The Burger Court Opinion Writing Database

Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission

429 U.S. 167 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: OCT 21 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-946

City of Madison, Joint School District No. 8, et al., Appellants, *v.* Wisconsin Employment Relations Commission et al.

On Appeal from the Supreme Court of Wisconsin.

[November —, 1976]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented on this appeal from the Supreme Court of Wisconsin is whether a State may constitutionally require that an elected Board of Education prohibit teachers, other than union representatives, to speak at its regular public meetings, if such speech is addressed to the subject of pending collective-bargaining negotiations.

The Madison Board of Education and Madison Teachers, Inc. (MTI), a labor union, were parties to a collective-bargaining agreement during the calendar year of 1971.[1] In January 1971, negotiations commenced for renewal of the agreement and MTI submitted a number of proposals. One among them called for the inclusion of a so-called "fair-share" clause, which would require all teachers, whether members of MTI or not, to pay union dues to defray the

[1] MTI had been certified on June 7, 1966, as majority collective-bargaining representative of the teachers in the district by the Wisconsin Employment Relations Commission.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 1, 1976

Re: 75-946 - City of Madison v. Wisconsin Employment Relations Commission

MEMORANDUM TO THE CONFERENCE:

Over the weekend I made several changes in the first draft of this opinion and a second draft will be around later today.

Regards,

WEB

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

SUBSTANTIAL CHANGES THROUGHOUT

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated:

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-946

City of Madison, Joint School District No. 8, et al., Appellants, *v.* Wisconsin Employment Relations Commission et al.

On Appeal from the Supreme Court of Wisconsin.

[November —, 1976]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented on this appeal from the Supreme Court of Wisconsin is whether a State may constitutionally require that an elected Board of Education prohibit teachers, other than union representatives, to speak at its regular public meetings, if such speech is addressed to the subject of pending collective-bargaining negotiations.

The Madison Board of Education and Madison Teachers, Inc. (MTI), a labor union, were parties to a collective-bargaining agreement during the calendar year of 1971.[1] In January 1971 negotiations commenced for renewal of the agreement and MTI submitted a number of proposals. One among them called for the inclusion of a so-called "fair-share" clause, which would require all teachers, whether members of MTI or not, to pay union dues to defray the

[1] MTI had been certified on June 7, 1966, as majority collective-bargaining representative of the teachers in the district by the Wisconsin Employment Relations Commission.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 8, 1976

Re: No. 75-946 - City of Madison v. WERC

Dear Lewis:

I have your memo and I confess I do not see the nuances that appear to give you concern with the possible exception of the point on limiting communication between public agencies and their non-union employees.

I am happy to accommodate your views, as follows:

(a) Page 9, second line, substitute "preserved" for "tolerated".

(b) Page 9, first line under Par. (3), insert after "until now" "assumes that the exclusivity principle . . .";

second line, same paragraph, insert:
"However, that issue is not presented, for when, . . ."

(c) Page 10, first full paragraph, substitute for the first 10 words down to "public", the following:
"Assuming, arguendo, that true negotiations on the terms of a collective bargaining contract of public employees can be restricted, public discussion, etc."

A revised draft of pages 9 and 10 will issue forthwith.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 10, 1976

RE: 75-946 - City of Madison v. Wisconsin Employment Relations Commission

Dear Bill:

I will need to await your proposed concurrence to see precisely what is the target. It may be that I can accommodate you, but if it means that we should say Holmquist could not communicate by letter or petition with the Board, I could not agree.

Regards,

Mr. Justice Brennan

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J ✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 16, 1976

Re: 75-946 - City of Madison, Joint School District No. 8,
v. Wisconsin Employment Relations Commission

MEMORANDUM TO THE CONFERENCE:

I have now completed a complete revision of my prior draft in this case, intended, as I hope, to satisfy almost everyone. It will be around soon.

Regards,

WEB

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 18, 1976

Re: 75-946 City of Madison v. Wisconsin Employment Relations Commission

MEMORANDUM TO THE CONFERENCE:

Enclosed is the third draft of opinion in the above case. I believe it now meets most, if not all, of the problems that gave concern.

