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Competing Teacher Associations and School Mailboxes: A Right of Equal Access

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COMPETING TEACHER ASSOCIATIONS AND SCHOOL MAILBOXES: A RIGHT OF EQUAL ACCESS

Perry Local Educators' Association v. Hohlt
652 F.2d 1286 (7th Cir. 1981),
rev'd, 51 U.S.L.W. 4165 (U.S. Feb. 23, 1983)

From the first amendment's guarantee that "Congress shall make no law . . . abridging the freedom of speech,"[1] two underlying guarantees have emerged by judicial interpretation. The first is that persons have a right of access to public property, at least to that property that has traditionally been used for public discourse, in order to exercise their right of freedom of expression.[2] Freedom of speech, without such access, would be a right reserved only for those who can afford other methods of communicating with their government and fellow citizens.[3] Public places are usually regarded as "public forums"[4] and speech ac-

1. U.S. CONST. amend. I.

2. Historically the first amendment right of access to public property was limited to property which "traditionally" served as a place for public discourse and debate: streets and parks. That view grew from a concurring opinion by Justice Roberts in Hague v. C.I.O., 307 U.S. 496, 515 (1939):

> Wherever the title of street and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

The Court has on occasion broadened the scope of the first amendment right of access to include nontraditional forums. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1974) (public theater); Brown v. Louisiana, 383 U.S. 131 (1966) (plurality opinion) (public library). *See generally* Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233 [hereinafter referred to as *Fora Americana*].

3. *See* Adderley v. Florida, 385 U.S. 39, 50-51 (1966) (Douglas, J., dissenting). In *Adderley*, college students demonstrated on the driveway of a county jail to protest the arrest of fellow students the day before, and for alleged racial segregation at the jail and elsewhere. After being warned that they were trespassing in violation of state law, the students were arrested when they refused to leave. In upholding the students' convictions, the Court's majority held that the students did not have a first amendment right of access to the jail's driveway. Justice Douglas, in dissent, argued that a first amendment right of access was needed to afford those who do not have access to other methods of communication a means of petitioning their government:

> Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable. . . .

See also Fora Americana, supra note 2, at 245.

4. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). *See generally* Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979); Kalven, *The Concept of the*

cess to such forums can only be curbed by reasonable "time, place and manner" regulations.[5] The second guarantee is that the first amendment prohibits the government from regulating speech on the basis of the content of the speaker's message.[6] The United States Supreme Court has viewed content-based regulations as a form of censorship, directly conflicting with the guarantee of freedom of speech.[7]

Although the principle that there is a general first amendment right of access to public places and the prohibition against content-based speech regulations are not dependent on each other for their application,[8] both principles have sometimes been at issue in a particular case. Thus, when the government has attempted to exclude persons from public property on the basis of speech content, the Court has frequently held that the restrictions are unconstitutional.[9]

Nevertheless, the Supreme Court and the lower courts have not been entirely consistent.[10] This inconsistency has been especially apparent when the courts have been confronted with claims of speech access to public places that do not resemble the streets and parks deemed in *Hague v. C.I.O.*[11] to have "immemorially been held in trust for the use of the public."[12] When the nature of the public place in question presents special problems to the government if broad first amendment access is granted, sometimes courts have found the competing governmental interests sufficient to outweigh the general prohibition against content-based exclusions from public places. The result has been that the courts have viewed the particular property as not fall-

Public Forum: Cox v. Louisiana, 1965 SUP. CT. REV. 1 [hereinafter referred to as Kalven]; Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975) [hereinafter referred to as *The Public Forum*].

5. Grayned v. City of Rockford, 408 U.S. 104, 121 (1972); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98-99 (1972).

6. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980); Madison Joint School Dist. v. Wisconsin Employment Rel. Comm'n, 429 U.S. 167 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

7. *See id. See also* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 82 (1978) [hereinafter referred to as Stone].

8. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 455 (1975), where the Court struck down a content-based restriction unrelated to speech access. In *Erznoznik*, the Court held that an ordinance that prohibited drive-in movie theaters from displaying any movie containing nudity if visible from the street was an unconstitutional content-based speech regulation. *See* Adderley v. Florida, 385 U.S. 39 (1966), where the exclusion from the forum was unrelated to content, but rather based on a state trespass statute. *See generally* Stone, *supra* note 7, at 95.

9. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980); Madison Joint School Dist. v. Wisconsin Employment Rel. Comm'n, 429 U.S. 167 (1976); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

10. *See* Stone, *supra* note 7, at 83; *The Public Forum, supra* note 4, at 118.

11. 307 U.S. 496 (1939).

12. *Id.* at 515.

ing within the types of property that constitute a public forum, thus allowing the government to either exclude the public from the place entirely,[13] or, in some cases, to selectively exclude some persons on seemingly content-based criteria.[14]

In the recent case of *Perry Local Educators' Association v. Hohlt*,[15] the United States Court of Appeals for the Seventh Circuit addressed the question of whether a teacher association had a constitutional right of access to a public school district's inter-school mail system to distribute literature related to association activities. In *Hohlt*, a collective bargaining agreement between the Perry Education Association,[16] which represented a majority of the district's teachers, and the school board gave the PEA the exclusive right to use the school district's inter-school mail system. The Perry Local Educators' Association,[17] a rival labor group, filed suit against the PEA and the school board members, claiming that the exclusive access provision violated its members' first amendment right of freedom of speech and the fourteenth amendment's guarantee of equal protection of the laws.[18]

13. Adderley v. Florida, 385 U.S. 39 (1966) (county jail grounds).

14. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976), where the Court upheld a regulation that prohibited, in part, partisan political speeches at a military base. *See also* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion). The plurality in *Lehman* upheld a city ordinance that prohibited political, but not commercial, advertising on city buses. Justice Blackmun, writing for the plurality, noted that the "nature" of the place often is an important consideration in determining whether a right of speech access exists:

> Although American constitutional jurisprudence, in light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question.

Id. at 302-03. *See also* Niemotko v. Maryland, 340 U.S. 268, 282-83 (1951) (Frankfurter, J., concurring).

15. 652 F.2d 1286 (7th Cir. 1981), *rev'd*, 51 U.S.L.W. 4165 (U.S. Feb. 23, 1983).

16. Hereinafter referred to as PEA.

17. Hereinafter referred to as PLEA.

18. Although the facts in *Hohlt* involved a labor confrontation, the case differs from a labor dispute in the private sector in two respects. First, state and local governmental bodies, like public school boards, are exempted from the scrutiny of the National Labor Relations Act, which regulates some private sector labor relations. The Act, which is codified at 29 U.S.C. §§ 151-169 (1976), provides in relevant part:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof. . . .

29 U.S.C. § 152(2) (1976).

Second, unlike private employers, who are not governed by the Constitution's Bill of Rights, governmental bodies cannot withhold rights embodied in the Constitution from their employees. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968), where the Court held that a school board's dismissal of a teacher who wrote a letter to the local newspaper criticizing the school board, violated the teacher's first amendment right of freedom of expression. Although an argument has been made that government, in its role as an employer, should have less of a responsibility in guaranteeing constitutional rights to its employees, that argument has now been generally

Thus, the *Hohlt* court was faced with a dilemma. If the court upheld the exclusive access provision it would in effect sanction a content-based speech restriction, which presumably violates the first amendment. The provision was content-based because it had the effect of favoring the PEA's views on labor issues over the views of the PLEA by restricting access to the mail system so that only the PEA could disseminate information about labor issues to teachers. However, if the court found that the mail system was a "public forum," the school district would have to open the system to the general public, placing a substantial burden on a system that was only designed for communication between school personnel.

Prior to *Hohlt* two federal circuit courts had addressed the constitutionality of collective bargaining agreements that granted exclusive access to public school districts' inter-school mail systems to majority teacher associations. In *Memphis American Federation of Teachers v. Board of Education*,[19] the United States Court of Appeals for the Sixth Circuit held that the exclusive access provision did not implicate the first amendment rights of the minority teacher association.[20] The Sixth Circuit also concluded that there was no violation of the equal protection clause of the fourteenth amendment because the provision was rationally related[21] to the school district's legitimate interest in preserving labor peace.[22] In *Connecticut State Federation of Teachers v. Board of Education Members*,[23] the United States Court of Appeals for the Second Circuit determined that the exclusive access provision did not violate the first amendment because the impairment on the minority associations' speech interests was "*de minimis*."[24] Because the Second Circuit interpreted an applicable state law in a way that made it unnec-

rejected by the courts. *See* Madison Joint School Dist. v. Wisconsin Employment Rel. Comm'n, 429 U.S. 167, 175-76 (1976). *See generally* Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 245 (1980); Note, *The Validity of Exclusive Privileges in the Public Employment Sector*, 49 NOTRE DAME L. REV. 1064, 1070 (1974).

