THE *FORBES* DECISION: HAS THE COURT CLOSED THE PUBLIC FORUM ON CANDIDATE SPEECH?

As set forth in the United States Constitution, the First Amendment's guarantee of freedom of speech ensures that every citizen will be given the opportunity to voice his or her viewpoints.[1] For several generations, however, the intentions of the framers of the First Amendment have been disputed.[2] Some scholars argue that the framers intended to encourage a "marketplace of ideas" to ensure public access to all competing ideas.[3] Other commentators, though,

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[1] *See* U.S. CONST. amend. I. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . . " *Id.* Although the First Amendment prohibits only the federal government from infringing on individuals' free-speech protections, the First Amendment is made applicable to the states through the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 1. Section 1 of the Fourteenth Amendment states in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. The First Amendment is binding on the states through the doctrine of "incorporation." *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (concluding that the Fourteenth Amendment incorporates the First Amendment and makes the guarantee of freedom of speech applicable to the states); Gitlow v. New York, 268 U.S. 652, 666 (1925) (stating that freedom of speech is protected by the Fourteenth Amendment from intrusion by the states); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 10.2, 11.6, at 340, 397 (5th ed. 1995) (noting that the First Amendment is incorporated into the Fourteenth Amendment and applied to the states).

[2] *See* NOWAK & ROTUNDA, *supra* note 1, § 16.5, at 989-90. Some scholars, such as Zechariah Chafee, argue that it was the framers' intention to abolish the common law of seditious libel. *See id.* at 990 (citing ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 19-21 (1941)). Other theorists, however, such as Leonard Levy, assert that the framers intended to accord free speech "only to those who propounded favorable opinions of the struggle for independence." *Id.* (citing LEONARD W. LEVY, LEGACY OF SUPPRESSION Ch. 2 (1964)).

[3] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 786 (2d ed. 1988) (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). The "marketplace of ideas" philosophy rests on the notion that the "ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); *see also* Red Lion Broad. Co. v. Fed-

contend that the framers' intentions were to provide a more narrow protection and allow the government to regulate free expression.[4]

At the core of First Amendment protection lies political speech disseminated through candidate debates.[5] Traditionally, political de-

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eral Communications Comm'n, 395 U.S. 367, 390 (1969) (arguing that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . ."); Associated Press v. United States, 326 U.S. 1, 20 (1945) (contending that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."); Terminiello v. Chicago, 337 U.S. 1, 4 (1940) (suggesting that "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people . . . ."); Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (stating that "[f]reedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period"). *But see* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974 (1978) (asserting that the idea that the "marketplace leads to truth, or even to the best or most desirable decision, [is] implausible"); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984) (suggesting that government regulation is frequently needed to correct market failures); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 123 (1973) (arguing that the "public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth").

In addition to the "marketplace of ideas" rationale for protecting free expression, commentators have focused on the self-fulfillment and autonomy rationales. *See* David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) (stating that the "value of free expression . . . rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish"); *see also* Turner Broad. Sys., Inc. v. Federal Communications Comm'n, 512 U.S. 622, 641 (1994) (arguing that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence").

[4] *See* Brown v. Louisiana, 383 U.S. 131, 166 (1966) (Black, J., dissenting) (defending the government's power to refuse individuals access to speech). Justice Black stated:

> I have never believed that [the First Amendment] gives any person or group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property . . . . [The First Amendment] does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas.

Id.; *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 18-19, 22-27 (1948) (suggesting that First Amendment protections should be limited to public discussion of important civic issues); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry in Substance and Limits of Principle*, 30 STAN. L. REV. 299, 308 (1978) (stating that First Amendment protections should only apply to "speech that is 'relevant to the purposes of self-government'") (quoting Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 51 (1974)).

bates were afforded extensive protection because they furthered the goals of society by enhancing access to a wide range of political ideas.[6] More recently, however, First Amendment implications have arisen when candidate debates are analyzed under the public forum doctrine.[7] Historically, this doctrine was an important device used to

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[5] *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976) (stating that the First Amendment gives the broadest protection to political speech); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784-85 (1978) (explaining that "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.") (citation omitted); Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (holding that free discussion of issues triggers the First Amendment's "fullest and most urgent application" to speech uttered during a campaign for political office); Mills v. Alabama, 384 U.S. 214, 218 (1966) (contending that the main purpose of the First Amendment is to protect free public discussions of candidates); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (stating that political speech "concerning public affairs is more than self-expression; it is the essence of self-government"); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 306 (1992) (asserting that "government should be under a special burden of justification when it seeks to control speech intended and received as a contribution to public deliberation"); John D. Shakow, Note, *Just Steal It: Political Sloganeering and the Rights of Trademark Holders*, 14 J.L. & POL. 199, 199 (1998) (observing that the "protection of political speech lies at the very heart of the American ethic"); R. Scott Shieldes, Comment, *Suturing Discourses Within the First Amendment*, 34 HOUS. L. REV. 1531, 1535 (1998) ("Political speech constitutes the prime category of protected speech, lying at the very core of the First Amendment.").

[6] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (concluding that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . . "); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980) (observing that speech on public issues "has always rested on the highest rung of the hierarchy of First Amendment values"); *Buckley*, 424 U.S. at 14 (arguing that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution"); Roth v. United States, 354 U.S. 476, 484 (1957) (noting that the purpose of a debate is to allow the expression of political views and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); Shakow, *supra* note 5, at 199 (claiming that the "right to speak freely in political discourse is critical to the sound progress of the democratic experiment").

[7] *See* Steven G. Gey, *Reopening the Public Forum — From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1535 (1998). In essence, "the story of the First Amendment is the story of the public forum doctrine." *Id.* The Court adopted a forum analysis to determine "when the [g]overnment's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the [g]overnment can control access depends on the nature of the relevant forum." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985). This doctrine emerged from the Supreme Court's refusal to accept the view that the government could limit the use of property in the same way as can a private property owner. *See* Gey, *supra*, at 1539. *Hague v. Committee for Industrial Organization* was the first Supreme Court decision that placed constitutional limitations on the government's power to restrict the right of access to public property. *See id.* (citing *Hague*, 307 U.S. 496, 515 (1939)). The *Hague* Court observed:

secure access to public property for free speech.[8] Even though the public forum doctrine emerged as a vehicle to expand First Amendment protection, it has, ironically, become a tool for limiting access to public expression.[9] While commentators continue to propose re-

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> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague, 307 U.S. at 515.

Currently, the public forum doctrine is analyzed under a three-tier system. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). One category consists of the traditional public forum, which is defined as a place that has been historically "devoted to assembly and debate." *Id.* at 45. If a traditional public forum is created, the state needs to show that its regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* (citing *Carey*, 447 U.S. at 461). The government may also enforce time, place, and manner regulations, which are content-neutral and are drawn to effectuate a state interest. *See id.*

Under the middle tier, the designated or limited public forum is defined as "property that the [s]tate has opened for expressive activity by part or all of the public." International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992); *see also Cornelius*, 473 U.S. at 802 (explaining that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse"). When a designated public forum is created, the government's action is strictly scrutinized, whereby its regulation must be narrowly drawn to further a compelling interest. *See* United States v. Kokinda, 497 U.S. 720, 726-27 (1990) (plurality opinion). In addition, when the state creates a limited public forum, it may enforce "[r]easonable time, place, and manner regulations . . . , and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. at 46 (citing Widmar v. Vincent, 454 U.S. 263, 269-70 (1981)).

At the other end of the spectrum, the nonpublic forum is defined as any other property that is not considered to be either a traditional public forum or a designated public forum. *See id.*; *see also Lee*, 505 U.S. at 678-79. The state may only limit access to a nonpublic forum if "the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Cornelius*, 473 U.S. at 800 (citations omitted).

[8] *See* C. Thomas Dienes, Commentary, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986) [hereinafter *Trashing of the Public Forum*]. Scholars have interpreted principles underlying the public forum doctrine:

> [I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.

Id. at 112 (alteration in original) (quoting Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 11-12).

