Professionalism, Oversight, and Institution-Balancing: The Supreme Court's "Second Best" Plan for Political Debate on Television

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Televised political debates have become a staple of modern elections. Proponents of open access to such debates argue that third party participation is a democratic necessity. They see as catastrophic the Supreme Court's decision in Arkansas Educational Television Commission v. Forbes, *in which a state broadcaster was given the discretion to exclude a minor party candidate from a televised debate so long as the decision was viewpoint-neutral. This Article reads the Court's decision as a functional, "second best" solution that seeks to mediate the expressive and democratic values implicated in both open and closed-access models. More generally, the Article sees in* Forbes *germs of an institution-balancing vision of politics in the media. Under this approach, public broadcasters would be empowered to serve as realistic programming counterweights to the electoral coverage of the commercial media. While there are reasons to be skeptical about the ultimate effectiveness of this institution-balancing strategy, only until refined, election-specific and historically-grounded data are collected and assessed in a context-specific fashion can we begin to evaluate the Court's approach in application.*

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Introduction

One of the major policy issues of the 2000 presidential election season was whether candidates other than Vice President Albert Gore and Governor George Bush would be permitted to participate in the presidential debates. Much controversy accompanied the decision of the Commission on Presidential Debates ("CPD") to set the debate inclusion threshold at a public support figure that effectively excluded all but the Democratic and Republican candidates. Demonstrating public engagement with the issue, legal claims were supplemented by street protests: Third-party proponents staged a "Boston TV Party," dumping televisions into Boston Harbor to protest Ralph Nader's exclusion from the first Bush/Gore debate.[1]

Debate access is one part of a much larger renaissance of arguments for campaign reform.[2] The power of the purse in elections and the

1 *See, e.g.*, Eric Bailey, *Campaign 2000, Shut Out of the Debates, Nader and Buchanan Have Plenty of Company*, L.A. TIMES, Sept. 30, 2000, at A13; Marcella Bombardieri, *Activists Take Time to Speak Up, Presidential Debate a Good Opportunity to be Seen and Heard*, BOSTON GLOBE, Oct. 3, 2000, at B1.

2 On the media front, in addition to free access to political debates as an antidote to the poverty of media political coverage, campaign reformers since the last presidential election have been

dominance of the Democratic and Republican parties in the electoral field have triggered calls for democracy-enhancing corrections. Proponents of liberal debate access rights worry that failing to require participatory diversity further entrenches the duopoly of American politics and precludes any true political alternatives to the status quo. By contrast, opponents of unconstrained access rights worry that political debates crowded with fringe or "spoiler" candidates will distract the public from its choices among realistically electable contenders.

The issue of equal access to public television debates, as a constitutional matter, was put to the Supreme Court in 1998 in *Arkansas Educational Television v. Forbes*.[3] The Court there held that a state-owned television network had the discretion to exclude a minor-party candidate from a congressional election debate sponsored by the station. The predominant response to the decision has been critical, with some going so far as to argue that *Forbes* was a complete "catastrophe."[4]

None of the scholarly reactions to date, however, has explored the degree to which the Court in *Forbes* was engaged in a "second-best" enterprise—a compromise attempt to mitigate the difficulties posed by both open and closed-access systems. Beginning from the assumption that an open-access model—as a practical matter in the "real world"—would undermine, rather than advance, democratic discourse about elections, the *Forbes* majority opted for a model of bounded discretion for governmental actors applying professional journalistic norms. Such discretion would be constrained both by Federal Communications Commission (FCC) licensing oversight and by particularly searching judicial review of debate access disputes.

More broadly, *Forbes* appears to illustrate an overall media strategy on the part of the Court that seeks to enhance electoral discourse functionally and structurally with a "checks-and-balances" structure provided by the counterpoint of public and private media and federal oversight of state broadcasters. The Court's implicit approach is apparently designed to provide a realistic media structure that accounts for the different incentives faced by various types of media. Ideally, such an institution-balancing structure could suppress the worst excesses of

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making recommendations for the mandatory provision of free airtime to candidates by broadcasters. *See, e.g.*, Lawrie Mifflin, *The Backdrop: Crusader for Free Airtime Wins a Big Ally*, N.Y. TIMES, Mar. 12, 1997, at A20; Rebecca R. Reed, *Free Air Time: Campaign Finance Reform or Constitutional Violation?*, 18 COMM. LAW. 21 (2000).

3 523 U.S. 666 (1998).

4 *E.g.*, Jamin Raskin, *The Debate Gerrymander*, 77 TEX. L. REV. 1943, 1946 (1999). Reflecting the observers' substantive visions of appropriate electoral decision-making in a democracy, a few commentators have endorsed the decision as an appropriate judicial recognition of the dominance of the two-party system. *E.g.*, Daniel H. Lowenstein, *Election Law Miscellany: Enforcement, Access to Debates, Qualification of Initiatives*, 77 TEX. L. REV. 2001 (1999).

commercial television while affirmatively allowing public media to play a gap-filling role where market failures are likely to limit the output of commercial outlets. Instead of command-and-control regulations designed to perfect commercial broadcasting, this approach appears to seek enhanced public discourse by empowering public broadcasters to be effective competitors to the commercial voice.

Is the Court's approach likely to expand electoral discourse? On the one hand, the decentralization of public television in the United States and the fact that *Forbes* permits discretion, rather than mandating third party exclusion, suggest that debate exclusion will not become government orthodoxy. On the other hand, while none is dispositive, there are reasons to be skeptical about the ultimate effectiveness of the Court's compromise media strategy.

Ultimately, only future experience with the editorial decisions of public broadcasters will determine whether the Court's attempt to substitute bureaucratic and professional expertise for populist access will achieve its goal of an informed electorate. The important issue then becomes the sophistication with which the results of such experience are collected, assessed, and analyzed.

Part I of this Article describes the debate over open access to political debates and the scholarly reactions to *Forbes*. Part II explores *Forbes* as a second-best alternative with a rational structure of bounded journalistic discretion. Finally, Part III proposes that *Forbes* should be read as part of an overall media strategy characterized by a contrapuntal relationship between public and commercial television. I conclude by arguing that although the Court's approach can be challenged by reference to the commercialization of public television, the FCC's history of deference to broadcasters, the questionable efficacy of structural guarantees of independence, and the lessons of the 2000 debate season, *Forbes* nevertheless permits an experiment whose effectiveness can be assessed only over time, on the basis of empirical data for whose collection and analysis the case should provide an impetus.

I. The Debate over Open Access to Political Debates

Although arguments for First Amendment-based rights of public access to the broadcast media have been in the air since Professor Jerome Barron's seminal article[5] introduced the notion, media access claims have recently enjoyed a renaissance in the context of political debates.[6]

5 Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

6 *See, e.g.*, Raskin, *supra* note 4, at 1952-77; OWEN M. FISS, LIBERALISM DIVIDED 9-20 (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 17-51 (1993); Martin H.

Candidates seeking access to televised debates have made both statutory[7] and constitutional[8] arguments for free expression and effective political process. Until the 1990s, however, none of the cases granted candidates a general right of access to debates under any of the proffered theories.[9] The general assertion of a First Amendment right of access to the airways had been addressed and rejected by the Supreme Court with respect to commercial broadcasters in *CBS, Inc. v. Democratic National Committee.*[10] However, until *Forbes,* the First Amendment status of *public* broadcasters had not been addressed specifically by the Court.[11]

Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. L. REV. 1083 (1999).

7 Historically, statutory arguments for debate access have rested primarily on the equal opportunities provisions of the Communications Act of 1934, 47 U.S.C. § 315 (2000), and the tax laws. *See, e.g.*, Fulani v. League of Women Voters Educ. Fund (Fulani I), 882 F.2d 621 (2d Cir. 1989) (featuring charge by independent presidential candidate in 1988 that the League of Women Voters should be precluded from staging televised presidential debates because candidate's exclusion constituted "partisan activity," triggering loss of tax-exempt status). Other statutory claims have been made as well. *See, e.g.*, Graham Clusen, 427 F. Supp. 820 (D.C. Cir. 1977) (featuring a claim by a voter in the 1976 presidential election that networks' decisions to exclude all presidential candidates other than Gerald Ford and Jimmy Carter from electoral debates conspired forcibly to deprive him of an informed vote under 42 U.S.C. § 1985 (1970)).

In the statutory context, under the Communications Act, courts have held uniformly that individual candidates do not have standing to bring actions under § 315's equal opportunities provision. *See, e.g.*, Forbes v. Ark. Educ. Television Communication Network Found., 22 F.3d 1423, 1427-28 (8th Cir. 1994), *cert. denied*, 513 U.S. 995 (1994), 514 U.S. 1110 (1995); Belluso v. Turner Communications Corp., 633 F.2d 393, 397 (5th Cir. 1980); Daly v. CBS, Inc., 309 F.2d 83, 85 (7th Cir. 1962); Lamb v. Griffin Television, Inc., 804 F. Supp. 1430 (W.D. Okla. 1992); Maher v. Sun Publ'ns, Inc., 459 F. Supp. 353 (D. Kan. 1978); Ackerman v. CBS, Inc., 301 F. Supp. 628, 631 (S.D.N.Y. 1969). Standing also derailed access claims grounded on the neutrality required by the tax-exempt status of the sponsoring organizations, *e.g.*, Fulani v. League of Women Voters Educ. Fund (Fulani II), 935 F.2d 1324, 1325-29 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 912 (1992), as did substantive findings that exclusion of a candidate from primary debates should not be considered partisan activity for tax status purposes. *E.g.*, *Fulani I*, 882 F.2d at 628-30.

Recent versions of the statutory argument have focused on federal election law, arguing unsuccessfully that the Federal Election Commission's debate regulations are inconsistent with their enabling statute, that exclusionary access decisions are actually illegal campaign contributions to the invited candidates, and that debate staging criteria adopted by the CPD do not satisfy the objectivity requirements of federal election law. *E.g.*, Becker v. FEC, 112 F. Supp.2d 172 (D. Mass. 2000); Buchanan v. FEC, 112 F. Supp.2d 58 (D.C. 2000).

8 *See, e.g.*, Chandler v. Ga. Pub. Telecomm. Comm'n, 917 F.2d 486 (11th Cir. 1990) (addressing First Amendment and equal protection claims); Johnson v. FCC, 829 F.2d 157, 164 (D.C. Cir. 1987) (addressing First and Fifteenth Amendment claims).

9 Forbes v. Ark. Educ. Television Comm'n v. Forbes, 93 F.3d 497 (8th Cir. 1996), *rev'd sub nom.* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); *see also* Arons v. Donovan, 882 F. Supp. 379, 387 (D.N.J. 1995) (suggesting that the New Jersey Public Broadcasting Authority, by its programming sponsorship of interactive gubernatorial debates, may have created a limited public forum in which gubernatorial candidates had a First Amendment right to participate and from which plaintiff could not have been constitutionally excluded on the basis of viewpoint).

10 412 U.S. 94 (1973). The Court had upheld the constitutionality of a limited statutory right of reasonable access for federal candidates under § 312(a)(7) of the Communications Act in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

11 Indeed, the Court had only addressed the content regulation of public television stations in *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down an amendment to the Public Broadcasting Act of 1967 prohibiting "editorializing" by noncommercial educational television

A. *First Amendment Claims for Access to Public Broadcaster Debates*

Arkansas Educational Television Commission v. Forbes gave the Supreme Court the opportunity to address the question of access rights in the context of state television. Ralph Forbes, a perennial political aspirant, was a candidate for a federal congressional seat from the Third District of Arkansas in the 1992 elections. Forbes had qualified for the ballot on the basis of a relatively small number of signatures of qualified electors. Having previously campaigned as a member of the American Nazi Party and the Republican Party, Forbes ran as an independent in 1992. A Klu Klux Klan member who had successfully managed David Duke's run for Congress from Louisiana, Forbes had himself unsuccessfully run between 1985 and 1992 for U.S. Senate, Lieutenant Governor of Arkansas, and a local school board seat.[12] In the course of his 1992 campaign, despite his later testimony that it would have taken a "miracle" for him to have won the election, Forbes requested participation in a political debate to be staged by the Arkansas Educational Television Network (AETN).[13]

The AETN, a state-owned public television network, did not give him the oppoftunity to participate and Forbes sued. Although he lost in the district court, the Eighth Circuit held that Forbes had a "qualified right of access" created by AETN's sponsorship of the debate, and that AETN must have "a legitimate reason to exclude him strong enough to survive First Amendment scrutiny."[14] Applying that standard on remand, judgment was entered for the defendant after a jury trial.[15]

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stations receiving grants from the Corporation for Public Broadcasting).

12 For accounts of Forbes' political history, see, for example, Associated Press, *Arkansas Runoff Offers Foes at Polls Who Are Poles Apart*, ORANGE COUNTY REG., June 12, 1990, at A5; Associated Press, *Duke Claims Credit for Shifting Debate to Right in Campaign for U.S. Senate*, BATON ROUGE ST. TIMES, June 11, 1990, at 4D; 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; Clay Hathorn, *An 'Unbelievable' Runoff, Ex-Nazi Faced Black in Arkansas GOP Race*, DALLAS MORNING NEWS, June 11, 1990, at 7D; John Reed, *Forbes Softens Racist Rhetoric to Gain Votes*, ARK. GAZETTE, June 10, 1990, at 1A; John Reed & Jim Nichols, *Stark Choices in Arkansas Race*, GANNETT NEWS SERVICE, June 10, 1990, 1990 WL 4911545; Mike Rodman, *Suit May Affect Public TV Stations: Supreme Court to Rule on Exclusion from 92 Arkansas Debate*, DALLAS MORNING NEWS, Jan. 25, 1998, at 43A; and Leonard Zeskind, *For Duke, Just a Start*, N.Y. TIMES, Oct. 9, 1990, at A25.

13 Tr. 162 (R. Forbes), J.A. 100; Forbes Dep. 82, Brief for the Petitioner at 14, Ark. Educ. Television Comm'n v. Forbes, 93 F.3d 497 (8th Cir. 1996). The Arkansas Educational Television Commission (AETC) is an Arkansas state agency owning and operating a network of five non-commercial television stations referred to as the Arkansas Educational Television Network (AETN). Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998).

14 Forbes v. Ark. Educ. Television Communication Network Found., 22 F.3d 1423, 1428 (8th Cir. 1994), *cert. denied*, 513 U.S. 995 (1994), 514 U.S. 1110 (1995).

15 On remand, the district court found that the debate was a non-public forum, and the issue became whether Forbes' views were the reason for his exclusion. The jury found on special verdict that the decision to exclude Forbes had not been influenced by political pressure or disagreement with his views. Forbes v. Ark. Educ. Television Comm'n v. Forbes, 93 F.3d 497, 500-01 (8th Cir. 1996), *rev'd sub nom.* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

The Eighth Circuit Court of Appeals reversed that judgment, finding that although the Arkansas Educational Television Commission's (AETC's) exclusionary decision had been made in good faith, AETC had opened its facilities to candidates running for the Third District Congressional seat—thereby making the debate a limited public forum to which all candidates legally qualified to appear on the ballot for that seat would have a presumptive First Amendment right of access.[16] The station's reasons for excluding Forbes—that he was not a "viable candidate" and that he had "no chance to win"—were found insufficient under strict scrutiny.[17] The court deemed the State of Arkansas to have defined political viability in its ballot access statutes: "Whether he was viable was ultimately a judgement to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication."[18] Noting that "[a] journalist employed by the government is still a government employee," the court found the fact of state ownership determinative in its analysis.[19] Thus, in *Forbes*, the Eighth Circuit held that even if the actual decision to exclude a candidate from a televised debate by a state entity was based not on his viewpoints but simply on a characterization of his electoral viability, that decision would not pass strict constitutional muster because of the vagueness and subjectivity of the standard used in determining viability.

The Supreme Court, in both the majority and the dissenting opinions, rejected the notion of a general First Amendment right of access to political debates for all ballot-qualified candidates.[20] Beginning with the proposition that the public forum doctrine should not be mechanically extended to the "very different context" of public television broadcasting,[21] Justice Kennedy's majority opinion asserted that "[a]s a

16 *Id.* Cases prior to *Forbes* had rejected the claim that public broadcasting as a whole should be considered a public forum. *See, e.g.*, De Young v. Patten, 898 F.2d 628, 632-33 (8th Cir. 1990); Johnson v. FCC, 829 F.2d 157 (D.C. Cir. 1987); Kennedy v. FCC (Kennedy I), 636 F.2d 417 (D.C. Cir. 1980).

By contrast to the Eighth Circuit in *Forbes*, the Eleventh Circuit had concluded on similar facts in *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990), that neither the First nor the Fourteenth Amendments had been violated by a public television station's denial of debate access to third-party candidates. The Court granted certiorari in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), because of the "manifest importance" of the case and to resolve the lower court conflict. *Id.* at 672.

17 93 F.3d at 504-05.

18 *Id.*

19 *Id.* at 505.

20 In the absence of congressional commands to "[r]egimen[t] broadcasters" in that way by exchanging public trustee broadcasting with rights of access, 523 U.S. at 675 (quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1973)), the majority was "disinclined to do so through doctrines of [its] own design." *Id.* at 675. While the First Amendment may not bar Congress from imposing neutral access rules for public broadcasting, "in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming." *Id.*

21 *Id.* at 672-73.

general rule," the inevitability of editorial judgments should protect public broadcasters from claims of viewpoint discrimination as a result of their programming decisions.[22] Broad rights of access for outside speakers would be "antithetical"[23] to the journalistic discretion that stations must exercise "to fulfill their journalistic purpose and statutory obligations."[24]

Having dispensed quickly with the possibility that a televised debate should be classified as a traditional public forum,[25] the majority also rejected the Eighth Circuit's view that it should be considered a limited or designated public forum. The majority read the designated public forum precedents as requiring that the government have intended to designate a public forum, and concluded 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. In *Forbes*, the Court found that the AETC debate was not intended to provide general access to all of the candidates for the congressional seat. Rather, the AETC "reserved eligibility for participation" in the debate to candidates for the Third District congressional seat (as opposed to some other seat), and then "made candidate-by-candidate determinations," selecting from within the eligible group.[26]

According to the majority, candidate debates "present the narrow exception to the rule" that public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine.[27] Because of the exceptional significance of debates in the electoral process and because the debate is by design a forum for candidates' political speech with minimal intrusion by the broadcaster, the *Forbes* majority held that the debate was a nonpublic forum, from which AETC could exclude Forbes only in the reasonable, viewpoint-neutral, exercise of its journalistic discretion.[28]

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22 *Id.* at 673. Programming decisions would be "particularly vulnerable" to such claims of viewpoint discrimination even if the exclusions were "principled" and "rooted in sound journalistic judgment" because "a broadcaster by its nature will facilitate the expression of some viewpoints instead of others." *Id.* at 674.

23 *Id.* at 673.

24 *Id.* Citing *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 105, and *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984), Justice Kennedy said that Congress rejected open access norms for broadcast facilities and that television broadcasters enjoy the widest journalistic freedom consistent with their public responsibilities. 523 U.S. at 673-74. One of their public responsibilities is to schedule programming serving the public interest: "Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming." *Id.* at 674. Thus, broadcasters have two intended purposes that distinguish them from public parks and funding for state university student publications: 1) journalistic purposes, and 2) statutory obligations to provide programming serving the public interest.

25 523 U.S. at 678.

26 *Id.* at 680.

27 *Id.*

28 *Id.* at 676. Although unlimited access is not feasible in many cases for candidate debates, the majority opined that "the requirement of neutrality remains; a broadcaster cannot grant or deny

The Supreme Court majority found that the record supported the jury's finding that the exclusion was not based on Forbes' viewpoints. The record evidence reflected a number of claims on the part of journalists at AETN that they rejected him because he was not a viable or newsworthy candidate.[29] The majority found it "beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest."[30]

Three dissenting Justices—led by Justice Stevens—would have affirmed the judgment of the Eighth Circuit. While the dissent agreed with the majority that the Constitution does not impose on state-owned television networks the constitutional obligation to allow every candidate access to station-sponsored political debates, Justice Stevens contended that AETC's decision was an exercise of standardless discretion particularly problematic for a state-owned entity.[31] For the dissent, AETN's status as a governmental entity would necessarily increase the risk of government censorship and propaganda[32] with respect to "speech

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access to a candidate debate on the basis of whether it agrees with a candidate's views." *Id.* Viewpoint discrimination in this context would present "an inevitability of skewing the electoral dialogue." *Id.*

29 In the lower court, AETN apparently relied on Forbes' lack of political viability as the basis for his exclusion. At the Supreme Court, the network characterized its decision as based on newsworthiness. *See* Brief for the Respondent Forbes at 4, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998). Not much was made of the change from political viability to newsworthiness as a justificatory criterion in the Supreme Court's opinion, although the *Forbes* brief had strongly criticized the shift as permitting even more unaccountable discretion to be reposed in state actors because of the broader scope of newsworthiness. *See id.* at 17-18.

30 523 U.S. at 682. The editors testified that Forbes was a perennial candidate who had garnered little public support in past campaigns; that he had not received significant financial support for his campaign; that he did not have a campaign headquarters or paid, full-time campaign staff; that he never spoke before large groups or rallies (having declined one of two speaking invitations he received); that the news organizations did not consider him a serious candidate; and that the AP did not plan to report his name in the election-night results. Virtually all of these elements were mentioned in the majority opinion as reflecting the journalistic judgment of the AETN personnel. The Court also noted Forbes' own characterization of his campaign organization as "bedlam" and his media coverage as "zilch." *Id.*

31 As Justice Stevens put it,

> Like the Court, I do not endorse the view of the Court of Appeals that all candidates who qualify for a position on the ballot are necessarily entitled to access to any state-sponsored debate. . . [However,] [r]equiring government employees to set out objective criteria by which they choose which candidates will benefit from the significant media exposure that results from state-sponsored political debates would alleviate some of the risk inherent in allowing government agencies—rather than private entities—to stage candidate debates.

Id. at 694-95 (Stevens, J., dissenting).

32 "Because AETC is owned by the State, deference to its interest in making ad hoc decisions about the political content of its programs necessarily increases the risk of government censorship and propaganda in a way that protection of privately owned broadcasters does not." *Id.* at 689. The dissent noted that Congress initially chose a system of private broadcasters because "public ownership created unacceptable risks of governmental censorship and use of the media for propaganda," *id.* at 688, and that it even attempted to prohibit public stations from editorializing for fear of such effects.

that plays a central role in democratic government."[33]

The ad hoc decision of the AETC staff should have been held unconstitutional, according to the dissent, based on the reasoning of the Court's parade permit precedents. Those cases had held unconstitutional rules that allowed public officials to make licensing decisions without reference to narrow, objective and definite standards to guide the licensing authority.[34] The dissent would instead have imposed a "modest requirement" that public broadcasters apply pre-established, neutral and objective criteria to identify debate invitees.[35] Had such criteria been applied, the dissent suggested, AETN's rejection of Forbes' request would have been suspect.[36]

Thus, while the dissenting opinion did not specify the selection criteria itself, it called for public stations to use and adhere to pre-established, neutral and objective criteria to determine who among qualified candidates may participate in debates—praising such criteria as "providing the public with some assurance that state-owned broadcasters cannot select debate participants on arbitrary grounds."[37]

B. *Reactions to Forbes*

While a few scholars do appear to support the result in *Forbes*,[38] the largest, and most vehement, group consists of those critics who support the

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33 *Id.* at 689. The opinion cited *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), to demonstrate prior recognition of the distinctiveness of, and particular problems posed by, public broadcasters. 523 U.S. at 687. Justice Stevens also distinguished *FCC v. League of Women Voters*, 468 U.S. 364 (1984), on the ground that that case implicated the right of wholly private stations to express their own views on a wide range of topics that have nothing to do with government. 523 U.S. at 689.