19. 534 F.2d 699 (6th Cir. 1976).

20. *Id.* at 702.

21. The term "rationally related" refers to the rational basis test, one of two tests used by the courts to review equal protection claims. If the court finds that the regulation does not impinge on a fundamental right, like speech, or is not otherwise suspect, it will apply the rational basis test. Under this test, the governmental regulation is almost always upheld. *See, e.g.*, McDonald v. Board of Elections, 394 U.S. 802, 809 (1969). If the court finds that a discriminatory regulation has impaired a fundamental right, or is otherwise suspect, the court will apply "strict scrutiny." Under this test, the governmental regulation usually does not survive constitutional attack. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). *See* notes 39-63 and accompanying text *infra*.

22. 534 F.2d at 703.

23. 538 F.2d 471 (2d Cir. 1976).

24. *Id.* at 481.

essary to address the equal protection issue, the court abstained from deciding that claim.[25]

Contrary to the decisions of the Sixth and Second Circuits, the *Hohlt* court held that the exclusive access provision violated the first amendment rights of the minority association. The *Hohlt* court also held that the provision violated the equal protection clause. Unlike the other federal circuit courts, the Seventh Circuit strictly scrutinized[26] the school board's justifications for the access provision, instead of using the easily met rational basis test.[27] In determining that the exclusive access provision was unconstitutional, the Seventh Circuit distinguished between content-based restrictions that deny first amendment access to public facilities in a neutral manner and policies that deny access to public facilities on the basis of a speaker's viewpoint.[28] The *Hohlt* court stated that the access provision did not evenhandedly remove the entire subject of labor relations from being discussed by both associations via the forum, but discriminated between associations on the basis of their viewpoint on the subject.[29] The court stated that the latter restriction was a more onerous form of censorship and held that if one association was allowed access to the system, the school board was constitutionally obligated to provide speech access to the competing association.[30]

Thus, instead of recognizing a general first amendment right of access to the mail system, the *Hohlt* court saw the problem as one of equal access. Although the *Hohlt* court recognized that the access provision was content-based, the purpose of this case comment will be to show that the court failed to prevent the possibility that school boards, under the *Hohlt* analysis, can close mail systems to all discussion related to labor concerns, thus engaging in content-based regulation and eroding the general principle of first amendment access.

The constitutionality of a speech-access regulation depends substantially on the degree of scrutiny that the courts use to review the government's justifications for the regulation. As a result, it is impor-

25. *Id.* at 483-84.
26. *See* note 19 *supra*.
27. 652 F.2d at 1294-96.
28. *Id.* The Seventh Circuit distinguished between subject-matter speech regulation and viewpoint-based speech regulation. In the former, the government removes an entire subject from being discussed in the forum. In the latter, the government allows the subject to be discussed, but only from certain viewpoints. Both regulations are forms of content-based speech regulation. This comment, when referring to content-based speech regulation, is meant to include both subject-matter and viewpoint-based speech regulation. *See generally* Stone, *supra* note 7.
29. 652 F.2d at 1294-96.
30. *Id.*

tant to understand the different standards of review, or scrutiny, before considering questions of constitutionality. Accordingly, this case comment will begin by briefly describing the degrees of scrutiny that the United States Supreme Court uses when it addresses speech-access claims under the first amendment and the equal protection clause. Secondly, this comment will provide an overview of cases which illustrate factual situations where the courts have applied the different standards of review. Then, it will address the problem of how the "nature" of a particular place can create a tension between first amendment rights and important governmental interests associated with the facility. Next, this case comment will analyze the facts and rationale of the *Hohlt* court. It will suggest that the inter-school mail system in *Hohlt* was a limited public forum. Last, this comment will recommend a way to grant access to both associations which will prevent the possibility that school boards will engage in content-based censorship and yet avoid overburdening a system that was not designed to be used by the general public.

SPEECH ACCESS TO PUBLIC PLACES

If a governmental regulation grants speech access to one group of citizens, but denies access to another group, the first amendment or the equal protection clause of the fourteenth amendment may be raised to attack the governmental regulation.[31] The first amendment may be raised because it guarantees that an individual's freedom of speech will not be abridged by the government.[32] The equal protection clause may be raised because the regulation discriminates between two groups, violating the fourteenth amendment's proscription against creating discriminatory classifications.[33]

As a matter of practicality, the Supreme Court has rarely addressed the equal protection claim when speech access issues are raised because freedom of speech is specifically protected by the first amendment.[34] The first amendment guarantees have been incorporated

31. *See generally* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) [hereinafter referred to as Karst]; J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 675-76 (1978) [hereinafter referred to as NOWAK].

32. *See, e.g.*, Madison Joint School Dist. v. Wisconsin Employment Rel. Comm'n, 429 U.S. 167 (1976) (holding that a commission order barring non-union teachers from addressing the school board during a public meeting on collective bargaining issues violated the first amendment).

33. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980) (holding that a city ordinance prohibiting picketing in residential neighborhoods, except peaceful labor picketing, violated the equal protection clause).

34. *See* NOWAK, *supra* note 31, at 676.

through judicial interpretation into the fourteenth amendment, which acts as a limitation on state and lesser governmental bodies.[35] Nonetheless, the Court has on occasion applied an equal protection analysis as a basis for decision.[36] Some writers have suggested that the Court has employed the equal protection analysis in these cases to avoid the more difficult question of whether a broad-based first amendment right of access should be granted.[37] The Court also has applied so-called "ancillary doctrines"—for example, finding that the access regulation is unconstitutionally overbroad or vague—in an attempt to avoid the first amendment access issue.[38]

The Standards of Review: The First Amendment and Equal Protection Clause

Whether a governmental policy regulating speech access to public property is constitutional is largely determined by the degree of scrutiny the courts decide is necessary in a given case to review the government's justifications for the regulation.[39] Presuming that the speech in question does not fall within certain well-defined categories of speech that are not afforded first amendment protection, such as obscenity,[40]

35. U.S. CONST. amend. XIV provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitutional guarantees like the first amendment are applicable to state and local governments, like public school boards, through the due process clause of the fourteenth amendment. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968). *See generally* NOWAK, *supra* note 31, at 379.

36. Carey v. Brown, 447 U.S. 455 (1980); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

37. *See* Karst, *supra* note 31. Professor Karst notes, that "the equality principle is becoming a preferred ground for decision. The reasons are easy to see. The principle permits the Court to protect first amendment activity without making a frontal attack on the legitimacy of the interest by which the state seeks to justify its regulation." *Id.* at 66-67 (footnote omitted). *See also* Comment, *Equal But Inadequate Protection: A Look at Mosley and Grayned*, 8 HARV. C.R.-C.L. L. REV. 469, 480 (1973) [hereinafter referred to as *Equal But Inadequate Protection*].

38. *See* Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679 (1978). The Court may find, for example, that the government regulation is an unconstitutional "prior restraint" on speech, *e.g.*, prohibiting the speech before it is judicially determined whether the speech is constitutionally protected. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). The Court may determine that a law is "overbroad," curtailing more speech than is necessary to promote a legitimate governmental interest. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963). A statute impinging on speech may be struck down under the "void for vagueness" doctrine. Thus, if a law is unclear as to its scope, possibly including protected speech, it may not survive first amendment scrutiny. *See, e.g.*, Winters v. New York, 333 U.S. 507 (1948).

39. *See* Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422 (1980) [hereinafter referred to as Emerson].

40. *See* Miller v. California, 413 U.S. 15 (1973), where the Court upheld a conviction for violating a state obscenity statute. The petitioner had been convicted for distributing advertise-

libel,[41] "fighting" words,[42] and speech that presents a "clear and present danger,"[43] the courts usually begin their analysis of speech-access cases by determining the amount of scrutiny they will use to review the regulation.

Under a first amendment analysis, the United States Supreme Court has sometimes subjected the government's justifications for the regulation to strict or "exacting" scrutiny. The government must then show that its justifications are "compelling" and that the method it used to further its interest is the "least drastic means," *i.e.*, the method that least curtails speech and still promotes that interest.[44] The Court has not clearly stated when the strict scrutiny test should be applied, although one writer has suggested that the test is used often when the speech is political in nature or the governmental regulation is a prior restraint on speech.[45] The Court, however, has on occasion applied less exacting scrutiny. Some members of the Court have advocated using less exacting scrutiny when they have viewed the speech in question as having little social value or the regulation as having an insignificant impact on speech.[46] Under that test the Court will uphold an impor-

ments containing pictures of persons engaged in sexual activities. *See also* Roth v. United States, 354 U.S. 476 (1957).

