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The Southern Public Employee Unions' Constitutional Card: Utilization of the Equal Protection Clause

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THE SOUTHERN PUBLIC EMPLOYEE UNIONS' CONSTITUTIONAL CARD: UTILIZATION OF THE EQUAL PROTECTION CLAUSE

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Southern public employee labor unions have been frustrated in their efforts to serve their members because of generally unfavorable legislation and court decisions. One bright spot in southern public sector labor relations, however, has been labor's recent success in pressing equal protection claims. In this Article, Mr. Livingston examines this use of the equal protection clause and concludes that the clause may help public employee labor unions secure rights not otherwise available to them under state laws.

I. INTRODUCTION

The laws of the various southern states traditionally have provided little support, by way of favorable legislation, to public employee labor organizations. Although some southern states have enacted statutes granting bargaining rights to a select group or groups of public employees,[1] only Florida has enacted broad legislation designed to promote collective bargaining between local governments and labor organizations representing public employees.[2] One southern state, North Carolina, has enacted legislation declaring that contracts between governmental units and public employee labor unions are illegal.[3] In other southern states where these contracts are not specifically made illegal, the courts have consistently ruled that, absent clear statutory authority to the contrary, collective bargaining agreements between labor unions and governmental units are of no force and effect.[4] Thus, while public employees

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1. For example, Alabama gives firefighters the right to have their chosen representative present proposals to city governments relating to salaries and other conditions of employment, ALA. CODE § 11-43-143(b) (1975). This right, however, does not include the right to negotiate enforceable agreements. Nichols v. Bolding, 291 Ala. 50, 277 So.2d 868 (1973). Georgia also extends collective bargaining rights to firefighters. GA. CODE ANN. §§ 54-1301 to -1314 (1974). Louisiana requires public transportation systems to bargain collectively with employees through labor unions authorized to act for such employees. LA. REV. STAT. ANN. § 23:890 (West Supp. 1980). Tennessee allows contract negotiations between boards of education and professional employee organizations representing teachers. TENN. CODE ANN. §§ 49 -5501 to -5516 (Cum. Supp. 1979); and extends collective bargaining rights to public transit employees. TENN. CODE ANN. § 7-56-102 (1980). *See generally* Beaird, *Public Employee Labor Relations in the Southeast—An Historical Perspective*, this symposium.

2. FLA. STAT. ANN. §§ 447.201 to .609 (Harrison 1977 & Cum. Supp. 1979).

3. Law of June 4, 1959, ch. 742, § 1, 1959 N.C. Sess. Laws 731 (codified at N.C. GEN. STAT. § 95-98 (1975)). For a comprehensive examination of this statute and the North Carolina law dealing with public employee labor relations, *see* Comment, *Public Employee Bargaining in North Carolina: From Paternalism to Confusion*, this symposium.

4. *See* Engineers Local 321 v. Water Works Bd., 276 Ala. 462, 163 So.2d 619 (1964); Miami

are free to join the labor organizations of their choice,[5] their efforts at unionization are frustrated because the southern states typically afford public employee labor unions little freedom to exercise the functions traditionally associated with "unionism." Further frustrating efforts of southern public employee unions is the express exclusion of state and municipal governing bodies or agencies from the coverage of the National Labor Relations Act,[6] which grants rights to unions in the private sector.

Despite the general absence of legislation favorable to public employee unions in the South, southern public employee unions did achieve modest concessions through the courts during the 1970s by basing legal arguments upon certain guarantees of the Bill of Rights. This was possible because labor disputes that might be commonplace in the private sector, and controlled by federal labor legislation, often become constitutional litigation in the public sector because public employers are involved rather than private entities. One of the constitutional provisions being explored successfully by the public employee unions is the equal protection clause of the fourteenth amendment.[7] Through use of equal protection arguments, southern public employee unions have been able to secure rights not otherwise available to them under state laws.

This Article will examine some of the instances in which southern public employee labor unions have used the equal protection clause in their quest for rights and privileges. The article is not designed to bring into focus the legal niceties of equal protection. Rather, it is intended to show that, under certain circumstances, public employee unions may be able to use the equal protection clause to achieve their goals when other avenues of judicial redress are unavailable.

