AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**City of Austin, Texas v. Reagan National Advertising of Austin, LLC, 142 S.Ct. 1464** (2022)

*Reagan National Advertising of Austin, LLC owned a series of billboards in Austin, Texas, that they wished to digitalize. Austin denied their application because the city had just passed an ordinance forbidding the digitalization of off-premises signs, understood to be “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.” In addition to forbidding the digitalization of existing off-premises signs, the city code also prohibited the construction of new off-premises signs. Reagan National Advertising filed a lawsuit against Austin, claiming that the ban violated the free speech clause of the First Amendment as incorporated by the due process clause of the Fourteenth Amendment. The local federal district court refused to grant an injunction, but that decision was reversed by the Court of Appeals for the Fifth Circuit. Austin appealed to the Supreme Court of the United States.*

*The Supreme Court reversed the Court of Appeals by a 6-3 vote. Justice Sonia Sotomayor’s majority opinion held that the Austin regulations did not merit strict scrutiny because they were not content based. Both the majority opinion and Justice Thomas’s dissent rely heavily on* [Reed](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)) v. Town of Gilbert(2015) *when determining what constitutes a content-based law. Who has the better understanding of* Reed*? Justice Breyer would narrow* Reed. *What does he believe are* Reed*’s faults? Is he right to call for European-style proportionality review? Thomas in his dissent claims the majority is repeating the mistakes of* Hill v. Colorado (2000), *a decision the majority never cites.* Hill *concerned abortion protestors. Does the majority stand by the* Hill *decision? Should the majority stand by the* Hill *decision*?

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)&analyticGuid=Ibac7fdc9c12d11ec80bec15c770a3f3d) delivered the opinion of the Court.

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American jurisdictions have regulated outdoor advertisements for well over a century. . . . As part of this regulatory tradition, federal, state, and local governments have long distinguished between signs (such as billboards) that promote ideas, products, or services located elsewhere and those that promote or identify things located onsite. . . . .

**. . . .**

A regulation of speech is facially content based under the First Amendment if it “target[s] speech based on its communicative content”—that is, if it “applies to particular speech because of the topic discussed or the idea or message expressed.” . . . Unlike the regulations at issue in [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)) *v. Town of Gilbert* (2015), the City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City's distinction is content neutral and does not warrant the application of strict scrutiny.

The [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))Court confronted a very different regulatory scheme than the one at issue here: a comprehensive sign code that “single[d] out specific subject matter for differential treatment.”  The town of Gilbert, Arizona, had adopted a code that applied distinct size, placement, and time restrictions to 23 different categories of signs.  The Court focused its analysis on three categories defined by whether the signs displayed ideological, political, or certain temporary directional messages. . . . The [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))Court determined that these restrictions were facially content based.  Rejecting the contention that the restrictions were content neutral because they did not discriminate on the basis of viewpoint, the Court explained: “[I]t is well established that ‘[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.’ ”  Applying these principles, the Court reasoned that “a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. . . .

In this case, enforcing the City's challenged sign code provisions requires reading a billboard to determine whether it directs readers to the property on which it stands or to some other, offsite location. Unlike the sign code at issue in [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)), however, the City's provisions at issue here do not single out any topic or subject matter for differential treatment. A sign's substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations. Rather, the City's provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)) does not require the application of strict scrutiny to this kind of location-based regulation.

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[T]he First Amendment allows for regulations of solicitation—that is, speech “requesting or seeking to obtain something” or “[a]n attempt or effort to gain business.” To identify whether speech entails solicitation, one must read or hear it first. Even so, the Court has reasoned that restrictions on solicitation are not content based and do not inherently present “the potential for becoming a means of suppressing a particular point of view,” so long as they do not discriminate based on topic, subject matter, or viewpoint.

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Underlying these cases and others is a rejection of the view that *any*examination of speech or expression inherently triggers heightened First Amendment concern. Rather, it is regulations that discriminate based on “the topic discussed or the idea or message expressed” that are content based.  The sign code provisions challenged here do not discriminate on those bases.