Regards,

WEB

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CHANGES THROUGHOUT

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-946

City of Madison, Joint School District No. 8, et al., Appellants, *v.* Wisconsin Employment Relations Commission et al. } On Appeal from the Supreme Court of Wisconsin.

[November —, 1976]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented on this appeal from the Supreme Court of Wisconsin is whether a State may constitutionally require that an elected Board of Education prohibit teachers, other than union representatives, to speak at open meetings, at which public participation is permitted, if such speech is addressed to the subject of pending collective-bargaining negotiations.

The Madison Board of Education and Madison Teachers, Inc. (MTI), a labor union, were parties to a collective-bargaining agreement during the calendar year of 1971.[1] In January 1971 negotiations commenced for renewal of the agreement and MTI submitted a number of proposals. One among them called for the inclusion of a so-called "fair-share" clause, which would require all teachers, whether members of MTI or not, to pay union dues to defray the

[1] MTI had been certified on June 7, 1966, as majority collective-bargaining representative of the teachers in the district by the Wisconsin Employment Relations Commission.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 18, 1976

RE: 75-946 - City of Madison v. Wisconsin Employment Relations Commission

The attached was inadvertently overlooked when the third draft of the opinion in this case was circulated.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 9, 1976

RE: No. 75-946 Madison School District v. Wisconsin Employment Relations Commission

Dear Chief:

I am afraid that the changes you have made in the above make more rather than less difficult my joining your opinion. In consequence, I shall in due course circulate a separate opinion concurring in result.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 9, 1976

RE: No. 75-946 City of Madison v. Wisconsin Employment Relations Commission

Dear Chief:

I gather that Lewis and I may not agree on the question whether the exclusivity principle applies equally to public and private employees. It seems to me that Justice Holmes' opinion in Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915), strongly suggests that it does. He said there:

> "Where a rule of conduct applies to more than a few people it is impractical that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. . . . There must be a limit to individual argument in such matters if government is to go on."

I therefore think inadvisable your comment on p. 9 that in the absence of a public forum, Holmquist would have had "a First

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Amendment right to communicate with [his] employer." Bi-Metallic seems to indicate that it is within the power of the state to conduct collective bargaining sessions without admitting to them anyone who wishes to be heard, or even anyone who wishes to hear.

Perhaps the best way out is to recognize that the facts of this case make it unnecessary to address in any general way the relation of the exclusivity principle to the First Amendment, or the extent to which the same considerations apply in the private and public sector. The critical fact in this case, as recognized in section (3) of your draft, is that the state has created a public forum dedicated to the expression of views by the general public. "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972). The state could no more prevent Holmquist from speaking at this meeting than it could prevent him from publishing the same views in a newspaper or proclaiming them from a soapbox.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 11-12-76

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-946

City of Madison, Joint School District No. 8, et al., Appellants, *v.* Wisconsin Employment Relations Commission et al. | On Appeal from the Supreme Court of Wisconsin.

will join this later

[November —, 1976]

MR. JUSTICE BRENNAN, concurring in the judgment.

The Court's opinion, *ante*, 10, assumes "*arguendo*, that true negotiations of public employees collective-bargaining contracts can be restricted." I think rather that the First Amendment plainly does not forbid Wisconsin from limiting attendance at a collective-bargaining session to school board and union bargaining representatives and denying Holmquist the right to attend and speak at the session. That proposition is implicit in the words of Mr. Justices Holmes, that the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Bi Mettalic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445 (1915). Wisconsin has adopted the exclusivity principle as a matter of state policy governing relations between state bodies and unions of their employees, and in that context, "There must be a limit to individual argument in such matters if government is to go on." *Ibid.* For the First Amendment does not command "that people who want to [voice] their views have a constitutional right to do so whenever and however and wherever they please." *Adderley* v. *Florida*, 385 U. S. 39, 48 (1966). For example, this Court's "own conferences [and] the meetings of other official bodies gathered in executive session" may be closed to the

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JV

To: The Chief Justice
Mr. Justice Stewart
Mr Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:

Recirculated: 11/15/76

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-946

City of Madison, Joint School District No. 8, et al., Appellants, *v.* Wisconsin Employment Relations Commission et al.

