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## Restricting the “Marketplace of Ideas”: Third Parties, Media Candidates, and Forbes’ Imprecise Standards

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## NOTE AND COMMENT

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### RESTRICTING THE “MARKETPLACE OF IDEAS”: THIRD PARTIES, MEDIA CANDIDATES, AND *FORBES*’ IMPRECISE STANDARDS

If a man does not keep pace with his companions,  
perhaps it is because he hears a different drummer.

— Henry David Thoreau, from *Walden*

That’s right, kids. We can beat those guys.

— Jesse Ventura, Minnesota Governor and former  
Reform Party member, nine days  
before he was elected<sup>1</sup>

#### I. INTRODUCTION

History illustrates the impact of third parties<sup>2</sup> on the development of new policies and the testing of new programs, such as the Prohibition Party’s support of women suffrage and the Socialist Party’s struggle against child labor.<sup>3</sup> Reform can only begin outside status quo standards of acceptability.

In June 1992, Arkansas Educational Television Commission (AETC) invited the Republican and Democratic candidates for Arkansas’ Third Congressional District to participate in a televised debate scheduled for

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1. *ABC World News Sunday* (ABC television broadcast, Oct. 25, 1998).

2. For the purposes of this Note, “third party” will be used interchangeably with “minor party” and “independent candidate” to describe candidates who are not members of mainstream political parties.

3. *Greenberg v. Bolger*, 497 F. Supp. 756, 771 (E.D.N.Y. 1980). Another notable third party was the Populist Party, which campaigned for equal rights for men and women. J. DAVID GILLESPIE, *POLITICS AT THE PERIPHERY: THIRD PARTIES IN TWO-PARTY AMERICA* 25 (1993).

October.<sup>4</sup> Two months later, after obtaining the 2,000 signatures required by Arkansas law, Ralph Forbes was certified as an independent candidate qualified to appear on the ballot.<sup>5</sup> The executive director of the agency denied Forbes' request to be included, explaining that "viewers would be best served by limiting the debate" to only the two invited candidates.<sup>6</sup> The one-hour debate allowed approximately fifty-three minutes for the candidates to speak.<sup>7</sup>

Forbes filed suit, and after remand,<sup>8</sup> the District Court entered judgment for AETC.<sup>9</sup> The Circuit Court of Appeals reversed, stating AETC's assessment of Forbes' "political viability" was neither a "compelling nor [a] narrowly tailored" reason for excluding him from the debate.<sup>10</sup> The Supreme Court again reversed, holding that AETC's decision to exclude Forbes from the debate was consistent with the First Amendment.<sup>11</sup>

This Note examines the Supreme Court's opinion in *Arkansas Educational Television Commission v. Forbes*. Part II briefly provides background on the role of third parties, the public forum doctrine, and the requirement that administrative agencies formulate clear standards. Part III summarizes Justice Kennedy's majority opinion in *Forbes* and Justice Stevens' dissent. Part IV criticizes the majority's acceptance of the vague, indefinite standards used both in the language of the public forum doctrine and in AETC's explanation for Forbes' exclusion. Finally, Part V proposes an original solution in light of previously suggested alternatives – legislation containing a two-step analysis of candidate exclusion combined with a multiple-debate format.

## II. HISTORY/BACKGROUND

### A. *Third Parties' Rights*

Citizens who evaluate major-party candidates solely on issues are twenty to twenty-eight percent more likely to support third parties.<sup>12</sup> Third parties

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4. *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

5. *Id.*

6. *Id.* at 671.

7. *Id.* at 670.

8. For a summary of *Forbes*' procedural history prior to remand, see Thomas F. Ackley, *Political Candidates' First Amendment Rights Can Be Trumped By Journalists' Editorial Rights: Candidates Barred From Public Television Debate in Marcus v. Iowa Public Television*, 31 CREIGHTON L. REV. 475, 505 (1998).

9. *Forbes*, 523 U.S. at 672.

10. *Id.* at 672. The Court of Appeals' decision is discussed in greater detail by ACKLEY, *supra* note 8, at 505-509.

11. *Forbes*, 523 U.S. at 683.

12. STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA: CITIZEN RESPONSES TO MAJOR PARTY FAILURE* 164 (2d ed. 1996).

popularize ideas that the major parties ignore and serve as policy innovators.<sup>13</sup> As such, provide a voice for a large number of the electorate and "should not be viewed . . . as outside the [political] mainstream."<sup>14</sup>

Courts have often used strong language to support third parties.<sup>15</sup> In *Anderson v. Celebrezze*,<sup>16</sup> an independent candidate's supporters gathered signatures, filed documents, and submitted filing fees in order to meet the requirements of ballot access.<sup>17</sup> An early filing deadline, applicable only to independent candidates, however, prevented the candidate's name from appearing on the ballot.<sup>18</sup> The Supreme Court held the early deadline unconstitutional:

a state's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism, and it is often true that the best means to that end is to open the channels of communication rather than to close them.<sup>19</sup>

The Court also stated that restrictions on small political parties or on independent candidates "threaten to reduce diversity and competition in the marketplace of ideas."<sup>20</sup>

A similar restriction on the "marketplace" was held unconstitutional in *Williams v. Rhodes*.<sup>21</sup> Election laws required new political parties to obtain petitions signed by qualified electors totaling fifteen percent of the number of

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13. *Id.* at 221-22.

