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COMMENTS

PUBLIC SECTOR COLLECTIVE BARGAINING AND SUNSHINE LAWS — A NEEDLESS CONFLICT

Exclusive recognition,¹ long the keystone of collective bargaining in the private sector,² also has become the predominant mode of bargaining in the public sector. In response to the growth in the number of public employees over the past decade and to increasing employee unionization and militancy, a majority of states³ and the District of Columbia⁴ have enacted legislation governing public sector collective bargaining. Most of these statutes authorize the recognition of a single organization as the exclusive representative for the employees.⁵ Others require a majority union to represent the inter-

1. Exclusive recognition means that the organization selected or designated by a majority of the employees of a particular bargaining unit has the obligation and right to act as the sole and exclusive bargaining agent for all the employees of the unit, without regard to their membership or nonmembership in that organization. See M. LEIBERMAN & M. MOSKOW, *COLLECTIVE NEGOTIATIONS FOR TEACHERS* 244 (1966); Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004, 1004 n.1 (1970) [hereinafter cited as *Exclusive Recognition*].

2. D. WOLLET & R. CHANIN, *THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS* 2:24 (1974).

3. Alabama, Alaska, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming. See BNA's GOV'T EMPLOYEE REL. REP. RF-49 51:1011 *et seq.* (1976) [hereinafter cited as GERR]. For an overview of the current status of public sector bargaining statutes see Brown, *Federal Legislation for Public Sector Collective Bargaining: A Minimum Standards Approach*, 5 TOLEDO L. REV. 681, 695-706 (1974). The authorization for collective bargaining in state legislation has been phrased in terms of public employees generally or in terms of specific classifications such as state employees, municipal employees, public school employees, firefighters and policemen. See notes 5-9 *infra*. Postal service employees are granted collective bargaining rights by The Postal Reorganization Act of 1970. 39 U.S.C. §§ 1201-09 (1970). Executive Order No. 11491 provides collective bargaining for federal employees. 34 Fed. Reg. 17609 (1969).

4. Exec. Order No. 70-229 (D.C. 1970), as implemented by DISTRICT PERSONNEL MANUAL ch. 25A (GERR RF-106 51:6011 (1975)).

5. ALASKA STAT. § 14.20.560(a)-(b) (1976) (GERR RF-129 51:1115) (teachers); *id.* § 23.40.100(a)-(b) (GERR RF-129 51:1111-12) (public employees); CAL. GOV'T CODE § 3544 (1976) (GERR RF-112 51:1418-19) (public school employees); CONN. GEN. STAT. ANN. § 7-471(1) (1975) (GERR RF-108 51:1612) (municipal employees); *id.* § 10-153b(e) (Cum. Supp. 1976) (GERR RF-108 51:1625) (teachers); CONN. P.A. 566, L. 1975 § 2 (GERR RF-1038 51:1620) (state employees); DEL. CODE ANN. tit. 14, § 4004 (1975) (GERR RF-104 51:1712) (teachers); *id.* tit. 19, § 1306 (1975) (GERR RF-104 51:1711) (public employees); FLA. STAT. ANN. § 447.307(1) (Cum. Supp. 1976) (GERR RF-89 51:1811) (public employees); GA. CODE ANN. § 54-1305 (1974) (GERR RF-24 51:1911) (firefighters); HAWAII REV. STAT. § 89-8(a)

(Supp. 1975) (GERR RF-126 51:2015) (public employees); IDAHO CODE § 33-1273 (Cum. Supp. 1975) (GERR RF-126 51:2112) (teachers); *id.* § 44-1803 (Cum. Supp. 1975) (GERR RF-20 51:2111) (firefighters); IND. STAT. ANN. § 20-7.5-1-10 (1975) (GERR RF-104 51:2314) (teachers); *id.* § 22-6-4-7 (Cum. Supp. 1976) (GERR RF-104 51:2318) (public employees); IOWA CODE ANN. §§ 20.14-.15 (Cum. Supp. 1976) (GERR RF-93 51:2414-15) (public employees); KAN. STAT. ANN. § 72-5415 (1972) (GERR RF-124 51:2518) (teachers); *id.* § 75-4327(d) (Cum. Supp. 1975) (GERR RF-88 51:2513-14) (public employees); KY. REV. STAT. § 345.030(2) (Cum. Supp. 1976) (GERR RF-124 51:2611) (firemen); ME. REV. STAT. ANN. tit. 26, § 967(2) (Cum. Supp. 1976) (GERR RF-108 51:2815-16) (public employees); *id.* tit. 26, § 979-F (GERR RF-126 51:2822) (state employees); *id.* tit. 26, § 1025 (GERR RF-126 51:2826-27) (university employees); MD. CODE ANN. art. 77, § 160A(e) (1975) (GERR RF-109 51:2912) (public school employees); PRINCE GEORGE'S COUNTY, MD., CODE OF ORDINANCES & RESOLUTIONS ch. 13A-5 (1975) (GERR RF-102 51:2924) (county employees); BALTIMORE, MD., CITY CODE art. 1, § 115, 117(c) (1968) (GERR No. 266, E-4 to E-5) (municipal employees); MASS. GEN. LAWS ANN. ch. 150E, § 4 (Cum. Supp. 1976) (GERR RF-122 51:3012) (public employees); MICH. COMP. LAWS ANN. § 423.211 (1967) (GERR RF-126 51:3113) (public employees); MINN. STAT. ANN. § 179.63(6) (Cum. Supp. 1976) (GERR RF-123 51:3211) (public employees) *id.* § 179.77 (GERR RF-123 51:3215-16); MO. ANN. STAT. § 105.500(2) (Cum. Supp. 1976) (GERR RF-107 51:3411) (public employees); MONT. REV. CODE ANN. §§ 41-2204 to 44-2207 (Cum. Supp. 1975) (GERR RF-112 51:3517) (nurses in health-care facilities); *id.* §§ 59-1603 - 1606 (GERR RF-112 51:3512-14) (public employees); NEB. REV. STAT. § 48-838 (1975) (GERR RF-94 51:3616) (public and utility employees); NEV. REV. STAT. § 288.160(2) (1975) (GERR RF-107 51:3714) (local government employees); N.H. REV. STAT. ANN. § 273-A:8 to :10 (Supp. 1975) (GERR RF-108 51:3813-14) (state employees); N.J. STAT. ANN. § 34:13A-5.3 (Cum. Supp. 1976) (GERR RF-99 51:3912-13) (public employees); NEW YORK CITY, ADMINISTRATIVE CODE ch. 54, § 1173.3.0(1) (1972) (GERR RF-40 51:4162) (municipal employees); N.D. CENT. CODE § 15-38.1-11 (1971) (GERR RF-1 51:4312-13) (teachers); OKLA. STAT. ANN. tit. 11, § 548.4 (Cum. Supp. 1976) (GERR RF-105 51:4513) (firefighters and policemen); *id.* tit. 70, § 509.2 (1972) (GERR RF-105 51:4516) (school employees); ORE. REV. CODE §§ 243.666 - .682 (1975) (GERR RF-104 51:4612-14) (public employees); R.I. GEN. LAWS ANN. § 28-9.1-5 (Supp. 1975) (GERR RF-126 51:4819) (firefighters); *id.* § 28-9.2-5 (1970) (GERR RF-126 51:4821) (policemen); *id.* §§ 28-9.3-3 to -5 (GERR RF-124 51:4815) (teachers); *id.* § 28-9.4-4 (1970) (GERR RF-124 51:4812) (municipal employees); *id.* § 36-11-2 (Supp. 1975) (GERR RF-124 51:4811) (state employees); S.D. COMP. LAWS ANN. § 3-18-3 (1974) (GERR RF-98 51:5011-12) (public employees); TEX. REV. CIV. STAT. ANN. art. 5154-c-1, § 6 (GERR RF-66 51:5212) (Cum. Supp. 1976) (firefighters and policemen); UTAH CODE ANN. § 34-20a-4 (Supp. 1975) (GERR RF-126 51:5311) (firefighters); VT. STAT. ANN. tit. 16, § 1991(a) (Cum. Supp. 1976) (GERR RF-126 51:5425) (teachers); *id.* tit. 21, § 1583 (GERR RF-107 51:5411) (state employees); *id.* tit. 21, §§ 1722(a)(8), 1723 (GERR RF-126 51:5419-20) (municipal employees); WASH. REV. CODE ANN. § 41.59.090 (Supp. 1975) (GERR RF-112 51:5620) (teachers); *id.* § 28B.16.100 (Supp. 1975) (GERR RF-112 51:5623) (higher-education teachers); *id.* § 28B.52.030 (GERR RF-112 51:5622) (community college faculty); *id.* § 41.56.060 (GERR RF-96 51:5612) (local government employees); WIS. STAT. ANN. § 111.70(4)(d)(1) (1974) (GERR RF-99 51:5820) (municipal employees); *id.* § 111.83 (GERR RF-91 51:5813) (state employees); WYO. STAT. ANN. § 27-267 (1967) (GERR RF-94 51:5911) (firefighters). California's Local Public Employee Organizations statute provides that a public agency may adopt rules for certifying representatives including exclusive recognition. CAL. GOV'T CODE § 3507 (West Cum. Supp. 1976) (GERR RF-112 51:1414). Exclusive recognition is provided as well by Executive Order No. 11491, § 10(a) dealing with federal employees, 34 Fed. Reg. 17609 (1969), *as amended*, Exec. Order No. 11616, 36 Fed. Reg. 17319 (1971), and by The Postal Reorganization Act of 1970, 39 U.S.C. § 1203(a) (1971).

