Silencing the Minority: The Practical Effects of Arkansas Educational Television Commission v. Forbes

Francis J. Ortman III

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Chief Justice Earl Warren, writing the opinion of the Supreme Court in *Sweezy v. New Hampshire*,¹ noted that “[h]istory has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been the vanguard of democratic thought and whose programs were ultimately accepted .... The absence of such voices would be a symptom of grave illness in our society.”² Nevertheless, the Supreme Court’s decision in *Arkansas Educational Television Commission v. Forbes*³ signals that subjective, ad hoc decisions of state employees can silence such vanguard, dissident voices.⁴

The First Amendment’s promise of freedom of speech⁵ has produced many struggles involving the ability of the government to establish limits relating to how,⁶ where,⁷ and in some cases, what⁸ a speaker may say. One of the most enduring difficulties for the Court has been determining

¹J.D. candidate, May 2000, The Catholic University of America, Columbus School of Law.
²Id. at 251.
⁴See id. at 683 (holding that a public broadcaster’s decision to exclude a controversial candidate from a television debate was a reasonable and viewpoint-neutral exercise of journalistic discretion).
⁵U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech”).
⁶See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 296 (1984) (holding that the National Park Service could deny homeless protesters the right to sleep on the National Mall because Park Service regulations against camping were narrowly tailored and left open alternative means for the group to convey their message).
⁷See, e.g., *Greer v. Spock*, 424 U.S. 828, 836, 838 (1976) (holding that the military could prohibit a presidential candidate from giving a speech on a military base even though the base is open to the public).
⁸See, e.g., *New York v. Ferber*, 458 U.S. 747, 758, 773-74 (1982) (upholding the conviction of a seller of child pornography on the basis that the protection of children provided by a statute prohibiting production and distribution of this type of material outweighs child pornographers’ freedom of speech).
where and when the government may restrict a speaker's access to a particular forum. 9

From this endeavor, the Court has defined three types of fora: the traditional public forum, the designated or limited public forum, and the nonpublic forum. 10 For each, the Court has also established standards for access. 11 The traditional public forum includes public streets and parks, areas where property has been "held in trust for the use of the public and . . . [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 12 A designated public forum exists when the government establishes an area that has not traditionally been a forum for expressive activity to all or part of the public for speech purposes. 13 The Court has also held that a designated public forum can "be created for a limited purpose such as use by certain groups." 14 If the state wishes to exclude a speaker from the traditional public forum or a forum that is designated for speech purposes, the state must demonstrate that the exclusion serves a compelling state interest and that the regulation of speech is narrowly tailored to serve that interest. 15 In the nonpublic forum, however, an area that has not by tradition or designation been open to speech, the state may regulate speech as long as the regulation is reasonable and does not constitute an attempt to

9. See generally Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 805-06, 813 (1985) (allowing the exclusion of various groups from a federal charity campaign because that type of forum is not characteristic of property used for expressive purposes and was, therefore, a nonpublic forum); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47, 55 (1983) (permitting a school to restrict access to a teachers' mail system because it was a nonpublic forum); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that a university created a public forum by opening up its facilities to student groups).
10. See Perry, 460 U.S. at 45-47.
11. See Cornelius, 473 U.S. at 800 (discussing various standards).
12. Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1938) (striking down a municipal ordinance forbidding the distribution of printed matter and public meetings in streets and other public places); see also Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 (1976) ("[T]he use of streets and parks for the free expression of views on national affairs may not be conditioned upon the sovereign's agreement with what a speaker may intend to say.").
14. Perry, 460 U.S. at 46 n.7. This type of forum, also known as a "footnote 7" forum, allows access to a forum only for specific groups or purposes. See id. (citing Widmar v. Vincent, 454 U.S. 263, 264-65 (1981) (access by student groups) and Madison Joint Sch. Dist. v. Wisconsin Pub. Employment Relations Comm'n, 429 U.S. 167, 169 (1976) (use of forum only for school board business)).
15. See Perry, 460 U.S. at 45.
exclude a speaker based on his or her views.\(^{16}\)

The *Forbes* Court stated that although most public television programs do not require scrutiny under public forum precedents, the candidate debate is an exception.\(^{17}\) The Court has recognized that broadcasters are entitled to the "widest journalistic freedom"\(^{18}\) and that Congress did not intend for broadcasting companies to be required to open their facilities to anyone desiring to use them.\(^{19}\) The Federal Communications Commission however, monitors both private and public broadcasters and Congress requires them to schedule programming that serves the public interest.\(^{20}\)

As the 1992 elections approached, the Arkansas Educational Television Commission (AETC) decided to sponsor a series of debates, including a debate for candidates vying for the seat in the Third Congressional District.\(^{21}\) Ralph Forbes was a certified independent candidate who had run unsuccessfully in 1990 for Lieutenant Governor on the Republican ticket.\(^{22}\) Forbes was also known for his involvement in the white supremacist movement and his management of fellow white supremacist David Duke’s 1988 presidential campaign.\(^{23}\) After his certification as a candidate, Forbes contacted AETC to ask permission to participate in the debate.\(^{24}\) AETC informed Forbes of its intention to include only the two major party candidates in the debate because it did not consider him

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16. See *Cornelius*, 473 U.S. at 800.
17. See Arkansas Educ. Television Comm’n v. Forbes, 523 U.S. 666, 675 (1998). Justice Kennedy, writing for the majority, noted both the significance of the debate in the electoral context and the debate forum as a free flowing exchange between candidates as reasons for applying forum doctrine to *Forbes*. See id.
18. See *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.,* 412 U.S. 94, 110, 132 (1973) (holding that a broadcaster who meets public obligations to provide fair coverage of public issues does not have to accept editorial advertisements).
19. See id. at 105.
20. See 47 U.S.C. § 309(a) (1994) (stating that in granting broadcasting licenses, Federal Communications Commission (FCC) considerations include whether the public interest, convenience, and necessity will be served by the acceptance of such application); see also *Red Lion Broad. Co., Inc. v. Federal Communications Comm’n*, 395 U.S. 367, 400-01 (1969) (holding that due to the scarcity of frequencies, broadcasters must allow limited access to their facilities to further the public interest in a range of viewpoints).
22. See id. at 670, 684-85. Although he was ultimately unsuccessful in his bid for Lieutenant Governor, Ralph Forbes received 46% of the vote in a three-candidate race in the Republican primary. See Respondent’s Brief at 4, Arkansas Educ. Television Comm’n v. Forbes, 523 U.S. 666 (1998) (No. 96-779). In addition, Forbes won a majority in 15 of the 16 counties located in the Third Congressional District. See id.
a serious candidate or one popular enough to be included.\footnote{See Forbes v. Arkansas Educ. Television Communication Network Found., 22 F.3d 1423, 1426 (8th Cir. 1994). Forbes claimed that an AETC official told him that the network would rather run "St. Elsewhere" than any debate that included Forbes. \textit{See id.}}

Forbes filed suit in United States District Court for the Western District of Arkansas, seeking both to enjoin the debate from proceeding without him and damages.\footnote{See Forbes, 523 U.S. at 671.} Forbes claimed a right to limited equal access to television coverage under both the Communications Act of 1934\footnote{See Communications Act of 1934, 47 U.S.C. § 315(a) (1994) (as amended). The Act states:
If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station:
\textit{Provided,} That such licensee shall have no power of censorship over the material broadcast under the provisions of this section.
\textit{Id.}} and the First Amendment.\footnote{See Forbes, 523 U.S. at 671.} The district court dismissed Forbes’ complaint for failure to state a claim.\footnote{See id.}

