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Erick Howard
Erick.Howard@chicagounbound.edu

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Debating PBS: Public Broadcasting and the Power to Exclude Political Candidates from Televised Debates

Erick Howard†

Televised political debates are an integral part of the contemporary American political system, providing candidates both an opportunity to challenge the views of their opponents directly and exposure to the voting public. Debates also give the public a “raw” view of candidates, independent of their carefully prepared televised advertisements.

Although courts agree that private television stations may exclude qualified candidates for public office from televised political debates,¹ it is not clear whether public television stations may do so.² In recent cases, plaintiffs have argued that public television stations are government actors. Therefore, when they exclude candidates from televised debates, they engage in a form of government censorship that violates the First Amendment.³ The two circuits that have considered the issue are split. The Eleventh Circuit held that state-owned and operated public television broadcasters⁴ are government actors, but that they have discretion to promulgate reasonable regulations regarding the content of the programs they air. Under this rationale, the broadcasters can exclude candidates from debates without violating the First Amendment.⁵ The Eighth Circuit, however, has ruled that as state actors, public television broadcasters may not

† B.A. 1993, Northwestern University; J.D. Candidate 1996, University of Chicago.
¹ See Johnson v FCC, 829 F2d 157, 165 (DC Cir 1987). See also In re Sagan, 1 FCC Rec 10 (1986).
³ See Chandler, 917 F2d at 488; Johnson, 829 F2d at 159.
⁴ Neither Forbes nor Chandler involved privately-owned, nonprofit public television stations and no case has arisen involving such a station. Because this Comment argues that the status of the broadcaster as nonprofit, state owned, or private is irrelevant to the resolution of the issue, the term “public broadcaster” or “public television station” shall be read to include state-owned public television stations.
⁵ See Chandler, 917 F2d at 489; Johnson, 829 F2d at 164.
exclude a candidate from a debate unless there is a compelling state interest in doing so.\(^6\)

The split between these circuits centers on a struggle between expansive broadcaster discretion in programming and limited discretion in programming based on the status of the broadcaster as private or public. Whether public television stations may constitutionally exclude candidates from televised debates raises basic questions concerning broadcasters' proper place in the constitutional scheme and their proper role as sources of political information.

As this Comment will show, the distinction between public and private television stations is irrelevant to determining the constitutionality of restricting access to station-sponsored programs. Rather, the question should be whether there is something "special" about public broadcasters such that they should not be allowed to restrict candidates from debates.

This Comment will argue that public broadcasters' ability to exclude candidates from debates actually preserves First Amendment values by ensuring that broadcasters are not dissuaded from airing controversial topics. Further, this Comment will explain that Congress's regulatory scheme provides a public interest safeguard to ensure that a candidate's views will be aired even if the candidate is barred from a particular broadcast. This safeguard applies to all television stations and guards against impermissible censorship, whether a private or public station is involved. Thus, there is nothing "special" about public television stations that should bar them from restricting candidates' access to political debates. While candidates cannot be denied access to a private or public station merely because of their viewpoint, candidates do not have a First Amendment right to speak on a particular program. Recognizing a candidate's right to appear on particular programs would undermine First Amendment values and chill stations from engaging in expressive activity.

Part I examines the contrasting rationales of the Eleventh and Eighth Circuit's decisions with respect to this issue. Part II then analyzes public television stations as public fora for expressive activity and the duties of those stations under Congress's

\(^6\) See *Forbes*, 22 F3d at 1430. In reaching this conclusion, the court overruled part of an earlier Eighth Circuit case, which held that state agencies are restricted only by Communications Act requirements when picking candidates to appear on televised debates. *DeYoung v Patten*, 898 F2d 628 (8th Cir 1990).
regulatory scheme. Finally, part III explores the strengths and weaknesses of the Eleventh and Eighth Circuit approaches in light of the mandates of the Communications Act of 1934 ("Act"). This Comment concludes that the Eleventh Circuit's approach, which allows public broadcasters to ban political candidates from debates, best resolves this issue.

I. CONTRASTING APPROACHES OF THE ELEVENTH AND EIGHTH CIRCUITS

A. The Eleventh Circuit's Approach: Allowing Public Broadcasters Broad Programming Discretion

In *Chandler v Georgia Public Telecommunications Commission*, the Eleventh Circuit held that a public television station could refuse to allow political candidates to participate in televised debates sponsored by the station. In *Chandler*, the station denied a Libertarian Party lieutenant governor candidate's request to be included in a station-sponsored debate between Democratic and Republican gubernatorial candidates. The plaintiff argued that excluding him from that debate violated his First Amendment rights.