ests of all the employees,⁶ though these have been interpreted to authorize exclusive recognition.⁷ A few statutes establish "members only" recognition⁸; still others do not define representative recognition.⁹ It is not surprising that the concept of exclusivity has been extended into the public sector.¹⁰ The widespread adoption of exclusive recognition in private sector state and federal labor legislation¹¹ attests to its success and to its advantages over other forms of recognition.¹²

6. See, e.g., LOS ANGELES COUNTY, CAL., EMPLOYEE RELATIONS ORDINANCE § 9 (1975) (GERR RF-107 51:1430) (county employees); CITY & COUNTY OF SAN FRANCISCO, CAL., ADMINISTRATIVE CODE art. XI.A, § 16.211 (1974) (GERR RF-81 51:1435-1436) (city and county employees); N.Y. CIV. SERV. LAW §§ 204, 206-08 (McKinney 1973) (GERR RF-88 51:4114) (public employees); PA. STAT. ANN. § 217.1 (1968) (GERR RF-129 51:4720) (firefighters and policemen).

7. See, e.g., N.Y. Public Employment Rels. Bd., Rules and Regulations, § 201.9 to .11 (2 CCH LAB. L. REP.—State Laws, N.Y. ¶ 47,427.11 (Oct. 17, 1969)) (adopted pursuant to N.Y. CIV. SERV. LAW § 206 (McKinney 1973)).

8. See, e.g., CAL. GOV'T CODE § 3528 (West Cum. Supp. 1976) (GERR RF-112 51:1414) (state employees); NEB. REV. STAT. § 79-1289 (1967) (GERR RF-94 51:3617) (teachers).

9. See, e.g., ALA. CODE tit. 37, § 450(3) (Cum. Supp. 1973) (GERR RF-69 51:1011) (firefighters); *id.* tit. 55, § 317(3); GA. CODE ANN. §§ 89-1303 to -1305 (1971) (GERR RF-24 51:1911) (firefighters); KY. REV. STAT. §§ 78.470 to .480 (Cum. Supp. 1976) (GERR RF-103 51:2615) (policemen); WASH. REV. CODE ANN. 53.18.030 (Supp. 1974) (GERR RF-112 51:5625) (port district employees).

10. See *Exclusive Recognition*, *supra* note 1, at 1013.

11. See, e.g., 29 U.S.C. § 159(a) (1971); WIS. STAT. ANN. § 111.05(1) (1974).

12. Two other forms of recognition exist. The first is recognition of an organization as the representative of its *members only*. This type of recognition is "inconsistent with the logic of a collective negotiations system [for it] . . . would guarantee maximum instability in the employer-employee relationship [and] would be chaotic and impractical." D. WOLLET & R. CHANIN, *supra* note 2, at 2:22. The second alternative, proportional representation, is consistent with collective bargaining because any agreement reached will apply to all bargaining unit employees. *Id.* at 2:22. It operates through the use of a negotiating council composed of members appointed by the various organizations in proportion to their relative strength in the bargaining unit. The council then deals with the employer. See CAL. EDUC. CODE § 13085 (West 1975), *repealed by* CAL. GOV'T CODE § 3543.3 (West Cum. Supp. 1976). Inherent defects in such a system are that proportional representation divides the representatives on the employees side and transfers the competition of views between the contending organizations to the bargaining table, thereby impairing the process of reaching an agreement through collective negotiations. R. DOHERTY & W. OBERER, *TEACHERS, SCHOOL BOARDS, AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD* 75 (1967). See D. WOLLET & R. CHANIN, *supra* note 2, at 2:22-23. It thus weakens the solidarity of the employees at the bargaining table and permits the employer to use one competing organization against another. See R. DOHERTY & W. OBERER, *supra* at 75-76. For a discussion of other problems arising from proportional recognition see R. DOHERTY & W. OBERER, *supra* at 75-76; D. WOLLET & R. CHANIN, *supra* note 2, at 2:22-23; Note, *Municipal Employment Relations in Wisconsin: The Extension of Private Labor Relations Devices into Municipal Employment*, 1965 WIS. L. REV. 671, 673 [hereinafter cited as *Extension*]. Exclusive recognition, on the other hand, promotes orderliness and stability. D. WOLLET & R. CHANIN, *supra* at 2:23. Exclusivity gives the exclusive organization authority; authority leads to responsibility and a stronger, more mature ap-

The pattern of bargaining under exclusivity is clear. Once a majority union is designated as exclusive representative, minority unions or individual employees need not be accorded equal treatment.¹³ By definition, exclusivity prohibits both minority organizations and individual employees from negotiating a labor agreement.¹⁴ The employer has the positive duty to bargain with the chosen representative and the negative duty to bargain with no other.¹⁵ He must avoid actions that violate the exclusive representative's bargaining rights.¹⁶ In addition, the employer must refrain from initiating action that has the aim of diminishing the effectiveness of the exclusive representative.¹⁷ To violate these duties is to commit unfair or prohibited labor practices.¹⁸

Not only must the public employer reach labor agreements solely through negotiations with the exclusive representatives of the public employee, he also must adhere to the "opening meeting," "anti-secrecy," or "sunshine" laws commanding that formal action by state or local governing bodies be introduced, deliberated upon, and adopted only at public meetings.¹⁹ The potential conflict between these obligations makes the question of what constitutes "negotiating" of a public sector labor agreement one of peculiar and crucial importance. It is necessary to decide precisely which communications to the employer/governing body are part of the bargaining process, and thus to be conducted only by the exclusive representa-

proach toward negotiations. See E. SHILS & C. WHITTIER, *TEACHERS, ADMINISTRATORS, AND COLLECTIVE BARGAINING* 261 (1968); D. WOLLET & R. CHANIN, *supra* note 2, at 2:24. For a discussion of other advantages of exclusivity see *Lullo v. Firefighters*, 55 N.J. 409, —, 262 A.2d 681, 691 (1970); E. SHILS & C. WHITTIER, *supra* at 261; D. WOLLET & R. CHANIN, *supra* note 2, at 2:22-24; *Extension*, *supra* at 108-10, 119.

