

FINDING ROOM FOR INDEPENDENT CANDIDATES IN LIGHT OF *Arkansas Educational Television Commission v. Forbes*

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There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.¹

Public access to channels of political discourse is vital to democratic ideals.² The Framers of our Constitution held political speech above all other discourse.³ Thus, political speech deserves the utmost protection under the First Amendment.⁴ When the government attempts to restrict political speech in places traditionally "devoted to assembly and debate," a plethora of Supreme Court

opinions have subjected the prohibitions to the strictest of scrutiny.⁵ Candidate debate lies at the core of this protection because it provides a medium where spontaneous discussion can educate the electorate about its candidates' platform.⁶

Historically, the media has effectively conveyed political thought and stimulated public debate.⁷ Today, Americans rely on electronic media as their primary source of political information.⁸ Televised debates have a substantial impact on

¹ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 (1969) (discussing spectrum scarcity as a problem unique to broadcasting). *Red Lion* scarcity rationale prevents broadcasters from congesting the air waves with their own bias on matters of public importance or endorsing candidates with whom they politically agree. See *Red Lion*, 395 U.S. at 390, 392. Rather, broadcasters must represent the communities' views indiscriminately or their license will be revoked. See *id.* at 389-90. *But cf.*, Christopher S. Lentz, *The Fairness in Broadcasting Doctrine and the Constitution: Forced One-Stop Shopping in the Marketplace of Ideas*, 1996 U. ILL. L. REV. 271 (1996) (questioning the rationale's viability in today's marketplace).

² See *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (emphasizing that "speech concerning public affairs . . . is the essence of self-government"). See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-35 (1971) (discussing the emphasis placed on protecting political speech).

³ The Framers envisioned a government where the free exchange of political ideas would keep it free from faction, or majority tyranny. See THE FEDERALIST NO. 10 (James Madison) (Buccaneer Books, Inc., 1992). Madison valued exchange of political thought because it laid at the core of representative government. See generally CASS R. SUNSTEIN, A REPUBLIC OF REASONS, THE PARTIAL CONSTITUTION (1993) (discussing a "deliberative democracy," an ideal which reflects the Framers' desire to limit self-interested representation and promote majority rule).

⁴ See U.S. CONST. amend. I (providing "Congress shall make no law . . . abridging the freedom of speech . . ."). The Framers adopted the First Amendment to promote political discourse. See *Whitley v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (arguing "[those who won our independence] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . .").

⁵ See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (explaining that the burden is on the State to show a "compelling state interest and that it is narrowly drawn to achieve that end"). Alternatively, the state may place a restriction on the "time, place and manner of expression" on the condition that the restriction is "narrowly tailored to serve a significant government interest," and it "leaves open ample alternative channels of communication." *Id.* See also *United States Postal Serv. Comm'n v. Council of Greenburgh*, 453 U.S. 114, 131-32 (1981) (upholding the a federal statute that prohibited unstamped mail from mailboxes when the restriction did not eliminate communication); *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535-36 (1980) (striking down a restriction on literature that debated controversial issues when the content-based restriction precluded free expression).

⁶ See MARION R. JUST, ET AL., *CROSSTALK: CITIZENS, CANDIDATES AND THE MEDIA IN A PRESIDENTIAL CAMPAIGN 65* (1996) (comparing candidate debate to alternative campaign methods). Just contends that, unlike speeches or advertisements, debates are valuable because their subject matter is not always within the candidates' control. See *id.*

⁷ Although critics have questioned the media's choices in its issue coverage, even its earliest, skeptics recognized the value in freedom of the press. Compare, Jefferson letter to John Tyler (June 28, 1804), THE POLITICAL WRITINGS OF THOMAS JEFFERSON 152-53 (Merrill D. Peterson ed., Thomas Jefferson Memorial Foundation, Inc., 1993) (finding that free press is the most "effectual" . . . "avenue to truth"), with MICHAEL J. ROBINSON ET AL., *OVER THE WIRE AND ON TV 141-3* (1980) (discussing Jefferson's distaste of newspaper as a primary source of political information).

⁸ See HERBERT B. ASHER, *PRESIDENTIAL ELECTIONS AMERICAN POLITICS: VOTERS, CANDIDATES, AND CAMPAIGNS SINCE 1952 240-244* (1992) [hereinafter ASHER, *Presidential Elections*] (discussing "the patterns of media coverage over time"). Pro-

candidate selection.⁹ Critics argue that the media's control over political campaign coverage and the high price of broadcast advertising excludes viable candidates.¹⁰

The Supreme Court has specifically recognized the public's interest in choosing among legally qualified candidates¹¹ and has upheld legislation granting all legally qualified candidates for federal office¹² "reasonable access" to electronic media.¹³ However, candidates do not have a private cause of action to enforce their statutory rights and courts will only address the merits of a candidate's statutory complaint once the candidate has exhausted his or her administrative remedies.¹⁴

At the start of its October 1997 Term, the Supreme Court faced the question whether legally-qualified candidates for federal office enjoy a presumptive right of access to public broadcast-

ing stations that sponsor televised debate.¹⁵ In *Arkansas Educational Television Commission v. Forbes*,¹⁶ a state-owned broadcasting company sponsored a debate between candidates running for federal public office.¹⁷ Historically, candidates have enjoyed a presumptive right of access to government property commonly associated with "assembly and debate," such as a public park or a private property dedicated to public use.¹⁸ Candidates may refute their opponents' positions in these "traditional public forums" unless the government has a compelling reason to deny the speaker's access.¹⁹ Likewise, when the government regulates the media's access to a limited frequency-spectrum, it may not censor broadcasters' viewpoints because ". . . the editorial function itself is an aspect of 'speech.'"²⁰ Public broadcasters, however, are unique, because, as government employees, their

fessor Asher discovered that by 1988, ninety-five percent of the electorate relied on television for some campaign information. See *id.* at 240; see also Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1102 (1996) (citing Jeffery A. Levinson, Note, *An Informed Electorate: Requiring Broadcasters to Provide Free Airtime to Candidates for Public Office*, 72 B.U. L. Rev. 143, 146 n.10 (1992)). A 1992 survey conducted by the Los Angeles Times indicated that 41% of Americans surveyed received all their campaign information from television and 80% indicated they received most of their information from television coverage. See *id.*

⁹ See, e.g., Just, *supra* note 6, at 71. During the 1992 debates between President Bush and Bill Clinton, Clinton's emphasis on domestic economic affairs as opposed to foreign policy contributed to his successful campaign. See *id.* at 68-71.

¹⁰ See Montague Kern, *Campaign '96: Messages for the New Millennium*, 8/1/97 AM. BEHAVIORAL SCIENTIST 1238, 8 (1997) (discussing the "social cost" of campaign advertising and alternative modes of electoral communication for poorly-funded candidates). Kern suggests that the Internet may provide candidates a cost effective alternative to communicate. See *id.* at 9. However, the Internet cannot currently provide a substitute for the valuable discourse exchanged during a live debate. See, e.g., *California and the West; Davis Lungren Seek to Define Differences*, L.A. TIMES, Sept. 24 1998, at A3 (summarizing a live debate between gubernatorial candidates who had the opportunity to ask questions of their opponent).

¹¹ The Court will look to state law to determine whether a candidate is legally qualified for federal office. See *In re Complaint of Continuing Committee for Mayor Bergin v. Station WATR-TV, Memorandum Opinion and Order*, 90 F.C.C.2d 813, para. 3 (1982).

¹² Congress purposely excluded state and local candidates from the provisions of the Communications Act of 1934 § 312(a)(7), as amended, 47 U.S.C. § 312(a)(7) (1994), because the burden on the broadcasting industry would be severe. See *CBS, Inc. v. FCC*, 453 U.S. 367, 378-79 (1981); see also *In re Codification of Commission's Political Programming Policies, Report and Order*, 7 FCC Rcd. 678, paras. 11-12 (1991), modified, 7 FCC Rcd. 4611 (1992).

¹³ See *CBS, Inc. v. FCC*, 453 U.S. 367, 397 (1981) (upholding section 312(a)(7) of the Communications Act of 1934). Chief Justice Burger stated "it is of particular importance that candidates . . . have the opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their position on vital public issues before choosing among them on election day." See *id.* at 396 (citing *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1975)).

¹⁴ See, e.g., *Perot v. FEC*, 97 F.3d 553, 557-58 (D.C. Cir. 1996) (rejecting candidate Ross Perot's civil claim under the Federal Election Campaign Act of 1971 ("FECA") § 309(a)(8)(C), as amended, 2 U.S.C. 437g(a)(8)(C) (1994), because he failed to exhaust his administrative remedies with the FEC, which has primary jurisdiction to adjudicate any claims brought under FECA).

¹⁵ See *Forbes v. Arkansas Educ. Television Comm'n*, 22 F.3d 1423, 1426 (8th Cir. 1994), *enforced*, 93 F.3d 497 (8th Cir. 1996), *rev'd*, 118 S. Ct. 1633 (1998).

¹⁶ See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998).

¹⁷ See *id.* at 1637.

¹⁸ See *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37, 45 (1983) (discussing the public's First Amendment right of access to the "traditional public forum").

¹⁹ See *id.* See, e.g., *United States Postal Serv. Comm'n v. Council of Greenburgh*, 453 U.S. 114, 128, 132 (1981) (reasoning the government may restrict unstamped mail from mailboxes when mailboxes are "[essential] . . . to the 'delivery and receipt of mail'"); *Greer v. Spock*, 424 U.S. 828, 840 (1975) (a military commander may prohibit political speeches and distribution of literature on military grounds when he or she concludes they are a "clear danger to military disloyalty").

