Finding Room for Independent Candidates in Light of Arkansas Educational Television Commission v. Forbes

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There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. The public access to channels of political discourse is vital to democratic ideals. The Framers of our Constitution held political speech above all other discourse. Thus, political speech deserves the utmost protection under the First Amendment. When the government attempts to restrict political speech in places traditionally “devoted to assembly and debate,” a plethora of Supreme Court opinions have subjected the prohibitions to the strictest of scrutiny. Candidate debate lies at the core of this protection because it provides a medium where spontaneous discussion can educate the electorate about its candidates’ platform.

Historically, the media has effectively conveyed political thought and stimulated public debate. Today, Americans rely on electronic media as their primary source of political information. Televised debates have a substantial impact on the electorate about its candidates’ platform.


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

5 See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983) (explaining that the burden is on the State to show a “compelling state interest and that it is narrowly drawn to achieve that end”). Alternatively, the state may place a restriction on the “time, place and manner of expression” on the condition that the restriction is “narrowly tailored to serve a significant government interest,” and it “leaves open ample alternative channels of communication.” Id. See also United States Postal Serv. Comm’n v. Council of Greenburgh, 453 U.S. 114, 131-32 (1981) (upholding the federal statute that prohibited unstamped mail from mailboxes when the restriction did not eliminate communication); Consol. Edison Co. v. Public Serv. Comm’n, 447 U.S. 530, 555-36 (1980) (striking down a restriction on literature that debated controversial issues when the content-based restriction precluded free expression).

6 See Marion R. Just, et al., CROSSTALK: CITIZENS, CANDIDATES AND THE MEDIA IN A PRESIDENTIAL CAMPAIGN 65 (1996) (comparing candidate debate to alternative campaign methods). Just contends that, unlike speeches or advertisements, debates are valuable because their subject matter is not always within the candidates’ control. See id. at 195-202.

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

8 See Herbert B. Asher, PRESIDENTIAL ELECTIONS AMERICAN POLITICS: VOTERS, CANDIDATES, AND CAMPAIGNS SINCE 1952 204-244 (1992) [hereinafter Asher, Presidential Elections] (discussing “the patterns of media coverage over time”).
candidate selection. Critics argue that the media's control over political campaign coverage and the high price of broadcast advertising excludes viable candidates.

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

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

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

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


5 See id. at 1637.

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

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

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

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


22 See Arkansas Educ. Television Comm'n, 118 S. Ct. at 1647-8 (Stevens, J., dissenting, joined by Souter and Ginsburg, J.J.) (citing Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151 (1969)) (arguing that public broadcasters' decisions must be based on objective criteria because, as state actors, they are subject to the First Amendment). See also C. Thomas Dienes, On Speech Issues, Court Speaks in Many Tongues, LEGAL TIMES, July 13, 1998 at 284 [hereinafter Dienes, On Speech Issues] (discussing Justice Steven's dissent and concluding that public networks must remain viewpoint neutral).


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

25 Forbes argued that, in the alternative, he had a statutory right to additional airtime on AETN, under the Communications Act of 1934, § 315(a), as amended, 47 U.S.C. § 315(a) (1994). See Forbes, 22 F.3d at 1426. Section 315(a) provides that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office . . . " 47 U.S.C. § 315(a).

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

27 Susan Howarth, AETC's Executive Director denied Forbes' request because AETC felt that Forbes was not a viable candidate and AETC would effectively serve the public interest by limiting the debate to the major party candidates. See Brief for the Petitioner at 3, Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1635 (1998) (No. 96-779).

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

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

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

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

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

33 See id. at 504.
The Eighth Circuit reasoned that it opened its network to a specific class of speakers — legally qualified candidates running for the Third District Congressional seat — and for the specific purpose of sponsoring a live debate. Thus, Forbes, as legally qualified candidate running for this seat, had a presumptive right of access to a limited public forum under the First Amendment.