13. See Exec. Order No. 11491, §§ 7(c), 10(e), 14, 19(d), 20, 21(a), 34 Fed. Reg. 17608-14 (1969), *as amended*, Exec. Order No. 11616, 36 Fed. Reg. 17319 (1971); D. WOLLET & R. CHANIN, *supra* note 2, at 2:24-33.

14. *Exclusive Recognition*, *supra* note 1, at 1011.

15. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944).

16. *Exclusive Recognition*, *supra* note 1, at 1012.

17. *Id.*

18. See, e.g., *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Quaker State Oil Ref. Corp. v. NLRB*, 270 F.2d 40, 45-46 (3d Cir. 1959); *Opinions of Council*, 1 PERB ¶ 1-536 (Apr. 16, 1968).

19. E.g., MASS. GEN. LAWS ANN. ch. 39, § 23A (Cum. Supp. 1975); N.Y. EDUC. LAW § 1708(3) (McKinney 1969); WIS. STAT. ANN. § 66.77 (1974). Approximately 32 other states also have open meeting statutes. For a compilation of this statutory authority see Wickham, *Let the Sun Shine In! Open Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 NW. U.L. REV. 480, 480 n.2 (1975). The statutes generally are interpreted to allow for closed negotiations, provided final action on the tentative agreement is taken in an open-meeting. See notes 85-88 *infra* & accompanying text.

tive. For example, if the governing body holds a regularly scheduled, open meeting while a public employees' labor agreement is under negotiation, the question arises whether the individual employees or a minority organization has a right to appear and speak at such a session.

This issue confronted the Supreme Court of Wisconsin in *City of Madison Joint School District No. 8 v. WERC*.²⁰ Negotiations for a teacher's contract had reached an impasse. At a regularly scheduled school board meeting at which pickets and several hundred teachers were present, the president of the majority organization spoke urging the board to resume negotiations. Immediately thereafter a Mr. Holmquist, speaking for an ad hoc committee of teachers, read a petition requesting that resolution of the fair share provision²¹ issue be deferred. Following the meeting, the board adjourned into executive session to consider the unresolved issues and adopted an offer excluding a fair share provision.²²

The exclusive representative subsequently filed a complaint with the Wisconsin Employment Relations Commission²³ alleging that the school board, by listening to Mr. Holmquist at the meeting, had committed an unfair labor practice: prohibited negotiating with one other than the exclusive collective bargaining agent.²⁴ The WERC's finding that the board had committed such an unfair labor practice²⁵ was affirmed by the circuit court and by the Wisconsin Supreme Court.²⁶

Although both the majority opinion and the dissenting opinion in

20. 69 Wis. 2d 200, 231 N.W.2d 206 (1975).

21. A fair-share provision is a clause in a collective bargaining agreement providing that nonmembers of the exclusive representative's organization pay "their proportionate share of the cost of the collective bargaining process and contract administration. . . ." WIS. STAT. ANN. § 111.70(1)(h) (1975). Such a provision is permissible under the Wisconsin statute. *Id.* § 111.70(1).

22. 69 Wis.2d at ____, 231 N.W.2d at 210-11.

23. The Wisconsin Employment Relations Commission (WERC) is "an administrative body charged with the responsibility of administering statutory policy with respect to both public and private employees." *Id.* at ____, 231 N.W.2d at 208.

24. *Id.* at ____, 231 N.W.2d at 211.

25. The WERC found that the school board had violated Section 111.70(3)(a), which provides: "It is a prohibited practice for a municipal employer . . . 1) To interfere with, restrain or coerce municipal employees in the exercise of their rights [to form labor organizations and to bargain collectively through the representatives of their choice] . . . 4) To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. . . ." WIS. STAT. ANN. § 111.70 (3)(a) (1975) (GERR RF-99 51:5817-18).

26. 69 Wis.2d 200, 231 N.W.2d 206 (1975).

City of Madison recognized the majority union as the exclusive representative for collective bargaining, they differed as to what constituted "negotiating" in public sector collective bargaining. The majority declared that as long as a contract is under negotiation, negotiating occurs whenever an individual teacher or minority organization expresses its views on a negotiable topic at a public meeting. In contrast the dissent distinguished private negotiating sessions from regularly scheduled public meetings, asserting that exclusivity in a bargaining relationship is a concept confined to the sphere of private negotiations. Accordingly, the dissent argued that exclusivity was no bar to the expression, at public meetings, of views on negotiable subjects.

This Comment will analyze the rights of individual employees and of minority organizations to speak at the employer's public meetings, on subjects being negotiated by a public employer and an exclusive representative. The "right to speak" issue may arise in two contexts.²⁷ One context is as in *City of Madison* in which the individual employee or minority organization attempts to speak at a regularly scheduled meeting of the governing body; the other is when a labor agreement bargained for in private is submitted for ratification by the governing body, and the individual employee or minority union attempts to speak at a public hearing.²⁸ As *City of Madison* illustrates, the determination of individual employee and minority union rights depends upon how negotiating is defined. Because of the statutory requirement that meetings held by the governing bodies be open, this problem is unique to the public sector.

In analyzing the question of what should constitute "negotiating" in the public sector this Comment will focus on the immediate implications of the *City of Madison* definition. Also, the validity of this definition will be examined in view of both the significant difference between the public and private sectors and the interplay

27. This is not to imply that the question raised here is unique to a system of collective bargaining providing for exclusive representation as its means of recognition. The same problem can arise under other modes of recognition. See, e.g., *West Valley Fed'n of Teachers, Local 1953 v. Campbell Union High School District* 24 Cal. App. 3d 297, 101 Cal. Rptr. 83, 80 LRRM 2446 (1972) (proportional representation). In that case the court adopted the anomalous position that although a minority teacher's organization that was not represented on the negotiating council was not precluded from presenting proposals to its public employer, it could not do so at a public meeting of the school board, but had to refer its proposal to the negotiating council. *Id.* at ____, 101 Cal. Rptr. at 85, 80 LRRM at 2467.

28. This was the situation in *Board of School Dirs. v. WERC*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969).

between sunshine laws and public sector collective bargaining statutes.

ANALYSIS OF THE CITY OF MADISON DEFINITION

In deciding the central question of whether permitting a minority organization to speak at a board meeting qualifies as bargaining the court in *City of Madison* relied on a dictionary definition of negotiating: "to communicate or confer with another so as to arrive at the settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise" ²⁹ The actions of both the school board and the minority organization, however, did not fulfill that definition. Implicit in this definition is the notion of a give-and-take relationship between two parties across a bargaining table. The school board meeting in *City of Madison* lacked this character; the board neither replied to Mr. Holmquist's petition nor exchanged views with him. ³⁰ Moreover, the minority organization spoke not at a negotiating session but during the public forum portion of a regularly scheduled session of the school board, a time when any citizen is permitted to express his views on matters relating to the public schools. ³¹ In reality, therefore, the court did not rely upon the dictionary definition, rather it defined "negotiating" much more expansively. The court's analysis of Mr. Holmquist's statement evinces a broader definition. Quoting *Board of School Directors v. WERC*, ³² the court stated: "[I]f the minority union representative is permitted to *influence* the decision of the school board by his argument then he is truly 'negotiating.'" ³³ Thus the court defined "negotiating" not as ongoing bargaining between two or more parties, but rather, as an attempt to influence a governing body's decision on a negotiable subject. Presenting a statement at a public meeting easily fell within this broad definition of negotiation.