²⁰ See *Denver Area Educ. Telecomm. Consortium, Inc., v. FCC*, 518 U.S. 727, 737 (1996) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994)). Commonly, First Amendment challenges, in cases involving the electronic media, question the state's restriction on broadcasters' free expression, rather than the state's protection of broadcasters' editorial discretion. See *id.* (discussing prominent First Amendment broadcasting cases).

decisions are subject to scrutiny under the First Amendment.²¹ Thus, public networks must consider the public's interest in free expression on government property in order to ensure that no person is excluded arbitrarily.²²

Ralph P. Forbes, an independent candidate²³ for Arkansas' Third Congressional District, asserted his First Amendment right to participate in Arkansas Educational Television Network's, hereinafter ("AETN"), debate because the station was a government property dedicated to political speech.²⁴ Forbes brought a private action,²⁵ seeking injunctive and declaratory relief, against the Arkansas Educational Television Commission,²⁶ hereinafter ("AETC"), after AETC refused to allow Forbes to participate.²⁷ The District Court for

the Western District of Arkansas granted a dismissal for failure to state a claim.²⁸ On appeal, the Eighth Circuit reversed and remanded the district court's dismissal of Forbes' First Amendment claim.²⁹ The Eighth Circuit held that the AETN must provide the court with "any principled reason" for excluding Forbes from its debate.³⁰ On remand, the district court held, as a matter of law, that the AETN had sponsored the debate in a nonpublic forum and the jury found that the network had permissibly excluded Forbes for reasons other than his political viewpoint.³¹ Forbes again appealed and the Eighth Circuit reversed.³² The Eighth Circuit held that when the state-owned public television station sponsored a debate, it designated its property a "limited public forum."³³

²¹ A government-controlled entity is a state actor and subject to the First Amendment, applicable to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV. See also *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (recognizing that when the government establishes a corporation and appoints its directors "the corporation is part of the government for purposes of the First Amendment"). Arkansas Educational Television Commission is a public television station established by the state of Arkansas. See ARK. CODE ANN. §§ 6-3-102(a)(1)(b)(1) (Michie Supp. 1997), § 25-16-804(b)(1) (Michie 1996). Nonetheless, government-controlled networks, like commercial networks enjoy the freedom to make programming decisions without undue government restriction. See 47 U.S.C. §§ 398(c), 399 (1994). See, e.g., *In re Codification of Commission's Political Programming Policies, Report and Order*, 7 F.C.C. Rcd 678, para. 9 (1991), modified, 7 F.C.C. Rcd. 4611 (1992) (holding both commercial and non-commercial stations subject to the same "reasonable access" provisions of § 312(a)(7) of the Communications Act of 1934).

²² See *Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1647-8 (Stevens, J., dissenting, joined by Souter and Ginsburg, J.J.) (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969)) (arguing that public broadcasters' decisions must be based on objective criteria because, as state actors, they are subject to the First Amendment). See also C. Thomas Dienes, *On Speech Issues, Court Speaks in Many Tongues*, LEGAL TIMES, JULY 13, 1998 at S34 [hereinafter Dienes, *On Speech Issues*] (discussing Justice Steven's dissent and concluding that public networks must remain viewpoint neutral).

²³ See ARK. CODE ANN. §7-7-103(c)(1) (1993). Forbes obtained the 2,000 signatures required to qualify for the ballot. See Brief for the Petitioner at 3, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998) (No. 96-779).

²⁴ See *Forbes v. Arkansas Educ. Television Comm'n*, 22 F.3d 1423, 1426 (8th Cir. 1994). *But cf.*, *Perot v. FEC*, 97 F.3d 553, 557 (D.C. Cir. 1996) (affirming the district court's dismissal of candidate Ross Perot's First Amendment claim when the debate's sponsor was a private network).

²⁵ Forbes argued that, in the alternative, he had a statutory right to additional airtime on AETN, under the Communications Act of 1934 § 315(a), as amended, 47 U.S.C. § 315(a) (1994). See *Forbes*, 22 F.3d at 1426. Section 315(a) provides that "[i]f 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 . . ." 47 U.S.C. § 315(a).

²⁶ The Commission is a state agency in control of five television stations comprising Arkansas Educational Television Network. See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1637 (1998). Eight staff members are appointed by Arkansas' governor and removed only for "good cause." See *id.*

²⁷ Susan Howarth, AETC's Executive Director denied Forbes' request because AETC felt that Forbes was not a viable candidate and AETC would effectively serve the public interest by limiting the debate to the major party candidates. See Brief for the Petitioner at 3, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998) (No. 96-779).

²⁸ See *Forbes v. Arkansas Educ. Television Comm'n*, 22 F.3d 1423, 1426 (8th Cir.1994). The district court rejected Forbes' First Amendment claim based on *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990). *Id.* In *DeYoung*, the Eighth Circuit declined to extend to political candidates a First Amendment right of access to the electronic media. See *DeYoung*, 898 F.2d at 632. The court dismissed Forbes' claim under Section 315 because Forbes did not exhaust his administrative remedies. See *Forbes*, 22 F.3d at 1428. The Eighth Circuit noted that Forbes did contact the FCC but failed to file a complaint. See *id.* at 1425-26.

²⁹ See *id.* at 1430 (overruling in part the portion of *DeYoung*, 898 F.2d at 632, holding "[a] political candidate does not have a constitutional right of broadcast access to air his views").

³⁰ See *id.* On remand, the AETN contended that Forbes was not "politically viable" and thus, it chose to limit its invitation to candidates that the network felt had a chance to take the seat. See *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 504 (8th Cir. 1996) (discussing the AETN's justification for Forbes' exclusion).

³¹ See *Forbes*, 93 F.3d at 499-501 (8th Cir. 1996). The jury concluded that the network's decision to exclude Forbes was not influenced by political pressure or distaste for Forbes' opinions. See *id.* at 501.

³² See *id.* at 505, *rev'd*, 118 S. Ct. 1633 (8th Cir. 1998).

³³ See *id.* at 504.

The Eighth Circuit reasoned that it opened its network to a specific class of speakers — legally qualified candidates running for the Third District Congressional seat — and for the specific purpose of sponsoring a live debate.³⁴ Thus, Forbes, as legally qualified candidate running for this seat, had a presumptive right of access to a limited public forum under the First Amendment.³⁵

AETC petitioned the Supreme Court for review.³⁶ AETC alleged that the Eighth Circuit erred when it classified the debate as a designated public forum³⁷ because the AETC had reasonably limited its invitation to viable candidates,³⁸ rather than the general public. The network asserted its decision to exclude Forbes from a nonpublic forum was reasonable in light of his lack of public support.³⁹ In the alternative, AETC argued that it had a compelling state interest to serve the public and that Forbes' exclusion was narrowly drawn to achieve that end, given the debate's time constraints.⁴⁰ The Supreme Court granted certiorari to resolve the conflict between the Eighth and Eleventh Circuits concerning the issue of whether forum analysis should apply to a government-sponsored debate.⁴¹

³⁴ See *id.*

³⁵ See *Forbes v. Arkansas Educ. Television Comm'n*, 22 F.3d 1423, 1429 (8th Cir. 1994); 93 F.3d 497, 504-05 (8th Cir. 1996) (finding AETN's reason for Forbes' exclusion—his political viability — neither compelling nor narrowly tailored so as to survive a First Amendment challenge).

³⁶ See *Arkansas Educ. Television Comm'n*, 118 S. Ct 1633, 1638 (1998).

³⁷ See Brief for Petitioner at 18, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct 1633 (1998) (No. 96-779).

³⁸ AETN staff deemed a candidate "viable" when he or she elicited media coverage and financial support. *Id.* at 16-17.

³⁹ See *id.* However, Forbes was a viable candidate in the election for Lieutenant Governor in 1990 when Forbes received 46% of the vote in a three-candidate race. See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct 1633, 1645 (1998) (Stevens, J., dissenting, joined by Souter and Ginsburg, J.J.). Furthermore, Forbes carried the majority in 15 out of 16 counties within the Third Congressional District. See *id.*

⁴⁰ See Brief for Petitioner at 18, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct 1633 (1998) (No. 96-779).

⁴¹ See *Arkansas Educ. Television Comm'n*, 118 S. Ct at 1638. In *Chandler v. Georgia Public Telecommunications Commission*, the Eleventh Circuit denied that forum analysis applied to government sponsored debates. 917 F.2d 486, 488 (11th Cir. 1990). The opinion analogized the debate to a news program where the station maintains control over the program's content. Cf. *Arkansas Educ. Television Comm'n*, 118 S.Ct at 1640 (explicitly rejecting the Eleventh Circuit's reasoning). The majority found that broadcasters exercise little control over the content of the candidates' speech. See *id.* Thus,

The Court held, six-to-three, that legally qualified candidates have no presumptive right of access when state-owned broadcasting companies sponsor political debates.⁴² The majority held that government-sponsored debate embodies a nonpublic forum, for purposes of the First Amendment.⁴³ As a result, AETC could exclude Forbes so long as his exclusion was "viewpoint neutral" and "reasonable in light of the purpose of the property."⁴⁴

Justices Stevens, Souter and Ginsburg, dissenting, questioned the neutrality in AETC's "ad hoc" candidate selection process.⁴⁵ Justice Stevens, writing for the dissent, reasoned that when AETC dedicated its property to political debate between viable candidates, it had, in fact, issued a permit to participating candidates.⁴⁶ The dissent contended that this permit was analogous to a prior restraint on speech.⁴⁷ The dissent argued that when the government places a prior restraint on speech, it must base its selection process on "objective criteria."⁴⁸ Despite AETC's attempt to justify its candidate selection process,⁴⁹ the dissent refused to accept its decision as anything more than arbitrary.⁵⁰

This Note examines the special nature of gov-

debate is subject to forum analysis. See *id.* at 1640-41.

