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## The “Ample Alternative Channels” Flaw in First Amendment Doctrine

Enrique Armijo

*Elon University School of Law*

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# The “Ample Alternative Channels” Flaw in First Amendment Doctrine

Enrique Armijo\*

## *Abstract*

*In reviewing a content-neutral regulation affecting speech, courts ask if the regulation leaves open “ample alternative channels of communication” for the restricted speaker’s expression. Substitutability is the underlying rationale. If the message could have been expressed in some other legal way, the ample alternative channels requirement is met. The court then deems the restriction’s harm to the speaker’s expressive right as de minimis and upholds the law. For decades, courts and free speech scholars have assumed the validity of this principle. It has set First Amendment jurisprudence on the wrong course.*

*Permitting a speech restriction because the speaker could have communicated the same message another way distorts the First Amendment. Ample alternative channels analysis instructs courts to engage in counterfactual, post-hoc reasoning as to the expressive choices the speaker could have made, but didn’t—i.e., to substitute the court’s own value judgments for those of the speaker’s. The modern communications world expands the doctrine’s pernicious effects, since speech-facilitating technologies can always theoretically grant an alternative means of expression to any infringed speaker. And the origin of the doctrine, from Justice Harlan’s concurrence in *United States v. O’Brien*, shows that*

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\* Associate Dean for Academic Affairs and Associate Professor, Elon University School of Law and Affiliated Fellow, Yale Law School Information Society Project. Thanks to colleagues at the Yale Information Society Project’s Freedom of Expression Scholars’ 2015 Conference and the Loyola Chicago 2015 Constitutional Law Colloquium. Individual thanks go to Jack Balkin, Joseph Blocher, David Han, Chad Golder, Randy Kozel, Kerry Monroe, Alex Tsesis, Mark Tushnet, and Tinsley Yarbrough, to the librarians at Princeton University’s Mudd Rare Manuscript Library for providing access to the John Marshall Harlan Papers Collection, and to Spenser Tatum, Elizabeth Long, and Britney Boles for research assistance.

*ample alternative channels analysis was in its incipiency a misguided afterthought—born, as historical Supreme Court case files never examined before this Article show, as literally a margin note to an unpublished draft.*

*In the place of ample alternative channels analysis, courts should ask whether a speaker’s chosen mode is incompatible with the government’s interest in the restriction in question. An incompatibility rule would be more consistent with the Roberts Court’s turn toward reviewing content-neutral speech restrictions rigorously, as evidenced in 2014’s McCullen v. Coakley.*

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### I. Introduction

You are a Hare Krishna. As part of your spiritual obligation, you must engage in *Sankirtan*, which requires, in addition to public singing and chanting of mantras, the hand-to-hand dissemination of religious literature and face-to-face solicitation of donations for the church.<sup>1</sup> These interactions between devotees and potential recruits in public spaces are critical to the growth of your chosen faith.<sup>2</sup>

Your community’s largest public gathering of the year, and thus your best opportunity to proselytize to thousands of potential new recruits to Krishna Consciousness, is the state fair.<sup>3</sup> But the fair’s vendor solicitation rules require you, or any other person or organization seeking to distribute materials to fairgoers, to do so only from behind a booth that is assigned to a fixed location within the fairgrounds chosen by the fair’s organizers.

Note what the fair’s requirements do *not* bar you from doing. They do not ban you from the fairgrounds altogether, and it permits you to interact with fellow fairgoers who approach your

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1. See E. Burke Rochford Jr., *Recruitment Strategies, Ideology, and Organization in the Hare Krishna Movement*, 29 SOCIAL PROBS. 399, 401 (1982) (noting that encounters in public places are an important way of recruiting new members to the growth of the International Society for Krishna Consciousness); see also *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 952–53 (D.C. Cir. 1995) (describing a “Krishnafest” held by the International Society for Krishna Consciousness of the Potomac).

2. See Rochford, *supra* note 1, at 401–02; (“Table 1 shows [that] 42 percent [of ISKCON devotees] made contact in public places.”); see also E. Burke Rochford, Jr., *A Study of Recruitment and Transformation Processes in the Hare Krishna Movement* 19–20 (Apr. 1, 1982) (unpublished Ph.D. dissertation, University of California, Los Angeles) (observing that, unlike other new religious movements, in which preexisting “social network ties have played a prominent role in the[ir] expansion . . . persons recruited into Krishna Consciousness most often made their initial contact with the movement in *public place* encounters with Krishna devotees.”) (on file with the author).

3. These facts are taken from *Heffron v. Int’l Soc. for Krishna Consciousness*, 452 U.S. 640, 655 (1981).

assigned booth. You challenge the fair's requirements on First Amendment grounds. Should you prevail?

Now consider a second hypothetical. You own a piece of real estate that you wish to sell.<sup>4</sup> To attract interest in the property from prospective buyers, you want to post a "For Sale" sign in the home's front lawn. However, your town bars owners from placing sales-related signage on the lawns of their homes. Once again, note what the restriction does *not* bar you doing: you may list your property for sale with agents; you may place informational flyers in a dedicated box on the lawn that passersby can help themselves to (so long as the box is labeled "Free Information," and not "For Sale"); you may place your sign in the home's windows (though again, not the yard); craigslist, realtor.com, and the rest of the Internet are available to you; and you retain the ability to show the home to prospective buyers at times of mutual convenience.

You challenge the township's signage ban on First Amendment grounds. Should the aforementioned facts be relevant? In other words, should the ban survive your challenge because you are able communicate that the home is on the market by other means despite the township's restriction—even though you, the restricted speaker, favor using a "For Sale" sign over any of those means?

Alternatively, assume instead that the sign you wish to place in your lawn expresses your opposition to the Iraq War.<sup>5</sup> This time, your township bars all yard signs *except* for "For Sale" signs.<sup>6</sup> Is the town's abridgement of your speech cured by your ability to express your distaste for the War through a range of other constitutionally protected manners of expression, from picketing and handing out antiwar flyers on your front lawn to placing bumper stickers all over your car (parked right outside your house)—expression that the township's signage ban does not implicate in any way?

These three hypotheticals, all based on actual cases, involve different kinds of speech—religious; commercial; political. The

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4. These facts are taken from *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 98 (1977).

5. These facts are taken from *City of Ladue v. Gilleo*, 512 U.S. 43, 58–59 (1994).

6. *Id.* at 45.

government interests underlying the regulations abridging that speech vary widely as well—patron enjoyment of the state fair; preventing white flight; aesthetic choices regarding visual clutter.<sup>7</sup> But in all three cases, in deciding whether the restriction in question abridged the speaker’s First Amendment right, the U.S. Supreme Court considered the relative effectiveness of alternative modes of expression that the speaker did not use—and, for all we or the Court know, that the speaker may in fact *have chosen* not to have used.

Current First Amendment doctrine finds that if ample *alternative* channels of expression exist for a speaker to express her views, then a content-neutral regulation foreclosing the speaker’s *chosen* channel of expression will survive review.<sup>8</sup> This Article’s fundamental premise is that such a finding is at odds with the First Amendment itself.

Giving the availability of alternative communication channels dispositive significance in speech cases undermines speakers’ communicative choices with respect to their speech’s audience, effectiveness, and reach—choices that both self-autonomy and marketplace theory teach deserve constitutional respect.<sup>9</sup> The doctrine calls on judges to substitute their First Amendment values for the restricted speaker’s; to engage in counterfactual, post-hoc reasoning as to the choices the speaker could have made, but did not; and to focus on such hypotheticals at the expense of the relevant inquiry: whether the state has adequately justified its

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7. See *Heffron*, 452 U.S. at 656–57 (justifying the state fair’s rule in the interest of maintaining orderly movement of individuals at the fair); *Linmark Assocs., Inc.*, 431 U.S. at 94 (“[T]he vital goal this ordinance serves [is] namely, promoting stable, racially integrated housing.”); *Gilleo*, 512 U.S. at 49 (“Ladue relies squarely on that [esthetic values] content-neutral justification for its ordinance.”).

8. See *Hill v. Colorado*, 530 U.S. 703, 726 (2000) (“[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.”).

9. See *id.* at 751 (Scalia, J., dissenting) (stating that the “right to be let alone” contemplated by Justice Brandeis in *Olmstead v. United States* is the right of a speaker in a public forum to be free from governmental intrusion).

interference with speech.<sup>10</sup> This approach leads to speech-averse results in a range of cases.<sup>11</sup> It is also a constitutional anomaly.

In no other area of constitutional law do courts excuse government interferences with protected rights on the grounds that despite the interference at issue, the affected party could have exercised that same right as effectively in a different way. For example, when a college student is denied admission to their public university of choice on account of their race, no court asks whether the student could have been admitted to another comparable school (let alone whether the student did in fact apply and was admitted to such a school), and if so, whether that fact minimizes the harm caused by violating the student's right to equal protection.<sup>12</sup> A city could not successfully defend a ban on firing ranges against a Second Amendment challenge on the ground that ranges are available in a jurisdiction nearby.<sup>13</sup> And after last term's *Obergefell v. Hodges*,<sup>14</sup> which held that the right to same-sex marriage is fundamental,<sup>15</sup> no state could save its ban on such marriages by arguing that it permits same-sex civil unions, which

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10. See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 50 (1987) ("The Court does not seriously inquire into the substantiality of the governmental interest, and it does not seriously examine the alternative means by which the government could achieve its objectives. As a result, when the Court applies this standard, it invariably upholds the challenged restriction.").

11. *Infra* Part II.B.1.

12. These facts may at most raise a standing question, but even that issue is far from clear. See, e.g., *Fisher v. Univ. of Tex.*, 758 F.3d 633, 662 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198, 2207 (2016) (arguing that nonadmitted student lacked standing to challenge constitutionality of public university admissions decision because the student had been admitted and subsequently graduated from another school).

Moreover, the Court has expressly rejected the argument that a state can cure a race-based denial of a student's university admission by providing a substitute as an alternative. See *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337, 351–52 (1938) (finding that attendance at a university of any adjacent state for law school is not a valid alternative for attendance at in-state institution that will not accept black students).

13. See *Ezell v. City of Chicago*, 651 F.3d 684, 697, 709–10 (7th Cir. 2011) (finding that Chicago had not established a strong enough public-interest rationale for its ban on firing ranges and thus this plan likely violated the plaintiffs' Second Amendment rights).

14. 135 S. Ct. 2584 (2015).

15. See *id.* at 2607 ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.").

provide all of the benefits of marital status under that state’s substantive law, and thus the ban does not offend due process.<sup>16</sup>

The closest analogy is to free exercise claims. Post-*Employment Division of Oregon v. Smith*,<sup>17</sup> courts apply much less searching review to laws of general applicability that incidentally burden religious exercise.<sup>18</sup> However, even post-*Smith*, if a generally applicable law burdens a specific religious practice, a court does not—indeed, could not—find as a basis for supporting the law that the burdened party can exercise their religion just as avidly despite the burden, due to a different but legally available means for the same expression. In *Smith* itself, the majority did not conclude—and in fact expressly declined to conclude—that Native Americans could engage in their religious rituals without peyote.<sup>19</sup> But this is what happens in every First Amendment case

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16. This was true pre-*Obergefell* as well. *See, e.g.,* Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 414–17 (Conn. 2008) (rejecting the argument that the state’s refusal to marry same-sex couples did not violate due process because civil unions in the state entitled “gay persons . . . to all of the rights that married couples enjoy”).

17. 494 U.S. 872 (1990).

18. *See id.* at 892 (“[T]he Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. . . .”).

19. *See id.* at 887

Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim . . . . It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith . . . .

(quoting *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989)).

The Court’s undue burden analysis in its abortion jurisprudence might be analogous. A law closing every abortion clinic in a given area might not violate a woman’s right (from that area) to terminate a pre-viability pregnancy if the woman can obtain an abortion in some other less convenient, though still available, locality. *See, e.g.,* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2015) (“We recognize that increased driving distances do not always constitute an ‘undue burden.’”). But the undue burden test is about determining whether inconvenience has crossed into impermissible interference with the right the test protects. *See* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 920 (1992) (“A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: A burden may be ‘undue’ either because the burden is too severe or because it lacks a legitimate, rational justification.”). In those First Amendment cases where a choice as to mode, time, or place for speech is itself expressive, the alternative saving the regulation’s constitutionality (as discussed *infra* notes 26, 39–41) is



involving a content-neutral law; such restrictions are upheld so long as the reviewing court deems that the speaker could have expressed the speech in question through a different mode.<sup>20</sup> And most importantly, this is so irrespective of the *speaker's* assessment of the equality of the substitute.<sup>21</sup> This is the equivalent of arguing that a state's blanket ban on peyote does not offend the free exercise rights of Native Americans because they remain free to use sweat lodges.<sup>22</sup>

Unlike other anomalies in constitutional law, this one has garnered near-total acceptance. In a rare display of unanimity in an area where first principles have been contested for decades,<sup>23</sup> courts and scholars have long found that it is not a constitutionally significant intrusion upon free speech to limit a speaker's preferred mode of expression, so long as the intrusion leaves open other available means by which the speaker may communicate.<sup>24</sup> This is

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usually a materially different expressive act from the one the speaker chose. *See City of Ladue v. Gilleo*, 512 U.S. 43, 55–56 (1994) (stating that the alternatives proposed to respondent for displaying opposition to war efforts “carr[y] a message quite distinct” from displaying a sign from one's residence).

20. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)

[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”

(quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

21. *See id.* at 789 (finding alternative avenues of expression, but not considering respondent's input on the stated alternatives).

22. Post-*Smith*, the Religious Freedom Restoration Act sought to protect religious exercise from “burdens” imposed by “laws [that are] neutral toward religion,” which it deemed as offensive to religious practice “as laws intended to interfere with religious exercise.” 42 U.S.C. § 2000bb(a)(2) (2012). The U.S. Congress therefore expressly rejected any distinction between laws that could be characterized, to use Speech Clause terminology, as “religious exercise-based” and those that are “religious exercise-neutral.” *Id.*

23. *See infra* Part III.A (referring to the ongoing debate between marketplace and self-autonomy theorists as to which theory best supports the First Amendment).

24. *See* C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Restrictions*, 78 NW. U. L. REV. 937, 937 (1984) [hereinafter Baker, *Unreasoned Reasonableness*] (arguing that subjecting time, place, and manner restrictions interfering with expressive conduct to the equivalent of a mere reasonableness standard is “possibly the most universally

so as to self-autonomy, marketplace, and instrumentalist theorists.

On the self-autonomy front, Daniel Farber and John Nowak argue that, "[a]lthough some people may be unable to express themselves in the exact physical manner, location, or time they find most satisfying, this inconvenience hardly seems a radical intrusion into individual autonomy."<sup>25</sup> Similarly, Eugene Volokh claims that "a typical law aimed at noncommunicative effects is unlikely to excessively inhibit the communication of some viewpoint of fact, because many different media would remain available to the speakers."<sup>26</sup> As to marketplace theory, Geoffrey Stone has argued that the content of the message is not blocked from the speech market so long as that content can reach the market via some other legal channel accessible to the speaker and his audience.<sup>27</sup> 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.<sup>28</sup> For the instrumentalists, Judge Richard Posner compares restrictions on a speaker's preferred mode of communication to a "tax of variable severity on ideas and opinions [that make] it more costly for the speaker to reach his audience," analogous to a "tax on newsprint or on broadcast air time, or for that matter, an increase in second-class postal rates"<sup>29</sup>—a burden

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accepted tenet of first amendment doctrine").

25. Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1237 (1984).

26. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1305 (2005).

27. See Stone, *supra* note 10, at 67 ("In some cases, these 'time, place, and manner' regulations serve merely a channeling function and have no appreciable impact on free expression.").

28. See *id.* at 68 ("In light of the availability of alternative means of expression, it seems doubtful that such restrictions have an appreciable effect on the total quantity of public debate.").

29. Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U.L. REV. 1, 16–17 (1986) [hereinafter Posner, *Free Speech in an Economic Perspective*]; see also RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 76 (2001) (explaining the impact of modern thinking on free speech).

paling in comparison to the “much heavier tax” of a content-based restriction on a particular category of ideas.<sup>30</sup>

However, there are several unexamined problems with the ample alternative channels approach—problems to which the claims set out above do not respond. First, one can safely assume that by dint of the chosen channel of communication alone, the speaker herself has not found alternative channels of communication to be analogous. It seems much more than a mere “inconvenience,” to use Farber and Nowak’s term,<sup>31</sup> to tell a speaker she can be punished for using the mode of expression that she believed to be *most* effective, but could have avoided punishment if she had chosen a way to communicate the same message that she likely viewed as *less* effective. Accordingly, the notion that the availability of substitutes for expressing a given idea minimizes the constitutional harm to a barred speaker’s freedom of choice offends the self-autonomy-related justifications for the First Amendment.<sup>32</sup> It also seems wrong to find that the marketplace of ideas is not harmed when speakers are barred by generally applicable restrictions on the ground that speech could, in theory, reach the market in some other way.<sup>33</sup> The deprivation of the market has already occurred, and from both the speaker’s and his intended audience’s perspective, the alternative means by which the speech could have reached the market are not true contemporaneous substitutes. And Judge Posner’s analogy to taxes on modes of speech delivery conflates the concepts of restriction and proscription: a “tax on newsprint,” even a significant one, is not the same as making newsprint illegal (as opposed to costly) and forcing newspaper printers to become broadcasters, corner speakers, or bloggers.<sup>34</sup>

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30. See Posner, *Free Speech in an Economic Perspective*, *supra* note 29, at 16 (“A prohibition on all public expression of an idea is a much heavier tax.”).

31. Farber & Nowak, *supra* note 25, at 1237.

32. See *Hurley v. Irish-Am. Gay*, 515 U.S. 557, 573 (1995) (“[T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . .”).

33. See Stone, *supra* note 10, at 65 (stating that not all alternative means of expression are perfect and that, in some circumstances, certain means of expression may have specific advantages).

34. Cf. *NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 76–80 (1964) (Black, J., concurring) (justifying a restriction on expression on the

Speaking of bloggers: with the rise of speech-facilitating technologies, there is now no limit to the damage that alternative channels analysis can do to free speech.<sup>35</sup> Courts have already begun to find that thanks to the availability of such technologies, an alternative means of expression is always available to any user whose speech has been infringed.<sup>36</sup> And in a world where the existence of YouTube, Blogger, Twitter, or Facebook means that an alternative channel to the one chosen is always available, even the broadest content-neutral restrictions on speech will increasingly survive judicial review.

To adduce precisely why ample alternative channels analysis has won such a hold on First Amendment doctrine, it makes sense to consider its origin. And if those foundations are shaky, we might be more inclined to examine whether ample alternatives analysis serves a proper purpose in balancing the liberty of the speaker against the government’s interests in generally applicable regulations that infringe on speech.

Ample alternative channels analysis arose more than fifty years ago, in Justice John Marshall Harlan’s concurrence in *United States v. O’Brien*.<sup>37</sup> In that seminal case, Harlan stated the First Amendment was not offended by O’Brien’s prosecution for burning his draft card because O’Brien could have communicated his antigovernment, antiwar message by other, legal means.<sup>38</sup> The

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ground that “other methods of communication are left open” and thus the restriction is “on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations”).

35. See *Interstate Outdoor Adver., L.P. v. Zoning Bd. of Mt. Laurel*, 706 F.3d 527, 535 (3d Cir. 2013) (“Potential alternative channels of communication [for prohibited billboards] include on-premises signs, internet advertising, direct mail, radio, newspapers, television, sign advertising, and public transportation advertising.”); see also *Gun Owners’ Action League v. Swift*, 284 F.3d 198, 212 (1st Cir. 2002) (“The restriction challenged here ‘allows for reasonable alternative channels of communication.’ Whatever messages the appellants seek to express by shooting at human images on targets, those messages may be spread via writing, the Internet, word of mouth, or other communication technologies.”).

36. See *Bl(a)ck Tea Soc’y v. City of Bos.*, 378 F.3d 8, 14 (1st Cir. 2004) (finding that the ability to communicate protest messages through mass media qualified as a “viable alternative means . . . to enable protesters to communicate their messages to the delegates”).

37. 391 U.S. 367, 388–89 (1968) (Harlan, J., concurring).

38. See *id.* at 389 (“O’Brien manifestly could have conveyed his message in many ways other than by burning his draft card.”).

development of Justice Harlan's concurrence, however, as evidenced through multiple drafts of that concurrence and the majority opinion in the case—none of which have ever been examined by scholars until this Article—shows that ample alternative channels analysis was in its incipiency a misguided afterthought.<sup>39</sup> By dint of its being incorporated into the test for content-neutral restrictions and applied in subsequent cases, however, the concept now carries dispositive force in First Amendment doctrine.<sup>40</sup> It is time to save the doctrine, and the interests it is intended to protect, from the tyranny of the afterthought.

