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PUBLIC FORUM ANALYSIS AND STATE OWNED PUBLICATIONS: BEYOND KUHLMEIER v. HAZELWOOD SCHOOL DISTRICT

INTRODUCTION

A public forum is state owned property where government restrictions on speech must be narrowly tailored to serve a compelling state interest. The majority of cases involving the public forum issue have focused on only whether a particular geographical location was within the definition of public forum. Since the late 1960's, however, litigants have been

1. State owned property is real estate or chattels in the government's possession. First amendment rights are protected within certain of these properties that are considered public fora for the dissemination of speech. The first publicly owned properties to come under the public forum rubric were streets and parks. See Hague v. C.I.O., 307 U.S. 496, 515-16 (1939). In the decades following Hague, several other kinds of state controlled property were determined to be appropriate fora for free speech. See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal auditorium); Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.) (city owned airport), cert. denied, 421 U.S. 992 (1975); National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973) (public school auditorium); Wolin v. Port of N.Y. Auth., 392 F.2d 83 (2d Cir.) (bus terminal), cert. denied, 393 U.S. 940 (1968); Reilly v. Noel, 384 F. Supp. 741 (D.R.I. 1974) (State House rotunda); Dulaney v. San Francisco Mun. Ct., 11 Cal. 3d 77, 520 P.2d 1, 112 Cal. Rptr. 777 (1974) (public utility poles).

Property that is not owned by the state carries no first amendment right to be used as a forum for dissemination of speech. For example, the Supreme Court has held that there is no first amendment right to distribute information concerning public issues at a privately owned shopping center. See Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972). But see PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (decided under the California State Constitution).


2. See Cornelius v. NAACP Legal Defense & Educ. Fund, 105 S. Ct. 3439, 3448 (1985) ("Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("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.");

trying to expand the protections provided by the public forum doctrine to speech embodied in state owned publications. These publications include high school, college, and prison newspapers as well as a city's guide to services and organizations and state bar association journals.

Although a number of courts have addressed the issue, no consistent rule has emerged for determining under what circumstances to categorize a state publication as a public forum. This Note proposes a test to remedy this confusion. Part I is a brief history of the public forum doctrine and its application to state publications. Part II analyzes state publications in current public forum analysis. Part III examines the inconsistency among the courts applying the public forum doctrine to state publications. Part IV proposes a test and concludes that its application is the most appropriate way to analyze the public forum status of state publications.

I. HISTORY OF THE PUBLIC FORUM DOCTRINE

In the mid-twentieth century, the Supreme Court advanced the idea that the first amendment rests on the principle that the widest possible dissemination of information promotes the public welfare. "[I]t is only


10. See infra notes 66-109 and accompanying text.

11. See infra notes 66-109 and accompanying text.

12. See Associated Press v. United States, 326 U.S. 1, 20 (1945); Kansas City Star Co.
through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected.'"13 From this maxim sprang the public forum doctrine.

Initially, the public forum doctrine provided that certain publicly owned property such as parks and streets were open to citizens for expressive activity.14 This doctrine is rooted in Justice Roberts' dictum in 

Hague v. C.I.O.15 that streets and parks "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."16 In the ensuing fifteen years, a series of "streets and parks" cases turned this dictum into doctrine.17 From 

Schneider v. State,18 in which the Supreme Court declared ordinances prohibiting the distribution of pamphlets on streets unconstitutional,19 through Kunz v. New York,20 in which the Court invalidated a city ordinance prohibiting certain citizens from speaking about religious matters on city streets,21 the seeds of the public forum doctrine were sown.22

In Niemotko v. Maryland,23 Justice Frankfurter summarized the "streets and parks" cases up to that time.24 He isolated the central issue of what came to be the public forum doctrine: how to join the free expression in public places with the primary uses of streets and parks.25 In other words, the law must accommodate speakers without disturbing those using the public property for other purposes. Justice Frankfurter's analysis laid the groundwork for the eventual application of the public

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14. Id. at 515.
15. See id. at 276-83 (Frankfurter, J., concurring).
16. Justice Frankfurter approached the problem of "how to reconcile the interest in allowing free expression of ideas in public places with the protection of the public peace and of the primary uses of streets and parks," by analyzing the "cases more exclusively concerned with restrictions upon expression in its divers [sic] forms in public places." Id. at 276. He first examined cases in which the only reason for abridging a person's first amendment rights was to keep the streets clean. He next reviewed cases in which "regulation of solicitation" was the issue. Id. at 276-78. Finally, Justice Frankfurter analyzed cases of disparate factual situations, ranging from the sale of religious literature by Jehovah's Witnesses to door to door solicitation ordinances. Id. at 278-82.
From the 1960's to the present, the public forum theory has expanded to include more diverse public properties such as: university buildings, municipal and public school auditoriums, state owned airports, government buildings and their grounds, public utility poles, and state owned bus terminals.

Recently, in *Perry Education Association v. Perry Local Educators’ Association,* the Supreme Court clarified the public forum doctrine by establishing three categories of public property: public forum by tradition, public forum by designation, and nonpublic forum. A public forum by tradition is state property that has been used throughout history for purposes of assembly and the communication of thoughts between citizens. A public forum by designation is property that the state appoints specifically as an area for the dissemination of speech. A nonpublic forum is property that is neither by tradition nor designation a forum for public communication.