⁴² See *id.* at 1637.

⁴³ See *id.* at 1642.

⁴⁴ See *id.* at 1643. The opinion emphasized that a state may restrict public access to a nonpublic forum when its exclusion of a class of persons is "reasonable" and in accord with the "governmental intend[ed]" purpose of the property. See *id.* at 1642-43. See also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) (holding that limited access to a nonpublic forum is permissible when the exclusion is based on "status" rather than viewpoint). The majority compared the facts in *Perry* to the case at bar and concluded that AETC excluded Forbes' based on his unpopular status rather than his political views. See *id.*

⁴⁵ *Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1645 (Stevens, J., dissenting, joined by Souter and Ginsburg, J.J.) (arguing that AETC had "no secure basis for exercise of governmental power consistent with the First Amendment").

⁴⁶ See *id.* at 1647-48.

⁴⁷ See *id.*

⁴⁸ See *id.* at 1648 (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969)). In *Shuttlesworth*, the Court invalidated a city ordinance permitting city officials to withhold a permit for expressive activity based on their own arbitrary notions of disruptions to the public "welfare, peace and safety." See *Shuttlesworth*, 394 U.S. at 150-51.

⁴⁹ See *Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1649. See also THE ARKANSAS EDUCATIONAL TELEVISION COMMISSION PROGRAMMING POLICY FOR AETN 2 (adopted June 7, 1994) (describing AETC's commitment to serving the public interest).

⁵⁰ See *Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1649.

ernment sponsored campaign debates. First, this Note discusses the Supreme Court's treatment of political speech in light of the First Amendment and distinguishes public broadcasters' First Amendment rights from broadcasters in general. Second, it compares candidates' First Amendment interests in accessing the electronic media to the electorate's interest in making educated political choices. Then, this Note analyzes the majority and dissenting opinions in *Arkansas Educational Television Network v. Forbes*. Finally, this Note concludes that in order to preserve political debate, the Court must define some neutral guideline on which public broadcasters will base their decisions. Absent objective criteria, the electorate's interest will suffer because public broadcasters may hesitate to schedule debates, or alternatively, exclude viable candidates from public scrutiny.

I. POLITICAL SPEECH: MOVING FROM THE STREETS TO THE AIRWAVES

A. The Public Forum: Government's Control Over America's First Amendment Values

The Supreme Court introduced the Public Forum Doctrine in *Hague v. Committee for Industrial Organization*.⁵¹ Prior to the *Hague* decision, the government had exercised control over the free-

dom of expression on all public property.⁵² In *Hague*, the Court re-embraced the value of assembly and debate.⁵³ The *Hague* opinion prevented city officials from impeding a labor organization's efforts to express their views on the National Labor Relations Act.⁵⁴ The Court held that the organization enjoyed a First Amendment right to distribute pamphlets on the public streets.⁵⁵ However, the *Hague* Court determined that the public's First Amendment freedoms were not absolute.⁵⁶ The government therefore could regulate expressive activity on government property.⁵⁷

In *Perry Education Association v. Perry Local Educators' Association*,⁵⁸ the Supreme Court explained the concept of the "public forum."⁵⁹ The *Perry* Court divided government property into three categories.⁶⁰ The first category was the traditional public forum recognized in *Hague*,⁶¹ where the government's interest in regulating speech activities must be compelling and its restriction narrowly drawn.⁶² The second category is a designated public forum that the government opened specifically to speech activity.⁶³ As long as the forum remains open, the state is bound by the same standard as if the property was a traditional public forum.⁶⁴ The third category is the nonpublic forum where the property at issue is not originally intended for speech activity.⁶⁵ Here, the state may restrict speech so long as the restriction is

The dissent criticized the majority's deference to AETC staff who are essentially "government officials" for purposes of the First Amendment. The dissent argued that the law is well settled—when government officials attach a prior restraint to speech activity, this restraint must be set according to objective criteria. *See id.* at 1648 (citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)).

⁵¹ 307 U.S. 496 (1939).

⁵² *See* C. Thomas Dienes, *The Trashing of the Public Forum: Problems In First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 111 (1986) [hereinafter Dienes, *Trashing the Forum Doctrine*] (discussing the evolution of the public forum). Professor Dienes noted the Court's rejection of free expression on all government property. *See id.* at 114-115.

⁵³ *See Hague*, 307 U.S. at 515. *Cf.* *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis J., concurring) (analogizing the Framers' intent in finding that freedom of speech is absolute). Brandeis contended that the Framers "believed that the final end of the state was to make men free to develop their faculties . . . [W]ithout free speech and assembly discussion would be futile." *See id.*

⁵⁴ *See Hague*, 307 U.S. at 512-13.

⁵⁵ *Cf.* cases cited *supra* note 5, with *Hague*, 307 U.S. at 515 (capturing the Framers' spirit of assembly, stating that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust . . . for purposes of assembly, communicating thoughts between citizens and discussing

public questions").

⁵⁶ *See generally*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 11 (1971) (discussing the First Amendment's boundaries).

⁵⁷ *See e.g.*, *United States v. Kokinda*, 493 U.S. 807 (1989) (upholding a federal law that prohibits solicitation on post office grounds); *Adderley v. Florida*, 385 U.S. 39 (1966) (upholding University Students' trespass conviction after they protesting on jailhouse grounds).

⁵⁸ 460 U.S. 37 (1983).

⁵⁹ *See id.* at 45-47.

⁶⁰ *See id.*

⁶¹ *See id.* at 45.

⁶² *See id.* (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). Since *Carey*, the Court hesitated to extend the traditional public forum beyond streets and parks. *See e.g.*, *International Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680-81 (1992) (rejecting Petitioner's argument that an airport terminal is analogous to a traditional public forum).

⁶³ *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). When the government chooses affirmatively to open its property to speech activity, the property becomes a designated public forum. *See id.*

⁶⁴ *See id.* at 46.

⁶⁵ *See id.*

“reasonable” in light of “the use to which it is lawfully dedicated.”⁶⁶ A restriction is reasonable when it makes no attempt to suppress the speaker’s views.⁶⁷

In *Perry*, a union, Perry Local Educators’ Association (“PLEA”), and two of its members brought an action challenging a provision of a collective bargaining agreement, giving one union, Perry Education Association (“PEA”), exclusive access to the schools’ internal mail system.⁶⁸ PLEA argued the agreement curtailed communication between PLEA and its members and thus violated their rights under the First Amendment.⁶⁹ The Court held that the internal mail system at issue constituted a nonpublic forum,⁷⁰ because the school board’s selective access provision reasonably limited entry to PEA who “participated in the forum’s official business.”⁷¹ The *Perry* Court emphasized that the government does not designate a public forum when it provides selective access to individual speakers.⁷²

The Supreme Court remained reluctant in *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*,⁷³ to invalidate a government regulation on speech activity in a nonpublic forum when the Court found that the restriction did not suppress the viewpoint of the speaker.⁷⁴ In *Cornelius*, legal

defense and political advocacy groups challenged an Executive Order⁷⁵ that excluded them from a charity drive directed at federal employees and military personnel.⁷⁶ The Court upheld the Executive Order, which explicitly prohibited the groups’ participation in the charity.⁷⁷ The majority believed that the government intended to create a nonpublic forum when it targeted the charity to limit solicitation in the workplace,⁷⁸ drawing from its precedent which upheld regulations on speech activity that were consistent the forum’s purpose.⁷⁹ Nonetheless, the Court cautioned that selective access to a nonpublic forum is constitutionally permissible only when it is rationally related to a valid government interest and thus, viewpoint neutral.⁸⁰ Although the *Cornelius* Court articulated the distinction between “general access” to a designated public forum and “selective access” to a nonpublic forum,⁸¹ it left the division between “viewpoint based” and “viewpoint neutral” for the challenger to define.⁸²

In *Rosenberger v. Rector and Visitors of the University of Virginia*,⁸³ the Court in a plurality decision, refused to tolerate viewpoint discrimination on government property designated as a nonpublic forum.⁸⁴ In *Rosenberger*, a state university established guidelines governing its distribution of

⁶⁶ See *id.* (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass’n*, 453 U.S. 114, 129-30 (1981)).

⁶⁷ See *id.* (reasoning that that the First Amendment does not “guarantee access” to all government chattels).

⁶⁸ See *id.* at 40.

⁶⁹ See *Perry*, 460 U.S. at 40. Cf. *id.* at 71 (Brennan, J. joined by Marshall, Powell and Stevens, J.J., dissenting) (asserting that PLEA’s exclusion from the internal mail system was viewpoint based and violated the First Amendment).

⁷⁰ The government may restrict access to its property not designated for speech activity as long as the restriction is “reasonable in light of the purpose that the forum serves.” See *id.* at 47. Selective access to a nonpublic forum is reasonable when it is consistent with the states’ “legitimate interest in ‘preserving the property . . . for the use to which it is lawfully dedicated.’” See *id.* (citing *United States Postal Serv. v. Greenburgh Civic Ass’n*, 453 U.S. 114, 129-30 (1981)).

⁷¹ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 53 (1983).

⁷² See *id.* at 49 n.9 (citing *Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1976)). Justice Blackmun feared that all “public facilities would immediately become Hyde Parks open to every would-be pamphleteer and politician”). See *id.* Notably, “pamphleteers and politicians” still gather at “Speakers Corner” on Sunday afternoons in Hyde Park to stir up debate from the passers-by.

⁷³ 473 U.S. 788 (1985).

⁷⁴ The challengers carried a heavy burden because the Court’s “reasonableness standard” is fairly easy to meet. See Dienes, *Trashing the Forum Doctrine*, *supra* note 52, at 117-18

(discussing the various cases where the Court upheld the regulation of a nonpublic forum as reasonable and viewpoint neutral).

