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Televised Political Debates and Arkansas Educational Television Commission v. Forbes: Excluding the Public from Public Broadcasting

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Televised Political Debates and *Arkansas Educational Television Commission v. Forbes*: Excluding the Public from Public Broadcasting

I. INTRODUCTION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, *or abridging the freedom of speech*, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1]

If the eye of television had thrown open the doors of the First Congress and publicly broadcast the debates over the Bill of Rights, who knows what sort of influence television would have had in both the wording of the First Amendment, and on the actions of its drafters.

But television was not there, nor even envisioned, and as a result, the problem of applying the First Amendment to the broadcast media has fallen largely on the modern legislature and the courts.[2]

One aspect of regulating television that required the utmost care was the regulation of political speech. To be certain, the increasing role that television plays in the lives of the average citizen makes it one of the most influential tools in disseminating political ideas.[3]

47 U.S.C. § 315, which grew out of the Communications Act of 1934, requires that equal opportunities be made available to political candidates to have access to the airwaves.[4] However, as with any scarce resource, this has presented practical concerns because primary elections can result in as many as thirty candidates vying for the same office.[5]

The Supreme Court struggled with the opposing aims of protecting political speech and regulating a scarce resource when the Court presided over the case of

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1. U.S. CONST. amend. I (emphasis added).

2. *See* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 11 (University of California Press) (1987).

3. *See Governor's Race Puts Big Money in TV Ads, Advisers Say It's Best Way to Reach Voters*, RICHMOND TIMES-DISPATCH, Sept. 15, 1997, at B1; Kevin Gaughan, *Until We Curb TV's Power, Political Influence Will Be Bought And Sold In the Marketplace*, BUFFALO NEWS, April 16, 1997, at B2.

4. *See* 47 U.S.C. § 315 (1994).

5. *See* WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 368 (Harcourt Brace College Publishers 1996) (1982).

Arkansas Educational Television Commission v. Forbes.[6] In its six-to-three decision, the Court held that a government-owned public television station was not precluded by the First Amendment from denying a third-party candidate access to its televised political debate.[7]

This note will examine the Court's decision in *Forbes* and discuss its implications for future First Amendment and 47 U.S.C. § 315 cases involving political speech. Part II discusses the historical background of cases and statutory law concerning both public access to television under the First Amendment and the permissible regulation of free speech under the First Amendment.[8] Part III discusses the facts and procedural history of *Forbes*.[9] This prefaces the discussion in Part IV in which the majority and dissenting opinions will be summarized and analyzed.[10] Part V will be a critical projection of immediate and future trends in the First Amendment's application to broadcasting.[11] Part VI of this note will briefly summarize the material.

II. HISTORICAL BACKGROUND

A. *Communications Act of 1934: Congress Defines the Role of Broadcast Media*

Prior to 1934, Radio was regulated by two pieces of legislation, the Wireless Ship Act of 1910 and the Radio Act of 1912.[12] They were both woefully inadequate because neither had been drafted at a time when broadcasting was perceived as a commercial endeavor.[13] The Wireless Ship Act was a safety measure to ensure that ships had proper radio equipment in case of emergency.[14] The Radio Act was an attempt to fulfill international treaty obligations, and required licensing of stations by the Commerce Department, but did not require the assigning of broadcast frequencies.[15]

In 1920, under the auspices of the Radio Act, Westinghouse Electric and Manufacturing Company applied for and was granted a license for a shore station in Pittsburgh.[16] KDKA came into existence and was put on the air not to

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6. 118 S. Ct. 1633 (1998) (hereinafter *Forbes*).
7. *See id.* at 1644.
8. *See infra* notes 12-139 and accompanying text.
9. *See infra* notes 140-68 and accompanying text.
10. *See infra* notes 169-252 and accompanying text.
11. *See infra* notes 253-86 and accompanying text.
12. *See* POWE, *supra* note 2, at 54.
13. *See* OVERBECK, *supra* note 5, at 347.
14. *See* POWE, *supra* note 2, at 54.
15. *See id.*
16. *See id.* at 53.

communicate with ships, but to promote Westinghouse products.[17] By 1922, approximately 576 commercial stations were on the air,[18] and they were literally drowning one another out.[19] Over the ensuing years, the problem of signal interference got worse.[20] "Like modern [Citizens' Band radio], the AM band then had layer upon layer of signals, with the louder ones covering up weaker ones and with signals suddenly disappearing and showing up elsewhere on the dial."[21]

After a series of industry conferences aimed at self-regulation failed, existing broadcasters asked then Commerce Secretary Herbert Hoover to impose order.[22] Hoover attempted to do so despite a D.C. Circuit Court ruling[23] that the Radio Act of 1912 did not confer such power upon him.[24] Hoover reorganized the radio spectrum and assigned frequencies and hours of operation.[25] New broadcasters coming on the air refused to adhere to Hoover's decisions,[26] and his authority was again undermined in *United States v. Zenith Radio Corp.*[27] The *Zenith* court held that the Radio Act did not give Hoover the authority to impose restrictions on the transmission power, broadcast frequency, or hours of operation of a station.[28]

Realizing that new legislation was needed, Congress passed the Radio Act of 1927.[29] It established a new regulatory agency under the Commerce Department, the Federal Radio Commission.[30] The Commission's job was to assign broadcast frequencies through licensing and create an orderly system of stations such that stations' signals did not interfere with one another.[31] Also, the legislation recognized the airwaves as a public resource.[32] As a result, licensing under the Act was to be done so that the "public interest, convenience, or necessity will be served."[33]

Licenses could be, and were, denied if the Commission felt that the public

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17. *See id.*
18. *See id.* at 54.
19. *See id.* at 59 (for example, two Cincinnati radio stations, unable to reach an agreement on allocating the same frequency, simultaneously broadcast on it for weeks on end).
20. *See id.* at 58-60.
21. OVERBECK, *supra* note 5, at 348.
22. *See* POWE, *supra* note 2, at 58.
23. *See* Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923).
24. *See* POWE, *supra* note 2, at 58.
25. *See id.*
26. *See id.* at 59.
27. *See* United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926).
28. *See* POWE, *supra* note 2, at 59-60.
29. *See* OVERBECK, *supra* note 5, at 348.
30. *See id.*
31. *See* POWE, *supra* note 2, at 63.
32. *See id.* at 61.
33. *See id.*

interest was not being served by the broadcaster.[34] The public ownership of the airwaves was further reinforced by the licensing period. Licenses were issued for only three years, and then, if not renewed, the licensed frequency reverted back to the public for reissue.[35]

Under Roosevelt's New Deal legislation, the Radio Act of 1927 was replaced with the Communications Act of 1934.[36] While similar in form and substance to the 1927 Act,[37] it had a few important differences. The Federal Radio Commission now became the Federal Communications Commission, and was funded separately from the Commerce Department.[38] Congress also reiterated that the airwaves were owned and to be licensed and operated for the benefit of the public.[39] Additionally, Congress enacted 47 U.S.C. § 315, allowing for equal opportunity for political candidates to have access to broadcasting facilities, as a means of furthering the goal of serving the public interest.[40]

Section 315 was amended in 1959 to except newscasts, news interviews, documentaries, and on-the-spot news reports from the equal opportunity requirement.[41] In 1960, Congress suspended the equal time provision to allow the broadcasting of the Great Debates between Richard Nixon and John F. Kennedy.[42] Suspending the provision allowed Nixon and Kennedy to debate while excluding other Presidential candidates from participation.[43] The equal time provision was reinstated and despite pleas from Kennedy to suspend the provisions for the 1964

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34. *See id.*

35. *See id.* at 66; *see also* NBC v. United States, 319 U.S. 190 (1943) (upholding the authority of a regulatory agency to deny broadcast licenses).

36. *See* OVERBECK, *supra* note 5, at 349; Communications Act of 1934, ch. 652, Pub. L. No. 416 (codified as amended at 47 U.S.C. § 151 et seq. (1994)).