Water Works Local 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946); City of Belleview v. Belleview Fire Fighters, 367 So. 2d 1086 (Fla. Dist. Ct. App. 1979); Dade County v. Amalgamated Ass'n. of St. Elec. Ry. & Motor Coach Employees, 157 So. 2d 176 (Fla. Dist. Ct. App. 1963), *appeal dismissed*, 166 So. 2d 149 (Fla. 1964), *cert. denied*. 379 U.S. 971 (1965); International Longshoremen's Ass'n v. Georgia Ports Auth., 217 Ga. 712, 124 S.E.2d 733, *cert. denied*, 370 U.S. 922 (1962); City of Jackson v. McLeod, 199 Miss. 676, 24 So. 2d 319 (1946); City of Alcoa v. Electrical Workers Local 760, 203 Tenn. 12, 308 S.W.2d 476 (1957); Weakley County Mun. Elec. Sys. v. Vick, 43 Tenn. App. 524, 309 S.W.2d 792 (1957), *cert denied*, 41 L.R.R.M. 2639 (Tenn. 1958) (*but see* Moberly, *Public Sector Labor Relations Law in Tennessee: The Current Inadequacies and the Available Alternatives*, 42 TENN. L. REV. 235 (1973), noting that the prohibition against a public employer entering into a collective bargaining agreement with a union in the above cited Tennessee cases is dicta); Commonwealth v. County Bd., 217 Va. 558, 232 S.E.2d 30 (1977).

5. The public employee can associate freely under the first amendment and is protected from retaliation for doing so. Lontine v. VanCleave, 483 F.2d 966 (10th Cir. 1973); Vorbeck v. McNeal, 407 F. Supp. 733 (E.D. Mo.), *aff'd*, 426 U.S. 943 (1976); Melton v. City of Atlanta, 324 F. Supp. 315 (N.D. Ga. 1971); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969). *Cf.*, Pickering v. Board of Educ., 391 U.S. 563, 574-75 (1968) (teacher's exercise of first amendment right to speak on issues of public importance may not furnish basis for dismissal from public employment); Shelton v. Tucker, 364 U.S. 479 (1960) (statute requiring disclosure by teachers of all organizations with which they were associated as condition of employment was an invalid infringement of right of free association).

6. *See* Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 152(2) (1976).

7. U.S. CONST. amend. XIV, § 1.

II. STANDARD OF REVIEW—A GENERAL LOOK

The equal protection clause itself provides no substantive rights to a public employee labor organization or to its members. Under some circumstances, however, the clause precludes a governmental entity, such as a state or city, from discriminating among various public employee labor organizations that have members who are employed by the entity. While a southern public employee labor union may have no right per se to such things as the checkoff of union dues[8] or an arrangement to "meet and confer" with a governmental entity over personnel policies affecting its members,[9] these things may become available to the union as a matter of right under the equal protection clause if the entity affords these benefits to another labor organization representing its employees.[10]

The unequal treatment of labor organizations by a governmental unit, however, in itself does not determine the question of constitutionality under the equal protection clause. A statute or a governmental action that distinguishes among public sector labor organizations and their respective members generally will violate the constitutional requirements of equal protection only if the government's classification is "without any reasonable basis."[11] This "reasonable basis" test is commonly referred to as the "traditional standard" of equal protection analysis. Under this standard, the equal protection clause is breached only if a government's distinction between its citizens rests on grounds wholly irrelevant to the achievement of a legitimate governmental objective.[12] When a government's classification interferes with the exercise of a fundamental right,[13] or operates to the particular disadvantage of a suspect class,[14] however, the traditional standard will not apply, and the constitution-

8. Dues check-off is the deduction of union dues by the employer from the paycheck of the employee union member with the approval of the employee.

9. When a "meet and confer" arrangement exists, discussions between a union and an employer are only advisory. These discussions often take place with multiple employee representatives rather than with an exclusive bargaining agent. One commentator has noted that "critics of the 'meet and confer' model argue that it forces a union to engage in 'collective begging.'" Edwards, *An overview of the "Meet and Confer" States—Where Are We Going*, LAW QUADRANGLE NOTES, Winter 1972, at 10.

10. *See* Truck Drivers Local 728 v. City of Atlanta, 468 F. Supp. 620 (N.D. Ga. 1979) (union obtained "dues check-off"); O'Brien v. Leidinger, 452 F. Supp. 720 (E.D. Va. 1978) (union obtained right to "meet and confer").

11. Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78 (1911). *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973); McGinnis v. Royster, 410 U.S. 263 (1973); Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961).

12. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425 (1961).

13. Among such fundamental rights are privacy, Roe v. Wade, 410 U.S. 113 (1973); voting, Dunn v. Blumstein, 405 U.S. 330 (1972); travel, Shapiro v. Thompson, 394 U.S. 618 (1969); and speech, Mills v. Alabama, 384 U.S. 214 (1966).

14. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973). Suspect classifications include alienage, Graham v. Richardson, 403 U. S. 365 (1971); race, McLaughlin v. Florida, 379 U.S. 184 (1964); and ancestry, Oyama v. California, 332 U.S. 633 (1948). A suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

ality of the classification must be judged by the stricter standard of whether the classification promotes a compelling governmental interest.[15] Distinctions made between public employee labor unions may be subject to either the traditional or the compelling interest standard depending upon whether the classification impairs a fundamental right.[16]

III. THE BATTLE GROUND

A. Right to Checkoff of Union Dues

1. *Truck Drivers Union Local 728 v. City of Atlanta*[17]

In 1977, Local 728, Truck Drivers and Helpers Union brought suit against Atlanta, Georgia, alleging that the city violated the equal protection rights of the union's members by refusing to withhold for the union the dues of its members who were city policemen while withholding dues for the union representing city firefighters.[18] The district court, in *Truck Drivers Union Local 728 v. City of Atlanta*, considered the constitutionality of the city's practice under the traditional equal protection standard. Under that standard, the city's distinction between policemen and firefighters would survive the union's challenge only if it was reasonably related to the furtherance of a legitimate governmental interest.[19] The court applied the traditional standard rather than requiring a showing of a compelling governmental interest because a city's refusal to check off union dues for policemen involves neither a "fundamental right"[20] nor a "suspect class"[21] requiring strict scrutiny of the government's purposes for differentiating among public employee organizations.[22]

Atlanta attempted to justify the line it drew between police employees and other city workers on the ground that a police union presented a threat to both public safety and to property within the city.[23] The court, however, noting that both Atlanta's policemen and firefighters have a duty to protect life and property, could find no reasonable basis for a distinction between policemen and firefighters[24] based upon the city's protection of life and property

15. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

16. *See* University of Mo. v. Dalton, 456 F. Supp. 985, 997 (W.D. Mo. 1978) (Absent a "compelling state interest," once a state university provides the use of its facilities to faculty organizations, it cannot refuse to grant the use of the facilities to one particular faculty organization because that organization promotes collective bargaining.).

17. 468 F. Supp. 620 (N.D. Ga. 1979), *appeal docketed*, No. 79-2247 (5th Cir. May 24, 1979), *remanded*, Sept. 17, 1980.

18. *Id.* at 621.

19. *Id.* at 623.

20. *See* City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283, 286 (1976).

21. *See id.*; Muzquiz v. City of San Antonio, 520 F.2d 993, 1001 (5th Cir. 1975). In Firefighters Local 2069 v. City of Sylacauga, 436 F. Supp. 482 (N.D. Ala. 1977), it was stated that "[a] classification involving a distinction between policemen and firemen has never, to the court's knowledge, been subject to the strict scrutiny afforded suspect classifications." 436 F. Supp. at 489.

22. 468 F. Supp. at 623.

23. *Id.*

24. The dangerous nature of police work, however, has been found to establish a reasonable basis for distinguishing between policemen and city workers other than firefighters. In Confedera-

rationale.[25] The court rejected the claim "that the police in a unique way and through individual discretionary decisions protect life and personal security while the fire department only operates on a team basis to protect property and, on occasion, life."[26]

Because the city's differential classification of policemen and firefighters was without a reasonable basis, the court enjoined the city from withholding from plaintiffs access to the privilege of union dues checkoff.[27] Thus, a union representing certain police officers of Atlanta obtained the valuable right to have union dues withheld by the city, for the benefit of the labor organization, through utilization of the equal protection clause.[28]

2. *City of Charlotte v. Local 660, International Association of Firefighters*[29]

The holding in *City of Atlanta*, while a clear victory for southern public employee labor unions, must be read narrowly. The case stands for the proposition that a unit of government cannot refuse to check off union dues for employees within one of its departments while extending that privilege to employees within another department when no reasonable basis exists for treating the groups differently. The United States Supreme Court's decision in *City of Charlotte v. Local 660, International Associaton of Firefighters*[30] precludes a more expansive interpretation of *City of Atlanta*. In *City of Charlotte* the Supreme Court held that it is not an equal protection violation for a city to refuse to check off union dues for firefighters while withholding moneys from firefighters' paychecks for payment to various other organizations when the city's classification reasonably constitutes a legitimate method of avoiding the financial and administrative burden of withholding money for all organizations requesting it.[31]

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tion of Police v. City of Chicago, 382 F. Supp. 624, 630 (N.D. Ill.), *rev'd on other grounds*, 529 F.2d 89 (7th Cir.), *vacated*, 427 U.S. 902 (1976), the court found that a reasonable basis exists for providing library workers, but not policemen, collective bargaining rights and a formal grievance procedure because police work is "dangerous and important to the public's welfare." *See also* Vorbeck v. McNeal, 407 F. Supp. 733 (E.D. Mo. 1976), *aff'd*, 426 U.S. 943 (1976) (Police officers occupy such a unique place in society that their exclusion from a public employee "meet and confer" statute has a rational relation to a legitimate objective of the state.).

