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Enduring the Reign of Tweedledee and Tweedledum: How the Court Further Entrenched America's Two-Party Duopoly in *Arkansas Educational Television Commission v. Forbes* and How It Can Be Dredged Out

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COMMENT

ENDURING THE REIGN OF TWEEDLEDEE AND TWEEDLEDUM:[1] HOW THE COURT FURTHER ENTRENCHED AMERICA'S TWO-PARTY DUOPOLY IN *ARKANSAS EDUCATIONAL TELEVISION COMMISSION V. FORBES*[2] AND HOW IT CAN BE DREDGED OUT

"[O]ne who excels at warfare first establishes himself in a position where he cannot be defeated." [3]

It is not known whether Republican and Democratic strategists have been studying Sun-Tzu. For all practical purposes, though, their stranglehold on the American political process mirrors the celebrated tactician's above-quoted admonition. It remains to be seen whether the U.S. Supreme Court is content with this status quo. Despite indulging, on occasion, in glowing prose about the manifold benefits that third parties bestow on the American political scene,[4] the Court has always tethered such enthusiasm to warnings about what would befall the Republic if the stability of the two-party system were imperiled.[5] The inherent tension between the increasing prominence of

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[1] "Two persons or things nominally different, but practically the same; a nearly identical pair." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 2041 (1996). Also, characters popularized in LEWIS CARROLL, ALICE IN WONDERLAND (Schocken 1978) (1869).

[2] 118 S. Ct. 1633 (1998).

[3] Sun-Tzu, *The Art of War*, *in* THE SEVEN MILITARY CLASSICS OF ANCIENT CHINA 145, 164 (Ralph D. Sawyer trans., 1993).

[4] *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 794 (1983) ("Historically [sic] political figures outside the two major parties have fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream.").

[5] *See* Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1374 (1997) ("[P]olitical stability is best served through a healthy two-party system."); Storer v. Brown, 415 U.S. 724, 736 (1974) ("[S]plintered parties and unrestrained factionalism may do significant damage to the fabric of government.").

third parties and the implicit threat they pose to the Republican/Democrat political duopoly has forced the Court to consider the wisdom of sanctioning greater electoral accessibility to independents. The Court has already allowed limits on third parties' right to receive federal campaign funds[6] and their right to appear on the ballot.[7]

The most recent question facing the Court concerned third parties' right of access to a state-sponsored candidate debate on public television.[8] A split between federal appellate courts prompted the Court to hear the case.[9] This latest dilemma pitted the right of third party candidates to engage in rhetorical electioneering on public airwaves versus the right of public broadcasting programmers to choose who may debate.

This Comment argues that the Supreme Court erred in *Forbes*. While the Court properly applied its First Amendment "forum" doctrine, it failed utterly by not laying down guidelines to check the discretion of public broadcasting programmers in future debates. That this decision will not bode well for those voters who like a choice other than bland and tasteless is incontestable. Thus, it is now up to state legislatures or Congress take the initiative and expand the electoral menu.

I. BACKGROUND

Ralph Forbes ran as an independent candidate in 1992 for Arkansas' Third Congressional District.[10] Forbes was no stranger to

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[6] *See* Buckley v. Valeo, 424 U.S. 1 (1976) (requiring allocation of campaign subsidies to be governed by pre-established and objective criteria).

[7] *See* Jenness v. Fortson, 403 U.S. 431, 442 (1971) ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot."); Williams v. Rhodes, 393 U.S. 23 (1968) (holding that a candidate was entitled to a spot on the ballot after showing a minimal level of electoral support). *But cf. Timmons*, 117 S. Ct. at 1375 (cautioning that the state may not "completely insulate the two party system from minor parties' or independent candidates' competition and influence," but may do so to preserve political stability).

[8] *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633 (1998).

[9] *See* Forbes v. Arkansas Educ. Television Comm'n Network Found., 93 F.3d 497 (8th Cir. 1996) (granting right of access to state-sponsored debate under First Amendment grounds to all ballot qualified candidates); Chandler v. Georgia Public Telecomm. Comm'n, 917 F.2d 486 (11th Cir. 1990) (holding exclusion of third party candidate from state-sponsored debate did not violate First Amendment).

[10] Forbes' party affiliation in this election was unclear. News media consistently reported him as an independent. In 1985, he was with the Populist Party. Currently, he is running under the Reform Party banner. *See* Andrew Arnold, *First Amendment Hit by Supreme Court*, THE SPOTLIGHT, June 15, 1998, at 3. Forbes is a self-described "Christian supremacist" and a former member of the American Nazi Party. *See Editorial: Public Broadcasters Must Exercise Editorial Control*, SEATTLE POST-INTELLIGENCER, May 21, 1998, at A18, *available in* Westlaw, 1998 WL 4294761.

campaigns for political office.[11] In August of 1992, Forbes obtained the 2,000 signatures necessary to qualify under Arkansas' ballot access law.[12] He then endeavored to gain entrance to a candidate debate sponsored by the Arkansas Educational Television Commission (AETC). The AETC had already invited the Republican and Democratic candidates, but refrained from extending the same courtesy to Forbes, based on its opinion that this decision was in the best interests of its viewing public.[13]

In October of 1992, Forbes filed suit in federal district court for injunctive and declaratory relief on First Amendment and statutory grounds.[14] The court dismissed Forbes' suit for failure to state a claim. The Eighth Circuit, however, while affirming the dismissal of the statutory claims,[15] reversed on the First Amendment issue. The court found that Forbes had "a qualified right of access created by [AETC's] sponsorship of a debate,"[16] because AETC was a state actor.[17] As such, AETC could only exclude Forbes if it could proffer reasons "strong enough to survive First Amendment scrutiny."[18] The court determined that a public forum of some sort had been created, but remanded to the factfinder to ascertain which kind of forum it was, and whether AETC's as-yet-unarticulated reasons could pass constitutional muster.[19]

On remand, a jury found that Forbes' exclusion "was not the result of political pressure, and that it was not based on opposition to-

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[11] In 1990, running for Lieutenant Governor as a Republican, Forbes captured 46.8% of the vote in the primary, winning 15 of 16 counties statewide. *See* Jamin Raskin, *Let the Little Guy Have His Day on TV,* WASHINGTON TIMES, October 8, 1997, at A19, *available in* Westlaw, 1997 WL 3685838.