14. *Id.* at 223.

15. *See* *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("A desire to suppress support for a minority party or an unpopular cause [is] plainly illegitimate") and *Fulani v. League of Women Voters*, 882 F.2d 621, 627 (2d Cir. 1989) ("[Campaigns] are used to educate the public, to advance popular ideas, and to protest the political order, even if the candidate has no hope of election.").

16. *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Justice Stevens argued in favor of a minor-party candidate in the majority opinion of *Anderson* as he does in the dissent in *Forbes*, 523 U.S. 666. *See infra* pp. 11-12.

17. *Anderson*, 460 U.S. at 782.

18. *Id.*

19. *Id.* at 798 (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

20. *Id.* at 794. For further discussion on filing deadlines, *see* Fred H. Perkins, *Better Late than Never: The John Anderson Cases and the Constitutionality of Filing Deadlines*, 11 HOFSTRA L. REV. 691 (1983). Although the concept of a "marketplace of ideas" dates back to John Milton in the 18th century, Justice Oliver Wendell Holmes explained the concept in his dissent in *Abrams v. United States*, 250 U.S. 616, 629 (1919):

[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . 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. . . . That at any rate is the theory of our Constitution.

*Id.*

21. *Williams v. Rhodes*, 393 U.S. 23 (1968).

ballots cast in the previous election.<sup>22</sup> An independent candidate met the threshold, but was still denied ballot access due to an early filing deadline.<sup>23</sup> The Court stated that “all political ideas cannot and should not be channeled into the programs of our two major parties,” and warned that the “absence of [minority and dissident] voices would be a symptom of grave illness in our society.”<sup>24</sup>

#### B. *The Public Forum Doctrine and Candidate Exclusion*

While third party views are to be respected, public property is not open for unrestrained free speech.<sup>25</sup> Governmental bodies will often regulate how public events can proceed and may also require applications or permits before a group can have access to a public space.<sup>26</sup> The Supreme Court has established the public forum doctrine to determine when a government’s interest in limiting the use of its property outweighs the interest of those who wish to use it for free speech purposes. Three types of fora exist, each with its own criteria for exclusion.<sup>27</sup>

A traditional public forum is characterized by the objective characteristics of the property, such as whether by tradition, the property has been devoted to assembly and debate.<sup>28</sup> Exclusion must be necessary to serve a compelling state interest and must be narrowly drawn to achieve that interest.<sup>29</sup> For example, the Court stated in *Hague v. CIO*<sup>30</sup> that streets and parks “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.” Streets and parks thus fall into the traditional forum category.

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22. *Id.* at 24-25.

23. *Id.* at 26-27.

24. *Id.* at 39 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)); see also Keith Darren Eisner, *Non-Major Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 990-997 (1993). Eisner discusses ballot access laws and other barriers third parties face, such as the electoral college’s winner-take-all format in presidential elections. Kevin Cofsky argues in favor of strict scrutiny for ballot access laws in *Panning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. PA. L. REV. 353 (1996). A state-by-state listing of the number of signatures that were required by a new party in order to appear on the November 1996 ballot can be found in John F. Persinos, *Third Party Rising?*, CAMPAIGNS & ELECTIONS, Sept. 1995.

25. *United States Postal Serv. v. Council of Greenburgh Civic Ass’n*, 453 U.S. 114, 129 (1981).

26. Private citizens, however, still have a greater right than government to regulate speech on their property. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569-70 (1972).

27. *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 800 (1985).

28. *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

29. *Id.*

30. *Hague v. Committee for Indus. Org. (CIO)*, 307 U.S. 496 (1939).

The second category of fora is the limited, or designated, public forum. The government specifically opens the property for expressive activity by all or part of the public and also intends to make the property "generally available" to a class of speakers.<sup>31</sup> Speakers need not obtain permission to use the property to assert their views.<sup>32</sup> Limited purposes include use only by certain groups, such as student groups,<sup>33</sup> or for the discussion of certain subjects, such as school board business. In a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activity of a certain genre, it may not selectively deny access for other activities of that genre.<sup>34</sup> Any exclusion from a limited public forum is subject to strict scrutiny.<sup>35</sup>

The nonpublic forum is the third category. Courts have not articulated a specific definition of nonpublic fora, but if public property is not a traditional or limited forum, it is either a nonpublic forum or not a forum at all.<sup>36</sup> As stated by the Court, "[the] State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."<sup>37</sup> In other words, the government is not required to open property for expressive activity if the property has traditionally served a different purpose. Any exclusion must be reasonable and not an effort to suppress expression based on the speaker's views.<sup>38</sup>

### C. *The Public Forum Doctrine Generally Does Not Apply to Public Broadcasting*

Broadcasters have a duty to schedule programming that serves the public interest and convenience,<sup>39</sup> which requires them to exercise substantial editorial discretion in the selection of their programming.<sup>40</sup> A large amount of speakers must therefore be excluded. The public forum doctrine usually does not apply to public broadcasting because the many claims that would arise by excluded speakers would require courts to tediously oversee which individuals or groups have had an opportunity to speak.<sup>41</sup>

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31. *Int'l. Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992).

32. *Cornelius*, 473 U.S. at 804.

33. *See Widmar v. Vincent*, 454 U.S. 263 (1981).

