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I. Introduction

Professor Enrique Armijo's excellent article on the history of the "Ample Alternative Channels" Doctrine[1] provides plausible answers to two of the most important questions—"what" and "how"—raised by this problematic rule. *What* have courts done when presented with speech restrictions that supposedly leave "ample alternative channels" for speech? Armijo provides a thorough catalog of the major cases that have invoked ample alternative channels, both in upholding speech restrictions and (occasionally) in striking them down.[2] And *how* can our First

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1. Enrique Armijo, *The "Ample Alternative Channels" Flaw in First Amendment Doctrine*, 73 WASH. & LEE L. REV. 1657, 1659 (2016).

2. *See id.* at 1705–22 (discussing the conflict between the ample alternative channels doctrine and free speech zone cases, adult entertainment

Amendment jurisprudence be improved so that such unjustified restrictions on speech are not upheld in the future? Armijo gives a convincing answer, namely that courts must require the government to show that the use of a particular channel of speech is incompatible with a government interest.[3]

Rather than attempting to improve on Armijo's work on these two questions, this response will focus instead on a third question: *Why*. Why has the Ample Alternative Channels Doctrine (AAC) so firmly taken hold in our judicial canon? Professor Armijo provides the first half of an answer to this question with his engrossing and revelatory behind-the-scenes account of Justice Harlan's *O'Brien* concurrence.[4] The history behind Harlan's opinion tells the AAC origin story. But this still leaves unanswered *why* courts have accepted, applied, and even expanded the AAC doctrine for over forty years since *O'Brien*, seldom noting dissent or even concern with the implications of the test.[5]

This response will examine several factors that have contributed to the AAC doctrine's resilience, and will also suggest possible solutions to counteract these factors and thereby move away from the AAC doctrine. The most basic cause of the doctrine's longevity, I propose, is linguistic. The concept of a "channel" of speech may seem simple enough. Yet, in fact, courts have used the word "channel" to describe three distinct elements of speech transmission.[6] The failure to distinguish between these meanings has led to a blurring of the lines between regulations that truly affect speech and those that do not.[7]

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cases, prohibited means cases, and abortion clinic protest cases).

3. *See id.* at 1728–38 (providing as a solution the "incompatibility test").

4. *See id.* at 1670 ("Alternative channels analysis was born . . . in Justice Harlan's concurrence. And an earlier version of that latter opinion had much bigger game in its sights: what Harlan viewed as the dangerous logical fallacy of the Court's distinguishing between speech and content in First Amendment cases."); *id.* at 1671–89 (providing the background of Justice Harlan's concurrence in *O'Brien*).

5. *See id.* at 1668 (noting that although the "ample alternative channels analysis was in its incipiency a misguided afterthought . . . the concept now carries dispositive force in First Amendment doctrine").

6. *See infra* Part II (discussing the three meanings or "categories" of the term "channels").

7. *Id.*

But a simple linguistic misunderstanding cannot be the full explanation. An additional problem arises from the misapplication of what Armijo calls the "marketplace theory" of the First Amendment.[8] Courts have overwhelmingly applied the marketplace theory when analyzing speech restrictions, justifying the value of speech based on its contribution to the marketplace of ideas.[9] This has been to the detriment of speakers challenging speech restrictions, who have been forced to prove that their speech (in its intended form) is unique and irreplaceable. If a regulation seems to remove easily replaceable speech from the marketplace, then that regulation is frequently upheld as having no real harm.[10]

The answer to these errors, I propose, is not to move to the alternative "self-autonomy" theory,[11] which focuses on the rights of speakers rather than the effects on listeners.[12] That theory is implausible as a definition of speech rights since it can protect choices unrelated to the perception of an audience. Instead, the answer is to move to a modified version of the marketplace theory, one that is still listener-focused but *not* open to judicial balancing. Under this view, *any* regulation that affects the experience of listeners is a violation of free speech rights. The job of courts should be limited to determining only whether a regulation has altered the experience of listeners. Once this objective line is crossed, the regulation qualifies as a speech restriction and should only be upheld if it passes a strict test such as the one Armijo proposes. [13]

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8. *See* Armijo, *supra* note 1, at 1705 ("Ample alternative channels respects marketplace theory in those cases where alternatives are found to be poor substitutes, but disrespects marketplace theory in those cases where alternatives are found to be proper substitutes.").