[12] *See* ARK. CODE ANN. § 7-7-103(c)(1) (Michie 1993).

[13] *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1638 (AETC alleged that it had "made a bona fide journalistic judgement that our viewers would be best served by limiting the debate" to the major party candidates.).

[14] *See id.* Aside from his claim for being excluded from the debate, Forbes charged that an anti-abortion ad sold to private television stations was wrongly run during "safe harbor" hours without an official finding that the ad was "indecent," and that his exclusion from the debate violated the "equal time" provisions of 47 U.S.C. § 315. *See* Forbes v. Arkansas Educ. Television Comm'n Network Found., 22 F.3d 1423, 1425 (8th Cir. 1994).

[15] *See Forbes,* 22 F.3d at 1427. Specifically, the court found there was no private cause of action under 47 U.S.C. § 315 and that Forbes had failed to exhaust his administrative remedies before the FCC. Similarly, his equal time claim under the same statute was barred. *Id.*

[16] *Id.* at 1428.

[17] *See id.* This overruled the portion of DeYoung v. Patten, 898 F.2d 628 (8th Cir. 1990), which held that no First Amendment right to appear in a public debate existed beyond that provided in 47 U.S.C. § 315. Otherwise, with no chance for private relief, states could make viewpoint based exclusions with impunity.

[18] *Forbes,* 22 F.3d at 1428.

[19] *See id.* at 1430. AETC had not yet filed its answer to Forbes' complaint.

wards plaintiff's political opinions."[20] As a matter of law, the district court held "that the debate in question was a non-public forum."[21] Forbes again appealed and again the Eighth Circuit reversed. The appellate court was especially displeased with the district court's handling of the forum issue. The main issue for the Eighth Circuit was whether the station's reasons for exclusion were constitutionally sound. By deciding as a matter of law that the forum was non-public, the district court had removed the real issue from the jury.[22]

The Eighth Circuit deemed that it was required to conduct an independent review. In so doing, the court determined that AETC's debate was "without reservation" a limited public forum.[23] The court then went on to assail "the legal sufficiency of the reason given for the exclusion,"[24] which it found wanting. This time AETC appealed, and the Supreme Court granted certiorari.

The Supreme Court approached the issues in the same manner as the Eighth Circuit. The Court first analyzed the public forum doctrine's applicability, and then decided if AETC's reasons for excluding Forbes were constitutionally permissible. Unfortunately for Forbes, but not for the reigning duopoly, the Court disagreed with the Eighth Circuit.

II. FORUM ANALYSIS: WHERE THE COURT WAS RIGHT

A. Not a Forum at All?

Opponents of the Eighth Circuit's decision took issue with the very notion of applying public forum analysis to government-sponsored public broadcasters. They made two primary arguments against the application of forum analysis: that the government itself was the speaker and that the principle of *stare decisis* should be followed.

The first argument urged that the government itself was the speaker and was not opening a public forum.[25] Under this reasoning,

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[20] Forbes v. Arkansas Educ. Television Comm'n Network Found., 93 F.3d 497, 499 (8th Cir. 1996).

[21] *Id.* at 500.

[22] *See id.* at 502. AETC argued that Bose Corp. v. Consumer's Union, 466 U.S. 485 (1984), compelled this result. The Eighth Circuit disagreed, approaching the forum issue as a mixed question of fact and law, resolved "by applying legal principles to facts" and more properly before a jury. *See Forbes*, 93 F.3d at 502.

[23] *See id.* at 504.

[24] *Id.*

[25] *See* Amicus Brief of the State of California, et al., *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998), *available in* Westlaw, 1997 WL 311451. In particular, the states urged that "[w]here government utilizes outside speakers to help present a public broadcast program, it is itself speaking and not opening a forum." *Id.* at *3.

the government acts as an editor and "may fully regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."[26] The candidates are simply "incidental beneficiaries,"[27] while the "intended beneficiary . . . is the viewing audience, not the candidates."[28]

The second argument, built on precedent, asserted that public forum analysis is inapplicable to a government-licensed station's programming determinations, under both FCC regulations[29] and federal appellate case law.[30] As with the first contention, the second also came down to an infringement on the state-entity station's editorial discretion; namely, "the broadcast licensee exercising sole programming authority."[31]

Mindful of the public broadcasters' need for editorial discretion, the Court accepted that, "in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming."[32] However, realizing that acceptance of these arguments, especially the first, would necessarily imply the government's rejection of candidates that it excluded from a debate, the Court held that "candidate debates present the narrow exception to the rule."[33] Candidate debates are unlike other programs, because they open "by design a forum for political speech"[34] and assume a place "of exceptional significance in the electoral process."[35] Finding that the "debate was a forum of some type,"[36] the Court next turned to the issue of determining the nature of the forum.

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[26] *Id.* at *5.

[27] *Id.* at *6.

[28] *Id.* at *5.

[29] *See* Mississippi Auth. for Educ. Television, 71 F.C.C.2d 1296, 1303 n.12 (1979); City of New York Municipal Broadcasting System, 56 F.C.C.2d 169, 170 (1975).

[30] *See, e.g.*, Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1043 (5th Cir. 1982) (holding that the station is "by definition . . . not a 'public forum'" and an excluded speaker "is without grounds for challenge under the public forum doctrine").