37. *See* POWE, *supra* note 2, at 66-67.

38. *See* OVERBECK, *supra* note 5, at 349.

39. *See* Communications Act of 1934 § 1 (codified as amended at 47 U.S.C. § 1 et seq.) (§ 1 repealed 1947). Section 1 of the Act read, in part:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio *so as to make available, so far as possible, to all the people of the United States* a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . there is hereby created a commission to be known as the "Federal Communications Commission . . . ."

Id. (emphasis added).

40. *See id.* § 315 (codified as amended at 47 U.S.C. § 315 (1994)). Section 315 read:

> 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, and the Commission shall make rules and regulations to carry this provision into effect: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

Id.

41. *See id.* § 315(a) (as amended by Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557).

42. *See* OVERBECK, *supra* note 5, at 367.

43. *See id.*

Presidential Election,[44] Congress refused.[45]

In 1975, the FCC, in its regulatory authority, interpreted the 1959 amendment excepting newscasts from the equal time requirement to include the broadcasting of political debates sponsored by non-broadcast organizations.[46] In 1983, the FCC further expanded this interpretation to include debates sponsored by the broadcasters themselves.[47]

B. Modern First Amendment Holdings

1. Distinguishing the Standards For Public and Non-public Fora.

a. Widmar v. Vincent

The Court has determined that First Amendment protections of free speech vary depending on the classification of the forum in which the speech is to be propounded. *Widmar v. Vincent*[48] typifies the Court's interpretation of the First Amendment's application to public fora. In *Widmar*, a student religious group sued for access to the University of Missouri, Kansas City campus facilities for the purpose of conducting meetings.[49] The group previously had access to the facilities, but the University had changed its policy in order to conform to the Establishment Clause of the First Amendment.[50] The Court in *Widmar* concluded that the University facilities were a public forum because the University "has opened a forum for direct citizen involvement."[51] Because it applied to a public forum, the University's policy was subject to strict First Amendment scrutiny.[52]

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44. *See* S. Rep. No. 88-448 at 5-8 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2050, 2054-57 (the letter was from President Kennedy to the President of the Senate and the Speaker of the House).

45. *See* OVERBECK, *supra* note 5, at 367.

46. *See id.*; *see also* In re Aspen Inst., 55 F.C.C.2d 697 (1975) (the FCC interpretation was upheld by Chisolm v. FCC, 538 F.2d 349 (D.C. Cir. 1976)).

47. *See* OVERBECK, *supra* note 5, at 367; *see also* In re Henry Geller, 95 F.C.C.2d 1236 (1983) (the FCC interpretation was upheld by League of Women Voters Educ. Fund v. FCC, No. 83-2194 (D.C. Cir. 1984) (listed in table at 731 F.2d 995)).

48. 454 U.S. 263 (1981).

49. *See id.* at 265-66.

50. *See id.* at 265.

51. *See id.* at 268 (quoting Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 (1976)).

52. *See id.* at 269-70.

Under the strict scrutiny standard the University "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[53] The Court concluded that the University's interest in not violating the Establishment Clause of the First Amendment was not compelling enough for it to abridge the students' freedoms under the free speech guarantees of the First Amendment.[54]

b. Boos v. Barry

In *Boos v. Barry*,[55] the Court again applied the public-forum standard to a Washington, D.C. ordinance prohibiting the display of anti-foreign government signs within 500 feet of that government's embassy.[56] The Court found that because the statute allowed pro-government speech, but not anti-government speech, it was not content-neutral and therefore was subject to the strictest First Amendment scrutiny.[57] Under a First Amendment analysis, the Court found that the city's interest in protecting foreign dignitaries from hateful speech was not compelling enough to overcome the First Amendment right to freely express an anti-government sentiment.[58]

c. Perry Education Ass'n v. Perry Local Educators' Ass'n

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[59] the Court held that non-public fora are not subject to the same degree of protection under the First Amendment as public fora.[60] The Court stated: "Public property which is not by tradition or designation a forum for public communication is governed by different standards."[61] "In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[62]

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53. *Id.* at 270 (citing Carey v. Brown, 447 U.S. 455, 464-65 (1980)).
54. *See id.* at 277-78.
55. 485 U.S. 312 (1988).
56. *See id.* at 321.
57. *See id.* at 318-19.
58. *See id.* at 329.
59. 460 U.S. 37 (1983).
60. *See id.* at 46.
61. *Id.*
62. *Id.* This has become known as the viewpoint-neutrality test. *See also infra* notes 70, 75, and accompanying text.

d. Cornelius v. NAACP Legal Defense and Educational Fund, Inc.

In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,[63] the Court applied the non-public forum standard recognized in *Perry*.[64] The *Cornelius* Court was faced with determining whether an executive order denying certain organizations access to solicit contributions during a federal employee charity drive violated the free speech guarantees of the First Amendment.[65] In deciding which forum standard should apply,[66] the Court noted: "We will not find that a public forum has been created in the face of clear evidence of a 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."[67] The Court also recognized that the government can designate as public fora areas that would not traditionally be considered public fora and then a First Amendment public-forum standard would apply.[68]

However, in finding that the charity drive was, in fact, a non-public forum, the Court recognized that the First Amendment is not nearly as protective of non-public fora.[69] "Access to a nonpublic forum . . . can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'"[70] In determining that the government's justification for excluding certain groups from the charity drive was reasonable,[71] the Court held: "The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances."[72]

e. International Society for Krishna Consciousness v. Lee

In *International Society for Krishna Consciousness v. Lee*,[73] the Court again elucidated its standards for non-public fora.[74] Recognizing that an airport terminal

63. 473 U.S. 788 (1985).
64. *See id.* at 801-04.
65. *See id.* at 797.
66. *See id.* at 802.
67. *Id.* at 803.
68. *See id.* at 800.
69. *See id.*
70. *Id.* (citation omitted); *see also supra* note 62 and accompanying text.
71. *See id.* at 809-10.
72. *Id.* at 810.
73. 505 U.S. 672 (1992).
74. *See id.* at 678-79.

was neither a traditional public forum nor a designated public forum, the Court held that any restriction on speech inside the airport terminal need only be reasonable and not an effort to suppress the speaker's activity based upon his viewpoint.[75] Restricting solicitation to prevent disruption of foot traffic was a reasonable restriction in a non-public forum.[76]

2. The First Amendment Prohibition Against Standard less Time, Place, and Manner Restrictions Due to the Danger of Viewpoint Discrimination

a. Lakewood v. Plain Dealer Publishing Co.

In *Lakewood v. Plain Dealer Publishing Co.*,[77] the Court overturned a municipal ordinance allowing the mayor discretion to issue permits as to when and where news racks could be placed on public sidewalks.[78] In *Lakewood*, the Court was concerned with the lack of clear standards in the statute to guide the mayor in approving or denying a permit.[79] The Court noted that "without standards governing the exercise of discretion, a government official may decide who may speak and who may not *based upon the content of the speech or viewpoint of the speaker.*"[80] The Court recognized that "even if the government may constitutionally impose content-neutral prohibitions on speech, it may not *condition* that speech on obtaining a license . . . from a government official in that official's boundless discretion."[81] The Court reasoned that to hold otherwise would open the door for a government official to use such a statute to prohibit speech based upon the content of the speech or viewpoint of the speaker.[82]

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75. *See id.* at 679; *see also supra* note 62 and accompanying text.
76. *See id.* at 683-84.
77. 486 U.S. 750 (1988).
78. *See id.* at 772.
79. *See id.* at 769.
80. *See id.* at 763-64 (emphasis added). The Court has never elucidated the difference between permissible content-neutrality and permissible viewpoint-neutrality. From *Perry*, discussed *supra*, notes 56-62, one might reasonably conclude that a non-public forum restriction could satisfy the First Amendment if it were content-specific but viewpoint-neutral. However, the Court has seemingly combined the weight of viewpoint-neutrality and content-neutrality with its language in *Lakewood*. *See id.*
81. *Id.* at 764.
82. *See id.* at 763-64.

