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Public Television and the Government's Perpetuation of a Bipartite System - The Democratic and Republican Parties

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NOTES

PUBLIC TELEVISION AND THE GOVERNMENT'S PERPETUATION OF A BIPARTITE SYSTEM— THE DEMOCRATIC AND REPUBLICAN PARTIES

All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society.
—Chief Justice Warren[1]

I. INTRODUCTION

During political elections, any restraint on speech can pose a serious threat to our basic guarantees of freedom of expression and democratic government under the United States Constitution.[2] Even more detrimental to the American public would be a limitation on access to the mass media because of the media's significant effect on the outcome of elections.[3] In fact, the mass communications media increasingly have be-

1. Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957). *See also* Alan Raphael, Comment, *Keeping Third Parties Minor: Political Party Access to Broadcasting,* 12 IND. L. REV. 713 (1979) ("Third parties . . . have raised new issues many of which have been adopted later by the major parties and have become enshrined in law.").

2. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[There is] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); Raphael, *supra* note 1, at 716 ("Wide exposure [to divergent political views] leads to an informed electorate, upon which the proper functioning of a democracy rests."). *See also infra* notes 138-40 and accompanying text.

3. Raphael, *supra* note 1, at 721 ("Today, television is the major source of public information about most issues and candidates."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 808 n.16 (2d ed. 1988) ("The increased frequency of government communication, coupled with expanding use of sophisticated mass media technologies to enhance the effectiveness of government messages, makes it likely that government can affect public opinion on a wide variety of issues."); Arnold P. Lutzker, *Campaigns on the Air: Political Broadcast Litigation,* 6 LITIG. 36 (1980) ("Politics is synonymous with the media. In an

come a prominent ingredient of effective campaigning.[4] Television, in particular, has become a primary source of candidate exposure and a means to heavily influence voters.[5] Television has the capacity to "focus public attention,"[6] set the public agenda[7] and impact voters' perceptions of candidates.[8] Additionally, television creates candidates' public images[9] and promotes a candidate's name awareness more effectively than does the print media.[10]

Because of the scarcity of broadcast frequencies and television's enormous power to inform and shape public opinion, the broadcast industry represents both significant opportunities and hazards for free expression.[11] When a television station is publicly owned as an instrumentality of the government, the government has the potential to control political ideas. Additionally, the government has the ability to increase the likelihood of election of particular candidates and the parties they represent. This can lead to the perpetuation of certain governmental beliefs and interests. Thus, defining the limits of the government's power to restrict the speech of candidates for political office is of compelling urgency and importance; such manipulation of the electoral process and prescription of program content may constitute a direct infringement of a candidate's First Amendment right to freedom of speech.[12]

In *Chandler v. Georgia Public Telecommunications Commission*[13] *("Chandler")*, the Eleventh Circuit Court of Appeals held that a public television station may exclude third party candidates[14] from broadcast political debates.[15] The court thereby reversed an injunction barring Georgia Public Television ("GPTV") from excluding Libertarian candi-

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age of technological revolutions, television is the most forceful, direct, passionate medium of expression.").

4. Buckley v. Valeo, 424 U.S. 1, 19 (1976).

5. James A. Gardner, Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine,* 51 U. CHI. L. REV. 892, 927-28 (1984).

6. *Id.* at 928 n.189.

7. *Id.*

8. *Id.*

9. *Id.*

10. Gardner, *supra* note 5, at 928 n.189.

11. Johnson v. FCC, 829 F.2d 157, 160 (D.C. Cir. 1987).

12. *See, e.g.,* WALTER GELLHORN, AMERICAN RIGHTS 41 (1960) ("Governmentally imposed constrictions of thought and conscience are obviously inconsistent with popular control of the government. And since thinking without communication is profitless, freedom of expression must be protected in order to make freedom of thought a reality.")

13. 917 F.2d 486 (11th Cir. 1990).

14. "Third party," "minor party" and "minority party" are used interchangeably throughout this note.

15. *Chandler,* 917 F.2d at 489.

dates from debates between Democrats and Republicans in a Georgia gubernatorial contest. The Eleventh Circuit reasoned that its decision allowing GPTV to exclude the Libertarians from the debates did not violate the Libertarians' First Amendment rights because it was a matter of editorial discretion.[16] The court explained that although its decision was content-based,[17] it was not made in an effort to suppress the views of the minor party candidates.[18]

This note will demonstrate that the appellate court's decision in fact constituted a viewpoint-based restriction, and therefore, violated the First Amendment.[19] It will further establish that even if the decision was not viewpoint discrimination, the ruling constituted an unjustified content-based regulation.[20] This note will then illustrate that the *Chandler* court, in ruling that third party candidates can be excluded from televised debates, failed to consider the underlying policies of the First Amendment. Consequently, the court's holding was contrary to these fundamental national values.[21] Finally, this note will argue that government-controlled public television stations have an obligation to air the views of all ballot-qualified candidates for public office in order to prevent government monopoly over the election process.[22]

II. BACKGROUND OF THE LAW—THE FIRST AMENDMENT'S PROTECTION OF FREEDOM OF EXPRESSION

The First Amendment of the Constitution provides in unequivocal and unqualified language that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[23]

Expression has been granted more immunity from government regulation than most other forms of human conduct. Yet, that extensive immunity is not absolute.[24] For example, the United States Supreme Court has held that restraints on free expression may be "permitted for appro-

16. *Id.* at 488-89.

17. A content-based restriction is a restraint put on communication because of the message conveyed. Generally, the government cannot restrict speech based on its message unless it can demonstrate a compelling justification for such a regulation. *See infra* notes 26-34 and accompanying text.

18. *Chandler*, 917 F.2d at 489.

19. *See infra* notes 95-111 and accompanying text.

20. *See infra* notes 112-23 and accompanying text.

21. *See infra* notes 124-55 and accompanying text.

22. *See infra* part VI.

23. U.S. CONST. amend. I.

24. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.").

priate reasons"[25] and that abridging the right to freedom of speech requires interpretation.[26]

Central to an analysis of the First Amendment's protection of freedom of expression is the determination of the type of speech being suppressed. The Supreme Court has generally grouped restraints on free expression into two broad classifications: content-based restrictions and content-neutral restrictions.[27] Content-based restrictions are prohibitions placed on communication because of the message conveyed.[28] By contrast, content-neutral restrictions restrict communication without regard to the message conveyed or its communicative impact.[29] These restrictions reduce the flow of communication by limiting the activities through which such communication may be conveyed.[30]

Generally, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[31] In applying content-based restrictions, however, the Court distinguishes between "high" and "low" value expression.[32] For example, advocacy of imminent lawless behavior, false statements of fact, commercial speech, and obscenity have been accorded "low" First Amendment value and have traditionally been considered unprotected or only marginally protected speech.[33] Courts subject unprotected and marginally protected speech to a lower level of scrutiny and, therefore, most restrictions on these types

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25. Elrod v. Burns, 427 U.S. 347, 360 (1976).