With the help of Justice Harlan's case files in *O'Brien*, Part II of this Article discusses the birth of the ample alternative channels analysis and its role in the content-discrimination doctrine's intermediate scrutiny standard of review.<sup>41</sup> Part III critiques ample alternative channels analysis because in its blanket treatment of alternatives as dispositive to the First Amendment issue, it fails to differentiate those cases in which the speaker's chosen mode of expression is as worthy of protection as the message expressed thereby.<sup>42</sup> In terms of practical consequences, this Part also shows that ample alternative channels analysis often yields inconsistent and speech-averse results in a range of contexts—a problem that will only be compounded by the current emergence of technology-facilitated speech.<sup>43</sup> In closing, Part III argues that the Supreme Court's longstanding distinction between content-based and content-neutral restrictions cannot support the

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39. *See id.* (concurring with majority's determination of when a government regulation is sufficiently justified and adding additional language concerning alternative ways for O'Brien to communicate his message).

40. *See* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 790 (2007) (explaining that in content-neutral cases, "the Court will uphold regulations of speech so long as, in its view, the regulation keeps open for that speaker ample alternative, and effective, channels of communication"); Harold L. Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439, 490 (1986) [hereinafter Quadres, *Content-Neutral Public Forum Regulations*] (stating that the "alternative access question" is the "touchstone of the whole balancing process" in assessing content-neutral regulations).

41. *Infra* Part II.

42. *Infra* Part III.

43. *Infra* Part III.

use of ample alternative channels analysis in the latter type of case but not the former.<sup>44</sup>

Turning to recommendations, Part IV proposes that in lieu of ample alternative channels analysis, courts reviewing content-neutral regulations should ask whether permitting the speaker’s use of her chosen channel of communication is incompatible with the government’s interest in adopting the regulation in question.<sup>45</sup> Incompatibility is a more rigorous standard than the reasonableness approach that has come to govern content neutrality analysis.<sup>46</sup> It will protect the speaker’s chosen mode of expression in most cases, except those in which permitting the speaker’s chosen mode of expression would frustrate a compelling governmental interest in near-totality.<sup>47</sup> In other words, the focus is not where the current doctrine places it—on whether the speaker could have met her communicative goals by expressing the content of her message in another legal way. Rather, the inquiry is whether the government *could not have* achieved its legislative goals if the speaker had been able to express her message in the desired manner. An incompatibility standard would also be able to differentiate between conduct that merely facilitates speech and conduct that is itself communicative or otherwise essential to the speaker’s expressive act, which is a distinction that modern First Amendment doctrine has merged right out of the law. Finally, abandoning ample alternative channels analysis in favor of incompatibility would be consistent with the Roberts Court’s turn toward a pro-speaker view of the First Amendment—a view that rigorously reviews even content-neutral restrictions on speech, as evidenced in last Term’s *McCullen v. Coakley*.<sup>48</sup>

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44. *Infra* Part III.

45. *Infra* Part IV.

46. *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (articulating the reasonableness standard that currently governs restrictions “on the time, place, or many of protected speech”).

47. *See* *Rosenbaum v. City of S.F.*, 484 F.3d 1142, 1167 (9th Cir. 2007) (stating an “incompatibility” standard that must be proved by the State to deny appellants free speech in the public forum).

48. *See* 134 S. Ct. 2518, 2541 (2014) (“[The Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers . . . . The Commonwealth may not do that consistent with the First Amendment.”).

*II. The Birth of Ample Alternative Channels Analysis: Justice  
Harlan's O'Brien Opinion*

To better understand the role alternative channels analysis is intended to play in Free Speech doctrine, we should start with the analysis's source. When looking for origin stories in constitutional law, one can easily find statements in cases that were afterthoughts at the time, but later serve as the foundations upon which subsequent courts build legal doctrine.<sup>49</sup> But excavating those statements can uncover mismatches between the context and principles animating the statements at the time of their making on the one hand, and their application to modern controversies on the other—mismatches that current law, building upon itself through the common law process of decision, can be blind to.<sup>50</sup>

For present purposes, the statement being excavated first appeared in a tent-pole First Amendment case: David Paul O'Brien's conviction under the Selective Service Act (SSA or Act) for burning his draft card on the steps of the South Boston Courthouse in protest of the Vietnam War.<sup>51</sup> Alternative channels analysis was born not in the *O'Brien* majority opinion, however, but rather in Justice Harlan's concurrence.<sup>52</sup> 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.<sup>53</sup>

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49. See, e.g., Geoffrey P. Miller, *The True Story of Carolene Products*, 198 SUP. CT. REV. 397, 398–99 (1987) (discussing a footnote about strict scrutiny of individual rights becoming the takeaway of a case about the federal “Filled Milk Act”); David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1263–65 (2010) (discussing the doctrinal implications of Justice Stone's footnote in *Carolene Products*).

50. See Miller, *supra* note 49, at 398 (listing numerous legal doctrinal developments that have surfaced as a result of a footnote where “[t]he facts were not the stuff of great decisions”).

51. See *United States v. O'Brien*, 391 U.S. 367, 369 (1968) (“David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse . . . For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts.”).

52. See *id.* at 389 (Harlan, J., concurring) (“O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card.”).

53. See Justice Harlan, *Concurring Draft Opinion Circulated Apr. 1968*:

*A. Briefing, Argument, and the First Draft Majority Opinion*

After being convicted in Massachusetts federal court for violating the “no willful destruction” section of the SSA by burning his draft card, O’Brien appealed to the U.S. Court of Appeals for the First Circuit.<sup>54</sup> That court held that O’Brien’s conviction violated the First Amendment.<sup>55</sup> In the Supreme Court, the United States challenged the First Circuit’s reversal of O’Brien’s conviction.<sup>56</sup>

On the First Amendment question, the United States’ merits brief argued that “the decisive consideration” in determining whether conduct like O’Brien’s was protected speech was whether it fit within those “limited class of activities” that are “[1.] inextricably tied to oral expression or [2.] where no reasonably effective alternative means of communication [are] available.”<sup>57</sup> As to the first question, the United States claimed that burning a draft card was not protected symbolic speech because it was not “a natural extension of [a] verbalization,” not integral to a concomitant “oral expression[’s] meaning,” and not “the manifest equivalent of, or traditionally recognized substitute for, a verbal statement.”<sup>58</sup> As to the second alternative showing under its proposed test, the Government argued that “other effective means for expressing” the ideas communicated by the conduct that O’Brien engaged in “plainly exist,” and that those means, unlike

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United States v. O’Brien at 2 (Harlan, J., concurring), in John Marshall Harlan Papers, Box 311, Seeley G. Mudd Manuscript Library, Princeton University [hereinafter Harlan Papers, Box 311] (“This double-barreled approach seems to me hopelessly to confuse two separate definitional problems presented by the language of the First Amendment.”) (on file with the Washington and Lee Law Review).

54. O’Brien v. United States, 376 F.2d 538, 539–40 (1st Cir. 1967), *vacated* 391 U.S. 367, 369 (1968).

55. See *O’Brien*, 391 U.S. at 370–71 (“On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech”).

56. See *id.* at 372 (“The government petitioned for certiorari in No. 232, arguing that the Court of Appeals erred in holding the statute unconstitutional . . .”); see also Brief for the United States at 7–8, United States v. O’Brien, 391 U.S. 367 (1968) [hereinafter O’Brien United States Brief] (setting forth the United States’ arguments for challenging reversal).

57. O’Brien United States Brief, *supra* note 56, at 8.

58. *Id.* at 15.



draft-card burning, “do not interfere in any significant way with the orderly functioning of government.”<sup>59</sup> O’Brien and like-minded protestors had such “other effective means” to convey their views, ranging from “the use of mass communication media” to “the public meeting hall” to “peaceable demonstration” to “the distribution of literature.”<sup>60</sup> In response, O’Brien argued that the Court’s cases established “a constitutional right to deliver one’s speech at the place where, the time when, and the manner in which the speaker deems it to be most effective.”<sup>61</sup> That right, claimed O’Brien, “include[s] the right to make the most dramatic and compelling speech possible,” subject to narrow limitations.<sup>62</sup>

After oral argument, at which the Solicitor General reiterated the Government’s argument that O’Brien was free “at all times to express dissent by speech from the courthouse steps or on the street corners, by letters to the editor, by pamphlet, by radio and television,”<sup>63</sup> the Government’s position prevailed. Chief Justice Warren’s first draft opinion for the majority circulated on April 12, 1968.<sup>64</sup> Consistent with only the first part of how the Government had litigated the symbolic speech question, however, Warren’s opinion turned exclusively on the speech-conduct distinction.<sup>65</sup> Warren found that burning draft cards, even in protest of military action, was conduct and not speech—and was thus not protected by the First Amendment.<sup>66</sup>

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59. *Id.* at 19.

60. *Id.* at 19–20.

61. Brief for O’Brien at 11, *United States v. O’Brien*, 391 U.S. 367 (1968), (Nos. 232, 233) [hereinafter O’Brien Brief].

62. *Id.* at 40.

63. Transcript of Oral Argument at 10, *United States v. O’Brien*, 391 U.S. 367 (1968) (Nos. 232, 233); *see also id.* at 11 (stating the SSA is “not fairly to be regarded as an abridgement of freedom of speech when it does not involve speech in any way and *when all avenues of speech remain open to the defendant*” (emphasis added)).

64. Chief Justice Warren, Majority Draft Opinion Circulated Apr. 12, 1968: *United States v. O’Brien* at 1 *in* Harlan Papers, Box 311 [hereinafter Majority First Draft] (on file with the Washington and Lee Law Review).

65. *See id.* at 18 (“[T]he core concern of the [First] Amendment is . . . verbal expression . . .”).

66. *See id.* at 7–8 (“The 1965 Amendment [subjecting to criminal liability anyone who knowingly destroys a certificate] on its face deals with conduct having no connection with speech.”).

Warren’s first analytical step was to affirm that the Act did not facially infringe upon speech.<sup>67</sup> As a general matter, there was nothing “necessarily expressive,” Warren noted, about the conduct that the Act prevented.<sup>68</sup> Next, and with respect to O’Brien’s as-applied claim alleging that *his* conduct was expressive and therefore protected, Warren’s opinion held firmly that even though the Court had “no reason to doubt” that O’Brien “intended by burning his certificate to express his disagreement with the war and the draft,” O’Brien’s “conduct of burning his certificate was not speech within the meaning of the First Amendment.”<sup>69</sup>

With the Government’s position as a starting point for his analysis, Warren rejected O’Brien’s position that the First Amendment protected symbolic speech, driving a broad wedge between words and conduct—even conduct intended to be expressive—for First Amendment purposes.<sup>70</sup> He did so first by placing conduct as far subordinate to verbal utterances in the free speech hierarchy:

The view of the First Amendment advanced by O’Brien is premised upon a definition of ‘speech’ that bears no resemblance to the meaning and usage of that word in our society. Under this view, any act done by an individual would be speech if the individual intended by the act to express any idea, and at some time made known his intent . . . . The multitude of decided cases corroborate what is in any event apparent on the face of the [Speech and Press] clauses—that their core meaning and concern is with verbal expression, the spoken and written utterance of words . . . . From its adoption through the present time, the traditional, normal, and by far most important way that people in our society have expressed their ideas is by using language.<sup>71</sup>

So the “spoken and written utterance” was at the core of the Speech Clause’s concerns, and to stray from that core was to depart

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67. *See id.* at 8 (“[The 1965 Amendment] prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct.”).

68. *Id.* at 8.

69. *Id.* at 16 (emphasis added).

70. *See id.* at 17 (stating that the cases decided on this confirm that the clauses of the First Amendment concern “verbal expression, the spoken and written utterance of words”).

71. *Id.* at 17–18.

not only from First Amendment text, history, and tradition, but also from common conceptions regarding the sharing of ideas that have been widely held from the Founding to the present day.

Warren admitted, however, that under the Court's previous cases, one narrow category of conduct did merit First Amendment protection, noting that "the Amendment would have a rather narrow compass if it embraced only the initial utterance of words. The conception of freedom of communication embodied in the Amendment by definition draws within its ambit behavior engaged as a means of communicating, that is of disseminating or transmitting, uttered words."<sup>72</sup> According to Warren, examples of such verbal expression-disseminating conduct that could fall within the Speech Clause's protection included assemblies to discuss matters of public interest,<sup>73</sup> a speaker's use of sound amplification devices,<sup>74</sup> union soliciting without a permit,<sup>75</sup> and "distributing . . . printed material."<sup>76</sup> Only conduct that was "a natural extension of a verbalization" was protected.<sup>77</sup> Speech-facilitating conduct, in other words, was protectable, but conduct intended to communicate nonverbally, or what would later come to be known as symbolic speech, did not implicate the First Amendment at all.

Based on his distinction between conduct that was unprotected even if intended to be expressive and conduct that was "a means for the dissemination of verbal expression" and thus protected,<sup>78</sup> Warren concluded that "burning a document"<sup>79</sup> fell into the former category.<sup>80</sup> Such an act was "wholly unrelated to the employment of language, and consequently, its protection is of no moment to the core concern of the First Amendment."<sup>81</sup> "Preventing people from burning things," Warren concluded, "in no

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72. *Id.*

73. *Id.* (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939)).

74. *Id.* (citing *Saia v. New York*, 334 U.S. 558 (1948)).

75. *Id.* (citing *Staub v. City of Baxley*, 355 U.S. 313 (1958)).

76. *Id.* at 19 (citing *Ex parte Jackson*, 96 U.S. 727 (1877); *Schneider v. State*, 308 U.S. 147 (1939); *Martin v. City of Struthers*, 319 U.S. 141 (1943)).

77. *Id.* at 20.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 20–21.

way impinges on their freedom to communicate ideas through language.”<sup>82</sup> Accordingly, punishing O’Brien for an act that was “far-removed from what we mean by the word speech in our society” did not implicate the First Amendment.<sup>83</sup>

Concluding, Warren summarized his proposed “commonsense” holding for the Court, finding that

[a]n act unrelated to the employment of language is not speech within the First Amendment if as a matter of fact the act has an immediate harmful impact completely apart from any impact arising by virtue of the claimed communication itself. And if the Government . . . has attached legal consequences to that noncommunicative impact, those consequences may be enforced against the person who committed the act.<sup>84</sup>

### *B. Justice Harlan’s Response: Ample Alternative Channels Is Born*

Upon receipt of Chief Justice Warren’s first draft for the majority, Justice Harlan set out over the latter half of April 1968 to draft a concurrence.<sup>85</sup> Harlan’s lengthy draft would express deep concern with the Warren draft’s rejection of the idea that the First Amendment could protect symbolic conduct. The first draft of Harlan’s concurrence, circulated on May 1, 1968, stated the Justice was “in full accord with the reversal” of the First Circuit’s holding in O’Brien’s favor, yet Harlan was “unable to subscribe to the process of reasoning by which the Court concludes that O’Brien’s conviction for draft card burning . . . did not violate his right to free speech as assured by the First Amendment.”<sup>86</sup> That reasoning, Harlan continued, employed “restrictions on the reach of the First

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82. *Id.* at 21.

83. *Id.* at 22.

84. *Id.* at 23.

85. See Justice John M. Harlan, First Draft Concurring Opinion Dated May 1968: United States v. O’Brien and Justice John M. Harlan, First Draft Concurring Opinion Circulated May 1, 1968: United States v. O’Brien [hereinafter First Draft Concurrence] in Harlan Papers, Box 311 (“I find myself unable to subscribe to the process of reasoning by which the Court concludes that O’Brien’s conviction for draft card burning, pursuant to 50 U.S.C. App. § 462 (b)(3), did not violate his right of free speech assured by the First Amendment.”). The quotations cited here are from the draft opinion dated “May 1968,” but the two drafts cited in this section are materially similar.

86. *Id.*

Amendment” that were “illogical, unsound, and in conflict” with the Court’s prior cases.<sup>87</sup> Harlan called for “an entirely different approach” to restrictions on nonverbal expression than that propounded by Warren’s draft.<sup>88</sup>

The primary flaw in Warren’s reasoning, according to Harlan, was to deem that the First Amendment protects “nonverbal expression if it is prohibited solely because of its ‘communicative’ effect, but not otherwise.”<sup>89</sup> Recall here Warren’s (and by extension the Court’s, if the Warren majority draft were adopted) analytical two-step, in which (1) “only verbal activity may qualify as ‘speech’”; and (2) only those restrictions on conduct which are aimed at the conduct’s “speech”-like or “speech”-facilitating attributes, or its dissemination of “uttered speech,” implicate the First Amendment.<sup>90</sup> In Harlan’s view, that method of analysis would have led to “results inconsistent both with the First Amendment’s purpose and with its prior construction.”<sup>91</sup>

For example, noted Harlan, a government seeking to suppress speech could simply aim its laws at the noncommunicative aspects of conduct intended to communicate a message, and in so doing, avoid the First Amendment altogether:

Suppose that a citizen of the District of Columbia flies a large, moth-eaten, unsightly red flag at a low altitude in his front yard, as a protest against organized government, and by so doing runs afoul of a generally worded zoning ordinance. [Under the Court’s draft opinion,] the citizen would not even be entitled . . . to raise the First Amendment in defense at his trial, because his action does not amount to “speech,” but involves only “conduct.” Now suppose that the same citizen flies the same flag for exactly the same reason, and is prosecuted under another statute making it an offense to display a red flag in protest against organized government. [This prosecution, by contrast,] must fail because of the First Amendment. Yet to me it seems but sleight of hand to suggest that the First Amendment has come into play because the very same activity, undertaken for precisely the same reason, has been

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87. *Id.* at 1.

88. *Id.* at 1–2.

89. *Id.* at 2.

90. See *supra* notes 78–86 and accompanying text (discussing Warren’s draft opinion).

91. First Draft Concurrence, *supra* note 85, at 4.

transformed from “nonspeech” to “speech” [when a]ll that has changed is the form of the statute.<sup>92</sup>

Harlan’s “red flag” hypothetical, based on *Stromberg v. California*,<sup>93</sup> a case decided by the Court three decades before, showed that under Warren’s approach, the state could decide through regulation whether expressive conduct was constitutionally protected or not—which was no way to interpret the Constitution.<sup>94</sup> Harlan also noted that the consequences of Warren’s strict speech-conduct distinction would have pernicious effects on speakers’ communicative choices *ex ante* as well. According to Harlan, Warren’s approach ignored the principle that nonverbal conduct can “greatly enhance the force of the spoken or written word.”<sup>95</sup> Presuming conduct was not protected by the First Amendment, Harlan argued, would deprive speakers of giving “extra impact to the ideas they are seeking to communicate.”<sup>96</sup> Accordingly, presuming the lawfulness of restrictions on symbolic conduct would “compel persons to choose less effective means of communicating their ideas”—in effect self-censorship of symbolic speech.<sup>97</sup>

Having shown the deleterious effects of the draft majority opinion’s broad proposed holding, Harlan next proposed an alternative approach, under which “governmental interference with the performance of *any* act undertaken to aid in the communication of an idea . . . *may*” raise a First Amendment question.<sup>98</sup> However, unlike Warren’s order of analysis, which would rely on his speech versus conduct distinction to decide as an initial matter whether the First Amendment applies to the conduct

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92. *Id.* at 3.

93. 283 U.S. 359 (1931).

94. See First Draft Concurrence, *supra* note 87

Hence, if the Court’s opinion is to retain logical coherence, it must be read as saying that a statute which interferes with communication in the course of implementing a legitimate, non-ideological governmental objective does not amount to a “law . . . abridging” speech, while a statute which prohibits expression on account of the ideas communicated does. However, this reasoning is also inadequate to support.

95. *Id.* at 4.

96. *Id.* at 5.

97. *Id.*

98. *Id.* at 6 (first emphasis added).

in question at all, Harlan proposed to apply a “balancing” test to regulations which “though in term [are] aimed at noncommunicative activity, may in some applications interfere with expression.”<sup>99</sup> Harlan’s test would ask “whether the Government,” through a narrowly drawn statute, “has forbidden conduct in circumstances where the governmental interests served by the prohibition outweigh its impact on communication.”<sup>100</sup>

Unlike the draft majority opinion’s, Harlan’s approach would lead to the conclusion that O’Brien’s “act . . . of burning his draft card was within the scope of the ‘speech’ clause of the First Amendment.”<sup>101</sup> However, like the draft majority opinion, Harlan in the end found O’Brien’s prosecution was constitutional. The government’s interests in preventing destruction of draft cards and ensuring that prospective draftees had their cards on their person at all times were, as both Warren’s and Harlan’s drafts recognized, significant. And on the other side of Harlan’s scale, O’Brien’s “interest in lending force to his protest by burning his draft card” did not outweigh the government’s.<sup>102</sup> What is most interesting about Harlan’s draft for the purposes of this Article, however, is the method Harlan proposed using to weigh the speaker’s interest in such a case.

