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## Protecting the Free Speech Rights of Insurgent Teachers' Unions: Evaluating the Constitutionality of Exclusive Access to School Communications Facilities

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# PROTECTING THE FREE SPEECH RIGHTS OF INSURGENT TEACHERS' UNIONS: EVALUATING THE CONSTITUTIONALITY OF EXCLUSIVE ACCESS TO SCHOOL COMMUNICATIONS FACILITIES

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As teacher unionization increases,<sup>1</sup> so too do squabbles among rival teachers' unions.<sup>2</sup> Debates over appropriate bargaining positions and other union-related matters spur competition among unions for teacher support. One means by which a union can gain a competitive advantage is by obtaining exclusive access to a school district's internal communications facilities, which normally include the internal mailing system, bulletin boards, and meeting facilities.<sup>3</sup> Not surprisingly, the union serving in a school district as the teachers' exclusive bargaining agent

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1. Ninety-one percent of teachers are unionized. See Levine & Lewis, *The Status of Collective Bargaining In Public Education: An Overview*, 33 LAB. L.J. 177, 177 (1982). In 1981 the National Education Association (NEA) had a total membership of almost 1,680,000 while the American Federation of Teachers (AFT) claimed more than 568,000 members. See Jascourt, *Labor Relations in the Decade Ahead*, 10 J.L. & Educ. 357, 360 (1981). For a discussion of the growth of collective bargaining among teachers, see generally Gee, *The Unionization of Mr. Chips: A Survey Analysis of Collective Bargaining in the Public Schools*, 15 WILLAMETTE L. REV. 367 (1979).

2. The following news report illustrates the current rivalry between the NEA and the AFT:

Long bitter foes, the National Education Association and American Federation of Teachers square off for big representation fights this year. Probable main events: teachers in Dade County, Fla., Oklahoma City and St. Louis. . . . The NEA defeated the AFT in San Francisco last spring, but the smaller union vows to win back the right to represent the 4,342 teachers there.

. . . Such rhetoric and the representation fights suggest any merger is off "for the foreseeable future," an NEA man says.

*A Wider War? The Teachers' Unions Step Up Attacks on Each Other*, Wall St. J., Sept. 22, 1981, at 1, col. 5. See also Vieira, *Exclusive Representation Versus Freedom of Petition for Nonunion Public Employees — A Study in Irreconcilable Constitutional Conflict*, DET. C.L. REV. 499, 525 (1977) ("[B]oth the NEA and the AFT consider and employ exclusive representation as a platform for organizing teachers—and, conversely, as a means for undermining and destroying their rivals."); Gee, *supra* note 1, at 380 ("Even though the two organizations share many common goals, they continue to be locked in a struggle for control of the teacher unionism movement.")

3. See, e.g., *Connecticut State Fed'n of Teachers v. Board of Educ. Members*, 538 F.2d 471, 475 n.2 (2d Cir. 1976).

("EBA") often negotiates for such an exclusive grant in the final collective bargaining agreement.<sup>4</sup> School board policies permitting this exclusive access have been attacked as violative of insurgent union free speech and equal protection rights.<sup>5</sup>

Lower courts are split on this issue.<sup>6</sup> Some hold that a school's

4. See, e.g., *id.* at 475.

Exclusive access necessarily limits the communicative effectiveness of insurgent unions. See *Michigan City Fed'n of Teachers, Local 399 v. Michigan City Area Schools*, 74 Lab. Cas. (CCH) ¶ 10,055, at 16,178 (N.D. Ind. 1973), *vacated on other grounds*, 499 F.2d 115 (7th Cir.) ("[T]hese privileges do affect the ability of [the insurgent] to communicate with its members and all other teachers, especially since such privileges are being extended to the opposing Union . . ." and "a continuation of such treatment would do irreparable damage to the insurgent.").

The motives of the incumbent and the school board were aptly summarized in *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1297 n.41 (7th Cir. 1981), *appeal granted sub nom.* *Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982) ("[B]ecause of the school board's natural interest in quiet and stable labor relations, and [the EBA's] natural interest in self-perpetuation, neither was in a position to assess the costs and benefits of the exclusive-access rule in a disinterested manner or motivated to preserve the institutional interests of the minority.").

5. See, e.g., *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286 (7th Cir. 1981), *appeal granted sub nom.* *Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982); see also Vieira, *supra* note 2 (citing first and fourteenth amendment violations); Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004 (1970) (merging equal protection analysis and labor law principles to find equal protection guarantees for insurgent union speech) [hereinafter cited as Note, *Exclusive Recognition*]; Note, *The Validity of Exclusive Privileges in the Public Employment Sector*, 49 NOTRE DAME LAW. 1064 (1974) (rejecting first amendment application but finding equal protection violations in certain instances) [hereinafter cited as Note, *Exclusive Privileges*].

Free speech protection for government employees has been slow in developing, but recent cases show that government employees do not lose constitutional protections by working in the public sector. See, e.g., *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979) (barring teacher dismissals resulting from criticism of the school district); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (not forcing non-union employees to finance the political involvement of the collective bargaining representative); *City of Madison School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (halting prohibition on non-union speech at school board meeting). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

6. Most courts have upheld the grant of exclusive access. See *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); *North County Fed'n of Teachers, Local 3724 v. North St. Francois County School Dist.*, 103 L.R.R.M. (BNA) 2865 (E.D. Mo. 1979); *Haukedahl v. School Dist. No. 108*, No. 75-C-3641, slip op. (N.D. Ill. May 14, 1976); *Federation of Del. Teachers v. De La Warr Bd. of Educ.*, 335 F. Supp. 385 (D. Del. 1971); *Local 858 of the Am. Fed'n of Teachers v. School Dist. No. 1*, 314 F. Supp. 1069 (D. Colo. 1970); *Clark County Classroom Teachers Ass'n v. Clark County School Dist.*, 91 Nev. 143, 532 P.2d 1032 (1975); *Maryvale Educators Ass'n v. Newman*, 70 A.D.2d 758, 416 N.Y.S.2d 876, *appeal denied*, 48 N.Y.2d 605, 424 N.Y.S.2d 1025 (App. Div. 1979). Two courts have ordered equal access. See *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286 (7th Cir. 1981), *appeal granted sub nom.* *Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982); *Michigan City Fed'n of Teachers, Local 399 v. Michigan City Area Schools*, 74 Lab. Cas. (CCH) ¶

internal communications facilities must be open to all competing unions.<sup>7</sup> Others find it inappropriate to liken a school mailroom to a facility with comparatively unrestricted access, such as a public park,<sup>8</sup> and regard the EBA's special status as sufficient justification for exclusive access.<sup>9</sup> These same courts claim that communication alternatives for insurgent unions are adequate,<sup>10</sup> and envision potential labor strife if equal access to school facilities is provided.<sup>11</sup>