26. *See, e.g., Elrod,* 427 U.S. at 360 (infringement of First Amendment interests does not end the court's inquiry, because "the prohibition on encroachment of First Amendment protections is not an absolute").

27. *See, e.g.,* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1024 (2d ed. 1991); TRIBE, *supra* note 3, at 789-92; Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

28. STONE, *supra* note 27, at 1024.

29. *Id.*

30. TRIBE, *supra* note 3, at 789-90.

31. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

32. STONE, *supra* note 27, at 1024.

33. *See, e.g.,* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In *Chaplinsky,* the Supreme Court explained:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . the insulting or 'fighting' words—those by which their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72 (footnote omitted). *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."); Central Hudson Gas v. Public Service Comm'n of New York, 447 U.S. 557, 562-63 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.") (citation omitted); Miller v. California, 413 U.S. 15, 23 (1973) ("[O]bscene material is unprotected by the First Amendment.").

of speech are upheld.[34]

In contrast, a court must strictly scrutinize all other content-based regulations. In such cases, there is a strong presumption that the regulation is unconstitutional, and the government has the burden of showing "that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[35] Additionally, the government may not tell persons what they can or cannot say.[36] It has an obligation to remain neutral in its regulation of protected communication. Hence, viewpoint discrimination is "censorship in its purest form,"[37] and the government can never regulate content solely to suppress the particular viewpoint a speaker espouses.[38]

When the regulation is content-neutral, the court's analysis depends on whether the expression takes place in a public forum, semi-public forum or nonpublic forum.[39] If expression occurs in a public forum, an individual's right to free speech is deemed to be substantially important.[40] Thus, any regulation which is imposed on the time, place and

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34. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (defendant's conviction for calling the city marshall a "goddamned racketeer" and "a damned Fascist" upheld; his words would likely provoke the average person to retaliate); New York v. Ferber, 458 U.S. 747, 762 (1982) (state may ban the distribution of materials showing children engaged in sexual conduct, even though the material is not legally obscene; First Amendment value of allowing children to be photographed in such acts is "exceedingly modest, if not *de minimis*").

35. Widmar v. Vincent, 454 U.S. 263, 267-70 (1981). *See also* Elrod v. Burns, 427 U.S. 347, 362-63 (1976) ("It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. . . . The interest advanced must be paramount, . . . [t]he gain to the subordinating interest . . . must outweigh the incurred loss of protected rights, and the government must 'emplo[y] means closely drawn to avoid unnecessary abridgment. . . .' ") (citations omitted)); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978).

36. Young v. American Mini-Theatres, 427 U.S. 50, 63 (1976).

37. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 (1983).

38. *Id. See also* Young v. American Mini-Theatres, 427 U.S. 50 (1976). In its opinion regarding the propriety of imposing viewpoint-based restrictions upon expression, the Court explained:

> A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate, he said: 'I disapprove of what you say, but I will defend to the death your right to say it.' The essence of that comment has been repeated time after time in our decisions invalidating attempts by the government to impose selective controls upon the dissemination of ideas.

Id. at 63.

39. *See, e.g.*, Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985); TRIBE, *supra* note 3, at 986-87.

40. *See, e.g., Perry Educ. Ass'n*, 460 U.S. at 45.

See also Milwaukee County v. Carter, 45 N.W.2d 90, 93 (1950). The Wisconsin Court, in invalidating legislation that prohibited the use of public parks for religious and political addresses, stated:

> Government may, in the interests of public order, safety, and the equitable sharing of

manner of expression must be narrowly tailored to serve a significant governmental interest and provide adequate, alternative channels for communication.[41] Examples of public forums include public areas such as streets, sidewalks, parks and public facilities created for the primary purpose of communication.[42]

A limited or semi-public forum is public property the state has opened up to public communicative activity.[43] As long as the state retains the open nature of this type of property, it is bound by the same standards that apply in a traditional public forum.[44] Some government-owned property, such as schools and libraries, fall into this category.[45]

When speech transpires in a nonpublic forum, the government has the greatest ability to regulate speech activities. Regulation of expression is acceptable so long as it is reasonable.[46] The government need only show that restrictions on speech are rationally related to a legitimate governmental purpose.[47] It should be noted, however, that just as the government cannot establish content-based regulations founded upon a person's viewpoint,[48] the government cannot regulate speech in a manner designed to suppress an individual's point of view. This type of regulation would be unconstitutional in any of the three forums.[49]

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facilities, exercise reasonable control over when, where and under what conditions public meetings may be held on public property; but to deny to the people all use of the people's property for the public discussion of specified subjects is an unconstitutional interference of rights expressly guaranteed by both state and federal constitutions.

41. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *Perry Educ. Ass'n*, 460 U.S. at 45.

42. *See, e.g.*, Schneider v. State, 308 U.S. 147, 160 (1939); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 290 (1983); *Ward*, 491 U.S. at 790-91.

43. *See, e.g., Perry Educators' Ass'n*, 460 U.S. at 45.

44. *Id.* at 45-46. *See also supra* notes 39-42 and accompanying text for public forum standards and examples.

45. *See, e.g.*, Grayned v. Rockford, 408 U.S. 104 (1972); Brown v. Louisiana, 383 U.S. 131 (1966).

46. *Perry Educators' Ass'n*, 460 U.S. at 37.

47. *See, e.g.*, Adderley v. Florida, 385 U.S. 39, 47-48 (1966); United States v. Kokinda, 110 S. Ct. 3115, 3119-20 (1990); *Perry Educators' Ass'n*, 460 U.S. at 46.

48. *See supra* notes 36-38 and accompanying text.

49. *See, e.g.*, Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989). "The existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." *Id.* at 1324 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 811 (1985)).

III. PROCEDURAL HISTORY

A. *Statement of the Case:* Chandler v. Georgia Public Telecommunications Commission

Walker Chandler, the Libertarian candidate for lieutenant-governor of Georgia, and intervenor Carole Ann Rand, the Libertarian candidate for governor, requested to be included in a pre-election political debate for their respective offices.[50] These debates were to be broadcast by Georgia Public Television ("GPTV") on November 2, 1990, and November 4, 1990, respectively.[51] GPTV is the broadcasting facility of the Georgia Public Telecommunications Commission ("GPTC") and an instrumentality of the State of Georgia.[52] GPTC denied the Libertarian candidates' requests to participate in the debates, which included only the Democratic and Republican candidates.[53] Their requests were denied even though both candidates were ballot-qualified[54] and GPTC would not have been unduly burdened by extending the debate one half-hour to accommodate the additional participants.[55] Instead, GPTC only offered each of the Libertarians one-half hour of television time to state their views, separate from the debates.[56]

Chandler and Rand sued GPTC and its directors and officers in an effort to enjoin the public television broadcaster from airing political debates between the Democratic and Republican candidates without including the Libertarians.[57] A federal district court issued a temporary restraining order, requiring GPTC to include the two Libertarian candidates in the televised debates.[58] On appeal,[59] the Court of Appeals for

50. Chandler v. Georgia Pub. Telecommunications Comm'n, 917 F.2d 486, 487-88 (11th Cir. 1990).

51. *Id.* at 488.