41. Libel, which involves the printing of defamatory falsehoods, is one category of speech where the Court has relaxed its presumption that the speech is not protected. *See* New York Times v. Sullivan, 376 U.S. 254 (1964), where the Court held that the first amendment protection of free speech and press limit state powers to award damages for libel when the person claiming the defamation is a public official. Under *New York Times*, a public official cannot recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice,' " that is, with "knowledge that [the defamatory falsehood] was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

42. *See, e.g.*, Chaplinski v. New Hampshire, 315 U.S. 568 (1942), where the Court upheld a conviction for violating a statute which prohibited persons from saying "any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place." *Id.* at 569. The petitioner was convicted for calling the town marshall a "damned Fascist" and "damned racketeer" on a public street. The Court held that such words were "fighting" words, those likely to inflict injury or provoke an immediate breach of the peace, and hence, were not protected. *Id.* at 573-74.

43. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969), where the petitioner, a leader of a Ku Klux Klan group, was convicted of 'advocat[ing] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.' *Id.* at 444-45. The petitioner had publicly stated that he and other Klansmen were going to march on Washington, D.C. The Court, in reversing the conviction, formulated what is considered the modern "clear and present danger" test, holding that unless such advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," the state may not forbid that speech. *Id.* at 444.

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

45. Emerson, *supra* note 39, at 450.

46. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion), which involved the issue of whether a zoning ordinance prohibiting, in part, "adult" theaters from being within 1,000 feet of other regulated establishments, such as pool halls, violated the first amendment. Although the theaters did not show films that were "obscene" as defined by the

tant governmental interest merely if it is shown that the regulation only incidentally regulates speech, that it is unrelated to the suppression of expression, and that the regulation is no more burdensome than is reasonably necessary to protect the governmental interest.[47] Under either test, the Court weighs the government's justifications for the access regulation against the speech interests involved, tipping the scale in favor of the individual under strict scrutiny, and in favor of the government under a less exacting scrutiny. The Court has been inconsistent in its use and application of these tests, and one prominent writer has suggested that the tests are almost meaningless.[48]

An access regulation which is susceptible to attack under the first amendment may also sometimes be attacked under the equal protection clause of the fourteenth amendment.[49] When, for example, an access regulation treats differently two groups of people who are in similar positions with respect to the regulation,[50] the Court may use an equal protection analysis.[51] When the regulation impinges on the fundamental right of one group, but not on the fundamental right of another group similarly situated, the Court will subject the regulation to strict scrutiny.[52] Although the rights found in the Constitution's Bill of

Court, the ordinance was upheld. First, the plurality noted that the ordinance would not have a significant impact on first amendment freedoms. *Id.* at 60. Secondly, the plurality noted that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Id.* at 70.

47. Brown v. Glines, 444 U.S. 348 (1980).

48. Emerson, *supra* note 39, at 440. Professor Emerson notes:

> In essence, the balancing doctrine is no doctrine at all but merely a skeleton structure on which to throw any facts, reasons, or speculations that may be considered relevant. Not only are there no comparable units to weigh against each other, but the test is so vague as to yield virtually any result in any case.

Id.

49. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980). *See generally* NOWAK, *supra* note 31, at 676.

50. The classifications are not tested to determine if the groups are actually different, *e.g.*, men and women, but whether the groups are different in terms of the end the governmental regulation is trying to achieve. Thus, in Reed v. Reed, 404 U.S. 71 (1971), the Court held that gender was an unconstitutional basis to determine who is capable of being an executor of an estate. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), where the Court held that peaceful nonlabor pickets and peaceful labor pickets could not be treated differently under an ordinance that attempted to curb disruptions of the peace near schools. Under an equal protection analysis, the Court determines whether the classifications that the government makes relate sufficiently to the purpose that the government contends it is promoting. A classification can relate to the purpose in several ways. It could totally select the wrong group of persons for a benefit or burden. The classification may be under-inclusive, whereby it includes only a small number of persons who fit the purpose of the law, but does not include other persons who are similarly situated. A classification may be over-inclusive in that it includes some persons who do not belong in the class that should receive the benefit or burden. The classification may be both over- and under-inclusive at the same time. *See* NOWAK, *supra* note 31, at 520-21.

51. *Id.*

52. *Id.* at 524-25.

Rights are fundamental for purposes of applying the equal protection clause,[53] the Court rarely engages in an equal protection analysis when those rights are involved because the pertinent amendment provides specific protection for the claimed right.[54] The Court has identified certain fundamental rights, such as the right to exercise the voting franchise[55] and the right of interstate travel,[56] that are not specifically protected by the Bill of Rights and these rights are more likely targets for an equal protection analysis. Under the strict scrutiny of an equal protection analysis, as in the first amendment analysis, the government must show a compelling interest for the classification.[57] Similarly, the government must also show it used the "least restrictive means" to further that interest.[58]

The Court, however, will not apply strict scrutiny to equal protection claims unless there is a fundamental right involved, or the classification is otherwise suspect as, for example, a classification which discriminates on the basis of race,[59] or national origin.[60] The Court then will apply the rational basis test, where the burden is on the plaintiffs to show that the regulation is irrational.[61] If the Court determines that the regulation is in any way rationally related to a legitimate governmental purpose, it will be upheld.[62] Thus, the selection of the stan-

53. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (first amendment).

54. NOWAK, *supra* note 31, at 675.

55. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

56. Shapiro v. Thompson, 394 U.S. 618 (1969).

57. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). The Court said that the interest must be "substantial" but Professor Gunther insists that the scrutiny applied was the strict "compelling interest" kind of scrutiny. *See* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter referred to as Gunther]. It seems that the Court has at times used "substantial," "compelling" or "important" interchangeably under both the equal protection clause and first amendment analyses. *See, e.g.*, Brown v. Glines, 444 U.S. 348 (1980) (Brennan, J., dissenting), which upheld an air force regulation requiring that servicemen obtain prior approval from the base commander before circulating petitions on base. Justice Brennan, arguing for a strict scrutiny standard, used the words "compelling" and "important" interchangeably. *Id.* at 364.

Several commentators have indicated that the Burger Court now frequently employs a "middle level" standard of review in equal protection cases. Although the standard of review is still strict in these cases, it seems to be different than either the compelling interset test or the rational basis test. The Court has not expressly stated that there is a "middle level" standard of review. *See* Gunther, *supra*; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classification*, 62 GEO. L.J. 1071 (1974); Note, *Equal Protection and Due Process: Contrasting Methods of Review under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C.L. L. REV. 529 (1979).

58. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972).

59. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

60. *See, e.g.*, Oyama v. California, 332 U.S. 633 (1948).

61. NOWAK, *supra* note 31, at 524.

62. *See* McDonald v. Board of Elections, 394 U.S. 802 (1969), where the Court rejected an equal protection challenge to an Illinois law that did not include prisoners awaiting trial in a county jail in the class of persons entitled to absentee ballots. The Court stated:

dard of review will usually determine whether a regulation is found unconstitutional. The strict scrutiny standard, under both the first and fourteenth amendments, is " 'strict' in theory and fatal in fact," whereas the rational basis standard in reality subjects regulations to hardly any scrutiny at all.[63]

Regulation of Speech Access: Prohibition Against Content-Based Discrimination

If the government discriminates among speakers by regulating access to public property on the basis of the speaker's message, the Court will generally apply the almost fatal strict scrutiny analysis to the case.[64] This is true whether the Court analyzes the government's regulation under the first amendment or under the equal protection clause.[65] In *Madison School District v. Wisconsin Employment Relations Commission*,[66] the Supreme Court applied strict scrutiny under a first amendment analysis to strike down a regulation that prohibited some persons from addressing a school board at a public meeting.[67] A non-union teacher in *Madison School District* spoke up against adopting a "fair share" clause, requiring both non-union and union teachers to pay union dues, during a public school board meeting.[68] Union representatives, who were negotiating a new contract with the school board, objected to the board's decision to allow the non-union teacher to speak. Subsequently, the union sought and obtained an order from the Wisconsin Employment Relations Commission prohibiting anyone, except union representatives, from addressing the board "on matters subject to collective bargaining."[69] The Court held that the order violated the first amendment, explaining that when a governmental body opens a forum to the public, it may not "discriminate between speakers on the basis of their employment, or the content of their speech."[70] The Court

> The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.

Id. at 809. *See also* Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).

63. Gunther, *supra* note 57, at 8.

64. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980); *see* Stone, *supra* note 7; Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980).

65. *See* NOWAK, *supra* note 31, at 675-76.

66. 429 U.S. 167 (1976).

67. *Id.* at 169.

68. *Id.* at 171-72.

69. *Id.* at 176.

