

ARE POLITICIANS A PROTECTED CLASS?: THE CONSTITUTIONALITY OF 'REASONABLE ACCESS' MEDIA RIGHTS UNDER THE COMMUNICATIONS ACT

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To most Americans, politicians do not qualify as a protected class. However, due to the constituencies they represent, the candidates' rights may have an impact on voters' rights. In our media saturated society, the ability of a candidate for public office to obtain television or radio access is often crucial to a campaign's success. Furthermore, a candidate's ability to deliver a message to American voters through the broadcast media plays a critical role in the preservation of a free and democratic society.

Section 312(a)(7) of the Communications Act¹ guarantees candidates for federal elected office the right of "reasonable access" to the broadcast media. While the federal election law reform was well intentioned, Congressional exclusion of state and local candidates to "reasonable access" remains a mystery. Although twenty-five years have passed since the passage of Section 312(a)(7), it is not untimely to pose a constitutional inquiry—namely, does the distinction drawn between federal and non-federal candidates under the "reasonable access" rule violate the Equal Protection Clause of the Constitution?² This query is the subject of this article.

Now is the time to reconsider the Constitutional ramifications drawn between federal and non-federal political broadcasting. Campaign finance reform is currently underway and sister provisions of the Communications Act are pro-

posed for amendment. In the United States Senate, for instance, campaign finance reform legislation was introduced in January 1997 by, *inter alia*, Senators McCain and Feingold. This legislation was placed on the Senate calendar in September 1997.³ A portion of the proposed legislation seeks to amend Section 315 of the Communications Act of 1934,⁴ which would grant candidates to the United States Senate thirty minutes of free broadcasting time.⁵ Although this proposed amendment does not address the "reasonable access" provisions of Section 312(a)(7) of the Communications Act, the underlying issue of media access is addressed with respect only to United States Senate candidates. Therefore, as related changes may take place during an upcoming Congressional term, it is timely to raise the Constitutional issues presented herein.

Section I of this article describes the "reasonable access" requirement for federal candidates under Section 312(a)(7) of the Communications Act, as interpreted by the courts and the Federal Communications Commission ("FCC"). Section II examines the case law progression applicable to voter and candidate rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and identifies the appropriate standard of constitutional review. Section III analyzes the constitutionality of the "reasonable access" rule's exclusive applicability

Clause of the Fifth Amendment has been held to incorporate an Equal Protection component which is identical to the standards that apply to state action under the Equal Protection Clause of the Fourteenth Amendment. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *United States v. Paradise*, 480 U.S. 149, 166, n.16 (1987).

³ *See* S. 25, 105th Cong. (1997).

⁴ 47 U.S.C. § 315 (1994).

⁵ *See* S. 25, 105th Cong. § 102 (1997).

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¹ 47 U.S.C. § 312(a)(7) (1994).

² Although there is no explicit Equal Protection Clause in the United States Constitution which applies directly to the actions of the Federal government, the Due Process

to federal candidates in light of proffered governmental objectives and legislative intent.

I. A FEDERAL CANDIDATE'S RIGHT OF REASONABLE ACCESS TO THE BROADCAST MEDIA

Section 312(a)(7) of the Communications Act provides that a broadcasting station's license may be revoked for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."⁶

In *CBS, Inc. v. FCC*,⁷ the United States Supreme Court addressed the issue of whether Section 312(a)(7) created an affirmative individual right of media access or merely codified the pre-existing general public interest standard applicable to all political broadcasts.⁸ In 1979, the Carter-Mondale Presidential Committee requested television access on specific dates and programming times.⁹ The Committee wanted to broadcast a formal announcement of President Carter's candidacy, which included a documentary describing his administration's record.¹⁰ Petitioner CBS refused to make all the requested times available due to the large number of Presidential candidates and the potential programming disruption that might ensue.¹¹

The Supreme Court held that Section 312(a)(7) gives rise to a "personal right of access" by "focus[ing] on the individual 'legally qualified candidate' seeking air time to advocate 'his candidacy,' and guarantees him 'reasonable access' enforceable by specific governmental sanction."¹² The Court further declared that "[i]t is clear on the face of the statute that Congress did not prescribe merely a general duty to afford some mea-

sure of political programming, which the public interest obligation of broadcasters already provided for."¹³

Furthermore, the Court touched upon the distinction between federal, state and local candidates for office. In a footnote, the Court elaborated on its holding and stated, "[t]he public interest requirement still governs the obligations of broadcasters with respect to political races at the state and local levels."¹⁴ This language put state and local candidates subject to the pre-1971 public interest standard requiring stations to make "reasonable good faith judgments about the importance of particular races."¹⁵

In its 1984 Primer, the FCC described briefly the obligations created by Section 312(a)(7) with respect to state and local candidates:

[T]he law does not require stations to provide access to every state, county, and local candidate. However, the Commission, the courts, and Congress have recognized that political broadcasting is one of the most important services that a station can provide to the public. Therefore, stations are expected to allocate reasonable amounts of time to other political races, based on the licensee's judgment of the importance of the races and the amount of public interest in them.¹⁶

Such language appears to apply the general public interest standard to a state or local candidate's request for media access.¹⁷ Furthermore, the analysis of the 1984 Primer appears to be a reaction to the Supreme Court's decision in *CBS*.

