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YOUNG V. AMERICAN MINI THEATRES, INC.: THE WAR ON NEIGHBORHOOD DETERIORATION LEAVES FIRST AMENDMENT CASUALTY

Carol Rudnick Kirchick*

I. INTRODUCTION

"[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." With this statement, the Supreme Court in Young v. American Mini Theatres, Inc., upheld a Detroit zoning ordinance that classified adult theaters and bookstores based upon the substance of the material they sell. The Court, in a plurality opinion written by Justice Stevens, equated the level of protection afforded speech with its appeal to the public and upheld the ordinances, as non-violative of the First Amendment and the equal protection clause.

In 1972, the City of Detroit promulgated ordinances which adopted a theory of inverse zoning. This plan required that various enterprises be separated throughout the community rather than

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* Staff Member, ENVIRONMENTAL AFFAIRS


2 427 U.S. 50.

3 American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1015 (6th Cir. 1975), rev'd sub nom. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). (Gribbs was mayor of Detroit at the time of the district court and circuit court suits. Since that time Coleman Young has been in the mayoral position).

4 DETROIT, MICH. ORDINANCE 742-G § 66.000 (1972). 66.000 Regulated Uses

In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control of regulation is for the purpose of preventing a concentration of these uses in any one area (i.e. not more than two such uses

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concentrated in one area. Among those uses restricted were "adult" movie theaters and bookstores, although the specific adult material offered in these establishments had not been judicially declared obscene. These ordinances were amendments to a 1962 'Anti-Skid Row' ordinance, promulgated to prevent the deleterious effects thought to accompany certain adult entertainment businesses. The ordinances prohibited more than two such enterprises from being located within one thousand feet of one another and further required that adult theaters and adult bookstores not be located within five hundred feet of a residential area. The ordinances provided for waiver of the restrictions if the proposed use would not be contrary to the public interest and would not encourage the further development of a "skid-row" area.

within one thousand feet of each other which would create such adverse effects). Uses subject to these controls are as follows:

Adult Book Store, Adult Motion Picture Theater, Adult Mini Motion Picture Theater, Cabaret, Group "D" Cabaret, Establishment for the sale of beer or intoxicating liquor for consumption on the premises, Hotels or motels, Pawnshops, Pool or billiard halls, Public lodging houses, Secondhand stores, Shoeshine parlors, Taxi dance halls.

Obscene material is not protected by the First Amendment. Roth v. United States, 354 U.S. 476 (1957). The Supreme Court has established guidelines for determining whether material is obscene:

1) whether the average person, applying contemporary standards would find the work taken as a whole, appeals to the prurient interest; 2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; 3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973). The Supreme Court limited prosecution for the sale or exposure of obscene materials to those materials that depict "hard core" sexual conduct. Id. at 27.

Unlike the situation in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), the Detroit zoning ordinances in American Mini did not provide for individualized determination of whether a particular movie or book was obscene. See note 94 infra.

427 U.S. at 54. See note 4, supra, for the text of the 1972 amendments.

The Commission may waive this locational provision for Adult Book Stores, Adult Motion Picture Theaters, Adult Mini Motion Picture Theaters, Group "D" Cabarets, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, or taxi dance halls if the following findings are made:

a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.
b) That the proposed use will not enlarge or encourage the development of a "skid row" area.
c) That the establishment of an additional regulated use in the area will not be contrary to
A number of "adult" establishments sought relief, claiming that the ordinances denied due process of law because they were void for vagueness and also that the ordinances violated the First Amendment and equal protection clause of the Fourteenth Amendment. They claimed that the ordinances classified theaters and bookstores as "adult" based solely on the content of the material displayed at such establishments, a classification repugnant to the freedoms protected by the First Amendment.

The plurality opinion of the Supreme Court addressed the issues of vagueness, prior restraint on protected speech, and violations of the First Amendment and the equal protection clause. Three Justices concurred with Justice Stevens that the Detroit zoning scheme did not violate the equal protection clause since the city must be afforded an opportunity to experiment with methods to avoid neighborhood deterioration. Justice Powell rested his concurrence on the traditionally wide latitude that courts have afforded to municipal zoning power. Additionally, Powell concluded that any burden imposed by the ordinances upon the First Amendment was permissibly incidental.

In analyzing Young v. American Mini Theatres, Inc., this article first will examine the varying and often inconsistent bases upon which the Supreme Court has decided cases of discrimination based upon the content of speech. If such content based classifications are indeed identified by the court, the Court applies either one of two constitutional tests. The Court may determine whether the burden on speech, protected by the First Amendment, is an incidental by-product of regulating specific non-speech conduct. On the other hand, the Court may apply the strict scrutiny test mandated by the equal protection clause. Under equal protection analysis, the Court will permit the classifications to stand only if it finds that a compelling state interest is present. Second, the standard of equal protection invoked by Justice Stevens will be studied to determine whether the theater and bookstore owners were afforded adequate protection of the laws.

Analysis of these issues will demonstrate that equal protection was the correct basis for decision in American Mini. It is submitted,
however, that the Supreme Court failed to recognize that its responsibilities to safeguard speech from indirect censorship are the same for all types of speech, regardless of the Court’s distaste for the content of that speech or the public’s willingness “to march (their) sons and daughters off to war” for the right to view “x-rated” entertainment.

II. BACKGROUND TO THE American Mini DECISION

A. The Standards of Review as Applied to Discrimination of Speech Based Upon Content

1. The Rationale of Equal Protection Review

Traditionally, the Court has employed a two-tier standard of review in equal protection scrutiny. Under the least protective level, a legislative classification is presumptively valid. The Court’s inquiry ends upon a finding that the legislation could reasonably further a legitimate state interest. Most often this “rational basis” tier is applied in cases of economic discrimination. The Court has invalidated an economic regulation under the rational basis scrutiny on only one occasion. Under the strict tier of review, the state, rather than the complainant, carries the burden of justification. The stricter tier of equal protection is employed by the Court where “suspect” classifications are found or fundamental rights are invaded.

