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# Arkansas Educational Television Commission v. Forbes: Independent Candidate Access to Public Television Debates

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## NOTES

### ***Arkansas Educational Television Commission v. Forbes:* Independent Candidate Access to Public Television Debates**

Once again, perennial candidate and self-described “Christ Supremacist” Ralph Forbes threw his hat into Arkansas’s political ring, this time as an independent candidate for Congress.<sup>1</sup> His Republican and Democratic opponents had already been invited to a televised debate hosted by the state’s public television station, the Arkansas Educational Television Commission (“AETC”).<sup>2</sup> When Forbes asked to participate, AETC quickly rejected him.<sup>3</sup> That denial prompted Forbes to file suit against AETC,<sup>4</sup> claiming that the

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1. See *Arkansas Educ. Television Comm’n v. Forbes*, 118 S. Ct. 1633, 1638 (1998). Arkansas law allows citizens to qualify as candidates by submitting petitions with the signatures of at least three percent of the qualified electors in the district in which the candidate wishes to run for office. See ARK. CODE ANN. § 7-7-103(b)(1) (Michie 1993 & Supp. 1997). Potential candidates do not need to collect more than 2000 signatures. See *id.* By August 1992, Forbes had collected a sufficient number of signatures to qualify as a congressional candidate in the Third District. See *Forbes*, 118 S. Ct. at 1638. Forbes is a self-described “Christ Supremacist,” who “advocates the preservation of the white race and returning [African-Americans] to Africa.” Peggy Harris, *White Separatist Hopes to Run Graphic Anti-Abortion Ads*, ASSOCIATED PRESS POL. SERV., Sept. 5, 1992, available in 1992 WL 5140328, at \*3. Forbes, a former American Nazi, unsuccessfully campaigned to be Arkansas’s lieutenant governor in 1986 and 1990. See *id.* In 1988, he was involved in David Duke’s failed presidential campaign. See *id.* For more information on Forbes’s background, see David S. Broder, *A Close Governor’s Race in Arkansas?: Longtime Incumbent Clinton to Face Ex-Democrat in Fall Showdown*, WASH. POST, May 31, 1990, at A10; *Crime of Silence: Republican National Committee Does Not Act to Prevent Klansmen Nomination*, NATION, June 25, 1990, at 25; Frank Fellone, Editorial, *A Necessary Function*, ARK. DEMOCRAT-GAZETTE, Oct. 13, 1997, at B7, available in LEXIS, News Library, Arkdcm File; Maralee Schwartz & David S. Broder, *Harris Backed in Arkansas GOP Runoff*, WASH. POST, June 10, 1990, at A7.

2. See *Forbes*, 118 S. Ct. at 1637-38. In 1992, AETC hosted one debate for the candidates in each of Arkansas’s four congressional elections, as well as one debate for the candidates competing in the state’s senatorial election. See *id.* Each debate lasted one hour, allotting 53 minutes for questions and answers. See *id.*

3. See *id.* at 1638. AETC’s executive director explained that Forbes’s request was denied based on “‘a bona fide journalistic judgment that our viewers would be best served by limiting the debate’” to the major party candidates. *Id.* (quoting Brief for the Petitioner at 61a, *Forbes*, (No. 96-779)). AETC did not consider Forbes a “serious” candidate. See *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423, 1426 (8th Cir. 1994) (en banc). Forbes alleged that a representative of AETC told him that the station would show a rerun of the television program *St. Elsewhere* instead of airing a debate that included Forbes. See *id.*

4. See *Forbes*, 118 S. Ct. at 1638.

station, a state agency, had violated his First Amendment rights.<sup>5</sup> Forbes's claim pitted a political candidate's interest in free speech against a public television station's interest in its autonomy and journalistic freedom. In weighing these interests, the courts not only had to confront philosophic constitutional questions concerning the First Amendment but also had to face the practical issues involved in producing a televised debate.

This Note first discusses Forbes's attempt to be included in the AETC debate and the procedural history of Forbes's battle with AETC in the federal courts.<sup>6</sup> It reviews the United States Supreme Court's recent disposition of Forbes's claim in *Arkansas Educational Television Commission v. Forbes*.<sup>7</sup> After exploring the history and modern application of the public forum doctrine in the Supreme Court,<sup>8</sup> the Note discusses criticisms of the modern forum doctrine and proposes that the Court's reliance on the doctrine in assessing the speech interests of a candidate wishing to join a debate sponsored by a public television station is particularly troubling.<sup>9</sup> Finally, the Note suggests that the Court in the future can analyze such a claim through a balancing test that weighs the individual's speech interests against the usual use of the government's property.<sup>10</sup>

Three days before the AETC debate was scheduled to take place, Forbes filed his suit, seeking injunctive and declaratory relief against his exclusion from the debate.<sup>11</sup> He claimed that he was entitled to engage in the debate under the Federal Communications Act<sup>12</sup> and the First Amendment.<sup>13</sup> Though both the district court and

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5. *See id.*

6. *See infra* notes 11-43 and accompanying text.

7. 118 S. Ct. 1633 (1998); *see infra* notes 44-84 and accompanying text.

8. *See infra* notes 85-204 and accompanying text.

9. *See infra* notes 205-304 and accompanying text.

10. *See infra* notes 305-25 and accompanying text.

11. *See Forbes*, 118 S. Ct. at 1638. After AETC initially refused to include Forbes in the debate, he called the Federal Communications Commission ("FCC") to file a complaint. *See Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423, 1426 (8th Cir. 1994) (en banc). Allegedly, the person he spoke with at the FCC told him to file a formal FCC complaint, although such a complaint would "be a waste of time." *Id.* Heeding this advice, Forbes wrote a letter to the FCC asking for a quick rejection of his claim. *See id.* When the FCC responded by writing a letter explaining the complaint process, Forbes filed for the preliminary injunction. *See id.* Forbes, however, had failed to exhaust his administrative remedies, so the district court dismissed his claims under 47 U.S.C. § 315 of the Federal Communications Act. *See Forbes*, 118 S. Ct. at 1638. Forbes's claim against AETC also included a request for damages. *See id.*

12. 47 U.S.C. § 315 (1994). Section 315 states that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in

the Eighth Circuit Court of Appeals denied his request for an injunction,<sup>14</sup> Forbes continued to pursue his claim against AETC. Following the election, the district court dismissed Forbes's complaint for failure to state a claim.<sup>15</sup> The court held that a "political candidate does not have a constitutional right of broadcast access to air his views."<sup>16</sup>

Sitting en banc, the Eighth Circuit agreed that candidates generally do not have a constitutional right to "demand air time."<sup>17</sup> The court held, however, that Forbes had a qualified right of access

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the use of such broadcasting station." *Id.* Forbes claimed that under this provision, he had a right to participate in the debate. *See Forbes*, 118 S. Ct. at 1638.

13. *See Forbes*, 118 S. Ct. at 1638.

14. *See Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d at 1427. For the press reaction to these decisions, see *Appeals Judge Denies Forbes' Motion*, ASSOCIATED PRESS POL. SERV., Oct. 21, 1992, available in 1992 WL 5148273; *Independent Candidate Loses Another Bid to Get in Debate*, ASSOCIATED PRESS POL. SERV., Oct. 22, 1992, available in 1992 WL 5148548; Joel Williams, *Independent Candidate's Request Denied by Federal Court*, ASSOCIATED PRESS POL. SERV., Oct. 20, 1992, available in 1992 WL 5147631.

During the AETC debate, the two major party candidates discussed their views on taxes, the line-item veto, a balanced budget amendment, and family values. *See Candidates Agree Raising Taxes Not the Way to Salvage Economy*, ASSOCIATED PRESS POL. SERV., Oct. 22, 1992, available in 1992 WL 5148506, at \*1-3. While the candidates debated, Forbes attempted to enter the AETC studio, but following requests from AETC representatives, Forbes left the building. *See id.* at \*3-4.

The day before the election, Forbes amended his complaint and added two private television stations as defendants. *See Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d at 1427. Forbes's claim against the private stations centered on their refusal to air a campaign ad concerning abortion at any time other than during late night, safe-harbor hours. *See id.*; *see also Forbes Claims Stations Plan to Squelch His Ads*, ASSOCIATED PRESS POL. SERV., Oct. 30, 1992, available in 1992 WL 5150640 (describing the anti-abortion ads that Forbes sought to air); Harris, *supra* note 1, at \*1-2 (describing Forbes's efforts to raise money to show the ads). In his claim, Forbes alleged that the networks were engaged in a criminal conspiracy and had violated 42 U.S.C. §§ 1981, 1983, and 1985, as well as 47 U.S.C. § 315. *See Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d at 1427. As he pursued his claims in court, Forbes also continued to pursue political office in Arkansas. *See Forbes' Bid for 1994 Ballot Dismissed*, ASSOCIATED PRESS POL. SERV., June 27, 1995, available in 1995 WL 6733301, at \*3. In 1994, the state denied Forbes's effort to qualify as a candidate because he did not meet the procedural requirements to get his name on the ballot. *See id.* at \*2.

15. *See Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d at 1427 (citing FED. R. CIV. P. 12(b)(6)).

16. *Id.* at 1428 (quoting *DeYoung v. Patten*, 898 F.2d 628, 632 (8th Cir. 1990) (quoting *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 430-31 (D.C. Cir. 1980))). The district court also held that Forbes failed to state a claim under any of his statutory complaints. *See id.* at 1427. Among its other holdings, the district court's dismissal stated that no private right of action exists under 47 U.S.C. § 315. *See id.*

17. *Id.* at 1428 (citing *Kennedy for President Comm.*, 636 F.2d at 430-31).

to AETC's debate under the First and Fourteenth Amendments.<sup>18</sup> Because AETC is a state agency, the court analyzed Forbes's claim using the public forum doctrine.<sup>19</sup>

Citizen's claims to First Amendment rights on public property are analyzed using the public forum doctrine, which classifies the property in question into one of the following three categories: traditional public forum, limited public forum, or nonpublic forum.<sup>20</sup> A traditional public forum is a place that historically has been open to citizens for public debate and free expression.<sup>21</sup> A limited public forum can be created by the government on public property that traditionally has not been open to free expression by the public.<sup>22</sup> To create such a forum, the government must intend to create a forum for "use by certain groups or for the discussion of certain subjects."<sup>23</sup> All property that is not a traditional or limited public forum is classified as a nonpublic forum.<sup>24</sup>

Although the Eighth Circuit readily acknowledged that the debate was not a true public forum,<sup>25</sup> it noted that the debate may have been a limited public forum.<sup>26</sup> The court explained that if the debate was a limited public forum, AETC must have a "sufficient government interest" for excluding Forbes from the debate.<sup>27</sup> The

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18. See *id.* The court overruled *DeYoung v. Patten*, 898 F.2d 628, 632 (8th Cir. 1990), which held that a political candidate does not have a right to appear in public television debates beyond rights established under § 315. See *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d at 1427.

19. See *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d at 1428-30. Ironically, from the court's opinion, it appears that AETC "suggest[ed]" that the case should be governed by public-forum analysis." *Id.* at 1429. This suggestion provided the Eighth Circuit with the rationale for reversing the district court's decision in favor of AETC. See *id.* at 1429-30.

20. See *Forbes*, 118 S. Ct. at 1641-42.

21. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); see also *infra* notes 169-72 and accompanying text (discussing the traditional public forum).

22. See *Forbes*, 118 S. Ct. at 1641; see also *infra* notes 50-53 and accompanying text (discussing the limited public forum). Courts use the term "designated public forum" interchangeably with "limited public forum." Compare *Forbes*, 118 S. Ct. at 1641 (describing a designated public forum), with *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d at 1429 (describing a limited public forum).

23. *Perry Educ. Ass'n*, 460 U.S. at 46 n.7.

24. See *Forbes*, 118 S. Ct. at 1642; see also *infra* notes 54-55 and accompanying text (discussing the nonpublic forum).

25. See *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d at 1429 ("[T]here is no unlimited right of access to the airwaves.").

26. See *id.* The court defined a "limited public forum" as property that normally is not accessible for free speech, yet the government has acquiesced to open the property for such expression for "a limited period of time, a limited topic, or a limited class of speakers." *Id.* (citations omitted).

27. *Id.* (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293

court also recognized that the debate might have been a nonpublic forum,<sup>28</sup> in which case Forbes could have been excluded if his exclusion was “‘reasonable in light of the purpose’” of the debate and was not based on his views.<sup>29</sup> The Eighth Circuit held that whether the debate was a limited public forum or nonpublic forum was a question of fact to be determined at trial.<sup>30</sup> Accordingly, it remanded the case for trial on that issue.<sup>31</sup>

On remand, the district court instructed the jury that the debate was a nonpublic forum as a matter of law.<sup>32</sup> The jury found by special verdict that AETC did not exclude Forbes because of political pressure or his political views,<sup>33</sup> and the district court entered judgment for AETC.<sup>34</sup> Forbes appealed again, claiming that the debate was a limited public forum and that AETC’s reason for excluding him was legally insufficient.<sup>35</sup>

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(1984)). The court explained that if the debate was a limited public forum, Forbes had a protected right to participate because he was a member of the class of speakers for whom the forum was created (i.e., candidates for the Third Congressional District seat) and because he sought to speak on the topic of the debate (i.e., which candidate should be elected to the House of Representatives). *See id.*

28. *See id.* The court defined a “nonpublic forum” as “property not usually compatible with expressive activity.” *Id.* (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 803(1985)). The court also pointed out that Forbes could not be excluded because of his political views if the debate was a nonpublic forum. *See id.*

29. *Id.* (quoting *Cornelius*, 473 U.S. at 806).

30. *See id.* at 1429-30. At the time of the court’s decision, AETC had not filed an answer to Forbes’s complaint, and, consequently, it had not given any reason for excluding him from the debate. *See id.* at 1430.

The dissenting opinion concluded that AETC’s debate was a nonpublic forum because its format “was not compatible with either unrestricted public access or with unrestricted access by all of the legally qualified candidates.” *Id.* at 1431-32 (McMillian, J., dissenting). The dissent contended that AETC probably sought to establish a traditional debate format, and if AETC limited the debate to either the major-party candidates or the candidates with the most support, AETC’s decision would be acceptable as viewpoint-neutral. *See id.* at 1432 (McMillian, J., dissenting). Notably, the rationale of Judge McMillian’s dissent is remarkably similar to the Supreme Court’s final disposition of Forbes’s claim. *See infra* notes 48-72 and accompanying text. One commentator criticized the Eighth Circuit decision and the Supreme Court’s denial of certiorari of the injunction ruling for leading to uncertainty regarding the composition of public television debates and the editorial authority of such stations. *See* Lyle Denniston, *Who Can Join Public Television Debates?*, AM. JOURNALISM REV., Jan./Feb. 1995, at 50, 50.

31. *See* *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d at 1429-30.