Forbes appealed and the Eighth Circuit remanded the First Amendment claim, whereupon the district court concluded as a matter of law that the debate was a nonpublic forum.\footnote{See DeYoung v. Patten, 898 F.2d 628 (8th Cir. 1990), which held that a statutory claim should be brought before the FCC prior to reaching a court, and that no First Amendment right to appear in televised debates exists beyond that granted by 47 U.S.C. § 315. \textit{See id.} at 633-35. Forbes appealed the dismissal to the Eighth Circuit. \textit{See Forbes, 22 F.3d. at 1425.} That court affirmed the dismissal of Forbes’ statutory claims, but reversed the district court holding as to Forbes’ First Amendment claim. \textit{See id.} at 1430. The Eighth Circuit thereby overruled that portion of \textit{DeYoung} that held that the First Amendment places no restraint on a state agency to sponsor candidate debates and pick which candidates will be included. \textit{See id.} The court stated that regardless the type of forum, AETN would have to provide a viewpoint-neutral reason to justify the exclusion of Forbes. \textit{See id.} at 1429-30. Because AETN had not filed an answer providing the reasons for the exclusion of Forbes, the Eighth Circuit remanded, stating that without a neutral reason for exclusion, Forbes had stated a claim. \textit{See id.} at 1430.} After the court determined that it was a nonpublic forum, however, the jury found that Forbes’ exclusion was neither “the result of political pressure” nor based on opposition to his political views; thus, the court entered judgment in favor of AETC.\footnote{See Forbes, 22 F.3d at 1428. The district court relied on \textit{DeYoung v. Patten}, 898 F.2d 628 (8th Cir. 1990), which held that a statutory claim should be brought before the FCC prior to reaching a court, and that no First Amendment right to appear in televised debates exists beyond that granted by 47 U.S.C. § 315. \textit{See id.} at 633-35. Forbes appealed the dismissal to the Eighth Circuit. \textit{See Forbes, 22 F.3d. at 1425.} That court affirmed the dismissal of Forbes’ statutory claims, but reversed the district court holding as to Forbes’ First Amendment claim. \textit{See id.} at 1430. The Eighth Circuit thereby overruled that portion of \textit{DeYoung} that held that the First Amendment places no restraint on a state agency to sponsor candidate debates and pick which candidates will be included. \textit{See id.} The court stated that regardless the type of forum, AETN would have to provide a viewpoint-neutral reason to justify the exclusion of Forbes. \textit{See id.} at 1429-30. Because AETN had not filed an answer providing the reasons for the exclusion of Forbes, the Eighth Circuit remanded, stating that without a neutral reason for exclusion, Forbes had stated a claim. \textit{See id.} at 1430.} Forbes again appealed the district court ruling to the Eighth Circuit for
de novo review of the First Amendment forum issue. The circuit court noted that in defining the parameters of the forum, the court should consider the type of access sought by the speaker. The court determined that Forbes was solely seeking access to the debate, not general access to the station. Thus, the Eighth Circuit held that Forbes was seeking access to a state-designated public forum. The court also declared Forbes a member of the class of speakers for whom the state established the forum. Consequently, AETC could not exclude Forbes as a member of that class without a narrowly tailored, compelling reason. The court held that AETC's opinion on the viability of Forbes' candidacy was insufficient justification for his exclusion from the debate. As a result, AETC appealed, and the Supreme Court granted certiorari to resolve a split between the Eighth and Eleventh Circuits regarding the forum status of a public television debate.

In a six-three decision delivered by Justice Kennedy, the Court reversed the Eighth Circuit, holding that the Arkansas debate was a non-public forum and that Forbes' exclusion "was a reasonable, viewpoint neutral exercise of journalistic discretion consistent with the First Amendment."
In coming to this conclusion, the Court followed the precedent established in *Perry Education Ass'n v. Perry Local Educators' Ass'n* that permits exclusion from the nonpublic forum based on status rather than the views of the speaker. In his dissent, Justice Stevens, joined by Justices Ginsburg and Souter, did not challenge the finding that public television stations do not have to allow access to every candidate. Rather, he challenged the ad hoc decision of AETC to exclude Forbes from the debate as subjective and arbitrary. Justice Stevens advocated for the establishment of an objective set of criteria to eliminate the risks inherent in allowing state owned networks to stage political debates.

This Note first discusses the variety of contexts in which the Supreme Court has examined the public forum debate in the broadcasting context. Next, this Note analyzes the majority and dissenting opinions in *Forbes* and concludes that the Court mislabeled the debate a nonpublic forum. This Note agrees with the dissent that the subjective, standardless character of AETC's exclusion of Forbes from the nonpublic forum creates the impression that the exclusion was viewpoint-based in violation of the First Amendment. Accordingly, the Court should have required state owned broadcasters to use pre-established objective guidelines in future decisions regarding access to the forum.

I. DEFERENCE TO JOURNALISTIC DISCRETION: THE PUBLIC FORUM ANALYSIS AND THE COURT'S ROLE IN SCRUTINIZING THE DECISIONS OF BROADCASTERS

The doctrinal framework of the Supreme Court's public forum analysis has been developed and applied in a variety of contexts. Each time,
however, the Court balances the individual’s First Amendment right to free speech against the practical concerns of governmental functions.46

In the context of both public and private broadcasting, the Court has determined that as a general rule, broadcasting “does not lend itself to scrutiny under the forum doctrine.”47 Broadcasters traditionally have had almost absolute journalistic discretion in their programming choices.48 The candidate debate, though, is a narrow exception to this rule.49 In determining debate access, the Court assesses the importance of such debates and attempts to comport its analysis into its public forum framework.50

A. The Court’s Public Forum Analysis

1. The Traditional Public Forum

Of the three types of fora, the traditional public forum provides a speaker with the greatest constitutional protection. The Court has long which ideas are subject to suppression); Schneider v. State, 308 U.S. 147, 165 (1939) (holding that a state may not prohibit the distribution of literature in streets and parks that are traditional public forums, as long as such activity does not interfere with others using the forum).

46. See, e.g., Mosley, 408 U.S. at 98. Mosley was protesting discrimination against blacks by picketing in front of a public school. See id. at 93. The Court recognized that Mosley’s action was expressive and entitled to the protection provided by the First Amendment. See id. at 95. The Court noted, however, that not “all picketing must always be allowed.” Id. at 98. “We have continually recognized that reasonable ‘time place and manner’ regulations of picketing may be necessary to further significant governmental interests.” Id. The Court struck down the challenged ordinance, holding that it was not a regulation of the time, place, or manner of speech, but an impermissible regulation of the subject matter of the speech. See id. at 99.

47. Forbes, 523 U.S. at 675. The Court has allowed both Congress and the FCC to determine and regulate the appropriate requirements for public access to the airwaves. See 47 U.S.C. § 309(a) (1994). The Court has expressed concern that the application of forum analysis in the broadcasting context would require courts to participate in the editorial decisions of broadcasters. See Forbes, 523 U.S. at 673-74.


49. See Forbes, 523 U.S. at 675 (1998) (“For two reasons, a candidate debate like the one at issue here is different from other programming. First, unlike AETC’s other broadcasts, the debate was by design a forum for political speech by the candidates . . . . Second, in our tradition, candidate debates are of exceptional significance in the electoral process.”). See also infra Part II.A.1 (discussing the candidate debate exception enunciated by the Court in Forbes).

50. See Forbes, 523 U.S. at 675-76.
held that citizens should enjoy the privilege and right to use the traditional public forum, such as a town square or park.\footnote{See Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").}

In \textit{Schneider v. State},\footnote{308 U.S. 147 (1939).} the Court first defined the limits of state regulation of speech in the traditional public forum by holding invalid municipal ordinances against leafleting on streets or other public places.\footnote{See id. at 160. This decision consolidated four cases from different states, each challenging a municipal ordinance that made it illegal to use streets and parks for leafleting, regardless of subject matter. See \textit{id.} at 153-54. Each municipality claimed a right to prevent litter as the reason for enacting such a statute. See \textit{id.} at 154-57. Of those charged with violating the ordinance, three were passing out information while on the sidewalk, concerning a labor dispute, a discussion of the war with Spain, and a protest in connection with the administration of unemployment insurance, respectively. See \textit{id.} The other was cited for distributing literature about the Jehovah's Witnesses from door to door. See \textit{id.} at 158.} The \textit{Schneider} Court held that the prevention of litter in streets was insufficient as a state interest to justify an absolute ban on leafleting.\footnote{See \textit{id.} at 162. The majority noted, "Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press." \textit{Id.}} The Court stated that as long as those people distributing information were not impeding the flow of traffic or other citizens attempting to use the street, their actions were protected because streets are the natural place for dissemination of information and exchange of opinion.\footnote{See \textit{id.} at 160. Likewise, the Court has ruled that government may not restrict the subject matter of those picketing on the public sidewalk. See Police Dep't of Chicago v. Mosley, 408 U.S. 92, 93-94 (1972). In \textit{Mosley}, the Court struck down an ordinance banning all picketing in front of a school except picketing involving a labor dispute. See \textit{id.} at 94. Mosley had been protesting in front of Jones High School against its alleged racist practices; Justice Marshall wrote, "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." \textit{Id.} at 93, 96.}

The Court further clarified the definition and rule for state restriction on access in \textit{Perry Education Ass'n v. Perry Local Educators' Ass'n}.\footnote{460 U.S. 37 (1983).} The \textit{Perry} Court stated that objective characteristics define the traditional public forum, such as whether "by long tradition or by government fiat," the forum has been "devoted to assembly and debate."\footnote{See \textit{id.} at 45.} In a traditional public forum, the state can exclude a speaker only if exclusion serves a compelling state interest and is narrowly drawn to serve that in-
terest. Although the state can enforce reasonable time, place, and manner regulations on the use of the traditional public forum, the Court requires that regulations be narrowly tailored to advance significant governmental interests.