The rights secured by the First Amendment are among those rights considered fundamental. Thus the state must show that the classification drawn is the least restrictive alternative to achieving the specific goal.

Several commentators have chronicled the evolution of a third

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10 Nowak, Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications, 62 Geo. L. J. 1071 (1974). “[T]his standard of review has been ‘strict’ in theory and fatal in fact.” Id. at 1080. Analysis of a legislative classification under strict scrutiny has been upheld only twice by the Supreme Court: Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).


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standard of equal protection scrutiny. It is seen as "more demanding than the 'rational basis' of the lower tier, yet less exacting than 'strict scrutiny' . . . [it] require[s] factual substantiation that these [legislative] ends are rationally furthered by the classifications employed . . . ."13 The middle tier has been given a variety of descriptive titles—"Demonstrable Basis Theory,"14 "Substantial in Fact,"15 or "legislative means must substantially further legislative ends."16 The Court's inquiry under this "new" tier is whether the state's "interest is capable of withstanding analysis and that the limitation is a reasonable and narrow means of promoting that interest. Thus, the Court has done no more than insure that such rights are not limited arbitrarily."17 Rather than attribute a constitutionally valid purpose to the legislation, the Court scrutinizes the legislation to see if it actually bears a substantial relationship to the legislative purposes.18

2. United States v. O'Brien: Incidental Burdens on First Amendment Rights

Governmental regulations of specific conduct that affect speech protected by the First Amendment have been upheld by the Court. In United States v. O'Brien,19 the Supreme Court concluded that where "speech" and "non-speech" elements of conduct were combined, an overriding governmental interest in regulating the non-speech element would justify an incidental burden on the speech notwithstanding the guarantees of the First Amendment.20 In effect, the Court removes the legislation from a strict scrutiny analysis under equal protection, and imposes a rationale that investigates the alleged burden placed upon protected speech. O'Brien was convicted under a statute that prohibited destruction of Selective Ser-

[Notes]

14 Nowak, supra note 10, at 1071. This process involves review of the asserted end of the legislation, as well as the means by which it furthers that end.
15 Id. at 1081; 1973 Term, supra note 13, at 124. The Court inquires whether there is a factual substantiation that the legislative objective is rationally furthered by the legislative means selected.
17 Nowak, supra note 10, at 1092.
18 Gunther, supra note 16, at 20.
19 391 U.S. 367 (1968). In support of the validity of the ordinance, the district court majority and circuit court dissent in American Mini relied on the criteria set forth in O'Brien.
20 Id. at 376.
vice draft cards. In a public rally to publicize his views of the Vietnam War, he burned his draft card. O'Brien later claimed that prosecution for such activity was unconstitutional as an abridgment of his freedom of expression and that his act was protected as "symbolic speech." The Court, however, did not agree and upheld O'Brien's conviction for destruction of his draft card, an act which frustrated the substantial government interest in an efficiently managed Selective Service System, an interest unrelated to protected free speech.

In arriving at their conclusion, the Court propounded a four-part test to determine whether a government regulation, infringing on the First Amendment, may be removed from strict judicial scrutiny. The criteria set forth were:

1) is it within the constitutional power of the government to enact the regulation;
2) does the enactment of the regulation further an important or substantial governmental interest;
3) is the governmental interest unrelated to the suppression of free expression; and
4) is the incidental burden on alleged First Amendment freedoms no greater than is essential to the furtherance of that interest.21

The Court specifically found that the O'Brien case was unlike a case "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct itself is thought to be harmful."22 The statute in O'Brien on its face dealt with conduct having no connection with speech. The O'Brien test is expressly limited to those instances where the aim of the legislation is regulation of conduct and not regulation of speech.

B. The American Mini Decision

The district, circuit, and Supreme Courts relied in varying degrees upon an equal protection analysis as well as a First Amendment approach similar to O'Brien. The district court analyzed the equal protection claims by applying the strict scrutiny standard, demanding a finding that the ordinances furthered a compelling

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21 Id. at 377.
22 Id. at 382 (emphasis added).
The court relied upon an affidavit filed by a sociologist that suggested that a concentration of adult establishments led to neighborhood deterioration. The affidavit, in part, read:

If people believe something is true, even it it is not originally, they will tend to act as if it were true, and in so doing help produce the condition that originally was only believed. If residents of any neighborhood believe that the concentration of the proscribed uses damage the neighborhood, they will act as if it were true and will seek to move away and allow in people with different standard; they will allow the property to decline . . . .

The district court concluded that the affidavit "clearly" established the "destructive impact" of adult establishments. Therefore, the ordinances were necessary to promote the compelling state interest of neighborhood preservation and were non-violative of the equal protection clause.