32. *See* *Forbes v. Arkansas Educ. Television Comm’n*, 93 F.3d 497, 500-01 (8th Cir. 1996), *rev’d*, 118 S. Ct. 1633 (1998); *see also* *Jury Finds Against Forbes in Suit Against Public TV Network*, ASSOCIATED PRESS POL. SERV., June 7, 1995, available in 1995 WL 6730810 (noting that the jury deliberations lasted under two hours).

33. *See* *Forbes v. Arkansas Educ. Television Comm’n*, 93 F.3d at 501.

34. *See id.* at 499.

35. *See id.* at 500.

On appeal, a panel of the Eighth Circuit held that the debate was a limited public forum from which Forbes should not have been excluded.<sup>36</sup> The court determined that the relevant forum for analysis was the debate—not the television station or the Third Congressional District.<sup>37</sup> The court held that the debate was a limited public forum because the government (through AETC) created a forum for a limited class of speakers (candidates for a specific congressional seat).<sup>38</sup> Finally, the court turned its attention to the “real issue”—the legal sufficiency of AETC’s reason for excluding Forbes, which AETC characterized as having been based on its conclusion that Forbes was not a politically viable candidate.<sup>39</sup> The court declared that voters, not AETC or any government employees,<sup>40</sup> were the ultimate arbiters of Forbes’s political viability.<sup>41</sup> Forbes, as a qualified candidate for the Third District, was equal with the major party candidates in the eyes of the law.<sup>42</sup> As a

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36. *See id.* at 504-05. On appeal, Forbes challenged not only the district court’s ruling on the First Amendment issue but also several of its procedural rulings. *See id.* at 501-02. The Eighth Circuit did not upset the lower court’s rulings on the procedural issues. *See id.* The Eighth Circuit also discussed whether the issue of how to classify the debate within the public forum analysis was the responsibility of the judge or jury at trial. *See id.* at 502. While recognizing that the classification was a mixed question of law and fact, the court explained that the issue of who should determine the classification at trial was “of no practical significance” once the case was appealed because the appellate court’s review is *de novo*. *Id.* at 502-03 (citations omitted).

37. *See id.* at 503.

38. *See id.* at 504.

39. *See id.* at 500, 504-05. At different stages of the Forbes controversy, the television station offered different reasons for Forbes’s exclusion. *Compare id.* at 500 (explaining that Forbes was excluded because he was not a “viable” political candidate), with *Jury Finds Against Forbes in Suit Against Public TV Network*, *supra* note 32 (reporting that AETC’s attorney justified the decision by saying, “‘We determined [that the major-party candidates] were the two candidates that AETN’s viewers would want to see and hear debate. . . . This was classic editorial judgment of the kind that the free press has the responsibility and the obligation to make.’”). These differences were immaterial to the ultimate outcome of the case. *See infra* notes 68-72 and accompanying text. AETC oversees the Arkansas Educational Television Network, sometimes referred to as “AETN.”

40. The Eighth Circuit recognized that AETC’s decision to exclude Forbes was the same journalistic judgment made by newsmen everyday. *See Forbes v. Arkansas Educ. Television Comm’n*, 93 F.3d at 505. But the court emphasized that “the people making this judgment were not ordinary journalists: they were employees of government.” *Id.* AETC’s commissioners are “appointed by the Governor with the advice and consent of the Senate.” ARK. CODE ANN. § 6-3-102(b)(1) (Michie 1993).

41. *See Forbes v. Arkansas Educ. Television Comm’n*, 93 F.3d at 504-05. The court noted that “[t]he question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment.” *Id.* at 505.

42. *See id.* at 504.

result, the court held that AETC's political viability standard was "neither compelling nor narrowly tailored" and that AETC had violated Forbes's First Amendment rights.<sup>43</sup>

In an opinion by Justice Kennedy, the Supreme Court reversed the Eighth Circuit.<sup>44</sup> At the outset of its opinion, the Court stated that the public forum doctrine generally should not be applied to the programming decisions of public television stations.<sup>45</sup> The Court, however, recognized that political debates were the exception to this rule.<sup>46</sup> The Court justified this exception by explaining that the nature of a debate is to serve as a forum for political discourse by the candidates, not a station's employees, and that debates play an important role in the American electoral process.<sup>47</sup>

With both parties in the case recognizing that the debate did not constitute a traditional public forum,<sup>48</sup> the Court considered whether the debate served as a limited public forum or a nonpublic forum.<sup>49</sup> The Court noted that a limited public forum can be created by the government on property that traditionally has not been open for public discourse.<sup>50</sup> The key to assessing whether such a forum has been established is the government's intent—"the government must intend to make the property 'generally available' to a class of

43. *Id.* at 505.

44. *See Forbes*, 118 S. Ct. at 1638. The majority opinion was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Thomas, and Breyer. *See id.* at 1637. Justice Stevens wrote a dissenting opinion, in which Justices Souter and Ginsburg joined. *See id.* (Stevens, J., dissenting). For news reports and analysis discussing the Court's opinion, see Joan Biskupic, *Public Broadcasters Given Choice in Candidate Debates: Supreme Court, 6-3, Says TV Stations May Control Access*, WASH. POST, May 19, 1998, at A2; Bernard James, *In Two Cases, Court OKs Speech Limits: The 'Forbes' and 'NEA' Decisions Approve Greater Governmental Control Over Forms of Speech*, NAT'L L.J., Aug. 10, 1998, at B15; Terry Lemons, *Court Sides with AETN on Debates*, ARK. DEMOCRAT-GAZETTE, May 19, 1998, at A1, available in LEXIS, News Library, Arkdem File; Dan Trigoboff, *Public TV Wins in High Court*, BROADCASTING & CABLE, May 25, 1998, at 34; *see also* Timothy B. Dyk & Thomas M. Fisher, *Courtside*, COMM. LAW., Winter 1998, at 24, 24-25 (discussing the oral arguments before the Supreme Court).

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

46. *See id.*

47. *See id.*

48. *See id.* at 1641. The Court reaffirmed its precedents that defined public forums by objective characteristics, such as whether the property historically had been recognized as a place of assembly and debate. *See id.* (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). If the property is a public forum, the government can exclude speakers only if the exclusion "serve[s] a compelling state interest and . . . is narrowly drawn to achieve that interest." *Id.* (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

49. *See id.*

50. *See id.*



speakers.”<sup>51</sup> If the government has created a limited public forum, then it can only exclude speakers within the stipulated class according to the same standards governing a traditional public forum.<sup>52</sup> Thus, the Court will strictly scrutinize the government’s decision to exclude a speaker from a limited public forum.<sup>53</sup> Finally, the Court explained that all other government properties, that is, properties not classified as traditional or limited public fora, are either nonpublic fora or not fora at all.<sup>54</sup> The government can exclude speakers from a nonpublic forum if the exclusion is reasonable in light of the property’s purpose and is not designed merely to suppress the speaker’s opinions.<sup>55</sup>

The Court then offered some guidance on how to distinguish a limited public forum from a nonpublic forum.<sup>56</sup> Concluding that the critical distinction is whether the government has provided “general access” or “selective access” to the property, the Court explained that “[a] designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.”<sup>57</sup> Furthermore, the government does not create a limited public forum if it “reserve[s] eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, ‘obtain permission’ to use it.”<sup>58</sup>

Using this model, the Court considered whether the AETC debate was designed to provide general or specific access to government property.<sup>59</sup> The Court noted that the debate was not designed to be an open-microphone session that generally would be available to all candidates.<sup>60</sup> Instead, AETC merely had restricted eligibility to participate in the debate to one district’s candidates.<sup>61</sup> Then, AETC made candidate-by-candidate determinations about

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51. *Id.* at 1642 (citation omitted) (quoting *Widmar v. Vincent*, 454 U.S. 263, 264 (1981)).

52. *See id.* at 1641.

53. *See id.* (citing *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990) (plurality opinion); *Cornelius*, 473 U.S. at 802). As in a traditional public forum, a limited public forum allows the government to place reasonable time, place, and manner restrictions on citizens’ ability to speak, but content-based exclusions “must be narrowly drawn to effectuate a compelling state interest.” *Perry Educ. Ass’n*, 460 U.S. at 46. This level of scrutiny places greater restraint on government’s control of its property than the discretion given to regulate nonpublic fora. *See id.*

54. *See Forbes*, 118 S. Ct. at 1641.

55. *See id.* (citing *Cornelius*, 473 U.S. at 800).

56. *See id.* at 1641-43.

57. *Id.* at 1642 (citation omitted).

58. *Id.* (citation omitted).

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

60. *See id.* at 1642.

61. *See id.*

The Court emphasized that ample evidence existed to support the jury's finding and that Forbes had presented no "serious" argument that AETC had not acted in good faith.<sup>71</sup> In the end, the Court held that AETC's decision to exclude Forbes from the debate was "a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment."<sup>72</sup>

In dissent, Justice Stevens agreed with the Court's holding that public television stations are not obligated by the Constitution to give every candidate access to the debates they host.<sup>73</sup> He contended that in this case, however, AETC's refusal to include Forbes in the debate violated his constitutional rights.<sup>74</sup> Justice Stevens expressed uncertainty about the validity of AETC's criteria for inviting candidates, characterizing AETC's decision as "standardless" and "ad hoc."<sup>75</sup> He noted that Forbes had demonstrated greater political viability than candidates invited by AETC to participate in the debates it sponsored for other congressional districts.<sup>76</sup> Justice

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71. See *id.* at 1644.

72. *Id.*

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

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

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

76. See *id.* at 1645 (Stevens, J., dissenting). Forbes had been "a serious contender" in the 1986 and 1990 campaigns to be the Republican nominee for Lieutenant Governor. *Id.* (Stevens, J., dissenting). In 1990, Forbes lost the nomination for lieutenant governor in a run-off despite garnering more than 46% of the vote and winning majorities in 15 of the 16 counties that comprise the Third Congressional District. See *id.* (Stevens, J., dissenting); see also Robert Marquand, *Which Candidates Get to Speak on TV?*, CHRISTIAN SCI. MONITOR, Oct. 9, 1997, at 1 (discussing Forbes's success in previous elections). Meanwhile, Republican Terry Hayes was included in the AETC-sponsored debate for the First Congressional District, even though he had "virtually no chance of winning" and on election day garnered only 30.2% of the vote. *Forbes*, 118 S. Ct. at 1645 n.6 (Stevens, J., dissenting). In addition, AETC invited Republican Dennis Scott to participate in the Second District's debate despite raising a mere \$6000 for his campaign (which was less than Forbes) and losing to an incumbent representative who won more than 74% of the vote. See *id.* (Stevens, J., dissenting). Justice Stevens noted that AETC's decision to exclude Forbes was particularly unfortunate because the eventual winner of the 1992 congressional election, Republican Tim Hutchinson, received a slight majority (50.22%) and beat his opponent, Democrat John VanWinkle, by less than 8000 votes. See *id.* at 1645 (Stevens, J., dissenting); *Election Results Table*, WASH. POST, Nov. 5, 1992, at A34. Consequently, Forbes needed "to divert only a handful of votes" from Hutchinson to have caused his defeat. See *Forbes*, 118 S. Ct. at 1645 (Stevens, J., dissenting). Justice Stevens suggested that AETC's decision "may have determined the outcome of the election." *Id.* (Stevens, J., dissenting); see also Biskupic, *supra* note 44, at A2 (noting that third-party candidates who attract public attention can affect the outcome of elections by luring voters away from the major-party candidates). Forbes may have even been more well-known than VanWinkle when the campaign began. See Meredith Oakley, Editorial, *Ruling Chills Freedom-Lovers*, ARK. DEMOCRAT-GAZETTE, May 25, 1998, at B7, available in LEXIS, News Library, Arkdem File. Notably, a poll conducted during the week of the AETC

which of the eligible candidates would be invited to engage in the debate.<sup>62</sup> The Court determined that the selective access of the AETC debate did not establish a public forum because the government had not purposefully designated the property for general public use.<sup>63</sup> Therefore, the Court held that the debate was a nonpublic forum.<sup>64</sup>

The Court stressed that the Eighth Circuit's decision finding that the debate was a limited public forum for all candidates would restrict speech in campaigns.<sup>65</sup> When confronted with the burden of being forced to include all qualified candidates, public television stations might choose not to host debates at all.<sup>66</sup> The majority also worried that the number of candidates that would have to be included in a public television debate would undermine the debate's educational value to voters.<sup>67</sup>

Having ruled that the debate was a nonpublic forum, the Court held that AETC did not violate Forbes's constitutional rights by excluding him from the debate on the ground that his candidacy was not politically viable.<sup>68</sup> The Court reiterated that the district court jury had found that Forbes's exclusion did not stem from AETC's opposition to his views.<sup>69</sup> Rather, he was not invited to participate because his campaign had failed to attract the interest of voters.<sup>70</sup>

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

63. See *id.*

64. See *id.* at 1643.

65. See *id.*

66. See *id.* The Court supported this conclusion by pointing out that Nebraska's public television station canceled a senatorial debate following the Eighth Circuit's decision that the debate constituted a limited public forum from which Forbes should not have been excluded. See *id.*; see also C. David Kotok, *Nelson, Hagel to Appear but Not Debate at Fair*, OMAHA WORLD-HERALD, Aug. 24, 1996, at 1, available in 1996 WL 6028916 (explaining that Nebraska Education Television canceled a political debate in light of the Eighth Circuit's holding and the subsequent efforts of two minor party candidates to be included in the debate); Editorial, *Minor-Party Farce Denied Voters a Debate*, OMAHA WORLD-HERALD, Aug. 27, 1996, at 10, available in 1996 WL 6035074 (criticizing the Eighth Circuit's holding and claiming that the inclusion of minor party candidates in Nebraska Education Television's debate would have "made a mockery of a serious political event"). But see *Third Party Candidates to Join Debate*, ASSOCIATED PRESS POL. SERV., Sept. 27, 1996, available in 1996 WL 5409402 (reporting that AETC included an independent candidate and a candidate from the Reform Party in its Third Congressional District debate following the Eighth Circuit's decision).

67. See *Forbes*, 118 S. Ct. at 1643 (citing TWENTIETH CENTURY FUND TASK FORCE ON PRESIDENTIAL DEBATES, *LET AMERICA DECIDE* 148 (1995) [hereinafter TASK FORCE ON DEBATES]).

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

69. See *id.* at 1643.

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

on public expression on government-owned property dates back to the late nineteenth century<sup>86</sup> when the Court held that the state had the same right to prohibit speech on public property that a owner had to forbid it on private property.<sup>87</sup> By 1939, the Court expressed a different opinion. In *Hague v. Committee for Industrial Organization*,<sup>88</sup> Justice Roberts wrote that the public's use of streets and parks "for purposes of assembly, communicating thoughts between citizens, and discussing public questions . . . has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."<sup>89</sup>

Until the 1960s, the Court generally continued to protect the public's right to free expression in streets, sidewalks, and parks. The civil rights movement, however, forced it to confront the "problems raised by [African-American] protest in public places."<sup>90</sup> In the wake of two Supreme Court cases concerning civil rights protests,<sup>91</sup>

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*the Public Forum*, 34 UCLA L. REV. 1713, 1718-64 (1987); Edward J. Neveril, Comment, "Objective" Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery, 90 NW. U. L. REV. 1185, 1192-1217 (1996).