The FCC revised its rules pertaining to political broadcasting in 1992.¹⁸ After the public comment period, the Commission addressed the issue of media access by state and local candidates.¹⁹ Bound considerably by the unequivocal language in Section 312(a)(7), which specifically applies reasonable access rights to federal candidates, the Commission decided as follows:

The Commission will not require a specific right of access for non-federal candidates. Section 312(a)(7), the only access provision in the political broadcasting laws,

⁶ 47 U.S.C. § 312(a)(7) (1994).

⁷ *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

⁸ *See id.* at 376-377.

⁹ *See id.* at 372-373.

¹⁰ *Id.*

¹¹ *See id.* at 372.

¹² *Id.* at 377-379.

¹³ *Id.* at 377-378.

¹⁴ *Id.* at 379, n.6; citing *Public Notice: The Law of Political Broadcasting and Cablecasting*, 69 F.C.C. 2d 2209, 2290 (1978) "1978 Primer."

¹⁵ *Id.* at 378.

¹⁶ 100 F.C.C. 2d at 1525-26 (1984).

¹⁷ Political broadcasting is one of the fourteen elements that must be covered in order for a broadcast licensee to meet the "public interest" requirements in addressing the "needs and desires of the community." *See Report and Order: Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C. 2d 1079, 1087-1088 (1978).

¹⁸ *See generally* 47 C.F.R. Parts 73 and 76, 57 Fed. Reg. 189 (Jan. 3, 1992).

¹⁹ Radio Broadcast and Television Broadcast Services, Cable Television Service; Codification of the Commission's Political Programming Policies, 57 Fed. Reg. 189, 192 (1992) (to be codified at 47 C.F.R. pt. 73 and 76).

is quite explicit in creating a right of "reasonable access" exclusively for federal candidates. Thus, no statutory basis exists to create a right which Congress implicitly rejected.²⁰

Although it is clear that both Congress and the FCC mandate that individual access rights under Section 312(a)(7) apply only to federal candidates, the rationale for this limitation is not apparent from the face of the statute and regulations alone.

The legislative history surrounding the enactment of Section 312(a)(7) does not provide a clear justification for limiting media access rights to federal candidates. Section 312(a)(7) was enacted as part of the Federal Election Campaign Act of 1971.²¹ The initial House drafting did not contain what later became Section 312(a)(7).²² Section 312(a)(7) was added to the Senate version of the bill and initially applied to "any legally qualified candidate" — whether federal, state or local.²³ However, the applicability of Section 312(a)(7) was narrowed by the Joint Conference Committee, which expressly limited its provisions to federal candidates.²⁴

II. THE APPLICABLE LEVEL OF EQUAL PROTECTION SCRUTINY

The first step in analyzing whether Section

312(a)(7) violates the Equal Protection Clause is to determine the applicable level of judicial scrutiny. If a law discriminates unequally against a suspect or protected class or involves a fundamental right, it is subject to strict judicial scrutiny.²⁵ However, if a law draws a distinction between persons who do not belong to a protected class and does not involve a fundamental right, the law will pass constitutional muster if it is "rationally related to a legitimate government purpose."²⁶

The distinction drawn in Section 312(a)(7) is between federal, and state or local candidates for public office. In *Chandler v. Georgia Public Telecommunications Commission*,²⁷ the Court of Appeals for the Eleventh Circuit held that candidates for public office are not members of a protected class and that only a rational basis analysis is necessary for Equal Protection purposes.²⁸ However, when the rights of candidates are restricted, the rights of voters are indirectly affected. Because voting is a fundamental right²⁹ which ordinarily triggers close judicial scrutiny, questions arise concerning the nexus between the rights of candidates and voters.³⁰

In *Bullock v. Carter*,³¹ the Supreme Court held that a Texas primary election filing-fee system contravened the Fourteenth Amendment Equal

²⁰ See *id.*

²¹ See Pub. L. No. 92-225, 86 Stat. 3 (1972).

²² See H.R. REP. NOS. 92-564 & 92-565 (1971), reprinted in 117 CONG. REC. 43417-22 (1971).

²³ S. Conf. Rep. No. 92-580, at 22 (1971).

²⁴ *Id.*; see also H. CONF. REP. NO. 92-752, at 22 [hereinafter H. CONF. REP. NO. 92-752] (1971).

²⁵ See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

²⁶ *Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990). See also *Fry v. City of Hayward*, 701 F. Supp. 179, 181 (N.D. Cal. 1988). "Unless a statute distinguishes on the basis of a suspect or a quasi-suspect classification, or burdens fundamental rights, then it will be presumed valid and sustained against an equal protection challenge if 'the classification drawn is rationally related to a legitimate state interest.'" See *id.* at 179. Property owner claimed that a land use measure precluding him from obtaining a change in her property's zoning designation without prior approval involved neither a suspect class, nor a fundamental right, and consequently, the Court applied a rational basis standard. See *id.* at 181.

²⁷ *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990).

