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Twisted Sister, Washington Wives and the First Amendment: The Movement to Clamp Down on Rock Music

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ENTERTAINMENT & SPORTS LAW JOURNAL

TWISTED SISTER, WASHINGTON WIVES AND THE FIRST AMENDMENT: THE MOVEMENT TO CLAMP DOWN ON ROCK MUSIC

SETH GOODCHILD*

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I. INTRODUCTION

Rock and roll music¹ has always aroused intense passions.² Immediately christened the Devil's language, rock was denounced as a plot to "mongrelize America,"³ while its first popular hero, Elvis Presley, became the target of censors across the country.⁴ Church leaders urged boycotts and burned records,⁵ while several communities banned live concert performances,⁶ because of the music's overly sexual content.⁷

During the 1960's,⁸ the music, now firmly established in Amer-

1. Although this article's analysis could be applied to all forms of music, from popular to jazz to classical, it is limited to rock and roll because that genre has been the more frequent subject of censorship efforts. It should not be construed to suggest that other music is free of opposition, nor unprotected by the first amendment. In the 1940s, for example, songs were banned by broadcasters for their sexual content. Dougherty, *From Race Music to Heavy Metal: A Fiery History of Protests*, PEOPLE, Sept. 16, 1985, at 52.

2. See, e.g., R. DUNCAN, *THE NOISE: NOTES FROM A ROCK 'N' ROLL ERA* (1984) (discussing rock's impact on the 1960's); J. DUNSON, *FREEDOM IN THE AIR* (1965); C. GILLET, *THE SOUND OF THE CITY, THE RISE OF ROCK AND ROLL* (1983) (elaborating history of popular music); H. LONDON, *CLOSING THE CIRCLE: A CULTURAL HISTORY OF THE ROCK REVOLUTION* (1984).

3. H. LONDON *supra* note 2, at 24-25 (quoting a representative of the White Citizens Council of Alabama). Much of the early opposition to rock music was linked to its role in a supposed black plot to corrupt the minds of white youth. *Id.* at 36. The South served as the anti-rock stronghold. As a result, record companies encouraged white performers to remake songs originally distributed by black artists, to increase sales and avoid negative reaction. Dougherty, *supra* note 1, at 53.

4. Clerical leaders declared that Presley was "one of the lewdest persons ever to appear on stage," while community officials declared he would not perform in their cities. P. HAMMONTREE, *ELVIS PRESLEY* 20 (1985). An Oakland, California policeman was said to have remarked, "If he did that (perform) in the street, we'd arrest him." H. LONDON, *supra* note 2, at 24-25.

5. The church stood at the forefront of the opposition to rock. H. LONDON, *supra* note 2, at 36.

6. Hartford city officials sought to revoke the state theater's license after it booked rock acts; the Washington, D.C. police chief wanted to ban shows; Minnesota theater owners withdrew films featuring rock music; Asbury Park, New Jersey, prohibited the music from city dance halls; Santa Cruz barred it from civic buildings; San Antonio forbade jukeboxes. *Id.* at 36, 50.

7. Frank Sinatra, in the following statements, typified the establishment viewpoint. "Rock 'n' roll smells phony and false. It is sung, played and written for the most part by cretinous goons and by means of its almost imbecile reiteration and sly, lewd, in plain fact, dirty lyrics . . . [it] manages to be the martial music of every side-burned delinquent on the face of the earth.'" H. LONDON *supra* note 2, at 24-25. As one commentator noted, rock was "consistently identified with rebellious attitudes towards sex and other moral issues." Comment, *Drug Lyrics, The FCC and the First Amendment*, 5 LOY. L.A.L. REV. 329 (1972).