29. 231 N.W.2d 213, quoting *Board of School Dirs. v. WERC*, 42 Wis. 2d 637, 652, 168 N.W.2d 92, 99 (1969), quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1514(3d ed. 1969).

30. 69 Wis. 2d at ____, 231 N.W.2d at 210 (emphasis supplied).

31. *Id.* at 216 n.5.

32. 42 Wis. 2d 637, 168 N.W.2d 92 (1969).

33. 69 Wis. 2d at ____, 231 N.W.2d at 214. In concluding that Mr. Holmquist's petition constituted such negotiating, the court further noted that he desired to have the fair share proposal deleted from the agreement. *Id.*

IMPLICATIONS OF THE COURT'S DEFINITION

The implications of defining "negotiating" as an "attempt to influence" are far reaching. If logically extended, the definition would preclude any individual or association except the exclusive representative, from appearing and presenting a statement on a negotiable subject at a public meeting of the governing body.³⁴ Certainly, a private citizen is "attempting to influence" the governing body's decision whenever he appears and speaks on a subject under negotiation. Because minority organizations or individual employees have been found to be negotiating by such an appearance, private citizen groups similarly would be precluded. In the private sector, bargaining with outsiders constitutes an unfair labor practice that can be prohibited.³⁵ In the public sector, however, the exclusion of appearances by the public at open meetings would frustrate the purposes of anti-secrecy statutes.³⁶ Furthermore, any attempt to curtail the rights of private citizens to speak on labor matters may well infringe the first amendment right to free speech.³⁷ Therefore, to apply the *City of Madison* definition of "negotiating" arguably would violate the constitutional right to speak on such matters.

Notably, the Wisconsin Supreme Court's application of its definition of negotiating was expanded in *City of Madison* beyond its use in *Board of School Directors*. In *Board of School Directors*, the court preserved the right of the individual employee to appear and speak in his own behalf.³⁸ In *City of Madison*, however, the court failed to make even this distinction, instead prohibiting appearances by teachers in either a personal capacity or as the representative of a minority organization.³⁹

PRIVATE SECTOR LABOR LAW PRECEDENT

Because of the unique problems in public sector collective bar-

34. Although it is arguable that all statements made at public meetings on negotiable subjects will not qualify as an "attempt to influence," in light of the facts of *City of Madison*, it is difficult to imagine such a situation. As the minority noted: "Unless a speaker takes a firm stand on both sides of the fence, it is difficult to see where a statement of position would not be for or against a proposal or proposition." 69 Wis. 2d at ____, 231 N.W.2d at 218.

35. See *NLRB v. Pepsi-Cola Bottling Co.*, 449 F.2d 824, 831 (5th Cir. 1971).

36. See notes 91-94 *infra* & accompanying text.

37. See *NLRB v. American Pearl Button Co.*, 149 F.2d 311 (8th Cir. 1945). See also *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Hague v. CIO*, 307 U.S. 496 (1939).

38. 42 Wis. 2d at ____, 168 N.W.2d at 98-100; see *Exclusive Recognition*, *supra* note 1, at 1016.

39. 69 Wis. 2d at ____, 231 N.W.2d at 211-14.

gaining, private sector principles have limited applicability. Private labor law precedent nevertheless is a valuable and logical aid in analyzing the validity of the "attempt to influence" definition of negotiating,⁴⁰ especially in view of the marked similarities between the provisions of the Wisconsin Municipal Employment Relations Act and those of the National Labor Relations Act.⁴¹

Because the entire negotiating process can be, and is, regularly conducted in private, there are no private sector cases directly on point.⁴² There are, however, situations that parallel attempts by a minority organization or individual employee to speak at public meetings on a subject being negotiated by the employer and the exclusive representative. Controversies in the private sector occur when an individual employee, or several employees acting in concert, present to the private employer a petition concerning conditions of employment, and the employer responds to the demands. Case law suggests that the National Labor Relations Board (NLRB) will not deem a private employer to have negotiated if (1) he in no way encouraged or solicited a petition⁴³ and (2) he neither exhibited an intent to deal nor actually dealt with the persons responsible for the petition.⁴⁴

The *City of Madison* definition thus creates an anomalous situation. Although in the private sector the mere presentation of a petition to an employer does not comprise negotiating, under the Wisconsin court's expansive definition of negotiating as "an attempt to influence," in the public sector such a presentation does constitute negotiating. Moreover, because of the protection provided in the public sector by the anti-secrecy statutes, this broader definition is unwarranted. These statutes assure the exclusive representative

40. D. WOLLET & R. CHANIN, *supra* note 2, at 6:1-4; Note, *The Validity of Exclusive Privileges in the Public Employment Sector*, 49 NOTRE DAME LAWYER 1064, 1065 (1974) [hereinafter cited as *Exclusive Privileges*].

41. Compare Labor Management Relations Act (Taft-Hartley Act) § 8(a)(1)-(5), 29 U.S.C. § 158(a)(1)-(5) (1971) [hereinafter cited as NLRA], with WIS. STAT. ANN. § 111.70(3)(a)(1)-(4) (1974) (GERR RF-99 51:5817). Many other state public sector bargaining statutes are similar to the NLRA. *Exclusive Privileges*, *supra* note 40, at 1065-66.

42. See D. WOLLET & R. CHANIN, *supra* note 2, at 4:1-2.

43. Coast Radio Broadcasting Corp., 151 NLRB 1101, 58 LRRM 1574 (1965); Lawn-Boy Div. Outboard Marine Corp., 43 NLRB 535, 53 LRRM 1342 (1963). See notes 45-46 *infra* & accompanying text.

44. American Printing Co., 173 NLRB 73, 69 LRRM 1238 (1968). See notes 47-48 *infra* & accompanying text. For a discussion of the meaning of "dealing with" see Comment, *Protest Groups and Labor Disputes — Toward a Definition of "Labor Organization"*: Center for United Labor Action, 17 WM. & MARY L. REV. 796, 803-06 (1976).

greater protection than exists in the private sector for they provide that the representative may be present whenever a minority petition is submitted, thereby affording the representative an immediate opportunity to offer countervailing views. In the private sector, however, as petitions are presented in the absence of the majority representative, no such opportunity exists. In view of this anomaly and in view of the private sector precedent, the court's definition of negotiating as "an attempt to influence" appears questionable. For example, in *Lawn-Boy Division Outboard Marine Corporation*,⁴⁵ the NLRB held that during negotiations with the exclusive representative, receipt by company officials of an unsolicited petition coupled with notification to the employees of its receipt was not an unfair labor practice; as stated by the Board, because the corporation "was not responsible for the circulation of the petition, it cannot be found that it sanctioned its circulation . . . simply by informing the employees that it had been received."⁴⁶ Similarly, in *American Printing Co.*,⁴⁷ company officials who met with employees concerning an unsolicited petition were deemed not to have negotiated as they made no counterproposals and thus did not "bargain directly" with the employees.⁴⁸ Therefore, if a private employer merely listens to or receives unsolicited proposals on negotiated subjects, but in no way deals with the employees concerning their proposals, he has not breached his statutory duty to negotiate solely with the exclusive bargaining representative. That the proposals may influence the employer in his dealings with the representative apparently is immaterial.

