First Amendment claim, wherein the district court relied on the Eighth Circuit's holding in *DeYoung* "that [a] political candidate does not have a 'constitutional right of broadcast access to air his views.'" *Id.* (citing *DeYoung*, 898 F.2d at 632).

dates' campaign in *DeYoung v. Patten*,[42] the Eighth Circuit, in *Forbes I*, held that "Forbes did have a qualified right of access created by the Arkansas Educational Television Network's ("AETN's")[43] sponsorship of the debate, and that AETN must have a legitimate reason to exclude him."[44] Although the Eighth Circuit discussed the different fora analysis established under a First Amendment jurisprudence, the court did not provide a conclusive answer regarding which forum should be applied in the pending case.[45] However, since the AETN had neither filed an answer to Forbes' amended complaint, nor had it provided a reason for excluding Forbes from the campaign, the *Forbes I* court remanded this action to the United States District Court for the Western District of Arkansas.[46]

On remand, the "district court found as a matter of law that the debate was a nonpublic forum, and the issue became whether Forbes' views were the reason for his exclusion."[47] At trial, AETN testified that its decision to exclude

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[42] 898 F.2d 628 (1990). The Eighth Circuit held that DeYoung, a candidate for the United States Senate seat in Iowa, did not have a First Amendment right to participate in the debates sponsored by Iowa Public Television station. *See id.* at 630. Furthermore, the court held that DeYoung's sole remedy was to pursue his claim under the equal time provision in the Federal Communications Act of 1934. *See id.* at 632-33. However, since the Communications Act does not afford a private right of action, DeYoung's only available cause of action would be to request sanctions against the Iowa Public Television station by approaching the FCC. *See id.* at 634-35.

[43] *See Forbes I*, 22 F.3d at 1428. Note that Forbes brought the original action against the Arkansas Educational Television Communication Network Foundation ("AETN") in *Forbes I*; but that the name was changed to the Arkansas Educational Television Commission, referred to as AETC throughout this Note, in *Forbes II* and the Supreme Court decision in *Forbes*.

[44] *Id.* The Eighth Circuit disagreement with the *DeYoung* decision stemmed from the limited remedy of filing an action with the FCC that is afforded to speakers that are denied access. *See id.* at 1428-29 (citing *DeYoung*, 898 F.2d at 632). The court found that "this holding would allow a state-owned station to exclude all Republicans, or all Methodists . . . except to the extent, if any, that the excluded candidates could obtain relief under the Communications Act. We believe that the error of such proposition is self-evident." *Id.*

[45] *See id.* at 1429-1430. The court asserted that public television stations do not fit into the traditional public forum genre. *See id.* at 1429. For a more in-depth analysis of the available fora see *supra* notes 124-133 and accompanying text.

[46] *See Forbes I*, 22 F.3d at 1430. The Eighth Circuit left the determination of whether the AETN-sponsored debates were a designated public forum or a non-public forum to the district court, to be determined after AETN had the chance to file an answer to Forbes' complaint. *See id.*

[47] Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 671 (1998) (citing the

Forbes was based upon his lack of campaign organization, meager voter support, and limited candidacy potential.[48] Based upon the jury's conclusion that the AETN had not excluded Forbes' due to "political pressure or disagreement with his views," the district court entered a judgment for AETC.[49]

Forbes appealed, and once again, the Eighth Circuit, in *Forbes II,* reversed.[50] The main issue was whether the debate staged by AETC was a limited-purpose public forum, or a non-public forum.[51] First, the court of appeals determined that the debate, rather than the television station itself, was the forum at issue.[52] This determination is based upon the type of access that is sought by a speaker.[53] Where a speaker seeks limited access, the perimeters of the forum must be determined via a more tailored approach.[54] Since Forbes sought access to the debate alone, which is one particular program that is broadcast by AETC among numerous other viewings, the court reasoned that the communication forum that Forbes tried to access was the debate, as opposed to the television station.[55]

The court of appeals then focused on which type of forum the AETC sponsored debate qualified.[56] The court adopted Forbes' position that the debate was a limited public forum "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[57]

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unpublished district court decision).

[48] *See id.*

[49] *Id.* at 672.

[50] *See Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 499 (1996).

[51] *See id.* at 502. In fact, the court of appeals admitted that the jury's finding that AETC's exclusion of Forbes was not viewpoint based, was fatal to Forbes if the debate was a non-public forum. *See id.*

[52] *See id.* at 503.

[53] *See id.* (quoting Cornelius v. NAACP Legal Def. & Educ. Fund., 473 U.S. 788, 800 (1985)).

[54] *See id.*

[55] *See id.*

[56] *See Forbes II,* 93 F.3d at 503.

[57] *Id.* (quoting *Cornelius*, 473 U.S. at 802).

A limited public forum can exist where the government "encourage[s] a diversity of views from private speakers,"[58] although the government itself does not speak or subsidize the "transmittal of a message it favors."[59] The court concluded that the debate sponsored by AETC was opened by the government for a limited class of speakers, namely the candidates running for the Arkansas Third District Congressional seat.[60] The court emphasized that the government did not have the right to exclude one member of a class of speakers,[61] especially within the context of political speech by legally qualified candidates[62] because such actions have the effect of "a prior restraint . . . [and] keep[s] [the] views from the public on the occasion in question."[63]

Since Forbes had obtained enough signatures to appear on the ballot, the *Forbes II* court reasoned that he had equal status with both the Republican and Democratic nominees who had been invited to participate in the debate.[64] According to the court, Forbes' viability as a debate candidate should have been determined by the voters, rather than the AETC personnel who were officials of the government.[65] The court reversed the judgment of the district court on the basis that the reasons for excluding Forbes were not legally sufficient under the First Amendment.[66] The case was then remanded to the district court to ascertain the actual damages sustained by Forbes.[67]

The Supreme Court granted *certiorari* to resolve the conflict between the Eighth Circuit's interpretation under *Forbes II* and the decision of the Eleventh

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[58] *Id.* (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)).

[59] *Id.* (quoting *Rosenberger*, 515 U.S. at 833).

[60] *See id.* at 504.

[61] *See id.* The court further stated that "surely the government cannot, simply by its own *ipse dixit*, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation." *Id.*

[62] *See Forbes II*, 93 F.3d at 504.

[63] *Id.*

[64] *See id.*

[65] *See id.* at 504-05.

[66] *See id.* at 505.

[67] *See id.*

Circuit in *Chandler v. Georgia Public Telecommunication Commission*.[68] In *Chandler*, the Eleventh Circuit held that a public television station's refusal to include a Libertarian candidate in its sponsored debates was not viewpoint restrictive and therefore permitted under the First Amendment.[69] The Supreme Court resolved these competing views by holding that the AETC debate was a nonpublic forum from which a candidate may be excluded by a broadcaster when the broadcaster employs viewpoint-neutral journalistic discretion.[70]

Justice Kennedy, writing for the majority, provided the opinion of the Court (referred to as *Forbes* throughout this Note).[71] In reaching its holding, the Court first examined whether the application of public forum case law is applicable in the broadcasting arena.[72] Relying on *Columbia Broadcasting System, Inc., v. Democratic National Committee*,[73] the Court stipulated that television broadcasters enjoyed broad journalistic discretion and that access to broadcast facilities is based upon the selection of the editorial staff,[74] particularly because, as a general rule, broadcasters are not subject to claims of viewpoint discrimination and public forum analysis.[75] Although broadcasters engage in speech activity when selecting programming,[76] the Court was disinclined to

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[68] *See Forbes*, 523 U.S. at 673 (quoting Chandler v. Georgia Pub. Telecomm. Comm'n., 917 F.2d 486, *cert. den.*, 502 U.S. 816 (1991)).

[69] *See Chandler*, 917 F.2d at 489-90. The court held that although the public station did regulate content by excluding the Libertarian candidates, the station's content-based decision did not violate the First Amendment because it was not viewpoint restrictive. *See id* at 489. The court did stipulate that "use of state instrumentalities to suppress unwanted expressions . . . would authorize judicial intervention to vindicate the First Amendment. Short of that, public television stations must . . . abide by the dictates of 47 U.S.C. § 315." *Id.*

[70] *See Forbes*, 523 U.S. at 682-83.

[71] *See id.* at 668. Justice Kennedy delivered the opinion of the Court, in which Rehnquist, C.J., and O'Connor, Scalia, Thomas, and Breyer, J.J., joined. *See id.*

[72] *See id.* at 672.

[73] *See* Columbia Broad.Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 105 (1973); *see also supra* notes 169-186 and accompanying text.

[74] *See Forbes*, 523 U.S. at 673 (citing *Columbia Broad.*, 412 U.S. at 105). The Court in *Forbes* relied on *Columbia Broadcasting* wherein Congress had rejected the proposition that "broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." *See id.* (quoting *Columbia Broad.*, 412 U.S. at 105).

[75] *See id.*

[76] *See id.* (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994)).

regiment broadcasters' rights in the absence of congressional commands.[77] However, candidate debates, because of their exceptional significance in the electoral process, present a narrow exception to the general rule that affords broadcasters' freedom from public forum restrictions.[78]

The Court, after considering the different applicable fora, determined that the AETC debate was not a designated public forum but rather a non-public forum.[79] The majority based their decision on the distinction between "general access" and "selective access" to speech.[80] Namely, the Court reasoned that prior case law indicated that general access to property was an indication of designated public forum status, while selective access was a representation of non-public forum status.[81] The AETC debates were not "generally available" to all candidates via "an open-microphone format," because the AETC reserved the debate for the Arkansas Third Congressional Seat.[82] In fact, the Court reasoned that providing access to all qualified candidates would limit the public speech, rather than expand it.[83] To buttress its reasoning, the Court pointed to the cancelled, television-sponsored debates that had been originally scheduled during the 1996 United States Senate Race in Nebraska.[84]

Finding that the AETC scheduled debates were non-public forum, the Court next contemplated whether AETC's actions met the non-public forum requirements.[85] Since the exclusion from a non-public forum must be reasonable and not based on personal beliefs,[86] the Court determined that Forbes' circum-

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[77] *See id.* at 675.

[78] *See id.*

[79] *See id.* at 678.

[80] *See Forbes*, 523 U.S. at 679-80.

[81] *See id.* at 678 (citing *Cornelius*, 473 U.S. at 803-05).

[82] *Id.* at 680.

[83] *See id.* at 681-82.

[84] *See id.* The Court was referring to Nebraska Educational Television Network ("NEPTV") which decided to cancel its scheduled debates after the *Forbes II* decision rather than allow other candidates to participate. *See* C. David Kotok, *Nelson-Hagel Debate Cancelled, But They Will Visit Sate Fair*, OMAHA WORLD-HERALD, August 24, 1996, at 17.

[85] *See Forbes*, 523 U.S. at 682.