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

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34 See id.
35 See Forbes v. Arkansas Educ. Television Comm'n, 22 F.3d 1423, 1429 (8th Cir. 1994); 93 F.3d 497, 504-05 (8th Cir. 1996) (finding AETN's reason for Forbes' exclusion—his political viability — neither compelling nor narrowly tailored so as to survive a First Amendment challenge).
38 AETN staff deemed a candidate "viable" when he or she elicited media coverage and financial support. Id. at 16-17.
39 See id. However, Forbes was a viable candidate in the election for Lieutenant Governor in 1990 when Forbes received 46% of the vote in a three-candidate race. See Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1645 (1998) (Stevens, J., dissenting, joined by Souter and Ginsburg, J.J.). Furthermore, Forbes carried the majority in 15 out of 16 counties within the Third Congressional District. See id.
41 See Arkansas Educ. Television Comm'n, 118 S. Ct. at 1638.
42 In Chandler v. Georgia Public Telecommunications, the Eleventh Circuit denied that forum analysis applied to government-sponsored debates. 917 F.2d 486, 488 (11th Cir. 1990). The opinion analogized the debate to a news program where the station maintains control over the program's content. Cf. Arkansas Educ. Television Comm'n, 118 S.Ct at 1640 (explicitly rejecting the Eleventh Circuit's reasoning). The majority found that broadcasters exercise little control over the content of the candidates' speech. See id. Thus, the debate is subject to forum analysis. See id. at 1640-41.
43 The majority held that government-sponsored debate embodies a nonpublic forum, for purposes of the First Amendment. As a result, AETC could exclude Forbes so long as his exclusion was "viewpoint neutral" and "reasonable in light of the purpose of the property." 44 Justices Stevens, Souter and Ginsburg, dissenting, questioned the neutrality in AETC's "ad hoc" candidate selection process. Justice Stevens, writing for the dissent, reasoned that when AETC dedicated its property to political debate between viable candidates, it had, in fact, issued a permit to participating candidates. The dissent contended that this permit was analogous to a prior restraint on speech. The dissent argued that when the government places a prior restraint on speech, it must base its selection process on "objective criteria." Despite AETC's attempt to justify its candidate selection process, the dissent refused to accept its decision as anything more than arbitrary.

This Note examines the special nature of government-sponsored debate subject to forum analysis. See id. at 1640-41.
ernment sponsored campaign debates. First, this Note discusses the Supreme Court’s treatment of political speech in light of the First Amendment and distinguishes public broadcasters’ First Amendment rights from broadcasters in general. Second, it compares candidates’ First Amendment interests in accessing the electronic media to the electorate’s interest in making educated political choices. Then, this Note analyzes the major and dissenting opinions in Arkansas Educational Television Network v. Forbes. Finally, this Note concludes that in order to preserve political majority and dissenting opinions in political choices. Then, this Note analyzes the major and dissenting opinions in Arkansas Educational Television Network v. Forbes. Finally, this Note concludes that in order to preserve political

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

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

The Supreme Court introduced the Public Forum Doctrine in Hague v. Committee for Industrial Organization. Prior to the Hague decision, the government had exercised control over the free-
"reasonable" in light of "the use to which it is lawfully dedicated."66 A restriction is reasonable when it makes no attempt to suppress the speaker's views.67

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

The Supreme Court remained reluctant in Cornelius v. NAACP Legal Defense and Education Fund, Inc.,73 to invalidate a government regulation on speech activity in a nonpublic forum when the Court found that the restriction did not suppress the viewpoint of the speaker.74 In Cornelius, legal defense and political advocacy groups challenged an Executive Order75 that excluded them from a charity drive directed at federal employees and military personnel.76 The Court upheld the Executive Order, which explicitly prohibited the groups' participation in the charity.77 The majority believed that the government intended to create a nonpublic forum when it targeted the charity to limit solicitation in the workplace,78 drawing from its precedent which upheld regulations on speech activity that were consistent the forum's purpose.79 Nonetheless, the Court cautioned that selective access to a nonpublic forum is constitutionally permissible only when it is rationally related to a valid government interest and thus, viewpoint neutral.80 Although the Cornelius Court articulated the distinction between "general access" to a designated public forum and "selective access" to a nonpublic forum,81 it left the division between "viewpoint based" and "viewpoint neutral" for the challenger to define.82