b. Shuttlesworth v. Birmingham

Lakewood affirmed the rule of a prior Court decision, *Shuttlesworth v. Birmingham*,[83] in which the defendant was convicted under a city ordinance for participating in a civil rights protest march without a permit.[84] The ordinance required that anyone participating in a march or parade secure a permit from a city commission before doing so.[85] The ordinance also gave the commission the authority to deny the permit should it find that "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused."[86]

Disregarding that the ordinance may have been aimed at secondary effects and not the content of the speech itself,[87] the Court noted that, "we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places."[88] The Court overturned the conviction because the ordinance was too broad in the standards it prescribed for regulating a First Amendment right.[89]

c. Forsyth County v. The Nationalist Movement

In *Forsyth County v. The Nationalist Movement*,[90] the Court again prohibited an over-broad licensing statute.[91] In this case, the licensing statute provided that persons seeking a permit to publicly assemble were required to pay a fee to defray the costs, such as crowd control and cleanup, incurred by the local government as a result of the public assembly.[92] Discretion was given to the county administrator to determine the amount of the fee for each application.[93] While the Court found that the fee was permissible under the First Amendment, the lack of clear standards for determining the fee was not permissible.[94] "A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and

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83. 394 U.S. 147 (1969). Although *Lakewood* is a more concise and more recent precedent, Justice Stevens repeatedly cites to *Shuttlesworth*, hence its inclusion here. *See infra* notes 219-27 and accompanying text.
84. *See id.* at 148-49.
85. *See id.* at 149.
86. *See id.* at 149-50.
87. *See id.* at 152.
88. *See id.* at 153. (citations omitted).
89. *See id.*
90. 505 U.S. 123 (1992).
91. *See id.* at 132-33.
92. *See id.* at 126-27.
93. *See id.* at 127.
94. *See id.* at 133.

manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view."[95]

In *Forsyth County*, the Court was especially concerned with the ordinance's requirement that the nature of the assemblage determine the permit fee.[96] In effect, in order to determine what the assemblage would cost, the county administrator would be required to examine the content of the speech.[97] The Court rejected the argument that examining the content of the speech to determine the cost of its effect on the listening public is content-neutral.[98] The Court stood firm to the rule that, "[l]isteners' reaction to speech is not a content-neutral basis for regulation."[99]

3. Private Citizens Have a First Amendment Right to Editorialize

In *Hurley v. Irish-American Gay, Lesbian And Bisexual Group of Boston*,[100] the Court held that requiring organizers of a St. Patrick's Day Parade to include groups with views the organizers disagreed with was a violation of the organizers' First Amendment rights.[101] The right of the press to editorialize also extends to private citizens, and thus, the organizers, as private citizens, had a right to exclude any group[102] espousing a message with which they disagreed.[103] A Massachusetts law[104] requiring the organizers to include the group had the effect of altering the expressive content of their message, and therefore violated the organizer's First Amendment rights.[105]

C. Balancing the First Amendment Rights of Broadcasters with Congressional Intent to Provide a Fair Playing Field

1. *Red Lion Broadcasting Co. v. FCC*

One of the first important cases dealing with broadcasting and the effect of the

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95. *Id.* at 130 (citations omitted); *see also supra* note 62 and accompanying text.
96. *See id.* at 133-34.
97. *See id.*
98. *See id.* at 134.
99. *See id.*
100. 515 U.S. 557 (1995).
101. *See id.* at 559.
102. The organizers did not, however, have a right to exclude individuals from that group. *See id.* at 572. "Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march." *Id.*
103. *See id.* at 573-74.
104. *See* MASS. GEN. LAWS ANN. ch. 272, § 98 (West 1998).
105. *See Hurley*, 515 U.S. at 574.

First Amendment upon it was *Red Lion Broadcasting Co. v. FCC*.[106] In *Red Lion*, the FCC ruling that a Red Lion station had violated FCC rules by failing to provide reply time to a person whose reputation was attacked on a broadcast was challenged.[107] The Court upheld the FCC's ruling, holding that the FCC's application of the "Fairness Doctrine", which requires broadcasters to provide equal time to those wishing to express opposing viewpoints, was within the broad scope of the powers granted to the FCC by Congress.[108] On the application of the First Amendment to broadcasters, the Court noted:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.*[109]

2. *CBS, Inc. v. Democratic National Committee*

In *CBS, Inc. v. Democratic National Committee*,[110] the Court was presented with the question of whether Congress had granted the right to private licensees to exercise editorial discretion in refusing to sell advertising time.[111] The Court, in deciding that Congress had intended to grant such a right to private licensees, noted that while it is not the Court's duty to defer to the judgment of Congress in determining whether a regulatory scheme comports with the First Amendment,[112] the Court, in evaluating First Amendment claims, must nevertheless afford great weight to the decisions of Congress and FCC.[113] This is due to the dynamic nature of broadcasting in which decisions regarding access to broadcasting, which were adequate in the past, can become quickly outdated.[114]

The Court also noted that Congress, when drafting the predecessor legislation

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106. 395 U.S. 367 (1969).
107. *See id.* at 372.
108. *See id.* at 391. The Fairness Doctrine was an FCC regulation requiring that opposing viewpoints get equal airtime. The Fairness Doctrine was severely limited by the D.C. Circuit in Meredith Corp. v. FCC, 809 F.2d 863 (1987), and the FCC subsequently repealed it. Congress has made no attempt to reestablish the Fairness Doctrine by codifying it. *See also* OVERBECK, *supra* note 5, at 371.
109. *Red Lion*, 397 U.S. at 390 (citations omitted) (emphasis added).
110. 412 U.S. 94 (1973).
111. *See id.* at 97.
112. *See id.* at 103.
113. *See id.* at 102.
114. *See id.*

to 47 U.S.C. § 315,[115] had affirmatively intended that private licensees not be held under a duty to open the airwaves to all who wished to present a viewpoint.[116] At the same time, Congress imposed a duty on private licensees to present differing viewpoints in a balanced manner.[117] Such a duty was, in fact, inherent in the language of 47 U.S.C. § 315, but could be exercised within the bounds of the private licensee's editorial discretion.[118] Whether such editorial authority vested in public broadcasters was not addressed.

3. *CBS, Inc. v. FCC*

In *CBS, Inc. v. FCC*,[119] the Court decided that the FCC had broad authority to punish a broadcaster who failed to perform his duty of providing reasonable access to the airwaves to candidates for Federal office.[120] Paramount in deciding this question was the Court's determination of whether Congress had imposed a duty on broadcasters to provide such access that superseded broadcasters' editorial discretion.[121] The Court found, in fact, that Congress had imposed such an additional duty outside of the equal opportunity requirement of 47 U.S.C. § 315.[122]

This duty, enacted in the Federal Election Campaign Act of 1971 and codified as 47 U.S.C. § 312(a)(7)[123] allowed the FCC to revoke a broadcaster's license "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."[124] The Court noted that the language of 47 U.S.C. § 315 was modified to accommodate the duty under 47 U.S.C. § 312(a)(7).[125] Thus, Congress had evinced an intent to

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115. *See* Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927) (repealed by Communications Act of 1934, ch. 652, Pub. L. No. 416 (1934)); *see also supra* notes 29-35 and accompanying text.

116. *See CBS, Inc v. Democratic Nat'l Comm.* 412 U.S. at 117 (noting: "[Section 3(h) of the Communications Act of 1934] stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. Both these provisions [sections 3(h) and 326] clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.").

117. *See id.* at 110-11.

