# The Content-Discrimination Two-Step Post-*Reed* and *Austin*

*Enrique Armijo**

## Introduction

Decided in its 2021–2022 term, the U.S. Supreme Court's decision in *Austin v. Reagan National Advertising* held an ordinance that defined whether a sign was on- or off-premises based on the sign's message was content neutral, and thus should not be subjected to strict scrutiny by a court reviewing the law under the First Amendment.[1] To some, including the dissenters in *Austin* itself, the decision repudiated the Court's prior sign ordinance case, the 2014–2015 term's *Reed v. Town of Gilbert*. That case held that, for First Amendment purposes, a court should deem a speech-restrictive law content based, and thus presumptively unconstitutional, if the law "on its face draws distinctions based on the message a speaker conveys." *Reed* then applied that rule to invalidate an ordinance that treated signs differently based on their content. Both *Reed* and *Austin* address the proper application of the Court's "content-discrimination" doctrine, which dictates that under the First Amendment—and with a few exceptions not relevant here—government may generally not regulate speech because of what it says.

*Reed* set off a firestorm of criticism, with those opposed to the decision believing it threatened a range of existing rules and doctrines more forgiving of government action that affected speech, from commercial speech to compelled disclosures. These critics

* Professor, Elon University School of Law; affiliated fellow, Yale Law School Information Society Project; faculty affiliate, UNC-Chapel Hill Center for Information, Technology, and Public Life. Thanks to Ash Bhagwat and Alan Chen for comments, to Kaylee Faw for research assistance, and to the *Cato Supreme Court Review* for inviting me to write this article.

[1] City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464 (2022).

believed *Reed* thus called into question areas of regulation that were long thought to be of no First Amendment concern.[2] Similarly, some commenters welcomed *Austin* as a necessary but incomplete, if slightly disjointed, corrective.[3] By its own terms, the rule announced in *Austin* gives governments greater leeway in using speech as a basis for regulation. But by diluting *Reed*'s primary contribution to content-discrimination doctrine, *Austin* has cracked open a door that *Reed* was right to shut.

In setting out a content-discrimination rule that operates independently of government purpose, *Reed* rejected prior, more contextual interpretations of the Court's First Amendment cases. These interpretations had held governments could make facial references to a particular type or category of content in their laws and still avoid strict scrutiny, so long as those laws were not referring to that content in order to express disagreement with or disapproval of it. Contrary to how most lower courts had understood and applied content-discrimination doctrine, *Reed* held laws that treat different kinds of speech differently deserve strict scrutiny regardless of any asserted government purpose to justify doing so. Post-*Reed*, it was thought that even a benign governmental purpose could not save a law referring to content from the most rigorous constitutional standard of review.

However, *Austin*, in which the Court found a content-neutral purpose could cause a law referencing content to avoid such scrutiny, has now brought that principle back into question. The result of *Austin*'s partial unwinding of *Reed*'s core First Amendment holding will inevitably be an unwelcome return to judicial considerations of government purpose and intent behind regulations that facially and intentionally distinguish among types of speech. By permitting legislatures to treat speech differently through the use of statutory

[2] See, e.g., Adam Liptak, Court's Free-Speech Expansion Has Far-Reaching Consequences, N.Y. Times (Aug. 17, 2015), https://nyti.ms/3yM2U1B.

[3] See, e.g., Amanda Karras, Big Win for Local Government in Supreme Court Sign Case, International Municipal Lawyers Association (Apr. 21, 2022), https://bit.ly/3uT8sGx; but see, e.g., Eugene Volokh, Supreme Court on What Counts as a Content-Based Speech Restriction, Volokh Conspiracy (Apr. 21, 2022), https://bit.ly/3IEqbHD (*Austin* makes content discrimination test "somewhat fuzzier"); Laurence Tribe (@tribelaw), Twitter (April 27, 2022 7:31AM), https://bit.ly/3z9JPYN (*Austin* "made a total mess of 1st Am law").

references to content, it will also give governments that seek to punish speech they do not like more opportunities to do so.

Part I of this article details the shifting and uncertain role government purpose has traditionally played in content-discrimination doctrine. It argues *Reed* was correct in cabining the consideration of purpose in First Amendment cases to only those instances in which content-neutral regulations of speech are being used to discriminate against particular speech and speakers. Part II discusses *Austin*, in particular how and why the Court avoided the obvious conclusion that the ordinance at issue was content based on its face—a conclusion compelled not just by *Reed* but by common sense. Part III argues that nearly all the consternation around *Reed*'s formalistic rule stems from a failure to disentangle content discrimination from another regulatory area of less traditional First Amendment concern, namely compelled disclosures and related information-forcing by the government in the interest of public health, safety, and protection. Unraveling those two threads reveals that the *Reed* two-step is not the anti-regulatory bludgeon that its detractors fear.

## I. *Reed* and the Evils of Government-Purpose Tests

*Reed v. Town of Gilbert* was born out of a decades-long confusion, starting at the Supreme Court but then manifesting itself in dozens of federal appellate First Amendment cases, over the role government purpose should play in setting a standard of review for legislative uses of content categories. Content discrimination began as a doctrine applied in facial First Amendment challenges rather than as-applied ones. But, prior to *Reed*, courts regularly applied the doctrine in a way that permitted governments to regulate speech using laws whose text referred to the content of that speech, so long as the reference was not made in order to express official disagreement or disapproval of the particular content being abridged.