In addition, the district court found that the Detroit zoning ordinances did not offend First Amendment rights. Referring to the criteria in O'Brien, the court concluded that the ordinances at issue merely regulated conduct, namely the location of "certain" theaters and bookstores. In the court's view, the government's interest, the preservation and stabilization of neighborhoods, was an interest
unrelated to the suppression of free speech. Therefore, as in *O'Brien*, any burden on First Amendment rights was an incidental by-product of regulation affecting conduct.\(^\text{27}\)

The circuit court reversed the district court decision, even though the appellate court applied the same standard of equal protection scrutiny as the lower court.\(^\text{28}\) In arriving at a result contrary to the district court, the circuit court stated that when classifications substantially burden the First Amendment, the government bears a heavy burden of justification, not dismissed by simply establishing that the ordinances served a compelling public interest. Since First Amendment "fundamental" rights were at stake, "the City had the further burden of showing that the method which it chose to deal with the problem at hand was necessary and that its effects on protected rights [were] only incidental."\(^\text{29}\) The city's object of neighborhood preservation may have been accomplished by regulating the location for movie theaters on a basis neutral to the content of the films displayed or the city may have validly required that theaters be operated only during certain hours. The court concluded, however, that the Detroit ordinance went further than constitutionally permissible by regulating a specific commercial business "solely by reference to the content of the constitutionally protected materials which they purvey to the public."\(^\text{30}\)

The circuit court did not find that the ordinances were merely an incidental burden of First Amendment rights. Regardless of the alleged purpose of the zoning ordinances, their effect was to establish a means to regulate particular films and books which had not been declared obscene. The dissent, however, relied on the *O'Brien* rationale reaching a conclusion similar to that of the lower court.\(^\text{31}\)

Justice Stevens delivered the plurality opinion of the Supreme Court, in which Chief Justice Burger, Justice White, Justice Rehnquist, and Justice Powell concurred. Four of the five Justices, comprising the plurality, relied on an equal protection rationale. Justice Powell, however, relied on the broad zoning power of the city and a substantive First Amendment *O'Brien* rationale. He expressly disagreed with the plurality analysis of the equal protection issue.\(^\text{32}\)

\(^{27}\) *Id.* at 371.

\(^{28}\) Gribbs, *supra* note 3, at 1018.

\(^{29}\) *Id.* at 1020.

\(^{30}\) *Id.*

\(^{31}\) *Id.* at 1021 (Celebreeze, J., dissenting).

\(^{32}\) 427 U.S. 50. Justice Powell rejected the equal protection analysis. I do not think we need reach, nor am I inclined to agree with, the holding in Part III (and supporting discussion) that nonobscene, erotic materials may be treated differently under
In reversing the circuit court, the Supreme Court did not clearly articulate the standard of equal protection invoked. Justice Stevens' opinion refers to a "factual basis" in the record before the court which he suggests substantiates the causal connection between neighborhood blight and a concentration of "regulated uses" such as "adult" entertainment. Presumably, his reliance rested on the affidavits which stressed the "deleterious effects" of the adult establishments in question. However, whether or not these affidavits demonstrated the necessary "empirical link" between neighborhood blight and adult entertainment did not seen to be an important factor in the Court's determination, since the Court's opinion

First Amendment principles from other forms of protected expression. I do not consider the conclusions in Part I of the opinion to depend on distinctions between protected speech.

Id. at 73 n.1.


34 California v. Larue, 409 U.S. 109, 131 (1972) (Marshall, J., dissenting). Theater owner respondents claimed on a number of bases that reliance on the affidavits filed was misplaced and unjustified because the conclusions drawn were based on people's fears and apprehensions that caused them to act in accordance with latent prejudices. In effect any resulting neighborhood blight was the product of a "self-fulfilling prophecy." Brief for the Respondent at 10-11. Note, however, the Court's statement in a similar case: "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 101 (1972), citing Tinker v. Des Moines School Dist., 393 U.S. 503, 508 (1969). The affidavit of the real estate appraiser, submitted by Respondents, stated:

... many factors which have tended to, and will continue to, reduce property values in the City of Detroit, including racial and socioeconomic changes in neighborhoods, real estate financing, crime, city income tax, a defunct school system, etc; that it cannot be said that the establishment of an adult bookstore or theater either has or will destroy a neighborhood or the values of the property therein ... [affiant] state[d] that he has studied available data concerning sales of property in one of the areas of Detroit in which adult theaters and bookstores have located, and concludes that residential values in the neighborhoods have increased over the past two to two and a half years.

summarized the situation by noting that, "the city [of Detroit] must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."\footnote{35}

The Court treated the bookstores and theaters as any other economic enterprise, ignoring the presence of a fundamental right, the freedom of speech, and applied the least rigorous standard of equal protection review.\footnote{36} The Court did not investigate any alternatives less restrictive of the First Amendment; nor was sufficient attention paid to the contradictory evidence indicating that the presence of adult entertainment may not be a cause of neighborhood decline.\footnote{37} Perhaps, any justification offered by the city of Detroit in this case would have been sustained by the Court as a means of preventing neighborhood deterioration.

III. Young v. American Mini Theaters, Inc.: A RADICAL DEPARTURE FROM SETTLED CONSTITUTIONAL PRINCIPLES

Young v. American Mini Theatres, Inc. offered the Court an opportunity to clarify the constitutional standard of review in content-discrimination cases. A series of cases, raising similar issues to those posed in American Mini, provided ample precedent for decision. The Court, however, departed from the principles of these cases and confused the area of content-discrimination.

A. The Presumptive Validity of the Zoning Power: Zoning and Equal Protection

The Supreme Court in American Mini relied heavily on the city's

\footnote{35} 427 U.S. at 71. Cf. The zoning classification upheld in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) was found to bear a "rational relationship to a [permissible] state objective." Id. at 8, citing Reed v. Reed, 404 U.S. 71, 76 (1971). The Court in Belle Terre, however, did not find that fundamental rights were involved, and therefore minimal scrutiny was invoked. The fundamental rights at stake in American Mini, like those at stake in Mosley, required a stricter judicial scrutiny that the interests found by the Court in Belle Terre. See note 56, infra.

\footnote{36} Railway Express Agency v. N.Y., 336 U.S. 106 (1949); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); Williamson v. Lee Optical of Okla. 348 U.S. 483 (1955). All of these cases upheld economic regulations. See, City of New Orleans v. Duke, 427 U.S. 297 (1976). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discrimination and require only that the classification challenged by rationally related to a legitimate state interest . . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. Id. at 303. (emphasis added).