8. During the McCarthy hearings in the 1950's, popular musicians with leftist sympathies found themselves abandoned by a record industry fearful of retribution. The en-

ican society, came under increasing attack for its political bent.⁹ Record companies suppressed lyrics,¹⁰ communities prohibited its most vibrant expression, the rock festival,¹¹ and civic auditoriums tried unsuccessfully to prohibit performance of the musical "Hair," renowned for its sexual hijinks and staunch anti-war stance.¹²

Vice President Spiro Agnew established a similar tone for the 1970's by consistently assailing rock music for its "blatant drug-culture propaganda."¹³ His attacks culminated in an official Federal Communications Commission ("FCC") public notice¹⁴ reminding radio licensees of their duty not to promote songs with drug-oriented lyrics.¹⁵

The advent of music videos in the 1980's has expanded the traditional legions of those seeking to suppress rock music.¹⁶ The graphic representations of the songs has triggered national concern that many pop lyrics, videos and concert performances are both obscene and harmful to the nation's children. Several organizations, troubled by this perceived menace to American youth, have

tainment community "yielded to the blackmail and turned a cold shoulder on anyone with a hint of left-wing associations." C. GILLET, *supra* note 2, at 289. The Weavers, a popular folk group, were forced to disband because of trouble obtaining bookings. "For a few years, folk music was regarded with some mistrust by the major record companies, even after the McCarthy fervor had died down." *Id.* at 289-90.

9. See *infra* notes 107-15 and accompanying text.

10. Topical music had "the meaning of many of the songs . . . toned down to suit the managers, agents and disc jockeys." J. DUNSON, *supra* note 2, at 111. Bob Dylan was a frequent target of the in-house censor. He "found himself in a position of having recorded his songs for Columbia and not having them released. Only two songs out of the twelve on his first record were written by himself, and neither of them could be considered political in nature." *Id.* at 73-74.

11. "Communities confronted with the possibility of a rock festival being held in their area have combated the onslaught of the 'barbaric horde' with zoning laws, ordinances regulating mass meetings, and, most successfully with injunctions for nuisance." Note, *Rock Festivals and Nuisances*, 25 ARK. L. REV. 362 (1971).

12. See *infra* note 86.

13. Comment, *supra* note 7, at 330 nn.16-17.

14. See *infra* notes 358-71 and accompanying text.

15. Public pressure combined with the naturally cautious inclinations of commercial record companies to spur widespread industry self-censorship. The legal department at MGM ruled against printing lyrics written by Frank Zappa because they were too controversial. Comment, *supra* note 7, at 329-30.

16. Video has also enlarged its audience and transformed the music itself. See Gelman, *Rocking Video*, NEWSWEEK, Apr. 18, 1983, at 96 ("Rock video is standing music on its ear; helping to revive the troubled record industry . . . It is giving rock a way to be new again."); Levine, *TV Rocks with Music*, N.Y. Times, May 8, 1983, § 6 (Magazine), at 42, col. 4 (noting record industry "sees them as the most promising marketing tool to come along in the 20 years since the proliferation of FM rock stations"); Harrington, *The Look of Rock TV and Music*, Washington Post, Aug. 28, 1983, at K1, col. 1 (stating video has "already effected a major transformation in the music itself . . . the biggest thing to hit music since stereo").

campaigned against the rock industry, seeking regulations that would restrict public access to the lyrics.¹⁷ This crusade, whose effectiveness has exceeded prior music censorship activities,¹⁸ threatens to silence a vibrant medium of political and social expression.

This article will examine that movement. First, it will analyze music's status under the Constitution. Although entertainment is expression covered by the first amendment,¹⁹ the Supreme Court has never expressly included music and lyrics among the classes of protected speech. This article will demonstrate that regulations aimed at rock songs must satisfy the same constitutional protections as those affecting other forms of entertainment, pursuant to both case law and bedrock first amendment principles. It will illustrate that rock music, an unpopular, often unpleasant and crude form of speech that lacks a politically-influential audience, is particularly vulnerable to the censor. The need for vigilant application of first amendment standards is therefore acute.

Next, the article will evaluate the constitutionality of the various proposals advanced to restrain porn rock—banning certain allegedly obscene records, rating albums, limiting minors' attendance at concert performances and regulating music video content. It will apply the first amendment's substantive and procedural safeguards to these efforts and conclude that they largely cannot withstand constitutional scrutiny.