Although the majority of public forum cases have involved state owned real property, state owned personal property, such as state public...
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cations, also became susceptible to public forum analysis. 39

The first cases addressing a first amendment right of access to state publications appeared in the late 1960's and early 1970's. 40 Although the courts did not specifically refer to the publications as public fora, their analyses were essentially those of the public forum doctrine. For example, in Radical Lawyers Caucus v. Pool, 41 the district court of the Western District of Texas decided that a state bar journal could not refuse a political advertisement when it had regularly accepted other commercial and political advertisements in the past. 42 Similarly, in Lee v. Board of Regents, 43 it was held that a state college newspaper, which was open to some political and service advertisements, as well as commercial advertising, could not constitutionally reject the plaintiff's political advertisement solely because of its content. 44

Implicit in these and other similar decisions is a finding that a public forum existed because "the requirement of equal access is predicated on the existence of a public forum." 45 Recently, courts have expressly applied the public forum doctrine to cases involving state owned publications. 46

II. STATE PUBLICATIONS IN PUBLIC FORUM ANALYSIS.

Perry Education Association v. Perry Local Educators' Association 47 represents the Supreme Court's current version of the public forum doctrine. 48 The first Perry category, traditional public forum, is public prop-

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42. See id. at 270.

43. 441 F.2d 1257 (7th Cir. 1971).

44. See id. at 1258.


48. See Cornelius v. NAACP Legal Defense & Educ. Fund, 105 S. Ct. 3439, 3449 (1985) ("[h]aving identified the forum . . . we must decide whether it is nonpublic or public in nature. Most relevant in this regard, of course, is Perry Education Ass'n").

In Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), a public school system granted the incumbent labor union access to teachers' mailboxes but denied access to the rival union. Id. at 39-41. The rival union claimed that its first amend-
erty that has "by long tradition . . . been devoted to assembly and debate." In a traditional public forum, speech activity cannot be entirely prohibited. For the state to proscribe communicative activity, it must show that the regulation is necessary by proving that it serves a "compelling state interest." The second Perry category comprises "designated public forums," public properties set aside by the state as places for speech activity. A state does not have to keep these facilities as open fora. However, as long as it does, it is bound by the same compelling state interest standards that apply in the traditional public forum setting. The third Perry category, nonpublic forum, is "[p]ublic property which is not by tradition or designation a forum for public communication." Here, the state may freely regulate speech activity as long as the regulation is reasonable.

If state publications are public fora at all, they fall under the second Perry category, designated public fora. State publications, by definition, are developed for expressive activity. Publications, of course, cannot be traditional public fora because they are not streets or parks. Thus, under the Perry formulation, the questions addressed by this Note are which state publications should be designated public fora, which should be nonpublic fora, and why?

In several publication cases, courts have analyzed state publications as designated channels of expressive activity. For example, in San Diego Committee Against Registration and the Draft v. Governing Board, the Ninth Circuit held that a school board had established a limited public forum and could not exclude speech unless it had a compelling reason. Id. at 41, alleging that the mailboxes were public fora. Id. at 44-48. The Supreme Court disagreed, finding that the mailboxes were not public fora. Id. at 55.

Examples of traditional public fora include streets and parks. Id. at 45. Examples of designated public fora include municipal theaters and public auditoriums. Id. at 45-46.

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. Id.

Examples of designated public fora include municipal theaters and public auditoriums. Id. at 45-46.

"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." Id.

Examples of designated public fora include municipal theaters and public auditoriums. Id. at 45-46.

In this case, the court held that "[h]aving established a limited public forum, the Board cannot, absent a compelling governmental interest, exclude speech otherwise within the boundaries of the forum." Id. at 1478.
Similarly, in *Luparar v. Stoneman*, the District Court of Vermont wrote that a state is not required to establish a prison newspaper. However, once the state establishes one it cannot censor the publication for any reasons except those already permissible under the first amendment. The language in both cases indicates that the state publications were designated public fora.

If a state publication is not a designated public forum, it is a nonpublic forum under the third *Perry* category where more restrictions on access are permitted. For example, in *Allston v. Lewis*, the court found that once a nonpublic forum is involved, there is no first amendment violation unless there is no reasonable relation between the defendant's restrictive publication policy and its refusal to grant access to the plaintiff.

In recent years, lower courts have applied the *Perry* analysis directly to state publication cases. Thus, it is becoming increasingly clear that the analytical framework developed under the geographical public forum cases will likely govern cases involving a right of access to state publications. The analogy, however, between a right of access to public places and a right of access to state publications is imperfect. The concerns

59. The court stated that "'[t]he state is not required to establish or support an inmate newspaper, and once it does so, it can withdraw its approval or support for any reason, except those impermissible under the first amendment." Id. at 499.
60. *Compare id.* ("[O]nce the state has allowed a newspaper to be established, the objection of prison officials . . . to its editorial content is not a permissible reason under the first amendment to prohibit its distribution."). *San Diego Comm. Against Registration & the Draft v. Governing Bd.*, 790 F.2d 1471, 1475 (9th Cir. 1986) ("Once the state has created a limited public forum, its ability to impose further constraints on the type of speech permitted in that forum is quite restricted."), *Perry Local Educators' Ass'n v. Perry Educ. Ass'n*, 460 U.S. 37, 46 (1983) ("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.").
61. The level of scrutiny used for analyzing restrictions on access to nonpublic fora is more relaxed than the level of scrutiny required for the first two *Perry* categories. *See supra* notes 34-38 and accompanying text.
63. Id. at 334. The *Allston* court listed some examples of reasons that would justify a restriction in such a case: "avoiding the 'gray areas' of professional ethics, maintaining the informational character of the publication, limiting lawyer referrals to other [and to] separate Bar Association services focusing on the needs of the members of the bar as opposed to the general public." Id.; *see also Pittman v. Hutto*, 594 F.2d 407, 411-12 (4th Cir. 1979) (the court used a reasonableness test, which is the same as a rational basis test, to decide that prison officials' concerns need only be reasonable to prohibit the publication of a prison magazine); *Frasca v. Andrews*, 463 F. Supp. 1043, 1051 (E.D.N.Y. 1979) (applying a rational basis test, the court ruled that school officials were permitted to seize and prevent distribution of issues of a high school newspaper).
65. *See infra* notes 134-40 and accompanying text.
underlying geographical public forum analysis differ from those underlying a right of access to state publications. The next Part of this Note samples some of the divergent concerns in cases involving a right of access to state publications in order to highlight the current need for a more uniform approach.