\footnote{37} See note 35, supra.
need to experiment with methods designed to preserve and stabilize neighborhoods. This reliance on the city’s justification is at least partially due to the long established presumption of validity attributed to local zoning ordinances. Land use regulation and urban planning have historically been given broad recognition by the Supreme Court. The broad scope of the zoning power is derived from the municipality’s police power. As legislative acts, zoning ordinances are presumptively valid “despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”

This broad deference to local zoning was clearly evidenced by the Supreme Court in Village of Belle Terre v. Boraas, in which the Court considered an equal protection challenge to a zoning ordinance. Justice Douglas, writing for the majority, did not find that fundamental rights were at stake. Consequently, he applied the equal protection standard of “a rational relationship to a [permissible] state objective.” The decision in Belle Terre broadened the goals of the municipalities’ police power to include “[a] quiet place where yards are wide, people few, and motor vehicles restricted . . . .” These goals “are legitimate guidelines in a land-use project addressed to family needs.”

Justice Marshall’s dissent in Belle Terre focused on the level of equal protection scrutiny applied by the court. The ordinances, he concluded, burdened fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments, and therefore demanded the stricter tier of equal protection analysis. Although a city must be given substantial latitude in the area of zoning, judicial “deference does not mean abdication. [The] Court has an obligation to ensure that zoning ordinances, even when adopted in furtherance of such legitimate aims, do not infringe upon constitutional rights.”

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38 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). “If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.” Id. at 388.
42 Id. at 8, citing Reed v. Reed, 404 U.S. 71, 76 (1971).
43 Id. at 9.
44 Id. at 18 (Marshall, J., dissenting). The level of scrutiny applied in equal protection rationale is discussed at II A. 1 supra.
45 Id. at 14 (Marshall, J., dissenting).
the stricter constitutional scrutiny only upon proof that the burden on fundamental rights was necessary to promote a compelling state interest.46

Two important considerations that bear heavily upon a proper analysis of American Mini are clear from the Belle Terre decision. The Court reaffirmed the long standing presumptive validity of local land use legislation. Courts do not fashion themselves as zoning appeals boards and when possible will defer to the locality’s judgment. This consideration was clearly recognized by the Supreme Court in American Mini.

However, equally implicit from the Belle Terre decision is a recognition of the proper standard of equal protection scrutiny. The level of equal protection scrutiny was not reduced because of the presence of the zoning power. Rather, the Court’s failure to find fundamental rights in Belle Terre justified the minimum tier of judicial scrutiny. Had fundamental rights been present, similar to the First Amendment rights at stake in American Mini, the Court in Belle Terre would have undoubtedly invoked the stricter standard of scrutiny.47 Yet, unpredictably, in American Mini, when faced with infringement of constitutionally protected rights, the Court deferred quite willingly to the municipality’s need to experiment in the area of neighborhood preservation.48

B. Precedent for Decision in Cases of Content-Discrimination

1. Mosley: Equality of Status in the Field of Ideas

Although American Mini provided a novel context for a content-discrimination issue,49 discrimination based upon particular types of speech had been presented to the Supreme Court on a number of

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46 Id. at 18 (Marshall, J., dissenting). Justice Marshall concluded that the legislative goal of keeping residential areas free of noise, control of population density, prevention of traffic and parking problems, preservation of the rent structure of the community, and aesthetic value to the residents were all legitimate governmental interests. However, the legislative means were both underinclusive and overinclusive and there were alternate means, less burdensome on protected rights, of achieving the same goal. Id. at 19-20 (Marshall, J., dissenting). Compare with Young v. American Mini Theatres, Inc., 427 U.S. 50, 87 (1976) (Stewart, J., concurring); Gribbs, supra note 3, at 1020; California v. Larue, 409 U.S. 109, 135 (1972) (Marshall, J., dissenting).


49 Id. at 50. This was the first case in which the interests in free expression protected by the First and Fourteenth Amendments had been implicated by a municipality’s zoning ordinance. Id. at 76 (Powell, J., concurring).
occasions. In Police Department of Chicago v. Mosley, the Court considered a Chicago ordinance that prohibited all picketing within 150 feet of school buildings, exempting all peaceful, labor picketing from this total prohibition. Respondent Mosley had picketed a local school for a number of months before the ordinance was enacted, alleging that the school practiced racial discrimination. The ordinance prohibited picketing against non-labor issues, such as racial discrimination, but permitted picketing in labor-related protests.

Finding that the ordinance treated some forms of speech differently from others, the Court rested its rationale on an equal protection analysis, although the issue was "closely intertwined" with the First Amendment. The Court concluded that the government could not selectively exclude speakers from a public forum based on reference to content alone. Finding that there is an "equality of status in the field of ideas," the Court held that the First Amendment and the equal protection clause required the government to afford all points of view an opportunity to be heard.

Although the city asserted that the legislative motive was to prevent school disruption, a substantial and legitimate state interest, no proof was offered that peaceful labor picketing was any less disruptive than peaceful non-labor picketing. The city argued that as a class, non-labor picketing was more prone to violence. The Court, however, refused to accept "[p]redictions about imminent disruption[s] . . ." and rejected the city's justification.

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If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached. The objection can then no longer be keyed to interferences with other users of the public places, but would appear to implicate the kind of message that the groups were transmitting. The regulation would thus slip from the neutrality of time, place and circumstances into a concern about content. The result is that equal protection analysis in the area of speech issues would merge with considerations of censorship.

408 U.S. 92 (1972).

Id. at 96. Access to a public forum is discussed at III B.2, infra.

Id.

Id. at 99-100.

Id. at 100-01. Predictions about imminent disruptions from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with a guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis.