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

67 See id. (reasoning that the First Amendment does not "guarantee access" to all government chattels).
68 See id. at 40.
69 See Perry, 460 U.S. at 40. Cf. id. at 71 (Brennan, J. joined by Marshall, Powell and Stevens, J.J., dissenting) (asserting that PLEA's exclusion from the internal mail system was viewpoint based and violated the First Amendment).
70 The government may restrict access to its property not designated for speech activity as long as the restriction is "reasonable in light of the purpose that the forum serves." See id. at 47. Selective access to a nonpublic forum is reasonable when it is consistent with the states' "legitimate interest in 'preserving the property . . . for the use to which it is lawfully dedicated.'" See id. (citing United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114, 129-30 (1981)).
72 See id. at 49 n.9 (citing Lehman v. Shaker Heights, 418 U.S. 298, 304 (1976)). Justice Blackmun feared that all "public facilities would immediately become Hyde Parks open to every would-be pamphleteer and politician"). See id. Notably, "pamphleteers and politicians" still gather at "Speakers Corner" on Sunday afternoons in Hyde Park to stir up debate from the passers-by.
74 The challengers carried a heavy burden because the Court's "reasonableness standard" is fairly easy to meet. See Dienes, Trashing the Forum Doctrine, supra note 52, at 117-18 (discussing the various cases where the Court upheld the regulation of a nonpublic forum as reasonable and viewpoint neutral).
75 See Exec. Order No. 12,353, as amended by No. 12,404, 5 C.F.R. 950.101 (1997) (limiting CFC participation to "charitable fundraising programs").
76 See Cornelius, 475 U.S. at 790, 796.
77 See id. at 812.
78 See id. at 804-06.
80 See Cornelius, 475 U.S. at 811. See also Dienes, Trashing the Forum Doctrine, supra note 52, at 117. Professor Dienes suggests that the Cornelius Court minimized the governments' burden in justifying its exclusion of advocacy groups from a nonpublic forum because other controversial groups, such as Planned Parenthood and the Right to Life Educational Trust Fund participated in the charity drive. See id.
82 See Dienes, Trashing the Forum Doctrine, supra note 52, at 118 (analogizing to the difficulty a challenger has proving government intent in the context of Equal Protection cases).
84 See id. at 832, 837.
funds toward student activities and excluded independent student groups who participated in religious activity.\footnote{See id. at 825. The guidelines defined religious activity as "activity that primarily promotes or manifests a particular benefit in or about a deity or an ultimate reality." See id.} In a five-to-four decision, the Court invalidated the guidelines on the basis that the University discriminated against the student groups solely because of their viewpoint.\footnote{See id. at 831, 846 (rejecting the argument that the guidelines were viewpoint neutral because they excluded all religious speech).} The Court emphasized that all speech contributes to the marketplace of ideas.\footnote{See id. at 831-32.} Rosenberger confirmed that the First Amendment prohibits all government efforts to suppress the viewpoint of the speaker, regardless of whether the forum is limited to selective speakers.\footnote{See id. at 829, 837 (holding that the viewpoint-based guidelines deprived private groups of their First Amendment right to free expression).}

B. The Public Broadcaster’s Role as Public Trustee

Congress adopted the Communications Act of 1934\footnote{47 U.S.C. §§ 307, 312, 315, 399 (1994).} in order to preserve broadcasters’ First Amendment right to “the widest journalistic freedom consistent with their public obligation.”\footnote{See Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 110 (1973). In Columbia, the Court stated it will defer to the FCC’s judgment unless there are “compelling indications of error.” See id.} By 1960, the broadcast media had become the public’s primary source of information. See e.g., Asher, supra note 8, at 240. Asher’s 1988 survey indicated that 87% of the public relied on television for campaign information, while 42% relied on the radio. See id.