While a school's internal communications facilities are admit-

10,055 (N.D. Ind. 1973), *vacated on other grounds*, 499 F.2d 115 (7th Cir. 1974).

In response to *Connecticut State Fed'n of Teachers v. Board of Educ. Members*, 538 F.2d 471 (2d Cir. 1976), legislation was passed to establish a policy of equal access in Connecticut. Telephone interview with Martin A. Gould, Attorney for the incumbent union (Jan. 27, 1982). The legislation provides that:

All organizations seeking to represent members of the teaching profession shall be accorded equal treatment with respect to access to teachers, principals, members of the board of education, records, mail boxes and school facilities and, in the absence of any recognition or certification as the exclusive representative as provided by section 10-153b, participation in discussions with respect to salaries and other conditions of employment.

CONN. GEN. STAT. § 10-153d (1981).

Some courts have ordered equal access where no union was formally given statutory status as the exclusive bargaining representative. *See, e.g.*, *Jefferson County Am. Fed'n of Teachers, Local 2143 v. Jefferson County Bd. of Educ.*, No. 71-468-S, slip op. (N.D. Ala. Feb. 17, 1972) (giving four unions in a school district the same communications privileges to satisfy the guarantees of the equal protection clause); *Dade County Classroom Teachers' Ass'n, Inc. v. Ryan*, 225 So. 2d 903, 907 (Fla. 1969) (finding that a state statute that disallows any labor union from representing a non-consenting employee or union implicitly requires the school district to enforce a policy of equal access). The lower court in *Memphis Am. Fed'n of Teachers, Local 2032 v. Board of Educ.*, 534 F.2d 699 (6th Cir. 1976), similarly ordered equal access on this ground. *See Memphis Am. Fed'n of Teachers, Local 2032 v. Board of Educ.*, No. C-74-100, slip op. at 5 (W.D. Tenn. Dec. 2, 1974). On appeal, however, the Sixth Circuit found that the school board's policy of treating one union as the exclusive bargaining representative when that union had at least two-thirds of the teachers in the school district as members was sufficient to confer upon the majority the status necessary to justify the grant of the exclusive privileges. The opportunity for such judicial gerrymandering is becoming obsolete outside of the Southeast because the overwhelming majority of states now statutorily recognize some form of collective bargaining for public school teachers. *See generally* *Gee, supra* note 1.

7. *See Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1301 (7th Cir. 1981), *appeal granted sub nom. Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982); *Michigan City Fed'n of Teachers, Local 399 v. Michigan City Area Schools*, 74 Lab. Cas. (CCH) ¶ 10,055 (N.D. Ind. 1973), *vacated on other grounds*, 499 F.2d 115 (7th Cir. 1974).

8. *See, e.g.*, *Connecticut State Fed'n of Teachers v. Board of Educ. Members*, 538 F.2d 471, 480 (2d Cir. 1976); *see also infra* note 21.

9. *See, e.g.*, *Memphis Am. Fed'n of Teachers, Local 2032 v. Board of Educ.*, 534 F.2d 699, 703 (6th Cir. 1976); *see also infra* note 64.

10. *See, e.g.*, *Connecticut State Fed'n of Teachers v. Board of Educ. Members*, 538 F.2d 471, 481-82 (2d Cir. 1976); *see also infra* note 69.

11. *See, e.g.*, *Memphis Am. Fed'n of Teachers, Local 2032 v. Board of Educ.*, 534 F.2d 699, 703 (6th Cir. 1976); *see also infra* note 78.

tedly not open to the public in the sense contemplated by the "traditional public forum" or "limited public forum" cases,<sup>12</sup> a school board's decision to discriminate on the basis of union affiliation is equivalent to discrimination on the basis of the speakers' viewpoints and calls for special justification. Analysis of this viewpoint discrimination and its ostensible justification leads to this Note's conclusion that exclusive EBA access is unconstitutional for communications, such as union proselytizing, not strictly related to EBA activities. Part I examines the traditional and limited public forum doctrines designed to guarantee speakers a right of access to public places, and finds these theories inadequate in the school union setting. Part II explores a recent addition to the free speech/equal protection analysis: the content neutrality doctrine. This doctrine mandates that when a school board allows one union to express its viewpoints, a duty is created to provide equivalent access to all unions, absent a compelling state interest. Part III reviews several justifications for limiting non-EBA access, and finds most of them without merit and none of them adequate to justify the school board's viewpoint discrimination. This Note concludes that an exclusive access policy not strictly related to EBA activities is unconstitutional, and that school boards must provide equal access for insurgent unions.

## I. THE INADEQUACY OF THE PUBLIC FORUM DOCTRINE

Courts are searching continually for a balanced theory that protects free speech rights of speakers on government-owned property while also protecting the government's interest in controlling activities on these facilities. One such theory is the traditional public forum doctrine, and its related counterpart, a limited public forum. Both concepts are useful in cases dealing with conventional arenas of speech. Application in less orthodox forums, however, illuminates the inability of these doctrines to protect all speakers who deserve protection.

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12. "Public forums" are government-owned properties where would-be speakers are guaranteed a right of access, subject to certain limitations. For a discussion of the traditional public forum concept see *infra* notes 13-19 and accompanying text. For a discussion of the more restrictive limited public forum idea see *infra* notes 23-38 and accompanying text.