9. *See id.* at 1696 (describing marketplace theory as "the dominant theory of the First Amendment").

10. *See id.* at 1665 ("The restrained expression can thus still contribute to the search for truth, so the harm the restriction causes, both to the speaker and to listeners participating in the broader speech market, is minimal.").

11. *See generally id.* at 1689–95 (discussing the self-autonomy theory).

12. *See id.* at 1690–91 ("Accordingly, for self-autonomy theory, it is the speaker's *choice* of expression that is . . . 'the crucial factor in justifying protection' of that expression." (quoting C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 52 (1989))).

13. *See infra* Part IV (elaborating on this solution).

Finally, I will consider why courts have been willing to use the AAC doctrine to uphold regulations that manifestly interfere with the content of a speaker's message, such as the regulation in *O'Brien*. One reason, I will argue, is that courts wish to avoid an uncomfortable fact: if breaking a law is a uniquely powerful form of expression against that law, then enforcing the law *inherently* places an asymmetrical burden on critics of the status quo. For a legal regime that prides itself on striving for viewpoint neutrality, this asymmetry is not only an unfortunate fact, but also an unavoidable one. Courts should acknowledge it, so as to be clear-eyed in measuring the burden that a regulation places on speakers.[14]

II. The Three Meanings of "Channel"

Much of the confusion surrounding the "ample alternative channel" doctrine arises from linguistic imprecision. Laying out the three possible meanings of the word "channel" at the outset will help clarify the distinctions drawn later in this response.

First, there are cases where two different "channels" can be used to carry the *same message* to the *same set of recipients*. For example, suppose that a letter could be carried by truck to your city and then placed in your mailbox on Wednesday morning. Alternatively, that same letter could be carried to your city by *plane* and then placed in your mailbox on Wednesday morning. The truck and the plane are two alternative "channels" by which the message might travel. But, regardless of which channel is chosen, your perception, as the recipient of the message, is identical in every way. No matter what, you will find the same letter in your mailbox on Wednesday morning. I will call this type of channel a "Category I" channel.

Second, there are cases where two different "channels" can be used to carry the *same message* to two *different* sets of recipients. For example, suppose that an open letter could be publically disseminated either via flyers posted around a town or via a post on an internet blog. The letter consists entirely of text, and the speaker intends the text to be the full extent of the letter's

14. *See infra* Part V (exploring why courts have upheld restrictions on speech where two different channels can be used to carry different messages).

message. In this case, everyone who sees the letter receives the same message, whether they read it on a flyer or on a blog. But the number of people who see the message, and the identity of those people, may well differ depending on which of these two channels is used.[15] I will call this type of channel a "Category II" channel.[16]

Third, and finally, there are cases where two different "channels" can be used to carry *different messages*.[17] For example, suppose that an anti-materialist message could be delivered by means of either burning a real $100 bill or burning a fake $100 bill. The real bill and the fake bill are two different "channels" by which—through the means of a dramatic demonstration—an anti-materialist message could be delivered. But because they are two different objects being burned (only one of them representing an actual sacrifice on the part of the burner), the message received by viewers of the two potential demonstrations would be different. I will call this type of channel a "Category III" channel.

With this terminology laid out, the next section will explore the category where courts have most frequently used the AAC doctrine to uphold speech restrictions: Category II cases.

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15. For example, the flyers may be read only by the residents of a particular locality, while the blog post may be read by a much more geographically dispersed audience (which, if the issue is one of local politics, may be less desired by the speaker).

16. In these Category II cases, speakers are harmed by being deprived of what Armijo calls a "technique" of disseminating their messages. *See* Armijo, *supra* note 1, at 1684 (arguing that "the availability of alternative means seems much more relevant to a law that incidentally burdens speech by banning 'techniques' for expression than to a law that bans the expressive act itself"). As Armijo explains, the term "technique" was first used by Justice Black. *Id.* at 1684 n.121. In *Martin v. Struthers*, Black wrote that "door to door campaigning is one of the most accepted *techniques* of seeking popular support." Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (emphasis added). A Category II ban is "a restriction on one 'technique' by which a message can be expressed." Armijo, *supra* note 1, at 1684.