70. *Id.* at 174.

explained that the school board had opened a portion of the meeting to comments from the general public and that the commission's order prohibited the non-union teacher's speech on the basis of the content of his message.[71]

Similarly, in *Police Department of Chicago v. Mosley*,[72] the Court addressed the question of whether an ordinance that prohibited picketing within 150 feet of city schools while the schools were in session, but exempted "peaceful picketing of any school involved in a labor dispute,"[73] violated the equal protection clause. Prior to the enactment of the ordinance, Mosley, a federal postal employee, had peacefully picketed in front of a local high school to protest alleged racial discrimination there. After inquiring whether the ordinance pertained to his solitary picketing, Mosley was told by Chicago police that he would be arrested if he picketed in front of the school. He brought suit alleging that the ordinance violated his first amendment right of freedom of speech, and requesting declaratory and injunctive relief.

The *Mosley* Court first noted that since the ordinance treated labor picketing differently from other picketing, the ordinance should be analyzed in terms of the equal protection clause.[74] The Court stated, however, that the "equal protection claim in this case is closely intertwined with First Amendment interests,"[75] and proceeded to speak of the first amendment as well as the equal protection clause. The *Mosley* Court held that the ordinance violated the equal protection clause because it denied access to some pickets on the basis of the content of their message.[76] The Court said that the government can impose "[neutral] time, place and circumstance"[77] restraints on speech in public places

71. *Id.* at 176. The Supreme Court of Wisconsin had held that the order was constitutional because the teacher's speech before the school board presented a "clear and present danger" to bargaining exclusivity granted by state statute. The Court found that argument unpersuasive, stating: "Assuming *arguendo*, that such a 'danger' might in some circumstances justify some limitation of First Amendment rights, we are unable to read this record as presenting such danger as would justify curtailing speech." *Id.* at 174. The Court also used two ancillary doctrines to strike down the order. First, the Court said that the order was "overbroad" because practically any subject concerning school operations could be a subject of collective bargaining. *Id.* at 176-77. Second, the Court said that because the order prohibited future speech and conduct it was the "essence of prior restraint." *Id.* at 177. Arguably the order could have been held to be unconstitutional under the equal protection clause as well. The order, like the ordinance in Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) prohibiting non-labor pickets, discriminated on the basis of speech content. *See* Princeton Educ. Ass'n v. Princeton Bd. of Educ., 480 F. Supp. 962 (S.D. Ohio 1979).

72. 408 U.S. 92 (1972).

73. *Id.* at 93.

74. *Id.* at 94-95.

75. *Id.* at 95.

76. *Id.*

77. *Id.* at 99.

deemed to be public forums. The Court found, however, that Chicago's anti-picketing ordinance went beyond those "neutral" constraints:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.[78]

The *Mosley* Court held that, when the government selectively excludes a group from a public place on the basis of the content of the group's message, its justifications must be "carefully scrutinized."[79] Applying an equal protection, strict scrutiny analysis to the ordinance, the Court held that it had to be "tailored to serve a substantial government interest,"[80] if it was to be upheld. In the case of the ordinance in *Mosley*, there was no substantial government justification to discriminate between peaceful labor picketing and peaceful non-labor picketing.[81]

Public Facilities and the Public Forum

Although the Court's opinion in *Mosley* was couched in terms of the equal protection clause, *Mosley* arguably embraced the prevailing idea that persons have a right of speech access to public places, irrespective of whether the ordinance had or had not been content-based.[82] Justice Marshall, writing for the Court in *Mosley*, spoke of the sidewalk as a "public forum."[83] Indeed, it is baffling to some that the Court did not simply employ a public forum analysis, because the sidewalk fit

78. *Id.* at 95. The Court continued:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to an assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Id. at 96 (footnote omitted).

79. *Id.* at 99.

80. *Id.*

81. *Id.* at 100.

82. *Id.* at 95. *See generally Fora Americana, supra* note 2.

83. 408 U.S. at 95. Justice Marshall also discussed "time, place and circumstance" regulations associated with the public forum doctrine. *Id.* at 99.

neatly within the Court's view of what constitutes a "public forum."[84] Ever since Justice Robert's concurring opinion in *Hague v. C.I.O.*,[85] the right of speech access to public streets and parks had been recognized as part of the first amendment's guarantee of freedom of speech.[86] From *Hague* sprang the theory that streets and parks—places that have "traditionally" been used for public assembly—are "public forums," and speech exercised in these places is afforded a substantial degree of protection.[87] The government may enact reasonable "time, place and manner"[88] restrictions on speech in the public forum, but it may not prohibit speech on the basis of its content.

Then, in *Grayned v. City of Rockford*,[89] the Court formulated what appeared to be an extension of the "traditional" test. Prior to *Grayned*, only a few cases had advocated extending the first amendment's public forum doctrine to include nontraditional public places.[90] In *Grayned*, the Court stated that the "crucial question" in determining if a particular place is a public forum is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[91] The *Grayned* Court struck down an anti-picketing ordinance similar to the ordinance in *Mosley*, but upheld an anti-noise ordinance that prohibited disturbances near schools while schools were in session. The petitioners, demonstrators who had been arrested under the ordinances for protesting alleged racial inequalities at a local high school, argued that the anti-noise ordinance was overbroad, and thus, impinged on protected speech.[92] The *Grayned* Court, which construed the anti-noise ordinance as only prohibiting that speech which "materially disrupts" classwork,[93] found the anti-noise ordinance to be a reasonable "time, place and manner" restriction.[94]

Nontraditional Forums and Speech Access

Some writers have argued that the "incompatibility" test formu-

84. *See Equal But Inadequate Protection, supra* note 37.

85. 307 U.S. 496, 515 (1939) (Roberts, J., concurring).

86. *See, e.g.*, Jamison v. Texas, 318 U.S. 413 (1943); Cox v. New Hampshire, 312 U.S. 569 (1941); Schneider v. State, 308 U.S. 147 (1939).

87. *See generally* Kalven, *supra* note 4.

88. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941). *See generally Fora Americana, supra* note 2.

89. 408 U.S. 104 (1972).

90. Adderley v. Florida, 385 U.S. 39 (1966) (dicta); Brown v. Louisiana, 383 U.S. 131 (1966) (plurality opinion) (right of access to public library).

91. 408 U.S. at 116.

92. *Id.* at 114-15.

93. *Id.* at 118.

94. *Id.* at 121.

lated in *Grayned* was an expansion of the "traditional" test to include more property in the public forum.[95] Despite this view, the Court has been unable to establish satisfactory solutions to speech-access claims when the public property involved does not fit within the category of a "traditional" public forum.[96] When the nature of the particular public property has created a tension between the first amendment right of access and an important governmental interest in assuring a more limited access, the Court has not adhered to the principles enunciated in *Mosley, Grayned* and other public forum cases.

In *Greer v. Spock*,[97] the Court upheld the constitutionality of a regulation that prohibited, in part, "political speeches" at a military base. Political candidates who sought to conduct meetings and campaign at the base were denied access on the basis of the regulation. Large portions of the base had always been open to the public. Members of the public intent on entering the base were greeted with a large "Visitors Welcome" sign. Several major streets ran through the base. Speakers had also been invited to talk at the base on a variety of topics such as drug abuse and business management.[98] The candidates only claimed a right of access to those parts of the base that were open to the general public.[99] The *Greer* Court noted, however, that unlike streets and parks, which traditionally have served as forums for public debate, a military base was not a public forum.[100] Thus, the Court applied rational basis scrutiny to review the regulation. The Court concluded that the regulation was a reasonable way to protect the military's interest in maintaining political neutrality.[101]

Justice Stewart, writing for the majority in *Greer*, noted that the military commander had not selectively excluded some candidates based on their political views.[102] Justice Powell, concurring, added that the regulation would have been reviewed under a strict scrutiny standard had the commander discriminated between politicians by choosing among the viewpoints he liked or disliked, instead of excluding all politicians from the base "objectively and evenhandedly."[103] Thus, the

95. *See* Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565, 574-75 (1980) [hereinafter referred to as Shiffrin]; *Fora Americana, supra* note 2, at 251.

96. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion). *See generally The Public Forum, supra* note 4, at 118.

97. 424 U.S. 828 (1976).

98. *Id.* at 831.

99. *Id.* at 858.

100. *Id.* at 838.

101. *Id.* at 838-39.

102. *Id.*

103. *Id.* at 848 n.3 (Powell, J., concurring); *see id.* at 839.