III. THE INCONSISTENT APPLICATION OF THE PUBLIC FORUM DOCTRINE TO STATE PUBLICATIONS

A. High School Newspapers

Inconsistencies exist among the lower courts as to which state publications are public fora and how to analyze the question. Many cases arise in the context of high school newspapers where school administrators attempt to suppress certain speech because of concerns about how particular newspaper articles will affect students. Some courts hold that these student publications are public fora and enjoin unwarranted restrictions on access. Other courts, using a different analysis, conclude that high school newspapers are nonpublic fora and tolerate greater restrictions on access. In Kuhlmeier v. Hazelwood School District, for example, administrators of a high school deleted pages of the school newspaper because they objected to the content of two articles. One article concerned student pregnancy and the other discussed the impact of divorce on children. The administrators believed that the articles were inappropriate for a high school publication. The Eighth Circuit, reversing the trial court, proscribed the censorship, holding that the newspaper was a designated public forum for the expression of student opinion.


70. See id. at 1370.

71. See id. at 1371.

72. See id.

73. See id. at 1370.
court found the public forum doctrine applicable by employing an intent test that probed the school's purpose for creating a newspaper.\(^7\)

Other courts disregard the intent test and employ either a "rational basis" level of scrutiny\(^7\) or a "reasonableness test."\(^7\) Under this approach, it is a foregone conclusion that the publication is a nonpublic forum.\(^7\) In *Frasca v. Andrews*,\(^7\) for example, school officials were permitted to seize issues of the high school newspaper and prevent their distribution because they contained two letters about students on the lacrosse team written in language that the school officials felt was inappropriate for a high school publication.\(^7\) Determining that the two letters could have caused a substantial disruption of school activities, the *Frasca* court held that the officials did have a rational basis for seizing the newspaper and that this did not violate student editors' first amendment rights.\(^8\)

Notwithstanding that the first amendment rights of the students and the concerns of the high school administrators were the same in both cases, the courts used completely different analyses. Using an "intent" test, the *Kuhlmeier* court upheld the students' first amendment rights over the objections of the school administrators.\(^8\) Using a "rational basis" test, the *Frasca* court came to the opposite conclusion.\(^8\) However, both tests are inadequate. They do not take into account the concerns of readers or speakers. In addition, the lack of uniformity among the courts leaves readers and speakers confused as to the extent of their first amendment rights.

\(74.\) See *Nicholson v. Board of Educ.*, 682 F.2d 858, 863 (9th Cir. 1982) ("These rights are not coextensive with those of adults and may be modified or curtailed by school policies that are reasonably designed to adjust those rights to the needs of the school environment."); *Trachtman v. Anker*, 563 F.2d 512, 517 (2d Cir. 1977) ("In order to justify restraints on secondary school publications . . . school officials must bear the burden of demonstrating a 'reasonable basis for interference with student speech.'") (quoting *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 810 (2d Cir. 1971)), cert. denied, 435 U.S. 925 (1978); *see also* *Kuhlmeier v. Hazelwood School Dist.*, 607 F. Supp. 1450, 1466 (E.D. Mo. 1985) ("school officials still must demonstrate that there was a reasonable basis for the action taken"), rev'd, 795 F.2d 1368 (8th Cir. 1986), cert. granted, 55 U.S.L.W. 3493 (U.S. Jan. 20, 1987) (No. 86-836).

\(75.\) Courts use the words "rational basis" and "reasonableness" to identify the same test. *See San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 44, 47, 51 n.108, 55 (1973) (using the terms interchangeably); cf. *Southwestern Elec. Power Co. v. Federal Power Comm'n*, 304 F.2d 29, 44-45 (5th Cir. 1962) ("We are considering whether the decision of the Commission . . . is a reasonable one—whether it has a rational basis.").


\(77.\) See *id.* at 1050-51.

\(78.\) See *id.*

\(79.\) See *supra* notes 69-74 and accompanying text.

\(80.\) See *supra* notes 78-80 and accompanying text.
B. State Bar Journals

The same confusion exists in cases involving state bar journals. In *Radical Lawyers Caucus v. Pool*, a group of lawyers attempted to place an advertisement in a state bar journal announcing a caucus concerning certain national issues. The editors of the journal rejected the advertisement and, in response, the group sued for access. The *Pool* court used the “clear and present danger test” where censorship of speech by
a state agency is prohibited unless there is a clear and present danger to the public. Finding that no "clear and present danger" would be caused by the publication of the advertisement, the court upheld the speaker's first amendment rights to place the advertisement in the journal.