As early as 1972 the Supreme Court stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[4] However, the Court's assessment of government purpose in content-discrimination doctrine finds its roots, like many of its

[4] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

doctrinal wrong turns, in cases involving sexually explicit speech.[5] In 1976's *Young v. American Mini Theaters*, the Court adopted a lenient standard of review in assessing a statute that clearly and obviously treated adult theaters differently from other theaters. Writing for four members of the Court, Justice John Paul Stevens wrote that the essence of content-discrimination doctrine was the requirement of "absolute neutrality by the government" with respect to content; the government's "regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator."[6] Stevens's point then became the primary inquiry under the doctrine: if there was no evidence that the government's reference to content was based on "hostility for the point of view being expressed," then the neutrality requirement was met and the reference to content was not constitutionally suspect. This principle reached its peak in influence 13 years later in 1989's *Ward v. Rock Against Racism*, in which the Court, in assessing the constitutionality of a facially content-neutral regulation, stated that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[7] In other words, if a statute treated a speaker differently due to a statutory reference to the content of that person's speech, that abridgement could nevertheless avoid strict scrutiny if there was no evidence the government passed the content-classifying statute out of hostility to the content being classified.

Following *Ward*, the Court continued to prioritize purpose testing over facial review in First Amendment cases, such as its statement in *Bartnicki v. Vopper* that "in determining whether a regulation is

[5] *Young v. American Mini Theaters*, along with its successor cases *City of Renton v. Playtime Theatres* and *City of Los Angeles v. Alameda Books*, also adopted the much-maligned secondary effects doctrine, under which a reviewing court can find a facially content-based restriction content neutral if the restriction is aimed at the "secondary effects" of the content. In fact, the doctrine is so maligned that the Court has never applied it outside of First Amendment challenges to zoning restrictions by adult theaters. But see Mark Rienzi & Stuart Buck, Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test, 82 Fordham L. Rev. 1187, 1189–92 (2013) (arguing that even without formal extension, the secondary effects doctrine has had negative, speech-averse effects on other areas of First Amendment law).

[6] Young v. Am. Mini Theaters, 427 U.S. 50, 68 (1976).

[7] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

content based or content neutral, we look to the purpose behind the regulation."[8] Armed with such language, the lower courts crafted content-discrimination tests that put purpose, not text, as the driving inquiry in assessing First Amendment facial challenges. And because of "the general reluctance [of courts] to impute illicit purpose," the government purpose part of the inquiry consistently led to laws that referred expressly to content being subjected to only intermediate scrutiny.[9] For example, the Fourth Circuit characterized its content-discrimination test as one that followed a "pragmatic rather than formalistic approach to evaluating content neutrality," under which a speech regulation "is only content based if it distinguishes content with a censorial intent."[10] And in the lower court decision in *Reed* itself, the Ninth Circuit upheld the town of Gilbert's sign ordinance despite its use of content to distinguish among regulatory treatment of signs because the town "did not adopt its regulation of speech because it disagreed with the message" of the statutorily disfavored signs.[11] A search for evidence of censorial intent by the government, rather than a facial review of a statute's text, was the driving force in setting the standard of review.[12] Indeed, in looking for such intent, some courts even considered a government's purpose *before* looking at the text of the statute at issue.[13]

The reason so many applications of pre-*Reed* content-discrimination doctrine focused on government purpose was due to judicial unease with the premise underlying the doctrine itself: that government references to categories of speech in law are constitutionally

[8] 532 U.S. 514, 526 (2001). The majority opinion in *Bartnicki* was also written by Justice Stevens.

[9] Leslie Kendrick, Content Discrimination Revisited, 98 Va. L. Rev. 231, 292 (2012); see also *id.* at 296 ("Where both suspect and neutral justifications [for a content-based classification] are present, [the Court] tends to give the government the benefit of the doubt.").

[10] Clatterbuck v. City of Charlottesville, 708 F.3d 549, 556 (4th Cir. 2013), abrogated by Cent. Radio Co. v. City of Norfolk, 811 F.3d 625 (4th Cir. 2016).

[11] Reed v. Town of Gilbert, 707 F.3d 1057, 1071 (9th Cir. 2013), rev'd and remanded, 576 U.S. 155 (2015).

[12] The leading constitutional law treatise of the time agreed. See Laurence Tribe, American Constitutional Law 794 (2d ed. 1998) (a law is content based "if on its face a governmental action is targeted at ideas or information *that government seeks to suppress*") (emphasis added).

[13] See, e.g., Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 366 (4th Cir. 2012).

suspect regardless of the nature of the category. In particular, the unease arises from a tension between that premise and a broader feeling, recognized in many First Amendment cases, that all speech is not equally valuable.[14] As Ashutosh Bhagwat writes, treating all government references to content as triggering strict scrutiny runs into "an unstated discomfort with the implications of [the doctrine's] all-speech-is-equal premise," which meant that "judges regularly look[ed] to avoid labeling the law [under review] as content based, even when it is clearly so."[15] In other words, if one believes that some speech is more valuable than other speech—and that belief is supported by, indeed embedded in, not just many First Amendment cases, but the self-governance rationale for the First Amendment[16]—then government references in law to that kind of "more valuable" speech are more pernicious than references to content that is not as valuable. And the converse is also true; when the government refers in its laws to speech that is less valuable, it often means no harm, to that speech or to the First Amendment more generally, and so judicial review should be less strict. If one needs proof-of-concept for this theory, the tension Bhagwat identifies also fully explains why content-discrimination doctrine went so wrong in cases involving sexually explicit films and books.[17]

Purpose-based content-discrimination analysis is one approach to First Amendment problems, but it certainly does not treat all government references to content alike. Nor does it seem consistent with the text of the amendment itself, which does not distinguish among types of government speech abridgements based on their underlying purpose or motivation. And as is usually the case, theoretical confusion led to confusion in application. As I mentioned above, different courts were giving different weight to government purpose

[14] See, e.g., Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("Not all speech is of equal First Amendment importance.") (cleaned up and quoting several cases).