86. See Harry Kalven, Jr., *The Concept of the Public Forum*: *Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 12.

87. See *Davis v. Massachusetts*, 167 U.S. 43, 47-48 (1897). In *Davis*, the Supreme Court reiterated Oliver Wendell Holmes's notion that "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." *Id.* at 47 (quoting *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895)). The *Davis* Court upheld a Boston city ordinance stipulating that people wishing to make speeches in public areas must first receive permits from the mayor. See *id.* at 48. For further discussion of *Davis*, see David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 150 (1992).

88. 307 U.S. 496 (1939).

89. *Id.* at 515.

90. Kalven, *supra* note 86, at 2.

91. In *Edwards v. South Carolina*, 372 U.S. 229 (1963), the Court reviewed whether African-American high school and college students' constitutional rights were violated when they were arrested for breaching the peace by protesting discrimination on the grounds of the South Carolina State House. See *id.* at 230. During their protest, the students carried signs and marched in an orderly manner on the sidewalks of the State House without obstructing any pedestrian or vehicular traffic. See *id.* at 231-32. After police advised them that they would be arrested if the demonstration did not end within 15 minutes, the students began singing religious songs and *The Star-Spangled Banner*. See *id.* at 233. Subsequently, the police arrested the students. See *id.* In overturning the students' convictions, the Court noted that their protest reflected "an exercise of these basic constitutional rights [of free speech and assembly] in their most pristine and classic form." See *id.* at 235; see also Day, *supra* note 87, at 154-56 (discussing the Court's holding in *Edwards*).

Two years later, the Court revisited the issue of government restrictions on citizens' right to protest in public places. In *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court invalidated the conviction of a protester who had been convicted under statutes prohibiting breach of the peace. See *id.* at 551-52. The protester in *Cox* led a

Stevens was particularly troubled that AETC invited all major party candidates but excluded the only independent candidate running for Congress in Arkansas.<sup>77</sup> He contended that such "ad hoc" standards provided public television stations with nearly unfettered discretion.<sup>78</sup> Pointing out that private stations face significant regulation when they choose to host debates,<sup>79</sup> Justice Stevens argued that public stations should face at least the same scrutiny as private stations do, given the inherent risk of allowing a state agency to host a political debate.<sup>80</sup>

Finally, Justice Stevens suggested that state-sponsored television debates "may not squarely fit within our public forum analysis."<sup>81</sup> In his view, decisions about debate invitations should meet at least the same standards required for government decisions to grant permits for parades.<sup>82</sup> In considering whether governments must issue permits, the Court has previously held that applications for parade permits must be assessed using "'narrow, objective, and definite standards.'"<sup>83</sup> Justice Stevens argued that public television stations should use similar certainty and objectivity in state-sponsored debates to avoid "arbitrary or viewpoint-based exclusions."<sup>84</sup>

To fully appreciate the conflict in *Forbes*, it is useful to trace the history of the public forum doctrine and examine its modern application.<sup>85</sup> The struggle to define what limits the state can place

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debate showed that Hutchinson trailed VanWinkle in the polls by seven percent. See *Survey Shows Tight Race with Democrat Holding Narrow Lead*, ASSOCIATED PRESS POL. SERV., Oct. 23, 1992, available in 1992 WL 5148639 (reporting poll results with VanWinkle supported by 44% of people surveyed, Hutchinson 37%, Forbes 1%, and 18% undecided). For a summary of the campaign, see Julie Stewart, *Lawyer, State Representative, White Supremacist Seek 3rd District Seat*, ASSOCIATED PRESS POL. SERV., Nov. 3, 1992, available in 1992 WL 5151598.

77. See *Forbes*, 118 S. Ct. at 1648 n.14 (Stevens, J., dissenting).

78. See *id.* at 1648 (Stevens, J., dissenting).

79. See *id.* at 1645 (Stevens, J., dissenting). Justice Stevens explained that private networks are subject to regulation under the Federal Election Campaign Act. See *Forbes*, 118 S. Ct. at 1645 (Stevens, J., dissenting) (citing 2 U.S.C. § 441b(a) (1994)); *infra* note 267 (comparing the new standard for public television stations under *Forbes* to the federal regulations governing private stations).

80. See *Forbes*, 118 S. Ct. at 1649-50 (Stevens, J., dissenting); see also *infra* notes 273-78 and accompanying text (explaining that AETC is a state agency).

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

82. See *id.* at 1647-48 (Stevens, J., dissenting).

83. *Id.* at 1648 (Stevens, J., dissenting) (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969)).

84. *Id.* at 1649 (Stevens, J., dissenting).

85. For review of the public forum doctrine's framework and history, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.45-47, at 1138-67 (5th ed. 1995); Robert C. Post, *Between Governance and Management: The History and Theory of*

Professor Harry Kalven wrote an influential article in which he first coined the phrase "public forum."<sup>92</sup> In his analysis of the problems raised by civil rights demonstrations on government-owned property, Kalven drew from the theoretical framework established by the Court in a series of cases<sup>93</sup> regarding the rights of citizens to distribute leaflets in public places.<sup>94</sup> He explained that the Court had held that leaflet distribution could not be prohibited on public streets and could only be regulated for "weighty reasons."<sup>95</sup> Kalven believed that this framework provided a model that should be applied to all cases in which citizens seek to exercise their freedom of speech in public places.<sup>96</sup> While government should not have the power to control the content of speech, Kalven contended that the government should be permitted to implement "reasonable parliamentary rules"

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demonstration at the Baton Rouge courthouse. *See id.* at 539-40. Nearly 2000 students gathered at the courthouse to protest segregated lunch counters and the arrest of several students who protested local lunch counters the day before. *See id.* at 538-39. As in *Edwards*, the student protest was orderly. *See id.* at 540-44. Significantly, nearly 20 years later the Court held that the sidewalks surrounding the U.S. Supreme Court building constituted a public forum and deserved appropriate First Amendment protection. *See United States v. Grace*, 461 U.S. 171, 180 (1983).

92. Kalven, *supra* note 86, at 12. Kalven wrote that "the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a *public forum* that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom." Kalven, *supra* note 86, at 11-12 (emphasis added). Although Kalven's article has received acclaim, *see, e.g.*, Post, *supra* note 85, at 1718, 1724 (describing Kalven's article as "classic" and "profoundly influential"), he claimed to do "no more than to invoke a slightly different way of looking at familiar issues," Kalven, *supra* note 86, at 10.

93. *See Talley v. California*, 362 U.S. 60 (1960) (overturning conviction of defendants who had distributed leaflets without printing the name and address of the leaflet's author, printer, and sponsor); *Jamison v. Texas*, 318 U.S. 413 (1943) (rejecting an ordinance that prohibited the distribution of leaflets); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (upholding an ordinance forbidding the distribution of commercial handbills); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (holding that public interest in cleanliness did not justify prohibition against all distribution of handbills in public places). At least one commentator has suggested that Kalven may have mischaracterized the nature of the Court's holdings in the leaflet cases. *See Post, supra* note 85, at 1720. While Kalven used the leaflet cases to explain a framework developed by the Court for leaflet distribution on public property, Post notes that at the same time the Court also rejected an ordinance banning door-to-door leaflet distribution in private places. *See Post, supra* note 85, at 1720 (citing *Martin v. City of Struthers*, 319 U.S. 141 (1943)). Post suggests that the Court was protecting speech generally, not just speech in public places. *See Post, supra* note 85, at 1720.

94. *See Kalven, supra* note 86, at 15-21.

95. *Id.* at 21.

96. *See id.*; *see also* C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 112 (1986) (explaining that "Kalven's public-forum concept had suggested that the First Amendment right of access was not limited to streets and parks").

to govern public dialogue on public property.<sup>97</sup> He argued that government should be permitted to place reasonable time, place, and manner restrictions on expression in public places.<sup>98</sup> In evaluating those restrictions, Kalven urged the Court to use a balancing test weighing the public interest in free expression against the other functions of public places with "the thumb of the Court . . . on the speech side of the scales."<sup>99</sup> In the end, Kalven cautioned that designing rules to govern the public forum framework "poses a problem of formidable practical difficulty."<sup>100</sup>

Shortly after Professor Kalven's article was published, *Adderley v. Florida*<sup>101</sup> came before the Court. In *Adderley*, a group of African-American students was arrested after protesting at a jail and refusing to leave following a request from the sheriff to do so.<sup>102</sup> They were subsequently convicted under a Florida trespass statute.<sup>103</sup> The case presented the Court with its first opportunity to implement Kalven's framework, but Justice Black's majority opinion steered clear of such an approach. The Court upheld the convictions because the students did not present any evidence that the sheriff had objected to the content of their protest.<sup>104</sup> In addition, the Court justified its holding by noting that similar protests or gatherings had not occurred at the jail during its history.<sup>105</sup> Harkening back to the philosophy

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97. Kalven, *supra* note 86, at 23. Kalven drew a parallel between the need for some reasonable regulation of public protests with the need for regulation at a traditional town hall meeting so that everyone can speak and everyone can be heard. *See id.* at 23-25 (citing ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 24-28 (1960)).

98. *See id.* at 28.

99. *Id.* at 27-28.

100. *Id.* at 12. At least one commentator has claimed that Kalven did not intend for his concept of the public forum to be used as "a tool for categorizing different kinds of government property." Post, *supra* note 85, at 1718. While the premise of Kalven's article gives rise to such a conclusion, the words and metaphors he used provide some support for the Court's later development of a public forum doctrine focused on the character of government property. For example, Kalven wrote that "[w]hen the citizen goes to the street, he is exercising an immemorial right of a free man, a kind of First-Amendment easement." Kalven, *supra* note 86, at 13 (emphasis added).

101. 385 U.S. 39 (1966).

102. *See id.* at 40.

103. *See id.* at 40-41.

104. *See id.* at 47.

105. *See id.* Justice Black distinguished the student protest in *Adderley* from the protest in *Edwards* by explaining that jails, unlike state capitol grounds, were not traditionally built to be open for the public. *See id.* at 41. The Court's discussion of content and history may be oblique nods to Kalven's commentary. Compare *id.* at 41, 47 (discussing the traditional use of the property at issue and noting that the sheriff did not "object[] to what was being sung or said by the demonstrators"), with Kalven, *supra* note 86, at 23-27 (discussing the traditional use of property for speech and state "control of content").

articulated by the Court in the late nineteenth century, Justice Black wrote that the government, just like any property owner, "has power to preserve the property under its control for the use to which it is lawfully dedicated."<sup>106</sup> While the Court avoided adopting Kalven's approach, this statement provided a foothold for what the Court later described as the "nonpublic forum."<sup>107</sup>

Six years later, the Court handed down two decisions that embraced Professor Kalven's theoretical framework for examining public speech rights in public places.<sup>108</sup> In *Grayned v. City of Rockford*,<sup>109</sup> protesters were convicted for violating an ordinance forbidding noise-making near school buildings while school was in session<sup>110</sup> by demonstrating against discrimination in a local high school.<sup>111</sup> Writing for the majority, Justice Marshall explained that government may regulate speech and assembly on public property.<sup>112</sup> He noted that in regulating such speech, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."<sup>113</sup> To that end, Justice Marshall noted that the regulation needs to be narrowly tailored to meet the government's interest in the place and time.<sup>114</sup>

Proceeding to uphold the constitutionality of the ordinance, the *Grayned* Court echoed Professor Kalven's analysis in several respects.<sup>115</sup> First, the Court explained that citizens' right to use public property for free expression "may be restricted only for weighty reasons."<sup>116</sup> In addition, the Court noted that "reasonable 'time,

106. *Adderley*, 385 U.S. at 47. Even after *Adderley*, the Court continued to wrestle with the problems raised by the protests of the Civil Rights movement. See, e.g., *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1968) (considering whether conviction under a Birmingham city ordinance prohibiting public demonstrations without a permit was constitutionally valid).

107. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); see also Dienes, *supra* note 96, at 116 (describing *Adderley* as the "foundation for the nonpublic-forum doctrine").

108. For a discussion of Kalven's influence on these decisions, see Post, *supra* note 85, at 1729-33.

109. 408 U.S. 104 (1972).

110. See *id.* at 107-08.

111. See *id.* at 105-06.

112. See *id.* at 115.

113. *Id.* at 116.

114. See *id.* at 116-17.

115. See *id.* at 116 n.34.

116. *Id.* at 115. Compare *id.* (noting "[t]he right to use a public place for expressive activity may be restricted only for weighty reasons"), with Kalven, *supra* note 86, at 21 (explaining that "the right to the streets as a public forum is such that leaflet distribution . . . can be regulated only for weighty reasons" and "the leaflet cases furnish the relevant model for analysis of the complex speech issues involved" in mass civil rights protests).



place, and manner' regulations may be necessary to further significant governmental interests, and are permitted."<sup>117</sup> Finally, the Court asserted that in conducting the balancing test between free speech and the government's interest in a particular place, courts "must weigh heavily the fact that communication is involved."<sup>118</sup>

*Police Department v. Mosley*<sup>119</sup> was decided on the same day as *Grayned*. *Mosley* struck down an ordinance that prohibited picketing near schools in session.<sup>120</sup> The ordinance, however, provided an exception allowing protests for school-related labor disputes.<sup>121</sup> Justice Marshall's opinion for the Court relied explicitly on Professor Kalven's work, referring to public facilities as a "public forum."<sup>122</sup> The Court explained that in a public forum, the government "may not select which issues are worth discussing or debating."<sup>123</sup> Furthermore, the Court stressed that because First Amendment rights are at stake, government regulation of expression in a public forum is subject to strict scrutiny.<sup>124</sup> As a result, the Court held that the ordinance was unconstitutional because its restriction was based solely on the content of the protest.<sup>125</sup>

Two years later the Court again addressed the emerging public forum doctrine in *Lehman v. City of Shaker Heights*,<sup>126</sup> the first case involving a political candidate to use the notion of the public forum.<sup>127</sup> The candidate in *Lehman* asked the city to place campaign

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117. *Grayned*, 408 U.S. at 115 (quoting *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941)); cf. Kalven, *supra* note 86, at 27 (explaining that "regulation of time, place, manner, and circumstance" is appropriate in examining cases concerning mass protest).

118. *Grayned*, 408 U.S. at 116; cf. Kalven, *supra* note 86, at 27-28 (explaining that the Court's regulation of mass protest must "weigh heavily the fact that communication was involved").

119. 408 U.S. 92 (1972).

120. *See id.* at 92-94; cf. *Carey v. Brown*, 447 U.S. 455 (1980) (rejecting on equal protection grounds a statute banning picketing of residences except peaceful picketing of a location that is involved in a labor dispute).

