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NOTES

ODD MAN OUT: POLITICAL DEBATES AND THE FIRST AMENDMENT AFTER *ARKANSAS EDUCATIONAL TELEVISION COMMISSION V. FORBES*

The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment.¹

I. INTRODUCTION

One of our nation's fundamental principles is the right to speak freely and express oneself without fear of retribution.² This right is essential to a successful democratic society.³ It became part of our Constitution in 1771 as the First Amendment in the Bill of Rights.⁴

1. *Forbes v. Arkansas Educ. Communication Network Found.*, 22 F.3d 1423, 1426 (8th Cir. 1994), *rev'd*, 118 S. Ct. 1633 (1998).

2. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877 (1963); see also *New York Times Co. v. Sullivan*, 367 U.S. 254, 269 (1964) (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931), noting: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

3. Emerson, *supra* note 2, at 883 (noting that "the right of all members of society to form their own beliefs and communicate them freely to others must be regarded as an essential principle of a democratically-organized society" and further that "freedom of expression . . . is indispensable to the operation of a democratic form of government.").

4. U.S. CONST. amend. I. The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for the redress of grievances." *Id.*

Freedom of speech and expression has particular significance in the area of political action,⁵ and one of the core First Amendment values is the protection of political speech.⁶ This concept was profound at the inception of the First Amendment.⁷ The Supreme Court has noted that the “Framers of the Bill of Rights were most anxious to protect—speech that is ‘indispensable to the discovery and spread of political truth.’”⁸ Since then the Supreme Court has shown on several occasions that political speech enjoys particular significance with regard to the First Amendment right to free speech.⁹ Accordingly, the Court has held that “[t]he First Amendment ‘has its fullest and most urgent application precisely to the conduct of campaigns for political office.’”¹⁰ The Court has, therefore, consistently respected our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹¹ The Court further emphasized that:

[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we are to follow as a nation. . . . [So] it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.¹²

Difficult questions arise, however, when the First Amendment rights of some individuals clash with the First Amendment rights of others. In these situations, the Supreme Court has been called upon to reconcile the rights of both parties. For instance, over the last several decades, the Supreme Court has struggled to balance the First Amendment rights of individuals with the First Amendment rights of the press.¹³ Although freedom of the press is well established in our Constitution, and broadcasters are not without protection under the First Amendment, the Supreme Court has made it clear that “it is the right of the viewers and listeners, not the right of the broadcasters, which is

5. Emerson, *supra* note 2, at 883.

6. Chandler v. Georgia Pub. Telecomms. Comm’n., 917 F.2d 468, 493 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991).

7. FCC v. League of Women Voters, 468 U.S. 364, 383 (1984) (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

8. *Id.*

9. See *supra* notes 1 & 8, and accompanying text; see *infra* notes 10-12 and accompanying text.

10. CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

11. New York Times Co. v. Sullivan, 376 U.S.254, 270 (1964) (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949) and De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

12. Kennedy for President Comm. v. FCC, 636 F.2d 417, 430 (quoting Buckley v. Valeo, 424 U.S. 1, 14-15 (1976); and *Monitor Patriot Company*, 401 U.S. at 272).

13. See *infra* notes 84-123 and accompanying text.

paramount.”¹⁴ In *Arkansas Educational Television Commission*¹⁵ v. *Forbes*,¹⁶ the Supreme Court was faced with the difficult task of weighing the First Amendment right of an Arkansas congressional candidate to be included in a televised debate, against the First Amendment right of a state-owned television station to broadcast a debate with candidates it believed, in its journalistic discretion, best satisfied the interests and needs of its audience.¹⁷

The Arkansas Educational Television Commission (“AETC”), a state-owned government broadcaster, excluded Ralph Forbes from a political debate it broadcasted in anticipation of the 1992 election for the Third Congressional District of Arkansas.¹⁸ Forbes, an independent “ballot qualified”¹⁹ candidate, was excluded from the debate by AETC because the station concluded that he did not have the appropriate “political viability” to participate.²⁰ Forbes filed suit against AETC claiming that his rights were violated *under* the First Amendment and 47 U.S.C § 315.²¹ He sought injunctive and declaratory relief as well as compensatory damages.²²

14. See Vincent Blasi, *The Checking Value in the First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523, 613 (1997); U.S. CONST. amend. I; *Columbia Broadcasting System Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973) (quoting *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969) and citing *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948)).

15. The Arkansas Educational Television Commission is an “Arkansas state agency owning and operating a network of five noncommercial television stations (Arkansas Educational Television Network or AETN). The eight members of AETC are appointed by the Governor for 8-year terms and are removable only for good cause. . . . AETC members are barred from holding any other state or federal office, with the exception of teaching positions.” *Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633, 1637 (1998) (citing ARK. CODE ANN. §§ 6-3-102(a)(1), (3) (Michie Supp. 1997)).

16. Ralph Forbes is a “former American Nazi Party member who now calls himself a Christian supremacist.” Roger K. Lowe, *Public Stations Can Exclude Candidates*, *High Court Rules*, THE COLOMBUS DISPATCH, May 19, 1998, at 9A.

17. *Arkansas Educ. Television Comm’n v. Forbes*, 118 S. Ct. 1633.

18. *Id.* at 1637.

19. *Id.* According to Arkansas law, in order to become a “ballot qualified” candidate, to have your name qualified to appear on the ballot for the Third Congressional District seat, the candidate must “file petitions signed by at least three percent of the qualified electors in the district in which he is seeking office, provided, however, that no more than 2000 signatures are required.” *Forbes v. Arkansas Educ. Television Comm’n (“Forbes II”)*, 93 F.3d 497 at 500 (8th Cir. 1996) (citing ARK. CODE ANN. §7-7-103(c)(1) (1993) *rev’d*, 118 S. Ct. 1633).

20. *Id.* at 1638.

21. *Id.* 47 U.S.C. § 315 provides in pertinent part: “If any licensee shall permit any person who is legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station”

22. *Forbes*, 118 S. Ct. 1633.

The United States Supreme Court, in a 6-3 decision, held that AETC's exclusion of Forbes from the debate "was a reasonable, viewpoint neutral exercise of journalistic discretion consistent with the First Amendment."²³

This note analyzes the Supreme Court's ruling in *Forbes*. More specifically, it argues that AETC's exclusion based on "political viability" was a pretext for its viewpoint discrimination. Part II explains the development of non-commercial broadcasting and how the Supreme Court has decided access-related First Amendment issues using the public forum doctrine.²⁴ Part III presents the facts and procedural history of *Forbes* and discusses the majority and dissenting opinions.²⁵ Part IV contains the author's analysis of the decision.²⁶ The Note concludes by suggesting that Forbes' effect will be far-reaching and detrimental to independent candidates.²⁷

II. HISTORY

A. *A historical perspective of non-commercial educational broadcasting and its regulation.*

"The history of noncommercial, educational broadcasting in the United States is as old as broadcasting itself."²⁸ In the beginning of broadcast regulation, in 1912, the Federal Radio Commission ("FRC") was the authority over broadcasters.²⁹ It was not until 1934 that the Federal Communication Commission ("FCC"), the main broadcasting authority today, took over broadcast regulation.³⁰ During the first few decades of broadcast regulation, Congress regulated commercial and non-commercial broadcasters in the same manner.³¹ The Radio Act of 1927 followed by the Communications Act of 1934 laid the foundation for modern broadcast regulation.³² Under this legislation, non-commercial educational broadcasting stations were subject to

23. *Id.* at 1637.

24. *See infra* notes 28-123 and accompanying text.

25. *See infra* notes 124-272 and accompanying text.

26. *See infra* notes 273-90 and accompanying text.

27. *See infra* notes 291-93 and accompanying text.

28. *League of Women Voters*, 468 U.S. at 367 (citing S. FROST, EDUCATION'S OWN STATIONS 464 (1937)).

29. Gayle S. Ecabert, Comment, *The Demise of the Fairness Doctrine: A Constitutional Reevaluation of Content-Based Broadcasting Regulations*, 56 U. CIN. L. REV. 999, 1004 (1987).

30. Adrian Cronauer, *The Fairness Doctrine: A Solution in Search of a Problem*, 47 FED. COMM. L.J. 51, 58-59 (1994).

31. *Id.* at 367.

32. *See* Ecabert, *supra* note 29, at 1004; Radio Act of 1927, ch. 169, 44 Stat. 1162; Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064 (1934).

the same licensing, renewal, and programming requirements as their commercial counterparts.³³

In the early years of broadcast regulation, the FCC imposed a set of regulations known as the “fairness doctrine” to protect the interests of the listeners by guaranteeing diversity in what was being broadcast.³⁴ This doctrine required broadcasters to represent all sides of issues that were of public importance.³⁵ The concept of fair treatment of important issues was raised in the early national radio conferences and actually predated the enactment of the 1927 radio legislation.³⁶ As implemented in 1927, the doctrine contained an equal opportunity provision for qualified candidates.³⁷ Sixty years later, many thought that the fairness doctrine had become unnecessary due to the expanded marketplace and media outlets.³⁸ As a result, the doctrine was dropped in 1987.³⁹

Today, 47 U.S.C. § 315 provides that “[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.”⁴⁰

33. *League of Women Voters*, 486 U.S. at 367.