118. *See id.* at 109-11. "Other provisions of the 1934 Act also evince a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations." *Id.* at 111. The Court then cited to enumerated licensing duties and the Fairness Doctrine as examples of these public duties. *See id.*

119. 453 U.S. 367 (1981).

120. *See id.* at 390.

121. *See id.* at 396-97.

122. *See id.* at 385-86.

123. *See* 47 U.S.C. § 312(a)(7) (1994).

124. *See id.*

125. *See CBS, Inc. v. FCC*, 453 U.S. at 381; *see also* 47 U.S.C. § 315(a) (1994). The amendment to 47 U.S.C. § 315(a) changed it to read in pertinent part: "No obligation is imposed *under this subsection* upon any licensee to allow the use of its station by any such candidate. . ." thus recognizing the new duty that was, in fact, imposed under section 312(a)(7) (emphasis added). *See id.* §§ 312(a)(7), 315(a).

impose a duty on broadcasters to provide access for federal candidates that was greater than the broadcaster's duty under 47 U.S.C. § 315 to serve the public interest.[126]

4. *FCC v. League of Women Voters of California*

In *FCC v. League of Women Voters of California*,[127] the Court was faced with the question of whether the First Amendment permitted Congress to ban editorializing on any station, publicly or privately owned, that received money from the Corporation for Public Broadcasting.[128] In deciding that such a ban was impermissible,[129] the Court held that the First Amendment right to editorialize superseded Congress' intent to keep these stations from becoming mouthpieces of the government.[130] The Court, in a footnote,[131] refused to extend such a right to editorialize to publicly owned broadcast stations stating: "Whether a prohibition on editorializing restricted to the licensees of state and local governmental entities would pass constitutional muster is a question we need not decide."[132]

5. *Turner Broadcasting System, Inc. v. FCC*

In *Turner Broadcasting System, Inc. v. FCC*,[133] the Court was faced with the question of whether the FCC's must-carry provision violated the First Amendment.[134] The must-carry provision,[135] enacted by Congress, required that local cable providers provide enough channels on which all local broadcast stations could be carried.[136] In determining that such a provision did not violate the First Amendment,[137] the Court held that in examining a content-neutral restriction on speech, a less rigorous First Amendment analysis would be employed.[138] A content-neutral restriction would pass First Amendment muster if 1) the restriction achieved "a substantial governmental interest that would be achieved less

126. *See CBS, Inc. v. FCC*, 453 U.S. at 385-86.
127. 468 U.S. 364 (1984).
128. *See id.* at 366.
129. *See id.* at 402.
130. *See id.* at 395.
131. *See id.* at 394-95 n.24.
132. *Id.*
133. 512 U.S. 622 (1994).
134. *See id.* at 626-27.
135. *See* 47 U.S.C. § 534 (1994).
136. *See id.* § 534(b); *see also Turner Broadcasting*, 512 U.S. at 630-32.
137. *See Turner Broadcasting*, 512 U.S. at 661-62.
138. *See id.*

effectively absent the regulation", and 2) such a restriction does not "burden substantially more speech than is necessary to further the government's legitimate interests." [139]

These cases illustrate a diverse range of concerns that the Court has addressed in examining restrictions on free speech and the broadcast media, both in the context of the First Amendment and the intent of Congress.

III. FACTS OF *FORBES*

In 1992, Petitioner, the Arkansas Educational Television Committee ("AETC"), decided to organize and broadcast political debates for each of the five Federal legislative seats being contested in that year's elections.[140] AETC is a state agency run by a board of eight appointed Commissioners who oversee a network of five noncommercial stations running programming for the Public Broadcasting System ("PBS").[141]

The AETC invited only the Republican and Democratic candidates running for the Arkansas Congressional third district seat to participate in its televised debate.[142] The invitations were extended in June of 1992, approximately four months before the October 22 debate.[143] In August of 1992, Respondent Ralph Forbes received the 2000 signatures necessary to qualify for the third congressional district ballot.[144] He subsequently wrote to AETC asking to be included in the October debate.[145]

Forbes had lost several prior Arkansas elections and was considered to be a marginal candidate in the third district race with little popularity.[146] Per a prior decision only to allow major party and popular candidates, AETC turned down Forbes' request to be included in the debates.[147] AETC premised its denial on the assertion that their decision was the result of having "'made a bona fide journalistic judgement that our viewers would be best served by limiting the debate,' to the candidates already invited."[148]

Three days prior to the debate, Forbes filed a lawsuit against AETC.[149] His complaint was premised on violations of both the First Amendment and 47 U.S.C. § 315.[150] 47 U.S.C. § 315 is popularly known as the "equal opportunity

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139. *Id.* at 662 (citation omitted).
140. *See Forbes*, 118 S. Ct. at 1637.
141. *See id.*
142. *See id.* at 1637.
143. *See id.* at 1637-38.
144. *See id.* at 1638.
145. *See id.*
146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.*

doctrine."[151] The equal opportunity doctrine requires that television stations provide equal air time to political candidates under specified circumstances.[152]

In his complaint, Forbes requested injunctive relief and declaratory relief, i.e, to be included in the debate.[153] He also requested monetary damages.[154] The district court not only refused to grant the injunctive relief but also dismissed the case for failure to state a claim.[155] The Eighth Circuit, on appeal, affirmed both the denial of the injunctive relief and the dismissal of the 47 U.S.C. § 315 claim.[156] However, in an en banc opinion, the Eighth Circuit reversed the dismissal of the First Amendment claim.[157] The court reasoned that because AETC is a state agency, AETC must have a legitimate First Amendment reason to exclude Forbes that overcomes his qualified right of access to the debate forum.[158] The case was remanded.[159]

On remand, the district court applied the test of whether the forum fell under one of the categories of public fora, or was a non-public forum.[160] The court determined that the debate was a non-public forum.[161] The court then turned to the issue of why Forbes was excluded and determined that the exclusion was due to a legitimate non-viewpoint based reason.[162] Namely, Forbes did not have an organized campaign, had little voter support, and was regarded as having no shot by the local media.[163] The district court found in favor of AETC.[164]

On appeal, the Eighth Circuit again reversed.[165] The court noted that the criteria of non-public forum eligibility were not valid here because the First Amendment created a presumptive right of access to the forum.[166] "[T]he court determined that the AETC's assessment of Forbes' 'political viability' was neither a 'compelling nor [a] narrowly tailored' reason for excluding him from the debate."[167]

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151. *See* OVERBECK, *supra* note 5, at 369-71.
152. *See id.* at 371; *see also* 47 U.S.C. § 315 (1994).
153. *See Forbes*, 118 S. Ct. at 1638.
154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.*
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.*
163. *See id.*
164. *See id.*
165. *See id.*
166. *See id.*
167. *Id.* (citation omitted).

The United States Supreme Court granted the AETC's writ of certiorari.[168]

IV. SUMMARY OF THE OPINIONS

A. Justice Kennedy's Majority Opinion

Justice Kennedy delivered the opinion of the Court in which five Justices joined.[169] Justice Kennedy began by examining whether the Eight Circuit's public forum analysis was necessary.[170] He concluded that normally, television does not fall under a traditional public forum analysis. "[B]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations."[171]

Justice Kennedy reasoned that Congress had rejected the idea that television was a traditional public forum in crafting legislation, citing language in *CBS, Inc. v. Democratic National Committee*,[172] in which Congress specifically rejected common carrier status for broadcasters.[173] He also noted that when broadcasters chose to include or exclude someone from their airwaves, this action was a form of editorializing protected by the First Amendment.[174]

Justice Kennedy then noted that political debates were an exception to this general rule.[175] He gave two reasons for such an exception.[176] One, that the ideas produced at the debates were clearly the opinions of the candidates, and were not the editorial views of the broadcaster.[177] Justice Kennedy's second justification for the exception centered around the importance of political speech and the pervasive reliance on television by the public in gathering information about candidates.[178]

Justice Kennedy's recognition of the political debates exception afforded in the Court's previous First Amendment rulings is astute, but failed to recognize that Congress has afforded political speech the same exceptional status. While, as Justice Kennedy pointed out, Congress specifically intended not to make broadcasters common carriers, Congress simultaneously made quite a few attempts

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168. *See id.*

169. *See id.* at 1637 (joining the opinion were Chief Justice Rehnquist, and Justices Breyer, O'Connor, Scalia, and Thomas).