Congress adopted the Communications Act of 1934 in order to preserve broadcasters’ First Amendment right to “the widest journalistic freedom consistent with their public obligation.” After the broadcast industry became an influential actor in the field of communications,\footnote{See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Justice White explained that broadcasters exchange a portion of their First Amendment rights in return for control of a scarce number of media outlets open to the public.\footnote{Id. at 388-89. Red Lion unanimously upheld the FCC’s requirement that broadcaster’s employ a “fairness doctrine” which allowed the public a reply time when stations aired personal attacks or political editorials. Id. at 400-01. Although the Fairness Doctrine still binds the industry to disseminating a balance of information, its validity in today’s marketplace has been questioned. See Lentz supra note 1, at 283-85 (discussing the Commission’s rejection of viewpoint rational); see also In re Inquiry into Section 73.1920 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Report, 102 F.C.C.2d 145, paras. 104-24 (1985) (urging that spectrum scarcity is no longer a legitimate concern because new sources of communication disperse information). Congress failed to generate enough support in all three of its attempts to pass the Fairness in Broadcasting Act. See Lentz, supra note 1, at 285-86.} the Supreme Court promptly distinguished broadcasters’ First Amendment rights from the media in general.\footnote{See Red Lion, 395 U.S. at 390 (stating “the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium”). The FCC has the authority to issue licenses for up to eight years. Telecommunications Act of 1996, Pub. L. No. 104-104, § 203, 110 Stat. 112 (codified as amended at 47 U.S.C. § 307(c)(1)); see also FCC v. Sander Bros. Radio Station, 309 U.S. 470, 475 (1940) (recognizing that licenses are issued for a limited time and subject to review by the Commission).} In Red Lion Broadcasting Co. v. FCC,\footnote{See Red Lion in Winter: First Amendment and Equal Protection Concerns in the Allocation of Direct Broadcast Satellite Public Interest Channels, 6 CommLaw Conspectus 185, 187 (1998) (discussing the tension between the Court’s holdings in Tornillo and Red Lion).} Justice White explained that broadcasters exchange a portion of their First Amendment rights in return for control of a scarce number of media outlets open to the public.\footnote{95 U.S. 367 (1969).} Essentially, Red Lion established the relationship between the government, broadcasters and the public.\footnote{395 U.S. 367, 385 (1969) (upholding the FCC’s efforts to impose a “fairness doctrine” on the electronic media that would essentially achieve the same end). Hightower suggests that these cases are “mirror images” (quoting Fred W. Friendly, The Good Guys, the Bad Guys and the First Amendment XV 193 (1976)). But see Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. at 110 (discussing the broad journalistic freedom enjoyed in the broadcast industry). See also Jeffery S. Hops, Red Lion in Winter: First Amendment and Equal Protection Concerns in the Allocation of Direct Broadcast Satellite Public Interest Channels, 6 CommLaw Conspectus 185, 187 (1998) (discussing the tension between the Court’s holdings in Tornillo and Red Lion).} In the Court’s view, broadcasters hold the public interest in trust when they operate under a license issued by the government.\footnote{See id. at 388-89. Red Lion unanimously upheld the FCC’s requirement that broadcaster’s employ a “fairness doctrine” which allowed the public a reply time when stations aired personal attacks or political editorials. Id. at 400-01. Although the Fairness Doctrine still binds the industry to disseminating a balance of information, its validity in today’s marketplace has been questioned. See Lentz supra note 1, at 283-85 (discussing the Commission’s rejection of viewpoint rational); see also In re Inquiry into Section 73.1920 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Report, 102 F.C.C.2d 145, paras. 104-24 (1985) (urging that spectrum scarcity is no longer a legitimate concern because new sources of communication disperse information). Congress failed to generate enough support in all three of its attempts to pass the Fairness in Broadcasting Act. See Lentz, supra note 1, at 285-86.} As public trustees, broadcasters are expected to exchange some of their First Amendment rights for the good of society.\footnote{99 U.S. 367 (1969). Justice White explained that broadcasters exchange a portion of their First Amendment rights in return for control of a scarce number of media outlets open to the public.\footnote{Id. at 388-89. Red Lion unanimously upheld the FCC’s requirement that broadcaster’s employ a “fairness doctrine” which allowed the public a reply time when stations aired personal attacks or political editorials. Id. at 400-01. Although the Fairness Doctrine still binds the industry to disseminating a balance of information, its validity in today’s marketplace has been questioned. See Lentz supra note 1, at 283-85 (discussing the Commission’s rejection of viewpoint rational); see also In re Inquiry into Section 73.1920 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Report, 102 F.C.C.2d 145, paras. 104-24 (1985) (urging that spectrum scarcity is no longer a legitimate concern because new sources of communication disperse information). Congress failed to generate enough support in all three of its attempts to pass the Fairness in Broadcasting Act. See Lentz, supra note 1, at 285-86.} Today, broadcasters’ judgments are subject to review only when the station fails to fairly serve the public interest.\footnote{98 U.S. 367 (1969). Justice White explained that broadcasters exchange a portion of their First Amendment rights in return for control of a scarce number of media outlets open to the public.\footnote{Id. at 388-89. Red Lion unanimously upheld the FCC’s requirement that broadcaster’s employ a “fairness doctrine” which allowed the public a reply time when stations aired personal attacks or political editorials. Id. at 400-01. Although the Fairness Doctrine still binds the industry to disseminating a balance of information, its validity in today’s marketplace has been questioned. See Lentz supra note 1, at 283-85 (discussing the Commission’s rejection of viewpoint rational); see also In re Inquiry into Section 73.1920 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Report, 102 F.C.C.2d 145, paras. 104-24 (1985) (urging that spectrum scarcity is no longer a legitimate concern because new sources of communication disperse information). Congress failed to generate enough support in all three of its attempts to pass the Fairness in Broadcasting Act. See Lentz, supra note 1, at 285-86.} However, the Court continues to rely on the scarcity rationale to prevent
prohibiting noncommercial stations from "support[ing] for the corporation was to appropriate funds for alternative programming which would promote the diversity inhibited by commercial broadcasting because of its dependence on outside support. Hightower, supra note 92, at 158-49 (discussing the Carnegie Commission's vision for public television).