34. 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, 484 (citing DOM CARISTI, EXPANDING FREE EXPRESSION IN THE MARKETPLACE: BROADCASTING AND THE PUBLIC FORUM 74-75 (1992)); see Ecabert, *supra* note 29, at 1000 (citing D. PEMBER, MASS MEDIA LAW 584-601 (4th ed. 1987) (discussing Fairness Doctrine); see also 47 C.F.R. § 73.1910 (1986) for the administrative regulations implementing the Fairness Doctrine).

35. Ecabert, *supra* note 29, at 1004.

36. Fourth National Radio Conference Proceedings & Recommendations for Regulation of Radio 6 (Washington D.C. Nov. 9-11, 1925).

37. Ecabert, *supra* note 29 at 1005; H.R. REP. NO. 69-1886 (1927). Section 18 as enacted provides:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office . . . and the Commission shall make rules and regulations to carry this provision into effect; provided, that such a licensee shall not have power of censorship over the material broadcast under the provisions of the section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

44 Stat. 1162, sec. 18 (1927).

38. Cronauer, *supra* note 30, at 51.

39. *Id.*

40. 47 U.S.C. § 315 (1994). Section 315 further provides:

Appearance by a legally qualified candidate on any—

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary, or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political

In the 1930s, commercial broadcasting expanded greatly and the number of non-commercial broadcasters began to shrink.⁴¹ As a result, in 1939, recognizing the trend toward commercial broadcasting and realizing that commercial pressures could eventually take over educational stations, the FCC decided to step in and reserve certain frequencies for educational radio.⁴² Six years later, the FCC allocated twenty radio frequencies on the FM spectrum exclusively for educational use.⁴³ Similarly, with the advent of television in 1952, the FCC reserved the use of certain television channels for the sole purpose of educational programming.⁴⁴ During this period, several non-commercial educational stations developed.⁴⁵ State and local governments funded some of these stations; foundation grants and private donations funded others; and Congress, in 1962, began providing direct financial assistance to non-commercial broadcasters.⁴⁶

Congress, via the Educational Television Act of 1962, authorized the former Department of Health, Education, and Welfare to distribute \$32 million in matching grants over a five-year period to be used for the construction of non-commercial television facilities.⁴⁷ Five years later, in 1967, a special commission was formed to review the state of federal broadcasting.⁴⁸ The commission found that local stations were hobbled by chronic under-financing.⁴⁹ The commission decided that in order for non-commercial educational broadcasters to survive as a viable alternative to commercial broadcasting, the stations needed funding from the federal government to supplement the existing state, local, and private financing.⁵⁰ In addition, the commission recommended the creation of a nonprofit, non-governmental "Corporation for Public Television" to provide support for the non-commercial broadcasting stations. The duties of that Corporation were to include funding

conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

Id.

41. *League of Women Voters*, 486 U.S. at 367.

42. *Id.* (citing 47 CFR §§ 4.131-4.133 (1939)).

43. *Id.* at 367 (citing FCC, Report of Proposed Allocations 77 (1945)).

44. *Id.* (citing Television Assignments, 41 F.C.C. 148 (1952)).

45. *Id.* See Carnegie Commission on Educational Television, *Public Television: A Program for Action* 21-29 (1967) (hereinafter "Carnegie I"); Carnegie Commission on the Future of Public Broadcasting, *A Public Trust* 33-34 (1979) (hereinafter "Carnegie II"); see also S. Rep. No. 93-123, pp. 2-6 (1973).

46. *League of Women Voters*, 486 U.S. at 367; Carnegie Commission on Educational Television, *supra* note 45.

47. *Id.*, at 368 (citing Educational Television Act of 1962, Pub. L. 87-447, 76 Stat. 64).

48. *Id.* The Commission was sponsored by the Carnegie Corporation. *Id.*

49. *Id.* (citing Carnegie I at 33-38).

50. *Id.*

for new program production, funding for local station operations, and the establishment of satellite interconnection facilities to permit nationwide distribution of educational programs to all local stations that wished to receive them.⁵¹

Also in 1967, Congress enacted the Public Broadcasting Act of 1967 which amended the Communications Act of 1934 and is the basic framework of today's public broadcasting system.⁵² Its goal was "to support and promote the development of non-commercial, educational broadcasting stations."⁵³ The Act provided that its purpose was to be accomplished by:

extending and improving the provisions thereof relating to grants for construction of educational television broadcasting facilities, by authorizing assistance in the construction of noncommercial educational radio broadcasting facilities, by establishing a nonprofit corporation to assist in establishing innovative educational programs, to facilitate educational program availability, and to aid the operation of educational broadcasting facilities; and to authorize a comprehensive study of instructional television and radio⁵⁴

Furthermore, Title I of the Act authorized \$38 million to be appropriated to carrying out the aforementioned purposes over a four-year period.⁵⁵ Title II established a nonprofit educational broadcasting corporation.⁵⁶ This corporation was "authorized to disburse federal funds to noncommercial television and radio stations in support of station operation and educational programming."⁵⁷

The purpose and activities of the Corporation included but were not limited to: "the production of . . . education television or radio programs for national or regional distribution, . . . to aid in financing local educational television or

51. *League of Women Voters*, 486 U.S. at 368. Although these recommendations were in reference to "public television," which were intended to include instructional, educational, political, and cultural programming, Congress later applied them to non-commercial radio stations as well. See *Carnegie I* at 1.

52. Public Broadcasting Act of 1967, Pub. L. 90-129, 81 Stat. 365, 47 U.S.C. § 390; *League of Women Voters*, 468 U.S. at 368.

53. *League of Women Voters*, 468 U.S. at 366.

54. Public Broadcasting Act of 1967, 81 Stat. at 365.

55. *Id.* The Act provided for the appropriation of "\$10,500,000 for the fiscal year ending June 30, 1968, \$12,500,000 for the fiscal year ending June 30, 1969, and \$15,000,000 for the fiscal year ending July 1, 1971." *Id.*

56. *Id.* at 367-69. Section 396(c) provides: "The corporation shall have a Board of Directors . . . , consisting of fifteen members appointed by the President, by and with the advice and consent of the Senate. . . . The term of office of each member of the Board shall be six years . . ." *Id.* at 369. The structure of the Board was modified in 1981 to provide for 10, instead of 15 members. 47 U.S.C. § 396(c), as amended by Pub. L. 97-35, Title XII, § 1225(a)(1), 95 Stat. 726. See *League of Women Voters*, 468 at 370 n.4.

57. *League of Women Voters*, 468 U.S. at 366.

radio programming costs,”⁵⁸ and “to arrange . . . for interconnection facilities suitable for distribution and transmission of educational television or radio programs to noncommercial educational broadcast stations.”⁵⁹ Finally, in order to ensure that they were carrying out their activities “in ways that will most effectively assure the maximum freedom of the noncommercial educational . . . stations throughout the United States,”⁶⁰ the Corporation was not allowed to “own or operate any television or radio broadcast station, system, or network”⁶¹

Today, about two-thirds of the 348 public television stations in the country are licensed to state and local governments.⁶² The FCC now grants licenses for the operation of television broadcasting stations for a period no longer than eight years.⁶³ After each eight-year term, broadcasters must apply for renewal of their licenses.⁶⁴ One important factor in the FCC’s decision to renew a broadcaster’s license is whether they promote “public interest” broadcasting.⁶⁵

Specifically, Congress and the FCC have established rules to ensure greater access to the airwaves for political candidates with diverse viewpoints.⁶⁶ Section 399 of the Public Broadcasting Act of 1967 provided that “[n]o noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.”⁶⁷ Although the Supreme Court held this invalid, 47 U.S.C. § 399 is the comparable statute today. It provides that “[n]o noncommercial educational broadcasting station may support or oppose any candidate for political office.”⁶⁸ Additionally, 47 U.S.C. § 312(a)(7) of the U.S.C. allows the FCC to sanction any station for “willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a

58. 42 U.S.C. § 396(g)(2)(B)&(C).

59. *See id.* § 396(g)(2)(E).

60. *See id.* §396(g)(1)(d).

61. *See id.* §396(g)(3).

62. Linda Greenhouse, *Public TV has no duty to also-rans*, THE NEWS AND OBSERVER (Raleigh, N.C.), May 19, 1998, at A1.

63. *See* 47 U.S.C. § 307(c)(1) (1994); 62 Fed. Reg. 5339, 5347 (1997) (codified at 47 C.F.R. § 73.1020).

64. *See* 47 U.S.C. § 307(c); *see also* 47 U.S.C. § 309(k) (1994) (license and renewal procedures).