### A. Traditional Public Forum

Once the government acquiesces to the use of publicly owned property as an open forum for expression, the public may come to expect continued acquiescence, and the government may be estopped from denying any person access to this public forum.<sup>13</sup> These traditional public forums include "streets, sidewalks, parks, and other similar public places . . . historically associated with the exercise of First Amendment rights."<sup>14</sup> In defining similar public places the Supreme Court has been restrictive, denying such status to advertising space on public transits,<sup>15</sup> home letter boxes,<sup>16</sup> military bases,<sup>17</sup> and the grounds outside a jailhouse.<sup>18</sup> When a government facility is deemed a traditional public forum, only even-handed time, place, and manner regulations may be enforced, and these restrictions are allowed only when they serve a significant governmental interest, leave open adequate alternative channels of communication, and remain neutral with regard to the content of the speech.<sup>19</sup>

A school's internal communications facilities fail to qualify as such a historically protected site. Access is restricted to official

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13. The public forum idea first arose in *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.), but lay dormant until *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring). See Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. Many cases have since relied on the doctrine. See *infra* notes 13-18 and accompanying text. See generally Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979); Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233; Comment, *Access to State-Owned Communications Media — The Public Forum Doctrine*, 26 U.C.L.A. L. REV. 1410, 1410-26 (1979).

14. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968).

15. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

16. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

17. *Brown v. Glines*, 444 U.S. 348 (1980); *Greer v. Spock*, 424 U.S. 828 (1976); see also *Persons for Free Speech at SAC v. United States Air Force*, 675 F.2d 1010 (8th Cir. 1982) (en banc). See generally Zillman & 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).

18. *Adderly v. Florida*, 385 U.S. 39 (1966). The often stated justification for limiting the scope of the public forum doctrine was provided in *Adderly*: "The State, no less than a private owner of property, has power to preserve the property under its control for the uses to which it is lawfully dedicated." *Id.* at 47. See, e.g., *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981); *Greer v. Spock*, 424 U.S. 828, 836 (1976).

19. See, e.g., *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980).

communication among teachers and between teachers and the administration.<sup>20</sup> Analogy to a public park is strained and inappropriate.<sup>21</sup> Failure to qualify as a traditional public forum does not mean, however, that the school board may indiscriminately choose those who may gain access and those who may not; it means only that full access for all speakers and all topics is not demanded.<sup>22</sup>

### B. *Limited Public Forum*

Certain forums, admittedly not public in the traditional sense, nevertheless warrant limited protection for expressive activity. When facilities are "created not primarily for public interchange but for purposes closely linked to expression,"<sup>23</sup> a limited public forum may arise. So long as the expressive activity is compatible with the mission of the facility and not disruptive, the courts extend first amendment protection.<sup>24</sup> The Supreme Court provides such protection to schools,<sup>25</sup> public libraries,<sup>26</sup> and state

20. See, e.g., *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1287 (7th Cir. 1981), *appeal granted sub nom. Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982); *Connecticut State Fed'n of Teachers v. Board of Educ. Members*, 538 F.2d 471, 480 (2d Cir. 1976).

21. See *Connecticut State Fed'n of Teachers v. Board of Educ. Members*, 538 F.2d 471, 480 (2d Cir. 1976) (stating that the internal communications facilities "are unlike a street, sidewalk, park, or other similar place so historically associated with the exercise of First Amendment rights"); *North County Fed'n of Teachers, Local 3724 v. North St. Francois County School Dist.*, 103 L.R.R.M. (BNA) 2865, 2868 (E.D. Mo. 1979); *Federation of Del. Teachers v. De La Warr Bd. of Educ.*, 335 F. Supp. 385, 388 (D. Del. 1971); *Local 858 of the Am. Fed'n of Teachers v. School Dist. No. 1*, 314 F. Supp. 1069, 1075 (holding that "those internal channels of school communication . . . are not traditionally of a public nature").

22. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-21 (1978).

23. *Id.* at 690.

24. Compare *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969) (protecting student right to wear armband at school in silent protest), with *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (prohibiting noisy demonstration outside of school).

A vocal minority of the Court has attempted to extend this flexible compatibility test to all access claims to government-owned property where expressive activity is not customarily heard. See, e.g., *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 136-37 (1981) (Brennan, J., concurring in the judgment); *id.* at 149-50 (Marshall, J., dissenting); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 312 (1974) (Brennan, J., dissenting); *Greer v. Spock*, 424 U.S. 828, 859-60 (Brennan, J., dissenting); see also Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975); Note, *The Public Forum in Nontraditional Areas* — *Lehman v. City of Shaker Heights*, 51 WASH. L. REV. 142 (1975).

25. *Widmar v. Vincent*, 102 S. Ct. 269 (1981) (state university facilities); *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969) (high school classroom).

26. *Brown v. Louisiana*, 383 U.S. 131 (1966).

fairs.<sup>27</sup> Lower courts have gone further and included airport terminals,<sup>28</sup> welfare office waiting rooms,<sup>29</sup> courthouse buildings and grounds,<sup>30</sup> state houses,<sup>31</sup> and port authority terminals<sup>32</sup> under the umbrella of the limited public forum concept.

Several restrictions are placed on access to a limited public forum that are not placed on access to the traditional public forum. For instance, only those areas of the government-owned facility used to further the mission of the facility are considered open.<sup>33</sup> Thus, private employee areas not part of the mainstream of the facility's expressive arenas receive no special speech protection.<sup>34</sup> In addition, only speech related to the mission of the forum warrants judicial protection in a limited public forum.<sup>35</sup> Consequently, non-students acting outside of educational roles will not receive the stringent safeguards normally provided students and school speakers.<sup>36</sup> Finally, the manner of the speech must not be "basically incompatible with the normal activity" of the forum.<sup>37</sup> Noisy demonstrations thus fall outside the courts' protection while the right to silent protest is preserved.<sup>38</sup>

While certain school areas may receive the protection of the limited public forum doctrine, the internal communications facilities would not seem to so qualify. The employee-only mailroom can hardly be likened to a classroom, and any further-

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27. *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 298 (1981).