2. The Designated Public Forum

The second forum category is the designated public forum. Here, the state has acted affirmatively to create a public forum where none traditionally existed. A court will examine the actions of the state in determining whether the state intended to designate an area as a public forum. Courts will also examine the characteristics of the forum to determine if the property is one where speech activity is likely to occur. If the Court determines that the state created a designated public forum, the Court applies the same level of judicial scrutiny as the traditional public forum.

In *Widmar v. Vincent*, a university made its facilities generally available for the use of registered student groups. The Supreme Court ruled that by creating a forum generally available to student groups, the uni-

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58. See id.

59. See id.; see also Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981). In *Heffron*, the Court upheld a regulation of solicitation on state fairground property that limited solicitation to a licensed booth. See id. at 648-49. The Court stated that the test of reasonableness required that the regulations "are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." Id. at 648 (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)). As *Heffron* illustrates, the state may place reasonable time, place, and manner restrictions on access to the public forum and still withstand constitutional scrutiny. See id. at 655.

60. See *Perry*, 460 U.S. at 45-46 (describing the designated public forum and its standards for exclusion).


63. See *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (holding that the university setting provides many opportunities for debate for its students and has many characteristics of the public forum).

64. See *Cornelius*, 473 U.S. at 800; see also *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.").


66. See id. at 267.
versity intended to open the facility for expressive purposes and therefore could not close those facilities to an on-campus religious group that sought access to the area for meetings. In holding that First Amendment rights of speech extend to the campuses of state universities, the Court noted that the characteristics of the university setting represent a pure "marketplace of ideas." The Court held that the content-based exclusion of the religious student group violated the fundamental principle that state regulation of speech in a designated public forum must be content neutral and narrowly tailored to serve a compelling state interest. As later cases would define, the state must make a forum generally available, as in Widmar, for the court to consider it a designated public forum. Otherwise, courts deem the forum nonpublic.

3. The Nonpublic Forum

When the state has limited access to a particular forum by denying general access, or if the forum property lacks the characteristics of a forum for expressive activity, then it falls into the third category of the nonpublic forum. The Court in Cornelius v. NAACP noted that the government's policy of limiting participation in a federal charity campaign to certain organizations revealed its intention not to create a forum generally open to organizations.

In Cornelius, various groups, including the NAACP, argued that exclusion of some groups from participation in the federally sponsored charity campaign violated those groups' First Amendment rights to solicit charitable donations. The Court held that the charity campaign was a nonpublic forum rather than a designated public forum because the characteristics of the property used for the campaign were not consistent with expressive activity. The Court also noted that organizations seeking to

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67. See id. at 277.
68. See id. at 267 n.5 (quoting Healy v. James, 408 U.S. 169, 180 (1972)).
69. See id. at 270, 277.
70. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983) (stating that where the state has established a forum and then limited access to that forum, it did not create a designated public forum). The Court noted that because the public school reserved access to the teacher's mailboxes, the exclusion of a teachers union from access was constitutional. See id. at 47-48.
72. See id. at 804.
73. See id. at 795-96. Solicitation of funds by charitable organizations is recognized as a protected interest by the First Amendment's guarantee of freedom of speech. See Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 639 (1980) (striking down an ordinance prohibiting solicitation in the public forum).
74. See Cornelius, 473 U.S. at 805-06. "We will not find that a public forum has been
join the campaign were required to get permission—clear evidence that the government did not intend to make the campaign "generally available."75 The Cornelius Court stated that regulation of access to the non-public forum must be reasonable and not an attempt to suppress a speaker's view because public officials oppose that view.76

Prior to Cornelius, the Court in Perry had noted that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government."77 Perry involved a teachers' union in competition with a public school teachers' existing union that was denied access to an inter-school mailbox system for teachers, while the union currently representing the teachers was granted access.78 The Court held that the mailbox system was a nonpublic forum because the school traditionally had limited outside access to the boxes.79 This fact demonstrated that, unlike the government in Widmar, the school did not intend to make access generally available.80 The Court noted further that the characteristics of the forum property did not suggest that it was a place for free expressive activity.81 Finally, the Court found that the school based its policy on the rival union's outsider status rather than on its views.82

In both Perry and Cornelius, the Court relied on the intentions of the state in opening the forum, the characteristics of the property, and the relative status of the speaker in deciding that the exclusion of the union was constitutional.83 The nonpublic forum designation, however, does not permit the government to exclude speakers with impunity.84 Al-

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75. See id. at 804-05.
76. See id. at 800 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).
78. See id. at 39-40.
79. See id. at 47.
80. See id. at 48. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." Id. at 49.
81. See id. at 46-47. The Court noted that the school district had a legitimate interest in preserving the mailboxes for their intended use as an internal means of communication. See id. at 50-51.
82. See id. at 49. The Court held that distinctions that are unconstitutional in the public forum may be permissible in the nonpublic forum in order to preserve the property for its intended purpose. See id.
84. See International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 687
though it is easier for a state to exclude a speaker in the nonpublic forum, exclusion cannot be based on the speaker's viewpoint and must be reasonable in light of the purpose of the property. 85

B. Traditional Deference To Congress, the FCC, and the Editorial Discretion of Broadcasters in Determinations on Access to the Airwaves

Prior to Arkansas Educational Television Commission v. Forbes, the Supreme Court had not applied public forum doctrine to private or public broadcasting for fear that it would open the floodgates for third parties claiming rights of access. 86 Further, the Court noted that broad rights of access would be antithetical to the journalistic purpose and statutory obligations of broadcasters. 87 Therefore, the Court allowed broadcasters great latitude in the area of editorial discretion and relied on Congress to protect the public's interest in the fair and accurate representation of opposing views. 88 Broadcasting licenses are scarce resources, however, and the Court stated that the First Amendment must define the boundaries of congressional regulatory power in the broadcasting arena. 89

Despite the Court's inclination against intrusion into the journalistic discretion of public broadcasters, the dissemination of information regarding public affairs has proved to be an exception. 90

(1992) (O'Connor, J., concurring) (concluding that although airport terminals are non-public fora, the government cannot prohibit all First Amendment activities).

85. See Cornelius, 473 U.S. at 800.
88. See CBS, Inc. v. Federal Communications Comm'n, 453 U.S. 367, 396-97 (1981) (upholding a statutory right to limited television access for federal candidates); see also Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364, 402 (1984) (invalidating a section of the public broadcasting act that prevented federally funded broadcasters from editorializing). The Court in League of Women Voters stated that "if the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of broadcasters who bear the public trust." Id. at 378 (citation omitted).
89. See League of Women Voters, 468 U.S. at 377-78; see also Red Lion Broad. Co., Inc. v. Federal Communications Comm'n, 395 U.S. 367, 375 (1969) (upholding access regulations under the FCC's "fairness doctrine"). In Red Lion, the Court stated that "as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." Id. at 389. "[T]he licensee has no constitutional right to . . . monopolize a radio frequency to the exclusion of his fellow citizens." Id. at 389.
90. See Red Lion, 395 U.S. at 390. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Id. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ." Id.
Federal Communications Commission, the Court recognized the importance of public exposure to candidates that enables "'the electorate [to] intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.'" The Court in CBS upheld the FCC's application of 47 U.S.C. § 312(a)(7) to federal election television access. The Court stated that the regulation was a congressional effort to assure that a scarce resource, the broadcasting airwaves, was used in the public interest. The Court held that the right to airtime provided by § 312(a)(7) best reconciled the First Amendment with the rights of broadcasters and the public.