With respect to weighing O’Brien’s interest in expressing his message in the manner he chose, Harlan turned to the argument made in the Government’s brief and at oral argument, but unmentioned by Chief Justice Warren’s draft: “in measuring the effect of a statute on communication, it is relevant to consider the alternative means of expression which are available.”<sup>103</sup> Applying that principle to the present case, Harlan argued that even though O’Brien’s chosen form of expression “did achieve a far wider dissemination of his ideas than if he had merely made a speech to the same effect,” “alternative means of communication . . . were available” for him to communicate the same message.<sup>104</sup>

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99. *Id.* at 7–8.

100. *Id.* at 7.

101. *Id.* at 7.

102. *Id.* at 9.

103. Justice John M. Harlan, Internal First Draft of Concurrence: United States v. O’Brien at 21 [hereinafter Internal First Draft of Concurrence] *in* Harlan Papers, Box 311.

104. *Id.* at 9–10.

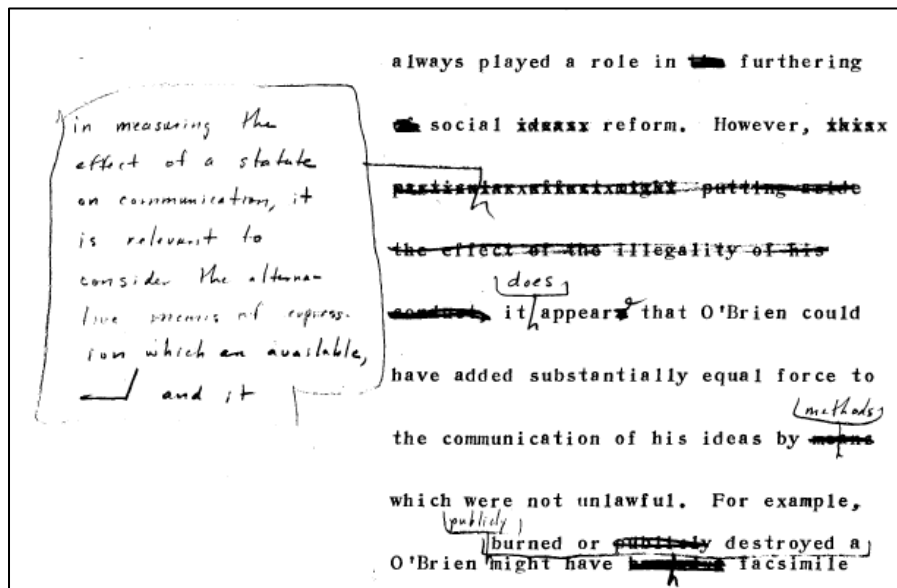
“For example,” Harlan continued, “O’Brien might have burned a facsimile of his draft card and a copy of the [Act] or regulations,” or “he might have employed a number of other lawful means, verbal and nonverbal, of publicizing his ideas at approximately the same time and place.”<sup>105</sup> According to Harlan, “[t]he alternative means of communication which were available” to a speaker who has been punished for a communicative act—someone in Harlan’s chambers went so far as to hand-write the phrase in the margin of the typed, marked-up internal draft of his concurrence that he wrote prior to his draft for circulation<sup>106</sup>—should be part of the analysis in assessing the law in question’s effect on communication and the extent to which it burdened protected speech.

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105. *Id.* at 10.

106. *Id.* at 21. Tinsley Yarbrough, Justice Harlan’s biographer, informs me that the handwriting is that of a law clerk’s; because of Harlan’s failing eyesight, Harlan’s opinion drafting process involved a clerk reading written drafts to Harlan, and then Harlan’s dictating edits to the draft back to the clerk. *See* E-mail from Tinsley Yarbrough to Enrique Armijo (Apr. 29, 2015, 11:21AM) (on file with the author); *see also* TINSLEY YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 324–25 (1992) (discussing Harlan’s failing eyesight and how it shaped the work process of his Chambers).





*Text from internal draft opinion of Justice John Marshall Harlan in United States v. O'Brien, n.d. (drafted April/May 1968). The "alternative means of expression which are available" formulation is set out in the handwritten note in the left margin. John Marshall Harlan Papers, Box 311, Mudd Manuscript Library, Princeton University.*

Remember from the beginning of this Section that at oral argument, the Solicitor General claimed that O'Brien's First Amendment rights were not abridged by his prosecution because he or any another war protestor could give a speech "from the courthouse steps," "on the street," or in "public meeting halls"; "peaceably demonstrate," "distribute literature" and "send letters to the editor"; or use "mass communication media."<sup>107</sup> Harlan's analysis considered whether these "alternative means of communication" were actually analogous to the means O'Brien chose; in his final circulated draft, Harlan made sure to note that the alternatives he listed could allow O'Brien to "substantially duplicate" the "force" that burning a draft card "add[ed] to [his] ideas."<sup>108</sup> But this analytical turn in Harlan's draft, which was a

107. *Supra* text accompanying notes 23–30.

108. Justice John M. Harlan, Final Draft Concurrence Circulated May 1, 1968: United States v. O'Brien at 11 [hereinafter Final Draft Concurrence] in Harlan Papers, Box 311.

sidecar added after-the-fact to his main point, raises a larger question: Why did Harlan consider alternative means of communication at all?

It is illogical to weigh—or more precisely, to abate the weight of—an individual’s interest in making a choice by pointing to other choices the individual could have made, but did not. Indeed, the presence of alternative modes by which O’Brien could have communicated his message would more logically call for giving his interest in making the choice *more* weight, not less. O’Brien may well have considered burning a photocopy of his draft card or of the SSA, but he chose to burn the genuine article instead due to the difference in communicative impact between burning that copy and the actual card. Harlan characterized the interest to be balanced against the government’s as O’Brien’s interest in the communicative choice to burn his draft card “in order to add impact to his expression of ideas.”<sup>109</sup> If that is so, it does O’Brien no service to find that the result of his choice—the burning of the actual card rather than a copy—minimizes his interest in making it.

What is going on here is that Harlan is not weighing an interest at all. Rather, he is attempting to distinguish O’Brien’s prosecution from those cases in which a generally applicable restriction on conduct has the effect of curtailing or eliminating the speaker’s expression altogether—an effect he deemed was absent from the present case. Like Warren, Harlan was concerned with incidental restrictions on speech that barred a means for the “dissemination” of verbal expression.<sup>110</sup> But in resolving his concerns, Harlan wound himself into the same knot that Warren’s draft opinion sought, to its credit, to untie: failing to distinguish between conduct that *facilitates* speech on the one hand, and conduct that *is itself* communicative on the other.

As noted above, immediately after pointing to the alternative legal ways in which O’Brien could have expressed his message, Harlan’s draft concurrence notes that O’Brien’s chosen act was “therefore in no way analogous to such sometimes essential means of expression as the dissemination of handbills o[r] the door-to-door distribution of circulars.”<sup>111</sup> In other words, a ban on destroying a

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109. *Id.* at 10.

110. Majority First Draft, *supra* note 64, at 20.

111. First Draft Concurrence, *supra* note 85, at 10 (typographical error in

draft card is not like banning leafleting, because there are other ways to communicate the underlying message that destroying a draft card expresses; but a ban on leafleting has the same effect as banning the message in the leaflet. By Harlan's lights, if there is *no other way* to communicate the message at issue, then the speaker's expressive interest in the speech facilitating-content in question is significant and the restriction on it, even if not aimed at expression, must not stand. But if there is some other way to communicate the message, then the speaker's expressive interest in the speech-facilitating content of her choice is minimal, and the government's restriction on the particular mode at issue is more likely to be lawful.

This distinction does not persuade, however, for a vitally important First Amendment-related reason: It has no connection whatsoever to the *expressiveness* of the proscribed conduct in question. Burning a draft card is not a means of communicating expression or a dramatic device intended to attract attention to an expressive message; it is itself expressive. No more proof for this point need be proffered than to consider the difference between the mode of expression chosen by O'Brien and the alternatives that Justice Harlan claimed were available to him and "substantially duplicated" the same "force."<sup>112</sup> Burning a copy of a draft card says something altogether different than burning the card itself. Accordingly, in a symbolic speech case, banning the act bans the message, and the fact the message could have been communicated in some other way should be constitutionally irrelevant.<sup>113</sup> Indeed, the failure to treat such alternatives as irrelevant does affirmative harm to the speaker's communicative rights. Harlan's refusal to distinguish between a means and a message led directly to the alternative means of communication analysis that bedevils First Amendment doctrine to this day.

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original; corrected in Circulated draft of May 1, 1968) (citing Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 30; *Martin v. Struthers*, 319 U.S. 141, 146 (1943)).

112. *Supra* text accompanying note 63.

113. See Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2276 (2004) ("O'Brien publicly burned his draft card, as he explained to the jury at his trial, 'to influence others to adopt his antiwar beliefs,' and 'so that other people would reevaluate their positions . . . and reevaluate their place in the culture of today, to hopefully consider [his] position.'").

To further demonstrate the point, consider *Martin v. City of Struthers*,<sup>114</sup> the case that Harlan cited for the proposition that burning a draft card is distinct from the “essential means of expression” of “the door-to-door distribution of circulars.”<sup>115</sup> There, Thelma Martin, a Jehovah’s Witness, was convicted under a Struthers, Ohio ordinance barring the ringing of doorbells for the purpose of handing the home’s resident a handbill.<sup>116</sup> In an opinion by Justice Black, the Court reversed Martin’s conviction, finding no basis for the ordinance other than “the naked restriction of the dissemination of ideas.”<sup>117</sup> In so holding, the Court noted that “door to door campaigning is one of the most accepted techniques of seeking popular support,” that “the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes,” and, most colorfully, that “door to door distribution of circulars is essential to the poorly financed causes of little people.”<sup>118</sup>

O’Brien relied upon *Struthers* in arguing his case to the Court, citing it for the proposition that “the speaker has the right to choose the place where he can be most effective.”<sup>119</sup> Indeed, there was no discussion whatsoever in Justice Black’s *Struthers* opinion regarding legal alternatives available to Martin that may have been as expressive as the conduct barred by the ordinance—including, as Justice Jackson noted in dissent, the fact that a home visitor was “free to make the distribution if he left the householder undisturbed, to take it in in his own time.”<sup>120</sup> Black apparently

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114. 319 U.S. 141 (1943).

115. *Supra* note 115 and accompanying text.

116. *Martin*, 319 U.S. at 142.

117. *Id.* at 147. Despite Justice Black’s rejection of a distinction of legal significance between speech and content in *Struthers*, he was the Justice most supportive of Chief Justice Warren’s first draft for the majority in *O’Brien*. See Memorandum from Justice Black to Chief Justice Warren, Re: Nos. 232 and 233—U.S. v. O’Brien, etc. (April 16, 1998) (joining draft three days after first circulation and commending Warren on its “very excellent discussion”); Memorandum from Justice Black to Chief Justice Warren, Re: Nos. 232 and 233—United States v. O’Brien; *O’Brien v. United States* (May 15, 1968) (stating that Black “much prefer[red Warren’s] first opinion” to the revised draft discussed *infra*) in Harlan Papers, Box 311.

118. *Martin*, 319 U.S. at 146.

119. O’Brien Brief, *supra* note 63, at 41.

120. *Douglas v. City of Jeannette*, 319 U.S. 157, 177 (1943) (Jackson, J., dissenting).

rejected those alternatives out of hand on the ground that it was for Martin, not the government, to decide what conduct might most effectively communicate her speech. The *sine qua non* relation of door-to-door distribution of handbills to the expression distributed therein was thus taken as a given.

But in a First Amendment world where dispositive weight is given to alternative means in some cases but not others, is it in fact a given? Even by Black's terms in *Struthers*, door-to-door distribution is not inherently expressive in and of itself, nor is a restriction on that mode of distribution content-based. It is rather a restriction on one "technique" by which a message can be expressed.<sup>121</sup> The means of door-to-door handbilling says nothing about the contents of a particular issue of *The Watchtower*, or about the tenets of the Witness faith. And 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 was the case in a symbolic speech case like *O'Brien*. Indeed, as Harlan's draft opinion's cite to *Struthers* and the references to the "dissemination of handbills o[r] the door-to-door distribution of circulars" indicate, it was the cases involving "techniques" for disseminating speech that were the Justice's motivating concern.<sup>122</sup>

To use ample alternative means analysis as Harlan did—namely, as a basis for finding that bans on *expressive* conduct are more permissible than bans on *speech-facilitating* conduct—is to endorse a result that is the exact opposite than the one that the First Amendment should abide. And even worse, under current doctrine, once a speech-abridging law is deemed content neutral, it is irrelevant in a particular First Amendment dispute whether it is the speaker's *mode* of speech (burning a draft card; live nude

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121. See *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (demonstrating that the term "technique" being used here is Justice Black's).

122. First Draft Concurrence, *supra* note 85, at 10.

dancing;<sup>123</sup> outdoor sleeping<sup>124</sup>) or her *means* of disseminating speech (hand-billing<sup>125</sup>; sign-posting<sup>126</sup>; sound truck amplification<sup>127</sup>) that is being abridged. So long as other adequate legal means exist to disseminate what a reviewing court deems is an analogous message, the restriction in either kind of case is going to stand. Perhaps Harlan himself, whose primary motivating concern in responding to Warren’s draft majority opinion was protecting speech-facilitating conduct from laws of general applicability, might not have countenanced such a result.

*C. Chief Justice Warren’s Revised Majority Opinion and Justice Harlan’s Withdrawal of His Draft Concurrence*

After receiving Justice Harlan’s draft concurrence on May 1, Chief Justice Warren revised (or to use Warren’s word, “rewrote”<sup>128</sup>) his opinion to address Harlan’s concerns. In this second draft for the majority, circulated on May 15, Warren

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123. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“[Appellants] principal claim is that the imposition of criminal penalties under an ordinance prohibiting all live entertainment, including nonobscene, nude dancing, violated their rights of free expression guaranteed by the First and Fourteenth Amendments of the United States Constitution.”).

124. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 305 (1984) (“Here respondents clearly intended to protest the reality of homelessness by sleeping outdoors in the winter in the near vicinity of the magisterial residence of the President of the United States.”).

125. See *Greer v. Spock*, 424 U.S. 828, 848 (1976) (“The noncandidate respondents contest the Fort Dix regulation requiring prior approval of all handbill, pamphlet, and leaflet literature (even if nonpartisan) before distribution on the base.”).

126. See *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 791–92 (1984) (“Section 28.04 of the Los Angeles Municipal Code prohibits the posting of signs on public property. The question presented is whether that prohibition abridges appellees’ freedom of speech within the meaning of the First Amendment.”).

127. See *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (“[T]he ordinance bars sound trucks from broadcasting in a loud and raucous manner on the streets. There is no restriction upon the communication of ideas or discussion of issues . . . . We think that the need for reasonable protection in the homes . . . justifies the ordinance.”).

128. Chief Justice Warren, Final Draft Majority Opinion Circulated May 15, 1968: *United States v. O’Brien* at 1 (handwritten note on p. 1 stating “Rewritten Starting with p. 7”) [hereinafter Final Draft Majority Opinion] in *Harlan Papers*, Box 311.

removed all of the excerpts quoted *supra* concerning a strict legal division between speech and content. In their place, he substituted a much narrower First Amendment analysis, the “crux” of which, as Harlan called it, was elements that are now familiar from the intermediate scrutiny test applied to content-neutral regulations:

[A] government regulation is sufficiently justified if it [1] is within the constitutional power of the government; [2.] furthers an important or substantial governmental interest; [3.] if the governmental interest is unrelated to the suppression of free expression; and [4.] if the incidental restriction on alleged freedom is no greater than is essential to the furtherance of that interest.<sup>129</sup>

Instead of declaring, as he did in his first draft, that O’Brien’s conduct was insufficiently tied to “disseminating or transmitting uttered speech” to merit protection, Warren now “assum[ed] that the alleged communicative element in O’Brien’s conduct is sufficient to bring into play the First Amendment.”<sup>130</sup> At Harlan’s urging, Warren the First Amendment line-drawer had become Warren the balancer. Within two days of its circulation, five other Justices had joined the new draft opinion.<sup>131</sup>

Three days later, on May 20, 1968, Harlan wrote the Chief Justice, noting that the “recirculated opinion . . . m[et] all of the difficulties which [he] endeavored to express in the concurrence that [he] recently circulated”<sup>132</sup> with one caveat that would go on to form the basis for Harlan’s final, much shorter (single-page, in fact) concurrence. That caveat involved those “hard” cases (though Harlan stressed that “in [his] view, *O’Brien* [was] not one”) “in

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129. *Id.* at 9; see also Final Draft Concurrence, *supra* note 108, at 1. Commentators have puzzled over the fact that the final *O’Brien* opinion, by eliding the speech versus content aspect of O’Brien’s case, “represents a strained attempt to avoid the issue of symbolic speech.” Keith Werhan, *The O’Briening of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635, 638–39 (1987). This Article solves that mystery.

130. Final Draft Majority Opinion, *supra* note 128, at 9.

131. See Joining Memoranda from Justices Black, Brennan, White (May 15, 1968), Stewart, and Fortas (May 16, 1968) to Chief Justice Warren, Re: Nos. 232 and 233—United States v. O’Brien in Harlan Papers, Box 311 (on file with the Washington and Lee Law Review).

132. Memorandum from Justice Harlan to Chief Justice Warren, Re: Nos. 232 and 233—U.S. v. O’Brien (May 20, 1968) in Harlan Papers, Box 311 (on file with Washington and Lee Law Review).

which an incidental restriction on expression would in practice have such a severe impact that a serious question would be raised whether even a ‘substantial’ governmental interest would necessarily be sufficient to justify it.”<sup>133</sup>

In his final published concurrence, Harlan expanded on this idea, noting that a future case could be conceived where an incidental restriction “has the effect of *entirely* preventing a ‘speaker’ from reaching a significant audience with whom he could not otherwise lawfully communicate,” and in such a case the Court might ask whether *any* governmental interest, let alone an “important or substantial” one, could justify such a restriction.<sup>134</sup> This was not such a case, however, because as both Harlan’s longer draft and published short concurrence noted, O’Brien “manifestly could have conveyed his message in many ways other than by burning his draft card,” and he thus could have “reached a significant audience” with his intended message by lawful means.<sup>135</sup> This is the form of ample alternative channels analysis that would later be incorporated into the test for content-neutral restrictions on speech, joining Chief Justice Warren’s four-part test from the final majority draft in the Court’s later time, place, and manner cases.<sup>136</sup>

Though these last two sentences were all that remained of Harlan’s ample alternative means analysis in his final concurrence, his accompanying memorandum to the Chief

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133. *Id.* at 1; *see also* United States v. O’Brien, 391 U.S. 367, 389 (1968) (Harlan, J., concurring) (discussing similar concerns). Chief Justice Warren’s first prong—that the law in question be “within the constitutional power of the Government”—was soon abandoned by the Court because of its “analytical insignifican[ce].” Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 771 (2001) (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994)).

134. *O’Brien*, 391 U.S. at 389 (Harlan, J., concurring).

135. *Id.*

136. *See, e.g.*, *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (analyzing whether an ordinance prohibiting the posting of signs on public utility poles left open adequate alternative methods of speech); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 290–92 (1984) (applying the same test); Werhan, *supra* note 129, at n.77 (“The requirement that the restriction leave ample alternative channels for communication incorporates Justice Harlan’s proviso to the *O’Brien* test.”); Daniel A. Farber, *Playing Favorites? Justice Scalia, Abortion Protests, and Judicial Impartiality*, 101 MINN. L. REV. HEADNOTES 23, 26 (2016) (detailing the ample alternative channels element of the test for content-neutral regulations “derived . . . from Harlan’s [*O’Brien*] concurrence”).



expanded on those types of “hard cases” he had in mind, offering in effect a fifth prong to the four-part test that Warren had proposed: “If application of the regulation does not have the effect of preventing a ‘speaker’ from reaching a significant audience with which he has no reasonably equivalent, lawful means of communicating.”<sup>137</sup>

In other words, according to Harlan, in order for a channel of communication to substitute for the one the speaker chose, reviewing courts should consider the alternative channel’s effectiveness relative to the speaker’s channel in terms of audience reach, expressiveness, and other factors.

These qualifiers—“significant audience” and “reasonably equivalent”—were not included in Harlan’s final concurrence, though, as discussed in Part IV *infra*, the law of ample alternative channels would in effect incorporate them, albeit inconsistently, in later cases. But whether such factors are considered or not, the fundamental flaw in ample alternative channels analysis would remain. With respect to the self-fulfillment and truth-finding values that the First Amendment seeks to affirm, there is often little difference between the speaker’s mode of expression and the expression itself. A court’s finding that a lawful alternative is available to the speaker, and deciding a case in the government’s favor on that basis, renders the connection between expression and mode completely apart.