The article begins with a review of the Constitution's guarantee of free speech and its relationship to entertainment.

II. MUSIC UNDER THE CONSTITUTION'S FREE SPEECH GUARANTEE

A. *The First Amendment Generally*

The first amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press."²⁰ This constitutional guarantee, applying with equal force to the states

17. See *infra* notes 169-72 and accompanying text. This campaign has not been limited to the music. Both album art and music magazines have been affected. See *Pornography Charged in Rock-Album Poster*, N.Y. Times, June 5, 1986, at C24, col. 6 (describing pornography charge against rock musicians based on poster distributed with album); Goldberg, *Wal-Mart Bans LPs*, ROLLING STONE, Sept. 11, 1986, at 15, (detailing retailer's decision not to carry "nearly three-dozen rock and pop culture magazines").

18. It has been noted that this effort is the "most serious protest against rock lyrics" since 1971. Love, *Furor Over Rock Lyrics Intensifies*, ROLLING STONE, Sept. 12, 1985, at 13, 13.

19. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

20. U.S. CONST. amend. I.

through the fourteenth amendment,²¹ is accorded an "exalted position" among the liberties created by the Bill of Rights.²² The first amendment obtained this stature because of its intimate relationship with the democratic objectives promised in the Constitution.²³

The Supreme Court has stated that "it is the purpose of the first amendment to preserve an uninhibited marketplace of ideas."²⁴ With this constitutional guarantee the framers ensured that American society would feature "robust and wide-open" debate²⁵ on the issues affecting its politics, people and culture.²⁶ Only through this clash of competing thoughts, occurring free of the potential constraints imposed by an authoritarian government, would the public be adequately prepared to govern itself.²⁷ Therefore, the

21. *Gitlow v. New York*, 268 U.S. 652 (1925); *See also Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931).

22. *Dennis v. United States*, 341 U.S. 494, 584-85 (1951) (Douglas, J., dissenting). *See also Widmar v. Vincent*, 454 U.S. 263, 276 (1981) ("First Amendment rights are entitled to special constitutional solicitude."); *Swope v. Lubbers*, 560 F. Supp. 1328, 1331 (W.D. Mich. 1983) ("First Amendment rights . . . have long been regarded as among the most precious."); *ACLU of Virginia v. Radford College*, 315 F. Supp. 893, 896 (W.D. Va. 1970) ("It needs no citation to suggest that First Amendment liberties have been considered as among the most important guaranteed to citizens . . .").

23. As Justice Cardozo stated, "[O]f that freedom one may say that it is the matrix, the indispensable condition of nearly every other form of freedom. With rare aberrations pervasive recognition of that truth can be traced in our history, political or legal." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). *See also McKay, The Preference of Freedom*, 34 N.Y.U.L. REV. 1182, 1184 (1959) ("[F]reedom of expression is so vital in its relationship to the objectives of the Constitution that inevitably it must stand in a preferred position.").

24. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). *See also Porter v. Califano*, 592 F.2d 770, 779 (5th Cir. 1979) ("The First Amendment generally favors the marketplace testing of ideas and information . . .").

25. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This debate is not limited to politics, but includes "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). *See also Red Lion Broadcasting Co.*, 395 U.S. at 390 (public has right to "social, political, esthetic, moral, and other ideas and experiences").

26. It is well-settled that the first amendment guarantees are not limited to political expression. *See Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 323 (1977) (political speech is not only protected area); *Red Lion Broadcasting Co.*, 395 U.S. at 390 (public has a right to "social, political, esthetic, moral and other ideas and experiences"); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 223 (1967); *But cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (Rehnquist, J., dissenting) (arguing first amendment should apply only to political speech).

