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### Minnesota State Board for Community Colleges v. Knight: Constitutional Parameters of State Public Employee Labor Statutes

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MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES V.  
KNIGHT: CONSTITUTIONAL PARAMETERS OF STATE  
PUBLIC EMPLOYEE LABOR STATUTES

INTRODUCTION

In *Minnesota State Board for Community Colleges v. Knight*,<sup>1</sup> the United States Supreme Court decided an issue which required consideration of first amendment, labor and administrative law principles. The Court confronted the question of whether a state may validly require public employers to meet with employee union representatives to the exclusion of nonunion employees, not only to negotiate contract terms such as wages, but also to discuss broad issues of policy, such as budgetary planning and selection of administrators.<sup>2</sup> The Court answered the question in the affirmative, upholding a statute which strengthens and extends the relationship between employer and employee union—a relationship which Congress and some state governments have supported consistently by legislation throughout much of this century.<sup>3</sup> At the same time, the decision shed new light on a rule of administrative law first enunciated in 1915, which held that an individual does not have a due process right to a hearing before governmental authorities when those authorities are making policy decisions.<sup>4</sup> The holding also reinforced the rule that, in the context of nonpublic forums, government officials may “pick and choose” the speakers to whom they will listen—a rule which has evolved from the Court’s first amendment decisions.<sup>5</sup>

I. FACTS OF THE CASE

In 1971, the Minnesota legislature passed the Public Employees Labor Relations Act (PELRA), which requires public employers<sup>6</sup> to negotiate with their employees, through the employees’ collective bargaining representatives, on “terms and conditions of employment.”<sup>7</sup> The statute also requires public employers to “meet and confer” with profes-

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1. 104 S. Ct. 1058 (1984).

2. *Id.* at 1060.

3. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 423.215-.254 (West 1978); MINN. STAT. ANN. §§ 1797.61-.776 (West Supp. 1984). *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 4-6 (1976) (discussing federal labor laws).

4. *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

5. 104 S. Ct. at 1068.

6. The employers covered by the statute include the state and its political subdivisions, agencies and instrumentalities. MINN. STAT. ANN. § 179.63(4) (West Supp. 1984).

7. *Id.* §§ 179.61; 179.66(2). “Terms and conditions of employment” is defined as hours, wages, fringe benefits except for retirement benefits, and personnel policies which affect “working conditions.” *Id.* § 179.63(18). Most state legislatures tended to adopt wholesale the NLRA phrase “wages, hours, terms and conditions of employment” to define their scope of bargaining. Pisapia, *What’s Negotiable in Public Education?*, 1 GOV’T UNION REV. 23, 25 (1980). Yet Minnesota did not. Minnesota has specifically enumerated a list of mandatory bargaining subjects which reflects a determination to limit the scope of bargaining. *Id.* However, Minnesota courts have stated there should be a “liberal” attitude

sional employees on policy issues which are not terms and conditions of employment.<sup>8</sup> If employees have chosen a collective bargaining representative, the statute requires that the employer meet and confer only with that representative.<sup>9</sup>

Since enactment of the statute, the Minnesota State Board for Community Colleges has negotiated successive employment contracts with community college faculty members through the faculty's exclusive bargaining representative, the Minnesota Community College Faculty Association (MCCFA).<sup>10</sup> Pursuant to the statute, the State Board and administrators of Minnesota's eighteen community colleges also have met with MCCFA representatives in regularly scheduled sessions to meet and confer on policy issues not covered by the bargaining agreements.<sup>11</sup> Administrators and MCCFA members participating in these "meet and confer" sessions have discussed such issues as budgetary policy, curriculum selection, and the hiring of administrators.<sup>12</sup> Under the statute's mandate, the MCCFA has had the exclusive right to choose which faculty members will confer with administrators in the "meet and confer" sessions. The MCCFA has chosen only union members to perform that task.<sup>13</sup> The Minnesota State Board considers the opinions expressed by the "meet and confer" committees to be the official view of all faculty.<sup>14</sup>

In 1974, twenty nonunion faculty members challenged the statute in federal district court claiming that, as applied to community colleges, PELRA constitutes an invalid delegation of legislative authority and an unconstitutional infringement on the speech and associational rights of nonunion teachers as protected by the first and fourteenth amendments.<sup>15</sup> The district court upheld the statute's meet and negotiate provisions, but struck down as a violation of the first amendment that part of PELRA which permits only the MCCFA to choose faculty participants for the "meet and confer" sessions.<sup>16</sup> On February 21, 1984, the United States Supreme Court reversed the district court's ruling and held that PELRA's meet and confer provisions are constitutionally valid.<sup>17</sup>

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applied when construing "terms and conditions of employment." See *City of Richfield v. Local No. 1215, Int'l Ass'n of Firefighters*, 276 N.W.2d 42, 49 (Minn. 1979).

8. *Id.* § 179.66(3). Under the statute, teachers are designated as professional employees. MINN. STAT. ANN. § 179.63(10)(1c) (West Supp. 1984).

9. *Id.* § 179.66(7).

10. 104 S. Ct. at 1061.

11. *Id.*

12. *Id.* at 1062.

13. *Knight v. Minnesota Community College Faculty Ass'n*, 571 F. Supp. 1, 10 (D. Minn. 1982), *rev'd sub nom. Minnesota State Bd. for Community Colleges v. Knight*, 104 S. Ct. 1058 (1984).

14. 104 S. Ct. at 1062.

15. 104 S. Ct. at 1063; *Knight v. Minnesota Community College Faculty Ass'n*, 571 F. Supp. at 3, 5.

16. 571 F. Supp. at 12.

17. 104 S. Ct. at 1064.

## II. BACKGROUND OF THE LAW

### A. *Collective Bargaining*

The creation of labor unions and collective bargaining agreements has brought numerous constitutional challenges to the courts, including challenges under the first and fourteenth amendments. Rules and regulations adopted in public sector bargaining agreements must withstand constitutional tests simply because the government is the employer.<sup>18</sup> To better understand the case law dealing with constitutional challenges to labor union agreements and practices, it is necessary to consider the history of collective bargaining in relation to the speech and associational rights which are protected by the first and fourteenth amendments.

#### 1. Public-Sector Bargaining

Collective bargaining is the process by which employees, through a designated organizational representative, and employers meet to establish terms and conditions of employment.<sup>19</sup> Private sector collective bargaining was given federal recognition with the passage of the National Labor Relations Act of 1935 (NLRA),<sup>20</sup> which rendered illegal employers' resistance to employees' attempts to unionize in the private labor sector.<sup>21</sup> In the public sector, employee unionization has increased rapidly since 1960.<sup>22</sup> Many observers believe the initial impetus for public sector bargaining was provided by President Kennedy's Executive Order 10988 which encouraged federal government employees to join unions and bargain collectively.<sup>23</sup> Since then, federal courts have stated that public employees have a constitutionally protected right to join labor unions, founded in the first amendment.<sup>24</sup>

Public sector bargaining is now widespread among state, local and federal governments. In fact, in some states, collective bargaining in the public sector is more prevalent than bargaining in the private sector.<sup>25</sup>

18. Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 247 (1980).