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. . . . [A] regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a “function or purpose” proxy that achieves the same result. That does not mean that any classification that considers function or purpose is *always*content based. Such a reading of “function or purpose” would contravene numerous precedents, including many of those discussed above. [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))did not purport to cast doubt on these cases.

Nor did [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))cast doubt on the Nation's history of regulating off-premises signs. Off-premises billboards of the sort that predominate today were not present in the founding era, but as large outdoor advertisements proliferated in the 1800s, regulation followed. As early as 1932, the Court had already approved a location-based differential for advertising signs.  Thereafter, for the last 50-plus years, federal, state, and local jurisdictions have repeatedly relied upon on-/off-premises distinctions to address the distinct safety and esthetic challenges posed by billboards and other methods of outdoor advertising. The unbroken tradition of on-/off-premises distinctions counsels against the adoption of Reagan's novel rule.

. . . .

It is the dissent that would upend settled understandings of the law. Where we adhere to the teachings of history, experience, and precedent, the dissent would hold that tens of thousands of jurisdictions have presumptively violated the First Amendment, some for more than half a century, and that they have done so by use of an on-/off-premises distinction this Court has repeatedly reviewed and never previously questioned.

This Court's determination that the City's ordinance is facially content neutral does not end the First Amendment inquiry. If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based. Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be “ ‘narrowly tailored to serve a significant governmental interest.’ ”

. . . . Because the Court of Appeals did not address these issues, the Court leaves them for remand and expresses no view on the matters.

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)&analyticGuid=Ibac7fdc9c12d11ec80bec15c770a3f3d), concurring.

[*Reed v. Town of Gilbert* (2015)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000708&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)), is binding precedent here. Given that precedent, I join the majority's opinion. I write separately because I continue to believe that the Court's reasoning in [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))was wrong. . . . [T]he First Amendment is not the Tax Code. Its purposes are often better served when judge-made categories (like “content discrimination”) are treated, not as bright-line rules, but instead as rules of thumb. And, where strict scrutiny's harsh presumption of unconstitutionality is at issue, it is particularly important to avoid jumping to such presumptive conclusions without first considering “whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives. Here, I would conclude that the City of Austin’s (City's) regulation of off-premises signs works no such disproportionate harm. I therefore agree with the majority's conclusion that strict scrutiny and its attendant presumption of unconstitutionality are unwarranted. . . . [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))’s strict formalism can sometimes disserve the very First Amendment interests it was designed to protect.

The First Amendment helps to safeguard what Justice HOLMES described as a marketplace of ideas.  A democratic people must be able to freely “generate, debate, and discuss both general and specific ideas, hopes, and experiences.” . . . Courts help to protect these democratic values in part by strictly scrutinizing certain categories of laws that threaten to “ ‘drive certain ideas or viewpoints from the marketplace.’ ”  We have recognized, for example, that First Amendment values are in danger when the government imposes restrictions upon “ ‘core political speech,’ ” when it discriminates against “particular views taken by speakers on a subject,”  and, in some contexts, when it removes “an entire topic” of discussion from public debate,

But not all laws that distinguish between speech based on its content fall into a category of this kind. That is in part because many ordinary regulatory programs may well turn on the content of speech without posing any “realistic possibility that official suppression of ideas is afoot.”  Those regulations, rather than hindering the ability of the people to transmit their thoughts to their elected representatives, may constitute the very product of that transmission.

The U. S. Code (as well as its state and local equivalents) is filled with regulatory laws that turn, often necessarily, on the content of speech. Consider laws regulating census reporting requirements, securities-related disclosures, copyright infringement,  labeling of prescription drugs, or consumer electronics, highway signs, tax disclosures, confidential medical records,  robocalls, workplace safety warnings,  panhandling,  solicitation on behalf of charities, signs at petting zoos, and many more.