See also Section 399(g)(1)(A) providing that the Corporation's grants will be distributed "with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature." 47 U.S.C. § 396(g)(1)(A). Section 396(a)(1)-(10) outlines the government interest in establishing the corporation. 47 U.S.C. §396 (a)(1)-(10) (1994). See also League of Women Voters, 468 U.S. at 367-70 (discussing the legislative history); Hightower, supra note 92, at 146-49 (discussing the Corporation's purpose).

104 See League of Women Voters, 468 U.S. at 367. The League of Women Voters did not challenge the language prohibiting noncommercial stations from "support[ing] or oppos[ing] political candidates for public broadcasting and the Court did not address this issue on appeal. See id. at 371 n. 9.

105 See id. at 370-71.

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

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

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

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

110 See id. at 377.

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

112 See id. at 381. The majority refused to create a 'substantial government interest' in a regulation "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest." See id. at 385-84. See generally, 1988 Amendment. Pub. L. 100-626 (codified as amended at 47 U.S.C. § 399) (substituting "Support of" for "Editorializing and Support" and eliminated the provisions prohibiting noncommercial broadcasters from editorializing).

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


115 See id. at 402.

116 See id. at 381-82 (1984) (finding editorializing indis-
ers' interest in freedom of expression and the government's interest in remaining viewpoint neutral, it failed to emphasize the government's involvement in noncommercial broadcaster's programming decisions.

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

Candidates for public office do not have an unlimited right of access to electronic media, rather candidates have a "reasonable right." In CBS, Inc. v. FCC, private networks petitioned the Court for review of a FCC order holding that the networks violated section 312(a)(7). The majority agreed that the networks had, in fact, violated the provision. The Court declined to read the provision as a "general duty" to cover some political programming when Congress clearly required broadcasters to provide individual "legally qualified" federal candidates "reasonably access" in order to promote "his candidacy." The opinion confirmed that Section 312(a)(7) exceeded programming obligations imposed under Section 315. The Court concluded that Section 312(a)(7) did not violate broadcasters' First Amendment rights by hampering their discretion, rather Section 312(a)(7) promoted First Amendment values by fostering political speech. Thus, in CBS, Inc., the Court remained careful not to undermine broadcasters' editorial judgments.