⁷⁵ See Exec. Order No. 12,353, as amended by No. 12,404, 5 C.F.R. 950.101 (1997) (limiting CFC participation to “charitable fundraising programs”).

⁷⁶ See *Cornelius*, 473 U.S. at 790, 796.

⁷⁷ See *id.* at 812.

⁷⁸ See *id.* at 804-06.

⁷⁹ See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) (limiting outside correspondence circulating through a School Board’s internal mail system); *Lehman v. Shaker Heights*, 418 U.S. 298 (1976) (restricting political advertising space on buses).

⁸⁰ See *Cornelius*, 473 U.S. at 811. See also Dienes, *Trashing the Forum Doctrine*, *supra* note 52, at 117. Professor Dienes suggests that the *Cornelius* Court minimized the governments’ burden in justifying its exclusion of advocacy groups from a nonpublic forum because other controversial groups, such as Planned Parenthood and the Right to Life Educational Trust Fund participated in the charity drive. See *id.*

⁸¹ See *Cornelius v. NAACP Legal Defense Fund, Inc.*, 473 U.S. 788, 803, 805 (1985); *Arkansas Educ. Television Comm’n v. Forbes*, 118 S. Ct. 1633, 1642 (1998) (discussing the *Cornelius* Court’s forum analysis).

⁸² See Dienes, *Trashing the Forum Doctrine*, *supra* note 52, at 118 (analogizing to the difficulty a challenger has proving government intent in the context of Equal Protection cases).

⁸³ 515 U.S. 819 (1995).

⁸⁴ See *id.* at 832, 837.

funds toward student activities and excluded independent student groups who participated in religious activity.⁸⁵ In a five-to-four decision, the Court invalidated the guidelines on the basis that the University discriminated against the student groups solely because of their viewpoint.⁸⁶ The Court emphasized that all speech contributes to the marketplace of ideas.⁸⁷ *Rosenberger* confirmed that the First Amendment prohibits all government efforts to suppress the viewpoint of the speaker, regardless of whether the forum is limited to selective speakers.⁸⁸

B. The Public Broadcaster's Role as Public Trustee

Congress adopted the Communications Act of 1934⁸⁹ in order to preserve broadcasters' First Amendment right to "the widest journalistic freedom consistent with their public obligation."⁹⁰

After the broadcast industry became an influential actor in the field of communications,⁹¹ the Supreme Court promptly distinguished broadcasters' First Amendment rights from the media in general.⁹² In *Red Lion Broadcasting Co. v. FCC*,⁹³ Justice White explained that broadcasters exchange a portion of their First Amendment rights in return for control of a scarce number of media outlets open to the public.⁹⁴ Essentially, *Red Lion* established the relationship between the government, broadcasters and the public.⁹⁵ In the Court's view, broadcasters hold the public interest in trust when they operate under a license issued by the government.⁹⁶ As public trustees, broadcasters are expected to exchange some of their First Amendment rights for the good of society.⁹⁷

Today, broadcasters' judgments are subject to review only when the station fails to fairly serve the public interest.⁹⁸ However, the Court continues to rely on the scarcity rationale to prevent

⁸⁵ See *id.* at 825. The guidelines defined religious activity as "activity that primarily promotes or manifests a particular benefit in or about a deity or an ultimate reality." See *id.*

⁸⁶ See *id.* at 831, 846 (rejecting the argument that the guidelines were viewpoint neutral because they excluded all religious speech).

⁸⁷ See *id.* at 831-32.

⁸⁸ See *id.* at 829, 837 (holding that the viewpoint-based guidelines deprived private groups of their First Amendment right to free expression).

⁸⁹ 47 U.S.C. §§ 307, 312, 315, 399 (1994).

⁹⁰ See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973). In *Columbia*, the Court stated it will defer to the FCC's judgment unless there are "compelling indications of error." See *id.*

⁹¹ By 1960, the broadcast media had become the public's primary source of information. See *e.g.*, Asher, *supra* note 8, at 240. Asher's 1988 survey indicated that 87% of the public relied on television for campaign information, while 42% relied on the radio. See *id.*

⁹² See Meridith C. Hightower, *Beyond Lights and Wires in a Box: Ensuring the existence of Public Television*, 3 J.L. & Pol'y 133, 175-76 n.51 (1994) (comparing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating a Florida statute that imposed an affirmative obligation on newspapers to provide candidates with free reply space when the papers condemned their actions), with *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 385 (1969) (upholding the FCC's efforts to impose a "fairness doctrine" on the electronic media that would essentially achieve the same end). Hightower suggests that these cases are "mirror images" (quoting Fred W. Friendly, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT XV* 193 (1976)). But see, *Columbia Broad. Sys. Inc.*, 412 U.S. at 110 (discussing the broad journalistic freedom enjoyed in the broadcast industry). See also Jeffery S. Hops, *Red Lion in Winter: First Amendment and Equal Protection Concerns in the Allocation of Direct Broadcast Satellite Public Interest Channels*, 6 *COMMLAW CONCEPTS* 185, 187 (1998) (discussing the tension between the Court's holdings in *Tornillo* and *Red Lion*).

⁹³ 395 U.S. 367 (1969).

⁹⁴ See *id.* at 388-89. *Red Lion* unanimously upheld the FCC's requirement that broadcaster's employ a "fairness doctrine" which allowed the public a reply time when stations aired personal attacks or political editorials. *Id.* at 400-01. Although the Fairness Doctrine still binds the industry to disseminating a balance of information, its validity in today's marketplace has been questioned. See Lentz *supra* note 1, at 283-85 (discussing the Commission's rejection of scarcity rationale); see also *In re Inquiry into Section 73.1920 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, Report, 102 F.C.C.2d 145, paras. 104-24 (1985) (urging that spectrum scarcity is no longer a legitimate concern because new sources of communication disperse information). Congress failed to generate enough support in all three of its attempts to pass the Fairness in Broadcasting Act. See Lentz, *supra* note 1, at 285-86.

⁹⁵ The government conditions Broadcasters' licenses on the premise that the "public interest, convenience, and necessity would be served." See *Red Lion*, 395 U.S. at 394; 47 U.S.C. § 307(a) (1994).

⁹⁶ See *Red Lion*, 395 U.S. at 390 (stating "the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium"). The FCC has the authority to issue licenses for up to eight years. Telecommunications Act of 1996, Pub. L. No. 104-104, § 203, 110 Stat. 112 (codified as amended at 47 U.S.C. 307(c)(1)); see also *FCC v. Sander Bros. Radio Station*, 309 U.S. 470, 475 (1940) (recognizing that licenses are issued for a limited time and subject to review by the Commission).

⁹⁷ See Lentz, *supra* note 1, at 292; see also Hightower, *supra* note 92, at 179-80 (discussing *Red Lion* and the Court's treatment of the fairness doctrine).

⁹⁸ Despite *Red Lion's* emphasis on the public's right to receive balanced programming, the Court rejected the notion that the general public has an unlimited right of access to the airwaves. See *Red Lion*, 395 U.S. at 391. Rather, the public has a First Amendment right to a "balanced presentation of information on issues of public importance." See *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S.

broadcasters' own bias from congesting the air waves.⁹⁹

In *FCC v. League of Women Voters*,¹⁰⁰ the Court addressed whether public broadcasters should be treated differently with respect to their First Amendment rights. In *League of Women Voters*, the Court held that Section 399 of the Public Broadcasting Act¹⁰¹ impermissibly restricted public stations' freedom of speech.¹⁰² The Act prohibited noncommercial stations that received funds from the Corporation for Public Broadcasting ("CPB")¹⁰³ from engaging in "editorializing" or "support[ing] or oppos[ing]" political candidates.¹⁰⁴ Some station operators alleged that the Act violated their First Amendment rights.¹⁰⁵ The Court agreed that Section 399 was directed at editorial speech, which "lies at the heart of First Amendment protection."¹⁰⁶ However, the Court contended that Congress had the authority under the Commerce Clause¹⁰⁷ to regulate scarce resources.¹⁰⁸ The majority reasoned that spectrum scarcity¹⁰⁹ supported the government's "impor-

tant and substantial interest" to ensure that broadcasters remain responsive to the public by providing it with a "balanced presentation of views."¹¹⁰ The Court concluded that the issue was whether Congress "narrowly tailored Section 399 to further a substantial government interest."¹¹¹ The opinion stated that Section 399 did not meet this standard.¹¹² The Court was reluctant to sacrifice the rights of noncommercial broadcasters when the scope of Section 399 centered on the content of editorial speech.¹¹³ The majority reasoned that editorial speech was "precisely that form of speech which the Framers of the Bill of Rights were most anxious to protect—speech that is indispensable to the discovery and spread of political truth."¹¹⁴ However the Court's holding did not deny Congress or the FCC their power to regulate content-based speech.¹¹⁵ The Court declined to subject the government to the "compelling interest" standard that encompasses strict scrutiny.¹¹⁶ Although *League of Women Voters* attempted to resolve the tension between broadcast-

94, 112 (1973). The FCC has the authority, under the Communications Act of 1934, to determine whether the licensee made a "good faith" effort to keep the public "fully and fairly" informed. See *Columbia*, 412 U.S. at 127. However, the Court refused to extend FCC's authority to encompass supervision that would unnecessarily intrude on the daily operations of the industry. See *id.* at 126-27.

⁹⁹ See e.g., *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (citing *Red Lion*, 395 U.S. 367, 389 (1969)).

¹⁰⁰ 468 U.S. 364 (1984).

