Loyola University Chicago Law Journal

Volume 30
Issue 4 *Summer 1999*

Article 7

1999

A Standard with No Moxie: The Supreme Court in *Arkansas Educational Television Commission v. Forbes* Allows Government Actors to Choose Candidates for Television Debates with Little Restriction

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Note

A Standard with No Moxie: The Supreme Court in *Arkansas Educational Television Commission v. Forbes* Allows Government Actors to Choose Candidates for Television Debates with Little Restriction

I. INTRODUCTION

By now, America is surely familiar with Minnesota's newly elected governor, former Navy Seal and professional wrestler, Jessie Ventura.[1] Such notoriety is as much a product of his unconventional background as of his flippancy behind the microphone. "Jessie the Body" once used the phrase "Democryps and Rebloodicans" in a mocking comparison of the two political parties to the rival street gangs, the Crips and the Bloods.[2] He also suggested that Hillary Rodham Clinton, after she referred to his campaign as a "sideshow," "maybe ought not leave the White House as often as she used to . . . . Bad things seem to happen when she leaves, so she'd be better off staying back at the White House and taking care of business there, rather than worrying about politics in Minnesota . . . ."[3] These comments represent the unorthodox, potentially offensive, yet widely popular approach that eventually led to Ventura's election victory.[4] Ventura's appeal stemmed from not only his rapport with the

1. Ventura was sworn into office on January 4, 1999, as Minnesota's 38th governor. *See* Jim Ragsdale, *Ventura Assumes Command*, CHI. TRIB. , Jan. 5, 1999, § 1, at 6; Pam Belluck, *Bravo, Plain-spoken Drive Make Jessie Ventura a Winner*, SAN DIEGO UNION-TRIB., Nov. 5, 1998, at 1, *available in* 1998 WL 20057781. He claimed 37% of the vote as a Reform party candidate, and this marked the first time that a candidate of Ross Perot's party won state office. *See id.*

2. Dane Smith, *Diary of an Upset*, MINNEAPOLIS-ST. PAUL STAR-TRIB., Nov. 8, 1998, at 1, *available in* 1998 WL 6375354. The Crips and the Bloods are the names of two rival Los Angeles street gangs known for their violence and animosity toward one another. *See id.*

3. *Id.* at 3.

4. *See* Barry Schlachter, *"The Body" Politic Minnesota's Governor-elect, Ex-wrestler Jesse Ventura Shows Pros of Another Field that They Don't Have a Hammerlock on High Office*, FORTWORTH STAR-TELEGRAM, Nov. 5, 1998, at 2, *available in* 1998 WL 14935964 (noting that Ventura's down-to-earth, low-budget campaign brought out many voters who would not have voted otherwise).

boisterous, rowdy professional wrestling fans and sports radio listeners,[5] but also from a rising discontent among Minnesota voters with the major political parties.[6] While most observers, including Ventura himself, only slowly warmed to the legitimacy of the campaign,[7] his visibility and outspoken, direct style influenced voters.[8]

While Governor Ventura's surprising election reflected a disenchantment in voters' minds with the two major party candidates,[9] it is also an example of an election outcome that has been made more unlikely as a consequence of a recent United States Supreme Court decision.[10] According to the Court's decision in *Arkansas Educational Television Commission v. Forbes*,[11] a public television station airing a political debate can deny a political candidate, such as Ventura, the opportunity to enhance his standing through the forum of a televised debate.[12] The Court ruled that a public television station may exclude a ballot-qualified candidate[13] from a debate if the station makes a reasonable and viewpoint-neutral decision as to the candidate's exclusion.[14]

Developments since this decision reveal the important consequences

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5. *See* Steve Rushin, *Body Language Governor-elect Jesse Ventura's Gigs on Sports Radio Helped Give Him a Stunning Hold on Voters*, SPORTS ILLUSTRATED, Nov. 16, 1998, at 20.

6. *See* Schlachter, *supra* note 4, at 2.

7. Just four days before the election, Ventura called his sports call-in show producer and, in response to his rising numbers, said: "[W]hat am I gonna do if I win this thing?" Rushin, *supra* note 5, at 20.

8. For instance, while hosting his radio show, he voiced his opposition to a plan to use tax dollars to fund a new Minnesota Twins baseball stadium by saying, "What's his name, Mike Piazza [baseball player], has signed for 91 million dollars for seven years, and I'm gonna tell a 31-year-old with a couple of kids that I'm taking her money so Mike has a place to play?" *Id.*

9. *See* Schlachter, *supra* note 4, at 2 ("There were voters angry at, or bored with, the two major party candidates–Republican St. Paul Mayor Norm Coleman and liberal Democrat Hubert Humphrey III.").

10. *See infra* Part IV.B-C.

11. Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633 (1998) (hereinafter *Forbes III*).

12. *See id.* at 1640-41.

13. In Arkansas, an independent candidate qualified for the election ballot by filing petitions signed by 3% of the electors in the district in which the person seeks office, provided that no more than 2,000 total signatures would be required. *See* Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497, 500 (8th Cir. 1996) (hereinafter *Forbes II*).

14. *See Forbes III*, 118 S. Ct. at 1641; *see also infra* Part III.B (discussing the Court's application of the requirement that the decision be reasonable and viewpoint-neutral to the public television station's decision to exclude Forbes).

of the Court's reasonable and viewpoint-neutral standard.[15] For one, a Minnesota public television station protected by this broad rule could have sponsored a debate without Ventura if the station supported its decision with minimal statistical evidence,[16] even if that evidence were arbitrary in nature.[17] Also, in light of the potentially heightened role of debates in the current political climate, the decision carries more weight than one might initially suspect. For instance, in addition to the recent organization of groups created to promote debates,[18] recent scholarly debate has focused on the possibility of constitutionally requiring debates as a means of campaign finance reform.[19] Thus, debates could influence voter decisions even more significantly in the future, and any standard that threatens to bar viable candidates deserves heavy scrutinization.[20]

This Note will argue that the public forum standard endorsed by the Supreme Court does not address the government's role in future debates with sufficient specificity. Part II of this Note highlights the development of the public interest standard and the First Amendment in the broadcasting arena, culminating with a discussion of the Public Forum Doctrine and its relation to a public television station's right to deny candidates access to debates.[21] Part III then traces the development of *Arkansas Educational Television Commission v. Forbes* in the

15. The Supreme Court decided the case on May 18, 1998. *See Forbes III*, 118 S. Ct. at 1633.

16. For instance, a station could have advanced the campaign's funding difficulties, *see infra* notes 267-68 and accompanying text, or preliminary poll figures such as those released by the Minnesota Poll on September 23, 1998, which reflected that Ventura had only a 10% showing. *See* Dane Smith, *The Stretch Run: It's Up for Grabs*, MINNEAPOLIS-ST. PAUL STAR-TRIB., Nov. 1, 1998, at 6, *available in* 1998 WL 6374509; *infra* Part V (discussing the broad Supreme Court standard now in effect and its impact on third-party candidates such as Ventura).

17. *Compare Forbes III*, 118 S. Ct. at 1643-44, *with Forbes III*, 118 S. Ct. at 1644-45 (Stevens, J., dissenting) (showing how the majority and dissenting opinions used different facts surrounding the Arkansas election to support opposing positions).

18. The Minnesota Compact is one such group. *See* Smith, *supra* note 2, at 3 (stating that the Minnesota Compact had a major goal of improving debates for the 1998 elections).

19. *See* Jeremy Paul, *Campaign Reform for the 21st Century: Putting Mouth Where the Money Is*, 30 CONN. L. REV. 779 (1998) (proposing a constitutional amendment requiring candidates for federal office to appear jointly before voters); *see also* Edward B. Foley, *Public Debate and Campaign Finance*, 30 CONN. L. REV. 817 (1998) (advocating not only mandatory debates but also a requirement of pre-election messages to voters).

20. The Supreme Court acknowledged the heightened role of debates in *Forbes*, noting that debates are regarded as the only time where a significant portion of the American public truly focuses on the election. *See Forbes III*, 118 S. Ct. at 1640; *see also infra* Part II.C.3.

21. *See infra* Part II.

lower courts, discusses the Supreme Court's endorse-ment of the public forum doctrine, and provides an overview of the dissent's disapproval with the Court's analysis.[22] Part IV suggests that the Supreme Court's public forum analysis needs further clarification.[23] As a possible solution, Part IV will also endorse a more specific standard for government actors and proposes "established, objective criteria" that will limit government actors' subjective leeway in debate decisions.[24] Part V analyzes the impact of the standard set by the Court on future debates and emphasizes the potential growing importance of political debates sponsored by state actors.[25]

II. BACKGROUND

A. The Development of Broadcast Rights and the Public Interest Standard

Federal regulation of broadcast rights began in the early twentieth century with the passage of the Radio Act of 1912[26] and the later, more developed Radio Act of 1927 ("Radio Acts").[27] The Radio Act of 1927 created the Federal Radio Commission ("FRC"), which regulated the airwaves as the predecessor to the Federal Communications Commission ("FCC").[28] The FRC under the Radio Acts regulated broadcasters according to the "Fairness Doctrine."[29] The

22. *See infra* Part III.

23. *See infra* Part IV.B.

24. *See infra* Part IV.C-D.

25. *See infra* Part V.

26. *See* Radio Act of 1912, ch. 287, 37 Stat. 302, *repealed by* Radio Act of 1927, ch. 169, 44 Stat. 1162. The Radio Act of 1912 gave the Secretary of Commerce the responsibility to provide order in the area of radio transmissions. *See* Adrian Cronauer, *The Fairness Doctrine: A Solution in Search of a Problem*, 47 FED. COMM. L.J. 51, 57 (1994). Court decisions interpreting the Act, however, stripped the Secretary of Commerce of the power to place conditions on licenses. *See id.*

27. *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, 484 (1998). Congress mainly passed the later Radio Act in response to the meager effects of the earlier legislation and the great increase in the number of frequencies through the early 1920s. *See* Gayle S. Ecabert, Comment, *The Demise of the Fairness Doctrine: A Constitutional Reevaluation of Content-Based Broadcasting Regulations*, 56 U. CINN. L. REV. 999, 1004 (1998). A series of national radio conferences and the resulting recommendations ultimately led to the drafting of a bill that later became the Radio Act of 1927. *See id.*

28. *See* Ackley, *supra* note 27, at 484 (citing Radio Act of 1927, ch. 169, 44 Stat. 1162; Cronauer, *supra* note 26, at 58).

29. *See id.*; *see also* Ecabert, *supra* note 27, at 1005. This doctrine required that "[a] station must permit reasonable opportunity for the presentation of views which contrast

doctrine required that broadcasters fairly cover public issues by ensuring that the public hear contrasting viewpoints regarding the topics presented.[30]

The Communications Act of 1934 ("the Act"), which governs broadcasters' rights today, updated the Radio Acts and established requirements that must be met every three years for the renewal of individual broadcast licenses.[31] Under the Act, Congress transferred the regulatory power of the FRC to the FCC.[32] The new legislation required the FCC to grant broadcasting license renewals based upon a public interest standard.[33] According to the standard, the FCC should renew licenses based on whether a station furthers the "convenience and necessity" of the community.[34]

As the means for determining whether a broadcaster acts in the public interest, however, the FCC originally avoided developing and applying the public interest ideals of convenience and necessity.[35] Instead, the FCC promulgated the "fairness doctrine" of the Radio Acts as the means for determining whether a broadcaster retained its license.[36] In 1959, after independently applying the "fairness doctrine" for decades, Congress codified the FCC's policies when it amended the Act of 1934 by specifically promulgating the "fairness doctrine."[37] This doctrine remained the standard for broadcaster decisions and the focus of considerable development in the courts until 1985.[38]

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those of persons who originally presented a controversial issue of public importance." Ackley, *supra* note 27, at 484 (quoting PHILIP KEIRSTEAD, MODERN PUBLIC AFFAIRS PROGRAMMING 167 (1979)).

30. *See* Ackley, *supra* note 27, at 484; *see also* Ecabert, *supra* note 27, at 1001.