52. *See* Chandler v. Georgia Pub. Telecommunications Comm'n, 749 F. Supp. 264, 265 (N.D. Ga. 1990); GA. CODE ANN. § 20-13-1(a) (Michie 1991).

53. *Chandler,* 917 F.2d at 490.

54. *Id.* at 490. Georgia law provides that any political body that is duly registered is qualified to nominate candidates for state-wide public office by convention if "[a]t the preceding general election, the political body nominated a candidate for state-wide office and such candidate received a number of votes equal to 1 percent of the total number of registered voters who were registered and eligible to vote in such general election." GA. CODE ANN. § 21-2-180(2) (Michie 1991).

There were 2,941,339 registered voters in Georgia in 1988. Therefore, a Libertarian candidate had to receive a minimum of 29,414 votes in a statewide election held that year in order to be considered ballot-qualified. *Chandler,* 917 F.2d at 490 n.2.

55. *Chandler,* 749 F. Supp. at 269.

56. *Id.*

57. *Id.* at 265.

58. *Id.* at 270.

59. The *Atlanta Journal* and the *Atlanta Constitution*, the parties responsible for paying

the Eleventh Circuit vacated the district court's order and remanded the case with instructions to dismiss the complaint.[60]

B. The District Court's Decision: First Amendment Violated

The *Chandler* district court held that the decision by the directors of GPTC to deny the ballot-qualified Libertarian gubernatorial candidates the opportunity to participate in the televised debates violated the candidates' First Amendment rights.[61] In its analysis, the court distinguished between a traditional public forum and a nonpublic forum. It explained that in a traditional public forum, speakers can be excluded only when the restriction is narrowly drawn to serve a compelling state interest.[62] In a nonpublic forum, however, only a reasonable basis is needed to restrict access.[63] The district court decided that its analysis did not depend upon a determination of the nature of the relevant forum because the defendants failed to articulate even a reasonable basis for excluding the Libertarians.[64]

The court pointed out that GPTC's executive director stated that the Commission chose to include only the two "frontrunners" in each debate because their information was of greater interest to the public, and hence, more newsworthy.[65] The court conceded that in comparison to the Democrats and Republicans, the Libertarian platform was less popular and represented a minority view in Georgia.[66] Nevertheless, the court concluded that excluding the views of Chandler and Rand because they were less interesting or less newsworthy was viewpoint-based dis-

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the cost of the stage set-up for the gubernatorial debate, intervened to pursue an appeal. *Chandler*, 917 F.2d at 488 n.2.

60. *Id.* at 490.

61. Chandler v. Georgia Pub. Telecommunications Comm'n, 749 F. Supp. 264, 269 (1990).

The court also found that the exclusion of the Libertarian candidates was a violation of the Fourteenth Amendment Equal Protection Clause. *Id.* In its analysis, the court explained that third party candidates are not a protected class for equal protection purposes. Thus, a minimal scrutiny standard of analysis, giving deference to state objectives, was required. However, a state must exhibit "some rationality in the nature of the class singled out." *Id.* (citing Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966)). The court could not find any rational or legitimate public purpose for excluding the minor party candidates. It noted that both Chandler and Rand, along with the Democratic and Republican candidates, were ballot-qualified; the fact that Chandler and Rand were from a less popular party did not constitute a rational basis for their exclusion. The court also stated that the GPTC's actions violated the Equal Protection Clause for many of the same reasons the First Amendment had been violated. *Id.*

62. *Chandler*, 749 F. Supp. at 267. *See also supra* notes 39-42 and accompanying text.

63. *Chandler*, 749 F. Supp. at 267. *See also supra* notes 46-47 and accompanying text.

64. *Chandler*, 749 F. Supp. at 267.

65. *Id.* at 268.

66. *Id.*

crimination in violation of the First Amendment.[67] Further, the court found the regulation constituted a "constitutionally impermissible prior restraint based on content."[68] Consequently, the district court found that the two Libertarian candidates had satisfied the requirements to sustain a motion for a temporary restraining order,[69] and enjoined GPTC from airing the debates unless Chandler and Rand were also included.[70]

IV. THE REASONING OF THE COURT OF APPEALS

A. The Court of Appeals' Per Curiam Decision

The Eleventh Circuit Court of Appeals held that GPTC's actions did not violate the First Amendment,[71] and remanded the district court's order with instructions to dismiss the complaint.[72] The Eleventh Circuit explained that the amount of control a public broadcast licensee can exercise over its programming consistent with the First Amendment "depends on the mission of the communicative activity being controlled."[73] In *Chandler,* the court found that GPTC, as a public television station, had an obligation to serve the public interest.[74] The court noted that GPTC was designed to provide educational and instructional services to the citizens of Georgia,[75] and therefore, was not a medium open to all who have a message to convey.[76] Thus, the state could regulate the con-

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67. *Id.*

68. *Id.*

69. To prevail on a motion for a temporary restraining order, a plaintiff must establish the following: (1) a substantial likelihood that the plaintiff will prevail on the merits; (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted; (3) the threatened harm to the plaintiff outweighs the possible harm to the defendants should they be enjoined; and (4) the grant of an injunction will not disserve the public interest. *Chandler,* 749 F. Supp. at 269-70 (citing United States v. Alabama, 791 F.2d 1450, 1459 n.10 (11th Cir. 1986), *cert. denied,* 479 U.S. 1085 (1987)).

70. *Chandler,* 749 F. Supp. at 270.

71. Chandler v. Georgia Pub. Telecommunications Comm'n, 917 F.2d 486, 488-89 (11th Cir. 1990). The court also held that GPTC's actions did not violate the Equal Protection Clause of the Fourteenth Amendment. It explained that the candidates were not members of a protected class, and thus, the appellants only needed to exhibit a rational basis for their decision. It pointed out that, as demonstrated previously in reference to the First Amendment issue, the appellants' decisions were rational, and hence, there was no Equal Protection violation. *Id.* at 489.

72. *Id.* at 490.

73. *Id.* at 488 (citing Schneider v. Indian River Community College Found., Inc., 875 F.2d 1537, 1541 (11th Cir. 1989)).