121. *See Mosley*, 408 U.S. at 92-93.

122. *Id.* at 96, 99. This description represents the first time that the Court labeled public property as a public forum. *See Post*, *supra* note 85, at 1731. Justice Marshall's opinion explicitly cited Kalven's work. *See Mosley*, 408 U.S. at 95 n.3, 99 n.6.

123. *Mosley*, 408 U.S. at 96.

124. *See id.* at 98-99.

125. *See id.* at 102. The Court explained that the statute in question was not content neutral by emphasizing that "[t]he operative distinction is the message on a picket sign." *Id.*

126. 418 U.S. 298 (1974) (plurality opinion).

127. *See id.* (plurality opinion). Justice Blackmun wrote the plurality opinion, which was joined by Chief Justice Burger and Justices White and Rehnquist. *See id.* at 299 (plurality opinion). Justice Douglas wrote a concurring opinion. *See id.* at 305 (Douglas, J., concurring) (emphasizing the "right of commuters to be free from forced intrusions" as

advertisements on spaces reserved for advertisements on the city's transit system.<sup>128</sup> Although commercial advertisements were permitted on the spaces, the city denied the candidate's request.<sup>129</sup> The Court upheld the city's denial, but no five justices agreed on a rationale.<sup>130</sup> The Court's plurality opinion concluded that the spaces reserved for advertisements were not public fora.<sup>131</sup> The plurality justified this conclusion by examining the "nature of the forum" and identifying the city's interest in the spaces as "proprietary."<sup>132</sup>

In dissent, Justice Brennan sought to develop clear criteria to evaluate whether a public forum existed.<sup>133</sup> Citing Professor Kalven's article, he wrote that in assessing whether government property should be classified as a public forum, "the Court [should] strike a balance between the competing interests of the government, on the one hand, and the speaker and his audience, on the other."<sup>134</sup> Justice Brennan believed that in *Lehman* the government had "voluntarily established" a public forum by installing space for advertisements and posting commercial and public service advertisements.<sup>135</sup> He contended that by accepting some advertisements, the government had "effectively waived any argument" that advertising on the transit system was incompatible with the system's primary function.<sup>136</sup> In conclusion, he argued that government cannot selectively exclude expression from such a forum merely because of its content.<sup>137</sup>

Although the *Lehman* Court did not clarify the formula for evaluating public speech rights in public places, its opinions began to bring the modern public forum classifications into focus.<sup>138</sup> In 1976,

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a captive audience on city buses). Justice Brennan wrote a dissenting opinion, which Justices Stewart, Marshall, and Powell joined. *See id.* at 308 (Brennan, J., dissenting).

128. *See id.* at 299-300 (plurality opinion).

129. *See id.* at 300-01 (plurality opinion).

130. *See id.* at 299 (plurality opinion).

131. *See id.* at 301-02 (plurality opinion).

132. *Id.* at 302-04 (plurality opinion).

133. *See id.* at 312 (Brennan, J., dissenting).

134. *Id.* (Brennan, J., dissenting).

135. *Id.* at 314 (Brennan, J., dissenting).

136. *Id.* (Brennan, J., dissenting).

137. *See id.* at 316 (Brennan, J., dissenting).

138. The Court's holding in *Lehman* established that certain public property does not constitute a public forum. *See id.* at 302-04 (plurality opinion). In dissent, Justice Brennan implicitly agreed that not all public property is a public forum, but he also recognized that the government could voluntarily establish a public forum where one had not previously existed. *See id.* at 310, 312 (Brennan, J., dissenting). While the Court had previously held that certain government property is not a public forum, *see, e.g., Adderley v. Florida*, 385 U.S. 39 (1966) (upholding conviction for protesting on prison grounds), Justice Brennan's dissent represents the first time that a member of the Court

two years after *Lehman*, the Court again confronted a public forum issue involving political candidates in *Greer v. Spock*.<sup>139</sup> In *Greer*, several independent political candidates sought to enter a base to meet with military personnel to discuss campaign issues and distribute campaign literature.<sup>140</sup> The base's commanding officer denied their request in accordance with regulations prohibiting political speeches on the base.<sup>141</sup> The Court upheld the regulations and ruled that the candidates did not have a constitutional right to speak at the base because a military base is not a public forum.<sup>142</sup> Relying on *Adderley*, the Court stated that a public forum is not created whenever people are given access to government-owned property.<sup>143</sup> Rather, it emphasized that the property at issue traditionally had not served as a place for free expression.<sup>144</sup> Furthermore, the Court reiterated that the government had the authority to preserve public property for its intended use.<sup>145</sup> In this case, the property's intended use was a military training facility.<sup>146</sup> As

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acknowledged that the government could create a public forum, see *Lehman*, 418 U.S. at 310 (Brennan, J., dissenting) (writing that "the city created a forum for the . . . expression of ideas"). See also Post, *supra* note 85, at 1736 (explaining that "Brennan's dissent was the first effort to set forth a systematic doctrine of the public forum"). By 1976, in *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), the Court recognized that government could "open[] a forum for direct citizen involvement," in which case it cannot discriminate against speakers based on "the content of their speech." *Id.* at 175-76 (holding that an order by the Wisconsin Employment Relations Commission prohibiting teachers, other than the designated collective bargaining representatives, from speaking about labor issues at open meetings of local school boards violated the teachers' First Amendment rights). The first case that explicitly acknowledged the limited public forum was *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), which held that the Minnesota State Fair was a limited public forum. See *id.* at 655.

Less than a year after *Lehman*, the Court ruled that a city-leased auditorium and a city-owned auditorium were public fora. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975). Moreover, the Court held that the auditoriums' directors had violated a promoter's First Amendment rights when they denied his application to bring the musical *Hair* to the auditorium. See *id.* at 561-62. The holding was based on the doctrine of prior restraint, which required procedural safeguards. See *id.* at 562.

139. 424 U.S. 828 (1976). The decision in *Greer* has been called "pivotal" in the development of the public forum doctrine. Post, *supra* note 85, at 1739. The holding in *Greer* has also been criticized as beginning an "unfortunate pattern" in which the Court has made "no effort to articulate any connection between its definition of a public forum and a theory of the first amendment." *Id.* at 1741.

140. See *Greer*, 424 U.S. at 832-33.

141. See *id.* at 833 n.3.

142. See *id.* at 838-40.

143. See *id.* at 837.

144. See *id.* at 838.

145. See *id.*

146. See *id.* at 837-38.

such, the government could restrict speech on the base without violating the potential speaker's constitutional rights, as long as the restriction was not applied "irrationally, invidiously, or arbitrarily."<sup>147</sup>

The rationale in *Greer* represented a shift in analyzing public forum cases.<sup>148</sup> The Court had moved from considering "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"<sup>149</sup> to considering the traditional use of the place and the government's proprietary control over it.<sup>150</sup> In developing the public forum doctrine, the Court fully embraced Professor Kalven's description of the public forum in terms of the property at issue, while ignoring the fundamental message of his theoretical framework advocating "parliamentary rules" with the Court's "thumb . . . on the speech side."<sup>151</sup>

Dissenting in *Greer*, Justice Brennan cautioned that the majority's shift in forum analysis blinded the Court to the importance of accommodating free expression.<sup>152</sup> He called for the Court to use a more flexible approach when assessing free speech rights on government property.<sup>153</sup> Justice Brennan ominously warned the Court that "with the rigid characterization of a given locale as not a public forum, there is the danger that certain forms of public speech at the locale may be suppressed, even though they are basically compatible with the activities otherwise occurring at the locale."<sup>154</sup>

The danger that Justice Brennan had warned about in *Greer* was realized in *Widmar v. Vincent*.<sup>155</sup> In *Widmar*, the University of

147. *Id.* at 840. In fact, the Court noted that "[w]hat the record shows . . . is a considered . . . policy, objectively and evenhandedly applied, of keeping official military activities [on the base] wholly free of entanglement with partisan political campaigns of any kind." *Id.* at 839.

148. See Post, *supra* note 85, at 1745. Post has explained that *Greer's* legacy is a sharp distinction between public and nonpublic fora. See *id.* He has contended that *Greer* provides government with "virtual immunity" in limiting free expression in a nonpublic forum based on its control over the location. *Id.*

149. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

150. See Post, *supra* note 85, at 1742-43.

151. Kalven, *supra* note 86, at 24, 28.

152. See *Greer*, 424 U.S. at 859 (Brennan, J., dissenting).

153. See *id.* at 859-60 (Brennan, J., dissenting).

154. *Id.* at 860 (Brennan, J., dissenting). Justice Brennan's admonition is particularly noteworthy because he wrote the influential dissenting opinion in *Lehman*, which called for a clearer development of the public forum doctrine. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 308 (Brennan, J., dissenting); Post, *supra* note 85, at 1744; see also *supra* notes 133-37 and accompanying text (discussing Brennan's dissent in *Lehman*). Remarkably, Justice Marshall, who wrote the Court's opinions in *Grayned* and *Mosley* that first gave voice to the Court's adherence to Kalven's notion of the public forum, also joined the dissent. See *supra* notes 109-25 and accompanying text.

155. 454 U.S. 263 (1981).

Missouri at Kansas City allowed registered student groups to use its facilities for a myriad of purposes, but it prohibited one such group from meeting in its facilities for religious worship and discussion.<sup>156</sup> The Court held that the university's policy generally permitting groups to use its facilities created a public forum.<sup>157</sup> While the university did not have to create a forum in the first place,<sup>158</sup> the Court held that once such a forum had been created, the university could only regulate access based on the content of the speech if the "regulation is necessary to serve a compelling state interest and . . . it is narrowly drawn to achieve that end."<sup>159</sup> In its opinion, the Court hinted that the forum at issue was different from traditional public fora previously recognized by the Court, such as streets and parks, because it had been created by university policy.<sup>160</sup>

Explicit recognition of different types of public fora became clear two years later, when the Court decided *Perry Education Ass'n v. Perry Local Educators' Ass'n*.<sup>161</sup> The Court's five-to-four decision in *Perry* proved to be the defining moment of the modern public forum doctrine.<sup>162</sup> The collective bargaining agreement of the Perry school district gave the Perry Education Association ("PEA"), which was the exclusive bargaining representative of teachers in the district, access to the interschool mail system and teachers' mailboxes.<sup>163</sup> The district denied other teachers' unions the same access.<sup>164</sup> The issue in *Perry* centered on the efforts of the Perry Local Educators' Association ("PLEA") to gain access to the mail system.<sup>165</sup> While the

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156. *See id.* at 265.

157. *See id.* at 267.

158. *See id.* at 268.

159. *Id.* at 270. The Court ruled that the state's interest was not "sufficiently 'compelling' to justify content-based discrimination" against a student group seeking to use university facilities for religious purposes. *Id.* at 277-78. The Court also wrestled with the issue of separation of church and state under the Establishment Clause, ultimately holding that an "equal access policy" would not be incompatible with the Constitution's mandates. *See id.* at 271-77.

160. *See id.* at 268 n.5; *see also* Post, *supra* note 85, at 1748-49 (discussing the implications of *Widmar*).

161. 460 U.S. 37 (1983).

162. *See* Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1547-50 (1998); *see also* Day, *supra* note 87, at 147 (noting that the modern forum doctrine was enunciated first in *Perry*).

163. *See Perry Educ. Ass'n*, 460 U.S. at 38-39. The Court noted that the "primary function" of the mailboxes was to "transmit official messages among the teachers and between the teachers and the school administration." *Id.* at 39.

164. *See id.* The exclusive use policy only applied to the mailboxes—not to other school facilities. *See id.* at 41.

165. *See id.*

Court determined that the mail system was a nonpublic forum,<sup>166</sup> the significance of the decision lay not in its holding but in its rationale.

For the first time, the Court stated that when evaluating the public's right to speech on public property, the property should be classified into one of three categories: (1) traditional public forum; (2) designated public forum; (3) or nonpublic forum.<sup>167</sup> The Court stipulated that each category carried with it different rights.<sup>168</sup> Drawing on Justice Roberts's opinion in *Hague*, the Court explained that the first category consisted of "quintessential" public fora, such as streets and parks.<sup>169</sup> These fora were places that "by long tradition or by government fiat" have been open to citizens for public debate and free expression.<sup>170</sup> The Court held that the government could only exclude speakers from such fora based on content if "its regulation is necessary to serve a compelling state interest and . . . it is narrowly drawn to achieve that end."<sup>171</sup> In addition, the government could regulate the "time, place, and manner of expression" in these quintessential public fora as long as the regulations are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."<sup>172</sup>

Guided by *Widmar*, the Court described the second forum classification as "public property which the State has opened for use by the public as a place for expressive activity."<sup>173</sup> As in *Widmar*, the Court recognized that governments are not required to open such a forum to the public.<sup>174</sup> Furthermore, the Court stressed that once governments opened such a forum, they are not required to maintain the forum indefinitely.<sup>175</sup> As long as the forum remains open, however, government regulation must follow the same standards that

166. See *id.* at 53. In light of the Court's holding in *Forbes*, it is significant that *Perry* emphasized that "[d]uring election periods, PLEA is assured of equal access to *all* modes of communication." *Id.* (emphasis added).

167. See *id.* at 45-46.

168. See *id.* The public forum framework established in *Perry* was bolstered in significance by the Court's implication that "the nature of the forum must be considered *before* other factors, especially the nature of the government's regulatory action." Day, *supra* note 87, at 162.

169. *Perry Educ. Ass'n*, 460 U.S. at 45.

170. *Id.*

171. *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)); see also Day, *supra* note 87, at 150 (describing the traditional public forum as a "highly speech-protective device").

172. *Perry Educ. Ass'n*, 460 U.S. at 45.

173. *Id.*

174. See *id.*

175. See *id.* at 46.

apply to traditional public fora.<sup>176</sup> Arguably, the most significant feature of the second forum category was the Court's recognition that "[a] public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects."<sup>177</sup>

Finally, the *Perry* Court held that all other government property is subject to a different standard than for traditional and limited public fora.<sup>178</sup> The Court noted that the " 'First Amendment does not guarantee access to property simply because it is owned or controlled by the government.' "<sup>179</sup> Relying once again on Justice Black's comparison of the government to a "private owner" in *Adderley*,<sup>180</sup> the Court ruled that the government may regulate speech in a nonpublic forum to protect the forum's intended uses.<sup>181</sup> The Court only limited the government's ability to regulate a nonpublic forum by stipulating that the regulation must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's views."<sup>182</sup>

In *Perry*, the Court's analysis in classifying the school district's mail system as a nonpublic forum provided a subtle subtext for the framework it had articulated earlier in the opinion.<sup>183</sup> The Court

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176. See *id.* Post has argued that this holding is a questionable assertion contradicted by the precedents used by the Court to support it. See Post, *supra* note 85, at 1753. Such precedents include *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). See Post, *supra* note 85, at 1753.