28. *See, e.g., International Soc'y of Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975).

29. *New York City Unemployed and Welfare Council v. Brezenoff*, 677 F.2d 232 (2d Cir. 1982); *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319 (2d Cir.), *cert. denied*, 419 U.S. 838 (1974).

30. *Grace v. Burger*, 665 F.2d 1193 (D.C. Cir. 1981).

31. *Reilly v. Noel*, 384 F. Supp. 741 (D.R.I. 1974).

32. *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968); *Moskowitz v. Cullman*, 432 F. Supp. 1263 (D.N.J. 1977).

33. *See Widmar v. Vincent*, 102 S. Ct. 269, 273 n.5 (1981).

34. *See, e.g., New York City Unemployed and Welfare Council v. Brezenoff*, 677 F.2d 232 (2d Cir. 1982) (holding that outside groups could be limited to the waiting room area of a welfare office to avoid disruption); *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981) (holding that employee-only areas in airport terminals are private).

35. *Widmar v. Vincent*, 102 S. Ct. 269, 273 n.5 (1981).

36. *Id.*

37. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (prohibiting noisy demonstration outside of school); *see also Widmar v. Vincent*, 102 S. Ct. 269, 278 (1981) (granting equal access to student groups to use school facilities because that would not disrupt the school's mission); *New York City Unemployed and Welfare Council v. Brezenoff*, 677 F.2d 232 (2d Cir. 1982) (holding in part that to avoid overcrowding of a welfare office the government could require outside groups to schedule in advance for literature distribution).

38. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

ance of the school's educational mission therein must be considered a secondary result. Indeed, the subject matter of the communications is employment-related, not part of the exchange of ideas considered central to an educational facility.<sup>39</sup>

## II. CONTENT NEUTRALITY AND THE "CREATED" LIMITED PUBLIC FORUM

The traditional public forum and limited public forum doctrines provide protection for expressive activity in relatively conventional settings. Outside such areas, however, courts have until recently been reluctant to halt governmental exclusion of all would-be speakers from a facility. This reluctance stems from the public forum doctrine's focus on the nature of the physical area, not the content of the speech. In contrast, the relatively new "content neutrality" principle focuses more on the substance of speech excluded from a facility. Under this principle, when the government exercises discriminatory access to a facility based on a speaker's viewpoint, it violates the first amendment's central proscription against government censorship.<sup>40</sup> By not opening the forum to speakers with opposing viewpoints the government willfully distorts the "marketplace of ideas."<sup>41</sup> The

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39. *But see* Brief of Appellant at 20, *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286 (7th Cir. 1981), *appeal granted sub nom.* *Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982) (arguing that the teachers' group is not a labor union, but rather a group concerned primarily with the quality of educational instruction in the schools).

40. *See, e.g., Board of Educ. v. Pico*, 50 U.S.L.W. 4831, 4838 (U.S. June 25, 1982) (Blackmun, J., concurring in part and concurring in the judgment) (a "generally applicable First Amendment rule[ ] . . . is the central proscription of content-based regulations of speech"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 553 (1981) (Stevens, J., dissenting in part) ("The essential concern embodied in the First Amendment is that government not impose its viewpoint on the public or select the topics on which public debate is permissible.").

The content neutrality doctrine has both first and fourteenth amendment underpinnings. *See, e.g., Carey v. Brown*, 447 U.S. 455, 463 (1980) (equal protection; dictum suggests first amendment as well); *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (equal protection; dictum suggests first amendment as well); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (plurality opinion) (first and fourteenth amendments); *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n*, 447 U.S. 530, 544 (1980) (first and fourteenth amendments); *First Nat'l Bank of Boston v. Bellotti*, 453 U.S. 765, 784-85 (1978) (first amendment); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (first amendment); *see also Westen, The Empty Idea of Equality*, 95 HARV. L. REV. 537, 560-63 (1982) (arguing that the doctrine can rely only on the first amendment); *Blasi, Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1492-97 (1970) (discussing the first amendment-equal protection merger).

41. *See Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n*, 447 U.S. 530,

following sections apply this content neutrality principle to a school board's exclusive access policy.

### A. *The Content Neutrality Principle*

The content neutrality doctrine has recently become one of the principal judicial tools for protecting free speech.<sup>42</sup> Under this doctrine, when the government limits the access of some — but not all — speakers, the limitation will be scrutinized for its even-handedness.<sup>43</sup> If the prohibition is unrelated to the poten-

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537-38 (1980) ("If the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'") (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972)); *First Nat'l Bank of Boston v. Bellotti*, 453 U.S. 765, 791 (1978) (the first amendment is "plainly offended [in giving] one side of a debatable question an advantage in expressing its views to the people"); *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."); see also Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 100-04 (1978).

There have been many criticisms of the marketplace of ideas rationale for the protection of free speech. See, e.g., Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 974-81 (1978); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 616-19 (1982); Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 129-31 (1981) [hereinafter cited as Redish, *Content Distinction*]. Still, much revisionist theory supports the content neutrality principle. See, e.g., Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521 (arguing that expressive activity should be protected whenever it would serve as a check on the abuse of governmental power).

42. Some have argued that the doctrine should be the primary focus for the protection of free speech. See *Carey v. Brown*, 447 U.S. 455, 471 (1980) (Stewart, J., concurring) (defining the content neutrality principle as "the basic meaning of the constitutional protection of free speech"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 776 (1976) (Stewart, J., concurring) (terming the content neutrality principle "the cardinal principle of the First Amendment"); see also Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1976). But see Redish, *Content Distinction*, *supra* note 41 (arguing that the principle may limit free expression).

43. See, e.g., *Board of Educ. v. Pico*, 50 U.S.L.W. 4831, 4838 (U.S. June 25, 1982) (Blackmun, J., concurring in part and concurring in the judgment) ("[C]ertain forms of state discrimination between ideas are improper. . . . [T]he State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons."). See generally Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Karst, *supra* note 42; Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Stone, *supra* note 41.