[15] Ashutosh Bhagwat, In Defense of Content Regulation, 102 Iowa L. Rev. 1427, 1428 (2017).

[16] Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("Speech concerning public affairs is more than self-expression; it is the essence of self-government.").

[17] See also Alan E. Brownstein, Illicit Legislative Motive in the Municipal Land Use Regulation Process, 57 U. Cin. L. Rev. 1, 95 (1988) ("Although the Court never explicitly affirms the view that sexually explicit expression is a generally less valuable form of speech [in the secondary effects cases], no other explanation of *Renton* is plausible.").

in their applications of content-discrimination doctrine, with some applying text-based tests and some analyzing motive.[18] The question before the Court in *Reed*, therefore, was whether, to quote the proposed question presented in Clyde Reed's successful petition for certiorari, the purpose-focused lower courts were correct that a "mere assertion of a lack of discriminatory motive" could "render [a] facially content-based sign code content neutral."[19]

*Reed*'s primary doctrinal contribution in response to these developments was to cabin analysis of government purpose. According to *Reed*, when assessing whether a law was content based or content neutral, a reviewing court was to take a two-step approach: First, assess whether the law on its face referred to content. If the answer to that question was yes, then the court should apply strict scrutiny, and—to borrow a term from the well-known administrative law two step from *Chevron v. Natural Resources Defense Council*—then "that is the end of the matter" for content-discrimination doctrine. In other words, despite the purpose-focused language in *Young* and *Ward* and the applications of that language in content-discrimination cases in lower courts, when analyzing a law on its face, a court should not inquire as to whether the law regulates speech "because of disagreement with the message [the affected speech] conveys." By contrast, if the law under review makes no facial reference to speech, *then* the reviewing court asks whether that facially neutral law was adopted because of disagreement with the speech the law regulates—that is, the court asks whether the "purpose and justification for the [content-neutral] law are content based." Government purpose, in other words, cannot save content-based laws from strict scrutiny; it can only doom content-neutral laws that are content-discriminatory in their purpose or intent. The guiding inquiry is not a search for governmental motive that reveals or disproves a commitment to neutral treatment, rather, the test is textual. The larger question in *Reed*, as

[18] See Bethany J. Ring, Comment, Ripples in the Pond: United States Supreme Court Decision Impact Predictions v. Reality, 23 Chap. L. Rev. 205, 219–20 (2020) (Fourth, Sixth, and Ninth Circuit tests permitted a content-neutral motive for a facially content-based law to avoid strict scrutiny, while First, Second, Eighth, and Eleventh Circuits looked to law's text and Third Circuit applied a "context-sensitive balancing" content-discrimination test).

[19] Petition for Writ of Certiorari by Pastor Clyde Reed & Good News Cmty. Church at i, Reed v. Town of Gilbert, 576 U.S. 155 (2015) (No. 13-502).

well as in the commentary following it, is how formalistically content discrimination should be applied—that is, whether, like overbreadth, the other facial doctrine for First Amendment challenges, it should begin and end with a statute's text, or rather whether functionalist inquiries of statutory interpretation like purpose and intent can inform, and even override, answers supplied by textual analysis. *Reed* planted the flag firmly in the former camp.

Even though *Reed* was unanimous in the judgment, several concurring justices expressed concerns about the consequences of adopting a content-discrimination rule that could not use a speech-benign government purpose to save content-based laws from strict scrutiny. Justice Stephen Breyer argued that a formalistic approach to content neutrality would place most government regulation at risk.[20] Justice Elena Kagan warned that the *Reed* approach would threaten a host of noncensorial laws that referred to content for reasons unrelated to that content's viewpoint.[21] And Justice Samuel Alito concurred in the judgment by listing other hypothetical sign regulations that he argued would survive the *Reed* two-step, including, most helpfully for the city of Austin six years later, a sign law "distinguishing between on-premises and off-premises signs."[22]

*Reed* represented a victory for the argument that government purpose or intent should not save facially content-based laws from strict scrutiny. The victory recognizes that the government's intent in passing a statute that references content bears no relation to the subsequent application of that statute's content distinction against a particular speaker because of what they say. By definition, content-based laws lend themselves to censorious applications. If a category of content is capable of being proscribed based on the face of a statute, nothing holds the government back from doing so, even for viewpoint-discriminatory reasons, so long as its true motivation is kept hidden from view. Motivation or intent with respect to a statute's passage, in other words, does not bear on motivation or intent with respect to its application. *Reed* decided that the First Amendment solution to that problem was to invalidate the government's opportunity to act on its discriminatory intent in application, rather

[20] Reed, 576 U.S. at 175 (Breyer, J., concurring in the judgment).

[21] *Id.* at 179 (Kagan, J., concurring in the judgment).

[22] *Id.* at 174 (Alito, J., concurring).

than force the speaker to wait for an as-applied challenge post-enforcement and proffer evidence of such intent *ex post*.

Take for example the sign ordinance in *Austin* itself, which is discussed in more detail below. If the city of Austin is permitted to treat offsite signs differently than onsite signs, and signs are classified in those categories based on what they say, what prevents the city from using that distinction to discriminate against offsite signs that it disagrees with? The answer is nothing, because overinclusiveness with respect to content discrimination is not a deterrent for the government. Neither a Catholic church nor a mosque can erect an offsite sign advertising its services within Austin's city limits. But a government that does not like Islam and is indifferent to Catholicism simply pays the cost of discriminating against speech it does not care about in order to discriminate against speech that it dislikes. And if a speaker of the disfavored content is less likely to be able to erect an onsite sign because it does not have property on which to build one, all the better for the government. In this example and many others, the facial content distinction has content-differential effects in application, and those content-differential effects may even be motivated by animus, let alone a lack of neutrality, toward certain content. But as shown in part II below, after *Austin*'s limits on the facial inquiry set out in *Reed*, that does not matter.