Id. at 100-01.
In applying an equal protection standard of "careful scrutiny,"56 the Court found that where the First Amendment is involved, governmental legislation must be narrowly drawn so that fundamental rights are not curtailed. Thus, in Mosley, although the city claimed a substantial state interest, the selective restrictions on expression were found to be far greater intrusions of protected speech than were necessary.57

The Supreme Court in American Mini did not attempt to distinguish Mosley.58 The dissent in the American Mini circuit court opinion59 had attempted, albeit unconvincingly, to distinguish the two cases, and found that Mosley was not controlling because that city ordinance did not merely regulate the right to picket, but rather "was an absolute ban on picketing near schools, unless the picketing was labor-related."60 Mosley, however, cannot be distinguished on that ground alone. In American Mini, the ordinance also was an absolute ban on the location of theaters and bookstores within specified areas, if the theaters exhibited the proscribed material. The

56 In a footnote to the majority opinion in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1972), the Court refers to the standard of scrutiny applied to the Mosley ordinance. "The stricter standard of review was appropriately applied since the ordinance was one 'affecting First Amendment interests.'" 411 U.S. at 34, n.75. The Court's analysis in Rodriguez illustrates why commentators have had difficulty in pinpointing the Court's standards of review in the Equal Protection area. In dissent, Justice Marshall lamented that the Court attempted to stratify the categories of Equal Protection analysis. However, in his view, Supreme Court decisions resting upon Equal Protection rationale applied a sliding scale of standards. Id. at 98-99.

57 At least one commentator has hailed Mosley as a landmark First Amendment decision. [Mosley] makes two principal points: 1) the essence of the First Amendment is its denial to government of the power to determine which messages shall be heard and which suppressed; . . . 2) Any 'time, place and manner' restriction that selectively excludes speakers from a public forum must survive careful judicial scrutiny to insure that the exclusion is the minimum necessary to further a significant government interest . . . The Court has explicitly adopted the principle of equal liberty of expression. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 28 (1975).

58 The Court attempted to distinguish Mosley by a discussion of the use of content analysis in the inapposite area of defamation. The Court concluded that implicit in their holdings is the assumption that the content of the news article determines the quantum of First Amendment protections. Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976). However, the subject matter of an article is determinative only of the standard of proof that the complainant carries. The American Mini Court itself, noted that "although the content of a story must be examined to decide whether it involves a public figure or a public issue, the Court's application of the relevant rule may not depend on its favorable or unfavorable appraisal of that figure or that issue." Id. at 67 (emphasis added). Therefore, even in the area of defamation, the Court will not permit content valuations to be considered. See note 104, infra.

59 Gribbs, supra note 3, at 1021 (Celebreeze, J., dissenting).

60 Id. at 1024.
basis for this distinction between "adult" theaters and all other theaters was the fear that such speech concentrated in one geographical area would lead to a deterioration of surrounding neighborhoods. Both the Mosley ordinance and the ordinances at issue in American Mini effectively singled out particular forms of speech for regulation in some manner and therefore were not content-neutral in their application. Additionally, the Mosley Court was unwilling to accept the "[p]redictions about imminent disruption[s]" that might result from non-labor picketing, whereas the Court in American Mini clearly accepted the speculative causal connection between concentrations of adult entertainment and neighborhood deterioration. Clearly, the Mosley precedent prohibiting selective exclusion of speech precluded the enactment of the American Mini zoning ordinance, which differentiated among movie theaters and bookstores solely upon the content of the material sold.

2. Lehman: An Aberration in the Area of Content-Discrimination

The Mosley mandate against excluding communication based on content was ignored by the Court in Lehman v. City of Shaker Heights. Petitioner Lehman challenged a policy of the municipal rapid transit system that allowed commercial, but denied political advertising. Lehman, a candidate for political office, argued that the city of Shaker Heights, by accepting commercial advertising, had opened a public forum, and therefore space had to be granted in a nondiscriminatory manner to noncommercial advertising. The plurality opinion, written by Justice Blackmun, found that the city was engaged in a commercial venture and that it was within their discretion and business judgment to treat advertising space as they wished. He viewed the city's policy as similar to a municipal decision to charge "a 10-, 25-, or 35-cent fare," or to change schedules and locations of bus stops.

The plurality in Lehman rested their decision upon their failure to find a public forum. In their view, advertising space on public

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Id. at 304.

Justice Stevens' analysis starts from the premise that the zoning ordinance was a content classification, not a content-neutral time, place, or manner regulation as Justice Powell, in his concurring opinion, viewed the ordinance.

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 100 (1972).

transportation did not represent an implied acquiescence on the part of the city to afford access to all potential advertisers. The Court’s unwillingness to find a public forum may have been based on a number of considerations. First, the Court viewed the leasing of advertising space as a proprietary activity. Under this rationale, the Court concluded that business judgment may have dictated the exclusion of political ads. The plurality opinion surmised that political advertising was not as revenue-productive as commercial advertising, due to the “short term candidacy or issue-oriented advertisement.”

The Court’s assumption in Lehman that the politician’s claim did not “rise to the dignity of a First Amendment violation,” may have been influenced by the Court’s approach to advertising in general. Traditionally the Court has not afforded “commercial speech” the same protections given to other forms of speech. Commercial speech, like advertising, is speech that “[does] no more than propose a commercial transaction.” The fact that the politician in Lehman framed his claim as a right of access to advertise may have accounted for the Court’s willingness to find that his constitutional rights were not denied.