Licensing cases also provide support for the content neutrality principle. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-53 (1969) (holding unconstitutional the discriminatory licensing of pickets and parades); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (holding unconstitutional a licensing policy that discriminates against cer-

tial speaker's message, but is designed to regulate the manner of presentation, it will be upheld as content neutral, subject only to a simple balancing test.<sup>44</sup> Thus, a ban on loudspeakers in a residential area affects all speakers on all subjects, and is considered content neutral; conduct, not content, is at issue.<sup>45</sup> Moreover, even if a ban in a non-public forum bars all speakers on a specific subject matter, the limitation may be upheld if the government can provide a legitimate reason for such action.<sup>46</sup> A ban on all political speakers at a military base, for instance, can be justified by showing merely a rational basis for its enactment.<sup>47</sup> If the ban extends only to certain speakers, however, and other speakers with different viewpoints are allowed to speak, the limitation is assumed to be content-based and invalid absent a compelling state interest supporting the prohibition.<sup>48</sup>

The viewpoint neutrality principle has been applied to protect

tain religious groups).

44. See, e.g., *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (upholding a prohibition on inserting unstamped "mailable" mail in home letter boxes as reasonably furthering the goals of protecting mail revenues and ensuring efficient deliveries); see also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981) (plurality opinion) ("[T]he government has legitimate interests in controlling the noncommunicative aspects of the medium. . . .").

45. See *Kovacs v. Cooper*, 336 U.S. 77 (1949).

46. See, e.g., *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) (upholding a prison prohibition on union solicitation and organizational activities while granting other groups communicative channels); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (permitting a city to prohibit only political advertisements on public transits); see also *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (stating that a ban on all employee speakers at an open school board meeting would be permissible); Farber, *supra* note 43. But see Stone, *supra* note 41 (arguing that subject matter restrictions should be given the same scrutiny as viewpoint restrictions).

A common rationale for restricting speech in these non-public facilities is that to further the mission of the facility, the government has an affirmative right to control expressive activity on the facility. See generally Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565 (1980); Tribe, *Toward a Metatheory of Free Speech*, 10 Sw. U.L. Rev. 237, 244-45 (1978); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. 863 (1979). The most recent issue involving government speech is the power of a local school board to remove books from its library. See *Board of Educ. v. Pico*, 50 U.S.L.W. 4831 (U.S. June 25, 1982).

47. *Greer v. Spock*, 424 U.S. 828 (1976) (allowing a military base to ban political speakers while permitting access to other speakers, thus preserving military discipline and the appearance of political neutrality); see also *Brown v. Glines*, 444 U.S. 348 (1980) (upholding a military regulation requiring service members to obtain prior approval for circulating petitions on military bases; *Persons for Free Speech at SAC v. United States Air Force*, 675 F.2d 1010 (8th Cir. 1982) (en banc) (holding that a military base has a legitimate reason in excluding a group protesting the arms race from its open house because it is designed to foster good relations between the military and the community).

48. See *infra* notes 49-52 and accompanying text. See generally Stephan, *supra* note 43.

private speakers over whom the government has control,<sup>49</sup> would-be speakers in places defined as public forums,<sup>50</sup> and expressive activity in government facilities not considered public forums.<sup>51</sup> An example of this latter case arises when a school board allows union representatives to speak on a collective bargaining issue at a school board meeting, but bars non-union speakers seeking to speak on the same issue.<sup>52</sup>

Use of the viewpoint neutrality principle leads to the conclusion that insurgents should have access to a school district's internal communications facilities where the school board exercises viewpoint discrimination by granting one group exclusive access to a non-public forum.<sup>53</sup> The means by which the judiciary often invalidates such regulations which discriminate against

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49. See, e.g., *Consolidated Edison Co. of N.Y., Inc. v. Public Service Comm'n*, 447 U.S. 530 (1980) (invalidating the commission's prohibition on the utility's practice of including monthly billing inserts on controversial political matters); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (striking down a statute which prohibits corporations from making expenditures to publicize views on political matters); *Taxation with Representation of Washington v. Regan*, 676 F.2d 715 (D.C. Cir. 1982) (en banc) (invalidating an IRC provision which allows tax-deductible contributions to lobbying organizations only if their lobbying was not a substantial part of their activities).

50. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (invalidating a city ordinance which restricts some types of billboard messages while favoring temporary political campaign and on-site commercial signs); *Carey v. Brown*, 447 U.S. 455 (1980) (striking down a state statute prohibiting all but peaceful labor picketing in residential areas); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (invalidating a city ordinance banning only films containing nudity from being shown in drive-in theaters); *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (holding unlawful a city ordinance prohibiting all but labor picketing on streets near schools); *Dallas Ass'n of Community Orgs. for Reform v. Dallas County Hospital Dist.*, 670 F.2d 629 (5th Cir. 1982) (holding in part that the discriminatory application of a ban on solicitation in a public hospital unfairly affects one group).

51. See, e.g., *Widmar v. Vincent*, 102 S. Ct. 269, 274 (1981) (finding improper a state university ban on religious student group meetings in university facilities when other student groups were allowed access to these facilities); *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (holding invalid a ban on non-union employee speech at an open school board meeting when union representatives were allowed to speak); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (forbidding a city from excluding a production containing nudity from a municipal theater while permitting access to other productions not containing nudity); *National Black United Fund, Inc. v. Devine*, 667 F.2d 173 (D.C. Cir. 1981) (holding in part that government denial of access to a charity group at a federally sponsored charity drive held at federal workplaces discriminates against the speech of that group); *Jaffe v. Alexis*, 659 F.2d 1018 (9th Cir. 1981) (finding that a state department of motor vehicles discriminates against the speech of a religious group by denying it access to state property); *Jenness v. Forbes*, 351 F. Supp. 88 (D.R.I. 1972) (holding that the military cannot discriminate among political parties in access to a base).