74. *Id.*

75. *Id.*

76. *Chandler,* 917 F.2d at 488.

tent of GPTC's programming to best serve the public's interest.[77]

Further, the court reasoned that the decision to air any show is necessarily content-based,[78] and GPTC clearly had regulated content by making an editorial decision to air the debates between the two major parties.[79] Contrary to the district court's holding, however, the Eleventh Circuit characterized GPTC's actions as "reasonable" and found that GPTC's decision promoted its function.[80] Therefore, the court of appeals held that although GPTC's decision to limit the debates to the Democratic and Republican candidates was content-based, it was "not an effort to suppress expression merely because public officials oppose the speaker's views."[81] The court contended: "Our view does not mandate [or] authorize . . . state thought control through selective airing of viewpoints on public television stations. Without deciding, we can safely predict that the use of state instrumentalities to suppress unwanted expressions in the marketplace of ideas would authorize judicial intervention to vindicate the First Amendment."[82] The court concluded that the district court had erred in basing its order on First Amendment grounds, because the selection of the candidates who would participate in the televised debates was not viewpoint-restrictive and did not advance a constitutionally impermissible, discriminatory bias in the station's mission.[83]

B. The Dissenting Opinion

In his dissent, Judge Clark declared that the First Amendment forbids the state from "selectively choosing which qualified candidates can and cannot debate,"[84] and prohibits the state from refusing its citizens the chance to concurrently view all of the candidates whose names will appear on the ballot.[85] He explained that the resolution of the case revolved around the typology of forums developed for First Amendment

77. *Id.* (citing Schneider v. Indian River Community College Found., Inc., 875 F.2d 1537, 1541 (11th Cir. 1989)).

78. *Id.* at 489.

79. *Id.*

80. *Id.*

81. *Chandler*, 917 F.2d at 489 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

82. *Id.*

83. *Id.* The court also reasoned that the Libertarian candidates did not demonstrate a substantial likelihood of success on the merits, so the grant of preliminary injunctive relief was an abuse of the district court's discretion and injunctive relief should be denied. *Id.* at 490. The standard of review regarding a district court's grant of preliminary injunctive relief is abuse of discretion. United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir. 1983).

84. Chandler v. Georgia Pub. Telecommunications Comm'n, 917 F.2d 486, 490 (11th Cir. 1990).

85. *Id.*

analysis.[86] Judge Clark concluded that the government of Georgia had created, at a minimum, a nonpublic forum[87] because the general public was not invited to appear on GPTC's network and there was no evidence of governmental intent to designate a public forum.[88]

Further, Judge Clark pointed out that the main issue in the case was the Libertarians' First Amendment right to express their viewpoints, not GPTC's prerogative to maintain control over its programming content.[89] Judge Clark argued that the content of GPTC's broadcasts of the two debates had already been determined; it was to be the political contention for the offices of lieutenant-governor and governor of Georgia. Therefore, GPTC could not dictate the particular message the contenders would communicate.[90] According to Judge Clark, GPTC's decision to exclude Chandler and Rand was not viewpoint-neutral and should have been held unconstitutional. Judge Clark would have affirmed the lower court:[91] "[B]y discriminating against the viewpoints expressed by the Libertarians, GPTC has violated even the minimal First Amendment standards applicable to nonpublic forums."[92]

Additionally, Judge Clark explained that the exclusion of particular candidates not only put a stamp of approval on the favored candidates but also curtailed access to ideas. As a result, GPTC prevented the dissemination of information to the public by precluding the public's viewing of the interaction between debating candidates.[93] Judge Clark asserted that if lines had to be drawn, qualification for the ballot was a justified line allowing access to the debates.[94]

V. ANALYSIS

A. The Eleventh Circuit's Decision Exceeds the Bounds of the First Amendment

1. Imposition of a Viewpoint-Based Restriction

The decision of the Georgia Public Telecommunications Commission, which the court of appeals approved, clearly discriminated against the viewpoints of the Libertarian candidates. GPTC is "an instrumental-

86. *Id.* at 491.
87. *Id.*
88. *Id.*
89. *Chandler*, 917 F.2d at 493.
90. *Id.*
91. *Id.*
92. *Id.* at 491.
93. *Id.* at 493-94.
94. *Chandler*, 917 F.2d at 494.

ity of the State of Georgia and a public corporation."[95] As such, it has the power to "act as agent for the United States of America, or any agency, department, corporation, or instrumentality thereof, in any manner within the purposes or powers of the commission."[96] Yet GPTC, functioning as an arm of the State of Georgia and its government, cannot discriminately choose which qualified candidates may be allowed to convey their views. As Judge Clark indicated in his dissent,[97] GPTC's actions were not viewpoint-neutral; GPTC prohibited the views of Chandler and Rand from being aired, based on their minor party affiliation.

It is a matter of law that individual members of the public do not have a right to broadcast their own particular views on any matter,[98] and individuals cannot compel a television station to air their views, no matter how true and important they may be.[99] Instead, Congress has chosen to protect the public's First Amendment rights in broadcasting "by relying on broadcasters as public trustees, periodically accountable for their stewardship, to use their discretion in ensuring the public's access to conflicting ideas."[100] In Chandler and Rand's case, however, GPTC failed to exercise sound discretion when it chose to air political debates between only the Democratic and Republican candidates. Its disparate treatment of the Libertarians constituted unconstitutional viewpoint-based discrimination. GPTC clearly stated that it had excluded Chandler and Rand from the televised debates because the ideas and information communicated by minor party candidates would be of less interest and benefit to the Georgia citizens.[101] Further, the director of GPTC, who is a state employee,[102] explicitly asserted that the viewpoints of the Libertarians

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95. GA. CODE ANN. § 20-13-1(a) (Michie 1991).

96. *Id.* § 20-13-11(8).

97. *See supra* notes 84-94 and accompanying text.

98. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 112-13 (1973).

99. *See, e.g.*, FCC v. League of Women Voters of California, 468 U.S. 364, 380-81 (1984); Johnson v. FCC, 829 F.2d 157, 162 (D.C. Cir. 1987); Amiri v. WUSA TV-Channel Nine, 751 F. Supp. 211, 212 (D.D.C. 1990).

100. Johnson v. FCC, 829 F.2d 157, 162 (D.C. Cir. 1987) (citations omitted).

101. The district court pointed out that GPTC had stated:

> Were its air waves open for unrestricted access to all citizens, the GPTC would be unable to operate within the guidelines set by Congress through enactment of the Federal Communications Act . . . . GPTC clearly has as its legitimate purpose the dissemination of newsworthy information in a format it judges to be responsive to the demands of the public. The citizens of Georgia will, in large measure, vote for either the Democratic or Republican candidates in the upcoming elections.

