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THE VALIDITY OF EXCLUSIVE PRIVILEGES IN THE PUBLIC EMPLOYMENT SECTOR

I. Introduction

A. *The Scope of the Issue*

An increasing number of states have statutorily adopted a policy of recognizing an exclusive bargaining representative in the public employment sector.[1] Because the adoption of an exclusive recognition policy casts upon the state the dual role of regulator and employer,[2] the public employment sector is inherently marked by unique problems regarding a minority union's organizational and representational rights vis-à-vis a majority union's contractual exclusive privileges. To illustrate the social, statutory, and constitutional considerations which create difficulty in defining and protecting minority union's rights, this note will focus on the legality of granting solely to an exclusive teachers' bargaining representative certain contractual privileges related to the internal communications system of a school.

Does the scope of permissible exclusivity encompass a majority union's privileges to use bulletin boards, faculty mailboxes, school equipment (for example, mimeograph machines), and the school building while an employer denies these same privileges to a minority union? Do these exclusive privileges constitute unlawful support or interference by the school board? Does the denial of these privileges violate minority union members' first amendment free speech and association rights? Does such discrimination between the majority and minority unions violate the fourteenth amendment equal protection clause? A determination of the validity of exclusive rights involves first deciding what body of law is applicable (labor law, constitutional law or both), then appropriately applying that law within the context of potentially conflicting public policy considerations.

B. *Applicable Law*

The issue of the validity of granting exclusive rights to a majority teachers' union obviously presents an issue of labor relations between employer and employee. When confronted with a minority teachers' union's complaint that a denial of special privileges involving the use of school buildings for meetings free of charge, use of school bulletin boards and teachers' mailboxes except during election campaigns, and a dues check-off denied to the union members their first amendment rights of free speech and association, the Colorado district court in *Local 858 of A.F. of T. v. School District No. 1*[3] relied primarily on labor law. The court established the context for its inquiry in declaring:

1 For a compilation of this statutory authority see Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004 1, at 1004-05 nn.2-9 (1970); 1 CCH LAB. L. REP., STATE LAWS ¶ 40,355 (1971).

2 Eisner, *First Amendment Right of Association for Public Employee Union Members*, 20 LAB. L.J. 438, 442 (1969); Note, *supra* note 1, at 1006.

3 314 F. Supp. 1069 (D. Colo. 1970).

> This case presents a problem of labor relations, and although the problem is in the context of public employment, this does not alter its essential character. Plaintiffs are a labor union and its officials and members, and they are seeking to utilize only those internal channels of school communication which are not traditionally of a public nature for the purpose of furthering the goals of their union. The privilege of dues check off which they claim is peculiarly a matter of labor relations. Thus, we do not accept plaintiffs' characterization of the issue as one of alleged impairment of broad First Amendment rights.[4]

The court did recognize, however, that because the employer is a public entity, the case "presents a departure from classic labor law."[5] Then the court went to great pains to distinguish "the exercise of those rights peculiarly involved in the employer-employee relationship from broader rights of speech and association."[6] This effectively culminated in rendering the constitutional claims as "nothing more than appealing rhetoric" and extending the private employer's negative duty to treat with no other union than the exclusive representative to public employers as well[7] so as to uphold the validity of the enumerated special privileges. Thus, although the court observed the public nature of the employment involved here, it failed to acknowledge that this necessarily places the inquiry into a labor law issue in a constitutional context.

In striking down a school regulation prohibiting teachers from circulating a petition during lunch periods on school premises, the California Supreme Court in *Los Angeles Teachers Union v. Los Angeles City Board of Education*[8] explained the essential difference between private and public employment by noting that "under ordinary circumstances a private employer is not subject to the First Amendment."[9] The absence of any reported decision holding that a private employer must permit similar activity on his premises was, therefore, neither surprising nor dispositive of the issue before the court.[10] In light of these different views a thorough analysis of the problem requires inquiry into both labor and constitutional law considerations.