FUNDAMENTAL DISTINCTIONS BETWEEN THE PUBLIC AND PRIVATE SECTORS

Because government is the public employer, collective bargaining in public employment differs significantly from that in private employment. In the private sector, collective bargaining is shaped pri-

45. 143 NLRB 535, 53 LRRM 1342 (1963).

46. 143 NLRB at 545. *See also* *Coast Radio Broadcasting Co.*, 151 NLRB 1101, 58 LRRM 1574 (1965).

47. 173 NLRB 73, 69 LRRM 1238 (1968).

48. *Id.* at 73-76, 69 LRRM at 1239. *See also* *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944), in which an employer was found to have committed an unfair labor practice by ignoring the exclusive representative and directly making counterproposals to a group of employees who had submitted a list of demands. *Id.* at 683-85.

marily by market forces;⁴⁹ in the public sector, collective bargaining is responsive to both economic and political forces.⁵⁰ Because the true employer is always the public to whom all governmental officials are responsible,⁵¹ public sector agreements, though greatly influenced by economic factors of the market, also are "filtered through the political process" in which strictly economic elements combine with noneconomic considerations to yield a political decision.⁵²

Denying minority organizations and individual employees the right to speak at public meetings impedes the political processes through which public sector collective bargaining should and does function.⁵³ Political officials adopting a collective bargaining agreement can be held responsible to the public at the polls. For this portion of the political process to be responsive and reliable, however, citizens must have knowledge of the issues being negotiated, of their implications, and of alternative proposals to those posed or adopted. Thus the public is entitled to hear not only the views of the majority organization but also those of individual employees and minority organizations. To deny the public access to all the points of view on a proposed collective bargaining agreement is tantamount to denying citizens the information needed to make an intelligent and informed decision through the political process.⁵⁴

Also, individual employees should be accorded the right to speak on negotiable subjects at any public meeting of a governing body because public collective bargaining, as part of the governmental process, requires that "responsible political officials be entitled to, if not obligated to, listen to the views of all those who have an interest in the decision."⁵⁵ Permitting a representative of a minority organization or an individual employee the right to speak on negotiable subjects at public meetings should not constitute negotiating because (1) it gives the complainant no greater role in determining the terms and conditions of employment than he would have had prior to the introduction of collective bargaining into the public

49. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974).

50. *Id.* at 1159.

51. *Id.*

52. *Id.*

53. *See id.* at 1198-99.

54. *Cf. id.* at 1198-99.

55. *Id.* at 1198.

sector;⁵⁶ (2) it gives him no greater access to the employer than the public or majority organization has;⁵⁷ and (3) it does not reduce the advantage which the majority organization, as exclusive bargaining representative, obtains by the collective bargaining process.⁵⁸ At most it reduces the majority union's ability to conceal an absence of unanimous support for its position on every demand; "exclusive recognition has never, in law or in fact, guaranteed the majority union any such right to conceal."⁵⁹

The other significant difference between the private and public sectors arises because the public employer, as a governing body, traditionally acts as a regulator.⁶⁰ Even as it acts as an employer it still is performing an administrative, governmental function; its actions therefore must meet state and federal constitutional standards.⁶¹ Whether a minority organization or individual employee can speak to a public employer who is contemporaneously the governing body must be analyzed within the scope of the protections

56. As Summers, *supra* note 49, points out, "public employees, even without collective bargaining, can and normally do participate in determining the terms and conditions of employment. Many can vote . . . and present arguments in the public forum. Because their terms and conditions are decided through the political process, they have a right as citizens to participate in those decisions which affect their employment." *Id.* at 1160.

57. *Id.* at 1198.

58. *Id.* at 1199.

59. *Id.*

60. Eisner, *First Amendment Right of Association for Public Employee Union Members*, 20 LABOR L.J. 438 (1969); *Exclusive Recognition*, *supra* note 1, at 1006; see D. WOLLET & R. CHANIN, *supra* note 2, at 1:34.

61. U.S. CONST., amend. I provides:

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

The first amendment is made applicable to the states by the due process clause of the fourteenth amendment. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). It is well established that public employees do not relinquish their first amendment rights as a result of the public nature of their employment. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

Many state constitutions possess first amendment counterparts. *E.g.*, CONN. CONST. art. I, § 14; MICH. CONST. art. I, § 3; N.Y. CONST. art. I, § 9; VA. CONST. art. I, § 12; WIS. CONST. art. I, § 4.

In *Los Angeles Teachers Union v. Los Angeles City Bd. of Educ.*, 71 Cal. 2d 551, 455 P.2d 827, 78 Cal. Rptr. 723 (1969), the California Supreme Court explained the essential difference between private and public employment by stating that "[u]nder ordinary circumstances a private employer is not subject to the First Amendment." *Id.* at ____, 455 P.2d at 835-36, 78 Cal. Rptr. at 731-32. But see *Local 858 of A.F. of T. v. School District No. 1*, 314 F. Supp. 1069 (D. Colo. 1970). Confronted with a question of the validity of granting exclusive privileges to the majority union in light of first amendment rights, the court treated the constitutional argument as "nothing more than appealing rhetoric." *Id.* at 1075.

afforded by the first amendment grants of freedom of speech, assembly, petition and association.

Granting exclusive recognition to a majority organization for collective bargaining purposes, therefore, cannot prevent an individual employee or a minority organization⁶² from petitioning their public employer about employment grievances.⁶³ Yet the definition of "negotiating" adopted in *City of Madison* deprives minority organizations and individual employees of the right to petition that governmental body which has both the control over and the power to alleviate grievances.⁶⁴ By defining "negotiating" in such a manner, the Wisconsin court has created a conflict between the public sector collective bargaining statute and a fundamental constitutional right. Accordingly, the statutory scheme may not withstand a constitutional attack under the "vague but inescapable 'overbreadth' or 'less drastic means' tests."⁶⁵ Under this test restrictions on first amendment rights are invalid if they restrain more freedom than is necessary to achieve a legitimate governmental purpose,⁶⁶ for "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly

62. Under the first amendment the nexus between the freedoms of speech and association is sufficiently close that comments on matters of public concern made by groups of individuals acting through an association should receive the same protection as comments made by an individual. See *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967), (extending the ruling of *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964)); *NAACP v. Button*, 371 U.S. 415 (1963). The controlling question is not whether the statements are made individually or in concert, but rather whether there is a compelling state interest justifying an infringement of personal liberty. *NAACP v. Button*, 371 U.S. 415 (1963).

63. The term "grievance" is used here in its generic sense to mean any problem, concern, or complaint. See generally *Jackson v. United States*, 428 F.2d 844 (Ct. Cl. 1970); *Swaaley v. United States*, 376 F.2d 857 (Ct. Cl. 1967). In *Thomas v. Collins*, 323 U.S. 516 (1945), the Court held that grievances for which the right to petition was created were not solely religious or political ones but extended to any field of human endeavor. *Id.* at 531. Cf. *Harrison v. Brotherhood of Ry. & S.S. Clerks*, 271 S.W.2d 852 (Ky. App. 1954) (a union cannot deprive an individual employee of a private right to petition Congress); *Spayd v. Ringing Rock Lodge No. 665*, 270 Pa. 67, ___, 113 A. 70, 73 (1921) (voiding union rule prohibiting members from petitioning legislature in opposition to union's view).