In contrast, the Court in Columbia Broadcasting System, Inc. v. Democratic National Committee held that the FCC's refusal to require broadcast licensees to accept all paid political advertisements was consistent with the First Amendment. The Court expressed concerns that such an imposition would intrude into the editorial discretion of broadcasters. The Court stated further that the First Amendment allows broadcasters the widest journalistic freedom consistent with their public duties.

In Federal Communications Commission v. League of Women Voters, operators of noncommercial, educational broadcasting stations filed suit to challenge section 399 of the Public Broadcasting Act of 1967, which

92. Id. at 396 (quoting Buckley v. Valeo, 424 U.S. 1, 52-53 (1976)).
The Commission may revoke any station license or construction permit . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

Id.

94. See CBS, 453 U.S. at 397. The 1980 Carter-Mondale ticket had approached the three major networks requesting that they air a thirty minute program about the Carter administration and candidacy during prime time. See id. at 371. When each network effectively declined, the Carter-Mondale Presidential Committee filed a complaint with the Federal Communications Commission charging that the networks had violated the "reasonable access" provisions of the Communications Act of 1934. See id. at 372-74.

95. See id. at 397.
96. See id. The Court held that by denying access to the Carter campaign during an election cycle, the networks had violated the "reasonable access" provisions. See id.
98. See id. at 121.
99. See id. at 123-25.
100. See id. at 110.
prohibited those stations receiving federal funding from editorializing.\textsuperscript{103} The Court noted that because broadcast frequencies are a scarce resource, licensees act as fiduciaries, assuring that the public is exposed to differing views.\textsuperscript{104} Whereas the opportunity to advocate one's own positions without airing those of an opponent may be acceptable for newspaper publishers, broadcasters do not enjoy the same opportunity.\textsuperscript{105} Although the Court noted the special considerations of broadcasters, it held that section 399 violated the First Amendment, affirming the precedents that demonstrated considerable faith in the editorial discretion of broadcasters.\textsuperscript{106}

Although the Supreme Court has been reluctant to apply forum analysis in the broadcasting context, the Court decided to apply this framework to the decision made by AETC\textsuperscript{107} in \textit{Arkansas Educational Television Commission v. Forbes},\textsuperscript{108} noting the importance of the candidate debate. In \textit{Forbes}, the Court balanced forum precedent against the rights of broadcasters to use editorial discretion.\textsuperscript{109} The Court's decisions in the broadcasting context allow broadcasters, both public and private, wide journalistic discretion to determine what their networks air.\textsuperscript{110} The Court, however, has noted that because broadcasting licenses are a scarce commodity, broadcasters have public interest responsibilities not imposed on non-broadcast journalists.\textsuperscript{111} In the context of electoral debates, the Court has attempted to balance its deference to editorial discretion against the importance of media access for candidates seeking elective office.

\textsuperscript{103} See \textit{League of Women Voters}, 468 U.S. at 370 n.7.
\textsuperscript{104} See id. at 377.
\textsuperscript{105} See id. at 376-77. In \textit{League of Women Voters}, the Court noted that First Amendment claims of access against broadcasters require different treatment than similar claims of access to other media due to the scarcity of broadcast frequencies and the regulation of broadcasters by the government. See id.
\textsuperscript{106} See id. at 402.
\textsuperscript{107} See id. at 675.
\textsuperscript{109} See id. at 676-82.
\textsuperscript{111} See \textit{League of Women Voters}, 468 U.S. at 376. The Court stated that those obtaining licenses have a duty to present """"those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves."""" See id. at 377 (quoting \textit{Red Lion Broad. Co., Inc. v. Federal Communications Comm'n}, 395 U.S. 367, 389 (1969)).
II. AETC v. FORBES: APPLYING FORUM ANALYSIS TO THE PUBLIC BROADCASTING DEBATE

The Supreme Court granted certiorari to *Arkansas Educational Television Commission v. Forbes*112 to resolve a split between the Eighth and Eleventh Circuits.113 The Eleventh Circuit held that the candidate debate was not a public forum,114 but the Eighth Circuit held that the AETC debate was a designated public forum, established for a class of speakers—candidates for the Third Congressional District.115 The Eighth Circuit stated further that Forbes was a member of that class and that any exclusion of Forbes must be narrowly tailored to serve a compelling state interest.116 The Eighth Circuit held that exclusion of Forbes based on staff

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113. See id. at 672.
115. See Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497, 503 (8th Cir. 1996) (determining de novo the type of forum to which Forbes sought access). The Forbes court relied on *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985), for help in determining the forum classification. *See Forbes*, 93 F.3d at 503. """In defining the forum we [] focus [] on the access sought by the speaker.""" Id. (quoting *Cornelius*, 473 U.S. at 801). The court stated that if only limited access is sought, the court should use a """"more tailored approach to ascertain [] the perimeters of a forum...."""" See id. (quoting *Cornelius*, 473 U.S. at 801). Forbes sought access to the debate, not access to the network as a whole, enabling the court to focus its evaluation on the debate as the relevant forum. See id.

In its analysis, the Eighth Circuit found the debate forum most similar to the forum created in *Widmar v. Vincent*, 454 U.S. 263 (1981), where a state university created a designated public forum by opening its facilities to student groups. *See Forbes*, 93 F.3d at 504. In *Widmar*, the Supreme Court held that the university could not open a forum for expressive activity and then exclude certain student groups. *See Widmar*, 454 U.S. at 277. The Eighth Circuit, relying on *Widmar*, found that the debate was a designated public forum. *See Forbes*, 93 F.3d at 504.

The circuit court then distinguished *Cornelius*, stating that the charity campaign involved was not clearly established as a forum for expressive activity, in contrast to the candidate debate. *See id.* at 504. The Eighth Circuit stated that the debate was a place opened by the state for a limited class of speakers, candidates for the Third Congressional District seat, a class of which Forbes was a member. *See id.* The exclusion of Forbes was a prior restraint because the state cannot """"define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class."""" See id.

The Eighth Circuit stated further that the decision of AETC to exclude Forbes based on the subjective opinions of governmental employees rendered the decision suspect. *See id.* Any decision based on political viability would be """"so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment."""" Id. at 505. The court also recognized that such a determination was especially suspect when Forbes had already satisfied Arkansas' own test of viability by his certification as a candidate. *See id.* at 504.

116. *See Forbes*, 93 F.3d at 505.
members' opinions was not narrowly tailored and that the reasons given for Forbes' exclusion did not serve a compelling state interest.\footnote{17}

The Supreme Court reversed the Eighth Circuit.\footnote{18} It determined that the candidate debate constituted a narrow exception to the rule that public forum doctrine should not be applied in the broadcasting context.\footnote{19} The Court applied its public forum framework analysis and determined that the debate was a nonpublic forum, concluding that the exclusion of Forbes from the debate was constitutional.\footnote{20}

\section{The Majority Opinion: Overturning the Eighth Circuit and Holding that the Exclusion of Forbes from a Nonpublic Forum was a Viewpoint-Neutral Exercise of Editorial Discretion}

In overturning the Eighth Circuit Court of Appeals, the Court placed public and private broadcasters on comparable footing when applying journalistic discretion in the coordination of candidate debates.\footnote{21} After determining that the debate was a nonpublic forum, the majority relied on the assertions of AETC directors to conclude that Forbes' exclusion was viewpoint neutral, not a result of political pressure, and therefore constitutional.\footnote{22}

\subsection{Noting that the Candidate Debate is an Exception to the Rule that Forum Doctrine Should Not be Applied in the Broadcasting Context}

The \textit{Forbes} Court sought to determine whether the application of the public forum doctrine was appropriate in the context of public broadcasting.\footnote{23} Justice Kennedy, speaking for the majority, noted that the Court traditionally had avoided the examination of editorial decisions made by television producers.\footnote{24} The majority feared that intrusions into the realm of broadcasters would likely entangle the judicial branch in the daily editorial decisions of producers and could lead to endless litigation.