Chandler v. Georgia Pub. Telecommunications Comm'n, 749 F. Supp. 264, 267-68 (N.D. Ga. 1990).

102. GA. CODE ANN. § 20-13-10(a) (Michie 1991).

were less valuable than those of the Democrats and Republicans.[103] The result was that GPTC seriously thwarted Georgia citizens' access to conflicting ideas among all the candidates who would appear on the ballot.

Contrary to GPTC's opinion that the views of minor party candidates are of little benefit, minor party candidates have the potential to win elective office or substantially impact the outcome of an election.[104] Even if the major party candidates attract more attention and have a greater chance of election by the community, suppression of the viewpoints of minor party candidates violates the First Amendment's guarantee of freedom of speech. This type of discrimination violates "a bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[105]

As a United States agent, GPTC is authorized to receive funding from the State of Georgia, the United States of America, or any agency, political subdivision, or instrumentality thereof.[106] In effect, the *Chandler* decision allows the government, via GPTC, to use taxpayers' money and public facilities to endorse the views of the two majority parties and dictate what the public will view. The government's actions, which were sanctioned by a United States appellate court, exhibit an intolerance for views that are not as widely accepted by the general public. The exclusion of minor party candidates and their ideas from political discussions not only reinforces the two-party mold among the American people, but also benefits national, state and local government in an extremely self-serving way. This encouragement of only two parties is especially apparent in Georgia, where the state government is composed entirely of Democratic and Republican officials.[107]

Finally, it was not necessary for the district court and court of ap-

103. *Chandler*, 749 F. Supp. at 268. *See also* Chandler v. Georgia Pub. Telecommunications Comm'n, 917 F.2d 486, 491-92 (11th Cir. 1990). In his dissent, Judge Clark noted that the transcript of the evidentiary hearing held by the district court was replete with statements by the executive director that GPTC decided the viewpoints of the Libertarians were less valuable. *Chandler*, 917 F.2d at 491-92. For example: "I think . . . that the value of the program was that only these two sets of views would be expressed, one contrasted with the other, because, again, they are the frontrunners for which the majority of the people, in all likelihood, will vote." *Id.* at 492.

104. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 35 (1975).

105. Texas v. Johnson, 491 U.S. 397, 414 (1989).

106. GA. CODE ANN. §§ 20-13-5(b), 20-13-11(6) (Michie 1991).

107. THE COUNCIL OF STATE GOVERNMENTS, STATE ELECTIVE OFFICIALS AND THE LEGISLATURES 1991-92 25-28 (1991). *See also* Raphael, *supra* note 1, at 742 ("Minor parties in this century have been of fleeting importance politically and have often represented unpopular causes. The experience and orientation of those in Congress and on the Court have been toward a two-party system.").

peals to consider the type of forum created by the Georgia state government or determine whether a reasonable basis existed for the exclusion of the Libertarian candidates. The courts need not have reached these issues because GPTC forbade the broadcast of the third party candidates' less popular views, and thereby failed to meet the threshold standards required for both content-based and content-neutral restrictions.[108] Indeed, any regulation based upon an individual's views is an unconstitutional violation of the First Amendment.[109] The First Amendment prohibits such viewpoint-based discrimination even in nonpublic forums, where the government is given the greatest latitude to regulate.[110]

> 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 . . . . [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 [sic] benefit the forum was created, . . . [but] 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.[111]

2. A Compelling Governmental Interest Does Not Exist to Justify the *Chandler* Decision

Even if the exclusion of the Libertarians was not viewpoint-based, the court's regulation of speech based on content was unjustified. Freedom of speech is a fundamental right, and Chandler's and Rand's speech undoubtedly fell within that classification of expression that is granted the greatest constitutional protection—core political speech.[112] The Eleventh Circuit Court of Appeals acknowledged that its decision to preclude Chandler and Rand from entering the debates was content-

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108. *See supra* notes 27-49 and accompanying text.

109. *See supra* notes 36-38 and accompanying text.

110. *See supra* notes 48-49 and accompanying text.

111. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (citations omitted).

See also Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) ("[A third category consists of] [p]ublic property which is not by tradition or designation a forum for public communication . . . . [T]he State may reserve [such property] for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

112. Meyer v. Grant, 486 U.S. 414, 422 (1988).

based,[113] yet it concluded that the decision was "reasonable" and consistent with the First Amendment, considering GPTC's function to educate and serve the public.[114]

The United States Supreme Court has defined core political speech as "interactive communication concerning political change."[115] It has asserted that such speech shall receive "First Amendment protections . . . 'at its zenith.' "[116] Unlike governmental regulation of categories of speech that have been accorded "low" First Amendment value and are only marginally protected,[117] regulation of core political speech is "subject to exacting scrutiny."[118] Debates between candidates in a political campaign exemplify expression within the Supreme Court's definition of core political speech. Thus, contrary to the court of appeals' holding, the government may not restrict such speech based on its content or the message conveyed unless the regulation is *necessary* to achieve a *compelling* governmental purpose.[119] In the *Chandler* case,

> no more telling example of "interactive communication concerning political change" can be imagined than debates between candidates for political office held only a few days before the elections. [Chandler's and Rand's] speech is clearly core political speech, and any restrictions on that speech must be subjected to the strictest constitutional review.[120]

The regulation imposed by GPTC is unnecessary, if not directly antithetical, to accomplishing the objective of providing a program of educational value. Inclusion of all of the ballot-qualified candidates, in addition to the Democratic and Republican candidates, would likely have increased the program's educational worth.[121] Further, the programmers' stated goal in airing the debate between the two "frontrunners"—to provide an educational program of sufficient interest to attract

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113. Chandler v. Georgia Pub. Telecommunications Comm'n, 917 F.2d 486, 489 (11th Cir. 1990).

114. *Id.*

115. *Meyer*, 486 U.S. at 422.

116. *Id.* at 425 (quoting Grant v. Meyer, 828 F.2d 1446, 1456-57 (10th Cir. 1987)).

117. *See supra* notes 31-34 and accompanying text.

118. *Meyer*, 486 U.S. at 420.

119. *See supra* note 35 and accompanying text. *See also* Brown v. Hartlage, 456 U.S. 45, 53-54 (1982) ("[W]hen a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.").

120. Walker L. Chandler and Carole Ann Rand, Petitioners, Petition for Writ of Certiorari at 5, Chandler v. Georgia Pub. Telecommunications Comm'n, 917 F.2d 486 (11th Cir. 1990).