19. PORTRAIT OF A PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT XXV (M. Gibbons, R. Helsby, J. Lefkowitz, B. Tener eds. 1979) [hereinafter cited as PORTRAIT OF A PROCESS]. The National Labor Relations Act (N.L.R.A.), section 8(d) defines collective bargaining as "[T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and to confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement . . . and the execution of a written contract . . . but such obligation *does not* compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (1982) (emphasis added).

20. See C. GREGORY AND H. KATZ, *LABOR AND THE LAW* 224 (1979).

21. *Id.*

22. Gershenfeld, *Public Employee Unionization—An Overview*, in PORTRAIT OF A PROCESS, *supra* note 19, at 7.

23. Troy, *The Agenda of Public Sector Unions and Associations*, 4 GOV'T UNION REVIEW 15 (1983).

24. See *Norbeck v. Davenport Community School Dist.*, 545 F.2d 63, 67 (8th Cir. 1976), *cert. denied*, 431 U.S. 917 (1977); *University of N.H. Chapter of the Am. Ass'n of Univ. Professors v. Haselton*, 397 F. Supp. 107, 108 (D.N.H. 1975).

25. Petro, *Public-Sector Bargaining: An Assessment*, 3 GOV'T UNION REV. 3 (1982).

Twenty-seven states have passed public-sector collective bargaining legislation applicable to public employees. Twelve other states have statutory coverage for one or more of the categories of policemen, firemen, teachers or transit workers and only eleven states have no state-mandated public sector bargaining statutes.<sup>26</sup>

## 2. Collective Bargaining in Public Education

One of the most well-publicized developments in public-sector labor relations has been the adoption of collective bargaining procedures by teachers. Most of this country's public school teachers are employed pursuant to a labor contract negotiated by their teachers' union.<sup>27</sup> There are three major national educational unions: the National Education Association (NEA), the American Federation of Teachers (AFT/AFL-CIO) and the American Association of University Professors (AAUP).<sup>28</sup> However, the key decision-makers in educational collective bargaining are local union officers, state councils or officials of district councils rather than national union officials.<sup>29</sup> Educational matters normally subject to bargaining are merit pay, length of school day and school year, terms of dismissal, pay raises,<sup>30</sup> leaves, insurance and grievance procedures.<sup>31</sup> The scope of bargaining in public education is in some respects narrower than that of the private sector because state education laws often preempt issues normally negotiated in collective bargaining agreements.<sup>32</sup>

On the college level, faculties historically have enjoyed the opportunity to participate in the decision-making processes of their institutions. Such participation is accomplished by means of faculty senates or councils that consist of elected representatives.<sup>33</sup> In recent years, faculties have begun to perceive that their role in governing their institutions has declined or has become non-existent; thus, there has been a strong move toward collective bargaining in higher education.<sup>34</sup> As of 1981,

26. *See id.* at 8-9. These figures reflect the 1983 enactments of public sector bargaining statutes in Ohio and Illinois. 4 LAB. REL. REP. (BNA) (State Lab. Laws) 23:215 (Jan. 23, 1984) (Illinois' public employment labor relations act effective July 1, 1984); 4A LAB. REL. REP. (BNA) (State Lab. Laws) 45:217 (Aug. 8, 1983) (Ohio's public employee labor relations act effective April 1, 1984).

27. Lieberman, *Educational Reform and Teacher Bargaining*, 4 GOV'T UNION REV. 59 (1983) [hereinafter cited as Lieberman].

28. Stern, *Unionism in the Public Sector*, in PUBLIC-SECTOR BARGAINING 62-63 (B. Aaron, J. Grodin, J. Stern eds. 1979).

29. *Id.* at 63.

30. Lieberman, *supra* note 27, at 59.

31. Doherty, *Public Education*, in COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE 529 (G. Somers ed. 1980).

32. *Id.* at 525.

33. Zeller, *Why Faculties Organize*, in COLLECTIVE BARGAINING IN HIGHER EDUCATION—THE DEVELOPING LAW 81 (J. Vladeck and S. Vladeck eds. 1975) [hereinafter cited as COLLECTIVE BARGAINING IN HIGHER EDUCATION]. These representatives advise college administration on issues such as curriculum instruction, admission requirements, and grading policies. *Id.*

34. Osborne, *The AAUP Collective Bargaining*, in COLLECTIVE BARGAINING IN HIGHER EDUCATION, *supra* note 33, at 154. It should be noted that some observers believe faculty senates and councils cannot survive collective bargaining in higher education. *See, e.g.,*

thirty-one states provided for collective bargaining by faculty in higher education.<sup>35</sup> State bargaining statutes such as Minnesota's PELRA recognize the importance of input by faculty members into policy decisions. PELRA thus encourages a policy of close cooperation between public employers and teachers due to the teachers' knowledge, expertise and education that can be helpful and necessary to the quality of public services.<sup>36</sup>

As far as constitutional freedoms are concerned, the Supreme Court has ruled that public school teachers do not lose their first amendment rights as a result of their public employment status.<sup>37</sup> A selected survey of first amendment Supreme Court cases aids in understanding the Court's position in cases challenging the constitutionality of collective bargaining agreements.

### B. *Freedom of Speech*

The first amendment to the United States Constitution, applicable to the states through the fourteenth amendment,<sup>38</sup> provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government . . ." <sup>39</sup> It was not until the close of World War I that the Supreme Court began to interpret and apply the first amendment.<sup>40</sup> But by 1940, the Court had attributed to the principles of free speech a place of highest importance in the balancing of state and individual interests.<sup>41</sup>

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Wollett, *Self-Governance and Collective Bargaining for Higher Education Faculty: Can the Two Survive?*, in COLLECTIVE BARGAINING IN HIGHER EDUCATION, *supra* note 33, at 15.

35. Henkel & Wood, *The Power of State Legislatures in Public University Collective Bargaining*, 2 GOV'T UNION REV. 18-20 (1981). This figure does not reflect change since the enactment of Ohio and Illinois public sector bargaining statutes in 1983. See *supra* note 26.

36. MINN. STAT. ANN. § 179.73(1) (West Supp. 1984).

37. See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

38. The Supreme Court on many occasions has held that the rights protected by the first amendment are implicit in the fourteenth amendment and therefore apply to the states as well as to the federal government. *E.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937).

39. U.S. CONST. amend. I.

40. See, *e.g.*, *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919) (reprinted in part in GUNTHER, *supra* note 38, at 1119-24).

41. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 864-65 (2d ed. 1983) (citing *Thornhill v. Alabama*, 310 U.S. 88 (1939); *Schneider v. State*, 308 U.S. 147 (1939); *Herndon v. Lowry*, 301 U.S. 242 (1937)). See also *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Chief Justice Stone noted, "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." 304 U.S. at 152 n.4.

It should be noted that only certain categories of speech are protected by the first amendment. The Court has held that, "it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every (kind of) utterance." *Roth v. United States*, 354 U.S. 476, 483 (1957). For example, obscenity, defamatory words, and fighting words are not constitutionally protected. *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words). J. NOWAK, R. ROTUNDA & J.