Holding for the defendant, however, the Eleventh Circuit noted that the station was not a "pure marketplace of ideas" because not everyone who wished to express his or her view could gain access to airtime. In addition, as a state-owned public television licensee, the station was charged with presenting programming in the public interest. The court noted that employees of the station made the editorial decisions regarding their public interest requirements. In so doing, they made content-based decisions, because deciding to air one program rather than...
another necessarily affected the content of the station’s program-
ing. Similarly, the court argued, the station made a permis-
sible content-based decision when it chose to include only Demo-
ocratic and Republican candidates in its debate because it had
concluded that a debate exclusively between those candidates
would be of the greatest interest to the citizens of Georgia. The
court concluded that the station could make judgments regarding
which candidates to include in televised debates, so long as those
judgments were not efforts to suppress an excluded candidate's
views. The court explained that the station’s content-based
decisions were not viewpoint restrictive because the decisions
were not “an effort to suppress expression merely because public
officials oppose the speaker's views.”

Underlying the court’s reasoning lay a fear that requiring
public television stations to include candidates in debates would
cause the stations to avoid controversial public issues. The
court explained that if it required the station to include candi-
dates that had obtained a ballot position, it could not see a prin-
cipled way to exclude all other serious candidates. Such a re-
quirement might force public stations to forego airing programs
on controversial issues, because airing such programs would then
require the “inclusion of a cacophony of differing views” on those
issues. The values central to the First Amendment would be
frustrated rather than facilitated by an inclusionary mandate on
public television stations.

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15 Id at 489.
16 Chandler, 917 F2d at 489.
17 The station did, in fact, offer the excluded candidates, including the plaintiff, thirty
minutes of air time to present their views after the debate. Id at 488 n 1.
18 Id at 489, citing Cornelius v NAACP Legal Defense and Ed. Fund, Inc., 473 US
788, 800 (1985)(finding that federal charity organization was a nonpublic forum, and
therefore legal defense and political advocacy organizations could be excluded from
communicative access to the charity organization).
19 Chandler, 917 F2d at 489-90.
20 "The mixture of ideas, protected by the First Amendment, is just as protected when
offered by a write-in candidate as by one on the ballot by petition, by primary election, or
by party convention." Id at 489.
21 Id at 490.
22 Id. Initially it might appear that a "cacophony of differing views" on controversial
issues would facilitate expressive values because the public would be exposed to a large
amount of information on a given issue. However, with so many voices speaking on
particular programs, the messages might not be dispersed as effectively.
B. The Eighth Circuit Approach: Limiting Broadcaster Programming Discretion

In *Forbes v Arkansas Educational Television Communication Network Foundation*, the Eighth Circuit refused to grant a public television station the broad discretion in programming authorized by the Eleventh Circuit. Faced with facts similar to those of *Chandler*, the Eighth Circuit found that the excluded candidate had a qualified right of access created by Arkansas Educational Television Communications Network Foundation's ("AETN") sponsorship of the debate.

In reaching its decision, the Eighth Circuit overruled a portion of *DeYoung v Patten*, which had held that there is no right to appear in a television debate, except as provided for in Section 315 of the Communications Act of 1934. The court found *DeYoung* patently flawed because it allowed the station, an admitted state actor, the power to "exclude all Republicans, or all Methodists, or all candidates with a certain point of view ...." The court held that the plaintiff, as a qualified political candidate, had a basic right of access to the broadcast media.

Adopting a traditional public forum analysis, the court argued that the station could not exclude the plaintiff without articulating a compelling state interest for doing so. The *Forbes* court noted that the Supreme Court recognized three categories of government property: the traditional public forum, the limited public forum, and the nonpublic forum. A traditional public forum has "by long tradition or by government fiat ... been devoted to assembly and debate." This type of forum did not apply to public television stations because there was no unlimited

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24 The plaintiff, Ralph Forbes, was an independent candidate for United States Representative for the Third Congressional District of Arkansas. Like the plaintiff in *Chandler*, he had received enough signatures to qualify for the ballot, but the public station decided to air a debate including only the two major-party candidates. *Forbes*, 22 F3d at 1426.
25 Id at 1428.
26 898 F2d 628 (8th Cir 1990).
27 Id at 633-35.
28 *Forbes*, 22 F3d at 1428.
29 Id.
30 Id at 1429.
31 Id.
32 See *Perry Education Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 45 (1983)(holding interschool mail system to be a nonpublic forum even though civic and church organizations were allowed access to the system; therefore the school board could prevent a teachers' union from using the system).
right of access to the airwaves. A limited public forum is not generally open for public expression, but is open, by government designation, for limited speech purposes. The Forbes court stated that the government might have created a limited public forum when it decided to sponsor a political debate among candidates. The court concluded that if the government had created a limited public forum, the plaintiff could be excluded only if AETN had a sufficient government interest in doing so. A nonpublic forum is usually considered incompatible with expressive activity. Even in such fora, however, the court argued that minimum First Amendment requirements applied, and the government could not deny the plaintiff access merely because of objections to his viewpoint. The court concluded that AETN could ban the plaintiff from the debate only if it provided a rational, viewpoint-neutral justification for doing so. Additionally, the court noted the plaintiff's allegation that the defendant station had denied the candidate any access to the station, so that he could not even respond to the views expressed in the debate.