31. *See* Communications Act of 1934, 47 U.S.C. §§ 301, 307(a), 307(d), 309(a) (1994). The FCC now grants licenses for eight year terms. *See* 47 U.S.C.A. § 307(c)(1) (West Supp. 1998).

32. *See* Ackley, *supra* note 27, at 485; *see also* Cronauer, *supra* note 26, at 58.

33. *See* Erick Howard, *Debating PBS: Public Broadcasting and the Power to Exclude Political Candidates from Televised Debates*, 1995 U. CHI. LEGAL F. 435, 443 (citing 47 U.S.C. § 309(a)).

34. *See id.* Congress does not delineate the meanings of these terms. *See id.*

35. *See* Ackley, *supra* note 27, at 484-85. The Communications Act may set forth the terms "convenience and necessity" as the standard; however, the FCC carried over the fairness doctrine from the Radio Acts as the governing principle until Congress formally rejected the doctrine in 1987. *See id.*

36. *See id.*

37. *See id.* at 485; *see also* Cronauer, *supra* note 26, at 60; Communications Act of 1934, ch. 652, 48 Stat. 1064.

38. *See* Ackley, *supra* note 27, at 490. The Supreme Court considered the fairness doctrine on a number of occasions in the 1970s. In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court found the fairness doctrine constitutional. 395 U.S. 367, 386-89 (1969). In that case, a radio host employed by Red Lion alleged on-air that a certain

In 1987, however, the FCC completely reversed its position and abruptly abandoned the "fairness doctrine."[39] The FCC determined that the "fairness doctrine" actually dissuaded broadcasters from addressing certain topics for fear that contrary viewpoints would require exorbitant time and expense.[40] The standard also lost much of its purpose because technological advances created numerous venues for individual expression and the potential disservice toward unrepresented individuals was balanced by the broadcasting opportunities on other mediums.[41] Consequently, the FCC formally rejected the "fairness doctrine," and the more general public interest standard has continued as the measuring stick for granting license renewals to broadcasters.[42]

Thus, while the fairness doctrine no longer applies, certain provisions of the Communications Act as carried forth by Congress in the code continue to regulate access to the airwaves and endorse the public interest standard.[43] Section 309(a) sets out the language of the Act of 1934 when it requires the FCC to consider "the public interest, convenience, and necessity" when renewing or granting licenses.[44]

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author was a Communist. *See id.* at 371. The FCC required that Red Lion provide the author with the opportunity to respond to the attacks and the Supreme Court upheld the decision. *See id.* at 372, 386. Later, the Supreme Court determined that the fairness doctrine does not provide an individual or a group the right to demand use of broadcast facilities for advertisements. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 113, 132 (1973).

39. *See* Ackley, *supra* note 27, at 490 (quoting Ecabert, *supra* note 27, at 1009-10). The FCC "made a one hundred and eighty degree change in its position." *Id.*

40. *See id*; *see also* Ecabert, *supra* note 27, at 1010.

41. *See* Ackley, *supra* 27, at 490; *see also* Cronauer, *supra* note 26, at 72.

42. *See* Ackley, *supra* note 27, at 490-91. The FCC "formally renounced the Fairness Doctrine" in 1987. Cronauer, *supra* note 26, at 62. This statement followed the Supreme Court's stance in *FCC v. League of Women Voters* that the Court would be forced to review the fairness doctrine's constitutional basis if the Commission found the doctrine had "the net effect of reducing rather than enhancing" the free expression of ideas by broadcasters. *Id.* at 61 (quoting FCC v. League of Women's Voters, 468 U.S. 364, 378-79 n. 12 (1984)). Since 1987, Congressional attempts to enact the FCC's previous interpretation of the fairness doctrine into law were opposed by Presidents Reagan and Bush, and more recent attempts under President Clinton have also been unsuccessful. *See* Ackley, *supra* note 27, at 491.

43. *See* 47 U.S.C.A. § 309(a) (West 1991 & Supp. 1998) (providing the requirements for license renewal); 47 U.S.C. § 315 (1994) (setting forth the "equal time" doctrine that governs broadcasters in decisions regarding candidates for political office). The Communications Act of 1934 in general is codified as amended at 47 U.S.C. §§ 151-613 (1991).

44. 47 U.S.C.A. § 309(a). The public interest standard's constitutionality rests on the "scarcity" rationale established in *Red Lion Broadcasting Co. v. FCC. See* Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1688 (1997) (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)). The Supreme Court justified

While Congress did not provide a definition of the obligations to the community that the broadcaster must meet to fulfill the requirements of the standard,[45] the code does specifically discuss a broadcaster's obligations toward political candidates.[46] Section 315 of the Act establishes equal opportunity requirements as they specifically apply to a broadcaster's decision to allow air time for the candidates.[47] Section 315 states 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."[48]

B. Common Law Development of the Public Interest Standard

The courts generally have interpreted the Communications Act broadly and given wide latitude to broadcasters in determining the public interest.[49] The Supreme Court acknowledged the broadcaster's discretion when it noted that neither Congress nor the First Amendment limited a private network's journalistic freedom.[50] The Court

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the regulatory power of the government because more people want to broadcast than there are available frequencies. *See* Red Lion, 395 U.S. at 388-89. Thus, the scarcity of broadcast frequencies dictates that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." Logan, *supra*, at 1688 (quoting FCC v. Pacifica Found., 438 U.S. 726, 748 (1978)).

45. *See* Ackley *supra* note 27, at 492 (citing Philip Keirstead, Modern Public Affairs Programming 154 (1979)).

46. *See* 47 U.S.C.A. § 315.

47. *See id.*

48. *Id.* The equal opportunity doctrine does not require a station to offer air-time in general; rather, it simply requires that if a broadcaster allows one candidate to use the station, then all candidates must be afforded the same opportunity. *See* Ackley, *supra* note 27, at 493. This requirement of equal opportunity may be satisfied if the station airing a debate between only the two major party candidates also provides other air time for the remaining candidates. *See id.* at 519. The Eighth Circuit, however, dismissed an opportunity to determine whether other air time fulfills the § 315 requirement when it concluded that equal opportunity matters were best left to the FCC. *See* DeYoung v. Patten, 898 F.2d 628, 633-34 (8th Cir. 1990).

49. *See* Howard, *supra* note 33, at 444-45 (citing Massachusetts Universalist Convention v. Hildreth and Rogers Co., 183 F.2d 497 (1st Cir. 1950); Gemini Enterprises, Inc v. WFMY Television Corp., 470 F. Supp. 559 (M.D. NC 1979)). In *Massachusetts Universalist Convention*, the First Circuit determined that a "licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest." *Massachusetts Universalist Convention*, 183 F.2d at 500. In *Gemini*, the court posited that broadcasters are "gatekeepers who control much of the flow of information in our society," and as such, "the First Amendment protects the ability of these gatekeepers to make decisions without government interference." *Gemini*, 470 F. Supp. at 568.

50. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973). In *Columbia Broadcasting*, the Democratic National Committee and the Business Executives Move for Vietnam Peace ("BEM") brought suit alleging violation

more recently endorsed this view when it stated that television broadcasters must be given the "widest journalistic freedom" in line with their public responsibilities.[51]

Though courts have consistently affirmed the availability of private broadcaster discretion, broadcaster discretion does not go unchecked.[52] For instance, the Court has stated that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[53] Thus, despite the desire to allow private broadcasters wide discretion, the Court has expressed a willingness to limit broadcasters in instances where their decisions deter the First Amendment's purpose of protecting the marketplace of ideas as a source of truth, and instead act as a vehicle for market monopolization by the government or by a private licensee.[54]

C. The Development of Public Broadcasting Regulation

While private broadcasting has been the subject of legislation and litigation since the turn of the century,[55] public broadcasting has been the subject of much less scrutiny by the courts because it did not exist as a separate entity until approximately thirty years ago.[56] As a general rule, public networks have enjoyed the same journalistic freedom in their programming decisions as their private station counterparts.[57]

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of the "fairness doctrine" because a television station refused to sell commercial air time to BEM. *See id.* at 98. The Supreme Court upheld the FCC's decision that "a broadcaster who meets his public obligation to provide full and fair coverage of public issues is not required to accept editorial advertisements." *Id.* at 97, 130-31.

51. *See* FCC v. League of Women Voters, 468 U.S. 364, 378; *infra* notes 67-71 and accompanying text, for a more thorough discussion of the case and its ramifications.

52. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

53. *Id.*

54. *See id.* (citing Associated Press v. United States, 326 U.S. 1, 20 (1945); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)); *see also supra* note 44 (briefly explaining the decision and providing an example of the Court using the fairness doctrine as a tool against unbridled broadcaster discretion).

55. *See supra* Part II.A-B (discussing regulation and common law development of broadcast rights).

56. *See infra* Part II.C.1-2 (discussing the creation of the Public Broadcasting Act of 1967).

57. *See Forbes III*, 118 S. Ct. 1633, 1646 (1998) (noting that "noncommercial, educational stations generally have exercised the same journalistic independence as commercial networks"); Rebecca L. Torrey, *First Amendment Claims Against Public Broadcasters: Testing the Public's Right to a Balanced Presentation*, 1989 DUKE L.J. 1386, 1394 ("[T]he original 1934 Communications Act provisions, along with subsequent legislation directed at public broadcasters, cover public stations."). Public television stations differ mostly from private stations in their means of funding and the

Nonetheless, state-owned networks have been subject to the scrutiny of both the FCC through the Communications Act of 1934 and more recent legislation specifically directed at public broadcasters.[58]

1. The Public Broadcasting Act

Although Congress provided funding for the development of commercial television stations through the Educational Television Act of 1962,[59] public broadcasting did not formally exist until Congress created the Public Broadcasting Act of 1967,[60] which amended the Communications Act of 1934.[61] The Public Broadcasting Act established the Corporation for Public Broadcasting ("CPB") and set forth guidelines protecting public broadcasters from federal government intervention.[62] The public broadcast stations in turn are governed by FCC regulation and statutory requirements; the stations receive funds contingent upon compliance with these provisions.[63] Congress provided the CPB with the authority to distribute these funds, allocated annually by Congress,[64] for the improvement of broadcast facilities and production of "high-quality," "creativity," and

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support they receive from the government. *See* Telephone Interview with Bill Handley, Vice President of Minnesota Production, in Minneapolis, Minn. (Mar. 22, 1999). Public stations, as indicated by their name, receive support from state government and from the public at large. *See id.* In general, three types of public television stations exist, but all three receive at least some financial support from the government. *See id.* Thus, they receive slightly different treatment than private stations, which are owned by private individuals. *See id.*

58. *See* Torrey, *supra* note 57, at 1394.

59. *See id.* at 1386 n.51 (citing Educational Television Act of 1962, Pub. L. No. 87-447, 76 Stat. 64). For a more thorough discussion of the development of public television and origin of the Public Broadcasting Act of 1967, see *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

60. *See* Pub. L. No. 90-129, 81 Stat. 365 (1967) (codified as amended at 47 U.S.C. §§ 390-99 (West 1991 & West Supp. 1998)). Congress authorized this federal funding because the Carnegie report found that the "instructional, educational, and cultural purposes" of public television "serve[] the public interest." Torrey, *supra* note 57, at 1395.

61. *See* Act of June 19, 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-613 (1991 & Supp. 1998)); Torrey, *supra* note 57, at 1934 n.50.

62. *See* 47 U.S.C. § 396(a)(7) (1992); 47 U.S.C. § 396(b) (1991). The Corporation for Public Broadcasting ("CPB") serves as an "intermediary" between the federal government and public stations in order to distance government involvement. *See* Torrey, *supra* note 57, at 1396 (citing FCC v. League of Women Voters, 468 U.S. 364, 388-89 (1984)). In order to make available these federally funded programs, the CPB established the Public Broadcasting Service ("PBS") and National Public Radio ("NPR"). *See id.* at 1396.

63. *See* Torrey, *supra* note 57, at 1398.

64. *See id.* at 1395 (citing 47 U.S.C.A. § 396(k)(2)(B) (West Supp. 1989) (amended 1992) (establishing a Public Broadcasting fund).