## 1. Content-based Regulations

The Supreme Court has consistently ruled that in order to achieve self-realization and effective self-government, citizens must be able openly to discuss or debate any topic, regardless of its content.<sup>42</sup> For that reason, governments may not pass laws or regulations which prohibit or regulate speech because of its content or viewpoint unless the content restriction is narrowly drawn and is necessary to achieve a compelling state interest.<sup>43</sup> For instance, the government may not ban the distribution of literature which urges citizens to resist the draft and oppose a war, unless that literature will clearly cause insurrection.<sup>44</sup> On the other hand, governments may pass "time, place and manner" regulations, the purposes of which are not to suppress a viewpoint, but are necessary for the public convenience. Such regulations must be reasonable,<sup>45</sup> must serve a valid governmental interest (but not necessarily a compelling interest)<sup>46</sup> and must leave open adequate alternative channels for communicating the information.<sup>47</sup>

## 2. Public and Nonpublic Forums

In an early first amendment case, *Hague v. CIO*,<sup>48</sup> the Court ruled that the government is not only prohibited from regulating speech based upon content, but in public forums it is prohibited from banning speech altogether.<sup>49</sup> Regulations which curb constitutionally protected speech in traditionally public places were held to be invalid, unless they are narrowly drawn to provide for the public convenience.<sup>50</sup> The Court

YOUNG, CONSTITUTIONAL LAW, 943, 944, 954 (2d ed. 1983). The speech at issue in *Knight* does not fall into any of these "unprotected" categories.

42. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Whitney v. California*, 274 U.S. 357 (1927); *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.), *rev'd* 246 F. 24 (2d Cir. 1917). See generally G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1106-10 (10th ed. 1980) [hereinafter cited as GUNTHER] (discussing free speech values and judicial responsibility).

43. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-49 (1983); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). GUNTHER, *supra* note 42, at 1197.

44. *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.) *rev'd*, 246 F. 24 (2d Cir. 1917).

45. See generally *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) (a content-neutral local ordinance against emission of loud noises on public street is reasonable); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (a local ordinance forbidding street parades without a license is reasonable).

46. See *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

47. *Virginia Pharmacy*, 425 U.S. at 771; *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980). In *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court held that the state could require ISKCON, a religious organization desiring to distribute literature and solicit donations at a state fair, to do so only at an assigned booth on the fairgrounds. *Id.* at 656. The Court determined that the regulation was not content-based; served a substantial government interest because of the state's need to maintain orderly crowd movement; and allowed alternative forums for the expression of ISKCON's protected speech outside the fairgrounds. *Id.* at 654-55.

48. 307 U.S. 496 (1939).

49. *Id.* at 515-16.

50. *Id.*

later held that this rule applies not only to traditionally public places, but also "where the state has opened a forum for direct citizen involvement," such as school board meetings.<sup>51</sup> In the more recent case of *Perry Education Association v. Perry Local Educators' Association*,<sup>52</sup> the Court again reiterated the rule that governmental authorities must show a valid and compelling state interest in order to prohibit or regulate speech on the basis of content in any public forum, whether that forum has been made public by tradition or by "government fiat."<sup>53</sup> Once the forum has been made public, all speakers must have equal access to it.<sup>54</sup>

However, in the last two decades, the Court has held that not all publicly-owned places are public forums.<sup>55</sup> In *Adderley v. Florida*,<sup>56</sup> the Court ruled that the state of Florida did not violate the free speech rights of student protesters in arresting members of the group for demonstrating on the grounds of a county jailhouse. The Court reasoned that the jailhouse and its grounds were reserved exclusively for "jail uses," and thus did not constitute a public forum. Since the property was not a public forum, the state could bar public access to it.<sup>57</sup> In *Perry Education Association*, the Court concluded that in a nonpublic forum, the state need only show that its speech-inhibiting regulation "rationally furthers a legitimate state purpose."<sup>58</sup> The Court ruled that the state may choose among speakers in deciding who, if anyone, may use a government-owned nonpublic forum to air their views, as long as the choice of speakers is related to the forum's purpose and to a valid state interest.<sup>59</sup> *Perry Education Association* was brought by a teacher's union which had lost to a rival union in its bid to become the exclusive bargaining representative for teachers district-wide. Plaintiff charged that the school district had violated its members' first amendment rights by agreeing to permit only the exclusive bargaining representative to communicate with teachers through school mailboxes.<sup>60</sup> The Court reasoned that the bargaining representative's responsibility to communicate with district teachers and the district's interest in supporting that responsibility, constituted a legitimate state interest to which

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51. *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976). See *infra* note 89 and accompanying text.

52. 460 U.S. 37 (1983).

53. *Id.* at 45. See also *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) (regulation on picketing unconstitutional because it was content-based and did not further substantial governmental interest); *Consolidated Edison, Inc. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) (prohibition on public utility bill inserts unconstitutional because it was content-based and did not serve a compelling state interest).

54. See *City of Madison*, 429 U.S. at 168.

55. "The Court has stated on several occasions that the first amendment does not guarantee access to property simply because it is owned or controlled by the state." Comment, *Constitutional Law: First Amendment Restrictions Upon Nonpublic Forum Need Only Be Reasonable and Without Discriminatory Intent*, 23 WASHBURN L.J. 185, 189 n.41 (1983).

56. 385 U.S. 39 (1966).

57. *Id.* at 47-48.

58. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 54.

59. *Id.* at 48-52.

60. *Id.* at 40-41.



the exclusive access to mailboxes was rationally related.<sup>61</sup> Thus, the Court has made clear that the strict scrutiny it has long used in reviewing regulations which inhibit protected speech will not be used in reviewing cases involving a nonpublic forum. Instead, the Court will uphold any government regulation in a nonpublic forum which results in restricting communication, as long as the regulation is reasonable.<sup>62</sup>

### C. *Associational Rights and Labor Unions*

The first amendment protects both the individual's freedom to speak and the individual's freedom to associate with others.<sup>63</sup> Included in the latter constitutional protection is the right to associate with co-employees in labor organizing efforts. For example, in *Thomas v. Collins*,<sup>64</sup> the Court struck down a Texas statute which required labor organizers to register with the state before making pro-union speeches. The Court held that only if the labor activity presented a "clear and present danger" to the welfare of the state could the state interfere with organizing efforts. Unwarranted interference constituted a violation of the organizer's speech and associational rights.<sup>65</sup> The Court has also ruled that individuals have a constitutional right *not* to speak or associate. These rights, referred to as "negative first amendment rights,"<sup>66</sup> prohibit governments from compelling individuals to engage in speech or to associate with anyone or with any idea.<sup>67</sup> In *West Virginia State Board of Education v. Barnette*,<sup>68</sup> teachers and students were required to salute the flag and several Jehovah's Witness students refused to do so on religious grounds.<sup>69</sup> The mandatory salutation to the flag was found to be unconstitutional because it compelled citizens to express their faith in politics, nationalism or religion.<sup>70</sup>

The question of whether employees have a constitutional right not to associate with *labor unions* was presented three decades later in *Abood v. Detroit Board of Education*.<sup>71</sup> In that decision, the Court upheld a Michi-

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61. *Id.* at 50-51.

62. Another example of the Court's recent decisions involving nonpublic forums is that of *United States Postal Serv. v. Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (residential mailboxes held not to be a public forum).

63. "Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977). See *Buckley v. Valeo*, 424 U.S. 1 (1976); *NAACP v. Button*, 371 U.S. 415 (1963).

64. 323 U.S. 516 (1945).