17. These are the situations where, as Ed Baker puts it, "the intended meaning of people's expression relates to the time or the place or the manner of the expression." C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Restrictions*, 78 NW. U. L. REV. 937, 946 (1984). This category corresponds to the "associative conduct" category of cases that Armijo describes—cases where "the relevant speech's intended message and effects, along with its particular audience, are inextricably *associated* with the message's mode, time, and place." Armijo, *supra* note 1, at 1735.

III. Restrictions on Audience: The Quintessential "Ample Alternative Channels" Case

The most common "Category II" speech restrictions may be regulations that prevent people from speaking in certain physical locations. Frequently, such regulations come in the form of a so-called "buffer zone," a rule preventing speakers from coming within a certain distance of a sensitive area.[18] Buffer zones affect who will receive a speaker's intended message. For example, a buffer that prevented protesters from approaching the site of a World Trade Organization (WTO) conference "unquestionably limited the barred speakers from reaching the speech marketplace of their choice—those individuals the protestors most sought to persuade, i.e., the WTO delegates themselves, as well as others closely following the conference."[19]

How have courts ruled in these cases? Most often, as Professor Armijo catalogs, the regulations have survived thanks to the AAC doctrine.[20] But it may be those rare cases in which regulations have been struck down that are the most telling. In *McCullen v. Coakley*,[21] the Supreme Court struck down a law that banned approaching persons to engage them in conversation within 35 feet of an abortion clinic.[22] Why did this buffer zone fail

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18. *See* Armijo, *supra* note 1, at 1718 ("A typical example is from *Clift v. City of Burlington, Vermont*, in which Burlington adopted a 35-foot radius around reproductive health care facilities in the city. Burlington's ordinance decreed that 'no person or persons shall knowingly congregate, patrol, picket, or demonstrate in the buffer zone.'" (citing Clift v. City of Burlington, Vt., 925 F. Supp. 2d 614 (D. Vt. 2013))). Another case involving abortion clinic buffer zones is Hill v. Colorado, 530 U.S. 703 (2000). Cases involving protesters of conferences and events include Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005); Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8 (1st Cir. 2004); Coalition to March on the RNC and Stop the War v. City of St. Paul, Minn., 557 F. Supp. 2d 1014 (D. Minn. 2008); and American Civil Liberties Union of Colorado v. City and County of Denver, 569 F. Supp. 2d 1142 (D. Col. 2008).

19. Armijo, *supra* note 1, at 1702 (citing Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005)).

20. *See id.* at 1718 ("The question then becomes whether that physical separation impermissibly impedes on the speakers' expression. And through the use of ample alternative channels analysis, courts consistently hold that it does not.").

21. 134 S. Ct. 2518 (2014).

22. *See id.* at 2541 (concluding that "the extreme step of closing a substantial portion of a traditional public forum to all speakers" is not

where so many others succeeded? Perhaps the most important clue is that the Court described the ban as interfering with "the close, personal conversations that [the petitioners] view as essential to 'sidewalk counseling.'"[23] In other words, the speakers were helped by having a *unique and specific* method of communication, one that the Court could easily grasp as being connected in a special way to the area in which they wished to speak.

Similarly, in *Weinberg v. City of Chicago*,[24] the U.S. Court of Appeals for the Seventh Circuit easily understood *why* the author of an anti-Chicago Blackhawks book would particularly wish to reach attendees at Blackhawks games.[25] As a result, a restriction banning sales of the book near the Blackhawks arena on game days was struck down.[26]

In considering other Category II restrictions besides "buffer zones," courts have likewise only protected the most specifically targeted speech. One such case was the ban on "signs 'affixed to any wooden, plastic, or other type of support' during parades and public assemblies."[27] In that case, the U.S. Court of Appeals for the Ninth Circuit correctly recognized that a sign held aloft during a Nazi parade would reach a particular set of people (the attendees), a set that would otherwise have been impossible to reach as a group.[28] The court thus readily understood why a

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"consistent with the First Amendment").

23. *Id.* at 2535.

24. 310 F.3d 1029 (7th Cir. 2002).

25. *See id.* at 1042 ("His intended audience is Chicago Blackhawks fans. The most opportune time and place to reach this audience is outside the United Center, before and after Blackhawks home games.").