"excellence" in its programming.[65]

2. Judicial Interpretation of the Standard

The Supreme Court did not consider public broadcasting rights in any context until 1984, when it evaluated the constitutionality of a provision of the Public Broadcasting Act forbidding federally subsidized stations from editorializing.[66] In *FCC v. League of Women Voters*,[67] the majority found the statute overly broad because it banned speech by private stations on topics completely independent of government involvement.[68] The Court noted, however, that this decision did not reflect a judgment of whether a similar statute prohibiting stations operated by state or local governments from editorializing would be unconstitutional.[69] Thus, the Court only concluded that private stations have a right to express their views free of government intervention,[70] and it refrained from making a decision on similar congressional limitations of public television stations.[71] Consequently, until recently,[72] the courts allowed public broadcasters the same journalistic discretion as their private television counterparts.[73]

3. Public Broadcasting Rights in the Context of Political Debates

In recent cases involving political debates on public television stations, however, courts have applied different standards to public television broadcasters in their decisions regarding candidates for

65. *See* 47 U.S.C. § 396(g)(1)(A) (1994). Regardless of these duties, Congress explicitly did not create the CPB as a United States governmental agency or establishment. *See id.* § 396(b).

66. *See* FCC v. League of Women Voters, 468 U.S. 364, 395 (1984) (discussing constitutionality of Public Broadcasting Amendments of 1981, Pub. L. No. 97-35, 95 Stat. 730, amending § 399 of the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 47 U.S.C. §§ 390-399).

67. FCC v. League of Women Voters, 468 U.S. 364 (1984).

68. *See id.* at 395. The suit was brought by Pacifica Foundation, a nonprofit corporation owning noncommercial educational broadcasting stations in various metropolitan areas. *See id.* at 370. Its licensees operated by virtue of the grants provided by CPB, and brought this action challenging the constitutionality of the limitations placed on the stations by § 399 of the Public Broadcasting Act. *See id.*

69. *See id.* at 394-95 n.24.

70. *See id.* at 395.

71. *See id.* at 394-95 n.24.

72. *See infra* Part II.C.3 (discussing recent cases concerning public broadcasting rights with respect to political debates), *see also infra* Part III (discussing the Supreme Court's recent decision in *Forbes III*, 118 S. Ct. 1633 (1998)).

73. *See Forbes III*, 118 S. Ct. at 1646.

televised debates.[74] While private networks continue to be guided by the public interest standard in their debate decisions, public stations face potential accusations of subjectively selecting candidates worthy of the debate.[75] Thus, in its capacity as a state actor, the public station's programming decisions may be construed as either government censorship or government endorsement of the station's content while such fears are inapplicable to private broadcasters.[76]

Additionally, the Supreme Court has emphasized the heightened importance of free speech when it involves restrictions on candidates for political office.[77] The Court has stated that debate on public issues "should be uninhibited, robust and wide-open,"[78] and that the constitutional guarantee regarding free speech "has its fullest and most urgent application precisely to the conduct of campaigns for political office."[79] Thus, much debate has focused on whether the public interest standard[80] adequately governs public television broadcasters in the context of political candidate debates when Section 315[81] and the public forum doctrine[82] provide alternative methods of regulation.[83]

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74. *See* Marcus v. Iowa Pub. Television, 97 F.3d 1137, 1144 (8th Cir. 1996) (holding that a public television debate is a designated public forum and determining that the station's decision to limit a political debate to newsworthy candidates rather than all candidates was in the public's interest); *Forbes II*, 93 F.3d 497, 504-05 (8th Cir. 1996) (station's content-based decision to exclude Libertarian candidate did not violate First or Fourteenth Amendment); Chandler v. Georgia Pub. Telecomms. Comm'n, 917 F.2d 486, 488-89 (11th Cir. 1990) (debate was designated public forum from which candidate could not be excluded on the basis that the station did not consider the candidate politically viable).

75. *See Forbes III*, 118 S. Ct. at 1647.

76. *See id.* "[A]d hoc decisions about the political content of its programs necessarily increases the risk of government censorship and propaganda in a way that protection of privately owned broadcasters does not." *Id.*

77. *See id.* at 1640; *see also* CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981) (emphasizing the importance of opportunities for candidates to express their views so that the public may make informed, intelligent decisions based on the candidate's personal qualities and positions on vital issues).

78. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995) (citation omitted).

79. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

80. *See supra* Parts II.A-B (discussing development of broadcast rights and public interest standard).

81. *See supra* Part II.A (discussing "equal time" doctrine).

82. *See infra* Part II.D (discussing public forum doctrine).

83. *See* Marcus v. Iowa Pub. Television, 97 F.3d 1137, 1141 (8th Cir. 1996) (applying the public forum doctrine as the standard for determining whether a public television station may limit the number of candidates appearing on a televised debate); *Forbes II*, 93 F.3d 497, 504 (8th Cir. 1996) (applying the public forum doctrine and finding that the debates constitute designated public fora); Chandler v. Georgia Pub. Telecomms. Comm'n, 917 F.2d 486, 488-89 (11th Cir. 1990) (ignoring a public forum analysis in favor of the public interest standard); Ackley, *supra* note 27, at 524-25

D. The Public Forum Doctrine

If a court determines that public television stations serve as government actors when choosing candidates for debate,[84] then the court may overlook the governing power of the FCC and instead evaluate a public station's decisions in terms of the First Amendment's protection.[85] If applied, this constitutional protection would not guarantee government property access to any parties that wish to exercise their right to free speech.[86] Limits to this access exist and, as a means to define these limits, the Supreme Court originally adopted a public forum analysis for situations where the government's interest in restricting the use of the property to a particular purpose outweighs the interest of other parties hoping to use the property.[87] Thus, the government can control access to speech on its property only if the relevant forum allows such control by its nature.[88]

The Supreme Court has identified the following three types of fora within the public forum analysis: the traditional public forum, the designated public forum, and the nonpublic forum.[89] The first forum,

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(endorsing § 315's equal opportunity protection as the appropriate regulatory tool for public broadcasters); Howard, *supra* note 33, at 453-54 (supporting the public forum analysis, but claiming that a more lenient application actually protects First Amendment rights because public television broadcasters will not be dissuaded from airing candidate debates).

84. Many courts and commentators determined that public television stations acted on behalf of the state and thus were subject to First Amendment scrutiny. *See* Forbes v. Arkansas Educ. Television Communication Network Found., 22 F.3d 1423, 1428 (8th Cir. 1994) (hereinafter "*Forbes I*"); DeYoung v. Patten, 898 F.2d 628, 631-32 (8th Cir. 1990), *overruled in part by Forbes I*, 22 F.3d at 1423; Torrey, *supra* note 57, at 1403-04 (determining that the editorial and operating decisions of public stations licensed to the government are state actions for First Amendment purposes). This stance was validated by the Supreme Court's decision in *Forbes v. Arkansas Educational Television Commission* when the Court applied a First Amendment public forum analysis to the public television station's candidate debate decisions. *See Forbes III*, 118 S. Ct. 1633, 1641-43 (1998).

85. *See* Ackley, *supra* note 27, at 494 (asserting that the FCC has failed to revoke a license in 20 years and, as a result, "an examination of First Amendment case law and how it impacts broadcasters is now in order.")

86. *See* Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800-01 (1985). In *Cornelius*, the legal defense fund brought suit against the government alleging that the government's exclusion of legal defense and political advocacy organizations from "a charity drive aimed at federal employees" violated the First Amendment. *Id.* at 790. The Supreme Court determined that the charity drive was not a designated public forum. *See id.* at 804-05.

87. *See id.* at 800.

88. *See id.*

89. *See id.* at 802; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-47 (1983). In *Perry*, a union challenged the constitutionality of an exclusivity clause in a contract between the school district and its union that granted the union

the traditional public forum, consists of places that have long been "devoted to assembly and debate" and includes venues such as public streets and parks.[90] In these "quintessential public forums," the government may only prohibit speech activity under strict circumstances.[91] To employ a content-based decision on the regulated speech, the state must show that its regulation is narrowly tailored to achieve a compelling state interest.[92]

Alternatively, the government may create a designated public forum[93] by designating a place or means of communication for use by the public for assembly, for use by speakers, or for discussing particular subjects.[94] Because the government has designated this second type of forum, the Constitution forbids exclusions from these places unless the exclusion serves a compelling state interest.[95] Applying the public forum doctrine, the Supreme Court determined that a state university established a designated or limited public forum by adopting a policy that allowed registered student groups access to meeting facilities.[96] The Court also found that a state statute requiring open school board meetings created a designated public forum.[97]

Certain government property that is neither a traditional nor designated public forum may still receive First Amendment protection

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exclusive access to the school's mail facilities. *See id.* at 39-41. The Court held that the school mail system constituted a nonpublic forum because the school only opened the forum to selective access. *See id.* at 47.

90. *See Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 45; *see also* Hague v. CIO, 307 U.S. 496, 515 (1939) (eliciting 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").

91. *See Perry*, 460 U.S. at 45.

92. *See id.* In traditional public fora, any restrictions on "the time, place, and manner of expression" must be "content-neutral," must be "narrowly tailored to serve a significant government interest," and must "leave open ample alternative channels of communication." *Id.* Any restrictions, however, on the time, place, and manner of expression in designated public fora need only be reasonable. *See id.* at 46.

93. Courts use the terms "limited public forum" and "designated public forum" interchangeably. In the interest of consistency, except where quoted, this Note will refer to such a forum as a "designated public forum."

94. *See Cornelius*, 473 U.S. at 802 (citing *Perry*, 460 U.S. at 45-46 and n.7).

95. *See Perry*, 460 U.S. at 45-46. While the scrutiny applied to a content-based decision by a state actor is the same for traditional and designated public fora, the scrutiny differs for restrictions of time, place, and manner. *See supra* note 92 (noting differences in scrutiny).

96. *See* Widmar v. Vincent, 454 U.S. 263, 277 (1981) (determining that the university created a forum when it left the property "generally open" to all registered student groups, and as such the property was open to a class of speakers).

97. *See* Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 174-75 and n.6 (1976).

as a nonpublic forum, the third type of forum.[98] The First Amendment, however, does not guarantee absolute access to the property merely because the government owns or controls it.[99] Rather, these government-owned "nonpublic fora" may be subject to government restriction so long as the restrictions are reasonable and viewpoint-neutral.[100] Thus, the government maintains the right to use its property for its intended purpose in the same manner as a private land owner.[101] In applying this forum analysis, the Supreme Court has held that the government, by running a charity drive authorized by executive order and aimed at federal employees, created a nonpublic forum because the government limited access to the forum and the limited access promoted a more efficient workplace.[102] Moreover, the Court has also concluded that school mail facilities consisted of a nonpublic forum because the mail system was not open generally to the public.[103]

E. The Eleventh Circuit Endorses the Public Interest Standard

The public forum doctrine provided three types of public fora, each with a different standard, for the Supreme Court when analyzing cases where a state actor restricted speech on its property.[104] Recent decisions by different federal courts of appeal, however, reflect a growing confusion regarding whether the public forum analysis applies to public broadcasters when they limit the number of candidates invited to appear on televised debates.[105]

In at least one circuit, the court used the public interest standard to deny an independent candidate access to a televised debate on public television. The Eleventh Circuit in *Chandler v. Georgia Public*

98. *See Perry*, 460 U.S. at 46.

99. *See id.* (citing United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981)).

100. *See id.*

101. *See id.*

102. *See* Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 805-06 (1985).

103. *See Perry*, 460 U.S. at 46-47.

104. *See supra* Part II.D (discussing the public forum doctrine); *supra* note 92 (explaining the slight differences between the traditional public forum and designated public forum standards).

105. *See, e.g., Forbes II*, 93 F.3d 497 (8th Cir. 1996); Chandler v. Georgia Pub. Telecomm. Comm'n, 917 F.2d 486 (11th Cir. 1990). Neither of these two decisions concentrated on § 315 and its equal opportunity requirement; however, some commentators believe that this statute's protection amply regulates public broadcasters decisions. *See* Ackley, *supra* note 27, at 516-21.