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33 Forbes, 22 F3d at 1429.
34 See Heffron v International Society for Krishna Consciousness, Inc., 452 US 640, 655 (1981)(holding that a State can limit the manner in which a religious organization propagated its views in a limited public forum where all organizations distributing materials in the forum were subject to the same restrictions).
35 Forbes, 22 F3d at 1429.
36 Id. AETN did not file an answer to the plaintiff's complaint, and thus had not offered any reason for excluding him from the debate. Id at 1430.
37 See Cornelius, 473 US at 806.
38 The Forbes court quoted Cornelius:

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Forbes, 22 F3d at 1429, quoting Cornelius, 473 US at 806. The Forbes court argued that the plaintiff was a member of the class of speakers for which the forum was created because he was a candidate for the congressional seat and because he wished to address who should be elected to Congress, a topic clearly encompassed by the debate. See Forbes, 22 F3d at 1429.
39 Id at 1430.
40 Id. Allegedly, an official at AETN told plaintiff that the station would run "St. Elsewhere" rather than a debate that included him. In addition, the station allegedly refused plaintiff airtime to respond to the views expressed in the debate. This contrasts
C. The Level of Programming Discretion Afforded Public Television Stations

Forbes and Chandler express two conceptions of the scope of public broadcaster discretion and the nature of the television station as an expressive forum. Chandler represents a view that public television operators are merely broadcasters and not state actors. Under Chandler, public television broadcasters can make even content-based decisions, so long as they are not viewpoint restrictive, because broadcasters generally must make such decisions.41 This theory conceives of the state as taking on the full rights and responsibilities of broadcasters when it decides to involve itself in broadcasting.

By contrast, Forbes understands the public broadcaster as part of the state. Because the broadcaster remains an instrumentality of the state, it must continue to adhere fully to First Amendment limitations on state action. Therefore, under Forbes, a public broadcaster cannot make the same content-based decisions that a private broadcaster may make. The public broadcaster is not the same as a private broadcaster because it has a state identity that is fundamental to its existence. It is precisely because the broadcaster is part of the state that its discretionary power is limited by the First Amendment.

Equally important are the two circuit courts' contrasting conceptions of the broadcast station as a forum for expression. Chandler views the television station, rather than the individual programs aired on the station, as the forum for speech. Individual programs, even if conceived by the broadcaster, are not fora but rather stages through which speakers can gain access to the broadcast media.

In contrast, Forbes sees the broadcast station as merely a medium for which speakers create programs, which are the real fora. In its discussion of AETN's power regarding the three types of public fora, the court repeatedly stated that by sponsoring a debate, AETN had created either a limited public or nonpublic forum.42 The debate, then, focused on whether a right of access to programs existed, as opposed to a right of access merely to the broadcast station. This conception of individual programs as fora, and the station as merely a medium, comports with the Eighth

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41 Id at 489.
42 Forbes, 22 F3d at 1429.
Circuit's view of the public broadcaster as essentially a state actor. If the broadcaster is another arm of the state, then the station is essentially a mechanism through which the state can accomplish its goals. These goals are furthered by creating fora (i.e., individual programs) on the stage. When free expression questions arise, Forbes looks to the programs to see if the state has impermissibly abridged free speech rights. Thus the Forbes conception finds the state identity of public broadcasters to be a "special" quality that limits their otherwise broad discretionary power.

Although the Forbes court's public forum analysis is the correct way to consider the problem, the analysis should find that public broadcasters have the discretion to exclude candidates from programs in order to protect First Amendment values. As Chandler recognizes, the "special" quality of public broadcasters is not that they are arms of the state, but rather that they are broadcasters. As broadcasters they have public interest duties under the Communications Act of 1934 that limit their discretion in making programming choices. In addition, because public stations are at least limited public fora, they are restricted in their ability to limit the expressive activities of those demanding access to the station. Recognition of a candidate's constitutional right to appear on a particular program would limit broadcaster discretion to the point that broadcasters would avoid airing controversial issues. In this respect, Chandler recognizes that given the public interest standard and the public station's status as at least a limited public forum, we can preserve First Amendment values best by allowing public broadcasters the discretion to exclude candidates from particular debate programs.