¹⁰¹ See 47 U.S.C. § 399 (1994). Section 399 provided that "[n]o noncommercial educational broadcasting station which receives a grant from the Corporation for Public Broadcasting under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for public office." See *League of Women Voters*, 468 U.S. at 370-71 & n. 7 (discussing the legislative history of Section 399).

¹⁰² See *League of Women Voters*, 468 U.S. at 398.

¹⁰³ 47 U.S.C. § 396-399B (1994). The primary purpose for the corporation was to appropriate funds for alternative programming which would promote the diversity inhibited in commercial broadcasting because of its dependence on outside support. See Hightower, *supra* note 92, at 138-49 (discussing the Carnegie Commission's vision for public television), See also Section 399(g)(1)(A) providing that the Corporation's grants will be distributed "with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature." 47 U.S.C. § 396(g)(1)(A). Section 396(a)(1)-(10) outlines the government interest in establishing the corporation. 47 U.S.C. § 396 (a)(1)-(10) (1994). See also *League of Women Voters*, 468 U.S. at 367-70 (discussing the legislative history); Hightower, *supra* note 92, at 146-49 (discussing the Corporation's purpose).

¹⁰⁴ See *League of Women Voters*, 468 U.S. at 367. The League of Women Voters did not challenge the language prohibiting noncommercial stations from "support[ing] or

oppos[ing] candidates for public broadcasting and the Court did not address this issue on appeal. See *id.* at 371 n. 9.

¹⁰⁵ See *id.* at 370-71.

¹⁰⁶ See *League of Women Voters*, 468 U.S. at 381.

¹⁰⁷ See U.S. CONST. art. I, § 8, cl. 3.

¹⁰⁸ See *League of Women Voters*, 468 U.S. at 376.

¹⁰⁹ The majority recognized that the theory of spectrum scarcity had been subject to criticism, however the Court declined to rule on the theories' feasibility unless Congress or FCC initiated some revision of current regulation, in light of new technological advances. See *id.* at 376 n. 11.

¹¹⁰ See *id.* at 377.

¹¹¹ See *id.* at 380 (explicitly rejecting the district court's application of the compelling interest standard to evaluate § 399).

¹¹² See *id.* at 381. The majority refused to create a 'substantial government interest' in a regulation "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest." See *id.* at 383-84. See generally, 1988 Amendment, Pub. L. 100-626 (codified as amended at 47 U.S.C. § 399) (substituting "Support of" for "Editorializing and Support" and eliminated the provisions prohibiting noncommercial broadcasters from editorializing).

¹¹³ See *League of Women Voters*, 468 U.S. at 382 (reasoning that editorializing is "a means of satisfying the public's interest in receiving a wide variety of ideas and views through the medium of broadcasting has long been recognized by the FCC"). *Id.* (discussing Editorializing by Broadcast Licensees, 13 F.C.C.2d 1246 (1949)). The Court noted that the Commission's opinion applied equally to both noncommercial and commercial stations until Section 399 specifically prohibited noncommercial stations from editorializing. *Id.* at n. 14.

¹¹⁴ See *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984).

¹¹⁵ See *id.* at 402.

¹¹⁶ See *id.* at 381-82 (1984) (finding editorializing indis-

ers' interest in freedom of expression and the government's interest in remaining viewpoint neutral,¹¹⁷ it failed to emphasize the government's involvement in noncommercial broadcaster's programming decisions.¹¹⁸

C. *CBS, Inc. v. FCC*: A Candidate's Right to Access

Candidates for public office do not have an unlimited right of access to electronic media, rather candidates have a "reasonable right."¹¹⁹ In *CBS, Inc. v. FCC*,¹²⁰ private networks petitioned the Court for review of a FCC order¹²¹ holding that the networks violated section 312(a)(7).¹²² The majority agreed that the networks had, in fact, violated the provision.¹²³ The Court declined to read the provision as a "general duty" to cover some political programming when Congress clearly required broadcasters to provide individual "legally qualified" federal candidates "reason-

able access" in order to promote "his candidacy."¹²⁴ The opinion confirmed that Section 312(a)(7) exceeded programming obligations imposed under Section 315.¹²⁵ The Court concluded that Section 312(a)(7) did not violate broadcasters' First Amendment rights by hampering their discretion, rather Section 312(a)(7) promoted First Amendment values by fostering political speech.¹²⁶ Thus, in *CBS, Inc.*, the Court remained careful not to undermine broadcasters' editorial judgments.¹²⁷

D. FCC's Clarification of Broadcasters' Obligations Under Section 312(a)(7)

In 1991, the FCC sought to clarify existing policies regulating political programming.¹²⁸ The Notice of Proposed Rulemaking¹²⁹ sought to formalize existing guidelines defining "reasonable access" under Section 312(a)(7).¹³⁰ The Commis-

pensable to political truth); *id.* at 381 (justifying a "substantial interest" standard based on the government's role in monitoring the electronic media that receives CPB funds). The Court concluded that the public interest prevails in either case. *Compare League of Women Voters*, 468 U.S. at 376-7 (finding that government can permissibly regulate the industry), *with League of Women Voters*, 468 U.S. at 382 (reasoning that editorializing serves the public interest).

¹¹⁷ See *id.* at 395-96.

¹¹⁸ Cf. *id.* at 415-16 (1998) (Stevens, J. dissenting) (reasoning that Section 399 prevented the government from becoming entangled in political "propaganda"); *id.* at 408 (Rehnquist, J. dissenting, joined by Burger, C.J. and White, J.) (contending that Congress made a rational decision when it limited Corporation for Public Broadcasting funds to educational rather than editorial or political programming).

¹¹⁹ See discussion *supra* note 13 and accompanying text.

¹²⁰ 453 U.S. 367 (1981).

¹²¹ See *In re Complaint of Carter-Mondale Presidential Comm., Inc. against ABC, CBS and NBC Television Networks*, 74 F.C.C.2d 631 (1979).

¹²² See *CBS, Inc.*, 453 U.S. at 374. See generally 47 U.S.C. § 312(a)(7); see also discussion on section 312(a)(7) *supra* notes 11-13 and accompanying text. The Carter-Mondale Presidential Committee filed a complaint with the FCC after ABC, CBS, and NBC denied the committee's request to purchase air time. See *CBS, Inc.*, 453 U.S. at 374. The FCC rejected the networks' excuses, calling them "deficient" under its "standards of reasonableness" and ordered the networks to comply with 312(a)(7). See *id.* at 374 (citing *In re Complaint of Carter-Mondale Presidential Comm., Inc. against ABC, CBS and NBC Television Networks*, 74 F.C.C.2d 631 paras. 45, 46 (1979)).

¹²³ See *CBS, Inc.*, 453 U.S. at 395, 397.

¹²⁴ See *id.* at 377-78. The Court reasoned that the severity of the sanctioned imposed, license revocation, supported an interpretation of the statute that enlarges broadcasters' obligations to air political programming. See *id.* at 378.

¹²⁵ See *CBS, Inc.*, 453 U.S. at 377. The Court noted that before the Federal Election Campaign Act of 1971, the FCC only required that broadcasters allocate some broadcast time to political speech, nor did candidates have any right of access unless his or her opponent aired his or her views. *Id.* at 387. See generally, 47 U.S.C. § 315 (providing "equal opportunity" to all legally qualified candidates running for the same public office). But see, *CBS, Inc.*, 453 U.S. at 403-04 (White J., dissenting joined by Rehnquist J., and Stevens J.) (finding little support in the provision's legislative history for the majority's conclusion).

¹²⁶ See *id.* at 401 (persuading that "political broadcasting is one of the fourteen elements necessary to meet the public interest, needs and desires of the community") (citing *In re Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, Report and Order*, 68 F.C.C.2d 1079, paras. 33-38 (1978)).

¹²⁷ See *id.* at 395 (permitting "journalistic freedom consistent with its public duties.") (citing *Columbia Broad. Sys., Inc., v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973)). The Court will "afford great weight to the decisions of Congress and the experience of the [FCC]" when it examines First Amendment claims. See *Columbia Broad. Sys., Inc.*, 412 U.S. at 102.

¹²⁸ See *In re Codification of the Commission's Political Programming Policies, Notice of Proposed Rulemaking*, 6 FCC Rcd. 5707 (1991) [hereinafter *Notice of Proposed Rulemaking*]. The Preamble stated that a 1990 audit of 13 television and radio stations indicated that candidates paid considerable higher rates than commercial advertisers. See *id.* at para. 6.

¹²⁹ See *Notice of Proposed Rulemaking, supra* note 128.