²⁸ See *id.* at 489. Although *Chandler* involved Section 315 of the Communications Act, its Equal Protection analysis is the same as that applied to Section 312(a)(7). *Chandler* involved attempts by the Libertarian Party's candidates for governor and lieutenant governor to enjoin televised political debates between the Democratic and Republican candi-

dates for those offices, unless they were also included as participants. See *id.* at 488. The court held that the decision of a public television station to limit the number of participants in a televised political debate was rationally related to the programmer's undertaking to provide an educational program of sufficient interest to attract interested viewers, and that such a decision is for the programmers to decide. See *id.* The court declined to set a precedent that would require public television stations to forego the broadcast of important public issues by all "serious" candidates in order to provide a public forum to any candidate that obtained a ballot position. See *id.*

²⁹ The United States Supreme Court considers the political franchise of voting to be a fundamental political right because it is "preservative of all rights." See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (holding that a municipal ordinance regulating public laundries within the limits of a municipality, in this case San Francisco, violates the principles of the Constitution, if it confers upon the municipal authorities arbitrary powers to make unjust discriminations founded on classifications based on race). The guarantee of protection contained in the Fourteenth Amendment to the Constitution of the United States extends to all persons within the territorial jurisdiction of the United States, without regard to differences of race, color, or nationality. See *id.* at 356.

³⁰ See *infra* note 37 and accompanying text.

³¹ *Bullock v. Carter*, 405 U.S. 134 (1972) (holding that a state statute that imposes fees of such magnitude that numerous qualified candidates are precluded from running in an

Protection Clause.³² The Texas statute at issue required candidates for public office to pay a filing fee in order to be placed on the ballot for primary elections.³³ The Court determined the "threshold question" to be whether the appropriate standard of judicial review of the Texas statute was "rational basis. . . or a more rigid standard of review."³⁴

The Court in *Bullock* recognized that because fundamental right status had not been afforded to "candidacy" in general, that "a rigorous standard of review" would not be invoked.³⁵ The *Bullock* Court cited to *Harper v. Virginia Board of Elections*,³⁶ in which the Court invoked a strict standard of review to find an annual poll tax on residents over the age of twenty-one to be a denial of Equal Protection. The *Bullock* Court, however, found the facts were distinguishable, yet applied the reasoning of *Harper* to formulate its own standard of review.

Essential to an understanding of both *Harper* and *Bullock* is the distinction between candidates and voters. *Harper* was based on the constitutional rights of voters, not candidates. *Bullock*, however, pointed out that the rights of candidates and voters are not easily separated from either a theoretical or a correlative standpoint.³⁷ Hence, the *Bullock* Court declared that "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters."³⁸

Candidates were not afforded fundamental right status by the *Bullock* decision. However, the Court intimated that, if an infringement on candidates' rights has more than an incidental or minimal impact on the rights of voters, then strict scrutiny may apply. The *Bullock* Court clarified the standard of scrutiny as follows:

election must be closely scrutinized and can be sustained only if it is reasonably necessary to accomplish a legitimate state objective, and not merely because it has some rational basis).

³² See *id.* at 134. Appellees seeking candidacy for local office in the Texas Democratic Primary Election challenged the validity of the statutory scheme which required payment of fees as high as \$ 8,900. See *id.* Appellees asserted they were unable to pay the required fees and were therefore barred from running. See *id.* The Court held that, although a state has an interest in regulating the number of candidates on a ballot and eliminating those that are spurious, it cannot attain these objectives by arbitrary means such as those called for by the Texas statute which eliminates potential candidates who cannot afford filing fees. See *id.*

³³ See *id.* at 135.

Because the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude, as in *Harper*, that the laws must be "closely scrutinized" and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster.³⁹

The effect of the Texas filing-fee on voters was "neither incidental nor remote," as the electorate's choice in less affluent communities would be more heavily affected due to their candidates' inability to pay.⁴⁰ Instead of merely demonstrating a "rational basis" for the filing-fee system, the *Bullock* court required a showing of "reasonable necessity."⁴¹ In both *Harper* and *Bullock*, the relationship between wealth and voting rights was a vital factor in not only the outcome of the case, but in justifying the applicable standard of review. For example, the Court elaborated in *Harper* that "wealth, like race, creed, or color, is not germane to one's ability to participate in the electoral process."⁴² The *Harper* Court then proceeded to "closely scrutinize" the poll tax law, declaring it unconstitutional because "wealth or fee paying has. . . no relation to voting qualifications [and] the right to vote is too precious, too fundamental to be so burdened or conditioned."⁴³

In 1974, the Court of Appeals for the Ninth Circuit interpreted the *Bullock* standard in *Paulsen v. FCC*⁴⁴. A petition was filed to review an FCC ruling by entertainer Pat Paulsen, who declared his candidacy for the Republican nomination for President in 1972.⁴⁵ Since Walt Disney planned to air a television series starring Pat Paulsen during the campaign, a declaratory ruling was sought from the FCC as to whether television stations that broadcast the series must provide "equal opportunities" to other candidates for television

³⁴ *Id.* at 142.

³⁵ See *id.* at 142-143.

³⁶ *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

³⁷ See *Bullock v. Carter*, 405 U.S. 134 at 143.

³⁸ *Id.*

³⁹ See *id.* at 144.