170. *See id.* at 1639.

171. *Id.*

172. 412 U.S. 94 (1973).

173. *See id.* at 110-11; *Forbes*, 118 S. Ct. at 1639; *see also supra* notes 110-18 and accompanying text.

174. *See Forbes*, 118 S. Ct. at 1639.

175. *See id.* at 1640; *see also supra* notes 119-26 and accompanying text.

176. *See Forbes*, 118 S. Ct. at 1640.

177. *See id.*

178. *See id.* (citing CBS, Inc. v. FCC, 453 U.S. 367 (1981)).

to carve out exceptions to this rule, specifically for political debates.[179]

47 U.S.C. § 315 specifically requires equal opportunities for access for federal political candidates that are not afforded to the public at large.[180] Additionally, 47 U.S.C. § 312(a)(7) allows the FCC to revoke the license of any broadcaster who fails to make reasonable attempts to grant access to all Federal election candidates.[181] Both of these legislative acts tend to show a congressional intent to exempt broadcasters from being able to exercise editorial discretion when it came to political debates.

Justice Kennedy's analysis also failed to bolster the majority's argument that Congress intended to allow broadcasters discretion to exclude marginal candidates from debates.[182] Specifically, Justice Kennedy did not address the Senate report from the Federal Election Act of 1971 which presented evidence of a Congress willing to allow broadcasters to exclude "fringe" candidates.[183]

Because of the recognized exception for public debates, Justice Kennedy concluded that the Court was required to make a determination whether the AETC political debate was a public or non-public forum.[184]

Justice Kennedy began his public forum analysis by examining the classifications of fora under a First Amendment analysis: the traditional public forum, the government designated public forum, and the non-public forum.[185] The Court did not undertake a traditional public forum examination because the parties stipulated that the debate was not a traditional public forum.[186] Notwithstanding the stipulation, Justice Kennedy recognized the fact that public forum analyses tend not to look at the position of the parties or their determinations of how to classify the

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179. *See supra* notes 39-47 and accompanying text (discussing these exceptions).

180. *See id.*; *see also* 47 U.S.C. § 315 (1994).

181. *See supra* notes 123-26 and accompanying text (discussing 47 U.S.C. § 312(a)(7)).

182. *See* S. Rep. No. 92-229 at 33 (1972), *reprinted in* 1971 WL 11292 at *33.

183. *See id.*

> Because section 315 requires equal time for every candidate for an office, however insignificant or frivolous his candidacy, the practical effect of the law has been to deny free broadcast time to major candidates or to force free time to be shared with fringe candidates. Therefore, we recommend the repeal of section 315(a) and its equal time requirements for all candidates.

Id.

184. *See Forbes*, 118 S. Ct. at 1640-41. It is not clear why Justice Kennedy felt that he had to justify performing a public forum analysis. The issue's First Amendment relevance was recognized by the lower courts as well as the parties. *See id.* at 1638-39.

185. *See id.* at 1641.

186. *See id.* at 1641-42.

forum.[187]

Citing to *International Society for Krishna Consciousness v. Lee*,[188] Justice Kennedy recognized the longstanding rule that the Court will not extend the label of traditional public forum beyond its historic definitions.[189]

Justice Kennedy then analyzed the debate to determine if it fell into the category of a designated public forum.[190] Citing to *Widmar*, he recognized that "[t]o create a forum of this type, the government must intend to make the property 'generally available' . . . to a class of speakers."[191] Citing to *Perry Education Association v. Perry Local Educators Association*,[192] he recognized that when the government grants general access to a class of speakers, it has created a designated public forum.[193] However, when the government reserves the right to be selective in which persons from a class of speakers have access to a particular forum, it has not created any type of public forum.[194]

Justice Kennedy then reasoned that because AETC had not used an open-microphone format but had used a scripted format with selected candidates, it had not created general access to its debate.[195] Applying *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, he noted: "'Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum.'"[196]

However, Justice Kennedy's application of *Cornelius* to the facts of *Forbes* is seemingly flawed in that it misinterprets how *Cornelius* applies to government agencies.[197] Most notably, Justice Kennedy distinguished that if AETC had chosen to go with an open microphone format for its debates, then this could be interpreted that AETC was granting general access to its debates.[198] This narrow focus on the

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187. *See id.* Thus, even though the University of Missouri in *Widmar v. Vincent* contended that it did not consider its facilities to be designated public fora, the Court observed that the University's determination that the facilities' status was irrelevant in determining, under the First Amendment, whether the facilities were considered a designated public forum. *See supra* notes 48-54 and accompanying text.

188. 505 U.S. 672 (1992), *aff'd*, 505 U.S. 830 (1992).

189. *See Forbes*, 118 S. Ct. at 1641; *Krishna Consciousness*, 505 U.S. at 680-81; *see also supra* notes 73-76 and accompanying text (discussing *Krishna Consciousness*).

190. *See Forbes*, 118 S. Ct. at 1642.

191. *Id.* (Citation omitted).

192. 460 U.S. 37 (1983).

193. *See Forbes*, 118 S. Ct. at 1642.

194. *See id.*

195. *See id.*

196. *Id.* at 1643; *see also supra* notes 63-72 and accompanying text (discussing *Cornelius*).

197. *See Cornelius*, 473 U.S. at 802 ("[T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum."). Seemingly, a local legislature's or administrator's intent not to create a public forum would not override congressional intent to create a public forum. However, the Court refused to address this exact question in *Widmar v. Vincent* by limiting its holding. *See* Widmar v. Vincent, 454 U.S. 263, 275-76 (1981).

198. *See Forbes*, 118 S. Ct. at 1642.

intent of AETC alone completely ignores the intent of Congress.[199] Again, 47 U.S.C. §§ 315[200] and 312(a)(7),[201] both strongly indicate congressional intent to designate a public forum by granting general access to Federal election candidates. The language of both sections indicates a desire to make access available to the entire class of Federal election candidates by non-selective, equal, and reasonable criteria.[202] By applying *Cornelius* only to the lower state agency and not considering *Cornelius* in the context of congressional intent,[203] Justice Kennedy has seemingly granted greater interpretive power to state and local legislatures than to Congress for designating public fora.

Justice Kennedy then argued that requiring general access to broadcasting in this way would restrict free speech, not promote it, because broadcasters would be less inclined to hold such debates if they were required under the First Amendment to invite every viable candidate.[204] As an example, he noted that when the court of appeals reversed the district court's ruling in the lower court disposition of *Forbes*,[205] a Nebraska PBS station dropped its scheduled debate fearing that it would be required to invite all of the qualified candidates.[206]

However, Justice Kennedy's analysis failed to recognize the affirmative duty that Congress already created in 47 U.S.C. § 312(a)(7), requiring broadcasters to provide reasonable access to candidates for purposes such as a debate.[207] Justice Kennedy posited: "Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all."[208] However, if a broadcaster were faced with cacophony on one hand or losing its broadcast license on the other, it is hard to imagine that broadcasters would not sprint headlong into the din. With a positive duty to provide a free flow of political information as mandated by 47 U.S.C. § 312(a)(7), the danger of self-censorship seems slight.[209]

Justice Kennedy next performed a non-public forum inquiry to decide whether the exclusion of Forbes by AETC was for non-viewpoint related reasons.[210] Under