Nor should this concern be alleviated by the fact that as-applied challenges can smoke out censorious applications of laws referencing content that a court has deemed content neutral on purpose grounds. With some notable recent counterexamples by the legislatures of Florida and Texas notwithstanding,[23] governments generally do not willingly give up evidence of censorious intent with respect to a content-referencing law's passage.[24] Legislative history

[23] See, e.g., NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082, 1093–94 (N.D. Fla. 2021) (signing statements and bill sponsor statements demonstrating a "viewpoint-based motivation" for legislation, "without more, subjects the legislation to strict scrutiny"), aff'd, 34 F.4th 1196, 1228 (11th Cir. 2022) (disagreeing that expressing a viewpoint-based motivation for a law alone is sufficient to trigger strict scrutiny, but noting that "there's no legitimate—let alone substantial—governmental interest in leveling the expressive playing field").

[24] For an argument that purpose and motivation tests are both (1) difficult to apply, because legislators have a "collection of different motivations," and (2) futile, because the government is always free to supply a less constitutionally suspect motivation to the same legislative classification after judicial review, see Palmer v. Thompson, 403 U.S. 217, 224–25 (1971).

or its equivalent concerning the government's adverse *application* of a given law to a particular speaker is even harder to find.[25] And differential effects, in the First Amendment and elsewhere in constitutional law, are almost never enough. As Geoffrey Stone points out, "[e]ven when the Court does take the presence of a content-differential impact into account in its content-neutral balancing, it does not shift automatically to full content-based standards of review."[26]

In the end, as *Reed* correctly recognized, government purpose analysis suffers from a fatal and irredeemable flaw: One legislature's benign content-neutral purposes in passing a facially content-based law does not limit a future executive officer from then using that content distinction to apply that law in a discriminatory way against speakers of that content that the government does not like. Justifications offered for the content-based legislative distinction in litigation do not bind a future enforcer in any way; the distinction, having survived a lesser level of scrutiny, lies in wait to be used against speakers whose speech falls into the disfavored content category. As Justice Clarence Thomas wrote for the *Reed* majority:

> Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—*i.e.*, the "abridge[ement] of speech"—rather than merely the motives of those who enacted them.[27]

To assess *Austin*, one must ask the degree to which it reaffirmed this principle. As I discuss below, the majority in *Austin* avoided the obvious

[25] The Court has deemed a law's textual "target[ing of certain] speakers and their messages for disfavored treatment" as support for the conclusion that a law's motivation is content- and viewpoint-based. See Sorrell v. IMS Health, Inc., 564 U.S. 552, 565 (2011). But that is motive analysis based on the text of the statute itself, not on extrinsic evidence of purpose or motivation. In fact, the Court in *Sorrell* essentially discounted the content-neutral interests asserted in support of the law in light of its application to a limited set of speakers. In other words, motivation analysis based on statutory text trumped motivation analysis based on asserted interests.

[26] Geoffrey R. Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81, 103 n.110 (1978) (citing United States v. O'Brien, 391 U.S. 367 (1968)).

[27] Reed, 576 U.S. at 167.

result on the narrow content-based versus content-neutral question before it, but its avoidance will come at a broader doctrinal cost.

## II. Sign, Sign, Everywhere a Sign, Blockin' out the Scenery, Breakin' my Mind[28]

After *Austin*, a regulation that requires reading a sign to determine whether a restriction applies to that sign does not necessarily result in differential treatment of speech that should be of first-order First Amendment concern. This is the Court's point in distinguishing between the sign categories in *Reed*—"ideological," "political," "temporary directional"—and the on- versus off-premises categories in *Austin*. Differential treatment based on references to particular kinds of subject matter or viewpoint are problematic, but references to content *per se* are not. But the *Austin* ordinance itself disproves this point.

Though there was no evidence yet in the record that the ordinance was intended to treat offsite signs worse than onsite ones because of the particular kinds of messages offsite signs tended to carry, the ordinance by definition creates a preference for on-premises signs by subjecting them to fewer restrictions. And dispositively for content-discrimination doctrine purposes, whether those restrictions apply depends not just on the location of a sign, but on the connection between a sign's location and its content. This is so even though the interests Austin asserted in support of the ordinance in the litigation—"to protect the aesthetic value of the city and to protect public safety"[29]—are not any more adversely affected by off-premises signs than they are by on-premises ones.[30]

To further prove the point, compare an imaginary (and much shorter) sign ordinance that subjects all signs, regardless of location, to the same restrictions. As a general matter under First Amendment doctrine, the absence of a categorical approach to regulating speech usually scrubs any content-discrimination-related problems, at least

[28] Five Man Electrical Band, Signs (May 1971).

[29] Amended Joint Stipulation of Fact and Evidence, Reagan Nat'l Adv. & Lamar Adv. Holding Co. v. City of Austin, W.D. Tx. 1:17-CV-673-RP (filed June. 5, 2018), ¶ 13, J.A.61a.

[30] Mosley, 408 U.S. at 100 (holding a ban on nonlabor residential picketing underinclusive, and thus in violation of the First Amendment, when labor picketing affected government interest in residential peace just as adversely).

facial ones.[31] But by contrast, by distinguishing based on location, the actual Austin ordinance chooses among types of signs that would be so restricted and those that would not, and the enforcement of the choice depends on the content of the sign.