34. *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (stating that once a limited forum has been opened, its lawful boundaries must be respected); *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, 692 (2d Cir. 1991).

35. *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990).

36. *Krishna Consciousness*, 505 U.S. at 678-79.

37. *Id.* at 679-80.

38. *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 800 (1985).

39. 47 U.S.C.S. § 309(a) (1998).

40. *Forbes*, 523 U.S. at 674.

41. *Id.*

*Columbia Broadcasting System, Inc. v. Democratic National Committee*<sup>42</sup> tested these principles. A national organization of businessmen who wished to express their views on Vietnam filed a complaint with the Committee, charging that a radio station had refused to sell them time to broadcast a series of one-minute announcements.<sup>43</sup> While acknowledging that balancing First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a "task of great delicacy and difficulty," the Supreme Court held that broadcast licensees had broad journalistic discretion in the area of discussion of public issues and the public interest would not be served by a system affording a right of access to broadcasting facilities for paid editorial ads.<sup>44</sup>

The Court stated that great weight must be afforded to the decisions of Congress and the experience of the FCC.<sup>45</sup> Congress has consistently rejected efforts to impose on broadcasters a "common carrier" right of access for all persons wishing to speak out on public issues.<sup>46</sup> An absolute right of access would implicate the FCC in a case-by-case determination of who should be heard and when, thus enlarging the involvement of the government in broadcasting operations.<sup>47</sup> Substantial risks also accompany a policy of broad access – the system may be monopolized by those who could pay the costs, and public accountability, which now rests with the broadcaster, would be diluted.<sup>48</sup>

The Court thus held that the public has a right to adequate coverage of a range of viewpoints, but not every individual member of the public has a right to broadcast his own particular views on any issue,<sup>49</sup> as could be the case under the public forum doctrine. Providing time for all viewpoints is not only physically impossible, but also antithetical to the purpose of broadcasting; editorial discretion becomes a necessity.

#### *D. Agencies Must Promulgate Definite Standards*

Administrative agencies are accountable for exercising their discretion, however. The existence of an "absolute and uncontrolled discretion" in a

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42. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973).

43. *Id.* at 98.

44. *Id.* at 123-25.

45. *Id.* at 102.

46. *Id.* at 106-09. "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is engaged, be deemed a common carrier. 47 U.S.C. § 153(10) (1998).

47. *Columbia Broadcasting Sys.*, 412 U.S. at 126-127.

48. *Id.* at 124-25.

49. *Id.* at 127.

governmental agency vested with the administration of a vast program would be an "untolerable invitation to abuse."<sup>50</sup> Due process requires that selections among applicants be made in accordance with "ascertainable standards,"<sup>51</sup> and in cases where many candidates are equally qualified under these standards, further selections must be made in some reasonable manner.<sup>52</sup>

In *Shuttlesworth v. City of Birmingham*,<sup>53</sup> an Alabama ordinance stated that anyone who wished to participate in a parade or public demonstration must first obtain a permit.<sup>54</sup> The ordinance also authorized the members of a city commission to refuse to issue a permit if required to do so in order to preserve "public welfare, peace, safety, health, decency, good order, morals, or convenience."<sup>55</sup> Defendant and fifty others were arrested for marching four blocks in protest of the denial of civil rights to African-Americans in Birmingham, Alabama.<sup>56</sup>

The Court held that without "narrow, objective, and definite standards" to guide the licensing authority, the ordinance must be held unconstitutional. Licensing systems cannot vest in an administrative official "discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places."<sup>57</sup>

Similarly, in *Soglin v. Kaufman*,<sup>58</sup> college students protesting the presence of recruiting representatives from an environmental corporation were suspended for misconduct by the Administrative Division of the Committee on Student Conduct and Appeals.<sup>59</sup> The Supreme Court held that rules embodying standards of discipline must be contained in "properly promulgated regulations" and "reasonably clear and narrow rules."<sup>60</sup>

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50. *Holmes v. New York City Housing Auth.*, 398 F.2d 262, 265 (2nd Cir. 1968); *see also* *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964) (stating that "the public has a right to expect its officers to observe prescribed standards").

51. *Hornsby*, 326 F.2d at 612.

52. *Hornsby v. Allen*, 330 F.2d 55, 56 (5th Cir. 1964), (petition for reh'g denied).

53. *Shuttlesworth City of Birmingham*, 394 U.S. 147 (1969).

54. *Id.* at 149.

55. *Id.* at 149-50.

56. *Id.* at 148-49.

57. *Id.* at 150-51, 153; *see also* *Kunz v. New York*, 340 U.S. 290, 293 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

58. *Soglin v. Kaufman*, 418 F.2d 163 (7th Cir. 1969).

59. *Id.* at 165.

60. *Id.* at 167.



## III. ARKANSAS EDUC. TELEVISION COMM'N V. FORBES

A. *Summary of the Majority Opinion*

*Forbes* explores the relationship among third party rights, the public forum doctrine, agency discretion, and agency accountability. Writing for the majority, Justice Kennedy's opinion addressed three primary issues: 1) whether the AETC debate was a forum, 2) if so, which of the three fora was applicable, and 3) whether AETC's decision to exclude Forbes was consistent with the First Amendment.