34 523 U.S. at 691.

35 *Id.* at 694-95.

36 The dissent criticized the majority for its too-easy acceptance of AETN's exclusionary judgment regarding the significance of Forbes' candidacy, noting that Forbes had been a serious contender in a prior primary race for the Republican nomination for Lieutenant Governor, and that the network's decision to eliminate him from the debate may have "determined the outcome of the election." *Id.* at 684-85. On these facts, Justice Stevens claimed that the Eighth Circuit had rightly characterized the staff's appraisal of political viability as too subjective: "The apparent flexibility of AETC's purported standard suggests the extent to which the staff had nearly limitless discretion to exclude Forbes from the debate based on ad hoc justifications." *Id.* at 686. In exercising their subjective judgments, the station employees were free to rely on factors—such as Forbes' relative lack of campaign funds—that the dissent characterized as arguably favoring inclusion. *Id.* at 692.

37 *Id.* at 694.

38 *See, e.g.*, Lowenstein, *supra* note 4, at 2009. *Cf.* Burt Neuborne, *Conflicting Claims to First Amendment Rights*, 15 TOURO L. REV. 1557, 1563-64 (1999) (arguing for objective access rules but speculating that the *Forbes* majority did not wish to foreclose full discussion of public financing of elections by creating an access precedent that would apply by analogy to election funding); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 86-87 & 88 n.12 (1998) (expressing doubts about the *Forbes* holding vis-à-vis debates, but nevertheless recognizing that debate access raises the familiar problem of allocating scarce resources between the competing claims of participatory diversity on the one hand and the actual preferences of audiences on the other).

open access viewpoint.[39] Lambasting the majority opinion as "an analytical mess and a First Amendment catastrophe,"[40] opponents interpret it as placing the Court's imprimatur on government-supported "debate gerrymandering" and political discrimination.[41]

Some of the more optimistic *Forbes* analysts focus less on the debate question than the more general issue of the Court's approach to the government as speaker.[42] Even they, however, are engaged in finding the silver lining in the cloud—either seeing the opinion as a "near miss" in a positive doctrinal development, or finding in it the seeds of a new and affirmative turn in free speech theory. One theorist sees what is important in *Forbes* as the intimation of an institution-specific First Amendment approach to the government's intrinsically content-based enterprises, but regrets this path as "not fully taken" by the Court for reasons of judicial methodology and traditional interpretation of First Amendment doctrine.[43] Another focuses not on the part of the opinion affirming discretionary government speech, but on the Court's refusal to go further in guaranteeing complete public broadcaster discretion.[44] On the latter view, the important aspect of *Forbes* is that the limited right of access to debates created by the Court's requirement of viewpoint neutrality in debate selection decisions could extend to constrain private commercial stations as well, with respect to those managerial decisions that undermine television's educational function.[45] Yet another analyst, while implicitly

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39 Jennifer Wright-Brown, *Finding Room for Independent Candidates in Light of* Arkansas Educational Television Commission v. Forbes, 7 COMMLAW CONSPECTUS 137 (1999); R. George Wright, *Dominance and Diversity: A Risk-Reduction Approach to Free Speech Law*, 34 VAL. U. L. REV. 1, 34 (1999); Jennifer Dillman, Note, Arkansas Educational Television Commission v. Forbes—*Journalistic Editorial Discretion or Unconstitutional Prior Restraint?*, 30 U. TOL. L. REV. 331 (1999); Daniel B. Greenfield, Note, Arkansas Educational Television Commission v. Forbes*: Ending Debate on Political Debates*, 50 MERCER L. REV. 611 (1999); Sutton I. Kinter III, Comment, *Enduring the Reign of Tweedledee and Tweedledum: How the Court Further Entrenched America's Two Party Duopoly in* AETC v. Forbes *and How It Can Be Dredged Out*, 49 CASE W. RES. L. REV. 257 (1999); Monica Mardikian, Note, *The* Forbes *Decision: Has the Court Closed the Public Forum on Candidate Speech?*, 29 SETON HALL L. REV. 1069 (1999); James B. Toohey, Note, *A Standard With No Moxie*, 30 LOY. U. CHI. L.J. 765 (1999).

40 Raskin, *supra* note 4, at 1946.

41 *Id.* at 1945, 1995.

42 *See, e.g.*, Randall P. Bezanson, *The Government Speech Forum:* Forbes *and* Finely *and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 993 (1998) (describing *Forbes* as beginning the "important task" of conceptualizing the government's constitutional authority as speaker rather than speech regulator or manager); Schauer, *supra* note 38, at 86 (arguing that *Forbes*' reliance on institution-specific ideas—such as the autonomy of journalistic decisionmaking—moved the Court closer to a workable approach to managing the free speech issues in the government's own enterprises).

43 Schauer, *supra* note 38.

44 Owen Fiss, *The Censorship of Television*, 93 NW. U. L. REV. 1215, 1233-34 (1999); *see also* Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999) (suggesting that *Forbes*' debate exceptionalism may contain the seeds of more expansive electoral expansionism).

45 Professor Fiss suggests that *Forbes* and some other recent Supreme Court media cases

commending the *Forbes* Court for its recognition of government's constitutional rights of expression, concludes that the Court does not clearly explain the scope of those rights and their limits.[46]

This Article takes a different tack, adopting a holistic reading of *Forbes* in which the Court's doctrinal compromise is explained as a response to the contending institutional norms of public broadcasting and political debates. It articulates the second-best reasons for supporting the *Forbes* approach, and situates *Forbes* in a contrapuntal media strategy whose viability can only be tested by experience and empirical study.

C. *Pros and Cons of Open Debate Access*

Critical reactions to *Forbes* must be placed in the fuller perspective of the current debate on open access to public-station programming. Despite the vehemence of the critiques, *Forbes* is a difficult case because it involves incommensurable commitments and significant values on both sides of the equation. Those who seek access equality rely both on speech values and on norms of participatory democracy to ground their claim for a rich and unconstrained political conversation.[47] But their opponents as well could argue against constitutional access rights on the basis of speech values and the democratic need for informed voter choice in a context of scarce resources.[48]

1. Pro Open Access

Advocates of open access argue that mandated third party inclusion in televised political debates both avoids the electoral harms of state censorship in the political arena and affirmatively benefits the electoral process in expanding political debate beyond the two-party system. From the process-protective point of view, access proponents contend that open

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show a Court attending to managerial, private censorship as well as state censorship. Fiss, *supra* note 44, at 1224. Professor Fiss sees Justice Breyer's approach to the First Amendment as "the first hesitant step toward the recovery of a jurisprudence that sees the First Amendment more as a protection of the democratic system than as a protection of the expressive interests of the individual speaker"—a turn away from "the libertarian doctrine that has so dominated the Court for the last twenty-five years." *Id.* at 1238. This would involve a recognition that "remedying managerial censorship requires a measure of speech-abridging state action." *Id.* at 1237. *See also* Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REF. 817 (1998) (arguing that Justice Breyer has written opinions that emphasize a balancing of interests rather than the protection of one interest over another).

46 Bezanson, *supra* note 42, at 967-68.

47 *See, e.g.*, Raskin, *supra* note 4, at 1946 (contending that debate gerrymandering violates First Amendment rights of excluded candidates and "discards basic democratic premises").

48 *See, e.g.*, Lowenstein, *supra* note 4, at 2009; *see also* Schauer, *supra* note 38, at 116 n.149 (explaining that "both Forbes' claims to access and [AETN's] claims to the journalistic prerogative to deny that access can easily be couched in First Amendment terms").

debate prevents manipulation of election information by government agencies that apply vague and standardless discretion to disguise viewpoint-based decisions inimical to an inclusive conception of democracy. From the discourse-enhancing point of view, access proponents contend that third party participation enriches political debate by providing a real counterpoint to the domination of political discourse by mainstream candidates and private broadcasters. As demonstrated by Ralph Nader's indictment of the two major parties as the indistinguishable "Republicrats," access proponents believe that the spectrum of political ideas spanned by mainstream electoral discourse misses many important issues.[49]

Although the Democratic and Republican parties have dominated American politics in the twentieth century, third parties have achieved some electoral success.[50] Irrespective of this success, however, third-party candidates have had distinctive effects on the political process as a whole.[51] Specifically, scholars argue that third-party candidates perform agenda-setting, electorally strategic, and symbolically democratizing functions in elections.[52] In their symbolic role, minor party candidates can

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49 *See, e.g.*, Ralph Nader, *A Real Debate Requires All the Candidates*, WALL ST. J., Aug. 25, 2000, at A14; *see also* Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373, 390-92 (1993) (describing strong incentives for the major parties to resemble each other).

50 While no third-party candidate has won presidential office, independent candidates have been elected to Congress on occasion and have made even better showings in local and regional races. *See, e.g.*, J. DAVID GILLESPIE, POLITICS AT THE PERIPHERY: THIRD PARTIES IN TWO-PARTY AMERICA (1994); MICHAEL BARONE & GRANT UJIFUSA, ALMANAC OF AMERICAN POLITICS 1296 (1994); EARL R. KRUSCHKE, ENCYCLOPEDIA OF THIRD PARTIES IN THE UNITED STATES 3 (1991); Sandor M. Polster, *Maine's King Makes Independence a Virtue*, Nov. 30, 1999, *available at* www.stateline.org; Sunny Kaplan, *Green's California Assembly Victory: Anomaly or Start of Trend?*, Apr. 16, 1999, *available at* www.stateline.org. As demonstrated by Ralph Nader's candidacy in the 2000 contest, some portion of the voting public will consistently support minor party alternatives, even in presidential elections. *See also* STEVEN J. ROSENSTONE ET AL., THIRD PARTIES IN AMERICA 4 (1996) (showing that third party candidates have received significant support in American presidential elections).

Third parties have represented nearly every political viewpoint—from the Communist Party on the left to American Nazi Party on the right. *See id.* at 5. Some parties—such as the American Communist Party, the Socialist Party, and the Libertarian Party—have shown a long-standing commitment to a particular political agenda. *See* KRUSCHKE, *supra*, at 2. Others—such as the Progressives or Bull Moose Party of 1912 and the George Wallace American Independent Party of 1968—have emerged as spin-offs from major parties. Still other minor third parties (such as the Vegetarian Party and the Prohibition Party) have been single-issue organizations. For a directory of current US political parties, see http://politics1.com/parties.htm.

51 Much has been written about the roles played by and the effects of third parties in the American political landscape. *See generally* ROSENSTONE ET AL., *supra* note 50, and sources cited therein; *see also* DAVID T. LANOUE & PETER R. SCHROTT, THE JOINT PRESS CONFERENCE: THE HISTORY, IMPACT, AND PROSPECTS OF AMERICAN PRESIDENTIAL DEBATES (1991); DANIEL A. MAZMANIAN, THIRD PARTIES IN PRESIDENTIAL ELECTIONS (1974); WITH THE NATION WATCHING: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON TELEVISED PRESIDENTIAL DEBATES 84 (1979); WILLIAM HASSELTINE, THIRD PARTY MOVEMENTS IN THE UNITED STATES (1962); Keith Eisner, Comment, *Non-Major Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973 (1993); Raskin, *supra* note 4, at 1969-71.

52 *See, e.g.*, Samuel Isacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 681-83 (1998); Schauer & Pildes, *supra* note 44, at

encourage voter turnout in an otherwise politically cynical and disengaged citizenry.[53] With respect to strategic electoral effects, minor parties can split the vote and therefore influence the outcome of the electoral contest between the major-party candidates (as evidenced by the results of the 2000 presidential contest).[54]

Finally, and perhaps most importantly, minor-party candidates can advance issues to the forefront and demand that the two major parties address them. Ideas generated initially by third parties often find their way into the policy platforms of the major parties. Whether to co-opt an increasingly popular minor-party candidate, to still third-party grumbling, or to make policy changes that reflect the population's shifting views,[55] major parties in the past have adopted and borrowed from the agendas of third parties.[56] At a minimum, the third-party candidate's positions can serve as a counterpoint—forcing the major parties to refine their positions in response to those articulated by the minor-party candidate.[57]

If, the argument goes, third-party candidates can perform such a variety of salutary functions, then they should be allowed to participate in the electoral arena to the fullest extent possible. Their absence is particularly problematic with regard to campaigns for local offices in which, for example, the private press is not as likely to provide extensive coverage of the candidates.

2. Pro Broadcaster Discretion

Opponents of equal-access rights challenge the claimed benefits of uncontrolled access, point to dangers likely posed by such a plan in practice, and rely on alternative means to constrain the abuse of

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1803 n.5; Eisner, *supra* note 51; Kinter, *supra* note 39, at 270-72.

53 *See* PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, FEWER SEE CHOICE OF PRESIDENT AS IMPORTANT: VOTER TURNOUT MAY SLIP AGAIN, *available at* http://www.people-press.org/june00rpt.htm (reporting on Pew Center's finding that voters are more disengaged than in the recent past).

54 *See, e.g.*, Robert G. Kaiser, *Political Scientists Offer Mea Culpas for Predicting Gore Win*, WASH. POST, Feb. 9, 2001, at A10.

55 ROSENSTONE ET AL., *supra* note 50, at 221; *see also* Eisner, *supra* note 51, at 986 (suggesting that the major parties adopt minor-party positions not out of altruism but to put third parties out of business).

56 Historians contend that among the policies initially put on the political map by third parties were the direct election of senators, suffrage for women, the graduated-income tax, the notions of initiative, referenda, and recall, railroad regulation, high standards for civil service, and the encouragement of labor unions. ROSENSTONE ET AL., *supra* note 50, at 8; KRUSCHKE, *supra* note 50, at 8; Eisner, *supra* note 51, at 983; *see also* Anderson v. Celebrezze, 460 U.S. 780, 794 (1983) ("Historically, political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream.").

57 *See, e.g.*, ROSENSTONE ET AL., *supra* note 50, at 222 (discussing the impact of George Wallace's candidacy on the Nixon administration's civil rights policies).

government power. The principal dangers of a right of access articulated by courts and commentators consist of cacophony, skewed participation, insufficient time for elaboration of candidates' views, inhibited and thin coverage, and reduced audience. Access opponents also worry that the nation's political discourse would be hijacked by truly fringe concerns. Finally, these theorists make a slippery slope argument regarding the possible extension of the right-of-access rationale to public station programming beyond the category of debates.[58]

On this view, allowing every candidate the bully pulpit will either affirmatively harm political debate or, at the very least, will lead to massive channel switching by a confused or irritated audience.[59] The increasing incidence of low voter turnout, the decreasing power of political parties, the diminishing attention span of the American public (for matters political or otherwise), and the generalized cynicism bred by generic distaste for all politicians suggest that we face a political reality far from the ideal. Access opponents claim that opening debates to all candidates would reinforce these trends rather than reverse them. Indeed, the particular realities of the modern media structure may mean that rules requiring debate inclusion will not necessarily promote the intended democratic values of political transparency and informed citizen self-determination. One of the mechanisms by which mass media merely simulates political transparency (rather than actually promoting it) is information overload, which, along with a focus on scandal, tends to distract the audience.[60] To the extent that this happens with debates, the meaning and salience of political debates may be minimized over time. Information/debate overload may cause the audience to tune out.

Especially in crowded fields, debates cannot be staged without deciding who may participate.[61] In practice, allowing totally open fora may

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58 Brief for the Federal Communications Commission and the United States at 17, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); Lowenstein, *supra* note 4, at 2011-12.

59 *See* Record at 33, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (No. 96-779), 1997 WL 664266 (question to Forbes attorney about negative effect of including "Willie Wacko" in broadcast debate). *See* Schauer, *supra* note 38, at 87 (describing how limiting debate participation "increases the audience and sharpens the debate [although it does so] at the risk of further entrenching mainstream views against challenges from the outside"); *see also* NBC News Transcripts, Meet the Press, Sept. 24, 2000 (quoting William Safire for the proposition that "the difference between a four-person debate and a two-person debate is the difference between a debate and a beauty contest").

60 Jack Balkin, *How Mass Media Stimulate Political Transparency*, http://www.yale.edu/lawweb/jbalkin/articles/media01.htm.

61 Debate experts have argued that including all candidates on a televised debate is often not feasible due to the sheer number of candidates. TWENTIETH CENTURY FUND TASK FORCE ON PRESIDENTIAL DEBATES, LET AMERICA DECIDE 148 (1995). In 1988, for example, the Amicus Brief of the Association of America's Public Television Stations points out that approximately 280 people filed statements with the Federal Elections Commission declaring their presidential candidacies. Of these, 168 actually declared and 23 appeared on the ballot in one or more states. Amicus Curiae Brief for the Association of America's Public Television Stations, Corporation for Public Broadcasting, Public

well squelch debate. If, for example, a station were to invite all prospective candidates to the debate in order to avoid restricting speech, speech-suppressive consequences would likely ensue. Most obviously, the time available for front runners to respond to questions and present their positions would necessarily be curtailed by the sheer number of participants in the debate.[62] Thus, a large number of participants may diminish the debate's utility as an electoral mechanism by making it unwieldy and uninformative.

The presence of alternatives may additionally cause viewers to conflate the more mainstream candidates by comparison. That is, voters might underestimate the policy differences between the Democratic and Republican candidates by contrasting them to third party options. Thus, to the extent that debates are central to voting decisions, debates that feature a large number of participants may well lead the audience to make electoral decisions on the basis of a *less* detailed understanding of policy differences between the plausible contenders.[63]

Broadcasting Service, at 15, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (No.96-779) [hereinafter *AAPTS Brief*]. In the 1992 election, 23 presidential candidates appeared on state ballots and 21 appeared on ballots in 1996. *Id.* As for candidates running for other offices, many states' ballot access rules are relatively simple to satisfy for an affiliated candidate. *See, e.g.*, ARK. CODE ANN. § 7-7-103(d)(1) (Michie 2000) (providing that only ten signatures are required to run for municipal office); OKLA. STAT. ANN. tit. 26, § 5-112 (West, 2000) (requiring a modest fee in order to appear on the ballot); TENN. CODE ANN. § 2-5-101(b)(1) (providing that only 25 signatures are required to qualify as a candidate for any office). As a result of lenient ballot access requirements, races among as many as 11 candidates for a single office were not uncommon in 1996. *AAPTS Brief, supra*, at 16.

62 *See, e.g.*, Frances J. Ortman, *Silencing the Minority: The Practical Effect of* Arkansas Educational Television Commission v. Forbes, 49 CATH. U. L. REV. 613 (2000); *see also* Chi. Acorn v. Metro. Pier & Exposition Auth., 150 F.3d 695, 701 (7th Cir. 1998).

63 *See, e.g.*, TWENTIETH CENTURY FUND TASK FORCE ON PRESIDENTIAL DEBATES, *supra* note 61, at 19 (describing how crowded debates can impair the voters' ability to "focus sharply on the major candidate"). On the other hand, this argument assumes that the major-party candidates would not change their positions in response to the pressure of the third-party alternatives. Major-party candidates, particularly for high national office, are often criticized for tailoring their positions and debate postures to the results of an escalating number of public-opinion polls. *See, e.g.*, Dan Balz, *Bush, Gore Nearly Even, Poll Shows: Stakes High for Three Debates*, WASH. POST, Oct. 3, 2000, at A1; Richard L. Berke, *Voter Tune-Out: Focusing on the Few, Blind to the Many*, N.Y. TIMES, Oct. 22, 2000, at § 4, p.1; Jackie Calmes, *Bush Tries to Score a Few Points After the Bell*, WALL ST. J., Oct. 5, 2000, at A28; Peter Sinton, *Polling Using the Internet Seeks to Improve Accuracy*, S.F. CHRON., Oct. 28, 2000, at B1. Third-party candidates charge that this leads to virtually indistinguishable centrism on the part of the major-party candidates. One of the effects of including third-party candidates in debates, then, may be that they would force the major-party candidates away from the middle. In the Gore/Bush campaign, for example, it is possible that Nader's participation would have led to a more left-leaning Gore and that Buchanan's participation would have led to a more right-leaning Bush. The rationale for this is that Gore's concern that Nader would cost him the left wing of the Democratic Party and Bush's concern that Buchanan would siphon away the right wing of the Republican Party would lead them to modulate their positions to forestall those defections. These tactical decisions on the part of the major-party candidates would have the overall effect, proponents suggest, of expanding the spectrum of political choice for the electorate. Rather than voting for "Republicrats," the American public would have a real choice to make between Gore and Bush once they gravitated away from the relatively indistinguishable center and moved toward more distinct ideologies. *See* Nader, *supra* note 49. Even for those who would find this a politically desirable result, however, the specific circumstances of each

Scheduling multiple debates would not eliminate the problem; that solution too raises the question of who gets to appear on which debate stage, when and with whom. Obviously, there would be disadvantages to debate schedules in which the realistically electable candidates did not have an opportunity to debate one another.[64] While these disadvantages may be acceptable at the primary level, they may be intolerable by the time of the final contest.

Given the ambivalence with which at least some candidates view debates, an equal-access requirement might ironically permit some or all major-party candidates to use third party participation as an excuse not to participate.[65] An incumbent with a strong lead may be reluctant to debate the front running opponent for fear of the potential effect of "losing" the debate. Such a candidate could strategically deflect attention from that issue by justifying his refusal to participate on the ground that he would have to debate third-party candidates. Political discussion would be harmed by the reluctance of major-party candidates to participate in debates with fringe opponents.[66] Even if a debate boycott by major-party candidates would be less likely today (when the presidential debates are more firmly institutionalized) strategic use of the access right by candidates might nevertheless harm public debate.[67]

Moreover, the prospects of cacophony or First Amendment liability may move public television broadcasters to choose not to sponsor debates

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election, and the number and strength of the third-party candidates, would affect the calculus. If, for example, there were only one serious third-party candidate rather than two, the major-party candidates' responses to the third-party hopeful would likely have a different effect than the balance projected in the Nader/Buchanan scenario described above. With regard to the 2000 contest, we might speculate that a presidential debate featuring all of the candidates would have mirrored the effect of the Nader candidacy in siphoning votes away from Gore and ensuring Bush's election.

64 *See, e.g.*, Lowenstein, *supra* note 4, at 2012-13.

65 TWENTIETH CENTURY FUND TASK FORCE ON PRESIDENTIAL DEBATES, *supra* note 61, at 148 (1995). That a debate on a public broadcasting station is an opportunity for free exposure is not a reason to discount such strategic behavior. Because public stations are statutorily not permitted to charge for advertisements by political candidates, all such candidates—whether mainstream or fringe—have audience access without the potential risks posed by debates.

66 For example, proponents of this view would point to Jimmy Carter's refusal to participate in a presidential debate with Ronald Reagan in 1980 if independent candidate John Anderson were included in the event. The end result was that the Reagan-Anderson debate took place, but was "anti-climactic" and drew a much smaller audience than the 1976 presidential debates, probably because of President Carter's refusal to participate. *See* THOMAS H. NEALE, CAMPAIGN DEBATES IN PRESIDENTIAL GENERAL ELECTION, CRS Rep. for Cong., 93-588 GOV, at 5 (1993); NBC News Transcripts, Transcript of Meet the Press, Sept. 24, 2000. In another version of the strategic use of third-party candidates, President Nixon's refusal to debate Hubert Humphrey unless George Wallace were included in the debate might well be characterized as a strategic ploy to avoid debating. *See* NEALE, *supra*, at 3.