If [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)) is taken as setting forth a formal rule that courts must strictly scrutinize regulations simply because they refer to particular content, we have good reason to fear the consequences of that decision. One possibility is that courts will strike down “ ‘entirely reasonable’ ” regulations that reflect the will of the people. . . . A second possibility is that courts instead will (perhaps unconsciously) dilute the stringent strict scrutiny standard in an effort to avoid striking down reasonable regulations. . . . A third possibility is that courts will develop a matrix of formal subsidiary rules and exceptions that seek to distinguish between reasonable and unreasonable content-based regulations. Such a patchwork, however, may prove overly complex, unwieldy, or unworkable. . . .

For these reasons, . . . I would reject [*Reed's*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))approach, which too rigidly ties content discrimination to strict scrutiny (and, consequently, to “almost certain legal condemnation”).  Instead, I would treat content discrimination as a rule of thumb to be applied with what Justice KAGAN has called “a dose of common sense.”  Where content-based regulations are at issue, I would ask a more basic First Amendment question: Does “the regulation at issue wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives”?  I believe we should answer that question by examining “the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so.” [*Ibid.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))

. . . .

Billboards and other roadside signs can generally be categorized as a form of outdoor advertising. Regulation of outdoor advertising in order to protect the public's interest in “avoiding visual clutter,”  or minimizing traffic risks is unlikely to interfere significantly with the “marketplace of ideas.” In this case, for example, there is no evidence that the City regulated off-premises signs in order to censor a particular viewpoint or topic, or that its regulations have had that effect in practice. There is consequently little reason to apply a presumption of unconstitutionality to this kind of regulation.

. . . .The City's regulation here appears to work at most a limited, niche-like harm to First Amendment interests. Respondents . . . complain only that they cannot digitize the signs, which would allow them to display several messages in rapid succession. Perhaps digitization would enable them to make more effective use of their billboard space. But their inability to maximize the use of their space in this way is unlikely to meaningfully interfere with their participation in the “marketplace of ideas.”

At the same time, the City has asserted a legitimate interest in maintaining the regulation. As I have said, the public has an interest in ensuring traffic safety and preserving an esthetically pleasing environment, and the City here has reasonably explained how its regulation of off-premises signs in general, and digitization in particular, serves those interests. . . .

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)&analyticGuid=Ibac7fdc9c12d11ec80bec15c770a3f3d), concurring in the judgment in part and dissenting in part.

I agree with the majority that we must reverse the decision of the Court of Appeals holding that the provisions of the Austin City Code regulating on- and off-premises signs are facially unconstitutional. . . . “Normally, a plaintiff bringing a facial challenge must ‘establish that no set of circumstances exists under which the [law] would be valid,’ or show that the law lacks ‘a plainly legitimate sweep.’ ”  A somewhat less demanding test applies when a law affects freedom of speech. Under our First Amendment “overbreadth” doctrine, a law restricting speech is unconstitutional “if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.”

In this case, the Court of Appeals did not apply either of those tests, and it is doubtful that they can be met. Many (and possibly the great majority) of the situations in which the relevant provisions may apply involve commercial speech, and under our precedents, regulations of commercial speech are analyzed differently.

It is also questionable whether those code provisions are unconstitutional as applied to most of respondents’ billboards. It appears that most if not all of those billboards are located off-premises in both the usual sense of that term, and in the sense in which the term is used in the Austin code. The record contains photos of some of these billboards, see App. 130–147, and all but one appears to be located on otherwise vacant land. Thus, they are clearly off-premises signs, and because they were erected before the enactment of the code provisions at issue, the only relevant restriction they face is that they cannot be digitized. The distinction between a digitized and non-digitized sign is not based on content, topic, or subject matter. Even if the message on a billboard were written in a secret code, an observer would have no trouble determining whether it had been digitized.