Telecommunications Commission[106] held that a public television station could refuse the candidate access to the debate without violating the candidate's First Amendment rights.[107] In *Chandler*, two Libertarian candidates for political office in Georgia filed suit against the state's public television station, the Georgia Public Telecommunications Commission ("GPTC"), because the station invited only the Democratic and Republican candidates to a series of televised debates.[108]

In a succinct opinion,[109] the court of appeals employed the public interest standard in finding for the GPTC.[110] The court of appeals first noted that the GPTC did not constitute a pure marketplace of ideas.[111] Instead, the GPTC was created for the narrow purpose "of providing educational, instructional, and public broadcasting services."[112] Consequently, the state could regulate the content of its programs to achieve its primary function of providing educational and instructional broadcasts for the citizens of Georgia.[113] The court next noted that the GPTC was regulated by the duty to provide programming in the public's best interest.[114] While the court found that the station "regulated content" by deciding to air certain candidates at the exclusion of others, it determined that the GPTC's decision was reasonable, not viewpoint restrictive, and helped to achieve GPTC's primary function.[115] In allowing public broadcasters broad discretion,

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

107. *See id.* at 488-89.

108. *See id.* at 487-88. The district court, relying on the First Amendment and Fourteenth Amendment Equal Protection grounds, enjoined the defendants from televising the debates unless the station included the Libertarian candidates. *See id.* at 488.

109. The court felt the need for a prompt resolution before the debates and delivered its opinion two days before the first scheduled debate. *See id.* at 488.

110. *See id.* at 488.

111. *See id.* The court admitted that "[w]ere GPTC a medium open to all who have a message, whatever its nature, GPTC would function as a marketplace of ideas." *Id.* (citing Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, (5th Cir. 1982) (Rubin, J., concurring). The court, however, did not find GPTC to be such a medium. *See id.*

112. *Id.* (citation omitted).

113. *See id.* The court of appeals emphasized, however, "that, public television stations must, no matter what may be the wishes of state government personalities, abide by the dictates of 47 U.S.C. § 315 regarding fairness and balance or lose their licenses." *Id.* at 489.

114. *See id.* at 488.

115. *See id.* at 489. The court determined that GPTC's decision to include only the Democratic and Republican candidates was valid because GPTC believed that such a debate was in the best interest of the citizens of Georgia. *See id.* Essentially, the court used the nonpublic forum standard without explicitly addressing it as such. *See supra*

the court emphasized its reluctance to "establish a precedent that would require public television stations to forego the broadcast of controversial views touching upon important public issues . . . lest the airing of such programs require a cacophony of differing views on each subject."[116]

III. DISCUSSION

A. *Facts of the Case and the Lower Courts' Opinions*

The Eleventh Circuit's subtle endorsement of the public interest standard indicated that courts may be willing to look beyond the First Amendment where public stations choose candidates for debates.[117] The tide shifted, however, in *Forbes v. Arkansas Educational Television Commission*,[118] where the Eighth Circuit applied the public forum analysis to require a public television station to give access to an independent candidate.[119] In *Forbes*, the appellate court determined that a government-controlled television station cannot deny a third party access to a televised debate on the subjective ground that the candidate is not viable.[120] The suit sprung from a decision by the Arkansas Educational Television Commission ("AETC") to broadcast a debate on October 22, 1992 between the Democratic and Republican candidates for the Congressional seat in the Third District of Arkansas.[121] Two months after the AETC invited the candidates from

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Part II.D (recognizing that certain government property can be constitutionally controlled so long as such control is "reasonable" and "viewpoint-neutral").

116. *Chandler*, 917 F.2d at 489-90.

117. *See supra* Part II.E (discussing Chandler v. Georgia Pub. Telecomms. Comm'n, 917 F.2d 486 (11th Cir. 1990)). Even if the Eleventh Circuit did not directly endorse the public interest standard, at the very least the court of appeals considered the debate decision reasonable and viewpoint neutral, which meets the qualifications of the nonpublic forum. *See Chandler*, 917 F.2d at 489.

118. *Forbes II*, 93 F.3d 497 (8th Cir. 1996).

119. *See id.* In *Forbes I*, the Eighth Circuit reversed the district court's decision to dismiss Forbes' complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Forbes I*, 22 F.3d 1423, 1430 (8th Cir. 1994). The court held that a public-forum analysis correctly governed the case, and that the determination of whether the debate constituted a designated public forum was for the factfinder to decide. *See id.* at 1429-30. The Eighth Circuit, however, affirmed the district court's rejection of Forbes' 47 U.S.C. § 315 claim. *See id.* at 1427-28. The court held that a § 315 equal opportunity claim does not create a private cause of action, and thus a party may only pursue such a claim through the procedure proscribed by the FCC. *See id.*

120. *See Forbes II*, 93 F.2d at 500.

121. *See id.* The AETC actually chose to air five debates, one for the Senate and one each for the four congressional seats in Arkansas. *See Forbes III*, 118 S. Ct. 1633, 1637 (1998). The AETC, which owns and operates Arkansas' five noncommercial television networks, limited the debates to two candidates because the debate format allowed

the two major parties, Ralph Forbes obtained the necessary 2,000 signatures required by Arkansas law and qualified as an independent candidate for the election day ballot.[122] Mr. Forbes then requested permission from the AETC to participate in the debate, but AETC denied the request because, as Executive Director Susan Howarth explained, it was in the best interest of the viewers that the debate be limited to the candidates already invited.[123]

Three days before the debate, Forbes filed suit against the AETC seeking a preliminary injunction warranting his appearance in the debate.[124] The district court and the United States Court of Appeals for the Eleventh Circuit denied this request, and the district court later dismissed the complaint for failure to state a claim.[125] The Eighth Circuit reversed, however, holding that AETC is a state actor, and that the exclusion must survive First Amendment scrutiny under a public-forum analysis.[126] The appellate court left the determination of whether the debate constituted a designated public forum or nonpublic forum to the factfinder in order to determine the necessary standard of First Amendment scrutiny.[127] Additionally, the court remanded the case to the district court because the defendant had provided no reason for excluding Forbes from the debate.[128]

On remand, the district court ruled that AETC was a nonpublic forum as a matter of law.[129] The jury then considered the facts and found that the AETC's decision was viewpoint-neutral and that it was not the result of outside political pressure.[130] Thus, the district court

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approximately 53 minutes of questions and answers for each of the one hour debates. *See id.*

122. *See Forbes II*, 93 F.3d at 500. State law requires a candidate to file petitions signed by at least 3% of the qualified voters in the district in which the candidate seeks office, but no more than 2,000 signatures are required. *See id.* (citing ARK. CODE ANN. § 7-7-103(c)(1)). Forbes previously ran for the Republican nomination for Arkansas Lieutenant Governor in both 1986 and 1990. *See Forbes III*, 118 S. Ct. at 1644-45. Here, however, he qualified as an independent candidate under state law for this election. *See Forbes II*, 93 F.3d at 500.

123. *See Forbes III*, 118 S. Ct. at 1638.

124. *See id.*

125. *See id*; *see also supra* note 119 (discussing history of the case).

126. *See Forbes III*, 118 S. Ct. at 1683.

127. *See Forbes I*, 22 F.3d 1423, 1429-30 (8th Cir. 1994).

128. *See id.* at 1430 (noting that AETN had not yet filed an answer).

129. *See Forbes II*, 93 F.3d 497, 500 (8th Cir. 1996). The district court took this decision out of the hands of the jury and presented only the limited issues of fact necessary to determine if the station's actions conformed with the First Amendment requirements of a nonpublic forum. *See id.* at 500-01.

130. *See id.* at 501. The jury submitted these two conclusions on special verdict. *See id.* The jury addressed the outside political pressure because the defendants asserted at

entered judgment for AETC and Forbes appealed.[131]

After entertaining a series of procedural issues,[132] the Eighth Circuit vigorously opposed the district court's public forum decision.[133] First, the appellate court determined that the forum is defined by the access sought by the speaker and that, when a speaker pursues access to a certain means of communication, the analysis should focus on that particular forum only.[134] Thus, the court characterized the debate, rather than the station at large, as the relevant forum.[135]

After explaining the background of the public forum doctrine and stating that no bright line test exists for determining the appropriate designation, the appellate court asserted that a debate constitutes a designated public forum.[136] The Eighth Circuit analogized the debate to the forum in *Widmar v. Vincent*, where the Supreme Court concluded that a university created a designated public forum by making its facilities available to registered student groups for expressive purposes.[137] The court equated the opening of the university's facilities to AETC's decision to open its facilities to a particular group, which were the qualified candidates for the Third Congressional seat.[138]

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trial that Forbes could recover only upon a finding that outside pressure influenced AETC. *See id.* The court of appeals did not mention whether the district court specifically examined reasonableness. *See id.*

131. *See id.*

132. *See id.* at 501-02. The court first found the special interrogatories presented to the jury did not violate Forbes' First Amendment rights because they were sufficiently clear. *See id.* at 501. The court also held that the district court did not abuse its discretion in excluding evidence that Forbes contended would have proved that the husband of the debate's producer was prejudiced against him. *See id.* at 501-02. Additionally, the Eighth Circuit determined that the question of which forum is appropriate is a mixture of law and fact and, in First Amendment cases with questions of both law and fact, the court's review is de novo. *See id.* at 502-03.

133. *See id.* at 503. The court went so far as to state that "[t]he choice between the two forums suggested is not a difficult one." *Id.* The court later stated "without reservation . . . that the forum in this case, the debate, is a limited public forum." *Id.* at 504.

134. *See id.* at 503 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 801 (1985)).

135. *See id.*

136. *See id.* at 504. The court described the public forum as "limited" instead of the more commonly chosen term "designated." *See id.*; *see also supra* note 93 (noting that courts use these two words interchangeably to describe a forum type).

137. *See Forbes II*, 93 F.3d at 504 (discussing Widmar v. Vincent, 454 U.S. 263, 267-68 (1981)); *see also supra* note 96 and accompanying text (summarizing the Supreme Court's holding in *Widmar v. Vincent*).

138. *See id.* The Eighth Circuit also distinguished *Forbes II* from two cases in which the Supreme Court found that the government opened nonpublic fora. *See id.* In both of the cases, the Eighth Circuit determined that the fora were not created to provide an

Applying the appropriate First Amendment scrutiny,[139] the Eighth Circuit determined that AETC's decision was "neither compelling nor narrowly tailored."[140] While the appellate court agreed that political "viability" is the type of journalistic discretion ordinarily afforded broadcasters, the court emphasized that these journalists were employees of the government and thus could not base their decisions on subjective determinations such as political viability.[141] Consequently, the court held that Forbes was entitled to judgment and remanded the case to the district court in order to determine damages.[142] The Supreme Court granted certiori first to resolve the conflict between the Eighth Circuit's use of the public interest standard and the Eleventh Circuit's use of the public forum doctrine in *Chandler*, and second because of the magnitude of the issue before the Court.[143]

B. The Majority Opinion

Justice Kennedy, writing for the majority, endorsed the public forum doctrine[144] but reversed the Eighth Circuit's decision on the grounds that the Eighth Circuit had wrongly classified the type of public forum and hence applied the incorrect level of scrutiny.[145] The Court held that the debate was a nonpublic forum and that AETC's exclusion of Forbes withstood constitutional scrutiny because the decision was both "reasonable" and "viewpoint-neutral."[146]

The Court analyzed the issue of whether Forbes' exclusion from the

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opportunity for expression. *See id.* In *Cornelius v. NAACP Legal Defense and Educational Fund*, the government designed the forum to minimize workplace disruptions. *See* 473 U.S. 788, 805 (1985). In *Perry Educational Association v. Perry Local Educators Association*, the forum, which was the school's internal mail system, provided for a form of expression "relating to school business." *See* 460 U.S. 37 (1983). The debate by AETC, however, was staged solely as a means for candidates to express their views. *See Forbes II*, 93 F.3d at 504; *see also supra* notes 86-95 (discussing *Cornelius* and *Perry* in more detail).