[9] *See* C. Thomas Dienes, *On Speech Issues, Court Speaks in Many Tongues*, 153 N.J. L.J. 735, 735 (1998) [hereinafter *On Speech Issues*]; *see also* Gey, *supra* note 7, at 1541 (arguing that, since *Hague*, the Supreme Court has left open numerous avenues for

interpretations of the public forum doctrine,[10] the Supreme Court has been extremely reluctant to extend protection to forums outside the realm of the traditional contexts.[11]

Recently, in *Arkansas Educational Television Commission v. Forbes*,[12] the United States Supreme Court considered whether the government has a First Amendment obligation to provide political candidates access to state-sponsored debates.[13] The Court held that the Arkansas Educational Television Commission's (AETC) exclusion of Ralph Forbes, a political candidate, was entirely consistent with the First Amendment.[14] In so holding, the Court asserted that the state does not have a constitutional obligation to give every candidate the opportunity to participate in a televised debate.[15]

In 1992, petitioner, AETC,[16] a state-owned television broadcaster, decided to sponsor a series of televised debates between can-

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government regulation).

[10] *See* Gey, *supra* note 7, at 1555. Some commentators argue that, as a result of the Supreme Court's refusal to afford new forums full protection under the public forum doctrine, complications have ensued. *See id.* As a result, new interpretations have been formulated to extend the protection of speech to include any government place that provides an "instrumentality 'specifically used for the communication of information and ideas.'" *Id.* at 1576 (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 137 (1981) (Brennan, J., dissenting)). For example, Professor Gey suggests that the public forum doctrine should protect speech in all public places unless it would "tend to interfere in a significant way with the government's own activities in that forum." *Id.*

[11] *See id.* at 1536 (observing that the Court has allowed the government to restrict speech from any publicly owned property that does not fit the traditional model of a park or street). *See, e.g., Lee*, 505 U.S. at 680 (giving the government the authority to regulate speech at an airport terminal); *Kokinda*, 497 U.S. at 730 (authorizing the Postal Service to limit expressive activity at a post office); *Cornelius*, 473 U.S. at 806 (permitting the government to restrict access to a charity drive); *Perry*, 460 U.S. at 47 (allowing a school district to regulate access to a mail system).

[12] 118 S. Ct. 1633 (1998).

[13] *See id.* at 1637.

[14] *See id.* The Court determined that, because the Arkansas Educational Television Commission (AETC) created a nonpublic forum, its exclusion of Forbes was a "reasonable, viewpoint-neutral exercise of journalistic discretion." *Id.*

[15] *See id.*

[16] AETC is an agency of the state. *See* Brief for Respondent at 4, Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633 (1998) (No. 96-779). AETC is funded by state appropriations. *See id.* at 5. Pursuant to Arkansas law, the Governor of Arkansas appointed eight AETC members for eight-year terms. *See Forbes*, 118 S. Ct. at 1637; *see also* ARK. CODE ANN. §§ 6-3-102(a)(1), (b)(1) (Michie Supp. 1997), § 25-16-804(b)(1) (Michie 1996). These appointments require the consent of the Arkansas Senate. *See* Brief for Respondent at 5, *Forbes* (No. 96-779). In order to ensure that the members are insulated from political influences, AETC adopted the Statement of Principles of Editorial Integrity in Public Broadcasting. *See Forbes*, 118 S. Ct. at 1637. Under this policy, AETC delegates authority to the Executive Director to make all of its programming decisions. *See* Brief for Petitioner at 6, Arkansas Educ.

didates running for Arkansas's Third Congressional District seat.[17] Due to time constraints,[18] AETC limited the debates to the major party candidates.[19] Consequently, AETC invited only the Republican and Democratic congressional candidates to participate in the debate.[20]

Two months later, respondent, Ralph Forbes,[21] obtained enough signatures to qualify as an independent candidate.[22] On August 24, 1992, Forbes sought permission to participate in AETC's sponsored debate.[23] AETC claimed that a limited debate would be more beneficial to its viewers and refused Forbes's request.[24]

As a result of this exclusion, on October 19, 1992, Forbes brought suit against AETC.[25] Forbes argued that he was entitled to participate in the debate under the First Amendment and requested an injunction requiring AETC to allow him access to the debate.[26]

Television Comm'n v. Forbes, 118 S. Ct. 1633 (1998) (No. 96-779). AETC members appointed Susan Howarth as Executive Director. *See id.* Even though AETC is an agency of the state, its editorial decisions are made independent of the political and administrative processes of the state. *See id.* at 9.

[17] *See Forbes*, 118 S. Ct. at 1637. AETC developed a series of five debates, which included four congressional elections and one senate election. *See id.* To serve the best interests of its viewers, AETC designed the debates by providing a detailed list of issues that were of greatest significance to the public. *See* Brief for Petitioner at 10, *Forbes* (No. 96-779).

[18] *See Forbes*, 118 S. Ct. at 1637. The Court noted that the debate was limited to one hour and allowed for 53 minutes of questions and answers. *See id.*

[19] *See id.*

[20] *See id.*

[21] Forbes was one of three candidates running for the Arkansas Third Congressional District of the United States House of Representatives. *See* Brief for Respondent at 4, *Forbes* (No. 96-779). Prior to the 1992 congressional election, Forbes had successfully run for several elected offices. *See id.* For instance, in 1990, Forbes received 46% of the votes in the Arkansas Lieutenant Governor Republican Primary and won a majority of the votes in 15 of the 16 counties that comprise the Third Congressional District seat. *See id.*

[22] *See Forbes*, 118 S. Ct. at 1638. Under Arkansas law, an independent candidate must obtain 2000 signatures to appear on the ballot. *See* ARK. CODE ANN. § 7-7-103(c)(1) (Michie 1991). Forbes received 6,000 signatures. *See* Brief for Respondent at 5, *Forbes* (No. 96-779).

[23] *See Forbes*, 118 S. Ct. at 1638.

[24] *See id.* Forbes was the only balloted candidate who was excluded from AETC's debate. *See* Brief for Respondent at 4, *Forbes* (No. 96-779). Eventually, the debate took place without Forbes. *See id.* at 6.

[25] *See Forbes*, 118 S. Ct. at 1638.

[26] *See id.* Forbes also alleged that he was entitled to participate in the debate under 47 U.S.C. § 315 (1988), which gives political candidates equal access to air time. *See id.* Nonetheless, Forbes abandoned his statutory claim after the district court and the court of appeals ruled that he had failed to exhaust his administrative remedies. *See id.* In addition to the injunction, Forbes sought declaratory relief and damages. *See id.*

The district court denied this request and dismissed Forbes's complaint for failure to state a claim.[27]

The United States Court of Appeals for the Eighth Circuit reversed the dismissal and held that Forbes had a right to participate in the debate.[28] The court contended that, because AETC was state owned and operated,[29] it must demonstrate a compelling interest to exclude Forbes from the debate.[30] Without such an interest, the court concluded that AETC's exclusion would be inconsistent with First Amendment principles.[31] Nevertheless, the court remanded the case to determine why AETC excluded Forbes from the debate.[32]

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[27] *See id.*

[28] *See* Forbes v. Arkansas Educ. Television Communication Network Found., 22 F.3d 1423 (8th Cir.) (en banc), *cert. denied*, 513 U.S. 995 (1994). Forbes sued AETC, its members and officers, and staff of the Arkansas Educational Television Network. *See* Brief for Petitioner at 3, *Forbes* (No. 96-779). For purposes of this Note, the defendants will be collectively referred to as AETC.

The Eighth Circuit overruled the First Amendment analysis in *DeYoung v. Patten*, which held that a candidate did not have a constitutional right to participate in a televised debate. *See Forbes*, 22 F.3d at 1430 (citing *DeYoung*, 898 F.2d 628, 632 (8th Cir. 1990)). In so doing, the court asserted that such a decision would permit a government-owned station to make politically motivated or content-based exclusions. *See id.* at 1428. Due to AETC's sponsorship of the debate, the Eighth Circuit held that Forbes was entitled to access. *See id.* The court, however, emphasized that its holding applied only to state-sponsored debates. *See id.* at 1430 n.5.