In Allston v. Lewis, a lawyer wanted to place an advertisement in a state bar journal seeking counsel to help him in his litigation against other attorneys. The advertisement was rejected. The Allston court, using an intent test, ruled in favor of the journal holding that the publication was not a public forum but rather was more like a private trade publication "not intended as a voice of the general public."

Although both publications were state bar journals, the courts used different analytical approaches to determine whether the speaker should be afforded rights of access. When a "clear and present danger" test was used, the journal was, in effect, accorded public forum status. This test is inadequate because it fails to take into account the editor's or owner's rights. The test considers only the danger posed by the speech. Where an "intent" test was used, however, the bar journal was held to be a nonpublic forum and the speaker's right to access was denied. These differing approaches illustrate the lack of uniformity among the courts. This leads to uncertainty for aspiring speakers as to the extent of their rights under the first amendment.

C. Prison Publications

In addition to high school newspapers and state bar journals, courts seem to be at odds in cases involving prison publications. In Pittman v. Hutto, inmates and editors of a prison magazine sued to enjoin prison officials from suppressing an issue of the publication. Prison officials asserted that certain of the articles were not in good taste. The Pittman court used a "reasonableness" standard and decided that prison officials'

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89. See id.
91. See id. at 330. The advertisement was rejected because it involved solicitation and, as a trade publication of the South Carolina Bar, the paper could not accept it, citing professional ethical considerations. Id.
92. Id. at 334. "Although the Court [made] no ruling as to the presence of state action in this case, the determination was made under the assumption this required element [was] present." Id.
93. See supra notes 87-89 and accompanying text.
94. See supra notes 90-92 and accompanying text.
95. 594 F.2d 407 (4th Cir. 1979).
96. See id. at 408.
97. Id. at 409. The case did not describe the specific topics of the articles in dispute. However, the articles were questioned "particularly with regard to whether [they] were factually correct, whether they were 'out of line with good taste,' and whether they were 'fair' to the administration and might be 'putting the magazine in jeopardy.'" Id.
concerns need only be reasonable in order to prohibit the publication of the magazine. Because the officials' concerns for bad taste were reasonable, both the readers' and editors' first amendment rights were ignored.

In contrast, *Luparar v. Stoneman* used a heightened level of scrutiny to determine whether prison officials could restrain the publication of a prison newspaper because some of the articles were objectionable. The *Luparar* court held that the articles did not threaten security, order or rehabilitation and thus the restraint was not permitted. The court used public forum language and stated that once the state establishes a newspaper, prison officials cannot impose regulations broader than necessary to protect legitimate governmental interests of prison security and order.

Although both cases involved prison publications and the suppression of speech, the courts used disparate analytical approaches. The *Luparar* court used a reasonableness standard to allow prison officials to restrain speakers' rights, whereas the *Pittman* court used an approach that is tantamount to holding that the newspaper was a public forum by strictly scrutinizing denials of access.

Thus, identical factual situations in publication cases have disparate results because courts use different analyses. There is a need for unity...
and consistency in this area of first amendment law. Unfortunately, none of the existing approaches or tests are adequate.

The clear and present danger test is not always applicable since not all denials of access to a publication are based on danger. The intent test, which consists of looking at the state's intent in creating a publication, is difficult to use because intent is not always discernible. There are no factors from which one can extract government intent and no guidelines to follow in making an analysis. This leads to differing results, although the fact patterns of two cases might be similar. The reasonableness or rational basis test assumes the publication is a nonpublic forum. This test would deny any publication the possibility of being considered a public forum. It is a simple test for those who would censor speech to meet. Lastly, the strict scrutiny approach assumes that the publication is a public forum. Questions of reasonableness and compelling interests are subsequent to the determination of public forum status.

IV. PROPOSED TEST FOR ANALYSIS OF PUBLIC FORUM STATUS OF STATE PUBLICATIONS

This Note proposes a uniform test for determining the presence of a public forum among state publications. The public forum status of a state publication should depend on whether the publication has equivalent counterparts in the private sector. That is, if equivalent private publications are available to the aspiring speaker for the dissemination of information, the state publication should not be a public forum. This may be called the "competitive" situation. If, however, equivalent private publications are not available, the state publication should be a public forum. This may be termed the "non-competitive" situation.

Whether a publication is competitive or non-competitive depends on the answer to two threshold questions. The first is whether the state publication, at its inception, is substantively and structurally similar to equivalent counterparts in the private sector. To determine substantial similarity the following factors should be considered: 1) whether the publications reach the same audience in the same geographical area; 2) whether they are published with the same regularity; 3) whether they contain the same proportion of advertisements to articles per issue; and 4) whether they are thematically similar.

106. See Cass, First Amendment Access To Government Facilities, 65 Va. L. Rev. 1287, 1305 (1979) (To distinguish between public fora and other properties courts have used two different tests. "One test is whether the property is suitable for public speech use. The other is whether government has assigned the property for public speech use. The two tests provide opportunity for different results both because they are, perhaps necessarily, imprecise and because the tests are not functionally equivalent.") (footnotes omitted).
108. See id. at 45.
109. See id. at 46.
110. The term "equivalent counterparts" is defined as publications that are substantively similar. To determine substantial similarity the following factors should be considered: 1) whether the publications reach the same audience in the same geographical area; 2) whether they are published with the same regularity; 3) whether they contain the same proportion of advertisements to articles per issue; and 4) whether they are thematically similar.
isting private publications. The second is whether the audience of existing private publications is substantially the same as the audience of the state publication at its inception.\(^\text{111}\) If, after careful analysis, both questions can be answered in the affirmative, then the state publication has equivalent private counterparts and should not be considered a public forum. However, if one or both questions are answered in the negative, then the state publication has no equivalent private counterparts and should be given public forum status.