Greer Court distinguished between regulations that remove entire subjects from being discussed in a forum and supposedly more onerous regulations that allow only some viewpoints on a given subject to be expressed in a forum.[104]

Several commentators have argued that the *Greer* decision is an aberration, wrongly decided, and that the prohibition against content-based speech discrimination should apply full force.[105] The *Greer* Court had much difficulty in distinguishing a prior decision in which it held that a public street on a military base was a public forum.[106] Secondly, the prohibition against content-based speech regulation does not depend on whether the public property in question is a public forum. Whether the forum in *Greer* was public or not, the government was still granting access to some persons, while denying access to others, solely because the latter wanted to discuss politics. The Court's distinction between regulations that remove an entire subject from the forum and regulations that allow the subject to be discussed, but only from certain viewpoints, is an unreasonable dividing line. Both subject-matter speech restrictions and viewpoint-based speech restrictions fall under the general umbrella of content-based speech regulation.[107] Both place the government in the position of a censor, deciding what speech it considers appropriate for a particular place. Prior decisions such as *Police Department of Chicago v. Mosley*[108] had not distinguished between subject-matter and viewpoint-based speech regulation.[109]

The *Greer* decision, however, illustrates the difficulty of grappling with speech-access claims to public property when the property does

104. *Id. See* Stone, *supra* note 7, at 95. *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion). The *Young* plurality upheld an ordinance that prohibited "adult" movie theaters from being located within 1,000 feet of other regulated uses, such as pool halls, and within 500 feet of a residential area. Although the theaters did not show obscene movies, the plurality held that sometimes content-based speech restrictions will be upheld. *Id.* at 65-66. The plurality stated, however, there is a "need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the *point of view* being expressed by the communicator." *Id.* at 67 (emphasis added). *But see* Metromedia Inc. v. San Diego, 453 U.S. 490 (1981) (plurality opinion), where the Court rejected the distinction between content-based and viewpoint-based speech discrimination; however, the distinction still has its adherents on the Court. *See id.* at 540 (Stevens, J., dissenting).

105. *See* Stone, *supra* note 7, at 95; Shiffrin, *supra* note 95, at 576; Zillman and Imwinkelried, *The Legacy of Greer v. Spock: The Public Forum Doctrine and the Principle of the Military's Political Neutrality*, 65 GEO. L.J. 773 (1977).

106. Flower v. United States, 407 U.S. 197 (1972) (per curiam). The majority in *Greer* stated that the military officials in *Flower* had "abandoned" any claim to the street. 424 U.S. at 837. Justice Brennan, dissenting, noted that the majority's attempt to distinguish *Greer* from *Flower* "is wholly unconvincing, both on the facts and in its rationale." *Id.* at 849 (Brennan, J., dissenting).

107. *See generally* Stone, *supra* note 7.

108. 408 U.S. 92 (1972).

109. Stone, *supra* note 7, at 86-87.

not fall neatly within the "traditional" concept of the public forum, especially where the government asserts an interest in limiting access to the forum which, in the Court's view, conflicts sharply with the first amendment claim. The interest asserted by the government in defense of the limitation will often vary, depending on the nature of the property involved. The interest of the government expressed in *Greer* in limiting speech access to a military base in an effort to preserve military neutrality, for example, differs from a public school board's justifications for limiting access to its school mail system designed only for inter-school communication. The Supreme Court has neither addressed whether inter-school mail systems are public forums, nor determined the standard of review applicable where a school district grants access to such systems to one teachers' association, but denies access to a competing association.

INTER-SCHOOL MAIL SYSTEMS: THE OTHER CIRCUITS

Prior to *Hohlt*, the two federal circuit courts that had considered provisions granting exclusive access to one employee group to use inter-school mail systems followed a number of lower federal and state court decisions that had found similar provisions to be constitutional.[110] In *Memphis American Federation of Teachers v. Board of Education*,[111] a collective bargaining agreement allowed the recognized teachers' association[112] to use the inter-school mail system, school bulletin boards and other facilities.[113] An association, composed of a minority of the school district's teachers,[114] sought declaratory and injunctive relief, claiming that the exclusive access provision violated the association's first amendment and equal protection rights. The federal district court held that there was no first amendment violation, but found that the provision was unconstitutional on the basis of the equal

110. *See* Federation of Del. Teachers v. De La Warr Bd. of Educ., 335 F. Supp. 385 (D. Del. 1971); Local 858, Am. Fed'n of Teachers v. School Dist. of Denver, 314 F. Supp. 1069 (D. Colo. 1970) (both cases upheld the constitutionality of provisions that granted majority associations exclusive access to bulletin boards and inter-school mail systems); Clark County Classroom Teacher Ass'n v. Clark County School Dist., 91 Nev. 143, 532 P.2d 1032 (1975) (dicta); Civil Serv. Employees Ass'n v. State Univ. of Stony Brook, 82 Misc. 2d 334, 368 N.Y.S.2d 927 (1974) (mem.) (meeting rooms).

111. 534 F.2d 699 (6th Cir. 1976).

112. The term "recognized teachers' association" for the purpose of this case comment means an association that has been granted the right to represent a district's teachers for collective bargaining purposes.

113. 534 F.2d at 701.

114. The district had about 5,400 teachers. More than 90 percent were represented by the recognized association, which had to represent two-thirds of the teachers to maintain its recognized status. The minority association represented less than 300 teachers. *Id.* at 701.

protection clause.[115]

In reversing the district court decision, the United States Court of Appeals for the Sixth Circuit in *Memphis American Federation of Teachers* determined that the access provision did not place the school board in a position of regulating speech content or subject matter, nor was the provision an attempt by the school board to "[censor or promote] a particular point of view."[116] Rather, the court stated, the access provision was a privilege only granted on the premise that the recognized association represented and continued to represent at least two-thirds of the teachers in the school system.[117] The court concluded that, since the school board was not attempting to censor the minority association's messages, its members' first amendment rights were not impaired.

The minority association's equal protection claim did not fare any better. The court viewed access to the mail system not as a "right" but as a "privilege" based on the majority association's membership as determined by the school board. Because the court decided that the provision did not impair the fundamental right of freedom of speech, but merely withheld a privilege, it determined that the rational basis test, not strict scrutiny, should be applied to review the equal protection claim.[118] The school board argued that the exclusive access provision promoted labor peace in a school system that had two competing teachers' associations. Moreover, the school board argued that the provision promoted labor stability because the provision was an attempt to accommodate the largest number of teachers. The board also argued that granting access to the minority association would place an undue strain on school facilities.[119] The Sixth Circuit agreed that the provision was rationally related to the school board's legitimate interest in promoting labor peace and stability in the school system.[120]

The United States Court of Appeals for the Second Circuit in *Connecticut State Federation of Teachers v. Board of Education Members*[121] considered a similar access provision. Five school boards gave the rec-

115. *Id.*

116. *Id.* at 702. *Accord*, Maryville Educators' Ass'n v. Newman, 70 A.D.2d 758, 416 N.Y.S.2d 876 (1979).

117. 534 F.2d at 703.

118. *Id.* at 702-03.

119. *Id.* at 703.

120. *Id.* In Federation of Del. Teachers v. De La Warr Bd. of Educ., 335 F. Supp. 385 (D. Del. 1971) and Local 858, Am. Fed'n of Teachers v. School Dist. of Denver, 314 F. Supp. 1069 (D. Colo. 1970), the courts used the compelling interest test, but nonetheless held there was no violation of the minority associations' constitutional rights.

121. 538 F.2d 471 (2d Cir. 1976).

ognized teachers' associations in their districts the exclusive right to use inter-school mail systems, bulletin boards and meeting rooms. The minority teachers' associations from the five school districts sought declaratory relief, contending that the exclusive access provisions violated their members' first amendment and equal protection rights.[122] They argued that the exclusive access provisions gave the majority associations an advantage in attracting members.[123] The associations also contended that the school boards had failed to show that the discipline and operation of the schools would be substantially impaired if they were granted access to school facilities.[124] They contended that the district court had erred when it applied the rational basis test, instead of the compelling interest test.[125]

The Second Circuit, in affirming the lower court decision, stated that before the strict scrutiny standard could be applied it first had to be shown that the access provisions infringed on the minority associations' first amendment rights.[126] The Second Circuit stated that the school facilities were not public forums, in the traditional sense like streets and parks, so the associations did not have a general first amendment right of access to them.[127] The court also noted that the associations had alternative means of communicating with their members, such as meeting off-campus after school, talking to members during free periods in the teachers' lounges, and calling teachers at home.[128] Thus, the court concluded that the impairment of the associations' exercise of speech was "so inconsequential" that the provisions could not be considered to violate the first amendment.[129] The Second Circuit abstained on the equal protection claim, deciding that there was a state law susceptible of an interpretation that would make it unneces-

122. *Id.* at 476.
123. *Id.* at 477.
124. *Id.*
125. *Id.*
126. *Id.* at 479.
127. *Id.* at 480.
128. *Id.* at 481.
129. *Id.* The court also expressed concern about involving itself in a labor squabble:

> This case presents the all-too-familiar situation in which a dispute, commonplace in the private sector, becomes constitutional litigation by virtue of the fact that public employers (the school boards) are involved, rather than private entities, and the plaintiffs are, therefore, able to turn a problem of labor relations into a constitutional issue. Mindful of the undesirability of becoming entangled in the operation of local school systems, we nevertheless must address this case in a constitutional . . . framework.