139. When a state actor opens a designated public forum, its content-based decisions must be narrowly tailored to serve a compelling state interest. *See supra* notes 92-97 and accompanying text.

140. *Forbes II*, 93 F.3d at 505. *But see* Marcus v. Iowa Pub. Television, 97 F.3d 1137, 1141 (8th Cir. 1996) (finding a public station's exclusion of a candidate passed First Amendment scrutiny because the station found the candidate non-newsworthy).

141. *See Forbes II*, 93 F.3d at 504-05.

142. *See id.* at 505.

143. *See Forbes III*, 118 S. Ct. 1633, 1638 (1998).

144. *See id.* at 1639-40

145. *See id.* at 1644; *see also supra* notes 118-42 and accompanying text (outlining the Eighth Circuit's rationale).

146. *See Forbes*, 93 F.3d at 1641.

debate was consistent with the First Amendment in three steps.[147] The Court first determined that the "special characteristics of candidate debates" qualify the debates as some type of forum.[148] In doing so, the Court reviewed general broadcast principles[149] and concluded that in most instances the broad nature of editorial discretion warrants a system of minimal interference with broadcaster decisions.[150] The majority, however, determined that candidate debates provided "the narrow exception to the rule" for two reasons.[151] First, the candidate debate by design is a forum for candidate expression with the purpose of allowing candidates to share political views with minimal intrusion or guidance.[152] Second, the candidate debate plays a heightened role in the electoral process as it significantly impacts the electorate in evaluating the candidates' positions and competence.[153] Accordingly, the candidate debates lend themselves to scrutiny under the forum doctrine[154] and are not subject only to the public interest standard. Having decided that political debates warrant heightened editorial scrutiny, the Supreme Court turned its attention to whether the debate consisted of a traditional, designated, or nonpublic forum.[155]

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147. *See id.* at 1638-44.

148. *Id.* at 1640-41 (noting that candidate debates are "different from other programming").

149. *See id.* at 1639-40. The Court stated that "broad rights of access for outside speakers would be antithetical . . . to the discretion that stations and their editorial staff must exercise . . ." *Id.* at 1639. Additionally, the Court cited the broad discretion usually afforded broadcasters by the courts, and the broadcaster's duty to serve the public interest as the rationales for disallowing third-party claims of access under the public forum precedents. *See id.* at 1639-40.

150. *See id.* at 1639 (positing that editorial discretion generally "counsels against subjecting broadcasters to claims of viewpoint discrimination"). While the majority noted that public broadcasters applying editorial discretion engage in "speech activity," the Court also stated that scrutiny under the forum doctrine unjustifiably interferes with a broadcasters' purposes. *See id.* at 1639-40.

151. *Id.* at 1640.

152. *See id.*

153. *See id.* The Court stated that:

> [D]ebates 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, as well as the only campaign information format which potentially offers sufficient time to explore issues and policies in depth in a neutral forum.'

Id. (quoting CONGRESSIONAL RESEARCH SERV., CAMPAIGN DEBATES IN PRESIDENTIAL GENERAL ELECTIONS (summary) (June 15, 1993)); *see also supra* notes 77-79 and accompanying text (elaborating on the importance of elections).

154. *See Forbes III*, 118 S. Ct. at 1640-41.

155. *See id.* at 1641. The Court provided a very succinct overview of its precedential discussions of the forum doctrine. *See id.* The Court stated:

> [T]raditional public fora are open for expressive activity regardless of the government's intent . . . . The government is free to open additional

After reviewing the First Amendment public forum doctrine, the Court specifically narrowed the issue to whether the debate was either a designated public or nonpublic forum.[156] The Court distinguished the two fora by focusing on the intent of the state actor in creating the forum.[157] If the government intended to make the property "generally available," it created a designated public forum.[158] If instead the government opened a forum based on "selective access"—in other words, allowing access to only a certain class of speakers—then the property was a nonpublic forum.[159] The Court concluded that AETC did not open the debate generally to all available candidates for the Arkansas Congressional seat, but instead reserved eligibility for the debate to selected candidates for the Third Congressional seat.[160] Thus, AETC made "candidate-by-candidate" decisions regarding which individuals would appear on its debate.[161] This "selective access, unsupported by evidence of a purposeful designation for public use, [did] not create a public forum."[162]

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properties for expressive use by the general public or by a particular class of speakers, thereby creating designated public fora. Where the property is not traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all.

Id.

156. *Id.* at 1641-42 (noting that the Court agreed with the parties that "the AETC debate was not a traditional public forum").

157. *See id.* Here, the Supreme Court's analysis differed from the approach of the Eighth Circuit, which focused its analysis on the nature of the expressive activity. *See supra* note 134 and accompanying text (discussing the circuit court's approach). The Court found that the university in *Widmar* expressly created a forum "generally open" to registered student groups. *See id.* (interpreting Widmar v. Vincent, 454 U.S. 263, 267-68 (1981)). On the other hand, the Court determined that the government in *Perry* and *Cornelius* intended the forum for only parties that received permission, and the Court found that this "selective access" formed a nonpublic forum. *See id.* (citing Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 805 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)); *see also supra* notes 86, 89 (discussing Cornelius and Perry, respectively, in more detail) and Part II.D (discussing the public forum doctrine).

158. *See Forbes III*, 118 S. Ct. at 1642. While the Supreme Court in *Forbes III* cited to *Cornelius*, 473 U.S. at 804-05, the Court first created the distinction between general and "selective access" in *Perry*. *Perry*, 460 U.S. at 47. The Court, however, more clearly set forth this distinction as the key determination in *Forbes III*. *See Forbes III*, 118 S. Ct. at 1642.

159. *See Forbes III*, 118 S. Ct. at 1642.

160. *See id.*

161. *See id.* at 1642-43. The Court compared this to its decision in *Cornelius* where the Government made agency by agency determinations as to which of the eligible agencies would participate in a charity drive. *See id.*; *supra* notes 86-88 and accompanying text (discussing *Cornelius* in greater detail).

162. *See id.* at 1643 (quoting *Cornelius*, 473 U.S. at 805).

Once the Court classified the forum as nonpublic, it turned to the "reasonable" and "viewpoint neutral" standard to decide the case.[163] Justice Kennedy found the decision to exclude Forbes to be viewpoint neutral by citing the jury's finding that the exclusion was not based on objections to Forbes' opposing viewpoints.[164] Additionally, the Court found reasonableness in the testimony of AETC Executive Director Susan Howarth that she excluded Forbes because his candidacy lacked real public interest.[165] Thus, Justice Kennedy asserted that Forbes' minimal objective support justified his exclusion, and the Court reversed the judgment of the Eighth Circuit.[166]

C. The Dissent

Justice Stevens, joined by Justices Souter and Ginsburg, expressed disapproval with the majority's conclusion because AETC's exclusion of Forbes conflicted with "well-settled constitutional principles" that the majority neglected.[167] Justice Stevens explained that the AETC's decision raised "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.'"[168]

The dissent emphasized three issues that the majority failed to address in its decision.[169] The dissent first explained that certain facts in the record reflected the subjective nature of the decision by

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163. *See id.* at 1644. The Eighth Circuit, having found a designated public forum, erroneously applied the higher compelling interest standard. *See Forbes II*, 93 F.3d 497, 504-05 (8th Cir. 1996).

164. *See* Forbes III, 118 S. Ct. at 1643.

165. *See id.* at 1644. She testified that Forbes was excluded

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

Id. at 1643-44 (citing Appeal to Pet. for Cert. 23a, Arkansas Educ. Television Comm'n. v. Forbes, 118 S. Ct. 1633 (1998) (No. 96-779)).

166. *See id.* at 1644. The Court did not address 47 U.S.C. § 315's equal opportunity requirement because Forbes earlier dropped his statutory claim. *See id.* at 1638-39.

167. *See id.* at 1644 (Stevens, J., dissenting).

168. *Id.* (Stevens, J., dissenting) (quoting Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969)).

169. *See id.* at 1644-49 (Stevens, J., dissenting).

AETC.[170] AETC's flexibility in discarding these facts, which proved that Forbes may have had stronger support than indicated, and that Forbes' exclusion may have affected the outcome of the debate, reflected the "virtually limitless" discretion afforded the staff of the station.[171] The dissent supported the Eighth Circuit's conclusion that AETC's determination of "'political viability' was . . . so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment."[172]

The dissent also disapproved of the Court's understatement of the importance of the differences between state and private ownership of broadcast networks.[173] Justice Stevens acknowledged that the majority implicitly indicated that the AETC staff members were government employees, but he doubted whether the Court understood the significance of the distinction between public and private broadcast facilities.[174] Congress specifically chose a system of private broadcasters licensed by the government in large part because of the risks of government censorship created by public ownership.[175] Thus, the dissent asserted that while the First Amendment does not constrict a private station's journalistic freedom, it does place certain limitations on a state-owned network because the "political content of [the station's] programs necessarily increases the risk of government censorship and propaganda in a way that protection of privately owned broadcasters does not."[176]

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170. *See id.* at 1644 (Stevens, J., dissenting).

171. *See id.* (Stevens, J., dissenting). The dissent first points out that Forbes had been a serious contender for the Republican nomination for Lieutenant Governor in 1986 and 1990. *See id.* at 1644-45 (Stevens, J., dissenting). In a three-way primary race just two years prior to AETC's decision, Forbes received 46.88% of the vote and carried 15 of the 16 counties in the Third Congressional District by absolute majorities. *See id.* at 1645 (Stevens, J., dissenting). Further, despite the AETC's potentially correct conclusion that Forbes was not a serious candidate, the station's decision may have affected the outcome of the election as the Republican winner of the Third District Congressional race garnered only 50.22% of the vote to the Democrat's 47.20%. *See id.* (Stevens, J., dissenting).

172. *Id.* at 1645 (Stevens, J., dissenting).

173. *See id.* at 1644 (Stevens, J., dissenting).

174. *See id.* at 1646 (Stevens, J., dissenting).

175. *See id.* (Stevens, J., dissenting).

176. *Id.* at 1647 (Stevens, J., dissenting). The dissent also discussed the one time that the Supreme Court previously considered whether public stations may exercise the same journalistic freedom as private stations. *See id.* at 1646 (Stevens, J., dissenting). In *FCC v. League of Women Voters*, the Court held that a statute forbidding stations receiving federal money from "editorializing" was invalid because it even prohibited certain speech by private networks. *See id.* at 1646-47 (Stevens, J., dissenting) (interpreting FCC v. League of Women Voters, 468 U.S. 364, 395 (1984)). The Court,

Additionally, the dissenting justices disagreed with the majority's acceptance of AETC's arbitrary method of defining the scope of the debate.[177] The dissent emphasized the well-settled principle that once a state actor opens a limited forum and exposes itself to First Amendment scrutiny, the State must respect the boundaries it has set.[178] As a result, the dissent articulated that "[t]he dispositive issue in this case, then, is not whether AETC created a designated public forum or a nonpublic forum, as the Court concludes, but whether AETC defined the contours of the debate forum with sufficient specificity to justify the exclusion of a ballot-qualified candidate."[179]

The dissent endorsed the Supreme Court's position in *Shuttlesworth v. City of Birmingham*[180] as the appropriate measuring stick for AETC's exclusion of Forbes.[181] In *Shuttlesworth*, the Court considered the constitutionality of a city ordinance requiring groups participating in a parade, procession, or other public demonstration to obtain a permit from the City Commission.[182] Because the Supreme Court considered picketing and parading as methods of expression, the Court determined that the ordinance must survive First Amendment

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however, reserved decision on the constitutionality of a proposed ban concerning only stations owned by the state. *See id.* at 1647 (Stevens, J., dissenting) (discussing *League of Women Voters*, 468 U.S. at 394 n.24).

177. *See id.* at 1647 (Stevens, J., dissenting). The dissent mainly opposed the subjective considerations of a candidate's "viability" or "newsworthiness," which both provide the broadcaster wide discretion in making candidate decisions. *See id.* at 1648 (Stevens, J., dissenting).

178. *See id.* at 1647 (Stevens, J., dissenting).