26. *See id.* (holding that "the peddling ordinance is not a reasonable time, place, and manner restriction").

27. Armijo, *supra* note 1, at 1704 (quoting Edwards v. City of Coeur D'Alene, 262 F.3d 856, 859–60 (9th Cir. 2001)).

28. *See Edwards*, 262 F.3d at 867

> Because there is no other effective and economical way for an individual to communicate his or her message to a broad audience during a parade or public assembly than to attach a handle to his sign to hoist it high in the air, Section 1(D) of Ordinance 2920 prevents Edwards from reaching his intended audience. We conclude, therefore, that Ordinance 2920(1)(D) also does not comport with the third prong of the time, place, and manner test because it does not allow for ample alternative means of communication.

protester would want his anti-Nazi message to be visible to those attending the Nazi rally.

In contrast, the U.S. Court of Appeals for the Third Circuit upheld a ban on Sunday openings of adult stores, on the grounds that "the statute allows those who choose to hear, view, or participate publicly in sexually explicit expressive activity more than thirty-six hundred hours per year to do so."[29] An adult store almost surely would have reached more *total* listeners in the additional 728 hours per year it wished to remain open on Sundays than Weinberg reached by standing outside Chicago Blackhawks games. But because no *particular* group of relevant people was likely to visit an adult store on Sunday, the store's claim was unsuccessful.

What should we take away from these decisions? Courts in category II cases can certainly be sympathetic to the plight of those who are prevented from reaching their intended audience. But for such sympathy to be determinative, courts have demanded an explanation for *why* that intended audience is particularly relevant to the message being expressed. The AAC doctrine is the vehicle by which courts have upheld Category II restrictions that do not—in the judge's view—involve bans on reaching *uniquely relevant* audiences. And so to answer the question of why courts have found the AAC doctrine attractive, we must understand why they have placed such an emphasis on the fit between speech and audience.

In the next section, I will focus on that explanation: courts have implicitly applied a stunted version of what Armijo calls the "marketplace theory" of speech rights.

IV. Toward a Better Version of the Marketplace Theory

A. The Marketplace Theory as Currently Applied

As Armijo explains, "Marketplace theory defines the First Amendment's primary function as facilitating a process by which truth can be reached."[30] For our purposes, the most important

29. Ben Rich Trading, Inc. v. City of Vineland, 126 F.3d 155, 163 (3d Cir. 1997).

30. Armijo, *supra* note 1, at 1696.

attribute of marketplace theory is that it "is listener-based in its orientation; it is listeners who are witnesses to the truth-finding function taking place within the marketplace of ideas."[31] The marketplace theory is thus fundamentally *instrumentalist*; it favors the protection of speech only as a means to the end of a more informed populace.

From this listener-focused perspective, the actions of judges in Category II cases makes more sense. If speech is useful because of its effects on listeners, then we can understand why judges would have more sympathy for speech that is specifically targeted to particular listeners (and often urging those listeners to take a particular action, such as asking Blackhawks fans to lobby for a change in the team's mascot).

But this listener-focused approach also has a troubling consequence. Speech that is targeted to a particular audience has a better chance of overcoming a Category II restriction than speech that a speaker simply wishes to broadcast to as many people as possible. This means that the *content* of speech is influencing the level of protection it receives. Such favoritism, though unintended, is a serious blow to the principle of content-neutrality toward which First Amendment jurisprudence strives.

B. The Self-Autonomy Theory

Given the negative consequences of the marketplace theory as currently applied, what should be done to help lead courts in a better direction? One obvious possibility is to urge a rejection of the listener-focused marketplace theory entirely.

As Armijo explains, the main alternative to the marketplace theory is the self-autonomy theory, which focuses on the liberty of the *speaker*.[32] The self-autonomy theory values freedom of speech because that freedom allows each individual to exercise "the ability to think on one's own, to choose one's audience, to speak with that audience, and to express and receive ideas, so as to

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31. *Id.* at 1698.