64. See *Exclusive Recognition*, *supra* note 1, at 1015. In *Swaaley v. United States*, 376 F.2d 857, 862 (Ct. Cl. 1967), the Court of Claims held that "whatever rights a civil service employee has under the first amendment include petitions to the head of his own department" In *Lawson v. Housing Authority*, 270 Wis. 269, ___, 70 N.W.2d 605, 608 (1955), the Wisconsin Supreme Court held that Article I, § 4 of the Wisconsin Constitution guaranteed the same rights as those insured by the first amendment of the United States Constitution.

65. See *Eisner*, *supra* note 60, at 442-44.

66. *Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960).

achieved."⁶⁷ The overbreadth test is applied absolutely so that if a governmental action suppresses too much freedom it is unconstitutional and will not be saved by a balancing or weighing of any interest of the state against the rights of citizens.⁶⁸ Under this analysis the constitutional issue in *City of Madison* becomes a question of to what extent freedom to petition must be stifled to maintain the integrity of exclusive recognition.⁶⁹

Exclusive recognition does not require a denial of minority organizations' and individual employees' rights of petition. The concept of exclusivity alone does not prohibit a public employer from receiving, at public meetings, communications from either minority organizations or individual employees.⁷⁰ As one authority has stressed, "everyone can be entitled to present his view even if precluded from negotiations per se."⁷¹ Moreover, the policies supporting exclusive recognition may be better fulfilled by allowing minority organizations and individual employees to testify at such meetings. The exclusive representative, for example, would be compelled to observe its statutory duty to represent all the employees in the collective bargaining unit without regard to membership in the majority organization.⁷² Furthermore, as it is possible with a majority union representing only 51 percent of the employees, for 26 percent to pass proposals binding upon all,⁷³ one of the dangers of exclusivity lies in the representative's opportunity to abuse its favored position. Permitting minority statements at public meetings, however, would protect against such abuse, thus preserving the integrity of exclusivity by exposing any unsupported proposals of the majority union.

The exclusive representative's statutory position as sole bargaining agent would not be endangered if minority speech were permitted, because the right to petition does not raise a correlative constitutional duty on the part of the public employer to negotiate, re-

67. *Id.* at 488 (footnote omitted).

68. *United States v. Robel*, 389 U.S. 258, 268 n.20 (1967).

69. As noted, exclusivity is the most workable method of recognition in a collective bargaining scheme; its use, therefore, should not be in question. See note 12 *supra* & accompanying text.

70. See R. DOHERTY & W. OBERER, *supra* note 12, at 77, quoting T. STINNET, J. KLEINMAN & M. WARE, PROFESSIONAL NEGOTIATIONS IN PUBLIC EDUCATION 42 (1966); M. LIEBERMAN & M. MOSKOV, *supra* note 1, at 116; E. SHILS & C. WHITTIER, *supra* note 12, at 77; *Extension*, *supra* note 12, at 679.

71. M. LIEBERMAN & M. MOSKOV, *supra* note 1, at 116.

72. See *Vaca v. Sipes*, 386 U.S. 171 (1967); Exec. Order No. 11491 § 10 E, 34 Fed. Reg. 17608 (1969), as amended, Exec. Order No. 11616, 36 Fed. Reg. 17319 (1971).

73. E. SHILS & C. WHITTIER, *supra* note 12, at 216.

spond to, or otherwise redress the grievance.⁷⁴ All that the public employer is required to do is to receive the petition.⁷⁵

In addition to the first amendment problem, the rights of individual employees also must be measured against the equal protection requirements of the fourteenth amendment.⁷⁶ As exclusivity in bargaining is required for a functional bargaining process in the public sector,⁷⁷ the distinction between majority organizations on the one hand and minority organizations and individual employees on the other is a justifiable and permissible classification premised on a compelling state interest—stable and peaceful labor relations in public employment.⁷⁸ Although the concept of granting representation to an exclusive group may fulfill the requirements of equal protection in the abstract, it does not follow that every action taken by an employer and by the exclusive representative will be constitutionally acceptable. In essence, the question is: Does the special privilege conferred upon the majority organization relate directly to the proper execution of its duties as the exclusive representative? The test for determining the validity of such exclusive privileges has been delineated by the Wisconsin Supreme Court, which stated: "Those rights or benefits . . . must in some rational manner be related to the function of the majority organization in its representative capacity and must not be granted to entrench such organization as the bargaining representative."⁷⁹ Yet the *City of Madison* definition of "negotiating" may create an unwarranted exclusive privilege for the majority organization: that is, the sole right to speak for all

74. See *Exclusive Recognition*, *supra* note 1, at 1016.

75. This is not to say that in dealing with dissident factions the employer may not exceed his duty to receive a petition and thus commit an unfair labor practice. See notes 47-48 *supra* & accompanying text.

76. U.S. CONST. amend. XIV provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

77. See note 12 *supra*.

78. *Exclusive Recognition*, *supra* note 1, at 1099; *Exclusive Privileges*, *supra* note 40, at 1073. See Local 858 of A.F. of T. v. School District No. 1, 314 F. Supp. 1069 (D. Colo. 1970) (implication).

79. *Id.* at ____, 168 N.W.2d at 97, quoting the declaratory ruling of the WERC (emphasis supplied by the court). Valid privileges for the exclusive representative include: checkoffs; organizational use of the public employer's facilities for meetings; union security; use of public employer's internal means of communication. D. WOLLETT & R. CHANIN, *supra* note 2, at 2:29; see *Board of School Dirs. v. WERC*, 42 Wis. 2d 637, ____, 168 N.W.2d 92, 97-98 (1969); *Exclusive Privileges*, *supra* note 40, at 1069-70, 1073-74; *Exclusive Recognition*, *supra* note 1, at 1010-11, 1023-30. But see Local 858 of A.F. of T. v. School Dist. No. 1, 314 F. Supp. 1069, 1074-77 (D. Colo. 1970); *Bauch v. City of New York*, 21 N.Y.2d 599, 237 N.E.2d 211, 289 N.Y.S.2d 951, cert. denied, 393 U.S. 834 (1968).

the employees of a bargaining unit at public meetings.⁸⁰ For, as noted previously, maintaining exclusivity does not preclude individual employees and minority unions from speaking on negotiable subjects at public meetings;⁸¹ indeed, allowing others to speak may enhance the effectiveness of exclusivity.⁸² Moreover, "[i]t is doubtful that public comment from any source will undermine the collective bargaining role of the exclusive representative,"⁸³ as that representative maintains the sole right to meet with the public employer in closed sessions during which the "give and take" of true negotiations takes place. Finally, it is anomalous to prohibit the speech of individual employees or minority organizations on negotiable subjects, yet to allow the general public to express their views at open meetings. The words of a citizen alone, or through an organization, sometimes might have as great or greater an influence than an individual employee or minority organization.⁸⁴ Thus, the court's definition of "negotiating" in *City of Madison* may violate the equal protection clause by impermissibly distinguishing between public employees and other citizens who attend public meetings.

80. Whether the result of the court's definition can be characterized as an exclusive privilege is debatable. The exclusive representative's sole right to speak at public meetings of the governing body both possesses and lacks characteristics of an exclusive privilege. The right is similar to such a privilege in that it does confer upon the majority organization an important advantage. By permitting the exclusive representative to speak unhindered by other employee organizations or individual employee presentations, the exclusive representative is given a valuable forum in which to publicize its position, derogate its opposition, and win the public favor. This sole right to petition a governmental body is not granted in the private sector in which a union may not prohibit even its own members from personally petitioning a governmental body in opposition to the union position. See *Harrison v. Brotherhood of Ry. & S.S. Clerks*, 271 S.W.2d 852 (Ky. App. 1954); *Spayd v. Ringing Rock Lodge No. 665*, 270 Pa. 67, ___, 113 A. 70, 73 (1921). In *City of Madison*, the court has allowed the majority organization to stifle all employee presentations, even those of the organization's members speaking as individuals. 69 Wis. 2d at ___, 231 N.W.2d at 211.