65. *See* 47 U.S.C. § 307(d)(2).

66. Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1694 (1997).

67. Public Broadcasting Act of 1967, 81 Stat. at 368. This Section was amended in the Broadcasting Amendments of 1981 and forbid “noncommercial educational broadcasting station which receives a grant from the Corporation” to engage in “editorializing,” but the Supreme Court held the restriction to be invalid. *League of Women Voters*, 486 U.S. at 402; Public Broadcasting Amendments of 1981, Pub. L. 97-35, 95 Stat. 730, amending § 399 of the Public Broadcasting Act of 1967, Pub. L. 90-129, 81 Stat. 365, 47 U.S.C. § 390.

68. *See* 47 U.S.C. § 399 (1994).

broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.”⁶⁹

B. The First Amendment and Political Speech

The Supreme Court has held on several occasions that political speech is at the heart of First Amendment values.⁷⁰ Furthermore, the Court has emphasized “that restrictions on access to the electoral process must survive exacting scrutiny.”⁷¹ The Court explained that limitations on access could be justified only when the interests advanced are of paramount, and vital importance.⁷² “The burden is on the government to show the existence of such an interest.”⁷³ Moreover, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”⁷⁴

Although the Supreme Court had recognized issues relating to public forums for some time,⁷⁵ the phrase “public forum” was not coined until 1965.⁷⁶ In 1972, the Court used the concept of the “public forum” in relation to First Amendment jurisprudence for the first time,⁷⁷ and by 1984, this concept had elevated to the status of “a fundamental principle of First Amendment doctrine.”⁷⁸ The doctrine divides government property into three main categories and attempts to set rules governing the regulation of expression in accordance with those categories.⁷⁹

Analysis of First Amendment questions relating to access of government property often begins by assessing the type of forum involved.⁸⁰ First the court determines the nature of the “property” involved, which is central to a

69. See 47 U.S.C. § 312(a)(7) (1994).

70. See *supra* notes 5-12 and accompanying text.

71. Buckley v. Valeo, 424 U.S. 1, 93-94 (1976).

72. *Id.* at 94.

73. Elrod v. Burns, 427 U.S. 347, 362 (1976) (citing *Buckley*, 424 U.S. at 94).

74. *Id.* at 373 (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

75. See, e.g., *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring) (“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.”).

76. Harry Kalven coined the phrase “public forum.” See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718 (1987); see also Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

77. *Id.* at 1714.

78. *Id.* (quoting *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280 (1984)).

79. See *id.* at 1715.

80. Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739, 739-740 (1991).

determination of whether the forum is public or non-public.⁸¹ Then, depending on what kind of forum is involved, the court will then apply a specific level of First Amendment scrutiny.⁸² Over the last several decades, the Supreme Court has used this two-step process to decide cases involving the exclusion of an individual or group from government “property.” The Court has divided forums into three basic categories: (1) unlimited public forum, also referred to as “traditional public forums;” (2) limited public forums; and (3) and non-public forums.⁸³

Traditional public forums, which the Supreme Court referred to in *Perry Education Assn. v. Perry Local Educators’ Assn.*, as “quintessential public forums,” are places that traditionally have been “devoted to assembly and debate.”⁸⁴ This type of forum severely limits the rights of the state to restrict expressive activity.⁸⁵ Examples of such forums are public streets and parks.⁸⁶ The government may not restrict or prohibit expressive activity in such forums based on the content of the activity unless it can “show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”⁸⁷ The state may, however, enforce “regulations of time, place and manner of expression which are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”⁸⁸

A second category, public forums, consists of public property that the state has opened specifically for use by the public for expressive activity.⁸⁹ An example of such a forum is a town’s municipal auditorium open for use by the public.⁹⁰ Even when the state is not required to create this type of forum, once it is created, the Constitution forbids certain exclusions from the forum in the same way it would forbid exclusions from all forums generally open to the public.⁹¹ Although there is no required time in which the state must maintain the “open character of the facility,” for the period that it is so maintained, the

81. See Jonathan H. Beemer, *Denver Area Telecommunications Consortium, Inc. v. FCC & the Forum Status of Cable Access Channels*, 63 BROOK. L. REV. 955, 973-74; see also *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-47 (1982).

82. *Perry*, 460 U.S. at 45-47.

83. *Id.*

84. *Id.* at 45.

85. *Id.*

86. *Id.*

87. *Perry*, 460 U.S. at 45 (citing *Carey v. Brown*, 447 U.S. 445, 461 (1980)).

88. *Id.* (citing *United States Postal Service v. Council of Greenburgh*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Public Service Comm’n*, 447 U.S. 530, 535-536 (1980); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); and *Schneider v. New Jersey*, 308 U.S. 147 (1939)).

89. *Id.*

90. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975).

91. *Perry*, 460 U.S. at 45 (citing *Widmar v. Vincent*, 454 U.S. 263 (1981)).

state is bound by the same standards and regulations that apply in a traditional public forum.⁹² The government can set restrictions as to time, place, and manner, as long as they are reasonable, but any “content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”⁹³

The Supreme Court has also recognized a second type of public forum, a “limited public forum,” which has a more limited character than the public forum.⁹⁴ A limited public forum is “created for a limited purpose such as use by certain groups. . .or for the discussion of certain subjects.”⁹⁵

The final category, non-public forums, is governed by different standards than the public forums.⁹⁶ Non-public forums consist of “(p)ublic property which is not by tradition of designation a forum for public communication . . .”⁹⁷ The Supreme Court explained in *Perry* that the First Amendment does not guarantee access to property simply because that property is “owned or controlled by the government.”⁹⁸ With regard to non-public forums, the state may set time, place, and manner regulations.⁹⁹ In addition, the state may reserve the forum for its intended purposes and limit access to the non-public forum “as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”¹⁰⁰

In *Perry*, the Supreme Court held that an interschool mail facility was a non-public forum.¹⁰¹ In this case, a teachers union, the Perry Local Educators’ Association (“PLEA”), brought an action challenging a provision of a collective bargaining agreement between the Perry school district and the Perry teachers’ representative union.¹⁰² This provision gave the representative union access to the teachers’ mailboxes and an interschool mail system that rival unions were denied.¹⁰³ In addition to allowing the representative union access to the mail system, some principals permitted various private organizations to

92. *Id.* at 46.

93. *Id.* (citing *Widmar*, 454 U.S. at 269-70).

94. The Supreme Court in *Widmar* concluded that the university created a limited public forum by opening its facilities to registered student groups for expressive speech. *Widmar*, 454 U.S. at 272.

95. *Perry*, 460 U.S. at 46 n.7 (citing *Widmar*, 454 U.S. 236 (student groups) and *City of Madison Joint School Dist. v. Wisconsin Public Employment Relations Comm’n*, 429 U.S. 167 (1976) (school board business)).

96. *Id.* at 46.

97. *Id.*

98. *Id.* (quoting *United States Postal Service v. Greenburgh Civic Ass’n*, 453 U.S. 114, 129 (1981)).

99. *Id.*

100. *Perry*, 460 U.S. at 46 (citing *Greenburgh Civic Ass’n*, 453 U.S. at 131 n.7).

101. *Id.*

102. *Id.* at 39.

103. *Id.*

use the mailboxes to distribute messages.¹⁰⁴ A rival union brought an action against the teachers' representative union and specific members of the school board claiming that this barring of access to the teachers' interschool mail system violated its constitutional rights under the First and Fourteenth Amendments.¹⁰⁵

The United States District Court for the Southern District of Indiana granted summary judgment for the defendants.¹⁰⁶ The Seventh Circuit Court of Appeals for the reversed, reasoning that the school board failed to provide a reason for denying access to outside unions.¹⁰⁷ The Supreme Court reversed holding that "PLEA did not have a First Amendment or other right of access to the interschool mail system."¹⁰⁸ The Court concluded that "[t]his type of selective access does not transform government property into a public forum."¹⁰⁹ Moreover, the limitations on PLEA's access to the school mail system satisfied the reasonableness standard for non-public forums because the substantial alternative channels remained open for the unions to communicate with the teachers.¹¹⁰

Similarly, in *Cornelius v. NAACP*, the Supreme Court held that an annual charity drive that took place in a federal workplace was a non-public forum.¹¹¹ In *Cornelius*, the Court followed the same two-step analysis used in *Perry*: discern what type of forum is involved and whether the limitations to access survive the standard of scrutiny applicable for that forum.¹¹² As part of the forum analysis, the Court looked at the access sought by the speaker.¹¹³

The issue in *Cornelius* was whether the federal government violated the First Amendment when it excluded legal defense and political advocacy organizations from participating in the Combined Federal Campaign ("CFC"), a charity drive aimed at federal employees allowed to take place in the federal workplace.¹¹⁴ President Reagan limited participation in the CFC drive to

104. *Id.*

105. *Perry*, 460 U.S. at 41.

106. *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1289 (7th Cir. 1981), *rev'd*, 460 U.S. 37 (1983).