65. *Id.* at 530.

66. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. Rev. 995, 996 (1982).

67. *Id.* at 995.

68. 319 U.S. 624 (1943).

69. *Id.* at 626, 629.

70. *Id.* at 642. Compare *Wooley v. Maynard*, 430 U.S. 705 (1977) (a Jehovah's Witness allowed to cover state motto: "Live Free or Die" on his license plate because the statute requiring display of this motto infringed on negative first amendment freedoms) with *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (negative first amendment rights of shopping center owners not infringed by allowing visitors to engage in public expression unrelated to the center's commercial purposes).

71. 431 U.S. 209 (1977).

gan statute which allowed a public school teachers' union to require nonunion teachers within the union's collective bargaining unit to pay the union a service fee equal in amount to union dues.<sup>72</sup> The Court said in *Abood* that fees extracted from nonunion teachers may be used only to pay for expenses associated with collective bargaining and grievance procedures;<sup>73</sup> such fees cannot be used against an employee's will to support a union's political or ideological activities.<sup>74</sup> The Court found that collection of dues for collective bargaining activities constituted an "interference" with nonunion employees' associational rights, but reasoned that the interference was "justified" by the state's interest in labor peace.<sup>75</sup> Labor peace in this context could only be secured by a union assured of financial solvency through the collection of dues and fees from members and nonmembers alike.<sup>76</sup> The collection of fees was further justified by the fact that nonunion teachers benefitted from the union's collective bargaining efforts.<sup>77</sup> The Court concluded however that no state interest justified the collection of fees for ideological activities to which nonunion employees objected.<sup>78</sup> In this context, the balance between nonunion teachers' associational rights and the state interest tipped in favor of the teachers. Thus, by the time the Court turned to consider *Minnesota State Board for Community Colleges v. Knight* in 1984, it had long recognized the validity of strong state support for employee unions, but had also established some constitutional protection for nonunion employees who felt coerced by that state support.

#### D. *The Right to a Government Hearing*

The question whether an individual has a right to speak to and be heard by governmental authorities was answered by the Supreme Court in *Bi-Metallic Investment Co. v. State Board of Equalization*<sup>79</sup> in 1915. The Court held that the due process clause of the fourteenth amendment<sup>80</sup> does not require governments to provide hearings unless they are making decisions which involve specific, disputed facts which affect a small number of persons on "individual grounds."<sup>81</sup> If the above circumstances are not present, the affected individual's recourse is not through a hearing, but through the elective process.<sup>82</sup> The Court has not deviated from this rule since it first was enunciated in *Bi-Metallic Investment Co.*,<sup>83</sup> even when the rule has been considered in light of the strong

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72. *Id.* at 222-23.

73. *Id.* at 225-26.

74. *Id.* at 222.

75. *Id.* at 222-23.

76. *Id.* at 221-22.

77. *Id.* at 222.

78. *Id.* at 233-37.

79. 239 U.S. 441 (1915).

80. The fourteenth amendment provides that states may not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

81. 239 U.S. at 445-46.

82. *Id.* at 445.

83. *See, e.g., O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 800 (1980) (nursing home residents have no right to a hearing when government decides to close the

protection of expression offered by the first amendment.<sup>84</sup>

### E. *Academic Freedom*

Until fairly recent times, the concept of academic freedom in American universities and colleges was grounded in tradition rather than in law. Legal protection of academic freedom began in the 1930's through the concept of tenure which was viewed as a way of protecting faculty members' rights of free speech and association.<sup>85</sup> "Academic freedom" as a distinct legal concept was not strongly tested until the McCarthy era's "Red Menace" cases.<sup>86</sup> In those cases, the Supreme Court stated that academic freedom is a "special concern of the First Amendment."<sup>87</sup> Teachers in higher education were free "to inquire, to study and to evaluate"<sup>88</sup> due to their specialized role as the educators and leaders of society.

On the secondary-school level, the Court has ruled that public school teachers in unionized districts have the right to speak in public forums on any issue—including bargaining issues. In *City of Madison Joint School District v. Wisconsin Public Employment Relations Commission*,<sup>89</sup> a nonunion teacher spoke to the Board of Education in a public meeting concerning a topic of pending negotiation, namely, the payment of union dues. The teacher's right to speak was upheld and the Court stated that "teachers may not be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."<sup>90</sup> However, the Court noted that this case dealt with a meeting of the Board of Education that was open to the public<sup>91</sup> and that individuals may not always have a constitutional right to voice their views whenever, however, and wherever they please.<sup>92</sup> In fact, the Court recognized that meetings of official bodies "may be closed to the public without implicating any constitutional

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nursing home); *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 245 (1973) (no right to a hearing when governments set industry-wide rates for freightcar use); *Bowles v. Willingham*, 321 U.S. 503, 519-20 (1944) (landlords have no right to a hearing when a government agency imposes rent control); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 708-09 (1923) (no hearing required when government determines whether an individual's property is needed for public use); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 12.2 (2d ed. 1979).

84. "(T)he First Amendment does not impose any affirmative obligation on the government to listen, (or) to respond (to the individual affected by government policymaking)." *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979).

85. H. EDWARDS & V. NORDIN, *HIGHER EDUCATION AND THE LAW* 163 (1979).

86. *Id.* See *infra* note 119.

87. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Some commentators believe that academic freedom is vanishing in the United States in the wake of compulsory collective bargaining in education. See, e.g., Kirk, *Bargaining Away Academic Freedom*, 2 *Gov't UNION REV.* 20 (1980).

88. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

89. 429 U.S. 167 (1976).

90. *Id.* at 175 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).

91. *Id.* at 175.

92. *Id.* at 178 (Brennan, J., concurring) (quoting *Adderly v. Florida*, 385 U.S. 39, 48 (1966)).

rights whatever."<sup>93</sup> This could conceivably include the implied constitutional right (if there be any) of academic freedom.

#### F. Equal Protection

The fourteenth amendment guarantees all persons "equal protection" under the law.<sup>94</sup> In interpreting this clause, the Supreme Court consistently has held that states may treat individuals differently under social and economic legislation as long as the difference in treatment is a rational way of achieving a valid governmental objective. For instance, in *Williamson v. Lee Optical Co.*,<sup>95</sup> the Court held valid an Oklahoma statute which prohibited opticians from fitting lenses to the wearer's face without a prescription written by an optometrist or ophthalmologist, but did not apply a similar prohibition to sellers of ready-to-wear eyeglasses.<sup>96</sup> However, the Court has held that when governments treat individuals differently on the basis of race or violate an individual's fundamental right to interstate travel, to vote, or to appeal from criminal convictions, the statute will be subject to strict scrutiny and will be upheld only if the government can show a compelling state interest requiring such legislation.<sup>97</sup> Thus, in *Brown v. Board of Education*,<sup>98</sup> Kansas, South Carolina, Virginia and Delaware denied black students admission to public schools under state laws that required or allowed segregation according to race. The court found race to be a suspect class, applied strict scrutiny to the state laws and found them to be unconstitutional as a denial of equal protection of the laws.<sup>99</sup>

Under these precedents, because PELRA involves neither a suspect class nor a fundamental right protected by the equal protection clause, the legislation challenged in *Knight* would violate the equal protection clause only if it were irrational or if Minnesota's objective in fashioning the legislation were to constitute an invalid state end.