This test is appropriate for several reasons. First, it is co-extensive with the ample alternatives analysis\(^\text{112}\) and, second, with the intent test\(^\text{113}\) both of which are found in traditional public forum cases. Third, it addresses situations in which a scarcity of fora mandates access.\(^\text{114}\) Fourth, quantitatively more actors' first amendment rights are protected by the use of the test.\(^\text{115}\) Finally, it fulfills the purpose of the public forum doctrine, is relatively straightforward and is easier to apply than any of the existing analytical approaches.\(^\text{116}\)

### A. Ample Alternatives

The proposed test comports with the ample alternatives notion originally found in some early geographical public forum cases.\(^\text{117}\) Under the ample alternatives analysis, if there are alternative channels of communication where a speaker or a reader may contribute or obtain information, then even without the protection of the public forum doctrine, no one is denied the opportunity for free expression.\(^\text{118}\) In practical terms, the competitive situation is one in which there is opportunity for robust debate and the dissemination of information without the government providing a forum. In the non-competitive situation, the principles behind the first amendment remain dormant without public forum protection.

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\(^{111}\) It is important to note that under the proposed test a state publication's status is assessed at the publication's inception. There either are or are not private equivalents at that time. Under the proposed test, events after the publication's inception will not change its status.

\(^{112}\) See infra notes 117-31 and accompanying text.

\(^{113}\) See infra notes 132-51 and accompanying text.

\(^{114}\) See infra notes 152-56 and accompanying text.

\(^{115}\) See infra notes 157-65 and accompanying text.

\(^{116}\) See infra notes 166-67 and accompanying text.


\(^{118}\) See, e.g., United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981) ("This Court has long recognized the validity of reasonable time, place, and manner regulations on such a forum so long as the regulation is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication."); see also supra note 100.
In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, one factor in the Court's decision not to consider an interschool mail system a public forum was the alternative means through which the union could communicate with the teachers. The Court wrote that a "[s]tate may also enforce regulations . . . [that] leave open ample alternative channels of communication." These, according to the Court, ranged from bulletin boards to the United States mail system. Thus, because the Court determined that the interschool mail system was not a public forum, the union was denied access.

One year later, the Court, using this ample alternatives reasoning in *Members of City Council v. Taxpayers for Vincent*, held that an ordinance prohibiting the posting of signs on public utility poles was constitutional and that this government owned property was not a public forum. The Court found that the "ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited." According to the Court, this was an ample alternative.

This ample alternative notion has recently been imported from geographical public forum cases into publication public forum cases. For example, in *Allston v. Lewis*, the court denied the plaintiff access to a state bar association magazine because the court reasoned that restrictions are permissible provided they do not foreclose all avenues of communication. In other words, the existence of ample alternative channels indicates a nonpublic forum. In *Avins v. Rutgers*, the court held that the law review of a state law school is not a public forum. The court noted that plaintiff was denied access to only one of many law reviews and eventually would have the opportunity to publish in one of the others.

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120. See id. at 53; see also supra note 48 (discussing the facts of Perry).
121. Id. at 45.
122. See id. at 53.
124. See id. at 817.
125. See id. at 815.
126. Id. at 812 (footnote omitted).
127. See id.
129. Id. at 333 (restrictions are permissible if "they leave open ample alternative channels for communication of the information"), aff'd without opinion, 688 F.2d 829 (4th Cir. 1982).
130. 385 F.2d 151 (3d Cir. 1967), cert. denied, 390 U.S. 920 (1968). Plaintiff sued the editors of the *Rutgers Law Review* when they refused to publish his Article. The court ruled in favor of the editors because the Law Review, even though part of a state owned university, was not a public forum and the editors had complete discretion in deciding whether or not to publish the Article. Id. at 152.
131. Id. at 153 (The court noted that "sooner or later [the plaintiff will] be able to publish in [another] law review").
The ample alternatives doctrine enables first amendment jurisprudence to be far more efficient. The proposed test addresses the concerns of the ample alternative notion in the context of state publications by determining whether there were other publications where speech could have been disseminated.

B. The State's Intent

The proposed test is also in harmony with the intent test of recent Supreme Court public forum cases, but it yields better results in cases involving state publications. In *Cornelius v. NAACP Legal Defense and Educational Fund,* the Court, as it had done in the past, used the government's intent for creating the forum as part of its analysis. The Court stated that the government creates a public forum by intentionally opening a nonpublic forum for expressive activity. Therefore, the Court looked at the policy and practice of the government to determine whether it intended the property to be a public forum.

The Supreme Court also examines the nature of the property and its compatibility with expressive activity to discern whether the government intended to establish a public forum. In *Widmar v. Vincent,* the Court analyzed a state university's express policy of making its meeting facilities available to student groups. By examining the policy, the Court found that the university administration intended to create a public forum. In addition, the Court noted that the university campus possessed many of the characteristics of a traditional public forum.