52. See *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976).

53. See *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1293 (7th Cir. 1981), appeal granted *sub nom.* *Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982); see also *Vieira, supra* note 2, at 529-30.

speakers' viewpoints is examined in the following section.

### B. *The "Created" Limited Public Forum and EBA Exclusive Access*

Unable to completely jettison conventional public forum concepts, many courts have coupled the content neutrality principle with a continued emphasis on "public" arenas for speech.<sup>54</sup> Thus, where historically closed government property is the site of a one-sided presentation, many cases suggest that the arena "becomes public" for the limited purpose of balancing the views presented.<sup>55</sup> This approach is fictional and unnecessary;<sup>56</sup> the

54. See *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1293 (7th Cir. 1981), *appeal granted sub nom.* *Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982) (explaining past judicial construction of the public forum doctrine so that the doctrine mistakenly incorporated the content neutrality principle).

55. See, e.g., *Widmar v. Vincent*, 102 S. Ct. 269, 278 n.20 (1981) (certain facilities to which only some student groups were given access became "a public forum created by the university itself"); *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976) (noting that by maintaining a policy of differential access to an open school board meeting "the State has opened a forum for direct citizen involvement"); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 319 (1974) (Brennan, J., dissenting) (by its differential access policy for advertisements "the city has voluntarily opened its rapid transit system as a [public] forum for communication"); *Bonner-Lyons v. School Comm.*, 480 F.2d 442, 444 (1st Cir. 1973) (referring to a bussing group's desire for equal access in the use of the internal mailing system, the court noted: "[O]nce a forum is opened for the expression of views, regardless of how unusual the forum, under the dual mandate of the first amendment and the equal protection clause neither the government nor any private censor may pick and choose between those views which may or may not be expressed."); *University of Mo. v. Dalton*, 456 F. Supp. 985, 997 (W.D. Mo. 1976) ("while the University has no obligation to provide the use of its facilities to faculty organizations, once it does so, it cannot refuse to grant such facilities to one faculty organization in particular" based on their advocacy of collective bargaining); *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951 (Alaska 1978) (holding that the city had created a public forum by its differential access policy of mentioning only some groups in its guide of city services and organizations).

Equal access problems often arise when a school board deviates from an open door policy for use of school meeting facilities and denies access to an outside group because it disagrees with the group's viewpoints on social issues. See, e.g., *Knights of KKK v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973); *Hennessey v. Independent School Dist. No. 4*, 552 P.2d 1141 (Okla. 1976); *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885, 892 (1946) (according to Traynor, J.: "It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand [that speakers conform to its dictates].").

56. Three circuits have recently recognized that the content neutrality doctrine and the public forum doctrines are completely independent safeguards of free speech. See *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1297-98 (7th Cir. 1981), *appeal granted sub nom.* *Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982); *Jaffe v. Alexis*, 659 F.2d 1018, 1020 n.2 (9th Cir. 1981); *National Black United*

first amendment's concern over governmental distortion of the marketplace of ideas should prevail regardless of where such distortion takes place. Nevertheless, this fiction has appeal to those courts unwilling to make a major break with the public forum orientation. For example, in *Widmar v. Vincent*,<sup>57</sup> the Supreme Court held that a state university which allowed some student groups to meet in previously closed facilities must provide access to all non-disruptive student groups.<sup>58</sup> The Court decided that the facilities had been turned into a limited public forum for the expressive activity of student groups.<sup>59</sup>

The plight of the non-EBA insurgent union is similar to that of the barred student group in *Widmar*; it seeks access to a historically closed forum open only to the incumbent. Without such access the insurgent is unable to compete effectively in the marketplace of ideas concerning union representation of teachers' interests. By providing the incumbent EBA with access to a highly efficient internal mailing system, and denying the insurgent comparable access to this facility, the government willfully distorts the marketplace.<sup>60</sup> Courts should therefore grant insurgents equal access through the content neutrality principle, regardless of whether they use the created limited public forum fiction, unless the school board has sufficient reasons for enforcing such a policy.

### III. STATE INTERESTS AND THE STANDARD OF REVIEW

Courts applying the content neutrality principle to test the validity of a differential access policy which creates viewpoint restrictions have used a compelling state interest standard.<sup>61</sup>

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*Fund, Inc. v. Devine*, 667 F.2d 173, 178-79 (D.C. Cir. 1981). The doctrines are viewed as independent safeguards because the public forum cases focus on the government's ability to deny access to a facility irrespective of the speaker's message. In contrast, the content neutrality doctrine assesses how similarly situated speakers are treated wherever they may be speaking. Consequently, the government may deny access to all would-be speakers in a public facility that is not a public forum, but cannot allow only one speaker to present a viewpoint while other speakers are excluded.

57. 102 S. Ct. 269 (1981).

58. *Id.* at 278.

59. *Id.* at 273.

60. What little equality of access may be provided by the school district is usually limited to the period just before EBA elections and then only for the purpose of the election. See, e.g., *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1288 n.2 (7th Cir. 1981), *appeal granted sub nom.* *Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1981).

61. See *supra* notes 49-52 and accompanying text.

This standard can be lowered either when the favored speaker has special status, or where excluded speakers have adequate alternative means of communication. After determining the appropriate standard of review for the school board's exclusive access policy, the sufficiency of the asserted state interest in maintaining the exclusive access policy, ensuring labor peace, is assessed.

### A. *Differential Status and EBA-Related Presentations*

Where two or more competing speakers have equal status, government discrimination against one speaker is unconstitutional: the government is presumably censoring some viewpoint and thus breaching the content neutrality doctrine.<sup>62</sup> The government may overcome this presumption, however, by showing that some status distinction between speakers justifies differential access to the normally closed forum.<sup>63</sup> School boards argue that the EBA status of the incumbent union provides a status distinction justifying exclusive access.<sup>64</sup> This argument is persuasive, but only to the extent that exclusive access is strictly related to EBA activities. Even then, the school board is subject to a balancing test between its interest in limiting access and the insurgent union's interest in gaining access.<sup>65</sup> For instance, information pertaining to the progress of collective bargaining negotiations, or the outcome of grievance hearings, is most efficiently disseminated through the single voice directly involved in those proceedings.