[31] *Id.* at 1042.

[32] Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1640 (1998).

[33] *Id.* An additional problem with the first argument is that it makes the forum the station, when it is really the debate. *See, e.g.*, Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 801 (1985) ("[F]orum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker. . . . In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum *within the confines of the government property*.") (emphasis added).

[34] *Forbes*, 118 S. Ct. at 1640.

[35] *Id.*

[36] *Id.* at 1641.

B. Traditional Public Fora

Historically, the Court has recognized "three types of fora: the traditional public forum, the public forum created by government designation, and the non-public forum."[37]

The traditional public forum designation, characterized "by long tradition or by government fiat" as a site for "assembly and debate,"[38] was rejected by both AETC and Forbes.[39] The Court agreed, noting that it had already jettisoned the idea of expanding the traditional public forum "beyond its historic confines,"[40] and citing the incompatibility of "the programming dictates a television broadcaster must follow" with the traditional public forum's practically unconstrained right of access.[41]

C. Designated Public Fora

The Court next considered whether AETC's sponsorship of a candidate debate created a designated public forum, a proposition adhered to by the Eighth Circuit. A designated public forum is created by deliberate governmental action "intentionally opening a nontraditional public forum for public discourse."[42] This focus on intent provides the government the option to establish a limited public forum or a nonpublic forum.[43] The appellate court believed that a limited public forum is born where the government "does not itself speak or subsidize transmittal of a message it favors but instead . . . encourage[s] a diversity of views from private speakers."[44] In support, the Eighth Circuit recited "a number of instances" where the Court found a designated public forum.[45] Focusing in particular on the Court's *Widmar v. Vincent*[46] decision, the appellate court paralleled the opening of a university's facilities to registered student groups for expressive speech purposes to AETC's opening of "its facilities to a particular

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[37] *Cornelius*, 473 U.S. at 802; *see also* G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 950-51 (proposing an alternative test to avoid continuing Court deference to the government's asserted reasons for exclusion).

[38] Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983) (finding internal school mail system was nonpublic forum).

[39] *See Forbes*, 118 S. Ct. at 1641.

[40] *Id.*

[41] *Id.*

[42] *Cornelius*, 473 U.S. at 802.

[43] "[W]hen the Government acts as the holder of public property other than streets, parks, and similar places, the Government may do whatever it reasonably intends to do, so long as it does not intend to suppress a particular viewpoint." *Id.* at 814 (Blackmun, J., dissenting) (recounting the majority's holding).

[44] Forbes v. Arkansas Educ. Television Comm'n Network Found., 93 F.3d 497, 503 (8th Cir. 1996) (quoting Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 834 (1995)).

[45] *Id.* (internal citations omitted).

[46] 454 U.S. 263 (1981).

group—candidates running for the Third District Congressional seat."[47] This debate was "staged in order for the candidates to express their views on campaign issues,"[48] unlike other forums opened selectively to speakers on an individual basis.[49] The candidates constituted a limited class and, as such, every candidate legally qualified as a member of said class should be included in the debate.[50]

The Court objected to what it saw as the Eighth Circuit's misuse of precedent. In *Widmar*, the Court stated, the government created a designated public forum because it allowed general access to a class of speakers; AETC, however, allowed only "selective access for individual speakers."[51] Individuals belonging to the student groups in *Widmar* were not required to ask permission when they sought to speak since the policy of the state actor "intended to designate a place not traditionally open to assembly and debate as a public forum."[52] Thus, it was "property that the State has opened for expressive activity by all or part of the public."[53]

While the Eighth Circuit correctly pegged the debate as a forum opened to a class of speakers, it failed to differentiate the access requirements involved—what the Court dubs the "*Cornelius* distinction between general and selective access."[54] For the Court, AETC did "no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.'"[55] Contrary to the appellate court's position, the debate was not generally open to all candidates, but was left to AETC to make "candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate."[56] This did not give rise to a limited public forum.[57]

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[47] *Forbes*, 93 F.3d at 504.

[48] *Id.*

[49] *See id.* The Eighth Circuit distinguished Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (finding expressive activity incidental to reason for opening forum) and Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (granting access to groups on individual basis).

[50] The appellate court struck at the root of the problem in pronouncing on this issue: "Surely 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." *Forbes*, 93 F.3d at 504.

[51] Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1642 (1998). "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Adderley v. Florida, 385 U.S. 39, 47 (1966) (holding shopping center was not dedicated to public use).

[52] *Cornelius*, 473 U.S. at 802.

[53] International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) (allowing restrictions on speech in airport setting).

[54] *See Forbes*, 118 S. Ct. at 1642.

[55] *Id.* at 1642 (quoting *Cornelius*, 473 U.S. at 804).

[56] *Id.* at 1642-43.

[57] *See id.* at 1643. "Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Cornelius*, 473 U.S. at 805.

D. Nonpublic Fora

Having determined that the debate was a forum of some kind and not a traditional or designated one, the Court decided that it was a nonpublic forum.[58] Yet christening a forum nonpublic "does not mean that the government can restrict speech in whatever way it likes."[59] To justify its exclusion of Forbes, the Court would require AETC to proffer some objective, viewpoint-neutral explanation. By analyzing AETC's arguments, it becomes manifestly obvious where the Court erred in its analysis and equally apparent how it could be put right.