Id. at 478. Other courts have expressed the same concerns. *See* North County Fed'n of Teachers v. North St. Francis School Dist., 103 L.R.R.M. 2865 (E.D. Mo. 1979); Geiger v. Duval County School Bd., 357 So. 2d 442 (Dist. Ct. App. Fla. 1978).

sary to address the constitutional question.[130] In *Perry Local Educators' Association v. Hohlt*,[131] the United States Court of Appeals for the Seventh Circuit addressed similar issues.

PERRY LOCAL EDUCATORS' ASSOCIATION V. HOHLT

Facts of the Case

Every teacher at each of the thirteen schools in the Metropolitan School District of Perry Township in Marion County, Indiana, was provided with a mail slot. The district also had an inter-school mail system whereby administrators could quickly communicate with teachers at the various schools.[132] Teachers also could use the mail system and both the Perry Education Association and the Perry Local Educators' Association had access to the mail slots.

However, in 1977, PLEA challenged PEA in an election to become the recognized teachers' association in the school district. PEA retained its status as the recognized teachers' association and subsequently negotiated a contract with the school board which was ratified in July, 1978. PEA, which anticipated continued opposition from PLEA, obtained a provision in the labor contract giving it the exclusive right to use the school district's inter-school mail system.[133] Teachers, however, could still use the system for personal messages; the provision only concerned the mail system. PLEA was free to use the school bulletin boards, hold meetings on school property after school hours and to make announcements over the school public address systems if it obtained prior approval from the school principal. Community organizations such as the Cub Scouts, parochial schools and local church groups also could use the inter-school mail system with prior

130. 538 F.2d at 482-87. The court stated that a state statute prohibiting, among other things, "discriminatory practices" among labor associations, could be construed by the state courts as barring the access provisions. Since the state law was unclear, the court concluded that the equal protection issue could be avoided if the statute was interpreted by the state court. *Id.* at 484. The court said that by abstaining, it "avoids unnecessary federal-state friction, and promotes the vital policy of judicial review that dictates against unnecessary or premature resolution of a federal constitutional question." *Id.* at 484.

131. 652 F.2d 1286 (7th Cir. 1981), *rev'd*, 51 U.S.L.W. 4165 (U.S. Feb. 23, 1983).

132. *Id.* at 1286-87.

133. The provision stated:

> C. The Association [PEA] is permitted access to teachers' mailboxes in which to insert material, provided the Association makes a copy available to the building principal in advance of the distribution. The Association's sponsorship shall appear on all materials which are distributed through teachers' mailboxes. The rights and privileges of the Association, acting as the representative of the teachers . . . shall not be granted to any other school employee organization . . . .

Id. at 1288 n.1.

approval.[134]

Following ratification of the teachers' contract, PLEA and two of its members filed an action in the United States District Court for the Southern District of Indiana against PEA and the school board members, seeking declaratory and injunctive relief, and damages.[135] PLEA claimed that the exclusive access provision violated its members' first amendment and equal protection rights. On cross-motions for summary judgment, the district court entered judgment for PEA and the school board members. The district court, relying on *Connecticut State Federation of Teachers*,[136] held that there was no substantial infringement on PLEA's first amendment rights because PLEA had other adequate means of communicating with its members and because the mail system was not a public forum.[137] Then the court, relying on *Memphis American Federation of Teachers*,[138] held that the exclusive access provision was rationally related to the school board's legitimate interest in ensuring labor peace, and hence, that it did not violate the equal protection clause.[139]

The Seventh Circuit's Decision

PLEA appealed the summary judgment, and the case was heard by a three-judge panel of the United States Court of Appeals for the Seventh Circuit.[140] Because the school board was a government employer,[141] the Seventh Circuit began its analysis by determining the applicable standards of review under the first amendment and the equal protection clause of the fourteenth amendment.

Following the Second Circuit in *Connecticut State Federation of Teachers*,[142] the *Hohlt* court determined that the inter-school mail system was not a public forum, stating that the school board could "close

134. *Id.* at 1288.

135. Damages were sought under 42 U.S.C. § 1983 (1976). *See* 652 F.2d at 1288-89.

136. 538 F.2d 471 (2d Cir. 1976).

137. 652 F.2d at 1289.

138. 534 F.2d 699 (6th Cir. 1976).

139. 652 F.2d at 1289. The district court's opinion is unreported.

140. The panel consisted of Chief Judge Fairchild, Circuit Judge Cummings, and Senior Circuit Judge Wisdom, of the United States Court of Appeals for the Fifth Circuit, who was sitting by designation. Judge Wisdom was the author of the opinion. *Id.* at 1287.

141. The court, noting that the actions of the school board did not come under the purview of the National Labor Relations Act, nonetheless stated that the access provision would constitute an unfair labor practice under the Act. *Id.* at 1290. *See* NLRB v. Magnavox Co., 415 U.S. 322 (1974), where the Court struck down a contract provision that gave an electrical union the exclusive right to post notices on manufacturing plant bulletin boards.

142. 538 F.2d 699 (2d Cir. 1976).

it to all but official business if it chooses."[143] But, unlike the Second Circuit, the *Hohlt* court was unpersuaded that the absence of a public forum and the availability of alternative means of communication made it unnecessary to continue its inquiry as to whether the provision violated the first amendment. The *Hohlt* court stated that the first amendment's prohibition against content-based speech regulation operated independently of the public forum analysis.[144]

However, the *Hohlt* court observed that the Supreme Court had occasionally upheld content-based regulations that limited access to some public places that were not considered by the Court to be public forums under the traditional test. The *Hohlt* court noted, for example, that the Supreme Court in *Greer v. Spock*[145] had upheld a regulation that prohibited political candidates from campaigning on a military base. The Seventh Circuit stated, however, that, unlike the neutral subject-matter speech regulation in *Greer*, the Perry Township school access provision was viewpoint-based[146]—a more onerous kind of content-based regulation that the *Greer* Court stated it was unwilling to uphold as constitutional.[147] The *Hohlt* court explained that, unlike the evenhanded exclusion of all politicians from the military base in *Greer*, the Perry Township School Board did not evenhandedly exclude all union speech. Instead, only the teachers who belonged to PLEA were prohibited from using the mail system to communicate with other teachers on labor issues.[148] Because only PEA had access to the system to disseminate literature on labor issues, the provision effectively favored PEA's viewpoint on those issues over PLEA's viewpoint. By favoring one viewpoint over another, the school board was engaging in prohibited censorship. The court explained:

> Censorship, broadly defined as an attempt by the government to suppress the expression of disfavored points of view by private individuals, is a relative concept; it is defined by reference to the opportunities for expression opened to favored or neutral viewpoints. . . . [I]t may easily take the form of amplifying favored or neutral speech, rather than stifling the disfavored.[149]

Thus, the *Hohlt* court determined that it had to strictly scrutinize the access provision. The fact that PLEA had alternative means of communicating with its members, the court noted, did not alone justify re-

143. 652 F.2d at 1301.
144. *Id.* at 1298.
145. 424 U.S. 828 (1976).
146. 652 F.2d at 1294-96.
147. *Id.* at 1293 n.29.
148. *Id.* at 1296.
149. *Id.* at 1293-94.

stricting access to one forum when the restriction was content-based.[150]

The *Hohlt* court also stated that the "same standard of review may be derived from the equal protection clause."[151] Although the Seventh Circuit noted that "in principle" strict scrutiny under the first amendment might afford more protection than it would under the equal protection clause, the court could see "no substantial difference" between the standards used under the first amendment and equal protection clause when the courts reviewed claims of equal speech access.[152] The Seventh Circuit stated that, because the first amendment guarantee of freedom of speech is a fundamental right, any discriminatory classification that impinges on that right requires the courts to apply the strict scrutiny standard to review the government's justifications under an equal protection analysis.[153] Returning to its discussion of viewpoint-based speech regulation, the *Hohlt* court stated that, when the government grants speech access to one group, but denies access to another group based on the latter's viewpoint, thus engaging in censorship, the regulation discriminatorily impinges on the latter group's fundamental speech rights. Thus, the court found that the strict scrutiny standard applied.[154]

PEA and the school board argued that the exclusive access provision was needed by PEA to carry out its legal duties as the recognized teachers' association in the school district.[155] The Seventh Circuit in *Hohlt* first determined whether the exclusive access provision was the least restrictive way to allow PEA to carry out its legal responsibilities. The provision, the court concluded, was not the least restrictive means of promoting PEA's interest in meeting its legal obligations because it did not limit PEA's use of the mail system to those messages relating to

150. *Id.* at 1299. The court also stated that alternative methods of communication would be much less effective. The court explained that off-campus mailing would be more expensive than the inter-school system and mass telephoning would be more cumbersome. Hand-delivering messages would be very time consuming, and posting messages on bulletin boards or making announcements over the public address systems did not give PLEA the opportunity to explain its messages in much detail. The court said "meetings on school property after school hours only permit PLEA to preach to the converted." *Id.*

The court also criticized the Second Circuit's assertion in Connecticut State Fed. of Teachers v. Board of Educ., 538 F.2d 471, 481 (2d Cir. 1976), that the speech involved was of "limited public interest." The court stated that unions often attempt to influence government decision-making. *Id.* at 1298. The court also said that the value of the speech in question is irrelevant as to whether speech is protected by the first amendment. *Id.* at 1299.