121. *See infra* notes 151-55 and accompanying text.

viewers[122]—hardly seems to constitute a sufficiently compelling purpose to override the constitutional prohibition of content-based regulation of speech. In contrast, the need to assure individual liberty and the unfettered exchange of ideas to bring about political and social changes is of utmost significance.[123] Under general First Amendment standards, these fundamental interests far outweigh the need to exclude duly qualified candidates in the interests of programming and journalistic discretion. In demarcating the powers and obligations of the state and federal governments, the fundamental right to freedom of speech cannot succumb to inadequately justified governmental desires.

B. Chandler *Does Not Reflect Sound Policy*

1. The Fundamental Rationales of Free Expression Do Not Justify the Court of Appeals' Holding

Not only does the *Chandler* court's holding impose an impermissible viewpoint-based or content-based restriction on expression, but the court's ruling also runs counter to the underlying principles of the First Amendment. Thus, the Eleventh Circuit's holding was unconstitutional.

a. The Self-Governance Rationale

Courts and commentators have justified the protection of speech under the Constitution by focusing primarily on the rationales of "self-governance" and a "marketplace of ideas."[124] The self-governance theory is grounded upon the concept that free expression facilitates self-government and is necessary to ensure a democratic system.[125] Free men govern themselves,[126] and thus, need to be informed of the occurrences in their communities in order to hold their government—ultimately themselves—accountable.[127] The people of a democracy must be afforded the opportunity to exchange ideas and discuss and decide matters of public

122. *Chandler*, 917 F.2d at 489.

123. Miller v. California, 413 U.S. 15, 34-35 (1973) (citing Roth v. United States, 354 U.S. 476, 484 (1957)).

124. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1017-24 (2d ed. 1991); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785-89 (2d ed. 1988); CHESTER J. ANTIEAU, MODERN CONSTITUTIONAL LAW: THE INDIVIDUAL AND THE GOVERNMENT 4 (1969).

125. *See, e.g.*, TRIBE, *supra* note 124, at 786-87; WALTER GELLHORN, AMERICAN RIGHTS: THE CONSTITUTION IN ACTION 41-45 (1960).

126. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 16 (1948).

127. GELLHORN, *supra* note 125, at 42.

policy.[128]

In *Chandler,* the Eleventh Circuit's decision unconstitutionally abridged Chandler's and Rand's freedom of public discussion. As a result, the Georgia electorate was deprived of the opportunity to fully exercise its democratic powers. GPTC's exclusion of the Libertarians curtailed the two candidates' participation in political discussion as well as obstructed the Georgia citizenry's access to a complete interchange of political ideas—between *all* of the candidates who would appear on the ballot. Because of the vital role television plays in informing and educating the public,[129] GPTC's actions significantly and impermissibly frustrated the electorate's ability to make responsible, enlightened decisions about issues forming the bases of its government.

b. The Marketplace of Ideas Rationale

The marketplace of ideas theory rests on the premise that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[130] In fact, our society relies on the presumption that exposure of thoughts to the marketplace of ideas tests the worth of proposals leading to adoption of meritorious ideas and abandonment of irrational theories.[131]

The *Chandler* court's holding, however, was directly converse to the marketplace of ideas rationale. Instead of enhancing the public's discovery of truth, the Eleventh Circuit effectively limited the Georgia citizens' exposure to competing ideas. The Libertarians were not provided the opportunity to simultaneously express their views in competition with those of the Democrats and Republicans. Thus, by silencing the opinions of Chandler and Rand, the Eleventh Circuit robbed the Georgia electorate of the opportunity to freely discover and evaluate the most desirable ideas from among the *entire* marketplace of gubernatorial candidates.

c. The Rationale of Fear of Government Censorship

Among the other notable justifications suggested for protecting free

128. *Id. See also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 20-35 (1971).

129. *See supra* notes 2-11 and accompanying text.

130. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

131. ANTIEAU, *supra* note 124, at 4. See also United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), in which Judge Learned Hand said: "[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."

expression is the rationale based upon fear of government censorship. This theory arises from the desire to preclude the government from deciding what should be stated[132] and to prevent the mere threat of regulation from having a censorial or "chilling" effect on expression.[133] One famous legal scholar has noted that, "[i]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."[134]

Despite this national policy of promoting free expression within our republican system absent government restraint of ideas, the Eleventh Circuit, in effect, endorsed government censorship of what the public could view. The *Chandler* court failed to serve the community's need to have open vehicles through which individuals could express their thoughts, and the court did not rely on the democratic process to ensure that the most meaningful ideas would emerge from the debates. Rather, by permitting only the two major party candidates to participate in the debates, the Eleventh Circuit granted GPTC the authority to determine for the electorate which ideas were right or wrong.

d. The Checking Value Rationale

A "checking value" theory, which focuses upon the value of free speech in checking the abuse of power by public officials, has also been advanced to justify broad protection of free speech.[135] "The check on government must come from the power of public opinion .... [T]he role of the ordinary citizen is ... to retain a veto power to be employed when the decisions of officials pass certain bounds."[136]

Since our system of government is based on the premise of govern-

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132. *See, e.g.*, James A. Gardner, Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 893 (1984); Buckley v. Valeo, 424 U.S. 1, 14-15 (1976).

In the context of Government control over the content of broadcast discussions of issues of public interest, courts and Congress have been hesitant to acknowledge an unlimited right of interference by the government in the affairs of broadcasters. *See* Johnson v. FCC, 829 F.2d 157, 162 (D.C. Cir. 1987).

133. *Cf.* Lovell v. Griffin, 303 U.S. 444, 451-52 (1938) (Ordinance prohibiting the distribution of circulars, handbooks, advertising, or literature of any kind without first obtaining written permission from the City Manager "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship .... Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.").

134. New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964) (quoting 4 ANNALS OF CONG. 934 (1794)).

135. STONE et al., *supra* note 124, at 1022-23.

136. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 539, 542 (1977).

ment by the people, it follows that the electorate must have access to pertinent information to use in its decision-making process and to hold elected officials accountable.[137] In *Chandler,* however, the Eleventh Circuit stripped the Georgia citizenry of its right to witness the exchange of ideas from among all of the individuals who could potentially serve as its gubernatorial officials. The court's conclusion that GPTC permissibly could include in the broadcast debates candidates from only the major government parties—Democrats and Republicans—limited the citizens' availability of information impacting their community and their ability to provide a check on local government officials. In lieu of a policy of government by the people, the Eleventh Circuit authorized a system of government by the (GPTC) government officials, and the electorate was rendered powerless to veto this decision.

e. The Free Expression Rationales as Applied to Political Speech

Political speech goes to the heart of the Constitution.[138] It embodies basic values of the First Amendment, providing a means by which citizens can: (1) make informed decisions regarding public policy and the role of government; (2) test their ideas amongst others; (3) freely express their views on issues with no risk of censorship; and (4) check the actions of their government. Therefore, political speech should be ascribed the greatest security.[139] Indeed, the Supreme Court has recognized that "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' "[140] By holding that GPTC can constitutionally prohibit individuals from expressing their views in a

137. Gregory A. Paw, *Political Broadcasting Access in the United States and Great Britain,* 10 COMM. & L. 27, 32 (1988).