¹³⁰ See *In re Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678, para. 7 (1991) [hereinafter *Political Programming Policies*]. Four comments addressed the Commission's proposal. Three comments suggested "quantifiable access" or specific number of hours per week and one suggested a formula that would account for the markets' stations versus populations. See *id.* (citing Com-

sion declined to adopt formalized rules.¹³¹ Rather, it continued to rely on "reasonable, good faith judgments of licensees to provide reasonable access to federal candidates."¹³² The Commission stated it would continue to evaluate claims under Section 312(a)(7) on a case-by-case basis.¹³³ Thus, the FCC concluded that the guidelines outlined in the Commission's 1978 Report and Order on Reasonable Access¹³⁴ remained applicable.¹³⁵ The FCC reasoned that these guidelines were reaffirmed pursuant to the Court's opinion in *CBS, Inc.*¹³⁶ As a result, both commercial and noncommercial educational stations must allot programming time to legally qualified candidates unless "unusual circumstances" make it reasonably difficult.¹³⁷

II. ARKANSAS EDUCATIONAL TELEVISION COMMISSION V. FORBES: THE SEARCH FOR POLITICAL TRUTH IN THE FORUM OF PUBLIC BROADCAST

A. Public Broadcasters and Their First Amendment Interests

In *Arkansas Educational Television Commission v. Forbes*,¹³⁸ the Supreme Court denied independent candidates a presumptive right of access under

the First Amendment to government operated television networks.¹³⁹ In 1992, a public broadcasting network, Arkansas Educational Television Network,¹⁴⁰ sponsored a debate between the major party candidates running for Arkansas's Third Congressional District.¹⁴¹ The Arkansas Educational Television Commission invited major party candidates to participate but excluded Forbes, an independent candidate, running for the same office.¹⁴² Forbes protested, arguing that he had a presumptive right of access to a state owned and operated facility under the First Amendment.¹⁴³ The Supreme Court granted certiorari to determine whether access to the debate was indeed, a First Amendment problem.¹⁴⁴

Forbes contended that the Eighth Circuit correctly held that his exclusion was contrary to the First Amendment because AETC intentionally opened its station to qualified candidates, inviting the exchange of political discourse, when it planned and sponsored a congressional debate.¹⁴⁵ Forbes asserted that AETC failed to offer a compelling reason in justifying his exclusion from this designated public forum.¹⁴⁶ Forbes reasoned that he was a legally qualified candidate and thus, AETC's subjective determination that he was "non-newsworthy" was not narrowly drawn to

ments of Greater Media, Inc., to the *Notice of Proposed Rulemaking* *supra* note 128, at 3 (1991); Comments of Outlet Broadcasting at 1 (1991)).

¹³¹ See Political Programming Policies, *supra* note 130, at para. 8.

¹³² See *id.* (rejecting comments that suggested it apply complex formulas).

¹³³ See *id.* The Commission reviews both the candidate's request and the station's response. *Id.*

¹³⁴ See Political Programming Policies, *supra* note 130, at para. 8.

¹³⁵ See *id.* at para. 9. See generally *In re Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, Report and Order*, 68 F.C.C.2d 1079 (1978) [hereinafter *Policy in Enforcing Section 312(a)(7)*].

¹³⁶ See *CBS, Inc. v. FCC*, 453 U.S. 367, 391-94 (1981) (applying the FCC's guidelines on enforcing Section 312(a)(7) to evaluate a statutory complaint brought pursuant to the provision). See *e.g.*, *Policy in Enforcing Section 312(a)(7)*, *supra* note 135, para. 55 (outlining objective guidelines, governing both commercial and noncommercial broadcasters, in their allocation of airtime to political candidates for federal office).

¹³⁷ See Political Programming Policies, *supra* note 130, para. 9.

¹³⁸ See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998).

¹³⁹ See *id.* at 1644.

¹⁴⁰ The Arkansas Educational Television Commission controls the programming broadcast on the Arkansas Educational Television Network. The Commission and its staff are state employees. ARK. CODE ANN. §§ 6-3-102(a)(1)-(b)(1) (Michie 1996); see also discussion *supra* note 21.

¹⁴¹ See *Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1637.

¹⁴² See *id.* at 1637-38.

¹⁴³ Forbes asserted that the spirit of political discourse is shielded by the First Amendment. See Brief for Respondent at 12, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998) (No. 96-779) (citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). Forbes argued that the letter of law promotes uninhibited political broadcast, "in order to assure [the] unfettered interchange of ideas." See *id.*

¹⁴⁴ See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1639 (1998). See also discussion *supra* note 39.

¹⁴⁵ See Brief for Respondent at 15, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998) (No. 96-779). Forbes contended that AETC intended to open its station to public debate, thus creating a public forum. See *id.*

¹⁴⁶ See *id.* at 23. Forbes refuted AETN's position that the station would serve the public interest by limiting the debate to viable candidates. See *id.* at 28-29. Cf. Brief for Petitioner at 30 (citing *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 121 (1973)) (arguing AETC's editorial judgment would be undermined if the public enjoyed unlimited access to its network).

meet the compelling interest standard.¹⁴⁷ Furthermore, Forbes contended that AETC's subjective determination was viewpoint based.¹⁴⁸ Forbes noted that the Court has consistently held that viewpoint discrimination runs contrary to the First Amendment.¹⁴⁹

AETC denied that Forbes exclusion was viewpoint based, rather, AETC asserted that it made an educated decision to dedicate its station to political debate between "newsworthy candidates."¹⁵⁰ AETC argued to the Court that a journalist's editorial judgment enjoys First Amendment protection.¹⁵¹ Thus, AETC concluded that its decision to exclude Forbes was reasonable in light its purpose, to educate the public about the viable contenders in the upcoming election.¹⁵²

Further, AETC stated that Forbes' First Amendment claim to access was unavailing because AETC designated its debate a nonpublic forum, where only invited candidates could participate.¹⁵³ The network argued that it had a compelling interest in serving the public and its staff concluded that only "newsworthy" candidates furthered its objective.¹⁵⁴ AETC found that Forbes was non-newsworthy and it reasonably denied Forbes' request for access.¹⁵⁵

B. Public Broadcast of Political Speech is a Nonpublic Forum

The Supreme Court determined that AETC could exclude Forbes provided his exclusion was "viewpoint neutral" and "reasonable in light of the purpose of the property."¹⁵⁶ The majority recognized the First Amendment values inherent in political discourse and thus, subjected public broadcasters' "journalistic discretion" to review under the Court's Public Forum Doctrine.¹⁵⁷ Forum analysis is normally precluded under traditional review of programming decisions.¹⁵⁸ However, Justice Kennedy, writing for the majority, rationalized that political debates are distinguished from other types of programming for two reasons.¹⁵⁹ First, historically, political debate was a forum where candidates expressed themselves without the media's outside interference.¹⁶⁰ Second, debates have been an integral part of the electoral process.¹⁶¹ Nonetheless, Justice Kennedy concluded that public broadcast dedicated to political speech was a nonpublic forum when the "microphone" was not "open" to the general public.¹⁶² The majority found that the record supported AETC's contention that its decision to

¹⁴⁷ See Brief for Respondent at 28, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998) (No. 96-779). Further, Forbes noted AETC's 'ad hoc' justification for his exclusion—AETC reserved its forum for 'newsworthy candidates'—differed from AETC's justification on the record. See *id.* at 18 n.7.

¹⁴⁸ See *id.* at 28-29.

¹⁴⁹ See *id.* at 29 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)) (stating that viewpoint discrimination is prohibited on all government property).

¹⁵⁰ See Brief for Petitioner at 31, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998) (No. 96-779). These newsworthy candidates happened to be major party candidates who AETC believed held the most public support. See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1637, 1643 (1998). Forbes asserted that the record supports his contention that AETC engaged in viewpoint discrimination because AETC has not demanded that major party candidates "prove their viability" even where major party candidates have less financial support than their independent running mates. See Brief for Petitioner at 36, *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998) (No. 96-779) (citing Joint Appendix at 133-34, 136-38, 175).

¹⁵¹ See Brief for Petitioner at 30 (citing *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 121 (1973)).

¹⁵² AETC asserted that their only object was to serve the public. See *id.* The record provides that AETC's Executive Director Susan Howarth testified that "the debates were designed to benefit the viewers of AETN in the Third Congressional District, that we were putting the debate on for

their benefit." Brief for Petitioner at 32.

¹⁵³ See *id.* at 32-33, 36.

¹⁵⁴ AETC's staff considered the following in their consideration of Forbes' request: (1) the public's lack of interest in Forbes' campaign; (2) Forbes' lack of media coverage; (3) lack of organized campaign support staff; (4) Forbes' weak showing in other campaigns; (5) Forbes' lack of financial support and; (6) lack of public engagements. See *id.* at 32-33.

¹⁵⁵ See *id.* at 33-34.

¹⁵⁶ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1643 (1998) (citing *Cornelius v. NAACP Legal Defense and Educ. Fund Inc.*, 473 U.S. 788, 800 (1985)).

¹⁵⁷ See *id.*

¹⁵⁸ See *supra* note 21 (distinguishing public broadcasters from broadcasters generally). See generally Hightower, *supra* note 92, at 175-76 (discussing the Court's treatment of public broadcasting).

¹⁵⁹ See *Arkansas Educ. Television Comm'n*, 118 S.Ct at 1640.

¹⁶⁰ See *id.*; see also *id.* at 1647 (reasoning that debates are "by design a forum for political speech by the candidates").

¹⁶¹ See *id.* at 1640 (citing *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981)). In *CBS*, Justice Burger found that section 312(a)(7) contributes to the First Amendment interests of candidates, voters and broadcasters because it affords candidates the opportunity to inform the public about their platform and it affords the electorate an opportunity to reevaluate their choices. *Id.* at 396 (citing *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976)).