[29] *See id.* at 1428. Although the holding in *DeYoung* was rejected, the court adhered to the conclusion that a public television station was construed as a state entity. *See id.* (citing *DeYoung*, 898 F.2d at 631-32). As a result, the court concluded that AETC was a state actor. *See id.* Consequently, the court asserted that AETC's actions were subject to the Fourteenth Amendment. *See id.*

The court, then, distinguished the case from *Kennedy for President Commission v. Federal Communications Commission*, 636 F.2d 417 (D.C. Cir. 1980). *See Forbes*, 22 F.3d at 1428 n.2. The court agreed with the ruling in *Kennedy* that there is no First Amendment qualified right of access to appear on television. *See id.* (citing *Kennedy*, 636 F.2d at 432); *see also Kennedy*, 636 F.2d at 430-31 (doubting that a political candidate "has a constitutional right of broadcast access to air his views"). The court, however, recognized that the broadcast stations in *Kennedy* were private stations. *See Forbes*, 22 F.3d at 1428 n.2 (citing *Kennedy*, 636 F.2d at 419-20). Because AETC was state-owned, the court reasoned that the First Amendment analysis should be altered dramatically. *See id.*

[30] *See Forbes*, 22 F.3d at 1429.

[31] *See id.* The court determined that if AETC had created a limited public forum, then Forbes would be entitled to participate in the debate and could be refused access only if AETC had a sufficient government interest. *See id.* (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). Furthermore, the court asserted that, even if AETC had created a nonpublic forum, it would still violate the First Amendment if it excluded Forbes because of his viewpoints. *See id.* (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)); *see also, e.g.*, Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 362 (8th Cir. 1988) (determining that a state school is not allowed to deny funding because it

On remand, the district court addressed the issue of whether Forbes's viewpoints were the reason for his exclusion.[33] During the trial, AETC testified that Forbes was excluded because he did not generate enough public support and was not considered a serious candidate.[34] As a result of this testimony, the jury found that Forbes's political views were not the basis for AETC's exclusion.[35] Consequently, because the district court found that the debate was a nonpublic forum and determined that AETC's rejection was not viewpoint based, the court entered judgment for AETC.[36]

The court of appeals reversed the district court's judgment.[37] The Eighth Circuit held that the debate was a limited public forum,[38] whereby all balloted candidates had a right to participate in the debate.[39] Even if the debate was construed as a nonpublic forum, the

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opposes the organization's message).

[32] *See Forbes*, 22 F.3d at 1430. The court insisted that AETC must provide a viewpoint-neutral justification for its exclusion. *See id.* (citing *Cornelius*, 473 U.S. at 811) (observing that "existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination").

[33] *See Forbes*, 118 S. Ct. at 1638.

[34] *See id.* at 1643-44. Based on Executive Director Susan Howarth's testimony, the Court listed AETC's reasons for its exclusion of Forbes:

> (1) [T]he Arkansas voters did not consider him a serious candidate; (2) the news organizations also did not consider him a serious candidate; (3) the Associated Press and a national election result reporting service did not plan to run his name in results on election night; (4) Forbes apparently had little, if any, financial support, failing to report campaign finances to the Secretary of State's office or to the Federal Election Commission; and (5) there [was] no 'Forbes for Congress' campaign headquarters other than his house.

Id. Additionally, AETC testified that Forbes's political views had no influence on the decision to exclude him from the debate. *See id.* at 1643.

[35] *See id.* at 1638.

[36] *See id.*

[37] *See* Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497, 505 (8th Cir. 1996).

[38] *See id.* at 499-500. Initially, the court determined whether the AETC station or the debate was the relevant forum at issue. *See id.* at 503. Because it was the means of communication to which Forbes sought access rather than a forum in itself, the court concluded that the debate was the forum. *See id.* (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 801 (1985) (arguing that "in defining the forum we have focused on the access sought by the speaker"). Next, the court identified the type of forum that AETC created. *See id.* In recognizing the differences between public and nonpublic forums, the court reasoned that this debate was a public forum because AETC opened up its station to a class of speakers, the candidates running for Arkansas's Third District Congressional seat, in order for the candidates to express their viewpoints on public issues. *See id.* at 504.

[39] *See id.* at 500. The Eighth Circuit held that a state-owned television station may not exclude a qualified candidate from its sponsored debate when the decision to exclude was based on such a subjective ground. *See id.*

court found that AETC did not have a compelling interest to exclude Forbes from the debate.[40]

The United States Supreme Court granted certiorari[41] to address whether a state-owned broadcasting station has a First Amendment obligation to allow every candidate the opportunity to participate in a televised debate.[42] In a six-to-three opinion written by Justice Kennedy, the Court reversed the decision of the Eighth Circuit and held that AETC's decision to exclude Forbes from the televised debate was consistent with First Amendment principles.[43] In reaching this judgment, the Court concluded that the debate was a nonpublic forum and that Forbes's exclusion was viewpoint-neutral.[44]

For several years, the Supreme Court has grappled with defining the parameters of First Amendment protection of expressive activ-

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[40] *See id.* at 505. The court noted that AETC's exclusion of Forbes was based on his lack of political viability. *See id.* at 504. The court held that such a reason was not sufficient to survive First Amendment scrutiny. *See id.* at 505. In so holding, the court reasoned that Forbes's political viability should be left for the voters to decide themselves. *See id.* In essence, the court contended that AETC should not be permitted to decide which views the public will or will not hear. *See id.* In reaching this conclusion, the court emphasized that AETC employees were not only broadcasters, but employees of the government. *See id.* Moreover, the court asserted that, because this case involved political speech by a balloted candidate, AETC's exclusion of Forbes had the effect of a prior restraint. *See id.* at 504. Furthermore, the court concluded that AETC's decision to exclude Forbes was "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." *Id.* at 505.

[41] *See* Arkansas Educ. Television Comm'n v. Forbes, 117 S. Ct. 1243 (1997).

[42] *See Forbes*, 118 S. Ct. at 1637. The Court noted that it granted certiorari as a result of a conflict among the circuits arising from *Forbes* and the judgment in *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991). *See Forbes*, 118 S. Ct. at 1638. Similar to *Forbes*, in *Chandler*, a Libertarian candidate was excluded from a government-sponsored televised candidate debate. *See Chandler*, 917 F.2d at 488. The *Chandler* court held that a content-based decision to exclude a candidate was not viewpoint discrimination and, thus, did not violate the First Amendment. *See id.* at 489. Noting that the state broadcast station believed that a debate limited to Democratic and Republican candidates would most benefit its viewers, the court found that the station's decision to exclude a Libertarian candidate was reasonable. *See id.*

[43] *See Forbes*, 118 S. Ct. at 1644. The Court argued that, contrary to the Eighth Circuit's holding, AETC did not design its debate to give general access to the candidates. *See id.* at 1642. Instead, AETC limited eligibility to the candidates running for a specific congressional seat, and then made editorial decisions as to which candidates would be included in the debate. *See id.* at 1642-43.

[44] *See id.* at 1644. Because AETC did not make its debate generally available to candidates, the Court found that "'[s]uch selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum,'" but indicates that the debate was a nonpublic forum. *Id.* at 1643 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 805 (1985)).

ity.[45] Prior to the emergence of the public forum concept in *Hague v. Committee for Industrial Organization*,[46] the Court rejected every right of access to public property for the purpose of free expression.[47] In *Hague*, the Court established a right of access to traditional public areas, such as streets and parks.[48]

Even though *Hague* expanded free speech principles, the Court, nevertheless, began to limit the boundaries of First Amendment protection.[49] In one of the earliest cases, *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[50] the Court considered whether a broadcaster's refusal to sell air time to an organization[51] wishing to express its views through an editorial advertisement on the radio violated the First Amendment.[52] Because Congress[53] has traditionally

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[45] *See* Shakow, *supra* note 5, at 199 (observing that "[a]dministration of the [First Amendment] principle is a complex intellectual and jurisprudential task"). The full protection of political speech is uncertain. *See id.* at 214 (citing Arlen W. Langvardt, *Protected Marks and Protected Speech: Establishing the First Amendment Boundaries in Trademark Parody Cases*, 36 VILL. L. REV. 1, 49 (1991)); *see also* OWEN M. FISS, THE IRONY OF FREE SPEECH 1 (1996) (stating that "[f]or most of this century [freedom of speech] has been the subject of countless judicial battles and has sharply divided the Supreme Court").

[46] 307 U.S. 496 (1939).

[47] *See, e.g.*, Davis v. Massachusetts, 167 U.S. 43, 47 (1897) (stating, in an opinion pre-dating the incorporation doctrine vis-a-vis the First Amendment, that "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house").