III. RATIONALIZING EXCLUSION: WHERE THE COURT WENT AWRY

A. AETC's Criteria for Exclusion

1. What the Court Stomached . . .

Despite the classification of the debate as a nonpublic forum, AETC was still required to proffer objective, viewpoint-neutral explanations for why it excluded Forbes.[60] AETC's editorial staff testified that Forbes was excluded because (1) Arkansas voters and the news media did not take him seriously, (2) major voting results reporting services did not plan to run his name or his vote tally on election night, (3) he had minimal financial support and (4) his campaign headquarters were located at his home.[61] The Court relied heavily on the jury's "express finding" that AETC acted "in good faith" and that its decision was not politically motivated,[62] but rather was based on

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[58] *See Forbes*, 118 S. Ct. at 1643; Buchanan, *supra* note 37, at 952 ("[A] 'nonpublic forum' is a governmentally controlled forum that is neither a traditional public forum nor a designated public forum.").

[59] International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 687 (1992).

[60] *See Forbes*, 118 S. Ct. at 1643 ("To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property.").

[61] *See id.* at 1643-44. In summing up AETC's rationale the Court combined the concepts of "political viability," offered as justification on the appellate level, and "newsworthiness," an explanation offered primarily before the Court. The final two justifications for excluding Forbes were especially hypocritical. In Arkansas' Second Congressional District, the same year Forbes was excluded from the Third District debate based on insufficient financing, the Republican contender was invited, even though Forbes raised over 90% more money than the Republican. *See* Amicus Brief of Perot '96, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998), *available in* Westlaw, 1997 WL 361877, at *12. Furthermore, that the operation of Forbes' campaign headquarters out of his home somehow disqualified him is nonsensical. Many candidates of limited means function in this manner. Even John F. Kennedy conducted his presidential campaigns out of his home. *See id.* at *13 n.14.

[62] *Id.* at 1644.

Forbes' status.[63] Thus, Forbes' "own objective lack of support, not his platform," resulted in his rejection from the debate panel.[64]

The Court conveniently glossed over the fact that these "were employees of government"[65] deciding that "the voters lacked interest in [Forbes'] candidacy."[66] This confidence in governmental good faith, in a decade that has recorded innumerable abuses by government,[67] strikes one as rather naïve.[68] Such a surfeit of faith in government will inevitably lead to the very "manipulation of the political process" that the Court claims did not occur here.[69] This will happen whether the Court wants to acknowledge it or not; pretending the sun does not exist will not prevent sunburn to anyone exposed overlong before it.

2. . . .The Dissent and the Eighth Circuit Could Not

As Justice Stevens' dissent points out, Forbes' exclusion was preordained: "Two months before Forbes was officially certified as an independent candidate . . . the AETC staff had already concluded that he 'should not be invited.'"[70] AETC's claims to objectivity notwithstanding, Stevens correctly notes the "standardless character of the decision to exclude Forbes."[71] The real issue for Stevens, as it was for the Eighth Circuit, was not what type of forum AETC had created, "but whether AETC defined the contours of the debate forum with sufficient specificity to justify the exclusion of a ballot-qualified

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[63] *See id. See also* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 49 (1983) (holding that excluding a speaker based on status is permissible).

[64] *Forbes*, 118 S. Ct. at 1644. The Eighth Circuit dismissed AETC's reasons under the stricter test for a designated public forum. As will be seen, however, those same reasons would not have passed the more lenient, objective standard used by the Court. *See* Forbes v. Arkansas Educ. Television Comm'n Network Found., 93 F.3d 497, 505 (8th Cir. 1996).

[65] *Forbes*, 93 F.3d at 505.

[66] *Forbes*, 118 S. Ct. at 1644; *see also* Anderson v. Celebrezze, 460 U.S. 780, 798 (1983) ("A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.").

[67] *See, e.g., Editorial: Government Abused Power at Waco, Ruby Ridge*, PEORIA JOURNAL STAR, October 2, 1997, at A4, *available in* Westlaw, 1997 WL 7678009 (detailing federal atrocities against American citizens); David E. Rosenbaum, *Internal Audit Confirms Abusive IRS Practices*, N.Y. TIMES, January 14, 1998, at A1, *available in* Westlaw, 1998 WL 5393499 (documenting the Internal Revenue Service's admitted maltreatment of Americans); George Krau, *Is Feds Motto 'Do As We Say, Not As We Do'?* NAT'L L.J., March 2, 1998, at A24 (reporting how unconstitutional rules of engagement were used to justify the murder of Vicki Weaver at Ruby Ridge).

[68] Even if this faith could be chalked up to credence in the jury that decided that AETC acted in good faith, it is still misplaced in the constitutional context. "First Amendment questions of 'constitutional fact' compel this Court's de novo review." Bose Corporation v. Consumer's Union, 466 U.S. 485, 508 n.27 (1984) (calling for an independent review where there are mixed questions of fact and law).

[69] *Forbes*, 118 S. Ct. at 1644.

[70] *Id.* (Stevens, J., dissenting).

[71] *Id.*

candidate."[72] It is clear that AETC did not, whether AETC stands by its "newsworthiness" criteria, which it admits is subjective,[73] or its "political viability" criteria, which is equally subjective.[74]

Stevens' assertion that the majority is allowing public broadcasters unlimited discretion to impose a prior restraint on speech is, unfortunately, a bald overstatement of the case.[75] It is incorrect to liken AETC's control over who appears in the debate to a comparable government official determining who may receive a permit to utilize public facilities. AETC opened a nonpublic forum and therefore was not required to adhere to the higher standards imposed on those opening traditional or limited public fora.[76] This does not mean that any standard will suffice—it still must be unambiguous.[77] Despite only being required to meet the lesser standard, it is still crucial that AETC be restricted by some prefabricated guidelines.[78] Determining what these criteria will be and how best to implement them fairly will now be addressed.

B. In Search of a Fair Test

In divining a fair test for exclusion from a state-sponsored television debate, there are two principles at odds—the need for free flowing political dialogue versus the station's need to control the debate's parameters. The Court's permissive acceptance of AETC's proffered rationale for the exclusion of Forbes tips the balance too far in favor of broadcasters. Overreaching editorial discretion poses a great threat

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[72] *Id.* at 1647.