The Austin ordinance arguably makes speaker-based distinctions as well. It could safely be presumed that on-premises signs are often owned by (or at a minimum more often owned by than off-premises signs), and always under the control of, the owner or occupier of the premises where the sign is located.[32] So, given a connection between the message on the sign and its location, those who put signs on their own property are subjected to many fewer restrictions in Austin than those who put them elsewhere. That creates a preference for, if not a category of speech, then a certain category of speaker, namely those who use their own property for speech rather than the property of another.

By making a premises-based distinction, the city of Austin relied on, and was respectful of, longstanding principles in both common law property and First Amendment doctrine—particularly the notion that using one's own property for speech is consistent with the doctrine of exclusive possession and the liberty to use one's property to express one's views free of government interference. The fact that the *Austin* Court was untroubled by the ordinance's favored treatment of on-premises signs might have been proof that the Court, at least implicitly, agreed. As the Court said in *City of Ladue v. Gilleo*,

> A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there. . . . Most Americans would be understandably dismayed . . . to learn that it was illegal to display from their window an 8-by-11-inch sign expressing their political views.[33]

[31] See Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640, 649 (1981) (anti-solicitation ordinance "applied evenhandedly to all who wished to solicit funds" and was thus content neutral) (edits omitted) (quoted in Austin, 142 S. Ct. at 1473).

[32] The Austin sign ordinance defined an "off-premise sign" as "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." Austin J.A. 65.

[33] City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994); see also Maureen E. Brady, Property and Projection, 133 Harv. L. Rev. 1143, 1172–73 (2020) (noting that *City of Ladue* and other cases "emphasize[] the importance of the private citizen's right to communicate on or from his or her property.").

To be sure, *Austin*'s solicitousness of this principle isn't complete—the ordinance cuts in favor of property owner speech in a relative sense but against it in an absolute sense, since even on-premises sign owners are limited to speaking about only topics that relate to what is happening on their property.[34] But there is no real question that, under the ordinance, off-premises speakers' speech is more restricted, if not what they can say then how they can say it, than on-premises speech. Favoring one category of signs necessarily disfavors the other category. Property owners can put a billboard on their property, or later digitize it, so long as it advertises something for offer on their property. A billboard owner that owns the billboard alone, like the respondent companies in the *Austin* case itself, cannot do the same, unless the message on the billboard advertises something taking place on the property where the billboard is located. This obviously limits the content of such a billboard owner's message. And if the non-premises owner did not already have a billboard at the time of the sign ordinance's passage, they cannot build a billboard at all.

The Court, then, cannot dispute that the city of Austin is treating signs differently based on what a sign says. What it concludes, however—indeed what it must conclude to avoid the application of strict scrutiny—is that Austin is not doing so for a First Amendment–averse *reason*. And that is so here, according to the Court, because "on premises" may be a legislative category of *signs*, but it is not a category of "substantive" *speech content*, like "ideological" or "political."[35] According to the *Austin* majority, the restrictions triggered by the sign's content are not based on the sign's "topic or subject matter." Rather, they are triggered by whether or not the sign is advertising or promoting something on the same property as the sign itself. This, claims the Court, sounds more like a content-neutral time, place, and manner restriction than a restriction of speech because of its content.[36] Austin is regulating the sign based on its location, not its message. And if the ordinance's enforcer must read the sign's message to determine which location-based regulation to apply, that

[34] *Id.* at 1175 ("While it is an obvious point, what appears on property communicates about and from its owner, rather than anyone else.").

[35] Austin, 142 S. Ct. at 1472.

[36] *Id.* at 1471 (Austin's "off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines" and "is agnostic as to content.").

alone does not make the regulation content based. This conclusion, according to the *Austin* majority, is also consistent with *Reed*'s instruction that a law is content based when it "applies to particular speech because of the topic discussed or the idea or message expressed," because the content of a sign as it relates to whether the sign is on- or off-premises is not a "topic," "idea," or "message" for purpose of applying the First Amendment rule.[37] Requiring a peek at (or as some post-*Reed* lower courts have said, a "cursory examination" of) content in order to apply a content-neutral regulation does not trigger strict scrutiny.[38]

But the problem with the Court's reasoning is that, in this instance, a peek at content is necessarily also a peek at purpose. What *Austin* really says is that content-based categories do not trigger strict scrutiny when the uses to which those categories are put are content neutral. In other words, discriminating on the basis of content is not constitutionally suspect so long as the government has a content-neutral *motive or purpose* in doing so. Don't worry, says the *Austin* Court, the enforcer is only reading the sign to ask if it advertises activity on the sign's premises. This is different, the Court goes on, than the enforcer of the ordinance in *Reed,* who is deciding whether a sign's content is political or ideological before applying the law's various restrictions. Whether or why the *Reed* enforcer's motivation is content based, however, is left unclear, except to the extent that the use of subject-matter categories *itself* indicates a latent hostility, or at least a potentiality for same, towards some of those subjects. So if the law categorizes content for differential treatment based on its subject matter, purpose remains irrelevant; but if the law categorizes content based on a category that is capable of containing lots of different subjects, then purpose becomes relevant again, because a content-neutral purpose can save the law from strict scrutiny.

The Court distinguished the two ordinances in *Reed* and *Austin*: per *Reed*, any references to specific categories of speech are always content based regardless of purpose, but per *Austin*, references to broad categories of speech that are not limited to particular types

[37] *Id.* (citing Reed, 576 U.S. at 163).