67 In the 2000 presidential contest, Al Gore's last-minute decision to pull out of a Judicial Watch-sponsored debate featuring all the candidates—after George Bush had earlier rejected the debate invitation—suggests that major-party candidates in major races may well continue to decline to debate their less-popular opponents.

at all.[68] This chilling effect "would result in less speech, not more."[69] There is evidence that such chill is not merely a theoretical possibility: a "direct result"[70] of the Eighth Circuit's decision in *Forbes* was an immediate retrenchment in some public stations' debate plans.[71]

Opponents of generalized constitutional access rights argue that the touted benefits of equal access do not in fact outweigh the risks detailed above. They contend that while much can be said about the salutary effects of third parties in general on our political system,[72] not all third parties (nor all third-party candidacies) in fact live up to such high billing.[73] Absolutist equal-access opponents thus suggest that the asserted benefits of third-party candidacies could better be tapped if the debate sponsors could freely choose which of the independent candidacies would in fact lead to the desired benefits of policy inclusion, accountability, and

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68 Professor Raskin vehemently advocates the open access position, responding to concerns about cacophony, major-party candidate boycotts, and strategic behavior by arguing that public broadcasters do not have to sponsor and broadcast debates. Raskin, *supra* note 4. Yet discretion proponents would rejoin that the perfect is the enemy of the good, and that Professor Raskin's position would have the effect of suppressing the very institution—debates—that he finds so central to the democratic enterprise.

69 Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 680 (1998); *see also* TWENTIETH CENTURY FUND TASK FORCE ON PRESIDENTIAL DEBATES, *supra* note 61, at 19, 148 (recognizing that allowing all qualified candidates "may actually undermine the educational value and quality of debates" and "erode public perception of the legitimacy of the debate process").

70 523 U.S. at 681.

71 The Nebraska public television network, for example, cancelled its scheduled political debate in the 1996 senate race immediately after *Forbes* was decided because of its concern over the obligation to include third-party candidates. *Id.* The history of the debate exclusion from the equal opportunities obligations of § 315 of the Communications Act of 1934 may itself provide evidence supporting the majority's concern about a chilling effect. That history is an object lesson in broadcaster self-censorship. Despite a rich history of political debate in this country, the Kennedy-Nixon debates of 1960 were the first televised debates because of the FCC's interpretation of the equal opportunities rules of the Communications Act of 1934 at the time. *See* Commission on Presidential Debates, at http://www.debates.org. Because any appearances of a candidate—including appearances in bona fide news events—were then considered to trigger the equal opportunities obligations for the candidate's opponents, broadcasters shied away from incurring such coverage obligations by simply refusing, inter alia, to televise debates. The Kennedy-Nixon debates, now credited with having cost Nixon the 1960 election, were only televised because Congress enacted a specific exemption for the telecasts from the equal opportunities obligations under the statute.

72 *See, e.g.*, Eisner, *supra* note 51, at 983; *see also* discussion *supra* accompanying note 52.

73 As a result of multi-candidate campaigns, the Twentieth Century Fund Task Force on Presidential Debates has recognized that allowing all qualified candidates "may actually undermine the educational value and quality of debates" and "erode public perception of the legitimacy of the debate process." TWENTIETH CENTURY FUND TASK FORCE ON PRESIDENTIAL DEBATES, *supra* note 61, at 19, 148.

Opponents of mandated access also articulate substantive reasons for rejecting the reduction of time available to the front runners through mechanical accommodations of other candidacies. As Judge Posner put it in his discussion of *Forbes*, "what front runners have to say is probably more valuable to the audience than what the fringe candidates have to say—probably, not certainly." Chi. Acorn v. Metro. Pier & Exposition Auth., 150 F.3d 695, 701 (7th Cir. 1998). Thus, even though major parties can originate as fringe parties and, regardless of their popularity, contribute ideas and put issues on the agenda of the major parties, more extensive exposure to the front runners' positions is more useful to the population as a practical electoral matter: "restricting the speech opportunity of the fringe candidates might increase the speech benefits of the debate over all." *Id.*

progressive change.

This is particularly so as the agenda-setting function of third-party candidates can be accomplished without providing a debate platform to the maverick candidate.[74] The Communications Act of 1934 provides a specific right of "reasonable access" to federal political candidates in election contests.[75] Federal candidates can take advantage of their access rights under section 312(a)(7) of the Communications Act of 1934 to ensure that their platforms are presented to the voting public through their own political advertisements. This is particularly true now that the FCC has interpreted its rules implementing section 312(a)(7) as no longer permitting candidate access to be restricted to the commercial time periods ordinarily sold by the broadcast stations to commercial advertisers.[76] Thus, access right opponents could argue that both television and other media may serve as venues for the ventilation of minor-party candidate political platforms for federal office without having to ensure the candidates' participation in televised debates.[77]

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74 In *Johnson*, for example, despite the candidates' arguments that "by 1984 the televised presidential and vice presidential debates had become so institutionalized as to be a prerequisite for election," Johnson v. FCC, 829 F.2d at 159, the court concluded that the existing access provisions in the Communications Act "insure that political debate will not be monopolized by one or a very few candidates, but that candidates from all points of the political spectrum will be able to utilize the media." *Id.* at 161.

75 Communications Act of 1934, 47 U.S.C. § 312(a)(7) (2000); *see also* Political Primer 1984, 100 F.C.C.2d at 1479, 1523 (1984); 47 C.F.R. § 73.1944 (1999). Although commercial broadcasters providing reasonable access to federal candidates under § 312(a)(7) can charge for the provision of airtime, public stations may not sell time and may only charge facilities at cost. 47 C.F.R. § 73.621(a), (c), (e) (1999).

76 *In re* Petition for Consideration by People for the American Way and Media Access Project of Declaratory Ruling Regarding Section 312(a)(7) of the Communications Act, Memorandum Opinion & Order, F.C.C. 99-231, 1999 FCC LEXIS 4376 (Sept. 7, 1999).

77 In fact, a close reading of the access-proponent position demonstrates that the point of third-party access is not simply to ventilate third-party positions publicly, but rather, to use the effect of the debate itself to enhance the third-party candidacy. In keeping with that approach, access advocates consistently refer to the positive effect of Jesse Ventura's debate participation on his gubernatorial success. *See, e.g.*, Raskin, *supra* note 4, at 1964. The value of debate benefits varies depending on the status of the candidacies represented. For example, assuming two major-party candidates and a minor-party candidate, only the minor-party candidate would benefit substantially from her very inclusion in the debate. Thus, while the debate would serve as an occasion for the major-party candidates to score substantive points or make gaffes that would affect their electoral standing, the inclusion of the minor-party candidate would give her the additional benefit of unaccustomed visibility and provide a mainstreaming effect. Indeed, AETC's brief to the Supreme Court in *Forbes* makes this point: Forbes' "goal was to gain legitimacy from being seen on the same stage with candidates who had already gained significant public support." Brief for the Petitioner at 35, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

Access opponents might say that the effect of this kind of governmental subsidy is to give a step up to a candidate who would not otherwise have had a realistic chance of either winning or affecting policy. Thus, one might argue—as did the Arkansas Educational Television Network in *Forbes* itself—that rather than being a reflector of reality, the government would be enhancing or endorsing the fringe candidate and his viewpoints simply by asking him to participate.

This argument is problematic, however. It depends on the starting point of the analysis. If the third-party candidate's lower standing is caused by the dominance of the major parties and the media's exclusionary debate practices, then a mandatory-access rule might be seen as simply leveling the

Finally, proponents of broadcaster discretion may fear that, once constitutionally recognized, equal-access rights could not be confined to the political debate context in a principled way. Thus, the access right would also threaten public broadcasters' coverage of political campaigns more generally. Given that broadcasting necessarily entails editorial choices, public television stations would not be able to carry out their statutory mandates if the Constitution were read to require open access for the entirety of the broadcast day.[78] While for some that may in fact be a defensible result, it is important to recognize that the decision about access to political debate entails a more general decision about the scope and utility of all government-sponsored speech through government airways.

II. Forbes as a "Second Best" Alternative[79]

Given the conflicting democratic claims of open-access proponents and opponents, the best way to read the Court's approach in *Forbes* may be to see the decision as resting on a prudential recognition of the significant values on both sides of the controversy. Thus, the Court would seek a means to avoid the undesirable effects of both extreme openness and entirely unconstrained discretion in the debate context. Despite the analytical difficulties with some of the majority's doctrinal arguments, their conclusion appears driven by a "second best" mentality—predicting that the results of broadcaster discretion subject to judicial and FCC review are likely to be better than the alternative.[80]

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playing field. Because campaigns today are different than in the past—primarily in their reliance on electronic media—the traditional benefits of third-party candidacies may well be diminished from what they would otherwise be if the candidates are not given debate access. In any event, because third-party candidacies have a good constraining effect on major-party failures, we should seek to magnify that effect by giving the minor parties more of a platform than they would otherwise have. Simply put, the government, in selecting candidates for the debate, cannot help but have an effect on any of the candidacies it selects (and does not select) to showcase. In other words, if the government does not level the playing field and give the fringe candidate a boost that the majority candidates might consider "unearned," it will by definition be giving the major-party candidates the benefit of the third party's exclusion.

78 In analogous contexts, the Court has rejected vagueness-based First Amendment challenges to broadcast content regulations. For example, in the context of broadcast indecency regulation, the Court rejected a constitutional vagueness challenge on the ground that specific itemization of "indecent" language would restrict the field in an unprincipled way, and that vagueness was necessarily and inherently entailed in any attempt to regulate within this area. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987). When the Court recognized that vagueness is endemic to any attempt to regulate, it simply acknowledged this reality rather than finding that such vagueness required constitutional prohibition.

79 We have no way of knowing the precise intention of the members of the Court who joined Justice Kennedy's opinion for the majority. The argument here is that an interpretation of the case as providing a second best approach to a perennial problem associated with scarcity explains the majority opinion's doctrinal difficulties.

80 Professor Schauer has suggested that since "principled" doctrinal approaches to the government enterprise free speech cases have not worked, the Court is moving—albeit not fully—to a seemingly less principled, more policy-oriented, institution-specific, approach as evidenced by *Forbes*.

A. *Staking Out the Middle*

There are three plausible approaches to the issue of political programming by public stations. At least some of the pro-access arguments detailed in Part I suggest an absolutist access approach, eliminating editorial discretion (at least in the debate context) and requiring a substantive right of access to public stations. On this view, based on populist norms, state broadcasters can never appropriately be seen as anything but organs of the state (rather than professionals hewing to independent professional codes). Rejecting the constitutionality of viewpoint-based state speech, this conception of democracy requires the state to be a neutral conduit that guarantees equal access to citizen voices—at least in the electoral realm.

The approach at the other extreme, supported by the pro-discretion arguments detailed in Part I, would give plenary discretion and full editorial independence to all broadcasters, including state-owned stations, regardless of the type of political programming at issue. Such editorial independence would allow government broadcast stations to make viewpoint-based programming decisions even in the electoral arena. Political debates would not be subjected to more searching constitutional review than any other programming decisions.[81]

Schauer, *supra* note 38, at 97. While I agree that the Court's approach in *Forbes* is policy oriented and that the majority's recognition of institutional independence in state journalism was critical to the result in the case, I seek in the following Part to provide an account that explains not only the Court's reliance on journalistic independence, but also its imposition of limitations on state journalism. I contend that the Court's doctrinally unwieldy compromise was prompted by the need to achieve what the Court saw as a workable balance of important but competing interests. On this view, the Court's *Forbes* opinion was less a way-station on the road to a fully institution-specific First Amendment analysis than a way to provide for an admittedly problematic description of bounded discretion.

81 In keeping with the plenary discretion approach, some pre-*Forbes* lower courts considering the issue of public broadcaster content regulation had emphasized the inevitability and necessity of unfettered editorial independence for non-commercial, educational broadcasters. *See, e.g.*, Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1047-48 (5th Cir. 1982) (holding that public television stations should not be considered public fora for purposes of rights of access; that editorial decisions by such licensees should not be seen differently from the editorial decisions of private broadcast licensees; and that the decisions of state broadcasters to cancel the previously scheduled airing of a program that they considered controversial for political reasons did not constitute impermissible censorship under the First Amendment because the states had not prohibited or suppressed the speech of others, but rather exercised editorial discretion over their own expression); Johnson v. FCC, 829 F.2d 157, 161-62 (D.C. Cir. 1987) (holding that minor-party presidential and vice-presidential candidates possess no First Amendment right to be included in televised presidential debates sponsored by the League of Women Voters that aired over the public broadcasting system and three major networks in view of a "pervasive" scheme of broadcast regulation and broadcasters' public trustee obligations, without distinguishing between the public broadcasting system and private broadcasters, and opining that Congress "knowingly accepted the risk of broadcaster favoritism in order to promote wider coverage of political news"); *see also* Amiri v. WUSA TV Channel Nine, 751 F. Supp. 211, 212 (D.C. 1990) (rejecting on First Amendment grounds plaintiff's claim to compel a station to air certain stories he deemed newsworthy, opining that "no individual may compel a television station to broadcast that person's views, no matter how true and important they may be," and recognizing that the station has an "indisputable" right to choose the news it broadcasts and cannot

The third option is positioned somewhere between the two extremes, designed to recognize the complex and conflicting role of government speech, particularly in politics. The Court in *Forbes* embraced such a centrist, qualifiedly professionalist, approach: allowing journalistic discretion, but with the limitation that selection standards be viewpoint-neutral in the special case of debates. Even the dissent in *Forbes* took a middle ground position. Proceduralist rather than professionalist, the dissent sought to bound broadcaster discretion by objective, pre-selected and publicly articulated selection criteria.[82]

B. *Bounded Discretion*

While far from perfect, there is reason to see the *Forbes* majority's approach as a functional middle ground. Journalistic norms and structural autonomy *do* in fact function as real constraints on government propaganda in elections, and the Court's approach *does* subject debates to more searching review. The Court's approach is a not irrational compromise between the extreme alternatives in this controversy.

1. Journalistic Norms and Structural Autonomy

The *Forbes* majority discounted the constitutional significance of government ownership in the context of public television because of the necessity of editorial decisions and the unavoidable newsworthiness judgments made by all journalists; the journalistic, rather than institutional, loyalties of state-broadcaster editors; and the sufficiency of structural separations between the journalists/editors and the governmental infrastructure to safeguard editorial independence.[83] While the Court's public forum analysis is doctrinally subject to critique,[84] history, structural

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legally be coerced into unwanted expression).

82 Some characterize this proceduralist position as an attempt by the dissent to "finesse" the substantive issue. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); *see also* Bezanson, *supra* note 42, at 957-58 (characterizing disagreement between majority and dissent as "in a sense technical only").

83 As Professor Schauer has explained: "In the end it is the institutional character of public broadcasting as broadcasting, heightened here by the involvement of broadcasting professionals in the very decision under attack, that appears to have determined the outcome of the case." Schauer, *supra* note 38, at 91. *See* Tushnet, *supra* note 82, at 1257-62 & n.179 (1999) (suggesting that a less demanding standard of First Amendment oversight was rationalized in *Forbes* because of the autonomy promised by the public broadcaster's adherence to journalistic norms, and analogizing the *Forbes* approach to the loose judicial scrutiny provided in Britain to the quasi-autonomous governmental organization—*quango*—a governmental organization with decisionmakers applying professional norms in structures insulated from direct political control).

84 Critics from all sides of the debate have challenged the *Forbes* majority's public forum analysis as unsatisfactorily formalistic, categorical, and even tautological in the debate context. Critics who would have sought a broad application of the public forum doctrine in order to ensure equal and open access lambast the majority opinion as circular in its application of the doctrine. *See, e.g.*, Ark.

guarantees of independence, and the effect of journalists' professional self-perceptions intuitively support the claim that government broadcasters should not be treated in the same way as government regulatory agencies. To the extent that this is true, it may tip the balance against open access.

With respect to public broadcasters' loyalty to journalism norms, the Court's reliance on the shaping effect of such norms reflects its belief in the salience of professional norms in both the public and private journalism sectors.[85] It may also reflect some faith in the neutrality and

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Educ. Television Comm'n v. Forbes, 523 U.S. 666, 694, n.18 (1998) (Stevens, J., dissenting) (finding ironic the fact that the debates' non-public status was established for the majority by the very standardlessness of the exclusionary decision); Raskin, *supra* note 4, at 1952-58; Fiss, *supra* note 44, at 1231; Schauer, *supra* note 38, at 91-92, 97-99. From the other side, Professor Lowenstein suggests that if the Court had not attempted to apply forum analysis at all in *Forbes*, it would not be in the position of crafting such an awkward take on the designated public forum doctrine. It was only because of its desire to require some degree of constitutional exceptionalism for broadcast debates that the Court applied a version of the public forum analysis that could be subjected to a critique for circularity. *See, e.g.*, Lowenstein, *supra* note 4; *see also* Bezanson, *supra* note 42, at 966, n.72 (suggesting that forum analysis would be irrelevant if the government were acting as speaker rather than regulator or manager of speech on public property).

For a critique of the *Forbes* analysis in terms of its effect on public forum doctrine more generally, outside the context of debates, see for example, Steve G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998). For an important interpretation of the doctrine as an attempt to describe the bounds of government's managerial authority, see ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 228 (1995). *See also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1757 (1987).

85 Professor Schauer notes: "We are not surprised by judicial unwillingness to see this as a stereotypical government censorship case, because the journalist/non-journalist distinction carries far more cultural salience, to the Court as well as to the public, than does the public/private distinction." Schauer, *supra* note 38, at 116. He concludes: "In the end it is the institutional character of public broadcasting as broadcasting, heightened here by the involvement of broadcasting professionals in the very decision under attack, that appears to have determined the outcome of the case." *Id.* at 91; *see also* Bezanson, *supra* note 42, at 976 (explaining that what makes the government's action quasi-private and constitutionally acceptable in *Forbes* is that the Court conceptualizes it as government employees acting in a quasi-professional capacity rather than simply as agents of a monolithic governmental viewpoint).

As noted above, Professor Schauer has argued that *Forbes* shows evidence of the Court partially embracing an institutionally specific approach that would address government speech claims according to the character of the institution they involve, and that would lead to different rules and results with respect to different institutions of government speech. Schauer, *supra* note 38, at 107.

While there is much to be said for Professor Schauer's institution-specific predictions, it is unclear whether *Forbes* should be read to portend such different rules on the basis of institutional differences generally, or whether the Court adopts an autonomy and professionalism-based meta-standard to be applied to all speech involving government institutions. *Forbes* could be said to focus on whether the institutions in question are operating under two sorts of constraints: 1) self-regulation by some sort of professional norms external to the government; and 2) structures of autonomy. On this view, institutional differences would be attributable to the differential application of these supra-institutional principles designed to constrain the particular types of self-interest predictably threatened by the institution being a part of government. Thus, whether speaking of public broadcasting or the post office, the relevant question would be the degree, in reality, of institutional autonomy from the state and of self-regulation grounded on adherence to professional norms. To the extent that Professor Schauer's analysis sees the institution-specific element of the *Forbes* decision as its reliance on empirical descriptions of how autonomously government institutions operate in reality, this view is entirely in keeping with the reading suggested here. The interesting question then becomes how and to what degree courts can deal with the different available descriptions of institutional reality. In

objectivity of expertise and professional norms, at least as equally applicable in both public and private media. Moreover, as is evidenced in *Forbes* itself (where the state broadcaster used the Associated Press, an extra-governmental source, as an expert in the debate selection decision), private journalistic entities are often involved with and affect public broadcaster decisions. Justice Kennedy's focus on public broadcasting as more broadcasting than public "resonates with a considerable amount of empirical reality."[86]

While the majority's approach may understate the harms that can flow from unchecked governmental exercises of editorial judgment, the dissent's approach effectively puts into question the legitimacy of any editorial activity by state-owned stations (particularly regarding speech that plays a central role in democratic government). Such a result would leave the public entirely at the mercy of private media and undermine the government's ability to emphasize programming likely to be underproduced in the commercial market.[87]

The Court's faith in journalistic independence can be supported by an argument rooted in sociology and psychology. It is rational to assume that the modern journalist will by definition see herself in opposition to the authority structure in which she operates. It is also to be expected that the broadcast journalist's professional identification will lead to a need for independence, even if she works for a public station.[88] Thus, whether working for the state-owned station or the commercial, private network, the journalist will see herself as a free agent—or at most as part of the larger community of journalists, rather than as an employee of a governmental or corporate master.[89]

Another argument in favor of editorial independence relies on the history and structure of public stations. The *Forbes* majority's detailed attention to the structure of the AETN and the relationship between the governmental paymaster and the journalists and editors working at the stations suggests the importance attributed by the Court to structural guarantees of independence.[90] Structural realities do promote

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articulating the plausible but inconsistent descriptions of the public institutional press, this Article seeks to point to the difficulty and contestibility of the process.

86 Schauer, *supra* note 38, at 117. Professor Tushnet has characterized the British quasi-autonomous governmental organization—*quango*—analogously. Tushnet, *supra* note 82, at 1257-64

87 *See, e.g.*, C. Edwin Baker, *Giving the Audience What it Wants*, 58 OHIO ST. L.J. 311 (1998) (describing the market failures that characterize commercial electronic media).

88 Anecdotal examples support the prediction, even in the public broadcasting context. *See, e.g.*, Jacqueline Conciatore, *Hundreds Protest for KPFA After Tussle on the Air*, CURRENT, July 19, 1999, *available at* http://www.current.org/rad/rad913p.html (recounting conflict between West Coast Pacifica radio station's staff and national management).

89 Michael Schudson, for example, has explored the way in which journalists use professional norms in the identification and presentation of news. MICHAEL SCHUDSON, THE POWER OF NEWS (1995).

90 *See* Tushnet, *supra* note 82, at 1251-53. Professor Tushnet's description of *quangos*

independence in the world of public broadcasting.

Public broadcasting in the United States reflects fragmentation and decentralization.[91] The complex hierarchy in the public broadcasting system—not to mention congressional complaints about PBS content and liberal ideology—suggests that there is in fact significant independence

importantly describes their varying degrees of autonomy and provides examples of different degrees of autonomy entailed by different sorts of funding schemes. *Id.* at 1258-60.

91 MARK YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, & GOVERNMENT EXPRESSION IN AMERICA 133 (1983) ("The picture of public broadcasting . . . is one of a substantial fragmentation of authority, and a significant degree of decentralization and station autonomy over programming—particularly with respect to programs produced from nonfederal funds. This system is complex, not simple.").

There are several types of non-commercial broadcast stations, some licensed to governments and others to private non-profit organizations. Many "public" radio and television stations are privately-owned community stations operated by non-profit entities. *See, e.g.*, RALPH ENGELMAN, PUBLIC RADIO AND TELEVISION IN AMERICA, A POLITICAL HISTORY 43-82 (1996) (describing the Pacifica stations, for example). Many are educational and some focus on religious broadcasting. Randi M. Albert, *A New "Program for Action:" Strengthening the Standards for Noncommercial Educational Licensees*, 21 HASTINGS COMM. & ENT. L.J. 129, 137 (1998). Other public stations are licensed to universities, including state-funded colleges. *See generally* ROBERT MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING 1928-35 (1995) (describing the history of public broadcasting and the role of university radio stations). More directly governmental are the stations licensed to the states or local governments and operated by special governmental agencies. *See, e.g.*, YUDOF, *supra*, at 127; Albert, *supra*, at 137; *see also* CPB statistics on funding sources for public broadcasting at http://www.cpb.org/about/funding/whopays.html.