179. *Id.* (Stevens, J., dissenting).

180. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969). By relying on *Shuttlesworth* and *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the dissent applied a standard to broadcasters that it had not previously used in any decisions regarding either public or private broadcast rights. *See Forbes III*, 118 S. Ct. at 1648-49 (Stevens, J., dissenting); *supra* Part II (discussing the evolution of broadcasting rights). The dissent based this analysis on the similarity between the government's discretion in granting licenses to certain individuals and the public station's discretion in allowing access to debates. *See Forbes III*, 118 S. Ct. at 1648-49 (Stevens, J., dissenting).

181. *See Forbes III*, 118 S. Ct. at 1648-49.

182. *See Shuttlesworth*, 394 U.S. at 148. On Friday, April 12, 1963, 52 people marched from a Birmingham, Alabama church to protest the denial of civil rights to African Americans in the city. *See id.* at 148-49. After they marched four blocks in an orderly fashion along the sidewalks, the marchers were stopped and arrested by Birmingham police for violating Section 1159 of the Birmingham code, which outlaws public processions without the prior issuance of a permit. *See id.* at 149. The Court found that Shuttlesworth, one of the three ministers leading the protest, could not be punished due to his protected right of assembly and political expression because the statute did not provide an expedited process capable of handling license requests of this manner. *See id.* at 163-64.

scrutiny.[183] The Court felt that the ordinance "fell squarely within the ambit of 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."[184]

The dissent noted that AETC clearly violated this constitutional requirement, as no written criteria directed the staff's discretion.[185] Instead, the staff's exclusion of Forbes rested on the subjective criteria of "viability" or "newsworthiness."[186] As a result of the AETC's "wholly subjective" decision, the dissent reaffirmed its position that it was "convinced" that the Constitution demands access to political debates sponsored by public stations "be governed by pre-established, objective criteria."[187]

IV. ANALYSIS

Although the Supreme Court correctly followed precedent in its analysis, the Court failed to set forth adequate guidelines for public television stations and other state actors by only requiring that exclusions be reasonable and viewpoint-neutral.[188] This standard ignores the constitutional imperatives that previously influenced the Court when it required "that access to political debates planned and managed by state-owned entities be governed by pre-established, objective criteria."[189] Such objective criteria would help decrease the risks of excluding candidates from public fora that inherently stem from a governmentally-sponsored debate.[190]

183. *See id.* at 152.

184. *Id.* at 150-51; *see Forbes III*, 118 S. Ct. at 1648 (Stevens, J., dissenting). The Supreme Court reaffirmed this approach in *Forsyth County v. Nationalist Movement*, when the Court considered the constitutionality of a similar ordinance allowing an official the discretion to determine the amount of the permit fee. 505 U.S. 123, 126-27 (1992); *see Forbes III*, 118 S. Ct. at 1648 (Stevens, J., dissenting)). Because no objective factors guided the administrator in price setting, the Court concluded that the "First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth County*, 505 U.S. at 133.

185. *See Forbes III*, 118 S. Ct. at 1648 (Stevens, J., dissenting).

186. *See id.* (Stevens, J., dissenting).

187. *Id.* at 1649-50 (Stevens, J., dissenting).

188. *See id.* at 1644-50 (Stevens, J., dissenting).

189. *Id.* at 1649-50 (Stevens, J., dissenting).

190. *See id.* at 1650 (Stevens, J., dissenting).

A. *The Supreme Court Properly Applied First Amendment Scrutiny to Debates*

The Supreme Court's analysis of the public forum doctrine sufficiently justified the Court's decision to apply the doctrine to public broadcasters' decisions in the arena of political debates.[191] While some courts have either questioned the public forum doctrine's applicability to media or ignored it altogether,[192] the Supreme Court accepted the doctrine, but only under the very narrow circumstances of a political candidate debate.[193] In so limiting the doctrine, the Court relied upon both the exceptional significance of debates in the election process and a debate's very nature as a forum for controversial political speech.[194]

As a result of its decision to apply First Amendment scrutiny to political debates, the Court avoided specific application of either the public interest standard or the equal opportunity standard of § 315 of the Communications Act.[195] The Supreme Court's use of the public forum doctrine over either the public interest or equal opportunity standard reflects the need for heightened scrutiny in the sensitive area of political debates.[196] That the public interest standard does little to address the particular inherent dangers of publicly broadcast political debates can be seen in the FCC's license renewal policies.[197] While broadcasters maintain that the public interest standard adequately serves its purpose because the potential punishment is termination of the license,[198] the FCC has not found that a broadcaster violated the public's interest in twenty years.[199] Clearly, the FCC's regulatory powers pack more bark than bite.[200] The Court's decision in *Arkansas*

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191. *See id.* at 1639-41.

192. *See id.* at 1648 (Stevens, J., dissenting) (indicating that televised debates "may not squarely fit within our public forum analysis"). *See generally* Chandler v. Georgia Pub. Telecomm. Comm'n, 917 F.2d 486 (11th Cir. 1990) (avoiding the public forum analysis by endorsing the public interest standard).

193. *See Forbes III*, 118 S. Ct. at 1640.

194. *See id.*

195. *See supra* Part II.A (discussing both the public interest standard and § 315).

196. For the Supreme Court's reasoning that a heightened level of scrutiny need be applied to public station debates, see *supra* Part III.B.

197. *See* Ackley, *supra* note 27, at 494.

198. *See id.* (citing *In re* Comm'n Policy in Enforcing § 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 1080-81 (1978)).

199. *See id.* (citing Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1094 (1996)).

200. *See generally* Hundt, *supra* note 199, at 1094. Hundt notes that in the renewal proceedings conducted every five years, the FCC has renewed almost all broadcast licenses three times without a single revocation. *See id.*

Educational Television Commission v. Forbes,[201] however, while sidestepping the public interest standard in the area of political debates, maintained the integrity of that standard as the governing tool for all other aspects of broadcasting regulation.[202]

The Court avoided the equal opportunity standard of § 315 as well because Forbes abandoned his statutory claim.[203] The statute mandates broadcasters to provide political candidates equal air-time opportunities,[204] but it only triggers a candidate's right to be heard if a station first provides another candidate access to its station.[205] Forbes dropped the claim because the Eighth Circuit previously ruled that there is no private cause of action to enforce § 315.[206] The proper procedure for such action is to bring the claim through the FCC, and Forbes failed to exhaust these administrative remedies.[207] Thus, while the Supreme Court and the circuit court found that Forbes could not rely on § 315, they did not eliminate the provision's ability to govern candidate debates on public television stations.[208]

B. Clarifying the Distinction Between a Designated Public Forum and a Nonpublic Forum

The Supreme Court determined that a public television sponsored debate qualified as a nonpublic forum and, as such, the AETC's decision to deny Forbes access need only be reasonable and viewpoint

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201. *Forbes III*, 118 S. Ct. 1633 (1998); *see supra* Part III.B.

202. *See Forbes III*, 118 S. Ct. at 1639 (stating that "broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations").

203. *See id.*, 118 S. Ct. at 1638-39.

204. *See* 47 U.S.C. § 315(a); *see also supra* notes 46-48 and accompanying text (discussing requirements of § 315).

205. *See* ANDREW O. SHAPIRO, MEDIA ACCESS: YOUR RIGHTS TO EXPRESS YOUR VIEWS ON RADIO AND TELEVISION 51 (1976). Certain instances, such as news coverage of a candidate, do not qualify for the statute's protection. *See* 47 U.S.C. § 315(a). Broadcaster sponsorship of a debate, however, does trigger § 315 and subjects the broadcaster to the equal time provision. *See* DeYoung v. Patten, 898 F.2d 628, 633 (8th Cir. 1990). A public station may typically meet the statutory requirement by offering the candidate a chance to air his or her views on alternative programming. *See* Marcus v. Iowa Pub. Television, 97 F.3d 1137, 1139 (8th Cir. 1996).

206. *See Forbes I*, 22 F.3d 1423, 1427 (8th Cir. 1994).

207. *See id.*

208. *See Forbes III*, 118 S. Ct. at 1638-39; *Forbes I*, 22 F.3d at 1427. The Supreme Court's decision allows candidates two potential remedies. First, a third-party candidate may gain access to the debate itself if the broadcaster's decision to stage a two candidate debate is not reasonable and viewpoint-neutral. *See Forbes III*, 118 S. Ct. at 1643. Second, if a court finds the decision conformed with the First Amendment, the candidate may appear on another program offered by the station. *See Marcus*, 97 F.3d at 1139.

neutral.[209] The Court based this decision on the "selective" nature of the forum.[210] The station invited only candidates for the Third Congressional District seat and then determined participation on a candidate-by-candidate basis, thus, the station engaged in a process of selective access.[211] Consequently, the debate was not open generally to any person qualified as a bona fide candidate and it constituted a nonpublic forum.[212]

The Court created the distinction between selective and general access in an attempt to provide a clearer direction for both the lower courts and public television stations to follow.[213] The Court's distinction, however, serves only to muddle the differences between the designated public forum and the nonpublic forum and increases the likelihood that candidates will be arbitrarily excluded from debates.[214] By emphasizing that a state actor creates a designated public forum by limiting access to a "particular class of speakers," the Court created a rule ripe for manipulation by the government.[215] For instance, while the AETC's selectivity created a nonpublic forum, one could argue that the AETC instead created a designated public forum because it did invite the whole class of "viable" or "newsworthy" candidates.[216] As Justice Stevens noted with irony in the dissenting opinion, "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."[217]

Additionally, the Supreme Court's distinction between limited and nonpublic fora effectively eliminates any purpose that a designated public forum originally served.[218] Under the Court's interpretation, a station creates a nonpublic forum by simply excluding a candidate, giving rise to a lesser scrutiny and making it easier to justify the exclusion in the first place.[219] Accordingly, the difference between

209. *See Forbes III*, 118 S. Ct. at 1643.

210. *See id.* at 1642-43.

211. *See id.*

212. *See id.*

213. *See id.* For the full discussion of the difference between limited public and nonpublic fora, see *supra* Part II.D.

214. *See Forbes III*, 118 S. Ct. at 1649 (Stevens, J., dissenting).

215. *See id.* at 1642.

216. *See id.* at 1649 n.18 (Stevens, J., dissenting).

217. *Id.* (Stevens, J., dissenting).

218. *See supra* Part II.D (presenting the differences between the types of fora).

219. *See Forbes III*, 118 S. Ct. at 1642. The Court noted that "the government 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' to use it." *Id.* (citation omitted) (quoting Cornelius v.

selective access and general access stems from whether the state actor qualifies the availability of the forum to those within a certain class.[220] Consequently, the government, or more particularly, a public television station, may constitutionally deny an individual access to a forum by simply making it clear that only certain individuals will be granted access.[221]

Thus, any time the government hopes to avoid the stricter First Amendment scrutiny applied to a designated public forum, the actor need only assert that members of the class must in a sense "obtain permission."[222] As a result, only two categories of public fora truly exist–the traditional public forum and the nonpublic forum.[223] The Court needs to clearly acknowledge that its decision restructured the forum doctrine or it must establish a better system for distinguishing between limited and nonpublic forum.[224]

C. For All Types of Fora, The Heightened Role of Debates Requires "Pre-established, Objective Criteria"

The Supreme Court properly applied First Amendment scrutiny to public television debates and, despite the inadequacies of the Supreme Court's public forum analysis in *Forbes III*, the forum doctrine will continue guiding public television stations in the future.[225] By endorsing this doctrine without a consideration of other First Amendment principles, the Court avoided a clear opportunity to provide a stricter standard in an arena that will only grow in importance in the coming years.[226]

1. The *Shuttlesworth* Decision Demands the Court's Attention

In *Forbes III*, the Supreme Court's major failure did not result from

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NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 804 (1985)).

220. *See id.* at 1642.

221. *See id.*

222. *See id.* (quoting *Cornelius*, 473 U.S. at 804 (1985)).