138. *See, e.g.,* Williams v. Rhodes, 393 U.S. 23 (1968). In *Williams,* the Supreme Court explained: "There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Id.* at 32.

See also Mills v. Alabama, 384 U.S. 214, 218-19 (1966):

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

139. *See, e.g.,* Stromberg v. California, 283 U.S. 359 (1931). Chief Justice Hughes, speaking for the Court, stressed that "the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Id.* at 369.

140. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (citation omitted).

political debate, however, the Eleventh Circuit Court of Appeals cut off a vital channel of communication to the citizens of Georgia and inhibited the fundamental First Amendment rights of minor party candidates.

Because the ideas of the Libertarian candidates were representative of an organized political group, they were of collective import and should have been incorporated into the broadcast political debates. Although a broadcast medium is not constitutionally obligated to cater to individuals' demands of self-expression,[141] the interest in self-expression becomes a collective one rather than an individual concern when members of an identifiable group share certain views or beliefs that they desire to communicate to the populace.[142] The focus shifts from an individual need to express oneself to the opportunity for representatives of an identifiable group to convey commonly shared beliefs and be heard.[143]

As Alexander Meiklejohn explained:

> The First Amendment . . . is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have opportunity to do so . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said.[144]

When the identifiable group is political in nature, the opportunity for expression is of even greater salience. Because political viewpoint diversity is essential to democratic self-government,[145] and political parties are indispensable features of democracy,[146] access to a wide diversity of views in the political arena benefits all members of the listening and viewing audience.[147] Allowing the viewpoints of minority party candidates to be aired is also consistent with the fundamental principles of the First Amendment.[148] Viewers then have the opportunity to evaluate, adopt and reject particular views from amongst the "marketplace" of political ideas, and they can use this exposure to competing views as a basis for deciding how they wish to be governed and what policies should control.

One scholar has written: "For mature deliberation of an issue by

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141. Michel Rosenfeld, Metro Broadcasting Inc. v. FCC: *Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583, 621 (1991).

142. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3020 (1990).

143. Rosenfeld, *supra* note 141, at 621.

144. MEIKLEJOHN, *supra* note 126, at 26.

145. *See supra* notes 124-28 and accompanying text.

146. CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 430 (4th ed. 1968).

147. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3011 (1990).

148. *See supra* notes 124-37 and accompanying text.

any number of people who are to act collectively presupposes an exchange of views on the issues involved in the decision. If that opportunity is not available, nothing can be decided."[149] Consequently, since representatives of political groups have a legitimate interest in expression and society has an interest in encouraging such communication, freedom of speech might correspondingly be described as freedom to hear.[150] This right to hear and to be heard should not be dependent upon representatives' political party affiliations.

2. The Role of Public Television Differs from That of Private Commercial Broadcasting

Unlike private programming, which is based on competition and the demands of the market, public programming provides a forum for information that could not survive in the competitive commercial market or "pay its own way" on private television.[151] As a public broadcaster, GPTC was specifically "created, designed, and intended for the purpose of providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia. . . ."[152] In *Chandler,* the court of appeals explained that GPTC chose to air a debate between only the Democratic and Republican candidates because "it believed such a debate would be of the most interest and benefit to the citizens of Georgia."[153] It noted that "[s]uch a decision promoted GPTC's function."[154]

Contrary to the court's opinion, however, GPTC's exclusionary actions did not advance the goal of providing educational, instructional and public broadcasting services. Although the codified responsibilities of GPTC dictated that the views of the Libertarians be aired, GPTC did just the opposite. It barred the participation of the third party candidates in the political debate, thus depriving the public of the opportunity to consider all of the different views and make an informed decision. Indeed, in any given political campaign, it is difficult to believe that only two different positions exist on any given issue. Simplifying views into two party platforms (Democratic and Republican) and leaving voters

149. FRIEDRICH, *supra* note 146, at 131.

150. ANTIEAU, *supra* note 124, at 4.

151. *See, e.g.,* Cris T. Kako, Comment, *The Right of "Reasonable Access" for Federal Political Candidates Under Section 312(a)(7) of the Communications Act,* 78 COLUM. L. REV. 1287, 1300 (1978) ("Noncommercial stations serve a special broadcasting function by furnishing educational, cultural, and public interest programming that commercial licensees find economically impracticable to present."); Chandler v. Georgia Pub. Telecommunications Comm'n, 917 F.2d 486, 492 (11th Cir. 1990).

152. GA. CODE ANN. § 20-13-5(a) (Michie 1991).

153. *Chandler,* 917 F.2d at 489.

154. *Id.*

with only two candidates from which to choose does not seem to justly represent the diversity of views in society.

Further, the court's decision not only curtailed access to ideas, but also denied citizens the opportunity to simultaneously view and compare the candidates whose names would appear on the ballot. The Libertarian candidates were each offered one-half hour of air time to express their views. This time period, however, was separate from the debates. The executive director of GPTC even admitted that the audience during such a time would be substantially smaller than the audience during the debate.[155] Consequently, the Libertarians' views would receive less exposure among the citizens of Georgia. Additionally, the exclusion of minor party candidates deprived the Georgia community of the chance to observe concurrently the interchange of divergent points of view during the debates. Hence, the educational and instructional content of the communication that was aired provided limited value.

VI. IMPLICATIONS: INCLUSION OR EXCLUSION OF MINOR PARTY CANDIDATES IN FUTURE TELEVISED DEBATES?

The 1990 decision in *Chandler v. Georgia Public Telecommunications Commission* has been codified in the Official Code of Georgia, which states:

> EXCLUDING MINORITY CANDIDATE FROM POLITICAL DEBATE NOT UNCONSTITUTIONAL.
> —Commission's decision to air a debate between Democrat and Republican candidates for governor, while excluding a Libertarian candidate, was not viewpoint restrictive and did not lack a rational basis and therefore did not violate the first amendment or the equal protection clause of the fourteenth amendment.[156]

This codification, coupled with the ruling of the court, serves as a foundation to which courts in the State of Georgia, the Eleventh Circuit Court of Appeals, and even the United States Supreme Court, can refer in the future. The ramifications of the *Chandler* decision are unthinkable. The suppression of a duly qualified candidate's speech in a televised political debate has been deemed an acceptable, constitutional activity that others can now duplicate.