An additional basis for the Lehman decision was elaborated in Justice Douglas’ concurring opinion. Consonant with his reverence for the sanctity of the human environment, Justice Douglas equated advertising on a public transport with the obtrusiveness of highway billboards. Rather than consider the constitutional right of access claimed by the politician, Justice Douglas rested his decision on the constitutional right of commuters to be free from forced intrusions upon their privacy. He found that bus commuters were a “captive audience,” unable to exercise the choice of exposure to the speech. In his view, “the right of the commuters to be free from forced intrusions on their privacy preclude[d] the city from trans-

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66 Id.
67 Id.
68 Virginia State Board of Pharmacy v. Virginia Consumer Citizens, 425 U.S. 748 (1976) recently decided that commercial speech does not lose its First Amendment protection because money is spent to convey it to the public. The corollary to this holding would provide that commercial speech, although entitled to some First Amendment protection, is still regarded as a lesser category than other forms of protected speech.
form its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.” Justice Douglas failed to distinguish the obvious intrusions of commercial advertising, yet he recognized that such displays would be as offensive as political ads. However, that issue could not, in his view, be decided by the Court since no party was before the Court claiming an invasion of privacy.

Neither Justice Blackmun nor Justice Douglas viewed the content of the message in Lehman as relevant to the political candidate’s access to the forum. Justice Brennan’s dissent, however, focused on the content-discrimination issue. Because the city accepted commercial advertising, Justice Brennan concluded that they had voluntarily established a public forum, and “[o]nce a public forum has been established, both free speech and Equal Protection principles prohibit discrimination based solely upon subject matter or content.” Justice Brennan felt that the principle enunciated by the Court in Mosley, “equality of status in the field of ideas,” should have been controlling on the issue. Brennan would have required that the Court subject the city’s decision to strict scrutiny under equal protection analysis. With this test, the city would have been required to demonstrate that its discretionary classifications furthered a substantial governmental interest. Because the municipality’s decision to exclude particular speech was based solely upon subject matter or content, the dissent would have invalidated the policy under equal protection analysis.

Although Mosley and Lehman clearly presented similar issues of discrimination based upon content of speech, the plurality’s failure in Lehman to find a public forum led to contrary results in the two cases. Had the Court in Lehman accepted the political candidate’s claim that a public forum had indeed been created, the precedent established in Mosley, militating against content-discrimination, would likely have been applied. The competing interest of a “captive audience” and the nonexistence of a public forum were not issues in American Mini. The Detroit zoning ordinances were not directed at preventing the invasion of allegedly offensive com-

72 Id. at 307. There was neither a captive audience nor an invasion of privacy issue in American Mini, although the city raised these issues for the first time in their brief before the Supreme Court. Brief for the Respondent at 80, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). See Miller v. California, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting).
74 Id. at 314 (Brennan, J., dissenting).
75 Id. at 315. Justice Brennan relied upon the Mosley precedent for this conclusion.
munication upon a public unable to avoid exposure. Additionally, a public forum existed in the American Mini case as theaters and bookstores are public places. Both the plurality and dissent in Lehman agreed that if a public forum had been established, equal protection and First Amendment precedent would preclude discrimination solely upon the subject matter of the material.

3. *Erznoznik: Application of Strict Judicial Scrutiny to Legislative Exclusion of Offensive Speech*

Rather than clarify the inconsistencies of *Mosley* and *Lehman*, and resolve the ambiguous standard of review prevailing in content-discrimination cases, the Court in *Erznoznik v. City of Jacksonville* prolonged the confusion. *Erznoznik* applied both strict scrutiny under equal protection rationale and a substantive First Amendment analysis that considered privacy interests and the presence of a captive audience. In Jacksonville, Florida, an ordinance declared that drive-in theaters exhibiting films containing nudity would be a public nuisance if the movie screen was visible from a public street or place. The city maintained that public displays of nudity could be suppressed as a protection of the privacy interests of the community. The Court refused to accept such justifications and found the ordinance unconstitutional.

Justice Powell, writing the majority opinion in *Erznoznik*, agreed that privacy interests may be protected and may override the individual’s right to speech by content-neutral regulations. The Court concluded, however, that the First Amendment prohibited discriminatory treatment based on the substance of speech unless outweighed by the countervailing interests of a captive audience or the privacy of individuals. Although the ordinance was not a total suppression or restraint of free expression, the Court recognized its deterrent effects on protected speech.

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78 422 U.S. 205 (1975).
79 Id. at 209.
81 The deterrent manifested itself in two ways. Theaters would have to incur great financial expense if protective fencing was required for drive-ins. Second, theaters would be deterred from exhibiting any film that contained a fleeting glimpse of nudity, however innocent. See
A clearer application of equal protection analysis was prompted by the city's asserted justification that nudity on a drive-in screen acted as a distraction to passing motorists, causing an increase in accidents. Referring to Mosley, the Court found this classification underinclusive, as all outdoor theaters were potential traffic distractions to passing motorists. Furthermore, the city could offer no reason for the distinction drawn between the distractive nature of nudity on drive-in theaters as opposed to all other films.82

Significantly, the Court in Erznoznik subjected the ordinance to strict scrutiny under equal protection analysis. In cases where minimum scrutiny under equal protection analysis is invoked, the Court may uphold some classifications in order to further a legislative priority. However, the Court in Erznoznik was unwilling to accept the speculative necessity for the disparate treatment accorded nudity on drive-in screens, and found that First Amendment interests required strict judicial scrutiny.83

IV. The American Mini Decision: Curtailment of Fundamental Rights

Only an uncritical eye would overlook the Court's apparent distaste for the material involved in American Mini and the Court's resultant departure from First Amendment and equal protection principles. Police Department of Chicago v. Mosley84 considered the problem of discrimination based upon content of speech and held that the First Amendment as well as the equal protection clause prohibited censorship based upon the subject matter of unfavorable

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82 The Court offered as a solution a nondiscriminatory regulation requiring all drive-in theaters to fence the view from passing motorists. One commentator has suggested that equal protection analysis in this area would allow a municipality to broaden the scope of its legislation, covering all aspects of a problem, rather than a narrow piece of legislation, less restrictive on the First Amendment. Note, Equal But Inadequate Protection: A Look at Mosley and Grayned, 8 Harv. Civ. Rights - Civ. Lib. L. Rev. 464 (1973). However, if such result did occur, an equal protection claim might rest on the basis of the overinclusive nature of the legislation. See Tussman and tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949); Shapiro v. Thompson, 394 U.S. 618 (1969).