[86] *See id.* (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 687 (1992)).

stances met the non-forum standard, as his exclusion from the debates was not based on objections to his views, but rather on a lack of public support for his views.[87] Therefore, the Court reversed the *Forbes II* court of appeals decision[88] by upholding the right of public-television stations to exclude political candidates within a reasonable, viewpoint-neutral exercise of journalistic expression.[89]

Writing for the dissent,[90] Justice Stevens did not disagree with the majority's view that there is no constitutional obligation to allow every political candidate access to public television sponsored debate; nevertheless, the Justice felt that *Forbes II* should have nonetheless been affirmed.[91] Justice Stevens argued that the AETC's decision to exclude Forbes from the debate was an *ad-hoc* decision that raised constitutional concerns supported by thirty years of the Supreme Court's First Amendment decisions.[92]

III. HISTORICAL PERSPECTIVE

A. STATUTORY APPLICATIONS

Although the *Forbes* opinion was decided on the basis of First Amendment jurisprudence, an examination of the statutory guidelines regulating the airwaves provides an important historical backdrop to the First Amendment holdings. Three provisions of Title 47 of the United States Code provide the necessary perspective regarding political candidate access to air-time.[93] First,

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[87] *See id.* at 683.

[88] *See* Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497, 499 (1996).

[89] *See Forbes*, 523 U.S. at 683.

[90] *See id.* (Stevens, J., dissenting). Justice Stevens opinion was joined by Justice Souter and Justice Ginsburg.

[91] *See id.*

[92] *See id.* at 684 (Stevens, J., dissenting). Justice Stevens relied on *Shuttlesworth v. Birmingham*, wherein the court held that First Amendment freedoms must be evaluated via "narrow, objective, and definite standards" when subjected under the restraint of a licensing authority. *See id.* (quoting Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969)).

[93] *See* 47 U.S.C.A. § 309(a) (West, WESTLAW current through 1999 Pub. L. 106-73); 47 U.S.C. § 315; 47 U.S.C.A. § 312 (West, WESTLAW current through 1999 Pub. L. 106-73).

section 309(a) of the Federal Communications Act, sets forth the licensing requirements for broadcasters attempting to broadcast via United States airwaves.[94] Second, section 315 presents requirements that broadcasters must meet to schedule public debates on the airwaves.[95] Finally, section 312(a)(7) delegates enforcement authority to the government in assessing administrative sanctions against broadcasters who fail to provide political candidates with reasonable access to the airwaves or otherwise violate the aforementioned laws.[96]

Broadcasters' license requirements are articulated in section 309(a).[97] One such requirement is "[that] the public interest, convenience, and necessity will be served by the granting of such application."[98] The "public interest" requirement is of particular importance due to the scarcity of available airwave frequencies[99] and thus, it vests special obligations upon broadcasters to operate as "public trustees."[100]

A broadcaster's responsibility in presenting public candidates to the voters via the airwaves is sporadically defined in section 315.[101] Specifically, this section provides that if any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such a broadcasting station.[102]

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[94] *See* 47 U.S.C.A. § 309(a).

[95] *See* 47 U.S.C.A. § 315. This section is often referenced as the "equal time doctrine." *See* ANDREW O. SHAPIRO, MEDIA ACCESS: YOUR RIGHTS TO EXPRESS YOUR VIEWS ON RADIO AND TELEVISION 50-51 (1976).

[96] *See* 47 U.S.C.A. § 312(a)(7).

[97] *See* 47 U.S.C.A. § 309(a).

[98] *See id. See also* 47 U.S.C.A. § 312(a)(7).

[99] *See Broadcasters' Pub. Interest Obligations and S. 217, the Fairness in Broadcasting Act of 1991: Hearing Before the Subcomm. on Communications of the Comm. on Commerce, Science, and Transp.*, 102d Cong. 1 (1991) (opening statement of Sen. Daniel K. Inouye).

[100] *See id.* Senator Inouye's proposition that "broadcasters have special obligations and should operate as public trustees," however, was not supported by a definition of the requirements that broadcasters must meet to support their public interest obligations and is therefore easily sidestepped by broadcasters. *Id. See also* PHILIP KIERSTEAD, MODERN PUBLIC AFFAIRS PROGRAMMING 154 (1979).

[101] *See* 47 U.S.C.A. § 315.

[102] *See id.*

Although this doctrine is known as the "equal time" doctrine,[103] section 315 provides a variety of ways by which a candidate may appear on the news without triggering the "equal time" requirement.[104] This section also stipulates that the broadcaster is under no obligation to allow a candidate to "use" its broadcast facilities.[105] Accordingly, the equal time requirement is dormant until a broadcaster chooses to invite a public candidate to use its facilities.[106] Once a broadcaster allows public candidates the "use" of its station, the "equal time" requirement is triggered and the broadcaster must afford equal access to all other candidates.[107] The FCC policy, regarding the "equal time" requirement, permits broadcasters the freedom to grant candidates' request for airtime as long as they comply with the "reasonable access" provision of section 312(a)(7).[108]

Section 312(a)(7) of the Communications Act[109] provides for sanctions, including the revocation of a station's license for the "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."[110] However, the effectiveness of section 312(a)(7) as a potent threat has been questioned.[111] In fact, in over twenty years, the FCC has yet to revoke a broadcaster's license for failing

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[103] *See id.* The equal time provision stipulates that "if the broadcaster does let one candidate use his station, then he must afford equal opportunity to opposing candidates. But if that first candidate never uses the station, the broadcaster's programming will remain totally unaffected by the equal-time rule." Ackley, *supra* note 4, at 493.

[104] *See* 47 U.S.C.A. § 315(a); *see also* SHAPIRO, *supra* note 95, at 50-51.

[105] *See* 47 U.S.C.A. § 315(a).

[106] *See id.*

[107] *See* Ackley, *supra* note 4, at 492.

[108] *See* In re Comm'n Policy in Enforcing § 312(a)(7) of the Communications Act, 68 F.C.C. 2d 1079 (1978).

[109] *See* 47 U.S.C.A. § 312(a)(7).

[110] *See id.*

[111] *See* KIERSTEAD, *supra* note 100, at 167. Kierstead described FCC regulations as "a forest with a few tall trees and a great tangle of underbrush" whereas section 312(a)(7) serves as one of the trees. *Id.*

to provide public interest programming.[112]

The Public Broadcasting Service ("PBS") suggested that license revocation should be considered only where the broadcaster had grossly abused their journalistic discretion.[113] However, critics of the Communication Act, and its wide latitude, insist that broadcasters not only lack appropriate guidelines to fairly decide whose political views should be heard, but also require more guidance than the current laws afford.[114] Given the unclear statutory guidance within the political speech arena, an examination of the First Amendment case law and its impact on broadcasters is necessary.[115]

B. FIRST AMENDMENT LAW

Numerous times, the Supreme Court has held that political opinions deserve the utmost protection under the First Amendment.[116] The Court noted that a person's political beliefs and the right to express such beliefs are activities that are guaranteed by the First Amendment.[117] For example, *Elrod v. Burns*, a case involving employee dismissals because of political party affiliations, illustrates the Court's maxim that political beliefs are jealously guarded by the First Amendment.[118] Based upon the core nature of this right, the Court applied the strict scrutiny standard[119] wherein the infringement of such a right survives

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[112] *See* Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L. J. 1089, 1094 (1996).

[113] *See generally* In re Comm'n Policy, 68 F.C.C.2d 1079.

[114] *See id.*

[115] *See infra* notes 116-263 and accompanying text.

[116] *See e.g.*, Buckley v. Valeo, 424 U.S. 1, 14-15 (1976); Elrod v. Burns, 427 U.S. 347, 372-73 (1976); Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

[117] *See Elrod*, 427 U.S. at 356.

[118] *See id.* at 353. The Court admitted that the political patronage process was an integral and important function of the United States government. *See id.* However, notwithstanding the widespread political patronage system, where personnel are hired based upon their political affiliations, the First Amendment rights of free association and the freedom of debate are fundamental rights that must be protected above all. *See id.* at 356.

[119] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 415-16 (1997). Chemerinksy defined the three levels of scrutiny that have traditionally been applied by the Supreme Court to Constitutional dilemas. *See id.* at 415. The minimal level of review applied by the Court is the rational basis test. *See id.* The rational basis test is met,

only when the government advances a countervailing interest of paramount importance.[120]

C. POLITICAL SPEECH AND THE APPLICATION OF PUBLIC FORUM CASE LAW

The Court's determination of whether to apply strict scrutiny when First Amendment rights have been infringed begins with an analysis of the involved forum.[121] The Court defined the public forum standard in *Perry Education Association v. Perry Local Educators' Association*.[122] The controversy in *Perry* centered around a collective bargaining agreement between the school district and an exclusive bargaining representative wherein the bargaining representative was granted exclusive access to teacher mailboxes and the inter-school mail-system to the exclusion of other unions.[123]

Three categories of access to speech fora were analyzed in *Perry*.[124] First, the quintessential public forum was represented by streets and parks, which have traditionally been used "for the purposes of assembly, communicating thoughts between citizens, and discussing public questions."[125] In this forum, the government may not exclude speech based upon its content unless it can show that such exclusion is necessary to serve a compelling government inter-

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and the law is upheld as constitutional if "it is rationally related to a legitimate government purpose." *Id.* As a result, the law is generally upheld unless the challenger shows that this law "does not serve any conceivable legitimate purpose." *Id.* Next, under the intermediate level of scrutiny, a law is allowed if it is "substantially related to an important government purpose." *Id.* Therefore, the law must be "substantially related to achieving the goal" in a more than reasonable manner. *Id.* Finally, the most stringent level of review is the strict scrutiny standard. *See id.* at 416. A law is upheld under a strict scrutiny standard only "if it is necessary to achieve a compelling government purpose." *Id.* Pursuant to the strict scrutiny standard the Court will not uphold the law unless such a law is necessary to accomplish a chosen means and is the "least restrictive or least discriminatory alternative." *Id.*

[120] *See Elrod*, 427 U.S. at 362.

[121] *See infra* notes 124-33 and accompanying text. *See also* CHEMERINSKY, *supra* note 119, at 415-16.

[122] 460 U.S. 37 (1983).

[123] *See id.*

[124] *See id.* at 43-49.

[125] *Id.* at 45 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

est.[126] The government can also enforce content-neutral "time, place, and manner of expression" regulations if they are "narrowly tailored to serve a significant government interest."[127] Second, the government can designate property for expressive public activity.[128] As long as the state retains such property for public use, it is required to follow the "reasonable time, place, and manner" regulations applied under the traditional public forum.[129] Finally, if the property is neither a traditional public forum, nor a designated forum for public speech, it is governed by different standards.[130] Such property may be reserved by the state for its intended purpose, even when such purpose is communicative,[131] "as long as the state's regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." [132] Therefore, the government's policy need only rationally further a legitimate state purpose.[133]

The *Perry* Court held that the school mail facilities fell within the non-public forum category.[134] The basis for this conclusion centered on the normal

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[126] *See id.*

[127] *Id.* (citing United States Postal Serv. v. Council of Greenburgh, 453 U.S. 114, 132 (1981); Consol. Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-36 (1980)).

[128] *See* Perry Educ. Ass'n V. Perry Local Educators' Ass'n, 460 U.S. 37, 48 (1983).

[129] *See id.* at 46 (citing Widmar v. Vincent, 454 U.S. 263, 269-70 (1981) (Stevens, J., concurring)).

[130] *See id.* at 45-46.