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As the Court notes, under the provisions in effect when petitioner's applications were denied, a sign was considered to be off-premises if it “advertis[ed],” among other things, a “person, activity, ... or servic[e] not located on the site where the sign is installed” or if it “direct[ed] persons to any location not on that site.” Consider what this definition would mean as applied to signs posted in the front window of a commercial establishment, say, a little coffee shop. If the owner put up a sign advertising a new coffee drink, the sign would be classified as on-premises, but suppose the owner instead mounted a sign in the same location saying: “Contribute to X's legal defense fund” or “Free COVID tests available at Y pharmacy” or “Attend City Council meeting to speak up about Z.” All those signs would appear to fall within the definition of an off-premises sign and would thus be disallowed. Providing disparate treatment for the sign about a new drink and the signs about social and political matters constitutes discrimination on the basis of topic or subject matter. . . .

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Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)&analyticGuid=Ibac7fdc9c12d11ec80bec15c770a3f3d), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)&analyticGuid=Ibac7fdc9c12d11ec80bec15c770a3f3d) and Justice [BARRETT](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0505709001&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)&analyticGuid=Ibac7fdc9c12d11ec80bec15c770a3f3d) join, dissenting.

In *Reed v. Town of Gilbert*, (2015), we held that a speech regulation is content based—and thus presumptively invalid—if it “draws distinctions based on the message a speaker conveys.” . . . Under [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)), Austin's off-premises restriction is content based. It discriminates against certain signs based on the message they convey—*e.g.*, whether they promote an on- or off-site event, activity, or service. . . . [T]he majority's reasoning is reminiscent of this Court's erroneous decision in *Hill v. Colorado* (2000), which upheld a blatantly content-based prohibition on “counseling” near abortion clinics on the ground that it discriminated against “an extremely broad category of communications.” . . .

A content-based law is “presumptively invalid,” . . . and may generally be upheld only if the government proves that the regulation is narrowly tailored to serve compelling state interests. . . . [W]hether a law is characterized as targeting a “topic,” “idea,” “subject matter,” or “communicative content,” the law is content based if it draws distinctions based in any way “on the message a speaker conveys.”

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Like the town of Gilbert in [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)), Austin has identified a “categor[y] of signs based on the type of information they convey, [and] then subject[ed that] category to different restrictions.”  A sign that conveys a message about off-premises activities is restricted, while one that conveys a message about on-premises activities is not. And, per [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)), it does not matter that Austin's code “defin[es] regulated speech by its function or purpose”—*i.e.*, advertising or directing passersby elsewhere.  Again, all that matters is that the regulation “draws distinctions based on” a sign's “communicative content,” which the off-premises restriction plainly does.

. . . [T]at an Austin official applying the sign code must know *where* the sign is does not negate the fact that he also must know *what* the sign says. Take, for instance, a sign outside a Catholic bookstore. If the sign says, “Visit the Holy Land,” it is likely an off-premises sign because it conveys a message directing people elsewhere (unless the name of the bookstore is “Holy Land Books”). But if the sign instead says, “Buy More Books,” it is likely a permissible on-premises sign (unless the sign also contains the address of another bookstore across town). . . .

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The majority's suggestion that laws targeting broad categories of communicative content are not content based is hard to square with the sign categories that [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)) invalidated. For instance, we found Gilbert's expansive definition of “Ideological Sign[s]” to be content based even though it broadly covered any “sign communicating a message or ideas for noncommercial purposes” that did not already fall into one of the other categories. . . .

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Our pre-[*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)) precedents likewise foreclose a construction of “content based” that applies only to some content. We have held many capacious speech regulations to be content based, including restrictions on “ ‘advice or assistance derived from scientific, technical or other specialized knowledge,’ ”  “ ‘advertising, promotion, or any activity ... used to influence sales or the market share of a prescription drug,’ ”  “editorializing,”  “ ‘[publication] for philatelic, numismatic, educational, historical, or newsworthy purposes,’ ”  and “anonymous speech.”  These speech categories are no more “specific” or “substantive” than messages regarding off-premises activities. And some of these examples, like “editorializing” or publishing “newsworthy” information, are clearly *less*so. What unites these speech restrictions is that their application turns “on the nature of the message being conveyed,” not whether they regulate specific or general categories of speech, or whether they address substantive or non-substantive categories of speech.