On Appeal from the Supreme Court of Wisconsin.

[November —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE joins, concurring in the judgment.

The Court's opinion, *ante*, 10, assumes "*arguendo*, that true negotiations of public employees collective-bargaining contracts can be restricted." I think rather that the First Amendment plainly does not forbid Wisconsin from limiting attendance at a collective-bargaining session to school board and union bargaining representatives and denying Holmquist the right to attend and speak at the session. That proposition is implicit in the words of Mr. Justices Holmes, that the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Bi Mettalic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445 (1915). Wisconsin has adopted the exclusivity principle as a matter of state policy governing relations between state bodies and unions of their employees, and in that context, "There must be a limit to individual argument in such matters if government is to go on." *Ibid.* For the First Amendment does not command "that people who want to [voice] their views have a constitutional right to do so whenever and however and wherever they please." *Adderley* v. *Florida*, 385 U. S. 39, 48 (1966). For example, this Court's "own conferences [and] the meetings of other official bodies gathered in executive session" may be closed to the

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To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:

Recirculated: 11/16/76

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-946

City of Madison, Joint School District No. 8, et al., Appellants, *v.* Wisconsin Employment Relations Commission et al.

On Appeal from the Supreme Court of Wisconsin.

[November —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE WHITE join, concurring in the judgment.

The Court's opinion, *ante*, 10, assumes "*arguendo*, that true negotiations of public employees collective-bargaining contracts can be restricted." I think rather that the First Amendment plainly does not forbid Wisconsin from limiting attendance at a collective-bargaining session to school board and union bargaining representatives and denying Holmquist the right to attend and speak at the session. That proposition is implicit in the words of Mr. Justices Holmes, that the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Bi Mettalic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445 (1915). Wisconsin has adopted the exclusivity principle as a matter of state policy governing relations between state bodies and unions of their employees, and in that context, "There must be a limit to individual argument in such matters if government is to go on." *Ibid.* For the First Amendment does not command "that people who want to [voice] their views have a constitutional right to do so whenever and however and wherever they please." *Adderley* v. *Florida*, 385 U. S. 39, 48 (1966). For example, this Court's "own conferences [and] the meetings of other official bodies gathered in executive session" may be closed to the

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To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:

Recirculated: 11/18/76

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-946

City of Madison, Joint School District No. 8, et al., Appellants, *v.* Wisconsin Employment Relations Commission et al.

On Appeal from the Supreme Court of Wisconsin.

[November —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, concurring in the judgment.

The Court's opinion, *ante*, 10, assumes "*arguendo*, that true negotiations of public employees collective-bargaining contracts can be restricted." I think rather that the First Amendment plainly does not forbid Wisconsin from limiting attendance at a collective-bargaining session to school board and union bargaining representatives and denying Holmquist the right to attend and speak at the session. That proposition is implicit in the words of Mr. Justices Holmes, that the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Bi-Mettalic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445 (1915). Wisconsin has adopted the exclusivity principle as a matter of state policy governing relations between state bodies and unions of their employees, and in that context, "There must be a limit to individual argument in such matters if government is to go on." *Ibid.* For the First Amendment does not command "that people who want to [voice] their views have a constitutional right to do so whenever and however and wherever they please." *Adderley* v. *Florida*, 385 U. S. 39, 48 (1966). For example, this Court's "own conferences [and] the meetings of other official

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To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 11/19/76

5th DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 75-946

City of Madison, Joint School District No. 8, et al., Appellants, *v.* Wisconsin Employment Relations Commission et al.

On Appeal from the Supreme Court of Wisconsin.

[November —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, concurring in the judgment.