II. Labor Law Considerations

Although it is not sufficient to impose only labor law principles in the disposition of a public labor controversy, the body of private labor law is an established source to which one can easily and logically turn[11] in an initial analysis of the validity of exclusive privileges. This is an especially appropriate starting point in light of the striking similarities between state public employment statutory

4 *Id.* at 1075.
5 *Id.* at 1074.
6 *Id.*
7 *Id.* at 1075.
8 71 Cal. 2d 551, 455 P.2d 827, 78 Cal. Rptr. 723 (1969).
9 *Id.* at 564-65, 455 P.2d at 835-36, 78 Cal. Rptr. at 731-32.
10 *Id.* at 564, 455 P.2d at 835, 78 Cal. Rptr. at 731.
11 D. Wollett & R. Chanin, The Law and Practice of Teacher Negotiations 6:1-6:4 (BNA 1970).

provisions and the National Labor Relations Act provisions.[12] The relevant provisions of the NLRA are § 7 which establishes rights to union organization, independence, and maintenance and §§ 8(a)(1)-8(a)(3) which make it an unfair labor practice for an employer to interfere with the exercise of § 7 rights, to interfere with the formation or administration of a union or contribute support to it, and to discriminate among unions so as to encourage or discourage union membership.[13]

The decisional law has clearly established that employer interference and support are to be distinguished from mere permissible cooperation with a union. The leading case announcing this concept of cooperation is *Chicago Rawhide Manufacturing Co. v. NLRB.*[14] In that case the United States Court of Appeals for the Seventh Circuit found mere cooperation by an employer in permitting employees to hold elections of committees on company premises and time and to post election notices on bulletin boards, in providing for a nondeduction in salary for time spent on committee business, and in making financial contributions to the Recreation Committee. The court in rejecting the allegation that these activities constituted violations of § 8(a)(1) and 8(a)(2) set forth in an often cited passage its concept of cooperation:

> These two Sections are designed to prevent the employer from having any influence (except by free speech) over unions or the employees' choice thereof. "Support" is proscribed because, as a practical matter, it cannot be separated from influence. A line must be drawn, however, between support and cooperation. Support, even though innocent, can be indentified because it constitutes at least some degree of control or influence. Cooperation only assists the employees or their bargaining representative in carrying out their independent intention. If this line between cooperation and support is not recognized, the employer's fear of accusations of domination may defeat the principal purpose of the Act, which is cooperation between management and labor. . . .[15]
>
> . . .
>
> These acts do no more than evidence the presence of potential means for interference and support, a possibility that is always present to some degree in an employer-employee relationship. But, without evidence of the realization of that potential, they do not furnish a substantial factual basis for an unfair labor practice finding.
>
> The acts complained of show only laudable cooperation with the employees' organization, which represented a majority of the employees, rather than interference or support. . . .[16]

As a result of the cases following *Chicago Rawhide,* the concept of cooperation is liberally applied to encompass a wide variety of miscellaneous privileges

12 *Compare, e.g.,* Labor Management Relations Act (Taft-Hartley Act) §§ 7, 8(a)(1)-(3), 29 U.S.C. §§ 157, 158(a)(1)-(3) (1970) [hereinafter referred to and cited as NLRA], *with* IND. ANN. STAT. §§ 28-4556(a), 28-4557(a)(1)-(3) (Burns Cum. Supp. 1973); MICH. STAT. ANN. §§ 17.455(9), (10) (1968), *as amended,* § 17.455(10)(1) (Current Material 1973); WIS. STAT. ANN. §§ 111.70(2), (3)(a)(1)-(2) (1974).

13 NLRA §§ 7, 8(a)(1)-(3), 29 U.S.C. §§ 157, 158(a)(1)-(3) (1970).

14 221 F.2d 165 (7th Cir. 1955).

15 *Id.* at 167.