25. 468 F. Supp. at 623.

26. *Id.* at 623-24.

27. *Id.* at 624.

28. The benefit, however, was short-lived. Following the district court's decision, the Atlanta City Council passed an ordinance removing the firefighters from access to dues checkoff. CITY OF ATLANTA, CODE OF ORDINANCES § 7-1033 (1980). This, in effect, dissipated the city's infringement upon the equal protection rights of the policemen. For a discussion of Atlanta's history with dues checkoff for public employee labor unions, see Yancy, *Public Sector Bargaining in the South: A Case Study of Atlanta and Memphis*, INDUSTRIAL RELATIONS RESEARCH ASSOC. SERIES, PROCEEDINGS OF THE THIRTY-SECOND ANN. MEETING, December 28-30, 1979, at 303-05.

29. 426 U.S. 283 (1976).

30. *Id.*

31. *Id.* at 288. See, also, Bauch v. City of New York, 21 N.Y.2d 599, 237 N.E.2d 211, 289 N.Y.S.2d 951 (1968), *cert. denied*, 393 U.S. 834 (1969) in which the court held that it is not an equal protection violation for a city to checkoff dues only for a labor organization certified as the exclusive bargaining agent for all city employees within a department. *Id.* at 606, 237 N.E.2d at 214, 289 N.Y.S.2d at 955. The court held that a city has a legitimate interest in the maintenance of stability in the relations between the city and employee organizations as well as in the avoidance

City of Charlotte began in 1973 when Local 660 of the International Association of Firefighters brought suit against Charlotte, North Carolina, alleging that the city's refusal to check off union dues from the paychecks of city-employed union members while checking off, on request, monies to be paid to various charities, government subdivisions, private insurance companies, and other beneficiaries, violated the equal protection clause.[32] The district court determined that the city allowed a checkoff when required by law, when the checkoff option was available to all city employees, or when the checkoff option was available to all employees within a single employee unit such as the Fire Department.[33] The city did not allow checkoff options serving only single employees or programs that were not available either to all city employees or to all employees engaged in a particular section of city government.[34] The court noted that the city suggested neither a compelling state interest in refusing to withhold moneys for the benefit of Local 660 nor any rational basis for the refusal.[35] The court further found no difference in the state interest involved in the various payroll deductions that justified the discriminatory withholding policy.[36] The court, therefore, held that the city's refusal to check off union dues constituted a violation of the individual plaintiff's rights to equal protection of the laws.[37] The Fourth Circuit Court of Appeals affirmed the district court's order.[38]

In 1976 the Supreme Court found that a reasonable basis existed for the city's classification and reversed the judgment of the Fourth Circuit.[39] The Court reasoned that the city's practice need only meet the standard of reasonableness to survive constitutional scrutiny because neither the firefighter's status as union members nor their interest in obtaining a dues checkoff entitled them to special treatment under the equal protection clause.[40] The Court ruled that the city's practice of allowing withholding only when it benefited all city or

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of devastating work stoppages. *Id.* at 607, 237 N.E.2d at 214, 289 N.Y.S.2d at 955. The city's practice of checking off union dues only for the certified bargaining representative of all employees within a unit was, according to the court, reasonably related to the city's legitimate purposes. *Id.* Unlike New York in the *Bauch* case, Atlanta did not recognize labor unions as exclusive bargaining agents of city employees. The courts consistently have found a reasonable basis for distinguishing between two public employee unions when the union being extended special privileges has been recognized by the governmental unit as the exclusive bargaining agent for certain government employees. *See* Memphis Fed'n of Teachers Local 2032 v. Board of Educ., 534 F.2d 699 (6th Cir. 1976); Federation of Del. Teachers v. De La Warr Bd. of Educ., 335 F. Supp. 385 (D. Del. 1971) (distinction satisfied even a compelling state interest); Local 858, Am. Fed'n of Teachers v. School District No. 1, 314 F. Supp. 1069 (D. Colo. 1970) (distinction satisfied even a compelling state interest).