II. THE PUBLIC INTEREST STANDARD OF THE COMMUNICATIONS ACT OF 1934 AND PUBLIC TELEVISION STATIONS AS LIMITED PUBLIC FORA

The justification for allowing public broadcasters the discretion to exclude candidates from particular debate programs is the product of both the broadcaster's public interest duties under the Communications Act and the station's status as a limited public forum. Under the public interest standard, broadcasters have a

43 The state goals in this instance may be merely to disseminate information to the public. However, under the Forbes view, because the state must continue to limit itself as the state, it cannot merely take on all the rights and responsibilities of other broadcasters and ignore limitations on government power.
duty to air controversial topics and political views with which they do not necessarily agree. Nevertheless, the courts have found that broadcasters have broad discretion to determine what is in the "public interest." Public stations and their programs also are limited public fora, from which candidates cannot be banned merely because of their viewpoint. Broadcasters can fulfill their public interest requirements only if they have discretionary authority with respect to the proper forum. To avoid chilling coverage of controversial views or topics, broadcasters should have the authority to exclude candidates from particular debates, but not from stations altogether. Such a system would allow broadcasters to make permissible content-based decisions concerning particular programs while simultaneously prohibiting impermissible viewpoint-based restrictions regarding station programming as a whole.

A. The Public Interest Standard and Broadcaster Authority to Make Content-Based Decisions

The Communications Act of 1934 ("the Act") contains requirements broadcasters must satisfy to acquire and retain their broadcast licenses. Under the Act, the Federal Communications Commission ("FCC") may grant or renew licenses only if doing so will further the public interest. Thus, if broadcasters wish to retain their licenses, they must continually meet the requirements of a public interest standard mandated by the Act.

The Act defines the public interest as that which furthers the "convenience and necessity" of the community. The public interest standard requires all television broadcasters "to cover

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44 Andrew O. Shapiro, Media Access: Your Rights to Express Your Views on Radio and Television, ch 1 at 7 (Little, Brown and Co, 1976).
45 Massachusetts Universalist Convention v Hildreth and Rogers Co., 183 F2d 497 (1st Cir 1950)(finding that radio station broadcaster had sufficient discretion to exclude religious sermon from programming lineup).
46 See Widmar v Vincent, 454 US 263 (1981)(finding that state university violated First Amendment when it denied a student religious organization the use of university facilities where it allowed all other student organizations use of the same facilities).
47 The use of a frequency is a privilege and may not exceed three years, after which broadcasters must submit their licenses to the Federal Communications Commission ("FCC") for renewal. Communications Act of 1934, 47 USC §§ 301, 307(a), 307(d), 309(a) (1994).
48 47 USC § 309(a).
49 Shapiro, Media Access at 7 (cited in note 44).
50 Id.
political events and to provide news and public affairs programs dealing with the political, social, economic and other issues which concern their community.”

That standard includes encouraging public debate by airing issues that evoke diverse or controversial viewpoints.

The courts have held that broadcasters have broad discretion to determine what is in the public interest. For instance, in Massachusetts Universalist Convention v Hildreth & Rogers Co., the First Circuit stated that “the [Communications] Act does not expressly confer on anyone any right to broadcast any material at any time . . . . The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest.” Similarly, the court in Gemini Enterprises, Inc. v WFMY Television Corp., stated that because broadcasters are “gatekeepers who control much of the flow of information in our society,” they are free under the First Amendment to refuse individuals and groups access to programming. “These principles are grounded in the fundamental protections provided by the First Amendment . . . . Within wide bounds, the First Amendment protects the ability of these gatekeepers to make decisions without government interference.”

The courts also have recognized that public broadcasters have wide-ranging authority to make programming decisions. For instance, in Muir v Alabama Educational Television Commission, the Fifth Circuit explained that “[t]he pattern of usual activity for public television stations is the statutorily mandated practice of the broadcast licensee exercising sole programming authority.”

Though broadcasters have broad discretion to decide what is in the public interest, this discretion is not absolute; the licensee

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51 See Muir v Alabama Educational Television Comm'n, 688 F2d 1033, 1044 (5th Cir 1982) (finding that public broadcast licensees possess the same rights and responsibilities to make free programming decisions as their private counterparts, though as state instrumentalities, they lack First Amendment protection); Representative Patsy Mink (WHAR), 59 FCC2d 987 (1976); Federal Communications Commission, Fairness Doctrine and Public Interest Standards, 39 Fed Reg 26371 (1974).
52 Shapiro, Media Access at 7 (cited in note 44).
53 Massachusetts Universalist Convention, 183 F2d 497; Gemini Enterprises, Inc v WFMY Television Corp., 470 F Supp 559 (M D NC 1979) (discussing rights and responsibilities of broadcast licensees in general).
54 Massachusetts Universalist Convention, 183 F2d at 500.
55 Gemini, 470 F Supp at 568.
56 Id.
57 Muir, 688 F2d at 1033.
58 Id at 1042.
must be willing to broadcast views with which it may disagree or run the risk of losing the privilege to broadcast. The United States Supreme Court has recognized that the mandates of the public interest standard might conflict with a broadcaster's expressive inclinations. Therefore, in *Red Lion Broadcasting Co. v Federal Communications Commission*, the Court stated that broadcaster discretion ends where the public's right to truly informative broadcast material might be infringed.