Unlike an exclusive privilege, however, the right is not granted pursuant to negotiations between the exclusive representative and the public employer. Thus it is arguable that the right is a part of the public employer's obligation to bargain solely with the exclusive representative and is not an exclusive privilege.

Nonetheless, whether the right is an exclusive privilege or merely a part of the "obligation to bargain" seems immaterial. For, if the right is an exclusive privilege, the test enumerated above, see note 79 *supra* and accompanying text, is clearly applicable; if it is not an exclusive privilege, the test is appropriate by analogy. Not only do some exclusive privileges fail to satisfy equal protection requirements, but also some types of negotiating fail. For only negotiating that is essential for maintaining an effective public sector collective bargaining process should be deemed to fulfill the requirements of the fourteenth amendment.

81. See notes 70-71 *supra* & accompanying text.

82. See notes 72-74 *supra* & accompanying text.

83. *Exclusive Recognition*, *supra* note 1, at 1016.

84. *Cf. Summers*, *supra* note 49, at 1198-99.

RELATIONSHIP BETWEEN "ANTI-SECRECY" AND COLLECTIVE BARGAINING STATUTES

Introduction of collective bargaining into the public sector presents a threshold question of whether collective negotiations can be conducted in private sessions.⁸⁵ The sunshine statutes in effect in a majority of states necessitate this determination.⁸⁶ Under such statutes, parties generally select their respective negotiators or negotiating teams, formulate proposals, instruct their respective teams accordingly, and then proceed with the actual negotiations in closed sessions.⁸⁷ The tentative agreement and its final adoption, however, must be considered in open meeting.⁸⁸ All regularly scheduled meetings of the governing body also must be open to the public.⁸⁹ The sunshine laws, therefore, apparently permit individual employees and minority organizations to appear and address the governing body at its open meetings.

By defining "negotiating" to include statements made by individual employees and minority organizations at such meetings, the Wisconsin Supreme Court has created a conflict between the open-meeting law and the public sector collective bargaining statute.⁹⁰ Such a definition frustrates the policy expressed in the Wisconsin open-meeting statute of public access "to the fullest and most complete information regarding the affairs of government"⁹¹ during pub-

85. In the private sector, collective negotiations have long been conducted in closed meetings in the belief that such negotiations cannot be successful under scrutiny of the public eye. D. WOLLETT & R. CHANIN, *supra* note 2, at 4:1.

86. See note 19 *supra* & accompanying text.

Those states that have enacted some type of public sector collective bargaining statute and sunshine law include: Alabama, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah, Vermont, Washington, Wisconsin. See Wickham, *Let the Sun Shine In! Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 NW. U.L. REV. 480, 480 n.2 (1973).

87. *Basset v. Braddock*, GERR No. 396, E-1 (Apr. 12, 1971), *aff'd*, 262 So. 2d 425 (Fla. 1972); see *Talbot v. Concord School District*, 114 N.H. 532, 323 A.2d 912 (1974); 54 OP. ATT'Y GEN. WIS. vi (1965). A number of statutes authorizing collective bargaining in the public sector exempt negotiating sessions from the open-meeting statutes. *E.g.*, ALASKA STAT. § 14.20.560(e) (1976) (GERR RF-129 51:1115); IOWA CODE ANN. § 17.3 (Cum. Supp. 1976) (GERR RF-86 51:2415); NEV. REV. STAT. § 288.220 (1975) (GERR RF-107 51:3717).

88. See note 19 *supra*.

89. See note 19 *supra* & accompanying text.

90. *Cf. Edwards, The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885 (1973); *Exclusive Recognition*, *supra* note 1, at 1197.

91. WIS. STAT. ANN. § 66.77(1) (Cum. Supp. 1976).

lic meetings "open to all citizens at all times."⁹² The court's definition, therefore, thwarts the basic purposes for adopting such anti-secrecy statutes; for permitting only the majority organization to appear and speak at open meetings curtails the public's right to "go beyond and behind" the decisions reached [so as to] be apprised of the 'pros and cons' involved"⁹³ in the governing body's decisions on employment contracts.

Arguably no conflict exists between *City of Madison* and the purpose of the Wisconsin sunshine law because the purpose of the statute is to allow citizens to obtain information rather than to convey their opinions to governmental agencies. Such an argument, however, fails to recognize that citizens may not be aware of minority positions and of whether such positions are being considered by the governmental agency unless individuals and minority organizations are allowed to present their views at open meetings. Moreover, providing information to the public is not the only purpose of open-meeting laws. "Public meetings also may operate to provide officials with more accurate information; individual citizens will be able to correct factual misconceptions"⁹⁴

Furthermore, in holding that making statements at public meetings constitutes "negotiating", the Wisconsin Supreme Court failed to note that the government acts in a dual capacity as both a regulator and an employer. When officials sit at a public meeting, they are acting as regulators and during such meetings "[f]ormal negotiations between the public employer and exclusive representative . . . terminat[e] at least temporarily."⁹⁵ The sunshine statute requiring that regularly scheduled meetings and public hearings on tentative agreements be at open meetings thus does not contemplate that contributions made during such meetings constitute inputs to the negotiating process.⁹⁶

By defining negotiating as it did, the court failed to consider the

92. *Id.* at § 66.77(2)(d).

93. Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1200 (1962).

94. *Id.* at 1201.

95. *Exclusive Recognition*, *supra* note 1, at 1015.

96. See 54 OP. ATT'Y GEN. WIS. vi (1965): "In any event when the bargaining period is past no final action should be taken . . . until [the proposals] are made public and discussed in an open meeting." [emphasis supplied]. See also *Basset v. Braddock*, GERR No. 346, E-1 (Apr. 12, 1971), *aff'd*, 262 So. 2d 425 (Fla. 1972). In *Basset*, the Florida Supreme Court recognized that the consideration of tentative agreements and their adoption had to be open to the public because this part of the negotiation process did not entail "negotiating." *Id.*

effect of accepting a tentative agreement and exaggerated the influence upon a public employer effected by a minority organization or individual employee's statement at a public meeting. For, as noted by one commentator, in public employment "once an agreement is reached at the bargaining table, many of the issues are largely foreclosed; a heavy presumption arises against rejection of the agreement even on budgetary grounds."⁹⁷ To rescind approval of an agreement, expressing dissatisfaction with the terms would be insufficient; rather, an individual employee or minority organization at least would have to demonstrate to the public employer that its assent to the agreement had been based on a misunderstanding of the terms of underlying facts.⁹⁸

Moreover, the public employer need only listen to the minority union or individual employee, for he is under an affirmative duty to avoid responding to or treating with them.⁹⁹ Indeed, allowing such groups and individuals a right to appear at public meetings and to express their views on subjects under negotiation requires nothing substantially different of the public employer than is accepted for private employees. As a majority organization presents a tentative agreement to its members for discussion and ratification, so too, before ratifying a proposed agreement, a governing body, as representative of the public, should be permitted to hear the views of all citizens, including minority organizations and individual employees.¹⁰⁰

The policy and purposes behind public sector collective bargaining statutes and sunshine laws are thus consistent. By defining "negotiating" to include presentation by minority organizations and individual employees at open meetings the Wisconsin Supreme Court needlessly has created a conflict between the two types of statutes. To exclude from the definition presentations by anyone or any organization at such meetings, however, preserves the integrity of both laws.