By stating that "the extent to which true contract negotiations may be regulated [is] an issue we need not consider at this time," *ante,* at 8, the Court's opinion treats as open a question the answer to which I think is abundantly clear. Wisconsin has adopted, as unquestionably the State constitutionally may adopt, a statutory policy that authorizes public bodies to accord exclusive recognition to representatives for collective bargaining chosen by the majority of an appropriate unit of employees. In that circumstance the First Amendment plainly does not forbid Wisconsin from limiting attendance at a collective-bargaining session to school board and union bargaining representatives and denying Holmquist the right to attend and speak at the session. That proposition is implicit in the words of Mr. Justices Holmes, that the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Bi-Mettalic Investment Co.* v. *State Board of Equalization,* 239 U. S. 441, 445 (1915). Certainly in the context of Wisconsin's adoption of the exclusivity principle as a matter of state policy governing relations between state bodies and unions of their employees, "There must be a limit to individual argument in

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 22, 1976

RE: No. 75-946 City of Madison, etc. v.
Wisconsin Employment Relations Comm.

Dear Potter:

Enclosed is Draft 5 with the suggested deletion marked. Do you think this would avoid the difficulty?

Sincerely,

Mr. Justice Stewart

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:

Recirculated: 11/23/76

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-946

City of Madison, Joint School District No. 8, et al., Appellants, *v.* Wisconsin Employment Relations Commission et al. | On Appeal from the Supreme Court of Wisconsin.

[November —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, concurring in the judgment.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 15, 1976

Re: No. 75-946, Madison Sch. Dist. v. Wisconsin Empl. Rel. Comm'n

Dear Bill,

Please add my name to your concurring opinion in this case. I may add a few words of my own.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: NOV 8 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-946

City of Madison, Joint School District No. 8, et al., Appellants, *v.* Wisconsin Employment Relations Commission et al.

On Appeal from the Supreme Court of Wisconsin.

[November —, 1976]

MR. JUSTICE STEWART, concurring in the judgment.

The school board of the city of Madison, acting in accordance with state law, invited all members of the public to attend an open meeting whose agenda included discussion of the desirability of an agency shop arrangement. The board was entirely willing to hear Holmquist, speaking simply as a member of the community, express his views on this subject. Holmquist did not seek, at the meeting or at any other time, to reach agreement or to bargain with the board. The mere expression of an opinion about a matter subject to collective bargaining, whether or not the speaker is a member of the bargaining unit, poses no genuine threat to the policy of exclusive representation that Wisconsin has adopted. I therefore agree that the order entered by the Wisconsin Employment Relations Commission unconstitutionally restricts freedom of speech.

Mr. JUSTICE BRENNAN's concurring opinion, in which I join, reaffirms Mr. Justice Holmes' observation that "[t]he Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Bi Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445 (1915). A public body that may make decisions in private has broad authority to structure the discussion of mat-

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: NOV 17 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-946

City of Madison, Joint School District No. 8, et al., Appellants, *v.* Wisconsin Employment Relations Commission et al. } On Appeal from the Supreme Court of Wisconsin.

[November —, 1976]

MR. JUSTICE STEWART, concurring in the judgment.

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J/

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 19, 1976

No. 75-946, Madison Joint School District v. Wisconsin Employment Relations Commn

Dear Bill,

It seems to me that in the first few lines of the revised concurring opinion that you circulated today you have come close to deciding the primary basic issue presented in No. 75-1153, Abood v. Detroit Board of Education. Accordingly, I would have great difficulty joining this revised version of your concurring opinion.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

3rd DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Circulated: NOV 24 1976

No. 75-946

City of Madison, Joint School District No. 8, et al., Appellants, *v.* Wisconsin Employment Relations Commission et al.

On Appeal from the Supreme Court of Wisconsin.

[November —, 1976]

MR. JUSTICE STEWART, concurring in the judgment.

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MR. JUSTICE BRENNAN's concurring opinion reaffirms Mr. Justice Holmes' observation that "[t]he Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Bi Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445 (1915). A public body that may make decisions in private has broad authority to structure the discussion of matters that it chooses

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 15, 1976

Re: No. 75-946 - Madison Joint School District v. Wisconsin Employment Relations Commission

Dear Bill:

Please add my name to your concurrence in this case.