32. *See id.* at 1696 (noting "that much of First Amendment scholarship undertakes as its primary task the decoupling of self-autonomy theory from marketplace theory, and then arguing over which supplies a better justification for supporting the freedom of speech").

achieve that best version of oneself through reason, reflection, and exchange."[33] Whether the speech convinces an audience—or even whether it is relevant to an audience—has no bearing on the question of whether that speech merits protection under the self-autonomy theory. Instead, "it is the speaker's choice of expression that is . . . 'the crucial factor in justifying protection' of that expression."[34]

Does the self-autonomy theory represent the solution to the overly deferential approach judges have taken in Category II cases? Should judges switch to a pure *speaker*-focused self-autonomy theory, rejecting all attempts at line-drawing based on the effects on the listener? Many have made a strong case for moving to the self-autonomy theory, including Charles Fried, on whom Armijo principally relies in expounding the case for the theory.[35] Fried declares the self-autonomy theory to be superior to the instrumentalist marketplace theory by suggesting that several aspects of our current First Amendment doctrine would have to be discarded if we truly accepted the marketplace theory. I do not believe, however, that Fried's arguments are determinative in the debate.

First, Fried suggests that under the marketplace theory we would lose the right *not* to speak a message with which we disagree, a right currently protected by *West Virginia Board of Education v. Barnette*[36] and subsequent cases.[37] Fried argues that there is no logical reason to protect such a right under the marketplace theory. If we protect speech rights only so that *more* ideas can be added to the marketplace, Fried reasons, then there

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33. *Id.* at 1690.

34. *Id.* at 1690–91 (quoting C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 592 (1989)).

35. *See id.* at 1689–90 ("Summarizing the moral case for individual choice, Charles Fried writes that '[t]he capacity for judgment, to make plans, to choose one's good, is what we share with other persons'; indeed, this capacity is 'what makes us persons.'" (quoting CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT 56-57 (2007))).

36. 319 U.S. 624 (1943).

37. *See* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 227 (1992) ("The real trouble begins when this conception of the First Amendment is pressed further to *deny* free speech protection to speakers who wish *not* to pronounce certain views.").

is no justification for a constitutional right to *withhold* an idea from the marketplace.

But this objection is only to one version of the marketplace theory. Rather than preserving a liberty to *add* to the marketplace of ideas, the marketplace theory, more broadly understood, protects the liberty to *affect* the marketplace in any way that we want to. Withholding support for an argument that one believes to be false can have just as much of a positive effect on others as *adding* support to an argument that one believes to be true. Those who disagree with a view and do not want to be couriers of that view may feel that the marketplace will be a better one if *fewer* join the chorus for that view. Thus, the right to withhold support for a message is fully compatible with a broad version of the marketplace theory.

Second, Fried worries that the marketplace theory must lead to lessened protections for speech that courts deem "low-value," such as obscenity.[38] But this problem can also be avoided so long as we take the most expansive view of the marketplace theory. It is not up to *judges* but *speakers* to decide whether their speech will improve the marketplace of ideas. Thus, all speech should be protected if that speech is received by *anyone* else besides the speaker. It is the transmission of the speech from speaker to listener that is sufficient to make the speech worthy of protection, regardless of its content.[39]

It is not, then, the marketplace theory *per se* that is problematic. It is rather a crimped view of the marketplace theory that puts at risk the protections Fried identifies. Fried's critiques do not force us to abandon the marketplace of ideas as the core justification for protecting free speech.[40] Rather, they

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38. *See id.* at 228 ("Civic republicans explain the historic exclusion of obscenity from constitutional protection on the ground that obscenity does not contribute to, but rather degrades, public (republican) discourse. Obscenity law is a puzzle . . . .").

39. There is an element of self-autonomy in this fuller version of the marketplace theory in that it can only be the *speaker* who decides that his speech will be a meaningful contribution to the marketplace of ideas.

40. There are other reasons to be skeptical of a move to the self-autonomy theory. Most seriously, the self-autonomy theory, taken to its logical endpoint, might require First Amendment protection for even Category I speech restrictions. Suppose a choice of a particular courier service has a sentimental meaning to a speaker, but no effect whatsoever on a recipient. An

suggest that a *broader* view of the marketplace theory is necessary, a view I will explore in the next section.

C. The Marketplace Theory as It Should Be Applied

What is wrong with the marketplace theory as courts have most often applied it? Courts have confused the *justification* for protecting free speech with a *judicial test* for protecting free speech. We protect speech because there should be a robust marketplace of ideas, but that does not mean speech is worth protecting only if—in the judge's view—it will make a difference in the marketplace of ideas.