We have defined content-based restrictions to include *all* content-based distinctions because any other rule would be incoherent. After all, off-premises advertising could be considered a “subject” or a “topic” as those words are ordinarily used. And, in any event, there is no principled way to decide whether a category of communicative content is “substantive” or “specific” enough for the majority to deem it a “topic” or “subject” worthy of heightened protection. . . .

. . . .We have often acknowledged that the need to examine the content of a message is a strong indicator that a speech regulation is content based. One year before [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)), for example, we stated that an abortion clinic buffer-zone law “would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.” . . . .

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. . . . To be sure, history and tradition are relevant to identifying and defining those “few limited areas” where, “[f]rom 1791 to the present,” “the First Amendment has permitted restrictions upon the content of speech.”  But the majority openly admits that off-premises regulations “were not present [at] the founding.”  And while it asserts that “large outdoor advertisements proliferated in the 1800s,” it offers no evidence of any content-based restrictions from that period, let alone off-premises restrictions on *noncommercial*speech. The *earliest* example of an off-premises restriction that the majority cites arose in [*Packer Corp. v. Utah* (1932)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932123427&pubNum=0000708&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)), but that case involved a restriction on *commercial* advertising and did not even feature a First Amendment claim.

Ultimately, the majority's only “historical” support is that regulations like Austin's “proliferated following the enactment of the Highway Beautification Act of 1965.” *Ante*, at ––––. The majority's suggestion that the First Amendment should yield to a speech restriction that “proliferated”— under pressure from the Federal Government—some two centuries after the founding is both “startling and dangerous.”  This Court has never hinted that the government can, with a few decades of regulation, subject “new categories of speech” to less exacting First Amendment scrutiny.

. . . . In fact, there is only one case that could possibly validate the majority's aberrant analysis: [*Hill* v.*Colorado*.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000388777&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)) . . . [*Hill*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000388777&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)) involved a law that prohibited persons outside abortion clinics from knowingly approaching within eight feet of another person without consent “for the purpose of ... engaging in oral protest, education, or counseling.”  [*Hill*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000388777&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))concluded, implausibly, that this regulation was content neutral.

The majority's reasoning in this case is just as implausible. The majority asserts that the off-premises rule is not content based because it does not target a sufficiently “specific” or “substantive” category of communications.  [*Hill*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000388777&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))correspondingly held that restrictions on “protest, education, or counseling” were not content-based classifications because they cover “an extremely broad category of communications.” . . .

The parallel between the majority's opinion and [*Hill*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000388777&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)) should be discomforting given that [*Hill*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000388777&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search)) represented “an unprecedented departure” from this Court's First Amendment jurisprudence.  Its content-neutrality analysis was, as Justice SCALIA explained, “absurd” given that the buffer-zone law was “obviously and undeniably content based.”  . . .

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[T]ransforming [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))’s clear definition of “content based regulation” back into an opaque and malleable “term of art” turns the concept of content neutrality into a “vehicl[e] for the implementation of individual judges’ policy preferences.” . . .

Second, sanctioning certain content-based classifications but not others ignores that even seemingly reasonable content-based restrictions are ready tools for those who would “suppress disfavored speech.”  This is because “the responsibility for distinguishing between” permissible and impermissible content “carries with it the potential for invidious discrimination of disfavored subjects.”  That danger only grows when the content-based distinctions are “by no means clear,” giving more leeway for government officials to punish disfavored speakers and ideas. [*Ibid.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993072387&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))

The content-based distinction drawn by Austin's off-premises speech restriction is “by no means clear,”  and plainly lends itself “to suppress[ing] disfavored speech.” . . . [A]*mici* have proposed dozens of religious and political messages that would be next to impossible to categorize under Austin's rule. These pervasive ambiguities offer enforcement officials ample opportunity to suppress disfavored views. And they underscore [*Reed*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036476806&pubNum=0000780&originatingDoc=Ibac7fdc9c12d11ec80bec15c770a3f3d&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=3c35d314236f4f88bf9410aaf3be64d5&contextData=(sc.Search))’s warning that “[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute.”

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