Kennedy first states that the public forum doctrine, having first arisen in the context of streets and parks, should not be extended to public broadcasting.<sup>61</sup> Any event aired by public broadcast, in other words, should not be considered a forum, and the public forum doctrine does not apply. The doctrine commands open access and viewpoint neutrality.<sup>62</sup> Broad rights of access to speakers by stations, however, would conflict with the editorial discretion stations must exercise in order to fulfill their journalistic purpose.<sup>63</sup> Kennedy states that if the judiciary established a criteria for access, "it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion."<sup>64</sup>

Through an awkward exception, however, Kennedy states that candidate debates are a forum citing two reasons.<sup>65</sup> First, unlike other broadcasts, the debate was "by design a forum for political speech," so any views expressed by the speakers were not the opinions of the station, and broadcasters cannot exclude a candidate from participating because of his views.<sup>66</sup> According to Kennedy, even though unlimited access is not possible, debates meet the requirement of viewpoint neutrality.<sup>67</sup> Second, "candidate debates are of exceptional significance in the electoral process," a process by which the majority of Americans make their voting decisions.<sup>68</sup>

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61. *Forbes*, 523 U.S. at 672. This assertion is consistent with *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), *supra* pp. 6-7 and n.42.

62. *Id.* at 673.

63. *Id.*

64. *Id.* at 674 (relying on *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), *supra* pp. 6-7 and n.42).

65. *Forbes*, 523 U.S. at 675.

66. *Id.*

67. *Id.*

68. *Id.* at 675-76. *See also* *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) (stating 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").

Having decided that candidate debates are a forum, Kennedy then labeled the AETC debate as a nonpublic forum.<sup>69</sup> His analysis focused on the distinction between limited public fora and nonpublic fora.<sup>70</sup> Because AETC first reserved eligibility for participation in the debate only to candidates for the Third Congressional District seat, and then made candidate-by-candidate determinations as to which of the eligible candidates would participate, Kennedy concludes the debate was a selectively-accessed nonpublic forum.<sup>71</sup> He then criticized the Court of Appeals' holding as a "misapplication of precedent" that would result in "less speech, not more."<sup>72</sup> According to Kennedy, if all ballot-qualified candidates are required access, then broadcasters, facing the choice of chaos of First Amendment liability, may choose to not air any debates.<sup>73</sup>

The third and final portion of the majority opinion assessed whether Forbes' exclusion was based on his views, and thus a violation of his First Amendment rights.<sup>74</sup> Any exclusion must be reasonable.<sup>75</sup> Susan Howarth, the executive director of AETC, testified that Forbes was excluded for four reasons: 1) neither Arkansas voters, nor the news media, considered him a serious candidate, 2) the Associated Press and a national election result reporting service did not plan to run his name in results on election night, 3) Forbes had little, if any, financial support, and 4) the only campaign headquarters were at the candidate's house.<sup>76</sup> Howarth concluded that Forbes was not "newsworthy" enough to be invited to the debate.<sup>77</sup>

Kennedy states that "[i]t is, in short, beyond dispute that Forbes was excluded not because of his viewpoint, but because he had generated no appreciable public interest."<sup>78</sup>

#### B. Summary of Stevens' dissent

Justice Stevens criticizes AETC for an "ad-hoc decision" which "does not adhere to well-settled constitutional principles."<sup>79</sup> He cites specific facts that appear to undermine AETC's credibility. Just two years before the exclusion, Forbes had received 46.88% of the statewide vote and had carried fifteen of the

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69. *Forbes*, 523 U.S. at 680.

70. *Id.* at 678-80. Both parties agreed that the debate was not a traditional public forum. *Id.* at 679.

71. *Id.* at 680.

72. *Id.*

73. *Forbes* at 681.

74. *Id.* at 682.

75. *Forbes*, 523 U.S. at 682.

76. *Id.*

77. Brief for Petitioner at 3; *Forbes*, 523 U.S. at 666.

78. *Forbes*, 523 U.S. at 682.

79. *Id.* at 684.

sixteen counties within the Third Congressional District by absolute majorities.<sup>80</sup> In two of the other three districts in which both major party candidates had been invited to debate, one of them had virtually no chance of winning, and raised even less money than Forbes.<sup>81</sup> Furthermore, the winner of the election only received 50.22% of the vote, so the decision to exclude Forbes, who could have taken votes away from either side, may have determined the outcome of the election.<sup>82</sup>

Stevens thus states that AETC staff had nearly limitless discretion to exclude Forbes, and the majority's opinion is based on broad, subjective, and indefinite standards.<sup>83</sup> There were no written criteria to guide AETC's decision to exclude, and certain factors could favor inclusion as well as exclusion. Forbes' lack of financial support, for example, may be reason for allowing him to share a free forum with wealthier candidates.<sup>84</sup>

Stevens also explains the constitutional importance of the distinction between state ownership and private ownership of broadcast facilities.<sup>85</sup> Public ownership creates unacceptable risks of governmental censorship and use of media for propaganda, and the First Amendment prohibits the vesting of broad unbridled discretion in a governmental official.<sup>86</sup> Furthermore, a privately-owned network would be subject to scrutiny under the Federal Election Campaign Act unless the network used "pre-established objective criteria to determine which candidates may participate in [the] debate."<sup>87</sup>

Regarding the public forum doctrine, Stevens states that televised debates may not fit such an analysis, and the First Amendment will not tolerate arbitrary definitions of the scope of the forum.<sup>88</sup> Under the Court's reasoning, however, it created a designated public forum if the AETC invited either the entire class of "viable" or "newsworthy" candidates.<sup>89</sup> Stevens ends by again emphasizing that pre-established, objective criteria should govern access to political debates managed by state-owned entities.<sup>90</sup>

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80. *Id.* at 684-85.