[38] Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391, 404 (D.C. Cir. 2017).

of subject matter can be justified by content-neutral purposes.[39] The speech-averse incentives such a rule creates for the government are obvious: regulate speech by avoiding the use of targeted substantive subject-matter categories of content. If restricting speech through the use of categories like "political" or "ideological" triggers strict scrutiny per *Reed*, a government could, under the *Austin* rule, more easily restrict symbolic (e.g., "no visual obstruction of a historic building"[40]) or pictorial (e.g., "no murals on private property"[41]) speech, or distinguish between online and off-line speech (e.g., "no posts on social media"[42]). Those are categories of speech that do not themselves contain substantive content or describe the content therein, and so they likely don't receive automatic strict scrutiny review under the rule in *Austin*. This is so even though in each of the examples the content of the speech must be examined by the enforcer to apply the prohibition, since "visual obstruction," "mural," and "social media"

[39] Austin, 142 S. Ct. at 1472 ("Unlike the sign code at issue in *Reed,* however, the City's provisions at issue here do not single out any topic or subject matter for differential treatment."); Tr. of Oral Arg. at 17–18, City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464 (2022) (No. 20-1029) (Austin arguing that laws using "broad categor[ies of speech] that [are] not limited as to particular types of subject matter" are content neutral, but the use of more specific categories of speech as in *Reed* are content based); see also Austin, 142 S. Ct. at 1485 (Thomas, J., dissenting) ("[T]he majority contends that a law targeting directional messages concerning 'events generally, regardless of topic,' would not be content based, but one targeting 'directional messages concerning *specific* events' (*e.g.*, 'religious,' 'political' events) would be.").

[40] See, e.g., Mark Tushnet, Art and the First Amendment, in Free Speech Beyond Words 81–82 (2017) (permitting a historic preservation ordinance to prevent the work of artists Christo and Jeanne-Claude, who, with permission from the property owner, "wrap buildings in cloth for short periods," on the ground the ordinance is content neutral could have First Amendment–averse consequences).

[41] Cf. Neighborhood Enterprises, Inc. v. City of St. Louis, 644 F.3d 728, 736–37 (8th Cir. 2011) (finding a zoning ordinance's definition of "sign" that exempted from its definition flags, civic crests, and similar objects was content based because "to determine whether a particular object qualifies as a 'sign' and is therefore subject to the regulations, or is instead a 'non-sign' . . . one must look at the *content* of the object") (emphasis in original).

[42] Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (assuming a statute barring sex offenders from using social media sites available to children is content neutral, but finding it was not narrowly tailored because of its reach). To be clear, under the Court's current application of content-discrimination doctrine, a ban on online speech could be deemed content neutral because it applies only to the medium in which the speech takes place. See, e.g., Leathers v. Medlock, 499 U.S. 439 (1991) (state sales tax that exempted newspapers but not broadcasters was content neutral). But a speech restriction based on the type of website or platform that hosts the speech could also be deemed content based because such a restriction is applied based on the type of content the website hosts.

all lend themselves to content-based legislative definitions. Like "on-premises," those categories "do not single out any topic or subject matter for differential treatment," and the sign's "substantive message itself is irrelevant to the application of the provisions."[43] They are also, like the Austin ordinance, "content-agnostic."[44] But by not using a subject-matter category, they restrict speech *across* categories—and restrict more speech in the process. Subjecting laws that restrict more speech to less scrutiny is an unfortunate byproduct of content-discrimination doctrine generally, so long as those laws manage to avoid being found substantially overbroad.[45] But the *Austin* rule compounds that unfortunate problem by making it easier for the government to avoid strict scrutiny by defining the type of content it regulates through the use of broader, more cross-cutting categories of speech. Under *Austin*, generality works in the government's First Amendment favor.

It is possible to distinguish between on- and off-premises signs in a content-neutral manner. As the Fifth Circuit noted, quoting the Sixth Circuit, "a regulation that defines an on-premises sign as any sign within 500 feet of a building is content neutral."[46] This is so because in that example, the basis for the differential treatment of the sign, whether with respect to digitization rights or its existence altogether, is based purely on the sign's location, not on what it says, or on a connection between what it says and where it is. Likewise, if digitized billboards present a particular safety hazard to drivers, as several amici in *Austin* told the Court, then billboards or the digitization rights of same can be defined based on their size or location instead of their content.[47]

[43] Austin, 142 S. Ct. at 1472.

[44] *Id.* at 1475.

[45] See, e.g., Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2355 (2020) ("A generally applicable robocall restriction would be permissible under the First Amendment," but a statutory carve-out for government debt collection robocalls from that restriction is not because it is based on the carve-out's content); Alan K. Chen, Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose, 38 Harv. C.R.-C.L. L. Rev. 31, 65–66 (2003) ("More broadly drafted speech regulations tend to reduce the dissemination of greater amounts and types of speech than do viewpoint- and content-discriminatory laws.").

[46] Reagan Nat'l Adv. of Austin v. City of Austin, 972 F.3d 696, 704 (5th Cir. 2020), rev'd and remanded, 142 S. Ct. 1464, 1489 (2022) (quoting Thomas v. Bright, 937 F.3d 721, 732 (6th Cir. 2019)).

[47] See Austin, 142 S. Ct. at 1479 (Breyer, J., concurring) (summarizing amici safety-related arguments).

There are a range of true time, place, and manner-based options for municipalities that want to regulate signs and billboards, none of which require an enforcer to assess what a sign says in order to do so.

If one returns to the facts of *Reed*, the result of all this is particularly incoherent. As "Temporary Directional Signs Relating to a Qualifying Event," Pastor Clyde Reed's signs in the public rights-of-way advertising the location of his Good News Community Church services could stay up in Gilbert, Arizona, for 12 hours before and an hour after Sunday service. Other types of signs are not similarly restricted, and so this differential treatment, per the *Reed* Court, violates the First Amendment. However, if Pastor Reed's church was in Austin, Texas, because it had no building (which of course was the whole reason he needed his signs in the first place), his signs would be "off-premises" signs and they could never be put up at all. The *Austin* Court says this presents no First Amendment problem, due to Austin's content-neutral purpose for using a content-based statutory category of signs.