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

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

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117 See id. at 395-96.
118 Cf. id. at 415-16 (1998) (Stevens, J. dissenting) (reasoning that Section 399 prevented the government from becoming entangled in political "propaganda"); id. at 408 (Rehnquist, J. dissenting, joined by Burger, C.J. and White, J.) (contending that Congress made a rational decision when it limited Corporation for Public Broadcasting funds to educational rather than editorial or political programming).
119 See discussion supra note 13 and accompanying text.
122 See CBS, Inc., 453 U.S. at 374. See generally 47 U.S.C. § 312(a)(7); see also discussion on section 312(a)(7) supra notes 11-13 and accompanying text. The Carter-Mondale Presidential Committee filed a complaint with the FCC after ABC, CBS, and NBC denied the committee's request to purchase air time. See CBS, Inc., 453 U.S. at 374. The FCC rejected the networks' excuses, calling them "deficient" under its "standards of reasonableness" and ordered the networks to comply with 312(a)(7). See id. at 374 (citing In re Complaint of Carter-Mondale Presidential Comm., Inc. against ABC, CBS and NBC Television Networks, 74 F.C.C.2d 631 paras. 45, 46 (1979)).
124 See id. at 377-78. The Court reasoned that the severity of the sanctioned imposed, license revocation, supported an interpretation of the statute that enlarges broadcasters' obligations to air political programming. See id. at 378.
125 See CBS, Inc., 453 U.S. at 377. The Court noted that before the Federal Election Campaign Act of 1971, the FCC only required that broadcasters allocate some broadcast time to political speech, nor did candidates have any right of access unless his or her opponent aired his or her views. Id. at 387. See generally, 47 U.S.C. § 315 (providing "equal opportunity" to all legally qualified candidates running for the same public office). But see, CBS, Inc., 453 U.S. at 405-04 (White J., dissenting joined by Rehnquist J., and Stevens J.) (finding little support in the provision's legislative history for the majority's conclusion).
126 See id. at 401 (persuading that "political broadcasting is one of the fourteen elements necessary to meet the public interest, needs and desires of the community") (citing In re Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, Report and Order, 68 F.C.C.2d 1079, paras. 39-36 (1978)).
129 See Notice of Proposed Rulemaking, supra note 128.
130 See In re Codification of the Commission's Political Programming Policies, 7 FCC Rcd. 678, para. 7 (1991) [hereinafter Political Programming Policies]. Four comments suggested "quantifiable access" or specific number of hours per week and one suggested a formula that would account for the markets' stations versus populations. See id. (citing Com-
sion declined to adopt formalized rules. Rather, it continued to rely on "reasonable, good faith judgments of licensees to provide reasonable access to federal candidates." The Commission stated it would continue to evaluate claims under Section 312(a) (7) on a case-by-case basis. Thus, the FCC concluded that the guidelines outlined in the Commission's 1978 Report and Order on Reasonable Access remained applicable. The FCC reasoned that these guidelines were reaffirmed pursuant to the Court's opinion in CBS, Inc.

As a result, both commercial and noncommercial educational stations must allot programming time to legally qualified candidates unless "unusual circumstances" make it reasonably difficult.

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

A. Public Broadcasters and Their First Amendment Interests

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


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

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

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

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

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

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

B. Public Broadcast of Political Speech is a Nonpublic Forum

The Supreme Court determined that AETC could exclude Forbes provided his exclusion was “viewpoint neutral” and “reasonable in light of the purpose of the property.” The majority recognized the First Amendment values inherent in political discourse and thus, subjected public broadcasters’ “journalistic discretion” to review under the Court’s Public Forum Doctrine. Forum analysis is normally precluded under traditional review of programming decisions. However, Justice Kennedy, writing for the majority, rationalized that political debates are distinguished from other types of programming for two reasons. First, historically, political debate was a forum where candidates expressed themselves without the media’s outside interference. Second, debates have been an integral part of the electoral process. Nonetheless, Justice Kennedy concluded that public broadcast dedicated to political speech was a nonpublic forum when the “microphone” was not “open” to the general public. The majority found that the record supported AETC’s contention that its decision to their benefit.” Brief for Petitioner at 32.

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


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

See Arkansas Educ. Television Comm’n, 118 S.Ct at 1640. See id; see also id. at 1647 (reasoning that debates are “by design a forum for political speech by the candidates”).

See id. at 1640 (citing CBS, Inc. v. FCC, 453 U.S. 788, 800 (1981)). In CBS, Justice Burger found that section 312(a)(7) contributes to the First Amendment interests of candidates, voters and broadcasters because it affords candidates the opportunity to inform the public about their platform and it affords the electorate an opportunity to reevaluate their choices. Id. at 396 (citing Buckley v. Valeo, 424 U.S. 1, 52-53 (1976)).