81. *Id.* at 686 n.6. Democrat Ray Thornton, the incumbent, defeated Republican Dennis Scott by winning 74.2% of the vote. Scott also raised only \$6,000 (the amount Forbes raised was not stated). *Id.*

82. *Id.* at 685.

83. *Id.* at 686.

84. *Id.* at 692.

85. As Stevens notes, the majority gives very little treatment to the distinction between private and state-owned broadcast facilities. *Id.* at 684.

86. *Forbes*, 523 U.S. at 688.

87. *Id.* at 685.

88. *Id.* at 692, 690.

89. *Id.* at 694 n.18. The terms "politically viable" and "newsworthy" are indistinguishable. *Marcus v. Iowa Public Television*, 97 F.3d 1137, 1144 (8th Cir. 1996) (Beam, J., dissenting).

90. *Forbes*, 523 U.S. at 694-95 (relying on *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969)).

## IV. PROBLEMS WITH THE MAJORITY OPINION

A. *Application of Vague Standards*

Kennedy claims that the public forum doctrine usually does not apply to public broadcasters because they will be subject to a number of claims of viewpoint discrimination.<sup>91</sup> But such claims are directly attributable to the vague standards of the doctrine. The doctrine thus should not apply, but for different reasons. As seen in *Forbes*, words such as "compelling state interest," "reasonable," and "viewpoint discrimination" are open to simple manipulation, which then subjects the marketplace of ideas to confinement.<sup>92</sup>

Kennedy's two reasons for applying the doctrine are as indefinite as the doctrine itself. First, he claims there will be "minimal intrusion" by the broadcaster on speakers' views during the debate.<sup>93</sup> But such a standard ignores the critical initial step of candidate exclusion. Lack of intrusion during the debate does not help candidates who have been denied access. Second, Kennedy cites the importance of candidate debates in the electoral process as a justification for the application of the public forum doctrine.<sup>94</sup> The importance of the debate, however, provides ample reason to not apply the ad-hoc exclusion standards of the doctrine. Flexible standards can easily exclude meaningful candidates. The debate demands fair and objective exclusion criteria in order to minimize the risk of unfair speech suppression.

Howarth's conclusion about *Forbes*' "newsworthiness" was held to be both reasonable and not based on the candidate's political views, and therefore passed the nonpublic forum exclusion requirements.<sup>95</sup> A determination of a speaker's "newsworthiness" without specific criteria, however, is an impermissible content-based standard. Professor Barbara Mack of Iowa State University provides a definition of "newsworthiness":

When I teach freshmen journalists about what is meant by newsworthiness, what makes someone newsworthy, you talk about the quality that person or that news event has. Is that news event going to have an impact on the people who read your newspaper or who watch your television station? Is it going to change their lives? Does it have the potential to change their lives? Is it

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91. *Id.* at 674.

92. Frederick Schauer expresses a similar view in *Principles, Institutions and the First Amendment*, 112 HARV. L. REV. 84 (1998). Schauer believes that applying the unclear public forum doctrine probably is not appropriate in this case. First Amendment law distrusts particularity, however, and broad rules are considered necessary for a strong First Amendment. *Id.* at 111.

93. *Forbes*, 523 U.S. at 675.

94. *Id.* at 676, noting that debates are regarded as the only occasion during a campaign when the attention of a large portion of the American public is focused on the election.

95. *Id.* at 682.

something which is a public conflict? Conflict is one of our classic news values. Impact is a classic news value.<sup>96</sup>

A judgment of a candidate's "quality" can only be subjective. Focus on "conflict," "impact," and "news values" de-emphasizes issues, and voter knowledge in favor of the status-quo. But the high level of disinterest toward politics among many Americans indicates the need to reform the status-quo. Despite an estimated increase in voter registration to an estimated 128 million, and record amounts of money spent in the 1996 election, voter turnout in 1996 was only an estimated 48.8% of eligible voters, the lowest turnout since 1924 and the second lowest since 1824.<sup>97</sup> Since 1980, when the modern presidential debates began, voter turnout as a percentage of eligible Americans who voted each year since 1960 shows a declining trend in all years except 1992, when Reform Party candidate Ross Perot challenged the major parties and was included in the presidential debates.<sup>98</sup> A reason for voter apathy is the lack of alternative candidates to choose from.<sup>99</sup>

Two examples from the 1988 and 1992 presidential campaigns illustrate the negative effect of a "newsworthy" standard on voter education. During a campaign speech, Vice President George Bush incorrectly referred to September 7 as the anniversary of the Japanese bombing of Pearl Harbor.<sup>100</sup> Bush's misstatement received six paragraphs of coverage in both *The New York Times* and the *Washington Post* and eight paragraphs in the *Los Angeles Times*.<sup>101</sup> Policy issues rarely receive such a high level of attention. Similarly, during the 1992 campaign, Governor Bill Clinton's first major statement on the economy occurred the same day that Senator Bob Kerrey, running against Clinton, whispered a sexual joke during a political roast.<sup>102</sup> A microphone

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96. Professor Mack provided the definition of "newsworthiness" during her testimony as an expert witness for Iowa Public Television in *Marcus v. Iowa Public Television*, 97 F.3d 1137, 1143 (1996).