⁴⁰ See *id.* at 143-144.

⁴¹ See *id.* at 144.

⁴² See *Harper*, 383 U.S. at 667.

⁴³ *Id.* at 670. Justice Harlan joined in a dissent with Justice Stewart, disagreeing primarily with the majority's application of strict scrutiny. See *id.* at 681. Instead, the dissenters favored the application of a rational basis test. See *id.*

⁴⁴ *Paulsen v. FCC*, 491 F.2d 887 (9th Cir. 1974).

⁴⁵ See *id.* at 888-889.

time pursuant to Section 315 of the Communications Act of 1934.⁴⁶ The FCC found that “any national television appearances by Paulsen would impose equal opportunities obligations upon broadcast licensees.”⁴⁷

On appeal, Paulsen argued that the FCC ruling was an unconstitutional denial of equal protection because he was compelled to abandon his employment and livelihood in order to run for public office while other candidates were not similarly burdened.⁴⁸ Paulsen relied on *Bullock*, contending that the FCC ruling “falls with unequal weight — on performers not wealthy enough to stop working during their campaigns.”⁴⁹ The *Paulsen* court held that:

In *Bullock* the Court applied neither a compelling state interest test nor a rational basis test. Rather it required that, upon ‘close scrutiny,’ the Texas filing-fee system be ‘reasonably necessary to the accomplishment of legitimate state objectives.’ Texas maintained that the fees were necessary to regulate the primary ballot and to finance elections. The Court found, though, that the fees served no rational regulatory purpose and that the state interest in saving election costs did not justify a system that excluded poorer candidates unable to pay the fees. We find that Section 315 as interpreted by the FCC, on the other hand, is both reasonable and necessary to achieve the important and legitimate objectives of encouraging political discussion and preventing unfair and unequal use of the broadcast media. The section therefore passes constitutional muster.⁵⁰

The Ninth Circuit in *Paulsen* interpreted the *Bullock* test to involve a middle level scrutiny, somewhere between strict scrutiny and rational basis review. In 1974, the *Paulsen* decision was applied by the District Court for the District of Vermont in *Morrisseau v. Mt. Mansfield Television, Inc.*⁵¹ In *Morrisseau*, pro se plaintiff Dennis Morrisseau contended that defendant WCAX-TV was required to provide him free time as a candidate for office because, unlike his opponents, he was unable to pay for advertising on the station.⁵² Morrisseau’s action was based on the equal time provisions of the Communications Act, namely Sections 312(a)(7) and 315.⁵³

Morrisseau argued that the equal time provi-

sions of the Communications Act were unconstitutional. The District Court in *Morrisseau*, relying on *Paulsen*, rejected plaintiff’s equal protection claim for the same reasons that the FCC ruling was upheld in *Paulsen*⁵⁴ and chose not to elaborate on the issue. Therefore, as a result of the holding in *Morrisseau*, for constitutional purposes, the same standard of Equal Protection review in *Bullock* appears to apply to both Section 312(a)(7) (the “reasonable access” rule) and Section 315 (the “equal opportunities” rule) of the Communications Act.

III. THE CONSTITUTIONALITY OF SECTION 312(a)(7)

A. The Legislative Intent of Section 312(a)(7)

The legislative history of Section 312(a)(7) provides no clear explanation for its exclusive application of reasonable access rights to candidates for federal elective office. However, a few justifications can be proffered to explain the basis for drawing the federal/non-federal distinction.

1. Saturation of the Broadcast Media

The most compelling justification for limiting the “reasonable access” requirement to federal candidates may be to prevent the saturation of broadcast programming during the election season.⁵⁵ There are certainly less federal candidates than the number of state and local candidates who could conceivably inundate the broadcast media with their “reasonable access” requests.⁵⁶

In fact, the likelihood that state or local candidates may successfully access the broadcast media under the general public interest standard may be seriously diminished by the exercise of federal candidates’ “reasonable access” rights. Federal candidates who exercise Section 312(a)(7) rights might absorb most of the broadcasting time dur-

⁴⁶ See *id.* at 889. Section 315(a) provides in pertinent part: “[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . .” 47 U.S.C. § 315 (1994).

⁴⁷ *Paulsen*, 491 F.2d at 889.

⁴⁸ See *id.* at 891-892.

⁴⁹ *Id.* at 892.

⁵⁰ *Id.* (citation omitted).

⁵¹ *Morrisseau v. Mt. Mansfield Television, Inc.*, 380 F. Supp. 512 (D. Vt. 1974).

⁵² See *id.* at 514.

⁵³ See *id.* at 513.

⁵⁴ See *id.* at 516.

⁵⁵ Cf. Chris T. Kako, Note, *The Right of “Reasonable Access” for Federal Political Candidates Under Section 312(a)(7) of the Communications Act*, 78 COLUM. L. REV. 1287, 1303 (1978) [hereinafter *Kako*].

⁵⁶ See *id.*

ing an election season which may, depending on the state, coincide with state and local elections.