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93. *Id.* at 178 (Brennan, J., concurring) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972)).

94. The fourteenth amendment states in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

95. 348 U.S. 483 (1955) (also decided on due process grounds).

96. *Id.* See also *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

97. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (interstate travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting); *Douglas v. California*, 372 U.S. 353 (1963) (criminal appeals); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (race). See generally GUNTHER, *supra* note 42, at 671-72 (discussing the "two-tier approach" of the Warren Court that triggered strict scrutiny in the area of equal protection, i.e. the presence of a suspect classification and an impact on fundamental rights).

98. 347 U.S. 483 (1954).

99. *Id.* at 488-95.

## III. MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES V. KNIGHT

A. *The Majority Opinion*

## 1. Interpretation of the Statute

Section 179.66(7) of PELRA permits discussion of policy issues between any professional employee and his or her employer "when such communication is a part of the employee's work assignment."<sup>100</sup> Section 179.65(1) of the statute permits any employee to discuss with administrators "view(s). . . or opinion(s) on any matter related to the conditions or compensation of public employment or their betterment. . . ."<sup>101</sup> The Court interpreted these provisions to permit communication between nonunion faculty members and administrators on all issues of policy—even those outside the scope of the employee's work assignments—as long as such communication does not take place in, or take the place of, "meet and confer" sessions.<sup>102</sup> Apparently, the Court viewed § 179.66(7) as offering only one example of the contexts in which such communication could take place (*i.e.*, by way of employee work assignments), rather than as limiting such communication to the context of work assignments alone.<sup>103</sup>

## 2. Public Forums and Government Hearings

The Court ruled that PELRA does not violate the nonunion members' first and fourteenth amendment rights because they have no constitutionally guaranteed right to speak in the particular context prescribed by the statute.<sup>104</sup> First, the Court made clear that the nonunion members had not been banned from a public forum, because "meet and confer" sessions are not open to the public either by tradition or by "government designation," and therefore do not constitute a public forum.<sup>105</sup> For that reason, the Court concluded, the case was distinguishable from *City of Madison Joint School District v. Wisconsin Public Employment Relations Commission*,<sup>106</sup> in which the Court ruled that public school teachers had a constitutional right to speak at school board meetings. Unlike public school board meetings, PELRA's "meet and confer" sessions were never intended to be open to the public for public participation.<sup>107</sup>

However, rather than conclude that the nonunion members validly could be excluded from "meet and confer" sessions because such sessions were nonpublic forums, the Court distinguished *Knight* from nonpublic forum cases decided thus far. Nonpublic forum cases such as

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100. MINN. STAT. ANN. § 179.66(7) (West Supp. 1984).

101. *Id.* § 179.65(1).

102. 104 S. Ct. 1058, 1061-62 (1984).

103. *See id.*

104. 104 S. Ct. at 1064-70.

105. *Id.* at 1064.

106. 429 U.S. 167 (1976). *See supra* notes 90-92 and accompanying text.

107. 104 S. Ct. at 1064.

*Perry Education Association*<sup>108</sup> were brought by persons who demanded access to government property in order to speak to private individuals, the Court said. In contrast, the nonunion members in the instant case demanded access to a government forum in order to speak to public officials.<sup>109</sup> They did not demand only a right to speak, but a right to speak and to be listened to in a specific forum by governmental authorities—a right which does not exist under the rule of *Bi-Metallic Investment Co. v. State Board of Equalization*,<sup>110</sup> the Court concluded.<sup>111</sup>

Nor did the Court find the state's refusal to listen to the nonunion members while agreeing to listen to union members unconstitutional; the Court reasoned that our system of government recognizes the freedom of public officials to choose to whom they will listen.<sup>112</sup> The Court contended that any other rule would deprive all public officials, including the nation's President, of the right to pick their advisors.<sup>113</sup>

### 3. Public Employee Unions

The Court next analyzed the case in light of the nonunion members' status as public employees and concluded that they did not have a right to a hearing by governmental authorities merely because those authorities were also their employers.<sup>114</sup> By way of analogy, the Court compared the case with *Smith v. Arkansas State Highway Employees, Local 13156*.<sup>115</sup> In *Smith*, the Court upheld a public employer's refusal to consider employee grievances when filed by the employee's union rather than by the employee himself or herself.<sup>116</sup> The Court in *Knight* reasoned that *Smith* rested upon the principle that, when making policy decisions, governments may choose which of its employees to listen to, whether they speak as individuals or are represented by a group—a principle which also supports Minnesota's decision to listen only to MCCFA members in "meet and confer" sessions.<sup>117</sup>

### 4. The First Amendment and Academe

The Court rejected the nonunion members' argument that the Constitution guarantees the right of faculty members to confer with administrators on policy issues. The Court held that dialogue between faculty and administration on a college or university level is a sound American tradition, but not one which is protected by the Constitution.<sup>118</sup> Prior Supreme Court cases which recognized the importance of first amendment protection for teachers were distinguished as involving govern-

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108. 460 U.S. 37 (1983).

109. 104 S. Ct. at 1064-65.

110. 239 U.S. 441 (1915). See *supra* notes 79-84 and accompanying text.

111. 104 S. Ct. at 1065-67.

112. *Id.* at 1066.

113. *Id.* at 1064, n.6.

114. *Id.* at 1067.

115. 441 U.S. 463 (1979).

116. *Id.*

117. 104 S. Ct. at 1067.

118. *Id.*

mental suppression of communication between teachers and private individuals, while the instant case involved suppression of communication between teachers and public officials, the Court reasoned.<sup>119</sup>

### 5. Equal Protection

The Court, citing *Perry Education Association*, dismissed the nonunion members' claim that PELRA denied them equal protection.<sup>120</sup> The Court reasoned that the equal protection clause did not prohibit a state from permitting only union teachers to speak in a nonpublic forum, as long as the practice is rationally related to a valid state end.<sup>121</sup> Further, it concluded that the state's interest in labor peace and efficient employee-employer relations is valid, and the "meet and confer" sessions are a rational way of fulfilling that interest.<sup>122</sup>

### B. *The Concurrence*

Justice Marshall agreed with the outcome of the case, but disagreed with the majority's blanket application of *Bi-Metallic Investment Co.*, which he asserted denied the nonunion members the right to be heard by college administrators in any context.<sup>123</sup> Justice Marshall argued that the principles underlying *Healy v. James*<sup>124</sup> and other decisions involving institutions of higher education support a constitutional right to faculty-administrator communication in some situations. The Court often had recognized that a teacher's freedom to speak and associate could not be abridged if students were to become well-educated individuals and effective citizens, he asserted.<sup>125</sup> Justice Marshall concluded, however, that PELRA does not violate this freedom, for the statute permits communication between faculty members and administrators outside the context of "meet and confer" sessions.<sup>126</sup>

### C. *The Dissent*

#### 1. Justice Brennan

Like Justice Marshall, Justice Brennan argued that faculty members have a constitutional right to communicate with administrators—a right

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119. *Id.* at 1067-68. The Court cited *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), *Shelton v. Tucker*, 364 U.S. 479 (1960), and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). Each case involved teachers who refused to divulge their political party affiliations to governmental authorities attempting to rout Communists.