97. Nearly 68% of eligible voters were registered in 1996, the highest percentage since 1968. *Nearly half of the eligible voters won't go to the polls, experts say*, available at Nando.net, <http://www.nando.net/nt/Elex96/11.1.96/1101eligible.html>.

98. The 1992 debates boosted support for Perot. He stood at 13% in the polls before the debates, but had risen to 19% after the third debate. During the first debate, in fact, the dial groups for both President George Bush and Governor Bill Clinton recorded more positive ratings when Perot spoke than had ever been seen before. The general consensus was that Perot had won the debate, followed by Clinton, then Bush. NELSON W. POLSBY & AARON WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES IN AMERICAN POLITICS*, 211, 232 (9th ed. 1996). One of the dangers of excluding candidates is the deligitimization they suffer. Eisner, *supra* note 24. After exclusion, the public will likely assume that third party candidates are not capable of effective performances.

99. POLSBY & WILDAVSKY, *supra* note 98, at 274.

100. THOMAS E. PATTERSON, *OUT OF ORDER* 152 (1994).

101. *Id.*

102. *Id.* at 148.

leaning toward Kerrey picked up the joke and it became the major story of the day.<sup>103</sup> Clinton's speech received minimal coverage while *The Washington Post* devoted four stories and an editorial to Kerrey's joke.<sup>104</sup> Both incidents likely fit Professor Mack's criteria for newsworthiness because of their "impact" and "conflict," but at the same time, coverage of such events reduces politics to a caricature devoid of substance.

Programs and policies have become less "newsworthy" than tabloid sensationalism. A public "politically socialized" or conditioned to seek entertainment loses interest in issue explanation.<sup>105</sup> "Policy issues, on the other hand do not 'happen;' they merely exist [and] generally remain static."<sup>106</sup> As consultant William Zimmerman states: "TV demeans the news . . . by presenting only cursory glances at substantive world events while reserving hours for in-depth coverage of the weather. Is it any wonder that negative ads work in such an environment?"<sup>107</sup>

By excluding Forbes based on his lack of "newsworthiness," AETC implicitly claims the debate will be more "newsworthy" without his participation. The logic of the opinion, which supports AETC's decision, thus rests on the dangerous assumption that minor party voices only distract from mainstream views, rather than significantly contribute to political dialogue. For an issue to change citizens' voting habits, it must reach a high degree of salience for the voter.<sup>108</sup> The Socialist Party was known for its support of women suffrage and twenty years before the Civil War, the Liberty Party struggled against slavery.<sup>109</sup> These third parties ultimately fought to raise issues to a higher level of voter saliency, the first step to change.<sup>110</sup>

Specifically, collective change begins with voters who only pay a moderate amount of attention to politics.<sup>111</sup> Those who are most attentive likely identify themselves with a party and will overwhelmingly support that party's position.<sup>112</sup> Voters who pay little or no attention to politics on the other hand,

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103. *Id.*

104. *Id.* Clinton's speech received coverage in one story on the fourth page of the *Washington Post*. *Id.*

105. "Political socialization" is the process by which an individual receives societally approved attitudes toward politics. KEVEN V. MULCAHY & RICHARDS S. KATZ, *AMERICA VOTES: WHAT YOU SHOULD KNOW ABOUT ELECTIONS TODAY* 92 (1976).

106. BARBARA G. SALMORE & STEPHEN A. SALMORE, *CANDIDATES, PARTIES, AND CAMPAIGNS: ELECTORAL POLITICS IN AMERICA* 149 (2d ed. 1989).

107. *Id.* at 161.

108. POLSBY & WILDAVSKY, *supra* note 98, at 20.

109. GILLESPIE, *supra* note 3, at 24, 27.

110. Female suffrage later became part of both the Democratic and Republican party platforms in 1916, and the 19th Amendment granting women the right to vote was passed in 1920. *Id.* at 27.

111. POLSBY & WILDAVSKY, *supra* note 98, at 21.

112. *Id.*

also cannot be persuaded because of their refusal to think about or analyze issues.<sup>113</sup> The moderate voter is thus open to persuasion, but most citizens are not well informed about the details of issues.<sup>114</sup> Not surprisingly, voters tend to have more years of formal education than non-voters; an understanding of issues and policy makes politics “less threatening and more interesting.”<sup>115</sup>

Debates educate. Third parties thus become valuable additions, the teachers who are not guided by pressure from constituents or the need to engage in strategic wordplay. Minor parties can “tell it like it is,” thereby bringing more citizens into the political arena by increasing their awareness and grasp of issues.<sup>116</sup> By reaching out to the moderate voter through information, a change in public consciousness can eventually occur.

Allowing a “newsworthiness” standard to meet the requirement of neutral exclusion as required by the public forum doctrine also guarantees the exclusion of most third party candidates. Media access, which leads to “newsworthiness,” will often be difficult because, unlike Republicans or Democrats, minor parties do not enjoy the benefits of large donations<sup>117</sup> or historical success.