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\begin{enumerate}
\item See \textit{id}. The Eighth Circuit declared that the exclusion of Forbes based on subjective notions of viability was not legally sufficient under the First Amendment. \textit{See id.}
\item \textit{See id.} at 675.
\item \textit{See id.} at 676-80, 682-83.
\item \textit{See id.} at 683. The Court ruled that as long as the public broadcaster's decision to exclude a candidate is reasonable and viewpoint neutral, it is not a violation of the First Amendment. \textit{See id.}
\item \textit{See id.} at 682.
\item \textit{See id.} at 672.
\item \textit{See id.} at 672-73. Justice Kennedy stated that, "[a]s a general rule, the nature of editorial discretion counsels against subjected broadcasters to claims of viewpoint discrimination." \textit{Id.} at 673.
\end{enumerate}
by people claiming that their exclusion was unconstitutional.\footnote{125}{See id. at 674.}

Although the majority noted that public broadcasting did not lend itself to scrutiny under the public forum doctrine, the candidate debate was an exception to the general rule for two reasons.\footnote{126}{See id. at 675.} First, the candidate debate was different because it was designed as a political forum for candidates to air their views without intrusion by the broadcaster.\footnote{127}{See id.} Second, the "exceptional significance" of the candidate debate in the electoral process justified unique treatment.\footnote{128}{See id. at 675-76.} Thus, the majority found that "[t]he special characteristics of candidate debates support the conclusion that the AETC debate was a forum of some type."\footnote{129}{Id. at 676.}

\section*{2. Rejecting the Eighth Circuit and Defining the Debate as a Nonpublic Forum}

After defining the three types of fora, the majority applied its forum analysis to the AETC debate. Citing \textit{International Society for Krishna Consciousness, Inc. v. Lee}, the Court noted that the government creates a designated public forum only when it acts affirmatively to open a nontraditional public forum for expressive activity.\footnote{130}{505 U.S. 672 (1992).} To ascertain the type of forum, a court first examines the policy and practice of the state to determine its intentions.\footnote{131}{See Forbes, 523 U.S. at 677 (1998).} The majority distinguished \textit{Widmar}, where the state university opened its facilities to all student groups, from \textit{Cornelius} and \textit{Perry}, where the government allowed only selective access to a forum, thereby creating a nonpublic forum.\footnote{132}{See id. at 678-80.} In \textit{Widmar}, the majority noted, access to the university's facilities was made "generally open" for use by student groups, thereby creating a designated public forum.\footnote{133}{See \textit{Widmar v. Vincent}, 454 U.S. 263, 267-68 (1981).} In contrast, the nonpublic forums of both \textit{Cornelius} and \textit{Perry} did not allow either general access to a fundraising campaign (\textit{Cornelius})\footnote{134}{Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 804-05 (1985).} or teachers' mailboxes (\textit{Perry});\footnote{135}{Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 46-47 (1983).} instead, each required permission from the state before access would be granted.\footnote{136}{See \textit{Cornelius}, 473 U.S. at 804; \textit{Perry}, 460 U.S. at 47.}
The *Forbes* Court stated that the AETC debate was similar to both *Cornelius* and *Perry* in that AETC did not make the debate generally available to candidates, but rather reserved eligibility for certain Third Congressional District candidates. The majority noted that a state does not create a designated public forum when it allows selective access for a class of speakers. The Court stated further that when a state designates a forum for selective access without evidence that it intended it for public use, such a forum is nonpublic in character. The Court held that by opening the debate to a class of Third District candidates, but then reserving eligibility for certain candidates, AETC had created a nonpublic forum.

3. The Nonpublic Forum Determination Allows AETC to Exclude Forbes as a Reasonable, Viewpoint-Neutral Exercise of Journalistic Discretion

Once the Court established that the debate was a nonpublic forum, it considered whether the exclusion of Forbes from the debate was viewpoint neutral and reasonable in relation to the nature of the property. The Court examined the reasons given by the Executive Director of AETC, Susan Howarth, for excluding Forbes from the debate. She reasoned that Forbes should be excluded because neither the voters of Arkansas nor news organizations considered Forbes a “serious” candidate, so he lacked both the financial support and a campaign base from which to mount a strong campaign.

The Court relied on Howarth’s testimony to determine that the exclusion of Forbes was not based on his viewpoint but because Forbes “had generated no appreciable public interest.” The Court also cited *Perry*,

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139. *See id.*
140. *See id.* (citing *Cornelius*, 473 U.S. at 805).
141. *See id.*
142. *See id.* at 682.
143. *See id.*
144. *See id.* In her testimony, Howarth identified factors that contributed to her decision to exclude Forbes. *See* Joint Appendix of the Supreme Court Record at 118-19, Forbes v. Arkansas Educ. Television Comm’n, 523 U.S. 666 (1998) (No. 96-779). First, Forbes “didn’t have a serious chance to win the election.” *Id.* at 119. Second, journalists “did not think he had a chance to win the election.” *Id.* at 118. Third, the news media “weren’t even planning to report his name on election night in the results.” *Id.* Fourth, Forbes “raised very few dollars and hadn’t filed any paperwork with the Federal Election Commission.” *Id.* Fifth, “Forbes didn’t really have any kind of formal campaign headquarters except for his house.” *Id.*
indicating that "exclusion from [the] nonpublic forum 'based on [ ] status' rather than the views of the speaker is permissible." The majority concluded that AETC had acted in good faith in excluding Forbes based upon a reasonable, viewpoint neutral editorial decision, consistent with First Amendment speech protections.

**B. The Dissent: Taking Note of the Facts and Calling for Objective Standards**

Justice Stevens, along with Justices Ginsberg and Souter, dissented on the grounds that the decision to exclude Forbes lacked sufficient rationality and objectivity to withstand First Amendment scrutiny. The dissent framed the issue as whether AETC had "defined the contours of the debate forum with sufficient specificity to justify the exclusion of a ballot-qualified candidate." The dissent argued that the ad hoc nature of the AETC decision to exclude Forbes was similar to cases concerning prior restraint where the Court invalidated municipal licensing processes because they lacked "narrow, objective, and definite standards to guide the licensing authority." The dissent then cited various facts from the record showing that Forbes had previously been a viable candidate in the Third District. The dissent also noted the subjective nature of AETC's decision.

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146. *Id.* at 683 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983)).
147. *See id.* at 683.
148. *See id.* at 683-84 (Stevens, J., dissenting).
149. *Id.* at 690.
150. *Id.* at 684. The dissent cited *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969), where an ordinance requiring a license before using a public forum was found unconstitutional because of the lack of objective, narrowly tailored standards. *See Forbes*, 523 U.S. at 684. In *Shuttlesworth*, the Court held that decisions regarding prior restraint, without definite standards to guide the licensing authority are unconstitutional when First Amendment freedoms are involved. *See Shuttlesworth*, 394 U.S. 147, 150-51.
151. *See Forbes*, 523 U. S. at 684. The dissent noted that Forbes had run for lieutenant governor in 1986 and again in 1990. *See id.* In a three-way race conducted for the Republican primary in 1990, Forbes received 46.88% of the statewide vote and he carried 15 of the 16 counties in the Third Congressional District by absolute majorities. *See id.* at 685.
152. For another Justice Stevens dissenting opinion (also joined by Souter, J.) focusing on the facts of the case and asserting that the state placed unduly broad restrictions on First Amendment rights, see *Burson v. Freeman*, 504 U.S. 191, 217 (1992) (Stevens, J., dissenting) (holding that a prohibition of campaigning within 100 feet of a polling place does not violate the First Amendment).
153. *See Forbes*, 523 U.S. at 686 n.6. The dissent noted that while the election in the Third District was relatively close, in two of the other three districts in which both major party candidates had been invited to debate, it was clear that one of them had little chance of winning. *See id.* In the first district, the Democrat received 69.8% of the vote to the
tice Stevens, commenting that the discretion of the government employees appeared limitless, argued that the same factors used to exclude Forbes from the debate could also have been reasons to include him.\textsuperscript{154}

Observing the results of the 1992 Third District election, the dissent indicated that although Forbes may not have been able to win the election, his past electoral success on the Republican ticket and inclusion in the debate had the potential to help defeat the victorious Republican candidate.\textsuperscript{155} Stevens recognized the importance of debates on public issues, especially in the conduct of campaigns for political office,\textsuperscript{156} and that the majority's reliance on the subjective decisions of AETC employees in its forum analysis revealed a failure to recognize the importance of the candidate debate in the electoral process.\textsuperscript{157} Finally, Justice Stevens stated that the importance of avoiding arbitrary or viewpoint-based exclusions from political debates "militates strongly in favor of requiring the controlling state agency to use (and adhere to) pre-established, objective criteria" when determining participation in a debate.\textsuperscript{158} In addition, the dissent stated that objective standards for exclusion would allow government administrators to exclude candidates to further the viability of a debate.\textsuperscript{159}

\textsuperscript{154} See id. at 692. The dissent also noted that although Forbes' lack of financial support arguably justified his exclusion, this factor could also have been a reason to include him, enabling him to debate on a platform with wealthier candidates. See id. In a footnote, the dissent stated further that a lack of financial support apparently was not a factor in AETC's decision to invite a major party candidate with even less financial support than Forbes to a debate in another district. See id. at 686 n.6.