See Arkansas Educ. Television Comm’n, 118 S.Ct at 1642 (reasoning AETC created a nonpublic forum when it limited its debate to only viable candidates).
C. Justice Stevens: The Prior Restraint on Candidates' Free Speech

Justice Stevens, writing for the dissent, focused his inquiry on the public nature of the debate by comparing the debate to a prior restraint on free expression. Justice Stevens compared the government-sponsored debate to a parade where a government official issues a public license for the use of the city streets. Justice Stevens reasoned that precedent supported the dissent's position because the Court has analogized the power to issue permits with the "censorial" power to place a prior restraint on free expression. The dissent argued that AETC's decision to exclude Forbes should be governed by "pre-established objective criteria." The dissent maintained that contrary to precedent, Justice Kennedy failed to narrowly define the limits of a "viewpoint neutral exercise of journalistic discretion." The dissent recognized the majority opinion's emphasis on the significance of political speech in our democratic system of government, however, the dissent contended that the opinion discounted the impact of a public broadcaster's decision to exclude legally qualified candidates for federal office. Justice Stevens argued that AETC arbitrarily evaluated Forbes' viability. Moreover, Justice Stevens maintained that confining broadcasters' to objective criteria would not hamper their ability to exclude candidates who did not warrant coverage. Thus, the dissent was persuaded that a state official's control over access to government sponsored debate should be treated as a prior restraint on free expression.

III. CLARIFICATION OF OUR FIRST AMENDMENT VALUES

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

In light of the majority's approval of AETC's candidate selection process, political speech will be curtailed if public broadcasters are free to "pick and choose" candidates that they believe are viable candidates for federal office. Justice determined the outcome of the election." See id. at 1645 (noting the Republican winner's slim margin in the 1992 Congressional race).

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

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

165 See id. at 1647-48.

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

167 See id. at 1645 (comparing the guidelines imposed on private broadcasting stations by the Federal Election Campaign Act). See also 11 C.F.R. § 110.15(c) (1998). The criteria for candidate selection declared that "[f]or general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." See id. The section goes to explain when organizations may restrict participation. See id.


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

170 Id. at 1649. Moreover, Justice Stevens found evidence in the record that Forbes' exclusion very well "may have de-
Kennedy categorically classified government-sponsored debates based on AETC's candidate-by-candidate selection process. Justice Kennedy believed that this process was consistent with Cornelius' distinction between government property intended for "general access" and government property intended for "selective access." However, the restrictions in both Cornelius and Perry were permissible because: (1) the government dedicated its property to a specific purpose; and (2) the regulation was reasonable and not an effort to suppress to the speakers' message. In Cornelius, the majority was comfortable in allowing restrictions on speech activity because the speakers had alternative modes of communication. Justice O'Connor, writing for the majority, reasoned that "[r]arely will a non-public forum provide the only means of contact with a particular audience." Thus, Forbes was in a "rare" position because network access was not only Forbes most "efficient way" to communicate, rather, it was the only way for the public to evaluate Forbes' arguments against his opponents in AETC's live debate.

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

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

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175 See id. at 1642.
176 In Perry, the School Board dedicated its internal mail system to serve its teachers. See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 57, 40-41 (1983). It invited PEA to use its system because it acted as the exclusive union represented of all the district’s teacher. See id. at 51-52. In Cornelius, the government dedicated its charity drive to solicitation by “voluntary, charitable, health and welfare agencies” whose services directly benefit the employees. See Cornelius v. NAACP Legal Defense and Educ. Fund Inc, 473 U.S. 785, 795 (1985).
177 See Cornelius, 460 U.S. at 811.
178 See id. at 809.
179 See id. (contending that in a nonpublic forum, "[t]he First Amendment does not demand unrestricted access" because it may be "the most efficient way of delivering the speaker’s message").
180 AETC only sponsored one debate for the Arkansas’ Third Congressional seat, from which it excluded Forbes. See Arkansas Educ. Television Comm’n, 118 S.Ct 1633, 1637 (1998).
lection and thus, all legally qualified candidates have a statutory right of "reasonable access" under Section 312(a)(7) of the Communications Act of 1934. In CBS Inc., the Court approved the Commission's interpretation of Section 312(a)(7) by describing it as a balance of "the First Amendment rights of federal candidates, the public and the broadcasters." Thus, Forbes' failure to exhaust his administrative remedies should not thwart his First Amendment right to air his political views. Furthermore, broadcasters' enjoy the protection of the First Amendment even when programmers must adhere to Section 312(a)(7), which fosters candidates' political speech.