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62. See *supra* note 43 and accompanying text.

63. The underlying constitutional doctrine supporting this principle is the equal protection clause: the government can treat different classes in different ways if it has a legitimate reason for so acting. See, e.g., *Parham v. Hughes*, 441 U.S. 347, 353-57 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 440 U.S. 93 (1976). This principle is implicit in the lower standard of review given to subject matter restrictions where government speech is involved. See *supra* note 46.

64. See *Memphis Am. Fed'n of Teachers, Local 2032 v. Board of Educ.*, 534 F.2d 699, 703 (6th Cir. 1976) ("[T]he special privileges accorded to [the incumbent] were based solely upon its status as a majority representative."); *Local 858, Am. Fed'n of Teachers v. School Dist. No. 1*, 314 F. Supp. 1069, 1077 (D. Colo. 1970) (status distinction justifies incumbent privileges); *Maryvale Educators Ass'n v. Newman*, 70 A.D.2d 758, 416 N.Y.S.2d 876, 878, *appeal denied*, 48 N.Y.2d 605, 424 N.Y.S.2d 1025 (1979) ("[T]he reason why petitioner was denied equal access . . . was [the incumbent union's] status as exclusive bargaining representative.").

65. See *Connecticut State Fed'n of Teachers v. Board of Educ. Members*, 538 F.2d 471, 483 (2d Cir. 1976) (stating that exclusive privileges are permissible if related to EBA duties, but not acceptable if they are used to entrench the majority union). See generally *Note, Exclusive Recognition*, *supra* note 5; *Note, Exclusive Privileges*, *supra* note 5.

The special status of the EBA attaches to a limited range of topics, but often the school board places no real limit on incumbent speech relating to non-EBA topics.<sup>66</sup> The incumbent is allowed to speak not only in its EBA role, but also in its capacity as a union<sup>67</sup> while other unions — indistinguishable with respect to this non-EBA-related speech — are denied an equal opportunity to present their views. To protect these insurgents' rights, only that speech within the exclusive competence of the incumbent union as EBA should justify exclusive access.<sup>68</sup> Proof that speech outside this range receives privileged access should trigger a finding of unconstitutional speech discrimination and require the school board to demonstrate a compelling state interest for its policy.

### B. *Alternative Means of Communication*

An exclusive access policy may be less harmful to the free speech rights of an excluded speaker if feasible alternative methods of communication are available which render the government's channel unnecessary.<sup>69</sup> It seems unfair, however, to ex-

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66. See, e.g., *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1300 (7th Cir. 1981), *appeal granted sub nom.* *Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982) ("The access policy presently in force is . . . overinclusive, because the collective bargaining agreement does not limit [the EBA]'s use of the mail system to messages related to its special legal duties. . . .").

67. See *Vieira, supra* note 2, at 522-23 ("[W]hen NEA or AFT locals distribute union broadsides, newsletters, newspapers, or other materials which report on collective bargaining activities . . . [they] also devote space to attacks on rival unions or nonunion employees.").

68. If the exclusive privilege is limited officially only to EBA-related speech, difficulty remains in distinguishing incumbent speech related only to EBA responsibilities from incumbent speech related to union matters. See, e.g., *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1300 (7th Cir. 1981), *appeal granted sub nom.* *Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982) ("[I]t might be difficult—both in practice and in principle—effectively to separate 'necessary' communications from propaganda.").

Although such lines are admittedly difficult to draw, an equal access rule goes too far, and ignores the legitimate status distinction attached to EBA discussion of exclusive bargaining topics. A more realistic way of ensuring an expansive right for insurgent access is to put the burden of proof that some topic falls "within the exclusive competence of the EBA" on the incumbent union or protesting school board, thus guaranteeing that any uncertainties are resolved in the insurgent's union favor.

69. This argument has been accepted by many courts deciding the equal access issue. See, e.g., *Connecticut State Fed'n of Teachers v. Board of Educ. Members*, 538 F.2d 471, 481-82 (2d Cir. 1976); *North County Fed'n of Teachers, Local 3724 v. North St. Francois County School Dist.*, 103 L.R.R.M. (BNA) 2865, 2868 (E.D. Mo. 1979); *Haukedahl v. School Dist. No. 108*, No. 75-C-3641, slip op. at 7 (N.D. Ill. May 14, 1976); *Local 858, Am. Fed'n of Teachers v. School Dist. No. 1*, 314 F. Supp. 1069, 1076, 1077 (D. Colo. 1970).

pect insurgents to pursue alternate channels when the incumbent is gratuitously communicating its viewpoint with the aid of the government. Thus, the school board's content-based regulation cannot be justified solely on the availability of alternatives for excluded unions,<sup>70</sup> though available alternatives can lower the board's burden of proof in legitimizing its action.<sup>71</sup>

The test for adequate alternatives was established in *Linmark Associates, Inc. v. Township of Willingboro*.<sup>72</sup> A town ordinance prohibited posting "for sale" signs on real estate, thus relegating sellers to newspaper ads and realtor listings.<sup>73</sup> The Supreme Court found increased cost, lower seller autonomy, and less effective media communication combined to render the alternatives inadequate.<sup>74</sup>

School boards and incumbent unions claim that public mail, telephoning, hand delivery of messages during non-working hours, and off-hours conversations provide adequate substitutes.<sup>75</sup> Compared with the ease and effectiveness of a school's internal mailing system, however, these alternatives are no more adequate than those in *Linmark*. Phoning and mailing are costly, and other alternatives demand more time and cause greater inconvenience: many teachers may not be reached as effectively and much information may be lost in the process.<sup>76</sup> Moreover, teacher lists may be unavailable, thus limiting insurgent communications largely to those teachers already part of

70. See, e.g., *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980) ("we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression"); *Schneider v. State*, 308 U.S. 147, 163 (1939) ("One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

71. See, e.g., *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1299 (7th Cir. 1981), *appeal granted sub nom. Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982) ("The only effect of the existence of alternative channels of communication is to lessen the weight of the state interest necessary to justify a restriction on a particular channel and only to the extent that other channels are as effective as the restricted channel.").