Guided by vague standards, *Forbes* could signal a significant erosion of *Anderson’s* support for third parties. The need for more objective standards in order to protect the “marketplace of ideas” has never been more important.

*B. Even if the Public Forum Doctrine Applies, the Debate was a Limited Public Forum*

Limited public fora are designed only for use by certain groups.<sup>118</sup> AETC’s invitation to ballot-qualified candidates for Arkansas’ Third Congressional District only meets the requirement of a limited group, of which *Forbes* was a member.

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113. *Id.*

114. *Id.*

115. GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 87 (4th ed. 1997). *See also*, MULCAHY & KATZ, *supra* note 105, at 23 (stating that “[t]he interested person is more likely to vote”).

116. *See* Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331 (1998).

117. Money dominates major party politics today because it is considered necessary to win elections. *See* Meg Greenfield, *The First Qualification*, NEWSWEEK, Mar. 8, 1999, at 74 (stating that “It’s no longer whether candidates are fit to hold office. It’s their ability to raise money.”); Jonathan Alter & Michael Isikoff, *The Real Scandal is What’s Legal*, NEWSWEEK, Oct. 28, 1996, at 4-5 (listing the largest soft money donors to Democrats and Republicans); Michael Duffy and Viveca Novak, *The New Money Game*, TIME, Nov. 2, 1998; David Van Biema, *What Money Can Buy*, TIME, June 20, 1994.

118. *Widmar v. Vincent*, 454 U.S. 263 (1981).

AETC "already decided to give over its airwaves to political contenders for [elected] office"<sup>119</sup> by inviting the two candidates. One "genre" was therefore included, and AETC was not free to deny access to activities in the same "genre."<sup>120</sup> The indefinite standards of the doctrine again become apparent. The Court disregards the limited public forum requirement of equal access for all members of a certain class once the government grants access to one member. If *Forbes*, a member of a limited class of speakers, is denied access, then how is one to determine the difference between a limited public forum and a nonpublic forum? Nonpublic fora are defined awkwardly as "not limited fora,"<sup>121</sup> but in *Forbes*, the Court claims a limited fora is nonpublic. This redefinition of the public forum doctrine will only lead to greater confusion.

AETC also urged the Court to treat the debate not as a public forum, but as a form of editorial reporting, which would enable them to "edit" candidates.<sup>122</sup> Journalism, however, only observes and reports on those issues it feels are most important. A debate, on the other hand, is based on political dialogue – the exchange of ideas, arguments, questions, and answers. Although the Court does not comment on AETC'S argument, the comparison is a flawed one that does not realistically assess the nature of candidate debates.

## V. A POSSIBLE SOLUTION

### A. *Legislation Modeled After the Federal Election Campaign Act*

Privately-owned broadcasters must follow guidelines set forth in 11 C.F.R. 110.13, which requires written, objective criteria for candidate exclusion.<sup>123</sup> The commentary to the section states:

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119. *Chandler v. Georgia Public Telecomm. Comm'n*, 917 F.2d 486, 493 (11th Cir. 1990) (Clark, J., dissenting).

120. *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, 692 (2d Cir. 1991).

121. *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678-679.

122. Brief for Petitioner, *supra* note 77, at 23.

123. *Forbes*, 523 U.S. at 685. As Justice Stevens notes in his dissent, Federal Election Commission Regulations, 11 C.F.R. 110.13, Candidate Debates provides:

(b) Debate Structure. The structure of debates staged in accordance with this section and 11 C.F.R. 114.4(f) is left to the discretion of the staging organization(s), provided that:

(1) Such debates include at least two candidates: and

(2) The staging organization(s) does not structure the debates to promote or advance one candidate over another.

(c) Criteria for Candidate Selection. For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For 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 debate. For debates held prior to a primary election, caucus or convention, staging organizations may restrict candidate participation to candidates seeking the nomination of one party, and need not stage a



those staging debates would be well advised to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate. This will enable staging organizations to show how they decided which candidates to invite to the debate.<sup>124</sup>

After *Forbes*, Congress should require public broadcasters to adhere to the same specifications.

The legislation should specifically, state, however, that “reasonable” or “newsworthiness” will not pass as objective criteria. Previous suggestions for such criteria include tighter restrictions on ballot access laws, with all ballot-qualified candidates allowed access to debates, and access for any candidate who qualifies for matching funds.<sup>125</sup>

Following *Anderson’s* theory of respect for third party views, candidates should not be excluded if: 1) they have shown sufficient public support through either the stated previous suggestions, petition signatures, previous election history, evidence of national organization, or findings of significant public opinion polls, and 2) the candidate’s participation will enhance the voters’ understanding of the issues.

The first requirement incorporates “newsworthiness” with fairness. Rather than focusing on relatively insignificant factors such as the location of a candidate’s headquarters, as AETC did with *Forbes*, broadcasters would now consider the public’s support for a candidate’s stand on the issues. The second requirement, although stated broadly, eliminates any fringe candidate such as a celebrity, who passes the first prong of the test, but is concerned with publicity rather than policy.<sup>126</sup> Additionally, its basis lies in the important notion that

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debate for candidates seeking the nomination of any other political party or independent candidates.