Courts have provided lessened protections for generalized speech (such as protests on free trade issues) and perceived "low-value" speech (such as adult entertainment) based on whether a judge thinks a regulation seriously alters the marketplace of ideas. The result has been self-defeating, for the simple reason that no court can accurately predict how valuable speech will be, or who will most benefit from hearing it.

The only way to avoid this problem is for courts to treat all Category II restrictions alike. If a regulation affects the ability of a speaker "to choose one's audience, [and] to speak with that audience,"[41] then it is at least a Category II restriction. The listener-focused theory of the First Amendment is thus fully compatible with a bright-line, objective judicial test. Rather than asking *how much* the audience of a speaker has been affected, courts must simply shift to asking *whether* the audience of a speaker has been affected.

This does not mean, however, that judges will be left with no meaningful role to play in adjudicating speech restrictions. First, even if a ban does constitute a Category II (or Category III) restriction, a court may still uphold that ban if it is absolutely

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environmental group, for example, might choose to distribute flyers using only bicycle couriers. Because such a choice is made in the course of speech and could be described as "self-actualizing," the self-autonomy theory might hold that such a choice requires First Amendment protection. But choices that have absolutely no effect on listeners are implausible candidates for protection under the First Amendment, and a theory that might lead to such a result should be viewed with skepticism.

41. Armijo, *supra* note 1, at 1690.

necessary to a government objective, the test that Professor Armijo proposes.[42]

Second, courts must still engage in an enquiry to determine whether a facially Category I restriction actually rises, in practice, to the level of a Category II restriction. For example, to return to the hypothetical used in Part II, there is no difference in the experience of a recipient between receiving a letter by air or by truck. However, if a speaker is forced to use a less-preferred method, and that method is also *more expensive*, the speaker may not have the ability to send as many such letters as he otherwise would have. In this situation, the set of recipients *has* changed, and an apparent Category I restriction has risen to the level of Category II.[43]

V. Why Courts Have Upheld Category III Restrictions

Though we now have a plausible account of why the AAC doctrine is attractive in Category II cases, one important question remains: why has the AAC doctrine often been applied even in Category III cases? These cases, in which not just the audience of a message but the *content* of a message itself is altered, represent the most serious abridgment of free speech rights. They are situations where, as Armijo describes, a speaker is deprived "of her chosen mode of communication. The result of that restriction is that the speaker's message is never subjected to the truth process at all."[44] For this reason, no version of the marketplace theory can justify a Category III restriction. To explain why

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42. *See id.* at 1728

> One way to achieve this goal is to apply an incompatibility test: when a speaker' s expression is infringed by a law or regulation, a reviewing court should ask whether the infringed speech act—in the form the speaker intended to express it—is incompatible with the law and its purpose. The law will survive as applied to the speaker only if the speaker's mode is incompatible with the governmental interests asserted in the law's support.

43. One court, unfortunately, has upheld a ban that had precisely this effect. Despite acknowledging the burden it was placing on the speaker, the court wrote that he was not entitled to the "most cost-effective mode of communication." Johnson v. City of Philadelphia, 665 F.3d 486, 494 (3d Cir. 2011).

44. Armijo, *supra* note 1, at 1700.

courts have nonetheless used the AAC doctrine to uphold several such restrictions, we must look for a culprit beyond the marketplace theory.

The simplest explanation is that in some cases, it may be difficult for courts to determine whether a regulation actually constitutes a Category III restriction. Consider once again the facts of *O'Brien*.[45] Suppose that there was no way for anyone in the audience to have known the difference between a real draft card and an otherwise identical fake draft card. Suppose O'Brien's intended performance included no verbal explanation one way or the other. Suppose (assuming a counterfactual) that a prominent Supreme Court case had not brought significant attention to the question of whether O'Brien would be using a real or fake draft card. In this situation, it could well be that the message *received* by the audience would have been exactly the same whether the burned draft card had been real or fake. In this and similar cases, judges can disagree in good faith on whether a regulation will actually affect the perception of an audience, and thus whether a regulation falls in Category I or III.