97. Summers, *supra* note 49, at 1197; see Central School District No. 1 & Wappinger Cent. School Faculty Ass'n, GERR No. 489, B-12 (Feb. 5, 1973) (PERB decision).

98. See Central School District No. 1 & Wappinger Cent. School Faculty Ass'n, GERR No. 489, B-12 (Feb. 5, 1973) (PERB decision) (implication), in which New York's PERB stated: "[T]he reneging was not based upon a misunderstanding as to any of the terms; rather it was based solely on a change of mind. . . . The Act [Taylor Law] does not compel either party to agree to any proposal, but . . . the Act does not countenance the withdrawal of an agreement made." *Id.*

99. See notes 47-48 *supra* & accompanying text.

100. Cf. Summers, *supra* note 49, at 1198.

CONCLUSION

Although exclusive recognition of a bargaining unit's majority organization is desirable in public employment,¹⁰¹ "negotiating" must be defined so as to protect both the fundamental constitutional rights of employees and the integrity of open-meeting statutes. By defining "negotiating" as "an attempt to influence," the court in *City of Madison* failed to achieve these aims. The *City of Madison* definition succeeds only in raising questions as to the validity of the bargaining statute under both the first and fourteenth amendments to the Constitution¹⁰² and in placing the statute into unwarranted conflict with the open-meeting law.¹⁰³

These problems could have been avoided by excluding presentations at open meetings from the definition of "negotiating." In public employment disputes the best means of protecting both the constitutional rights of individual employees and minority organizations and the integrity of open-meeting statutes is a provision within the bargaining statute granting individual employees and minority organizations the right to present, at open meetings, ideas and proposals concerning subjects under negotiation.¹⁰⁴ The appropriate provision might state:

101. See note 12 *supra*.

102. See notes 62-84 *supra* & accompanying text.

103. See notes 85-100 *supra* & accompanying text.

104. A few states with public sector collective bargaining statutes provide for this. *E.g.*, MINN. STAT. ANN. § 179.65 (Cum. Supp. 1976) (GERR RF-123 51:3213-13) (public employees); N.J. STAT. ANN. § 34:13A-5.3 (Cum. Supp. 1976) (GERR RF-99 51:3912) (public employees). A number of other states protect only the rights of employees acting individually. *E.g.*, ALASKA STAT. § 14.20.600 (1976) (GERR RF-129 51:1115) (teachers); DEL. CODE ANN. tit. 14, § 4007 (1975) (GERR RF-104 51:1713) (teachers). Although such a provision does not circumscribe an individual's first amendment right to petition, it appears to violate statutory provisions protecting the employee's right to form, join, assist or participate in any organization of public employees, or refrain from such activity. *E.g.*, IOWA CODE ANN. § 20.8 (Cum. Supp. 1976) (GERR RF-86 51:2412) (public employees); N.J. STAT. ANN. § 34:13A-5.3 (Cum. Supp. 1976) (GERR RF-99 51:3912-13) (public employees); WIS. STAT. ANN. § 111.70(2) (1974) (GERR RF-99 51:8817) (municipal employees); see *Exclusive Recognition*, *supra* note 1, at 1016. Neither Alaska nor Delaware has such a provision. Such a provision also may abridge the first amendment right of association. See notes 60-62 *supra*.

The New Jersey Employer-Employee Relations Act, N.J. STAT. ANN. *supra*, does not limit the right only to open meetings but provides that a public official can hear requests or the views of an employee organization provided the exclusive representative is informed of the meeting and all modifications in terms and conditions of employment are made only through the exclusive representative. Whether it is desirable to allow the public employer to meet with a minority organization or individual employee in private, especially if the majority organization is not granted a right to be present at such meeting, is questionable. Such a situation might foster hidden agreements between the minority organization and the public employer or might encourage the minority organization to discredit the majority union for purposes of

Nothing herein shall prevent public employees, individually or in concert or through such representative as they may choose collectively or individually, from presenting or making known their positions and/or proposals to the appropriate governing body sitting in open meeting¹⁰⁵ so long as (a) the exclusive representative is provided an opportunity to speak at such meeting; (b) any changes or modifications in terms or conditions of employment are made solely through negotiations with the exclusive bargaining representative; and (c) a minority organization shall not present or process grievances.¹⁰⁶

The insertion of such a provision into the public sector collective bargaining statute alleviates the problems posed in this Comment.¹⁰⁷ Subsection (a), permitting the majority organization to speak and thereby counteract unsubstantiated and self-serving statements made by dissidents is designed to protect that organization from unwarranted criticism and harassment by rival factions.

self-gain. Thus it is preferable to limit contacts between public employer and minority organizations and individual employees to open meetings at which the exclusive representative will have the opportunity to speak in defense of its actions and proposals.

If the right to approach the public employer is limited to public meetings, a question arises as to the validity of such a restriction on the right to petition guaranteed by the first amendment. But constitutional law allows for the reasonable regulation of the place and manner of the exercise of first amendment rights. *See, e.g., Pell v. Procunier*, 417 U.S. 826-27 (1974) (restriction on the manner in which prisoner communications can be constitutional); *Adderley v. Florida*, 385 U.S. 39, 48 (1966) (citizens do not have constitutional right to protest whenever and however they please). Furthermore, the impact of statements made in private in the absence of the exclusive representative is greater than of a statement at a public meeting at which the exclusive representative is present and has the right to respond. Consequently, to thus restrict the right of minority organizations and individual employees to petition their public employer about subjects under negotiation is reasonable and necessary to safeguard a compelling public interest—stable and peaceful relations in public employment. *See note 78 supra* & accompanying text.

105. *See* KAN. STAT. ANN. § 72:5415 (1972) (GERR RF-124 51:2518) (teachers).

106. *See* N.J. STAT. ANN. § 34:13A-5.3 (Cum. Supp. 1976) (GERR RF-99 51:3912-13) (public employees).

The wording of subsection (c) may vary depending upon whether the right to present grievances is granted to a minority organization. *E.g., Wis. STAT. ANN. § 117.70(4)(d)(1)* (1974) (GERR RF-99 51:5820) (municipal employees). Moreover, the entire subsection may become superfluous if the minority organization must be allowed to process grievances under the first amendment right to petition. For a discussion of this problem and the problem of processing grievances in the public sector when exclusive recognition is involved, *see D. WOLLET & R. CHANIN, supra note 2*, at 2:26-29, 5:47-48, 5:48 n.165.

107. This provision eliminates the right to petition problem by allowing minority organizations and individual employees to petition at the open meeting. It also satisfies the equal protection question by granting the same right to speak at public meetings to minority organizations and individual employees that is granted to the majority organization. Finally, the policy and purposes behind the open-meeting statute are not abrogated.

Subsection (b) protects the integrity of exclusive recognition by preventing the public employer from dealing with the minority organization or with individual employees at public meetings concerning negotiable subjects.¹⁰⁸ Finally, subsection (c) prevents a minority organization from construing the right to speak at open meetings as conferring the ability to represent its members during grievance proceedings.

City of Madison reflects the problems that may arise in the absence of a right-to-speak provision. Unless states providing for both open meetings and public sector collective bargaining incorporate such a provision into their bargaining statutes, their courts inevitably will confront the issues raised in *City of Madison*. If these states' courts adopt the approach of the Wisconsin Supreme Court and define negotiations broadly they will undermine the constitutionality of their public sector collective bargaining statutes.

108. See notes 46-48 *supra* & accompanying text.