177. *Perry Educ. Ass'n*, 460 U.S. at 46 n.7 (citation omitted). Remarkably, the Court made this point in a footnote to its opinion. See *id.* Post has characterized this footnote as "puzzling." Post, *supra* note 85, at 1753. He has contended that "the footnote eviscerates the rule that in regulating public access to the limited public forum the government is bound by the same first amendment standards as bind the government's ability to regulate access to the traditional public forum." *Id.*

178. See *Perry Educ. Ass'n*, 460 U.S. at 46. The labels given to the first two categories (traditional and designated public fora) were drawn from the Court's explanation of the final category, which the Court aptly described as "[p]ublic property which is not by tradition or designation a forum for public communication." *Id.* (emphasis added).

179. *Id.* (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)).

180. See *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966); *supra* notes 101-07 and accompanying text (discussing *Adderley*).

181. See *Perry Educ. Ass'n*, 460 U.S. at 46.

182. *Id.* The Court later labeled this test as the "viewpoint neutral" standard. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); see also *Healy v. James*, 408 U.S. 169, 187 (1972) ("The mere disagreement . . . with the group's philosophy affords no reason to deny its recognition. . . . As repugnant as these views may have been, . . . the mere expression of [the group's views] would not justify the denial of First Amendment rights.").

183. See *Perry Educ. Ass'n*, 460 U.S. at 47-53.

reasoned that if the school district had opened up the mail system to the general public, then PLEA would have had a legitimate claim that the district had created a public forum.<sup>184</sup> But, the Court noted, people outside the school system who wished to use the mail system had to receive permission from the district.<sup>185</sup> The Court held that “[t]his type of selective access does not transform government property into a public forum.”<sup>186</sup> In dicta, the Court explained that even if the mail system was a limited public forum due to the school district’s grant of access to groups such as the Cub Scouts and YMCA, the right to access the forum would “extend only to other entities of similar character.”<sup>187</sup> In keeping with the framework it had established, the Court upheld the exclusion of PLEA from the mail system and noted that the exclusion from the nonpublic forum was justified based on the different status of PLEA and PEA.<sup>188</sup>

Thus, the Court in *Perry* waded fully into the “problem of formidable practical difficulty” of which Professor Kalven had warned when he first wrote about the public forum nearly twenty years earlier.<sup>189</sup> By focusing on the nature of the property in question, the Court seemed to adopt Kalven’s approach to public speech in public places.<sup>190</sup> Kalven’s initial public forum theory, however, had not contemplated circumstances such as *Perry*. He had only been concerned with “mass protest in public places” such as streets, state capitols, and courthouses, not union access to public school district’s internal mail systems.<sup>191</sup>

In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,<sup>192</sup> the Court continued to refine the practicalities of the emerging public forum doctrine.<sup>193</sup> In *Cornelius*, the Court ruled that the Combined Federal Campaign (“CFC”),<sup>194</sup> a charity drive, was a

184. *See id.* at 47.

185. *See id.*

186. *Id.*

187. *Id.* at 48. The Court stated that organizations like the Cub Scouts and YMCA were “engage[d] in activities of interest and educational relevance to students,” but PLEA was only “concerned with the terms and conditions of teacher employment.” *Id.* Because PLEA was not one of the groups for which the government intended to open the forum nor was it discussing a subject intended to be protected, PLEA could have been excluded even if the mail system was a designated public forum. *See id.*

188. *See id.* at 49.

189. Kalven, *supra* note 86, at 12.

190. *See Perry Educ. Ass’n*, 460 U.S. at 49.

191. Kalven, *supra* note 86, at 11.

192. 473 U.S. 788 (1985).

193. For further discussion of the Court’s holding in *Cornelius*, see Post, *supra* note 85, at 1756-57 and Day, *supra* note 87, at 164-67.

194. The CFC is a charity drive focused on raising money from federal employees. *See*



nonpublic forum and consequently held that the government could prohibit solicitation of federal employees in government workplaces by legal defense and political advocacy organizations.<sup>195</sup> Before determining what First Amendment rights were at stake in the case, the Court confronted the issue of determining the relevant forum to be analyzed—the workplace or the CFC.<sup>196</sup> The Court explained that “forum analysis is not completed merely by identifying the government property at issue.”<sup>197</sup> Instead, the *Cornelius* Court stated that the “access sought by the speaker” should be the starting point for its analysis.<sup>198</sup> If the speaker seeks “general access” to government property, then that whole property represents the relevant forum.<sup>199</sup> When the speaker seeks “limited access” to public places, the Court will take “a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.”<sup>200</sup> The Court noted that the organizations sought limited access to a particular means of communication, and therefore the CFC was the relevant forum in this case.<sup>201</sup> The Court’s opinion also emphasized that the government’s intent was critical in establishing whether a limited public forum existed.<sup>202</sup> Once the Court established that the CFC was a nonpublic forum, it upheld the restrictions on participation because “[t]he Government’s decision to restrict access to a nonpublic forum need only be *reasonable*; it need

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*Cornelius*, 473 U.S. at 790. An executive order by President Reagan limited participation in the CFC to tax-exempt, non-profit charitable agencies that provide health and welfare services. See *id.* at 795. President Reagan’s executive order excluded legal defense and political advocacy organizations from the CFC. See *id.*

195. See *id.* at 804-06.

196. See *id.* at 801.

197. *Id.*

198. *Id.*

199. See *id.*

200. *Id.*

201. See *id.* The government argued that the relevant forum was the workplace. See *id.* at 800. Presumably, the government staked out this position because the federal workplace, like the mail system in *Perry*, was a proprietary, nonpublic forum in which the government would have broad discretion to exclude certain speakers.

202. See *id.* at 802; see also Day, *supra* note 87, at 167 (explaining that *Cornelius* was the first case in which the government intent standard was used). As the Court noted, “[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *Cornelius*, 473 U.S. at 802. The Court’s opinion also included several thoughts in dicta that are noteworthy in light of the *Forbes* holding. See *id.* at 809-11 (“[A]voiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum. . . . The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination.”).

not be the most reasonable or the only reasonable limitation."<sup>203</sup>

Since *Perry* and *Cornelius*, the Court has continued to give meaning to the public forum doctrine and apply it in a variety of circumstances.<sup>204</sup> Some justices and commentators, however, have

203. *Cornelius*, 473 U.S. at 808.

204. For example, the Court has extended the doctrine to things that constitute fora "more in a metaphysical than in a spatial or geographic sense." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (holding that the University of Virginia's Student Activity Fund was a limited public forum); see also *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280 (1984) (holding that college administrators' "meet and confer" sessions with teachers concerning policy questions did not constitute a traditional or designated public forum).

The Court also has continued to classify actual property and has ruled that government property is not a public forum merely because it can be used as a means of expression. See *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (holding that utility poles are nonpublic fora); see also *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981) (stating that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government").

The Court's holdings in these cases have sent a series of confusing signals about the contours of the public forum doctrine. For example, the Court has stated that residential streets are traditional public fora despite the fact that they are narrow and the surrounding residents are concerned that protesters might impede the flow of traffic. See *Frisby v. Schultz*, 487 U.S. 474, 477, 480-81 (1988) (noting that residential streets are public fora while upholding a statute banning "picketing before or about the residence or dwelling of any individual" because the statute was narrowly tailored and fulfilled a "significant government interest"); see also *Day*, *supra* note 87, at 173-75 (discussing the *Frisby* decision). But see *Carey v. Brown*, 447 U.S. 455, 471 (1980) (rejecting on equal protection grounds a statute banning picketing of residences except peaceful picketing of a location that is involved in a labor dispute).

By contrast, the Court has held that airport terminals are not public fora in part because the "normal flow of traffic [could be] impeded." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683-84 (1992); see also *Gey*, *supra* note 162, at 1555-58 (analyzing the holding and decisions in *Lee*); *Day*, *supra* note 87, at 192-98 (exploring the significance of *Lee*). In *Lee*, the Court also based its holding that airport terminals are not public fora on "the lateness with which the modern air terminal has made its appearance" and the potential for "inconveniences to passengers." *Lee*, 505 U.S. at 680, 685. The decision in *Lee* followed *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), in which the Court found it unnecessary to address how an airport terminal should be classified under the forum doctrine. See *id.* at 573-74 (rejecting as overbroad an airport regulation stipulating that the terminal is "'not open for First Amendment activities'" (quoting the airport regulation)); see also *Day*, *supra* note 87, at 168-70 (discussing the holding and implication of *Jews for Jesus*). In addition, a plurality of the Court in *United States v. Kokinda*, 497 U.S. 720 (1990) (plurality opinion), held that a sidewalk outside a post office is not a public forum because it was "constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door." *Id.* at 720, 728 (plurality opinion); see also *Day*, *supra* note 87, at 179-85 (analyzing the *Kokinda* decision and suggesting that it represents "a new standard for determining a traditional forum"). But see *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391 (1993) (describing "traditional public forums such as parks and sidewalks"); *United States v. Grace*, 461 U.S. 171, 180 (1983) (holding that the sidewalks outside the U.S. Supreme Court are public fora).

denounced the entire approach as an ineffective method of assessing citizens' rights to free expression.<sup>205</sup> The doctrine has been criticized for being "virtually impermeable to common sense,"<sup>206</sup> developing artificial distinctions,<sup>207</sup> and amounting to "doctrinal pigeonholing."<sup>208</sup> Much of this criticism centers on the doctrine's overemphasis on the property interest of the government rather than the free speech interests of the people.<sup>209</sup>

In modern forum doctrine cases, the Court tends to focus first on the "character of the property at issue."<sup>210</sup> This focus provides a "geographical approach to first amendment law, [under which] results often hinge almost entirely on the speaker's location."<sup>211</sup> Rather than consider the First Amendment issues at stake, the modern forum doctrine tends to concentrate on property classification.<sup>212</sup> This tendency leads courts to evaluate the government's interest in the property as if the property itself were private and the government, as owner, had the right to exclude people from it at will.<sup>213</sup> While geographic labeling may be an efficient way to decide cases,<sup>214</sup> the nature of public property is lost in modern forum analysis.<sup>215</sup> More importantly, reliance on forum analysis "distracts attention" from the First Amendment interests

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205. See, e.g., *Kokinda*, 497 U.S. at 744 (Brennan, J., dissenting); *Cornelius*, 473 U.S. at 822 (Blackmun, J., dissenting); Day, *supra* note 87, at 168; Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 (1984); Post, *supra* note 85, at 1715, 1767; Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 97-100 (1998).

206. Post, *supra* note 85, at 1715.

207. See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987).

208. *Kokinda*, 497 U.S. at 743 (Brennan, J., dissenting).

209. In his dissent in *Cornelius*, Justice Blackmun captured the essence of this criticism when he wrote that "[r]ather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society's interests in freedom of speech against the interests served by reserving the property to its normal use, the Court simply labels the property and dispenses with the balancing." *Cornelius*, 473 U.S. at 821 (Blackmun, J., dissenting).

210. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

211. Farber & Nowak, *supra* note 205, at 1220.

212. See Post, *supra* note 85, at 1766; see, e.g., *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677-83 (1992).

213. See *Dienes*, *supra* note 96, at 112; see also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993) (concluding that "[t]here is no question that the District, like the private owner of property, may legally preserve the property under its control for the use which it is dedicated").

214. See *Dienes*, *supra* note 96, at 120.

215. See Post, *supra* note 85, at 1798.

being sacrificed.<sup>216</sup> Although courts rely on Professor Kalven's original framing of the public forum as a question of property,<sup>217</sup> the modern forum doctrine no longer reflects his ultimate call for a balancing of the public's free speech interests against the normal uses of the property at issue.<sup>218</sup> Instead of keeping its "thumb . . . on the speech side of the scales,"<sup>219</sup> the modern Court has tended to place its "thumb" firmly on the government's side.<sup>220</sup>

In *Forbes*, the outcome of the case ultimately hinged on how the debate was classified within the public forum framework.<sup>221</sup> While the Eighth Circuit's classification of the debate as a limited public forum paved the way for *Forbes*'s inclusion,<sup>222</sup> the Supreme Court's classification of it as a nonpublic forum gave public television stations free reign to exclude non-major-party candidates.<sup>223</sup> For *Forbes*, like all speakers who seek to protect their interest in freely expressing themselves in public places, the case ultimately turned on how the Court categorized the property where *Forbes* sought to speak, rather than the speech interests he sought to exercise.<sup>224</sup>

Although commentators bristle at the Court's use of property classification as a means for determining First Amendment rights,<sup>225</sup> the Court's system of classification is even more troubling because of the limited scope of the traditional public forum and the Court's reluctance to use the limited public forum label. In defining the

216. Farber & Nowak, *supra* note 205, at 1224.

217. See Kalven, *supra* note 86, at 13; see also *supra* note 100 (discussing Kalven's use of property images).

218. See Kalven, *supra* note 86, at 27.

219. *Id.* at 28.

220. See Day, *supra* note 87, at 163 (noting that the modern forum doctrine is speech-restrictive rather than speech-protective).

221. See *Forbes*, 118 S. Ct. at 1641.

222. See *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 500 (8th Cir. 1996), *rev'd*, 118 S. Ct. 633 (1998).

223. See *Forbes*, 118 S. Ct. at 1645 (Stevens, J., dissenting); see, e.g., *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814-15 (1984); *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280-83 (1984). This outcome counters popular notions of the importance of debate in campaigns. As Reed Hundt, former chairman of the Federal Communications Commission, has explained, America must "find ways to make it easier for candidates to get their messages across and to challenge other candidates' messages, as opposed to hampering their ability to do so. The heart of a democratic society is an electorate that is provided with sufficient information to make informed choices." Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1102 (1996).

224. See *Forbes*, 118 S. Ct. at 1641-44.

225. See, e.g., Dienes, *supra* note 96, at 120; Farber & Nowak, *supra* note 205, at 1224; Post, *supra* note 85, at 1766.

traditional public forum, the Court examines the historical use of the property at issue.<sup>226</sup> While this historical perspective generally has protected the public's use of sidewalks, streets, and parks as fora for free expression,<sup>227</sup> it has also been relied on as a justification for excluding citizens from exercising their First Amendment rights at other public facilities.<sup>228</sup> In essence, the historical-use standard forecloses the possibility that any new public fora will be recognized by the Court.<sup>229</sup> The importance of sidewalks, streets, and parks to American public discourse has diminished considerably as new technologies emerge.<sup>230</sup> Unfortunately, the Court has chosen to limit its greatest First Amendment protection under the public forum analysis to these arenas.<sup>231</sup>

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226. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

227. See Day, *supra* note 87, at 176.

228. See, e.g., *Lee*, 505 U.S. at 680 (holding that an airport terminal is not a traditional public forum in part because of "the lateness with which the modern air terminal has made its appearance").