[131] *See id.* at 46. The Court stipulated that the state can preserve the property for the use it was originally designated, even if that use is designed for communicative purposes. *See id.* (citing *United States Postal Serv.*, 453 U.S. at 129). In *Perry*, the Court upheld the school's restriction of its teacher mailboxes to the public, including some organizations, even though the school did allow some organizations access to the mailboxes on the premise that "[t]his type of selective access does not transform government property into public forum." *Id.* at 47. The Court further supported this proposition by stating that even if the school granted access to outside organizations such as the Cub Scouts or theYMCA, this right of access would extend only to organizations of similar character and would not include an organization such as Perry Local Educator's Association ("PLEA") "which is concerned with the terms and conditions of teacher employment" rather than activities of relevance to students. *Id.* at 48.

[132] *Id.* at 46 (citing *United States Postal Serv.*, 453 U.S. at 131 n.7).

[133] *See id.* at 54.

[134] *See Perry Educ. Ass'n*, 460 U.S. at 46.

function of the internal school mail system, which fostered communication of school-related matters to teachers, rather than the general public.[135] Although the school did allow selective access to the mailboxes for some outside organizations,[136] "this type of selective access does not transform government property into a public forum."[137] Finally, the Court concluded that the differential access that the school granted to the two unions was reasonable because it furthered the state's interest in preserving the mail system for the use that was legally intended.[138]

In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,[139] the Court further examined the distinctions in speech fora.[140] The issue in *Cornelius* was whether the government was constitutionally permitted to exclude legal defense funds from a charity drive aimed at federal employees and military personnel.[141] The Combined Federal Campaign ("CFC") charity fund drive was sponsored by volunteer federal employees and held during working hours.[142] The respondents in *Cornelius* represented political organizations attempting to influence public policy through means such as "political activity, advocacy, lobbying or litigation on behalf of others."[143] The Court applied a three step analysis to determine whether the CFC violated respondents' First

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[135] *See id.* at 47.

[136] *See id.* The PLEA and two other rival unions filed a complaint against Perry Education Association and individual members of the school board on the premise that the collective-bargaining agreement between the Board of Education of Perry Township and Perry Education Association, which allowed access to teacher mail facilities only to Perry Education Association, at the exclusion of all other unions, violated the First Amendment. *See id.*

[137] *Id.* at 47. The Court relied on several opinions support its conclusion. *See* Greer v. Spock, 424 U.S. 828, 838 n.10 (1976) (holding that the Fort Dix military base was not a public forum even though civilian speakers and entertainers were sometimes invited to speak in this facility); Lehman v. Shaker Heights, 418 U.S. 298 (1974) (Opinion of Blackmun, J.) (stating that a city's transit system's rental of advertising space in its vehicles did not require the city to accept political advertising).

[138] *See Perry Educ. Ass'n,* 460 U.S. at 50.

[139] 473 U.S. 788 (1985).

[140] *See id.* at 797-804

[141] *See id.* at 790.

[142] *See id.*

[143] *Id.* at 793.

Amendment rights by excluding them from the charity drive.[144] The analysis first entailed an examination of whether the actual solicitation for speech was protected by the First Amendment.[145] If the solicitation was constitutionally protected speech, the second step of the analysis involved identification of guidelines by which the government may limit access to speech.[146] Finally, based upon the fora identified, the third step of the analysis involved a determination of whether the exclusion from the relevant forum was reasonable.[147]

In applying step one of the three-part analysis, the Court determined that the CFC charity drive represented speech protected by the First Amendment.[148] Next, the Court identified the proper application of the forum.[149] The majority found that the "property" at issue, the federal workplace where the CFC charity is planned and implemented, was one consideration.[150] A second, and perhaps more important issue, was the access sought by the speaker.[151] If the speaker sought general access to the property, the forum enveloped the property itself.[152] However, where a more limited access was requested, the Court had to establish a "more tailored approach to ascertain the perimeters of a forum within the confines of the government property."[153] Since the respondents sought to participate only in the CFC, rather than the federal workplace, the Court determined that the forum was limited to the CFC itself.[154]

In part two of the test, the Court considered in which category, of the three

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[144] *See id.* at 797.

[145] *See Cornelius*, 473 U.S. at 797.

[146] *See id.*

[147] *See id.*

[148] *See id.* at 799. The Court stated that although the CFC only communicated via literature, the CFC literature itself "facilitate[d] the dissemination of views and ideas by directing employees to the soliciting agency to obtain more extensive information." *Id.*

[149] *See id.* at 800.

[150] *See id.*

[151] *See Cornelius*, 473 U.S. at 801.

[152] *See id.*

[153] *Id.*

[154] *See id.* at 802.

available, the CFC belonged: traditional public forum, designated public forum, or non-public forum.[155] Finding that the CFC was not a traditional public forum,[156] the Court focused on the designated public forum and the non-public forum distinctions.[157] Since the First Amendment does not guarantee automatic access to government property, a public forum designation will not be permitted when there is evidence of contrary intent.[158] Likewise, a public forum will not be inferred if the "nature of the property is inconsistent with the expressive activity."[159] In fact, where the principal function of the property would be disrupted by the speech or activity, the Court would be reluctant to find the government intent designating the property as a public forum.[160] Based upon these factors, the Court determined that the CFC was a non-public forum,[161] citing the history of the CFC campaigns and the minimization of disruption to the workplace as reasons for its conclusion.[162]

Lastly, the final step of the analysis centered on whether the government's restriction of certain parties from the CFC constituted a reasonable restriction. The Court determined that reasonableness must be evaluated "in light of the purpose of the forum and all surrounding circumstances."[163] In determining

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[155] *See id.* A traditional public forum refers to places which "'by long tradition or by government fiat have been devoted to assembly and debate. *See id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). *See also supra* notes 124-33 and accompanying text.

[156] *See Cornelius*, 473 U.S. at 802.

[157] *See id.*

[158] *See id.* at 803 (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 130 n.6 (1981)).

[159] *Id.* (citing Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977)).

[160] *See id.* at 804. The *Cornelius* Court cited to cases where military reservations, and jailhouse grounds, were held not to be designated public fora. *See id.* (citing Greer v. Spock, 424 U.S. 828 (1976); Adderley v. Florida, 385 U.S. 39 (1966)).

[161] *See id.*

[162] *See Cornelius*, 473 U.S. at 804. The Court referred to the high numbers of existing charitable organizations to support the conclusion that the CFC's policy and practice, where the CFC only admitted 237 organizations to participate in its 1981 campaign, is inconsistent with a public forum designation that would force CFC to open its doors to all tax-exempt organizations. *See id.*

[163] *Id.* at 809.

that the exclusion of political activist groups was reasonable, the Court pointed to several considerations, namely (1) that money spent allowing access to organizations that provide food and shelter to the needy is more beneficial than litigation support for the needy, (2) that rejection of all political activist groups negated the appearance of political favoritism, and (3) that refusal of some groups was reasonable if their participation could jeopardize the success of the entire campaign.[164] In addition, the Court noted that the government was not bound by the decisions of other executive agencies within similar contexts.[165] Therefore, the *Cornelius* Court allowed CFC to restrict access to the charity drive on the basis that "the First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness."[166]

D. FIRST AMENDMENT IMPLICATIONS FOR BROADCASTERS

The forum analysis of political debates is further complicated by the broad journalistic freedom that is typically afforded to broadcasting facilities.[167] The model for broadcasting freedom was announced by the Court in *Columbia Broadcasting Systems, Inc. v. Democratic National Committee*.[168] The issue in *Columbia Broadcasting* centered on whether a radio broadcasting station was required to air controversial advertisements regarding the Vietnam Conflict.[169] Writing for the majority, Chief Justice Burger pronounced that the "public interest" standard, espoused by the Communication Act of 1934,[170] rooted in First Amendment principles, did not require broadcasters to accept editorial advertisements.[171]

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[164] *See id.*

[165] *See id.*

[166] *Id.*

[167] *See infra* notes 176-81 and accompanying text.

[168] 412 U.S. 94 (1973).

[169] *See id.* at 98. Specifically, Washington based station WOTP, refused to sell time for spot announcements to the Democratic National Committee and the Business Executives' Move for Vietnam Peace, both of whom opposed United States involvement in Vietnam. *See id.*

[170] *See supra* notes 93-112 and accompanying text.

[171] *See Columbia Broad.*, 412 U.S. at 98.

The Court held that, although the First Amendment principles of free speech governed any situation where free speech was affected, such principles should not be utilized to cripple the regular work of the government.[172] The regulation of air-time among broadcasters is conducted pursuant to the regulation of interstate and foreign commerce by the Federal Communications Commission ("FCC").[173] Therefore, "every free-speech problem . . . has to be considered with reference to the satisfactory performance of the job as well as to the value of open discussion,"[174] wherein the FCC is provided ample scope to do its job.[175]

Turning to various provisions of the 1934 Communications Act for guidance regarding Congressional intent within the context of journalism,[176] the Court concluded that Congress intended to provide private broadcasters broad journalistic freedom, and that government powers, pursuant to the Communications Act, would come into play "only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters."[177] This regulation scheme is based upon the "fairness doctrine" which imposes two affirmative responsibilities upon the broadcasters when public interests are at stake.[178]

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[172] *See id.* at 103.

[173] *See id.*

[174] *Id.* The Court based the need for regulation on *Red Lion Broad. Co., Inc. v. Fed. Communications Comm'n,* wherein the Court had stipulated that broadcasting facilities had to be regulated due to the scarcity of broadcasting frequencies because "without government control the [broadcasting] medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." 395 U.S. 367, 376 (1969).

[175] *Columbia Broad.*, 412 U.S. at 103.

[176] *See* 47 U.S.C.A. § 312(a)(7); 47 U.S.C.A. § 315; 47 U.S.C.A. § 309(a). *See also supra* notes 94-113 and accompanying text.

[177] *See Columbia Broad.*, 412 U.S. at 110.

[178] *See id.* at 111. The "fairness doctrine" was developed to "guarantee diversity in what was being broadcast, thus protecting the interests of the listeners and not the broadcasters." Ackley, *supra* note 4, at 484 (relying on DOM CARISTI, EXPANDING FREE EXPRESSION IN THE MARKETPLACE: BROADCASTING AND THE PUBLIC FORUM 74-75 (1992)). The FCC abandoned the "fairness doctrine" in 1987 and has been unable to reinstate it since then. *See* Ackley, *supra* note 4, at 490-91 (relying on Adrian Cronauer, *The Fairness Doctrine: A Solution in Search of a Problem*, 47 FED. COMM. L.J. 51, 62 (1994)). Since 1987, Congress has unsuccessfully tried to enact into law provisions of the fairness doctrine. *See* Cronauer, FED. COMM. L.J. at 62.

First, if a paid sponsor is not available, the broadcaster must provide free time to opposing views.[179] Second, the broadcaster must initiate discussion of public issues if such issues are not presented by others.[180] However, these obligations are only enforced if the broadcaster violates the significant journalistic discretion that it is afforded pursuant to the Communications Act.[181]

After concluding its statutory analysis, the Court then examined the constitutional issue of whether the First Amendment required the government to mandate a private right of access to broadcast media.[182] This issue was unique because the forum sought for expression of speech, namely the broadcast media, was subject to statutory obligations that mandated its coverage of public issues.[183] The Court nonetheless rejected the court of appeals' view that the Fairness Doctrine provided a "paternalistic structure in which licensees and bureaucrats decide what issues are 'important' and how 'fully' to cover them and

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[179] *See id.* (citing Cullman Broadcasting, Co., 25 Rad. Reg. 895 (P&F) (1963)).