107. *Id.*

108. *Perry*, 460 U.S. at 54.

109. *Id.* at 47.

110. *Id.* at 53.

111. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

112. *Id.*

113. *Id.* at 801. The Supreme Court noted that:

in defining the forum we have focused on the access sought by the speakers. When speakers seek general access to public property, the forum encompasses that property. . . .

In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.

Id. (citing *Greer v. Spock*, 424 U.S. 828 (1976)).

114. *Id.* at 790.

“voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families.”¹¹⁵ This excluded “agencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves.”¹¹⁶ Some of the excluded agencies filed suit against the federal government alleging that restricting them from seeking charitable contributions was a violation of their First Amendment and equal protection rights under the Fifth Amendment.¹¹⁷

The United States District Court for the District of Columbia granted summary judgment for petitioners stating that this type of exclusion was content-based and, therefore unconstitutional.¹¹⁸ The United States Court of Appeals for the District of Columbia Circuit affirmed the trial court’s decision,¹¹⁹ but the United States Supreme Court reversed, holding that the Government did not violate the First Amendment when it limited participation in the CFC “in order to minimize disruption to the federal workplace, to ensure the success of the fund-raising effort, or to avoid the appearance of political favoritism.”¹²⁰ The Court concluded that such speech was of the type protected by the First Amendment.¹²¹ The CFC was a non-public forum because of the government policy used in creating the CFC, its practice in limiting access,¹²² and the government’s reasons for denying access satisfied the reasonableness standard necessary for non-public forum exclusion.¹²³

The CFC is an annual charitable fund-raising drive conducted . . . during working hours largely through the voluntary efforts of federal employees . . . [P]articipating organizations confined their fundraising activities to a 30-word statement submitted by them for inclusion in the campaign literature. Volunteer federal employees distribute to their co-workers literature describing the campaign and the participants along with pledge cards. Contributions may take the form of either a payroll deduction or a lump-sum payment made to a designated agency or to the general Campaign fund.

Id. at 790-91 (citing 5 C.F.R. §§ 950.521(c) & (e) (1983)).

115. *Id.* at 794-95 (quoting Exec. Order No. 12,353, 3 C.F.R. 139 (1983)).

116. *Cornelius*, 473 U.S. at 794-95 (quoting Exec. Order No. 12,353, 3 C.F.R. 139 (1983)).

117. *Id.*

118. *Id.* at 796.

119. *NAACP Legal Defense & Educ. Fund, Inc. v. Devine*, 727 F.2d 1247, 1248-49 (D.C. Cir. 1984), *rev’d*, 473 U.S. 788 (1985).

120. *Cornelius*, 473 U.S. at 813.

121. *Id.* at 799.

122. *Id.* at 806.

123. *Id.* at 810-11.

III. ARKANSAS EDUCATIONAL TELEVISION COMMISSION V. FORBES

A. *Facts and Procedural History of Arkansas Educational Television Commission v. Forbes.*

In the spring of 1992, the Arkansas Educational Television Commission (“AETC”) decided to sponsor a series of five debates between candidates for federal office in the November elections of that year.¹²⁴ Of the debates scheduled to be televised, one was for the Senate election and one was for each of the four congressional elections in Arkansas.¹²⁵ The AETC staff developed a format for the debates which allowed for 53 minutes of each 1-hour debate to be used for the candidates answering questions.¹²⁶ As a result of this time constraint, AETC decided that it would “limit participation in the debates to the major party candidates and any other candidate who had strong popular support.”¹²⁷

On June 17, 1992, AETC extended an invitation to the Republican and Democratic candidates for Arkansas’ Third Congressional District to participate in the debate for that seat.¹²⁸ Two months later, Ralph Forbes became certified as an independent candidate and qualified to appear on the ballot for that same district.¹²⁹ On August 24, 1992, Forbes requested permission from AETC to participate in the debate for his district, scheduled for October 22, 1992.¹³⁰ AETC Executive Director Susan Howarth denied his request on September 4. Mrs. Howarth explained that AETC decided in their journalistic judgment that their viewers would be best served by a debate limited to the Republican and Democratic candidates.¹³¹

On October 19, 1992, Forbes filed suit against AETC in the United States District Court for the Western District of Arkansas seeking an injunction and declaratory relief as well as damages.¹³² Forbes claimed that his exclusion from the debate violated his rights under the First Amendment and 47 U.S.C. § 315.¹³³ The district court denied Forbes’ request for a preliminary injunction

124. *Forbes*, 118 S. Ct. at 1637. The AETC is a “state agency owning and operating a network of five noncommercial television stations.” *Id.*; *see supra* note 15 and accompanying text.

125. *Id.*

126. *Id.* The AETC worked closely with Bill Simmons, the Arkansas Bureau Chief for the Associated Press, in planning the debates. *Id.*

127. *Id.* (citing Record, Affidavit of Bill Simmons ¶ 5).

128. *Id.* at 1637.

129. *Forbes*, 118 S. Ct. at 1637; *see supra* note 19 and accompanying text.

130. *Id.* at 1638.

131. *Id.*

132. *Id.*; *Forbes v. Arkansas Educ. Television Communication Network Found.* (“*Forbes I*”), 22 F.3d 1423, 1426 (8th Cir. 1994), *rev’d*, 118 S. Ct. 1633 (1998).

133. *Id.* For the text of 47 U.S.C. § 315, *see supra* note 40.

mandating his inclusion in the debate.¹³⁴ In addition, the court dismissed his complaint in accordance with Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim upon which relief can be granted.¹³⁵ The district court based its decision solely on Forbes' complaint; AETC had not even filed an answer yet.¹³⁶

Forbes appealed to the Eighth Circuit Court of Appeals, which also denied his request for a preliminary injunction.¹³⁷ Sitting en banc, the court affirmed the dismissal of Forbes' statutory claim and held that he failed to exhaust his administrative remedies, but reversed the dismissal of his First Amendment claim and remanded the action for further proceedings.¹³⁸ The Court stated that Forbes had "a qualified right of access created by AETN's¹³⁹ sponsorship of a debate, and that AETN must have [had] a legitimate reason to exclude him strong enough to survive First Amendment scrutiny."¹⁴⁰ The Court reasoned that "there was no way of knowing, on the state of the record as it existed, why AETV¹⁴¹ had excluded Mr. Forbes."¹⁴²

On remand, Forbes' First Amendment claim was tried to a jury.¹⁴³ After being instructed by the district court that the debate in question was, as a matter of law, a non-public forum, the jury found by special verdict that the decision to exclude Forbes from the debate was neither the result of political pressure, nor was it based on opposition towards his political views.¹⁴⁴ In accordance with the jury's findings, judgment was entered for the defendants.¹⁴⁵ Forbes appealed to the Eighth Circuit again, arguing that "the debate was a limited public forum, and that the reason given for excluding him, . . . even if it was the true reason, was not legally sufficient."¹⁴⁶

On appeal the second time, the Eighth Circuit agreed with Forbes and held "that a governmentally owned and controlled television station may not exclude a candidate, legally qualified under state law, from a debate organized

134. *Forbes*, 118 S. Ct. at 1638.

135. *Forbes I*, 22 F.3d at 1427.

136. *Id.* at 1430.

137. *Id.*

138. *Id.*

139. "AETN" stands for Arkansas Educational Television Commission Network Foundation. This is the same as AETC. The trial and appellate courts used the full name and the AETN abbreviation, while the Supreme Court dropped "Network Foundation" from the petitioner's name and referred to them as AETC.

140. *Forbes I*, 22 F.3d at 1428.

141. "AETV" stands for Arkansas Educational Television and is the same as AETN and AETC. The Court dropped the "Commission Network Foundation" from the name.

142. *Forbes II*, 93 F.3d at 499.

143. *Id.*

144. *Id.*

145. *Id.* at 501.

146. *Id.* at 499-500.

by it on such a subjective ground.”¹⁴⁷ In coming to this conclusion, the court identified the main issue of the case as “whether the congressional debate staged by AETN was a limited-purpose public forum, or a non-public forum, and, if it was the former, whether AETN’s reason for excluding Mr. Forbes could survive scrutiny under the First Amendment.”¹⁴⁸ The court reasoned that the government created a limited public forum because AETN opened their debate to a particular class of speakers; candidates legally qualified to appear on the ballot.¹⁴⁹ After determining that the debate was a limited public forum, the Eighth Circuit reviewed the sufficiency of the reason given for the exclusion.¹⁵⁰ The court concluded that it was crucial that the employees of AETC were not ordinary journalists, but employees of the government.¹⁵¹ Furthermore, the court held that “[t]he First Amendment exists to protect individuals, not government. The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment.”¹⁵²

Subsequently, AETC appealed to the United States Supreme Court.¹⁵³ On March 17, petitioner’s writ of certiorari was granted.¹⁵⁴ Oral arguments were heard on October 8, 1998, and the decision was handed down on May 18, 1998.¹⁵⁵ The Supreme Court granted certiorari in part because the decision in *Forbes II* created a split between the Eighth Circuit and the Eleventh Circuit’s decision in *Chandler v. Georgia Public Telecommunications Commission* (“GPTC”).¹⁵⁶

In *Chandler*, Walker Chandler, a Libertarian candidate, was denied access to a debate held by GPTC on November 2, 1990 for candidates seeking the office of lieutenant governor of Georgia.¹⁵⁷ Although not allowed to participate in the debate, GPTC offered Chandler thirty minutes of airtime on its stations to present his views.¹⁵⁸ On September 17, Chandler filed suit

147. *Forbes II*, 93 F.3d at 499.