2. *The Constitutional Authority for Congress' Enactment of the Federal Election Campaign Act*

Congress' decision to limit the "reasonable access" rule to federal candidates was part of an election reform package which included the enactment of Section 312(a)(7) as part of the Federal Election Campaign Act of 1971. The goal of this legislation was to reform federal election law. Amending the access and political advertising provisions of the Communications Act was not the sole purpose for the enactment of the Federal Election Campaign Act. Rather, the goal of promoting fairness in federal elections (not state or local elections), appears to be the dominant theme.

Due to the nature of campaign reform legislation, Congress' constitutional authority to act appears to be based primarily upon its right to regulate federal elections⁵⁷ rather than its power to regulate interstate commerce.⁵⁸ Congress may have exercised caution and deference by not interfering with the sovereign rights of states and their municipalities in enacting laws regulating state and local elections.⁵⁹ However, Congressional authority to enact laws regulating the broadcast industry is derived from the Commerce Clause of the Constitution.⁶⁰ Federal broadcasting laws preempt any and all state broadcasting

regulations as a consequence of the Constitution's Supremacy Clause.⁶¹

3. *The Effectiveness of the Media in Federal Campaigns*

Because national and statewide campaigns are enormous undertakings, the role of the media is crucial to their success.⁶² However, the broadcast media may not be the most effective method for a local candidate to deliver his or her campaign message.⁶³ Due to the grass roots nature of local campaigns, many local candidates may find it more effective to utilize other methods of communication, such as the distribution of campaign literature or use of the print media, rather than the more costly broadcast media.

Congress may have considered federal candidates to be more reliant upon the broadcast media for campaign communication than state and local candidates due to the enhanced size and volume of Congressional Districts as compared to most state and local election districts. Accordingly, Congress may have found federal campaigns to be in greater need of "reasonable access" to the broadcast media in order to effectively communicate campaign messages to voters, than state or local candidates. Despite this proposed rationale for a federal/non-federal distinction, no reference exists in the legislative history of Section 312(a)(7) to justify this theory.⁶⁴

⁵⁷ See U.S. CONST. art. I, § 4 (stating that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.").

⁵⁸ See Kako, *supra* note 55, at 1302-1303, n.89.

⁵⁹ The Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. It is self-evident that States have the sovereign right, in accordance with their Police Power, to regulate the time, manner and place of elections for State and Local office. However, such State rights must give way where a superseding Federal constitutional right or federal law preempts such rights under the Supremacy Clause.

⁶⁰ See U.S. CONST. art. I, § 8 ("Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States . . .").

⁶¹ The Supremacy Clause of the United States Constitution states that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.

⁶² See KATHLEEN HALL JAMEISON, *PACKAGING THE PRESIDENCY* 487 (3d ed. 1996). See also DARNELL M. WEST, *AIR WARS* 1 (2d ed. 1997) [hereinafter WEST].

⁶³ See WEST, at 1 (explaining that in 1996, Steve Forbes and Bob Dole both spent over \$30 million in advertising).

⁶⁴ See Pub. L. No. 92-225, 1972 U.S.C.C.A.N. 1773 (vol. 2), 1787, 1792, 1828, 1867.

B. The Augmented Equal Protection Standard of *Bullock v. Carter*

1. *The Nexus Between Local Candidate and Voter*

Under *Bullock*, when examining the constitutionality of candidate restrictions, it is essential to analyze "the extent and nature of their impact on voters."⁶⁵ By its limitation to federal candidates, the "reasonable access" requirement of Section 312(a)(7) may impact upon voter decision-making by denying them information concerning state and local candidates via the broadcast media during election season.

In Presidential, Senatorial and House of Representative elections, advertisement via television and radio is the primary method of communicating a candidate's message to voters.⁶⁶ Often, vast amounts of campaign funds are expended on political advertising in elections where voters must be reached over wide geographical areas.⁶⁷ One may contend that the federal/non-federal distinction is justified in that the offices of President, Senate and U.S. Representative are more significant and influential than some state and all local offices due to the enhanced size of the voting pool which elects these federal officials. However, some statewide offices such as governor, state comptroller, state attorney general and mayor of a large city represent more voters than all or many Congressional districts. For instance, there may be a more compelling need for statewide gubernatorial candidates to deliver a message to voters, because decisions made by this office impact the everyday lives of the citizens of the entire state, perhaps more so than a local federal elected official.⁶⁸

However, the delivery of most government services occurs through state and local govern-

ments.⁶⁹ The everyday problems of voters are addressed primarily through state and local legislatures. Many local government agencies, such as the Departments of Health, Sanitation, Transportation, Fire, Police, Social Services and Zoning Boards, deal directly with essential governmental functions.⁷⁰ State and local legislators are entrusted with and held accountable by their constituents for the delivery of quality government services through such entities.⁷¹ Issues which such officials address can spark intense local public interest in terms of political broadcasting.⁷²

The broadcast media could have a powerful impact upon the dissemination of information that can influence the result of an election.⁷³ Hence, increased broadcast media access for federal candidates empowers voters by providing them with information that can both influence their voting decisions, and prompt them to make a trip to the voting booth when they otherwise might not.⁷⁴ Because state and local candidates are important to the electorate, the rights of voters are affected when greater broadcast media exposure is provided to federal candidates, but not to local candidates.