With respect to funding, sixty-one percent of public broadcasting revenue derives from non-governmental sources, such as listener and viewer memberships and corporate sponsorship. *Id.* Although non-profit broadcast stations have operated in the United States since the 1930s, not until the enactment of the Public Broadcasting Act of 1967 did the federal government commit itself to funding public television. For the history of pre-1967 public broadcasting, see, for example, *FCC v. League of Women Voters*, 468 U.S. 364, 367 (1984); THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION 21-29 (1967); and THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING, A PUBLIC TRUST 33-35 (1979). The 1967 Act envisioned public broadcasting coordinated between the federal government and local stations. As such, the Corporation for Public Broadcasting was created to oversee the distribution of congressional appropriations toward: (1) construction of broadcast facilities; (2) development of "high quality programming;" (3) networking public broadcast stations; and (4) promoting continuing growth and expansion of new stations. YUDOF, *supra*, at 128; *see also* Cmty. Serv. Broad. v. FCC, 593 F.2d 1102 (D.C. Cir. 1978). The Corporation for Public Broadcasting in turn established the Public Broadcasting Service (PBS) and National Public Radio (NPR) as separate networks of public television and radio stations independent of CPB. PBS and NPR operate as non-profit corporations with memberships consisting of public stations that receive direct grants from the CPB and also receive any programs underwritten by CPB or PBS. For a complete breakdown of public broadcasting funding, see http://www.cpb.org/about/funding.

In addition to structuring the CPB as a non-profit, non-governmental corporation, 47 U.S.C. § 396(b) (1994), the statute creating the CPB established guidelines to protect the independence and editorial integrity of public broadcasters despite CPB funding of some of their programming. 47 U.S.C. § 396(g)(3) (1994); *see also* YUDOF, *supra*, at 129; Steven D. Zansberg, Note, *"Objectivity and Balance" in Public Broadcasting: Unwise, Unworkable, and Unconstitutional*, 12 YALE L. & POL'Y REV. 184, 189-93 (1994) (describing safeguards). Moreover, although Congressional oversight was required through annual reporting and yearly appropriation processes, government officers and Congress were expressly forbidden by statute from controlling programming, federal funding percentages were limited, and the ultimate decision to broadcast federally-funded programs was left to the local station rather than the Corporation for Public Broadcasting. YUDOF, *supra*, at 129.

from political masters. As for the relationship between the federal government and the local public stations, "[i]n operation, the real power lies with the local stations, not the corporation. . . ."[92] Indeed, commentators suggest that the decentralization was specifically designed to forestall federal control of program content.[93]

As for local control, state law sometimes explicitly provides some structural insulation even of governmentally-funded stations.[94] Moreover, the complex and changing relationships among and within the relevant governments with an interest in public station operations suggest some leeway for station independence. After all, administrations change, and relevant oversight structures can often contain contending political forces. Also, state and local governmental broadcasters are often part of existing governmental entities, such as school boards, which are more realistically seen as bureaucratic rather than partisan political organizations. Finally, FCC jurisdiction over all broadcasters, including state and local entities, ensures another layer of oversight over the state as licensee.

In sum, public broadcasting has not generally been regarded as a mouthpiece of the legislative or executive branches.[95] Rather than being criticized as government propaganda, public broadcasting has instead been charged with cultural elitism and, more recently, has been labeled as promoting liberal, controversial programming beyond the directly political sphere.[96] In any event, just as we can catalogue pressures on editorial

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92 YUDOF, *supra* note 91, at 129-30. Even between PBS and the Corporation, PBS has come out on top. *Id.* at 130. (For a story of confrontation between the White House and public broadcasting, see *id.* at 130-33).

93 William Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123, 1150-56 (1974); Linda L. Berger, Note, *Government-Owned Media: The Government as Speaker and Censor*, 35 CASE W. RES. L. REV. 707, 725-26 (1985).

94 *See, e.g.*, IOWA CODE § 256.82(3) (1999) (requiring Iowa's public television stations to have an advisory board on journalistic and editorial integrity and requiring that "[t]he division shall be governed by the national principles of editorial integrity developed by the editorial integrity project"); KAN. STAT. ANN. § 75-4924(i) (2000) (asserting that Kansas public broadcasting council shall have no regulatory authority over any individual station or its programming); N.J. STAT. ANN. § 48:23-3, § 52:27C-84 (West 2000) (making New Jersey Public Broadcasting Authority independent of supervision or control by Department of Public Utilities); OKLA. STAT. ANN. tit. 70, § 23-102 (West 2001) (making it a misdemeanor for government officials or their representatives to influence program content on public broadcasting stations).

95 YUDOF *supra* note 91, at 125. Professor Yudof has portrayed public broadcasting as a quasi-free enterprise system, operating with substantial amounts of private sector dollars. Especially in light of the Nixon administration's challenge to public broadcasting, "there appears to be an overwhelming sense among the relevant participants that government should not dominate programming." *Id.* at 133; *see also* Fiss, *supra* note 44, at 1223; *cf.* Monroe E. Price, *Public Broadcasting and the Crisis of Corporate Governance*, 17 CARDOZO ARTS & ENT. L.J. 417 (1999) (describing rifts in public broadcasting). Admittedly, some have criticized PBS as having become the tool of its corporate advertisers and drifted to the right. *See, e.g.*, JAMES LEDBETTER, MADE POSSIBLE BY . . . THE DEATH OF PUBLIC BROADCASTING IN THE UNITED STATES (1997).

96 *See* YUDOF, *supra* note 91, at 133-34. "If anything, controversy has centered on the possibility that an overly independent public television network would become dominated by biased elites, unfettered by congressional scrutiny . . ." *Id.* at 125. While the observations in the text were

independence in the public broadcasting context, historians also cite instances in which private, commercial broadcasters were subjected to governmental pressure with regard to their coverage.[97]

Finally, the Court's reliance on professional norms of journalism reflects its faith in the ability of judicial and administrative review to determine whether professional norms were in fact followed. That, under the majority's approach, the issue of independence is reviewable—and, indeed, by a jury—may mitigate some concerns about the Court's deference to the journalistic decisions of government broadcasters.[98]

While some might still argue that despite evidence of independent journalistic decisions, the Court's faith in professionalism and structural independence is naïve,[99] it is important to see the Court as engaging in a second-best, balancing approach. Perhaps the fundamental policy reason for not attributing particular weight to state ownership is precisely so that the state-owned or publicly-supported station would be empowered to act as a true and viable counterweight to the power of the private commercial media.[100] In the final analysis, the rationale for the majority's refusal to differentiate between private and public broadcasters with regard to most of their programming may be, in part, that the market in information is bigger than a single entity. Thus, we must look at the overall structure and recognize that editorial discretion is indispensable in keeping public stations as a realistic counterpoint to the economically-driven "censorship" that we might expect from private stations.[101]

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made in connection with PBS and not state-owned broadcast stations, they are nevertheless useful in casting doubt on the assumption that government sponsorship will necessarily lead to partisan behavior by public journalists.

97 *See, e.g.*, LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 132-33, 139, 140-41, 187-88 (1987) (describing Nixon administration pressure on CBS directly by the White House and indirectly through affiliates and FCC jawboning); SALANT, CBS, AND THE BATTLE FOR THE SOUL OF BROADCAST JOURNALISM: THE MEMOIRS OF RICHARD S. SALANT 71-110 (Susan Buzenberg & Bill Buzenberg eds., 1999) (describing governmental pressure on CBS); Thomas W. Hazlett & David W. Sosa, *"Chilling" the Internet? Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. & TECH. L. REV., 35, 47-50 (1997-98) (describing "Nixon's 'Chill'").

98 Similarly, although the majority in *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990), expressed sensitivity to the concern that its decision to reject a constitutional right of debate access to public stations might "mandate, authorize or predict Orwellian state thought-control through selective airing of viewpoints on public television stations," *id.* at 489, it found such consequences unlikely because any state attempts to suppress unwanted expression would lead to judicial intervention under the First Amendment and, in any event, would threaten a loss of license under the FCC's licensing system. *Id.*

99 *See infra* Part III.C.1.

100 *See infra* Part III.

101 Others might support this approach because of a view that even viewpoint-based government speech is desirable, so long as there is no government monopoly in the speech market. *See, e.g.*, Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000). Thus, it would not be professionalism but a belief in the appropriateness of government speech that would support public television taking substantive positions on even contested views of the good.

2. Viewpoint Neutrality as Bounding Discretion for Debates

Regardless of its recognition of journalistic and structural independence, Justice Kennedy's opinion hesitated to give public broadcasters complete *carte blanche* in the important context of political debates.[102] The Court in *Forbes* was not entirely willing to countenance the possibility that publicly-owned broadcast stations could make explicit, viewpoint-based, and perhaps even partisan selections. Rather, it cabined their discretion in that arena with a requirement of viewpoint neutrality. While those taking a broader, effects-based interpretation of viewpoint neutrality might criticize the Court's intent-based approach, this criticism is not entirely justified. The more stringent review called for by the Court's viewpoint neutrality standard can be thought rationally to provide some protection against government partisanship without sliding all the way to non-discretionary access. It is also preferable to the alternative of untrammeled discretion.[103]

In the *Forbes* Court's approach, viewpoint neutrality is a subjective, intent-based standard. Viewpoint neutrality review distinguishes debate exclusion based on governmental disagreement with a speaker's views from exclusion based on ideologically neutral newsworthiness or viability

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102 Both the FCC and the multi-state amicus brief on behalf of the Arkansas Educational Television Commission took the position that the forum doctrine should not apply in the situation at issue in *Forbes* because, in that context, the government was a speaker rather than simply the provider of a venue for private speech. *E.g.*, Amici Curiae Brief of the States of California, Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Kansas, Louisiana, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Ohio Oklahoma, Oregon, Vermont and Wyoming, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

According to this view, when the government is speaker—when, for instance, it invites contributions from third parties—it is permitted to control its own expression, which includes the authority to make content-based decisions. Therefore, on this view, that the station has selected from among the existing candidates for a particular office makes that expression or that selection the expression of the station's viewpoint about the newsworthiness of the candidates. While the majority in *Forbes* did recognize that when governmental broadcasters act in their overall programming day, they inevitably engage in editorial decisions, the characterization of debates as a "special case" distinguished the broadcaster's role in that context. The Court thus rejected the full-fledged "government as speaker" position.

103 Even some *Forbes* analysts who approach the decision from the point of view of First Amendment jurisprudence, rather than debate access, question the Court's viewpoint neutrality limitation on broadcaster discretion. *See, e.g.*, Bezanson, *supra* note 42, at 967-68 (arguing that limitations on when government has to constrain its editorial discretion are left undefined in *Forbes*); Schauer, *supra* note 38 (concluding that the Court did not subscribe fully to an institution-specific approach in *Forbes*).

However, one could borrow Professor Schauer's notion of institutionally specific analysis to justify the Court's approach. Thus, the odd doctrinal result in *Forbes* may be due to the Court's attempt to address the contending and inconsistent cultural claims of two different important institutions—journalism and debates—in their interaction with one another. The broad discretion and institutional freedom called for by journalism culture would be at odds with the broadly-conceived debate imperative. The Court's reliance on viewpoint neutrality in debate selection—however subject to critique as a standard—could be seen as an institution-balancing compromise between the contending absolute claims of the interacting institutions.

assessments designed to reflect popular will. The former is constitutionally impermissible; the latter is acceptable as a viewpoint neutral decision.

Critics of the decision contend that viewpoint neutrality is not an appropriate litmus test.[104] They argue on various grounds that newsworthiness and viability assessments are inescapably assessments based on viewpoint.[105] Thus, they claim that exclusion can never be viewpoint neutral because exclusion, by definition, constitutes a rejection of the significance of the excluded candidate's viewpoints. In fact, they see third party exclusion as an implicit governmental endorsement of the selected major-party candidates. They further charge that, because participation in debates can have an impact on popularity and electoral viability, participation decisions made on pre-debate voter interest have self-fulfilling results which put the government in the position of influencing election outcomes and substituting government fiat for citizens' fully-informed votes.[106] In addition, *Forbes*' critics charge that it is too easy to manipulate the Court's standard by allowing broadcasters to couch their viewpoint-based decisions in the language—and behind the façade—of viewpoint neutrality.

What is common to all these criticisms of *Forbes* is that they focus not on governmental intent in selection decisions, but on the effect of such decisions. From this point of view, the governmental reason for selection is irrelevant—exclusion is necessarily a viewpoint-based decision because all selection and exclusion decisions have an impact on the dissemination of viewpoints.

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104 *See, e.g.*, Raskin, *supra* note 4, at 1952-57 & n.61; Schauer, *supra* note 38, at 104-06; Joel M. Gora, Finley, Forbes *and the First Amendment: Does He Who Pays the Piper Call the Tune?*, 15 TOURO L. REV. 965 (1999); Fiss, *supra* note 44, at 1234; *see also* Brief of the American Civil Liberties Union and the ACLU of Arkansas at 19, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); The Appleseed Citizens' Task Force on Fair Debates, A Blueprint for Fair and Open Presidential Debates in 2000 (on file with author); Richard Morin, *Are Presidential Debates Too Exclusive?*, May 1, 2000, http://washingtonpost.com/wpsrv/politics/polls/wat/archive/ wat050100.htm.

Professor Bezanson reads *Forbes* as saying that when government expression inhibits competing speech and monopolizes the opportunity for exchange of ideas, then government expression should be seen as regulatory and not expressive, and therefore valid only if content neutral. Bezanson, *supra* note 42, at 993. However, this does not necessarily work to explain *Forbes* because such government monopolization of speech, for open-access critics, should lead not to viewpoint neutrality as the Court defines it, but to completely open access, which the Court rejects.

105 Brief for the Brennan Center for Justice at NYU School of Law for Respondent Forbes, at 4; Brief of the Natural Law Party of the United States at 2, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); Raskin, *supra* note 4; Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 56-57 (2000). Similar points were made by the dissent in *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990).

106 *See, e.g.*, Raskin, *supra* note 4, at 1946, 1961-63. For example, participation in the Minnesota gubernatorial debates is credited by many as having enabled Jesse Ventura's election despite his independent status and low pre-debate polls. *See also* Eric Bailey, *Campaign 2000: Shut Out of the Debates, Nader and Buchanan Have Plenty of Company*, L.A. TIMES, Sept. 30, 2000, at A13; *All Things Considered* (National Public Radio broadcast, Oct. 3, 2000) (comments of Mark Hertsgaard).

Rejecting an outcome-oriented test, the Court in *Forbes* adopted a narrower conception of viewpoint neutrality in this context. The Court's intent-oriented standard does not address the ideological consequences of exclusions from debates. It does not look at the possibility of viewpoint-skewing effects, nor does it address the manipulability of notions of popularity and newsworthiness. Instead, it relies on the jury's finding as to the governmental intent.[107] The standard simply focuses on whether the public broadcaster intended to select the participants in its debate on the basis of agreement with or distaste for their viewpoints.

The Court's decision to do so is not irrational. Claims that debate exclusions inherently constitute viewpoint-based discrimination are extremely broad. Because *any* access decision will have some effect on the viewpoints available to the public, an effects-focused analysis ineluctably leads to an open access proposal. But this focus entirely discounts the significance of any of the countervailing, pro-discretion arguments. Adopting such an expansive view of viewpoint neutrality would suggest that public broadcasters could never properly make editorial decisions that would result in excluding a candidate's voice in a debate. While this result might be acceptable to open access proponents, it is inconsistent with the conception of public stations as free to determine their optimal contributions to the electoral process.[108]

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107 This, of course, raises the question of whether the finding of viewpoint neutrality should be based largely on the jury finding. Although the finding of whether the decision to exclude Forbes was viewpoint-based turned on a factual determination, it was necessarily tied to Forbes' political opinions. The jury surely understood that a finding of viewpoint neutrality would support the exclusion of Forbes from the debate. In accepting the trial court's decision to turn the issue over to the jury and reviewing the jury's findings on the basis of the sufficiency of the evidence, the question is raised whether the Supreme Court overly limited the review that should be applied to protect unpopular speakers in First Amendment claims. To bolster his position on the AETN's viewpoint-based exclusion, Forbes might repeat his claim that someone at the AETN had told him that the station would run "St. Elsewhere" episodes before it ran a debate with him in it. Forbes v. Ark. Educ. Television Communication Network Found., 22 F.3d 1423, 1426 (8th Cir. 1994), *cert. denied*, 513 U.S. 995 (1994), 514 U.S. 1110 (1995). *See* Raskin, *supra* note 4, at 1950.

108 As for the argument that selection is tantamount to an implicit and improper endorsement of major-party candidates, the bottom line is that the government will have presented or excluded viewpoints regardless of its selection method, and some effect is unavoidable regardless of the government action. First, it is unclear that their selection would—or should—be read as such an endorsement. Why assume that the access to the debate—whatever the subsequent effects of the debate itself—will be perceived as a specific endorsement by the government of any participant's views? The problem may be addressed by an announcement at the beginning of the program that the program is not intended to suggest an endorsement of any candidate and by a subsequent "debate post-mortem" in which an explicit endorsement or an explicit disavowal can be made by the station. If the worry is that government exclusion of minor-party competitors will be seen as a governmental endorsement of only the major parties (rather than a specific endorsement of a particular candidate), skeptics might argue that viewers are just as likely to interpret the exclusion as evidence of the public's lack of interest in the competing candidates.

More importantly, one might argue, for example, that giving Forbes the opportunity to appear in a debate is actually much more of an endorsement of his candidacy than an endorsement of any particular major-party candidate. Depending on the starting point, one might well argue that government *inclusion* of an unpopular candidate who did not satisfy newsworthiness norms is not in

Moreover, the focus on viewpoint exclusion rather than speaker exclusion might result in undesirable case-by-case governmental determinations of the viewpoints of the candidates that were—and were not—excluded. Ultimately, some selections and some exclusions are inevitable, particularly in crowded fields, and a clean application of the effects-oriented approach is unworkable. A broad reading of exclusion as per se viewpoint discrimination would make suspect any such selection method.

Finally, the adoption of an open access, public forum approach is not the only alternative to the adoption of a viewpoint neutrality model for debates. The other alternative is that debates not be considered distinguishable from the public station's other programming and not be required to satisfy viewpoint neutrality standards. Under that approach, state sponsors of televised debates might be free to engage in viewpoint-based editorial decisions, as the *Forbes* Court reaffirmed they might in their general programming. This result would be far more distressing from the point of view of political discourse than a state station's attempt to select debate participants in a narrowly viewpoint-neutral fashion.[109]

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fact a viewpoint neutral decision and should be deemed an endorsement. *Campaign 2000 Debate Panel Defends Barring Nader, Buchanan*, L.A. TIMES, June 22, 2000, at A3 (quoting co-chair of commission to the effect that "[o]ur role is not to jump-start your campaign and all of a sudden make you competitive"). In fact, there is evidence that the support Forbes garnered in his prior race was based on voter ignorance. Gregg Jones & Ray Minor, *Voting for, Backing Forbes Seem to Be Different Things: Some Shocked at Votes for Forbes*, ARK. GAZETTE, June 8, 1990, at 1A (describing voters who voted based on the placement of Forbes' name on the ballot).

To the extent that legitimizing a "fringe" candidate is viewed as an endorsement of his views, government would be seen as an endorser whatever its debate selection. Simply by including otherwise minor and unelectable candidates, the public broadcaster thereby gives them the benefit of a potent platform for their views. The question then becomes whether government provision of such a benefit should be interpreted as an indirect sponsorship or endorsement of those candidates—or, at least, of the legitimacy of their views.

Moreover, the inclusion of only some third-party candidates can have a greater effect on the prospects of one of the major-party candidates than the other, particularly in elections in which a plurality is sufficient to win. Thus, relatively greater exposure of candidates appealing broadly to voters sharing one political philosophy may in fact work in favor of a candidate with a very different philosophy.

109 Critics suggest that if stringent First Amendment scrutiny had been applied to the newsworthiness and viability criteria as selection standards, such criteria could not have passed muster. *See* Raskin, *supra* note 4, at 1957-58. However, the Eighth Circuit itself, in *Marcus v. Iowa Public Television*, 97 F.3d 1137 (8th Cir. 1996), denied the Natural Law Party candidates' emergency motion for injunctive relief to compel their participation in the program *Iowa Press* where the Iowa Public Television station had scheduled "joint appearances" of Democratic and Republican candidates in each of Iowa's five congressional districts. Accepting for purposes of the injunction motion that the joint appearances were debates and that *Iowa Press*, which is a news and public affairs program, was a limited public forum for qualified congressional candidates, the court nevertheless found that the Iowa Public Television station had "a compelling interest, in meeting its public service goals, of limiting access to newsworthy candidates." *Id.* at 1144. Moreover, the court concluded that the station's methods for limiting access to newsworthy candidates were "narrowly suited to achieving this goal" as well as leaving substantial access to other fora offered by Iowa Public Television. While the court's analysis is not immune to criticism, the case is cited here to demonstrate that exclusionary debate outcomes have passed muster even under supposedly strict scrutiny applicable to government

Of course, arguments can be made on the facts in any given case that particular selection decisions were not viewpoint-neutral and were only pretextually based on newsworthiness criteria. Obviously, "subjective" criteria such as professional discretion and newsworthiness will leave room for abuse and for pretextual application. Yet, there are evidentiary checks on such manipulative practices. So long as the viewpoint neutrality argument is addressed on the facts of the relevant case, rather than being rejected by definition, courts do have leeway to determine whether to compel a candidate's inclusion.[110] Whether that, in turn, poses a problem of judicial partisanship is of course a different matter that raises much broader questions regarding judicial involvement in any aspect of the electoral process. It also depends on the role of the jury.

C. *The Special Character of Debates*

By requiring viewpoint neutrality in the special context of debates, the *Forbes* majority stopped short of treating public broadcasters as completely indistinguishable from private media entities. It did so because of the assertedly special character of debates. The *Forbes* majority distinguished debates from other public station programming on two grounds: that "[t]he very purpose of the debate was to allow the candidates to express their views with minimal intrusion by the broadcaster;" and that "in our tradition, candidate debates are of exceptional significance in the electoral process."[111] Effectively, the Court took the position that debates were too important to run the risk of government viewpoint discrimination, and that they could be carved out of the rest of public station programming for purposes of more stringent review, not only because of their importance, but because the broadcasters themselves had already ceded discretion to the candidates and decided to constrain their own substantive judgments in the context of debates.

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exclusions in a public forum.

110 For example, the *Forbes* Court could presumably have questioned the findings of fact as to the exclusion of Ralph Forbes. There was evidence in the record that the dissent interpreted as viewpoint-based.

111 Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 675 (1998). The *Forbes* majority found it "of particular importance," *id.* at 675 (quoting CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981)), that candidates make their views known so the electorate may intelligently evaluate the candidate's personal qualities and their positions on vital public issues:

> Deliberation on the positions and qualifications of candidates is integral to our system of government, and electoral speech may have its most profound and widespread impact when it is disseminated through televised debates. A majority of the population cites television as its primary source of election information, and debates are regarded as the "only occasion during a campaign when the attention of a large portion of the American public is focused on the election, as well as the only campaign information format which potentially offers sufficient time to explore issues and policies in depth in a neutral forum."

Id. at 676 (quoting the Congressional Research Service).

If debates are not in fact so different from the rest of political programming in modern elections, then pro-access critics can argue that, over time, the majority's requirement of viewpoint neutrality should extend beyond debates—at a minimum into the rest of the public stations' political programming.[112] If they have already ceded control to the candidates, then they should have no further control over the participants. By contrast, discretion proponents can challenge the focused constitutional scrutiny of debates and argue that there should be no constitutional difference between private and public broadcasters even as to debates because of the inevitable editorial discretion in all programming.