16 *Id.* at 170.

granted a majority union and activities by an employer.[17] Apparently a complainant in order to establish that an employer has crossed the boundary line between cooperation and support in violation of § 8 of the NLRA must produce evidence which rather blatantly displays employer domination or support designed to interfere with, restrain or coerce employees in the free exercise of their rights to choose and change their bargaining representative.[18]

A. *Employer Motivation*

Case law suggests at least three possible factors which may limit the scope of cooperation in the context of exclusive privileges. The first of these is the motivation of the employer in negotiating and promulgating rules and regulations whose enforcement provides special rights for the exclusive bargaining agent.

For example, although the United States Court of Appeals for the Seventh Circuit held in *NLRB v. Post Publishing Co.*[19] that a course of conduct whereby an employer permitted the bargaining union to hold meetings on business premises, to print notices on the employer's machines, and to retain a portion of annual profits from the cafeteria and vending machines constituted a form of cooperation, it conditioned its holding by noting the absence of any showing of employer motivation indicating domination or support designed to interfere with the employees' rights to choose and change their representative.[20] The Board in *Crompton-Shenandoah Co.*[21] commented on the limiting effect a showing of motivation could have on a question of cooperation:

> If these instances of clerical aid had occurred in a context of other forms of assistance *revealing an intent to aid* Fibre Workers Associated . . . *or to discriminate against* another labor organization, they might then be considered as illegal assistance by virtue of being part of an overall pattern of conduct.[22]

A showing of motivation also has been used to mitigate the literal application of § 8(b)(2) of the NLRA by qualifying as a defense to charges of union-induced discrimination.[23]

Motivation is especially significant in the public sector where the right to form and join union organizations is a recognized first amendment[24] as well as a common statutory right.[25] When action is justified by a state employer as only

17 *See, e.g.*, Hotpoint Co. v. NLRB, 289 F.2d 683 (7th Cir. 1961); Coppus Engineering Corp. v. NLRB, 240 F.2d 564 (1st Cir. 1957); Heston Corp., 175 N.L.R.B. 96 (1969).

18 NLRB v. Post Publishing Co., 311 F.2d 565 (7th Cir. 1962); *see, e.g.*, Duquesne Univ. of the Holy Ghost, 198 N.L.R.B.—, 81 L.R.R.M. 1091 (1972).

19 311 F.2d 565 (7th Cir. 1962).

20 *Id.* at 569.

21 135 N.L.R.B. 694 (1962) (emphasis added).

22 *Id.* at 697.

23 Philadelphia Typographical Union No. 2, 189 N.L.R.B. 829 (1971); under discussion in this case was "that portion of § 8(b)(2) which makes it an unfair labor practice for a union '. . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . .'" *Id.*

24 314 F. Supp. at 1074; Eisner, *supra* note 2.

25 *See* Note, *supra* note 1, at 1008 nn.22-24.

incidentally restrictive of these rights, a careful investigation should be made to insure that the employer is not using the form of apparently permissible cooperation to disguise an invalid purpose in attempting to dampen legitimate rival union organization and activity.[26]

B. *Labor Peace*

A second limitation on the application of the cooperation concept to the special privileges issue is rooted in the purpose of the NLRA.[27] The desire to encourage and sustain labor harmony gave birth in part to the enunciation of the cooperation concept.[28] Fear of destroying an established amiable employer-employee relationship led the courts and the Board to expand the boundaries of cooperation.[29]

The need for labor harmony is arguably more compelling in the public employment sector.[30] But to the extent that the evidence fails to support a forecast of a reasonable likelihood of substantial disruption,[31] the line between cooperation and unlawful support can and should be drawn at an earlier stage. Otherwise, the risk is increased that competitive union organizational activity will be dampened which would run afoul of the declared purposes of the NLRA.[32]

This line of argument is drawn in part from *Republic Aviation Corp. v. NLRB*[33] and *NLRB v. Babcock & Wilcox Co.*[34] which are cited in *NLRB v. Challenge-Cook Brothers of Ohio, Inc.*[35] as standing for the proposition that an employer cannot interfere with employees' rights to distribute union literature and solicit union interest on company premises during nonworking time absent a demonstration that unusual circumstances exist which make some limitation necessary to maintain management, production, or discipline. This principle was articulately applied in *NLRB v. Mid-States Metal Products, Inc.*[36] in striking down a contractual waiver of employees' rights to distribute materials and solicit in organizing. The court reasoned:

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26 Eisner, *supra* note 2, at 443.
27 NLRA § 1, 29 U.S.C. § 141 (1970).
28 *E.g.*, 221 F.2d at 167.
29 *See* note 17 *supra*.
30 *See* Kennedy & Johnson, *Public and Private Employment—A Double Standard*, 29 FED. B.J. 111, 112, 120 (1969).
31 This test was established in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) as the standard to be met by school officials in order to justify prohibition on school premises of students' free speech. See text accompanying notes 56-57, 77-78 *infra*. Application of the same test in the public labor sector offers an appropriate standard in determining when distribution and solicitation rights can be limited. A similar test is implied in private labor law principles. See text accompanying notes 33-37 *infra*.
32 *See* NLRB v. Mid-States Metal Products, Inc., 403 F.2d 702, 704, 706 (5th Cir. 1968). The court at 706 quotes with approval the following portion of Judge Kiley's dissent in NLRB v. Gale Products, 337 F.2d 390, 392 (7th Cir. 1964):

> The right of freedom to organize belongs to dissidents as well as the bargaining agent, and limiting its exercise by no-solicitation agreements, as the one before us, tends to smother competitive union organizational activity and accordingly militates against the purposes of the Act.

33 324 U.S. 793 (1945).
34 351 U.S. 105 (1956).
35 374 F.2d 147, 153 (6th Cir. 1967).
36 403 F.2d 702 (5th Cir. 1968).

> Where union and employee interests are one it can fairly be assumed that employee rights will not be surrendered except in return for bargained-for concessions from the employer of benefit to employees. But the rationale of allowing waiver by the union disappears where the subject matter waived goes to the heart of the right of employees to change their bargaining representative, or to have no bargaining representative, a right with respect to which the interests of the union and employees may be wholly adverse. Solicitation and distribution of literature on plant premises are important elements in giving full play to the right of employees to seek displacement of an incumbent union. We cannot presume that the union, in agreeing to bar such activities, does so as a bargain for securing other benefits for the employees and not from the self-interest it has in perpetuating itself as bargaining representative.[37]

The court viewed the contractual provision as stripping the employees of fundamental rights guaranteed by the NLRA.[38]

C. *The Bargaining Function*

Behind this reasoning is a recognition of the difference between a union's role as the exclusive bargaining agent and its role as a rival to a minority competitor.[39] This introduces the third limiting factor on the application of the cooperation concept. The difference between these dual roles requires that privileges granted to a majority union be directly related to the exclusive collective bargaining function and not merely to the majority union's self-perpetuation and entrenchment. This limiting factor on the expansive concept of cooperation was clearly defined by the Wisconsin Supreme Court in *Board of School Directors v. Wisconsin Employment Relations Commission:*

> *Those rights or benefits which are granted exclusively to the majority representative,* and thus denied to minority organizations, *must in some rational manner be related to the functions of the majority organization in its representative capacity,* and must not be granted to entrench such organization as the bargaining representative.[40]

The court noted that the validity of the exclusive use of school bulletin boards and teachers' mailboxes was not on appeal before it but that the Wisconsin Employment Relations Commission (WERC) had determined and the circuit court had affirmed that insofar as the use of the physical facilities of the school was related to normal union activities, the privileges had to be extended to the minority union if granted to the majority.[41]

The Michigan Labor Mediation Board adopted the WERC's decision.[42]

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37 *Id.* at 705.

38 *Accord,* NLRB v. Magnavox Co. of Tenn., —U.S.—, 94 S. Ct. 1099 (1974). This case adopts the rationale of *Mid-States* and the Board's decision in Gale Products, 142 N.L.R.B. 1246 (1963), *overruled,* 337 F.2d 390 (7th Cir. 1964).

39 Note, *supra* note 1, at 1006-07.

40 42 Wis. 2d 637, 649, 168 N.W.2d 92, 97 (1969) (emphasis in original).