[73] *See id.* at 1648 (attacking AETC's "subjective judgment" in determining the issue). AETC admitted that its criteria was "essentially subjective." Forbes v. Arkansas Educ. Television Comm'n Network Found., 93 F.3d 497, 504 (8th Cir. 1996). Although this confession came about in regards to AETC's decision on political viability, it mainly centered on its criteria in deciding two months prior to the election that Forbes was not newsworthy. "[A] judgment that [a candidate's] views are not newsworthy . . . 'is in reality a façade for viewpoint discrimination.'" Chandler v. Georgia Public Telecomm. Comm'n, 917 F.2d 486, 493 (11th Cir. 1990) (Clark, J., dissenting) (citation omitted).

[74] *See Forbes*, 93 F.3d at 505 ("[P]olitical viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment.").

[75] *See Forbes*, 118 S. Ct. at 1647 (Stevens, J., dissenting); Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 763 (1988) ("[The risk of viewpoint-based censorship is] at its zenith when the determination of who may speak and who may not is left to the unbridled decision of a government official.").

[76] The Court uses strict scrutiny to review restrictions in traditional and limited public fora. *See* Buchanan, *supra* note 37, at 953-54.

[77] *See, e.g.*, Families Achieving Independence and Respect v. Nebraska Department of Social Services, 91 F.3d 1076, 1079 (8th Cir. 1996) (vague standard inadequate to justify exclusion from nonpublic forum); Multimedia Publications v. Greenville-Spartanburg Airport, 991 F.2d 154, 159 (4th Cir. 1993) (striking down ban on newsracks in nonpublic forum for lack of persuasive reasons).

[78] *See Forbes*, 118 S. Ct. at 1648 (Stevens, J., dissenting) (lamenting that "[n]o written criteria cabined the discretion of the AETC staff").

to the First Amendment values implicated in the political debate setting.[79]

Justice Stevens, in his dissent, noted that private television networks, under the same set of facts at issue, "would be subject to scrutiny under the Federal Election Campaign Act unless the network used 'pre-established objective criteria to determine which candidates may participate in [the] debate.'"[80] Even the Court majority acknowledged that there is nothing to prohibit "the legislative imposition of neutral rules for access to public broadcasting."[81] Therefore, avoiding ad hoc/post hoc justifications would be best accomplished by "requiring the controlling state agency to use (and adhere to) pre-established, objective criteria."[82] On the other hand, the programmer should not be encumbered by "a strictly mechanical approach to candidate selection."[83] Identifying a criterion that satisfies these needs is required.

1. Ballot Access Requirements

The states already use one possible objective criterion—the ballot access requirement ("BAR").[84] BARs are contained in statutes that provide how many signatures are necessary to obtain a spot on the ballot in the coming election.[85] In a peculiar way, this objective measure of political viability is akin to fetal viability. The meeting of a BAR is evidence of an incipient candidate's quickening; it assures the state that the candidacy is "alive and kicking." The candidate has clearly attracted some public attention and, while the candidacy may be "stillborn" at the ballot box, the candidate has at least shown that

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[79] *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("[The First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

[80] *Forbes*, 118 S. Ct. at 1645 (Stevens, J., dissenting) (citation omitted). *But see* Reply Brief for the Petitioner, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998), *available in* Westlaw, 1997 WL 436243, at *16 (criticizing the FEC pre-established criteria rule as given to disparate results "when applied according to the editorial judgments of different broadcasters").

[81] *Forbes*, 118 S. Ct. at 1640.

[82] *Id.* at 1649 (Stevens, J., dissenting).

[83] Amicus Brief of Commission on Presidential Debates, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998), *available in* Westlaw, 1997 WL 311466, at *4 (arguing that debates will become overcrowded and subject to the risk of Republican and Democratic candidates opting not to participate).

[84] *See* Forbes v. Arkansas Educ. Television Comm'n Network Found., 93 F.3d 497, 504 (8th Cir. 1996).

[85] Some states operate on a monetary fee basis to acquire ballot access, *see, e.g.*, OKLA. STAT. ANN. tit. 26, § 5-112 (West 1997) ($750 for U.S. House, $1,000 for U.S. Senate).

he will be worth carrying to term. In most states, the amount of signatures necessary to qualify for the ballot is considerable.[86]

The BAR certifies that the candidates before the voters are serious contenders.[87] That the BARs are effective is seen in a comprehensive overview, which shows that on the average, there is currently "no more than one extra candidate per House district."[88] Surely, this would not result in the feared "cacophony of competing voices, none of which could be clearly and predictably heard."[89]

On the whole, it seems that the use of BARs alone could be a sufficient, objective criterion to compel government-entity stations to allow all qualified candidates into their public debates.[90] Unfortunately, strict adherence to them creates two primary difficulties: passing the threshold may be so easy that the BAR is (1) merely a sham, as in states with alarmingly low qualification thresholds,[91] and (2) may result in an overabundance of candidates.[92] When this occurs, the need for other standards to "ration or allocate the scarce resources on some acceptable neutral principle" becomes imperative.[93] These reasons, more than anything, illustrate why some editorial discretion, even for government employees, must be maintained.[94] That is why

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[86] *See generally* Brian L. Porto, *The Constitution and the Ballot Box: Supreme Court Jurisprudence and Ballot Access for Independent Candidates*, 7 BYU J. PUB. LAW 281, 288 (1993) (offering a survey of the generally high BAR threshold in different states).

[87] Amicus Brief for Perot '96, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998), *available in* Westlaw, 1997 WL 361877, at *20 ("Ballot access laws are the state's legitimate and objective way of screening out frivolous candidates and guaranteeing the seriousness of candidates who achieve a place on the ballot.").

[88] *Id.* at *4 (basing their finding on the last 25 general elections).