\textsuperscript{155} See id. at 685.

\textsuperscript{156} See id. at 693. (Stevens, J., dissenting) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971), indicating that the First Amendment "‘has its fullest and most urgent application precisely to the conduct of campaigns for political office’").

\textsuperscript{157} See id.

\textsuperscript{158} See id. at 694.

\textsuperscript{159} See id. at 694 n.19. This is not the first case in which Justice Stevens was concerned about the unfettered discretion of public officials. In Frisby v. Schultz, 487 U.S. 474 (1988), Justice Stevens dissented on grounds that the scope of an ordinance prohibiting picketing in front of private residences gave town officials too much discretion in enforcement. See Frisby, 487 U.S. at 499. The prohibition was aimed at preventing abortion protests from taking place outside the homes of local doctors. See id. at 476. Justice Stevens stated that although the town would probably only enforce the ordinance against hostile picketing, the scope of the ordinance was overbroad and could be easily amended. See id. at 499.

In Forbes, the Court refused to stray from the traditional stance that the journalistic decisions of broadcasters are best left unchallenged by the judicial branch.\(^\text{160}\) In rejecting the analysis of the Eighth Circuit that the AETC debate was a public forum, the Court relied too heavily on the stated intentions of AETC staff and ignored the characteristics of the candidate debate as a forum for speech. Even if the debate were a non-public forum, the Court failed to address in its opinion both that the controversial nature of Forbes' views made his exclusion suspect and that any exclusion of a candidate based solely on popularity would constitute viewpoint discrimination.\(^\text{161}\) By failing to call for objective standards in the debate context and ignoring the facts, the Court has further entrenched the duopoly in American politics and has silenced the minority voice.\(^\text{162}\)

\(^\text{160}\) See Forbes, 523 U.S. at 673, 683. Instead, the Court has traditionally deferred to the FCC and Congress to establish guidelines and to regulate the decisions of broadcasters. See supra Part I.B (noting decisions of the Court in the broadcasting context).

\(^\text{161}\) The exclusion of Forbes was suspect both because of his lack of party affiliation and his demonstrated bigotry; however, his exclusion flies in the face of Justice Holmes' "Marketplace of Ideas" theory of First Amendment jurisprudence. Holmes stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). The decision of the Court in Forbes will now act to effectively shut independent and controversial views out of that marketplace.

\(^\text{162}\) The controversy surrounding inclusion of third party and independent candidates in debates is not likely to abate anytime soon. Studies now show that less than one-third of young Americans identify with either major political party and 44% of voters aged 18 to 29 claim independent status. See Ted Halstead, A Politics for Generation X, ATLANTIC MONTHLY, Aug. 1999, at 34. Many Americans fail to see any distinction between the two parties and are instead opting for independent or third party candidates, as evidenced by former wrestler Jesse "The Body" Ventura's election to the Governorship of Minnesota. See id.; Steven F. Schier, Jesse's Victory: It Was No Fluke, WASH. MONTHLY, Jan. 1999, at 8. Governor Ventura ran as a Reform party candidate. See Schier, supra. The strongest support for Ventura's candidacy in 1998 and Ross Perot's in 1992 came from young adults who have become apathetic as a result of the infighting between the two major parties. See id. In addition, candidates such as Patrick Buchanan, who leave the major parties for third parties, understand the importance of appearing in a televised debate. See Ceci Connolly, Politics, Quotable I, WASH. POST, Oct. 21, 1999, at A12. Buchanan, a long time Republican and would-be Reform party presidential candidate said, "If I get into the race, my determination will be to get into the debates, and if I get into a free-wheeling forum . . . I think I can become president of the United States . . . ." See id.
A. By Allowing AETC to Reserve Access to the Debate Based on Subjective Notions of Viability, AETC Was Able to Exclude Forbes Because of His Controversial Views and Lack of Party Affiliation

In deciding whether the state has opened a designated public forum, the Court has traditionally examined two factors: the intentions of the state in establishing a forum for expressive activity and the characteristics of the forum itself. In \textit{Forbes}, the Court's reliance on assertions of AETC staff regarding the station's decision to host debates was inadequate to conclude that the debate was a nonpublic forum.

To determine whether a forum is a designated public forum or a nonpublic forum, the Court first examines the intentions of the state in opening the forum. In \textit{Forbes}, the Court held that AETC opened a fo-

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\item 163. \textit{See} \textit{Perry Educ. Ass'n v. Perry Local Educators' Ass'n}, 460 U.S. 37, 44-46 (1983) (stating that an evaluation regarding access must be based on the character of the forum and the intention of the government in allowing use of the property); \textit{see also} \textit{Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.}, 473 U.S. 788, 803 (1985) (stating that the Court will not find that a public forum exists when faced with evidence of contrary intent, "nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.").

\item 164. \textit{See Forbes}, 523 U.S. at 682-83. In 1992, AETC sponsored a series of four debates in four different Arkansas congressional races. \textit{See id.} at 670. In the other debates, candidates with less objective support and financial resources were permitted access to the debate, while Forbes was excluded from the Third District debate. \textit{See id.} at 686 n.6 (Stevens, J., dissenting). Forbes was a highly controversial candidate, who nevertheless, had a great deal of support from the Third District in prior statewide races. \textit{See id.} at 684.

AETC established a forum for candidates of the Third District, a class that included Forbes. \textit{See id.} at 693 n.18. As Justice Stevens noted in his dissent, when AETC opened the debate to a class of "viable" or "newsworthy" candidates, as AETC claimed, it created a designated public forum. \textit{See id.} Once the state has opened a designated public forum, any exclusion of a member of the class for which the forum was established must meet strict scrutiny. \textit{See Cornelius}, 473 U.S. at 800. The stated basis for exclusion of Forbes was that he was not popular or politically viable in the judgment of the state employees. \textit{See Forbes}, 523 U.S. at 671.

Reliance on government employees for a decision on who is viable or popular is perilous because Forbes' exclusion based on his viability, may have been merely a pretext for viewpoint discrimination. Such discrimination cannot be used to exclude a member of a class. \textit{See Perry}, 460 U.S. at 45-46. Two years prior to the debate in question, Forbes ran for Lieutenant Governor and carried 15 of 16 counties in the Third Congressional District. \textit{See Forbes}, 523 U.S. at 684-85. It seems suspect that a candidate could go from being overwhelmingly popular in a district to "not politically viable" in a span of only two years. Therefore, if the exclusion of Forbes was based on the subjective opinions of AETC staff, that exclusion should have been ruled unconstitutional regardless of the type of forum because of the risk that the decision was motivated by animus towards Forbes' views.