229. See Gey, *supra* note 162, at 1539. Concurring in *Lee*, Justice Kennedy, the author of the Court's opinion in *Forbes*, warned that the public forum doctrine "leaves almost no scope for the development of new public forums absent the rare approval of the government." *Lee*, 505 U.S. at 695 (Kennedy, J., concurring in the judgment). How will the Court classify a government website or handle other issues arising out of emerging Internet technology? Certainly, such technology has not been around immemorially. For a discussion of this question, see Gey, *supra* note 162, at 1611-33.

230. See Gey, *supra* note 162, at 1539. Because the relevant forum in *Forbes* was the debate and not the television station, *Forbes* could have made a compelling argument that the debate was a traditional public forum. See *Forbes*, 118 S. Ct. at 1640. He could have built this argument around the Court's recognition of the importance of candidate debates throughout history. See *id.* Although debates are not open to the general public for expressive purposes, *Forbes* might have argued that candidate debates are the streets and sidewalks of campaigns. Furthermore, he could have explained that debates for "time out of mind, have been used for . . . communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939). In light of the Court's reluctance to acknowledge new traditional fora, see *Forbes*, 118 S. Ct. at 1641, this argument probably would not have succeeded, but *Forbes* made a tactical error by conceding that the debate was not a traditional public forum. At a minimum, such an argument would have provided additional support for Justice Stevens's contention that debates hosted by public television stations "may not squarely fit within our public forum analysis." *Id.* at 1648 (Stevens, J., dissenting).

*Forbes* also may have had a credible claim under the "equal time" provisions of the Federal Communications Act. See Federal Communications Act, 47 U.S.C. § 315 (1994). He could not pursue this claim in court because he had not exhausted his administrative remedies with the FCC. See *Forbes*, 118 S. Ct. at 1638. The "equal time" provision of § 315 stipulates that if a broadcaster allows a candidate to use its station, it "shall afford equal opportunities" to other qualified candidates. 47 U.S.C. § 315(a). As in the Eighth Circuit's first *Forbes* decision, courts have held that § 315 does not create a private cause of action. See, e.g., *Belluso v. Turner Communications Corp.*, 633 F.2d 393, 397 (5th Cir. 1980); *Lamb v. Griffin Television, Inc.*, 804 F. Supp. 1430, 1432 (W.D. Okla. 1992); *Maher v. Sun Publications, Inc.*, 459 F. Supp. 353, 356 (D. Kan. 1978).

231. See *Perry Educ. Ass'n*, 460 U.S. at 44.

While the scope of the traditional public forum has remained static, the Court rarely has classified government property as a limited public forum.<sup>232</sup> When the Court does use the limited public forum classification, it permits the government to exclude speakers who wish to speak in a manner inconsistent with the government's purpose for creating the forum.<sup>233</sup> Justice Blackmun warned that using government intent as a justification for keeping speakers out of a limited forum "empties the limited-public-forum concept of all its meaning."<sup>234</sup> Because the Court's limited public forum analysis begins by asking whether the government sought to open a forum to a particular discussion or speaker, the mere fact that a speaker or topic was excluded demonstrates that even if the government created a limited forum, that speaker or topic was never intended to be included in the forum.<sup>235</sup> As a result, the government normally should win in limited forum cases,<sup>236</sup> particularly given the deference the Court often shows the government in public forum cases.<sup>237</sup> Such deference allows government officials to have limitless control over citizens' abilities to express themselves on public property.<sup>238</sup> Essentially the Court has ceded control to government officials, who are inclined to over-regulate speech.<sup>239</sup> Because speakers cannot

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232. See Marc Rohr, *Freedom of Speech After Justice Brennan*, 23 GOLDEN GATE U. L. REV. 413, 479 (1993); Rick A. Swanson, Comment, *Regaining Lost Ground: Toward a Public Forum Doctrine Under the Illinois Constitution*, 18 S. ILL. U. L.J. 453, 460 (1994).

233. See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985).

234. *Id.* at 815 (Blackmun, J., dissenting); see also Post, *supra* note 85, at 1754 (noting that the modern forum doctrine "renders illusory the harsh first amendment constraints formally made applicable to the limited public forum").

235. See Gey, *supra* note 162, at 1536; see also *Cornelius*, 473 U.S. at 825 (Blackmun, J., dissenting) (noting that "if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum"). Justice Blackmun also criticized the Court's reliance on the government intent standard as a method for classifying property as a nonpublic forum. See *Cornelius*, 473 U.S. at 825 (Blackmun, J., dissenting). Justice Blackmun explained that "[t]he very fact that the Government denie[s] access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum." *Id.*; see also Day, *supra* note 87, at 168 (claiming that the government intent standard is "circular and vacuous"). Justice Blackmun's criticisms have been realized in many nonpublic forum cases as the Court has accorded the government's intent "generous presumptions." See, e.g., *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132-33 (1981); Day, *supra* note 87, at 120.

236. See Gey, *supra* note 162, at 1549-50.

237. See Day, *supra* note 87, at 167.

238. See Post, *supra* note 85, at 1811.

239. See Day, *supra* note 87, at 187. Government officials "have an incentive to

reasonably rely on either the traditional or limited public forum classifications for protection in the vast majority of circumstances, "the Court's modern forum analysis has now become, at best a 'non-forum doctrine' " that restricts free speech.<sup>240</sup>

The Court's nonpublic forum analysis rests on a reasonableness standard that has proven to be a hollow limit on government restrictions.<sup>241</sup> In using this standard, the Court has never articulated why classifying property as a nonpublic forum automatically frees the government from the strict scrutiny the Court applies within other fora.<sup>242</sup> This problem is compounded because the Court merely considers the government's purpose in excluding the speaker when it reviews whether exclusions from a nonpublic forum represent viewpoint discrimination.<sup>243</sup> This consideration ignores whether the exclusion has any discriminatory effects.<sup>244</sup> Ultimately, the framework that the Court has established for reviewing citizens' free speech interests in a nonpublic forum saddles the citizen with the burden of persuasion<sup>245</sup> and, consequently, is extraordinarily speech restrictive.<sup>246</sup>

While the Court's nonpublic forum analysis may be problematic in most circumstances,<sup>247</sup> it is particularly worrisome when applied to candidate debates hosted by public television stations.<sup>248</sup> In the

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overregulate free speech" to "avoid[] disruption" of their normal activities or services. *Id.* (citing David Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFF. L. REV. 175, 207-210 (1983)). Day argues that "free speech doctrine cannot hinge on the 'intent' of the very officials it was designed to constrain. Free speech interests—if they are to actually be free—cannot be hostage to the government's intent." *Id.* at 203.

240. *Id.* at 201; see also *Cornelius*, 473 U.S. at 825 (Blackmun, J., dissenting) (warning that the majority's rationale in *Cornelius* "collapses the three categories of public forum, limited public forum, and nonpublic forum into two"). The Court's classification of property as a nonpublic forum normally represents the death knell for speakers' efforts to gain access to the forum. See, e.g., *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984); *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280-83 (1984).

241. See Dienes, *supra* note 96, at 117 (explaining that the reasonableness standard is "essentially no review at all").

242. See *Cornelius*, 473 U.S. at 821 (Blackmun, J., dissenting).

243. See Post, *supra* note 85, at 1824.

244. See *id.*

245. See Day, *supra* note 87, at 191.

246. See *id.* at 163.

247. See *Cornelius*, 473 U.S. at 825 (Blackmun, J., dissenting); Gey, *supra* note 162, at 149-50.

248. The disparity in lower courts' holdings concerning third-party candidates' right to be included in debates hosted by public television stations and their different methods of analyzing the similar issues not only illustrates the courts' opposing views about the proper

modern age, political candidates depend on mass media for electoral success,<sup>249</sup> and the public relies heavily on television for information about the candidates.<sup>250</sup> As a result, congressional candidates spend an inordinate amount of money attempting to get air time.<sup>251</sup> Too often, non-major-party candidates do not have the financial support necessary to purchase such time, so they are compelled to rely on free air time provided in such forums as candidate debates.<sup>252</sup> These

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classification of the debates within the public forum doctrine but also underscores the futility of using the modern doctrine to establish First Amendment rights. See *Marcus v. Iowa Pub. Television*, 97 F.3d 1137, 1139 (8th Cir. 1996), *aff'd* by 150 F.3d 924 (8th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3323 (U.S. Oct. 28, 1998) (No. 98-710) (upholding public television station's exclusion of independent candidates from debates because the station did not deem the candidates to be newsworthy); *Chandler v. Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486, 494 (11th Cir. 1990) (*per curiam*) (holding that public television stations could exclude candidates from debates); *DeYoung v. Patten*, 898 F.2d 628, 632 (8th Cir. 1990) (holding that a legally qualified independent senatorial candidate had no First Amendment right to air time greater than the right afforded by the Federal Communications Act's equal time provision); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1043 (Former 5th Cir. 1982) (plurality opinion) (*en banc*) (holding that public television stations are not public fora); *DeBauche v. Virginia Commonwealth Univ.*, 7 F. Supp. 2d 718, 724 (E.D. Va. 1998) (holding that a candidate could be excluded from a debate hosted by a private radio station and held at a public university); *Arons v. Donovan*, 882 F. Supp. 379, 390 (D.N.J. 1995) (holding that a public television debate is a limited public forum and a gubernatorial candidate could be excluded from such a debate if the exclusion was not view-point based); *Maher v. Sun Publications, Inc.*, 459 F. Supp. 353, 356-57 (D. Kan. 1978) (noting that, even if the court had proper jurisdiction, it would hold that the equal time doctrine does not require a private newspaper to include a candidate from a debate it hosted even if the debate is televised); see generally Erick Howard, Comment, *Debating PBS: Public Broadcasting and the Power to Exclude Political Candidates from Televised Debates*, U. CHI. LEGAL F., 435 (1995) (discussing the split between the circuits who had considered the issue of excluding candidates from public television debates).

249. See John B. Anderson, Editorial, *Politics Just Got Tougher for Third Parties*, SACRAMENTO BEE, May 29, 1998, at B7, available in 1998 WL 8824618 ("In modern politics, TV is the medium for the message."); Marquand, *supra* note 76, at 1 ("Which candidates are taken seriously in American politics runs hand in hand with which ones get air time or broadcast media.").

250. See Hundt, *supra* note 223, at 1102 (reporting that 80% of the public gets its information about political campaigns "mostly from television") (citing Jeffrey A. Levinson, Note, *An Informed Electorate: Requiring Broadcasters to Provide Free Airtime to Candidates for Public Office*, 72 B.U. L. REV. 143, 146 n.10 (1992) (citing *Survey: Public Prefers Tyson to Politics*, L.A. TIMES, Mar. 5, 1992, at A13)).

251. See *id.* at 1101 (citation omitted) (noting that the average congressional candidate spends approximately \$250,000 on media efforts).

252. See *Man Challenges Ballot Access: Supporter of Green Party Asks State Court to Look at Laws*, CHARLESTON GAZETTE & DAILY MAIL (W. Va.), Sept. 28, 1996, at 8A, available in LEXIS, News Library, Chrgaz File; *Minor-Party Candidates Seek Media Attention*, IDAHO STATESMAN, Oct. 6, 1998, at 4B, available in LEXIS, News Library, Idstmn File; David Wald, *Independent Parties Make Voices Heard at Election Hearing: State Panel Considers Matching Funds Ideas*, STAR-LEDGER (Newark, N.J.), Feb. 19, 1998, at 16. For a discussion of how Minnesota's campaign finance laws helped the Reform



debates generally play an important role in elections.<sup>253</sup> Not only do they provide an opportunity for voters to learn more about the candidates,<sup>254</sup> but they also give candidates a chance to influence the outcome of elections.<sup>255</sup> Winning a campaign debate has a direct impact on candidates' abilities to gain votes in elections.<sup>256</sup> Because

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Party candidate, Jesse Ventura, win the election to become the state's new governor, see Jon Jeter, *Campaign Reform Helped "The Body" Slam Rivals*, WASH. POST, Nov. 5, 1998, at A41. For a discussion of the most famous candidate debates in American history, the Lincoln-Douglas debates, see STEPHEN B. OATES, WITH MALICE TOWARD NONE: A LIFE OF ABRAHAM LINCOLN 149-60 (1994). For a series of thorough examinations of the historical presidential debates between John F. Kennedy and Richard M. Nixon, see THE GREAT DEBATES (Sidney Kraus ed., 1962). For an informative study of the series of debates held between John Kerry and William Weld during their 1996 campaign for the U.S. Senate in Massachusetts, see Douglas G. Rivlin, *Debates and the Candidate Agreement in the 1996 Senate Race in Massachusetts: A Report of the Annenberg Public Policy Center of the University of Pennsylvania* (1998) (unpublished manuscript, on file with the *North Carolina Law Review*). The roadblocks to electoral success of third-party and independent candidates in presidential elections is discussed in Paul R. Abramson et al., *Third-Party and Independent Candidates in American Politics: Wallace, Anderson, and Perot*, 110 POL. SCI. Q. 349 (1995). Meanwhile, the support received by winning third-party and independent candidates is analyzed in Howard L. Reiter & Julie M. Walsh, *Who Votes for Non-Major Party Candidates?: The Cases of Longley, Sanders, and Weicker*, 27 POLITY 651 (1995).

253. For discussions on the role of debates in presidential elections, see generally SUSAN A. HELLWEG ET AL., *TELEVISED PRESIDENTIAL DEBATES: ADVOCACY IN CONTEMPORARY AMERICA* (1992); KATHLEEN HALL JAMIESON & DAVID S. BIRDSELL, *PRESIDENTIAL DEBATES: THE CHALLENGE OF CREATING AN INFORMED ELECTORATE* (1988); TASK FORCE ON DEBATES, *supra* note 67. For recent deliberations on how to engender increased public debate between candidates, see Edward B. Foley, *Public Debate and Campaign Finance*, 30 CONN. L. REV. 817 (1998); Jeremy Paul, *Campaign Reform for the 21st Century: Putting Mouth Where the Money Is*, 30 CONN. L. REV. 779 (1998). For another example of non-major-party candidates attempting to be included in candidate debates, see *Perot v. Federal Election Comm'n*, 97 F.3d 553 (D.C. Cir. 1996).

254. See JAMIESON & BIRDSELL, *supra* note 253, at 126-54.

255. See John G. Geer, *The Effects of Presidential Debates on the Electorate's Preferences for Candidates*, 16 AM. POL. Q. 486, 494-96 (1988); Peter R. Schrott, *Electoral Consequences of "Winning" Televised Campaign Debates*, 54 PUB. OPINION Q. 567, 583 (1990).