The public interest standard thus ensures that television serves as a true medium of information and not merely as a mouthpiece for the views of the broadcaster or the privileged few who gain access to the media. However, the broadcaster's ability to determine and then broadcast what is in the public interest depends directly on the forum in which the broadcaster's discretion functions. Television stations' expressions can be seen as occupying two distinct fora: the station as a whole or the programs aired by the station. Only where broadcasters are allowed to retain control over the content of individual programs, but have more limited discretion regarding overall programming, can we protect First Amendment values. Circumscribing broadcaster discretion with regard to both overall programming and individual programs jeopardizes First Amendment values because broadcasters can not effectively carry out their public interest duties under such restrictions.

B. The Public Television Station as a Limited Public Forum

Courts should view public television stations as limited public fora. Though public stations generally are not open for the public to use for expressive purposes, they do allow certain classes of speakers to use the station. Notably, the public interest standard prevents all television stations from being nonpublic fora because the standard removes the broadcaster's authority to control what subject matter can be discussed on the station.

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60 Id at 390. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Id.
61 *Muir*, 688 F2d at 1044.
62 See *Widmar*, 454 US at 263, where the Supreme Court held that if a state university opened its facilities to student organizations, but not to the general public, then those facilities became limited public forums.
63 Broadcasters cannot, for instance, declare that no political discussions may be aired on the station. By virtue of the public interest standard, broadcasters must air such programs. Moreover, due to the breadth of the term "public interest," broadcasters cannot
Whatever the station regards as in the public interest must be aired on the station, even if the broadcaster dislikes the subject matter.\textsuperscript{64} Public stations extend an open invitation to political candidates to appear or speak because they usually hold views important to the public interest.\textsuperscript{65} As managers of limited public fora, broadcasters constitutionally cannot exclude candidates from the station because of their viewpoint.\textsuperscript{66} Therefore, a broadcaster cannot deny a candidate access to the station merely because of the views held by the candidate, unless there is a compelling state interest for doing so.\textsuperscript{67}

C. Individual Programs as Limited Public or Nonpublic Fora

As the \textit{Forbes} court recognized, courts might consider individual programs sponsored by the public station, such as debates, either limited public or nonpublic fora. A court might view a debate program as a limited public forum because when the station sponsors the debate, it extends an invitation to a class of speakers to express their views in the public broadcasting forum. However, a debate might also be a nonpublic forum because the station's invitation to the class of speakers is not general, but focused on a subclass of specific candidates. Of course, whether the court considers the station a limited public or nonpublic forum, the broadcaster cannot deny candidates access to the program because of their views, unless there is a compelling state interest for doing so.\textsuperscript{68}

declare that certain political controversies, such as welfare or abortion rights, cannot be aired on the station.

\textsuperscript{64} \textit{Red Lion}, 395 US at 390.

\textsuperscript{65} Viewers are extended an invitation to watch or decline to watch a broadcast station, not to schedule programs or appear on programs themselves. See \textit{Muir}, 688 F2d at 1042.

\textsuperscript{66} See \textit{Forbes v Arkansas Educational Television Communication Network Foundation}, 22 F3d 1423, 1429 (8th Cir 1994). See also 47 USC § 315(a)(mandating that a broadcaster cannot allow a candidate to use his or her station to express a view without affording other qualified candidates the same opportunity).

\textsuperscript{67} Even if public television stations were nonpublic fora in which there is no requirement to allow access for expressive purposes, the broadcaster still could not ban candidates from the station because of their viewpoint. For instance, if public stations were nonpublic fora, then broadcasters could ban all political debate from the forum. However, if the broadcaster decided to allow any political debate on the station, no candidate could be banned from the station merely for holding a view with which the broadcaster disagrees. See \textit{Greer v Spock}, 424 US 828 (1976)(finding that political candidate could be denied access to military base for speech purposes because the base was a nonpublic forum despite the fact that nonpolitical figures had been given access to the base to disseminate their views).

\textsuperscript{68} Note that this contention is based on pure public forum analysis. Normatively, to
Broadcasters' authority and duties under the public interest standard come into conflict with public forum doctrine where the doctrine forbids broadcasters from excluding candidates because of their views. Especially with respect to particular programs, a candidate's right to speak is not necessarily coterminous with the public interest in all cases. Thus broadcasters are given the difficult task of balancing their public interest standard duties with the access requirements of public forum doctrine. What emerges is a distinction between permissible content-based restrictions and impermissible viewpoint restrictions. The struggle between the Chandler and Forbes conceptions of broadcaster discretion rests, in part, on whether courts can separate content and viewpoint restrictions such that public broadcasters have some authority over who may gain access to station-sponsored programs.