While it is useful to challenge the *Forbes* majority's unquestioning debate exceptionalism in the abstract, debates today—and particularly nationally-televised presidential debates—still do play a different role in public discourse than ordinary news programming. The Court's debate exceptionalism serves an important functional role in an attempt to provide a safety net for government error in the special context of elections. Debates *should* be treated differently, because they implicate government speech in a different way than the typical programming decision and play an important cultural role in a political world of second-best resources.

1. The "Exceptional Significance" of Debates

Forbes claims that electoral speech has its "most profound and widespread impact" through televised debates because the public *en masse* pays attention to them, they allow for in-depth issue exploration, and they do so in a neutral (non-partisan) fashion. Intuition, as well as commentators, support the *Forbes* Court's proposition that televised debates are very significant electorally.[113] Both political analysts[114] and poll respondents[115] attest to their importance. Many credit Richard Nixon's defeat in the 1960 presidential election to his less-than-stellar showing in

112 *Cf.* Fiss, *supra* note 44, at 1233 (suggesting that the requirement should even extend into the educative programming of private, commercial broadcasters).

113 *See, e.g.*, E.D. DOVER, PRESIDENTIAL ELECTIONS IN THE TELEVISION AGE 1960-1992 (1994); SUSAN A. HELLWEG ET AL., TELEVISED PRESIDENTIAL DEBATES: ADVOCACY IN CONTEMPORARY AMERICA (1992). Exit poll data from the 1988 and 1992 presidential elections apparently revealed that more voters based their decisions on candidate performance in presidential debates than on any other single factor. Aimee Howd, *Politics Behind Candidate Debates*, INSIGHT ON THE NEWS, Nov. 22, 1999, at 20; *see also* Raskin, *supra* note 4, at 1943-46.

114 Raskin, *supra* note 4, at 1944 (pointing out that debates can be helpful to undecided voters and, especially, to those voters who have an interest in a particular substantive issue); *see also* KATHLEEN H. JAMIESON & DAVID S. BIRDSELL, PRESIDENTIAL DEBATES: THE CHALLENGE OF CREATING AN INFORMED ELECTORATE 127 (1988) (reviewing the research and concluding that "the educational impact of debates is surprisingly wide," and "the ability of viewers to comment sensibly on the candidates and their stands on issues increases with debates").

115 *See Majority of Citizens Taking Online Questionnaire Find Debates Valuable in Voting Decisions*, Oct. 20, 2000, http://www.debates.org/pages/news17.html.

the Nixon-Kennedy debates of 1960.[116] Courts have even taken judicial notice that a candidate's participation in debates bestows a competitive advantage over non-participant peers.[117]

Yet the precise character of debate significance has yet to be scientifically established. And the extent to which different debates—with different goals, different participants, and in different times and circumstances—may have different sorts and degrees of significance further complicates what seems like an intuitively obvious proposition.[118] Thus, critics arguing against significance-based debate exceptionalism can

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116 There has been, of course, a rich history of political debates in this country. *See, e.g.*, THE LINCOLN-DOUGLAS DEBATES (Harold Molzer ed., 1993). Yet the now-famous presidential debates between Richard Nixon and John F. Kennedy were the first televised contests. *See* NEWTON MINOW ET AL., PRESIDENTIAL TELEVISION 52 (1973) (describing how television allowed 75 million viewers to be captivated by an attractive, younger, tanned and poised Kennedy and to discount Nixon's eight-year tenure as vice president because of his refusal to wear make-up to disguise his five o'clock shadow and tense, haggard look); THEODORE WHITE, THE MAKING OF THE PRESIDENT 1960, 289 (1961) (quoting Nixon for the proposition that "[o]ne bad camera angle on television can have far more effect on the election outcome than a major mistake in writing a speech"); Robert Frazer, Note, *Political Broadcast Regulation in the United States and Great Britain*, 17 BROOK. J. INT'L L. 89, n.9 (1991); NEALE, *supra* note 66, at 2.

Even after Nixon and JFK broke ground on the televised debate, sixteen years passed before the next presidential debate was televised, both because of FCC regulations and because the front-running candidates declined to debate. *See, e.g.*, NEALE, *supra* note 66, at 3; Susan E. Spotts, *The Presidential Debates Act of 1992*, 29 HARV. J. ON LEGIS. 561, 563 (1992).

117 Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 626 (2d Cir. 1989). In fact, this competitive disability vis-à-vis the other candidates was the basis of the Second Circuit's finding that Fulani had standing to challenge the tax-exempt status of the League of Women Voters, the debate-sponsoring entity. *See supra* note 7 (describing the *Fulani* litigations).

118 Characterizations of the effect of media on viewer behavior are treacherous. Some studies of the effects of viewing televised political debates suggest that they are not likely to influence candidate evaluations or voting intentions very much. David H. Weaver, *What Voters Learn from Media*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 34, 41 (July 1996) (characterizing other studies); *see also* Rick Pearson & Monica Davey, *'Feeling Good,' Rivals Rush to Swing States: Polls Indicate Debate Didn't Sway Many*, CHI. TRIB., Oct. 5, 2000, at N1. Apparently, party identification and prior candidate preference may be more significant than watching televised political debates. Weaver, *supra* note 134, at 41. Moreover, saying that outstanding performance in a debate can provide a tremendous campaign boost while gaffes can be fatal just characterizes debate effects at the extremes. *See, e.g.*, Erwin Chemerinsky, *Changing the Rules of the Game: The New FCC Regulations on Political Debates*, 7 HASTINGS COMM. & ENT. L.J. 1, 1-2 (1984).

The particular office and the specific nature of the contest are doubtless critical in the role of the debate. It may well be that presidential debates, for example, are entirely distinct from debates for other offices (particularly if those debates do not enjoy notoriety for some other reason). Lowenstein, *supra* note 4, at 2010. Professor Lowenstein, for example, has suggested that although candidate debates in presidential elections are doubtless major events, neither evidence nor common sense would suggest extrapolating a similar significance to other debates. *Id.*

The styles of the candidates, the format of the debate, and the rest of the campaign are all also no doubt elements that influence the effect of the debate. Moreover, the role and perception of debates may change over time; what was spectacular when debates were first televised may become banal and uninteresting as such contests become *de rigueur*.

Finally, the social science literature concerns debates that have taken place thus far. To the extent that those debates have been exclusionary, we cannot rely on that literature to predict the effects of a broader debate field, especially in non-presidential debate contexts. Thus, extreme generalizations about the tremendously different and clear effect of debates may lose some of their intuitive appeal when tested against the complexity of the interactive elements in political campaigns.

challenge the Court's empirical assumption about electoral impact.

Such critics can also claim that the modern debate does not even serve the romantic goal of educating the public.[119] The degree to which independent and intelligent evaluation of candidates by voters can actually take place in a debate culture now saturated with spin doctors, political pundits, and media handicappers is an important practical question that may qualify the theoretical utility of debates. Modern candidates all-too-often pattern their personal qualities after what pollsters tell them the electorate expects,[120] turning debate appearances into scripted, manipulative campaign commercials. With regard to substantive points, the candidates are mainly concerned about "winning" the debate, and not about informing the public.[121] At the same time, the debate context does not permit vetting or checking of candidates' substantive claims.[122]

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119 *See, e.g.*, Spotts, *supra* note 116, at 561. The *Forbes* majority opinion advances the notion that "it is of particular importance" that candidates have the chance to make their views known so that the electorate can "intelligently evaluate" the candidates' "personal qualities" and "their positions on vital public issues." Ark. Educ. Television v. Forbes, 523 U.S. 666, 675-76 (1998) (quoting CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981)). The reference to *CBS, Inc. v. FCC* is interesting not only for the point made in text, but also for the fact that *CBS, Inc. v. FCC* did not involve political debates. Rather, the issue there was whether the Congress could constitutionally provide a reasonable right of access to the airwaves for federal candidates to make their views known. 453 U.S. at 371. Debates raise some of the same issues, but different ones as well.

120 *See, e.g.*, Alison Mitchell, *A Modest Poll Proposal*, N.Y. TIMES, Oct. 8, 2000, § 4, at 5. Whether or not they allow a reasoned evaluation of personal qualities, political debates can certainly educate the viewer about the image of the debating candidates; the politician participants' skills in responding to questions quickly; the attractiveness of the candidates as compared with one another; and a sense of the candidates' personalities and character (whether or not grounded in reality, but certainly deriving from the candidates' appearance, voice, style, and demeanor.) For critiques along these lines, see, for example, NEWTON N. MINOW & CLIFFORD M. SLOAN, FOR GREAT DEBATES 36 (1987); and JOEL L. SWERDLOW, BEYOND DEBATE 13 (1984). *See also* Howard Rosenberg, *The Presidential Debate: It's Not What's Said But Media Spin on What's Said*, L.A. TIMES, Oct. 4, 2000, at A10 (describing debates as "resonat[ing] entertainment values bleeding through news against the Muzak of prepackaged rhetoric"); Howard Rosenberg, *There We Go Again: Shallow TV Debates*, L.A. TIMES, Sept. 29, 2000, at F1; Michael Tackett, *Candidates Offer Voters Nothing New*, CHI. TRIB., Oct. 4, 2000, at N1 (describing debates as stagecraft); Roger Simon, *So, Let the Debates Begin Already*, U.S. NEWS & WORLD REP., Oct. 2, 2000, at 25 (describing debates as "theater," "minidramas," "one of the few moments in which the campaigns pull back the curtains and invite everybody to take a peek at the artificiality of the process");. At best, the debates provide a means for acquainting voters with the candidates and giving the viewers the opportunity "to watch candidates' minds at work in circumstances that are less scripted and controlled than usual." BRUCE BUCHANAN, ELECTING A PRESIDENT 109 (1991). *See also* JAMIESON & BIRDSELL, *supra* note 114, at 126.

121 Spotts, *supra* note 116, at 564.

122 As a result, the major television networks apparently routinely assign "truth squads" to investigate candidate claims made in debates. Phyllis Kaniss, *Assessing the Role of Local Television News in Elections: Stimulating Involvement or Indifference*, 11 YALE L. & POL'Y REV. 433, 440 (1993). In addition to accountability processes like Ad Watch, the last several elections have seen changes in news coverage. News programs have increasingly provided candidates with larger sound bites in which to address the population in their own words. In addition, newspapers especially undertake continuous issue inventories during election periods. But the fact that news commentary is an important adjunct and supplement to debates does not mean that the candidate debates are therefore insignificant.

While we can expect the candidates to some extent to combat one another's points and characterizations, they will presumably only do so when, and to the extent that, such correction serves

Nevertheless, the debate is best seen as part of a hortatory effort to improve political discourse. The fact that these debates allow politicians to spin their audience and project their preferred persona does not mean that the public cannot learn something important as a result of the debates. Even if public response is more visceral than intellectual, and even though debates do not generally provide adequate time for a nuanced explication of substantive platforms, viewers still can be affected by debates.

Moreover, even if social scientists still argue over whether debates are electorally dispositive, today they are still significant as an institution. And, at least some debates will even be individually significant. The central role of the presidential debate is established if only by the fact that between forty and eighty million people tune in, depending on the election. Even if they do not allow for in-depth issue exploration in the academic sense, debates do introduce the public to the candidate's expression of his views of the issues. Depending on the race, the timing, the issues, the level of audience interest and the personal qualities of the candidates, debates can indeed have significant, if not determinative, effects on election contests, or, at least, on issue platforms. By now, the institution of the political debate has a unique cultural salience.

In any event, it is a mistake to look at debates in a vacuum—the relevant question should be how informative they are compared with the other resources of political information available to the public. After all, with the increasing prevalence of "horse race" journalism[123] and negative political ads that intentionally "spin" the truth,[124] debates provide the possibility of candidate rebuttal and give the public an opportunity to see something different. Indeed, regardless of accuracy, debates may help to reverse some of the voter cynicism and apathy decried by political observers. Even if broadcasters have been providing more free time for candidates to speak their piece to the voters,[125] the debate format does

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their own political needs. Moreover, neither debate moderators during the debates nor post-debate analysis programming is likely to be adequate to identify all misinformation disseminated to the public by the candidates in the debate. The debate moderator—who often makes himself as unobtrusive as possible in order to give the floor to the candidates—is not principally there to inform the public substantively or to point out flaws and problems in any of the debating parties' arguments. As for post-debate debunking of the candidates' statements, there is no requirement for post-debate analysis and, while such analysis is by now common in presidential debate contexts, such programming is no doubt much rarer with regard to less significant races. Furthermore, much post-debate analysis is nothing more than an assessment of "who won the debate," and does not provide an adequate amount of the kind of non-partisan information that would enable viewers to address the accuracy of statements made by the participants. *See id.* at 435-36 (citing studies showing an over-emphasis on the horse-race).

123 *See, e.g.*, Howard Kurtz, *Instant, Ephemeral Analysis*, WASH. POST, Oct. 5, 2000, at C1.

124 For criticisms of candidates for increasingly running negative, image-oriented and non-substantive advertising, see, for example, Rupert Cornwell, *U.S. Elections: Negative Adverts Are Nasty, But They Have Been Nastier*, THE INDEPENDENT (LONDON), Nov. 6, 2000, at 13; and Adam Clymer, *Campaigns' Strategies: Negative vs. Negative*, N.Y. TIMES, Aug. 2, 2000, at A17.

125 *See, e.g.*, Paige Albiniak & Joe Schlosser, *NBC Makes Time for Candidates*, BROADCASTING & CABLE, Oct. 9, 2000, at 6; Jeff Leeds, *Fox Gives Bush, Gore Half an Hour of Free*

provide something new.

Under these circumstances, it is not irrational for the Court to conclude that debates provide an institution of political discourse that is too significant to permit the risk that government broadcasters could indulge in viewpoint-based participation decisions.

2. The Government's Role as Conduit

Simply noting the importance of debates, however, might not be doctrinally adequate to distinguish them from the rest of the public station's broadcast day and insulate their constitutional treatment. Thus, the *Forbes* Court relies on the broadcasters' own role in debates to justify the distinction. Justice Kennedy suggests that a debate differs from a political talk show, "whose host can express partisan views and then limit the discussion to those ideas,"[126] because the "very purpose" of the debate is "to allow the candidates to express their views with minimal intrusion by the broadcaster."[127]

Justice Kennedy's distinction cannot mean that debates are unmediated by comparison with other kinds of political programming aired by broadcasters.[128] In fact, critics of the American political scene have argued that political debates are no less structured and orchestrated than the typical Oprah program.[129]

This distinction breaks down in the face of an increasing number of political joint appearances, which now take place on talk shows and in other quasi-entertainment programming.[130] The difference is that debates are not wholly broadcaster-mediated because the candidates themselves

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TV Time, L.A. TIMES, Oct. 20, 2000, at A1; Dan Morgan, *A Made for TV Windfall: Candidates Air Time Scramble Fills Stations' Tills*, WASH. POST, May 2, 2000, at A1.

126 Ark. Educ. Television v. Forbes, 523 U.S. 666, 675 (1998).

127 *Id.*

128 All staging elements for debates require editorial decisions and have perceptible effects. The time allocation, the nature of the questions, the order, the issue of rebuttal rights, the lighting/make-up/clothes, whether an audience is present, and how the show is televised (including the selection of camera shots, among other staging details), are all elements of a debate that require editorial decisions by candidates, sponsors, and broadcasters. All of these selections, no matter how mundane, have effects on the "takeaway" of the program. Networks and commentators have complained vociferously about "pool" coverage of important political events because things like camera angles are substantive editorial decisions that will affect the end product. *See, e.g.*, Wendy S. Zeligson, Note, *Pool Coverage, Press Access and Presidential Debates: What's Wrong With This Picture?*, 9 CARDOZO L. REV. 1371 (1988). In the 2000 presidential campaign, CBS's split-screen shots of the candidates in the first presidential debate were criticized by some observers for inadvertently having given more screen space to Gore than to Bush.

129 *See, e.g.*, Richard L. Berke, *Lights, Camera . . . : It's Not Only What You Say, But How*, N.Y. TIMES, Oct. 1, 2000, § 4, at 1.

130 Gary Levin, *Bush, Gore Work Late Shift for Laughs, Humor May Help Sway Young Voters*, USA TODAY, Oct. 23, 2000, at 4D; *Talking the Talk: TV Shows Give National Candidates Valuable Exposure*, HOUS. CHRON., Sept. 29, 2000, at A32.

control much of the process in televised debates.[131] The broadcaster structures the debate primarily as a conduit, rather than directly as a speaker in its own right.[132]

Thus, what distinguishes the debate format is that the sponsor itself constrains its own ability to editorialize by allowing contrasting points to be made, and made by the parties that hold the views. The broadcaster's intent is to step off center stage and direct the audience's focus to the candidates.[133]

Debate proponents argue that the public gains from such candidate-centered programming. The political debate is, arguably, the one clear political forum in which the selection, mediation, editing and presentation of news and political information are not left entirely to the discretion of the broadcasters. Even if one does not see the press as particularly partisan,

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131 Candidates often have the power to influence the structure and format of the contests in which they will participate. The ability to decline the invitation makes the debate participants extremely powerful in setting the format and parameters of the debate. Howd, *supra* note 113, at 20; Spotts, *supra* note 116, at 561-66. Indeed, candidates often even have control over the questions asked (or at least familiarity with the range of questions to be asked). The League of Women Voters gave up sponsorship of presidential debates when it became clear, in the League's view, that the Committee on Presidential Debates was allowing the candidates to control too many aspects of the planned debates in 1988. NEALE, *supra* note 66, at 9. Since 1985, the bipartisan Commission on Presidential Debates, created by the chairmen of the Democratic and Republican parties, has sponsored the presidential debates. Spotts, *supra* note 116, at 563.

132 The *Forbes* Court notes that the debate is "by design a forum for political speech by the candidates . . . [in which] the implicit representation of the broadcaster was that the views expressed were those of the candidates, not its own." 523 U.S. at 675.

Despite the critics' charges, the *Forbes* majority's debate exceptionalism—which is grounded on who mediates the information—is a rational approach to the quasi-public forum analysis engaged in by the Court. After all, if at least part of the determination to be made in public forum cases is whether the government has adopted a conduit or managerial role, then distinguishing between programming primarily mediated by candidates rather than by broadcast journalists can provide enough of an analog to justify stricter scrutiny of debates than of traditional news and public affairs programming. In the cable context, in the *Turner Broadcasting* cases, the Court rejected the conduit-based common carrier argument about cable and held that the cable medium qualified for First Amendment protection. Turner Broad. Sys. v. FCC (Turner II), 520 U.S. 180 (1997); Turner Broad. Sys. v. FCC (Turner I), 512 U.S. 622 (1994). The *Turner Broadcasting* cases involved the constitutionality of the "must carry" provisions of the Cable Act of 1992. In *Turner I*, the Court acknowledged the First Amendment status of cable operators, but remanded the case for further evidentiary hearings. In *Turner II*, must carry was upheld as a valid exercise of congressional authority. In so holding, the Court recognized that selection, editing, formatting, timing and other structural decisions about programming are themselves decisions about content and constitute "speech." Nevertheless, it found that, constitutionally, cable operators could be required to carry the signals of over-the-air broadcast stations.

Justice Kennedy used an intermediate standard of review under the First Amendment in his consideration of the must-carry rules because he did not characterize them as content regulation. He also employed an antitrust-based form of analysis. Justice Breyer, whose vote was necessary to the result in *Turner II*, did not join in the competition-based analysis. Rather, Justice Breyer admitted that the must-carry rules exact a significant First Amendment-based price in suppressing the cable operator's expressive decisions, but nevertheless held them constitutional on a balancing theory.

133 For an argument that viewpoint neutrality is fundamentally inconsistent with editorial judgment, but that *Forbes* involved selection of speech by others—a decision more oriented toward publication and distribution than to the government's own expression, see Bezanson, *supra* note 42, at 959-60, 967.

one might worry that in the translation and characterization, the nuances of a candidate's position or response might lose their accuracy, individuality, and personality. After all, media coverage of politics does have significant agenda-setting and informing consequences, since the press plays "a major role in making some candidates, and certain of their traits, more salient or prominent than others."[134] That, in itself, might be enough to suggest that a political debate is both different from, and a desirable alternative to, more classically media-controlled news programming. The fact that broadcasters may choose to air non-debate programming influenced by the structure of the debate format does not detract from the fact that the debate cedes broadcaster control to candidates and their handlers.

A governmental role as neutral conduit may be particularly important in the context of political debates because of what corporate lawyers might call a "self-dealing" problem. Because the *Forbes* Court envisioned the AETN broadcasters as journalists, it did not address the issue of what might be particularly problematic about government-sponsored election debates. To the extent that such political debates are enmeshed in the public's election of governmental actors, then a certain conflict of interest may arise from government selection of the participants in the competition for governmental office on the basis of their viewpoints. Elections are the central context in which the public reviews and appraises government.[135] Of course, this is an abstract point. Sponsoring a presidential debate is not directly relevant to the selection of a state broadcaster's supervisory board, even though a gubernatorial debate might be. Nevertheless, sensitivity to the issue of self interest can explain the *Forbes* majority's desire to treat debates differently than the rest of the public station's programming.[136]

Critics might suggest that the broadcaster should act as a "pure" conduit when it chooses to host a debate by refusing to participate in the selection of candidates. The problem with that argument, however, is that it does not consider the broadcaster's decisions about the specifics of its

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134 DAVID H. WEAVER, MEDIA AGENDA SETTING IN PRESIDENTIAL ELECTIONS 185-92 (1981); Weaver, *supra* note 118, at 39.

135 *See* Bezanson, *supra* note 42, at 968 ("[T]here is a certain incompatibility between government's power to take positions on elections and the fact of democratically elected government.").

136 Some have read *Forbes* as recognizing editorial freedom of government as speaker so long as it does not monopolize the market. *See, e.g.*, Bezanson, *supra* note 42, at 968 (suggesting that this is a plausible reading). Thus, Professor Bezanson suggests that *Forbes* involved "a forum in which the government's speech choices acquired the force of monopoly." *Id.* However, the first step in the assessment of market power is the definition of the market. While Professor Bezanson's interpretation is plausible, one could also imagine the Court taking a broader view of the market, including commercial voices, and concluding that the public station should be deemed only a minor participant in that arena. *See* Tushnet, *supra* note 82, at 1245-46 (describing American public television as not having a "dominating role as a source of news"); *id* at 1254 (suggesting that the determination of whether a skewing effect really occurs requires consideration of speech opportunities available in the nongovernment market).

role as conduit to be themselves editorial choices. A viewpoint neutrality standard is thus a compromise between an open-access response to this conflict and the view that government has an appropriate role as speaker, even in the debate aspect of the political arena.

D. *Why Not Pre-established, Objective Criteria?*

For those critics who accept that some participant selections must be made in crowded fields, the *Forbes* Court's case-by-case, post-hoc, discretionary approach is, nevertheless, too dangerous. Such critics would be reassured, as was the dissent in *Forbes*, by objective, neutral, pre-established rules determining debate inclusion. Objective standards would serve both as guides for broadcaster behavior and litigation benchmarks for excluded third-party candidates.[137]

Why not take the dissent's approach and adopt a requirement of pre-established, objective criteria for debate inclusion in order to avoid the risk of government abuse? While pre-established rules have much to offer—such as their potentially constraining effect on abuse of governmental discretion—a realistic assessment of proceduralist approaches to the problem of debate access suggests that an essentially arbitrary bright-line access rule is not likely to achieve the democratic electoral results that the critics desire. Probably, and ironically, such objective, pre-established standards would mask the considerable exercise of discretion necessary to apply the standards in any given case. To the extent that the standards require the application of select uniform criteria in all contests, they would run the risk of under- or over-inclusion in any particular case. And, most likely, they would create an increase in litigation focusing on the technical and administrative process of selection pursuant to the guidelines.