[48] *See Hague*, 307 U.S. at 515. In *Hague*, the Court questioned whether a municipal ordinance prohibiting all public meetings in streets without a permit was constitutional. *See id.* at 512.

[49] *See* Gey, *supra* note 7, at 1540 (contending that the public forum concept introduced in *Hague* was not a complete victory for free expression).

[50] 412 U.S. 94 (1973).

[51] This case was a consolidation of two cases. *See id.* at 97. The complainants were the Democratic National Committee (DNC) and the Business Executives' Move for Vietnam Peace (BEM). *See id.* at 97-98. One of the organizations, DNC, filed suit, alleging that a broadcaster may not refuse to sell air time to present the views of the Democratic Party. *See id.* at 98. The other complainant, BEM, was a national group opposed to the Vietnam conflict. *See id.* BEM filed suit against a radio station, WTOP, after it refused to broadcast a series of advertisements expounding BEM's views on the involvement of the United States in Vietnam. *See id.*

WTOP argued that it was justified in declining BEM because it followed its policy of refusing air time to groups that wished to express their opinions on controversial issues. *See id.* Further, WTOP contended that, because it had already presented coverage of issues surrounding the Vietnam conflict, it was justified in refusing to accept BEM. *See id.* BEM claimed that it had a right of access to express its views on public issues. *See id.* at 99.

[52] *See id.* at 97. Additionally, the Court considered whether WTOP violated the Federal Communications Act of 1934, 48 Stat. 1064, *as amended*, 47 U.S.C. § 151 (1994). *See Columbia Broad.*, 412 U.S. at 97.

permitted broadcasters to exercise wide journalistic freedom,[54] the Court held that broadcasters do not have a First Amendment obligation to accept editorial advertisements.[55] In so holding, the Court contended that if strict First Amendment limitations were imposed, very few editorial decisions would avoid constitutional scrutiny.[56]

Almost a decade later, however, the Court seemed increasingly willing to extend the public forum doctrine beyond the confines of streets and parks.[57] In *Widmar v. Vincent*,[58] the Court considered whether a state university,[59] which opened its facilities to student groups, violated the First Amendment by denying access to a relig-

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[53] In evaluating First Amendment actions, the Supreme Court has traditionally afforded great weight to congressional decisions. *See Columbia Broad.*, 412 U.S. at 102. Accordingly, the Court contended that it was important to examine the decisions of Congress when evaluating First Amendment claims. *See id.* The *Columbia Broadcasting* Court stated:

> Once we get away from the bare words of the (First) Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks. The (First) Amendment should be interpreted so as not to cripple the regular work of the government. A part of this work is the regulation of interstate and foreign commerce, and this has come in our modern age to include the job of parceling out the air among broadcasters, which Congress has entrusted to the FCC. Therefore, every free-speech problem in the radio has to be considered with reference to the satisfactory performance of this job as well as to the value of open discussion. Although free speech should weigh heavily in the scale in the event of conflict, still the Commission should be given ample scope to do its job.

Id. at 102-03 (quoting 2 ZECHARIAH CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 640, 641 (1947)).

[54] *See id.* at 110. Upon review of legislative history, the Court argued that Congress manifested a desire to preserve values of journalism under a regulatory system. *See id.* at 109. Because of the inability to provide access for every viewpoint, the Court acknowledged that the right to exercise editorial discretion was granted to the broadcaster. *See id.* at 111.

[55] *See id.* at 122. In reaching this decision, the Court criticized the lower court's opinion that every speaker is the "best judge" of what views the public should hear. *See id.* at 124. Instead, the Court noted that "[c]alculated risks of abuse are taken in order to preserve higher values." *Id.* at 125. In essence, the Court claimed that "we should [not] exchange 'public trustee' broadcasting . . . for a system of self-appointed editorial commentators." *Id.*

[56] *See id.* at 120-21 (stating that "[j]ournalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on [g]overnment").

[57] *See* Dienes, *Trashing of the Public Forum*, *supra* note 8, at 112 (stating that the Court began to create a constitutional right of access to a broad public domain).

[58] 454 U.S. 263 (1981).

[59] The University of Missouri at Kansas City (UMKC) follows a policy of encouraging the activities of student groups. *See id.* at 265. UMKC regularly provided access to its facilities for meetings of student organizations. *See id.*

ious student group.[60] The Court noted that, because the university created an open forum, it would have to show that the group's exclusion was necessary to serve a compelling government interest.[61] Finding that no compelling justification existed,[62] the Court held that the university violated fundamental constitutional standards by denying the religious group access to its facilities.[63]

Shortly after *Widmar* opened the public forum doctrine to protect speech in nontraditional public forums, the Court, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[64] closed access to speech in nonpublic forums.[65] In *Perry*, the Court considered whether a school district's exclusion of a teachers' union from access to a school mail

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[60] *See id.* at 264-65. Between 1973 and 1977, Cornerstone, a student religious group, received permission from UMKC to conduct meetings at its facilities. *See id.* at 265. In 1977, however, UMKC excluded Cornerstone from using its buildings for religious discussion. *See id.*

[61] *See id.* at 267, 269-70. The Court found that, because UMKC followed its policy of allowing student organizations to hold meetings in its buildings, UMKC created a forum open for students. *See id.* at 267. The Court noted that the First Amendment prohibits the government from excluding individuals from a forum open to the public absent justification that meets constitutional standards. *See id.* at 268 (citing Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 (1976)) (declaring that "[w]here the [s]tate has opened a forum for direct citizen involvement," a justification for the restriction bears a heavy burden). More importantly, the Court observed that students of a public university enjoy freedom of speech rights and that the "denial [to particular groups] of use of campus facilities for meetings . . ." must be heavily scrutinized. *Id.* at 268 n.5 (citing Healy v. James, 408 U.S. 169, 181, 184 (1972)).

After concluding that UMKC created a public forum, the Court then determined that UMKC discriminated against Cornerstone based on its wish to use the University's facilities to engage in religious activity. *See id.* at 269. The Court noted that for a state to justify discriminatory exclusion from a public forum, UMKC must show that its restriction was "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 269-70 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

[62] *See id.* at 276. UMKC argued that it would have violated the Establishment Clause of the United States Constitution if it allowed religious groups access to its facilities. *See id.* at 270-71. The university also contended that the Missouri Constitution required a greater degree of separation of church and state than the Federal Constitution. *See id.* at 275. Therefore, UMKC contended that it had a compelling interest in complying with both constitutional standards. *See id.* The Court, however, asserted that the state's interest in separating church and state did not justify content-based discrimination against Cornerstone's speech. *See id.* at 276.

[63] *See id.* at 277.

[64] 460 U.S. 37 (1983).

[65] *See* Gey, *supra* note 7, at 1548. The *Perry* decision increased the government's ability to prohibit expression in nonpublic forums. *See id.* Under *Perry*, because the scope of the nonpublic forum was left wide open, Gey argues that the government will be able to characterize any forum so that it falls into the nonpublic category. *See id.*

system[66] violated the First Amendment.[67] The Court, creating a three-tier analysis of the public forum doctrine,[68] asserted that the school mail facilities fell within the category of a nonpublic forum because the system was not open to the public.[69] In essence, the Court held that, because the mail system was a nonpublic forum, the school district had no constitutional obligation to provide access to speech.[70]

Continuing the trend of denying public access to nonpublic forums by affording judicial deference to governmental judgment, the Court, in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*[71] addressed whether the government violated the First Amendment when it excluded political organizations from participating in a federal charity drive.[72] Because the government did not intend to create

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[66] The Metropolitan School District of Perry Township is comprised of 13 schools. *See Perry*, 460 U.S. at 39. Each school provides mailboxes for the teachers to communicate among themselves and with the school administration. *See id.* Perry Education Association (PEA) and Perry Local Educators' Association (PLEA), a rival teacher organization, represented teachers in the school district. *See id.* Prior to 1977, PEA and PLEA had equal access to the school mail system. *See id.* In 1977, however, PEA was elected as the exclusive bargaining representative for the teachers. *See id.* at 40. According to a school district policy, the Board of Education could provide access to the exclusive union without having to allow equal access to the other union. *See id.* Consequently, PEA was offered exclusive access to the use of the school mail system. *See id.* As a result of its exclusion from access to the mail system, PLEA brought suit. *See id.* at 41. PLEA asserted that PEA's preferential access violated the First Amendment. *See id.*

[67] *See id.* at 39. The Court began the opinion by noting that constitutional implications arose when PLEA was excluded from access to the mail system. *See id.* at 44 (citing Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506 (1969)) (stating that one could not argue "that either students or teachers shed their constitutional rights to freedom of speech . . . at the schoolhouse gate")). Nevertheless, the Court declared that teachers do not have "'an absolute constitutional right to use all parts of a school building . . . for . . . unlimited expressive purposes.'" *Id.* (quoting Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972)).