Sincerely,

Mr. Justice Brennan

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 30, 1976

Re: No. 75-946 - Madison Joint School Dist. v. Wisconsin Employment Relations Commn

Dear Chief:

Please join me in your most recent circulation in this case.

Sincerely,

Byron

The Chief Justice

Copies to Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 30, 1976

Re: No. 75-946 - Madison Joint School Dist v. Wisconsin Employment Relations Commn

Dear Bill:

The changes in the Chief's circulating opinion in this case permit me to join it. Also, the first two sentences of your concurrence, as most recently circulated, give me pause. I should, therefore, leave the Brennan-Nantucket ferry. In short, scratch my name.

Sincerely,

Byron

Mr. Justice Brennan

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 18, 1976

Re: No. 75-946 -- City of Madison v. Wisconsin Employment Relations Commission

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

November 22, 1976

Re: No. 75-946 - City of Madison Joint School District v. Wisconsin Employment Relations Comm'n

Dear Chief:

Here are some trivia you may wish to consider before the opinion is announced:

1. On page 4, third line from the bottom, the date is obviously erroneous.

2. There are typographical errors in the first line of footnote 8 on page 8, and in the fourth line of footnote 10 on the same page.

Sincerely,

HAB

The Chief Justice

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 22, 1976

Re: No. 75-946 - City of Madison Joint School District v. Wisconsin Employment Relations Comm'n

Dear Chief:

You may join me in your third draft circulated November 18.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

November 2, 1976

No. 75-946 Madison, Joint School District
v. Wisconsin Employment Relations
Commission

Dear Chief:

In view of your memorandum indicating revisions are being made in the draft opinion circulated October 28, I write to identify questions that occurred to me in a preliminary reading of the draft:

1. There was no discussion of the standing of the school board to assert either the First Amendment rights of teachers, or its own right "to listen" and need to be informed.

2. The draft devotes more attention to "the exclusivity principle" than seems necessary or desirable (pp. 6-8). Although it concludes, correctly, I think, that there was no "negotiation", I read the draft (e.g., p. 7) as undertaking then to balance the exclusivity interest against First Amendment rights. If there was no negotiation, this type of analysis seems unnecessary. In any event, in the context of this case, the First Amendment interests far outweigh any minimal exclusivity interest that may exist.

3. Nor do I think the emphasis on the Wisconsin "sunshine law" strengthens the opinion. I view the case as presenting a straightforward, and rather simple, First Amendment issue. I would prefer not to encourage the notion that every decision by an agency of government must be made in a goldfish bowl, but when public meetings are held employees cannot properly be excluded.

Probably you already have addressed the foregoing points in the second draft of your opinion. I am with you, of course, on its substantive holding.

Sincerely,

The Chief Justice

lfp/ss

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 8, 1976

No. 75-946 City of Madison v. Wisconsin
Employment Relations Commission

Dear Chief:

While I agree with most of the reasoning in your revised opinion, I still have one rather serious reservation.

The opinion appears to assume that the exclusivity principle, which I believe our cases have addressed only in the private sector, applies with full force to limit communication between public agencies and their non-union employees. I am unwilling to suggest (p. 9 of your Draft) that the principle applies equally to public as well as private employees.

As the opinion demonstrates, the result in this case will be the same whether or not you make that assumption. You could simply leave open the questions raised by the recognition of exclusive bargaining rights in public employees' unions.

Sincerely,

L. F. P.

The Chief Justice

lfp/ss

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 10, 1976

No. 75-946 City of Madison v. Wisconsin
Employment Relations Commission

Dear Chief:

In light of the changes in pp. 9-10 (as circulated yesterday), I am glad to join your opinion.

It would be agreeable with me, however, if you adopted the substance of Bill Brennan's suggestion in the last paragraph of his letter of November 9.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 19, 1976

No. 75-946 City of Madison v. Wisconsin
Employment Relations Commission

Dear Chief:

Please join me in the 3rd Draft of your opinion for the Court.

You have now met very well the reservations I had about the first draft.