148. *Id.* at 502.

149. *Id.* at 504.

150. *Id.*

151. *Id.* at 505.

152. *Forbes II*, 93 F.3d at 505.

153. *Forbes*, 118 S. Ct. at 1637.

154. *Arkansas Educ. Television Comm’n v. Forbes*, 117 S. Ct. 1243 (1997), *cert. granted*, 65 USLW 3619, (U.S. Mar. 17 1997) (NO. 96-779). At least thirteen amicus briefs were filed. *Id.* Groups submitting briefs included the Association of America’s Public Television Stations, the FCC, the Commission on Presidential Debates, and the American Civil Liberties Union with the ACLU of Arkansas. *Id.*

155. *Forbes*, 118 S. Ct. at 1633.

156. 917 F.2d 486 (11th Cir. 1990).

157. *Id.* at 488.

158. *Id.* at 488 n.1.

against the GPTC, an instrumentality of the state of Georgia, seeking to enjoin it from broadcasting the debate unless he was included as a participant, and claiming that his exclusion violated his First and Fourteenth Amendment rights.¹⁵⁹

The United States District Court for the Northern District of Georgia, Atlanta Division, heard Chandler's motion.¹⁶⁰ GPTC contended that the district court did not have jurisdiction over the matter, and that it should be handled by the FCC in accordance with 47 U.S.C. § 315.¹⁶¹ The district court, however, did not agree.¹⁶² The court reasoned that Chandler was not suing GPTC in its capacity as a broadcaster, nor was he suing under § 315 for an equal opportunity.¹⁶³ Chandler was suing GPTC members "in their capacities as state officials for alleged constitutional violations."¹⁶⁴ The court found for Chandler and held that GPTC had violated Chandler's freedom of speech and equal protection rights under the First and Fourteenth Amendments, respectively.¹⁶⁵

The court flatly rejected the claim that the GPTC had a journalistic right to choose which candidates could express their views based on their newsworthiness or interest to the public.¹⁶⁶ Moreover, the court held that GPTC's exclusion of third-party candidates from the debate was content-based and therefore, was "a constitutionally impermissible prior restraint based upon content."¹⁶⁷ In regard to the equal protection claim, the court found that GPTC did not give "any legitimate public purpose or rational purpose for excluding the third-party candidates."¹⁶⁸ Finally, the district court enjoined GPTC from televising the debate unless it included the Libertarian candidates.¹⁶⁹

GPTC appealed to the United States Court of Appeals for the Eleventh Circuit.¹⁷⁰ The Court did not go through the usual forum analysis used in

159. *Id.* The Libertarian candidate for governor, Carole Ann Rand, intervened as plaintiff and joined Chandler's action. She sought a similar injunction against the broadcast of a similar debate on November 4, 1990 between the Democratic and Republican candidates for governor. *Id.*

160. *Chandler v. Georgia Pub. Telecomm. Comm'n*, 749 F. Supp. 264, 265 (N.D. Ga. 1990), *vacated*, 917 F.2d 486 (11th Cir. 1990) ("*Chandler I*").

161. *Id.* at 266 & n.3. For the text of 47 U.S.C. § 315 *see supra* note 40.

162. *Id.*

163. *Id.* at 266-67.

164. *Id.* at 266.

165. *Chandler I*, 749 F. Supp. 264, 268-69.

166. *Id.* at 268.

167. *Id.*

168. *Id.* at 269.

169. *Chandler*, 917 F.2d at 488. This holding applied to the debate GPTC was planning to hold for governor of Georgia as well as the debate for lieutenant governor. *Id.*

170. *Id.* at 490.

access related First Amendment cases.¹⁷¹ Instead, it focused on “the mission of the communicative activity being controlled.”¹⁷² The court discussed GPTC’s obligation to serve the interests of the state of Georgia.¹⁷³ Unlike the Supreme Court in *Forbes*,¹⁷⁴ the Eleventh Circuit did not recognize a distinction between the First Amendment restrictions placed on a state-owned television station’s journalistic discretion in regular programming and candidate debates.¹⁷⁵ The court reasoned that GPTC employees “make editorial decisions on a daily basis determining which programs to air in order meet the needs and interests of Georgia’s citizens.”¹⁷⁶

The Eleventh Circuit vacated the district court’s order permanently and remanded, holding that GPTC’s decision to exclude Chandler was content-based but not viewpoint restrictive and did not violate the First Amendment.¹⁷⁷ In addition, the court briefly reviewed the equal protection issue and concluded that Chandler was not a member of a protected class, and thus GPTC needed only a rational basis for their decision to exclude him.¹⁷⁸ The Eleventh Circuit found that GPTC’s arguments were rational, and therefore no Equal Protection violation occurred.¹⁷⁹

B. *The United States Supreme Court Decision*

In *Forbes*, the Supreme Court addressed the following three issues. First, by reason of state-ownership, did AETC have a constitutional obligation to give every legally qualified candidate access to its debate?¹⁸⁰ Second, was the debate itself a limited public forum or a non-public forum under forum precedents?¹⁸¹ Finally, was AETC’s decision to exclude Forbes a reasonable, viewpoint-neutral exercise of journalistic discretion?¹⁸² In a 6-3 decision written by Justice Kennedy,¹⁸³ the Supreme Court reversed the Eighth Circuit’s

171. *Id.* at 488-90; *see supra* notes 80-100 and accompanying text.

172. *Id.* at 488.

173. *Id.*

174. *Forbes*, 118 S. Ct. 1633. The Supreme Court in *Forbes* concluded that the regular programming of a state-owned television broadcaster was not a forum at all, and therefore not subject to the First Amendment restrictions on accessibility, however, candidate debates were an exception to this. *Id.* at 1640.

175. *Chandler*, 917 F.2d at 488-89.

176. *Id.* at 488.

177. *Id.* at 488-90.

178. *Id.* at 489 (citing *Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990)).

179. *Id.*

180. *Forbes*, 118 S. Ct. at 1637.

181. *Id.*

182. *Id.*

183. Chief Justice Renquist and Justices O’Connor, Scalia, Thomas, and Breyer joined the opinion. *Forbes*, 118 S. Ct. 1633.

decision.¹⁸⁴ The Court found that the debate was a non-public forum and AETC did not have an obligation to include all legally qualified candidates.¹⁸⁵ Furthermore, AETC's decision to exclude Forbes from the debate was a "reasonable, viewpoint-neutral exercise of journalistic discretion" consistent with the First Amendment.¹⁸⁶

1. Majority Opinion

The Supreme Court first addressed the threshold issue of whether public forum principles apply to the AETC debate.¹⁸⁷ Justice Kennedy, writing for the majority, emphasized that traditional public forums such as streets and parks, which require unlimited access by constitutional mandate, "should not be extended in a mechanical way to the very different context of public television broadcasting."¹⁸⁸ According to the majority, this "mechanical" analysis would be antithetical to the journalistic discretion of the stations.¹⁸⁹

From the outset of the opinion, the Court made it clear that there was little distinction between the journalistic discretion of AETC and private broadcasters.¹⁹⁰ The Court noted that "television broadcasters enjoy the 'widest journalistic freedom' consistent with their public responsibilities"¹⁹¹ of "public interest, convenience, and necessity".¹⁹² Furthermore, the Court stated that "[p]ublic and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming."¹⁹³

The Court, however, distinguished between public broadcasting as a whole, which is not subject to strict scrutiny under the forum doctrine, and candidate debates, which are a narrow exception to that rule.¹⁹⁴ The Court set out two reasons for this exception. First, contrary to regular programming, "the debate was by design a forum for political speech," to allow the

184. *Forbes*, 118 S. Ct. at 1637.

185. *Id.* at 1643.

186. *Id.*

187. *Id.* at 1639.

188. *Id.* When a public forum is found to exist, that fact is sufficient to support a claim of access to that forum as a matter of constitutional law. Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 88 n.17 (1988) (citing Kalven, *supra* note 74, at 29-30).

189. *Forbes*, 118 S. Ct. at 1639.

190. *Id.*

191. *Id.* (quoting *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973)).

192. *Id.* (quoting 47 U.S.C. § 309(a)).