[68] *See supra* note 7 and accompanying text (outlining the three-tier system in *Perry*).

[69] *See Perry*, 460 U.S. at 46-47. Because the teachers had to obtain permission to use the system, the Court asserted that such selective access does not turn government property into a public forum. *See id.* at 47.

[70] *See id.* at 48. The Court observed that a school district does not have a "'constitutional obligation . . . to let any organization use the school mail boxes'" if such a mailbox is not a public forum. *Id.* (quoting Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471, 481 (2d Cir. 1976)). Furthermore, the Court determined that PLEA's exclusion was reasonable because the school district had a legitimate interest in "preserv[ing] the property . . . for the use to which it is lawfully dedicated." *Id.* at 50-51 (alteration in the original) (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129-30 (1981)).

[71] 473 U.S. 788 (1985).

[72] *See id.* at 790. The Combined Federal Campaign (CFC) was an annual charity drive conducted by federal employees at their workplaces. *See id.* The charitable

a public forum open to every charitable organization,[73] the Court determined that the charity drive was a nonpublic forum.[74] The Court, in observing that the government's restriction of access to a nonpublic forum needed only to satisfy a reasonableness requirement,[75] held that the government's exclusion of a political organization was reasonable.[76] Therefore, the Court concluded that, because the charity drive was a nonpublic forum and the government's regulation was reasonable, the First Amendment was not violated.[77]

Five years later, in *United States v. Kokinda*,[78] the Court questioned whether the United States Postal Service's regulation of a po-

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solicitation process began when participating organizations would write a statement describing their fundraising activities. *See id.* at 790-91. These statements would be included in CFC literature that federal employees would distribute, along with pledge cards, around the work sites. *See id.* at 791.

The CFC was created in 1957 to ensure order to the solicitation process and to encourage contributions from federal workers. *See id.* at 792. Pursuant to an Executive Order, the Civil Service Commission was given the authority to oversee the solicitation process. *See id.* (citing Executive Order No. 10927, 3 C.F.R. 454 (1959-1963), *reprinted in* 1961 U.S.C.C.A.N. 1281-82). Until 1982, the CFC limited participation to nonprofit, tax-exempt charitable organizations that were funded by public contributions and that provided "direct health and welfare services" to individuals. *Id.*

In 1980, the Office of Personnel Management (OPM), which had assumed the responsibilities of the Civil Service Commission, excluded the respondents, NAACP Defense and Educational Fund, Inc. (NAACP) and Puerto Rican Legal Defense and Education Fund, from the solicitation process because they did not meet the requirements for participation. *See id.* at 793. As a result of this refusal, NAACP brought action against Loretta Cornelius, the Acting Director of OPM. *See id.* NAACP argued that the denial of its right to solicit contributions violated the First Amendment. *See id.* at 795.

[73] *See id.* at 804. The Court explained that the extent to which the state can regulate access depends on the status of the relevant forum. *See id.* at 800. In determining the status of the forum, the Court first decided whether the relevant forum was the federal workplace or the CFC. *See id.* By focusing on the access sought by NAACP, the Court concluded that CFC was the relevant forum. *See id.* at 801. The Court then analyzed whether the CFC was a public or nonpublic forum. *See id.* at 802. Not only did the Court determine that CFC did not intend to create an open public forum, the Court also found that the government did not establish the CFC to provide a forum for speech purposes. *See id.* at 805.

[74] *See id.* at 806. The Court, in concluding that the charity drive was a nonpublic forum, noted that the government creates a pubic forum only when it intentionally opens a forum for public discussion. *See id.* at 802.

[75] *See id.* at 808. *See supra* note 7 and accompanying text (explaining when the government can limit access to a nonpublic forum).

[76] *See Cornelius*, 473 U.S. at 809. The Court held that the government's exclusion of the NAACP was reasonable because it was a way to avoid disruption in the federal workplace and to ensure the success of the charity drive. *See id.* Moreover, the Court found that denying access to the NAACP was reasonable because the government was avoiding political favoritism. *See id.*

[77] *See id.* at 813.

[78] 497 U.S. 720 (1990).

litical advocacy group seeking to solicit contributions on postal premises violated First Amendment principles.[79] The Court reasoned that, because the postal sidewalk was not traditionally open to expression[80] and the Postal Service did not dedicate the sidewalk to expressive activity,[81] the sidewalk was a nonpublic forum.[82] Because of the sidewalk's nonpublic forum status, the Court focused on the reasonableness of the government's exclusion.[83] In holding that the Postal Service's restriction was reasonable,[84] the Court concluded that it did not violate the First Amendment.[85]

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[79] *See id.* at 722-23. Marsha B. Kokinda and Kevin E. Pearl solicited contributions for the National Democratic Policy Committee and distributed pamphlets on political issues on a sidewalk near the entrance of a post office. *See id.* at 723. The sidewalk, where Kokinda and Pearl had set up a table, was the only way for customers to enter the post office. *See id.* Kokinda and Pearl were arrested, pursuant to a United States Postal Service regulation that prohibits "soliciting alms and contributions" on post office property. *See id.* at 724. (citing 39 C.F.R. § 232.1(h)(1) (1989)).

[80] *See id.* at 727. Respondents argued that the sidewalk was a traditional public forum and that the government's exclusion must be subjected to strict scrutiny. *See id.* Although the Fourth Circuit agreed with respondents, the Supreme Court found this argument to be unpersuasive because the "mere physical characteristics of the property cannot dictate forum analysis." *Id.* at 724, 727. The Court, in finding that the postal sidewalk was not historically open to expression, distinguished this case from *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), in which a street was held to be a traditional public forum. *See Kokinda*, 497 U.S. at 727. In *Heffron*, the public street was "continually open . . . and constitute[d] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment." *Id.* (alteration in original) (quoting *Heffron*, 452 U.S. at 651). Contrary to *Heffron*, the postal sidewalk in this case was not a general right-of-way but was designed solely to be a way for individuals to enter the post office. *See id.*

[81] *See Kokinda*, 497 U.S. at 730. The Court explained that the Postal Service does not have a regulation that dedicates its sidewalks to any free speech activity. *See id.* The Court further noted that postal premises are open to one form of communication, the posting of notices on public bulletin boards. *See id.* (citing 39 C.F.R. § 232.1(o) (1989)).

[82] *See id.* The Court held that the postal sidewalk was a nonpublic forum because the government creates a public forum "'only by intentionally opening a nontraditional forum for public discourse.'" *Id.* (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)). Because the postal property was not dedicated to speech activity, the Court determined that the sidewalk was a nonpublic forum. *See id.*

[83] *See id.* (citing *Cornelius*, 473 U.S. at 808). When a regulation is scrutinized under nonpublic forum analysis, it only needs to be "reasonable and 'not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).

[84] *See id.* at 732-33. The Court agreed with the government that the restriction is reasonable because solicitation is disruptive of the post office's business. *See id.* Additionally, the Court found that the regulation of the solicitation does not discriminate on the basis of the speaker's views. *See id.* at 736.

[85] *See id.* at 737.

To expand further the scope of the nonpublic forum as a basis for denying freedom of expression claims, the Court, in *International Society for Krishna Consciousness, Inc. v. Lee*,[86] considered whether an airport terminal was a public forum such that prohibiting solicitation of a religious group in the terminal violated the First Amendment.[87] Although the Court recognized that this form of solicitation was protected speech under the First Amendment,[88] the Court held that the government does not have an obligation to allow expressive activity on property that it owns.[89] The Court determined that, because airport terminals are not intentionally opened for speech purposes, they are nonpublic forums.[90] Once the Court concluded that the government did not create a public forum, the Court noted that its restriction merely had to meet a reasonableness standard.[91] Because the state had overriding interests,[92] the Court held that its denial of access to religious groups for soliciting funds did not violate the First Amendment.[93]

Given this foundation of precedent, the United States Supreme Court, in *Arkansas Educational Television Commission v. Forbes*,[94] again

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[86] 505 U.S. 672 (1992).