27. Justice Brandeis stated:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

framers preserved the public's right to receive ideas,²⁸ especially unpopular expressions,²⁹ secure in the belief that truth would ultimately prevail.³⁰ They were prepared to tolerate the excesses that might result from such unfettered discussion.³¹

Despite these broad principles, the first amendment does not grant an absolute license to speak.³² Certain categories of speech are devoid of constitutional protection because they "are of such slight social value" that any benefit occasioned by their expression is outweighed by the "social interest in order and morality."³³ They include "the lewd and obscene, the profane, the libelous, the insulting or 'fighting' words"³⁴ In addition, the state may prevent the publication of certain materials.³⁵ Although "any system of prior restraints" bears a "heavy presumption against its constitutional validity,"³⁶ the government has, in certain settings,

28. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."). See also *Board of Educ. v. Pico*, 457 U.S. 853, 866-67 (1982) ("[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."); *Martin v. Struthers*, 319 U.S. 141, 143 (1943) ("The right of freedom of speech . . . necessarily protects the right to receive it."). As one Justice noted, "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

29. First amendment protection does not depend on "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 (1963).

30. *Dennis v. United States*, 341 U.S. 494, 503 ("[T]he basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, [and] free debate of ideas will result in the wisest governmental policies.").

31. In *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), the Supreme Court stated: "[T]he people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

32. *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 47 (1961) ("It has never been suggested that liberty of speech is absolute."). See also *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961) (rejection of view that freedom of speech is an absolute); *National Ass'n for Better Broadcasting v. FCC*, 591 F.2d 812, 817 (D.C. Cir. 1978) ("Of course, not all speech is protected by the First Amendment"); *Therault v. Carlson*, 495 F.2d 390, 394 (5th Cir.), cert. denied 419 U.S. 1003 (1974) ("First Amendment freedoms are not absolute.").

33. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

34. *Id.* But see *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding state libel laws constrained by constitutional limitations).

35. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (all prior restraints are not constitutionally infirm); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) ("prior restraints are not unconstitutional per se").

36. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The government bears "a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

been able to justify such restrictions.³⁷

Speech can be suppressed when it advocates illegal conduct,³⁸ while commercial speech has less extensive first amendment rights than other forms of expression.³⁹ States may also enact reasonable time, place and manner restrictions on the exercise of these freedoms.⁴⁰ Regulations in these areas, however, must be carefully crafted so as to ensure that protected speech is not inadvertently inhibited.⁴¹

B. *Entertainment and the Constitution*

The Supreme Court initially refused to grant entertainment first amendment protection. In *Mutual Film Corp. v. Industrial Commission of Ohio*, the Court held that motion pictures did not deserve a constitutional harbor:

37. The cases authorizing prior restraints have largely concerned national security issues. See *Snepp v. United States*, 444 U.S. 507 (1980) (restraining publication of former CIA agent's book concerning experiences with agency); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) (enjoining disclosure of CIA secrets by former agency official); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975) (enjoining disclosure of CIA secrets by former agency official); *United States v. Progressive, Inc.*, 486 F. Supp. 5 (W.D. Wis. 1979) (enjoining disclosure of magazine article detailing intricacies of H-bomb). See also *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (recognizing need for courts to authorize prior restraint in issues involving basic "international relations and national defense"). All prior restraints, however, must be accompanied by certain procedural safeguards. See *infra* notes 54-56 and accompanying text.

38. See *infra* notes 334-36 and accompanying text.

39. "[C]ommercial speech receives a limited form of First Amendment protection so long as it concerns a lawful activity and is not misleading or fraudulent. . . . [S]peech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest." *Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico*, 106 S. Ct. 2968, 2976 (1986) (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980)). But see *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) (state may not ban commercial speech merely because it is harmful).

40. To be valid, a time, place and manner restriction must satisfy the following three-part test:

- (a) it must be content-neutral;
- (b) serve a significant government interest; and
- (c) leave open alternative channels for communicating the information.

Metromedia, Inc. v. San Diego, 453 U.S. 490, 516 (1981).

41. See *NAACP v. Button*, 371 U.S. at 433 ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.") (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)); *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) ("When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press, suffer.").