193. *Id.* The Court recognized that "beyond doubt" editors of newspaper and broadcast "can and do abuse this [editorial] power." But, these "[c]alculated risks of abuse are taken in order to preserve higher values." *Id.* (quoting *Columbia Broadcasting System, Inc.*, 412 U.S. at 124-25).

194. *Forbes*, 118 S. Ct. at 1640.

candidates to “express their views with minimal intrusion” by the AETC.¹⁹⁵ Second, throughout the history of candidate debates, it has been understood and accepted that they are of “exceptional significance in the electoral process.”¹⁹⁶ As a result, the Court held that the AETC debate was a forum, and subsequently selected the public forum precedents to answer the question of which type.¹⁹⁷

To determine which type of forum the debates represented, the Court looked to the categories of speech fora already established and discussed in its previous opinions.¹⁹⁸ Three categories of fora were identified and described:¹⁹⁹ the traditional public forum,²⁰⁰ the designated public forum,²⁰¹ and the nonpublic forum.²⁰² The Court explained that traditional public fora are defined by “objective characteristics of the property, such as whether, ‘by long tradition or by government fiat,’ the property has been ‘devoted to assembly and debate.’”²⁰³ Furthermore, the Court described the scrutiny to be applied when examining denial of access to each type of forum. A speaker can be excluded from a traditional public forum “only when the exclusion is necessary to serve a compelling state interest, and the exclusion is narrowly drawn to achieve that interest.”²⁰⁴ Since both parties to the suit agreed that the AETC debate was not a traditional public forum, the Court then turned its attention to whether the debate was a public forum or a nonpublic forum.

The Court explained that a designated public forum is “created by purposeful governmental action.”²⁰⁵ The exclusion of a speaker that falls within the class the forum is generally made available, is subject to the same strict scrutiny as a traditional public forum.²⁰⁶ All other government property

195. *Id.* The Court also distinguishes the debate from a talk show, because during a talk show, the host can express “partisan views” and limit discussion to those ideas. *Id.*

196. *Id.* The Court further stated: “it is of particular importance that candidates have the opportunity . . . to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues before choosing among them on election day.” *Id.* (quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981)).

197. *Id.* at 1640-41.

198. *Id.*; see *supra* notes 84-100 and accompanying text.

199. *Forbes*, 118 S. Ct. at 1641 (citing *Cornelius*, 473 U.S. at 802).

200. See *supra* notes 84-88 and accompanying text.

201. See *supra* notes 89-95 and accompanying text.

202. See *supra* notes 96-100 and accompanying text.

203. *Forbes*, 118 S. Ct. at 1641 (citing *Perry*, 460 U.S. at 45).

204. *Id.* (citing *Cornelius*, 473 U.S. at 800).

205. *Id.* The Court noted that “[t]he government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional [public] forum for public discourse.” Further, the Court specified that in deciding if a designated public forum is involved in a case, “the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.” *Id.* (citing *Cornelius*, 473 U.S. at 802).

206. *Id.* at 1641.

is either a nonpublic forum or not a forum at all.²⁰⁷ If the property in question is a nonpublic forum, the government can restrict 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.”²⁰⁸

The Court’s analysis focused on the type of access the government intended to permit when it created two types of fora.²⁰⁹ The Court used several cases to illustrate the difference between “‘general access,’ which indicates the property is a designated public forum, and ‘selective access,’ which indicates the property is a nonpublic forum.”²¹⁰ The Court compared the public forum created in *Widmar v. Vincent*²¹¹ with the nonpublic fora created in *Perry*²¹² and *Cornelius*.²¹³

In *Widmar*, a state university “generally opened” meeting facilities to registered student groups, and thereby created a designated public forum.²¹⁴ In contrast, the school board in *Perry* intended that there be only “selective access” to the school mail system.²¹⁵ The school board enforced a policy that required individuals to obtain permission from the principal of the individual school before access to the mail system could be granted.²¹⁶ Similarly, in *Cornelius*, the Combined Federal Campaign (“CFC”) drive was a nonpublic forum because the Government consistently limited participation in the CFC to charitable, rather than political, volunteer agencies and required that each agency obtain permission from federal and local campaign officials before they were granted access.²¹⁷

The Court concluded that the AETC debate was a nonpublic forum with selective access similar to that in *Perry* and *Cornelius*.²¹⁸ The Court noted that, although the government “creates a designated public forum when it makes its property generally available to a certain class of speakers,” it “does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, ‘obtain permission.’”²¹⁹ The Court

207. *Id.*

208. *Forbes*, 118 S. Ct. at 1641.

209. *Id.* at 1642.

210. *Id.* (quoting *Cornelius*, 473 U.S. at 803-05). The Court stated that “[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.” *Id.*

211. *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 264 (1981)).

212. *Id.*; see *supra* notes 101-10 and accompanying text.

213. *Forbes*, 118 S. Ct. at 1642; see *supra* notes 111-23 and accompanying text.

214. *Id.* (citing *Widmar*, 454 U.S. at 267).

215. *Id.* (citing *Perry*, 460 U.S. at 47).

216. *Id.* (citing *Perry*, 460 U.S. at 47).

217. *Id.* (citing *Cornelius*, 473 U.S. at 804).

218. *Forbes*, 118 S. Ct. at 1643.

219. *Id.* at 1642 (citing *Cornelius*, 473 U.S. at 804). The court stated:

reasoned that AETC's debate was not generally available to candidates for Arkansas' Third Congressional District seat, but instead that AETC "reserved eligibility for participation . . . to candidates for the Third Congressional . . . seat."²²⁰ Then, "AETC made candidate-by-candidate determinations as to which of the eligible candidates would [be invited to] participate in the debate."²²¹ The Court concluded that this type of selective access, "unsupported by evidence of a purposeful designation for public use, [did] not create a public forum."²²²

The Court then considered the practical implications of the Eighth Circuit's determination that AETC's debate was a limited public forum, rather than a nonpublic forum.²²³ The Court concluded that not only did the Eighth Circuit misapply their precedents, but that the "Court of Appeals' holding would result in less speech, not more."²²⁴ Furthermore, the Court stated its concern that in ruling that AETC's "debate was a public forum open to all ballot-qualified candidates, the Court of Appeals would place a severe burden upon public broadcasters who air candidates' views."²²⁵ The Court reasoned that if a broadcaster were required to include all legally qualified candidates it "might choose not to air the candidates' views at all."²²⁶ The Court concluded that "[a] First Amendment jurisprudence yielding these results does not promote speech but represses it."²²⁷

[t]he *Cornelius* distinction between general and selective access furthers First Amendment interests. By recognizing the distinction, we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all. That this distinction turns on governmental intent does not render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.

Id.

220. *Id.*

221. *Id.* at 1642-43.

222. *Id.* at 1643 (quoting *Cornelius*, 473 U.S. at 805).

223. *Forbes*, 118 S. Ct. at 1643.

224. *Id.*

225. *Id.* The Court noted: "in each of the 1988, 1992, and 1996 Presidential elections, . . . no fewer than 22 candidates appeared on the ballot in at least one State." *Id.* (citing Twentieth Century Fund Task Force on Presidential Debates, *Let America Decide* 148 (1995)); Federal Election Commission, Federal Elections 92, at 9 (1993); Federal Election Commission, Federal Elections 96, at 11 (1997)). Furthermore, the Court noted: "[i]n the 1996 congressional elections, it was common for 6 to 11 candidates to qualify for the ballot for a particular seat." *Id.* (citing *1996 Election Results*, 54 CONG. Q. WKLY. REP. 3250-57 (1996)).

226. *Id.* The Court notes that as a result of the Eighth Circuit's decision in this case, "the Nebraska Educational Television Network canceled a scheduled debate between candidates in Nebraska's 1996 United States Senate race." *Id.* (citing LINCOLN J. STAR, Aug. 24, 1996, at 1A).

227. *Id.*

Finally, the Court directed its attention to the exclusion of Forbes from the AETC debate. The Court explained that although the debate was a nonpublic forum, AETN did not have the power to exclude any candidate it wished.²²⁸ The Court stated that “[t]o be consistent with the First Amendment, the exclusion . . . must not be based on the speaker’s viewpoint and must otherwise be reasonable in light of the purpose of the property.”²²⁹

The Court found that AETC’s decision to exclude Forbes was reasonable.²³⁰ A jury found the exclusion was not based on objection or opposition to Forbes’ views, and the majority believed that the record supported this finding.²³¹ Susan Howarth, AETC’s executive director, gave five reasons AETC excluded Forbes from the debate: (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’”; and (5) “there [was] no ‘Forbes for Congress’ campaign headquarters other than his house.”²³² The Court concluded that the issue of Forbes’ exclusion was “beyond dispute.”²³³ It stated that Forbes was not excluded because of his viewpoints or in an attempt to manipulate the political process, but because he had not generated any “appreciable public interest.”²³⁴ Accordingly, the Supreme Court overruled the Eighth Circuit and held that AETC’s “decision to exclude Forbes was a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment.”²³⁵

2. Dissent

In his dissent, Justice Stevens²³⁶ began by conceding “that a state-owned television network has no ‘constitutional obligation to allow every candidate

228. *Forbes*, 118 S. Ct. at 1643. The Court further emphasized that just because the debate is a nonpublic forum that “does not mean that the government can restrict speech in whatever way it likes.” *Id.* (quoting *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1992)).

