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FREE MINDS AND FREE MARKETS

Supreme Court on What Counts as a Content-Based Speech Restriction

Today's decision in *City of Austin v. Reagan National Advertising* makes this test somewhat fuzzier.

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Over the last 50 years, the Supreme Court's First Amendment cases have treated content-based speech restrictions very differently from content-neutral ones. Even a relatively modest content-based restriction, generally speaking, must either fit within a First Amendment exception (such as for true threats or for defamation) or must pass the very demanding "strict scrutiny" test. But a relatively modest content-neutral restriction—such as a restriction on sound amplification, or a limit on the number of people who can picket in a particular place—is generally constitutional if it passes the considerably less demanding "intermediate scrutiny" test. (Harsher restrictions, which fail to leave open "ample alternative channels" for speech, are generally harder to justify, even if they are content-neutral.)

This of course means that it's crucial to define what's content-based and what's content-neutral. That's often clear: Restrictions that turn on the viewpoint of speech (e.g., even modest restrictions on racist speech or anti-government speech or some such) are certainly content-based. So are subject matter restrictions, for instance ones that restrict picketing but exempt labor union picketing, or ones that treat political signs different from other signs. So are restrictions on saying particular words (e.g., vulgarities), or restrictions that turn on whether the speaker conveyed certain facts (e.g., the names of rape victims, or the name of the author of a leaflet). But sometimes the matter is less clear.

In two cases in the mid-2010s, the Court set forth two rules that seemed to define content discrimination quite broadly: Under those rules (which also had ample precedent in past cases), a restriction is content-based if it

- "on its face" draws distinctions based on the "communicative content" of what a speaker conveys, *Reed v. Town of Gilbert* (2015), or
- "require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley* (2014).

But in today's *City of Austin v. Reagan National Advertising*, a 5-4 majority of the Court (Justice Sotomayor, joined by Chief Justice Roberts and Justices Breyer, Kagan, and Kavanaugh) cut back on this broad definition of content discrimination, though likely only a bit.

The case involved a city ordinance that limited "off-premises" signs, defined as "sign[s] 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"; the opposite of that, which is to say "on-premises" signs, were excluded from the ordinance. The ordinance wasn't limited to *commercial* advertising, which is subject to a different set of First Amendment rules, but included advertising of political, religious, ideological, and other activity as well.

This did seem to on its face distinguish based on the "communicative content" of what the sign said, and it did require authorities to "examine the content of the message" to determine whether a sign was covered. It also rested, I expect, on a judgment that on-premises speech was generally more valuable to speakers and to readers than off-premises speech—presumably because seeing a sign promoting a particular on-premises activity is more likely to be useful to people looking for that activity (e.g., looking for a coffee shop or a gas station, or more specifically looking for the name of a particular business or organization that they are trying to visit).

But the ordinance wasn't limited to any viewpoint, subject matter, words, or facts. Here is an excerpt from why the majority upheld the ordinance:

[T]he 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 [the categories held to be content-based in *Reed*], 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 message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. *Reed* does not require the application of strict scrutiny to this kind of location-based regulation. *Cf. Frisby v. Schultz* (1988) (sustaining an ordinance that prohibited "only picketing focused on, and taking place in front of, a particular residence" as content neutral)….

[We reject] 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….

Justices Thomas, Gorsuch, and Barrett dissented, as did Justice Alito with regard to the content discrimination question. (Justice Alito concurred in part on a separate procedural issue.)

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….

This conclusion is not undermined because the off-premises sign restriction depends in part on a content-neutral element: the location of the sign. Much like in *Reed*, that 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). Finally, suppose the sign says, "Go to Confession." After examining the sign's message, an official would need to inquire whether a priest ever hears confessions at that location. If one does, the sign could convey a permissible "on-premises" message. If not, the sign conveys an impermissible off-premises message. Because enforcing the sign code in any of these instances "requires [Austin] officials to determine whether a sign" conveys a particular message, the sign code is content based under *Reed*.

As the Court of Appeals noted, Austin's "prepared counsel" "struggled to answer whether" signs conveying messages like "'God Loves You,'" "'Vote for Kathy,'" or "'Sally makes quilts here and sells them at 3200 Main Street'" would be regulated as off-premises signs. Before us, Austin's counsel had similar difficulties, and amici 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*'s warning that "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute."

Because *Reed* provided a clear and neutral rule that protected the freedom of speech from governmental caprice and viewpoint discrimination, I would adhere to that precedent….

And from Justice Alito's dissent:

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.

Justice Breyer wrote a separate concurrence arguing for generally more of a balancing approach to free speech questions, in which content discrimination would be a less significant factor; but no other Justice endorsed that view (which is similar to what Justice Stevens had argued for back in his day).

As a practical matter, I doubt that this holding will affect the results of many cases (other than the ones dealing with the on-/off-premises distinction, which does indeed appear in many sign codes and is now likely to be adopted even more broadly). Justice Thomas suggested that it

might affect the question whether the Court should overrule the controversial decision in *Hill v. Colorado* (2000); *Hill* had upheld as content-neutral a regulation of speech outside medical facilities when the speech was said "for the purpose of … engaging in oral protest, education, or counseling." And perhaps there are other some such laws, but I expect relatively few.

Note that the majority didn't cite either *Hill* or *McCullen v. Coakley*, the 2014 case that endorsed the "require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred" test, even though the *McCullen* majority included four of the five Justices in the *City of Austin* majority (Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan). And none of the opinions discussed the "erogenous zoning" cases, such as *City of Renton v. Playtime Theatres, Inc.* (1986), which treated restrictions on pornographic bookstores and theaters as content-neutral on a "secondary effects" theory, even though those restrictions seem to be clear subject-matter restrictions.

Note that my students Elizabeth Anastasi, Daniel McDonald Meteer, and I, together with Ilya Shapiro (then at the Cato Institute) and Cato's Trevor Burrus, filed an amicus brief on behalf of Cato what proved to be the losing side in this case.