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

In light of independent candidates' limited media coverage, the Court must ensure the government's exclusion of a qualified candidate is not ambiguous. The exclusion must be both "reasonable" and "viewpoint neutral." The FCC has established statutory guidelines under Section 312(a)(7) that provide broadcasters with some direction in executing these decisions. However, public broadcasters have a special obligation to meet the obligations under Section 390. Public broadcasting networks were created to promote program diversity that may be inhibited in commercial programming where the market fixes the networks' agendas. Today, public networks regularly sponsor candidate debates that reflect the public's concerns without commercial influence. Thus, all qualified candidates must be invited indiscriminately.

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

its successor, the Communications Act (of 1934)).


See supra note 92, at 135-36 (discussing Congress' intent that public networks serve as "an alternative fare" to commercial networks). See also 47 U.S.C. § 390(5). Congress enacted section 390 to "strengthen the capability of existing public television and radio stations to provide public telecommunications services to the public." See id. Cf. EDITORIAL INTEGRITY IN PUBLIC BROADCASTING; PROCEEDINGS OF THE WINDSPRING CONFERENCE (1994) (setting forth a creed for the public broadcasting industry to further the public's interest in diversity).

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


AETC's Executive Director and staff excluded Forbes because they felt he had little public support, when in fact he had considerable support when he ran for office in 1992. See id. at 1645; see also supra note 39 and accompanying text.

See Arkansas Educ. Television Comm'n, 118 S. Ct. at 1657. AETC staff made programming decisions based on a "Statement of Principles of Editorial Integrity in Public Broadcasting." See THE ARKANSAS EDUCATIONAL TELEVISION COMMISSION PROGRAMMING POLICY FOR AETN 2 (adopted June 7, 1994). This statement provides that the station will maintain the "public trust in its editorial integrity by shielding the programming process from improper political pressure or influence from program funders or other sources." See id. AETN follows the guidelines set forth in EDITORIAL INTEGRITY IN PUBLIC BROADCASTING: PROCEEDINGS OF THE WINDSPRING CONFERENCE (1994). However, as Justice Stevens noted, Simmons, a local journalist worked extensively with AETC staff on its debate. See Arkansas Educ. Television Comm'n, 118 S. Ct at 1645 (Stevens, J., dissenting); see also Brief for Petitioner at 9-10 (stating that Simmons judgment was respected because of his "credibility and experience"). Nonetheless, AETC decided to invite the major party contenders before Forbes even qualified for the ballot. See Arkansas Educ. Television Comm'n, 118 S. Ct at 1645 (Stevens, J., dissenting). This suggests that Forbes may not have been seriously evaluated based on "viewpoint neutral" criteria if AETC had already extended its initial invitations. If a more defined selection process were in place, AETC could show Forbes' claim was without merit. Cf. Forsyth County v. Nationalist Movement, 505 U.S. 123, 135 (1992) (stating that absent a basis for an official's decision, the Court cannot review its credibility).


See Red Lion Broad. Co. v. FCC, 395 U.S.367 (1969);
Furthermore, the Court has explicitly stated that the First Amendment prohibits government entities from engaging in viewpoint discrimination on the basis of scarcity, absent some "acceptable neutral principle." Thus, it is imperative that public broadcasters fulfill their First Amendment obligations and evaluate candidates in a neutral manner.

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

Given the value placed on political expression, Justice Stevens' suggestion that that government-sponsored debate should be treated as a prior restraint on speech activity emerges as the sound position. The Court has prohibited government officials from ambiguously excluding groups from speech activity. The Court imposed objective criteria on government officials, which safeguarded our First Amendment value in free expression. Thus, broadcasters would adopt objective criteria rather than basing a decision to exclude candidates on a moral pretext or overly-broad "Statement of Principles." Furthermore, lower courts will have difficulty evaluating a candidate's claim under the First Amendment if the term "viewpoint neutral" remains undefined.

Minimal guidelines would not run afoul of the Constitution, rather they would provide a practical framework for lower courts.

IV. CONCLUSION

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