229. *Id.* (quoting *Cornelius*, 473 U.S. at 800).

230. *Id.*

231. *Id.* (citing App. to Pet. for Cert. 23a.) The Court noted that Susan Howarth, AETC executive director, testified that “Forbes’ views had ‘absolutely’ no role in the decision to exclude him from the debate.” *Id.* (quoting App. 142).

232. *Id.* (quoting App. 142 at 126-127). The Court also mentioned that “Forbes himself described his campaign organization as ‘bedlam’ and the media coverage of his campaign as ‘zilch.’” *Id.* (quoting App. 142 at 91, 96).

233. *Forbes*, 118 S. Ct. at 1644.

234. *Id.*

235. *Id.*, at 1644.

236. Justice Stevens wrote the dissent which was joined in full by Justices Souter and Ginsburg. *Id.*

access to' political debates that it sponsors."²³⁷ Justice Stevens, however, maintained that the majority had underestimated the constitutional importance of the difference between public and private ownership of broadcast facilities.²³⁸ He argued that "constitutional imperatives" require that access to political debates held by state-owned entities be governed by "pre-established, objective criteria."²³⁹ Justice Stevens concluded that the Court of Appeals decision should have been affirmed because AETC's decision to exclude Forbes from the debate "[did] not adhere to well settled constitutional principles."²⁴⁰

The dissent highlighted two problems with the majority's opinion.²⁴¹ First, the majority very briefly mentioned the "standardless character" of AETC's decision to exclude Forbes from the debate.²⁴² Second, the majority underestimated the significance of the distinction between state ownership and private ownership of broadcast facilities.²⁴³

The dissent began with a discussion of facts from the record that were either ignored or not adequately discussed in the majority opinion. Subsequently, the opinion reviewed parts of broadcast regulation's history.²⁴⁴ The dissent considered it significant that AETC disregarded the fact that Forbes' had considerable political support when he ran for Arkansas elected positions in the recent past. He received nearly 47% of the statewide vote and carried fifteen of sixteen counties in the Third Congressional District by absolute majorities in the Republican nomination for Lieutenant Governor only two years before the AETC staff decision. The AETC staff ignored this relevant data when they and made their decision to exclude Forbes from the debate. In fact, two months after he was excluded, but more than a month before the debate was held, Forbes was became a ballot-qualified candidate.²⁴⁵ In spite of these facts, AETC concluded that Arkansas voters did not consider him a serious candidate.²⁴⁶ What AETC obviously did not consider was the fact that although Forbes may not have been a realistic contender to win the Third Congressional District seat, "it would have only been necessary for Forbes, who made a strong showing in the recent Republican primaries, to divert a handful of votes from the Republican candidate to cause his defeat."²⁴⁷

237. *Forbes*, 118 S. Ct. at 1644 (Stevens, J., dissenting) (citing *id.*, at 1637).

238. *Id.* at 1644-45.

239. *Id.*

240. *Id.* at 1645.

241. *Id.* at 1644.

242. *Forbes*, 118 S. Ct. at 1644 (Stevens, J., dissenting).

243. *Id.*

244. *Id.* at 1644-45.

245. *Id.* at 1644. See *supra* note 19 for the definition of a "ballot-qualified" candidate.

246. *Id.*

247. *Forbes*, 118 S. Ct. at 1645 (Stevens, J., dissenting).

As it turned out, the Republican candidate defeated the Democratic candidate by a margin of only 3 percentage points, 50.22% to 47.20% respectively. Therefore, the dissent concluded that AETC's decision to exclude Forbes from the debate "may have determined the outcome of the election."²⁴⁸

Next, the dissent briefly examined the consequences of a privately owned network having made a comparable decision.²⁴⁹ 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.'"²⁵⁰ The dissent noted that "no such criteria governed AETC's refusal to permit Forbes to participate in the debate."²⁵¹ The dissent concluded that the standard AETC used was so flexible that "the staff had nearly limitless discretion to exclude Forbes from the debate based on ad hoc justifications."²⁵²

The dissent emphasized that the distinction between public and private ownership of broadcasting facilities is of great constitutional importance.²⁵³ The dissent stated: "AETC is a state agency whose actions 'are fairly attributable to the State and subject to the Fourteenth Amendment, unlike the actions of privately owned broadcast licensees.'"²⁵⁴ The AETC staff members "were not ordinary journalists: they were employees of the government."²⁵⁵ Furthermore, "the First Amendment imposes no constraint on the private networks' journalistic freedom."²⁵⁶ The dissent summarized by arguing that "[b]ecause AETC is owned by the State, deference to its interest in making ad hoc decisions about the political content of its programs necessarily increases the risk of government censorship and propaganda in a way that protection of

248. *Id.*

249. *Id.*

250. *Id.* at 1645 (citing 11 C.F.R. § 110.13(c)(1997)).

251. *Id.*

252. *Forbes*, 118 S. Ct. at 1645 (Stevens, J., dissenting). The dissent also rebutted the fourth reason given by AETC to exclude Forbes, that he "apparently had little, if any, financial support". The dissent noted that in Arkansas' Second District, Republican candidate Dennis Scott only raised \$6,000, which is less than Forbes; nevertheless he was invited to participate in the AETC debate for his district. *Id.* (quoting *id.* citing App. 133-134, 175).

253. *Id.* at 1646.

254. *Id.* at 1645 (quoting *Forbes I*, 22 F.3d at 1428).

255. *Id.* at 1646 (quoting *Forbes II*, 93 F.3d at 505).

256. *Id.* (citing *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973)). Justice Burger who was writing for the majority supported this view "by noting that when Congress confronted the advent of radio in the 1920's, it 'was faced with a fundamental choice between total Government ownership and control of the new medium—the choice of most other countries—or some other alternative.'" *Id.* (quoting *Columbia Broad. Sys., Inc.* 412 U.S. at 116).

privately owned broadcasters does not.”²⁵⁷ The dissent believed that the majority “seriously underestimate[d] the importance of the difference.”²⁵⁸

The dissent then turned its attention to forum analysis.²⁵⁹ The issue in *Forbes*, as identified by the dissent, was not whether the AETC debate fit into a pre-established forum category, as the majority concluded, but rather, “whether AETC defined the contours of the debate forum with sufficient specificity to justify the exclusion of a ballot-qualified candidate.”²⁶⁰ The dissent further refined the issue as follows: “[a] state-owned broadcaster need not plan, sponsor, and conduct political debates, however, [w]hen it chooses to do so, the First Amendment imposes important limitations on its control over access to the debate forum.”²⁶¹ AETC’s “ad hoc decision” to exclude *Forbes* from the debate “raises precisely the concerns addressed by ‘the many decisions of this Court over the last 30 years, 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.’”²⁶² The dissent concluded that “[t]he reasons that support the need for narrow, objective, and definite standards to guide licensing decisions apply directly to the wholly subjective access decisions made by the staff of AETC.”²⁶³

Furthermore, the dissent noted that the majority recognized that the debates sponsored by AETC were “by design a forum for political speech by the candidates” and that these debates were central in the electoral process.²⁶⁴ The dissent saw no need to “expound on the public forum doctrine to conclude that the First Amendment will not tolerate a state agency’s arbitrary exclusion from

257. *Forbes*, 118 S. Ct. at 1647 (Stevens, J., dissenting).

258. *Id.* at 1646.

259. *Id.* at 1647.

260. *Id.*

261. *Id.* This statement is supported by the fact that the Supreme Court had in the past recognized that “[o]nce it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set.” *Id.* (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

262. *Forbes*, 118 S. Ct. at 1644 (Stevens, J., dissenting) (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969)).

263. *Id.* The dissent noted that

Ironically, it is the standardless character of the decision to exclude *Forbes* that provides the basis for the Court’s conclusion that the debates were a nonpublic forum rather than a limited public forum. On page 1642 of its opinion, ante, the Court explains that “[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.” If, as AETC claims, it did invite either the entire class of “viable” candidates, or the entire class of “newsworthy” candidates, under the Court’s reasoning, it created a designated public forum.

Id. at 1649 n.18.