120. U.S. CONST. amend. XIV, § 1.

121. 104 S. Ct. at 1069.

122. *Id.* at 1069-70.

123. *Id.* at 1070.

124. 408 U.S. 169 (1972). In *Healy*, the Court stated that denying official recognition to student college organizations without adequate justification abridges first amendment rights. *Id.* at 181.

125. 104 S. Ct. at 1070-71 (citing *Sweezy v. New Hampshire*, 354 U.S. 479 (1957)).

126. *Id.* at 1071. As the majority opinion noted, the State Board and college administrators "solicit opinions" in college-wide meetings, and college administrators maintain an "open-door" policy which permits all faculty members to meet with administrators individually to discuss any topic of interest to the teacher. *Id.* at 1062, n.3.

based upon the first amendment's "special concern" for academic freedom.<sup>127</sup> However, Brennan disagreed with Marshall's conclusion that such right is satisfied by the contact which PELRA permits between non-union faculty members and college administrators,<sup>128</sup> and reasoned that the communication allowed by PELRA is too "sporadic and informal" to be meaningful.<sup>129</sup>

Justice Brennan also concluded that the statute violates nonunion teachers' associational rights.<sup>130</sup> "Meet and confer" sessions played so central a role in developing academic policy that teachers who "want to remain full members of the academic community" must participate in them.<sup>131</sup> Thus, since only MCCFA members could participate in "meet and confer" sessions, teachers who took their jobs seriously must join the MCCFA even if they have "personal or ideological objections" to the union.<sup>132</sup> Justice Brennan concluded that the statute forced an ideological association unwanted by the individual which, under the rule of *Aboud v. Detroit Board of Education*, violates the individual's first amendment right *not* to associate with others.<sup>133</sup>

## 2. Justice Stevens

Justice Stevens' dissent<sup>134</sup> was based on his conclusion that both PELRA and the majority's holding prohibit any communication between nonunion faculty members and administrators on any policy issues except those directly affecting the teachers' academic specialty.<sup>135</sup> Unlike the Court majority, Justice Stevens interpreted § 179.65(1) of the statute as permitting communication between nonunion faculty members and administrators only on issues related to collective bargaining.<sup>136</sup> In his view, these limitations prohibit even *willing* college administrators from listening to nonunion faculty members who want to speak about most policy issues.<sup>137</sup> He thus concluded that the issue in the nonunion members' case was not whether public officials could refuse to grant a hearing to individuals, but whether the state could prohibit individuals from competing for the attention of public officials who might be willing to listen to them.<sup>138</sup> Justice Stevens argued that governments could not prohibit such competition because to do so prevented the existence of an "open marketplace of ideas" which is guaranteed by the first amend-

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127. *Id.* at 1072.

128. *Id.* at 1072, n.1.

129. *Id.*

130. *Id.* at 1073.

131. *Id.*

132. *Id.*

133. *Id.* at 1073-74. See *supra* notes 71-78 and accompanying text.

134. Justice Brennan joined in all but Part III of Justice Stevens' dissent. Justice Powell joined in all but Part II.

135. 104 S. Ct. at 1075-76 and n.1 (interpreting MINN. STAT. ANN. §§ 179.65(1), 179.66(7) (West Supp. 1984)).

136. See *supra* notes 100-103 and accompanying text.

137. 104 S. Ct. at 1081-82.

138. *Id.*



ment.<sup>139</sup> By prohibiting any communication between nonunion teachers and administrators on most policy issues, PELRA prohibited those teachers from competing for the attention of administrators, thus violating the first amendment's "open marketplace" principle.

Justice Stevens' dissent also disagreed with the majority's conclusion that "meet and confer" sessions were not public forums, arguing that the sessions were public because they were held in public places and open to public view.<sup>140</sup> Applying the rule of *Police Department of Chicago v. Mosley*,<sup>141</sup> Justice Stevens concluded that the sessions constituted public forums rather than nonpublic forums, and Minnesota could not allow participation by one speaker while prohibiting participation by another.<sup>142</sup> The opinion further reasoned that even if the "meet and confer" sessions constituted a nonpublic forum, the majority erred in applying the rule of *Perry Education Association*<sup>143</sup> to uphold PELRA's uneven treatment of union and nonunion teachers.<sup>144</sup> The discriminatory treatment upheld in *Perry Education Association* was justified by the heavy responsibilities the exclusive bargaining representative carried in communicating with district teachers and upon the labor unrest that might result if both the exclusive representative and the minority union had access to teachers' mailboxes.<sup>145</sup> Justice Stevens averred that neither justification existed in the context of "meet and confer" sessions.<sup>146</sup>

Finally, this dissent concluded that PELRA violated the rule of *Abood*, which prohibited states from dealing exclusively with a union except in the context of collective bargaining. Any extension of exclusivity beyond that context violated the associational rights of nonunion employees.<sup>147</sup> Since "meet and confer" sessions were not connected with collective bargaining activity, exclusive participation by the MCCFA violated the rule of *Abood*.<sup>148</sup>

#### IV. ANALYSIS

In light of Minnesota's academic tradition of strong faculty involvement in administrative policymaking, to many minds PELRA is a terribly unattractive law. However, as the Court correctly concluded, it is not an unconstitutional one. It is the province of the Minnesota legislature, not

139. *Id.* at 1074-75, 1086. See generally *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (ultimate good is obtained by "free trade in ideas" and the best test of truth is the power of the thought to get itself accepted in the competition of the market).

140. 104 S. Ct. at 1084.

141. 408 U.S. 92 (1972). In *Mosley*, the Court struck down an ordinance which permitted only labor unions to picket near public school buildings during certain hours.

142. 104 S. Ct. at 1083-84.

143. See *supra* notes 120-122 and accompanying text.

144. *Id.* at 1085.

145. *Id.*

146. *Id.*

147. *Id.* at 1083.

148. *Id.*

that of the Court, to modify or abandon PELRA's meet and confer provisions if indeed the provisions should be modified or abandoned.

A. *Interpretation of the Statute*

The Court's holding that PELRA does not violate the free speech rights of nonunion teachers is based upon the majority's conclusion that PELRA permits nonunion teachers to discuss all policy issues with administrators in a variety of settings outside "meet and confer" sessions, and that Minnesota's community college administrators do in fact feel free to engage in such discussions with nonunion teachers.<sup>149</sup>

1. Section 179.65(1)

The Minnesota legislature made clear in § 179.65(1) that PELRA was not to be construed "to limit, impair or affect the right of any public employee or his representative to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment" as long as the communication does not interfere with "the rights of the exclusive [collective bargaining] representative."<sup>150</sup> Justice Stevens, in his dissent, interpreted this section to allow communication between nonunion teachers and administrators *on collective bargaining issues only*.<sup>151</sup> He interpreted the phrase "conditions or compensation" used in § 179.65(1) to be the equivalent of the phrase "terms and conditions of employment"—the phrase used in PELRA to refer to collective bargaining issues.<sup>152</sup> However, a close reading of PELRA forces one to conclude, as the majority correctly did, that if the Minnesota legislature had meant to limit § 179.65(1) to communications involving only collective bargaining issues, it would have used the phrase "terms and conditions" in place of the phrase "conditions and compensation" in that section. Throughout PELRA, the legislature consistently referred to collective bargaining issues as "terms and conditions" of employment.<sup>153</sup> In fact, nowhere in the statute are collective bargaining issues referred to in any way but as "terms and conditions" of employment. Thus, if the language of § 179.65(1) is to be viewed as consistent with the language employed in the rest of PELRA, it must be concluded that "conditions and compensation" refers to something other than collective bargaining issues. It must refer to *all* conditions of employment, whether they be hours and fringe benefits to be discussed in collective bargaining sessions, or broader policy issues which are the subjects of meet and confer sessions.