Although "compatibility with expressive activity" is a useful analysis for determining intent in geographical public forum cases, it is inappropriate in state publication cases. All publications are "compatible with expressive activity." Rather, the operative question should be whether

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132. 105 S. Ct. 3439 (1985). The Legal and Educational Defense Funds brought suit alleging that their first amendment rights were infringed because they were excluded from participation in a charity drive aimed at government personnel. The Supreme Court held that the charity drive was a nonpublic forum and ruled in favor of the defendant. *Id.* at 3442.

133. *See id.* at 3449.

134. *Id.* (The Court stated that governments do not create public fora by "inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place . . . a public forum.") (citations omitted).

135. *See id.* at 3449-50.


137. *Id.* at 265-67. From 1973 until 1977 the University allowed a religious group named Cornerstone to conduct its meetings in University facilities. It was the policy of the University of Missouri at Kansas City to encourage student organizations to conduct activities. However, in 1977, the group was no longer allowed to meet in University buildings.

138. *Id.* at 267.

139. *See id.* at 273. These characteristics include an open forum already available to other groups and to all forms of discourse.
the publication is the only outlet for the expression.\textsuperscript{140}

Using the proposed test, one may infer the state's intent by determining whether the state publication is the only one serving the subject matter and the readership,\textsuperscript{141} or whether it is only one contributor to a body of similar literature that collectively presents a broad spectrum of views.\textsuperscript{142} Where a competitive situation exists, the state's intent is not to provide a public forum but rather to open a public equivalent of competitive private publications. If the state publication is to be truly competitive, it cannot be intended as a public forum. A public forum would be at quite a competitive disadvantage if it had to meet the compelling state interest standard each time it denied access.

In the non-competitive situation, however, the intent of the state is to provide a forum, giving people the opportunity to receive and disseminate information and ideas where previously there was none. Thus, by merely establishing a publication for a community bereft of private publications, the state recognizes the need for a public forum. Of course, inferences of intent are always rebuttable.\textsuperscript{143} But in the absence of clear

\textsuperscript{140} Cf. Kania v. Fordham, 702 F.2d 475, 477 (4th Cir. 1983) ("The Daily Tar Heel... in its role as a forum for the expression of differing viewpoints, is a vital instrument of the University's 'marketplace of ideas.'").

\textsuperscript{141} An example of a state owned publication that is the only publication serving the subject matter and the readership is a high school newspaper. In Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1372 (8th Cir. 1986), cert. granted, 55 U.S.L.W. 3493 (U.S. Jan. 20, 1987) (No. 86-836), the high school newspaper was the only forum available to the student body for the expression of their views.

Another example of this type of publication is the paperback guide to services and organizations in Alaska Gay Coalition v. Sullivan, 578 P.2d 951, 953 (Alaska 1978). The book was the "single source of information" about local government and public services. \textit{Id.} Thus, using the proposed test, intent to create a public forum is inferred from the absence of equivalent counterparts. \textit{See supra} note 110.

\textsuperscript{143} An example of this type of publication is the law review of a state university law school like that in Avins v. Rutgers, 385 F.2d 151 (3rd Cir. 1967), cert. denied, 390 U.S. 920 (1968). There are many law reviews to which writers may contribute articles and which readers may choose to read. The law reviews published in this country comprise a collective forum presenting a spectrum of views.

Another publication that, in and of itself, does not serve as a public forum, but along with other literary publications of its type collectively makes up the forum, is the art magazine in Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir.), cert. denied, 429 U.S. 894 (1976).

Therefore, when using the proposed test, intent not to create a public forum is inferred from the presence of competitive publications.

\textsuperscript{143} Certainly, if a state publication's charter or constitution provides a clear indication of its status as a public forum then it should override any inferences drawn according to the principles of this Note. \textit{See, e.g., Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1371-73 (8th Cir. 1986) (the court looked at the statement of policy and charter of a high school newspaper to determine that it was a public forum because the government's intent was clear), cert. granted, 55 U.S.L.W. 3493 (U.S. Jan. 20, 1987) (No. 86-836); San Diego Comm. Against Registration & the Draft v. Governing Bd., 790 F.2d 1471, 1476 (high school newspaper's liberal publication policy evidencing government's intent to establish a designated public forum). The proposed test should be used where intent is not so easily discernable. \textit{See Allston v. Lewis, 480 F. Supp. 328, 331-32 (D.S.C. 1979) (the government's intent in setting up a bar journal was not clear), aff'd without opinion, 688 F.2d 829 (4th Cir. 1982).}
indications of intent, the pre-existence or lack of a particular "market-place of ideas" will shed light on the state's intent in founding a publication.

Thus, the law review of a state university law school144 and a publicly funded literary magazine145 presumably are not intended as public fora.146 In contrast, high school147 and college newspapers,148 and a government's guide to services and organizations,149 being the only publications of their kind available to their audience, are probably intended to be public fora.150 Indeed, application of either the intent test or the test proposed herein, would, in most cases, yield the same result.151 Thus, the proposed test, while not looking specifically at the intent of the state, harmonizes with the results of the intent test. The proposed test, how-