32. Local 660, Int'l Ass'n of Firefighters v. City of Charlotte, 381 F. Supp. 500 (W.D.N.C. 1974), *aff'd*, 518 F.2d 83 (4th Cir. 1975); *rev'd*, 426 U.S. 283 (1976).

33. *Id.* at 502.

34. *Id.*

35. *Id.*

36. *Id.* at 503.

37. *Id.* at 502-03.

38. Local 660, Int'l Ass'n of Firefighters v. City of Charlotte, 518 F.2d 83 (4th Cir. 1975), *rev'd*, 426 U.S. 283 (1976).

39. City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283 (1976).

40. *Id.* at 286.

departmental employees was a reasonable method for furthering the city's legitimate objective of avoiding the unduly burdensome and expensive task of withholding money for all persons or organizations that requested it.[41] On this point, the Court stated:

> We cannot say that denying withholding to associational or special interest groups that claim only some departmental employees as members and that employees must first join before being eligible to participate in the checkoff marks an arbitrary line so devoid of reason as to violate the Equal Protection Clause. Rather, this division seems a reasonable method for providing the benefit of withholding to employees in their status as employees, while limiting the number of instances of withholding and the financial and administrative burdens attendant thereon.[42]

City of Charlotte and *City of Atlanta* both apply a pragmatic approach to the equal protection problem. Whether a city's dues check-off policy violates equal protection depends upon a court's determination whether the distinction made by the city between similar organizations is reasonably related to a legitimate governmental objective. Undoubtedly, Atlanta's stated objective, to insure the safety of persons and property within its limits, was a legitimate one. However, the city sought to further that objective by denying checkoff of union dues to policemen while providing it to firefighters who also have a duty to protect life and property. Therefore, the city discriminated between two similarly situated groups. In *City of Charlotte*, on the other hand, none of the organizations permitted the privilege of checkoff were situated as closely to the plaintiff Firefighters Union as were the firefighters to the police in *City of Atlanta*. In *City of Atlanta* the city discriminated among various public employee groups. This discrimination between different groups of employees did not exist in *City of Charlotte*. Unless disparate treatment is dealt to similarly situated groups, an equal protection violation will not exist.[43] The more two groups are alike, the harder it is for a court to find a reasonable basis for distinguishing between them. Thus, while courts, like the court in *City of Atlanta*, are hesitant to find a reasonable basis for distinguishing between policemen and firefighters because of the similar nature of their work, they will more

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41. *Id.* at 288. The court also noted that the city's policy of drawing and applying standards in practice rather than pursuant to articulated guidelines was of no import for equal protection purposes. *Id.* at 287.

42. *Id.* at 288. The Supreme Court's decision was followed in Local 995, Int'l Ass'n of Firefighters v. City of Richmond, 415 F. Supp. 325 (E.D. Va. 1976).

43. In Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471 (2d Cir. 1976), the Second Circuit Court of Appeals explained that a governmental unit can defend against an equal protection claim by making a preliminary showing that plaintiff is not similarly situated to the group receiving special privileges. The Second Circuit stated:

> [The public employer] might be able to make a threshold showing that there is no "discrimination" because, as respects the purpose of the privileges granted, the . . . locals are not similarly situated. This would be in accordance with the principle that the equal protection clause does not deny to government the power to treat different classes in different ways, but rather only denies government the power to accord different treatment to persons placed into different classes on the basis of criteria wholly unrelated to legitimate governmental objectives.

Id. at 483.

easily find a reasonable basis for distinguishing between policemen or firefighters and other city employees who do not have a public responsibility to protect life and property.[44]

B. "Meet and Confer" and Collective Bargaining Agreements

In 1975, in a situation similar to *City of Atlanta*, certain police officer members of Teamsters Local No. 592 brought suit against the City Manager and City Council of Richmond, Virginia.[45] The officers alleged that the defendants' refusal to enter into good faith discussions with the union concerning police officers' wages, hours, working conditions, and grievances violated the plaintiffs' equal protection rights because the city discussed these topics with other local unions and representatives of various city employees.[46] As in *City of Atlanta* and *City of Charlotte*, the district court in *O'Brien v. Leidinger*[47] held that only a rational basis need exist for the city's disparate treatment of these police employees.[48] However, the court ruled that plaintiffs "are not bound to speculate as to possible explanations" for the city's classification and refute each one.[49] Rather, the court stated, the government has the burden of offering its reason for treating members of the Teamsters Union differently from members of other unions.[50] Because the city failed to offer any reason for differentiating between the unions,[51] the court concluded that the city was violating plaintiffs' rights to equal protection and that, therefore, plaintiffs had a right to have the city discuss wages, hours, benefits, and grievances with plaintiffs' labor union.[52]

Although the plaintiffs in *O'Brien* had no right under Virginia law to meet and confer with city officials over matters of employee concern, they obtained this privilege for themselves and their union under the equal protection clause because the city offered no reasonable basis for its policy of meeting with other labor unions.