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First Amendment doctrine on symbolic speech completely changed in the span of fifteen days in 1968. Thanks to Justice Harlan’s impassioned draft concurrence in *O’Brien*, the Speech Clause now protects a range of expressive conduct not directly tied to verbal speech that, under Chief Justice Warren’s initial *O’Brien* opinion, would have fallen outside of the First Amendment altogether. But because Harlan could not completely support an interpretation of the First Amendment that gave a speaker’s mode of expression the same weight as the expression itself in symbolic speech cases, he proposed ample alternative channels analysis as

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137. Memorandum from Justice Harlan to Chief Justice Warren, *supra* note 132, at 2.

a way to preserve *some* government authority over *some* expression-related conduct.

In its subsequent applications, however, ample alternative channels analysis has overtaken not only protection for expressive conduct, but also protection for the type of conduct that Chief Justice Warren’s draft opinion deemed “a means for the dissemination of verbal expression.”<sup>138</sup> In so doing, the doctrine has come untethered from the foundational, first-principle theories and values underlying the First Amendment since its inception.

### *III. The Conflict*

#### *A. Conflict with Theory*

As Robert Post has noted, “[d]octrine fulfills its function when it accurately accomplishes the purposes of the law.”<sup>139</sup> Here, doctrine is distorting the First Amendment’s purposes. Ample alternatives analysis conflicts with both of the theoretical foundations underlying the First Amendment. It conflicts with self-autonomy theory on substantive grounds and with marketplace theory on procedural grounds. This disconnect has led to inconsistent and often speech-averse applications of the doctrine in particular cases. As a result, a legal rule that is at odds with the interests the Speech Clause is intended to protect is carrying dispositive force.

#### *1. Self-Autonomy Theory*

Self-autonomy as a theoretical justification for freedom of speech goes back to John Locke.<sup>140</sup> As Locke recognized, the principle of government respect for individual choice powers autonomy theory.<sup>141</sup> Summarizing the moral case for individual

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138. Majority First Draft, *supra* note 64, at 20.

139. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 42 (2000).

140. JOHN LOCKE, TWO TREATISES OF GOVERNMENT BK. II, 4, 6, 123–31 (1690) (Peter Laslett ed. 1988); JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 101–02, 154–57 (Ian Shapiro ed. 2003) (1988).

141. LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING

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.”<sup>142</sup> And recognizing that capacity as inherent within oneself necessarily requires that each of us acknowledge and respect that same capacity within others. Similarly, Frederick Schauer notes that “[i]f we accept the importance of treating each person with *equal* respect, and of treating each person as independently valuable, then, the argument goes, we must treat each person’s choices with equal respect as well.”<sup>143</sup> By contrast, lack of respect for an individual’s capacity to choose deprives the disrespected individual of dignity and autonomy. It denies “the respect that comes from acknowledging his choices to be as worthy as the choices of anyone else.”<sup>144</sup>

Self-autonomy theory ties to the First Amendment the principle that the liberty to “choose one’s [own] good,” to use Fried’s phrase, is a value with moral dimension that the state must respect.<sup>145</sup> Self-autonomy enables the individual in society to “use his faculties to the fullest extent.”<sup>146</sup> Primary among these faculties is 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 achieve that best version of oneself through reason, reflection, and exchange.<sup>147</sup> Accordingly, for self-autonomy theory, it is the

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TOLERATION 101–02, 154–57.

142. CHARLES FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT* 56–57 (2007) [hereinafter FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT*]; see also Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (“[M]y status as a rational sovereign requires that I be free to judge for myself what is good and how I shall arrange my life in the sphere of liberty that the similar spheres of others leave me.”).

143. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 62 (1982) [hereinafter SCHAUER, *FREE SPEECH*].

144. *Id.*

145. FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT*, *supra* note 142, at 56.

146. *Id.* at 54.

147. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 59 (1989) (“[R]espect for individual integrity and autonomy requires the recognition that a person has the right to use speech to develop herself or to influence or interact with others in a manner that corresponds to her values.”).

speaker’s *choice* of expression that is, as Ed Baker argues, “the crucial factor in justifying protection” of that expression.<sup>148</sup>

A self-autonomy theory for the First Amendment is thus quintessentially speaker-based, as it is the speaker who will “reap the benefits of self-expression and self-realization most directly”—in other words, the benefits flowing from the speaker’s expressive choices.<sup>149</sup> Conversely, the law’s suppression of speech-related choices offends self-autonomy theory because it represents the state’s favoring of the collective will over the dignity of the individual.<sup>150</sup>

The finest articulation of self-autonomy theory and its relation to freedom of speech is in Justice Brandeis’s concurring opinion in *Whitney v. California*.<sup>151</sup> As Brandeis wrote, the motivating principles behind the Founding were “to make men free to develop their faculties,” to value liberty “both as an end and as a means,” and “the freedom to think as you will and to speak as you think.”<sup>152</sup> At its core, therefore, self-autonomy is about self-determination, and it establishes self-fulfillment as a predicate to participation in social change.

Unfortunately, where all this fits into the content-based versus content-neutral distinction that governs Speech Clause doctrine is unclear. A truly committed self-autonomy justification for the First Amendment should care little for the distinction between content-based and content-neutral restrictions.<sup>153</sup> If an

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148. *Id.* at 52.

149. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 684 (1991).

150. See BAKER, *supra* note 147, at 50 (arguing that a group or governmental body has no right to offend individual autonomy, as that autonomy is essential to democratic decision making).

151. 274 U.S. 357 (1927).

152. *Id.* at 375 (Brandeis, J., concurring). The Court affirmed that the First Amendment protects the speaker’s autonomy in choosing a manner of expression in *Cohen v. California*, 403 U.S. 15, 26 (1971). *Cohen*, of course, was also written by Justice Harlan, the father of ample alternative channels analysis—as noted in *supra* Part II—which is ironic because, in that case, Harlan declared that forcing Cohen to express his message with a nonexplicit alternative struck at the core of Cohen’s right to decide which particular words granted his message adequate “emotive [and] cognitive force,” and that the “emotive force” associated with that word choice “may often be the most important element of the overall message sought to be communicated.” *Id.*

153. See Williams, *supra* note 149, at 267 (explaining that while the content

expressive act is suppressed by government action, the “loss of self-fulfillment is precisely the same” whether the suppression is content-based or not; thus, the “government’s motivation for regulating speech is irrelevant to the self-realization value of the First Amendment.”<sup>154</sup> If a particular kind of conduct, time, or place is an essential or necessary concomitant to a speaker’s chosen expressive act, then self-autonomy is offended when that conduct is punished by the government, whether the *motivation* for the punishment is content-based or not.

A First Amendment driven by self-autonomy theory and by freedom of choice should protect not merely the act of speaking or the message contained in that speech. It should also protect the form that the speaker chose that speech to take.<sup>155</sup> Even if alternative means might have been open to the speaker—and to be sure, as discussed *infra*, one could always hypothesize *some* other means to communicate a given message—she should be “presumed to have chosen the most effective means available.”<sup>156</sup> As Martin Redish has noted, “the chosen ‘manner’ of expression often makes the substance of the message more powerful.”<sup>157</sup> This is so in both symbolic speech cases and in time, place, and manner cases.

Take the example of protesting homelessness. In 1982, advocates decided that the most powerful means to express their view that the federal government paid insufficient attention to “the plight of homeless people” was to “re-enact the central reality of homelessness” by sleeping overnight outdoors during “the dead of winter” in Lafayette Park, located directly across from the White House.<sup>158</sup> The symbolic significance of this communicative act was

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of the speech is of obvious importance to the speaker, the place and time is of equal importance because of the value of reaching a particular audience).

154. John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 320 (2009).

155. See BAKER, *supra* note 147, at 132–34 (contrasting liberty theory with other traditional views of the First Amendment and finding that liberty theory “affirms . . . that the function of constitutional rights is to protect self-expressive . . . conduct from majority norms or political balancing”).

156. Stone, *supra* note 10, at 78–79.

157. Martin Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 141 (1981) [hereinafter Redish, *The Content Distinction*].

158. Brief for Respondents at 1, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (No. 82-1998); see also *id.* at 37 (“Respondents seek to jolt a complacent and comfortable public into a realization of what it means to be a

obvious. The Park has been a gathering place for protestors and demonstrators for decades,<sup>159</sup> and according to the advocates, placing a symbol of powerlessness at the very seat of power would give the protest particular expressive force.<sup>160</sup> Indeed, the National Mall, of which the Park is a part, had been host to what one might call “expressive sleeping” earlier that same year, for approximately 1,000 Vietnam veterans who sought to reenact conditions at U.S. military encampments in Vietnam.<sup>161</sup>

Whether one *agrees* with the salience of these expressive choices should, in the eyes of a self-autonomy-protecting First Amendment, be irrelevant. What is important is that the *speakers themselves* believed them to go to the core of their expressive act. And whether or not an uninvested court can conceive of other ways that the message in question can be communicated should be doubly irrelevant.

Most importantly, there is also the issue of institutional competence. In order to *consider* alternative channels, a reviewing court must *formulate* them.<sup>162</sup> Judges are a homogeneous lot, with “vested interests in maintaining many elements of the existing social and political order that has placed them in positions of authority.”<sup>163</sup> Systematic biases in favor of “restraint and order”<sup>164</sup> will result in courts ratifying alternative channels of their own design (or suggested in government briefs) that will inevitably be more tradition-based, Establishment-respecting, and less

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homeless person by demonstrating at the center of the nation’s consciousness the fact that human beings are sleeping without decent shelter during the coldest months of the year.”).

159. *See id.* at 11–12 (discussing women’s suffrage protests in 1917 that took place in front of the White House at Lafayette Park’s current site).

160. *See id.* (discussing the powerful impact of the protest as intended).

161. *See id.* at 16, 57 (arguing that the prior Vietnam War protest did not result in an “onslaught” of requests to sleep in the park, and that the government’s argument is thus unsupported).

162. *See Baker, Unreasoned Reasonableness, supra* note 24, at 942 (“To determine the reasonableness of a regulation, the decisionmaker first must consider (which usually means, must formulate) other, possibly less restrictive, means to achieve her ends.”).

163. *Id.* at 942.

164. *Id.* at 943.

societally disruptive—and thus contain less persuasive force—than the channel the speaker chose.<sup>165</sup>

Of course, self-autonomy in the First Amendment context is really autonomy within limits. An analysis granting complete deference to what the speaker herself viewed as the most effective mode of communication, or the best time or place to communicate her speech, would ratify an absolutist view of the Amendment that the Court has never adopted. And an unqualified commitment to speaker autonomy would grant speakers the ability to claim that *any* alternative to the mode the speaker chose was by definition inadequate, on the simple ground that it was not the mode chosen. A legal principle based on a completely subjective measure is of no use—indeed, it is not “law” at all. But in those cases where the line between medium and message is difficult to discern, the speaker’s value judgments in choosing a particular mode of speech, though subjective, deserve a greater modicum of respect than ample alternative channels analysis currently provides.<sup>166</sup>

Issues arouse passion, and passion informs speech. Courts, by contrast, are, by design and as a matter of cultural determinism, dispassionate bodies.<sup>167</sup> One might be hard-pressed to conceive of someone less likely to burn a draft card than the boarding school-sired, grandson-of-a-Supreme-Court-Justice, Air Force-serving, Princeton Ivy Club-dining, Prohibition laws-enforcing John Marshall Harlan II. And yet it is Harlan, and not O’Brien, who is empowered to determine whether or not burning a copy of a draft card speaks with the same force as burning the draft card itself.<sup>168</sup> If self-autonomy theory has any value and the First Amendment is

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165. See BAKER, *supra* note 147, at 134 (positing that the problem with the majority decision-making is that it allows maintenance of a *status quo* at times when society in fact needs to be presented with behavior some may find offensive, to affect social change).

166. See *id.* at 178 (arguing that because the time and place of certain forms of speech is so integral to the intended message of the speech, the alternative channels analysis is inadequate to protect the speech as the speaker intended it).

167. See Jesse M. Barrett, Note, *Legislative History, the Neutral, Dispassionate Judge, Legislative Supremacy: Preserving the Latter Ideals with the Former Tool*, 73 NOTRE DAME L. REV. 819, 819–820 (1998) (“[T]he notion that an adjudicator should treat pronouncements . . . with a removed neutrality is deeply embedded in the structure of the American . . . judicial tradition.”).

168. *United States v. O’Brien*, 391 U.S. 367, 388–389 (1968) (Harlan, J., concurring).

intended to protect O’Brien’s dignity of choice, this is an incongruous result.

Alternative channels analysis thus deprives the party who cares most about what she says of the choice of how she says it. At the same time, it favors uninvested courts’ value judgments over how that speaker should have communicated her message. Self-autonomy theory and the values of liberty and choice that we collectively acknowledge inform the freedom of expression should not countenance such a process. But alternative channels analysis not only countenances that process, it compels it.

## 2. Marketplace Theory

As Brandeis’s *Whitney* opinion affirms, self-autonomy goes hand-in-hand with self-determination and self-governance.<sup>169</sup> Sovereignty of government is illegitimate without the sovereignty of its domiciliaries.<sup>170</sup> Underlying the marketplace of ideas theory of the First Amendment is the assumption that individuals rely upon information obtained in the marketplace to choose the policies that will govern them.<sup>171</sup> It follows that the greater the number of viewpoints upon which those policies rely, the better the policies, and in turn the greater self-realization that individuals can achieve living in a society governed by those policies.<sup>172</sup> This is the great virtuous circle of free expression.

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169. See *Whitney v. Cal.*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (“The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.”).

170. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 318–330 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (asserting that the civil state only exists because the people have exchanged some of their natural rights for an executive power to protect their property and liberties and without this consent there is no authority).

171. See Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U.L. REV. 951, 955 (1997) (discussing that the marketplace of ideas theory is dependent on a government serving “an informed electorate,” but that this assumption may not be valid).

172. See STEVEN J. HEYMAN, *FREE SPEECH & HUMAN DIGNITY* 41 (2008) (“[H]uman beings exercise their capacity for self-determination not only individually, but also collectively, when they engage in decision making on matters regarding their human common life.”).



It is curious, then, 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.<sup>173</sup> Fortunately, this project of forced divorce has little bearing on the claims made here. Ample alternative channels analysis is an equal opportunity offender with respect to both self-autonomy and marketplace theory. It is inconsistent with both rationales.

Marketplace theory defines the First Amendment's primary function as facilitating a process by which truth can be reached.<sup>174</sup> Long the dominant theory of the First Amendment "both rhetorically and conceptually,"<sup>175</sup> marketplace theory's seeds are in John Milton's *Aeropagitica*<sup>176</sup> and John Stuart Mill's *On Liberty*,<sup>177</sup> both of which argued that the only legitimate test of an idea is

173. See, e.g., BAKER, *supra* note 149, at 6–24, 89–91 (detailing one perspective on this debate); HEYMAN, *supra* note 174, at 66–67, 173–74 (same); Baker, *Unreasoned Reasonableness*, *supra* note 26, at 938 (same); Lucas A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 255 n.59 (1982) (rejecting "attempt[s] to compress the purposes of the First Amendment from assisting self-government and promoting individual autonomy into a single purpose"); see also Lawrence Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U.L. REV. 1319, 1354 (1983) (advocating for a theory of free speech that offers approaches to the doctrines of "regulation of communicative impact," "regulation of noncommunicative impact," "government as communicator," "diversity of communication," and "form and procedure of regulation"); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4 (1984) [hereinafter Ingber, *The Marketplace of Ideas*] ("Courts usually [justify] 'individual rights' because of the protection they afford to the person . . . . But courts that invoke the marketplace model of the first amendment justify free expression because of the aggregate benefits to society . . . not because an individual speaker receives a particular benefit."); Tona Trollinger, *Reconceptualizing the Free Speech Clause: From a Refuse of Dualism to the Reason of Holism*, 3 GEO. MASON INDEP. L. REV. 137, 140 (1994) ("The assumption and exaltation of competition as an epistemological premise is paradoxical and counterintuitive.")

174. See Baker, *Unreasoned Reasonableness*, *supra* note 26, at 944 ("The marketplace of ideas theory—the view that wise counsels will prevail over false ones in the clash of free public debate and "that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .").

175. BAKER, *supra* note 147, at 12.

176. See generally JOHN MILTON, *AEROPAGITICA—A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING* (1644).

177. See generally JOHN STUART MILL, *ON LIBERTY* (1859).

debate with other competing ideas.<sup>178</sup> A judgment by the majority that a particular idea is not worthy of protection, as manifested in legislation infringing the speech expressing that idea, undermines the functioning of the test for truth.<sup>179</sup> This is not merely because that judgment disrespects the dignity of the speaker seeking to enter the debate, as discussed above. Government restrictions on speech deprive the market of ideas, and those ideas that survive a market with less competition can be assumed to be further from the truth than would be the case in the absence of such restrictions.<sup>180</sup> The government’s role is thus to establish the conditions for a properly functioning market by restricting as little speech as possible. The “shared understandings of such matters as justice and the common good, which constitute the object of truth” in marketplace theory, are accordingly more legitimate if the government does not suppress speech.<sup>181</sup>

The imagery of the ideas marketplace pervades First Amendment judicial opinions, and its precepts underlie nearly every test devised by the Supreme Court in the area. Justice Holmes’s “clear and present danger” test was justified on the ground that the “best test of truth is the power of [a] thought to get itself accepted in the competition of the market.”<sup>182</sup> Justice Brennan’s constitutionalizing of state defamation law as applied to

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178. See *id.* at 89 (describing the importance of the exchange of truths as a test of finding the “whole truth,” which is often shared between conflicting doctrines); MILTON, *supra* note 178 at 167

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter.

179. See MILL, ON LIBERTY at 100

Not the violent conflict between parts of the truth, but the quiet suppression of half of it, is the formidable evil: there is always hope when people are forced to listen to both sides; it is when they attend only to one that errors harden into prejudices, and truth itself ceases to have the effect of truth . . . .

180. See Ingber, *The Marketplace of Ideas*, *supra* note 173, at 6 (explaining the underlying rationales of marketplace theory, one of which is that to find the truth any inhibition on the marketplace is detrimental as it hinders society’s ability to arrive at a truth that is anything other than “dogma and prejudice”).

181. HEYMAN, *supra* note 172, at 65.

182. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

public officials in *New York Times v. Sullivan* was intended to ensure “unfettered exchange of ideas” and the necessary “collision” between truth and error in public debate.<sup>183</sup> The entire corpus of First Amendment law relies to some degree on the notion that the Speech and Press Clauses were intended to protect a process by which ideas would compete against each other for acceptance.<sup>184</sup> If that process functions properly, the best of those ideas would necessarily win out.

A process-based definition of marketplace theory predominates in First Amendment scholarship as well. As Frederick Schauer argues, marketplace theory “defin[es] truth as that which survives the process of open discussion.”<sup>185</sup> Under Schauer’s conception, “there is no test of truth” in marketplace theory “other than the process by which opinions are accepted or rejected.”<sup>186</sup> Unlike self-autonomy theory, which as discussed focuses on the benefits that free expression accrues upon the speaker, marketplace theory is listener-based in its orientation; it is listeners who are witnesses to the truth-finding function taking place within the marketplace of ideas and listeners who will operationalize that truth through collective adoption of the “wisest” governmental laws and policies.<sup>187</sup> And the wisdom of those laws can be presumed only if listeners have obtained the information necessary to decide upon them, without government interference.<sup>188</sup> Under a process-based First Amendment, “the

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183. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)).

184. See SCHAUER, *FREE SPEECH*, *supra* note 143, at 15 (“[T]his theme [of marketplace theory] has surfaced in the judicial and extrajudicial writings of those American judges who have been most influential in molding the theoretical foundations of the First Amendment to the United States Constitution.”).

185. *Id.* at 19–20.

186. *Id.* at 20.

187. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (internal citation omitted); see ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948) (“In that method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers.”); see also BAKER, *supra* note 147, at 197 (“The ultimate purpose of protection under this view is to guarantee a proper distribution of the product, speech, to the consumer, a listener or reader.”); SCHAUER, *FREE SPEECH*, *supra* note 143, at 42 (“[F]reedom of speech is valuable because it allows *listeners* to receive all information material to the exercise of voting rights . . .”).

188. See *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) (“By suppressing

substantive results” of the speech market “are correct because of the purity of the process from which they emerge.”<sup>189</sup>

Superficially, marketplace theory’s process-based nature does not challenge the underpinnings of ample alternatives analysis.<sup>190</sup> Marketplace theory seems much more incompatible with content-based restrictions than content-neutral ones.<sup>191</sup> As Justice Marshall wrote in *Police Department v. Mosley*, “content control” is at the “essence” of the First Amendment’s intended protections, because restrictions on content “would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.”<sup>192</sup> Content-based restrictions serve a market-distorting function, as they “raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”<sup>193</sup> When that happens, government, in the words of Alexander Meiklejohn, “mutilat[es] the thinking process of the community” by favoring one side of public debate.<sup>194</sup>

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the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.”).

189. Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 941 (1993). The process-based conception of marketplace theory has not escaped scholarly critique. See, e.g., Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 8 (2016) (arguing that marketplace theory’s focus on truth is under-inclusive with respect to several types of speech that the First Amendment protects).

190. See BAKER, *supra* note 147, at 153 (“An assembly’s capacity to do things . . . does not fit will into a theory of first amendment rights centered on dialogue and rational persuasion.”).

191. See Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1357 (2006) [hereinafter McDonald, *Speech and Distrust*] (“[A] seemingly absolute rule of content neutrality . . . was necessary . . . to protect the right of people to be free from government censorship of thoughts, as well as the nation’s commitment to a free marketplace of public debate.”).

192. *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (citing *New York Times v. Sullivan*, 376 U.S. 254, 269–270 (1964)).

193. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). *But see* *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760–61 (1988) (“[L]aws of general application that are not aimed at conduct commonly associated with expression . . . carry with them little danger of censorship.”).

194. MEIKLEJOHN, *supra* note 187, at 25.

“In contrast,” the Court has stated, “regulations that are unrelated to the content of speech . . . in most cases pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.”<sup>195</sup> The state has caused no substantive harm to the message by requiring it to be communicated via a different form, because the speaker’s message remains able, due to the availability of an alternative channel, to be subjected to the truth-making process just described.<sup>196</sup> Accordingly, if a message does not survive in the speech and ideas market, it is not because of any government-imposed restrictions on its channel.<sup>197</sup> Rather, it is because the message, having been subjected to the test of process, failed to obtain a sufficient consensus in the market to survive into truth.<sup>198</sup> Unless a speech restriction is content-based, in other words, the market is not deprived of the restricted idea, and the truth-seeking process can continue unabated.<sup>199</sup>

Dig more deeply, however, and it becomes clear that applying marketplace theory’s frame to alternative channels analysis raises an ordering problem. As noted, the effect of permitting a government’s content-neutral restriction is to deprive the speaker of her chosen mode of communication.<sup>200</sup> The result of that restriction is that the speaker’s message is never subjected to the truth process at all.<sup>201</sup> In other words, it is the government’s

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195. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994).

196. *See* BAKER, *supra* note 147, at 132 (“The issue is only whether the restriction limits the effective operation of the marketplace of ideas. So long as the system allows ‘everything worth saying [to] be said,’ speech is adequately protected.”).

197. *See id.* at 131–34 (explaining that time, place, and manner restrictions, while burdensome, do not undercut the ability of ideas to compete for truth in marketplace theory).

198. *See id.* at 4 (explaining that marketplace theory argues that totally false assertions, “which could not survive open discussion,” will be “driven underground”).

199. *See* McDonald, *Speech and Distrust*, *supra* note 191, at 1385 (explaining that content based restrictions would impair the truth-seeking function of the marketplace of ideas).

200. *See supra* Part III.A (discussing the conflict with the theory).

201. *See* McDonald, *Speech and Distrust*, *supra* note 191, at 1385 (“There is little doubt that an absolute ban, or a broad restriction, on expressing or communicating particular information, ideas, or beliefs, would run a high risk of impairing the truth-seeking function of the marketplace of ideas, inhibiting the free flow of information necessary for citizens to make informed decisions . . .”).

restriction, not the test of process, which has decided the message’s fate. It is thus inaccurate to claim that the suppressed idea in question will rise or fall in the “market for the trade in ideas” despite the restriction.<sup>202</sup> Because the restriction in question is speech-interfering, it has removed the expression from the market and from the testing presented by other competing ideas.<sup>203</sup> And more importantly, once the restriction is upheld, the speech’s opportunity to survive or not in the relevant marketplace of ideas via the alternative channel has passed.<sup>204</sup> Accordingly, the presence of a substitute *at the time* of the restricted speech is, as to the marketplace question, at that point moot.

The Ninth Circuit demonstrated this ordering problem in 2005’s *Menotti v. City of Seattle*.<sup>205</sup> In *Menotti*, individuals protesting at the World Trade Organization’s (WTO) 1999 conference in Seattle were arrested for violating an emergency order that prohibited public access to parts of downtown Seattle where the conference was taking place.<sup>206</sup> Prior to the order and arrests at issue, a small minority of “violent protestors held, pushed, or tackled WTO delegates to prevent their entry into conference venues.”<sup>207</sup> In light of that activity, the mayor of Seattle issued an emergency order that prohibited entry into twenty-five square blocks of downtown Seattle to all except WTO-related delegates and employees, employees of businesses within the restricted area, and law enforcement and public safety personnel.<sup>208</sup> The arrested protestors brought First Amendment-based claims to the emergency order and their arrests, but the

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202. SCHAUER, FREE SPEECH, *supra* note 143, at 16.

203. See HEYMAN, *supra* note 174, at 26 (arguing that the best test of truth is the power of market competition, and a restriction on the content takes away from the truth of the idea).

204. See *Citizens United v. FEC*, 558 U.S. 310, 334 (2010) (“There are short timeframes in which speech can have influence . . . . A speaker’s ability to engage . . . is stifled if the speaker must first commence a protracted lawsuit.”).

205. 409 F.3d 1113 (9th Cir. 2005).

206. See *id.* at 1120–25 (explaining that the plaintiffs were arrested in relation to protests, some of which had elements of violence, that took place before and during the WTO conference).

207. *Id.* at 1123.

208. See *id.* at 1125 (citing the Mayor’s emergency order, which created a curfew in limited parts of the city and authorized the police to take “extraordinary” measures to curb the violent protests).

Ninth Circuit rejected them.<sup>209</sup> As to ample alternative channels, the court acknowledged that “the application of these principles presents a very difficult question,”<sup>210</sup> but in the end held that the emergency order still “allowed protestors to demonstrate directly across the street” from various WTO venues and most of the hotels hosting WTO delegates, and there was no evidence indicating that those locations were not within sight of the delegates.<sup>211</sup> Upon the court’s identification of an alternative channel, both the emergency order and the prosecutions for violating it survived intermediate scrutiny.<sup>212</sup>

Given the violence surrounding WTO-related meetings at the time of *Menotti*, it is difficult to cast much doubt on the substantiality of the City of Seattle’s interest in adopting the emergency order at issue. But the availability of ample alternatives should be a separate question. And it is difficult to see how the reasoning and result in the *Menotti* case jibe with marketplace theory. As an initial matter, the protest zone upheld by the majority in *Menotti* 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. Without access to the downtown area, the effectiveness of the protestors’ speech, and by extension the ability for that speech to be tested by other truths, was crippled.<sup>213</sup> And the alternative deemed sufficient by the majority, the boundaries outside the restricted zone and the area extending outward from there, divested the protestors’ speech of its intended reach.<sup>214</sup> In other words, the market that should matter most—that market

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209. *See id.* at 1118 (“We determine that the emergency order was a constitutional time, place, and manner restriction on speech on its face, and we affirm the judgment of the district court on that issue.”).

210. *Id.* at 1138.

211. *Id.* at 1141.

212. *See id.* at 1138–43 (applying a standard of intermediate scrutiny and determining that the order and prosecutions for violating it did not violate the First Amendment because ample alternative channels were available).

213. *See id.* at 1126 (“Chief Stamper testified in deposition that the effect of the Operations Order was to exclude protestors from entering the restricted zone.”).

214. *Id.* at 1138–41.

that the speakers most desired to reach—is the one that is deprived by the restriction in question.

Furthermore, in order to fit ample alternatives analysis within marketplace theory, courts must engage in counterfactual speculation with respect to what the speaker could have done at the time of the restricted speech, but did not. It makes little sense to find that an alternative mode of communication was available to a speaker and thus that the marketplace of ideas was not significantly divested of the restricted speech, well after the speaker has already been deprived of the opportunity to speak.<sup>215</sup> For example, as noted above, the court decided that protestors could have expressed themselves outside the borders of the restricted area and still reached their audience—hence the court’s emphasis on whether WTO delegates could hear and see the protestors from the location that the regulations forced them to use.<sup>216</sup> But it did so six years after the fact, when the attention, let alone the physical presence, of both the protestors and their intended audiences have long departed from the city of Seattle.<sup>217</sup> It does neither the speaker nor the market any good to find that an alternative could have permitted the speech to reach the market well after the speaker could have theoretically taken advantage of that alternative.

To be sure, courts analyzing content-neutral restrictions are occasionally sensitive to these concerns when considering the existence of alternative channels. But this is only in cases when courts give proper deference to the speaker’s intent with respect to the intended market for her speech. For instance, take the facts of *Edwards v. City of Coeur d’Alene*,<sup>218</sup> another Ninth Circuit case decided just four years before *Menotti*. There, petitioner Edwards was arrested while protesting a downtown march being conducted

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215. In theory, the speaker might be able to successfully enjoin the content-neutral restriction in question and thus be able to use her preferred mode of speech. But in cases such as *Menotti* where the speaker’s audience is limited in time to a particular event, emergency injunctive relief will likely be unavailable.

216. See *Menotti v. City of Seattle*, 409 F.3d 1113, 1141 (9th Cir. 2005) (holding that Order No. 3 provided “ample alternative channels of communication” to protestors).

217. See *id.* at 1120 (stating that the events giving rise the case occurred in 1999).

218. 262 F.3d 856 (9th Cir. 2001).



by the Aryan Nation.<sup>219</sup> Edwards's sign said "Stop the Nazis Now."<sup>220</sup> Edwards was arrested not for the content of his message, however, but rather for its wooden handle and slat supports, which violated a Coeur d'Alene ordinance that made illegal the use of signs "affixed to any wooden, plastic, or other type of support" during parades and public assemblies.<sup>221</sup>

The Ninth Circuit struck down the ordinance.<sup>222</sup> It found that the City's proffered alternative means such as "hand[ing] out leaflets, carr[ying] signs without supports and made of non-rigid materials, sing[ing], shout[ing], perform[ing] dramatic presentations," or "solicit[ing] signatures for petitions and appeal[ing] to passersby" did not permit Edwards to "reach the minds of willing listeners and . . . win their attention" with force equal to the means he chose, because those methods would not permit his message to be visible during the parade.<sup>223</sup> In other words, to the *Edwards* court, the relevant speech market for Edwards's counterspeech was the audience assembled at the Aryan Nations parade; depriving the speaker access to that audience deprived the marketplace of ideas.<sup>224</sup> The court thus affirmed Edwards's choice to use a larger sign that he could hold high above his head, but this was only after it became self-evident that a smaller, less sturdily supported one would go unseen at the parade.<sup>225</sup> If the court had deemed these smaller signs to be

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219. *Id.* at 859.

220. *Id.*

221. *Id.* at 859–60.

222. *Id.* at 867.

223. *Id.* at 867; *see also* Turner v. Plafond, No. C 09-683 MHP, 2011 WL 62220, at \*11 (N.D. Cal. 2011) (noting the "unique locale" of the speaker's desired audience).

224. *See* Edwards v. City of Coeur d'Alene, 262 F.3d 856, 864 (9th Cir. 2001) (finding that the protestor's intended audience was the pedestrians at the parade).

225. *See id.*

Signs attached to supports such as poles or sticks are effective tools by which to overcome the communication problems endemic to [parades]. A sign that can be hoisted high in the air projects a message above the heads of the crowd to reach spectators, passersby, and television cameras . . . [T]here 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.

adequate substitutes—and, had it applied the logic used in *Menotti*, it certainly would have—Edwards would not have had the opportunity to speak lawfully at all.

It is a weak defense of a legal doctrine to claim that the doctrine works when it does, and does not work when it doesn't. 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. This demonstrates a problem with the doctrine itself, not merely its application. And surveying its application across different types of cases reveals additional flaws.

### *B. Conflict Within Case Law*

As *Menotti* and *Edwards* show, a meaningful application of the ample alternative channels prong of content-neutral intermediate scrutiny should consider not just other legal and available means of communications, but closely compare the effectiveness of those means to the one the speaker chose.<sup>226</sup> As the cases also show, however, the rigor with which courts approach this inquiry is intermittent at best.

But even a careful application of ample alternative channels analysis that keeps the speaker's intended audience close in mind does First Amendment doctrine a disservice. The test's application in particular cases has led to speaker-averse results.<sup>227</sup> This Section catalogs some of the various types of cases in which appellate courts apply ample alternative channels analysis—in “free speech zone” cases, in which protestors or other speakers are corralled into specific areas of public space; in adult theater and

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226. See, e.g., *Weinberg v. City of Chicago*, 310 F.3d 1029, 1041–42 (7th Cir. 2002) (finding no alternatives available to an author who had self-published a book critical of Chicago Blackhawks owner when the author was barred by city's peddling ordinance from selling book outside the arena where Blackhawks played); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (“An alternative is not ample if the speaker is not permitted to reach the ‘intended audience.’”).

227. See *Menotti v. City of Seattle*, 409 F.3d 1113, 1140 (9th Cir. 2005) (rejecting the argument that the specific place of protest was essential to communicating the protesters' desired message).

bookstore cases, in which courts find that restricting the hours or location of such businesses is permissible so long as the speech is available in other places or at other times; in “prohibited means” cases, in which a particular mode of expression or mode of communicating it is barred; and in abortion protest cases, which combine principles of the “free speech zone” and “prohibited means” cases to uphold nominally content-neutral restrictions on protest activity near abortion clinics. A survey of these cases demonstrates that applying ample alternative channels analysis injects an unacceptable degree of caprice in an area where First Amendment law should provide clarity and predictability for both speakers and governments.

### 1. The “Free Speech Zone” Cases

The Ninth Circuit’s *Menotti* and *Edwards* cases demonstrate the inconsistent application of ample alternative channels in the public protest context.<sup>228</sup> In the former case, excluding protestors from the locations hosting the event that was the subject of their protest was permissible, even though those locations found to be adequate substitutes separated the protestors from their intended audience.<sup>229</sup> In the latter case, preventing a protestor from using his chosen means of communication, a large sign supported by a wooden handle and slats, was impermissible, because the alternative means that were permissible for the protestor to use—leaflets, or signs that could not be lifted as high without wooden supports—would not have been effective in reaching his intended audience as the one he chose.<sup>230</sup> Unfortunately, the *Edwards* approach has proven to be an outlier. Other cases involving government efforts to restrict protest activity in public spaces

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228. *Id.* at 1113; *Edwards*, 262 F.3d at 856.

229. *See Menotti*, 409 F.3d at 1138 (“Given the protestors’ ability to communicate directly across the street from most WTO venues . . . we think the better analysis favors the conclusion that Order No. 3 provided ample alternatives for communication.”).

230. *See Edwards v. City of Coeur d’Alene*, 262 F.3d 856, 867 (9th Cir. 2001) (“[The] ban on sign supports is an invalid time, place, and manner restriction on speech because it is not narrowly tailored to serve the City’s interest in public safety and it fails to leave open ample, alternative channels of communication to picketers.”).

demonstrate that ample alternative channels analysis drives First Amendment doctrine in speech-averse directions.

For example, take 2004’s *Bl(a)ck Tea Society v. City of Boston*.<sup>231</sup> There, Boston, like the city of Seattle in *Menotti*, limited protests around the Fleet Center, where the 2004 Democratic National Convention was being held, to a designated “demonstration zone,” which was well outside of the area immediately surrounding the Center.<sup>232</sup> The demonstration zone was encircled by barriers topped by eight foot-tall chain-link fencing and semitransparent mesh fabric.<sup>233</sup> It was undisputed that the demonstration zone “allowed no opportunity for physical interaction (such as the distribution of leaflets) and severely curtailed any chance for one-to-one conversation,” and even the use of signs there “was hampered to some extent by the cramped space and the mesh screening” around the zone’s perimeter.<sup>234</sup> In fact, the demonstration zone cut off protestors from their intended audiences to such a degree that no protestor decided to use it during the Convention.<sup>235</sup>

However, the First Circuit held that these restrictions did not violate the First Amendment.<sup>236</sup> On the ample alternative channels issue, the court found that the speakers challenging alternatives to the demonstration zone as inadequate because they were not “within sight and sound of the delegates”—again, a deal-breaker for the speakers themselves, who chose not to use the zone at all because of that fact—“greatly underestimate[] the nature of

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231. 378 F.3d 8 (1st Cir. 2004).

232. *See id.* at 10 (describing security measures taken in light of heightened sensitivity due to security concerns following the terrorist attacks of September 11).

233. *See id.* (describing the demonstration zone).

234. *Id.* at 13.

235. *See* Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 595 n.80 (2006) (“The designated demonstration area, a dank place under abandoned elevated tracks, failed its first test . . . when what will probably be the largest demonstration of the convention period simply walked by it.” (citing John Kifner, *Demonstrators Steer Clear of Their Designated Space*, N.Y. TIMES, July 26, 2004, at P3)).

236. *See Bl(a)ck Tea Soc’y*, 378 F.3d at 14 (upholding the district court’s determinations that the security measures undertaken by the City were narrowly tailored).

modern communications,” find that “[a]t a high-profile event, such as the Convention, messages expressed beyond the first-hand sight and sound of the delegates nonetheless have a propensity to reach the delegates through television, radio, the press, the Internet, and other outlets.”<sup>237</sup>

As discussed in detail below, taking modern communications technologies into account as part of ample alternatives analysis means that nearly any content-neutral restriction imaginable will survive constitutional scrutiny.<sup>238</sup> But pause here for a moment to consider what the First Circuit held. It does not violate the First Amendment to ban protestors from the area around a site hosting an event they wish to protest, because those protestors can speak their grievances to the general public by doing interviews with mainstream media and setting up websites.<sup>239</sup> Any conception of the First Amendment that recognizes speech and place as linked, or that gives the speaker’s views precedence as to the proper audience for speech or the best way to reach it, has been discarded. This is a diminished Speech Clause.<sup>240</sup>

Similarly, in *Citizens for Peace in Space v. City of Colorado Springs*,<sup>241</sup> a group of demonstrators whose concern was with “the militarization of space and the prevention of war” intended to protest a Department of Defense-sponsored conference of foreign defense ministers at a hotel and convention center in Colorado Springs.<sup>242</sup> For security reasons, public streets and sidewalks around the hotel were closed off.<sup>243</sup> The demonstrators requested

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237. *Id.* Other courts considering similar challenges have reached the same conclusion. See *Coalition to March on the RNC and Stop the War v. City of St. Paul, Minn.*, 557 F. Supp. 2d 1014, 1028–31 (D. Minn. 2008) (relying on *Bl(a)ck Tea Society* for the proposition that ample alternatives existed for protestors who could not march near convention site, because protestors could access members of the media).

238. *Infra* Part III.C.

239. See *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004) (applying ample alternative channels analysis).

240. Also, news coverage will always depend on the media’s determination of newsworthiness; the agency in such a communicative act’s reaching its intended audience is the journalist’s, not the speaker’s.

241. 477 F.3d 1212 (10th Cir. 2007).

242. See *id.* at 1218 (“Specifically, the Citizens hoped to conduct their protest on a sidewalk across from the International Conference Center.”).

243. See *id.* at 1217 (“The security plan for the conference included closing

access to those sidewalks in order to undertake a peaceful six-person protest.<sup>244</sup> They were denied access, but were granted permission to demonstrate outside of a checkpoint several blocks away through which conference delegates and the international media would enter the conference—a point at which the delegates and media “could only observe the protest briefly as their vehicles passed by.”<sup>245</sup> Furthermore, there was no dispute that the protestors outside the checkpoint were not within the line of sight of the hotel hosting the conference.<sup>246</sup> Despite those facts, the Tenth Circuit held that the checkpoint protest provided an alternative to the protest inside the security zone.<sup>247</sup> Among other reasons, the court found that local media had interviewed the protestors during the meeting, and thus barring them from the conference area did not materially infringe on their rights to access their intended audience.<sup>248</sup>

One reading of these cases suggests that they do not damn ample alternative channels analysis altogether; rather, they only call for a more “intended audience”-focused application of the analysis as laid out *supra* and as demonstrated in the Ninth Circuit’s *Edwards* case. But *Bl(a)ck Tea Society* and *Citizens for Peace* are wrong not simply because they fail to consider the speakers’ intended audience. Rather, they focus on that audience at the expense of the mode by which the speakers chose to communicate with it.<sup>249</sup>

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public streets and sidewalks and imposing a large ‘limited access area’ or ‘security zone.’”).

244. *See id.* at 1218 (“[T]he proposed protest would involve six persons who hold banners on a sidewalk across the street from the International Conference Center.”).

245. *Id.* at 1218.

