Supplementary Material

Chapter 10: The Reagan Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

---

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)

Teachers in Perry, Indiana, voted to make the Perry Educational Association (PEA) their exclusive bargaining representative. In 1977 and 1980, the PEA reached an agreement with the Metropolitan School District of Perry Township, Indiana, which gave the PEA exclusive access to the interschool mails and teacher mailboxes. The Perry Local Educator's Association (PLEA), a rival union, filed a lawsuit against the PEA, claiming that discriminatory access to the mailboxes violated the First and Fourteenth Amendments. A federal district court rejected that lawsuit, but that decision was reversed by the Court of Appeals for the Seventh Circuit. The PEA appealed to the Supreme Court of the United States.

The Supreme Court of the United States by a 5-4 vote ruled that PLEA had no constitutional right to have access to the school mailing system. Justice White's majority opinion declared that the mailboxes were not a public forum in which the state could not make content discriminations. Why did White conclude that no public forum existed? Why did the dissents disagree? The judges all conceptualized this case as concerned with free speech. Would the voting alignment have been different had the justices conceptualized this case as involving the rights of a duly elected union? Why were judges prone to see the issues in Perry *as more concerned with free speech rights than the rights of unions?*

JUSTICE WHITE delivered the opinion of the Court.

. . .

The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school . . . and on sidewalks outside. . . . But this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs. . . . The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.

In places which, by long tradition or by government fiat, have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks, which

> have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Hague v. CIO (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. . . .

A second category consists of public property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. . . .

Although a State is not required to indefinitely retain the open character of the facility, as long as it does so, it is bound by the same standards as apply in a traditional public forum. . . .

Public property which is not, by tradition or designation, a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." . . . In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. . . . As we have stated on several occasions, *"[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." . . .*

The school mail facilities at issue here fall within this third category. The . . . Perry School District's interschool mail system is not a traditional public forum. . . . The internal mail system, at least by policy, is not held open to the general public. It is, instead, the Perry Local Educator's Association's [PLEA] position that the school mail facilities have become a "limited public forum" from which it may not be excluded because of the periodic use of the system by private non-school-connected groups, and PLEA's own unrestricted access to the system prior to the Perry Educational Association's [PEA] certification as exclusive representative.

Neither of these arguments is persuasive. The use of the internal school mail by groups not affiliated with the schools is no doubt a relevant consideration. If, by policy or by practice, the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created. This, however, is not the case. As the case comes before us, there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum. . . .

Moreover, even if we assume that, by granting access to the Cub Scouts, YMCA's, and parochial schools, the School District has created a "limited" public forum, the constitutional right of access would, in any event, extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not, as a consequence, be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.

PLEA also points to its ability to use the school mailboxes and delivery system on an equal footing with PEA prior to the collective bargaining agreement signed in 1978. Its argument appears to be that the access policy in effect at that time converted the school mail facilities into a limited public forum generally open for use by employee organizations, and that once this occurred, exclusions of employee organizations thereafter must be judged by the constitutional standard applicable to public forums. The fallacy in the argument is that it is not the forum, but PLEA itself, which has changed. Prior to 1977, there was no exclusive representative for the Perry School District teachers. PEA and PLEA each represented its own members. Therefore the School District's policy of allowing both organizations to use the school mail facilities simply reflected the fact that both unions represented the teachers and had legitimate reasons for use of the system. PLEA's previous access was consistent with the School District's preservation of the facilities for school-related business, and did not constitute creation of a public forum in any broader sense.

. . . There is . . . no indication that the School Board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the *status* of

the respective unions, rather than their views. Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum, but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

The differential access provided PEA and PLEA is reasonable, because it is wholly consistent with the District's legitimate interest in "preserv[ing] the property . . . for the use to which it is lawfully dedicated." . . . . Use of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of all Perry Township teachers. Conversely, PLEA does not have any official responsibility in connection with the School District, and need not be entitled to the same rights of access to school mailboxes. . . Moreover, exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools. The policy "serves to prevent the District's schools from becoming a battlefield for inter-union squabbles."

. . .