[180] *See id.* (citing John J. Dempsey, 6 Rad. Reg. 615 (P&F) (1950)).

[181] *See Columbia Broad.*, 412 U.S. at 110.

> The journalist must take into account the following factors in determining the boundaries of the "broad journalistic discretion:" basing its judgment on whether to honor a request for time by answering questions such as "whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person [or group] making the request."

Id. (quoting Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1251-1252 (1949)).

[182] *See Columbia Broad.*, 412 U.S. at 129. The Court rebuffed the court of appeals finding that state-supported media were "prohibited by the First Amendment from excluding controversial editorial advertisements in favor of commercial advertisements." *Id.* (citing Lee v. Bd. of Regents of State Colleges, 306 F.Supp. 1097 (W.D. Wis. 1968); Zucker v. Panitz, 299 F.Supp. 102 (S.D.N.Y. 1969)).

Furthermore, the Court held that decisions holding that States cannot ban certain speech while permitting other speech in public areas provided little guidance where the issue is the right of private access to broadcast media. *See Columbia Broad Sys., Inc.*, 412 U.S. at 129 n.19 (noting Cox v. Louisiana, 379 U.S. 536 (1965); Fowler v. Rhode Island, 345 U.S. 67 (1953)).

[183] *See Columbia Broad.*, 412 U.S. at 129-30.

the format, time and style of the coverage."[184] Admitting that the current system was not perfect, the Court chose to reserve any constitutional holdings and instead relied on the FCC's efforts to provide greater access for discussion of public issues.[185] *Columbia Broadcasting System, Inc.*, provided strong support for both the broadcaster's rights, and the government's right to control such rights without interference from First Amendment constraints.[186]

Another case that has established broad discretion in the selection of speech is *Turner Broadcasting System, Inc. v. Federal Communications Commission*.[187] The issue at stake in *Turner Broadcasting* revolved around the constitutionality of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992,[188] which required cable stations to air local broadcast stations.[189] The cable operators filed an action under the premise that they engage in and transmit speech and therefore, are entitled to the protection of the First Amendment.[190]

The Court began the analysis by deciding the level of scrutiny applicable to

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[184] *Id.* at 130 (quoting Business Executives' Move For Vietnam Peace v. FCC, 450 F.2d 642, 656 (1971)).

[185] *See id.* at 131. The Court referred to ongoing FCC proceedings where the Commission was evaluating the proposed rules on cable television, wherein the cable systems "[would] maintain at least one specifically designated, noncommercial public access channel." 37 Fed. Reg. 3289, § 76.251(a)(4).

[186] *See supra* notes 168-85 and accompanying text.

[187] 512 U.S. 622 (1994).

[188] Cable Television Consumer Protection and Competition Act of 1992, Publ.L. 102-385, § 4, § 5, 106 Stat. 1471, codified at 47 U.S.C.A. § 534(b)(1)(B), (h)(1)(A), 535(a) (West, WESTLAW current through 1999 Pub. L. 106-73). Together, sections 4 and 5 enforce the "must-carry" provisions against all but the smallest broadcasters. *See Turner*, 512 U.S. at 632.

[189] *See id.* at 626. Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 require cable operators to carry a specified number of local broadcast television stations. *See id.* Section 4 requires carriage of full television broadcasters that operate within the same broadcast area as the cable stations unless the station qualifies as a "noncommercial educational" station under section 5. *See id.* at 630 (citing Cable Television Consumer Protection and Competition Act of 1992, Publ. L. 102-385, § 4, § 5, 106 Stat. 1471, codified at 47 U.S.C.A. § 534(b)(1)(B), (h)(1)(A), 535(a) (West, WESTLAW current through 1999 Pub. L. 106-73)). Together, sections 4 and 5 affect all but the smallest cable operators. *See id.* at 632.

[190] *See id.* at 636.

the "must carry" provisions of the 1992 Act.[191] It distinguished the more relaxed broadcast media standard, which permitted more intrusive government regulation than other media, on the basis that the inherent physical limitations present in the broadcast medium did not exist in cable television.[192] Based upon the special obligations that the "must carry" provisions imposed upon cable operators, the Court imposed a higher level of scrutiny than the rational basis standard that had been employed for the broadcasting community.[193]

Previously, the Court had applied an exacting level of scrutiny only where government action stifled private speech on the basis of its message;[194] therefore, regulations that "suppress, disadvantage, or impose differential burdens upon speech because of its content"[195] and "laws that compel speakers to utter or distribute speech bearing a particular message"[196] are subject to First Amendment strict scrutiny.[197] On the other hand, regulations that are "content-neutral," and lead to a potentially smaller risk of coercion of speech, are evaluated under intermediate scrutiny.[198] The "principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."[199] Further, a content-based purpose of a regulation is sufficient but not necessary by itself, to establish the content basis of a regulation.[200] Likewise, a

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[191] *See id.* at 637.

[192] *See id.* 637-39. Based on this evaluation the Court determined that the "more relaxed standard of scrutiny adopted in *Red Lion Broad. Co., Inc.*, and the other broadcast cases were inapt when determining the First Amendment validity of cable regulation." *Id.* at 639 (noting Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)).

[193] *See id.* at 641.

[194] *See Turner*, 512 U.S. at 642.

[195] *Id.* (citing Simon & Schuster, Inc. v. Members of State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

[196] *Id.* (citing Riley v. Nat'l Fed'n for Blind of North Carolina, Inc., 487 U.S. 781, 798 (1988)).

[197] *See id.*

[198] *See id.* (citing Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293 (1984)).

[199] *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[200] *See Turner Broad.*, 512 U.S. at 642.

content-neutral purpose does not establish content-neutrality, in and of itself, without a showing that the regulation does not discriminate.[201] Generally, laws that distinguish between favored and disfavored speech based upon the flavor of the ideas or views to be expressed, are content-based and therefore subject to strict scrutiny.[202] To the contrary, laws that impose burdens on speech "without reference to the ideas or views expressed are in most instances content-neutral."[203]

Applying the content-based and content-neutral distinctions to the must-carry provisions, the *Turner Broadcasting* Court held that the must-carry rules impose burdens without implications to speech content.[204] Although the Court did admit that the must-carry provisions significantly burden most cable carriers, these restrictions were not based upon the content of the programming, and were therefore, irrelevant under the First Amendment.[205] Moreover, the Court discounted the argument that the must-carry provisions, although content-neutral on their face,[206] were in fact designed by Congress to promote specific

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[201] *See id.* at 643 (citing Arkansas' Writers Project, Inc. v. Ragland, 481 U.S. 221, 231-32 (1987)).

[202] *See id.* The Court cited numerous Supreme Court cases. *See* Burson v. Freeman, 504 U.S. 191, 197 (1992) (holding that the freedom of individuals to demonstrate near polling places is based upon whether their speech is related to the political campaign); Boos v. Barry, 485 U.S. 312, 318-19 (1988) (plurality opinion) (stipulating that a municipal ordinance permitting or denying individuals to picket in front of a foreign embassy is legal since it is based upon whether the content of the demonstration is aimed at the foreign government.).

[203] *See Turner Broad.*, 512 U.S. at 643. Examples of Court opinions finding content-neutral laws include: *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (holding that an ordinance prohibiting positioning of signs on public property was content-neutral); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (holding that a State Fair regulation mandating specific locations for sales and solicitations was content-neutral). *See id.*

[204] *See id.* at 661.

[205] *See id.* The Court admitted that under the must-carry provisions, broadcasters were favored over cable programmers and operators. However, since the must-carry restrictions were not "a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment." *Id.*

[206] *See id.* at 645. The Court distinguished *Turner* from cases such as *United States v. Eichman*, where the government's conduct was prohibited as a suppression of free speech even though the Flag Protection Act contained no explicit content-based limitations. *See id.* (citing United States v. Eichman, 496 U.S. 310, 315 (1990)).

speech content.[207] Instead, the Court concluded that "Congress' overriding objective in enacting must-carry [provisions] was not to favor programming of a particular subject matter, viewpoint or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable."[208] Since the must-carry provisions do not influence the content of the speech presented by the cable programmers, they must be evaluated via the intermediate standard of scrutiny that is applicable to content-neutral regulations.[209]

Pursuant to the intermediate scrutiny standard, a regulation is constitutional if "it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[210] In order to survive the intermediate scrutiny standard of review, the government had to show that the must-carry provisions were necessary to protect the genuine "economic health of local broadcasting."[211] In addition, the government had to prove that the must-carry provisions did not burden speech more "than is necessary to further the government's legitimate interests."[212] Although the Court agreed that Congressional promulgations, such as the must-carry provisions, deserve substantial deference,[213] the Court held that there was no conclusive determination that the government satisfied the two prongs of the intermediate scrutiny standard.[214] Accordingly, the Court established a higher First Amendment stan-

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[207] *See id.* at 646.

[208] *See id.* "[T]here is a substantial government interest in promoting the continued availability of . . . free television programming, especially for those viewers who are unable to afford other means of television programming." Cable Television Consumer Protection and Competition Act of 1992, Publ.L. 102-385, § 2(a)(8)(B), 106 Stat. 1471, codified at 47 U.S.C.A. § 534(b)(1)(B), (h)(1)(A), 535(a) (West, WESTLAW current through 1999 Pub. L. 106-73).

[209] *See Turner*, 512 U.S. at 663.

[210] *See id.* at 662 n.16 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

[211] *Id.* at 665.

[212] *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

[213] *See id.* (relying on Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973)).

[214] *See id.* at 665-68. The Court held that the government did not conclusively prove the two propositions that it relied upon to show that the must-carry provisions were neces-

dard for speech media outside the narrow broadcasting spectrum.

E. ACCESS TO POLITICAL CANDIDATES

Compared to other forms of speech, political speech is afforded the utmost protection under the First Amendment.[215] However, even these broadly protected rights must be evaluated against the broad journalistic freedom enjoyed by the media.[216] In *Miami Herald Publishing Co. v. Tornillo*,[217] the Court held that a Florida statute, requiring newspapers to provide free space for political candidates to respond to negative editorials, was unconstitutional under the First Amendment guarantee of free press.[218] Although the Court conceded that the privately-owned press had the power to control political speech and to advance its own views,[219] it chose to uphold the freedom of the press to make its own editorial decisions,[220] thereby declaring the Florida statute an unconstitutional government regulation of speech.[221]

Another example of the strain between government regulation of speech and

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sary to protect the existence of broadcast television stations. These two propositions were "(1) that unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be refused carriage on cable systems; and (2) that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Id.* at 666.

[215] *See* Elrod v. Burns, 427 U.S. 347 (1976).

[216] *See generally* CBS, Inc. v. Fed. Communications Comm'n, 453 U.S. 367 (1981); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

[217] 418 U.S. 241 (1974).

[218] *See id.* at 241- 58. The action was prompted by a Florida "right of reply" statute which granted a candidate for any office, that is "assailed regarding his personal character or official record by any newspaper," the right to demand that the newspaper, print a reply made by the candidate, free of charge. *See* FLA. STAT. ANN. § 104.38, repealed by L. 1975, c. 75-2, § 1 (West, WESTLAW current through 1999 1st Reg. Sess.). Violations of this statute were punishable as a first degree misdemeanor. *See* FLA. STAT. ANN. § 775.082 (West, WESTLAW current through 1999 1st Reg. Sess.).