It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion.⁴²

Thirty years later the Court reconsidered this holding, but only in dicta.⁴³ It was not until 1948, in *Joseph Burstyn, Inc. v. Wilson*, that the Court overruled *Mutual Film*.⁴⁴ The Court reasoned that movies were a "significant medium for the communication of ideas" that impacted on American social and political life.⁴⁵ The Court ruled it immaterial that this expression entertained, rather than informed, the public.

The Court rejected the contention that motion pictures forfeit their first amendment shelter because they are conducted for profit, analogizing movies to newspapers and other publications sold in the marketplace.⁴⁶ Significantly, the Court disregarded the state's argument that films were somehow more dangerous to the community's youth because of their pervasive influence.⁴⁷

First amendment protection has since been extended to other forms of entertainment,⁴⁸ while obscene speech of all forms has gone unprotected.⁴⁹

42. 236 U.S. 230, 244 (1915).

43. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

44. 343 U.S. 495 (1952). *See also* *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment . . . enjoys First Amendment protection."); *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808, 811 (3rd Cir. 1982) ("Motion pictures contain protected speech.").

45. *Joseph Burstyn, Inc.*, 343 U.S. at 502. The Court noted that movies "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Id.* at 501.

46. *Id.* at 501-02.

47. *Id.* at 502.

48. *See, e.g.,* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (dance); *Southeastern Promotions, Ltd., v. City of Atlanta, Ga.*, 334 F. Supp. 634 (N.D. Ga. 1971) (theater productions); *Adams Theatre Co. v. Keenan*, 12 N.J. 267, 270, 96 A.2d 519, 520 (1953) ("The performance of a play or show, whether burlesque or other kind of theatre, is a form of speech and prima facie expression protected . . ."). *But cf. Murdock v. City of Jacksonville, Fla.*, 361 F. Supp. 1083 (M.D. Fla. 1973) (professional wrestling is not speech); *America's Best Family Showplace Corp. v. City of New York, Dept. of Bldgs.*, 536 F. Supp. 170 (E.D.N.Y. 1982) (video games not protected).

49. When the Constitution was adopted, at least 10 states had statutes prohibiting obscene publications. At first, the Supreme Court did not expressly rule that obscenity was unprotected, merely assuming that "the primary requirements of decency may be enforced against obscene publications." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). In

The most recent history of entertainment and the first amendment has largely been a story of the struggle by communities to ban allegedly obscene films⁵⁰ and other offensive programming.⁵¹ These crusaders have waged this battle, like those opposing rock music, to preserve public morals, shelter children from unsuitable entertainment, and uphold basic community virtues. Despite the loftiness of these aims, courts, bound by a long tradition of resisting efforts to restrict even the most unpopular speech, have remained defiant.⁵² As a result, only obscene entertainment cannot claim the first amendment's shield;⁵³ generally, expression that falls short of this standard, even if sexually-oriented, may not be prohibited.⁵⁴

The state's power to regulate obscene speech under these stan-

Roth v. United States, the Court held that speech "utterly without redeeming social importance" dealing with sex in a way so as to appeal to the "prurient interest" as defined by the contemporary community standards was outside the scope of the first amendment. 354 U.S. 476, 484, 487, 489 (1957).

50. See, e.g., Verani, *Motion Picture Censorship and the Doctrine of Prime Restraint*, 3 Hous. L. Rev. 11 (1965) (detailing history of administrative censorship); Comment, *Permissive Bounds of Prior Restraint of Movies*, 17 DEPAUL L. REV. 597 (1968) (chronicling municipal censorship ordinances); Note, "For Adults Only": *The Constitutionality of Governmental Film Censorship By Age Classification*, 69 YALE L.J. 141 (1959) (reviewing classification schemes).

51. See, e.g., Comment, *Exclusion of Children From Violent Movies*, 67 COLUM. L. REV. 1149 (1967) (discussing regulation aimed at preventing violence); Comment, *The Applicability of General Public Lewdness Statutes to Live Theatrical Performances*, 5 VAL. U.L. REV. 184 (1970) (noting that 35 states have lewdness provisions); Note, *Rock Festivals and Nuisance*, 25 ARK. L. REV. 362 (1971) (reviewing efforts to prevent rock concerts).