\item 165. \textit{See} \textit{Widmar v. Vincent}, 454 U.S. 263, 267 (1981) (holding that by allowing student groups to use its facilities, a university had created a forum generally open for use by student groups). The Court ruled that the university could not then exclude a religious student group from the facility because that group was a member of the class for which the
rum for candidates of the Third District, but that AETC could then re-
serve eligibility for participation based on the assessment of "political vi-
ability" made by AETC staff.166

The Court ignored the characteristics of the forum in its conclusion
that the debate was a nonpublic forum.167 Similar to the university forum
in Widmar, an electoral debate has the characteristics of a forum estab-
lished for expressive activity, and is a prototype of the "marketplace of
ideas."158 In a debate, candidates share their views without intrusion
from the broadcaster in order to help the electorate determine which
candidate best represents their constituents' ideologies.169 Nevertheless,
in Forbes, after noting the importance of the candidate debate for its spe-
cial characteristics,170 the Court then ignored those characteristics in its
forum analysis.171 The Court over-relied on the stated intentions of
AETC and failed to examine the forum's characteristics in depth. As a
result, the Court erred in rejecting the Eighth Circuit's analysis that the
debate was a designated public forum.172

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158. See Forbes, 523 U.S. at 680. The Forbes Court compared the debate to the char-
ity campaign in Cornelius, where the government made individualized assessments to de-
termine which agencies would participate in the campaign. See id.

159. Unlike the nonpublic fora of both Cornelius (federal charity campaign), and
Perry (teacher mailboxes), the forum at issue in Forbes had characteristics consistent with
a forum for speech activity. As was mentioned by both the majority and dissent through-
out the Forbes opinion, the debate is of central importance in the electoral process and is a
forum dedicated to the exchange of speech. See id. at 675-76, 692-94.

160. See Widmar, 454 U.S. at 267 n.5 (noting that a public university is not required to
grant free access to its facilities to both students and non-students alike). The university
setting, however, is a "marketplace of ideas" and any exclusion of a student group from an
area opened for expressive activity by students must meet strict scrutiny. See id.

161. See Forbes, 523 U.S. at 675. The Forbes Court noted that the debate is different
from a political talk show where the topics discussed are chosen, and the editors or host
can limit the conversation to those topics. See id.

162. See id. Candidate debate is of vital importance in any political race. Although
Jesse Ventura was without popular support in the race for Governor of Minnesota, op-
posing Democratic candidate "Skip" Humphrey insisted that Jesse Ventura be included in
each of 10 debates. See Schier, supra note 162, at 9. Humphrey's hope that Ventura, a
Reform Party candidate, would draw white males away from Humphrey's Republican op-
ponent backfired when Ventura came away from the debates as a popular alternative to
the staid political veterans of the major parties. See id. The push Ventura received from
the debates, as well as from Minnesota's campaign finance laws, helped Ventura pull a
stunning upset and become Governor of Minnesota. See id. at 8-9.

163. See Forbes, 523 U.S. at 676-77.
B. Even if the Debate was a Nonpublic Forum, Forbes’ Exclusion, Based on a Subjective Assessment of Viability by State Employees, Was Viewpoint Discrimination

The Court in Forbes held that although the state may exclude speakers from a nonpublic forum, that exclusion must be reasonable in light of the purpose of the property and may not be based on the views of the speaker. What the Forbes Court failed to recognize, however, was that by excluding Forbes, AETC was engaging in viewpoint discrimination.

Exclusion from a forum based on subjective notions of viability presents an unreasonable risk that the exclusion is based on the speaker’s viewpoint rather than on viability because viability is akin to popularity. Those candidates with unpopular views are less likely to be as viable or popular as candidates with politically mainstream views; however, one cannot exclude a speaker from a forum based on the popularity of his views. The exclusion of Forbes based on his subjective lack of viability presents an unreasonable risk that his exclusion by the staff of AETC was viewpoint discrimination. Several factors suggested that AETC’s reservation based on Forbes’ viability was a mere pretext for his exclusion, based actually on the unpopularity of his views. The major-

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173. See Forbes, 523 U.S. at 682.

174. Although not addressed in the Forbes opinion, during oral argument Justice Souter, who eventually sided with the dissent, asked counsel for AETC if the “newsworthy” standard used by AETC to exclude Forbes wasn’t a “pretty darned good surrogate for viewpoint discrimination?” “The viewpoint is unpopular,” Souter concluded. Id. See United States Supreme Court Official Transcript at 13-14, Arkansas Educ. Television Comm’n v. Forbes, 523 U.S. 666 (1998) (No. 96-779).

175. See Texas v. Johnson, 491 U.S. 397, 414 (1989) (noting that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

176. See Forbes, 523 U.S. at 686 (Stevens, J., dissenting). In his dissent, Justice Stevens noted the AETC’s viewpoint discrimination when he concluded that the Eighth Circuit “correctly concluded that the staff’s appraisal of ‘political viability’ was ‘so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment.’” Id.

177. See Robert Marquand, Which Candidates Get to Speak on TV?, CHRISTIAN SCI. MONITOR, Oct. 9, 1997, at 1, 14 (noting that Forbes is a former member of the Nazi party and a white supremacist who managed the 1988 presidential campaign of fellow white supremacist, David Duke).
ity, however, chose to rely solely on the stated assertions of AETC staff as to its intentions in sponsoring the debate. The exclusion of Forbes based on a flexible viability standard created the risk that his highly controversial views and lack of party affiliation, in conjunction with a lack of objective standards, caused his exclusion from the debate.

In addition, by deciding to hold a debate and then limit participation to Democrats and Republicans, regardless of election success, AETC engaged in viewpoint discrimination. As was noted in the Amicus Brief of Perot '96, Democrats outnumber Republicans nearly 3-1 in the First Congressional District of Arkansas; yet, the Republican candidate was not required to pass a "viability" test for inclusion in the debate. In the first district and in other districts in Arkansas as well, any per se qualification of a Republican candidate as viable is questionable, but AETC included the Republican candidates and excluded Forbes based on his "viability." The exclusion of Forbes was suspect not only because his views were controversial, but because, as an independent candidate, he was not politically mainstream. Regardless of the forum, the exclusion of Forbes should have been unconstitutional as viewpoint discrimina-

178. See Forbes, 523 U.S. at 682.
179. See id. at 692 (Stevens, J., dissenting) (noting that the "viability" standard employed by AETC raised serious concerns about the reasons for Forbes' exclusion and the unbridled discretion of AETC staff in controlling access to the debate); see also supra note 174 (noting Justice Souter's question at oral argument implying that a "newsworthy" standard was merely a surrogate for viewpoint discrimination).
180. In her testimony at trial, AETC director Susan Howarth testified that AETC decided to include only the candidates who had a chance of winning the election. See Joint Appendix of the Supreme Court Record at 118. Yet, AETC staff chose to include Republican Dennis Scott in another 1992 congressional debate, even though Scott had raised less money than Forbes and was a "long-shot" who "filed at the last minute to run, saying ['no incumbent should get a free ride.']['"] See Brief of Amicus Curiae Perot '96 at 12, Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (No. 96-779) [hereinafter Perot Brief].
181. See Perot Brief, supra note 180, at 12.
182. See id.
183. See id. The Perot '96 Brief notes that the debate sponsored by AETC in the first district of Arkansas illustrates the double standard of assumed viability. See id. at 11. "The First District of Arkansas is one of the most Democratic districts in the country and has not sent a Republican Representative to the House since 1868." Id. Therefore, the Perot brief argues, any test of viability based on chances of winning would exclude the Republican candidate. See id. at 12.
184. See id. at 11 (arguing that AETN's viability test was a pretext for political viewpoint discrimination because it was not used to screen major party candidates who had no chance of winning). The Court has noted that the interests of independent candidates are not likely to be addressed adequately by legislatures, and that the risk of those groups' First Amendment rights being violated "may warrant careful judicial scrutiny." Anderson v. Celebrezze, 460 U.S. 780, 793 n.16 (1983).
Therefore, even if the debate was a nonpublic forum, the Court should have held that the exclusion of Forbes was not a reasonable, viewpoint-neutral exercise of journalistic discretion.

C. The Court Should Have Adopted the Dissent’s Call for Objective Standards to Insure Against Viewpoint Discrimination in the Debate Context

Although the dissent did not argue that public broadcasters have a constitutional obligation to include all candidates in a debate, it indicated that the decision to exclude Forbes was standardless in character and tantamount to a prior restraint on speech. The majority should have called for the establishment of nonpartisan objective criteria to prevent future litigation regarding access and to give both the public and the candidates assurance that the government will not censor speech.