Three possibilities for an objective standard come to mind: a numerical standard selected by the broadcaster debate sponsor, a standard grounded in ballot access, and a non-numerical, but neutral and pre-established, guideline based on newsworthiness.[138] All three possibilities

137 *See* Fiss, *supra* note 44, at 1235 (contending that "the duty to use objective, pre-announced standards would give the excluded candidate a better chance to prove that his or her exclusion was arbitrary or, under the rule of the majority, a form of viewpoint discrimination").

138 The dissent's comment in footnote 19 is instructive. It discounts the majority's chilling effect example by saying that the Nebraska station would not have cancelled its planned debate if it "had realized that it could have satisfied its First Amendment obligations simply by setting out particularized standards before the debate." Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 694 n.19 (1998) (Stevens, J., dissenting). Since the majority had stated that the Nebraska station had cancelled because of the Eighth Circuit's holding that all ballot-qualified candidates have participation rights, the dissent must mean that there could be neutral and objective standards that are not based on ballot qualifications. Although it does not say what they are, it does not require a standard as "open to third parties and fringe groups" as the citations to the benefits of third-party candidates in footnote 14 might indicate.

are problematic.

First, simply calling for objective numerical benchmarks does not routinely ensure an inclusive debate result. Experience demonstrates that there may well be many minor-party candidates who would seek inclusion in a televised debate—depending on the office, the stage of the campaign, and, for congressional elections especially, the number of congressional districts in the station's coverage area. Certainly, the problem of multiple candidates would be exacerbated by a ruling that permitted access to debates.

The possibility of hugely-inflated ballots suggests that the rational broadcaster that seeks to adhere to the dissent's approach would adopt an easily verifiable, mechanistic and objective standard far more onerous than mere eligibility to appear on the ballot.[139]

Indeed, the fear of litigation might well create incentives to set high inclusion hurdles.[140] Such standards would deprive the stations of the discretion to invite minor-party candidates who did not meet the elevated access standard, but who would otherwise be deemed newsworthy and interesting. Ironically, the major problem with the dissent's argument is that it might well disadvantage precisely the sorts of new voices on the political scene that could beneficially affect electoral politics.

In any event, even if we accept, in the abstract, access proponents' claims that a debate sponsor's objective access criteria (such as those of the CPD) should not be set too high, what principled criteria would justify choosing among other possible, albeit lower, benchmarks? How can principled selections be made between sets of "objective," or even numerical, criteria selected by debate sponsors?

Second, while the option of ballot qualification as the objective access standard has the benefit of administrability and apparent neutrality, it may, in fact, be as problematic as the "discretionary" editorial judgments about newsworthiness decried by the dissent. Using ballot access as the standard may be under-inclusive and arbitrary because there is no principled

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139 *See* Natural Law Party v. FEC 111 F. Supp.2d 33, 39 (D.D.C. 2000). The court describes CPD's debate criteria as follows:

> (1) evidence of constitutional eligibility, (2) evidence of ballot access—a candidate must have his/her name appear on enough state ballots to have at least a mathematical chance of securing an Electoral College majority in the 2000 election, and (3) indicators of electoral support—a candidate must have the support of at least 15% of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly-reported results at the time of the determination.

Id.

140 One could argue in the CPD context, for example, that the group's shift from a more flexible set of selection criteria in the 1996 debates to the rigid and exclusionary 15% rule could be seen as a conscious attempt to preclude the problems of access claims such as the ones made by Ross Perot in the last presidential election. *Natural Law Party*, 111 F. Supp.2d at 37 (describing the CPD's prior approach).

distinction between write-in candidates' ability to contribute to public debate and that of the ballot-qualified candidates.[141] Ballot-focused rules, far from eliminating governmental discretion, effectively drive the discretionary governmental selection underground.[142] Given the variation in the stringency of the various states' ballot access rules,[143] the extent to which debate access rules will achieve their intended discourse—expanding effects will vary greatly by jurisdiction. Indeed, it is not inconceivable that a ballot-based criterion for inclusion in debates would, at least in local races, invite pressure on the legislature to limit ballot access. And for national contests, discretionary choices will have to be made about what degree of ballot access will be sufficient to trigger inclusion in national debates. Thus, the ballot access criterion may be only illusorily "objective" or "neutral." In this way, the criterion may simply push some of the discretionary decisions back to their legislative roots rather than permitting discretion to be exercised by the state broadcaster.

The fact that a ballot access scheme was adopted by an elected legislature does not give it democratic legitimacy per se if applied to debate access. There may be good policy reasons for relaxed ballot access standards that would not apply in the debate context.[144]

Government has an electoral role with respect to ballots, debates, and campaign funding. Both constitutional and policy concerns may dictate that the government adopt liberal rules for ballot access but, at the same time, that it be free to distinguish among candidates on the grounds of viability or newsworthiness for funding allocation purposes. This scheme is justified by a functional approach that looks at the reasons for

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141 *See, e.g.*, Chandler v. Ga. Pub. Telecomm. Comm'n, 917 F.2d 486 (11th Cir. 1990).

142 As Professor Jeremy Paul has noted persuasively, the government is necessarily involved in structuring campaign rules. Jeremy Paul, *Campaign Reform for the 21st Century: Putting Mouth Where the Money Is*, 30 CONN. L. REV. 779, 786 (1998) (noting that ballot access requirements "are themselves an effort to gauge chances of success").

143 In Arkansas, for example, only 2000 signatures are necessary to satisfy the ballot access requirements. ARK. CODE ANN. §§ 7-7-101, 7-7-103(b)(1) (Michie 1999); *see also* Katherine E. Schuelke, *A Call for Reform of New York State's Ballot Access Laws*, 64 N.Y.U. L. REV. 182, 183-84 (1989); Leonard P. Stark, *You Gotta Be On It to Be In It: State Ballot Access Laws and Presidential Primaries*, 5 GEO. MASON L. REV. 137, 140 (1997). On why additional objective criteria are necessitated by the "sham" ballot access rules of some states, see Kinter, *supra* note 39, at 268-69.

144 The Supreme Court has even upheld some limits on ballot qualification in order to avoid the distracting effect of "laundry list" ballots. Lubin v. Panish, 415 U.S. 709, 715 (1974) (criticizing "laundry list" ballots for discouraging voter participation and frustrating those voters who do participate); *see also* Bennett J. Matelson, *Tilting the Electoral Playing Field: The Problem of Subjectivity in Presidential Election Law*, 69 N.Y.U. L. REV. 1238 (1994). In all likelihood, crowded debates would distract the electorate, and even undermine electoral efficiency, more than the laundry list ballot. *Id.* at 1248. Even if adding a few names to a ballot is in fact unlikely to upset the election process (a matter now being reviewed in light of the confusion allegedly created by the "butterfly ballot" in Palm Beach County in the 2000 Presidential election), crowding a debate stage may be more likely to do so. *Id.* Moreover, exclusion from the debate by definition causes less harm to the candidate than ballot exclusion. *Id.* Thus, it is not irrational to apply more exacting selection criteria for debates than for ballots themselves. *Id.*

governmental involvement at each stage. Therefore, some middle ground appropriate to the function might be the right approach for debate selection rules as well.

In any event, there is a complex relationship between questions regarding the nature of the electoral system and questions related to participation in televised debates. On one level, we might expect rules regarding participation in televised debates to reflect the electoral system as it is. On another level, the rules regarding participation in televised debates themselves could affect the nature of the electoral system and the public's perception of the legitimacy of the outcome. However, to the extent that a debate over the legitimacy of debate access rules is actually a complaint about the electoral system as it is, it may be more appropriate to discuss and effect changes in the electoral system directly, rather than through the indirect medium of rules regarding participation in televised debates. Moreover, notwithstanding renewed public discussion following the 2000 presidential election, it remains unlikely that certain aspects of the electoral system will be modified: the constitutional provisions regarding the election of the President, including its provisions regarding the effect of failure to achieve a majority in the electoral college, are one obvious example.

Third, the fallback position of specific and publicly articulated rules for gauging political viability or newsworthiness for access purposes, while avoiding some of the critiques of arbitrary numerical standards, suffers from flaws of its own.[145] Once the door to discretion is opened, the guidelines presumably lose their "objectivity" and, by some accounts, their neutrality. A benchmark standard of whether the candidate has "a realistic chance of success" is harsh, disadvantaging not only new candidates with no clear track record, but also candidates who would significantly change the political discourse even if they were unlikely to win that particular seat at that particular time.[146] An alternative standard of whether the candidate could "capture the sustained attention of the voters"[147] reinjects discretionary judgments about the public's likely interest unconstrained by the relative mathematical certainty of electoral plausibility calculations. In any event, any, some, or all of those criteria can be criticized as not

145 For example, Professor Paul has suggested that such rules first be adopted by the legislature, with more refined and particular application to be undertaken by independent commissions pursuant to legislative guidelines. Paul, *supra* note 142, at 786 (proposing a constitutional amendment requiring all political candidates to participate in joint public discussions of the issues).

146 *See* Matelson, *supra* note 144, at 1248. This is also true for an "objective" standard based on access to matching governmental campaign funds. Qualification for public financing depends on having raised a certain amount of money from private sources. This kind of selection mechanism privileges either the already-popular or those candidates who have significant access to private funds. This is not necessarily the way to enhance the voice of minority candidates who do not have the benefit of a strong campaign apparatus and fundraising operation.

147 *Cf.* Paul, *supra* note 142, at 783-84.

"neutral," even if they are "objective." Critics complain that attention to poll data and electability is self-fulfilling and engages the state in swaying electoral outcomes.[148] The assessment of the claim of neutrality depends entirely on one's definition of neutrality.

Most generally, even if we could come up with a laundry list of objective criteria, how would we pick among them? They could depend on the contest at issue, the stage of the campaign, or various other triggering principles. If the criteria are more numerous than one, the choice among them becomes subjective.[149]

There is no doubt that having some clearly articulated guidelines that allow the identification both of real contenders and serious "dark horse" candidates is wise policy. The question is whether, in reality, such guidelines would be significantly different from the considerations that journalists would ordinarily employ in addressing newsworthiness concerns about a candidate.[150] Whether mandated by a written formula or

148 *See generally* Raskin, *supra* note 4. It does not take a heavily post-modern sensibility to challenge the "objectivity" of some of the criteria commonly taken to be objective and neutral. For example, many people and news organizations rely on poll data for all sorts of predictions in election contests. One might argue that poll data, being quantitative, do not give rise to the subjectivity problems of general newsworthiness determinations and therefore are the perfect debate selection criteria. Polls, however, are only as good as the pollsters and their questions. Such data have been criticized as varying in quality and accuracy. *See, e.g.*, THOMAS E. PATTERSON & ROBERT D. MCCLURE, THE UNSEEING EYE: THE MYTH OF TELEVISION POWER IN NATIONAL POLITICS (1976); Kaniss, *supra* note 122, at 436-37 (1993); The Appleseed Citizens' Task Force on Fair Debates, *supra* note 104; *Panel Discussion, On the Campaign Trail*, BROOKINGS REV., Jan. 1, 1997, at 42, *available at* 1997 WL 10193541 [hereinafter *Brookings Discussion*] (quoting Bill Adams' criticism of 1996 election polls as systematically wrong). In fact, polls have been lambasted for distorting the political process and diverting attention from policy questions both because of their accuracy problems and because of their quantitative, horse-race character. Accordingly, even the most quantitative of elements—statistical analyses of likely outcomes—are far less certain and filled with many more discretionary elements than would sit comfortably with someone determined to make the debate selection process entirely mechanical.

149 One can imagine the decision being mechanical—hinging on a variety of choices depending on various pre-identified factors. If the decision under those circumstances really *is* mechanical, however, then it can have all the negative effects of inflexible rules.

150 The dissent's characterization of Forbes' exclusion as "standardless" was based on three factors: 1) his showings in prior elections; 2) his diversionary effect on the outcome; and 3) the unequal application of AETN's stated standards. While the dissent's reluctance to rely on a jury finding of viewpoint neutrality is understandable, Justice Stevens attributed too much evidentiary weight to the factors the dissent isolated as suspicious.

With respect to Forbes' showing in prior elections, the Court did not address the issue of turn-out, the difference between a primary and a general election, or the differences in office between Lieutenant Governor and U.S. Congressman, or evidence that voters had cast their ballots for Forbes arbitrarily.

With regard to the dissent's argument that Forbes played a significant role in the campaign as a "spoiler," it is not uncontroversial to assert that the appropriate vantage point for an assessment of the seriousness of a candidate is not his own candidacy and electability, but his role in the entire campaign. Moreover, the "spoiler effect" argument assumes that Forbes' participation would have had the direct effect of siphoning off votes from the other Republican candidate. Finally, that Forbes' participation could have had a significant effect is merely another way of saying that his participation would have added arbitrariness to the result, but does not explain how or why that is a desirable thing.

With regard to the third factor, even though AETN had invited a major-party candidate who had

simply because of sound journalistic judgment, debate participant selections would likely focus on things like amount, depth and timing of news coverage, poll results, media endorsements, and funds raised. Obviously, manipulation, partisanship, and inclusions based on viewpoint are impermissible. But it is hard to believe that written guidelines of the sort suggested would eliminate such dangers.[151]

This argument is not intended to advocate that either legislators or courts reject the notion of debate participation guidelines. Rather, it should sound a note of caution about what exactly could be accomplished by such guidelines beyond the exercise of reasonable news judgment approved by the majority in *Forbes*. At a minimum, the dissent's proceduralist approach is no more satisfactory than the majority's in addressing the competing democratic arguments regarding open access to debates.

III. The Supreme Court's Overall Media Strategy

Forbes' second-best solution to the issue of debate access can be seen as one element of a media strategy designed to be assessed on a market-wide basis, across competitive media. The Court in *Forbes* laid the groundwork for an analytic method that seeks to achieve optimality in political debates indirectly—by providing journalists flexibility to create the right balance of access across media, and by providing for structural protections to preclude abuse. Because the *Forbes* discretionary approach permits—but does not require—third party exclusion, its results need not be catastrophic even from the point of view of equal access proponents. Although an anti-populist decision, *Forbes* in practice may give public broadcasters the flexibility realistically to provide debates and other political programming in true counterpoint to the private television sector. Yet because debates are still exceptional, the extra oversight required by the Court's approach provides a safety valve in the institution-balancing media strategy.

Absolute access proponents would of course have much preferred a constitutional right to the promise of an institution-balancing model. But short of that, whether the Court's approach will expand access to political debates and enrich the public counterpoint to commercial television still remains to be seen. While there are some reasons to be skeptical, only empirical study of the post-*Forbes* debate landscape will begin to answer

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collected even less campaign money than Forbes and was a long shot in the election, campaign money was only one of the factors used by AETN in its debate selection decisions, and one candidate inevitably looks like a comparative long shot in any unequal election.

151 One argument in support of pre-established criteria is that "the very construction of a list of objective criteria would produce an open discussion about the permissible grounds for exclusion." Fiss, *supra* note 44, at 1235. It is unclear whether that would necessarily occur and, if it did, what its effects would be.

the question.

A. Forbes *in Practice—No Guarantees of Exclusion*

While there are strong arguments for the potentially anti-democratic effects of debate exclusion for all third-party and "maverick" major-party candidates, it is important for critics to observe that the Court did not mandate exclusion. It simply permitted the exercise of journalistic judgment in the selection of debate participants. Moreover, the *Forbes* majority took pains to explain that its decision addressed the claimed First Amendment right of access and not legislative assurances of access.[152]

Even if legislative change is unlikely to be immediately forthcoming, we should not forget that public stations may well use their discretion under *Forbes* to include—as well as exclude—third-party candidates. Indeed, such stations would be free to include the third-party candidates even if they did not satisfy an "objective," numerical standard like that adopted for the 2000 presidential campaign by the CPD. Wholesale critiques of the *Forbes* outcome are problematic in that they assume—without empirical evidence—that public broadcasters will necessarily exclude third-party candidates from debates. Given the permissive nature of the Court's ruling in *Forbes*, we need to weigh the claimed harms and benefits of access in light of historical patterns of debate inclusion by public stations.

In fact, independent candidates have not faced systematic exclusion from debates sponsored and broadcast by state entities. They have often been invited to participate in debates on both public and private stations.[153] Ironically, the AETN's treatment of Ralph Forbes himself during the 1998

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152 With respect to the legislative solution, Congress has for several years contemplated bills designed to reform political debates. *See, e.g.*, Kyu Ho Youm, *Editorial Rights of Public Broadcasting Stations vs. Access for Minor Political Candidates to Television Debates*, 52 FED. COMM. L.J. 687, 724-25 (2000) (describing such legislation).

However, the difficulties faced by such legislation cast doubt on whether the *Forbes* majority's sanguine reference to legislative adoption of access rules could realistically solve the policy issue. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 675 (1998). While some Republicans and Democrats in Congress might vote for such legislation based on a belief in the role of minor-party candidates in the political landscape, and some might vote for it in order to be able to use access strategically (depending on the specifics of the campaign), many legislators would presumably reject such access rights out of hand because they would have no desire ever to face the problem of sharing the debate stage with a "fringe" candidate. *See, e.g.*, Matelson, *supra* note 144, at 1284-85. For similar arguments, including references to Congressional failure to pass proposed debate reform legislation in the early 1990s, see, for example, Eisner, *supra* note 51, at 1017 n.193; and Youm, *supra*, at 724-25.

153 Eisner, *supra* note 51, at 1000-01; Greenfield, *supra* note 39, at 628-30 (pointing out that of the public television debates for a variety of offices held by nineteen public television stations or networks, eleven included all ballot-qualified candidates and only five restricted their debates to major candidates); Karen Everhart Bedford, *Election 98 Projects Zoom in on Local Contests*, CURRENT, Oct. 26, 1998, *available at* http://www.current.org/el/el819d.html. Because First Amendment access rights were recognized by few courts prior to the appellate decision in *Forbes*, we need not attribute inclusion to a perception that failure to include was unconstitutional.

election—in which he was invited to participate in a debate the network aired—demonstrates that state-owned stations will not necessarily march in lock-step.[154] A simple reference to the CPD's high debate inclusion threshold for post-primary presidential debates should not suffice to diminish the significance of historical evidence of inclusion both in non-presidential and even in presidential debate contexts.

As noted in Part II.B.1 above, largely because of the fragmentation of authority and the decentralization of the public television system in this country, non-commercial station licensees by and large have avoided serious interference with programming decisions.[155] Moreover, students of public broadcasting observe that the non-commercial stations' oversight boards do not actually control their programming and operating decisions; these observers warn us not to ignore "the powerful influence of the professional staff."[156]

In any event, apocalyptic claims about the effect of *Forbes* should be assessed in the broad context of available media today. The explosion of new technologies may reduce, at least to some degree, the need for third party access to all debates broadcast by public stations. If the contending candidacies and viewpoints—including debates with third-party candidates—are available across the media spectrum, in various competing media, then one might wonder about the necessity of requiring open access to public station debates. That in turn raises questions about framing a constitutional norm to do so.

Assessing the issue of access across media—in the "information market" more generally—of course requires attention to the issue of media substitutability. Admittedly, at this time, broadcasting is still the single universal mass medium available for free to all Americans.[157] It remains today "the paramount public medium" at least in part because of its "unique capacity to create a shared understanding."[158] Arguments rooted in

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154 *See* David A. Lieb, *The Debate May Never Happen, But Ralph Forbes Can at Least Claim a Minor Victory by Being Invited*, ASSOCIATED PRESS POL. SERV., Sept. 4, 1998 at 1, *available at* 1998 WL 7442545. Moreover, any conclusions to be drawn from an analysis of debate history must focus particularly on debates sponsored by public media. Exclusions attributable to the selection criteria of other sponsoring organizations cannot properly serve to assess predictions about the behavior of public media entities in their own political debate formats. The key point is that broadcaster discretion will not necessarily lead to third party debate exclusion.

155 YUDOF, *supra* note 91, at 133. In fact, the real conflict seems to lie between the Corporation for Public Broadcasting and the Public Broadcasting System. The CPB has jurisdiction over the overall public television programming output, and PBS sees itself as representing the diverse mix of local stations. Nevertheless, as Dean Yudof points out, neither CPB nor PBS views itself "as an auxiliary of the government." *Id.*

156 *Id.* at 134.

157 *See, e.g.*, Fiss, *supra* note 44, at 1216 (warning us not to overstate the democratic value of computer-based means of communication at this point).

158 *Id.* at 1217. Admittedly, precisely what that means is unclear. It is certainly true that a television program watched nationally injects widely-shared events into popular culture. But the degree to which it actually creates a "shared understanding" beyond a shared experience is a more

the market-wide availability of campaign information must therefore address not only the future potential of new technology to inform voters, but also the specific reality of what is available today and to whom.

The Internet and e-mail are now much more significant elements of political campaigning than in the past.[159] Many web pages now provide detailed information about political candidates and even market themselves to Generation X web surfers who distrust mainstream political information sources.[160] It is also unrealistic to exclude talk shows and talk radio, although the effect of talk radio may vary by election.[161] Large segments of the American public have access to cable[162] and increasing numbers subscribe to direct broadcast satellite services.[163] Alternative political programming is increasingly easily available. Moreover, the decline of the mass audience and the multiplicity of electronic sources today create incentives for broadcasters to put on full-fledged and complete political debates at least in important elections.[164] Thus, the availability of candidate debates and position statements both on alternative media and on traditional television expands the political information accessible to the average voter. That access will doubtless further expand in the future.

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complex issue.

159 *See, e.g.*, Ben MacIntyre, *The E-Vote is Coming*, THE TIMES (LONDON), Jan. 18, 2000, at A1; Carolyn Said, *Politically Connected: Bush, Campaigns Plug Into Net To Reach Voters, Organize Volunteers*, S.F. CHRON., Oct. 9, 2000, at D1; Ryan P. Winkler, Note, *Preserving the Potential for Politics Online: The Internet's Challenge to Federal Election Law*, 84 MINN. L. REV. 1867, 1867-71 (2000) (discussing the application of election law to the Internet as a political tool).

The Internet now provides much information about the positions and voting records of political candidates in virtually every contest via web pages designed by the candidates' supporters or independent groups or individuals collecting information for review. The Internet is also increasingly mimicking the political coverage of the traditional electronic media. *See, e.g.*, Ben White, *Parties' Nominees Who Are Shut Out of Debates Are Invited to Weigh in on Web Site*, WASH. POST, Sept. 25, 2000, at A6 (describing a video-on-demand FreedomChannel.com invitation to third-party candidates in the 2000 presidential contest to submit videotaped answers to all the questions posed to the major candidates in the presidential debates). With the development of cyber-debates and town meetings on the Web, the Internet may increasingly serve as a serious contender to the by-now-traditional televised political debate. At a minimum, the Internet can permit instantaneous fact-checking in connection with candidates' debate claims. Glen Johnson, *The Boston Debate/Gore vs. Bush Spin Cycle: Surrogates for Candidates Debate the Debate*, BOSTON GLOBE, Oct. 4, 2000, at A27.

160 Shannon Dinniny, *Vote Smart Informs Electorate from Remote Montana Headquarters*, CHI. TRIB., Oct. 4, 2000, at C2; Hermione Malone, *A Web of Politics: New Sites Target Young Voters*, BOSTON GLOBE, Jan. 20, 2000, at B1.

161 *See Brookings Discussion*, *supra* note 148.