But in *Beauboeuf v. Delgado College*[53] a Louisiana public employee union did not fare as well. In *Delgado* the Fifth Circuit Court of Appeals, in a

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44. *See, e.g.*, Muzquiz v. City of San Antonio, 520 F.2d 993, 1002 (5th Cir. 1975) (It is reasonable to treat policemen and firemen in some respects differently from other employees because of the nature of their work.); Confederation of Police v. City of Chicago, 382 F. Supp. 624 (N.D. Ill. 1974), *rev'd on other grounds*, 529 F.2d 89 (7th Cir.), *vacated*, 427 U.S. 902 (1976) (finding a reasonable basis to distinguish between policemen and library workers).

45. O'Brien v. Leidinger, 452 F. Supp. 720 (E.D. Va. 1978).

46. *Id.* at 722-23.

47. 452 F. Supp. 720 (E.D. Va. 1978).

48. *Id.* at 723.

49. *Id.* at 724.

50. *Id.*

51. Following a motion by defendants to alter or amend the court's judgment, the court expressed its opinion that defendants' decision not to discuss wages, hours, and working conditions with the Teamsters "was a deliberate, tactical action to discourage police officers from association with Teamsters Local Union No. 592." O'Brien v. Leidinger, [1977-78] PUB. EMPL. BARG. (CCH) ¶ 36,343 (E.D. Va. 1978).

52. 452 F. Supp. at 724.

53. 428 F.2d 470 (5th Cir. 1970) (per curiam).

brief opinion in which it did not set forth its analysis of plaintiff's equal protection claim, upheld a district court decision rejecting the union's claim that it was being unlawfully treated differently from other labor organizations.[54] In *Delgado* the American Federation of Teachers, Local 1130, charged that New Orleans, Louisiana, denied it equal protection of the law when Delgado College, an agency of the city, refused to enter into collective bargaining negotiations with the union as agent for the school's faculty members.[55] However, the city bargained with labor unions representing other municipal employees.[56]

The lower court noted that while a government official's action may constitute a denial of equal protection when he or she grants rights to some and denies them to others, the exercise of selectivity is not in itself a federal constitutional violation.[57] Then, without clearly articulating its standard of review, the court stated that it is not unreasonable for a government to give special consideration to its teachers.[58] Apparently for that reason, the district court held that it is not a violation of equal protection for a city to bargain with unions representing employees other than teachers while refusing to bargain collectively with a union representing some, but not all, of its teachers.[59]

The district court in *Delgado* held that public school teachers, and the public employee labor unions that represent them, may be classified differently from other public employees and their unions for purposes of affording the benefits of collective bargaining. Neither the district court nor the court of appeals, however, made a step-by-step equal protection analysis that can be used as guidance by other courts in examining future equal protection claims by public employee unions.[60] Consequently, this case has had little impact on other southern equal protection cases involving public employee labor unions.[61]

C. Use of Facilities

A number of courts have been presented with the question whether a governmental unit violates the equal protection clause by denying use of its facilities to one public employee labor union while allowing a competing union to

54. *Id.* at 471.

55. Beauboeuf v. Dalgado College, 303 F. Supp. 861, 864-65 (E.D. La. 1969), *aff'd per curiam*, 428 F.2d 470 (5th Cir. 1970).

56. The district court found that the city was meeting with representatives of the Teamsters Union to frame a collective bargaining agreement covering sanitation workers; that the Sewage and Water Board had entered into a collective bargaining contract with the American Federation of State, County and Municipal Employees; and that the city had negotiated labor problems with the Firefighters Union. *Id.* at 865.

57. *Id.* at 865-66.

58. *Id.* at 866.

59. *Id.*

60, The circuit court's discussion of the union's equal protection claim merely reads: "We agree with the District Court that this case presents no cognizable issue of . . . equal protection." 428 F.2d at 471.