72. 431 U.S. 85 (1977).

73. *Id.* at 93.

74. *Id.*; see also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (plurality opinion) (applying *Linmark* to on-site commercial and political signs).

75. See, e.g., *Connecticut State Fed'n of Teachers v. Board of Educ. Members*, 538 F.2d 471, 481-82 (2d Cir. 1976).

76. *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1299 (7th Cir. 1981), *appeal granted sub nom. Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982); cf. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 124 (1981) (explaining that to the extent the home letter box is superior to alternatives for the delivery of a civic association's messages, such as placing material under doormats, it is superior because people expect it in their mailboxes).

the insurgent union.<sup>77</sup> It would be wholly inappropriate to allow a lower standard of review in the face of these inadequate alternatives.

### C. *Preserving Labor Peace*

Another justification for the school board's exclusive access policy stems from fears that equal access will spark labor unrest, conflict, and strikes.<sup>78</sup> It is unlikely that these concerns would materialize, however, merely from granting equal access to insurgent unions.

In meeting the compelling state interest test the school board has the burden of proving educational disruption from "concrete facts, not on mere apprehension or speculation."<sup>79</sup> There has been no evidence of insurgents breaching labor peace, however, once provided equal access;<sup>80</sup> indeed, some evidence indicates that labor peace often accompanies equal access.<sup>81</sup> Moreover, the alleged disruption must be such as to "substantially interfere with the opportunity of . . . students to obtain an education."<sup>82</sup>

77. Telephone interview with Lawrence M. Reuben, Attorney for the insurgent union in *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286 (7th Cir. 1981), *appeal granted sub nom.* *Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982) (Jan. 29, 1982); *see also* Note, *Exclusive Recognition*, *supra* note 5, at 1084.

78. Those courts finding this concern a compelling state interest include: *Haukedahl v. School Dist. No. 108*, No. 75-C-3641, slip op. at 6 (N.D. Ill. May 14, 1976); *Federation of Del. Teachers v. De La Warr Bd. of Educ.*, 335 F. Supp. 385, 389-90 (D. Del. 1971); *Local 858, Am. Fed'n of Teachers v. School Dist. No. 1*, 314 F. Supp. 1069, 1076, 1077 (D. Colo. 1970); *Clark County School Classroom Teachers' Ass'n v. Clark County School Dist.*, 91 Nev. 143, 532 P.2d 1032, 1033 (1975).

Those courts finding a rational relation in furtherance of a legitimate state interest include: *Memphis Am. Fed'n of Teachers, Local 2032 v. Board of Educ.*, 534 F.2d 699, 703 (6th Cir. 1976); *North County Fed'n of Teachers, Local 3724 v. North St. Francois County School Dist.*, 103 L.R.R.M. (BNA) 2865, 2868 (E.D. Mo. 1979); *Maryvale Educators Ass'n v. Newman*, 70 A.D.2d 758, 416 N.Y.S.2d 876, 878, *appeal denied*, 48 N.Y.2d 605, 424 N.Y.S.2d 1025 (1979).

79. *Connecticut State Fed'n of Teachers v. Board of Educ. Members*, 538 F.2d 471, 478 (2d Cir. 1976); *see also* *Healy v. James*, 408 U.S. 169, 189-91 (1972); *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 508-09 (1969); *James v. Board of Educ.*, 461 F.2d 566, 571 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

80. *See* *Vieira*, *supra* note 2, at 552.

81. *See* Brief of Appellants at 8, 12-13, *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, *appeal granted sub nom.* *Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982); Brief for Plaintiff-Appellee at 11-12, *Michigan City Fed'n of Teachers, Local 399 v. Michigan City Area Schools*, 499 F.2d 115 (7th Cir. 1974).

82. *Widmar v. Vincent*, 102 S. Ct. 269, 278 (1981); *see* *Healy v. James*, 408 U.S. 169, 189-91 (1972); *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 513 (1969); *see also* *Pickering v. Board of Educ.*, 391 U.S. 563, 572-73 (1968) (holding that a teacher may criticize the school board through a letter in the school newspaper because it had not "impeded the teacher's proper performance of his daily duties in the classroom or . . .

Only the disruption produced by a strike would qualify as "substantial interfere[nce]"; mere anger or verbal dispute is generally protected.<sup>83</sup> The notion that an equal access policy would cause a strike is fanciful. There is no inherent reason why the distribution of an insurgent union's messages to EBA and other rival union members is more likely to provoke antagonism between these rival unions than the stream of EBA messages to members of an insurgent union.<sup>84</sup>

### CONCLUSION

All teachers' unions in a school district must be given equal access to a school's internal communications facilities for messages relating to union activities, though not for messages pertaining to the duties of the exclusive bargaining agent. An exclusive access policy in favor of the EBA, for non-EBA-related messages, infringes on the free speech rights of insurgent unions. Although the communications facilities are not a public forum, an exclusive access policy discriminates unfairly against the content of insurgent speech. There is no status distinction between insurgents and the EBA for speech unrelated to EBA activities, insurgents do not have adequate alternative means of communication, and insurgents would not disturb the educational process by provoking strikes through their messages. Equal access should be the rule.

—Stephen E. Woodbury

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interfered with the regular operation of the schools generally").

83. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-64 (1976) (opinion of Stevens, J.); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

84. *Perry Local Educators' Ass'n v. Hohl*, 652 F.2d 1286, 1301 (7th Cir. 1981), *appeal granted sub nom. Perry Educ. Ass'n v. Perry Local Education [sic] Ass'n*, 102 S. Ct. 997 (1982); *see also* Vieira, *supra* note 2, at 546 ("Both the NEA and AFT affiliates engage in similar propaganda campaigns. . . . Common experience simply does not support the assertion that one union is more likely than the other to foment discord and disorder in the public schools.").