146. See Avins v. Rutgers, 385 F.2d 151, 153 (3rd Cir. 1967) ("Traditionally, a law review is student edited and the student editors determine the policies and decide which of the submitted articles and other material are to be published."); cert, denied, 390 U.S. 920 (1968); Advocates For the Arts v. Thomson, 532 F.2d 792, 796 (1st Cir.) ("If [public subsidizing of art projects] is to fulfill its purpose, the exercise of editorial judgement by those administering it is inescapable."); cert. denied, 429 U.S. 894 (1976).
151. For instance, in Alaska Gay Coalition v. Sullivan, 578 P.2d 951 (Alaska 1978), the court found that "[t]he publication was intended to provide a vehicle for the dissemination of information regarding public and private services and organizations in the Anchorage area." Id. at 957. The proposed test would yield the same result because the chamber of commerce publication is non-competitive vis-a-vis its subject matter and audience. In Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986), cert. granted, 55 U.S.L.W. 3493 (U.S. Jan. 20, 1987) (No. 86-836), a high school newspaper was considered "a public forum because it was intended to be and operated as a conduit for student viewpoint." Id. at 1372. Under the proposed test, the result is the same because, again, the high school newspaper is non-competitive. See San Diego Comm. Against Registration & the Draft v. Governing Bd., 790 F.2d 1471. 1476 (9th Cir. 1986) ("[t]he evidence clearly indicates an intent to create a [designated] public forum." The publication is the only one of its kind); Portland Women's Health Center v. Portland Community College, No. 80-558, slip op. at 6 (D. Or. Sept. 4, 1981) (Reviewing the written policy of the college newspaper and finding that "one of the purposes of [the newspaper] is to provide a forum for communication within the college community." This newspaper was the only one serving the college audience).
ever, offers the advantage of obviating the need for resort to the less readily litigable concept of subjective intent.

C. The Scarcity of Fora

Under the proposed test, where a non-competitive state publication exists, the publication is the only vehicle for the communication of ideas and information to a particular audience. When only one forum exists for the dissemination of certain ideas and information, the forum is as scarce as, for instance, airwave broadcast frequencies where the federal government requires fair access in order to promote the policies behind the first amendment. This proposition was stated in *Red Lion Broadcasting Co. v. FCC*,\(^{152}\) where the Supreme Court introduced the fairness doctrine—requiring that broadcasters present issues of public interest and that each side of those issues be given fair coverage.\(^{153}\) This is, according to the Court, due in large measure to the scarcity of broadcast frequencies in the electromagnetic spectrum.\(^{154}\) This same scarcity rationale can be applied to state publications to support a right of access. In *Portland Women’s Health Center v. Portland Community College*,\(^{155}\) the District Court of Oregon, relying on *Red Lion*, noted that an editor of a private newspaper has a right to edit, but the editor of a publicly funded newspaper is not permitted to exercise the same degree of control.\(^{156}\)

Thus, there is authority for the proposition that if a state publication is the only one of its kind for a given audience, it should have a substantial responsibility to grant access to opposing viewpoints.

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153. See id. at 369-72, 400-01. The Red Lion Broadcasting Company broadcast a radio show which discussed a person named Cook. Id. at 371. When Cook heard the broadcast, he felt that he had been personally attacked. Id. at 371-72. He demanded free reply time, which the station refused. Id. at 372. The Court held that the fairness doctrine, which requires that broadcasters present issues of public interest and that each side of those issues be given fair coverage, is constitutionally permissible. Id. at 400-01. This is, in large measure, due to the scarcity of broadcast frequencies in the electromagnetic spectrum. Id. Therefore, the radio station had to give Cook equal time to reply to the accusations made about his reputation.

154. See id. at 400-01.
156. “While it is clear that an editor for a private newspaper has a right to edit, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), it seems equally clear that the editor of a publicly funded newspaper does not have such a right.” *Portland Women’s Health Center v. Portland Community College*, No. 80-558, slip op. at 7 (D. Or. Sept. 4, 1981); see also Note, *Public Forum Analysis After Perry Education Association v. Perry Local Educators’ Association—A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 Fordham L. Rev. 545, 555 n.101 (1986) (suggesting that *Red Lion* scarcity combined with the public forum doctrine leads to mandatory first amendment access to state publications).
D. The Proposed Test is Responsive to the Rights of More People

The proposed test vindicates the first amendment rights of more people involved in disputes over access to a state publication regardless of whether the publication is competitive or non-competitive. In such a situation, several actors' rights are at stake. The taxpayer argues that he does not want to support views to which he is opposed.\(^\text{157}\) The state has an interest in regulating the content of its publication.\(^\text{158}\) The editor wants to exercise editorial discretion.\(^\text{159}\) The speaker wants access in order to speak.\(^\text{160}\) The reader has a right to receive information.\(^\text{161}\)

Under the proposed test, the first amendment rights of the speaker and the reader are always preserved. In the competitive situation, the speaker and reader can disseminate and receive information in private publications. In the non-competitive situation, the speaker and readers are without recourse unless the state publication is given public forum status. Thus, in the non-competitive situation, the first amendment rights of more people hinge on the public forum status of the state publi-

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\(^{157}\) See Panarella v. Birenbaum, 32 N.Y.2d 108, 114, 296 N.E.2d 238, 240, 343 N.Y.S.2d 333, 336 (1973) (taxpayers complained that the publication of articles attacking religion in the student newspaper that is supported by public funds violated their first amendment rights).