41 *Id.* at 642 n.3, 168 N.W.2d at 94 n.3.

42 Avondale School Dist. Bd. of Educ. (Avondale Fed'n of Teachers), 1968 Mich. L.M.B. Ops. 518, 525 (trial examiner's opinion).

Thus, if the exclusive privileges are necessary to the union's performance as the exclusive bargaining agent, "a rival organization may be denied all organizational conveniences or advantages except those which are essential to communicating with employees, such as the right to solicit membership during nonworking hours on the premises and the right to handbill or distribute literature at certain times and places."[43] Although this appears merely to reiterate the classic labor law principle announced in *Republic Aviation Corp.* and *Babcock & Wilcox Co.* which vests employees with solicitation and distribution rights absent unusual circumstances,[44] the Michigan Board applies this principle to a situation where the privileges granted are determined to be *necessary* to the majority union in its *bargaining function.*

The practical impact of the WERC's decision is exemplified in a later order which repeated the Commission's prohibition of a majority union's exclusive right to the use of bulletin boards and teacher mailboxes for the posting and distribution of printed matters relating to the internal and organizational activity of the union.[45] These materials included membership applications and fliers describing the union's benefits, philosophy, services, and insurance programs. Such a policy is not incompatible with an exclusive recognition policy. It is clear "the majority organization is entitled to certain benefits in order to effectuate and properly carry out its duties as the majority representative."[46] A standard which requires that the special privileges granted enable the exclusive bargaining union to perform its function as such can thus accommodate exclusive recognition and the protection of minority union's organizational rights.

III. Constitutional Law Considerations

A. *First Amendment Speech and Association Rights*

A constitutional challenge to the validity of exclusive privileges related to the communications system of a school is aimed at more than limiting the applications of the cooperation concept. It essentially is aimed at striking down entirely such privileges as a denial of minority union members' rights of free speech, association, and equal protection.

It is well established that teachers as well as other public employees do not relinquish their first amendment rights[47] as a result of the public nature of their employment.[48] But it is equally well established that the exercise of these rights

43 *Id.*
44 See text accompanying notes 33-37 *supra.*
45 Milwaukee Teachers Union, Decision No. 9258 (W.E.R.C. Oct. 8, 1969) (decision of Wisconsin Employment Relations Commission, previously called Wisconsin Employment Relations Board).
46 Milwaukee Teachers Union, Decision No. 6995-A at 20 (W.E.R.B. March 24, 1966) (decision of Wisconsin Employment Relations Board, subsequently called Wisconsin Employment Relations Commission), *rev'd in part on other grounds sub nom.* Bd. of School Dist. v. WERC, 42 Wis. 2d 637, 168 N.W.2d 92 (1969).
47 U.S. Const. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."
48 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

is subject to reasonable regulations just as in the community at large.[49] The difficulty arises in arriving at a realistic balance between the interests of the teacher as a citizen and the interests of the public employer in insuring the efficient functioning of the public schools as educational institutions.[50]

Employment regulations have been attacked successfully as vague or overbroad deterrents of employees' first amendment rights. In *Friedman v. Union Free School District No. 1*,[51] for example, a New York district court struck down a school regulation prohibiting distribution of all literature by teachers in all areas of school premises at all times. Such a regulation violates even basic labor law principles[52] and it is not surprising that the court found a regulation forbidding a whole range of possible speech without the slightest justification to be an unconstitutionally broad infringement on speech. Once again, however, it should be noted that the constitution does not bar reasonable regulations.[53] The court specifically acknowledged that the issue of distributing union publication and other literature on school property is a proper subject of negotiations.[54]