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199. *See supra* notes 36-47, 123-26 and accompanying text (discussing congressional intent with reference to sections 315 and 312(a)(7)).
200. *See* 47 U.S.C. § 315 (1994).
201. *See id.* § 312(a)(7).
202. *See id.* §§ 312(a)(7), 315; *see also supra* notes 40-44, 123-26 and accompanying text.
203. *See id.* §§ 312(a)(7), 315.
204. *See Forbes*, 118 S. Ct. at 1643.
205. *See* Forbes v. Arkansas Educ. Telecomm. Network Found., 93 F.3d 497 (8th Cir. 1996).
206. *See Forbes*, 118 S. Ct. at 1643.
207. *See* 47 U.S.C. § 312(a)(7); *see also supra* notes 123-26 and accompanying text.
208. *Forbes*, 118 S. Ct. at 1643.
209. *See* 47 U.S.C. § 312(a)(7); *see also supra* notes 123-26 and accompanying text.
210. *See Forbes*, 118 S. Ct. at 1643.

the non-public forum standard, restrictions are permissible if they are not due to the speaker's viewpoint and are reasonable in light of the purpose of the property.[211] Examining the record, Justice Kennedy determined that there was substantial evidence, including testimony from AETC employees, that Forbes exclusion was due to his unpopularity among the electorate and not due to any disagreement with Forbes' political views.[212]

Justice Kennedy determined that a candidate's popularity and political viability are viewpoint-neutral criteria for restricting speech. However, this seems to be in direct conflict with the Court's earlier holdings in *Forsyth County v. The Nationalist Movement*[213] and *Lakewood v. Plain Dealer Publishing Co.*[214] The popularity of a candidate and his viability are a direct result of the listeners' reaction to his message. And as the *Forsyth County* decision noted: "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[215] *Lakewood* affirmed the prohibition: "[W]ithout standards governing the exercise of discretion, government officials may decide who may speak and who may not based upon the content of the speech or the viewpoint of the speaker."[216] The *Forsyth County* decision was firm: "Listener's reaction to speech is not a content-neutral basis for regulation."[217] In light of this, *Forsyth County* and *Lakewood* dictate that any government regulation based upon listeners' reaction to the speaker's message can never be considered content-neutral or viewpoint-neutral.[218]

In his conclusion, Justice Kennedy reversed the ruling of the Eighth Circuit.[219]

B. Justice Stevens' Dissenting Opinion

Justice Stevens wrote a dissenting opinion joined by two justices.[220] Justice Stevens cited to *Shuttlesworth v. Birmingham*[221] to support his argument that AETC's failure to employ narrow, objective, and articulated standards in deciding

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211. *See id.*; *see also supra* notes 59-76 and accompanying text (discussing non-public forum analyses under *Perry*, *Cornelius*, and *Krishna Consciousness*).

212. *See Forbes*, 118 S. Ct. at 1643-44.

213. 505 U.S. 123 (1992); *see also supra* notes 90-99 and accompanying text (discussing *Forsyth County*).

214. 486 U.S. 750 (1988); *see also supra* notes 77-82 and accompanying text (discussing *Lakewood*).

215. *Forsyth County*, 505 U.S. at 135 (quoting Rogan v. Time, Inc., 468 U.S. 641, 648-49).

216. *Lakewood*, 486 U.S. at 763-64; *see also supra* note 80 (discussing viewpoint-neutrality).

217. *Forsyth County*, 505 U.S. at 134.

218. *See supra* note 80 (discussing the Court's unwillingness to distinguish between viewpoint-neutrality and content-neutrality in its holdings).

219. *See Forbes*, 118 S. Ct. at 1644.

220. *See id.* (Stevens, J., dissenting) (Justice Stevens was joined by Justices Souter and Ginsburg). *See id.*

221. 394 U.S. 147 (1969).

who to invite to the debate created an unconstitutional presumption of corruptibility in those administering the test.[222] Examining the record, Justice Stevens pointed out that AETC had decided not to invite Forbes two months before he had qualified to appear on the ballot, premising their decision on his popularity.[223] According to Justice Stevens, the lack of standards behind such a decision called into question AETC staff members' reasoning.[224] In its decision, AETC had neglected to consider that Forbes had been popular enough among the electorate to force a runoff election in a 1990 primary race.[225] Such an inconsistent application of AETC's standard less policy gave rise to the very presumption of viewpoint discrimination that *Shuttlesworth*,[226] *Lakewood*,[227] and *Forsyth County*[228] had attempted to dissuade.[229]

The 1992 third district winner, in the election giving rise to the claim in question, had won by only three percent of the vote.[230] Justice Stevens argued that with such a narrow margin of victory, the inclusion of Forbes might have changed the outcome of the election.[231] He postulated that AETC's decision not to include Forbes in the debate might have influenced the outcome of the election.[232]

Justice Stevens also pointed out that even though it was a public agency, AETC was now seemingly subject to a lesser standard in justifying its decision to exclude candidates from debates than privately owned television stations.[233] Under

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222. *See Forbes*, 118 S. Ct. at 1644 (Stevens, J., dissenting); *see also supra* notes 83-89 and accompanying text (discussing the Court's holding in *Shuttlesworth*).

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

224. *See id.* at 1645 (Stevens, J., dissenting). Justice Stevens also noted that AETC had decided to invite both the Republican and Democratic candidates in two other Arkansas districts to debate even though it was clear that the Republican candidates in those districts had little popular support as well. *See id.* at 1645 n.6 (Stevens, J., dissenting). This seems to indicate that AETC applied its unarticulated "popularity" criteria subjectively depending on the candidate's party affiliation.

225. *See id.* at 1645 (Stevens, J., dissenting).

226. 394 U.S. 147 (1969).

227. 486 U.S. 750 (1988).

228. 505 U.S. 123 (1992).

229. *See supra* notes 77-99 and accompanying text (discussing the Court's holdings in these cases regarding the *per se* unconstitutionality of broad speech regulations because they give rise to viewpoint discrimination).

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

231. *See id.*

232. *See id.* However, there is no indication from the Court's precedents that a broadcaster influencing the outcome of an election would violate the First Amendment. At most, it might be a violation of 47 U.S.C. § 315. *See generally* 47 U.S.C. § 315 (1994).

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

> If a comparable decision were made today by a privately owned network, it would be subject to scrutiny under the Federal Election Campaign Act unless the network used 'pre-established objective criteria to determine which candidates may participate in [the] debate . . . . No such criteria governed AETC's refusal to permit Forbes to participate in the debate.

the Federal Election Campaign Act,[234] privately-owned stations had to elucidate standards for denying a candidate access to a debate.[235] But, according to Justice Stevens, the lesser standard applied to AETC gave it a subjectiveness in its editorial decisions that was antithetical to the free speech protections of the First Amendment.[236] Justice Stevens also pointed out that the same criteria used to exclude Forbes were not used by AETC to exclude candidates in other debates who belonged to major parties.[237] Justice Kennedy stated that this lack of uniformity in the application of AETC's own policy provided "no secure basis for the exercise of governmental power consistent with the First Amendment."[238]

Justice Stevens also argued that under the Fourteenth Amendment, publicly owned television stations were required to grant more access to members of the public than privately owned television stations.[239] "AETC staff members therefore 'were not ordinary journalists: they were employees of the government.'"[240] Citing to *CBS, Inc. v. Democratic National Committee*,[241] Justice Stevens supported the idea that private stations had a right to editorialize that public stations, like those run by the AETC, did not.[242]

Justice Stevens' argument is supported by the Court's decision in *FCC v. League of Women Voters of California*.[243] He is also supported by 47 U.S.C. § 396.[244] In section 396, Congress specifically set out the reasons for establishing the Corporation for Public Broadcasting. Among these reasons Congress declared that "it is in the public interest to encourage the development of programming that involves creative risks and *that addresses the needs of unserved and underserved audiences* . . . ."[245] Congress further stated that "it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all

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Id. (citations omitted).

234. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

235. *See* 11 C.F.R. § 110.13(c) (1997).

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

237. *See Forbes*, 118 S. Ct. at 1645 n.6 (Stevens, J., dissenting); *see also supra* note 224.

238. *See Forbes*, 118 S. Ct. at 1645 (Stevens, J., dissenting) (quoting Forbes v. Arkansas Educ. Telecomm. Network Found., 93 F.3d 497, 505 (8th Cir. 1996)).

239. *See id.* at 1645-46 (quoting Forbes v. Arkansas Educ. Television Communication Network Found., 22 F.3d 1423, 1428 (8th Cir. 1994)).

240. *Id.* at 1646.

241. 412 U.S. 94 (1973).

242. *See Forbes*, 118 S. Ct. at 1647 (Stevens, J., dissenting) ("Because AETC is owned by the State, deference to its interest in making ad hoc decisions about the political content of its programs necessarily increases the risk of government censorship and propaganda in a way that protection of privately owned broadcasters does not.").

243. 468 U.S. 364, 402 (1984) (in striking down a bill banning editorializing on any station, publicly or privately owned, which received federal funding, the Court limited its decision: "We do not hold that the Congress or the FCC is without power to regulate the content, timing, or character of speech *by noncommercial educational broadcasting stations*.") (emphasis added).

244. *See* 47 U.S.C. § 396 (1994).

245. *Id.* (emphasis added).

citizens of the United States . . . ."[246] Such language indicates that Congress intended for public broadcasters to have a higher duty to provide access than that of private broadcasters.[247]

Justice Stevens then applied the *Forsyth County* v. *The Nationalist Movement*[248] decision to *Forbes*.[249] Justice Stevens argued that the unguided, unarticulated standards that AETC used to exclude Forbes were analogous to the standards found unconstitutional in *Forsyth County*.[250] "Perhaps the discretion of the AETC staff in controlling access to the 1992 candidate debates was not quite as unbridled as that of the Forsyth County administrator. Nevertheless, it was surely broad enough to raise the concerns that controlled our decision in that case."[251]

Justice Stevens concluded by distinguishing that his opinion did not necessarily support the notion that all candidates who qualified for the ballot should be given access to debates, but rather that the unarticulated and broad standards being afforded to AETC in making its decision did not comport with First Amendment free speech principles.[252]

V. IMPACT OF THE *FORBES* DECISION

A. Judicial Impact

1. Validating Candidate Popularity as Valid Content-Neutral Criteria

Immediately, the effect of *Forbes* is clear: it makes political viability and popularity of a candidate a constitutionally permissible criterion for excluding that candidate.[253] *Forbes* recognized the viability of a candidate as being a permissible

246. *Id.*
247. It should be noted that 47 U.S.C. § 315 imposes a duty on private broadcasters greater than that recognized by the majority for them in *Forbes*. *See* 47 U.S.C. § 315 (1994); *see also supra* notes 39-47 and accompanying text (discussing § 315).
248. 505 U.S. 123 (1992).
249. See Forbes, 118 S. Ct. 1648 (Stevens, J., dissenting).
250. *See id.*; *see also supra* notes 90-99 and accompanying text (discussing the holding in *Forsyth County*).
251. *Forbes*, 118 S. Ct. at 1648 (Stevens, J., dissenting).
252. *See id.* at 1649-50.
253. *See id.* at 1643-44.

content-neutral determination.[254] This directly conflicts with the Court's earlier holdings in *Forsyth County* and *Lakewood* that listener reaction can never be content-neutral.[255] The impact that this conclusion will have is to allow lower courts to give a broader definition of what type of restrictions are permissible under the First Amendment as content-neutral.

2. The Prohibition on Standard less Time, Place, and Manner Restrictions Applies Only to Public Fora

In previous rulings, such as *Lakewood*[256] and *Forsyth County*,[257] the Court never addressed the issue of whether the First Amendment prohibition on standard less time, place, and manner restrictions extended to non-public fora issues. Both *Lakewood* and *Forsyth County* dealt with traditional public fora.[258] In *Forbes*, the AETC guidelines, although vague at best, could be defined under the Court's language to fall into the category of a restriction on time, place, or manner.[259] Thus, the *Forbes* Court was considering the application of time, place, or manner restrictions on a non-public forum. The Court's affirmation of the standard less AETC restrictions as reasonable should suggest to lower courts that the prohibition against standard less restrictions, as stated in *Forsyth County*, should not extend to non-public fora.[260]

3. Extending the Right to Editorialize to Publicly-owned Television Stations

In *Hurley v. Irish-American Gay, Lesbian And Bisexual Group of Boston*,[261] the Court balanced two speech rights: the right of a private citizen to control the content of his speech (i.e., to editorialize) versus the right of under represented groups to have access to fora.[262] The *Hurley* Court decided that the right to

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254. *See supra* note 80. Assuming that content-neutrality and viewpoint-neutrality are subject to the same First Amendment restrictions per the *Lakewood* decision.

255. *See supra* notes 77-82, 90-99 and accompanying text (discussing the Court's holdings in *Forsyth County and Lakewood*).

256. 486 U.S. 750 (1988); *see also supra* notes 77-82 and accompanying text (discussing *Lakewood*).

257. 505 U.S. 123 (1992); *see also supra* notes 90-99 and accompanying text (discussing *Forsyth County*).

258. *See supra* notes 77-82, 90-99 and accompanying text (discussing the holdings in *Forsyth County and Lakewood*).

259. *See Forbes*, 118 S. Ct. 1633, 1644 ("To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum . . . must otherwise be reasonable in light of the purpose of the property.") (citation omitted); *see also supra* note 63 (discussing time, place, and manner restrictions).

260. *See supra* notes 94-99 and accompanying text (discussing the *Forsyth County* prohibition against standardless speech restrictions).

261. 515 U.S. 557 (1995); *see also supra* notes 100-05 and accompanying text (discussing the Court's holding in *Hurley*).

262. *See Hurley*, 515 U.S. at 573-74.

editorialize could not be superseded by legislative mandate to accommodate other groups' messages.[263] Thus, *Hurley* elevated the right to editorialize to a greater prominence than prior Court decisions had.[264]

The *Forbes* Court acknowledged that their decision represented a bow to the discretion of journalists to editorialize, even journalists working at state-run, state-funded public television stations.[265] Lower courts can interpret *Forbes* as an extension of *Hurley*, elevating the First Amendment right to control one's speech to a level equaling, if not superseding, the First Amendment right to access to speech fora.[266]

B. Legislative Impact

The legislative impact of *Forbes* is that it could strike a severe blow to the balance of power in the federal system. The Court has acknowledged in past rulings that non-traditional public fora may be designated public fora by the government.[267] However, these rulings have not set forth the threshold by which courts would measure whether a government has acted to affirmatively establish a designated public forum.

As discussed previously, there is a strong argument that Congress attempted to make the public airwaves a designated public forum through the language in the Communications Act of 1934.[268] 47 U.S.C. §§ 1, 303, and 315[269] all acknowledge an intent to have licensees serve the public good.[270] Additionally, even if the airwaves of private licensees were not intended by Congress to be a designated public forum, then the language of 47 U.S.C. § 396 nevertheless implies that the Corporation for Public Broadcasting was established to regulate public television

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263. *See id.* at 581.

264. *See infra* note 274.

265. *See Forbes*, 118 S. Ct. at 1639.

266. The right to editorialize has now been extended to private citizens, public broadcasters, and private broadcasters. For the case granting the right to editorialize to private broadcasters. *See* FCC v. League of Women Voters of California, 468 U.S. 364 (1984); *see also supra* notes 127-32 and accompanying text (discussing *League of Women Voters of California*). *See generally* OVERBECK, *supra* note 5, at 367.

267. *See* Widmar v. Vincent, 454 U.S. 263, 268 (1981); *see also supra* notes 48-54 and accompanying text (discussing the Court's holding in *Widmar*).