Accordingly, and after *Austin*, the *Reed* content discrimination two-step is now more like a tango-backward-*ocho*: (1) look to the face of the statute; (2) if the face of the statute refers to content, then ask whether the facial reference is to either (a), a substantive and particular category of content, which renders the law content based, or rather (b), a broad category of speech not limited as to subject matter; (3) if the answer to (2) is (b), ask whether the government's use of that type of category furthers a content-neutral purpose; and finally, (4) if the answer to (3) is yes, then conclude the law is content neutral. The *Austin* Court tried to preserve the *Reed* two-step, but by letting assessment of government purpose back into the content-based part of the test, it tripped over its feet in the process.

* * *

What caused the Court—or to be more precise, those members of the Court who were in the majority in both *Reed* and *Austin*, namely Chief Justice John Roberts and Justice Sonia Sotomayor[48]—to say

[48] Justices Antonin Scalia and Anthony Kennedy were also in the *Reed* majority; of their replacements, Justice Brett Kavanaugh was in the *Austin* majority and Justice Neil Gorsuch dissented. And Justice Alito's concurrence in the judgment and dissent agreed that Austin's definitions of on- and off-premises signs were content based, thus agreeing with the *Austin* dissenters that the majority misapplied *Reed.* Austin, 142 S. Ct. at 1479–81 (Opinion of Alito, J.).

essentially in *Austin*, "don't worry, we didn't really mean what we said in *Reed*"? The answer can be found in the opinion's very first line. The prospect of subjecting the sign regulations of "thousands of jurisdictions across the country" to strict scrutiny would call into question the fact that "American jurisdictions have regulated outdoor advertising for well over a century."[49] As the National League of Cities' amicus brief told the Court, "at least thirty states and thousands of municipal governments," following the federal Highway Beautification Act, distinguish between on- and off-premises signs as part of their regulation of billboards, and finding the Austin ordinance content based would throw all of those laws into question, causing those governments to "expend tremendous time, money, and resources to amend their sign codes."[50]

Given the possibility of casting tens of thousands of ordinances into constitutional doubt, and the hundreds if not thousands of lawyer billable hours it would presumably take to resolve those doubts, perhaps the Court was justified in proceeding cautiously. Of course, the fact that all of these statutes and ordinances exist does not necessarily mean they distinguish between those signs *on the basis of a sign's content*. As discussed above, a sign or billboard can be defined as "off-premises" without reference to the content of that sign. But concern around that perceived upheaval, combined with an unstated presumption that government action with a long history and tradition of presumed constitutionality should earn that action deference with respect to constitutional challenges, led the Court to avoid an obvious result.[51]

## III. Building a Wall Between *Reed* and (Some) Compelled-Speech Doctrine

Though the *Austin* majority's fears were motivated by the possibility of throwing thousands of sign ordinances into doubt, also driving the move from *Reed* to *Austin* is a concern that *Reed* exposed

[49] Austin, 142 S. Ct. at 1469.

[50] Brief of the National League of Cities et al. in Support of Petitioner at 2, 8, City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464 (2022) (No. 20-1029).

[51] See, e.g., Am. Meat Inst. v. Dep't of Agric., 760 F.3d 18, 32 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment) ("in First Amendment free-speech law, history and tradition are reliable guides" when determining whether an infringement on a speaker's speech rights is justified) (citing several Supreme Court cases).

consumer protection laws, in particular compelled disclosures, to constitutional overruling. For example, under the rule announced in *Austin*, content-discrimination doctrine no longer presents a barrier to labeling requirements, because even though requiring a private party to put specific information on a food or drug label is clearly content based, the motivation behind the compulsion is content neutral.

But *Austin* is a solution in search of a problem. There was no real danger of applying strict scrutiny to compelled-disclosure requirements rooted in traditional exercises of police power under *Reed*. Even pre-*Austin*, the First Amendment analysis of a consumer protection-based compelled disclosure would never proceed under an "if you have to read the label or the securities disclosure to assess compliance with the government's disclosure requirement, then scrutiny of the requirement is strict"–type test. That is because the law of compelled disclosures is distinct from content-discrimination doctrine.

Justice Breyer's opinions in *Reed* and *Austin* are right about one thing: *every* compulsion of speech by the government is content based. New Hampshire told George Maynard what speech had to be on his license plate.[52] West Virginia told the Barnett children the content of the pledge they had to say at the beginning of every school day.[53] The Securities and Exchange Commission tells prospective sellers of securities the content of the disclosure those sellers are required to make before any sale.[54] A public-school teacher who tells her social studies students to write a report on a great historical figure is compelling speech in a content-based way (and when the teacher gives the student who writes about Hitler an F, she is engaging in viewpoint discrimination as well). Similarly, deciding whether a given restriction should be subjected to commercial speech-applicable intermediate scrutiny is literally a content-dependent analysis, because the first step in such an inquiry is to decide whether the speech at issue is commercial. Those facts, however, do not turn every compelled or commercial speech case into a content-discrimination case to which the *Reed* two-step would have applied, because both

[52] Wooley v. Maynard, 430 U.S. 705 (1977).

[53] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[54] Securities Act, 15 U.S.C. § 77e.

pre- and post-*Reed*, all speech compulsions are not treated the same under the First Amendment.