246. *See id.* at 1218–19 (“There was no direct line of sight between the protest location and the International Conference Center, and the Citizens could barely be seen, if at all, from the Broadmoor itself.”).

247. *See Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1226 (10th Cir. 2007) (“[P]rotesting on the periphery of the security zone allowed the Citizens to present their views to the conference delegates and international media. They were not wholly cut off from their intended audience, such that there were no ample alternatives to a protests within the security zone itself.”).

248. *See id.* at 1226 (indicating that the Citizens were interviewed on October 7 and October 8).

249. *See Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 13 (1st Cir. 2004)

In both cases, the reviewing courts minimized the protestors' interest in "close, physical interaction" with their intended audiences as a necessary concomitant to the message being conveyed.<sup>250</sup> Once the courts credited the government's security interest in establishing the speech zones at issue, any expressive conduct that contemplated contemporaneous dialogue between the speakers and their audiences, including not only one-on-one discussions and leafleting but also the use of signs or other visual media or location-specific symbolic conduct, was immediately disfavored.<sup>251</sup> The courts then began looking for other ways the speakers could communicate their protests. In other words, ample alternative channels analysis provided a method courts in these and similar cases could use to minimize the demonstration zones' impact on the protestors' expressive rights.<sup>252</sup> Once a court decides that an intended audience could have been reached in some other way, the weight of the intended mode the speaker chose to reach that audience is drastically minimized in the First Amendment balancing.<sup>253</sup> It is Justice Harlan in *O'Brien* all over again.

Additionally, as these cases also show, the most troubling aspect of the free speech zone cases is the manner in which alternative channels analysis completely overtakes forum doctrine. The primary justification for protecting a public forum is to ensure that a speaker may reach her intended audience without

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("[T]he direct limits on aural communication seem minor, even this form of interaction may have been less effective because of the restrictions on other modes of expression.").

250. *Citizens for Peace in Space*, 477 F.3d at 1225.

251. *See* *Am. Civil Liberties Union of Colo. v. City of Denver*, 569 F. Supp. 2d 1142, 1182 (D. Col. 2008) ("In essence, the Plaintiffs argue that their message consists of not just its content but also the location in which it was delivered.").

252. *See id.* at 1166 (listing as examples of alternative channels "the ability to speak to attendees when they board buses," "the opportunity for any attendee wanting more information to return to the speakers," and the "ability of speakers to reach the attendees and the public through other media channels such as television and print"); *see also* *Coalition to March on the RNC and Stop the War v. City of St. Paul*, 557 F. Supp. 2d 1014, 1028–29 (D. Minn. 2008) (demonstrating that ample alternative channels were available to protestors who were denied a permit to parade around Republican National Convention site included including access to delegates through radio and television).

253. *See Am. Civil Liberties Union of Colo.*, 569 F. Supp. 2d at 1166 (providing an example where the intended audience could have been reached through alternative means).

significant government interference.<sup>254</sup> A particular forum is often “chosen for its significance to [the speaker’s] message.”<sup>255</sup> In such cases, “the place represents the object of protest, the seat of authority against which the protest is directed,” as well as where “the relevant audience may be found.”<sup>256</sup> But to find that speaker choices concerning audience and setting in public spaces can be overcome via a finding of ample alternative channels in *other places* is to directly undermine the reasons for affording government less latitude in regulating speech in public fora in the first place.

## 2. The Adult Entertainment Cases

Another set of cases in which a court’s finding of ample alternative channels proves dispositive involves adult entertainment theaters and bookstores. In *Young v. American Mini Theaters, Inc.*,<sup>257</sup> the Supreme Court held that municipalities’ use of their zoning ordinances to combat the undesirable secondary effects of such businesses should be reviewed under the standard of review for content-neutral laws.<sup>258</sup> Since *Young*, ample alternative channels analysis has played the critical role in upholding these ordinances. For instance, in *City of Renton v. Playtime Theatres*,<sup>259</sup> the ordinance in question prohibited “adult motion picture theater[s] from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school.”<sup>260</sup> Only five percent of the

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254. See *Galvin v. Hay*, 374 F.3d 739, 747 (9th Cir. 2004) (explaining that the propriety of a public forum is related to the relevance for the protest, either through a symbolic nature or for a specific intended audience).

255. *Id.* at 752.

256. *Id.* (citing *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 90 (2d Cir. 1968)); see also *United States v. Griefen*, 200 F.3d 1256, 1259 (9th Cir. 2000) (providing an example where demonstrators were in a northern Idaho forest to protest logging contracting practices of Forest Service).

257. 427 U.S. 50 (1976).

258. See *id.* at 61 (“The fact that First Amendment protects some, though not necessarily all, of that material from total suppression does not warrant the further conclusion that an exhibitor’s doubts as to whether a borderline film may be shown in his theater . . .”).

259. 475 U.S. 41 (1988).

260. *Id.* at 44.



city of Renton did not fall within the ordinance's proscriptions.<sup>261</sup> On that basis, however, the Court held that ample alternative channels existed for the respondents who sought to show adult films in the city.<sup>262</sup>

Other cases involve statutory restrictions on the hours of operation of such businesses. Lower courts have upheld those restrictions on ample alternative channels grounds as well. In *Mitchell v. Commission on Adult Entertainment Establishments*,<sup>263</sup> for example, Delaware passed a law restricting the operating hours of adult entertainment businesses to 10 am to 10 pm and required them to close on Sundays.<sup>264</sup> Upholding the law, the Third Circuit held that "adult bookstores are free to operate six days per week for twelve hours per day Monday through Saturday,"<sup>265</sup> and thus ample alternative means for the stores and their customers were available.<sup>266</sup> And the same court upheld a similar ordinance passed by Vineland, New Jersey, finding 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. We think the Constitution requires no more."<sup>267</sup>

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261. See *id.* at 53–54 ("[W]e note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites.").

262. See *id.* at 54 ("[W]e find that the Renton ordinance represents a valid governmental response to the 'admittedly serious problems' created by adult theaters.").

263. 10 F.3d 123 (3d Cir. 1993).

264. See *id.* at 128 (describing the "Adult Entertainment Establishments Act" passed by the Delaware General Assembly).

265. *Id.* at 139.

266. *Id.*

267. *Ben Rich Trading, Inc. v. City of Vineland*, 126 F.3d 155, 163 (3d Cir. 1997) (quoting *Mitchell*, 10 F.3d at 139); see also *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1170 (9th Cir. 2003) (upholding a similar law on ample alternative means grounds); *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 441 (6th Cir. 1998) (same); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074, 1079–80 (5th Cir. 1986) (same); *Schultz v. City of Cumberland*, 26 F. Supp. 2d 1128, 1145–46 (W.D. Wis. 1998) (same); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 973 F. Supp. 1428, 1447 (M.D. Fla. 1997) (same); *Tee & Bee, Inc. v. City of West Allis*, 936 F. Supp. 1479, 1492 (E.D. Wis. 1996) (same); *Bright Lights, Inc. v. City of Newport*, 830 F. Supp. 378, 389 (E.D. Ky. 1993) (same); *Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553, 1577 (M.D. Tenn. 1989) (same); *Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486, 493 (E.D. Tenn. 1986) (same).

Of course, the reason ample alternative channels analysis applies in these cases in the first place is because of the secondary effects doctrine, which serves to ratchet down from strict to intermediate the First Amendment scrutiny applied to laws that facially reference content.<sup>268</sup> Judges and scholars have criticized the secondary effects doctrine on the ground it “allow[s] communities to justify [facially] content-based laws” proscribing non-obscene sexual expression that, in any context other than pornographic speech, would be subjected to strict scrutiny.<sup>269</sup> Those critiques are certainly salient, but for present purposes, the troubling fact is that ample alternative channels analysis is carrying decisional weight. The cases stand for the proposition that *some* interference with protected speech is permissible on the ground that speech is *usually* accessible to those who wish to speak and receive it. Courts should be wary, however, of holding that reducing protected speech can be justified so long as the reduction preserves the ability to engage in that speech at another time or place of the government’s choosing. Indeed, this analysis is not even consistent with many of the other ample alternative channels cases, which consider actual *alternatives*—i.e., substitutes, as the theory underlying the doctrine intends—to the suppressed speech

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268. See *Ben Rich Trading, Inc. v. City of Vineland*, 126 F.3d 155, 160 (3d Cir. 1997) (“[I]f a regulation’s primary purpose is to ameliorate the socially adverse secondary effects of speech-related activity, the regulation is deemed content-neutral, and is accordingly measured by intermediate scrutiny . . .”).

269. David L. Hudson, Jr., *The Secondary Effects Doctrine: The Evisceration of First Amendment Freedoms*, 37 WASHBURN L.J. 55, 66 (1997); see also *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (explaining that laws at issue in secondary effects cases are “content-based, and we should call them so”); *id.* at 457 (Souter, J., joined by Stevens and Ginsburg, JJ., dissenting) (“It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it content correlated, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses.”); John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 304 (2009) (explaining that the secondary effects doctrine is a “fiction . . . inconsistent with the Court’s usual method of treating facially discriminatory regulations as content-based”); Christopher J. Andrew, Note, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175, 1178 (2002) (discussing judicial review of content-based and content-neutral regulations).

in question: flyers in lieu of *for sale* signs,<sup>270</sup> or anti-homelessness banners and “day-and-night vigils” in lieu of sleeping outside.<sup>271</sup>

Some comfort might be taken from the fact that *Young* and its progeny have had minimal precedential value in other kinds of speech cases.<sup>272</sup> Nevertheless, courts in these cases are simply holding that barring protected speech for one day a week is permissible so long as that speech is available for the other six days, even though under the Speech Clause, the second fact is irrelevant to the first.<sup>273</sup>

### 3. The “Prohibited Means” Cases

A third category of decisions using ample alternative channels analysis is often defended on the grounds it bars only a means of communication, not the communication itself. The primary “prohibited means” case is *Members of City Council v. Taxpayers for Vincent*,<sup>274</sup> in which the Court held that a municipal code banning the posting of signs on public property was content neutral and thus permissible even though it barred a city council candidate from posting political signs on the city’s utility poles.<sup>275</sup> Despite the ban on using poles, the Court found that ample alternative means existed for the speech in question, such as “speak[ing] and distribut[ing] literature in the same place where the posting of signs on public property is prohibited.”<sup>276</sup>

*Taxpayers for Vincent* has been applied in a range of lower court cases to uphold similar facially neutral regulations that

270. *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 390 (6th Cir. 1996).

271. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984).

272. See Thomas G. Krattenmaker & Lucas A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1272 (1978) (“[R]estrictive rulings by the Court in cases involving sexually related materials should and do have minimal precedential value when offered as justification for regulating other forms of speech.”).

273. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

274. 466 U.S. 789 (1984).

275. See *id.* at 804 (explaining that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest).

276. *Id.* at 812.

restricted political speech. In *Johnson v. City and County of Philadelphia*,<sup>277</sup> the Third Circuit held that an ordinance barring the posting on public property of political signs was constitutional because candidates were not entitled to their “favored or most cost-effective mode of communication” and they were free to advertise with the media or to post signs on private property.<sup>278</sup> Indeed, the court pointed to the fact that one of the complaining candidates had previously won election without violating the ordinance as evidence that such alternative means were as effective as the ones the ordinance proscribed.<sup>279</sup>

Geoffrey Stone has argued that these prohibited means cases are reconcilable with the First Amendment because the “particular means of expression” that these speakers choose are usually not “distinctive,” and thus the regulations at issue permit a speaker to shift from the prohibited means of communication to another permissible one without diminution of the message itself.<sup>280</sup> “[F]or the most part,” Stone claims, “the elimination of any one of these means of expression is unlikely to cause a significant reduction in the total quantity of free expression.”<sup>281</sup> In other words, restrictions in the prohibited means cases limit the noncommunicative *conduct* the speaker chooses to deliver his

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277. 665 F.3d 486, 494 (3d Cir. 2011).

278. *See id.* at 494 (“Accordingly, a speaker is not entitled to his or her favored or most cost-effective mode of communication. He or she must simply be afforded the opportunity to ‘reach the intended audience’ . . . .” (citing *Startzell v. City of Philadelphia*, 553 F.3d 183, 202 (3d Cir. 2008))).

279. *See id.* (“[I]n Johnson’s case at least, it was effective; he waged a successful campaign in spite of the ordinance’s restrictions, winning both the Democratic primary and the general election for State Representative.”).

280. Stone, *supra* note 10, at 64–65.

281. *Id.* at 65; *see also* Baker, *Unreasoned Reasonableness*, *supra* note 24, at 945 (“Quantity of expression is not a major concern of the marketplace of ideas theory.”).

expression—in addition to signage<sup>282</sup>, leafleting,<sup>283</sup> solicitation,<sup>284</sup> public demonstrations,<sup>285</sup> and the like—rather than speech.

Put differently, even though the speaker is restricted, a court reviewing the restriction can presume she can easily shift to a different type of conduct to communicate her desired message. As Stone notes, “[a]n individual prohibited from leafleting may post signs; an individual prohibited from door-to-door solicitation may solicit on the street; an individual prohibited from using sound trucks may rent billboards; an individual prohibited from using billboards may advertise on the radio; and so on.”<sup>286</sup> This category of cases sounds in the speech/conduct distinction that drives much of time, place, and manner doctrine; such restrictions are presumed valid because they are deemed to restrict conduct, not speech.<sup>287</sup>

However, this line of argument proves too much. As noted above, Justice Harlan would certainly not have been moved around the time of *O’Brien* by an argument that a prohibited pamphleteer’s expressive rights are not violated because that pamphleteer could theoretically post a sign or rent a billboard displaying the content of the banned pamphlet.<sup>288</sup> Indeed, the prohibited pamphleteer was the speaker whom Harlan believed

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282. See *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (finding that an ordinance banning the posting on political signage was constitutional).

283. See *Schneider v. New Jersey*, 308 U.S. 147, 160–61 (1939) (demonstrating that the prohibition of leafleting would not abridge the constitutional liberty because the activity bears no necessary relationship to the freedom to speak, write, print, or distribute information or opinion).

284. See *Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 636–37 (1980) (explaining that the legitimate interests of a municipality may be served by limiting solicitation, but in a manner that is narrowly tailored not to violate the First Amendment).

285. See *Cox v. Louisiana*, 379 U.S. 536, 552 (1965) (reversing a conviction for disturbing the peace because First Amendment rights were denied).

286. Stone, *supra* note 10, at 65; see also *id.* at 75 (“Content-neutral restrictions usually limit the availability of only particular means of expression. They are thus unlikely substantially to block the communication of particular messages.”).

287. See *Schneider*, 308 U.S. at 160–61 (discussing the conduct of leafleting).

288. See *supra* Part II (explaining that Harlan believed that Chief Justice Warren’s argument was flawed in stating that the First Amendment protected non-verbal expression simply because it had a communicative nature).

was most threatened by Chief Justice Warren’s proposed rule of decision in *O’Brien*.<sup>289</sup>

Furthermore, it is unresponsive to claim, as Stone does,<sup>290</sup> that content-neutral regulations generally impair conduct, while content-based regulations, which are more “distinctive” in their nature, impair speech, and that in content-neutral cases, alternative channels can permit the same speech to be communicated via different conduct. As the Court has noted for decades, the line between speech and conduct is hardly clear. As Justice Scalia argued, “there comes a point . . . at which the regulation of action intimately and unavoidably connected with traditional speech is a regulation of speech itself.”<sup>291</sup> When speech and action are “intimately connected,” it is no answer to claim that one action will do just as well as another without adversely affecting the speech that the action facilitates.<sup>292</sup> Ed Baker notes that this is particularly so when “the intended meaning of people’s expression relates to the time or the place or the manner of the expression,” in which case “a time, place, or manner regulation may prohibit the substantially valued expressive activity.”<sup>293</sup> As the next category of cases also demonstrates, place or manner can be intertwined with speech to such a degree that an interference with one is indistinguishable from an interference with the other.

#### 4. *The Abortion Clinic Protest Cases*

In the quote above, Justice Scalia was writing in the context of abortion clinic protests, during which there should be no doubt as to the “intimate connection” between the “time or the place or the manner of the expression” and its “intended meaning.”<sup>294</sup> In

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289. *Id.*

290. See Stone, *supra* note 10, at 75 (explaining that content-neutral restrictions limit other means of expression).

291. *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting).

292. See *id.* (“The strictures of the First Amendment cannot be avoided by regulating the act of moving one’s lips; and they cannot be avoided by regulating the act of extending one’s arm to deliver handbill . . .”).

293. Baker, *Unreasoned Reasonableness*, *supra* note 24, at 946; see also *id.* at 947 (“A person may find a round-the-clock vigil is necessary to express, live, and implement her values.”).

294. *Hill*, 530 U.S. at 749.

these cases, governments place “buffer zones” around the entrances of health centers and clinics that provide abortions or “bubble zones” around the individuals entering those centers rather than or in addition to the clinic itself. The laws have the effect of physically separating speakers from their intended audiences, primarily women seeking consultations or medical procedures concerning their pregnancies.<sup>295</sup> The question then becomes whether that physical separation impermissibly impedes on the speakers’ expression.<sup>296</sup> And through the use of ample alternative channels analysis, courts consistently hold that it does not.

A typical example is from *Clift v. City of Burlington, Vermont*,<sup>297</sup> in which Burlington adopted a 35-foot radius around reproductive health care facilities in the city.<sup>298</sup> Burlington’s ordinance decreed that “no person or persons shall knowingly congregate, patrol, picket, or demonstrate in the buffer zone.”<sup>299</sup> Individuals seeking to express their opposition to abortion outside Planned Parenthood’s Burlington Health Center challenged the ordinance on First Amendment grounds, arguing that the buffer zone prevented the speakers from handing flyers to those entering the Center and attempting to counsel them face-to-face concerning the abortion decision.<sup>300</sup> Combined with traffic, construction and other ambient street noise, in many cases the buffer zone prevented the petitioners from speaking to those individuals at all.<sup>301</sup> Despite these interferences with the speakers’ preferred

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295. *See id.* at 789 (Stevens, J., dissenting) (explaining the intent of the speakers to ask pregnant women to “contemplate the nature of the life she is carrying” when considering an abortion).

296. *See id.* at 738 (discussing that after weighing the government’s interest in protecting people from unwanted intrusion, the Court then focuses on the content neutrality of the regulation, the interests to be served, and the availability of other means of expressing the desired message).

297. 925 F. Supp. 2d 614 (D. Vt. 2013).

298. *Id.* at 626–27, 629–30.

299. *Id.* at 619.

300. *See id.* at 620 (“The Plaintiffs allege that the Ordinance, which came into effect on August 15, 2012, has severely disrupted their ability to approach, counsel, and distribute information to individuals approaching Planned Parenthood’s Burlington Health Center . . .”).

301. *See id.* (describing the physical layout of the Planned Parenthood facility).

means of communication, however, the court found that ample alternative channels existed because the petitioners could hold signs, sing, call out to individuals entering the facility (including through the use of amplification equipment), and engage in silent and vocal prayer.<sup>302</sup> Courts reach the same result in bubble zone cases. Those cases find ample alternative means for the speaker such as “peacefully hand[ing] leaflets” to the clinic-entering individual “as they pass by” without entering the bubble zone around that person.<sup>303</sup> In sum, reviewing courts have consistently found that ample alternative means exist for a speaker who is barred from communicating face-to-face with abortion clinic clients.<sup>304</sup>

The long procedural history of the 2013–14 Term’s *McCullen v. Coakley*<sup>305</sup> demonstrates this principle. In *McCullen*, the Court found that a Massachusetts statute establishing a thirty-five-foot buffer zone around the entrances and driveways of reproductive health service facilities was content neutral, but not narrowly tailored and thus failed intermediate scrutiny.<sup>306</sup> At every point prior to *McCullen*’s reaching the Court, however, the lower courts held that ample alternative channels existed for individuals

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302. *Id.* at 629; *see also* *United States v. Weslin*, 156 F.3d 292, 298 (2d Cir. 1998) (per curiam) (finding the federal Freedom of Access to Clinic Entrances Act constitutional because protestors are still “at liberty to hold signs, pass out handbills, speak conversationally, and so forth”); *American Life League, Inc. v. Reno*, 47 F.3d 642, 652 (4th Cir. 1995) (1995) (finding the Freedom of Access to Clinic Entrances Act leaves open ample alternative means for communication because the Act allows individuals to express antiabortion messages in a “non-violent, non-obstructive manner” via “voice, signs, handbills, symbolic gestures, and other expressive means”).

303. *See* *Madison Vigil for Life, Inc. v. City of Madison, Wis.*, 1 F. Supp. 3d 892, 895 (W.D. Wis. 2014) (analyzing *Hill v. Colorado*, 500 U.S. 703 (2000)); *see also* *McTernan v. City of York*, 564 F.3d 636, 657 (3d Cir. 2009) (analyzing *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994)).