[87] *See id.* at 674. International Society for Krishna Consciousness, Inc. (ISKCON) is a nonprofit religious corporation. *See id.* As part of a routine to raise funds, members of ISKCON enter public areas to distribute religious literature and solicit contributions. *See id.* at 674-75. The Port Authority of New York and New Jersey operates three airports. *See id.* at 675. The Port Authority adopted a regulation prohibiting the solicitation of funds within the airport terminals. *See id.* Walter Lee, the superintendent of the Port Authority, was in charge of enforcing the regulation. *See id.* ISKCON brought suit against Lee, alleging that the restriction violated the First Amendment. *See id.* at 676.

[88] *See id.* at 677 (citing Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); *see also Kokinda*, 497 U.S. at 725).

[89] *See id.* at 678 (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981); Greer v. Spock, 424 U.S. 828, 836 (1976)). The Court relied on *Kokinda* and argued that when the government is acting as an owner and not a lawmaker, its exclusions will not be strictly scrutinized. *See id.* (citing *Kokinda*, 497 U.S. at 725). Therefore, the Court, in giving examples of this "forum based" approach for examining government exclusions, discussed how *Perry* allowed a school district to restrict access to a mail system. *See id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48 (1983)).

[90] *See id.* at 680 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).

[91] *See id.* at 683 (citing *Kokinda*, 497 U.S. at 730).

[92] *See Lee*, 505 U.S. at 684-85. The Court determined that the government had an interest in controlling crowds and minimizing the burdens and inconveniences of the airport officials and passengers. *See id.*

[93] *See id.* at 685.

[94] 118 S. Ct. 1633 (1998).

reviewed the constitutionality of restricting political expression.[95] The *Forbes* Court continued its trend of upholding government regulations of the nonpublic forum.[96] The Court determined that, because the candidates' debate was a nonpublic forum, AETC did not violate the First Amendment by excluding a political candidate from its televised debate.[97]

Justice Kennedy began the majority opinion by considering whether public forum principles applied to the case.[98] The opinion discussed how the public forum doctrine initially emerged in the context of parks and streets[99] and concluded that this doctrine should not be extended to the public television context.[100] The majority observed that the public forum doctrine requires broad access and viewpoint neutrality[101] and found that, due to the nature of editorial discretion, journalists must be allowed to broadcast certain viewpoints while excluding others.[102] Further analyzing why the public fo-

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[95] *See id.* at 1637.

[96] *See id.* at 1643.

[97] *See id.* at 1644. The majority asserted that AETC's debate was a nonpublic forum because the debate did not provide for an "open-microphone" format. *See id.* at 1642. Essentially, the Court found that the debate was a nonpublic forum because AETC selectively reserved eligibility for specific speakers and did not make the debate open to every candidate running for Arkansas's Third Congressional District seat. *See id.*

[98] *See id.* at 1639.

[99] *See supra* note 7 and accompanying text (discussing the emergence of the public forum doctrine).

[100] *See Forbes*, 118 S. Ct. at 1639.

[101] *See id.* Justice Kennedy posited that the public forum doctrine's requirement of viewpoint neutrality must be "'compatible with the intended purpose of the property.'" *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983)); *see also* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 840 (1995) (illustrating how a university's policy of funding all student journals is consistent with the requirement of viewpoint neutrality such that the school does not violate the Establishment Clause of the First Amendment by providing funds to a religious publication).

[102] *See Forbes*, 118 S. Ct. at 1639. Justice Kennedy noted that Congress rejected the idea that "'broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues.'" *Id.* (quoting Columbia Broad. Sys. Inc., v. Democratic Nat'l Comm., 412 U.S. 94, 105 (1973)). As a result, the majority concluded that television broadcasters should be given the "'widest journalistic freedom.'" *See id.* (quoting Federal Communications Comm'n v. League of Women Voters of Cal., 468 U.S. 364, 378 (1984); *Columbia Broad.*, 412 U.S. at 110). Consistent with their obligation to serve the best interests of their viewers, the Court observed that broadcasters are frequently required to choose among speakers expressing opposing views. *See id.* Although the Court recognized "[t]hat [broadcasters] . . . can and do abuse this power . . . ", the Court contended that "[c]alculated risks of abuse are taken in order to preserve higher values." *Id.* (alteration in original) (quoting *Columbia Broad.*, 412 U.S. at 124-25).

rum doctrine should not be applied to a public broadcasting context, the majority reasoned that open access rights would undermine the editorial discretion that broadcasters must exercise in order to fulfill their journalistic responsibilities.[103] Without such broad journalistic freedom, the majority contended, control over programming decisions would be transferred from broadcasters to individuals bringing actions under the public forum doctrine.[104] In essence, Justice Kennedy claimed that the application of the doctrine would burden courts by requiring them to oversee the daily operations of broadcasting stations.[105] As a result, the Court concluded that it is not the judiciary's role to establish a framework to which broadcasters must adhere when making programming decisions.[106]

Although the Court determined that the public forum doctrine does not extend to television broadcasting, Justice Kennedy noted that candidate debates represent an exception to this rule.[107] The majority contrasted candidate debates with other public broadcasts and explained that, traditionally, a debate was, by design, a forum, wherein the candidate expressed his or her viewpoints without limitation by the broadcaster.[108] In addition, the Court asserted that tele-

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[103] *See id.* The Court noted that one of the duties of a broadcaster is to select and schedule programs that promote the "'public interest, convenience, and necessity.'" *Id.* (quoting 47 U.S.C. § 309(a) (1988)).

[104] *See id.* at 1640. The Court stated that "'[t]he result would be a further erosion of the journalistic discretion of broadcasters,' transferring 'control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals.'" *Id.* (quoting *Columbia Broad.*, 412 U.S. at 124). Essentially, the Court said that extending the application of the public forum doctrine to the context of television broadcasting would "'exchange 'public trustee' broadcasting, with all its limitations, for a system of self-appointed editorial commentators.'" *Id.* (quoting *Columbia Broad.*, 412 U.S. at 125).

[105] *See id.* Justice Kennedy, in discussing the consequences of extending the public forum doctrine to this context, noted that courts "'would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired.'" *Id.* (quoting *Columbia Broad.*, 412 U.S. at 127).

[106] *See id.* at 1639. Because of the possible danger of implicating the judiciary in judgments, the Court contended that the judiciary should not be required to establish criteria for access. *See id.* Instead, the Court stated that such decisions should be left to the discretion of the broadcasters. *See id.*

[107] *See id.* at 1640.

[108] *See Forbes*, 118 S. Ct. at 1640. In explaining the differences between the AETC debate and other programming, the Court discussed how views expressed in a debate are not those of the broadcasters, but of the candidates themselves. *See id.* With respect to other programs, such as political talk shows, the Court noted that broadcasters express their opinions and then restrict discussion to those views. *See id.*

vised candidate debates have a significant impact on the electoral process[109] because they give voters the opportunity to listen to different viewpoints and make informed choices on election day.[110] Due to the unique attributes of candidate debates, the majority concluded that AETC's debate was a forum.[111]

Justice Kennedy then explored the Court's public forum precedents in order to determine the status of the debate as a forum.[112] In analyzing the development of the public forum doctrine, the Court identified the three types of forums: the traditional public forum,[113] the designated or limited public forum,[114] and the nonpublic forum.[115] Noting that both of the parties agreed that the debate was not a traditional public forum,[116] the majority posited that the debate was either a designated public forum or a nonpublic forum.[117] Justice Kennedy illustrated the distinction between these two forums and determined that a designated public forum is created when the state provides general access,[118] whereas a nonpublic forum is formed when the government allows for selective access.[119]

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[109] *See id.* The Court acknowledged that candidate debates are seen as the "'only occasion during a campaign when the attention of a large portion of the American public is focused on the election, as well as the only campaign information format which potentially offers sufficient time to explore issues and policies in depth in a neutral form.'" *Id.* (quoting *Congressional Research Service,* Campaign Debates in Presidential General Elections, summ. (June 15, 1993)).