61. For example, the case is not cited in Memphis Am. Fed'n of Teachers Local 2032 v. Board of Educ., 534 F.2d 699 (6th Cir. 1976); Muzquiz v. City of San Antonio, 520 F.2d 993 (5th Cir. 1975), *aff'd on rehearing*, 528 F.2d 499, *vacated and remanded* 438 U.S. 901 (1978); or O'Brien v. Leidinger, 452 F. Supp. 720 (E.D. Va. 1978).

use the facilities.[62] These cases often involve a situation in which only one of two competing teachers' unions is given the right to use school buildings for meetings and school bulletin boards and mailboxes for communication with the teachers.[63] In *Memphis American Federation of Teachers Local 2032 v. Board of Education of Memphis City Schools*,[64] the issue before the Sixth Circuit Court of Appeals was whether the Memphis, Tennessee, Board of Education violated the constitutional rights of the Memphis American Federation of Teachers ("MAFT") by refusing to extend to it the same rights and privileges previously granted by the Board to another organization of its professional employees, the Memphis Education Association ("MEA").[65]

In 1970 the Memphis Board of Education recognized MEA as the exclusive representative of all professional personnel in the Memphis City Schools.[66] Following recognition, the Board granted MEA certain privileges including the use of school bulletin boards, the use of school facilities for meetings, and the use of interschool and intraschool mail services, including faculty mailboxes.[67] MAFT was denied these privileges and, therefore, challenged on equal protection grounds the Board's policy of granting exclusive privileges to MEA.

The Sixth Circuit ruled that the classification established by the Board need satisfy only the reasonable basis test to survive the constitutional challenge.[68] The court found that the "designation of MEA as authorized representative of the professional employees in the Memphis school system and the concomitant grant of certain privileges involved no . . . fundamental right and did not involve a suspect class."[69] Recognizing that the goal of labor peace and stability is a valid state objective,[70] the court held that the Board's policy of recognizing and attempting to deal only with the union that had as its members the majority of the Board's professional employees promoted this goal.[71] Consequently, the court held that the Board's practice of granting special privileges exclusively to MEA was reasonably related to a valid state ob-

62. *See, e.g.*, Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471 (2d Cir. 1976); Local 2032, Memphis Am. Fed'n of Teachers Local 2032 v. Board of Educ., 534 F.2d 699 (6th Cir. 1976); University of Mo. v. Dalton, 456 F. Supp. 985 (W.D. Mo. 1978); 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. No. 1, 314 F. Supp. 1069 (D. Colo. 1970).

63. *See, e.g.*, Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471 (2d Cir. 1976); Memphis Am. Fed'n of Teachers Local 2032 v. Board of Educ., 534 F.2d 699 (6th Cir. 1976); University of Mo. v. Dalton, 456 F. Supp. 985 (W.D. Mo. 1978); 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. No. 1, 314 F. Supp. 1069 (D. Colo. 1970).

64. 534 F.2d 699 (6th Cir. 1976).

65. *Id.* at 700-01.

66. *Id.* at 701. At the time of the suit MEA had over 90% of the Board's professional employees in its membership. *Id.*

67. *Id.*

68. *Id.* at 703.

69. *Id. See* text accompanying notes 11-16 *supra*.

70. 534 F.2d at 703.

71. *Id.*

jective and thus not violative of the equal protection clause.[72]

The Sixth Circuit's holding in *Memphis City Schools* is consistent with the decisions of other federal courts that have upheld the affording of special privileges only to unions recognized as exclusive bargaining agents.[73] The rationale for distinguishing among public employee labor organizations in this manner was developed in *Local 858, American Federation of Teachers v. School District No. 1*,[74] in which this classification was first challenged in the federal court system. The court in *Local 858* explained how this classification furthers a legitimate government interest:

> It allows the effective exercise of the right to form and join unions in the context of public employment. It provides the duly elected representative ready means of communicating with all teachers . . . . It eliminates inter-union competition for membership within the public schools except at time of representation elections.[75]. . . Finally, all of these benefits resulting from the grant of exclusive privileges to the elected representative serve the principal policy of insuring labor peace in public schools.[76]

A violation of equal protection may occur, however, if a governmental entity distinguishes between two public employee organizations in affording one of them special access to the government's facilities when neither organization is recognized as the exclusive bargaining agent for a group of the government's employees.[77] Furthermore, if the only material distinction that can be drawn between the favored employee organization and the other organiza-

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72. *Id.*

73. *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. No. 1, 314 F. Supp. 1069 (D. Colo. 1970). *But see* Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471 (2d Cir. 1976) (Second Circuit abstained from deciding the equal protection question, pending a definitive determination of certain state law issues by a state tribunal).