Finally, the reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place. These means range from bulletin boards to meeting facilities to the United States mail. During election periods, PLEA is assured of equal access to all modes of communication. There is no showing here that PLEA's ability to communicate with teachers is seriously impinged by the restricted access to the internal mail system. . . .

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE STEVENS join, dissenting.

. . .

In focusing on the public forum issue, the Court disregards the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic.

The First Amendment's prohibition against government discrimination among viewpoints on particular issues falling within the realm of protected speech has been noted extensively in the opinions of this Court. . . . In *Tinker v. Des Moines School District* (1969), . . . we held unconstitutional a decision by school officials to suspend students for wearing black armbands in protest of the war in Vietnam. The record disclosed that school officials had permitted students to wear other symbols relating to politically significant issues. The black armbands, however, as symbols of opposition to the Vietnam War, had been singled out for prohibition. We stated:

> Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

. . .

Admittedly, this Court has not always required content-neutrality in restrictions on access to government property. We upheld content-based exclusions in *Lehman v. City of Shaker Heights* (1974), in *Greer v. Spock* (1976), and in *Jones v. North Carolina Prisoners' Union* (1977). All three cases involved an unusual forum, which was found to be nonpublic, and the speech was determined for a variety of reasons to be incompatible with the forum. These cases provide some support for the notion that the government is permitted to exclude certain subjects from discussion in nonpublic forums. They provide no support, however, for the notion that government, once it has opened up government property for discussion of specific subjects, may discriminate among viewpoints on those topics. Although *Greer, Lehman,* and *Jones* permitted content-based restrictions, none of the cases involved viewpoint discrimination. . . .

Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not. . . We have never held that government may allow discussion of a subject and then discriminate among viewpoints on that particular topic, even if the government, for certain reasons, may entirely exclude discussion of the subject from the forum. In this context, the greater power does not include the lesser, because, for First Amendment purposes, exercise of the lesser power is more threatening to core values. Viewpoint discrimination is censorship in its purest form, and government regulation that discriminates among viewpoints threatens the continued vitality of "free speech."

Against this background, it is clear that the Court's approach to this case is flawed. By focusing on whether the interschool mail system is a public forum, the Court disregards the independent First Amendment protection afforded by the prohibition against viewpoint discrimination. . . .

. . .

As noted, whether the school mail system is a public forum or not, the Board is prohibited from discriminating among viewpoints on particular subjects. Moreover, whatever the right of public authorities to impose content-based restrictions on access to government property that is a nonpublic forum, once access is granted to one speaker to discuss a certain subject, access may not be denied to another speaker based on his viewpoint. Regardless of the nature of the forum, the critical inquiry is whether the Board has engaged in prohibited viewpoint discrimination.

. . .

Addressing the question of viewpoint discrimination directly, free of the Court's irrelevant public forum analysis, it is clear that the exclusive access policy discriminates on the basis of viewpoint. The Court of Appeals found that

> [t]he access policy adopted by the Perry schools, in form a speaker restriction, favors a particular viewpoint on labor relations in the Perry schools . . . : the teachers inevitably will receive from [the petitioner] self-laudatory descriptions of its activities on their behalf, and will be denied the critical perspective offered by [the respondents].

. . . This assessment of the effect of the policy is eminently reasonable. . . .

. . .

. . . [T]he exclusive access policy is both "overinclusive and underinclusive" as a means of serving the State's interest in the efficient discharge of the petitioner's legal duties to the teachers. . . . The policy is overinclusive because it does not strictly limit the petitioner's use of the mail system to performance of its special legal duties, and underinclusive because the Board permits outside organizations with no special duties to the teachers, or to the students, to use the system. . . .

. . .

In order to secure the First Amendment's guarantee of freedom of speech and to prevent distortions of "the marketplace of ideas," . . . governments generally are prohibited from discriminating among viewpoints on issues within the realm of protected speech. In this case, the Board has infringed the respondents' First Amendment rights by granting exclusive access to an effective channel of communication to the petitioner and denying such access to the respondents. In view of the petitioner's failure to establish even a substantial state interest that is advanced by the exclusive access policy, the policy must be held to be constitutionally infirm. . . .