223. While designated fora still exist, state actors will be tempted to limit access to a forum simply to avoid the higher First Amendment scrutiny associated with a designated public forum. Thus, the government's decision need only be reasonable and viewpoint-neutral instead of narrowly tailored to serve compelling state interest. *See supra* Part II.D (discussing fora and attendant levels of scrutiny).

224. The Supreme Court does recognize that the government controls whether it will designate the forum for a particular class but it does not address the effect this distinction will have on the forum analysis itself. *See Forbes III*, 118 S. Ct. at 1642.

225. *See supra* Part IV.A-B (explaining the Supreme Court's use of the forum doctrine and the problems with it in the context of political debates).

226. *See supra* Part II.C.3 (discussing the importance of political debates in the current climate).

the public forum analysis itself.[227] Rather, in its decision to ignore established precedent set in *Shuttlesworth,*[228] the Court granted too much freedom to public television stations and it provided little direction for courts in their future decisions concerning the choices of state actors in televised debates.[229]

As the *Forbes* dissent noted, AETC's control over the debate and the selection of candidates closely paralleled the authority of the City Commission over those applying for a license to use the public facilities for expressive purposes in *Shuttlesworth.*[230] Consequently, just as the Court required "narrow, objective, and definite standards" as a guide for a licensing official's decisions, so should the Court have placed this burden upon public television stations in order to direct broadcaster decisions affecting a political candidates' First Amendment rights.[231] While the public forum doctrine is useful for determining the level of scrutiny applied to broadcaster decisions, the doctrine fails to give any guidance to broadcasters who wish to survive the applied scrutiny.[232] Once the Court decided upon the correct forum classification and judicial scrutiny, the Court should have heeded its own mandate from *Shuttlesworth* and set forth definite standards to survive First Amendment scrutiny.[233] Instead, the Court applied only the public forum analysis without any justification for ignoring the mandates of the *Shuttlesworth* decision.[234]

Justice Stevens addressed this concern in the dissent when he supported the need for "pre-established, objective criteria" because of the very subjective nature of the decisions by the AETC staff.[235] For

227. *See supra* Part III.B (discussing the Supreme Court's public forum analysis).

228. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969). This precedent requires "narrow, objective, and definite standards." *Id.*

229. *Compare Forbes III*, 118 S. Ct. at 1643-44, *with Forbes III*, 118 S. Ct. at 1644-45 (Stevens, J., dissenting) (showing how the majority and dissenting opinions used different facts surrounding the Arkansas election to support opposing positions).

230. *See Forbes III*, 118 S. Ct. at 1647-48 (Stevens, J., dissenting). For a more thorough discussion of *Shuttlesworth*, see *supra* notes 180-87 and accompanying text.

231. *See Forbes III*, 118 S. Ct. at 1649. The dissent also notes the disparity between the majority's standard and the rules governing a privately owned network when airing a debate. *See id.* at 1645. Private stations are subject to the Federal Election Campaign Act unless the network uses "pre-established, objective criteria" when choosing candidates for debate. *See id.* (quoting 11 CFR § 110.13(c) (1997)).

232. The public forum analysis calls for either the broadcast decision to serve a compelling state interest or to be reasonable and viewpoint-neutral, depending on the forum, see *supra* Part II.B, but it does not indicate to the broadcaster any specific criteria that must be met by its debate decisions.

233. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1968).

234. *See Forbes III*, 118 S. Ct. at 1641-43.

235. *See id.* at 1645.

instance, the majority cited the testimony of AETC's Executive Director in support of its decision that Forbes' exclusion was reasonable and viewpoint-neutral.[236] The director testified that the station excluded Forbes because he had no official headquarters, he raised little in financial support, and the Arkansas voters and broadcast media did not consider him a serious candidate.[237] Conversely, the dissenting opinion emphasized different statistics, such as Forbes' serious past contention for the Republican nomination for Lieutenant Governor and the subsequent close election result in the 1992 Third Congressional District race, as support for the claim that AETC's decision was arbitrary and in violation of the First Amendment.[238] Thus, depending upon what particular set of statistics a public station endorses, a court could find that the public station's motivations constituted either a violation of the candidate's First Amendment rights or a reasonable, sound example of journalistic discretion.[239]

In addition to curbing arbitrary government decisions, pre-established, objective criteria create a clear, easily-evaluated standard for court scrutiny.[240] If AETC employees, for example, established criteria for their decision in advance, then the Supreme Court could have focused its analysis on whether the criteria were reasonable and viewpoint-neutral rather than on which set of facts should be emphasized in its analysis.[241] Thus, the public stations and the courts

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236. *See id.* at 1643-44.

237. *See id.*; *supra* note 165 (listing the five reasons for Forbes' exclusion). The dissent found AETC's reliance on Forbes' lack of financial support particularly troublesome. *See Forbes III*, 118 S. Ct. at 1648. AETC used this as evidence that Forbes lacked viability when it could have been a "reason for allowing him to share a free forum with wealthier candidates." *Id.* Thus, the majority relied on factors that arguably favor inclusion as support for excluding Forbes. *See id.*

238. *See id.* at 1644-45 (Stevens, J., dissenting); *supra* note 171 (providing specific, statistical evidence supporting Forbes' legitimacy).

239. *See Forbes III*, at 1645 (Stevens, J., dissenting). Justice Stevens states that "the facts in the record presumably would have provided an adequate basis either for a decision to include Forbes in the Third District debate or a decision to exclude him . . . ." *Id.* (Stevens, J., dissenting).

240. It stands to reason that if the dissent's suggested pre-established, objective criteria will curtail arbitrary exclusions by state actors, the criteria will also provide a specific, accessible source for judicial examination when a station's decisions come before the judiciary.

241. The negative effects of the arbitrary difference between a designated public forum and a nonpublic forum become less magnified if stations established these objective criteria. *See supra* Part IV.B (describing the arbitrary result of the Supreme Court's public forum analysis). Although the reasonable, viewpoint-neutral standard for public stations is a lower threshold than the strict scrutiny applies to designated fora, this lower threshold allows less room for manipulation if the stations must create pre-established criteria.

will not be tempted to engage in the type of statistical wrangling evident in the two different sets of facts considered by the majority and dissenting opinions of the Court.[242]

2. Objective Criteria Sufficiently Addresses Majority's Fears

Both the Supreme Court in *Forbes* and the Eleventh Circuit in *Chandler* expressed a similar concern regarding limitations on public broadcasters.[243] The Supreme Court opposed the idea of an all-or-nothing rule where a station either opens the forum to all interested candidates or does not open the forum at all.[244] The Court feared that with "the prospect of cacophony, on the one hand, and First Amendment liability on the other, a public television broadcaster might choose not to air candidates' views at all."[245] Accordingly, as a means of encouraging debates and allowing public broadcasters greater flexibility, the Court determined that candidate debates qualify as a nonpublic fora.[246]

Constitutionally mandated, pre-established standards, however, present no such problem.[247] If a public station satisfies its First Amendment duties simply by establishing qualification requirements before opening the forum, it maintains indirect control over the eligibility of candidates and prevents the potential cacophony of an all-or-nothing rule.[248] Thus, under the *Shuttlesworth* standard, public stations would most likely continue airing debates.[249]

D. Suggestions for the Legislature

The dissent's argument in favor of requiring stations to develop pre-

242. *Compare Forbes III*, 118 S. Ct. at 1643-44, *with Forbes III*, 118 S. Ct. at 1644-45 (Stevens, J., dissenting) (the majority and dissenting opinions use different facts surrounding the Arkansas election to support opposing positions).

243. *See Forbes III*, 118 S. Ct. at 1642-43; Chandler v. Georgia Pub. Telecomm. Comm'n, 917 F.2d 486, 489-90 (11th Cir. 1990); *see also* Part II.E (explaining the *Chandler* court's position).

244. *See Forbes III*, 118 S. Ct. at 1642.

245. *Id.* at 1643. The Court provided a concrete example of this concern. *See id.* As a result of the Eighth Circuit's decision in *Forbes II*, a Nebraska public station canceled a debate between candidates for the United States Senate in 1996. *See id.*

246. *See id.*

247. *See id.* at 1649 n.19 (Stevens, J., dissenting). Justice Stevens specifically responded to the majority's concern with the Nebraska debate by asserting that the Nebraska station would not have chosen to cancel the debate if it only had to set standards before the debate. *See id.* (Stevens, J., dissenting).

248. *See id.* at 1649-50. (Stevens, J., dissenting). This presumes, of course, the criteria are constitutionally sound.

249. *See id.* (Stevens, J., dissenting).

established, objective criteria does not solve the problem entirely.[250] The individual stations retain the license to create criteria at their discretion, and the networks could easily establish rules that infringe upon the First Amendment rights of candidates.[251] Consequently, courts may still have to decide whether the criteria fulfills its First Amendment obligations.[252]

Based on the facts considered by both the majority and the dissent in *Forbes*, however, public stations may compile a list of factors that ensure only "newsworthy" candidates will qualify while satisfying the restrictions of the public forum doctrine.[253] As possible criteria, a station could require in any combination that: (1) the candidate must qualify for the ballot;[254] (2) the candidate must have a history of serious political involvement;[255] (3) the candidate can sustain the attention of the voters due to his or her repute or past involvement in political affairs;[256] or (4) the electorate considers the person a serious candidate.[257]

While the first criteria certainly must be met, the remaining standards are subject to different interpretations by individual public

250. *See supra* Part IV.C (discussing the idea that the First Amendment requirement of pre-established, objective criteria and the public forum doctrine both should govern political candidate debates). The dissent implicitly acknowledged this as well because it only mentions that televised debates "may not squarely fit within our public forum analysis" without completely rejecting the public forum doctrine. *Forbes III*, 118 S. Ct. at 1648-49. The fact that the dissent endorses the *Shuttlesworth* standard while not directly rejecting the public forum doctrine reflects the idea that they may both govern debates.

251. *See supra* note 250 (discussing potential coexistence of the public forum analysis and the *Shuttlesworth* standard).

252. *See* Paul, *supra* note 19, at 787-88 (stating that over time the common law will develop precedents that will make subsequent rules regulating debates less arbitrary). Paul recommends certain rules but he does so in the context of his suggested 28th Amendment. *See id.*

253. *See supra* notes 165, 171 (discussing the facts cited by the majority and dissent).

254. *See* Paul, *supra* note 19, at 785-86 ("Candidates who have not crossed the minimum threshold of ballot access are presumptively excluded.").

255. *See Forbes III*, 118 S. Ct. at 1644-45 (Stevens, J., dissenting). The dissent used Forbes' political history as evidence of his viability. *See id.* Justice Stevens noted that he carried 46.88% of the statewide vote in a three-way primary election for the Republican nomination for Lieutenant Governor in 1990. *See id.*

256. *See* Paul, *supra* note 19, at 787. Professor Paul suggested that debates include anyone with "a realistic chance of winning or a potential to capture sustained attention." *Id.* He believed this standard will avoid embarrassments such as the 1996 decision to exclude Ross Perot from a presidential debate when Perot garnered 19% of the vote. *See id.*

257. *See Forbes III*, 118 S. Ct. at 1643. The majority includes this as one of the five factors considered by AETC in its decision to exclude Forbes. *See id.*

stations or government committees.[258] For instance, a station could more specifically define the second standard by requiring that the candidate must have run for political office in the past and garnered a certain percentage of the vote.[259] The fourth criteria may also have a specific percentage attached as evidence that the candidate at least commands the respect of a certain percentage of the voters.[260] Note, however, that only the first factor should be dispositive; therefore, a loophole in a given factor would not provide a station a justification for rejecting a candidate.[261] Regardless, any criteria that a station creates will likely be subject to further interpretation by the courts until precedent dictates how far a station may go.[262]

V. IMPACT

Protected by the broad standard embraced by the Supreme Court, a Minnesota public television station could have sponsored a debate and denied now-Governor Ventura participation if the station supported its decision with the type of inconclusive statistical evidence offered by AETC against Forbes.[263] Ironically, Ventura benefited greatly from a

258. *See* Paul, *supra* note 19, at 786 (suggesting that for presidential elections, a commission could be appointed by Congress to determine the guidelines, and that individual states could create their own election commissions for other offices).