[89] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969) (finding FCC regulations under fairness doctrine enhance First Amendment freedoms).

[90] This was the Eighth Circuit's conclusion that the Court reversed. The discussion herein contemplates a statute propagating the objective criteria, which would not necessarily have to be, and probably should not be, limited to the sole use of a BAR.

[91] *See, e.g.*, MISS. CODE ANN. § 23-15-359(1)(a), (c) (1990) (200 for House, 1,000 for Senate); TENN. CODE ANN. § 2-5-101(b)(1) (Michie 1994) (only 25 signatures needed to ballot qualify for any office); UTAH CODE ANN. § 20A-9-502(2)(a)(i),(ii) (Michie 1995) (100 for House, 300 for Senate).

[92] Even states with high BAR thresholds may produce an unwieldy number of candidates demanding debate access. In short, BARs offer "no obvious limiting principle." Amicus Brief of FCC, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998), *available in* Westlaw, 1997 WL 311464, at *12. Due to the Eighth Circuit's ruling that BARs alone compelled public stations to permit access to all qualified candidates caused the Nebraska Educational Telecommunications Network to cancel its 1996 senatorial debate. *See Forbes*, 118 S. Ct. at 1643. If states wish to ensure that their BARs are producing serious candidates they can always adjust the BAR to reflect a more objective measure of support. *See id.* at 1649 n.19 (Stevens, J., dissenting) (arguing that if Nebraska's public television programmers had pre-established, objective criteria they probably could have gone forward with the debate without fear of a lawsuit).

[93] Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 835 (1995) (determining university's denial of funds to religious group to be viewpoint discrimination).

[94] Naturally, avoiding all trace of subjectivity is an impossibility.

other standards with objective criteria respective of editorial discretion are needed in conjunction with BARs.

2. *When the BAR Is No Bar: Other Objective Standards*

One objective method is to examine the candidate's past electoral support. A perennial candidate's consistent failure to garner even the slightest hint of voter interest may constitute some evidence of the candidate's insignificance, possibly enough to justify his exclusion.[95]

Polls may constitute another way to reveal whether the public is interested in the candidate or his issues, and if the candidate has any realistic chance of making an impact on the election.[96] These, however, are fraught with uncertainty due to their unpredictability and anticipatory nature.[97] In addition, poll results are based on statistical calculations, which are always open to suspicion.[98]

A final possibility is to follow the New Jersey example of using campaign financing as the yardstick for debate participation.[99] A federal district court found the statute passed even the heightened scrutiny of the limited public forum doctrine.[100] The sole drawback is that

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> Whenever the government is in the business of speech . . . the exercise of editorial judgment is inescapable. If there is any political or ideological resonance to the expressive activity involved, the good-faith exercise of that judgment may have unavoidable political or ideological consequences; and so (because they are unavoidable) these consequences do not condemn the judgment.

Chicago Acorn v. Metropolitan Pier and Exposition Authority, 150 F.3d 605, 701 (7th Cir. 1998) (holding that *Arkansas Educ. Television Comm'n v. Forbes* did not grant government capability to limit use of nonpublic pier's facilities on political grounds). The goal, therefore, is to limit subjectivity as much as possible.

[95] A notable example is the late Lar Daly. "Daly ran unsuccessfully for more than 40 elections until his death in 1978." *See* Fulani v. FCC, 49 F.3d 904, 908 n.5 (2d Cir. 1995).

[96] This should not be limited to whether or not the candidate can win. The power of an independent to draw support away from a major party candidate may force that candidate to confront important issues that he would rather not address.

[97] *See* Amicus Brief of Perot '96, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998), *available in* Westlaw, 1997 WL 361877, at *15. Poll numbers tend to be evanescent. A prime example of their dubious utility came in the 1992 Wisconsin race for the U.S. Senate. Just three weeks prior to the Democratic primary a major poll showed the eventual winner receiving just 10% of the vote. *See id.* at *15-16.

[98] A disturbing example of this occurred in 1992 when a poll showed that 1 in 5 Americans doubted the Holocaust occurred. In 1994 the poll was redone and found that only 1 in 100 held this view. The 1992 survey was based on a flawed question. *See New Holocaust Poll: Fewer Doubters*, ORANGE COUNTY REGISTER, July 8, 1994, at A20, *available in* Westlaw, 1994 WL 4338570; *see also Misuse of Statistics*, SALT LAKE TRIBUNE, August 19, 1998, at A12, *available on* Westlaw, 1998 WL 4068271 (reviewing statistical abuses by government); Sheri L. Gronhoud, Note, *Social Science Statistics in the Courtroom*, 62 NOTRE DAME L. REV. 688 (1987) (commenting on the misuse of statistics in the juridical setting).

[99] *See* N.J. STAT. ANN. § 19:44A-45 (West 1989).

[100] *See* Arons v. Donovan, 882 F. Supp. 379 (D.N.J. 1995) (finding the statute viewpoint-neutral by operation of law).

the law forces state-entity stations to accept all qualified candidates for the debate. While it is an objective measure, it should not stand alone for two reasons: it robs programmers of *all* editorial discretion and it is classist.[101]

Ultimately, the pre-established criteria should offer an objective snapshot of where a candidate stands and whether, in the good faith editorial judgment of the programmer, the candidate can be excluded based on his failure to meet these standards.