¹⁶² *Arkansas Educ. Television Comm'n*, 118 S.Ct at 1642 (reasoning AETC created a nonpublic forum when it limited its debate to only viable candidates).

limit the debate to viable candidates was both reasonable and viewpoint neutral.¹⁶³

C. Justice Stevens: The Prior Restraint on Candidates' Free Speech

Justice Stevens, writing for the dissent, focused his inquiry on the public nature of the debate by comparing the debate to a prior restraint on free expression.¹⁶⁴ Justice Stevens compared the government-sponsored debate to a parade where a government official issues a public license for the use of the city streets.¹⁶⁵ Justice Stevens reasoned that precedent supported the dissent's position because the Court has analogized the power to issue permits with the "censorial" power to place a prior restraint on free expression.¹⁶⁶ The dissent argued that AETC's decision to exclude Forbes should be governed by "pre-established objective criteria."¹⁶⁷ The dissent maintained that contrary to precedent, Justice Kennedy failed to narrowly define the limits of a "viewpoint neutral exercise of journalistic discretion."¹⁶⁸ The dissent recognized the majority opinion's emphasis on the significance of political speech in our democratic

system of government, however, the dissent contended that the opinion discounted the impact of a public broadcaster's decision to exclude legally qualified candidates for federal office.¹⁶⁹ Justice Stevens argued that AETC arbitrarily evaluated Forbes' viability.¹⁷⁰ Moreover, Justice Stevens maintained that confining broadcasters' to objective criteria would not hamper their ability to exclude candidates who did not warrant coverage.¹⁷¹ Thus, the dissent was persuaded that a state official's control over access to government sponsored debate should be treated as a prior restraint on free expression.¹⁷²

III. CLARIFICATION OF OUR FIRST AMENDMENT VALUES

A. Debating Programming and the "Ad Hoc" Selection Process

In light of the majority's approval of AETC's candidate selection process, political speech will be curtailed if public broadcasters are free to "pick and choose" candidates that they believe are viable candidates for federal office.¹⁷³ Justice

¹⁶³ See *id.* at 1643-44 (1998). Justice Kennedy did not question the "good faith" of AETC's staff because its "good faith" was a question of fact decided by the jury below. *Id.*

¹⁶⁴ See *id.* at 1644, 1649-50 (Stevens J., dissenting, joined by Souter, J., and Ginsburg, J.). The dissent did not object to the majority's classification of the debate as a nonpublic forum. See *id.* at 1644.

¹⁶⁵ See *id.* at 1647-48.

¹⁶⁶ See *id.* (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969) (invalidating a city ordinance that "subject[ed] the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority").

¹⁶⁷ See *id.* at 1645 (comparing the guidelines imposed on private broadcasting stations by the Federal Election Campaign Act). See also 11 C.F.R. § 110.13(c) (1998). The criteria for candidate selection declared that "[f]or general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." See *id.* The section goes to explain when organizations may restrict participation. See *id.*

¹⁶⁸ See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1649-50 (1998).

¹⁶⁹ See *id.* at 1648 (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992)). Justice Stevens noted that *Forsyth* opinion recognized that government officials must be held accountable for their decisions when they place a prior restraint on free expression; "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official." See *id.*

¹⁷⁰ *Id.* at 1649. Moreover, Justice Stevens found evidence in the record that Forbes' exclusion very well "may have de-

termined the outcome of the election." See *id.* at 1645 (noting the Republican winner's slim margin in the 1992 Congressional race).

¹⁷¹ See *id.* at 1649 (Stevens, J., dissenting) (returning to the theory of spectrum scarcity by asserting "when the demand for speaking facilities exceeds supply, the State must 'ration or allocate the scarce resources on some acceptable neutral principle'") (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995)).

¹⁷² See *id.* 1649-50.

¹⁷³ See, e.g., *Chicago Acorn v. Metro. Pier and Exposition Auth.*, 150 F.3d 695, 699 (7th Cir. 1998) (finding that state officials in controlling a naval pier designated for recreation and commercial use are not able to "pick and choose" among political advocacy groups that are allowed to use the facility). The Seventh Circuit based its holding on the reasoning set forth in *Arkansas Educational Television Commission*. See *id.* at 701. The court reasoned that *Arkansas Educational Television Commission* established that the state must adopt criteria if its going to restrict access to a nonpublic forum dedicated to political speech. See *id.* at 701-02. Although the Seventh Circuit recognized the need for objectivity, the court denied it any meaning when it reasoned that objectivity is left to "the good-faith exercise" of state officials. See *id.* at 701: The Seventh Circuit stated that political or ideological consequences are unavoidable when the state dedicates a nonpublic forum to political speech, however, the Seventh Circuit refused to condemn its judgment. See *id.* at 701, 704. But see, William C. Canaby, Jr., *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1121, 1127 (1974) (finding that "[t]he ultimate danger is not that the government's point of view gets across; it is that the views of others do not").

Kennedy categorically classified government-sponsored debates based on AETC's candidate-by-candidate selection process.¹⁷⁴ Justice Kennedy believed that this process was consistent with *Cornelius'* distinction between government property intended for "general access" and government property intended for "selective access."¹⁷⁵ However, the restrictions in both *Cornelius* and *Perry* were permissible because: (1) the government dedicated its property to a specific purpose;¹⁷⁶ and (2) the regulation was reasonable and not an effort to suppress to the speakers' message.¹⁷⁷ In *Cornelius*, the majority was comfortable in allowing restrictions on speech activity because the speakers had alternative modes of communication.¹⁷⁸ Justice O'Connor, writing for the majority, reasoned that "[r]arely will a non-public forum provide the only means of contact with a particular audience."¹⁷⁹ Thus, Forbes was in a "rare" position because network access was not only Forbes' most "efficient way" to communicate, rather, it was the only way for the public to evaluate Forbes' arguments against his opponents in AETC's live debate.¹⁸⁰

Generally, poorly-funded candidates, like Forbes, enjoy only limited media coverage. For example, purchasing airtime has been so costly that both Congress and the FCC have repeatedly responded with reform to our current system.¹⁸¹ The public has expressed concern that candidates are at the mercy of the media.¹⁸² Critics comment on the difficulties poorly-funded candidates' have in gaining media exposure.¹⁸³ Thus, non-commercial stations may provide the only practical forum where these candidates can effectively reach his or her audience.¹⁸⁴

The Federal Communications Commission also contends that broadcasters are in a position to "revitalize our democracy" when networks dedicate complimentary airtime to candidate debate.¹⁸⁵ Nonetheless, the majority discounted the value of Forbes' participation in a publicly-sponsored debate.¹⁸⁶ Although Forbes failed to file a complaint with the Commission before proceeding to the district court,¹⁸⁷ Forbes' statutory right to reasonable access is "grounded in the First Amendment."¹⁸⁸ Congress recognized that the media is central to the electorate's candidate se-

¹⁷⁴ See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S.Ct 1633, 1642-43 (1998).

¹⁷⁵ See *id.* at 1642.

¹⁷⁶ In *Perry*, the School Board dedicated its internal mail system to serve its teachers. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 40-41 (1983). It invited PEA to use its system because it acted as the exclusive union represented of all the districts' teacher. See *id.* at 51-52. In *Cornelius*, the government dedicated its charity drive to solicitation by "voluntary, charitable, health and welfare agencies" whose services directly benefit the employees. See *Cornelius v. NAACP Legal Defense and Educ. Fund Inc.*, 473 U.S. 788, 795 (1985).

¹⁷⁷ See *Cornelius*, 460 U.S. at 811.

¹⁷⁸ See *id.* at 809.

¹⁷⁹ See *id.* (contending that in a nonpublic forum, "[t]he First Amendment does not demand unrestricted access" because it may be "the most efficient way of delivering the speaker's message").

¹⁸⁰ AETC only sponsored one debate for the Arkansas' Third Congressional seat, from which it excluded Forbes. See *Arkansas Educ. Television Comm'n*, 118 S.Ct 1633, 1637 (1998).

¹⁸¹ See Political Programming Policies, *supra* note 130; see also The Bipartisan Integrity Campaign Act of 1997, H.R. 2183, 105th Cong. (1998). The Act's objective is to amend the Federal Election Campaign Act of 1971, in order to reform campaign finance. 144 CONG. REC. 7298 (1998).

¹⁸² See, e.g., Editorial, *Open Debates for All Candidates*, WASH. POST, SEPT. 16, 1996, at A18 (advocating to open debate and allow free television spots for all parties who qualify for the ballot). See also 144 CONG. REC. 7298, 7303 (1998) (statement of Rep. Johnson) (stating that in light of the advertising, debates provide candidates an alternative mode of communication with the electorate); see also 144 CONG. REC.

7298, 7311 (1998) (statement of Rep. Farr) (emphasizing the cost of advertising limits common folk from running for office).

¹⁸³ See Hundt, *supra* note 8, at 1100 (arguing that the cost of "television advertising and fundraising is an enormous barrier for candidates seeking public office").

¹⁸⁴ Some commentators suggest that the Internet is an affordable alternative to reach a large audience, however it is hardly a forum for political debate. See MARK SABLEMAN, MORE SPEECH, NOT LESS, COMMUNICATIONS LAW IN THE INFORMATION AGE 246 (1997); see also Kern, *supra* note 10, at 9 (discussing the Internet as an alternative medium for political discourse).

¹⁸⁵ See, e.g., Speech by Reed E. Hunt Chairman, Federal Communications Commission, Variety/Schroder Wertheim Media Conference (New York, NY, April 1, 1997), (visited October 29, 1998) <<http://www.fcc.gov>> (emphasizing that broadcasters must remain aware of their public interest requirements by reserving airtime for "direct access by candidates to voters").

¹⁸⁶ See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1642 (1998) (reasoning that opening debate to all legally qualified candidates would not further First Amendment interests in free speech). *But cf.* *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) (reasoning that "[t]he First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office'") (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

¹⁸⁷ See discussion *supra* note 28 and accompanying text.

¹⁸⁸ See *FCC v. League of Women Voters*, 468 U.S. 364, 379 (1984); see also *Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973) (finding that Congress has "First Amendment values written into the Radio Act and

lection and thus, all legally qualified candidates have a statutory right of "reasonable access" under Section 312(a)(7) of the Communications Act of 1934.¹⁸⁹ In *CBS Inc.*, the Court approved the Commission's interpretation of Section 312(a)(7) by describing it as a balance of "the First Amendment rights of federal candidates, the public and the broadcasters."¹⁹⁰ Thus, Forbes' failure to exhaust his administrative remedies should not thwart his First Amendment right to air his political views. Furthermore, broadcasters' enjoy the protection of the First Amendment even when programmers must adhere to Section 312(a)(7), which fosters candidates' political speech.¹⁹¹

B. Finding Room for Independent Candidates: Defining Viewpoint Neutral Criteria

In light of independent candidates' limited media coverage, the Court must ensure the government's exclusion of a qualified candidate is not ambiguous. The exclusion must be both "reasonable" and "viewpoint neutral."¹⁹² The FCC has established statutory guidelines under Section

312(a)(7) that provide broadcasters with some direction in executing these decisions.¹⁹³ However, public broadcasters have a special obligation to meet the obligations under Section 390.¹⁹⁴ Public broadcasting networks were created to promote the program diversity that may be inhibited in commercial programming where the market fixes the networks' agendas.¹⁹⁵ Today, public networks regularly sponsor candidate debates that reflect the public's concerns without commercial influence.¹⁹⁶ Thus, all qualified candidates must be invited indiscriminately.