83 The Supreme Court, 1974 Term, 89 Harv. L. Rev. 47, 128 (1975).

84 408 U.S. 92 (1972).
speech. Although the Mosley precedent was ignored in Lehman v. City of Shaker Heights,\textsuperscript{85} it was the absence of a public forum and the presence of a captive audience that distinguished the Court's conclusion in Lehman. Erznoznik v. City of Jacksonville\textsuperscript{88} presented the Court with a similar factual situation as that posed in American Mini. In Erznoznik, the Court refused to validate a legislative prerogative designed to curtail unpopular speech. The Court found that the speech was protected by the First Amendment and applied strict judicial scrutiny under an equal protection rationale.

Erznoznik suggests that the Court in American Mini should have evaluated the Detroit ordinance under a strict scrutiny standard. Consistent with Mosley, the Detroit ordinance should have been struck down as an example of impermissible content-discrimination. The American Mini Court effectively ignored the teachings of Erznoznik and Mosley.

The plurality opinion in American Mini embarked on several different routes to arrive at the conclusion that the Detroit zoning ordinance was constitutionally permissible. Each rationale is perplexing, leaving future analysis of equal protection and First Amendment problems uncertain. The Court's statement "that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate,"\textsuperscript{87} is constitutionally unfounded. "Much speech that seems to be of little or no value will enter the market place of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom."\textsuperscript{88} It is the duty of the Court not to act as a censor of speech protected by the First Amendment.

When fundamental rights are legislatively classified, the Court has explicitly required a high degree of judicial scrutiny. Non-obscene protected speech receives full First Amendment protection.\textsuperscript{89} As a fundamental right, the interest curtailed in American Mini required strict judicial scrutiny under equal protection analysis. Only upon a finding of a compelling state interest should the Detroit ordinances have been validated. One can only attribute the

\textsuperscript{85} 418 U.S. 298 (1974).
\textsuperscript{86} 422 U.S. 205 (1975).
\textsuperscript{88} Id. at 88 (Stewart, J., dissenting).
Court's rashness in relinquishing settled constitutional principles to personal repugnance for the material claiming protection.

Unlike Lehman, American Mini did not present the issues of a public forum or a captive audience. Detroit citizens were not "captive," as they were capable at all times of avoiding any alleged invasion of their privacy. One is not forced to enter an adult theater or peruse the merchandise of an adult bookstore.

The asserted motive for the Detroit legislation was the prevention of neighborhood deterioration. In large part, the alleged deterioration was no more than the commercial residents' perception and prediction of the consequences of adult establishments. Although unwilling to accept such a forecast in Mosley, the Court comfortably rested its decision in American Mini on the city's need to experiment in the area of zoning. Although the police power has been given an almost unlimited rein by the Court, "it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution." 92

Although Justice Powell in his American Mini concurring opinion rejected the plurality's contention that non-obscene, erotic material justified different treatment under the First Amendment, his analysis is subject to criticism. Justice Powell distinguished Erznoznik and American Mini by stating that the former was a direct attempt at suppression of speech, while in American Mini, the legislation had only an indirect effect on speech. By analyzing American Mini under the criteria set forth in United States v. O'Brien, he concluded that the Detroit zoning ordinance was a regulation of conduct, not of speech.

O'Brien, however, may not even be applicable to the issue presented in American Mini. It was conceded by the Detroit Common Council that it was the results of particular speech that prompted the promulgation of the "adult" zoning ordinance. 94 "[T]he City's

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90 The City of Detroit seemingly would have the power to regulate outside displays of "adult" theatres and bookstores on the basis of its interest and responsibility for the well-being of minors. See Ginsberg v. State of New York, 391 U.S. 629, 643 (1968).
91 See text at note 24, supra and note 33, supra.
92 Buchanan v. Warley, 245 U.S. 60, 74 (1917).
93 See note 32, supra.

Even though there is no question that material judicially determined to be obscene may be banned there remains the very real problem of controlling the influx of adult businesses
principal asserted interest was in minimizing the ‘undesirable’ effect of speech having a particular content.” The *O'Brien* test is applicable only where the government’s purpose is to regulate conduct. *O'Brien* involved government regulation of conduct which only incidentally burdened First Amendments rights. On these limited facts the legislation was upheld. The *O'Brien* court distinguished the factual situation at issue in that case from one where the government’s regulation of conduct arose because the communication integral to the conduct was itself thought to be harmful. Clearly, the conduct regulated in *American Mini*, the operation of certain theaters and bookstores in specified locations, is integrally related to the supposed harmful effects of the “communication” occurring at such establishments. The classification, “adult,” derived from the \textit{content} of the books or films, should be evidence enough that the intent of the Detroit zoning regulation was to control the speech aspect of the enterprise, and not the non-speech or conduct element of location. Analysis of *American Mini* under *O'Brien* was clearly inappropriate. Rather, the issue was similar to that presented in *Erznoznik* and therefore required strict judicial scrutiny under the equal protection clause.