256. See Schrott, *supra* note 255, at 581, 583. In a longitudinal study of West German debates between candidates for chancellor, Schrott found that "the winner of the debate always receives a positive boost from that part of the audience [who thought he won]. . . . [T]he other candidates register declines in their overall evaluation." *Id.* at 576. In examining the effects of American presidential candidate debates, Geer found that "debates . . . can cause many cross-pressured and weakly committed individuals to change their preference for president." Geer, *supra* note 255, at 495-96. He also reported that "partisans became stronger supporters of their party's candidate following the debate." *Id.* at 494. But see *id.* at 487 (noting that "[m]ost studies have shown that debates have only a limited ability to influence the attitudes of the electorate, and hence the outcome of elections") (citing David O. Sears & Steven H. Chaffee, *Uses and Effects of the 1976 Debates: An Overview of Empirical Studies*, in THE GREAT DEBATES: CARTER VS. FORD, 1976, at 223, 244 (Sidney Kraus ed., 1979) (explaining that debates were not critical to the 1976 presidential campaign) and Paul R. Hagner & Leroy N. Rieselbach, *The*

non-major-party candidates lack the resources to buy significant air time and can be excluded from debates hosted by private entities, they rely on debates sponsored by public television to gain recognition.<sup>257</sup>

While the *Forbes* Court recognized the special role that debates play in American political campaigns,<sup>258</sup> its reliance on the conventional forum doctrine illuminates the greatest weaknesses of the nonpublic forum analysis.<sup>259</sup> Justice Kennedy, who wrote the Court's opinion in *Forbes*, previously had warned that the nonpublic forum designation "leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area."<sup>260</sup> In past public forum cases, the Court specifically worried about the "lurking doubts about favoritism and sticky administrative problems [that] might arise in parceling out limited space to eager politicians."<sup>261</sup>

By giving "a state-owned public television broadcaster" the authority to determine which candidates would be invited to participate in debates,<sup>262</sup> the Court jumped head-first into the "lurking doubts" about which it was once concerned. In addition, Justice Kennedy's majority opinion "ignored his own counsel" by classifying debates as nonpublic fora.<sup>263</sup> The *Forbes* Court started its opinion by emphasizing the importance of editorial discretion in

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*Impact of the 1976 Presidential Debates: Conversion or Reinforcement?*, in THE PRESIDENTIAL DEBATES 157, 177 (George F. Bishop et al. eds., 1978) (finding that the 1976 presidential debates only bolstered voters' pre-established preferences and concluding it was "doubtful that the debates played an important informational role within the 1976 campaign)). In the most recent gubernatorial election in Minnesota, Reform Party candidate Jesse Ventura's performance in live debates with his Republican and Democratic opponents helped him win the election. See Britt Robson, *Minnesota Discontent and the Invasion of "The Body,"* NEWSDAY, Nov. 8, 1998, at B4, available in 1998 WL 2693084.

257. See Biskupic, *supra* note 44, at A2. For a discussion of one proposal to increase candidates' access to the media by giving free air time, see Hundt, *supra* note 223, at 1100-10.

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

259. See *infra* notes 260-304 and accompanying text. The Court's decision in *Forbes* has been criticized because it "presents a tautology"—a candidate is excluded from a debate "because the forum is closed, and the forum is closed because [a candidate] is excluded from the debate." James, *supra* note 44, at B15. Such rationale merely "begs the question *Forbes* presents to the court." *Id.*

260. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgments).

261. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion).

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

263. James, *supra* note 44, at B15.

broadcast journalism.<sup>264</sup> The Court recognized that the discretion of public television stations to invite candidates to its televised debates was an "exception" that would be subject to the "scrutiny" of the Court's nonpublic forum standards.<sup>265</sup> Despite this exception, the Court's "scrutiny" of nonpublic fora retains broad discretion for government officials, in this case state employed broadcasters.<sup>266</sup> Such discretion gives public television stations wider latitude than private stations in excluding candidates from televised debates.<sup>267</sup>

Some journalists applauded the discretion that the Court afforded AETC and other public television stations<sup>268</sup> to serve as "gatekeepers" to determine what would be aired on their stations and decide who could appear in their debates.<sup>269</sup> After the *Forbes* decision was issued, one Arkansas newspaper wrote that it would prefer to leave the decision "to those organizing the debate than to the kind of bureaucrats who draw up government forms."<sup>270</sup> That newspaper, however, failed to recognize that such a distinction might not exist because "those organizing the debate" were also state employees.<sup>271</sup> The *Forbes* Court also "seriously underestimate[d] the importance of the difference between private and public ownership of broadcast facilities."<sup>272</sup>

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264. See *Forbes*, 118 S. Ct. at 1639. In dicta, the Court established that public television stations would enjoy the same editorial discretion that private stations have in controlling their programming and that such programming is not subject to public forum analysis. See *id.* at 1640.

265. *Id.*

266. See *supra* notes 235-39 and accompanying text.

267. Following *Forbes*, public television stations can exclude candidates from political debates as long as the exclusions are not based on the candidates' opinions and are "reasonable in light of the purpose of the property." *Forbes*, 118 S. Ct. at 1643 (citation omitted). The Court's holding permits public stations to base their decisions on which candidates can participate on criteria that are neither pre-established nor objective. *But cf.* 11 C.F.R. § 110.13(c) (1998) (requiring private television stations to use "pre-established objective criteria to determine which candidates may participate in [the] debate").

268. See Fellone, *supra* note 1, at B7; Paul Greenberg, Editorial, *A Victory for Public TV and Public Debate*, TULSA WORLD (Okla.), May 30, 1998, at 16.

269. See Fellone, *supra* note 1, at B7.

270. Editorial, *A Victory for Debate; and for Public Television*, ARK. DEMOCRAT-GAZETTE, May 24, 1998, at J4, available in LEXIS, News Library, Arkdem File. This argument would carry greater weight if public television journalists were subject to the same regulatory scrutiny as private journalists when determining which candidates will be invited to participate in debates. Unfortunately, they are not. See *Forbes*, 118 S. Ct. at 1645-46 (Stevens, J., dissenting).

271. *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 505 (8th Cir. 1996) (noting that "the people making this judgment were not ordinary journalists: they were employees of government"), *rev'd*, 118 S. Ct. 1633 (1998).

272. *Forbes*, 118 S. Ct. at 1646 (Stevens, J., dissenting).

While public television stations in other states may be governed differently, Arkansas's public television station is an arm of the state government.<sup>273</sup> Its commissioners are "appointed by the Governor with the advice and consent of the Senate,"<sup>274</sup> and its employees are paid by the state.<sup>275</sup> In addition, AETC receives funding through Arkansas's General Education Fund,<sup>276</sup> and the station has the power of eminent domain.<sup>277</sup> Like other Arkansas state agencies, AETC is obligated to submit an annual report to the state's Legislative Council.<sup>278</sup>

Although the *Forbes* Court held that the decision to exclude Forbes was a "reasonable, viewpoint-neutral exercise of journalistic discretion,"<sup>279</sup> it may have left the door wide open for abuse. Naturally, journalists' decisions are colored by partisan beliefs.<sup>280</sup> By essentially giving public television stations free reign to select which candidates appear in debates, the *Forbes* Court did not prevent these partisan beliefs from creeping into the selection process.<sup>281</sup> While such partisanship may be acceptable for private journalists, it becomes troublesome when exercised by public employees.<sup>282</sup>

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273. See ARK. CODE ANN. § 6-3-101 (Michie 1993) (creating AETC); *Arkansas Educational Telecommunications Network* (visited Nov. 12, 1998) <<http://www.aetn.org>> (stating that "AETN is an Arkansas state agency").

274. ARK. CODE ANN. § 6-3-102 (b)(1) (Michie 1993).

275. See *id.* § 6-3-110 (d) (Michie 1993).

276. See *id.* § 19-5-304 (3)(A) (Michie 1993).

277. See *id.* § 6-3-113 (Michie 1993).

278. See *id.* § 25-1-105 (g)(4) (Michie 1993).

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

280. See Thomas E. Patterson & Wolfgang Donsbach, *News Decisions: Journalists as Partisan Actors*, 13 POL. COMM. 455, 465 (1996). Patterson and Donsbach found that "partisanship can and does intrude on news decisions, even among journalists who are conscientiously committed to a code of strict neutrality. . . . [T]heir partisan predispositions affect the choices they make, from the stories they select to the headlines they write." *Id.* at 466. They also found that the partisanship of American broadcasters in local markets was not significantly correlated to news decisions. See *id.* at 464. This finding may not be relevant in the context of AETC and other public television stations which are not *local*, but rather are operated statewide. Patterson and Donsbach only considered national and local (i.e., citywide) media and found that in America and four other countries, "[p]artisanship intrudes on news decisions to a measurable degree among both print and broadcast journalists at both the national and local levels." *Id.* at 463.

281. See *supra* note 235 (discussing the deference accorded to government officials in nonpublic fora).

282. As Justice Stevens warned in his *Forbes* dissent, "[b]ecause AETC is owned by the State, deference to its interest in making ad hoc decisions about the political content of its programs necessarily increases the risk of government censorship and propaganda in a way that protection of privately owned broadcasters does not." *Forbes*, 118 S. Ct. at 1647 (Stevens, J., dissenting).

Partisanship by *private* journalists is more clearly acceptable under the First Amendment. See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (rejecting

Journalists' partisanship in the context of candidate debates is even more disturbing because such partisanship may affect debates twice: Journalists not only decide who gets to participate in debates but also can determine who "wins" through post-debate analysis.<sup>283</sup> Given the impact of "winning" a debate on the outcome of elections, journalists' decision-making and analysis are more critical than the Court recognized in *Forbes*.

While the Court's concern about viewpoint discrimination in nonpublic fora traditionally focuses on the purposes for restricting access to the forum,<sup>284</sup> excluding qualified candidates from public television debates may have significant discriminatory consequences.

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candidate's claim that he had a right of access to space in a private newspaper to respond to editorial criticism); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 113 (1973) (recognizing that "no private individual or group has a right to command the use of broadcast facilities"); *Belluso v. Turner Communications Corp.*, 63 F.2d 393, 398-99 (5th Cir. 1980) (recognizing that the "First Amendment is a restraint on government, not on private persons, . . . [and that the] First Amendment does not guarantee every individual a right of access to broadcasting"); *Mahe v. Sun Publications, Inc.*, 459 F. Supp. 353, 356-57 (D. Kan. 1978) (holding that a private newspaper can exclude a candidate from its debate even if the debate is televised). Nevertheless, private journalists' partisanship in political debates has been checked by federal regulations requiring the sponsoring organization to "use pre-established objective criteria to determine which candidates may participate in a debate." 11 C.F.R. § 110.13(c) (1998). Federal regulations also forbid private stations from using "nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." *Id.*

On the other hand, after *Forbes*, public television stations can exclude any candidate if the exclusion is reasonable and is not based on the candidate's views. *See Forbes*, 118 S. Ct. at 1644. This standard for exclusion permits public television stations to make ad hoc decisions, as opposed to the "pre-established criteria" private stations must use when selecting candidates. *See id.* at 1645 (Stevens, J., dissenting). When such ad hoc decisions are made, partisanship is more likely to creep into a journalist's selection, especially without pre-established objective criteria to check partisanship. Furthermore, the presumably objective "reasonableness" requirement used by the courts in nonpublic forum cases has allowed the state to have substantial discretion when excluding potential speakers. *See supra* notes 241-46 and accompanying text. Finally, public television stations are not prohibited by the regulation disallowing party affiliation to be the "sole objective criteria." *See Forbes*, 118 S. Ct. at 1645 (Stevens, J., dissenting); 11 C.F.R. § 110.13(c). The "political viability" standard used by AETC in *Forbes* served as a de facto reliance on membership in one of the two major political parties as the sole criteria for excluding a candidate. *See Forbes*, 118 S. Ct. at 1648 n.14 (Stevens, J., dissenting) (explaining that the only non-major-party candidate was excluded from the AETC debates). At a minimum, public television stations should be asked to comply with the same regulations that apply to private broadcasters.

283. Studies have demonstrated that journalists play a significant role in determining how voters interpret who won a particular debate. *See Geer, supra* note 255, at 488 (citing Gladys Engel Lang & Kurt Lang, *The Formulation of Public Opinion: Direct and Mediated Effects of the First Debate*, in *THE PRESIDENTIAL DEBATES* 61, 79-80 (George F. Bishop et al. eds., 1978)).

284. *See Post, supra* note 85, at 1824.

Allowing public television stations to limit debates to the major party candidates could “ ‘skew the outcome of elections.’ ”<sup>285</sup> In addition, such limits implicitly endorse America’s two-party political system by allowing only Republican and Democratic candidates to appear in debates sponsored by state agencies.<sup>286</sup> Furthermore, by shutting independent and third-party candidates out of public television debates, the Court’s decision in *Forbes* diminishes the impact that non-major-party candidates can have on elections and the political process.<sup>287</sup>

Although requiring public television stations to include third party candidates may create logistical problems, such problems should not justify allowing stations to exclude a candidate simply because a state-employed journalist decides the candidate is not politically viable or newsworthy.<sup>288</sup> The numerical concerns the Court raised in *Forbes* were not present in any Arkansas congressional election in 1992, where the largest number of candidates running for any given seat was three.<sup>289</sup> Furthermore, the logistical and numerical problems the Court identified could be addressed appropriately through the type of reasonable time, place, and manner regulations that have been upheld in other cases.<sup>290</sup> Certainly, public television stations could design debate formats to accommodate three (or more) candidates. Once candidates are deemed by the state to be legally qualified, there should be no

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285. Biskupic, *supra* note 44, at A2 (quoting Professor James Raskin, who represented Ross Perot’s 1996 presidential campaign and filed a friend of the court brief in support of *Forbes*).

286. *See id.*

287. *See* Anderson, *supra* note 249, at B7; James, *supra* note 44, at B15. John Anderson has fought his own legal battle for the rights of independent candidates. *See* Anderson v. Celebrezze, 460 U.S. 780 (1983) (rejecting Ohio’s early filing deadline for independent presidential candidates).

288. As *Forbes* himself explained, allowing candidates to be excluded because government employees do not consider them to be viable is “[l]ike *Animal Farm* [where] some are more equal than others. If I’m no good, the ones that should decide that are the people themselves, not these bureaucrats.” Williams, *supra* note 14; *see also* *Forbes v. Arkansas Educ. Television Comm’n*, 93 F.3d 497, 504 (8th Cir. 1996) (noting that *Forbes*’s viability “was, ultimately, a judgment to be made by the people”), *rev’d*, 118 S. Ct. 1633 (1998).

289. *See Election Results Table*, *supra* note 76, at A34. In 1998, the largest race for a congressional seat in Arkansas was among three candidates as well. *See* Rachel O’Neal, *Candidates for Arkansas’ District, State, and National Offices*, ARK. DEMOCRAT-GAZETTE, Apr. 5, 1998, at A22, available in LEXIS, News Library, Arkdem File.