*Austin* itself affirmed that neither it nor *Reed* displaced traditional commercial speech intermediate scrutiny.[55] "Purely factual" government information-forcing "about the terms under which" a speaker's "services will be available" has never been thought to trigger the same set of concerns as those instances in which the government is coercing individuals "into betraying their convictions" by involuntarily affirming the government's position with respect to certain viewpoints.[56] And in its first case applying *Reed*, a First Amendment challenge to the federal robocall solicitation statute's government-debt-collection exception in *Barr v. American Association of Political Consultants,* the Court expressly distinguished those "impermissible speech restrictions" that content-discrimination doctrine is intended to snuff out from "traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech."[57] And even absent the unnecessary cabining in *Austin*, lower courts were likewise distinguishing between those references to content to which the *Reed* two-step applied from laws and regulations that "safeguard the health and safety of citizens" but only incidentally burden speech.[58]

[55] Austin, 142 S. Ct. at 1480 (Alito, J., concurring in the judgment in part and dissenting in part) ("Many [and possibly the great majority] of the situations in which the relevant [Austin sign ordinance] provisions may apply involve commercial speech, and under our precedents, regulations of commercial speech are analyzed differently.").

[56] Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 31, 138 S. Ct. 2448, 2464 (2018).

[57] Barr, 140 S. Ct. at 2347; see also *id.* ("Our decision is not intended to expand existing First Amendment doctrine or to otherwise affect traditional or ordinary economic regulation of commercial activity.").

[58] Greater Phila. Chamber of Com. v. City of Philadelphia, 949 F.3d 116, 138 (3d Cir. 2020) ("[T]he Supreme Court has consistently applied intermediate scrutiny to commercial speech restrictions, even those that were content- and speaker-based."); see, e.g., Recht v. Morrisey, 32 F.4th 398, 405 (4th Cir. 2022) (statute regulating legal solicitations of clients in cases involving medications or medical devices "lies right at the heart of West Virginia's police power," namely its "one premier duty . . . to safeguard the health and safety of its citizens," and so district court's application of *Reed* rather than *Central Hudson*–based intermediate scrutiny for commercial speech to the statute was improper); see also *id.* at 409 ("*Reed* simply concerned a totally different context; it cannot be distorted to so unsettle the *Central Hudson* regime.").

Finally, the *Austin* Court said the fact that the First Amendment permits regulation of solicitation demonstrates that a rule is too broad if it deems a law content based if its enforcer must "read or hear" speech to enforce it. But the First Amendment law of solicitation actually proves the wisdom and utility of *Reed*. Laws that distinguish among kinds of solicitation and even types of solicitors should have been deemed content based even prior to *Reed*.[59] To the extent *Reed* instructs courts to ignore evidence of government intent justifying those distinctions, that is certainly a First Amendment–affirming result. And despite *Austin*'s affirmation of the Court's solicitation-based jurisprudence as proof of First Amendment lenience, lower courts have increasingly found that "laws targeting speech involving requests for money are content based,"[60] and that strict scrutiny applies, even when those laws distinguish between places where certain kinds of solicitation may occur.[61] In other words, strict scrutiny applies to solicitation statutes whose enforcement "distinguish[es] on the basis of location" and are thus as analogous to "ordinary time, place, and manner distinctions" as the ordinance at issue in *Austin*. So the Court in *Austin* was quite correct to say that "the First Amendment allows for regulations of solicitation," but that statement is only true insofar as those regulations are themselves content neutral—that is, if they treat solicitation no worse than other kinds of speech.[62] And *Austin*'s gloss on *Reed* will permit jurisdictions to avoid strict scrutiny by asserting content-neutral justifications for their content-based panhandling and solicitation bans, the very result that *Reed* itself precluded.

[59] But see Doucette v. City of Santa Monica, 955 F. Supp. 1192, 1204–05 (C.D. Cal. 1997) (upholding panhandling ban because there was no evidence that city disagreed with panhandlers' message).

[60] See, e.g., Kissel v. Seagull, 552 F. Supp. 3d 277, 289–90 (D. Conn. 2021) (citing Second, Eighth, and Ninth Circuit Courts of Appeals, as well as the district courts of the Eastern District of Louisiana and District of Minnesota).

[61] See Messina v. City of Fort Lauderdale, Fla., 546 F. Supp. 3d 1227, 1244–48 (S.D. Fla. 2021) (ordinance that prohibits panhandling in certain locations throughout city is content based because it defines "panhandling" as "any request for an immediate donation of money or thing of value").

[62] Austin, 142 S. Ct. at 1473 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940) and Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981)).

**Conclusion**

I end on a terminological note. Careful readers of this article who also follow the First Amendment will have noticed that throughout I use the term "content discrimination" rather than the more common doctrinal nomenclature "content neutrality." Part I above shows why. Characterizing the government's obligation under the doctrine as one that requires it to be "neutral" toward content led directly to the original sin of searching for governmental purpose and intent as a way of saving facially content-based laws. When a reviewing court's motivating doctrinal concern is to confirm government neutrality toward content referred to in law, searches for extratextual commitments to such neutrality—or more particularly, searches for the *absence* of any evidence of *non*-neutral motives—make perfect sense.

But nothing in the First Amendment grants government this degree of solicitousness. All references to content that are used to treat content differently constitute discrimination. The role of reviewing courts, as in other areas of constitutional law, is not to discern whether that discrimination is motivated by a cleansing neutral purpose and therefore unproblematic. Instead, courts should force the government to justify the differential treatment of speech with both a compelling interest and as narrow a fit as possible between the means and those ends. The *Reed* rule properly recognized the inherent constitutional problems presented when the government engages in content-based classifications of speech. The Supreme Court would be wise to return to it—and to make clearer those circumstances to which its level of highest scrutiny applies.