Further, the Court ignored the substantial possibility that the Detroit zoning ordinances were enacted as a means to eliminate, on a wholesale basis, unpopular, yet protected, First Amendment

\footnotesize{whose stock in trade, whether films, magazines or performances, are entitled to display and/or distribution before any judgment may be made as to whether the material offered is pornographic. In addition, unless and until the courts rule that the use of an establishment to exhibit or sell obscene press materials or films is abatable as a nuisance, continued and repeated convictions for disseminating pornographic material will not close those business establishments which are the continuing, visible sources of material which is offensive to the neighboring business and residential community, whether or not the materials have been legally determined to be pornographic. Experience has shown that one or more convictions against an establishment does not force its closure, nor does it offer any protection to the neighborhood.}

\textit{Id.} In applying the *O'Brien* criteria, Justice Powell noted that an intent or purpose to restrict the communication itself would make *O'Brien* inapplicable. 427 U.S. at 81 n.4 (Powell, J., concurring).


97 The Detroit ordinance explicitly defined the qualities that would characterize an establishment as “adult.” DETROIT, MICH. ORDINANCE 742-G § 32.007 (1972).

An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to “Specified Sexual Activities” or “Specified Anatomical Areas.”}
speech. Broad regulations, such as zoning, can act as a guise for the elimination of material not within judicial obscenity standards, but which a community finds offensive. Regulations may be enacted to evade conformity with such judicial commands and to by-pass the often frustrating, time consuming mechanics of the judicial process.

The brief for the city of Detroit intimated that the courts' failure to rule that "adult" material was abateable as a nuisance, interfered with the municipality's efforts to control the influx of such material prior to a judicial pronouncement that it was obscene and subject to suppression. However, the specific adult films and books regulated by the Detroit zoning ordinances were never determined to be obscene, and thus were never removed from the protections of the First Amendment. It is submitted that the Court's combined failure to countenance this fact and its blind deference to the city's need to prevent neighborhood deterioration, is a blatant abdication of judicial responsibility to First Amendment protections.

The Court was willing to find a direct causal connection between x-rated entertainment and the problem of neighborhood deterioration, though such a nexus was never supplied by the city of Detroit. The Court in *American Mini* willingly accepted the amorphous speculations and conclusions drawn from the sociologist's affidavit. Since First Amendment fundamental rights were at stake, strict scrutiny under equal protection was required. Using such strict analysis, the court would have had to reject the equivocal rationalizations offered by the city of Detroit. Where the First Amendment is threatened, it is the duty of the Court to demand the least restrictive alternative unless it can be conclusively demon-

Footnotes:


"Indeed there are some indications in the legislative history that California adopted these liquor licensing regulations for the specific purpose of evading [obscenity] standards. Thus Captain Robert Devin of the Los Angeles Police Department testified that the Department found adoption of the new regulations for the following reason: While statutory law has been available to us to regulate what was formerly considered as antisocial behavior, the federal and state judicial system has through a series of similar decisions, effective emasculated law enforcement in its effort to contain and control the growth of pornography and of obscenity and of behavior that is associated with this kind of performance." Id. at 126 n.4.

99 See note 94, *supra*.

100 See note 97, *supra*. A reading of the definition of "adult" in the Detroit zoning ordinance could include books or films that although within the definitional framework of the ordinance were not legally obscene. The Court in *Erznoznik* found an ordinance with a similar impact to be impermissibly overbroad. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

101 See text at note 24, *supra*.
strated that the protected activity and the resultant conduct are so closely intertwined that by regulating one, the other can be eliminated.\textsuperscript{102}

V. Conclusion

*Young v. American Mini Theatres, Inc.* presented the Supreme Court with a unique problem. Few would argue that the plight of urban areas should go unnoticed by concerned municipal legislatures. Judicial precedent has accorded cities an almost unlimited rein in coping with the complexities and problems associated with urban growth and expansion. Yet, no right is held more judicially sacred than the rights guaranteed by the First Amendment. The Court failed fully to appreciate that the two interests are not mutually exclusive.

The material regulated by the Detroit ordinances was protected speech. There was no determination that the books or films displayed at "adult" establishments fell within the unprotected sphere of obscenity. The court assumed that non-obscene "adult" material was of less intrinsic value to our society and thus entitled to less constitutional protection.

The ramifications of *American Mini* are unclear.\textsuperscript{103} The Court, in yielding to the censorial effects of the Detroit ordinance, has adopted gradations\textsuperscript{104} among types of protected speech. Yet the only


\textsuperscript{103} The *American Mini* decision has already been implemented in New York. Citing the *American Mini* opinion, the New York City Planning Commission amended the general zoning plan on January 26, 1977. The New York amendments went further in restricting adult enterprises than their Detroit counterparts by limiting adult uses to specific districts, and by subjecting them to distance, concentration, size, and amortization restrictions. New York, N.Y. Ordinance 32-461, 32-464 (1977).

The Board of Estimate later voted to postpone further consideration of the zoning ordinances, concerned that the breadth of the amendments may be beyond *American Mini* protection, N.Y. Times, March 29, 1977, p. 1, col. 1.

\textsuperscript{104} The Supreme Court has recognized categories of speech which are subject to some regulation. However, the Court’s reliance on such precedent is not appropriate for the discussion of the issues presented in *American Mini*. One area discussed is the limitation on the absolute freedom of speech in the context of defamation. However, libel and slander are areas of speech that are not accorded the ambit of First Amendment protections, whereas the non-obscene speech in *American Mini* is fully protected speech. See New York Times v. Sullivan, 276 U.S. 254 (1963) and Gertz v. Welch, 418 U.S. 323 (1975).

The Court has recognized that "commercial" speech, although protected, is not accorded the full First Amendment guarantees of other forms of speech. Virginia State Board of Pharmacy v. Virginia Consumer Citizens, 425 U.S. 748 (1976). However, the speech in *American Mini* does not fall within the definitional framework of "commercial" speech. Pittsburgh
indicia for preference of one form over another is the public's "readiness to parade off to war." In effect, the Court has relegated the degree of protection afforded speech, to its value in the eyes of a majority of the public. This premise is contradictory to the very purposes of the First Amendment; those forms of speech that are least favored by society require the greatest judicial protection.

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