Even if § 179.65(1) is viewed as ambiguous, PELRA's self-stated legislative purpose leads to the conclusion that § 179.65(1) encourages discussion of both collective bargaining issues *and* broad policy issues.

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149. 104 S. Ct. at 1062.

150. MINN. STAT. ANN. § 179.65(1) (West Supp. 1984).

151. 104 S. Ct. at 1075, n.1.

152. MINN. STAT. ANN. § 179.63(18) (West Supp. 1984).

153. *See id.* §§ 179.63(16); 179.63(18); 179.65(4); 179.66(2); 179.66(4).

The statute recognizes, for instance, that "professional employees possess knowledge, experience and dedication which . . . may assist public employers in developing their policies."<sup>154</sup> If § 179.65(1) were read to prohibit discussion of broad policy issues (*i.e.*, those not included in "terms and conditions" of employment), that legislative purpose would be frustrated.

Hence, since PELRA permits nonunion teachers and college administrators to discuss in other settings the kinds of broad policy issues discussed by MCCFA members in "meet and confer" sessions, the statute does not inhibit the "marketplace of ideas" which Justice Stevens argued is assured by the first amendment.<sup>155</sup> The marketplace exists on campus everywhere except within formal "meet and confer" and "meet and negotiate" (*i.e.*, collective bargaining) sessions. To insist that the marketplace must encompass even these formal sessions is to ignore the rule of *Bi-Metallic Investment Co.*<sup>156</sup>

## 2. Administrators' Interpretation of PELRA

The majority in *Knight* concluded not only that PELRA allows significant communication between all faculty members and administrators, but that administrators of Minnesota's community college system have interpreted the statute to permit such communication.<sup>157</sup> Justice Stevens, in his dissent, argued that testimony at the trial court level showed that administrators were afraid to communicate with nonunion teachers for fear such communication would constitute a violation of PELRA.<sup>158</sup> However, the Court majority concluded that the trial record showed that administrators' fears vanished after "an initial period of adjustment to PELRA."<sup>159</sup> The district court's findings clearly showed that most administrators had not been deterred from discussing policy issues with nonunion teachers outside "meet and confer" sessions.<sup>160</sup>

The majority's conclusion was buttressed by the district court's finding that "[t]he plaintiffs have not demonstrated . . . that any faculty member's exercise of free speech has been impaired in practice by virtue of this potential inhibition [on speech]."<sup>161</sup> In fact, the evidence showed that nonunion teachers had ample opportunity to express themselves on all policy issues, including those which were discussed by the MCCFA at "meet and confer" sessions. The State Board for Community Colleges met with teachers and other individuals for open discussions before each of its on-campus Board meetings; college presidents held "town meetings" on campus, attended faculty meetings and other-

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154. *Id.* § 179.73.

155. *See supra* notes 134-139 and accompanying text.

156. *See supra* notes 79-84 and accompanying text.

157. 104 S. Ct. at 1062.

158. *Id.* at 1077.

159. *Id.* at 1062, n.4.

160. *Id.*

161. *Id.* at 1062, n.4.

wise maintained an "open-door" policy.<sup>162</sup> One could assume that since college presidents felt free to speak with all teachers, other administrators also communicated with all teachers. This being the case, it could not be said that administrators had interpreted PELRA in a way which had hampered that "marketplace of ideas" essential to free speech.

### 3. Amplification of Union Voices

The Court did acknowledge the district court's finding that the MCCFA's voice was amplified over that of nonunion teachers by virtue of PELRA's "meet and confer" sessions. The sessions produced what administrators perceived to be the official view of the faculty on policy issues.<sup>163</sup> But the Court rightly concluded that *Smith v. Arkansas State Highway Employees, Local 1315* clearly held that such amplification does not violate free speech rights.<sup>164</sup> "Amplification of the sort claimed is inherent in government's freedom to choose advisors," the majority noted.<sup>165</sup> That is, choosing to listen to just one of many speakers is the equivalent of choosing to amplify the voice of that speaker, and to de-emphasize the voices of others.

### B. *Public v. Nonpublic Forums*

The Court's holding that "meet and confer" sessions were not public forums rested squarely on a line of precedent beginning with *Adderley* and continuing through *Perry Education Association*.<sup>166</sup> "Meet and confer" sessions, like the jailhouse grounds in *Adderley*, were not traditionally public places. Nor had they been opened by government for public participation. Therefore, under the rule of *Adderley*, government officials could ban individuals from "meet and confer" sessions. *Perry Education Association*, moreover, held that government officials could admit some individuals and ban others who want to speak in such nonpublic forums, as long as the government did not base its choice of speakers on the speaker's viewpoint, or the speech's content.<sup>167</sup> Officials may base the choice of speaker on the speaker's status<sup>168</sup> (e.g., union members v. non-union employees),<sup>169</sup> subject matter or category of speech<sup>170</sup> (e.g., commercial v. noncommercial speech),<sup>171</sup> or speaker identity<sup>172</sup> (e.g., the President may choose who will advise him as Chief of Staff). Thus, if Minnesota chose to let some teachers speak at "meet and confer" ses-

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162. *Id.* at 1062, n.3.

163. *Id.* at 1062, 1068; *See Knight v. Minnesota Community College Faculty Ass'n*, 571 F. Supp. 1, 8 (D. Minn. 1982).

164. *See supra* notes 114-117 and accompanying text.

165. 104 S. Ct. at 1068.

166. *See supra* notes 55-62 and accompanying text.

167. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 at 46.

168. *Id.* at 49.

169. *Id.*

170. *Id.*

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

172. 460 U.S. 37 at 50.

sions because they are representatives of the MCCFA, the choice was valid because it was based on the speakers' union status. If, on the other hand, a state choose only to listen to those teachers who favor a curriculum based upon a certain political outlook, that choice would be invalid, for it would be based upon those speakers' viewpoints. As *Perry Education Association* held, a choice based upon speaker status is valid as long as it rationally promotes a valid state end.<sup>173</sup> It is not correct to say, as Justice Stevens does,<sup>174</sup> that once a government opens a forum to one speaker, it must allow communication from all other speakers unless the state has a compelling reason for not doing so. Minnesota's choosing to permit only MCCFA teachers to speak at "meet and confer" sessions is a rational way of achieving two valid state ends: maintaining a peaceful relationship with public employees and better serving college communities by receiving guidance from professional teachers.