C. Why Third-Party Inclusion is Essential

1. The Historical and Future Value of Third Parties

Third parties have bequeathed a multiplicity of benefits upon the American polity and have always been in the vanguard of democratic progress.[102] Direct election of senators, suffrage for women and the graduated income tax were all initially espoused by independent parties,[103] as were regulation of the railways, higher civil service standards, the formation of labor unions and the promotion of populist tools such as the initiative, the referendum and the recall.[104] Third parties have also tended to advance nonviolent solutions for the radical, malcontented or potentially estranged. Ultimately, they deter the two-party duopoly from irrevocably institutionalizing itself,[105] which would be an appalling devolution into the realm of Tweedledee and

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[101] *See* Amicus Brief of Natural Law Party, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998), *available in* Westlaw, 1997 WL 441289, at *12 ("[In 1994] approximately 90% of Congressional races were won by the candidate who spent the most money."). *See generally Center for Responsive Politics* (visited Sept. 30, 1998) <http://www.crp.org/spend.htm> (providing general overview of the use of money in political campaigns). This infelicitous disparity is most pronounced in areas of race and class. "Most political donors live in white, upscale neighborhoods." Jim Drinkard, *Money Talks*, USA TODAY, Sept. 24, 1998, at 8A (comparing federal campaign finance data with Census findings); *but see* McGlynn v. New Jersey Public Broad. Auth., 88 N.J. 112, 125, 439 A.2d 54 (1981) (commending the law as a positive instrumentality for placing candidates of limited means before the public).

[102] *See* Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957) ("All political ideas cannot and should not be channeled into the programs of the two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted."); "Many of America's noblest and far-reaching advances in freedom were third-party proposals years before the major parties touched them with even the longest pole." J.D. GILLESPIE, POLITICS AT THE PERIPHERY: THIRD PARTIES IN TWO-PARTY AMERICA 24 (1993) (examining the history of independent political parties in the U.S.).

[103] *See* STEVEN J. ROSENSTONE ET AL., THIRD PARTIES IN AMERICA 8 (2d ed. 1996).

[104] *See* Keith Darren Eisner, *Non-major Party Candidates and Televised Presidential Debates: the Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 983 (1993) (arguing for the promulgation of laws promoting expanded debate opportunities for independent office-seekers).

[105] *See* Amicus Brief of Pacific Legal Foundation, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998), *available in* Westlaw, 1997 WL 370055, at *6.

Tweedledum politics that even the Supreme Court has counseled against.[106]

In the past two decades, independent political parties have expanded their base of support. America's complacency with a two-party system began to diminish in the early 1980s.[107] By 1994, a majority supported the formation of a national third party.[108] In 1995, 6 in 10 Americans wanted a third party to run candidates at all levels of government.[109] Over 10% of U.S. voters cast their ballot for a third party Presidential candidate in the 1996 election.[110] Third party candidates expand the political dialogue of America's diverse society, often broach issues considered too controversial by the major party candidates, act as "spoilers"[111] and occasionally win.[112] Simply put, the people are clamoring for these catalysts of change.[113] With burgeoning heterogeneity in the U.S. population,[114] coupled with increasing regionalism,[115] third parties that speak for the many diver-

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[106] *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 802 (1983) ("[P]rotecting the Republican and Democratic Parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena."); Williams v. Rhodes, 393 U.S. 23, 32 (1968) ("There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them.").

[107] *See* Christian Collet, *Trends: Third Parties and the Two-Party System*, 60 PUBLIC OPINION QUARTERLY 431, 433 (1996) (examining public attitudes toward independent parties).

[108] *See id.*

[109] *See* Gallup Newsletter Archives, Vol. 60, No. 9, July 7, 1995.

[110] *See* David Judson, *Third-Party Movements—Any Livelier After Election Day?* Gannett News Service, Nov. 7, 1996, *available in* Westlaw, 1996 WL 4390273.

[111] There is the distinct possibility that had Forbes been included in the debate he may have shifted the outcome in the Democrats' favor. Forbes garnered 2.5% of the vote; the Republican victor 50.2%. If Forbes had swayed just 1 in 15 GOP voters to vote for him, the Democrat would have won. *See* Jamin Raskin, *Let the Little Guy Have His Day on TV*, WASHINGTON TIMES, October 8, 1997, at A19, *available in* Westlaw, 1997 WL 3685838.

[112] Congress' only independent member, Bernard Sanders, began as a fringe-party candidate. *See* Candace Page, *Bernard Sanders Has Added to Vermont's . . .*, AP, June 28, 1997, *available in* Westlaw, 1997 WL 2536270.

[113] Eisner, *supra* note 104, at 985.

[114] *See generally*, Tom Morganthau, *The Face of the Future: Demographics*, NEWSWEEK, Jan. 27, 1997, at 58 (predicting a dystopian future for a non-white majority America divided by class and race); Jonathon Tilove, *White America: Ready to be a Minority?*, DAILY SOUTHTOWN, June, 29, 1998, at A1, A2 (forecasting a non-white majority in the United States by 2050).

[115] *See* Robert D. Kaplan, *Travels into America's Future*, ATLANTIC MONTHLY, August 1998, at 37 (pinpointing multicultural diversity as the chief reason for growing regionalism across the U.S. and Canada). Regionalism is often cited as one of the causes of the Civil War. In the 1860 presidential election the Southern Democrats, Northern Democrats, Republicans and Constitutional Unionists campaigned along geographical lines. "[A]ll results showed sectional voting to some extent." E.B. LONG, THE CIVIL WAR DAY BY DAY 2-3 (1971); *see also* David Judson, *Third-Party Movements—Any Livelier After Election Day?* Gannett News Service, Nov. 7, 1996, *available in* Westlaw, 1996 WL 4390273 (reporting that the last two presidential elections marked the first time since the Civil War era that third parties took over 10% of the national vote in successive presidential elections).

gent voices in America may well enhance minority opportunities for representation.[116]

2. *Applying Leash Laws to the Gatekeepers*

It is fundamental that the electorate have the greatest possible exposure to each serious candidate in order to form an educated opinion prior to voting.[117] In modern America, it is well nigh impossible to reach the constituency by wailing campaign slogans in the public square. Access to television, the medium of communication found in nearly every citizen's home,[118] is critical. Aside from expensive television advertising, televised candidate debates are an office-seeker's primary means for reaching the masses. Privately owned broadcasters must adhere to pre-established, objective criteria in determining which candidates will participate in a debate.[119] Why should public broadcasters—government employees—be permitted to employ some amorphous, unrecorded set of standards in making the same determination?