The Forbes Court should have held that the criteria used to exclude Forbes was vague, and that AETC could not exclude a candidate with-

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185. See R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) (stating that it is not permissible to “license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules”); see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 770 (1996) (Stevens, J., concurring) (noting that “[i]f the Government spared all speech but that communicated by Republicans from the control of the cable operator, for example, the First Amendment violation would be plain”).

186. See Arkansas Educ. Television Comm’n v. Forbes, 523 U.S. 666, 684 (1998) (Stevens, J., dissenting) (“The ad hoc decision of the staff of [AETC] raises . . . concerns addressed by ‘the many decisions of this Court . . . 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.’”’ (quoting Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969)).


188. In Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) the court struck down for vagueness an ordinance that required solicitors to obtain a permit before they canvassed neighborhoods. See id. at 623. The Court noted that the ordinance did not specify sufficiently what solicitors must do in order to comply, nor did the ordinance provide standards to guide the licensing authority. See id. at 621-22. Similarly, in Forbes, AETC had not established pre-determined objective criteria for access to the debate in order to allow the candidates to take actions that would qualify them for participation in the debate. See Forbes, 523 U.S. at 670. The Hynes Court noted that “ambiguities” in the Oradell ordinance gave police “effective power to grant or deny permission to canvass for political causes.” Hynes, 425 U.S. at 622. Therefore, the ordinance was held void for vagueness. See id. In Forbes, the Court should have held that the term “political viability” was similarly vague without pre-established qualifying standards to determine viability. AETC’s use of discretion in excluding Forbes was similar to the breadth of the Oradell ordinance in that no written criteria existed and government employees were able to use subjective judgment resulting in the exclusion of qualified candidates. See Forbes, 523 U.S. at 692 (Stevens, J., dissenting).
out pre-established objective standards to guide public broadcasters in debate access determinations. The majority in *Forbes* expressed concern that any imposition of standards would lead to less speech, not more, because state owned broadcasters would decline to sponsor debates for fear that sponsorship might entangle them in litigation. Although this concern may be valid, the dissent noted that the decision to allow a candidate access to a debate is at least as important as a decision to grant a parade permit. The establishment of objective criteria would serve to recognize that importance.

As Justice Stevens pointed out, objective standards for access would impose only a modest requirement on broadcasters, which would fall far short of a duty to grant all applications for access. Objective criteria would also assure the public that state owned broadcasters could not exclude candidates based on a vague or arbitrary basis.

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189. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (stating that “[a]ny prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity”); *see also City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 763 (1988) (stating that the “danger” of “content and viewpoint censorship . . . is at its zenith when the determination of who may speak . . . is left to the unbridled discretion of a government official”).

190. *See Forbes*, 523 U.S. at 681 (noting that a Nebraska Educational Television Network cancelled a congressional debate based upon the Eighth Circuit’s ruling in *Forbes*).

191. *See Forbes*, 523 U.S. at 693; *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131-33 (1992) (invalidating a parade permit ordinance that gave government administrators unfettered discretion to vary the permit fee). The *Forsyth* Court struck down the ordinance because it did not have adequate standards for the administrator to apply. *See id.* at 131-33. The Court noted that there was nothing in the law that prevented discrimination against some views by varying the permit fee. *See id.*


193. *See Duke v. Connell*, 790 F. Supp. 50, 56 (D. R.I. 1992) (granting presidential candidate and white supremacist David Duke an injunction preventing the Secretary of State of Rhode Island from excluding Duke from its primary ballot). The court applied the *Hynes* vagueness factors and found that (1) the ballot access statute was vague because it stated that those attempting to gain access must be “generally recognized nationally” as presidential candidates, without specifying by whom the candidates must be recognized, (2) the statute failed to specify what a candidate must do in order to comply, (3) the statute permitted a state administrator unfettered discretion to determine whether Duke was a presidential contender. *See id.* at 54.

194. Ballot access laws are likely to provide the most objective criteria for determining candidate viability. *See, e.g., Perot Brief, supra* note 180, at 20-21 (stating that access laws provide objective tests of viability, requiring “a finite number of signatures from real citizens, a test that all candidates understand, that measures seriousness with precise numbers, and that the government can readily certify a candidate as having passed or failed.”). As evidenced by the experience of Forbes, any candidate that attempts to qualify for the ballot must initially complete a rigorous test of his own viability. *See Joint Appendix of the Record of the Supreme Court at 84, Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998) (No. 96-779), Direct Examination of Ralph Forbes, at 84 (Forbes testi-
Forbes’ views may be odious and out of the political mainstream, but he is still entitled to free speech as guaranteed by the First Amendment. For candidates such as Forbes who lack the necessary financial resources, media attention, and large-scale organization required to operate a successful campaign, access to a forum like the one created by the AETC is crucial. The important fact in debate access claims is not whether the candidate has the ability to win, but whether prejudice will result from a candidate’s exclusion. Although many of these candidates have slim chances of winning, they have significant potential to affect election outcomes. Inclusion of a range of voices in the election context is necessary to assure that the promise of the First Amendment is fulfilled.


196. Ironically, in 1998, AETN invited Ralph Forbes to a debate against Republican Congressman Asa Hutchinson for the Third District seat. See Across the USA: News From Every State, USA TODAY, Sept. 4, 1998, at 8A. Forbes was running under the flag of the Reform Party, and he had a slim chance of defeating Hutchinson, a member of the powerful House Judiciary Committee. The election of Jesse Ventura as Governor of Minnesota is a signal that many Americans are fed up with a two-party system that looks more like a two headed monster. See Halstead, supra note 162, at 34. As a result of the Court’s decision in Forbes, for an independent candidate to qualify for inclusion in a debate sponsored by the government, one must be either independently wealthy or a celebrity. In discussing the possibility of his candidacy for president in 2000, Warren Beatty echoed the sentiments of many when he said “The political system is so corrupted, we don’t really need a third party. We need a second one.” Walter Kirn, President Bulworth; He’s musing about the job. Don’t laugh yet, TIME, Aug. 23, 1999, at 35.

197. See Fulani v. Brady, 935 F.2d 1324, 1331 (D.C. Cir. 1991). Dr. Fulani claimed that the Commission on Presidential Debates (CPD) excluded her from a debate because she was not a candidate with a realistic chance of winning. See id. at 1326. The majority held that Fulani lacked standing because her injury was not traceable to the actions of CPD. See id. at 1331. In his dissent, Chief Judge Mikva stated that the exclusion of Fulani undermined her credibility with an electorate that could not understand why she had been excluded, thereby casting doubt on her veracity. See id. at 1332. Chief Judge Mikva argued that such injury justified Article III standing under existing precedents. See id. Although Forbes seemingly had little chance of winning the election, his exclusion from an opportunity at free television access may have hampered his ability to affect the outcome of the race.

198. See Perot Brief, supra note 180, at 19 (hypothesizing that based on Third District election results, if Forbes had converted one in every 15 of Hutchinson’s voters, the election would have gone to Van Winkle); see also Bennett J. Matelson, Note, Tilting the Electoral Playing Field: The Problem of Subjectivity in Presidential Election Law, 69 N.Y.U. L. Rev. 1238, 1279 (1994) (noting that subjectivity creates unfair barriers for independent candidates and that courts often do not recognize that many minor party candidates run for reasons other than winning).

199. “The First Amendment . . . ‘presupposes that right conclusions are more likely to
IV. CONCLUSION

The Court in *Forbes* began its analysis by noting the importance of the candidate debate in American politics. In determining that the debate was a nonpublic forum, however, the Court ignored objective criteria as well as the characteristics of the debate as a pure marketplace of ideas, both of which supported finding that the debate was a designated public forum. The *Forbes* decision confirms the Court's reluctance to intrude into the decisions of broadcasters outside the realm of governmental regulation. In addition, the Court failed to recognize the possibility that any exclusion based on an individual’s popularity could have been mere pretext for viewpoint discrimination. By establishing or calling for the use of objective standards for public broadcasters in the candidate debate context, the Court could have provided more tangible guidelines to determine whether the broadcaster discriminated based on the speaker's views. Instead, the Court conformed to the American political duopoly and effectively made it easier to silence the voices of under-financed fledgling minority views in the future.

be gathered out of a multitude of tongues, than through any kind of authoritative selection.” New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). In the words of Judge Learned Hand, “’To many this is, and always will be, folly; but we have staked upon it our all.’” Id.