264. *Id.* at 1647 (quoting *id.* at 1640).

a debate forum based . . . on an expectation that the speaker . . . might hold unpopular views.”²⁶⁵

The dissent explained that its First Amendment concerns in *Forbes* are similar to the concerns of the Supreme Court in *Forsyth County v. The Nationalist Movement*.²⁶⁶ In *Forsyth County*, the Court described “the breadth of the [parade] administrator’s discretion” in setting an amount of each permit fee as follows:

There are no articulated standards either in the ordinance or in the county’s established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.²⁶⁷

The dissent conceded that “the discretion of the AETC staff in controlling access to the 1992 candidate debates was not quite as unbridled as that of the Forsyth County administrator,” but, “it was surely broad enough to raise the concerns that controlled [the Supreme Court’s] decision in that case.”²⁶⁸ Further, the dissent emphasized that no written criteria were in place to control the unlimited discretion of the AETC staff.²⁶⁹ As a result, AETC’s subjective judgment about a candidate’s “viability” or “newsworthiness” allowed them “wide latitude either to permit or to exclude a third participant in any debate.”²⁷⁰

In summarizing its opinion, the dissent emphasized that “[g]iven the special character of political speech, particularly during campaigns for elected office, the debate forum implicates constitutional concerns of the highest order.”²⁷¹ Finally, the dissent noted that “[r]equiring government employees to set out objective criteria by which they choose which candidates will benefit from the significant media exposure that results from state-sponsored political debates would alleviate some of the risk inherent in allowing government agencies—rather than private entities—to stage candidate debates.”²⁷²

265. *Id.* The dissent went on to state that “[i]t seems equally clear, however, that the First Amendment will not tolerate arbitrary definitions of the scope of the forum.” *Id.*

266. *Id.*; *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992).

267. *Forbes*, 118 S. Ct. at 1647 (Stevens, J., dissenting); *Forsyth County*, 505 U.S. at 133.

268. *Id.* at 1648.

269. *Id.*

270. *Id.*

271. *Id.* at 1648-49. The dissent further states that “speech concerning public affairs is . . . the essence of self-government.” *Id.*

272. *Forbes*, 118 S. Ct. at 1650 (Stevens, J., dissenting).

IV. CRITICAL ANALYSIS

A. AETC's exclusion based on "political viability" was a pretext for viewpoint discrimination.

AETC's exclusion of Forbes based on his "political viability" was the pretext under which the station discriminated against Forbes because of his views. AETC did not apply their political viability test to all ballot-qualified candidates in the four districts they were holding debates. Only Forbes, the one independent candidate in all of Arkansas' districts, was subjected to this so-called test. Neither Democratic nor Republican candidates in any of the districts were subjected to this test regardless of their electoral prospects.²⁷³ It is obvious from the other districts' statistics that AETC invited all Democratic and Republican candidates without considering their political viability.

For example, the First District of Arkansas is one of the most Democratic districts in the country, not having sent a Republican Representative to the House in thirty years.²⁷⁴ Prior to 1992, the election results for this district show that over the last eight years the democratic candidate has received between 64.2% and 100% of the general election vote.²⁷⁵ In addition, Terry Hayes, the Republican candidate for this district in 1992, raised only \$38,015 compared to the Democratic candidate's \$439,343, and therefore, was outspent more than eleven to one.²⁷⁶ Despite these facts, Terry Hayes was invited to participate in his district's AETC sponsored debate without any examination of his political viability.²⁷⁷ In the final tally of the First District, the Democrat, Blanche Lambert received 69.8% of the vote compared to Hayes 30.2%.²⁷⁸

The Second District of Arkansas had similar statistics. The Democrat, Ray Thorton received 74.2% of the vote, yet Republican, Dennis Scott, who raised considerably less campaign funds than Forbes, was invited to participate in the AETC debate in his district.²⁷⁹ After examining these statistics, it is obvious that if either of these candidates were subjected to the same "political viability" test as Forbes, they would fail.

273. See Amicus Brief for Perot '96 at 10; *Forbes*, 118 U.S. 1633 (1998).

274. See *id.* at 11-12 (citing CONG. QUARTERLY'S GUIDE TO U.S. ELECTIONS 978-1321 (John L. Moore ed., 3d ed. 1994)).

275. See *id.* at 11 (citing CONG. QUARTERLY'S GUIDE TO U.S. ELECTIONS 1279-1315 (John L. Moore ed., 3d ed. 1994)). The democratic candidate in the first district received 68.9%, 100%, 100%, 64.8%, 97.2%, 64.2%, 100%, and 64.3% respectively, over the eight years prior to the AETC debate. *Id.*

276. See *id.* (citing Federal Election Comm'n Financial Data for House Gen. Election Campaigns through Dec. 31, 1992, at 22).

277. See *id.*

278. See Amicus Brief for Perot '96 at 12 (citing Clerk of the U.S. House of Representatives, *Statistics of the Presidential and Congressional Election of Nov. 3, 1992*, at 5 (1993)).

279. *Forbes*, 118 S. Ct. at 1645 n.6 (Stevens, J., dissenting).

In addition to AETC's discriminatory application of the political viability test, they never defined the test or its process. The test factors AETC indicated it used to assess Forbes' political viability was actually a determination of the likelihood of his winning the election.²⁸⁰ Therefore, when the AETC staff decided that Forbes was not a viable candidate, they really meant that he had little chance of winning the election.²⁸¹

After one understands what is involved in AETC's ambiguous political viability test, it becomes obvious that AETC used this test to unfairly discriminate against Forbes because of his extreme views.

B. Televised debates are of vital importance to the success of independent candidates.

From the beginning of our Democratic society "campaigning and voting were inseparably linked."²⁸² In the past, political candidates campaigned directly to their voters through a medium controlled by their political party.²⁸³ Today's candidates depend on media, especially television, "that they do not control."²⁸⁴ This gives an enormous amount of power to the media to decide which candidates deserve coverage and which should be ignored.²⁸⁵

For all candidates, political debates are important to their campaign's success, but for independent candidates, they can be crucial for their pursuit of much needed name recognition.²⁸⁶ These are precisely the people who will be most affected by the Supreme Court's opinion in *Forbes*. Typically, independent candidates do not enjoy the same financial support as the Democratic and Republican candidates, therefore it is harder for them to reach voters through other means. Ironically, this lower financial status is one of the factors AETC used to disqualify Forbes from participating in their debate,²⁸⁷ which as the dissent notes "should arguably favor inclusion."²⁸⁸ Forbes' lack of financial support should have cut in favor of his participation, "allowing him to share a free forum with wealthier candidates," since he could not afford a private forum of any sort.²⁸⁹

280. *See supra* note 232 and accompanying text.

281. *See* Amicus Brief for Perot '96 at 21.

282. Amicus Brief for Eugene McCarthy & Larry Agran at 12; *Forbes*, 118 S. Ct. 1633 (1998).

283. Ackley, *supra* note 34, at 500 (citing STEPHEN ANSOLABEHERE ET AL., *THE MEDIA GAME: AMERICAN POLITICS IN THE TELEVISION AGE I* (1993)). "A successful politician was able to speak directly to his constituents and could often depend upon party-controlled newspapers to bring the voters his message." *Id.*

284. *Id.*

285. *Id.*

286. *Id.*; *Chandler v. Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486 (11th Cir. 1990).

287. *See supra* note 232 and accompanying text.

288. *Forbes*, 118 S. Ct. 1648 (Stevens, J., dissenting).

289. *Id.*

A good demonstration of how important media coverage is for independent candidate's success is the campaign of Jesse "The Body" Ventura. Jesse Ventura, a former professional wrestler won the race for governor of Minnesota in November 1998. In the beginning, his campaign was considered a joke to the Democratic and Republican parties, but due to his fame as a wrestler, he received the media coverage essential to the success of his campaign.

Jesse Ventura is an excellent example of how hard it is to predict election results, or "political viability" months before an election. As late as two months before the November election for governor, pre-election polls indicated that Jesse Ventura would garner only 10% of the vote.²⁹⁰ However, he won the election with more than 35% of the vote. This demonstrates how unreliable AETC's assessment of Forbes' "political viability" was in June, five months before the debate and election.

V. CONCLUSION

This decision potentially could have a broad effect on elections in the future. Since independent candidates rely on television as their best chance to reach their voters, and often change election results by stealing a small margin of the Democratic or Republican votes, the ability to exclude them from debates will severely affect their success. The conditions set by AETC are unacceptable if we are to protect of our most precious political freedoms under the First Amendment.²⁹¹ Jamin Raskin²⁹² summed up the majority's decision in this case by saying, "[w]e used to think the 1st Amendment protects the people against the government. This decision protects the government against the people."²⁹³

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290. Rochelle Olson, *Ex-Wrestler has Choke Hold on Foes in Minn. Campaign*, ARIZ. REPUBLIC, Oct. 21, 1998, at A15.

291. *See id.* at 11 (citing *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1998) (stating that the "danger" of "content and viewpoint censorship" is "at its zenith when the determination of who may speak and who may not is left to the unbridled decision of a government official"))).

292. The lawyer who represented Ross Perot. Amicus Brief for Perot '96 at 1.

293. David G. Savage, *Third-Party Candidates Dealt Court Blow Law: Justices Rule that Public Broadcasters Do Not Have to Provide Equal Access During Debates. Fringe Politicians Can Be Excluded*, L.A. TIMES, May 19, 1998, at A16.

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