[219] *See Miami Herald*, 418 U.S. at 253-55.

[220] *See id.* at 257-58. The Court held that the choice of materials for publication, whether fair or unfair, was part of editorial judgment guaranteed under the free press guarantee of the First Amendment. *See id.*

[221] *See id.* at 258.

the media's discretion, as afforded by the First Amendment, was presented in *CBS, Inc. v. FCC*.[222] The issue in *CBS* was whether the Federal Communications Commission ("FCC") overstepped First Amendment boundaries by regulating the access of federal election candidates to broadcasting facilities.[223] The FCC ruled that the three major networks had violated the "reasonable access" provision of section 312(a)(7) of the Communications Act of 1934, by denying air-time requested by the Carter-Mondale Presidential Committee.[224] Commencing its analysis by looking to the legislative history of section 312(a)(7), the Court decided that such regulations are necessary to provide flexibility to the FCC "to chart a workable middle course in its quest to preserve a balance between the essential public accountability and the desired private control of the media."[225] The Court then evaluated whether the broadcasters' First Amendment rights were infringed by section 317(a)(7).[226] Stipulating that the rights of the viewers and listeners were paramount over the rights of the broadcasters,[227] the Court proclaimed that the First Amendment's purpose was to provide an open market for communication of truth and ideas, not to protect broadcasters' from monopolization of the market.[228]

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[222] 453 U.S. 367 (1981).

[223] *See id.* at 371.

[224] *See id.* at 373-74. The issue at hand arose when "Gerald M. Rafshoon, President for the Carter-Mondale Presidential Committee requested each of the three major television networks to provide time for a 30 minute program between 8 p.m. and 10:30 p.m. on either the 4th, 5th, 6th or the 7th of December 1979." *Id.* at 371. All three networks declined Mr. Rafshoon's request. *See id.* at 372. In response to the network's refusal, the Carter-Mondale campaign filed a complaint with the FCC pursuant to the "reasonable access" provision. *See id.* (citing 47 U.S.C. §312(a)(7)). Section 312(a)(7) provided the FCC with the power to "revoke any station license or construction permit . . . (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." *See* 47 U.S.C. §312(a)(7). Based on this statute, the FCC concluded that the network's reasons for refusing to sell air-time were deficient and requested that the networks provide notice of how they would rectify the situation to the Carter-Mondale Presidential Committee. *See CBS Inc.*, 453 U.S. at 372 (citing 74 F.C.C.2d 631 (1979)).

[225] *Id.* at 390 (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 120 (1973)).

[226] *See id.* at 394-97.

[227] *See id.* at 395 (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

[228] *See id.*

The Court held that such freedom of expression, evidenced by an open communications and press market, is especially vital in the context of political speech.[229] In fact, "speech concerning public affairs is . . . the essence of self-government."[230] Therefore, it is crucial for political candidates to have the ability to express their views to permit the electorate the opportunity to evaluate these candidates.[231] Recognizing the politicians' First Amendment rights to express their views, the Court nonetheless held that the FCC's statutory rights over the broadcaster licensees were constitutional when balanced against the rights of the federal candidates and the public.[232]

In addition to the Supreme Court decisions, several appellate court decisions bore a direct impact on the *Forbes* decision because they tackled the First Amendment implications derived from access of political candidates to debates sponsored by public broadcasters.[233] A media case dealing specifically with access to broadcast political debates is *Chandler v. Georgia Public Telecommunications Commission*.[234] Libertarian candidate for lieutenant governor of Georgia, Walker Chandler, was denied access to a political debate sponsored by the Georgia Public Telecommunications Commission ("GPTC").[235] Although the GPTC refused Chandler and Carole Ann Rand, another Libertarian candidate, the opportunity to participate in the scheduled debate, it did offer thirty minutes of air-time to present their views.[236] Nevertheless, Chandler and Rand sought to enjoin GPTC from broadcasting its scheduled political debate between the Democratic and Republican candidates on the basis that their exclusion violated their First and Fourteenth Amendment rights.[237]

The United States District Court for the Northern District of Georgia ruled

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[229] *See supra* notes 116-120 and accompanying text.

[230] *CBS, Inc.*, 453 U.S. at 396 (quoting Garrison v. Louisiana, 379 U.S. 64, 74-5 (1964)).

[231] *See id.* (citing Buckley v. Valeo, 424 U.S. 1, 52-3 (1976)).

[232] *See id.* at 397.

[233] *See infra* notes 234-263 and accompanying text.

[234] 917 F.2d 486 (11th Cir. 1990).

[235] *See id.* at 488.

[236] *See id.* at 488 n.1.

[237] *See id.* at 488.

that GPTC's exclusion of third-party candidates from a public debate was a content-based exclusion.[238] Based upon this classification, the district court held that GPTC had violated the First Amendment by restricting the Libertarian candidates' access to the debates.[239]

The GPTC appealed to the United States Court of Appeals for the Eleventh Circuit,[240] which subsequently vacated the district court's order with instructions to dismiss the order.[241] Although the Eleventh Circuit concluded that the GPTC's decision to exclude the Libertarian candidates was content-based, the court maintained that this restriction was not viewpoint restrictive and thus, did not violate the First Amendment.[242] GPTC's function as a public broadcaster is to create, design and broadcast educational and instructional shows to the Georgian public.[243] In order to fulfill this function, GPTC must enforce content-based decisions on a regular basis.[244] Therefore, the court of appeals concluded that GPTC's decision to exclude the Libertarian candidates from the debates was reasonable under the First Amendment[245] and "was 'not an effort to suppress expression merely because public officials oppose the speaker's views.'"[246]

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[238] *See* Chandler v. Georgia Pub. Telecomm. Comm'n, 749 F.Supp. 264, 268 (N.D. Ga. 1990), *vacated*, 917 F.2d. 486 (11th Cir. 1990).

[239] *See id.* at 269.

[240] *See Chandler*, 917 F.2d at 488.

[241] *See id.*

[242] *See id.* at 489.

[243] *See id.* at 488.

[244] *See id.* at 489.

[245] *See id.* The court of appeals also referenced *DeYoung v. Patten* as support for its finding that the "First Amendment does not necessarily grant political candidates the right to be included in candidate debates." *Id.* at 489 n.5 (citing *DeYoung v. Patten*, 898 F.2d 628, 632-33 (1990)). In *DeYoung*, a legally qualified candidate running for Senator of Iowa in the 1984 elections, brought action against Iowa Public Television ("IPTV") when he was excluded from an IPTV sponsored debate. *See DeYoung*, 898 F.2d at 630. The Eighth Circuit Court of Appeals dismissed DeYoung's complaint on the basis that DeYoung did not have a First Amendment right to appear on television as long as IPTV complied with the "equal time provision" of the Federal Communications Act. *See id.* at 632-33. *See also supra* note 42 and accompanying text.

[246] *Chandler*, 917 F.2d at 489 (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

The Court of Appeals for the Eighth Circuit in *Marcus v. Iowa Public Television*[247] also dealt with political candidates' right of access to debates operated by publicly-owned broadcasting facilities.[248] Third party candidates, running for Iowa's congressional elections in 1996, brought an action against Iowa Public Television ("IPTV") as a result of IPTV's refusal to include them in scheduled programming designed to showcase Republican and Democratic Party Congressional and Senatorial candidates.[249] Both the district court[250] and the Eighth Circuit denied the third party candidates' motion for injunctive relief.[251] The third party candidates sought injunctive relief despite the fact that the IPTV did offer them an opportunity to "present [their] views on other programs presented by the network."[252]

The Eighth Circuit turned to the First Amendment implications in determining whether an injunction should be granted.[253] The court focused on balancing the harms that both parties would suffer as a result of its opinion,[254] noting that media organizations, such as the IPTV, must be allowed to "make editorial decisions regarding the content of [its] programming."[255] Furthermore, the court alluded that the IPTV, like its Nebraska public television affiliate, would cancel the existing programs if forced to admit the third party can-

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[247] 97 F.3d 1137 (8th Cir. 1996).

[248] *See id.* The *Marcus* case was decided in 1996, shortly after the Eighth Circuit decision in *Forbes II*. *See* Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497 (1996). Although both were Eighth Circuit decisions, the courts reached opposite results. *See Marcus*, 97 F.3d at 1144; *Forbes II*, 93 F.3d at 505. However, both courts relied on the same proposition, namely that political debates were a limited public forum, to reach these inapposite results. *See id.* The *Marcus* court held that public television stations could limit the number of political candidates for a debate that it sponsored. *See Marcus*, 97 F.3d at 1144. The court in *Forbes II* reached a contrary decision, holding that the Arkansas' public broadcaster did not provide a sufficient basis for excluding a qualified candidate from its' sponsored debate. *See Forbes II*, 93 F.3d at 505.

[249] *See Marcus*, 97 F.3d at 1138.

[250] *See* Marcus v. Iowa Pub. Television, No. 4-96-CV-80690, 1996 WL 764143, at *1 (S.D. Iowa Oct. 9, 1996).

[251] *See Marcus*, 97 F.3d at 1138.

[252] *Id.* at 1139.

[253] *See id.* at 1140.

[254] *See id.* at 1140-41.

[255] *Id.* at 1141.

didates "rather than impair [its] journalistic integrity and [its] credibility with [its] viewers."[256]

Accepting the district court's depiction of IPTV as a limited-public forum,[257] the *Marcus* court applied the strict scrutiny standard to determine if IPTV was justified in withholding access to the third party candidates.[258] Under this standard, IPTV could regulate access of the third party candidates to the scheduled programming only if such regulation was "narrowly drawn to achieve a compelling state interest."[259] The court held that IPTV was acting within its journalistic discretion in excluding the third party candidates from its programs."[260] In so holding, the court reasoned that IPTV met its main responsibility to provide "newsworthy programs" to its viewers within the confines of its editorial boundaries.[261] Therefore, since IPTV fulfilled its newsworthiness requirement, the court held that IPTV had a compelling interest in denying access to the third party candidates and that its methods were narrowly structured to fulfill its interest.[262] On this basis, the court denied the third party candidates' motion for injunctive relief.[263]

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[256] *Marcus*, 97 F.3d at 1141.

[257] *See* Marcus v. Iowa Pub. Television, No. 4-96-CV-80690, 1996 WL 764143, at *3 (S.D. Iowa Oct. 9, 1996). The court held that "[t]he Iowa Press programs constituted limited public forums, because they were political debates staged by a public television network." *Id.*

[258] *See Marcus*, 97 F.3d at 1144. The court was referring to Nebraska Public Television ("NEPTV") that cancelled its scheduled debates after the *Forbes II* decision. *See supra* note 84 and accompanying text.

[259] *See Marcus*, 97 F.3d at 1141 (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992)). *See also* CHEMERINSKY, *supra* note 119, at 415-16.

[260] *See Marcus*, 97 F.3d. at 1141-44.