III. THE CHANDLER COURT'S APPROACH IS SUPERIOR TO THAT OF THE FORBES COURT

As discussed in part I, the Chandler and Forbes courts view both the discretion of the public broadcaster and the nature of the broadcast station in fundamentally different ways. The Chandler court equates public and private broadcasters in terms of their rights and responsibilities. In addition, it sees the station as the forum for expression. In contrast, the Forbes court protect First Amendment values, it might be better to allow broadcasters the discretion to exclude candidates only from programs because of their viewpoint. The candidate would, of course, retain the right of access to the station more generally through a different program.

For instance, a broadcaster might want to sponsor a debate only between the leading proponents of opposing views. The broadcaster may have picked these views for expression on this single program because they are the ones of most concern to the public. Arguably, allowing every proponent of fringe viewpoints might not be in the public interest in that setting, because allowing these speakers access to the program would confuse issues rather than focus and clarify them. In other programs sponsored by the station, these views may be essential to the public interest, but that does not mean that they must be essential to the present debate program.

90 917 F2d 486 (11th Cir 1990).
91 22 F3d 1423 (8th Cir 1994), cert denied 115 S Ct 500 (1994).
92 Chandler, 917 F2d at 488.
93 Id at 489.
sees the broadcaster as an arm of the state and therefore subject to First Amendment burdens not shared by private broadcasters.\footnote{Forbes, 22 F3d at 1428.} Under the Forbes approach, individual programs are the fora subject to First Amendment analysis.\footnote{Id at 1429.}

The Chandler conception better protects First Amendment values by striking a balance between broadcaster discretion and public forum concerns. Chandler recognizes that the "special quality" of public broadcasters is their duty to make programming decisions in the public interest. In order to fulfill that duty and to avoid violating the access requirements of the public forum doctrine, courts should strictly limit broadcaster discretion concerning the right of access to the station, while allowing expansive discretion concerning access to particular programs.

A. The Broadcast Station as the Relevant Forum

As stated in part II, the most important factor in determining how much discretion public broadcasters should have is the conception of the relevant forum. Where a court considers the broadcast station itself the relevant forum for limiting discretion, broadcasters can make content-based decisions but must avoid impermissible viewpoint-based discrimination. Broadcasters can accomplish this because where the station is the relevant forum, its programs contribute to forming the forum. Evaluating whether there has been impermissible discrimination in the forum involves considering overall programming. Courts should require broadcasters to adhere strictly to the mandates of the public forum doctrine and allow political candidates access to the station to express their views.

For example, in Chandler the public station included only major party candidates in its debate, even though the Libertarian candidate wanted access. Clearly the station made a content-based decision by allowing some, but not all, candidates to join the debate. If the inquiry were to end here, then the station would fail a public forum analysis because the excluded candi-
date would have been banned due to his views. The station would also fail a public interest standard test because it did not present a contrasting viewpoint arguably concerning the public interest.

However, the station in Chandler did offer the excluded candidate time to respond to the views expressed in the debate. By doing so, the station avoided viewpoint discrimination and met its public forum requirements because the candidate expressed his views and the station did not disfavor his viewpoint. In addition, the station passed a public interest standard because the candidate's views were a matter of public interest and the candidate fairly expressed these views. Thus, where the broadcast station is the relevant forum for limiting broadcaster discretion, the station can make content-based decisions without viewpoint discrimination because the inquiry examines all programming before judging whether there has been a First Amendment violation.

In contrast, broadcasters cannot escape viewpoint discrimination if, as Forbes envisions, the individual programs aired on the station are the relevant fora for limiting discretion. Viewpoint discrimination occurs under this conception because the court considers the programs separately from one another. Therefore, any decision to restrict content in a particular program necessarily discriminates against viewpoints excluded from the program. Under this view, programs cannot balance one another to avoid viewpoint discrimination on the station.

If the debate program is the only relevant forum for limiting discretion then the station described in the example above would fail both public forum analysis and the public interest standard by excluding the Libertarian candidate. Unlike the example described above, an offer by the station to grant the candidate time to respond to the debate in a separate program would not correct the imbalance in the debate. The station could not rectify the restriction on free expression that occurred when the station

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76 This Comment assumes that the station is at least a limited public forum from which the candidate could not be excluded unless there was a sufficient state interest in doing so. In limited public fora, the state may not discriminate on the basis of viewpoint.