162 Television Bureau of Advertising, *TV Basics 2001* (Oct. 2000), http://www.tvb.org/tvfacts/tvbasics/basics3.html (noting that 68% of U.S. households nationwide subscribe to cable as of 2000). News reports claim that cable news channels had aired seventeen debates as of February, 2000. Glenn Kessler, *In Debates, Sponsors Can't Lose: Companies Using Political Forums to Promote Own Brand Names*, WASH. POST, Feb. 29, 2000, at E1.

163 Direct broadcast satellite penetration was over seven percent as of 2000. Television Bureau of Advertising, *TV Basics 2001* (Oct. 2000), http://www.tvb.org/tvfacts/tvbasics/basics11.html.

164 *Cf.* Paul, *supra* note 142, at 789 (making a similar point to support his suggestion that the electronic media not be compelled to carry the political debates or joint discussions he believes should be constitutionally mandated).

B. *The Anti-populist, Institution-Balancing Approach*

The Supreme Court's decision in *Forbes*, when read with other recent media decisions, suggests the implicit development by the Court of an overall media strategy reflecting a commitment to institutional balance across media markets, all under the administrative oversight of the FCC and subject to judicial review.[165] Such a market-grounded, contrapuntal media strategy allows for an affirmative role for potentially discourse-enhancing government speech without reliance on regulatory, command-and-control regulations designed to enhance the programming of commercial broadcasters.

A review of the Supreme Court's recent media cases suggests, inter alia, that the Court seeks to promote a competitive media environment characterized by institutional balance and the shared norms of private media. For example, apart from any of their complexities, the *Turner* cases teach us that the Court is concerned about ensuring over-the-air broadcasting for those people who have no cable access.[166] Indeed, in *Turner*, the Court upheld the constitutionality of "must carry" rules against the argument that the market itself would result in cable carriage of viable broadcasters without governmental intervention and that the only real effect of the rules would be to provide government-compelled private subsidies for inefficient stations.[167]

Just as *Turner* allows over-the-air broadcasting to continue in the shadow of cable and other new technologies, *Forbes* allows the development of a viable, credible role for professional public television in the presentation of American politics in electronic media. The Court's media cases, including *Forbes*, suggest that rules should be crafted to enhance the role of public broadcasting as a counterweight to the economic incentives facing commercial broadcasters in a complex and changing media atmosphere.

The American public appears to view public broadcasting with

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165 Professor Kenneth Casebeer has argued that privatization and marketization of the state are hallmarks of the Court's constitutional strategy overall. *E.g.*, Kenneth Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247 (2000); *see also* Marie A. Failinger, *New Wine, New Bottles: Private Property Metaphors and Public Forum Speech*, 71 ST. JOHN'S L. REV. 217 (1997).

Professor Mark Tushnet has explained that the viewpoint discrimination entailed by government speech may not present a substantial constitutional problem because of political competition, "which produces a system of public broadcasting that prevents it from becoming 'state television.'" Tushnet, *supra* note 82, at 1245. The argument in text explores the flip side of this observation. It suggests that the *Forbes* approach is a way of enhancing the political role of public television so that such public broadcasting can provide real competition to the private sector.

166 Turner Broad. Sys. v. FCC (Turner II), 520 U.S. 180 (1997); Turner Broad. Sys. v. FCC (Turner I), 512 U.S. 622 (1994).

167 *Turner II*, 520 U.S. at 180.

ambivalence. On the one hand, the public is regaled with numerous newspaper stories about Congressional pressure for public television station accountability for the viewpoints and stories that they broadcast.[168] On the other hand, there is also the sense that, apart from the Internet, public television is the last great (albeit perhaps illusory) hope for the development of a public political sphere in this country today. Public television is seen as fulfilling the kind of educational role that many analysts believe will be difficult if not impossible for private commercial television stations to satisfy.[169] The Supreme Court's strategy in *Forbes* is apparently designed to foster a viable, competitive public broadcasting alternative to commercial fare.

However, it is important to note that the Court's role for public television does not entail a transparent state serving as the conduit for the political talk of all its citizens. The viability of public television's counterweight role is to be measured by market-based metrics, such as audience interest and the journalistic norms designed to capture it. Thus, this is not a full endorsement by the Court of a positive role for the state *qua* state in the construction of electoral discourse. Rather, it is a notion that state broadcasters using private decisional mechanisms can function as counterpoints to the electoral coverage of private journalistic establishments. This is consistent with the Court's recognition of the appropriateness of permitting the state as speaker to editorialize in *FCC v. League of Women Voters*.[170]

On this model, the state is not given the role of acting as a direct

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168 During the campaign for the 1992 Republican party presidential nomination, Pat Buchanan railed against the airing on public television stations of *Tongues Untied*, as an allegedly indecent portrayal of gay life. *See, e.g.*, Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1551 (1996); Meredith C. Hightower, *Beyond Lights and Wires in a Box: Ensuring the Existence of Public Television*, 3 J.L. & POL'Y 133, 159-66 (1994). There are many more examples of members of Congress and others arguing that if we are going to fund public television stations, we should not do so as long as they air "indecent" programming—or at least programming that is not palatable to, and consistent with, family values. A parallel development is the ultimately successful campaign to include a decency clause in the funding standards for the National Endowment for the Arts. NEA v. Finley, 524 U.S. 569 (1998); *see, e.g.*, Patricia M. Chuh, Comment, *The Fate of Public Broadcasting in the Face of Federal Funding Cuts*, 3 COMMLAW CONSPECTUS 207 (1995).

169 For example, good children's educational programming is likely to be under-produced by advertiser-supported commercial broadcasters in the absence of governmental requirements. *See* In the Matter of Policies and Rules Concerning Children's Television Programming, 11 F.C.C.R. 10,660, 3 Communications Reg. (P & F) 1385 (1996) (imposing children's educational television programming requirement on broadcasters for that reason); *see also* Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Regulation Must Fail*, 95 MICH. L. REV. 2101, 2134-36 (1997); Chuh, *supra* note 168, at 208, 217. In fact, that some media analysts criticize public broadcasting for becoming too commercial suggests the extent to which non-commercial television in its pure form is viewed as a true alternative to programming on the commercial media. *See infra* note 91, and sources cited therein.

170 468 U.S. 364 (1984). The Court ruled that a ban on editorializing in the Public Broadcasting System was invalid.

conduit for citizens' political discourse. Instead, the state is enabled to be both a journalistic entrepreneur and a speaker in its own right. Indeed, in *Forbes*, the state is conceived as disaggregated into its constituent actors, whose independence can be ensured by simple structural mechanisms. This allows state actors to manage public entities as if they were private. It permits media coverage of politics to be formed by journalistic and bureaucratic norms, rather than the potential cacophony and inefficiency of unmediated public access. This empowers private-acting state actors rather than private citizens.

The effect of applying public forum doctrine in the context of mass communication would be to subvert the exercise of both governmental power over media entities and broadcasters' discretion to make editorial decisions about their programming. After all, once government "property" is characterized as a public forum, then neither the government itself nor its agents can prevent the public from engaging in expressive activities there. Rather than relying on the FCC as an administrative agency to control excesses of broadcaster speech-suppressive behavior, characterization of state broadcasting as a public forum would effectively license unmediated empowerment of unlicensed, unsupervised, private citizen speech. Or, perhaps even more likely, it would empower organized but unlicensed private interest speech. This sort of development might well have a significant power-redistributive effect, although the precise contours of such an effect are unclear at the outset.

In opting implicitly to reaffirm *CBS, Inc. v. Democratic National Committee*[171] and to reject the application of the public forum doctrine to public—and indeed state-owned—broadcasters, the Supreme Court rejected these power-redistributive possibilities. Reaffirming belief in the neutrality of professional judgments and the safeguarding effect of FCC review even over state-owned broadcast entities, the majority opinion in *Forbes* opted for bureaucracy and professionalism rather than populism. In that sense, the Supreme Court permitted the government to control and regulate public discourse pursuant to professionalism norms rather than the push and pull of private speech actors in the market. Again, in so doing, the Court rejected any unexamined reliance on purported democracy-reinforcing effects of public-forum-required public access.[172]

At the same time, the Court allowed private access decisions to be constrained by governmental institutions at various levels. The underlying implication of *Forbes* is that FCC licensing oversight and judicial review will serve as a backstop to possible abuses of expressive discretion by

171 412 U.S. 94 (1973).

172 *See*, Lili Levi, *On the Mixed Cultures of Regulation and Deregulation*, 38 JURIMETRICS J. 515, 534-37 (1998) (reviewing RATIONALES AND RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Robert Corn-Revere, ed., 1997)).

state-owned stations. This is consistent with prior institution-checking theories in the Court's other recent media cases. In *Denver Area*, for example, the cable operator's discretion to reject access to objectionable material harmful to children was constrained by the local oversight exercised over public, educational and governmental (PEG) channels by local governmental entities.[173] This indicates that the Court does not envision the governmental entities involved in media as interchangeable. Rather, the Court's focus on different levels of decisionmaking and oversight in cases like *Denver Area* suggests that the Court's structural model for media recognizes the hierarchy of government.

In addition to FCC oversight, judicial review, and competition from the commercial sector, state broadcasters may be constrained by entities in the public broadcast sector as well. A close look at "public" broadcasting in the United States shows a variety of different types of entities.[174] The different sorts of public broadcasters can thus potentially serve as balancing counterweights even within non-commercial broadcasting. This may provide yet another level of structural balance in the Court's scheme.

Some analysts suggest that the profit motivation of commercial broadcast stations will lead to mainstream programming regardless of increasing market fragmentation. The economic incentive to capture large chunks of the audience suggests that there will be some limitations on the programming liberties that commercial broadcasters may take inconsistent with the interests of their commercial advertisers. For fear of losing their advertising revenues, commercial broadcasters are likely to cover political contests in uncontroversial ways. Public broadcasters, on the other hand, because they are state-owned or at least partly governmentally supported and thereby far less reliant on the whims of private advertisers, are seen has having some greater programming leeway. Decisions like the one in *Forbes* may allow state-owned broadcasters—under the watchful eyes of the FCC and the courts—to provide political programming that might imaginatively advance electoral discussion.

The regulations of the Federal Election Commission (FEC) impose on all debate sponsors—including broadcasters—an obligation to stage non-

173 Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727 (1996). In *Denver Area*, the Court addressed certain indecency-related provisions of the Cable Act of 1992. One of the Act's provisions had authorized cable operators to prohibit indecent programs on leased-access and public-access channels. The cable operator veto was upheld for the leased channels, but found unconstitutional for the public-access channels. In large part, Justice Breyer's justification for striking the provision regarding public-access channels was that supervisory boards or managers controlled the programming on public access channels granted to municipalities. Because such local governmental oversight would act to screen out indecent material, additional oversight by the cable operator would be unnecessary. In turn, local government programming decisions would be locally and publicly accountable.

174 *See* discussion *supra* Part II.B.1.

partisan debates pursuant to pre-established neutral criteria.[175] Two things should be noted in this connection, however. First, the regulations apply only to federal contests. Second, the requirement of neutral and non-partisan criteria is not self-defining and could well include non-partisan professional judgments on newsworthiness and electability. Thus, private broadcasters sponsoring debates could be applying the same type of newsworthiness-based professional judgments as the public station journalists after *Forbes*. Even though critics fault such standards for being self-fulfilling and therefore inherently discriminatory against third-party contestants, they appear to be permissible under the regulatory framework.

To the extent that the pressure points are different for public and private broadcast stations, public stations can serve to provide political fare unlikely to appear in the mainstream commercial context. It is precisely in order to minimize the effect of commercial economic incentives generally that the public broadcasting system at the federal level is funded by Congress and designed to produce socially valuable programming unlikely to be aired by the commercial broadcast entities. While this might lead one to conclude—as did the Eighth Circuit and the Supreme Court's dissent in *Forbes*—that fringe candidates and small-time races are unlikely to be featured by commercial broadcasters, the appropriate conclusion to be drawn from that observation in terms of the obligations of public stations is not self-evident.

One might conclude that the failures of commercial broadcasting require the public sector broadcasters to provide full-fledged access to all candidates (especially those otherwise ignored). On the other hand, to the extent that such open access may lead to audience confusion and disaffection over time, doubt can be cast on the future availability and effectiveness of the political programming designed to be better than the commercial alternatives.

C. *Functional Benefits of the Institution-Balancing Approach*

On the one hand, giving state and other public broadcasters discretion to take newsworthiness into account in their political debate planning specifically (and their political campaign coverage more generally) presents the possibility of imaginative and useful political programming that might not otherwise be made available to the electorate. This approach, which relies on journalistic flexibility as enabling richer and more complex political programming, does not, however, guarantee that what would be available on public channels would in fact feature the

175 Federal Election Campaign Act, 2 U.S.C. § 441b(a) (1994) and regulations promulgated thereunder.

independent candidate who is not likely to be included in the commercial networks' political debates. But with discretion rather than a mechanical access right, public broadcasters, if they so wish, can tailor their political coverage in ways that might be socially beneficial. What is good about discretion is that it provides the basis for more extensive, probing and useful debates in the election context.

For example, it is unwise to talk about political campaigns as if they were either fungible with one another or, even within each campaign, as if such fast-moving contests should be seen as single and unchanging phenomena. Thus, it may be that a multi-candidate debate may be very useful during primary season when there are a number of unknown candidates and the campaign issues are first beginning to crystallize.[176] This suggests that different sorts of debate formats will be more or less appropriate depending on the timing and status of the particular election contest. Since one debate format is not always preferable to another, the choice of appropriate format and presentation will necessarily involve editorial judgment as to the particular circumstances if a reasonable and discourse-enhancing result is to be reached. Different allocation rules may very well be completely appropriate for different points in the campaign and, perhaps, for different campaigns and different offices.

Most significantly, there are a number of different views about what debates are supposed to accomplish. Among possibilities that come to mind are informing public discourse more generally; providing people information for a specific vote; persuading the electorate to vote in a particular way; enhancing the likelihood of voting by simply engaging the public in politics; forcing candidates to tackle hard questions; and providing the electorate another form of entertainment in the form of political theatre.

Obviously, political debates can accomplish one or more of those objectives. Different goals may be advanced by different debate formats. Determinations of newsworthiness about one candidate or another might well hinge on the debate format and the particular purpose the debate sponsors wish to achieve in any given debate format. Therefore, unless we feel that a single conception of the value of debates must be adopted by the state—in itself a problematic proposition—we might find affirmative benefit in a structure of public broadcasting that would allow the public stations to select their debate goals and formats on the basis of their own editorial judgments in a particular campaign year.

It does little good to respond that this allows the state to have a say in the structure of our politics. It already does have such a say at virtually every step, and the imposition of an access regime is simply the adoption

176 *See AAPTS Brief, supra* note 61, at 27.

of one kind of preferred politics over another. Giving public stations the option of making some choices and exercising their creativity in structuring political discourse is at least likely to lead to a less monolithic concept of appropriate political discourse than might a simple access scheme. The history of differential approaches to the inclusion of minor-party candidates in different elections and different stations suggests that the governmental choices in this regard are not in fact as uniform as might be feared.[177] When joined with a recognition that televised political debates on state-owned television stations are simply one source of information about a political contest, concerns about the corrosive effect of the exercise of journalistic discretion by public stations should decline. After all, the rest of the journalism market will serve as at least some minimal constraint on invidious discrimination against certain sorts of viewpoints by public broadcasters in their political debates. The rest of the journalism market includes not only newspapers and private broadcasters, but the increasingly popular cable medium and the Internet.[178]

Ultimately, if there are enough structures of autonomy in place, allowing public broadcasters the discretion to structure political debates as they wish may create the possibility for a richer alternative to the political coverage of the private broadcast networks. Even if public stations will exercise their discretion in a rather conventional way in the majority of cases, there is at least the possibility of more adventurous programming in some venues. Without that discretion, it is likely that access rights would lead to a diminution in political debates on public stations, and would thereby minimize the political significance of the one broadcast forum in which commercial imperatives would, subtly or directly, affect debate format policy far less than in the commercial television alternative.

Moreover, despite the proliferation of information resources, there are some hidden but systemic actors currently at work in the transmission of information through mass media. For example, national election coverage is on the rise in local station political reporting.[179] Because of lack of resources, however, local stations are merely accepting and airing candidate-provided material rather than undertaking their own political reporting.[180] These stations, on which many people rely for their political information, rarely have either the expertise or the resources to engage in political investigation at the national level on their own.[181] Furthermore, in addition to the general profit-making goals of private stations, there is at least some evidence of interference with editorial operations by owners in

177 *See* discussion *supra* Part IIIA.
178 *See supra* notes 159-64 and accompanying text.
179 Kaniss, *supra* note 122, at 432-55.
180 *Id.*
181 *Id.*

such institutions.[182]

More generally, the rationale for public broadcasting in the first place is the notion that public broadcasters are more likely to provide the kind of socially worthy programming that the economic goals of the private stations will not support to any significant degree. The public expects that the public broadcasters' political programming decisions are made pursuant to journalistic norms and editorial judgments unhampered by the commercial imperatives of private broadcasters. If public broadcasters wish to retain that legitimacy, they must provide a realistic stage for political debate.

Media coverage of politics has been criticized as merely simulating political transparency rather than achieving it.[183] On this view, media hinder true transparency because television values entertainment and is thus open to manipulation by politicians. Media events and scandals dominate other forms of political information and discussion, transforming the meaning of public discourse and crowding out public discussion of policy issues. Thus, as Professor Jack Balkin has recently put it, the goals of transparency are defeated by its central mechanisms: proliferating information, holding politicians accountable for their actions, and uncovering secrets.[184] This is particularly true with respect to commercial media.

There are other structural constraints on the various forms of publicly owned or supported media. Thus, on this view, diversity of coverage would be needed to avoid the cascade effect in newsworthiness decisions. Obviously, one means of trying to achieve such diversity of political coverage is for all media to create institution-specific structures that would generate such diversity.[185] An additional means, however, is to create contrapuntal structures within the media world as a whole. The Supreme Court's decision in *Forbes* can be seen as part of a media strategy that will promote this. As a result of these constraints on the private media (including election coverage), and because a full-fledged access right to public media is probably unworkable, allowing public broadcasters the possibility of providing counterweights in political coverage may be

182 Examples can be seen in some of the FCC's cases involving claims of impermissible news distortion. *See, e.g.*, Lili Levi, *Reporting the Official Truth: The Revival of the FCC's News Distortion Policy*, 78 WASH. U. L.Q. 1005, 1015-31 (2001) (citing relevant cases).

183 *See, e.g.*, Balkin, *supra* note 60.

184 *Id.*

185 *Id.*

desirable as a practical matter.[186]

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186 Professor Fiss has recently sketched an argument that the entanglement of the state with commercial broadcasting would provide "reason to believe, or at least to hope, that the duties Stevens and Kennedy crafted in the public broadcasting context may, in time, be extended to the television industry as a whole." Fiss, *supra* note 44, at 1236. However, *Forbes*' analytic structure suggests that the Court is less interested in conflating the public and the private in media than in structuring an overarching media policy based on checks-and-balances and subject to oversight by the FCC and the courts.

While two Justices would have found state action in *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973)—the only case specifically to address the issue in the context of holding that the First Amendment did not guarantee a generalized right of access to the broadcast media—four expressed the view that there was no state action in the decisions of private broadcasters not to accept anti-war editorializing advertisements and three thought they did not need to reach the issue. Most of the lower court cases addressing the matter have concluded that commercial broadcasters are not instrumentalities of the government for First Amendment purposes. *See, e.g.*, DeBauche v. Trani, 191 F.3d 499 (4th Cir. 1999); Belluso v. Turner Comm. Corp., 633 F.2d 393 (5th Cir. 1980); Kuzco v. W. Conn. Broad. Co., 566 F.2d 384 (2d Cir. 1977); Mass. Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (1st Cir. 1950); McIntire v. William Penn Broad. Co., 151 F.2d 597 (3rd Cir. 1945); Moro v. Telamundo Incorporato, 387 F. Supp. 920 (D.P.R. 1974); Smothers v. CBS, Inc., 351 F. Supp. 622, 627 (C.D. Cal. 1972); Post v. Payton, 323 F. Supp 799, 803-04 (E.D.N.Y. 1971). Those decisions are consistent with the general doctrine that the existence of even a pervasive set of governmental regulations does not automatically transform a regulated entity into a government instrumentality. *See, e.g.*, Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972).

Admittedly, such generalities do not adequately address either the complexity of the state action doctrine or its application in contexts involving commercial broadcasting. Yet, the *Forbes* Court's approach to the First Amendment analysis makes it unlikely that the Court would accept a claim that there should be a close case-by-case review of claims of state action even in the context of "private commercial broadcasting." By emphasizing the ordinarily high degree of journalistic discretion reposed in public broadcasters as being no different from the discretion left to private broadcasters, the Court's opinion in *Forbes* reaffirmed what had come to be the received understanding that *CBS, Inc. v. Democratic National Committee* had effectively foreclosed a successful public forum argument for private broadcaster programming decisions. *See* Levi, *supra* note 172, at 534-37. Taking as a given that private broadcasters have broad editorial discretion, Justice Kennedy's majority opinion used the commercial broadcaster as the comparison point—a strategy which permitted the majority opinion to argue for editorial discretion in the public broadcasting context as well. One of the majority's arguments for the proposition that private broadcasters should not be considered state actors was the fact that the Communications Act of 1934 leaves significant discretion to the broadcaster and does not mandate either total government control or common carrier status. The majority opinion in *Forbes* took for granted the proposition that private commercial broadcasters—although licensed by the government and significantly regulated by the FCC—nevertheless would have complete discretion in their editorial decision-making without threat of First Amendment scrutiny.

Even the *Forbes* dissent, in relying on the distinguishing importance of state ownership, implicitly agreed with the majority's treatment of the private, commercial broadcaster. Justice Stevens emphasized that Congress initially chose a system of private broadcasters, rather than a Continental model of state ownership, because "public ownership created unacceptable risks of governmental censorship and the use of the media for propaganda." Ark. Educ. Television v. Forbes, 523 U.S. 666, 688 (1998) (Stevens, J., dissenting). The contrast between private and public broadcasters was clear for the dissent: Because AETC is owned by the state, deference to the station's 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 private broadcasters do not." *Id.* at 689.

The Court in *Forbes* did not take an available opportunity to revisit the question of state action (and the applicability of the First Amendment) in the private broadcaster context. At best, in distinguishing debates from the rest of the public broadcaster's programming for purposes of the viewpoint neutrality requirement, the *Forbes* majority simply recognized a particularly important aspect of political programming that must be protected from state censorship. Nowhere in *Forbes* did either the majority or the dissent extend the concern about state censorship into managerial censorship, meaning private censorship, as well. When interpreted as this Article would read it, *Forbes* would

D. *Questions Raised by the Institution-Balancing Approach*

As the majority suggests in *Forbes*, there does not appear to be any constitutional impediment to congressional legislation requiring publicly owned stations to provide generalized access to their political debates. The question remains whether, as a policy matter, permitting discretion rather than requiring inclusion can be seen as a benefit to political discourse rather than a danger to democratic norms. Does the Court's market-wide, institution-balancing approach to electoral speech on television adequately justify the potentially exclusionary results of state-broadcaster discretion? Are there particular reasons to be skeptical about the likely success of the Court's second-best, contrapuntal approach in *Forbes*?

1. Telegenicity and Commercialization of the Public

There are a number of leaps of faith entailed in the decision to permit broadcaster discretion in order to enhance inter-institutional balance. First is a trust (such as displayed by the majority opinion in *Forbes*) in the professional newsworthiness decisions of journalists, whether governmental or private. Trust in those journalistic decisions—not that they are in any given instance "right" in some fundamental way, but, rather, that they are independent professional judgements and not acts of governmental censorship or propaganda—depends on structures of autonomy and accountability. On this view, public broadcasters must not only adhere to a journalistic code, but must also be subject to structures leading to institutional independence. If such institutional autonomy and journalistic standards are in place, then we may question the likelihood of harm to public discourse from the mere fact that a particular public broadcasting station is a state-owned entity. And if we support PBS because we believe in the structures of independence (and similar autonomy-creating installations in the state-owned broadcast context), then why not include politics?