[261] *See id.* at 1142-44. It is interesting to note that the court chose to evaluate IPTV's actions under the "newsworthiness" standard rather than the "viability" standard employed by the *Forbes II* court. Furthermore, the court stipulated that the *Forbes II* decision "cannot be read to mandate the inclusion of every candidate on the ballot for any debate sponsored by a public television station." *Id.* at 1142. The court defined newsworthiness by evaluating several, nonexclusive elements such as the nature of the campaign, the strength of a candidates' campaign organization, support from the voters, previous exposure to public office, and strength and public interest in candidates' issues. *See id.* at 1143.

[262] *See id.* at 1144.

[263] *See id.*

IV. ANALYSIS— GOVERNMENT-OWNED BROADCASTERS RETAIN THE RIGHT TO CONTROL POLITICAL CANDIDATES' FIRST AMENDMENT RIGHT OF ACCESS TO SPONSORED DEBATES— *ARKANSAS EDUCATIONAL TELEVISION COMMISSION V. FORBES.*

In *Arkansas Education Television Commission v. Forbes,*[264] the Court decided to review the issue of candidate access to debates sponsored by state-operated broadcast facilities due to the confusion created by the Eighth Circuit's decisions in *Forbes II*[265] and *Marcus*,[266] as well as the Eleventh Circuit's decision in *Chandler*.[267] Specifically, the Court reviewed the public forum analysis from *Forbes II* in which the Eighth Circuit mandated open access to all qualified political candidates by labeling the AETC debates as a designated public forum.[268]

A. THE COURT CORRECTLY RULED THAT DEBATES SPONSORED BY STATE-OWNED BROADCASTING FACILITIES WERE SUBJECT TO FORUM ANALYSIS.

Justice Kennedy, writing for the majority, first examined whether public forum case law applied in *Forbes*.[269] He cautioned that the application of the public forum doctrine, which first arose in the context of streets and parks, should not be mechanically extended to public television broadcasting.[270] B Viewpoint neutrality, which provides broad rights of access to speakers, is required in the case of streets and parks[271] and within the context of university

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[264] 523 U.S. 666. *See supra* notes 11-24, 68-92 and accompanying text.

[265] 93 F.3d 497. *See supra* notes 50-67 and accompanying text.

[266] 97 F.3d 1137. *See supra* notes 247-263 and accompanying text.

[267] 917 F.2d. 486. *See supra* notes 234-246 and accompanying text.

[268] *See Forbes*, 523 U.S. at 672-80. *See also*, Ackley, *supra* note 4, at 512-16 (criticizing the Eighth Circuit Court of Appeals' delineation of debates sponsored by state-owned facilities).

[269] *See Forbes*, 523 U.S. at 672.

[270] *See id.* at 672-73.

[271] *See id.* at 673 (quoting Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) (stating that the public forum doctrine within the context of streets and parks is "compatible with the intended purpose of the property.")).

funded student publications.[272] However, the Court refused to extend this doctrine, as a general rule, to television broadcasting[273] because such broad rights of access would be antithetical to the journalistic freedom that public television stations must exercise.[274]

Despite relying on *FCC v. League of Women's Voters of California*[275] to support its broad journalistic interpretation,[276] the Court further recognized the argument set forth in *Columbia Broadcasting*[277] where broad access was denied on merely a non-selective basis.[278] The majority in *Forbes* relied on *Columbia Broadcasting* where the Court had noted that "public and private broadcaster, alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming."[279] Therefore, as a general rule, broadcasters are not subject to claims of viewpoint discrimination.[280]

Justice Stevens, writing for the dissent, also focused on the different standards for government owned and private broadcasting facilities.[281] Justice Stevens pointed out that AETC, as a state-owned agency, is subject to the Fourteenth Amendment,[282] and thus, its staff members were employees of the

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[272] *See id.* (citing Rosenberger v. Rector, 515 U.S. 819 (1995)).

[273] *See id.* The Court relied on such cases as *Columbia Broadcasting and FCC v. League of Women Voters of California*, to distinguish broadcast media from Court-proclaimed, limited pubic forum as the university-funded, student publications in *Rosenberger*. *See Rosenberger*, 460 U.S. at 819; FCC v. League of Women Voters of California, 468 U.S. 364, 378 (1984); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 105 (1973).

[274] *See Forbes*, 523 U.S. at 673.

[275] 468 U.S. 364 (1984).

[276] *See Forbes*, 523 U.S. at 673.

[277] *See Columbia Broad.*, 412 U.S. at 94.

[278] *See Forbes*, 523 U.S. at 673.

[279] *Id.*

[280] *See id.*

[281] *See id.* at 685-87 (Stevens, J., dissenting).

[282] *See* U.S. CONST. amend. XIV. *See also Forbes*, 523 U.S. at 686 (Stevens, J., dissenting) (citing Forbes v. Arkansas Educ. Television Communication Network Found., 22

government rather than just ordinary journalists.[283] Public broadcasters, according to Justice Stevens, are subject to more regulation than their private counterparts who are afforded no constraints pursuant to the First Amendment.[284] In fact, Justice Stevens attributed Congress' desire to provide a system of private broadcasters, over publicly-owned counterparts,[285] to its fear that public ownership would lead to governmental censorship and propaganda.[286]

In response to these concerns, in 1981, Congress enacted a statute that prohibited stations, which receive federal subsidies, from editorializing.[287] However, the Court rejected this statute in *League of Women Voters of California,* stating that such a statute would implicate the broad rights of private stations to express their own views within a broad range of topics unrelated to the government.[288] Justice Stevens reasoned that *Forbes* centered on the rights of a state-owned station regulating speech central to a democratic government.[289] Providing such a state-owned network with broad rights to make *ad hoc* decisions would increase the risk of governmental control and censorship, which,

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F.3d 1423, 1428 (1994)).

[283] *See id.* (citing Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d. 497, 505 (1996)).

[284] *See id.* at 686-89 (Stevens, J., dissenting).

[285] *See id.* at 688. (Stevens, J. dissenting). Justice Stevens pointed out that Congress designated a system comprised of private broadcasters rather than public broadcasters because of its fear that "public ownership created unacceptable risks of government censorship and use of media for propaganda." *Id.*

[286] *See id.* (citing Columbia Broad Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 107 (1973)). The Court, in *Columbia Broadcasting*, further stipulated that given a choice between private and public censorship "[g]overnment censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the most to be avoided." *Columbia Broad.*, 412 U.S. at 105.

[287] *See Forbes*, 523 U.S. at 688. (Stevens, J., dissenting) (noting 47 U.S.C. § 390 *et seq.*, Pub. L. 97-35, 95 Stat. 730 (1981) (amending Public Broadcasting Act of 1967, § 399, Pub. L. 90-129, 81 Stat. 365.)).

[288] *See id.* at 688-89 (Stevens, J., dissenting) (citing FCC v. League of Women Voters of California, 468 U.S. 364, 378 (1984)). The Court did reserve its decision regarding the constitutionality of a more narrow ban that would apply only to stations owned by state or local governments. *See id.* at 689 (Stevens, J., dissenting) (citing *League of Women Voters of California*, 468 U.S. at 364).

[289] *See Forbes*, 523 U.S. at 690-91 (Stevens, J., dissenting).

as yet, is not prevalent in privately-owned broadcast facilities.[290]

Relying on *Columbia Broadcasting*, the majority admitted that editors and broadcasters most likely abuse this privilege,[291] although such risks of abuse are allowed in order to preserve higher values of journalistic expression.[292] A broadcaster, by nature, will inadvertently "facilitate the expression of some viewpoints instead of others."[293] Therefore, in the absence of a Congressional directive to "regiment" broadcasters freedoms,[294] the Court correctly refused to enact the same by extending its own doctrines.[295]

Candidate debates, however, fall within a narrow exception to the general immunity afforded to public broadcasters,[296] and thus must be analyzed under the public forum doctrine.[297] First, a public debate is a forum for political speech by the candidates and not the station itself, specifically since the views expressed are strictly those of the political candidates.[298] "Second, in our tradition, candidate debates are of exceptional significance in the electoral process."[299] In fact, publicly-aired debates are considered to be the main source of

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[290] *See id.* (Stevens, J., dissenting).

[291] *See id.* at 673-74 (citing *Columbia Broad.*, 412 U.S. at 124). In *Columbia Broadcasting*, the Court admitted that "editors, newspaper or broadcast—can and do abuse this power . . . [but] [c]alculated risks of abuse are taken in order to preserve higher values." *Columbia Broad.*, 412 U.S. at 124-25.

[292] *See Forbes*, 523 U.S. at 674.

[293] *Id.*

[294] *Id.* at 675 (quoting *Columbia Broad.*, 412 U.S. at 127).

[295] *See id.* The Court clarified, however, that the First Amendment, on its own, would not bar neutral rules aimed at access to public broadcasting propositioned by the legislature, but only that "the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming." *Id.*

[296] *See id.* The Court offered two reasons for why candidate debates are different from most other programming. *See id.* First, the Court pointed to the very nature of public debates, which are at the heart of First Amendment free speech jurisprudence. *See id.* Similarly, the Court pointed to the importance of television sponsored debates to the electoral process. *See id. See also supra* notes 176-183 and accompanying text.

[297] *See Forbes*, 523 U.S. at 675.

[298] *See id.*

[299] *Id.*

public information based on the wide dissemination of television programming and the population's use of television as its "primary source of election information."[300] Consequently, a broadcaster may not base its decision, to allow or reject a political candidate, on the basis of the candidate's views.[301]

B. THE COURT CORRECTLY CONCLUDED THAT THE DEBATE WAS A NON-PUBLIC FORUM.

Once concluding that candidate debates fall within the public forum doctrine, the Court in *Forbes* then evaluated the applicable forum. Following precedent, the Court held that the AETC debate was a nonpublic forum, and therefore, AETC could legally exclude Forbes as long as it exercised reasonable, viewpoint-neutral journalistic discretion.[302]

The majority reviewed the three categories of speech fora: (1) the traditional public forum; (2) the public forum created by government intervention; and (3) the non-public forum.[303]

Traditional public fora exist in property that has been "devoted to assembly and debate" by long tradition or government mandate.[304] A speaker can be excluded from the public forum only if the government can show a "compelling state interest and the exclusion is narrowly drawn to achieve that interest."[305] However, this forum analysis was not relevant in *Forbes* because both the AETC and Forbes agreed that the AETC debate was not a traditional public forum based on the Court's prior refusal to extend this fora beyond its historical confines.[306]

Government-designated public fora exist only where the government "in-

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[300] *Id.* (quoting *Campaign Debates in Presidential Elections*, Congressional Research Service, June 15, 1993 at summ.).

[301] *See id.*

[302] *See id.* at 676.

[303] *See Forbes*, 523 U.S. at 676 (quoting Cornelius v. NAACP Defense and Educ. Fund, 473 U.S. 788, 802 (1985) (citing Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983))).

[304] *Id.* (quoting *Perry Ed. Ass'n*, 460 U.S. at 45).

[305] *Id.* at 677 (quoting *Cornelius*, 473 U.S. at 800).