77 Indeed, the response program would be its own forum, to which other candidates could possibly demand access.
excluded the candidate from the debate by granting him airtime after the debate. Under this view, the only way to avoid viewpoint discrimination is to allow all who desire it access to the debate.

The Chandler approach gives effect to the balancing of discretion, free expression in public forum doctrine, and the public interest standard while the Forbes approach ignores this balancing and creates an inclusive rule for political candidates. Because the Forbes view destroys the balance between discretion and free speech values, it removes broadcaster discretion in programming because once a station extends an invitation to speakers, the broadcaster has no authority to focus the possible debate or exclude outlandish fringe views that are not truly matters of the public interest. The Forbes conception purports to destroy the balance to avoid opportunistic government censorship of political views. Though the Forbes view may do that, it also endangers the free expression it seeks to protect by chilling the expressive activities of broadcasters.

The weakness of the Forbes conception becomes apparent when one considers the relationship between the public interest standard and public forum doctrine. As explained above, public broadcasters must balance the requirements of these two concepts to retain their licenses and avoid constitutional violations. If, as Forbes would require, broadcasters must include all candidates demanding access to a station-sponsored program, broadcasters might choose not to air those programs at all. A broadcaster might choose such an approach for two related reasons. First, allowing every candidate access to the programs of their choice would be too difficult to organize. The broadcaster might fail altogether, or the resulting program might be so confusing as to be rendered meaningless. Second, the broadcaster might avoid such programs to protect its license. If a broadcaster attempted to sponsor a debate including all candidates and an excluded candidate brought suit, the station’s license might be in jeopardy because of the constitutional violation. To avoid this problem, broadcasters might reasonably decide not to air programs whose access requirements could endanger their licenses.

78 See Chandler, 917 F2d at 489. In addition, the universe of candidates might be broader than just candidates on the ballot, and under the Forbes rationale, these candidates should also be allowed access to the program.
79 The public interest standard’s mandate is general and does not require broadcast-
Debates, interview shows, and other programs which invite candidates to express their views are an important and effective means of disseminating political information as well as focusing and clarifying matters of public interest. The *Forbes* conception would chill broadcasters' inclination to air such programs, and therefore would obstruct the free expression of ideas. Because *Forbes* is not sensitive to the relationship between the public interest standard and public forum doctrine, and does not appreciate the pressures placed on broadcasters by that relationship, it harms the First Amendment values it seeks to protect. On the other hand, the *Chandler* approach accounts for the relationship between the public interest standard and public forum doctrine and appreciates the repercussions of that relationship for broadcasters. Therefore, courts should adopt the *Chandler* view.

B. Public Broadcasters as State Actors: The Danger of Opportunistic Censorship has been Negated by Regulation

Even if the *Chandler* view is the correct approach to the forum conception issue, *Forbes* might still be correct that public television broadcasters, inasmuch as they are part of the state, should bear greater First Amendment scrutiny. Although fears about government control over expression and overzealous abridging of speech are real concerns, the public interest standard largely negates them. Under this standard, the broadcasters must cover political issues. This necessarily entails allowing access to candidates with whom the broadcaster may not agree. The station will present all candidate views for public scrutiny, but not necessarily on every program it runs.

Initially, the *Forbes* conception appears appealing because it assures that stations will allow qualified candidates to speak in the forum of their choosing, thus contributing to the information available to the public. The *Forbes* argument against allowing state-owned stations the authority to exclude candidates is strong because such an exclusion immediately raises the specter of government censorship. Where a state-run network decides that only Republicans and Democrats may appear on a debate sponsored by the station, the state arguably is attempting to shape what the voting public should find politically important. The fact that

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ers to air certain formats. Therefore, a broadcaster could decide not to air any debates on the station, though it would have to cover political issues in some manner. See Communications Act of 1934, 47 USC §§ 301, 307(a), 307(d), 309(a) (1988).
state control over the local station is likely quite strong strengthens this suggestion. The state creates the station and employs the broadcasters that staff it.

The Forbes conception loses its theoretical power when one considers the safeguards of the public interest standard. The Forbes approach appears to conceive of broadcaster decision making as if it occurred in a vacuum, without any restriction on its reach. However, the public interest standard marks the outer boundaries of broadcaster discretion, thereby curbing a broadcaster from ignoring viewpoints with which he or she does not agree. The standard largely negates the danger of influence over, or collusion with, the broadcaster. The FCC, not local monitors, enforces the Communications Act against broadcasters. While state or local governments might have considerable influence over public stations, the FCC has ultimate control because it can "pull the plug" on the broadcaster. Thus, FCC authority negates whatever suppressive influences state governments might have over broadcasters.

The Chandler conception recognizes that broadcasters do not act in a vacuum, but rather that these public interest requirements influence them to a great degree. Discretion therefore is permissible, so long as the public forum and public interest requirements effectively limit this discretion.