The court in *Friedman* partially relied on *Los Angeles Teachers Union v. Los Angeles City Board of Education*[55] to support its conclusion. In that case the California Supreme Court held that teachers could not be prohibited from circulating during duty-free lunch periods on school premises a petition relating to the financing of public schools. The court reasoned that the disharmony which naturally results from circulation of a petition on a controversial matter is no greater than the disharmony inherent in permissible discussion among teachers of issues raised in the petition.[56] There was no showing that this possible friction constituted "a clear and substantial threat to order and efficiency in the schools."[57] In light of the fact that "the most effective forum in which and time at which . . . teachers can communicate . . . are the school premises and the hours during which teachers are both gathered together there and free to converse with one another,"[58] there was no acceptable alternative open to the teachers enabling them to carry on their political activity.[59] The court added that the school board could promulgate regulations of general applicability to protect teachers from interruptions in faculty rooms and lunchrooms, but "a prohibition only of interruptions due to circulation of petitions is an unjustifiable discrimination against one type of speech protected by the First Amendment."[60]

It has been suggested that the principles of *Healy v. James*[61] apply to establish that the denial of the use of a school's internal channels of communication

49 *Id.; see also, e.g.*, Cox v. Louisiana, 379 U.S. 536, 554 (1965); Healy v. James, 408 U.S. 169, 192-93 (1972).
50 391 U.S. at 568.
51 314 F. Supp. 223 (E.D. N.Y. 1970).
52 See text accompanying notes 33-37 *supra*.
53 *See* Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1042 (1969); *see also* cases cited in note 49 *supra*.
54 314 F. Supp. at 229.
55 71 Cal. 2d 551, 455 P.2d 827, 78 Cal. Rptr. 723 (1969).
56 *Id.* at 561, 455 P.2d at 833, 78 Cal. Rptr. at 729.
57 *Id.* at 565, 455 P.2d at 836, 78 Cal. Rptr. at 732.
58 *Id.* at 560, 455 P.2d at 833, 78 Cal. Rptr. at 729.
59 *Id.*
60 *Id.* at 562, 455 P.2d at 834, 78 Cal. Rptr. at 730.
61 408 U.S. 169 (1972).

impairs teachers' first amendment protected rights of association to organize and form unions and of free speech.[62] In that case the Supreme Court held that the unjustified denial of official recognition to the campus SDS organization at least indirectly impeded the free association of SDS members by imposing disabilities which in reality deprived the organization of necessary effective means of communication.[63] Without official recognition, the organization had no access to student bulletin boards, the school newspaper and campus meeting places.[64] The court held:

> [T]he Constitution's protection is not limited to direct interference with fundamental rights. . . . [T]he group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the [college] President's action. We are not free to disregard the practical realities.[65]

The finding here of interference with the right of association is rooted in the deprivation of viable means of communication as a consequence of nonrecognition. For all practical purposes, nonrecognition meant nonexistence for the organization.

It is not at all clear that one can reasonably conclude from these cases that the first amendment dictates that school boards must grant to teachers' unions and their members the use of bulletin boards, internal mail system, mimeograph machines, and so on. Given the fact that teachers can freely discuss issues among themselves, engage in political activities,[66] and handbill union literature and solicit membership on the premises during nonworking hours pursuant to classic labor law principles,[67] the denial of these conveniences does not prohibit or present substantial impediments to the exercise of free speech and association. Means of internal communication within a school which are set up to facilitate the efficient operation of educational programs do not have to be turned over to unions to facilitate their organizational activities. These "internal channels of school communication . . . are not traditionally of a public nature for the purpose of furthering goals of . . . union[s]."[68] "[T]here exists no *right* to their use."[69]

B. *Fourteenth Amendment Equal Protection Right*

Once the school board chooses to grant access to these facilities to the majority union, the question becomes one of whether or not such disparate treatment violates the fourteenth amendment equal protection clause[70] by arbitrarily

62 Michigan City Fed'n of Teachers, Local 399 v. Michigan City Area Schools, Civil No. 72 S 94 (N.D. Ind., Jan. 24, 1973).
63 408 U.S. at 181.
64 *Id.*
65 *Id.* at 183.
66 *E.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).
67 See text accompanying notes 33-37 *supra.*
68 314 F. Supp. at 1075.
69 *Id.* at 1076.
70 U.S. Const. amend. XIV provides: ". . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

denying the minority union the same conveniences and advantages in exercising speech and association rights. This, of course, depends on whether or not the distinction drawn between the majority exclusive bargaining representative and the minority union is a justifiable and reasonable classification.