\(^{158}\) See, e.g., Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1370-71 (8th Cir. 1986) (public school officials wanted to suppress two articles they considered inappropriate for publication), cert. granted, 55 U.S.L.W. 3493 (U.S. Jan. 20, 1987) (No. 86-836); Pittman v. Hutto, 594 F.2d 407, 410 (4th Cir. 1979) (a prison official would not allow a prison magazine to be published unless certain materials were deleted); Frasca v. Andrews, 463 F. Supp. 1043, 1046 (E.D.N.Y. 1979) (principal prohibited the distribution of a high school newspaper because it contained two arguably profane letters); Luparar v. Stoneman, 382 F. Supp. 495, 497 (D. Vt. 1974) (prison administration refused to allow a prison newspaper to be distributed because some of the articles were objectionable), appeal dismissed, 517 F.2d 1395 (2d Cir. 1975); Bailey v. Loggins, 32 Cal. 3d 907, 911-12, 654 P.2d 758, 760-61, 187 Cal. Rptr. 575, 577-78 (1982) (state prison officials wanted to regulate the content of the prison newspaper by suppressing the publication of two articles).

\(^{159}\) See, e.g., Avins v. Rutgers, 385 F.2d 151, 153-54 (3d Cir. 1967) (editors of a law review rejected plaintiff's submission pursuant to their editorial discretion), cert. denied, 390 U.S. 920 (1968); Radical Lawyers Caucus v. Pool, 324 F. Supp. 268, 269 (W.D. Tex. 1970) (editor of a state bar journal refused to accept an advertisement because it was of a political nature).

\(^{160}\) See, e.g., San Diego Comm. Against Registration & the Draft v. Governing Bd., 790 F.2d 1471, 1472-73 (9th Cir. 1986) (antidraft organization sued to gain access after its advertisement was rejected by the high school newspaper); Alaska Gay Coalition v. Sullivan, 578 P.2d 951, 953-54 (Alaska 1978) (the Gay Coalition wanted to have their group listing included in the municipality's guide to services and organizations).

\(^{161}\) See, e.g., Luparar v. Stoneman, 382 F. Supp. 495, 497-98 (D. Vt. 1974) (outside subscribers sued prison officials when officials terminated the publication of the prison newspaper to which these people subscribed. The outside subscribers felt that their right to receive the newspaper was infringed), appeal dismissed, 517 F.2d 1395 (2d Cir. 1975); see also Board of Educ. v. Pico, 457 U.S. 853, 867-69 (1982) (the Court rejected the petitioners' claim of absolute discretion to remove any book from the public school library); Stanley v. Georgia, 394 U.S. 557, 559-64 (1969) (plaintiff contended that he has the first amendment right to be free from the government's inquiry into the contents of his library).
cation than in the competitive situation. The proposed test is responsive to the first amendment rights of the speaker and reader while keeping in balance the interests of those who control the state publication. The latter are considered once it is determined whether the publication is a public forum by applying the appropriate level of scrutiny. Other approaches to disputes over access to state publications such as the intent test or the clear and present danger test account only for the interests of the owners and managers of the publication without regard to what recourse the speaker and reader may have.

E. The Test Fulfills the Purpose of the Public Forum Doctrine

The proposed test fulfills the purpose of the public forum doctrine: it prohibits the state from denying citizens the opportunity to exercise first amendment rights. In Associated Press v. United States, the Supreme Court stated that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." If there are equivalent private counterparts to a state publication, the policies behind the first amendment are fulfilled because the ideas and information can reach the same audience even if they are not published by the state publication. If the state publication has no equivalent private counterparts, however, the test mandates that it be a public forum in keeping with the first amendment values embodied in the public forum doctrine.

Finally, the proposed test is beneficial to public forum jurisprudence because it is objective. The proposed test is manageable in its application because it eliminates reference to subjective issues like intent or propriety which are often difficult to resolve. Additionally, the test will promote uniformity among the courts and relative simplicity in litigation. If a test is objective, state publishers and speakers can better respond to it and will be readily able to determine the status of the publication. This will

162. If the publication is deemed a nonpublic forum, those in control will be accorded wide latitude in restricting access. If the publication is a public forum, only content-neutral restrictions will be upheld. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1374 (8th Cir. 1986), cert. granted, 55 U.S.L.W. 3493 (U.S. Jan. 20, 1987) (No. 86-836); San Diego Comm. Against Registration & the Draft v. Governing Bd., 790 F.2d 1471, 1474-75 (9th Cir. 1986).

163. See supra notes 74, 92, 132-51 and accompanying text.

164. See supra notes 87-89 and accompanying text.

165. See supra notes 93-94, 132-134 and accompanying text.

In Allston v. Lewis, 480 F. Supp. 328 (D.S.C. 1979), aff'd without opinion, 688 F.2d 829 (4th Cir. 1982), the court used an intent test in deciding that a state bar journal was not a public forum but rather a private trade publication. It was "not intended as a voice of the general public." Id. at 334. Thus, an editor was allowed to reject an advertisement without violating the speaker's first amendment rights. See id. By focusing on the founders' intent, the test is a mere scrutiny of the publication and the purpose for which it was developed. This is unresponsive to the rights and privileges of readers and speakers.

166. 326 U.S. 1 (1945).

167. Id. at 20.
reduce disputes over access to state publications because speakers, readers, and publishers will be able to determine objectively their rights under the first amendment.

CONCLUSION

The public forum doctrine is ever changing law that strives to fulfill the values underlying the first amendment. The test proposed in this Note is the most efficient way for courts to adjudicate rights of access to state publications. It comports with the ample alternatives and intent notions in traditional public forum analysis. It addresses the problems that can arise in situations when a state publication is the only publication of its kind. In addition, the test protects the first amendment rights of more people. Finally, it fulfills the purpose underlying the public forum doctrine and is more objective than existing analytical approaches.

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