Debates are probably the single most decisive factor in how a citizen casts his ballot.[120] With fully two-thirds of public television stations state-licensed,[121] public broadcasting programmers are literally the gatekeepers that determine which candidates will be exposed to the public via a debate. Thus, they need to be leashed legislatively; albeit neither with a ductile cord nor a choker. A balance between

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[116] There is evidence to suggest that America's racial minorities would support a third party more in tune with their needs. *See, e.g.*, Tom Wicker, *Deserting the Democrats: Why African-Americans and the Poor Should Make Common Cause in Their Own Party*, THE NATION, June 17, 1996, at 11 (noting strong third-party sentiment from 46% of Blacks and 54% of Hispanics polled in a national survey); Lenora Fulani, *Blacks Need to Leave Dems, GOP Behind*, USA TODAY, Sept. 6, 1996, at 11A, *available in* Westlaw, 1996 WL 2067948 (pointing out that fully 65% of young Blacks favor the formation of a third party).

[117] *See* McIntyre v. Ohio Elections Commission, 514 U.S. 334, 346-47 (1995) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."). AETC came to see the light in this regard. For their 1998 debate for the Third Congressional District the network invited Ralph Forbes. The Republican incumbent refused to participate, probably since there was no Democratic candidate. As a result, Forbes was granted, under an FCC regulation, ten minutes of airtime to persuade Arkansas voters. *See Reform Party Candidate Gets 10 Minutes on Air in Lieu of Debate*, AP, Sept. 28, 1998, *available in* Westlaw, 1998 WL 7450311.

[118] As of 1995, 98.3% of all U.S. households owned a TV. *See* STATISTICAL ABSTRACT OF THE UNITED STATES 1997 (117th ed.), Table 888 at 566.

[119] *See* 11 CFR § 110.13(c) (1997).

[120] *See* Amicus Brief of Green Party, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998), *available in* Westlaw, 1997 WL 367005, at *9 (citing 1988 and 1992 exit polls that "showed that in presidential elections, more voters based their balloting decision on the debates than on any other single factor").

[121] *See* National Public Radio, Morning Edition, October 8, 1997, *available in* Westlaw, 1997 WL 12823467.

allowing "excessive discretion" to programmers and a scheme mandating "automatic inclusion" for candidates must be established.[122]

The Court has long recognized the danger in allowing a government authority unchecked discretion, unless "bounded by precise and clear standards."[123] The state-entity station's decision in inviting some candidates (inevitably those of the two major parties) and excluding others (typically everyone else) legitimizes the selected candidates[124] and relegates the uninvited to the *barbaricum*.[125] On the outside looking in, third parties are robbed of their ability to influence the electorate, hold the Republican/Democrat duopoly accountable, or raise "untouchable" issues.[126] Despite their ostensible designation as journalists, public television programmers remain government employees and, as such, "it can never be assumed that government journalists are in an adversarial relationship with their employers."[127] By providing a facile means to include the major party candidates and rationalize the exclusion of independents, the government is, in effect, imposing partisan preferences by entrenching the two-party duopoly.[128] Requiring programmers to adhere to the foregoing objective criteria will assure a fair opportunity for third party access to debates, while also reserving a circumscribed degree of editorial discretion to the programmers.

CONCLUSION

The inherently fractious nature of multicultural diversity can not be perpetually accommodated by a two-party system. Available evi-

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[122] Amicus Brief of Brennan Center for Justice, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998), *available in* Westlaw, 1997 WL 384770, at 4-5. The focus of this Comment has been on statewide elections. In the case of local elections the BARs are far easier to reach. *See, e.g.*, ARK. CODE ANN. § 7-7-103(d)(1) (Michie 1993) (ten signatures required to run for municipal office), IDAHO CODE § 34-708(2)(d) (Michie 1995) (five for county office), KY. REV. STAT. ANN. § 118.315(2) (West 1997) (two for city office). In those areas local programmers may be swamped with potential debaters, therefore they should be given more latitude in making exclusions. *See* Chandler v. Georgia Pub. Telecomm. Comm'n, 917 F.2d 486, 494 (11th Cir. 1990) (Clark, J., dissenting) (pointing out that were the state-entity station flooded with candidates, it "would have a neutral and not viewpoint-based rationale for not having all the candidates on the same debate panel at the same time"). Further, reaching the electorate is much more manageable in a local contest.

[123] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1974) (holding that government owned auditorium was devoted to expressive activities).

[124] Eisner, *supra* note 104, at 998.

[125] In classical history, this included any area beyond the civilized confines of Imperial Rome.

[126] ROSENSTONE, *supra* note 103, at 222.

[127] Amicus Brief of Natural Law Party, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998), *available in* Westlaw, 1997 WL 441289, at *3.

[128] "[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." American Party of Texas v. White, 415 U.S. 767, 781 (1974) (holding that state practice of not including third parties on absentee ballot denied equal protection).

dence indicates that the disparate peoples of America want greater electoral choice.[129] By adopting the reasonable, objective, viewpoint-neutral standards proposed herein, the "safety valve" function of third parties and the editorial function of public broadcast programmers can be preserved consistent with the First Amendment, while still broadening the electorate's choices.

SUTTON I. KINTER III[†]

[129] *See supra* notes 107-116 and accompanying text.

† The author would like to thank his grandfather for raising him up in the ways that are right. "Train up a child in the way he should go: and when he is old, he will not depart from it." *Proverbs* 22:6