259. *See Forbes III*, 118 S. Ct. at 1644-45; *see also supra* note 171 (discussing Forbes' support in the 1990 race for Lieutenant Governor). The statistics supporting Forbes' limited success in past debates provide an example from which an initial standard of "serious political involvement" could be created. *See Forbes III*, 118 S. Ct. at 1645.

260. This suggestion arises from the ambiguous nature of the requirement that the "electorate consider the person a serious candidate." *See supra* note 165 and accompanying text (stating the majority reliance on evidence that the media and electorate did not view Forbes as a serious candidate). The ceiling should be low, perhaps 10%, because debates often serve as an impetus for campaign success. *See* Smith, *supra* note 2, at 7 (stating that Ventura's success in the first debate on October 1 started his rise in the polls).

261. For instance, the second suggested factor relies on past political involvement. *See supra* text accompanying note 254. This could hinder a candidate's possible debate participation if running for the first time, but it should not eliminate the candidate's opportunity.

262. *See* Paul, *supra* note 19, at 787-88. The criteria likely will pass First Amendment scrutiny. The Supreme Court in *Forbes III* required that debate decisions only be viewpoint-neutral and reasonable. *See supra* Part III.B (discussing evidence that the decision to exclude Forbes was viewpoint-neutral and reasonable). Because a station would develop the criteria in advance, a court would likely find that the standards do not reflect the stations views. Thus, if the criteria are reasonable, they will survive First Amendment scrutiny.

263. *See supra* note 165 (discussing statistical evidence presented). Minneapolis station KTCA-KTCI sponsored three candidate debates before the election, and they included Governor Ventura. *See* Telephone Interview with Bill Handley, Vice President

series of debates held as a result of the work of Minnesota Compact, a group working for improving campaigns.[264] Under the *Forbes* decision, however, a public television station could have excluded Ventura if it used some of the statistical evidence as support.[265]

In Ventura's case, the very debates from which he may now have been easily excluded were a great source of his success.[266] Ventura's campaign started slowly and truly did not begin acquiring momentum until the months immediately preceding the election.[267] Ventura did not announce his candidacy until January 27, 1998, and as late as mid-September, banks were reluctant to give him loans because they were not convinced that he would get the 5% of the vote necessary to qualify for public money so the loan could be repaid.[268] After the first debate on October 1, his poll numbers began climbing, increasing from 10% on September 23 to 21% on October 19.[269] With the additional help of a late, ingenious ad campaign funded by the bank loan, Ventura won the election, garnering 37% of the vote to Republican Norm Coleman's 34% and Minnesota Attorney General Hubert H. Humphrey III's 28%.[270]

Based on these facts, a Minnesota public station could have made a strong case for Ventura's early exclusion. For instance, four of the

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of Minnesota Production in Minneapolis, Minn. (Mar. 22, 1999). Regardless, whether or not a Minnesota public television station aired a debate involving Ventura, the station retained the constitutional right to deny him access. *See infra* Part V (discussing the use of statistics to legitimize a candidate).

264. *See* Smith, *supra* note 2, at 3. The chairman of Ventura's staff, Dean Barkley, agreed to co-direct the Minnesota Compact, which worked to specifically improve 1998 campaigns. *See id.* The Compact focused on debates among other things, and Barkley used his position to open the debates to Reform Party candidates. *See id.*

265. *See supra* notes 239-42 and accompanying text (discussing the problems with using statistical evidence to support a station's decision).

266. *See* Smith, *supra* note 2, at 7. Dean Barkley, campaign chairperson, said that "Jesse hits a home run in [the first debate of the general election in] Brainerd [Oct. 1] and his poll numbers start climbing as a result." *Id.*

267. *See id.* at 6. The Ventura campaign had only $12,000 in July, 1998, and it wasn't until Ventura raised over $50,000 in August through fund-raising that the campaign qualified for the $327,000 in public money. *See id.*

268. *See id.* at 6-7. Because financial institutions hesitated to lend Ventura money, the campaign's attempt to air a series of television ads almost failed. *See id.* at 6. To secure the loan, the campaign procured insurance as collateral in case Ventura did not receive 5% of the vote. *See id.* Additionally, the campaign officers appealed to all of the State's Reform Party members to help in the search for a bank, and eventually succeeded through the last minute efforts of Minneapolis council member Steve Minn. *See id.* at 7.

269. *See* Smith, *supra* note 16, at 6. Ventura's poll numbers increased to 27% in the days leading up to the election. *See id.*

270. *See* Belluck, *supra* note 1, at 1-2.

five reasons cited by AETC to exclude Forbes applied to Ventura.[271] Three of the reasons dealt with whether Arkansas voters and media considered Forbes a serious candidate.[272] Applying the "serious candidate" criterion to Ventura, a station could have excluded Ventura with the September 19 poll as support.[273] Just as AETC emphasized Forbes' limited financial support,[274] a Minnesota public station clearly could have relied on Ventura's continual struggle to raise money as a reason to deny him access.[275] Additionally, the station could rely on other factors such as his late entrance onto the political scene, his sensationalist campaign style, and the lending institutions' lack of faith in his campaign as justifications for excluding Ventura.[276] Consequently, just as AETC's exclusion of Forbes survived First Amendment scrutiny, so too would a station's exclusion of Ventura.[277] Ventura won the election, however, and therefore he necessarily should have been involved in any debate between the gubernatorial candidates.[278]

It is easy to see how a Minnesota public television station could

271. *See Forbes III*, 118 S. Ct. at 1643-44; *see also supra* note 165 (setting forth determining factors). AETC also mentioned that Forbes did not have a campaign headquarters other than his house. *See Forbes III*, 118 S. Ct. at 1644. Ventura's campaign was more organized, as he had a team and a specific game plan designed by he and his campaign coordinator. *See* Smith, *supra* note 2, at 2.

272. *See Smith*, *supra* note 2, at 2.

273. This information may not even be necessary to support a station's claim. Dean Barkley, the campaign manager, arranged most of the debates during the spring and summer of 1998. *See id.* at 3. Since the debates were arranged so far in advance, a stations judgment would have to be even more subjective than if the decision were made in the weeks immediately preceding the debate.

274. *See Forbes III*, 118 S. Ct. at 1644-45; *see also supra* note 165 (summarizing the AETC Director's testimony).

275. *See supra* notes 165-66 (stating that the majority relied on Forbes' lack of financial support); Smith, *supra* note 2, at 5-6.

276. *See supra* note 165 and accompanying text (discussing factors used to exclude Forbes); *see also infra* Part I (discussing Ventura's unorthodox, less serious campaign style).

277. *See supra* notes 271-76 and accompanying text (discussing the similarities between the two cases).

278. Ventura benefited from the work of his campaign chairman with the Minnesota Compact and his subsequent appearances in debates. *See* Smith, *supra* note 2, at 3. His situation, however, was an exception rather than the rule. Most third-party campaigns do not have the opportunity to benefit from the work of an insider. Even Ross Perot, who ultimately received 19% of the vote in the 1992 presidential election, could not gain access to the debates. *See* Paul, *supra* note 19, at 787. Additionally, a candidate with limited finances such as Forbes may rely heavily on the opportunity to appear in a free debate. *See Forbes III*, 118 S. Ct. at 1648. Thus, the fact that he would have won the election even if a station denied him access should not diminish the negative impact that the *Forbes* standard could have on other candidates. *See id.* at 1648-49.

have included Ventura and still set out criteria limiting the debates to viable candidates. Of the four criteria suggested,[279] only the question of whether the electorate considers the candidate a "serious candidate" could have posed problems for Ventura.[280] But Ventura could have overcome the suggestion that voters did not consider him a serious candidate because the debates did not begin in force until October 1, by which time his campaign had acquired more momentum.[281] Consequently, by establishing pre-established, objective criteria before the campaign, a station would have reasonably included Ventura in a debate.[282]

The *Forbes* standard could have another far reaching effect. If debates are used as a means of campaign finance reform, the Supreme Court's decision may impact a greater number of debates in the future.[283] For instance, Professor Jeremy Paul suggests in a recent article that Congress amend the Constitution of the United States to require candidates to appear before the voters in debates scheduled close to the election.[284] Because the government in public television is a state actor, the standard set by the Court in *Forbes* may also guide

279. *See supra* Part IV.D (suggesting possible criteria to be adopted by broadcasting stations).

280. Ventura would could have met the second criteria based on his experience as mayor of Brooklyn Park, a Minneapolis suburb, from 1991 to 1995. *See* Ragsdale, *supra* note 1, at 6. Ventura also would have qualified for the third criteria, as he certainly kept the voters' attention throughout the campaign, and he has been well-known figure in Minnesota due to his time as a wrestler, mayor, and talk-show host. *See supra* Part I (describing Ventura's campaign approach).

281. Ventura's momentum began building when he secured the finances necessary to run the campaign in August and September, 1998. *See* Smith, *supra* note 2, at 6-7; *supra* notes 267-68 (explaining Ventura's financial difficulties). Thus, a public station holding a debate just over a month prior to the election would be stretching the "serious candidate" requirement beyond its limits if it chose to exclude Ventura.

282. *See supra* note 254 (explaining Professor Paul's criteria for debate candidates).

283. *See* Paul, *supra* note 19, at 779-82 (supporting the need for a 28th Amendment); Foley, *supra* note 19, at 817-18 (endorsing Paul's plan with changes).

284. *See* Paul, *supra* note 19, at 780-84. He believes that required debates even the playing field for political candidates without potentially infringing on the candidates First Amendment rights. *See id.* at 781. This serves as a more moderate and effective campaign reform than those that may prevent people from buying elections. *See id.* He reasons that one way to buy elections involves buying air time to support political ideas, and this too closely cuts against some free speech ideals. *See id.* Thus, political debates level the playing field without restricting political speech. *See id.* Professor Edward B. Foley, on the other hand, endorses the Amendment but he also suggests the debates constitute "all the messages that [the candidates] convey to the electorate in support of their candidacies during a certain period of time in advance of the election." Foley, *supra* note 19, at 818. He supports this with the idea that spending limits do not limit free speech, but instead are part of the overall effort to structure the public forum itself. *See id.* at 819; *see also supra* Part II.D (discussing the public forum doctrine).

decisions of the government as a result of the proposed amendment.[285] While an amendment may not be on the near horizon, the simple fact that campaign finance reform may lead to an even greater emphasis on debates requires a stricter standard for public television station decisions.[286] Thus, the *Forbes* standard could potentially play a much larger role in debate decisions in the future, and this further substantiates the need for an objective standard.[287]

VI. CONCLUSION

Public and private broadcasters alike have broad discretion when selecting and editing programming for stations. Public broadcasters, however, are government actors. Thus, in the limited circumstances that their decisions affect whether a candidate may participate in a televised political debate, their choices require First Amendment scrutiny. *Forbes* presented the Supreme Court with an opportunity to establish an objective standard for these scenarios so that broadcaster choices would protect the integrity of debates while preserving the candidates' First Amendment rights.

The Court, however, failed to accomplish this task. Instead, the Court created a subjective standard when it only required that a public station's exclusion of a candidate be reasonable and viewpoint-neutral. This standard ensures broadcasters' great latitude in their decisions, in the face of which only blatant bias by a broadcaster would preclude an exclusion of a candidate. Consequently, through its decision to ignore precedent and avoid requiring "pre-established, objective criteria," the Court not only endorsed a standard open to broadcaster manipulation, but it also essentially closed the door to future third-party candidates hoping to prove their worth through televised debates.

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285. *See Forbes III*, 118 S. Ct. 1633, 1645-46 (Stevens, J., dissenting). Justice Stevens notes that the Arkansas Educational Television Commission, a state-owned public television broadcaster, 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 licenses." *Id.* (quoting *Forbes I*, 22 F.3d 1423, 1428 (8th Cir. 1994)).

286. *See supra* note 264 and accompanying text (noting the Minnesota Compact focused its campaign reform efforts on increasing the quality and number of debates).

287. *See supra* note 247 (discussing Justice Stevens' position on set standards by stations).