52. See *infra* notes 77-90 and accompanying text.

53. The courts have had considerable trouble defining obscenity. It is not unreasonable to suggest that there may be no objective definition. Justice Stewart's oft-cited instruction remains appealing. He wrote that he considered obscenity to be only hard-core pornography:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shortened description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

54. The Supreme Court established the modern test for obscenity in *Miller v. California*, 413 U.S. 15 (1973). This standard resulted from several reworkings. In *Roth*, the Court defined obscenity as material "utterly without redeeming social importance," dealing with sex in a way so as to appeal to the "prurient interest." 354 U.S. at 489. Nine years later, the Court altered this standard in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). Obscenity was material whose dominant theme appealed to the prurient interest that is patently offensive and without redeeming social value. This standard resulted in few materials being judicially determined obscene. See *A Book Named John Cleland's Memoirs v. Attorney General of Massachusetts*, 383 U.S. 413 (1966) ('Fanny Hill' not obscene); *Attorney General v. A Book Named 'Naked Lunch'*, 351 Mass. 298, 218 N.E.2d 571 (1965) ('Naked Lunch' not obscene).

dards, however, is not unlimited.⁵⁵ In *Freedman v. Maryland*, the Court held that a prior restraint of even obscene films is valid "only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."⁵⁶ There are several elements a constitutionally permissible structure must contain. First, the procedure must assure prompt final judicial review and not be administered in a manner which would lend an effect of finality to the censor's decision.⁵⁷ Second, this judicial decision⁵⁸ cannot be *ex parte*.⁵⁹ Third, the burden of proof in this proceeding "that the film is unprotected expression must rest on the censor."⁶⁰ Finally, any censorship order resulting from this system must be narrowly drawn.⁶¹ The Court subsequently held that *Freedman*⁶² is not limited to "direct suppression" restraints, but applies to indirect systems that prevent distribution of speech as well, including classification systems for motion pictures.⁶³ The courts must overturn any system of regulation that fails to provide these protections.⁶⁴

The Court also developed two substantive limitations on obscenity regulation—the vagueness and overbreadth doctrines. The former provides that statutes defining illegal conduct in terms so

55. The Miller test is generally considered a higher standard than Roth. In a companion case, decided the same day, the Court recognized that states may limit even consenting adults' access to pornographic material. *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973).

56. 380 U.S. 51, 58 (1965). See also *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141 (1968) (procedural safeguards required); *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).

57. *Freedman*, 380 U.S. at 58-59. The *Freedman* Court identified the rationale underlying the need for judicial review:

The administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech. Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected interest in free expression.

380 U.S. at 57-58.

58. Restraints imposed prior to judicial involvement "must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Id.* at 59.

59. See *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 180 (1968) (*Ex parte* temporary restraining orders allowed only on a showing that "it is impossible to serve or notify the opposing parties and to give them an opportunity to participate."); *A Quantity of Books v. Kansas*, 378 U.S. 205, 211 (1964) (adversary hearing must be provided).

60. *Freedman*, 380 U.S. at 58.

61. *Carroll*, 393 U.S. at 184.

62. The *Freedman* Court also held that the burden of "proving that the film is unprotected expression must rest on the censor." 380 U.S. at 58.

63. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 688 (1968).

64. *Blount v. Rizzi*, 400 U.S. 410, 416-17 (1971).

vague and indefinite as to cause individuals of common intelligence to guess at their meaning are void.⁶⁵ The overbreadth doctrine states that ordinances which proscribe unprotected activities must not sweep protected speech within their ambit.⁶⁶ These twin safeguards ensure that protected speech is not deterred under the premises of regulating obscenity, thereby inhibiting the creative and artistic drive of entertainers.