On the other hand, the journalistic standards and structural independence on which this model relies may have a hidden anti-democratic, anti-diversity tilt despite the Court's balancing rationale. In other words, because the state broadcasters under the *Forbes* model are allowed to make viewpoint-neutral decisions on the basis of audience norms, they may well be using the same kinds of market-oriented factors as commercial broadcasters to decide on participation. While commercial

require a healthy public broadcasting system with extensive journalistic discretion precisely so that public broadcasting would be capable realistically of serving as a viable alternative to private broadcasters' political speech—given the various sorts of constraints to which such speech might be subject.

broadcasters' economic incentives will likely lead them to showcase maverick candidates only when they are extreme enough to attract and sustain a large audience, public broadcasters too may face different sorts of incentives that may lead to the same substantive result. Whether to increase viewership or establish credibility or become true competitors to the commercial outlets, public stations may also hew to market-based norms and effectively reproduce mainstream political pictures.

Similarly, one could argue that modern journalistic norms—which have been transformed by the effect of television—are in themselves likely to lead to newsworthiness decisions largely based on an impoverished notion of public discussion. It is by now old hat to criticize the modern reporter's reliance on the tried and true, on official sources, on particularistic rather than systemic questioning, and on the media event. Some argue that professional journalistic norms are limited by journalists' commitments to the two-party system and the stabilization of the status quo.[187] On this view, the public stations' professional judgments are definitionally imbued with norms that promote the status quo (or at least a narrow spectrum of political discourse). The type of professional judgment enshrined in *Forbes* is, for these critics, inevitably tainted by discriminatory selection criteria. It is by now commonplace to complain that television's need for entertainment and visual stimulation has led to a news culture in which the prurient and private is deemed to be more newsworthy than the substantive. If this is a true description of the culture of modern news regardless of ownership, then one may question the *Forbes* Court's implicit faith in the efficacy of journalistic norms as wielded by public stations no less than by private, commercial broadcasters.

Ultimately, the fear of viewpoint-based exclusion may simply miss the point. The problem with political discourse today is not that the media discriminates substantively against political viewpoints it does not like. Rather, the problem is that decisions about television coverage are in reality made primarily to satisfy the medium's need to entertain.[188] This explains, for example, why Jesse Ventura—a former wrestler who ran as an "outsider" candidate—was so avidly covered in his gubernatorial race in 1998. If these are the non-substantive news values that structurally shape television's political coverage, then don't we need inclusion rules to make television coverage of politics simply more substantive? The media's threat to public discourse is not viewpoint-based journalistic choices, but entertainment-based selections. Isn't that the real difficulty with the professionalism and the viewpoint neutrality standards adopted by

187 *E.g.*, Tushnet, *supra* note 82, at 1262.
188 *E.g.*, Balkin, *supra* note 60.

the *Forbes* Court? How can we avoid the cascade effect of entertainment-based choices in the mainstream media's political coverage?

There are several—albeit partial—responses to this challenge. So long as the selection decisions are made by journalists applying professional journalism norms, the problem of programmatic ideological selections of viewpoint by powerful government entities is not raised. Thus, at worst, the public stations, like private broadcasters, would be engaging in an impoverished and entertainment-oriented approach. This would not, under traditional doctrine, raise the kind of constitutional problem entailed by government propaganda. At least there would not be particular reason to be concerned about the involvement of the state *qua* state.

Moreover, while the point about the capture of politics by entertainment is an important critique of political coverage generally, it should have slightly less impact in the narrower debate context. It may well be that reliance on the criteria of entertainment and telegenicity would, in practice, lead to greater debate inclusion—particularly of extremely center-challenging candidates. The very people that a conservative ideological approach would exclude might be considered prime debate participants, if they are sufficiently "entertaining."

Finally, while public television is increasingly coming to resemble its commercial competitors in terms of advertising and sponsorship, one can nevertheless suspect on the basis of past public programming that public stations do not have precisely the same interpretation of norms of entertainment and telegenicity and might thus be somewhat less constrained by such exigencies than commercial outlets.

2. The Claimed Salutary Effects of Structure

The second leap of faith required by the *Forbes* Court's media strategy is that structural independence and FCC review will suffice to hold at bay politics-skewing abuses of governmental power. A skeptic might question the degree to which a state employee—even if a journalist by trade—could really be independent of his governmental masters.[189]

189 Some have argued that the Eighth Circuit's concern in *Forbes* about government censorship and propaganda "loses its theoretical power when one considers the safeguards of the public interest standard." Erick Howard, Comment, *Debating PBS: Public Broadcasting and the Power to Exclude Political Candidates from Televised Debates*, 1995 U. CHI. LEGAL F. 435, 452 (1995). This rather sanguine approach relies on the notion that every broadcaster's responsibility to operate in the public interest under FCC licensing supervision is sufficient to "negate the danger of influence over, or collusion with, the broadcaster." *Id.* On this view, because the FCC has the ultimate power to eliminate the station's license, "FCC authority negates whatever suppressive influences state governments might have over broadcasters." *Id.* Untroubled reliance on FCC oversight in this kind of argument is highly optimistic in light of the FCC's deregulatory approach to content and changes in license renewal standards under the Telecommunications Act of 1996.

Anecdotal assessments and arguments from history are very difficult to evaluate. How can we be certain that structural independence "really" works? Are a few examples of independence and anti-Administration editorializing sufficient to assure us that structural safety nets are preferable to mandated access rules? Even more significantly, mustn't the effectiveness of any given structural separation be assessed on its facts and not in the abstract?

In any event, there remains the underlying question of whether public broadcasting entities—even if they will not in most instances promote partisan advantage in their programming decisions—will nevertheless act in ways that "stabilize the status quo" and "tilt public understanding in favor of the political 'ins' or against the political 'outs.'"[190] Is an anti-democratic skew evidenced by the AETN's sense that journalistic norms would characterize major-party candidates as serious and newsworthy simply because of their party membership, even if they may have had no better chance of winning the election than Forbes? Some may suggest that the professional journalistic norms may be fundamentally conservative.[191]

While such generalizations can be questioned in light of the journalistic obsession with identifying the new, these observations nevertheless suggest that empirical data be gathered on the nature of such journalistic norms and the degree of actual independence in the multi-party public broadcasting regime.[192]

3. On the FCC's History of Deference

Another arrow in the skeptic's quiver is the FCC's history of restrictive interpretations of partisanship under section 315 of the Communications Act of 1934. To the extent that the FCC has interpreted the equal opportunities exemptions with significant deference to broadcaster newsworthiness judgments, access proponents would argue that FCC oversight is unlikely to ferret out the more subtle forms of electoral discrimination by state-owned broadcasters in the political context.

Although courts have rejected citizen standing to sue for debate

190 Tushnet, *supra* note 82, at 1262.

191 Professor Tushnet, for example, characterizes the journalistic norms applied in *Forbes* as evidencing a commitment to the two-party system. He finds the limitations on speech that result from the application of these professional norms to be "at least as troubling as those that emerge when politicians act for partisan advantage." Tushnet, *supra* note 82, at 1262. Because of this, the deferential review that might be appropriate for *quangos* in the abstract may presumably be thought inappropriate in the context of public station coverage of debates.

192 While Professor Tushnet's argument may be persuasive in the context of *Forbes*' own facts, I am wary of such generalizations about professional journalism norms. The AETC's decision to include Forbes in debates during the next election in which he participated suggests that journalistic norms will not always be applied in a status quo-enhancing fashion.

exclusion under the political programming provisions of the Communications Act of 1934, the FCC has provided ground-rules for broadcast of political debates. Such ground-rules—based on non-partisan selection of participants—have enabled the proliferation of such debates.

The Communications Act of 1934 provides both a candidate non-discrimination provision whenever political aspirants "use" a broadcast station under section 315, and a limited right of access to the air for federal political candidates under section 312(a)(7). Section 315 provides that if a licensee permits a legally qualified candidate for public office to "use" his station, it must provide equal opportunities to all the candidate's opponents for the same office at non-discriminatory rates (and, at certain times during the election period, at the station's "lowest unit rates").[193] As noted above, section 312(a)(7) provides that federal candidates must be provided reasonable access to the air, but does not specifically provide a right of access to any particular program.[194]

Because of the Commission's broad interpretation of section 315's equal opportunities provisions through the 1950s, broadcasters shied away from more than the minimal news and public affairs programming, and televised political debates were thought to be out of the question.[195] In 1959, Congress amended section 315 to assure that the broadcast stations' equal opportunities obligations would not be triggered by candidates' appearances in four sorts of public affairs programming: bona fide newscasts, bona fide news interviews, bona fide news documentaries (if the appearance of the candidate is incidental to the presentation of the subject covered by the documentary), and on-the-spot coverage of news events.[196]

Despite this amendment, however, the Commission did not interpret debates as falling within the ambit of the exemptions to the equal opportunities provision until 1975. The momentous televised presidential debates of 1960 between Richard Nixon and John F. Kennedy were made possible only when Congress specifically suspended the application of the equal opportunities statute to the debates.[197]

Finally, the FCC held in *Aspen Institute*[198] that a debate between two

193 47 U.S.C. § 315(a)-(b) (1994). The concept "legally qualified candidate" is not specifically defined in the Communications Act, and, therefore, the application of § 315 depends on the state law definition of candidate qualification. As for the meaning of the term "use," it has been interpreted to include any candidate appearance (including by picture or voice).

194 47 U.S.C. § 312(a)(7) (1994). Section 312(a)(7) provides: "The Commission may revoke any station license . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." *Id.*

195 *See* Interpretive Opinion re Section 315 of the Act, 26 F.C.C. 715 (1959).

196 47 U.S.C. § 315(a) (1994).

197 *See, e.g.*, NEALE, *supra* note 66, at 1-3.

198 55 F.C.C.2d 697 (1975), *aff'd sub nom.*, Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.

or more candidates would qualify as on-the-spot coverage of a bona fide news event exempt from the equal opportunities provision of section 315(a) when sponsored by third parties. Subsequently, in *Henry Geller,*[199] the Commission expanded the holding of *Aspen Institute* by holding that broadcaster-sponsored political debates would also be exempt from section 315 as on-the-spot coverage of bona fide news events. The only limitation on the applicability of the section 315(a) exemption is that the candidate's appearance in the debate in fact be the result of a bona fide news judgment on the part of the sponsoring organization rather than an intent to further any particular candidacy. Debates warrant section 315 exemption if they are covered live, based upon the good faith determination of licensees that they are "bona fide news events" worthy of presentation, and provided further that there is no evidence of broadcaster favoritism.[200]

As for broadcaster-sponsored debates, the Commission made clear that so long as the broadcaster has control over the format (and the debate is not simply an info-mercial staged by the candidates themselves), the debate exemption would apply.[201]

In application, the Commission's rules have permitted non-inclusive debates, regardless of whether the broadcast station is public or commercial and regardless of the debate sponsor's identity.[202] When assessed along with the FCC staff's relatively thin definition of partisanship, the FCC's approach to debate access has been rather deferential to broadcaster discretion.[203] In turn, courts have been deferential to the FCC's approach.[204]

1976).

199 95 F.C.C.2d 1236 (1983).

200 *Chisholm*, 538 F.2d at 351.

201 *See* Fulani v. Bentsen, 35 F.3d 49, 54 (2d Cir. 1994) (discussing the FCC's debate standards).

202 *See, e.g., In re* Cyril E. Sagan, 1 F.C.C.R. 10 (1986).

203 *See, e.g.*, Jim Trinity, 7 F.C.C.R. 3199 (1992) (rejecting the request of a Republican candidate for U.S. Senate in the 1992 California election to be included in a public entity's broadcast of a debate among other Republican candidates; finding "no basis for believing" that licensee's selections were not based on bona fide news judgment; and adopting an illiberal reading of the candidate's § 312(a)(7) access request). The *Trinity* decision is implicitly based on the proposition that comparative poll data would suffice to make a broadcast station's exclusion of a candidate simply a matter of bona fide news worthiness. *See also* George A. Lato, 6 F.C.C.R. 5840 (1991) (rejecting claim that broadcast stations had violated § 315(a) by not inviting a legally-qualified candidate for the office of governor of Louisiana to be included in a debate sponsored by the stations and concluding that "predetermined use of 7% as the cut off point" was not unreasonable and did not indicate a choice to promote the candidacy of the Democratic participant). In its analysis of whether the § 315 exemption should be disregarded in *Lato* because the exclusion of a candidate resulted from partisan intent, the Commission Staff refused to look at the overall effects of an exclusion as an indication of intent. For other decisions permitting broadcaster discretion, see, for example, *In re* Complaint of Socialist Workers Campaign, 88 F.C.C.2d 349 (1981); *In re* Complaint of Paula S. Schlesinger, 87 F.C.C.2d 773 (1980); and *In re* Complaints of The American Independent Party Against ABC et al., 62 F.C.C.2d 4 (1976).

204 *See, e.g.*, Kennedy v. FCC, 636 F.2d 417 (D.C. Cir. 1980) (affirming FCC's rejection of the argument by Sen. Edward Kennedy supporters during his presidential bid that he had been denied

4. Lessons from the 2000 Debate Season

The fourth leap of faith in the *Forbes* approach is that public television stations of all kinds will in fact be able to develop as strong counterweights to the electoral coverage of commercial stations. If public stations will not in fact be able to perform the salutary checking role that the *Forbes* Court enables, then why should we take the risk of exclusion in an important (albeit romanticized) aspect of democratic governance?

In the 2000 campaign season, it appeared to be the commercial broadcasters rather than public entities who featured presidential debates with third-party candidates.[205] Commercial stations are subject to the provisions of the FEC. Moreover, because of commercial competition and the fact that political programming is cheaper to produce than entertainment programming, commercial broadcasters have recently developed a multiplicity of political coverage formats.[206] The demand to fill airtime in such programming will likely present its own structural incentives for more expansive political programming on commercial television. Finally, we should not be overly sanguine about the distinction between public and private broadcast stations on the issue of economic incentives. As noted above, public stations are subject both to ideological pressures entailed by public funding and to the increasing need to raise funds by corporate sponsorship of their programs.

The most realistic response to those concerns might be that without an obligation to sponsor and broadcast debates, both public and private broadcasters would eschew the opportunity except in the most obvious instances (such as presidential debates). Thus, the end result of an access regime might well be less coverage, particularly in smaller and more crowded races. This result is far less desirable from the democratic point of view than a discretionary approach that might provide public stations an

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equal opportunities under § 315 of the Communications Act by the networks' broadcast of a Jimmy Carter press conference held on the eve of the 1980 presidential primary in New Hampshire and thought by the complainant to be simply a staged campaign advertisement).

205 For example, both Ralph Nader and Pat Buchanan appeared for a debate on NBC's *Meet the Press* program. Michael Finnegan & Edwin Chen, *Bush and Gore Prepare for the 2 Man Debate*, L.A. TIMES, Oct. 2, 2000, at A13. The group Judicial Watch sponsored a nationally televised presidential debate on October 20th to which Harry Browne, Pat Buchanan, Al Gore, John Hagelin, Ralph Nader and Howard Phillips and George Bush had been invited. Bush had early-on refused to participate in the debate and Gore subsequently declined. *Gore Not Debating Third Party Candidates*, COLUMBUS DISPATCH, Oct. 17, 2000, at 4D. Apparently, C-SPAN had agreed to televise the debate and Fox considered doing so on commercial television.

206 Explicitly political programs include *Meet the Press*, *Face the Nation*, *Inside Politics*, *This Week with Sam Donaldson*, and the *McLaughlin Group*. Ronald Brownstein, *Pundits With Your Pancakes: Sunday Morning Interview Shows Have Sorted Through the Spin Since Meet the Press Began 50 Years Ago*, L.A. TIMES, Nov. 2, 1997, at C7; Stephen Hess, *Morning News Shows Are Pushing Politics*, USA TODAY, Oct. 16, 2000, at 15A; Michael Tackett, *Tight Race Accentuates Importance of TV Debates*, CHI. TRIB., Oct. 3, 2000, at N1.

incentive to become more serious counterweights to commercial television.

Moreover, the possibility of an increasing public station role in electoral debates is supported by the recent decision of NBC and the Fox network not to require carriage of the first presidential debate between candidates Gore and Bush in the 2000 presidential election season.[207] Admittedly, both NBC and Fox were criticized for their decisions, and this might render it less likely that presidential debates would be boycotted by the conventional private broadcasters in the future.[208] However, the fact that these networks broke the ice and did not follow the earlier tradition of all-network debate coverage suggests that there may be an increasing role for the public sector in picking up the slack.

In any event, concerns about the public stations' skewing effects might be less pressing if in fact commercial stations do provide access to debates and the non-governmental political market is strong enough to withstand attempts by the public stations to dominate and monopolize the field.

E. *The Need for Empirical Study*

Ultimately, the most important factor in attempting to determine the effectiveness of the *Forbes* Court's professionalist approach to debate participation will be careful consideration of empirical and anecdotal data in future election contexts.

The first step in that connection is the systematic collection and dissemination of such data. To date, even if comprehensive collection has been undertaken, it does not appear to be publicly available.[209] The second step required is precise, contextual measurement of actual effects. Data on debates should be analyzed with careful attention to debate context and format, election-specificity, comparison between public and private media, and coverage in the overall market for electronically transmitted election information. Conclusions cannot appropriately be drawn from data without careful assessment of the election-specific differences we can anticipate. For example, information about public and commercial station coverage of

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207 NBC gave its affiliates the option of not broadcasting the debate in favor of a sports event. Fox aired an entertainment program instead of the debate. Lisa de Moraes, *Fox Puts Politics in Its Place*, WASH. POST, Oct. 3, 2000, at C1; Jim Rutenberg, *TV Audience for Debate is Smaller Than Expected*, N.Y. TIMES, Oct. 5, 2000, at A30; Dan Trigoboff, *Debatable Issues*, BROADCASTING & CABLE, Oct. 9, 2000, at 5.

208 *See, e.g.*, Bill Carter, *The Ratings: Fewer Watched Last Debate Than Most Previous Ones*, N.Y. TIMES, Oct. 13, 2000, at A25; William E. Kennard, *Fox and NBC Renege a Debt*, N.Y. TIMES, Oct. 3, 2000, at A27.

209 Research assistants spent many hours on the Internet and in blanket e-mail solicitations in fruitless attempts to discover systematically compiled and historically accurate information on public station debates.

presidential political contests in closely-contested presidential elections does not necessarily tell us much about media coverage of races in which large percentages of voters have made up their minds early in the election season. Similarly, election-specific data will be most useful in assessing debate participation in other federal, state, and local elections. Even if a commercial television station includes all third-party candidates in a debate in connection with a federal congressional race, it is unclear that such a station (particularly if it has a multi-state coverage area) will similarly cover local contests. Thus, it may be that public stations will exercise a significant gap-filling role under the *Forbes* model of journalistic discretion.

Until there is better information, it is wise to be cautious about definitive choices among competing values at stake in any contested legal issue. The difficulty of collecting information about third party access to debates in a systematic manner today demonstrates the need for refined fact-finding. A second-best alternative that provides the opportunity to generate and study the information is not an irrational approach under such circumstances.

Moreover, there is a complex relationship between questions regarding the nature of the electoral system and questions regarding participation in televised debates. On one level, we might expect rules regarding participation in televised debates to reflect the electoral system as it is. On another level, the rules regarding participation in televised debates themselves can affect the nature of the electoral system and the public's perception of the legitimacy of the outcome. Many of the criticisms of the *Forbes* Court's approach are as much criticisms of the electoral system as of the issue of debate access alone.[210] It would be more appropriate to debate and effect changes in the electoral system directly rather than through the indirect medium of rules regarding debate participation.

Conclusion

Political candidates, election pundits, media observers and the undecided public all tout the increasing electoral significance of televised candidate debates. Exclusions of third-party candidates from such debates lead to lawsuits claiming constitutional violations. In rejecting a First Amendment right of candidate access even to debates sponsored by state-owned media institutions, the Supreme Court in *Forbes* opened itself to forceful criticism for having issued an anti-democratic decision—relying

210 *Cf.* Gardbaum, *supra* note 49, at 396 (suggesting that if the underlying diversity of existing opinion is insufficient for meaningful choice regardless of how it is represented on the air, then probably only direct reforms of the electoral process can address the problem).

on hyper-technical applications of doctrine to entrench the dominance of the two-party system and to reify inequalities in political access.

It is true that the Supreme Court in *Forbes* did not take the opportunity to use state ownership as a way of opening political discourse to those disempowered by the dominance of the two-party system. It refused to justify general constraints on broadcasters' editorial decisions even though those decisions no doubt involve the state in affecting the substantive outcome of political contests. It specifically rejected a constitutional requirement of pre-established, objective criteria for debate access.

Forbes is more complicated than simply an encomium to the Democratic and Republican parties, however. It is clearly anti-populist and relies on journalistic norms and structural autonomy to promote editorial independence. On the other hand, while it permits journalistic discretion, it bounds editorial choices by a standard of viewpoint neutrality in the exceptional circumstances of debates. It implicitly relies on FCC licensing, administrative oversight, and judicial review to minimize the harms associated with editorial decisions made by state entities. While the regulation of public broadcasters *qua* public broadcasters is disapproved, the use of the FCC and judicial review to prevent unwholesome government censorship is not.

Whatever the doctrinal weaknesses of the Court's approach in the abstract, it is understandable as a functional, second-best approach to a hard problem. The *Forbes* Court chooses the middle path between the extremes of total open access and total broadcaster discretion. It does so because both expressive and democratic values are implicated in the debate and a middle-ground, compromise position may be the best alternative. The Court's decision to opt for bounded editorial discretion and to require special oversight in the special context of debates is not an irrational approach to the conflict over open access.

In fact, this Article argues that the Court's approach in *Forbes* is part of a particular type of institution-balancing vision of politics in the media. Public broadcasters, on this model, can serve as balancing alternatives—counterweights—to the electoral coverage of the commercial media. In turn, the variety in the type of public station, as well as the oversight of the FCC and judicial review, can serve as disincentives to politically partisan media injections into public discourse.

Whether such a contrapuntal approach to the improvement of political discourse will actually work is unclear. On the one hand, it may disempower candidates and undermine the possibility of developing a public communications system different from the mainstream commercial broadcast system. In other words, it may do nothing other than allow state entities to behave and regulate speech as if they were simply private actors

with no further public interest obligations. Factors such as television's fascination with entertainment value even in politics, the increasing commercialization of public television, the deferential attitude of the FCC to broadcaster programming decisions, and the potential inadequacy of structural mechanisms to prevent abuse all raise questions about the ultimate effectiveness of the debate model adopted in the *Forbes* decision.

On the other hand, the flexibility permitted under *Forbes* may promote a renewed commitment to a rejuvenated political discourse affirmatively managed by governmental agents subject to different kinds of programming pressures than their commercial counterparts. It may ensure that public broadcasters are not hamstrung by rigid access rights in their attempts to create imaginative alternatives to political discourse on the private stations. If the true goal is the enhancement of political discourse among the citizenry, then a mechanical open access policy may retard rather than advance it. Given the hidden limitations revealed by a hard look at access regimes, the second best alternative of broadcaster discretion may be worth a skeptical experiment. However, assessing the results of such an experiment calls for refined, election-specific and historically-grounded data to be collected and evaluated in a context-specific fashion.