[306] *See id.* at 678.

tentionally opens a nontraditional public forum for public discourse."[307] Courts evaluate whether a designated public forum exists by evaluating the policy and practice of the government.[308] Exclusion of a speaker from a designated public forum is measured under the same strict scrutiny standard employed for the public fora.[309] Examples of such fora include meeting rooms,[310] and municipal theaters.[311]

All other government properties either fall within the non-public fora or are not fora at all.[312] Access to a speaker may be restricted under a non-public forum "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."[313] Non-public fora are analyzed under the rational basis test of the First Amendment, rather than the strict scrutiny regiments of traditional and designated public fora.[314]

The Court rejected the Eighth Circuit's view that the debate was a designated public forum,[315] because creation of such a designation is dependent upon the government's intent to "make the property 'generally available.'"[316] However, a designated public forum is not created where the government provides "selective access to individual speakers rather than general access for a group

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[307] *Id.* at 677 (quoting *Cornelius*, 473 U.S. at 902).

[308] *See id.*

[309] *See Forbes*, 523 U.S. at 677.

[310] *See* Widmar v. Vincent, 454 U.S. 263 (1981).

[311] *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

[312] *See Forbes*, 523 U.S. at 678.

[313] *Id.* at 677-78 (quoting Cornelius v. NAACP Defense and Educ. Fund, 473 U.S. 788, 800 (1985)).

[314] *See* Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54-55 (1983).

[315] *See Forbes*, 523 U.S. at 678. Both the majority and Justice Stevens, in dissent, agreed that the AETC debates were non-public forum. *See id.* at 678-683. Thomas Ackley provided additional commentary regarding prior case law protocol that would necessitate the delineation of AETC debates as a non-public forum. *See* Ackley, *supra* note 4, at 512-16.

[316] *Id. See also Forbes*, 523 U.S. at 678 (quoting *Widmar*, 454 U.S. at 267). In *Widmar*, a designated public forum was found because the university made its facilities generally available to student groups. *See Widmar*, 454 U.S. at 273.

of speakers."[317] Justice Kennedy correctly maintained that the distinction between general and selective access, outlined in *Cornelius*,[318] furthered First Amendment goals because it precluded the government from closing access to its properties.[319]

The AETC debate was not generally available to all the candidates for Arkansas' Third Congressional District seat.[320] The AETC made candidate-by-candidate decisions regarding which eligible candidates would participate in the debate similar to the method used by the Federal Government in *Cornelius*, based on an agency-by-agency determination, which agency would be allowed to participate in the CFC charity drive.[321]

The Court further decided that the Eighth Circuit's holding—that the AETC debate was a designated forum—would result in more restricted speech rather than its purported expansion of free speech.[322] Categorizing the AETC debate as a designated forum would place a severe burden on public broadcasters because inclusion of all ballot-qualified candidates would undermine the quality and educational integrity of the debates.[323] Therefore, a public broadcaster, if

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[317] *Forbes*, 523 U.S. at 679. In *Perry*, a school district's internal mail system was not a designated forum although only selected speakers were provided access. *See Perry Educ. Assoc.*, 473 U.S. at 43-45.; *see also supra* notes 124-133 and accompanying text. Likewise, in *Cornelius*, the Court concluded that the Combined Federal Campaign (CFC) charity drive did not qualify as a designated public forum because the government consistently limited participation in the CFC to appropriate voluntary agencies. *See Cornelius*, 473 U.S. at 804; *see also supra* notes 139-166 and accompanying text.

[318] *See Cornelius*, 473 U.S. at 804.

[319] *See Forbes*, 523 U.S. at 680. Justice Kennedy found that selective access within a non-public forum encourages government to open its property to "some expressive activities, in cases where, if faced with an all-or-nothing choice, it might not open the property at all." *Id.*

[320] *See id.*

[321] *See id.*

[322] *See id.*

[323] *See id.* at 681. The Court provided logistical information regarding the numbers of qualified candidates that appeared on the ballot during different political elections. *See id.* These numbers included no fewer than 22 Presidential candidates during the 1988, 1992, and 1996 Presidential campaigns. *See* LET AMERICA DECIDE, TWENTIETH CENTURY FUND TASK FORCE ON PRESIDENTIAL DEBATES 148 (1995). Between 6 and 11 candidates ran during the 1996 congressional elections. *See* 1996 ELECTION RESULTS, 54 CONGRESSIONAL QUARTERLY WEEKLY REport 3250-57 (1996).

faced with making a choice between allowing all qualified candidates to participate in a debate or not allowing any, may opt to cancel all debates[324] and "by so doing diminish free flow of information and ideas."[325] Justice Kennedy proffered that the First Amendment restrictions, which would result from the Eighth Circuit's decision, were more than speculatory.[326] The cancelled Nebraska Educational Television Network debates, originally scheduled for candidates in Nebraska's 1996 United States Senate race, were a direct result of the Eighth Circuit's ruling in *Forbes*.[327] Therefore, based upon prior case law, the Court rightfully designated the AETC debate as a non-public forum.[328]

C. THE COURT REACHED THE CORRECT DECISION BY HOLDING THAT AETC'S EXCLUSION OF FORBES WAS JUSTIFIED.

Non-forum designation does not provide "unfettered power to exclude any candidate [that the public television broadcaster] wishes."[329] In order to fall within the protection of the First Amendment, the restriction of access to a speaker from a non-public forum "must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property."[330]

The Court held that there was ample support in the record to show that Forbes was not excluded based on his views, but rather, was excluded because of the limited public and financial support for his campaign.[331] In so holding,

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[324] *See Forbes,* 523 U.S. at 681; *see also supra* note 324 and accompanying text. Based on the large numbers of quantified candidates, the Court stipulated that "on logistical grounds alone, a public television editor might, with reason, decide that the inclusion of all ballot-qualified candidates 'would actually undermine the educational value and quality of debates.'" *Id.* (quoting LET AMERICA DECIDE, *supra* note 323, at 148).

[325] *See id.* (quoting Turner Broad. Sys., Inc. v. Democratic Nat'l Comm., 512 U.S. 622, 656 (1994) (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974))).

[326] *See id.*

[327] *See id.* at 681-82 (noting LINCOLN JOURNAL STAR, Aug. 24 1996, at 1A, col. 8).

[328] *See supra* notes 121-166 and accompanying text.

[329] *Forbes*, 523 U.S. at 682.

[330] *Id.* (citing Cornelius v. NAACP Legal Defense Educ. Fund, 473 U.S. 788, 800 (1985)).

[331] *See id.*

the Court relied on the testimony of AETC Executive Director, Susan Howarth, who testified "[that] Forbes' views had 'absolutely' no role in the decision to exclude him from the debate."[332] The Court also assessed other factors provided by the AETC as its basis for excluding Forbes, including Forbes' lack of voter support, the media's view that Forbes was not a serious candidate, and Forbes' lack of financial campaign funds and headquarters.[333]

D. JUSTICE STEVEN'S DISSENT

Justice Stevens, writing for the dissent, disagreed with the majority that Forbes was not a serious candidate.[334] He pointed out that although the AETC staff had already concluded that Forbes was not a serious contender for the November 1992 Arkansas Third Congressional District elections,[335] Forbes had been a serious contender for the Republican nomination for Lieutenant Governor in 1986 and 1990.[336] Additionally, in the 1990 Republican nomination, Forbes had received "46.88% of the statewide vote and had carried 15 of the 16 counties within the Third Congressional District by absolute majorities."[337] Justice Stevens argued that Forbes' strong showing in recent Republican primaries,[338] coupled with the close Third Congressional District race in 1992,[339]

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[332] *See id.*

[333] *See id.* Other factors supporting the lack of Forbes' popularity as a candidate include the Associated Press and national election result service's refusal to show Forbes' vote results on election night, and the fact that Forbes' ran his campaign out of his house. *See id.* In addition, Forbes had admitted that his campaign organization was "bedlam" and the media coverage of his campaign was "zilch." *See id.*

[334] *See id.* at 684-85 (Stevens, J., dissenting). Justice Souter and Justice Ginsburg joined in the opinion. *See id.*

[335] *See Forbes*, 523 U.S. at 684-85 (Stevens, J., dissenting).

[336] *See id.*

[337] *Id.*

[338] *See id.* at 685 (Stevens, J., dissenting).

[339] *See id.* The 1992 Third Congressional District race was very close wherein the Republican winner received 50.22% of the votes as compared with his Democratic counterpart who came away with 47.20% of the votes. *See id.* Therefore, given Forbes' strong recent showing in the recent Republican primaries, Forbes would only have had to divert a handful of votes from the Republican winner to cause his defeat and alter the outcome of the elections. *See id.*

may have directly affected the outcome of the 1992 Congressional elections.[340] In fact, Forbes would have needed to divert only a small percentage of votes from the Republican candidate to have caused his defeat.[341]

Further, Justice Stevens was concerned that, opposed to a privately owned network, the AETC, as a state owned-facility, was not subject to the Federal Election Campaign Act[342] and therefore, was not required to conform to "pre-established objective criteria to determine which candidates may participate in the debate."[343] Given AETC's flexibility to include or exclude Forbes and the other candidates,[344] the AETC staff had nearly limitless discretion for exclusion of a candidate based upon *ad hoc* reasons.[345] Accordingly, Justice Stevens reasoned that the Eighth Circuit correctly ruled in favor of Forbes because AETC's judgment was so subjective as to provide "no secure basis for the exercise of governmental power consistent with the First Amendment."[346]

The dispositive issue, according to the dissent, was whether AETC defined the debate forum with enough specificity to justify the exclusion of qualified candidates.[347] Neither arbitrary definitions of the debate forum, nor lack of any meaningful scope of the forum,[348] would insulate the government's actions

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[340] *See id.*

[341] *See Forbes*, 523 U.S. at 685 (Stevens, J., dissenting).

[342] *See id.* (citing 2 U.S.C. § 441b(a)).

[343] *Id.* (quoting 11 CFR § 110.13(c) (1997)).

[344] *See id.* at 686 n.6 (Stevens, J., dissenting). Justice Stevens pointed to popularity discrepancies present among several of the other candidates that AETC invited to participate in the debates. *See id.* at 686 (Stevens, J., dissenting). In the First Congressional District race, Democrat Blanche Lambert won in a resounding victory over Republican Terry Hayes, receiving 69.8% of the votes as compared to Hayes 30.2%. *See* R. SCAMMON & A. MCGILLIVRAY, AMERICAN VOTES 20: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS 99 (1993). In the Second Congressional District, Democrat Ray Thornton collected 74.2% of the votes and soundly defeated Republican Dennis Scott, who raised only $6,000 for his campaign, less than Forbes had raised. *See Forbes*, 523 U.S. at 686 (Stevens, J., dissenting).

[345] *See id.*

[346] *Id.* (quoting Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497, 505 (1996)).

[347] *See id.* at 690 (Stevens, J., dissenting).

[348] *See id.* at 689 (Stevens, J. dissenting). Justice Stevens pointed out several examples to buttress his position that the First Amendment does not tolerate a state agency's arbitrary

from the First Amendment.[349] A state-owned broadcasting facility must abide by First Amendment limitations regarding its control over political debate forums.[350] Justice Stevens analogized AETC's control over access to the debates to a local official's power to authorize permits for use of public facilities for speech related activities.[351] However, the issuance of permits in *Shuttlesworth v. City of Birmingham*[352] fell within the traditional public forum.[353] Nevertheless, Justice Stevens argued that the power to deny a license for such speech is comparable to censorship[354] and must be subjected to narrow, subjective and definite standards in order to comport with the First Amendment.[355]

This approach was reaffirmed in *Forsyth County v. Nationalist Movement*,[356] where a government official was given the power to set permit fees for

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exclusion from a debate forum. *See id.* He posits several examples of arbitrary exclusions from a speech forum such as "an expectation that the speaker might be critical of the Governor, or might hold unpopular views about abortion or the death penalty" wherein the First Amendment is an applicable tool of protection. *Id.* In fact, Justice Stevens, cites support of the majority to support his conclusion. *See id.* at 689 n.10 (Stevens, J., dissenting).