But these borderline cases do not fully explain why courts have often upheld Category III restrictions. Even when courts have *acknowledged* that certain prohibited conduct has expressive content, they have often minimized the importance of that conduct. In *Clark v. Committee for Nonviolence*,[46] for example, the Supreme Court assumed that an overnight campground near the White House would have expressive content.[47] Nonetheless, the Court upheld a denial of an overnight permit, dismissing the notion that "without overnight sleeping the plight of the homeless could not be communicated in other ways."[48] In this and other cases, the AAC doctrine has been a vehicle to *minimize* the importance of prohibited conduct to

45. *See* United States v. O'Brien, 391 U.S. 367, 369 (1968) ("On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse.").

46. 468 U.S. 288 (1984).

47. *See id.* at 293 ("We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment.").

48. *Id.* at 295.

expression. Why are courts so tempted to engage in this minimization?

Here is one possible answer: courts are reluctant to admit that illegal acts have an inherent and unique power to send a message. They are reluctant because once this is admitted, we are confronted with an uncomfortable fact: that enforcing the law *unavoidably* puts some messages at a disadvantage. Rather than making this admission, courts may find it easier to believe a useful fiction—that every message sent by a disruptive and illegal act could be made just as effectively by a legal act.

Consider this uncomfortable line of reasoning: The most effective demonstration of opposition to a law is to publicly engage in an act of disobeying that law.[49] The government nonetheless has an undeniably compelling interest in enforcing its laws. Thus, even though the government may not explicitly discriminate against speech on the basis of its content,[50] simply enforcing a law will necessarily eliminate some of the most effective speech *against* that law. Since no comparable obstacles stand in the way of speech *supporting* current law—publicly and conspicuously *obeying* a law is not only allowed but encouraged—a viewpoint in favor of the current state of the law will unavoidably be aided by the government.

I do not necessarily think there is a *solution* to this problem; life is difficult in many ways for those who disagree with current law, and this is one of them. The marketplace of ideas will never be an entirely fair fight between those opposed to current regulations and those supporting them, and that is unfortunate.

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49. For a recent example, see Alicia Victoria Lozano, *Marijuana Activists Gather for 'Smoke-In' at Rittenhouse Square*, NBC 10 PHILADELPHIA (Jan. 20, 2017), http://www.nbcphiladelphia.com/news/local/Rittenhouse-Square-Marijuana-Protest-411332455.html (last visited Apr. 24, 2017) (on file with the Washington and Lee Law Review).

50. Of course, a public act of lawbreaking may include a message promoting "imminent lawless action" (e.g., encouraging others to immediately engage in similar lawbreaking), which is not protected by the First Amendment under current precedent. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). But actions can carry more than one message simultaneously. Even if that portion of a demonstration advocating *imminent* lawbreaking is unprotected, that portion of the demonstration advocating a long-term change in the law itself remains protected as First Amendment expression.

Acknowledging that there is a problem is preferable to the alternative, however, which is to force oneself to believe that there is no problem at all. This is the optimistic view implied by holding that burning a fake draft card is just as effective in sending an anti-draft message as burning a real one.[51] The result of this optimistic view, ironically, has been a greater acceptance of the AAC doctrine, and with it even *less* protection for protesters than they would otherwise have received.

VI. Conclusion

In this response, I have explained the distinction between the three categories of restrictions on "channels" of speech, a distinction that courts and scholars have not made as explicit as they should. Further, I have suggested why courts have frequently applied the ample alternative channels doctrine in Category II cases, as an attempt to improperly devalue speakers' choices that do not make "enough" of an effect on the marketplace of ideas. I have suggested how judges could be more consistent in their treatment of Category II cases while also distinguishing them from Category I cases, which are implausible candidates for First Amendment protection. Finally, I have suggested that courts must be more realistic about the powerful expressive effect that many disruptive and illegal acts can have. Accepting this fact does not mean courts must allow widespread lawlessness (Armijo's proposed incompatibility rule would still allow many necessary regulations to stand in the face of First Amendment claims), but it does mean courts would give full weight to the speech interests at stake.

Professor Armijo's powerful and provocative Article is sure to provoke many responses, as courts consider whether they have been following the wrong path for more than 40 years. My hope is that this response can also play a role in that process, helping courts to look at their own prior reasoning with a fresh eye and an open mind.

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51. Or, more relevant to today's political climate, it is the view implied by believing that a "smoke-in" with fake marijuana would be just as effective as lighting up the real thing.