As the Chandler court noted, broadcasters must necessarily make content-based decisions, while the First Amendment prohibits viewpoint-based decisions as derogations of the freedom of speech and expression. Chandler created a scheme that promotes broad discretionary authority restricted by public interest concerns in order to assure that candidate views will be communicated to the public. Under that scheme, broadcasters may make any programming decisions they want as long as they do not completely exclude candidates from the broadcast station. When examining the exclusion of candidates from debates, it is thus proper to look at the provisions the broadcaster has made to

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80 See Community-Service Broadcasting of Mid-America, Inc. v FCC, 593 F2d 1102, 1115-16 (DC Cir 1978) (finding that statutory enactment requiring that public radio and television stations make and keep recordings of all political broadcasting unduly burdened public broadcasting licensees and presented a risk of direct governmental interference with program content).

81 Chandler, 917 F2d at 489.

82 The court in Chandler stated that the station offered candidates excluded from the debate the chance to respond to the debate and present their views. Unlike in Forbes, there was no attempt by the station to completely cut a candidate off from the broadcast medium. Id at 488 n 1.
allow the excluded candidates the opportunity to express their views. Only through such an examination may one discover if the broadcaster attempted impermissibly to silence the candidate's view and infringe upon his or her First Amendment rights.83

Under the Chandler conception, it is unimportant whether the station is private or public television. The regulatory scheme negates the special identity of a public station as a part of the state. Private stations can exclude candidates because the public interest standard restrains the otherwise unchecked danger that broadcasters will censor political speech. The standard acts on discretion in the same way, by disallowing unreasonable exclusion from the broadcast media, whether the station is private or public. Therefore, the power to exclude candidates from debates should cut across the two forms of broadcast licensing because in neither is there a real possibility that a candidate will be totally banned from the medium.

Of course, the manner in which a station expresses their views may concern candidates as much as whether the station expresses it at all. Candidates might argue that the debate context is such a unique medium of expression that it becomes fundamental to that type of expression. After all, debates are the only opportunity for opponents to meet “in the rough” without the benefit of carefully prepared speeches or presentations. A candidate may gain notoriety, positive exposure, and voting support from such meetings. Therefore, the argument goes, it would not be enough simply to allow the candidate response time, or ensure that his or her views receive fair coverage in the station’s overall programming, because these methods of expression do not result in the same benefits for the candidate as a debate.

This argument, however, places too much weight on the long-term importance of debates on the psyche of the public. During a campaign, the voting public receives many political messages from the candidates, and the totality of those expressions likely forms an impression of the candidate, not the debates alone. Debates are not, then, a form of expression in themselves, vital to campaign success, but merely one medium among many through which candidates may express their views.

83 Thus, while the rationale of Forbes is flawed, its holding might nonetheless be correct because it appears that the station made no attempt to offer the plaintiff access by means of another program to the station to reply to the views expressed in the debate. See Forbes, 22 F3d at 1429-30 n 4.
The Chandler conception complements the courts' understanding of broadcaster discretionary power by recognizing that candidates have a general right of access and that broadcasters have a duty to air candidates' views if they are in the public interest. Additionally, the Chandler conception solves the state action problem because it recognizes that the key question is not whether a station is private or public, but rather, whether the forum of television broadcasting has an unchecked authority to censor political speech. The Chandler conception thus makes the state-actor question virtually irrelevant to the inquiry, and concludes that public as well as private broadcasters have the authority to exclude candidates from televised debates.

CONCLUSION

Government censorship of political speech in the United States has always been abhorred in principle and generally avoided in practice. Since its inception in 1934, the Communications Act has attempted a precarious balancing act: on the one hand serving the public interest by providing broadcast stations to disseminate information, while on the other hand creating a manageable system of accountability for the broadcast licensees airing the information. Broadcasters, too, have been forced to balance the demands of being public trustees with the freedom of journalistic expression. Debates between qualified candidates for political office represent a difficult area of action for broadcasters because whether including or excluding certain candidates from a debate will be in the public interest is uncertain. The sponsoring station's status as a public station exacerbates this problem because the station becomes a limited public forum in which the station cannot exclude candidates merely because of their views. Moreover, these entities are more likely to be seen as arms of the government, thus raising the specter of government censorship.

The key question that courts must resolve is whether public broadcasting stations have the discretion to exclude candidates from debates. Properly understanding the relevant forum for limiting discretion answers this question. The public interest standard only has logical effect if the broadcast station is the relevant forum for limiting broadcaster discretion. Thus, as the Chandler conception of broadcaster discretion shows, when examining whether a station has violated a candidate's First Amend-
ment rights, one must examine whether the station has provided a reasonable means for the candidate to express his or her views, not whether the station allowed the candidate to appear on a particular program.