State regulations aimed at restricting minors' exposure to allegedly obscene entertainment have created special problems for the courts, because they pit several important values against each other. On one side is the state's interest in protecting children's well-being from potentially harmful sexual materials.⁶⁷ Matched against this community exigency are three aims—preserving the parents' traditional role in rearing children,⁶⁸ ensuring that young people are prepared for participation as adults in America's open society⁶⁹ and the minors' own first amendment rights.⁷⁰ The resolu-

65. *Zwickler v. Koota*, 389 U.S. 241 (1967). A statute will fail on vagueness grounds if it either "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application" *Id.* at 249 (citing *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)). Justice Brennan has written that vague statutes fail to provide adequate notice to those affected, chill speech, and invade the buffer zone for free speech under the first amendment. *Paris Adult Theaters I v. Slaton*, 413 U.S. at 86-87 (Brennan, J., dissenting).

66. *Thornhill v. Alabama*, 310 U.S. 88 (1940). The rationale behind this doctrine is to discourage the chilling effect of ordinances and prevent selective enforcement of speech. The Court, however, has recently limited its scope. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (requiring substantial overbreadth in certain settings); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (requiring significant degree of overbreadth in other situations).

67. "[B]asic in a democracy, stand the interests of society to protect the welfare of children" *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). The threat to a child's psyche from obscene and other inappropriate matter can include "emotional excitement and psychological or physical injury." *Id.* at 170.

68. As the Court noted in *Prince*:

[I]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . And it is in recognition of this that these decisions have respected the private realms of family life which the state cannot hinder.

321 U.S. at 166.

69. *Board of Educ. v. Pico*, 457 U.S. 853, 868 (1982) ("[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."); *Prince v. Massachusetts*, 321 U.S. at 168 ("A democratic society rests for its continuation upon the healthy, well-rounded growth of young people into full maturity as citizens.").

70. The Court has recognized that minors have first amendment rights. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (students can wear symbolic black armbands); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (school children cannot be required to engage in flag salutes).

tion of this conflict has special importance for rock musicians because their audience is largely composed of minors.

The Supreme Court has recognized that children possess a "significant measure of first amendment protection."⁷¹ Nevertheless it has granted states greater discretion to restrict minors' access to sexual materials than would be tolerated in regulations aimed at adults.⁷² States are free to define obscenity in terms that vary with age and can therefore limit materials which are harmful to children, but not obscene for adults.⁷³ The regulations may not infringe on adults' freedom of expression,⁷⁴ and, except in "narrow and well-defined circumstances," may not circumscribe protected speech⁷⁵ even to shield them from objectionable matter.⁷⁶

C. *Rock Music and the Constitution*

The Supreme Court has never determined whether music is entitled to the liberties described above. The following analysis indicates that rock songs and their lyrics deserve such protection.

1. LOWER COURTS RECOGNIZE PROTECTION FOR SONGS

Four circuit courts of appeal have considered the first amendment's application to music. They are unanimous in recognizing that songs are included in the constitutional guarantee of free speech.

The leading case is *Cinevision Corp. v. City of Burbank*.⁷⁷ The city council sought to prevent certain rock concerts on the grounds that they would attract drug users and other undesirable elements to their community.⁷⁸ The Ninth Circuit ruled that this action vio-

71. *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-13 (1975).

72. *Ginsberg v. New York*, 390 U.S. 629 (1968). See also *Erznoznik*, U.S. at 212-13.

73. *Ginsberg*, 390 U.S. at 635-39. See also *New York v. Ferber*, 458 U.S. 747 (1982) (states may employ different obscenity standard to protect children); *Custom Theatres Midwest States, Inc. v. City of Fort Wayne*, 473 F.2d 1297, 1300 (7th Cir. 1973) ("A state or city because of its strong and abiding interest in its youth is not without the authority to limit the access to minors of material which would be objectionable as to them, but which would not be obscene in its appeal to adults.").

74. *High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035, 1042 (N.D. Ga. 1978), *aff'd*, 621 F.2d 141 (5th Cir. 1980).

75. *Erznoznik*, 422 U.S. at 213-14.

76. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable to them." *Id.*

77. 745 F.2d 560 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2115 (1985).