[110] *See id.* (asserting that "'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 positions on vital public issues before choosing among them on election day'") (quoting CBS, Inc. v. Federal Communications Comm'n, 453 U.S. 367, 396 (1981) (citations omitted)).

[111] *See id.* at 1640-41.

[112] *See id.* at 1641.

[113] *See supra* note 7 and accompanying text (defining the traditional public forum).

[114] *See supra* note 7 and accompanying text (illustrating the designated public forum).

[115] *See supra* note 7 and accompanying text (discussing the nonpublic forum).

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

[117] *See id.* at 1642. The Court noted that the traditional public forum status has never extended beyond its historical boundaries. *See id.* at 1641. Even if traditional public forum principles were expanded, the Court reasoned that access to such a forum would be inconsistent with the journalistic obligations a television broadcaster must follow. *See id.*

[118] *See id.* at 1642. Justice Kennedy reiterated that in order to create a designated public forum, the state must intend to make access "generally available" to a class of speakers. *See id.* (citing Widmar v. Vincent, 454 U.S. 263, 267 (1981)).

[119] *See id.* In contrast to the designated public forum, the Court observed that when access is reserved to selected speakers, the state has created a nonpublic forum. *See id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-47 (1983)).

The Court applied the public forum doctrine to the facts at issue in *Forbes* to determine which type of forum AETC had created.[120] Justice Kennedy suggested that, because AETC did not provide general access to a class of speakers, the debate was not a designated public forum.[121] Instead, the majority found that AETC selectively reserved the debate to specific candidates running for the Third Congressional District seat.[122] Accordingly, the Court held that AETC's debate was a nonpublic forum.[123]

Regardless of the debate's status as a nonpublic forum, Justice Kennedy declared that a government entity can never exclude a candidate from such a nonpublic forum merely because it opposes his or her viewpoints.[124] Contrary to Forbes's assertion that his exclusion was based on viewpoint discrimination, the majority found that Forbes was denied access because of a perceived lack of public support.[125] Therefore, the Court held that AETC's exclusion of Forbes was a viewpoint-neutral exercise of editorial discretion consistent with First Amendment principles.[126]

Finally, the Court criticized the Eighth Circuit's holding that AETC's actions violated the First Amendment.[127] The majority expressed concern that treating a debate as a public forum open to all candidates might cause broadcasters to choose not to televise candidate debates at all.[128] Justice Kennedy argued that such a decision

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[120] *See id.* at 1642-43.

[121] *See id.* at 1642.

[122] *See Forbes*, 118 S. Ct. at 1642. The Court noted that once AETC reserved eligibility to candidates running for a specific congressional seat, it then made candidate-by-candidate decisions as to which ones would be given access to the debate. *See id.* at 1642-43. Therefore, the Court contended that AETC's "selective access" did not create a public forum. *See id.* at 1643 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 805 (1985)).

[123] *See id.*

[124] *See id.* In the context of a nonpublic forum, the majority observed that the state can limit access "'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Id.* at 1641 (quoting *Cornelius*, 473 U.S. at 800) (citations omitted); *see also* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 687 (1992) (O'Connor, J., concurring) (stating that the status of a nonpublic forum "does not mean that the government can restrict speech in whatever way it likes").

[125] *See Forbes*, 118 S. Ct. at 1644. Additionally, the Court noted that Forbes described his campaign as "bedlam." *See id.* (citing Brief for Petitioner at 91, *Forbes* (No. 96-779)).

[126] *See id.*

[127] *See id.* at 1643.

[128] *See id.* The Court stated that the court of appeals' decision that a debate was a public forum open to every qualified candidate would burden public broadcasters who sponsor candidate debates. *See id.* The Court explained that in the presidential

would result in less speech and would limit the variety of public debate.[129]

In a dissenting opinion, Justice Stevens, joined by Justices Souter and Ginsburg, agreed with the majority's decision that a state-owned television broadcaster has no constitutional responsibility to allow every candidate to participate in a debate.[130] Nevertheless, the dissent argued that the Court should have affirmed the Eighth Circuit's holding.[131] In reaching this conclusion, the dissent challenged the majority's reliance on public forum concepts.[132] On the contrary, the dissent contended that the focus should have been on whether AETC's regulation of speech satisfied its constitutional obligation that access must be governed by established standards.[133] Justice Stevens argued that, because AETC was governed by standardless crite-

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races in 1988, 1992, and 1996, at least 22 candidates appeared on each state ballot. *See id.* (citing TWENTIETH CENTURY FUND TASK FORCE ON PRESIDENTIAL DEBATES, LET AMERICA DECIDE 148 (1995); FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 92, 9 (1993); FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 96, 11 (1997)). The Court contended that, in the case of 22 qualified candidates, a broadcaster might believe that the inclusion of all of them would "'undermine the educational value and quality of debates.'" *Id.* (quoting TWENTIETH CENTURY FUND TASK FORCE ON PRESIDENTIAL DEBATES, LET AMERICA DECIDE 148 (1995)). Furthermore, the Court asserted that a broadcaster may decide that "'the safe course is to avoid controversy" . . . and by so doing diminish the free flow of information and ideas.'" *Id.* (quoting Turner Broad. Sys., Inc. v. Federal Communications Comm'n, 512 U.S. 622, 656 (1994).

[129] *See id.* Justice Kennedy asserted that a "'[g]overnment-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."'" *Id.* (quoting *Tornillo*, 418 U.S. at 257). For example, the Court stated that, due to the court of appeals' holding, the Nebraska Educational Television Network decided not to air its scheduled debate between candidates running for a seat in the United States Senate. *See id.* (citing LINCOLN J. STAR, AUG. 24, 1996, 1A).

[130] *See id.* at 1644 (Stevens, J., dissenting).

[131] *See Forbes*, 118 S. Ct. at 1644 (Stevens, J., dissenting).

[132] *See id.* at 1647 (Stevens, J., dissenting).

[133] *See id.* The dissent noted that AETC's lack of standards raised the same implications addressed by previous Supreme Court decisions "'holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.'" *Id.* at 1644 (Stevens, J., dissenting) (quoting Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969)). The dissent, in supporting the view that a state should be required to set definitive standards to follow in licensing decisions, explained the importance of avoiding arbitrary limitations. *See id.* at 1649 (Stevens, J., dissenting). The dissent contended that objective standards would assure the public that state-owned broadcasters cannot exclude debate speakers on arbitrary grounds. *See id.* The dissent further noted that a state-owned station's constitutional obligation to adhere to definitive standards would be less burdensome than requiring the state to allow access to every speaker. *See id.*

ria and exercised wide latitude either to permit or to refuse any participant, its exclusion of Forbes violated First Amendment concepts.[134]

The dissent then faulted the majority for overlooking the significant difference between state-operated and private-operated broadcast stations.[135] Because the AETC members were employees of the government,[136] Justice Stevens contended that the Court should have recognized the constitutional importance of the distinction between state and private ownership.[137] Unlike state-owned networks, the dissent noted that the First Amendment does not impose a constraint on privately owned stations' journalistic freedom.[138] On the other hand, the dissent asserted that the First Amendment demands more from a state-owned entity whose editorial decisions affect the constitutional interests of political candidates running for elected office.[139] Because AETC is owned by the state, the dissent declared that allowing it to engage in ad hoc decision-making would increase government censorship.[140]

Next, the dissent determined that the First Amendment prohibits the government from arbitrarily defining the scope of the forum.[141] Accordingly, Justice Stevens noted that the government's fail-

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[134] *See id.* at 1645 (Stevens, J., dissenting). Justice Stevens found AETC's exclusion of the only independent candidate troubling because "'political figures outside the two major parties have been 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.'" *Id.* at 1648 n.14 (Stevens, J., dissenting) (quoting Anderson v. Celebrezze, 460 U.S. 780, 794 (1983)) (citing Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 186 (1979)).

[135] *See id.* at 1644, 1646 (Stevens, J., dissenting).

[136] *See id.* at 1646 (Stevens, J., dissenting); *see also supra* note 16 and accompanying text (discussing AETC as a state entity).

[137] *See Forbes*, 118 S. Ct. at 1644, 1646 (Stevens, J., dissenting).