304. *See* *McTernan*, 564 F.3d at 657 (*citing* *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997); *Madsen v. Women’s Health Cntr., Inc.*, 512 U.S. 753, 770 (1994) (holding that a thirty-six-foot buffer zone around the clinic entrances burdens no more speech than necessary to accomplish the governmental interest at stake); *McGuire v. Reilly*, 260 F.3d 36, 49 (1st Cir. 2001) (upholding a six-foot floating buffer zone).

305. 134 S. Ct. 2518 (2014).

306. *See id.* at 2523 (explaining that even though the Act is content neutral, it is not narrowly tailored because it burdens more speech than necessary to further the legitimate interests of the government).



seeking to engage in face-to-face counseling of women entering those facilities.<sup>307</sup> The Court itself purported not to reach the ample alternatives issue.<sup>308</sup> But its tailoring analysis focused closely on the petitioners' preferred mode of communication, how the Massachusetts statute severely hampered that mode, and how alternatives to that mode proffered by the state in support of its restriction failed to cure the alleged First Amendment violation:

[At each of the] Planned Parenthood clinics where petitioners attempt to counsel patients, the zones carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics' entrances and driveways. The zones thereby compromise petitioners' ability to initiate the close, personal conversations that they view as essential to "sidewalk counseling."<sup>309</sup>

These cases raise important and sensitive issues regarding the conflict between the exercise of two fundamental constitutional rights.<sup>310</sup> But ample alternative channels analysis is no way to decide them. The first question the pre-*McCullen* cases raise is whether we want First Amendment rights to be defined via the application of a judicial yardstick. If a one-hundred-foot buffer zone is deemed to have not foreclosed alternative means of

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307. See *McCullen v. Coakley*, 844 F. Supp. 2d 206, 217, 224 (D. Mass. 2012), *aff'd*, 708 F.3d 1 (1st Cir. 2013) (analyzing the statute as applied to clinics in Boston, Worcester, and Springfield, and finding ample alternatives existed in all three cases); *McCullen v. Coakley*, 573 F. Supp. 2d 382, 413 (D. Mass. 2008), *aff'd*, 571 F.3d 167 (1st Cir. 2009) (finding the statute left ample alternative means in response to a facial challenge because most expressive activity can be seen and heard by people entering and exiting the buffer zone); *McCullen v. Coakley*, 571 F.3d 167, 180 (1st Cir. 2009) (finding protestors could "speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities," and thus ample alternatives to the buffer zone were available).

308. See *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 n.9 (2014) ("Because we find that the Act is not narrowly tailored, we need not consider whether the Act leaves open ample alternative channels of communication.")

309. *Id.* at 2535; see also *id.* at 2536 (noting that because of the difficulty petitioners encounter identifying patients before the patients enter the buffer zone, petitioners "often cannot approach them in time to place literature near their hands—the most effective means of getting the patients to accept it").

310. See, e.g., *Leading Case*: *McCullen v. Coakley*, 128 HARV. L. REV. 221, 228–30 (2014) (arguing that the Court should analyze abortion protest restriction cases by balancing protestors' right to free speech against women's constitutional right to seek abortions at the place of protest).

communication for the barred protestor, for example, it is certain that the fifty-foot zone in the next case will survive.<sup>311</sup> Moreover, the Court’s disposition in *McCullen* recognizes that a speaker’s preferred mode of expression deserves meaningful First Amendment protections.<sup>312</sup> While purporting not to reach ample alternative channels, the Court flatly rejected the lower courts’ consistent findings that substitutable alternatives existed for *these* speakers despite the restrictions in question:

Respondents also emphasize that the Act does not prevent petitioners from engaging in various forms of “protest”—such as chanting slogans and displaying signs—outside the buffer zones. That misses the point. Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations. And for good reason: It is easier to ignore a strained voice or a waving hand than an outstretched arm.<sup>313</sup>

A results-oriented view of the Court’s First Amendment jurisprudence might well conclude that *McCullen* is an abortion speech case, that the Court treats abortion speech differently, and that *McCullen*’s reach will thus be limited to those kinds of cases.<sup>314</sup> As we saw above, most First Amendment scholars view the secondary effects doctrine as limited to its subject matter. But another reading of the case reveals skepticism of, if not hostility to, deciding First Amendment cases on ample alternative channels arguments so readily, particularly when such alternatives are, by the restricted speaker’s lights and to use the Chief Justice’s word, irrelevant to the speaker’s communicative intent.<sup>315</sup>

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311. See *McGuire v. Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) (applying *Hill* to find that if the one-hundred-foot buffer and eight-foot bubble zone in *Hill* left open ample alternative means, then an eighteen-foot buffer and six-foot bubble zone indisputably did as well).

312. See *id.* at 43 (discussing judicial review standards of First Amendment complaints).

313. *McCullen*, 134 S. Ct. at 2536.

314. See *id.* at 2541 (Scalia, J., concurring) (“There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion.”).

315. See, e.g., *id.* at 2524 (“The Commonwealth has not shown that it seriously undertook to address these various problems with less intrusive tools readily available to it.”).

By favoring the mode of communication that the speakers themselves “view[ed] as essential” in its narrow tailoring analysis, and in giving that choice of mode significant weight in assessing whether the restriction at issue burdened the speakers’ expressive rights, the Court in *McCullen* took a first step toward diminishing the power of ample alternative channels analysis.<sup>316</sup> It should take the next step in that direction and abolish the inquiry from its review of content-neutral laws.

### *C. Conflicts to Come: Online Speech*

With the emergence of technology-enabled communication, we can expect the harms associated with alternative channels analysis to increase. As new methods of communication continue to develop, alternatives to the speaker’s choice of communicative mode will continue multiplying. Their existence tips First Amendment analysis in content-neutral cases in the government’s favor.<sup>317</sup>

There is little doubt that online connectivity has expanded the communicative opportunities and audience reach of nearly every speaker.<sup>318</sup> For present purposes, the substitute avenues for speakers that ample alternative channels analysis renders dispositive have increased exponentially.<sup>319</sup> Following the court decisions discussed in Part III.B.1 *supra* that have found opportunities to communicate via television and radio were ample alternatives to face-to-face protest activity, governments are already relying on this argument in defending regulations against First Amendment challenges.<sup>320</sup> In last Term’s *Reed v. Town of*

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316. *See id.* at 2535 (noting that because of the buffer zone, one speaker claimed she had to “rais[e] her voice at patients from outside the zone—a mode of communication sharply at odds with the compassionate message she wishes to convey”).

317. *See, e.g.,* Bl(a)ck Tea Soc’y v. City of Boston, 378 F.3d 8, 14 (1st Cir. 2004) (finding that the district court did not err in its First Amendment analysis because means of communication existed through the internet and television).

318. *See id.* (indicating that the speaker possessed an alternative for communication through the internet).

319. *See id.* (“At a high-profile event . . . messages have a propensity to reach delegates through television, radio, the press, the internet, and other outlets.”).

320. *See id.* (“[W]e think that the appellant’s argument greatly

*Gilbert*,<sup>321</sup> discussed in more detail *infra*, the town of Gilbert adopted a complicated and comprehensive regime regulating the size and duration of signs that could be displayed within the city limits.<sup>322</sup> In defending its ordinance under intermediate scrutiny, the Town argued that the church whose speech was abridged could have, and indeed did, express its views in an unfettered fashion in a range of other ways not implicated by the ordinance’s restrictions, arguing that the petitioners “have utilized a whole host of avenues to spread the word about their mission and location, including the internet, print advertising, personal solicitations, pamphlets, telephone calls, and emails.”<sup>323</sup> The Ninth Circuit accepted this reasoning before the case reached the Supreme Court.<sup>324</sup>

The problems raised by this convergence of doctrine and technological change are obvious and sobering. In 2016, it is difficult to conceive of a case where a content-neutral restriction on speech could *not* be defended on the ground the restricted speaker could “spread the word” through “the internet . . . and emails.”<sup>325</sup> Digital connectivity has removed spatial and temporal limitations on communication, but in a First Amendment world where the availability of alternative channels is dispositive, it has also expanded the government’s ability to restrict speech through the use of content-neutral restrictions, because that connectivity provides every speaker with alternative modes of communication to those the speaker chose.

The advent of online speech spaces has compounded the alternative ways by which practically any speech could be shared and accessed, and has correspondingly compounded the problem

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underestimates the nature of modern communication.”).

321. 135 S. Ct. 2218 (2015) (overruling *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013)).

322. See *id.* at 2224 (“The Sign Code identifies various categories of signs based on the type of information they convey then subjects each category to different restrictions.”).

323. Brief for Respondents at 52–53, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2014) (No. 13-502) [hereinafter Brief for Respondents].

324. See *Reed v. Town of Gilbert*, 707 F.3d 1057, 1075–76 (9th Cir. 2013), *overruled by Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (noting that the ordinance “does not regulate any of the many other ways in which” the church could engage in its intended speech).

325. Brief for Respondents, *supra* note 323, at 52.

that ample alternative channels analysis presents. It is now literally impossible for a ban on one venue for speech to operate as a complete ban on the speech in which that venue was to be expressed. Accordingly, in the context of content-neutral restrictions, the emergence of the Internet, ironically enough, will result in the systematic underproduction of speech.

#### *D. The Content Based vs. Content-Neutral Fallacy*

Let's back up for a moment. In its First Amendment cases, the Supreme Court has long adhered to a distinction between "restrictions that turn on the content of expression," which "are subjected to a strict form of judicial review," and restrictions that are "concerned with matters other than content," which "receive more limited examination."<sup>326</sup> As this Article details, this "more limited examination" considers the availability of alternative channels of communication for the abridged speech in question.<sup>327</sup> This Section considers why First Amendment doctrine has tied these two inquiries so closely together.

Ample alternative channels analysis and the justifications for a lesser standard of review for content-neutral restrictions work hand-in-hand. The very existence of alternative channels of communication supports the conclusion that the content restricting law in question is content-neutral.<sup>328</sup> As noted above, because a content-neutral regulation's effects are deemed by a reviewing court to infringe upon, at most, a means or locus of expression and not the expression's content, the speaker restricted by such a regulation is free to shift to another means or locus to express the same message.<sup>329</sup> Accordingly, the alternatives demonstrate that the law is not aimed at the content of the speaker's message and that content remains able to reach its

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326. Redish, *The Content Distinction*, *supra* note 157, at 113.

327. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

328. *See id.* at 144 n.186 ("[T]he more alternative avenues of expression that are available, the less justification the state must provide for restricting expression.").

329. *See id.* at 116 ("The reason that [content-neutral restrictions] are generally unobjectionable is that they presume the existence of alternative avenues of expression, alternatives that are by definition unavailable in the case of absolute regulation.").

intended listeners and contribute to public debate.<sup>330</sup> Ample alternative means analysis can thus be justified as an additional way to smoke out whether the restriction in question is truly content-neutral—if other ways to communicate the same message are available, then the reviewing court can comfortably conclude that the facially neutral restriction is not intended to restrict the message, but rather its mode.<sup>331</sup> Or so the theory goes, anyway.

But even if it makes sense, why is this inquiry irrelevant to the analysis of content-based restrictions? Most content-based restrictions (as opposed to apocryphal ones spoken of only in law school classes and law review articles, such as “speech about politics is banned”<sup>332</sup>) do not bar alternative channels of communication either. As then-Professor Elena Kagan noted, even a content-based restriction might make “the danger of distortion insignificant” if it affects a “small quantity of speech” and leaves “alternative means to communicate the ‘handicapped’ idea” readily available to speakers.<sup>333</sup> Yet under current law, the availability of those alternative channels is irrelevant to a reviewing court once a particular regulation is deemed content-based.<sup>334</sup> Scrutiny here is strict.<sup>335</sup> Accordingly, the government’s burden is to justify the

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330. See Quadres, *Content-Neutral Public Forum Regulations*, *supra* note 40, at 480 (“[I]f one could argue that, despite the questioned regulation, a speaker still has numerous alternative means by which to disseminate his message, the degree of first amendment injury may seem insubstantial . . . [because] [t]he speaker can always make use of his alternative access.”).

331. This interpretation may support the conclusion that ample alternative channels is simply a gloss on narrow tailoring analysis. But the two concepts are distinct: tailoring analysis involves the government’s alternatives, while alternative channels analysis focuses on the speaker’s alternatives. See Williams, *supra* note 149, at 642 (stating that the requirement of alternatives “exists because the Court believes that if adequate alternative channels of communication remain, then a regulation restricting a particular alternative will have no more than a minimal effect on speech.”).

332. See, e.g., Rubinfeld, *supra* note 133, at 793 (describing the hypothetical arrest of an author for criticizing the President pursuant to a statute that criminalizes such critiques).

333. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 446 (1996).

334. See *id.* at 446–47 (commenting that despite the fact that some content-based restrictions have very minimal effect on skewing public discourse, First Amendment doctrine does not distinguish “between content based laws of this kind and [those] that wholly excise ideas from public discourse”).

335. See *id.* at 443–44 (“Content-based restrictions on speech—restrictions that by their terms limit expression on the basis of what is said usually are subject to

level to which its interest in the restriction is compelling.<sup>336</sup> Government arguments that a speaker's message is not limited to the mode of expression that the regulation bars, and that the regulation's harm to speech is thus minimal, are not a part of the decision-making calculus for content-based laws.<sup>337</sup>

According to the relevant scholarship, the reason this is so is that a law's content-based nature is sufficient indicia *standing alone* of improper governmental motivation.<sup>338</sup> In other words, content-based restrictions are suspect enough on their face that there is no need for any further smoking out of government intent.<sup>339</sup> But even in the content-based context, the availability of different modes to express the same content remains relevant, particularly when a content-based law is aimed at a particular mode of expression.<sup>340</sup> A law that says "no draft card burning in protest of the Vietnam War" says nothing about burning President Johnson in effigy for the same reason. Can such a law safely be deemed as aimed at protesting the Vietnam War and not at draft card burning, merely by dint of its reference to content? The law's singling out of a particular mode of expression might lead one to conclude that the law is not aimed at, or primarily concerned with, restricting public debate, and thus a lesser standard of review might be appropriate.<sup>341</sup> But once the law makes reference to content, the level of scrutiny is decided.<sup>342</sup>

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far more rigorous scrutiny.").

336. *See id.* at 444 ("Formulations of the standard used to review content-based action vary, but the Court most often requires the government to show a compelling interest that could not be attained through less restrictive means.").

337. *Id.* at 445.

338. *See id.* at 414 ("First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives. The doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them.").

339. *See id.* at 452 n.104 ("[T]he face of a law indicates more reliably than the effects of the law what purposes underlie it.").

340. *See id.* at 418 (concluding that a content-based ordinance, "while not restricting a great deal of speech, thus restricted speech in a way that skewed public debate on an issue by limiting the expressive opportunities of one side only.").

341. *See id.* at 455 n.110 (stating that, "as the effect of a law on expressive opportunities increases, so too should the government's burden of justification" and thus, the standard of review used).

342. *See id.* at 499 n.237 ("To merit a stricter standard of review, a law would

If there is a place for alternative means analysis in First Amendment doctrine at all, it should, as a matter of logic, apply to both content-based and content-neutral restrictions. Nothing in the distinction between content-based and content-neutral restrictions calls for application of alternative channels analysis in the latter set of cases but not the former.<sup>343</sup> Martin Redish offers one path, which he proposes should be applied in any case involving regulations that adversely affect expression.<sup>344</sup> In such a case, a reviewing court should “balance the compellingness of the state interest served by the law against the availability of alternative means of expression to the speaker.”<sup>345</sup> The less likely it is “that the speaker will be able to find acceptable alternative methods of expression,” Redish continues, “the more compelling must be the government’s asserted justification.”<sup>346</sup>

As argued above, a primary flaw of ample alternative channels analysis is that it favors judge-made alternative modes of communication to those the speaker herself chose.<sup>347</sup> One could critique Redish’s proposal for significantly expanding the role these alternatives would play by extending them to content-based cases.<sup>348</sup> But ample alternative channels analysis’s selective application should trigger a critical reexamination of the doctrine, the work it is intended to perform, and its effects. Redish’s proposed test at least acknowledges the logical fact that

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need to have a justification relating not to the restriction of speech generally (which all content-neutral laws have), but to the restriction of speech of a certain content.”).

343. See Redish, *The Content Distinction*, *supra* note 157, at 129 (“[R]egulations that limit expression on content-neutral grounds should logically be as suspect as content-based regulations, since they may also undermine this value.”).

344. See *id.* at 143 (suggesting that, like content-based inquiries by the court, content-neutral inquiries also consider whether the government interests served by the restriction are “compelling” enough to “justify significant invasions of free speech interests.”).

345. *Id.* at 143; *cf.* Volokh, *supra* note 26, at 1307 (rejecting the application of ample alternative means to content-based restrictions because of inconsistencies in its application in content-neutral cases).

346. Redish, *The Content Distinction*, *supra* note 157, at 143.

347. *Supra* Part III.A.

348. See Volokh, *supra* note 26, at 1309–10 (criticizing the dangers of applying the “vague ample alternative channels” analysis to content-based speech restrictions).



alternative channels are relevant to either both kinds of cases or neither kind.<sup>349</sup>

The latter course is the better one. The availability of alternative channels of communication may indeed be as relevant to content-based restrictions as to content-neutral ones.<sup>350</sup> But the better conclusion is that considering such channels in the context of reviewing *any* restriction on speech, especially facially neutral ones, undermines longstanding rationales for the First Amendment.<sup>351</sup> Courts should thus no longer consider them. But what should courts consider in their place?

#### *IV. The Solution: Incompatibility*

The foregoing has argued that First Amendment doctrine should focus solely on the speaker's preferred mode of speech and the government restriction's abridgement upon it, to the exclusion of other hypothetical speech modes that the speaker has not used. 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.

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349. See Redish, *The Content Distinction*, *supra* note 157, at 83 (“Whatever rationale one adopts for the constitutional protection of speech, the goals behind that rationale are undermined by any limitation on expression, content-based or not.”).

350. See *id.* (noting that the proposed framework for evaluating the constitutionality of “impaired speech” should include “whether ‘feasible’ less restrictive alternatives are inadequate to accomplish that end; and whether the speaker will have available adequate means to express the same views to roughly the same audience.”).

351. *But see id.* (“Since the Court uses [this test] in reviewing content-based regulations, it should have no greater difficulty in applying them to all regulations of expression.”).

*A. The Test*

The concept of incompatibility is no stranger to First Amendment doctrine. The Court’s initial foray into reviewing time, place, and manner restrictions, 1972’s *Grayned v. City of Rockford*,<sup>352</sup> proposed an incompatibility test as the standard to be applied to content-neutral laws that adversely affected speech.<sup>353</sup> In *Grayned*, the speaker was convicted for protesting outside of a high school regarding the school’s differential treatment of Black students and prospective teachers.<sup>354</sup> The school claimed that the speaker and his fellow protestors’ activities disrupted classes and caused other students to be tardy.<sup>355</sup> The anti-noise ordinance that the speaker was arrested for violating made it unlawful to “make any noise or diversion” adjacent to a school in session “which disturbs or tends to disturb the peace or good order” of that school.<sup>356</sup>

In reviewing the ordinance, the Court held that “the nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.”<sup>357</sup> “The crucial question,” the Court concluded, “is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”<sup>358</sup> Further, even if the restriction in question is content-neutral on its face, a reviewing court should “weigh heavily the fact that communication is involved,” and the speech-suppressing regulation “must be narrowly tailored to further the state’s legitimate interest.”<sup>359</sup>

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352. 408 U.S. 104 (1972).

353. *See id.* at 120 (determining that the plaintiff’s noisy demonstrations were disruptive and “incompatible with normal school activities” and thus, “may be prohibited next to a school when classes are in session.”).

354. *Id.* at 105.

355. *See id.* (reporting that “the demonstrators repeatedly cheered, chanted, baited policemen, and made other noise that was audible in the school; that hundreds of students were distracted from their school activities”).

356. *Id.* at 107–08.

357. *Id.* at 116 (internal quotation marks omitted).

358. *Id.*

359. *Id.* at 116–17. The Court in *Grayned* held that the ordinance survived incompatibility analysis because it “punishe[d] only conduct which disrupts or is about to disrupt normal school activities,” as determined based on “an individual basis, given the particular fact situation.” *Id.* at 119.