While the decisions support the principle that exclusive privileges may be afforded unions recognized as exclusive bargaining agents, there is some disagreement between the courts whether the government's classification of unions for affording special privileges must be judged by the stricter standard of equal protection. At least two courts have indicated that such a classification must be necessary to further a compelling state interest because it infringes upon fundamental first amendment activities. *See* Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471 (2d Cir. 1976); Federation of Del. Teachers v. De La Warr Bd. of Educ., 335 F. Supp. 385 (Del. 1971).

74. 314 F. Supp. 1069 (D. Colo. 1970).

75. The court found that this benefit "has several salutary aspects:"

> Orderly functioning of the schools as education institutions is insured through the limiting of the time span when they may become a labor battlefield. The representative union is not subject to competition within the schools, and thus is better able to function as a representative, its efforts not spent in constant competition with the union that lost the representation election. The fact that the representative's strength is not bled away by such constant high intensity inter-union conflict allows public employees better representation, providing a more beneficial exercise of the right of association.

Id. at 1076.

76. *Id.* "Labor peace means a continuity of ordered collective bargaining between school officials and representatives of the teachers. It means a lowered incidence of labor conflict and strife, thus insuring less interference with the functioning of the public schools as educational institutions." *Id.*

77. *See* University of Mo. v. Dalton, 456 F. Supp. 985 (W.D. Mo. 1978).

tion is that the latter has as one of its goals collective bargaining with the governmental entity while the former does not, the governmental entity must offer a compelling state interest to justify its differing treatment of the two organizations.[78] A decision to deny a public employee union the use of governmental facilities because of the union's advocacy of collective bargaining imposes impediments to the fundamental first amendment rights of free speech and association[79] and therefore requires stricter scrutiny of the government's classification.[80] Thus, even though an employee organization may have no independent "right" to use a government's facilities, the government may not grant the use of a forum[81] to groups whose views it finds acceptable, but deny use of the forum to those wishing to express less favorable or more controversial views, unless the distinction made by the government is tailored to a substantial governmental interest.[82]

IV. CONCLUSION

As the cases discussed demonstrate, the requirements of the equal protection clause have enabled certain southern public employee labor unions to obtain a degree of viability and to fill some of the roles made available to unions in the private sector by federal labor legislation but otherwise denied public employees unions by state and local governments. The privileges that southern public employee unions have obtained became available to them when a government provided the privileges to other similarly situated organizations without sufficient justification for not affording the same privileges to the excluded labor organization. When a government does not grant special privileges to any labor union, or similarly situated organization, a successful equal protection claim cannot be made to obtain special privileges. Thus, a government can insulate itself from having to provide privileges to a particular public employee union by refusing to extend special privileges to any public employee union or similar organization.[83] But if a large and politically powerful public employee union is able to secure special privileges from a govern-

78. *Id.* at 997.

79. *Id.*

80. *Cf.* Police Dep't v. Mosley, 408 U.S. 92, 98-99 (1972) (ordinance restricting labor picketing must "serve a substantial governmental interest"); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (requirement of waiting period before eligibility for welfare benefits must "promote a *compelling* governmental interest").

81. For example, governmental buildings for meetings, and bulletin boards and mail services for communicating with public employees.

82. *See* Police Dep't v. Mosley, 408 U.S. 92, 96 (1972). When a government's classification infringes upon a first amendment right, equal protection claims become intertwined with first amendment interests. The interconnection between these interests is discussed in Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 29-30; Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328, 337-39 (1963).

83. For example, following the district court decision in Truck Drivers Local 728 v. City of Atlanta, 468 F. Supp. 620 (N.D. Ga. 1979), holding that "[s]o long as [Atlanta] is willing to withhold dues from the firemen, it must, under the equal protection clause, make the option open to police employees," the Atlanta City Council passed an ordinance removing firemen from access to dues checkoff. CITY OF ATLANTA, CODE OF ORDINANCES § 7-1033 (1980).

ment, other employee labor organizations may be able to secure these same privileges by utilizing the equal protection clause.

Southern public employee labor unions only recently have been successful in utilizing equal protection arguments. Consequently, the degree to which the courts will sustain the equal protection challenges of public employee unions remains to be seen. It can be assumed, however, that the recent court successes by the unions in the South will encourage public employee labor unions to continue to turn to the equal protection clause in their efforts to secure privileges from state and local governments.