124. Federal Election Commission, 60 Fed. Reg. 64, 261 (1995).

125. The related topic of fusion, the nomination of the same candidate by the major party and a third party may be necessary for third party survival, according to James Gray Pope, *Fusion, Timmons v. Twin Cities Area New Party, and the Future of Third Parties in the United States*, 50 RUTGERS L. REV. 473 (1998). For proposed legislation that would require candidates to receive free airtime, see Jeffrey A. Levinson, *An Informed Electorate: Requiring Broadcasters to Provide Free Airtime to Candidates for Public Office*, 72 B.U.L. REV. 143 (1992).

126. Jesse “The Body” Ventura, a celebrity and former professional wrestler, stood at 23% in the polls in Minnesota’s gubernatorial race two days before the election. The major party candidates, Democrat Hubert Humphrey III and Republican Norm Coleman were not far ahead at 36% and 33% respectively. Ventura, running for the Reform Party, would have easily passed the first requirement of public support. As for the second requirement, commentators noted Ventura’s “knowledge” and “intellect” concerning the issues despite his unorthodox television ads and general demeanor. He thus would pass both elements and be allowed to participate in debates, as was the case. According to commentators, the debates “significantly increased his legitimacy.” *CNN Late Edition* (CNN television broadcast, Nov. 1, 1998).

Ventura was elected on November 3, 1998, proving that third parties can have an impact even when not expected to. Ventura also revived citizens’ interest, many who would have “sat out the election if he hadn’t run.” *CBS This Morning* (CBS television broadcast, Nov. 5, 1998).

even a candidate who is not likely to win serves a legitimate purpose within the electoral scheme.

Similar to the Federal Election Act, broadcasters should reduce all decisions to writing and provide copies for the candidates. Both prongs should be explained in order to facilitate efficient campaigns in the future.

### B. *Multiple Debates*

An objection to the proposed legislation will likely be that too many candidates will be allowed access. Consistent with *Anderson*, restricting the marketplace of ideas because of too many ideas is illogical. Expanding the time to express those ideas, however, increases political debate and voter knowledge. Unlike saturated media coverage, televised debates provide the unusual experience of candidates explaining issues directly to voters. A public weary of politics often settles for campaign rallies and media sound-bites as sufficient information. However, respect not only for the candidate, but for the constituents the candidate will affect through his elected position, justifies an increase in the number of debates if necessary. AETC staff limited its one debate in *Forbes* to fifty-three minutes of total candidate speech, an average of twenty-six minutes each.<sup>127</sup> The debate could conveniently be completed in one hour, but undoubtedly left many issues unexplored. Only more time for all candidates to speak can fill the deficit of information created by the media.<sup>128</sup> In 1960, for example, approximately 54% of the election stories on the front page of *The New York Times* were framed within the context of policy and issues.<sup>129</sup> In 1992, however, only 15% were based on policy, while the remaining 85% were based on "strategy and electoral success."<sup>130</sup> Similarly, the average length of candidate quotes in 1992 news articles (6 lines on the front page) was less than half the average length in 1960 (14 lines on the front page).<sup>131</sup> The trend toward less speech and greater voter apathy becomes a cycle that reinforces itself – the less the public hears about politics, the less they care, and vice versa. Providing better, honest discussion is therefore one way to stop the cycle.

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127. *Forbes*, 523 U.S. at 670.

128. In the rare situations where an unmanageable number of candidates qualify for a debate, the government broadcaster can create content-neutral time, place, and manner rules. See *McGlynn v. New Jersey Public Broadcasting Auth.*, 439 A.2d 54, 62 (N.J. 1981) (stating that a statutory access provision permits the government broadcaster flexibility to determine the manner in which candidates will debate if the number is unwieldy).

129. PATTERSON, *supra* note 100, at 74.

130. *Id.*

131. *Id.* at 76. Why has the media become so cynical toward politicians? The question is beyond the scope of this Note, but Patterson provides an interesting answer by focusing on two major events of the twentieth century – Vietnam and Watergate. *Id.* at 19.

## VI. CONCLUSION

Public apathy toward politics, and specifically, toward the two major parties, illustrates the importance of minor party voices. A recent Maricopa Research Inc. poll found that more than 60% of Americans favor the formation of a new political party.<sup>132</sup> As cynical media coverage continues to cover political games such as stubborn gridlock, sex scandals, and mudslinging, underlying issues are treated as less important. Not surprisingly, then, media often labels minor party candidates who wish to discuss such issues as lacking in “news value” and “impact,” resulting in a reversal of political, media, and societal values. The tendency to silence the less “newsworthy” becomes the logical next step.

The Supreme Court has unfortunately expressed its support for such an ideology. Not all candidates can be allowed to debate, yet *Forbes* allows for easy exclusion of practically any third party voice. The proposed legislation attempts to realign reversed political thought through a respect for candidates outside the mainstream. As the recent polls indicate, many potential voters sense the need for this change, and with 58% of Democrats and 52% of Republicans even favoring the formation of a third party,<sup>133</sup> perhaps politicians would not be as cynical about the idea as most media gurus would undoubtedly claim.

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132. Tiffany Danitz, *A Warming Trend for Third Parties?*, INSIGHT OF THE NEWS, Jan. 12, 1998, at 22.

133. *Election '96 Internet Report*, USA TODAY, Aug. 23, 1996.