The media has such an important influence upon voters,⁷⁵ and therefore, a clear and sufficient link exists between the rights of citizens to vote and a candidate's right to media access. Accordingly, the *Bullock* standard of "reasonable necessity" should be applied to an Equal Protection analysis of Section 312(a)(7). Given the obvious governmental objective of promoting equality in federal elections,⁷⁶ Congressional exclusion of state and local candidates from the "reasonable access" provisions appears unnecessary. Even if one were to contend that only federal election reform was the intent of this law, Congress' exclu-

⁶⁵ See *Bullock*, 405 U.S. at 143.

⁶⁶ See generally Russel J. Davis, *Political Candidate's Right to Equal Broadcast Time Under 47 U.S.C. § 315*, 35 A.L.R. 856 (1977).

⁶⁷ See *id.* at 887.

⁶⁸ One could also contend that the federal/non-federal distinction is justified because federal law is supreme, and that federal issues are of greater importance for political broadcasting purposes.

⁶⁹ See generally *Board of Assessment Appeals v. AM/FM International*, 940 P.2d 338 (Colo. 1997).

⁷⁰ See *id.* at 345.

⁷¹ *Id.*

⁷² See *Tornillo v. Miami Herald Publ'g. Co.*, 287 So. 2d 78, 87 (1974).

⁷³ See generally Schacter, *infra* note 75 and accompanying text.

⁷⁴ See *id.*

⁷⁵ See Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 131 (1995) [hereinafter Schacter] (stating that the "most comprehensive studies of voter behavior in ballot campaigns demonstrate that media communications and political advertising are the most important sources shaping how voters understand the initiative proposals on which they are asked to vote.") See also Jack Winsbro, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 859-860 (1987).

⁷⁶ See H. CONF. REP. NO. 92-752, *supra* note 24, at 22.

sive legislative authority conferred by the Commerce Clause⁷⁷ to regulate all broadcasting in the United States imposes an obligation and responsibility to ensure the rights of all candidates and voters are protected equally. By leveling the playing field among federal candidates, Congress has effectively locked out state and local candidates from the field itself. Conceivably, state and local candidates could be unable to receive "reasonable access" even under the general public interest standard, because the federal candidate may utilize most of a licensee's broadcasting time.

It is important to clarify the distinction between the holding in *Paulsen* and the result proposed by this article. In *Paulsen*, the Ninth Circuit upheld the constitutionality of Section 315(a) of the Communications Act — which affords all candidates (federal, state and local) with "equal opportunities" to use a licensee's broadcasting station if access is granted to another candidate for the same public office.⁷⁸ The overall purpose of both the "equal opportunities" and "reasonable access" provisions, which were enacted simultaneously as part of the Federal Election Campaign Act, was to "encourag[e] political discussion and prevent. . .unfair and unequal use of the broadcast media."⁷⁹ Although such purposes were furthered by the Section 315(a) requirement that all candidates be afforded "equal opportunities,"⁸⁰ Section 312(a)(7)'s exclusion of state and local candidates belies entirely the very basic and legitimate governmental objective of encouraging political discussion and preventing unequal use of the broadcast media.

Any broadcast media congestion, caused by the "reasonable access" requests of federal candidates, may deny equal use of the broadcast spectrum to state and local candidates. Section 312(a)(7), as written, could be inherently unfair in its application. Political discussion concerning issues presented to voters by state and local candidates through the broadcast media can be either precluded or discouraged — again due to federal

candidates' consumption of broadcast time under Section 312(a)(7), which may afford state and local candidates minimal public interest broadcasting time on state and local issues that are often of greater interest and import to voters.

2. *The Relationship Between Wealth and "Reasonable Access"*

In *Bullock*, the Supreme Court emphasized that a candidate's inability to pay filing fees would have an impact upon the rights of voters in less affluent communities.⁸¹ The *Bullock* Court struck down the Texas filing fee law on Equal Protection grounds for that reason.⁸² In *Harper*, a poll tax law was declared unconstitutional because it made the fundamental right to vote contingent upon wealth or the ability to pay a fee.⁸³

Both the *Harper* and *Bullock* decisions involve election laws which, on their face, link a candidate's wealth or ability to pay to a burden upon the fundamental right to vote.⁸⁴ Filing fees and poll taxes are blatant wealth-based restrictions.⁸⁵ Although the plain language of Section 312(a)(7) does not raise any recognizable wealth based distinctions, the "reasonable access" provision raises such concerns in its application.⁸⁶

Certainly, many incumbent federal candidates possess sufficient resources and funds to finance their re-election campaigns. To be competitive, candidates who seek to challenge an incumbent federal candidate must be well financed in order to carry on a meaningful campaign. Incumbent federal candidates often have the luxury of Political Action Committee "PAC" and special interest group funds at their fingertips. Unlike most federal officials, many local and state incumbent may not be able to raise the same level of funding — with the exception of statewide office. The inequity of applying the "reasonable access" law to only federal candidates is evident. The "reasonable access" requirement does level the playing field between federal candidates, yet by doing so,

⁷⁷ See U.S. CONST. art. I, § 8.

⁷⁸ See 47 U.S.C. § 315 (1994).