290. *See, e.g.,* United States v. Grace, 461 U.S. 171 (1983); *see also infra* notes 305-20 and accompanying text (discussing a possible framework for evaluating First Amendment cases that involve public property that is not readily placed within the public forum doctrine).

difference between them in the eyes of the state, whether they are Republicans, Democrats, Libertarians, or Independents.<sup>291</sup> Furthermore, by including all legally qualified candidates, public television stations would avoid "lurking doubts about favoritism."<sup>292</sup>

Although the Forbes Court feared that public television stations would cease holding debates if forced to invite all candidates to participate, the Court did not explain why public television stations need to host political candidate debates. Public stations are not the only forums in which candidate debates are held.<sup>293</sup> For example, during Nebraska's 1996 senatorial campaign, the major party candidates debated several other times in debates hosted by private organizations.<sup>294</sup> During the 1992 campaign in Arkansas's Third Congressional District, the two major party candidates were able to participate in a debate broadcast by a private television station.<sup>295</sup>

While the Court may be correct in stating that more debates will occur if public television stations host debates,<sup>296</sup> it does not explain

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291. See *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d at 504; see also Oakley, *supra* note 76, at B7 (writing that "if public TV wants to provide a forum, that forum should be entirely open"). Justice Blackmun's dissent in *Cornelius* reminded the Court that "[a]ccess to government property permits the use of the less costly means of communication so 'essential to the poorly financed causes of little people' and 'allow[s] challenge to governmental action at its locus.'" *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 815 (1985) (Blackmun, J., dissenting) (quoting *Martin v. Struthers*, 319 U.S. 141, 146 (1943); Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1288 (1979)). The Arkansas state legislature has not recognized any difference between major party candidates and minor party or independent candidates. Compare ARK. CODE ANN. § 7-7-102 (Michie 1993) (discussing how candidates of political parties qualify for a general election in Arkansas), with ARK. CODE ANN. § 7-7-103 (Michie 1993) (discussing how independent candidates qualify for general elections in Arkansas).

292. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion).

293. As Oakley explains, "[i]n an age when cable and satellite TV provide for hundreds of channels, there are plenty of other options for public debate where private editorial judgment can be used to exclude fringe candidates." Oakley, *supra* note 76, at B7.

294. See C. David Kotok, *Hagel-Nelson Debate Turns to Verbal War*, OMAHA WORLD-HERALD, Sept. 7, 1996, at 1, available in 1996 WL 6030662; C. David Kotok, *Nelson, Hagel Debate Tonight Under Looser Format*, OMAHA WORLD-HERALD, Sept. 29, 1996, at 4B, available in 1996 WL 6032776; C. David Kotok, *Nelson, Hagel Lock Horns over Issues: Hour Forum Is Broadcast Across State*, OMAHA WORLD-HERALD, Aug. 25, 1996, at 1A, available in 1996 WL 6029007; Kotok, *supra* note 66, at 1; *Nelson, Hagel Debate Planned for Hastings*, OMAHA WORLD-HERALD, July 31, 1996, at 23, available in 1996 WL 6026189.

295. See *Hutchinson Says Congress Needs Minister More than Another Lawyer*, ASSOCIATED PRESS POL. SERV., Oct. 15, 1992, available in 1992 WL 5147066. It is worth noting that Forbes did not participate in the debate. See *id.*

296. See *Forbes*, 118 S. Ct. at 1643. Schauer suggests that "limiting participation in the most salient of electoral discourse [candidate debates] has the effect of narrowing political discourse generally, a consequence seemingly at odds with the larger goals of a free speech

why the government has an interest in hosting debates at all. In other cases where the Court has determined that public property is a nonpublic forum, the underlying justification has been that the government must protect the property for its intended use. This justification applies from the mailboxes that facilitate the communication necessary for teachers<sup>297</sup> to the airport terminals that ensure that passengers arrive to their planes on time.<sup>298</sup> In contrast, the *Forbes* Court explained that the purposes of a debate sponsored by a government agency are to educate the public about its choices for a particular office “with minimal intrusion from the broadcaster” and to promote the democracy upon which our government is founded.<sup>299</sup> To these ends, the public would arguably be better served by public television debates that include all candidates who have legally qualified under laws passed by the state legislatures,<sup>300</sup> rather than debates limited to candidates whom a state agency considers “viable.”<sup>301</sup> As the *Perry* Court explained, the “‘First Amendment does not guarantee access to property simply because it is owned or controlled by the government.’”<sup>302</sup> Likewise, as Justice Stevens explained in his *Forbes* dissent: “A state-owned broadcaster need not plan, sponsor, and conduct political debates. . . .”<sup>303</sup> If

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system.” Schauer, *supra* note 205, at 87 n.2; see also Corporation for Public Broadcasting, *Local Debate Night Helps Viewers Choose Candidates* (visited Nov. 12, 1998) <<http://www.cpb.org/library/researchnotes/rn110/rn110.html>> (discussing efforts to broadcast more debates on public television in the 1998 elections); Karen Everhart Bedford, *Election 98 Project Zooms in on Local Contests* (visited Nov. 12, 1998) <<http://www.current.org/el/el819d.html>> (discussing expanded coverage of local elections on public television during the 1998 mid-term elections).

297. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 47-48 (1983).

298. See *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682-83 (1992).

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

300. By only including major party candidates, public television debates mirror their privately sponsored counterparts. If public television stations included all legally-qualified candidates, they would serve a unique function by providing a forum through which citizens could evaluate all of the candidates for whom they will have an opportunity to vote on election day. Following the decision in *Forbes*, public television has more latitude to exclude candidates from debates than private stations. See *Forbes*, 118 S. Ct. at 1645 (Stevens, J., dissenting).

301. The state’s citizens are the best judges of political viability. See *Forbes v. Arkansas Educ. Television Comm’n*, 93 F.3d 497, 504-05 (8th Cir. 1996), *rev’d*, 118 S. Ct. 1633 (1998). Under Arkansas law, the state merely determines who has qualified to be a candidate, not which candidates actually have a good chance of winning the election. See ARK. CODE ANN. §§ 7-7-102, -103 (Michie 1993 & Supp. 1997). As such, legal qualification should be the only measure of “viability” recognized by the state.

302. *Perry*, 460 U.S. at 46 (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981)).

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



public stations chose not to host debates merely because they were obliged to invite all legally qualified candidates, their choice would be unfortunate. At least such a choice would raise no "lurking doubts about favoritism," and "sticky administrative problems" would not "arise in parceling out limited space to eager politicians."<sup>304</sup>

In evaluating the issues raised by Forbes's claim, the Court could have steered clear of the "circuitous route" carved out by the modern public forum doctrine<sup>305</sup> by returning to the roots of the public forum as expressed by Professor Kalven<sup>306</sup> and embodied in *Grayned*<sup>307</sup> and *Mosley*<sup>308</sup> by espousing a balancing test that weighs the individual's interest in speech against the normal use of the public property. Kalven likened the government's role to that of a moderator using "reasonable parliamentary rules" to preside over a town hall meeting.<sup>309</sup> As the Court held in *Grayned*, in cases involving public speech on public property, the central issue "is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."<sup>310</sup> To this end, the government

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304. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion). Such "lurking doubts" also could have been avoided if the Court had stipulated that public television stations that sponsor candidate debates should use "pre-established objective criteria to determine which candidates may participate." *Forbes*, 118 S. Ct. at 1645 (Stevens, J., dissenting) (quoting 11 C.F.R. § 110.13(c) (1998)). Even if public television stations were required to invite all qualified candidates to debates they sponsored, the stations might still be able to circumvent the rule by simply broadcasting debates between major party candidates that have been sponsored by private organizations. See *Maher v. Sun Publications, Inc.*, 459 F. Supp. 353, 356-57 (D. Kan. 1978) (noting that if non-broadcast entities host debates and the debates are covered live by television stations, such coverage is exempt from the Federal Communications Act's equal time provision because it is considered "on-the-spot coverage of bona fide news events").

305. *James*, *supra* note 44, at B15; see also *Forbes*, 118 S. Ct. at 1648 (Stevens, J., dissenting) (noting that the facts of *Forbes* "may not fit squarely within our public forum analysis"). Many commentators have presented alternative frameworks with which to consider issues raised by citizens' efforts to express themselves freely in public places. See, e.g., Dienes, *supra* note 96, at 121 (proposing that the Court should compare the "value of granting access . . . to the costs of the government permitting access"); Farber & Nowak, *supra* note 205, at 1240 (advocating a "focused balancing" approach); Gey, *supra* note 162, at 1576 (suggesting that the doctrine be recast in terms of significant interference with the intended use of the property at issue). For an interesting consideration of *Forbes* as a "hint[] of an institutionally focused approach to government enterprise free speech cases," see Schauer, *supra* note 205, at 87-92, 97-120.

306. See *supra* notes 91-100 and accompanying text.

307. See *supra* notes 109-18 and accompanying text.

308. See *supra* notes 119-25 and accompanying text.

309. Kalven, *supra* note 86, at 23-25 (citing MEIKLEJOHN, *supra* note 97, at 24-28 (1960)).

310. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); see also *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 822 (1985) (Blackmun, J.,

should be permitted to promulgate reasonable time, place, and manner regulations regarding public property.<sup>311</sup> Since the normal activity of a political debate is for candidates to discuss relevant issues, non-major-party candidates such as Forbes should be included in public television debates under *Grayned*. The government agency hosting a debate simply should not be granted the authority to exclude candidates from a forum which serves as the candidates' "town hall."<sup>312</sup>

According to *Mosley*, when First Amendment interests are at stake, government regulations should be subject to the strict scrutiny of the Court.<sup>313</sup> Professor Kalven and the *Grayned* Court agreed that free expression in public places could only face government restriction for "weighty reasons."<sup>314</sup> Therefore, the government "may not select which issues are worth discussing or debating."<sup>315</sup> In *Mosley*, the Court reasoned that if the government gave labor picketers a right to disrupt schools, then other picketers should be granted the same protection without regard to what they were protesting.<sup>316</sup> Similarly, in *Forbes*, once the government decided that a debate would be a good use for public television resources, it should not have been permitted to limit which candidates participated based on which constituencies the candidates represented or how much support their causes had garnered.<sup>317</sup> AETC's concerns of logistical burdens and potential educational value, although important, hardly represent the "weighty reasons" Professor Kalven described and probably would not survive the Court's strict scrutiny.<sup>318</sup>

Finally, as Justice Stevens pointed out, political debates sponsored by state-owned television stations do "not squarely fit

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dissenting) (noting that the Court had "abandon[ed] the compatibility test that always has served as a threshold indicator"); Stone, *supra* note 207, at 93-94 (arguing for a return to the *Grayned* compatibility standard).

311. See *Grayned*, 408 U.S. at 115; Kalven, *supra* note 86, at 28.

312. See *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 504 (8th Cir. 1996), *rev'd*, 118 S. Ct. 1633 (1998).

313. See *Police Dep't v. Mosley*, 408 U.S. 92, 98-99 (1972).

314. *Grayned*, 408 U.S. at 115; Kalven, *supra* note 86, at 21.

315. *Mosley*, 408 U.S. at 96.

316. See *id.* at 101-02.

317. See *Forbes*, 118 S. Ct. at 1633, 1648 (Stevens, J., dissenting).

318. Cf. *United States v. Grace*, 461 U.S. 171, 177-80, 183-84 (holding that sidewalks surrounding the Supreme Court building constitute a public forum and a prohibition against carrying signs, banners, or devices on the public sidewalks surrounding the building is not narrowly tailored and does not serve a significant government interest).

within [the Court's] public forum analysis."<sup>319</sup> Professor Kalven's public forum was never meant to be used in such a context,<sup>320</sup> yet a return to Professor Kalven's initial framework could have been used as a guide to analyze Forbes's First Amendment interests. The use of a balancing test would allow the Court to have the flexibility it needs to facilitate efficient government action while maintaining the integrity of the speech rights guaranteed by the Constitution.

In the end, the decision in *Forbes*, like the decision in other nonpublic forum cases, ignores Professor Kalven's call for "the thumb of the Court [to] be on the speech side of the scales."<sup>321</sup> The *Forbes* Court never seriously considered the speech being sacrificed by not allowing Forbes to participate in the AETC debate.<sup>322</sup> Rather, the Court focused on justifying why AETC should have the power to exclude him.<sup>323</sup> In this regard, the Court appears to value the discretion of government employees over the interest of a candidate to engage in a debate sponsored by a state agency. This conclusion signifies how far the Court has shifted from Kalven's original conception and how speech-restrictive the public forum doctrine has become.

The Court's use of the public forum doctrine in *Forbes* stands as the most recent example of the "problem of formidable practical difficulty" presented by the public forum concept.<sup>324</sup> The current doctrine's rigid classification of property overlooks the value of free expression in public places while allowing government officials to have nearly unfettered discretion in restricting such expression. The Court should consider returning to the theoretical roots of the forum doctrine by weighing society's interest in speech against the normal use of the public property. By allowing the government to exclude a legally qualified candidate from participating in a state-sponsored political debate, the Court has deprived voters of an opportunity to watch a "debate on public issues [that is truly] uninhibited, robust, and wide-open" and, consequently, of an opportunity to make a fully informed choice in their elections.<sup>325</sup>

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

320. When Kalven initially wrote about the public forum, he sought to address "mass protest in public places." Kalven, *supra* note 86, at 11.

321. *Id.* at 28.

322. See *Forbes*, 118 S. Ct. at 1641-44 ("The issue . . . is whether the debate was a designated forum or a nonpublic forum.").

323. See *id.* (explaining that labeling the debate a limited public forum "would place a severe burden upon public broadcasters who air candidates' views").

324. Kalven, *supra* note 86, at 12.

325. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

In the 1998 election, Ralph Forbes ran for congress again in Arkansas's Third District.<sup>326</sup> As in the past, AETC planned to host debates for candidates in each of Arkansas's congressional districts.<sup>327</sup> Perhaps recognizing the value of a more inclusive debate, AETC invited Forbes to participate.<sup>328</sup> Ironically, Forbes's opponent, incumbent Representative Asa Hutchinson, declined to participate.<sup>329</sup>

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326. See Lemons, *supra* note 44, at A1. Forbes ran as a candidate from the Reform Party "against the party's wishes." *A Reform Party Candidate Challenging Republican . . .*, ASSOCIATED PRESS POL. SERV., Nov. 3, 1998, available in 1998 WL 7462220; see also *Candidates for Arkansas' District, State, and National Offices*, ARK. DEMOCRAT-GAZETTE, Apr. 5, 1998, at A22, available in LEXIS, News Library, Arkdem File.

327. See David A. Lieb, *The Debate May Never Happen, but Ralph Forbes . . .*, ASSOCIATED PRESS POL. SERV., Sept. 4, 1998, available in 1998 WL 7442545.

328. See *id.*

329. See *id.* Subsequently, AETC gave Forbes 10 minutes of free air time. See Berry *Unopposed, Hutchinson Faces No Democrat Opposition*, ASSOCIATED PRESS POL. SERV., Oct. 26, 1998, available in 1998 WL 7459292. United States Representative Asa Hutchinson is the brother of Forbes's 1992 opponent, current Senator Tim Hutchinson. See Terry McNeal, *As A Jury, Senate is Full of Conflicts: Lawmakers Vow Impartiality Despite Personal Connections*, WASH. POST, Jan. 15, 1999, at A18.