First Amendment law is also familiar with incompatibility because of the concept's use in forum doctrine. Forum doctrine is often interpreted to allow governments to bar speech-related uses of public property that are incompatible with the property's intended use.<sup>360</sup> Incompatibility analysis in forum doctrine cases focuses on whether there is physical incompatibility between the intended mode of expression and the government's intended use of the property. For instance, in *International Society for Krishna Consciousness, Inc. v. Lee*,<sup>361</sup> the Supreme Court framed the issue as whether in-person solicitation of travelers was incompatible with the purpose of an airport terminal, which is to ensure those travelers can timely reach their flight gates.<sup>362</sup>

What is called for here is more searching. *Prima facie* incompatibility of the type discussed in public forum cases—what, in application in *Lee*, amounted to mere inconsistency, which sounds in rationality review<sup>363</sup>—should be insufficient for the speech-restricting regulation to survive. Rather, the burden should be on the government to show that its interests cannot be met if the expression infringed by the restriction were permitted.<sup>364</sup> *Inconvenience* to the government or its purposes in passing a law should never be sufficient in such a case. And a prior use of the same government property or other resource for expressive purposes that occurred without incident, as was the case in

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360. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (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.”); see also *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring) (“If the objective, physical characteristics of the property at issue and the actual public access and uses which have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum.”).

361. 505 U.S. 672, 698 (1992).

362. See *id.* at 682–83 (describing the traditional use and expectations of airport terminals).

363. See *id.* at 682 (stating that the appellants’ expressions in the airport were inconsistent with the forum’s purpose because “terminals have never been dedicated to expression in the form sought to be exercised here: i.e., the solicitation of contributions and the distribution of literature”).

364. See *id.* at 679 (stating that “the government has a high burden in justifying speech restrictions relating to traditional public fora”).

*Clark*,<sup>365</sup> would cut the incompatibility analysis in the speaker’s favor. In sum, a default rule of the type incompatibility analysis would impose would return a speaker-favoring presumption to the Court’s First Amendment cases—a presumption to which the Court’s historical First Amendment cases express sympathy for.<sup>366</sup>

There is no denying that content-neutrality doctrine serves an important overarching purpose: to ensure that there is no freestanding speech-related defense to laws of general applicability. But incompatibility analysis would not stand in the way of most generally applicable laws aimed at criminal conduct. It would not, for example, undermine the longstanding rule that the First Amendment does not protect speech facilitating illegal activity.<sup>367</sup> A piece of false advertising is incompatible with the government’s compelling interest in protecting consumers.<sup>368</sup> Similarly, a Craigslist ad that solicits prostitution or offers to sell illegal drugs is incompatible with the interest in criminalizing the conduct that the barred speech proposes. It would be incompatible with the government’s purpose in criminalizing homicide, property damage, or the like to permit those crimes on the claim the conduct underlying the violation was expressive. Where a law is clearly aimed at an important governmental interest unrelated to expression and any claimed harm to the speaker punished under the law’s expressive interest is truly *de minimis*, an incompatibility test would not stand in the state’s way every time a defendant proffers a First Amendment defense.

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365. See *supra* notes 158–161 and accompanying text (noting that the National Mall had been previously used for “expressive sleeping” purposes prior to the Petitioner’s request).

366. See, e.g., *Thomas v. Collins*, 323 U.S. 516, 529–30 (1945) (suspending usual presumption of constitutionality and placing burden of persuasion on government where economic legislation adversely affected the “freedoms secured by the First Amendment”).

367. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”).

368. See, e.g., *Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 781 (1976) (“[T]he elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection its contribution to the flow of accurate and reliable information relevant to public and private decision-making.”).

An incompatibility analysis of content-neutral restrictions would also prove flexible enough to accommodate the parade of horrors that many claim would follow if those restrictions were to receive greater scrutiny because of their effects on speech.<sup>369</sup> Facially neutral government considerations such as traffic flow and safety could justify denials of parade permits, for example, so long as the chosen mode of expression and its chosen time and place were truly incompatible with the government's interest in denying such requests for uses of public space.<sup>370</sup> As Justice Marshall wrote when expounding on the incompatibility principle in *Grayned*:

[T]wo parades cannot march on the same street simultaneously, and government may allow only one. A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. If overamplified loudspeakers assault the citizenry, government may turn them down. . . . Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would.<sup>371</sup>

Under the current "substantial government interest" prong of the content-neutral intermediate scrutiny standard, courts barely scrutinize the substantiality of the government's asserted interest at all.<sup>372</sup> Justice Marshall's *Grayned* opinion also suggests another potential feature of an incompatibility test: the validity of a particular law under the test will place sharper focus upon the government interest asserted in defense of that law.<sup>373</sup> Where a

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369. See Redish, *The Content Distinction*, *supra* note 157, at 142 ("Proponents of the content distinction [between content-based and content-neutral restrictions] may be concerned that increasing the level of judicial scrutiny for content-neutral restrictions may result in a generally reduced skepticism for all content-based classification.").

370. *Supra* note 353 and accompanying text.

371. *Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972) (internal citations omitted).

372. See William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 782–84 (1986) [hereinafter Lee, *Lonely Pamphleteers*] ("[M]easuring the substantiality of the government's interest is not a critical part of the Court's time, place and manner methodology. The Court rarely tells legislatures or Congress that their concerns are insubstantial; therefore the balance usually will be struck in favor of governmental interests.").

373. *Grayned*, 408 U.S. at 117.

speaker’s First Amendment rights are implicated, courts should not assume government interests are substantial simply because the laws purportedly supporting those interests were products of the legislative process. Speech interests cannot be put to majority vote.<sup>374</sup>

### B. Untying Doctrinal Knots

An incompatibility test can also solve one of the First Amendment’s most bedeviling doctrinal problems. Since the mid-1980s, the Supreme Court has collapsed the review of time, place, and manner regulations, and of regulations infringing symbolic speech into a single strand of intermediate scrutiny that includes ample alternatives analysis.<sup>375</sup> Much harm to speech has followed.<sup>376</sup> Incompatibility analysis might untie these two lines of doctrine.

Specifically, when characterizing the barred speaker’s chosen communicative mode for incompatibility analysis purposes, the court might first categorize the mode according to a distinction that Susan Williams has drawn as “communicative” versus “facilitative.”<sup>377</sup> In a symbolic speech case such as *United States v.*

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374. See Lee, *Lonely Pamphleteers*, *supra* note 372, at 784 (illustrating that scholars have criticized “the minimal scrutiny the Court applies to the substantiality of the government’s interest,” stating courts have given substantial weight to government interests merely because they were “not imaginary” and, thus, have failed to honestly “weigh the interest against the impact on freedom of expression”).

375. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (“[T]he *O’Brien* test differs little from the standard applied to time, place, or manner restrictions”); see also Williams, *supra* note 149, at 619–20 (“The Court, arguing that the two standards were always functionally identical, has melded them into one test.” (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989))); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (noting that “the four-factor standard of *United States v. O’Brien*, 391 U.S. 367 (1968), for validating a regulation of expressive conduct” is “little, if any, different from the standard applied to time, place, or manner restrictions”).

376. See Williams, *supra* note 149, at 620 (“Although the two separate lines of doctrine were far from robust even when they were independent, the new unified doctrine provides even less protection for speech.”).

377. See *id.* at 660–61 (defining the “communicative” mode as conveying a message “through symbols that represent [the] message” and the “facilitative” mode as “part of the speech activity which the speaker uses to aid in the transmission . . . of the message, but which does not itself play a role in the

*O'Brien* or *Clark v. CCNV*,<sup>378</sup> the mode of expression—burning a draft card, sleeping in Lafayette Park, or burning an American flag<sup>379</sup>—the conduct at issue is *communicative*, as it plays “a role in the representation of the message.”<sup>380</sup> In many cases, the speaker’s choice of mode is itself expressive; upholding the restriction in such a case on ample alternatives grounds forces the speaker to change her message to something different altogether.<sup>381</sup> It is in these symbolic speech cases where ample alternative channels analysis does the most harm to speech.<sup>382</sup>

Alternatively, in a case traditionally characterized as involving the time, place, or manner of expression, the choice of mode is *facilitative* of the underlying expression.<sup>383</sup> The mode aids in the message’s transmission and is intended to expand the potential audience for the speech—the use of loudspeakers on a sound truck<sup>384</sup> or of one’s own PA system rather than the one a host provides<sup>385</sup>—but it is not itself communicative. Here, finding the

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representation of the message”).

378. 468 U.S. 288 (1984)

379. *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

380. *Williams*, *supra* note 149, at 661–63.

381. *See id.* at 644 (“In a true symbolic speech case . . . [where] the communication takes place through symbolic action—the regulation would have to be aimed at . . . non-speech activities, rather than . . . content categories of speech, and the government’s purpose would have to be to prevent some non-communicative harm caused by such activities.”).

382. *See id.* at 654 (“[T]he range of doctrinal tools available to deal with complex first amendment problems has been reduced, and real first amendment protections have been lost.”).

383. *See id.* at 706 n.330 (“If the physical activity about which the government is concerned is expressive, we have a symbolic speech case; if it is facilitative, we have a [time, place, or manner] case.”).

384. *See, e.g., Kovacs v. Cooper*, 336 U.S. 77, 78 (1949) (examining the constitutionality of an ordinance that made it unlawful to use a sound truck for “advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares”).

385. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989)

This case arises from the city’s attempt to regulate the volume of amplified music at [an amphitheater] so the performances are satisfactory to the audience without intruding upon those who [reside] in its vicinity. The city’s regulation requires [amphitheater] performers to use sound-amplification equipment and a sound technician provided by the city.

speaker could have used an alternative mode may do less harm to the speaker’s expressive right.

And a third kind of case, not delineated by Williams but highly relevant, involves government infringements of the speaker’s choices of how, when, and where to speak that do not constitute symbolic speech, but nevertheless go to the core of the expressive act to a much greater degree than in the run-of-the-mill time, place, or manner restriction on facilitative conduct. Here, recall the kinds of cases discussed in Parts III.B.1. and B.4. *supra*: public protests at specific events intended for specific audiences, of the type discussed in the *Menotti*<sup>386</sup> and *Bl(a)ck Tea Society*<sup>387</sup> cases, or on-site abortion counseling of the type discussed in *McCullen*.<sup>388</sup> We might call these cases “associative conduct” cases, because though they do not involve symbolic speech, the relevant speech’s intended message and effects, along with its particular audience, are inextricably *associated* with the message’s mode, time, and place—so much so that communicative content can be ascribed to the speech-accompanying conduct.

Incompatibility analysis could take into account these three categories by granting greater or less deference to the speaker’s choice of expressive mode depending on where along the communicative-associative-facilitative continuum the mode falls. In other words, a presumption in favor of the speaker could be applied where the conduct in question is communicative or associative prior to determining whether permitting the mode would be incompatible with the government interest at issue. The more communicative a speaker’s choice of mode, the more likely the content-neutral restriction that has infringed upon that mode will be found to have violated the speaker’s First Amendment right.

Adopting incompatibility analysis can encourage courts to closely analyze the role that speech-accompanying conduct plays in a speaker’s expressive act. Under current doctrine, it is a court’s characterization of a particular law as content-based or content-

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386. *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005).

387. *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004).

388. *McCullen v. Coakley*, 844 F. Supp. 2d 206 (D. Mass. 2012).



neutral, not the speaker's intent, which decides the answer to that question.<sup>389</sup>

### *C. Incompatibility and Underinclusivity in the Review of Content-Neutral Laws*

Another important doctrinal advance that incompatibility analysis would accomplish is to place underinclusivity in the foreground when analyzing content-neutral speech restrictions. Despite the fact that scrutiny of such restrictions is nominally rigorous, courts have failed to take underinclusivity seriously in analyzing content-neutral laws.<sup>390</sup> First Amendment review of sign regulations offer a good example.

Municipalities justify signage restrictions based on government interests in traffic safety and aesthetics.<sup>391</sup> The local ordinance at issue in the abovementioned *Reed* facially distinguished between signs based on the message that those signs conveyed and was thus, as the Supreme Court eventually found, clearly content-based; in effect, the size of a sign or the length of time a sign could be shown depended on what that sign said.<sup>392</sup> As noted above, the Town of Gilbert had argued to the Supreme Court, consistent with the Ninth Circuit's holding in its favor, that its ordinance was content-neutral; in offering the government interests supporting the ordinance, the Town claimed that it

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389. See Redish, *The Content Distinction*, supra note 157, at 121–27 (discussing the development of the content-based and content-neutral distinction within the Supreme Court).

390. See *Harnish v. Manatee County*, 783 F.2d 1535, 1539 (11th Cir. 1986) (finding that bans on portable signs that were justified for aesthetic reasons were not fatally underinclusive, even though such signs “represent[ed] a small fraction of the total number of sign advertisements” in those cities); Mark Cordes, *Sign Regulation After Ladue: Examining the Evolving Limits of First Amendment Protection*, 74 NEB. L. REV. 36, 67 (1995) (“Potential problems arise, however, with regard to content-neutral restrictions which prohibit or more severely restrict particular types of signs within the same area, thus posing underinclusiveness concerns.”).

391. See Cordes, supra note 390, at 1 (recognizing one primary concern of municipal efforts to regulate signs and billboards to be “supporting regulation, most notably traffic safety and aesthetics”).

392. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (finding the town ordinance “content based on its face”).

“serve[d] to minimize visual clutter and confusion for people traveling to an event that has already concluded.”<sup>393</sup>

The Town’s arguments as to the relationship between these two asserted state interests and the means taken to further them, while claiming to apply intermediate scrutiny to its own ordinance, sound more in rationality review. As discussed *supra*, content-neutral intermediate scrutiny is, in effect, rational basis review, and those arguments thus would likely have been sufficient to uphold the Town’s restrictions if the Ninth Circuit had deemed the ordinance content-neutral.<sup>394</sup> However, the interests in preserving such “visual clutter” or in protecting “confuse[d] travelers”<sup>395</sup> would not survive incompatibility analysis. As to the “visual clutter”-related interest, the permissibility of a range of other signs—political signs (the display of which had to be allowed under state law), or signs that the Town called “Ideological Signs,” whose use was much less restricted under its ordinance—shows that the ordinance’s limits on a *particular subset* of signs is drastically underinclusive.<sup>396</sup> And as to the “confused traveler”-related interest,<sup>397</sup> travelers can be confused for a range of reasons, the overwhelming majority of which have nothing to do with a local church sign promoting an event in that community that has already passed. In both cases, the underinclusivity of the ordinance demonstrates that the restricted speech at issue is not

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393. Brief for Respondents, *supra* note 323, at 4. The Court’s cases have expressed sympathy for such arguments. *See, e.g.,* *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion) (explaining that “[w]here a city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience, these are reasonable” restrictions and there is no constitutional violation); *id.* at 307 (Douglas, J., concurring) (“In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.”).

394. *See supra* Part III.A (discussing self-autonomy theory and the marketplace).

395. Brief for Respondents, *supra* note 323, at 48.

396. *See Reed v. Town of Gilbert*, 707 F.3d 057, 1061 (9th Cir. 2013) (“Section 4.402(D) lists nineteen different types of signs that are allowed without a permit. Three of the types of exempted signs are of particular relevance: ‘Temporary Directional Signs Relating to Qualifying Event,’ ‘Political Signs,’ and ‘Ideological Signs.’”).

397. Brief for Respondents, *supra* note 323, at 48.

incompatible with the relevant state interests, and the ordinance should fail.

By focusing on the potential underinclusivity of government action suppressing speech, incompatibility analysis will force the government to act much more narrowly when burdening speech through content-neutral restrictions. For instance, while a generalized interest in aesthetics and visual clutter will often be insufficient to demonstrate sufficient incompatibility for a law to survive First Amendment scrutiny, preservation of a particular area's historic or aesthetic character might be.<sup>398</sup> While this kind of incompatibility-based tailoring may or may not be as demanding as the least restrictive means requirement that is applied to content-based restrictions—a test whose applicability to the content-neutral context the Court has rejected<sup>399</sup>—it will hold the government to its obligation to limit as little speech as possible when acting. Incompatibility will ensure that the burden of persuasion remains on the state to justify even an incidental restriction.<sup>400</sup>

### V. Conclusion

In 1939's *Schneider v. State of New Jersey*,<sup>401</sup> the Supreme Court was faced with four challenges to municipal ordinances passed by cities in California, Massachusetts, New Jersey, and Wisconsin.<sup>402</sup> These laws prohibited or restricted distributing

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398. See, e.g., *Messer v. City of Douglasville*, 975 F.2d 1505, 1511 (11th Cir. 1992) (finding a restriction on signs within 300 feet of historic site to be permissible).

399. See *Volokh*, supra note 26, at 64 (“While this principle [that the speaker chooses his means of communication] generally applies when the law restricts the content of speech . . . and thus interferes with the speaker's choice of content, it generally doesn't apply when a content-neutral law restricts the manner of speech, [interfering] with the speaker's choice of manner.”).

400. Cf. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 79–80 (1981) (Stevens, J., concurring in judgment) (“[I]f one starts . . . from the premise that appellant's claims are rooted in the First Amendment, it would seem reasonable for the Borough to overcome a presumption of invalidity.”).

401. 308 U.S. 147 (1939).

402. See *id.* at 153–54 (1939) (“Four cases are here, each of which presents the question whether regulations embodied in a municipal ordinance abridge the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment of the Constitution.”).

handbills or other preprinted material, regardless of the distributor’s identity or the handbill’s content.<sup>403</sup> In all four cases, the convictions for violating the ordinances were affirmed by the courts below, which found that the laws struck the proper balance between “the right of free expression” and the cities’ power to pass “reasonable” regulations supported by the governmental interests in preventing “littering of the streets” and “protecting the occupants” of homes “from disturbance and annoyance.”<sup>404</sup> Two of those courts, foreshadowing the dispositive role that alternative channels analysis would come to play in First Amendment doctrine, upheld the ordinances in question on the ground they excluded only “the public streets” from handbill distribution, and “leave[] open for such distribution all other places in the city, public and private.”<sup>405</sup>

The Supreme Court invalidated all four ordinances.<sup>406</sup> After noting that all of the ordinances were content-neutral but nevertheless burdened free expression,<sup>407</sup> the Court took particular exception to the claim that the ordinances permitted handbillers to distribute their messages in other ways, and that this fact saved the laws’ constitutionality.<sup>408</sup> The Court proclaimed that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”<sup>409</sup>

In the fifty years since *United States v. O’Brien*, the Court has abandoned this pronouncement. In its place, the Court has

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403. See *id.* at 156 (“An ordinance of the City of Worcester, Massachusetts, provides: ‘No person shall distribute in, or place upon any street or way, any placard, handbill, flyer, poster, advertisement or paper of any description.’”).

404. *Id.* at 165.

405. See *id.* at 157 (quoting the Massachusetts court’s decision upholding the Worcester ordinance); see also *id.* at 163 (referring to the Los Angeles ordinance).

406. See *id.* at 160 (“Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.”).

407. See *id.* at 163 (noting that one of the ordinances “bans unlicensed communication of any views or the advocacy of any cause”).

408. See *id.* (stating that the streets are an appropriate place to distribute printed matter to the public and just because one could theoretically distribute those materials elsewhere does not mean that the ordinance is constitutionally sound).

409. *Id.*; see also *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (citing *Schneider* for the very same proposition); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (per curiam) (same).

entrenched an approach that permits an entire category of burdens on speech-related conduct on the ground that those burdens are instrumental rather than substantive. And, in support of this approach, it has ratified an inquiry that permits judicially created speech norms to override speaker communicative choice—the very kind of governmental imposition on expression that the First Amendment was designed to protect speakers from.

A return to Justice Roberts' *Schneider* First Amendment baseline will likely result in more protestors sleeping in public parks to raise awareness about homelessness; more Hare Krishnas attempting to hand us leaflets as we stroll along the fairgrounds or rush to our airport gates; and more political signs in our public right-of-ways. These are minor prices, and they are well worth paying for a society that is committed to free expression. It also likely means that women seeking to exercise their right to choose will be confronted by anti-abortion activists who believe that those women may be about to make a tremendous mistake,<sup>410</sup> or that a candidate or her supporter seeking to persuade a voter need not stand back one-hundred feet from the entrance of the voter's polling place.<sup>411</sup> Perhaps some of us might be more equivocal about those prices. But again, they are worth paying in a society that is committed not only to the individual's liberty to decide what to say, but also of how one may say it.

It is indeed so that the First Amendment feeds “[h]umanity's innate desire for truth.”<sup>412</sup> But the Speech Clause also leaves to each of us to choose how to fulfill that desire, and to find that truth. In analyzing content-based restrictions on speech, the Supreme Court insists that “the First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.”<sup>413</sup> By abandoning ample alternative channels analysis, the Court can respect that same principle in its review of content-neutral laws.

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410. See *supra* Part III.B.4 (discussing abortion clinic protest cases).

411. See *Burson v. Freeman*, 504 U.S. 191, 204 (1992) (“New York . . . prohibited any person from ‘electioneering on election day within any polling-place, or within one hundred feet of any polling place.’”).

412. William F. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 27 (1995).

413. *Riley v. Nat'l Fed. of Blind*, 487 U.S. 781, 790–91 (1988).