151. *Id.* at 1296.

152. *Id.* at 1296-97.

153. *Id.* at 1296.

154. *Id.*

155. *Id.* at 1300.

its official duties.[156] The *Hohlt* court also chose to scrutinize the justification itself. The court found that the school board had "no discernible state interest" in making PEA's access exclusive because it had not shown that PEA would not be able to meet its obligations, or that the school district would incur "significant additional expenses" if PLEA were granted access to the inter-school mail system.[157]

PEA and the school board also argued that the provision promoted labor peace because it prevented possible conflicts between PEA and PLEA, which had been vying for membership among the district's teachers.[158] While the *Hohlt* court accepted the school board's justification as legitimate, it found the justification inadequate in this case because the school board had failed to show that such a disruption would occur if PLEA were granted access to the system.[159] Moreover, the Seventh Circuit noted that the alternative methods of communication available to PLEA, such as face-to-face contact in the teachers' lounges, were more likely to provoke teachers and prompt labor unrest, than the mail messages which a teacher could toss into a waste basket without even reading.[160] Therefore, the court concluded that the school board did not have a substantial interest in promulgating the access provision, and held that the provision violated both the first amendment and the equal protection clause of the fourteenth amendment.

ANALYSIS

The *Hohlt* opinion offers an alternative way of viewing public school teachers' claims of speech access to inter-school mail systems. Unlike the prior federal circuit court decisions, the *Hohlt* court held that PLEA had an equal right of speech access to the inter-school mail system. In reaching its conclusion that PLEA had an equal, but not absolute, right of access, the *Hohlt* court discussed both the issue of content-based speech regulation and the public forum doctrine. For purposes of analysis, the *Hohlt* court's treatment of each of these issues will be discussed separately.

Content-Based Speech Regulation

The inherent difficulty with the *Hohlt* decision is that it still leaves

156. *Id.*
157. *Id.*
158. *Id.* at 1300-01.
159. *Id.*
160. *Id.*

room for the government to engage in censorship, a practice that the first amendment prohibits.[161] Although the Seventh Circuit recognized that the underlying constitutional problem with the access provision in *Hohlt* was that it was content-based, the court's decision does not offer protection against all content-based speech regulation. Instead, under the *Hohlt* court's reasoning, school boards may deny access to inter-school mail systems to both teachers' associations, yet continue to allow teachers to send messages unrelated to labor issues via the mail system.

In finding that PLEA had a right of equal access, the *Hohlt* court distinguished between subject-matter speech discrimination and restrictions that discriminate between viewpoints on given subjects. In the former, the government removes the discussion of an entire subject from a given forum.[162] In the latter, the government allows the subject to be discussed in the forum, but only from certain viewpoints. The Sixth Circuit in *Memphis American Federation of Teachers*,[163] addressing facts similar to those in the *Hohlt* case, did not find a viewpoint-based speech regulation. The Sixth Circuit stated that the board policy was neutral as to speech content because the school board did not attempt to "[censor or promote] a particular point of view."[164] The Sixth Circuit based this conclusion on the fact that exclusive access to the mail system was granted to the majority association because of the association's status as representative of two-thirds of the school system's teachers.[165] The Sixth Circuit failed to see that, even if the board was not attempting to censor a particular point of view, by agreeing to the exclusive access provision, it did just that. While it may be true that the Memphis School Board favored neither of the association's viewpoints, the board in effect sanctioned one viewpoint on labor matters just because that viewpoint had more adherents.

In contrast, the *Hohlt* court determined that if the provision had the "effect" of favoring one viewpoint over another "on an identifiable issue," the strict scrutiny standard should apply.[166] The *Hohlt* court reasoned that, when access is predicated on the identity of the speaker, exclusive access provisions "almost invariably are not neutral with respect to the viewpoints they tend to disfavor."[167] The court concluded that presumption should be enough to trigger a strict scrutiny analysis

161. Stone, *supra* note 7, at 103.
162. *Id.* at 83.
163. 534 F.2d 699 (6th Cir. 1976).
164. *Id.* at 702.
165. *Id.* at 703.
166. 652 F.2d at 1294.
167. *Id.* at 1295.

because it presumes the government is engaging in censorship. The *Hohlt* court observed that the access provision had the effect of favoring PEA's viewpoint on labor issues because only PEA's viewpoint could be quickly disseminated to district teachers through the mail system. Indeed, PEA had recognized that the access provision would help shelter it from PLEA's criticisms and help it maintain its position as the recognized association in the school district. PEA had obtained the provision in the collective bargaining agreement solely because it anticipated continued opposition from PLEA.[168]

Although the access provision in *Hohlt* could be characterized as viewpoint-based, the court failed to explain adequately why a distinction between such restrictions and subject-matter regulations should be made. Both viewpoint-based and subject-matter speech regulations, as logic would have it, are content-based. More important, however, is the fact that the distinction between viewpoint-based and subject-matter speech regulations inevitably will erode the first amendment principle behind the prohibition against content-based speech regulation: that the government may not censor protected speech. The *Hohlt* analysis in effect invites school boards to "evenhandedly" close inter-school mail systems to both labor associations, and, at the same time, permit teachers to use the system for other school-related messages. Thus, the *Hohlt* analysis has the possible result of prompting school boards to permit teachers to engage in non-labor speech via the forum, but prohibit labor issues from being discussed. School boards, sensitive to criticism and opposition from labor groups over various issues, may very well decide to close the mail system entirely to both associations, thus engaging in censorship by selecting what subjects can and cannot be discussed.

A possible reason for the court's distinction between viewpoint-based and subject-matter speech discrimination was that it turned a first amendment problem into one of equal protection. Although the basis of the *Hohlt* decision was couched, in part, under the rhetoric of the first amendment, the court viewed the problem as one of equal protection, guaranteeing PLEA's use of the system only if PEA were granted access to the system by the school board. Indeed, the *Hohlt* court noted that its first amendment analysis was based on the fact that the first amendment has its own "equal protection guarantee."[169] Thus,

168. *Id.* at 1288.

169. The court stated:

> The peculiar identity of equal protection and first amendment analyses in differential access cases follows logically from the explicit constitutional designation of speech as

the court avoided having to determine whether school boards could bar teachers from sending advertisements or political messages to other teachers via the mail system,[170] such restrictions being content-based, subject-matter regulations. If the court were to prohibit all content-based regulations, it would effectively turn the mail system into a public forum, with almost unlimited access, since challenges to unequal exclusions from the forum could often be characterized as content-based. The court's hesitancy to burden a system designed only for a more limited use is understandable. Nevertheless, its distinction between subject-matter regulations and presumably more onerous viewpoint-based regulations, allows governmental bodies to ban certain subjects from being discussed in a forum even when discussion of the subjects themselves would not necessarily interfere with the official use of the forum.

The Public Forum Doctrine

The *Hohlt* court's treatment of the public forum issue was brief. Noting that the public forum doctrine has "sweeping consequences and potentially limitless application," the Seventh Circuit observed that the use of the doctrine had been restricted to facilities that have traditionally served as places for public discourse, or to facilities "whose normal use plainly will not be interfered with by such expression."[171] Then, agreeing with the Second Circuit in *Connecticut State Federation of Teachers*,[172] the court held that the inter-school mail system was not a public forum. The *Hohlt* court did not expressly state why the system was not a public forum, noting that the public forum issue was not dispositive of the case.[173]

Although not a public forum in the traditional sense, like streets and parks, the inter-school mail system in *Hohlt* arguably met the test enunciated in *Grayned v. City of Rockford*[174] as to what constitutes a public forum. In *Grayned*, the Supreme Court stated that the question

> fundamental and from the fact that the first amendment's proscription against censorship is itself simply a specialized equal protection guarantee. Thus, although *Mosley* evidently was the first case explicitly to apply the equal protection clause to differential access cases, the analytic tools of equal protection strict scrutiny—the requirements of a relatively important state interest, a close fit between end and means, and use of the least restrictive alternative—were applied to content discrimination under the aegis of the first amendment long before then.

Id. at 1296 (footnotes omitted).