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

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J ✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 16, 1976

Re: No. 75-946 - Madison Joint School District v. Wisconsin Employment Relations Commission

Dear Chief:

When I first saw your draft opinion, I thought it was a good deal broader than I would care to subscribe to, but when it comes to trying to point out exactly what it is one doesn't like one realizes that the opinion writer generally has a better understanding of the case than does the mere "joiner". I have distilled my remaining objections down to two, which are these:

(1) Footnote 11 says "the state's public policy is that governmental bodies have the benefit of all relevant information before making decisions." If the Supreme Court of Wisconsin is entitled to speak for the state, as I would have thought it was, it has said that in this case the public policy of the state is to prevent the school board from having the benefit of any information which Holmquist might supply. We are holding that the First and Fourteenth Amendments preclude the state from having such a public policy; I agree with that holding, but I think we must recognize that in so doing the constitutional provisions

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are overriding the public policy of the state, not benignly supplementing it, as this footnote infers.

(2) The first two sentences on page 11 speak in terms of "prior restraint", and invoke the conventional litany of criticism. I joined your Nebraska Press Association opinion last year, from which some of the quotation comes, but I do not see that it has application to this case. A school board's ordering of its agenda so as to exclude certain items, or to restrict the time which may be taken by a speaker, are not only constitutionally permissible, in my opinion, bus imply cannot accurately be described as "prior restraints" unless those words are simply stripped of their ordinary meaning. I think the opinion would be much better if Part (4) simply started with the present second paragraph on page 11.

If you can see your way clear to make these changes, I will join you.

Sincerely,

WWW

The Chief Justice

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 22, 1976

Re: No. 75-946 - City of Madison v. Wisconson Employment Relations Commission

Dear Chief:

Please join me in the third draft of your circulating opinion in this case.

Sincerely,

WHR

The Chief Justice

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 19, 1976

Re: No. 75-946 - City of Madison v. Wisconsin Employment Relations Commission

Dear Chief:

Please join me in your third draft. In my judgment you are entirely correct in not volunteering any opinion on "the extent to which direct contract negotiations may be regulated," since no such question is presented in this case.

Respectfully,

JPS

The Chief Justice

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CHANGES AS MARKED
PP 9 & 10

board meeting cannot fairly be characterized as "negotiation," and cannot be deemed to have so undermined the role of MTI as exclusive bargaining agent as to justify a restraint on speech.

Holmquist did not seek to bargain or offer to enter into any bargain with the board, nor does it appear that he was authorized by any other teachers to enter into any agreement on their behalf. Although his views were not consistent with those of MTI, communicating such views to the employer could not change the fact that MTI alone was authorized to negotiate and to enter into a contract with the board.[8]

We note that the NLRB, in implementing the analogous federal provision, has permitted far more elaborate interchanges between the employer and minority factions of employees. See, *e. g., Outboard Marine Corp.*, 143 N. L. R. B. No. 57 (1963); *American Printing Co.*, 173 N. L. R. B. No. 17 (1968); *Stokely-Van Camp, Inc.*, 186 N. L. R. B. No. 64 (1970). While NLRB precedents are generally not binding on state courts, these cases are nonetheless instructive as to what types of communication between employer and minority

[8] The union argues that expression of this dissenting opinion by a sizable group of bargaining unit employees would undermine the "collective clout" that an exclusive bargaining agent must have in order to extract the best possible deal from the employer. This, however, is not a sufficient motive for abridging the First Amendment rights of employees. While keeping the employer in the dark about the minority views in the bargaining unit may offer a dubious negotiating advantage and may be a permissible tactic, it is not a right guaranteed the union by the exclusivity principle. Restraints on First Amendment rights are not to be measured by the success or failure of one party to a negotiation to get what it demands.

The negotiation process is a "robust and hearty" affair, by no means so fragile as to be undermined by a speech or a petition presented at a public meeting. On the night in question, 13 issues remained unresolved between the union and the board, including "fair share." The prompt conclusion of the negotiations in a manner satisfactory to both sides discounts any notion that permitting Holmquist to speak embraced significant dangers to the negotiations.