⁷⁹ See *Paulsen*, 491 F.2d at 889; see also S. REP. NO. 96, 92d Cong., 1st Sess. 20 (1971); S. REP. NO. 229, 92d Cong., 1st Sess. 56 (1971) (stating that Title I of the Federal Election Campaign Act of 1971 will "give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters.").

⁸⁰ See *Paulsen*, 491 F.2d at 889.

⁸¹ See *Bullock*, 405 U.S. at 143-144.

⁸² See *id.* at 149.

⁸³ See *Harper*, 383 U.S. at 670.

⁸⁴ See generally *Harper*, 383 U.S. 663 (1966); *Bullock*, 405 U.S. 134 (1972).

⁸⁵ See generally, 383 U.S. 663 (1966); 405 U.S. 134 (1972).

⁸⁶ 47 U.S.C. § 312(a)(7)(1994).

state and local candidates are disadvantaged because they may be more likely to encounter difficulty in accessing the media. Federal candidates, who can otherwise afford alternative means of campaign communication can over-saturate a station's broadcast time to the exclusion of state and local candidates. Because federal candidates may possess greater fundraising potential than many state or local candidates, federal reasonable access rights may further elevate the wealth-based distinction between federal and state or local candidates. Indirectly, this disparity in campaign funding can adversely impact the voting franchise.

C. Rational Basis Analysis

Even if the heightened judicial scrutiny of *Bullock* were not applied to the constitutional analysis of Section 312(a)(7), the distinction drawn between federal and non-federal candidates may not survive an ordinary "rational basis" review.⁸⁷ Under any conceivable rationale for the federally favored "reasonable access" rights created by Congress, the statute fails on Equal Protection grounds.⁸⁸

Likewise, if Congress limited "reasonable access" rights to federal candidates because it feared saturation of the media with requests from numerous state and local candidates, the distinction must fail.⁸⁹ Given the legitimate governmental interest in encouraging political discussion and preventing unfair and unequal use of the broadcast media,⁹⁰ the overwhelming importance of statewide office and local elected office must have been ignored or disregarded.

Overall, there are more state and local elected positions than federal elective offices. Yet, the question remains: why were only federal candidates granted reasonable access rights? Was it because Congress drafted legislation to favor its own

interests? Was it because federal legislation is viewed as more important and newsworthy than state and local legislation? Certainly, the argument that Section 312(a)(7) was part of federal campaign election reform and not state or local reform must also fail as Congress should not disregard its Commerce Clause obligations under the Constitution.⁹¹ By virtue of the Commerce Clause, Congress is responsible for legislation affecting the entire broadcast spectrum.⁹² Without question, even if Congress' legislative purpose was to enact a comprehensive package of federal election reform, should it have included the broadcasting implications of the "reasonable access" rule. If this was an intended oversight, then there certainly is no rational basis for the federal/non-federal distinction.

It does not appear rational to draw a federal/non-federal distinction, as this may raise an inference that federal matters are more important than state or local matters. This decision should be left to the voters. The "reasonable access" doctrine, if [equally applied to all candidates, may impose an undue burden on the broadcasting industry. However, if a more careful limitation were drafted, this burden may not exist. For instance, the "reasonable access" rule could have been limited to campaigns in which the media is a particularly important influence on the outcome of an election, such as the offices of President, United States Senate, Governor, State Comptroller, State Attorney General or any other statewide election. A limitation in this manner would have been rational. However, including Congressional elections and not statewide positions appears arbitrary. The Congressional objective should have been to level the playing field for all candidates where the media plays an important role in the outcome of an election; not just to foster equality among federal candidates.⁹³

⁸⁷ *Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990). See also *Fry v. City of Hayward*, 701 F. Supp. 179, 181 (N.D. Cal. 1988). "Unless a statute distinguishes on the basis of a suspect or a quasi-suspect classification, or burdens fundamental rights, then it will be presumed valid and sustained against an equal protection challenge if 'the classification drawn is rationally related to a legitimate state interest.'" See *id.* at 179. Property owner claimed that a land use measure precluding him from obtaining a change in her property's zoning designation without prior approval involved neither a suspect class, nor a fundamental right, and consequently, the Court applied a rational basis standard. See *id.* at 181.

⁸⁸ See generally *Bullock*, 405 U.S. 134 (1972) (rejecting Texas filing-fee system that served no rational regulatory pur-

pose and excluded poorer candidates unable to pay the fee.)

⁸⁹ See *Bullock*, 405 U.S. at 145 (recognizing that state has legitimate interest in avoiding overcrowded ballots).

⁹⁰ See *Paulsen v. F.C.C.*, 491 F.2d 887, at 889 (1974).

⁹¹ See U.S. CONST. art I, §8 ("Congress shall have the Power. . .[t]o regulate Commerce. . .among the several States. . .").

⁹² See *id.*

⁹³ See PAUL TAYLOR, *SEE HOW THEY RUN*, 268-280 (1990). Taylor supports a "five-minute fix" wherein political parties, not candidates, would receive free broadcast time similar to the "party political broadcasts" employed in the British system. *Id.* at 271-272. Regarding the unfeasibility of providing media access for all candidates. See *id.* at 276-277. Taylor

While Congress should not make the determination that federal policy is more important than state policy, it would be permissible, in determining the overall fairness of broadcast media use, for Congress to decide whether the broadcast media is a more important influence on the exercise of voters' rights in certain types of elections.⁹⁴ An analysis of this type could be based upon factors including the number of registered voters, the geographical terrain of the district, the functions and duties of the elected office, in addition to whether broadcast saturation would cause an undue burden upon the broadcast media.