There are traditionally two approaches to the application of the equal protection clause.[71] The "deferential old" equal protection applies a rationality test whereby a classification satisfies constitutional requirements if there exists a rational relationship between the distinction and constitutionally permissible objectives.[72] On the other hand, there is the "interventionist new" equal protection which requires that a classification be necessary to satisfy a compelling state interest.[73] It is this latter test which is invoked in cases involving fundamental interests or suspect classifications.[74] The strict scrutiny test is applicable here where interests of speech and association are involved.[75]

The compelling state interest arguably promoted by disparate treatment of unions as to special privileges is the effective implementation of an exclusive representation policy so as to insure labor peace and stability in the vital area of public education.[76] It is clear, however, that the mere invocation of a recognized compelling state interest in peace and stability in its public institutions falls short of satisfying the constitution. The Supreme Court in *Tinker v. Des Moines Independent Community School District*[77] set forth the standards to be met. Fear of public inconvenience, annoyance, or unrest is insufficient. Rather, school officials must produce "facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities."[78] Absent such a showing of a substantial threat to the order and efficiency of the schools, the unions should be accorded equal treatment.

It is interesting to note that the developing "sliding scale" or the "expanded reasonable means inquiry"[79] also supports the conclusion reached under the strict scrutiny test. Under the means-focused model, the Court would continue to demand that the means employed by the government in limiting constitutional interests be more than reasonable but rather necessary or the least restrictive means.[80]

Equal treatment regarding special privileges does not violate the majority's status as the exclusive bargaining agent. The fourteenth amendment would not bar an employer from granting the majority union use of school facilities necessary to function as the exclusive collective bargaining representative. The equal protection argument focuses on those privileges not directly related to the exclusive agent's bargaining role which in reality serve to entrench the union's majority

71 *See generally* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine of a Changing Court: A Model For a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *See, e.g.,* 314 F. Supp. at 1076.
77 393 U.S. 503 (1969).
78 *Id.* at 514.
79 Gunther, *supra* note 71, at 20-48.
80 *Id.* at 24.

status by discriminating against the minority.[81] Equal treatment as to those privileges unrelated to the collective bargaining process provides for the preservation of the exclusive recognition and collective bargaining policies and the protection of the minority union against unlawful discrimination by recognizing the significant difference between the majority's role as exclusive bargaining agent and as a rival to a minority competitor.[82]

IV. Conclusion

Because of the special opportunities for the exercise of first amendment rights in the public institution of public schools,[83] it is important that care be taken to define and safeguard the rights of a union representing a minority of public employees. Application of both a limited concept of cooperation borrowed from classic labor law and of the fourteenth amendment equal protection clause logically circumscribes the benefits enjoyed by the majority union within the narrow realm of its exclusive representational duties.[84] Setting up the bargaining relationship[85] as the standard against which the validity of special privileges is tested takes into account the realities of the dual roles played by the state as regulator and employer and the exclusive agent as bargaining representative and as a union attempting to perpetuate and entrench its majority status in the face of competing minority unions. Furthermore, such an approach recognizes that the competing policy interests in implementing exclusive recognition in public employment and in protecting the statutory and constitutional rights of minority unions are not mutually exclusive.[86] Both can be effectuated by according equal treatment to public employee unions in all matters not directly related to the collective bargaining process.

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81 Note, *supra* note 1, at 1006-07, 1011; *see also* Commentary, *The Public Employe Relations Act and Pennsylvania Teachers: A Legal Analysis in Light of the January, 1971 Pittsburgh Dispute,* 10 DUQUESNE L. REV. 77, 80 (1971).
82 See text accompanying notes 39-46 *supra.*
83 *E.g.,* 314 F. Supp. at 1074.
84 See text accompanying notes 18-46, 70-82 *supra.*
85 Note, *supra* note 1, at 1032.
86 *Id.* at 1011.