268. *See supra* notes 40-47 and accompanying text.

269. *See supra* note 39 (discussing the pertinent language in 47 U.S.C. § 1, since repealed). The pertinent text in 47 U.S.C. § 303 allows the FCC to make regulations to "encourage the larger and more effective use of radio in the public interest." *See* 47 U.S.C. § 303(g) (1994). The pertinent language in 47 U.S.C. § 315 is discussed *passim*.

270. *See supra* notes 199-203 and accompanying text (discussing Congress' intent).

in the context of a public forum.[271]

If the above argument is a reasonable interpretation of congressional intent in enacting these sections, then Congress can infer that its language in drafting these sections did not cross the threshold necessary for it to establish a designated public forum.

Although a radical consequence of *Forbes*, the aforementioned possible blow to the balance of power in the federal system is an entirely reasonable interpretation by lower courts that the *Forbes* decision entirely precludes Congress or other legislative bodies from designating public fora.[272]

Another impact of the *Forbes* decision on Congress is that the *Forbes* decision may persuade Congress not to attempt to revive the Public Broadcasting Amendments Act of 1981.[273] That Act banned editorializing by broadcast stations receiving federal funds.[274] The Court overturned the ban in *FCC v. League of Women Voters of California*[275] because it authorized an unconstitutional ban on the editorial rights of privately owned stations.[276] However, the Court in *League of Women Voters of California* specifically reserved judgment concerning whether such a ban would be permissible for public television stations.[277]

The *Forbes* decision seemingly illuminates the Court's position on that undecided question. The *Forbes* decision clearly extends the right to editorialize to public broadcasters.[278] As a result, Congress is most likely to interpret the *Forbes* decision as forbidding legislation which bans editorializing on publicly owned television stations.[279]

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271. *See supra* notes 244-47 (discussing the enabling language of the CPB); *see also* 47 U.S.C. § 396 (1994).

272. This seems to be an unusual and unwarranted weakening of Congress' power by the Court and likely is an unintended effect of the *Forbes* decision. Nonetheless, it is advanced here because it does pose significant repercussions should the lower courts adopt such an interpretation.

273. *See* Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 730 (1981).

274. *See id.* The pertinent part of the act amended 47 U.S.C. § 399 to read: "No noncommercial educational broadcasting station which receive a grant from the Corporation [for Public Broadcasting] under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office." *See id.*

275. 468 U.S. 364, 402 (1984); *see also supra* note 274. Only the latter sentence from 47 U.S.C. § 399 in the previous note remains in the current statute. *See* 47 U.S.C. § 399 (1994).

276. *See supra* notes 127-32 and accompanying text.

277. *See League of Women Voters of California*, 468 U.S. at 402; *see also supra* note 243 and accompanying text (discussing the Court's exact language in *League of Women Voters of California*).

278. *See Forbes*, 118 S. Ct. 1633, 1640 (1998).

279. *See id.* at 1647 (Stevens, J., dissenting) (discussing the Court's reasoning for striking down the Public Broadcasting ban on editorializing, Stevens observed: "The Court noted that Congress had considered and rejected a ban that would have applied only to stations operated by state or local governmental entities, and reserved decision on the constitutionality of such a limited ban.")

C. Social Impact

The social impact of the *Forbes* decision is subtle, but continues a trend which seems not to be rooted in constitutional precedent, but rather in political precedent.

The *Forbes* decision seems to validate the sanctity of the two-party system.[280] *Forbes* allows any media broadcaster, either private or public, to justify its failure to invite any third-party candidate to a political debate based upon that candidate's viability.[281] Yet, the current two-party system implies that third-party candidates will always have questionable political viability because they are outside the two parties controlling the system. Arguably, without exposure through the popular media, and being able to be rightfully excluded from a debate with the two major party candidates, a third-party candidate will never be able to achieve the same media exposure as the major party candidates.[282] Under 47 U.S.C. § 315, because candidates in the same election must be able to purchase the same amount of ad time at the same rate, third-party candidates would always have to spend more money than their major party competitors in order to gain the same exposure that those major party candidates received for free by competing in the televised debate.[283] And the ability of political ads to affect the amount or kind of exposure that a candidate wants as effectively as participation in a televised debate is suspect.[284] Such an outcome, requiring third-party candidates to outspend major party candidates just to get the same television exposure seems to conflict with the aims of Congress in both their passage of 47 U.S.C. § 315 as well as in their

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280. *See supra* note 224. AETC's uneven application of its own popularity criteria when it came to inviting major party candidates and the Court's failure to recognize this in its decision are a clear signal that discriminating in favor of major party candidates is not unconstitutional.

281. *See Forbes*, 118 S. Ct. at 1644.

282. *See* Llewellyn H. Rockwell, Jr., *Show the "Big Boys" That 3rd Parties Count*, L.A. TIMES, Sept. 18 1996, at B9; William Bradley, *'96 Debate for Two Is a Loss for Voters*, L.A. TIMES, Sept. 6, 1996, at B9 (discussing the exclusion of third-party candidates from the 1996 Presidential debates and the setbacks it posed to their campaigns); *see also* Tracy Wilkinson, *Third Party Candidates Fight Obscurity*, L.A. TIMES, Oct. 30, 1992, at A22 (discussing the exclusion of third-party candidates from Senate seat debates). 1998 Minnesota Democratic gubernatorial candidate Hubert Humphrey III wanted to include Reform Party candidate Jesse Ventura in televised debates because he felt it would work to his opponent's disadvantage. *See* Christian Collet, *Can third party candidates win?*, SAN DIEGO UNION TRIBUNE, Nov. 6, 1998, at EC1. The performance of Ventura in those debates is touted as one of the primary reasons Ventura triumphed over the major party candidates in that election. *See id.*

283. See generally *Governor's Race*, *supra* note 3, at B1; Gaughan, *supra* note 3, at B2.

284. *See Governor's Race*, *supra* note 3, at B1 (the Virginia gubernatorial candidates in the 1997 election spent $2 million on campaign TV ads in one month).

passage of campaign finance legislation.[285] Thus, without having access to the same type of exposure as Republican and Democratic candidates for office, third-party candidates will have to expend tremendous financial resources, more than their major party counterparts, in order to be viable political candidates.

The two-party system is not rooted in Constitutional language, but is rooted in the specific interpretations and modifications of parliamentary law by Congress necessary to expedite its own functions.[286] The *Forbes* decision is a step towards keeping those parties who benefit from a two-party system in power.

VI. CONCLUSION

In *Arkansas Educational Television Commission v. Forbes*, the Court held that government-owned public television stations did not violate the First Amendment by excluding third-party candidates who they determined to be unpopular. As a result, the Court seemingly thwarted the intent of Congress in establishing and funding public televison coverage of political debates in the first place. The Court also gave a mandate to small agencies and local governments that: 1) they could establish standard less criteria for restricting access to a forum so long as they had a general policy of keeping those doors shut, and 2) they could decide whether or not to designate a public forum irrespective of Congress' intent.

Ultimately, the Court has strengthened the hands of the inside players in a two-party system even though this system has no basis in the Constitution. Third parties will continue to be politically unviable so long as their candidates do not have the same access and exposure as major party candidates. *Forbes* gives government-owned public broadcasting stations--stations that are funded and subject to the oversight of major party politicians in Congress–the right to continue to keep third-party candidates from being viable political entities. As a result, the threat third-party candidates pose to major-party candidates is substantially reduced. On its face, this result seems to greatly conflict with the intent of the First Amendment to promote free and open communication of ideas.

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285. *See supra* notes 40-47, 199-203 and accompanying text (discussing congressional intent with regard to 47 U.S.C. § 315); *see also* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (instituting fundraising limits and expressly provided funding to minor party candidates in federal elections).

286. *See* U.S. CONST. art. I § 2 et seq.