170. *Id.* at 1301.
171. *Id.* at 1298.
172. 538 F.2d 471 (2d Cir. 1976).
173. 652 F.2d at 1297.
174. 408 U.S. 104 (1972).

to be asked was whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[175] Neither PLEA's proposed manner of expression, nor the expression itself, was incompatible with the normal use of the mail system. PLEA simply wished to use the system in a way it was normally used, *i.e.*, to send messages to teachers. Moreover, there was no showing that the distribution of material on labor issues unduly interfered with the system. PEA used the system to send messages on labor issues to teachers, and, before the election to determine union representation, both associations freely used the mail system.[176]

The *Hohlt* court, however, was faced with an unwanted result if it held that the mail system was a public forum. A finding that a particular facility is a public forum necessarily means that the general public has a first amendment right of access—subject to reasonable time, place and manner restrictions—to that facility. The *Hohlt* court noted that "[t]he school's interest in keeping outsiders off campus during school hours doubtless supports appropriate restrictions on entry for the purpose of using the mail system."[177] Thus, the *Hohlt* court apparently was not concerned about the *manner* of expression but the possible *amount* of expression if it held that the mail system was a public forum. Unlimited access by the public to a facility neither designed nor capable of handling such an influx would certainly be unduly burdensome. A related problem in holding that such a system is a public forum is the amount of outside traffic coming into the schools to use the system, and the possibility that such traffic might disrupt classroom instruction. Nonetheless, the *Hohlt* court's holding that the mail system was not a public forum, further eroded the first amendment right of access to public property. The *Hohlt* opinion, in effect embracing the "traditional" view of the public forum, places further obstacles in the path of those who wish to use so-called nontraditional public property to exercise speech, even when the manner of expression does not interfere with the function of the property. Because many nontraditional public facilities provide an effective, and sometimes the only, method of communicating with government officials, the position in *Hohlt* is disquieting.

175. *Id.* at 116.
176. 652 F.2d at 1287.
177. *Id.* at 1301.

A Recommended Approach

Another way of approaching the *Hohlt* problem would have been to hold that the inter-school mail system is a "limited public forum" in the sense that it can be used freely by all school personnel. This approach would solve the underlying problems with the *Hohlt* court's analysis. First, the finding that the mail system is a limited public forum would avoid the possibility that public school boards, under the *Hohlt* opinion, will engage in content-based censorship by prohibiting teachers from discussing labor or other issues via the system. Access would be granted on the basis of employment, instead of speech content. By granting access on the basis of employment, school boards would have objective and neutral criteria to use in limiting access to such systems instead of relying on speech content for the basis of the regulation. Teachers would be free to disseminate information on any subject via the forum, subject to reasonable time, place and manner regulations promulgated by the school boards. Thus, school boards could not totally ban either association, or any teacher, from using the mail system.

Secondly, by finding that the system is a limited public forum, school boards' interest in curbing access to a system designed to handle a limited amount of information would be protected. Since access would be determined on the basis of whether or not the speaker was an employee, access to the general public could be denied entirely. Any increase in the amount of literature disseminated by teachers could be regulated by reasonable time, place and manner restrictions. School boards, for example, might enact reasonable rules that would limit the times when unofficial mail may be sent through the system, or designate certain places from which the mail must be sent, in an effort to prevent overburdening of the system.

The concept of a limited public forum, however, can present its own problems. Such an approach might prompt governmental officials to arbitrarily set employment or another seemingly objective standard in an attempt to limit speech access. Nevertheless, this problem can be remedied when the amount of speech, not the manner, is the justification for the restriction. Courts can require that the policy in question be the least restrictive possible and still further the governmental interest. In addressing whether the criteria used by the government are arbitrary, the courts can consider several factors: the purpose for which the facility was designed; the past and present use of the facility; whether the group selected for the benefit of access has a special inter-

est in using the forum over and above a general desire to use the facility; and whether the governmental grant of speech access is the broadest possible under the circumstances.

Applying the above criteria to the *Hohlt* case, a policy granting access to district teachers, but not to the general public would survive first amendment scrutiny. The purpose of the school mail system is to provide teachers and administrators with a quick and effective way to communicate with each other.[178] Although the mail system had been occasionally used by outside groups, it was primarily used by school personnel.[179] Teachers arguably would also have a special interest in using the mail system. As the *Hohlt* court noted, the mail system was the most effective and possibly the only practicable way for teachers in a large school district to communicate with each other.[180] Teachers' classroom effectiveness could be hampered if they did not have the means to communicate easily with each other about teaching ideas, educational programs or upcoming events related to their employment. Such access would also allow teachers to make informed decisions about subjects embraced by collective bargaining. Along with issues such as wages and benefits, concerns about such issues as academic freedom, classroom size, teacher competency testing, or school discipline are sometimes subjects of collective bargaining. These issues ultimately affect the district's students or taxpayers. Thus, if teachers were not granted access to the system, their ability to make informed decisions about important subjects embraced by collective bargaining would be substantially hampered. Such a policy would also promote dissension among teachers, who possibly would feel that they have no effective way of communicating with fellow teachers on important issues. That dissension could affect teachers' classroom performance or lead to increasing conflicts between teachers and the administration. Finally, a policy limiting access to school personnel is the broadest possible grant of speech access under the circumstances. Access by the general public would overburden a system designed to handle a limited amount of mail. Granting access to some outside groups but not others could place the government in a position of arbitrarily choosing among various groups that more often than not will have no special interest, other than a mere desire, in using the system.

178. *Id.* at 1287.
179. *Id.* at 1287-88.
180. *Id.* at 1299-1300.

CONCLUSION

Although the Seventh Circuit in *Hohlt* correctly recognized that the underlying problem with the exclusive access provision was that it was content-based, the court failed to safeguard adequately teachers' first amendment freedoms. By distinguishing between viewpoint-based and subject-matter speech regulations, the Seventh Circuit opened the possibility that school boards, under its analysis, would close such systems to both teachers' associations. Such an analysis allows school boards to choose what subjects they would permit to be discussed in the forum. By engaging in such subject selection, school boards would be regulating speech on the basis of its content, a practice the first amendment prohibits. Another way to approach *Hohlt* would have been to hold that the mail system is a public forum, with access limited to school personnel. That approach would have allowed for the broadest first amendment right of access possible without burdening a mail system designed for limited use.[181]

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181. As this article was going to press, the Supreme Court decided the *Hohlt* case. 51 U.S.L.W. 4165 (U.S. Feb. 23, 1983). By a 5-4 vote, the Court reversed the Seventh Circuit, and held that PLEA does not have a right of access to the inter-school mail system under the first amendment or the equal protection clause. The majority held that the mail system was "not by tradition or designation" a public forum and that PLEA could retain exclusive access if the regulation is "*reasonable*" and is not based on the speaker's viewpoint. *Id.* at 4168. (emphasis added). The majority found no viewpoint discrimination, determining that access was granted on the basis of PLEA's *status* as a bargaining agent.

The majority found the exclusive access provision "reasonable" for several reasons. First, the Court stated that the access provision was a legitimate means of allowing PLEA, as the teachers' bargaining agent, to carry out its official obligations. *Id.* at 4169. Second, the provision was a means of insuring labor peace in the school district. *Id.* Third, the access provision was reasonable because of the "substantial" number of alternative channels of communication open to PLEA. *Id.* at 4170.

The majority also rejected PLEA's equal protection claim, stating that PLEA's first amendment argument "fares no better in equal protection garb." *Id.* The Court explained that its public forum analysis had shown that PLEA does not have a first amendment right of access to the mail system, so the access provision does not impinge on a fundamental right. The Court concluded that the provision need only rationally further a legitimate state purpose. The majority found the reasons advanced by PEA and the school board for upholding the access provision under the first amendment sufficient to reject the equal protection claim as well.

The dissenting Justices criticized the majority for disregarding "the independent First Amendment protection afforded by the prohibition against viewpoint discrimination." *Id.* at 4172. (Brennan, J., dissenting, joined by Marshall, Powell and Stevens, JJ.). The dissent argued that intentional viewpoint speech discrimination could be inferred from the provision's effect and other facts. Therefore, the dissent stated that the provision must be subjected to "rigorous scrutiny." They concluded that the justifications advanced by PLEA and the school board were insufficient to uphold the provision under the strict scrutiny standard.

Justice Brennan hinted that he would characterize the inter-school mail system as a "limited" public forum, a position recommended by this author. Although he thought it unnecessary to reach this issue, he stated:

> It is arguable that the school mail system could qualify for treatment as a public forum of some description if one focuses on whether " 'the manner of expression is incompatible with the normal activity of a particular place at a particular time.' . . ." It is difficult to see how granting the respondents access to the mailboxes would be incompatible with the normal activities of the school especially in view of the fact that the petitioner and outside groups enjoy such access.

Id. at 4172 n.7 (citations omitted).