In *Arkansas Educational Television Commission*, the majority denied that the record supported a finding that AETC's decision was viewpoint based.¹⁹⁷ Notably, nothing in the record¹⁹⁸ supported a finding that the station used some "criteria" when making its selection.¹⁹⁹ The majority condoned Forbes' exclusion when his exclusion afforded major party contenders more airtime to advocate their positions on the station's limited frequencies.²⁰⁰ However, the scarcity rationale does not undermine candidates' First Amendment right of access to broadcasting networks.²⁰¹

its successor, the Communications Act [of 1934]).

¹⁸⁹ 47 U.S.C. § 312(a)(7) (1994).

¹⁹⁰ See *CBS, Inc. v. FCC*, 453 U.S. 367, 397 (1981).

¹⁹¹ See *supra* note 190 and accompanying text.

¹⁹² See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-47 (1983); *Cornelius v. NAACP Legal Defense and Educ. Fund Inc.*, 473 U.S. 788, 811 (1985).

¹⁹³ 47 U.S.C. 312(a)(7). Cf. Federal Election Campaign Act of 1971, § 316, as amended, 2 U.S.C. § 441(b); 11 C.F.R. §§ 110.13, 114.4(f) (1998). The Federal Election Commission permits eligible nonprofit organizations to stage debates on the condition they extend their invitation based on "pre-established objective criteria." 11 C.F.R. § 110.13 (c).

¹⁹⁴ 47 U.S.C. § 390 (1994) (providing support to "public telecommunications facilities" in return for enhanced programming).

¹⁹⁵ See *Hightower supra* note 92, at 135-36 (discussing Congress' intent that public networks serve as "an alternative fare" to commercial networks). See also 47 U.S.C. § 390(3). Congress enacted section 390 to "strengthen the capability of existing public television and radio stations to provide public telecommunications services to the public." See *id.* Cf. EDITORIAL INTEGRITY IN PUBLIC BROADCASTING: PROCEEDINGS OF THE WINDSPRING CONFERENCE (1994) (setting forth a creed for the public broadcasting industry to further the public's interest in diversity).

¹⁹⁶ See, e.g., Jeff Meyers, *Forums to Bring Candidates to Voters*, WISCONSIN STATE JOURNAL, Sept. 27, 1998, at 6E (discussing "Friday Night Forums" where the people of Wisconsin gather to submit questions for gubernatorial and Senate races, asked and answered during a public broadcast).

¹⁹⁷ See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1643 (1998).

¹⁹⁸ AETC's Executive Director and staff excluded Forbes

because they felt he had little public support, when in fact he had considerable support when he ran for office in 1992. See *id.* at 1645; see also *supra* note 39 and accompanying text.

¹⁹⁹ See *Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1637. AETC staff made programming decisions based on a "Statement of Principles of Editorial Integrity in Public Broadcasting." See THE ARKANSAS EDUCATIONAL TELEVISION COMMISSION PROGRAMMING POLICY FOR AETN 2 (adopted June 7, 1994). This statement provides that the station will maintain the "public trust in its editorial integrity by shielding the programming process from improper political pressure or influence from program funders or other sources." See *id.* AETN follows the guidelines set forth in EDITORIAL INTEGRITY IN PUBLIC BROADCASTING: PROCEEDINGS OF THE WINDSPRING CONFERENCE (1994). However, as Justice Stevens noted, Simmons, a local journalist worked extensively with AETC staff on its debate. See *Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1645 (Stevens, J., dissenting); see also Brief for Petitioner at 9-10 (stating that Simmons judgment was respected because of his "credibility" and experience"). Nonetheless, AETC decided to invite the major party contenders before Forbes even qualified for the ballot. See *Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1645 (Stevens, J., dissenting). This suggests that Forbes may not have been seriously evaluated based on "viewpoint neutral" criteria if AETC had already extended its initial invitations. If a more defined selection process were in place, AETC could show Forbes' claim was without merit. Cf. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (stating that absent a basis for an official's decision, the Court cannot review its credibility).

²⁰⁰ See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1643 (1998).

²⁰¹ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969);

Furthermore, the Court has explicitly stated that the First Amendment prohibits government entities from engaging in viewpoint discrimination on the basis of scarcity, absent some "acceptable neutral principle."²⁰² Thus, it is imperative that public broadcasters fulfill their First Amendment obligations and evaluate candidates in a neutral manner.

Justice Kennedy was reluctant to impose restraints on broadcasters' "journalistic discretion" because he felt this would inhibit debate rather than enlarge the "marketplace of ideas."²⁰³ To support his contention, Justice Kennedy referred to one instance where a debate was canceled because broadcasters were hesitant to exclude a candidate in light of the decision below.²⁰⁴ However, without objective guidelines to follow, broadcasters will exercise unfettered discretion in selecting candidates who they believe are qualified to participate.²⁰⁵

Given the value placed on political expression, Justice Stevens' suggestion that that government-sponsored debate should be treated as a prior restraint on speech activity emerges as the sound position.²⁰⁶ The Court has prohibited government officials from ambiguously excluding groups from speech activity.²⁰⁷ The Court imposed objective criteria on government officials, which safeguarded our First Amendment value in free

expression.²⁰⁸ Thus, broadcasters would adopt objective criteria rather than basing a decision to exclude candidates on a moral pretext or overly-broad "Statement of Principles."²⁰⁹ Furthermore, lower courts will have difficulty evaluating a candidate's claim under the First Amendment if the term "viewpoint neutral" remains undefined.²¹⁰ Minimal guidelines would not run afoul of the Constitution, rather they would provide a practical framework for lower courts.²¹¹

IV. CONCLUSION

Broadcasters are aware that their freedoms under the First Amendment are subject to serving the public interest. It is in the public interest to receive a balanced presentation of the views. The public will be denied this interest if independent candidates are arbitrarily excluded from candidate debate. Independent candidates who request access to a government-sponsored debate have a valid claim under the First Amendment. However, lower courts will have a difficult time evaluating their claim under the Supreme Court's viewpoint neutral standard when this standard is left to public broadcasters to define. Thus, independent candidates maybe forced to advocate their positions in the traditional town-square, while the public remains at home watching or listening to debates broadcast via electronic media.

see also discussion of *Red Lion* *supra* note 94 and accompanying text.

²⁰² *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (prohibiting the government's arbitrary viewpoint discrimination).

²⁰³ *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1643 (1998).

²⁰⁴ *See id.*; *see also* OMAHA WORLD-HERALD, Aug. 24, 1996 (reporting the debate's cancellation).

²⁰⁵ *See Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1645 (Stevens, J. dissenting) (reasoning "[t]he apparent flexibility of AETC's purported standard suggests the extent to which the staff had nearly limitless discretion to exclude Forbes from the debate based on ad hoc justifications"). *See also* Dienes, *On Speech Issues*, *supra* note 22 (commenting that public broadcasters cannot engage in "covert censorship"). Further, Justice Stevens noted Justice Kennedy's concern was unwarranted because public networks could easily avoid any First Amendment challenges to their 'journalistic discretion' if networks simply delineated some neutral criteria before inviting legally qualified candidates to participate. *See Arkansas Educ. Television Comm'n*, 118 S. Ct. at 1649 n. 19.

²⁰⁶ *See id.* at 1648.

²⁰⁷ *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 150 (1969) (invalidating an ordinance which allowed city officials to exclude the public from public streets based on their "ideas of public welfare . . . good order, morals or convenience.")

²⁰⁸ *See id.* at 150-51.

²⁰⁹ *See* discussion *supra* note 199. *Cf. Shuttlesworth*, 394 U.S. at 150 (finding that government officials' unrestrained discretion may lead to government censorship).

²¹⁰ *See Marcus v. Iowa Pub. Television*, 24 MEDIA L. REP. 2531 (1996) (upholding a broadcasters' judgment to exclude an independent candidate running for federal office when the broadcaster stated he was not "newsworthy"). Iowa Public Television followed the same "Statement of Principles of Editorial Integrity in Public Broadcasting" as AETC. *See id.* at 2533. In *Marcus*, the court distinguished this candidate's exclusion from Forbes' case because the Iowa network did not question this candidates' viability. *See id.* at 2533. However, in either case the networks excluded a legally qualified candidate from public debate, without any neutral principle justifying its decision, other than this "broadcaster's creed." *See id.* *Cf. EDITORIAL INTEGRITY IN PUBLIC BROADCASTING: PROCEEDINGS OF THE WINDSPRING CONFERENCE* (1994) (outlining the public broadcaster's obligation to the public).

²¹¹ Minimal guidelines preserve journalistic discretion and yet, account for the public interest in receiving a "balanced presentation of the views." *See FCC v. League of Women Voters*, 468 U.S. 364, 376 (citing *Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973)). *Cf. CBS, Inc., v. FCC*, 453 U.S. 367 (1981) (upholding FCC guidelines under § 312(a)(7)). *See Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1649 (1998) (Stevens, J., dissenting) (emphasizing the small burden on public networks).