[138] *See id.* at 1646 (Stevens, J., dissenting). The dissent noted that in *Columbia Broadcasting*, the Court held that a licensee is not a public forum "'that must accommodate the right of every individual to speak . . . .'" *Id.* (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973). The dissent, in supporting the view that there should be no constitutional constraint on a private network, discussed how Congress, in the 1920s, chose a system of private ownership instead of public ownership because of the risk of government censorship. *See id.*

[139] *See id.* at 1647 (Stevens, J., dissenting). The dissent contended that once a state-owned broadcaster chooses to sponsor a political debate, the First Amendment places constraints on its ability to control access to the forum. *See id.*

[140] *See id.* The dissent argued that "'[w]e can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor [should the government] ever be placed in the position of censoring this material.'" *Id.* at 1646 n.8 (Stevens, J., dissenting) (quoting *Columbia Broad.*, 412 U.S. at 104) (first alteration in original).

[141] *See id.* at 1647 (Stevens, J., dissenting). Justice Stevens recognized that "'[o]nce [the state] has opened a limited forum, . . . [it] must respect the lawful

ure to set parameters cannot insulate its action from First Amendment scrutiny.[142] Justice Stevens asserted that the relevant issue in this case should not have been whether AETC created a public or a nonpublic forum, but whether AETC defined the boundaries of the debate forum so as to justify the exclusion of a balloted political candidate.[143] Noting that AETC excluded Forbes based on purely subjective standards, the dissent argued that, because AETC chose to sponsor a debate, the First Amendment imposes limitations on its power to regulate access to the public.[144] Finally, given that Forbes had been successful in recent elections,[145] the dissent contended that AETC's decision to exclude Forbes may have been a determining factor in the result of the election.[146]

While *Forbes* expanded the scope of the nonpublic forum to include state-sponsored candidate debates,[147] the Supreme Court continued its trend in denying access to such forums.[148] Not only does *Forbes* reflect the Court's willingness to broaden the nonpublic forum, but it also represents the Court's unwillingness to classify any additional forums as public. As a result, individuals will be dissuaded from bringing actions for fear that their First Amendment claims will be governed by the Court's narrowed public forum analysis.

Labeling a state-organized candidate debate as a nonpublic forum, and thus allowing the government to regulate debate speech, has far-reaching implications for the future of American politics. Given the rise of independent candidates in the political arena, the *Forbes* decision undermines the ability of such candidates to achieve

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boundaries it has itself set.'" *Id.* (quoting Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995)).

[142] *See id.*

[143] *See Forbes*, 118 S. Ct. at 1647 (Stevens, J., dissenting).

[144] *See id.*

[145] The dissent noted that Forbes was a viable Republican nominee for Lieutenant Governor in 1986 and 1990. *See id.* at 1645 (Stevens, J., dissenting). In addition, in the primary race in 1990, Forbes received 46.88% of the votes and won, by absolute majorities, 15 of the 16 counties that comprise the Third Congressional District. *See id.*

[146] *See id.* Justice Stevens recognized that the Republican candidate won the election with 50.22% of the votes and the Democratic candidate received 47.20% of the votes. *See id.* (citing Brief for Petitioner at 172, *Forbes* (No. 96-779)). Because the race was so close, the dissent argued that, with only a few votes, Forbes could have taken away enough votes from the Republican to cause a different outcome in the election. *See id.*

[147] *See id.* at 1643.

[148] *See supra* note 65 (noting Professor Gey's argument that after *Perry*, the state will be able to classify any forum as nonpublic and, in turn, deny access to such forums); *see also supra* note 11 (discussing the Court's reluctance to extend protections to forums outside the traditional realm).

electoral success. Through AETC's exclusion, the government has influenced the political process by denying independent candidates whose political affiliations fall outside the spectrum of the major parties the ability to communicate their views to voters.[149] Consequently, voters will be at a disadvantage because they will not have the information necessary to make an informed decision. As the majority noted, televised political debates offer voters a vital source of information regarding candidates' views and policies.[150] If the state restricts these debates to the major party candidates, voters will not be equipped with full knowledge of political and social issues and non-affiliated party candidates will be unheard.[151]

Because the *Forbes* Court gave a state-owned broadcast station full editorial discretion to limit participation in its debate, the Court has essentially given the government-owned station the power to influence how voters in Arkansas are going to vote.[152] If one follows the

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[149] *See* Brief for Respondent at 10-11, *Forbes* (No. 96-779) (arguing that "the government does not have the power to directly influence an election by subjectively looking at individual candidates, determining their worthiness, and then conferring special benefits on the particular candidate . . . it chooses"); *see also* Anderson v. Celebrezze, 460 U.S. 780, 794 (1983) (arguing that independent candidates are burdened by the "discriminat[ion] against those candidates and — of particular importance — against those voters whose political preferences lie outside the existing political parties") (citing Clements v. Fashing, 457 U.S. 957, 964 (1982)).

[150] *See supra* note 109 and accompanying text (illustrating the impact on voters of a televised debate).

[151] *See Anderson*, 460 U.S. at 794. The *Anderson* Court asserted that

> [b]y limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically, political figures outside the two major parties have been fertile sources of new ideas and new programs . . . .

Id.; *see also* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 894 (1995) (Souter, J., dissenting) (asserting that the government offends the First Amendment when it "allows one message while prohibiting the messages of those who can reasonably be expected to respond"); International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 702 (1992) (Kennedy, J., concurring) (noting that the government is not "to tilt the dialog[ue] heard by the public, to exclude many, more marginal, voices"); Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (asserting that such an exclusion "directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues") (citations omitted); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 (1978) (holding that it is unconstitutional for the government "to give one side of a debatable public question an advantage in expressing its views to the people"); Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976) (contending that "[t]o permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees").

[152] *See* Brief for Respondent at 31, *Forbes* (No. 96-779) (arguing that AETC, in us-

majority's reasoning to its logical end, then any candidate who seems to lack public support can be excluded from the debate.[153] The Court, in giving AETC the ability to exclude candidates based on its own subjective standards, created arbitrary power that can be abused to the detriment of the electoral process. Considering the success that some non-mainstream candidates have recently achieved at the polls,[154] such unchecked discretion can unfairly narrow the range of political debate, derail candidacies before voters have a chance to learn their messages, and unduly influence the outcome of elections. Such an arbitrary power is plainly at odds with the aim of safeguarding "uninhibited, robust, and wide-open" political speech.[155] The Court's failure to extend the public forum to encompass government-sponsored candidate debates has diluted freedom of political expression, the very liberty at the heart of the First Amendment.[156]

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ing its governmental power to support or disfavor candidates by giving only one side of the debate, violated the First Amendment's prohibition against viewpoint discrimination); *see also* Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497, 505 (8th Cir. 1996) (arguing that the question of Forbes's political viability should be left for the voters to decide).

[153] *See* Forbes v. Arkansas Educ. Television Communication Network Found., 22 F.3d 1423, 1428 (8th Cir.) (en banc), *cert. denied*, 513 U.S. 995 (1994) (concluding that if a political candidate does not have a constitutional right of access to a televised debate, then a state-owned station could "exclude all Republicans, or all Methodists, or all candidates with a certain point of view . . . ."); *see also Forbes*, 93 F.3d at 505 (asserting that "[i]f Mr. Forbes can be excluded today, a Republican or a Democrat who is believed to have no chance of success could be excluded tomorrow"); Brief for Respondent at 23, *Forbes* (No. 96-779) (contending that if one accepts AETC's debate as a nonpublic forum, any candidate who has not been successful in a particular district could be excluded for lack of political viability).

[154] On November 3, 1998, Jesse Ventura shocked the nation when he won a three-way race for governor of Minnesota. *See* Dane Smith & Robert Whereatt, *Ventura Wins — Populist Campaign Brings Out Throngs of Young Voters — Historic First for Reform Party*, STAR-TRIB., Nov. 4, 1998, *available in* 1998 WL 6374813. Although best known for being a professional wrestler, Ventura became the first Reform Party candidate in the United States to be elected governor. *See id.* In so doing, Ventura beat out St. Paul Mayor Norm Coleman and Hubert H. Humphrey, the state attorney general and son of a former vice president. *See id.* Surprised by his own victory, Ventura said: "It's overwhelming. We shocked the world . . . . Nobody thought we had a chance." *Id.*

[155] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[156] *See supra* note 5 and accompanying text (contending that political speech is at the core of the First Amendment).