IV. CONCLUSION

The Congressional rationale for limiting "reasonable access" broadcast media rights to federal candidates remains a mystery. As demonstrated herein, any conceivable justification for excluding state and local candidates from the ambit of Section 312(a)(7) of the Communications Act⁹⁵ would not pass constitutional muster under either Equal Protection standard: (1) the heightened scrutiny test under *Bullock* and its progeny; or (2) the rational basis test.⁹⁶

Due to the inequities presented by Section 312(a)(7), Congress should consider amending the "reasonable access" rule to include state and local candidates.⁹⁷ However, it may not be feasible for any and all candidates to be covered by Section 312(a)(7).⁹⁸ Accordingly, Congress should investigate whether a burden would be imposed upon the broadcast media by extending the application of "reasonable access" rights to all federal and non-federal candidates. If the findings reveal that a significant burden would result, Section 312(a)(7) should be repealed. Certainly, the more logical result would be to amend Section 312(a)(7) and limit the scope of "reasonable access" rights to nationwide and certain statewide

elections. Again, such matters should be determined by Congress after significant inquiry.

The McCain-Feingold Bill seeks to reform the financing of federal elections.⁹⁹ Title I of the proposed legislation pertains to spending limits and benefits in Senate elections.¹⁰⁰ The scope of the bill, in its present form, provides for free broadcast time only for senatorial candidates.¹⁰¹ If this legislation is aimed only at specific problems which exclusively or primarily involve campaigns for the Senate, there may be a rational basis for limiting the creation of new rights under the Communications Act. However, Congress must be mindful to consider Constitutional issues, including the Equal Protection Clause, if it chooses ultimately to pass this legislation and limit free broadcasting time to Senate candidates.

The provisions of the McCain-Feingold Bill do not directly involve Section 312(a)(7) of the Communications Act in that it seeks to amend only Section 315 of the Act by creating free broadcasting rights for Senate candidates. However, assuming the free broadcast provisions of this proposed legislation survive lobbying efforts, further debate and/or committee revision, Congress may wish to consider expanding the scope of this legislation to address the Section 312(a)(7) "reasonable access" issue presented herein.

The McCain-Feingold Bill will not receive further consideration during this session of Congress. A Republican effort led by Senator Trent Lott of Mississippi, resulted in the removal of the bill from the Senate floor pursuant to a procedural tactic.¹⁰² The broadcasting provisions of the Bill were certainly overshadowed by issues such as "soft money" political party donations and interest group advocacy commercials.¹⁰³ It is likely, however, that this Bill and/or its underlying issues, will resurface during the next Congress as its supporters have vowed to address the acts of the opposition during this election year.

would not guarantee access to every candidate (or any candidate) but instead would allocate broadcast time to political parties and allow them to decide upon a distributive methodology. *See id.* at 277-278.

⁹⁴ *See* Kako, *supra* note 55, at 1300-1302 (discussing the special problems of noncommercial stations and rejecting Section 312(a)(7) access because the candidate's advocacy constitutes "commercial").

⁹⁵ *See id.* at 1302-1303, n.92 (discussing how the differentiation between Federal and state and local candidates within Section 312(a)(7) causes the state and local candidates to be seriously disadvantaged when competing against candidates

for federal office for access to a particular station).

⁹⁶ *But see id.* at 1304-1306 (discussing the constitutionality of Section 312(a)(7) under free speech rights).

⁹⁷ *See* 47 U.S.C. § 312(a)(7) (1934).

⁹⁸ *See id.*

⁹⁹ *See generally* S. 25, 105th Cong., 1st Sess. (1997).

¹⁰⁰ *See id.*

¹⁰¹ *See id.* § 102.

¹⁰² *See* David Rogers, *Issues on Campaign Finance Reform May Cause Sponsors to Change Tactics*, WALL ST. J., Feb. 27, 1998, at A20.

¹⁰³ *See id.*

Politicians may be a protected class, in that they represent or purport to represent the people and voters of their constituencies. It is more democratic to provide both equal and reasonable access to all qualified candidates so that their viewpoints and positions may be heard and digested by the voters. The opportunity now presents itself to re-

visit the legislative decisions made over two decades ago with respect to "reasonable access" rights. Whether or not the scope of this pending legislation is expanded, Congress should proceed carefully and prudently from a Constitutional standpoint when addressing the broadcasting amendments of the McCain-Feingold Bill.¹⁰⁴

¹⁰⁴ The McCain-Feingold Bill has provided for such contingencies in its "severability" provision, which allow for the survival of the remaining provisions of the Act should any portion thereof be declared unconstitutional. *See* S. 25, 105th Cong., 1st Sess. § 501 (1997). In addition, this bill al-

lows for an appeal directly to the United States Supreme Court from any final judgment, decree or order issued by any court ruling on the constitutionality of any of its provisions. *See id.* § 502.