[349] *See id.* at 690 (Stevens, J., dissenting) (citing Rosenberger v. Rector, 515 U.S. 819 (1995)).

[350] *See Forbes*, 523 U.S. at 690 (Stevens, J., dissenting).

[351] *See id.* at 690-91 (Stevens, J., dissenting) (citing Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)).

[352] 394 U.S. 147 (1969). Shuttlesworth challenged a city ordinance which stipulated that it was an offense "to participate in any parade, procession, or other public demonstration without first obtaining a permit from the city commission." *Id.* at 148. The Court allowed the ordinance to stand, notwithstanding its' curtailment of defendant's right of assembly and the opportunity for communication and discussion of public issues on the basis that the ordinance was narrowly constructed to pass the First Amendment Constitutional barrier. *See id.* at 149-151.

[353] *See Forbes*, 523 U.S. at 691 (Stevens, J., dissenting) (citing *Shuttlesworth*, 394 U.S. at 150-51).

[354] *See id.* Pointing to the Court's prior decisions, which dealt with traditional forum designations over the past 30 years, Justice Stevens stipulated that "we have found an analogy between the power to issue permits and the censorial power to impose a prior restraint on speech." *Id.*

[355] *See id.* (citing *Shuttlesworth*, 394 U.S. at 150-51).

[356] 505 U.S. 123 (1992).

assemblies and parades.[357] The Court in *Forsyth County* held that the lack of any articulated standards within the ordinance provided the county official with the unbridled discretion to discourage or encourage certain views through the permit fee protocol.[358] However, once again, the issue in *Forsyth County* was decided pursuant to the strict scrutiny standard of traditional and designated forum analysis.[359] AETC's discretion, although not as broad as that of the Forsyth County official, prompted similar concerns.[360] Since there were no written criteria for the exclusion of a public candidate, AETC enjoyed wide latitude in making the decision regarding which political candidates would participate in the debate.[361]

Justice Stevens urged that the public debate forum, although not fitting neatly within the accepted public forum, classification criteria,[362] does implicate "constitutional concerns of the highest order."[363] In *Garrison v. Louisiana*,[364] the Court recognized that "speech concerning public affairs . . . is the essence of self-government."[365] In fact, the protections afforded by the First Amend-

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[357] *See Forbes*, 523 U.S. at 691 (Stevens, J., dissenting) (citing Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992)).

[358] *See id.* (analyzing *Forsyth County*, 505 U.S. at 133).

[359] *See id.* Justice Stevens agreed with the *Forbes* majority that the AETC should be analyzed pursuant to the non-public forum analysis. *See id.* at 692 (Stevens, J., dissenting).

[360] *See id.* Admitting that the "discretion of the AETC staff in controlling access to the 1992 candidate debates was not quite as unbridled as that of the Forsyth County administrator," Justice Stevens continued to find that AETC's discretion was broad enough "to raise the concerns that controlled our decision" in *Forbes*. *Id.* Furthermore, AETC's subjectivity regarding what factors to use to refuse access provided an avenue to use factors, such as a candidate's financial support, "that arguably should favor inclusion." *Id.*

[361] *See id.* Justice Stevens points to the fact that only major party candidates were invited to participate in the debates regardless of their viability in the electoral process. *See id.*; *see also supra* note 339 and accompanying text. Likewise, the lack of financial support, which AETC provided as one of its rationales for excluding Forbes, was not a factor for AETC when they invited a major-party candidate who had less financial support than Forbes. *See Forbes*, 523 U.S. at 692 (Stevens, J., dissenting); *see also supra* note 344 and accompanying text.

[362] *See supra* notes 124-133 and accompanying text.

[363] *Forbes*, 523 U.S. at 693 (Stevens, J., dissenting).

[364] 379 U.S. 64 (1964).

[365] *Forbes*, 523 U.S. at 693 (Stevens, J., dissenting) (quoting *Garrison*, 379 U.S. at

ment are most viable when applied to the conduct of campaigns for public office.[366] The dissent extended these rationales, which mandate the application of narrow, objective and definite standards for licensing decisions, to the subjective and arbitrary process upon which AETC relied to reject Forbes' access to the Third Congressional District debate.[367] If the demand for public speaking facilities exceeds the allotted space, the decision of who should be permitted to participate must be made on the basis of neutral, objective standards.[368] These standards would impose "only a modest requirement that would fall short of a duty to grant every multiple-party request,"[369] while providing the public with the assurance that debate participants would not be selected on arbitrary grounds.[370]

Although rejecting[371] the Eighth Circuit's premise for ruling in favor of Forbes, Justice Stevens opined that constitutional guidelines set forth by *Shuttlesworth* and its progeny[372] demanded the application of neutral, objective criteria to decisions made by state-owned facilities in the context of political debates.[373] Objective criteria is necessary because such application would alleviate some of the risks that are inherent in allowing government-operated broadcasting facilities to stage political debates.[374] On this basis, Justice Stev-

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[366] *See id.* (citing Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

[367] *See id.* at 694 (Stevens, J., dissenting).

[368] *See id.*

[369] *Id.* Justice Stevens challenged the majority's view that the Eight Circuit's ruling in *Forbes* led to the cancellation of the 1996 state sponsored Nebraska debates. *See id.* at 694 n.19 (Stevens, J., dissenting). Instead, Justice Stevens found that the Nebraska station would not have canceled the debate if had it realized that it would satisfy the First Amendment obligations simply by providing participation standards before the debate. *See id.*

[370] *See id.*

[371] *See Forbes*, 523 U.S. at 694 (Stevens, J., dissenting). Justice Stevens stated that "[l]ike the Court, I do not endorse the view of the Court of Appeals that all candidates who qualify for a position on the ballot are necessarily entitled to access to any state-sponsored debate." *Id.*

[372] *See supra* notes 351-361 and accompanying text.

[373] *See Forbes*, 523 U.S. at 694-95 (Stevens, J., dissenting). Specifically, Justice Stevens disagreed with the Eighth Circuit's premise that all candidates who qualified for a position on the ballot would have automatic access to all state-operated debates. *See id.*

ens would have affirmed the judgment of the Eighth Circuit.

However, Justice Stevens' conclusion that the application of neutral, objective criteria was necessary to the AETC debate is flawed for several reasons. First, Justice Steven's decision was based upon case law decided under the traditional and government-designated forum analysis.[375] Second, the application of neutral, objective criteria is arbitrary based on the lack of any formal directive from the legislature regarding such factors.[376] Third, given the absence of appropriate guidelines in either prior case law or the legislature, the majority's finding that AETC had a reasonable, viewpoint-neutral basis for excluding Forbes is consistent with Justice Stevens' rationale. Forbes was permissibly excluded based upon the lack of appreciable public interest, opposed to his viewpoint.[377] Similarly, the majority found that AETC's exclusion of Forbes was not based upon political pressure.[378] Finding that AETC's decision to exclude Forbes was a "reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment,"[379] the Court appropriately reversed the judgment of the Eighth Circuit.[380]

V. CONCLUSION

In *Arkansas Education Television Commission v. Forbes*, the Court held that state-owned stations could exclude qualified political candidates as long as the exclusion was reasonable and viewpoint-neutral.[381] The Courts' evaluation of candidate access, to debates sponsored by publicly owned broadcast facilities, was necessary to elucidate the controversial and arbitrary decisions set forth by

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[374] *See id.* at 695 (Stevens, J., dissenting).

[375] *See supra* notes 124-133 and accompanying text.

[376] *See supra* notes 109-114 and accompanying text.

[377] *See Forbes*, 523 U.S. at 683. The Court in *Perry* held that the exclusion from a nonpublic forum based upon "status" rather than viewpoint is allowed. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983).

[378] *See Forbes*, 523 U.S. at 683.

[379] *Id.*

[380] *See id.*

[381] *See id.*

the lower courts.[382] In fact, the Court clarified the guidelines for political access to television debates by setting the standard for evaluation under the non-forum regulations.[383]

Based upon the non-forum analysis, the Court correctly concluded that AETC's exclusion of Forbes was based upon reasonable and viewpoint neutral criteria.[384] AETC's justification for excluding Forbes was reasonable because it centered on his lack of popularity with the voters.[385] Therefore, the AETC still fulfilled its duty as a journalistic entity in providing viewers with a balanced program by presenting the viewpoints and issues that the viewers desired to hear. The Court correctly balanced the First Amendment rights of political candidates with the vitally important rights afforded to the media.[386]

In fact, the *Forbes* Court avoided creating a greater restriction of political speech by providing a rational basis First Amendment requirement for access to debates sponsored by state-operated broadcast facilities. Indeed, it is very likely that many stations would choose to forego sponsoring such debates rather than permitting access to an uncontrolled number of candidates.[387] The Courts' decision is supported by the Nebraska Education Television Network's decision to cancel a debate shortly after the announcement of the *Forbes II* decision.[388] The fear of reprisals from the broadcast community is further evidenced by the Eighth Circuit decision in *Marcus*, where the court of appeals created a nearly indistinguishable standard of "newsworthiness" to justify its disparate outcome from *Forbes II*, which was handed down only several months earlier.[389]

Although the outcome in *Forbes* was justified, the Courts' decision will

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[382] *See* Marcus v. Iowa Pub. Television, 97 F.3d 1137 (1996); Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497 (1996); Chandler v. Georgia Pub. Telecomm. Comm'n, 917 F.3d 486 (1990); *see also supra* notes 68-92, 234-246, 247-263 and accompanying text.

[383] *See Forbes*, 523 U.S. at 680.

[384] *See supra* notes 302-328 and accompanying text. *See also supra* notes 124-166 and accompanying text.

[385] *See Forbes*, 523 U.S. at 682. *See also supra* notes 331-333 and accompanying text.

[386] *See supra* notes 116-120, 167-214 and accompanying text.

[387] *See Forbes*, 523 U.S. at 682.

[388] *See supra* note 34 and accompanying text.

[389] *See supra* note 4 and accompanying text.

most likely create some confusion regarding the implementation of the *Forbes* non-public forum standard. Justice Stevens' concerns regarding the lack of neutral, objective standards[390] do have merit. It is understandable, however, that the majority was reluctant to enumerate an objective, bright line test concerning an arena which juxtaposes political speech and journalistic freedoms. The issues created by a candidate's First Amendment rights, versus a broadcaster's First Amendment rights, should continue to be determined by a flexible balancing approach that the Court has chosen to implement in its prior decisions.[391]

Given the lack of legislative guidance in this arena, it will fall to the lower courts to decipher the Court's somewhat murky guidelines when evaluating the candidates' right of access to state-sponsored television debates. Perhaps, however, it is the Congressional right and duty to create a clear course, via statute, regarding political access to television-sponsored debates.

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[390] *See Forbes*, 523 U.S. at 694-95 (Stevens, J., dissenting).

[391] *See supra* notes 124-166 and accompanying text.