A. Distinctions Based Exclusively on Party Affiliation

By limiting the debate aired by a public broadcaster to the Demo-

155. *Id.* at 493.
156. GA. CODE ANN. § 20-13-5, Judicial Decisions (Michie 1991).

cratic and Republican candidates, the government is, in actuality, giving its seal of approval solely to the two parties and their views. This practice ensures that only persons from these parties will ever hold positions in office. It runs counter to the Supreme Court's declaration that "the primary values protected by the First Amendment . . . are served when election campaigns are not monopolized by existing political parties."[157] This apparent favoritism epitomizes government monopoly over the political process. The Georgia state government seems to be saying, "Since there are two major government parties and we have control over the television station, we can arbitrarily exclude the minor parties and favor the Democrats and Republicans." Thus, candidates can now be distinguished solely on the basis of their party affiliation and the views they represent. Majority rule in the free speech forum can be used to suppress minority views, and candidates can be excluded from taking part in important political discussions regardless of the fact that their party affiliations are irrelevant to their ability to participate intelligently in the electoral process.

B. Unanswered Questions

The *Chandler* decision not only imposes on society the majoritarian points of view to the detriment of third parties, but it also leaves open many unanswered questions. These questions include the following: (1) Will the exclusion of third party candidates from televised political debates be extended to other media, such as public television and radio in states other than Georgia?; (2) Can this government dominion over the political process stretch into other components of elections, such as political advertisements?; (3) Would the type of election involved, for example, party convention or primary elections, play a part in the decision?; and (4) If a public broadcaster were obligated to air the views of third party candidates, where should it draw the line? In other words, should access to debates be available for all candidates, including write-in candidates, or only to those who are ballot-qualified?

The holding in *Chandler*—permitting a public broadcaster to exclude minor party candidates from participating in political speech—could easily be expanded to apply to any type of public, government-controlled broadcast, even one remotely connected to the expression of political ideas. For example, *Chandler* could be interpreted as allowing the government to regulate which candidates may participate or be mentioned in political advertisements, commercials, question-and-answer

157. Anderson v. Celebrezze, 460 U.S. 780, 794 (1983).

symposia or commentaries appearing on any public television or radio station. The reach of the *Chandler* court's ruling could also include communications associated with any type of political election, such as party conventions, primary elections, and elections for local, state and national offices. Government censorship of political speech and control over potential speakers could become virtually all-encompassing.

C. An Alternative Approach

It is conceivable that if public broadcasters were required to air the views of all minor party candidates, freedom of expression would be further repressed and not enhanced. Television and radio stations may opt not to air debates out of fear of excluding a candidate and being subject to sanctions and negative publicity. Moreover, a requirement to air the views of all candidates could be time-consuming and interfere with public broadcasters' programming; it may act as a harness on public television and subsequently limit society's exposure to a diversity of views. The media may prefer to eliminate any in-depth, investigative reporting of political candidates and their views or to give only superficial treatment to individuals' candidacy. Additionally, broadcasters might choose to avoid discussion of public issues in their programming altogether.

Yet, rather than speculating on the future scope of *Chandler* and answering remaining open questions on a case-by-case basis, a line must be drawn so that the fate of third party candidates is not left to the whim of the judicial system. To assure the uninhibited presentation of contrasting viewpoints and controversial public issues without significant burdens on public airways, a line could be drawn to allow only those candidates with a certain percentage of votes to have air time. This percentage might be based on the required number of votes necessary to become qualified for the ballot according to the applicable federal or state law. In this manner, all candidates who have displayed a serious interest in candidacy would be permitted to participate in the political interchange. As an alternative, individuals could be required to obtain a certain percentage of voters to sign a petition for their candidacy. Regardless of which method is utilized, neither proposal leaves room for a court to levy its subjective opinion on an issue of such great import.

VII. CONCLUSION

The power of the broadcast medium—especially in the context of political elections[158]—combined with the fact that GPTC is a govern-

158. *See supra* notes 2-11 and accompanying text.

ment instrumentality and the fact that political speech was the type of expression at issue in *Chandler,* all dictated that GPTC's exclusionary actions were unconstitutional. The Eleventh Circuit's endorsement of the broadcaster's actions was inimical to the First Amendment, which was founded on the belief that some types of speech are invaluable.[159] Aside from the few narrowly-defined classes of unprotected or marginally protected expression,[160] the courts have recognized a need for speech, counterspeech and competing points of view. The advancement of speech is especially important in the areas of politics and public interest; the electorate and democracy benefit by increased accessibility to information and diverse viewpoints.[161] The media play a crucial role in bringing these ideas and messages to citizens and educating the public to perform the duties of the electorate.[162]

In maintaining public broadcasting stations, the government is engaged in the business of communicating to the citizenry. After *Chandler,* the government is permitted to bifurcate political issues into those representing the majority parties, the Democrats and Republicans, and those of the minority parties. Any views affiliated with a minor party may be suppressed. If this results, however, could the government justly say that the candidates participating in a debate on public television represent the voices of the people? The very essence of the First Amendment is that *all* individuals have been granted the right to express themselves freely.[163] The State should not possess the ultimate power to determine arbitrarily which views the public should hear in a political debate and what political exposure best serves the public interest. If such control were tolerated, government would seriously impair individuals' right to free

159. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1 (1976). In discussing the Federal Election Campaign Act of 1971, the Court noted that the Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities: "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* at 14.

160. *See supra* notes 31-34 and accompanying text.

161. *See, e.g.,* Minarcini v. Strongsville City School Dist., 541 F.2d 577, 583 (6th Cir. 1976) ("First Amendment protection of the right to know has frequently been recognized in the past."); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc. 425 U.S. 748, 756-57 (1976).

162. *See* Paw, *supra* note 137, at 27. *See also* Rosenfeld, *supra* note 141, at 623 ("Broadcasting is but one of many different fora suited for self-expression and the dissemination of viewpoints. Because of its capacity to reach a mass audience, however, broadcasting assumes a position of special importance in achieving these ideals.").

163. The Supreme Court has consistently recognized "the inherent value of free discourse." *See, e.g.,* Dennis v. United States, 341 U.S. 494 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940). *See also* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979) ("The values enshrined in the First Amendment plainly rank high 'in the scale of our national values.' ").

speech. The significance of the First Amendment's guarantee of freedom of expression, whether explained in terms of a self-governance, marketplace of ideas, fear of government censorship or checking value theory,[164] would be significantly undermined. A neutral, administrable boundary must be imposed, such as qualification for the ballot, to prevent the views of the majority from quashing the expression of those in the minority. The power of the government to fortify one type of view—in this case, the popular platforms espoused by the Democrats and Republicans—must not transform into the authority to stamp out another.[165]

Debra L. Klevatt

164. *See supra* notes 124-37 and accompanying text.

165. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978):

> "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.

Id. at 790-91 (citation omitted).