The Court distinguished the instant case from nonpublic forum cases because the nonunion members in the instant case demanded to speak to public officials rather than to private individuals.<sup>175</sup> The Court reasoned that analysis of nonpublic forum cases was therefore "irrelevant," since individuals can never demand a government audience when a government is making a policy decision.<sup>176</sup> Such reasoning, however, goes too far in separating the rule governing "government hearings" from that of public and nonpublic forums. Nonpublic forum analysis is necessary in *Knight* because it answers the question whether government officials may refuse to listen to one speaker while agreeing to listen to another. *Bi-Metallic Investment Co.* and its progeny answer only the question whether government officials acting in a policy-making capacity may refuse to listen to all individuals.<sup>177</sup> Indeed, for this reason, the Court in *Knight* found the nonpublic forum analysis of *Perry Education Association* far from irrelevant in the Court's consideration of the nonunion teachers' equal protection claim.<sup>178</sup>

### C. Associational Rights

The nonunion teachers argued, and the dissenters agreed, that PELRA violated their first amendment right to associate freely and to refrain from associating with others.<sup>179</sup> They complained that they were faced with the choice of joining the union or of being denied meaningful communication with administrators, thereby losing their status as full and effective members of the faculty. To be a full member of the faculty, the dissenters reasoned, teachers were forced by PELRA to join a union even though those teachers were ideologically opposed to unionism.

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173. See *supra* notes 58-59 and accompanying text.

174. See 104 S. Ct. at 1084.

175. See *supra* notes 57-60 and accompanying text.

176. 104 S. Ct. at 1065.

177. See *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). See also *supra* notes 48-52 and accompanying text.

178. See 104 S. Ct. at 1069.

179. See *supra* notes 130-33, 147-48 and accompanying text.

Such coercion, they argued, clearly violated the rule of *Aboud*.<sup>180</sup>

The majority's rejection of this argument is implicit in its conclusion that nonunion faculty members have ample opportunity to discuss policy issues with administrators. Nonunion faculty members who feel that they must communicate with administrators on issues of policy in order to maintain their status as full and effective members of the faculty have many opportunities to do so. They may communicate with members of the State Board before on-campus Board meetings, with the college president at town meetings and at discussion breakfasts, through letters and personal contact with the system's chancellor or by visiting the offices of other administrators.<sup>181</sup> Thus, in light of the many opportunities nonunion teachers have to communicate with administrators on broad policy issues, teachers need not join the MCCFA (and participate in "meet and confer" sessions) in order to communicate meaningfully with administrators.

#### D. *The Academic Setting*

The Court did not err in finding that nonunion faculty members have no special right to a government audience by virtue of the academic setting in which they work. The Court has never indicated that teachers have a greater right than does the general public to speak in nonpublic forums, or to speak before public officials.<sup>182</sup> In fact, in *Pickering v. Board of Education*<sup>183</sup> the Court stated in dicta that the state may restrict the speech of public school teachers in situations in which government would not be free to restrict the speech of other citizens. Public school teachers may speak out only if the communication does not "impede the teacher's proper performance . . . in the classroom or . . . [interfere] with regular operation of the schools generally."<sup>184</sup> The district court argued, as did Justice Brennan in *Knigh*t that the first amendment nevertheless offered enhanced protection to university-level professors.<sup>185</sup> The argument stemmed from dicta found in a series of cases spawned during the McCarthy era, in which the Court struck down state statutes which required teachers to take loyalty oaths or otherwise prove they were not affiliated with the Communist Party.<sup>186</sup> To deny employment in universities on the basis of political party affiliation would deny university students (and, therefore, the country's future leaders) "that robust exchange of ideas which discovers truth 'out of a multitude of tongues. . . .'"<sup>187</sup> As the Court in *Knigh*t pointed out, these McCarthy era cases were clearly distinguishable from the case

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180. See *supra* notes 130-33 and accompanying text.

181. 104 S. Ct. at 1062, n.3.

182. See *supra* notes 118-19 and accompanying text.

183. 391 U.S. 563 (1968).

184. *Id.* at 572-73.

185. 104 S. Ct. at 1072-73; *Knigh*t v. Minnesota Community College Faculty Ass'n, 571 F. Supp. at 9.

186. See *supra* note 119.

187. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943)).

before them. The former cases involved statutes which prohibited teachers from speaking and associating with Communists in private forums. The statute at issue in *Knight* prohibited teachers from speaking to public officials in the context of one nonpublic forum ("meet and confer" sessions).<sup>188</sup> In fact, the dicta of the former cases could not be applied to *Knight* without overruling *Bi-Metallic Investment Co.*, *Smith v. Arkansas State Highway Employees, Local 1315*, and other Supreme Court decisions which upheld government's freedom to ignore speakers altogether, or to choose to which speakers to listen. In fact, commentators have urged that the special first amendment protection which the court has espoused in dicta has actually been applied not to teachers but rather to colleges and universities as institutions.<sup>189</sup>

#### E. Government Hearings

The Court's holding is soundly supported by *Bi-Metallic Investment Co.* Justice Stevens' assertion that the state may not prevent public officials from listening to individuals if those officials are potentially willing listeners<sup>190</sup> ignores the fact that the public officials involved in *Knight* are the state, for they are agents of the state whose power is prescribed by the legislature.<sup>191</sup> His argument also pales in light of the many opportunities nonunion teachers have to speak to those administrators, who may and do listen.<sup>192</sup>

#### F. Equal Protection

The Court has ruled consistently that a state, in developing social and economic legislation, may treat individuals differently as long as it can show a rational basis for the legislation. Only when the legislation or regulation affects a "suspect class" of persons or involves voting, interstate travel or criminal appeals—which PELRA does not—will the Court require more.<sup>193</sup> As the Court noted, Minnesota's interest in "ensuring that its public employers hear one . . . voice presenting the majority view of its professional employees on employment-related policy questions" is rational.<sup>194</sup> It therefore passed the minimal scrutiny the Court has always applied in reviewing such legislation.

### CONCLUSION

*Minnesota State Board for Community Colleges v. Knight* constituted a synthesis of administrative, first amendment, and labor law and placed a

188. See *supra* notes 100-101 and accompanying text.

189. See Katz, *The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth*, 16 U.C.D. L. REV. 857, 859, 863 (1983); Malin & Ladenson, *University Faculty Members' Right to Dissent: Toward a Unified Theory of Contractual and Constitutional Protection*, 16 U.C.D. L. REV. 933, 950-55 (1983).

190. See *Bi-Metallic Investment Co.*, 239 U.S. at 445.

191. See B. SCHWARTZ, *ADMINISTRATIVE LAW* 8 (1976).

192. See *supra* notes 110-15 and accompanying text.

193. See *supra* notes 94-99 and accompanying text.

194. 104 S. Ct. at 1069.

limit upon the otherwise broad protection of speech and associational rights offered by the first amendment. As the Court interprets the Constitution, individuals do not have a right to be heard by public officials making policy decisions in a nonpublic forum, regardless of the individuals' status. In fact, those officials may choose which speakers to listen to and may base their choice on the speakers' union status, even when the policies or rules involved do not concern collective bargaining issues.

The holding in *Knight*, being based upon the strong precedent set in *Bi-Metallic Investment Co. v. State Board of Equalization*, reflects a long-held belief by the Court that government will grind to a halt unless officials who make rules and set policy are free to seek advice from whomever they please.<sup>195</sup> In this context, the individual's first amendment protection must bow to the needs of government as a whole.

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195. See *Bi-Metallic Investment Co.*, 239 U.S. at 445.