78. The city had contracted with a local promoter to provide musical entertainment in the municipal amphitheater. The arrangement had proceeded smoothly for several years until an "outspoken opponent of the concerts" was elected to the City Council and began

lated the promoter's first amendment rights, holding that "music is a form of expression protected by" the Constitution.⁷⁹

The Seventh Circuit held that an attempt to ban music at a liquor-serving bar violated the Constitution⁸⁰ because music, even if presented without words, constituted protected speech for first amendment purposes.⁸¹ And the Third Circuit likewise recognized that the music was protected in holding that a string band's selection of its songs for performance in a parade was sanctioned by the Constitution.⁸² The Second Circuit recently became the fourth circuit to hold that "musical entertainment is a form of protected speech."⁸³

Several other courts have considered the question of regulations aimed at suppressing live performances of music without reaching the issue of the Constitution's application to the songs and the lyrics. The issue was addressed by the Supreme Court which held that live entertainment is protected by the first amendment.⁸⁴ In *Schad v. Borough of Mount Ephraim*,⁸⁵ the Court included musical performances within this guarantee, but did not decide whether the music standing alone deserved constitutional protection.⁸⁶

The overwhelming majority of lower courts considering this is-

objecting to some of the shows. *Id.* at 565-66. Rejected were Blue Oyster Cult, Jackson Browne, Roxy Music, Todd Rundgren, Patti Smith and Al Stewart; accepted were Robert Palmer and Poco. *Id.* at 566 n.1. The court noted that the council's reasoning "considered arbitrary and unlawful factors" in rejecting the concerts. *Id.* at 576. Smith and Rundgren were thought to attract homosexual crowds, others predominantly black audiences, and still others opponents of nuclear power. *Id.* at 576-79.

79. *Id.* at 567. The decision recognized the first amendment interests of concert promoters in order to preserve "the right of public access to protected expression." *Id.* at 568. It noted the public must rely on concert promoters to obtain bookings of performers, similar to booksellers and theater owners.

80. *Reed v. Village of Shorewood*, 704 F.2d 943, 950-51 (7th Cir. 1983). The plaintiff alleged that the defendant city officials interfered with his business and harassed him into selling his bar because his establishment featured rock music. *Id.* at 947-48.

81. *Id.* at 950.

82. *Tacynec v. City of Philadelphia*, 687 F.2d 793, 796 (3rd Cir.), *cert. denied*, 459 U.S. 1172 (1983).

83. *Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2nd Cir. 1986). The city had rejected a promoter's request to hold a Beach Boys concert in a facility controlled by the municipality.

84. *Schacht v. United States*, 398 U.S. 58, 61 (1970).

85. 452 U.S. 61, 65 (1981).

86. *Id.* at 62-63. The Supreme Court's decision in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), considered a municipality's attempt to prevent the performance of the pop musical 'Hair.' The case, however, hinged on whether the municipal theater could be considered a public forum, and not the constitutional rights of producers to present performances.

sue have held that the first amendment protects the right to stage both rock concerts⁸⁷ and rock musicals.⁸⁸ The rationale for these cases is simple. At the heart of the attempts to stop these performances is the belief of certain community members that the music is offensive. Yet the courts have rejected these contentions. They have recognized that live rock productions and concerts are no different than other forms of protected entertainment performances and⁸⁹ thus, cannot be prohibited based on their "message, ideas, subject matter, content, popularity or social utility."⁹⁰

Some courts, however, elevating the concerns of local municipalities over the performers' first amendment rights, have enjoined the performance of rock concerts. During the 1970's, several rock festivals were prohibited because of their destructive impact on the community.⁹¹ One court's⁹² explanation typified their reasoning:

87. *Fact Concerts, Inc. v. City of Newport*, 626 F.2d 1060, 1063 (1st Cir. 1980), *rev'd on other grounds*, 453 U.S. 247 (1981) (first amendment protects right to produce jazz concerts despite community's fear that Blood, Sweat and Tears concert would attract unruly crowd); *Goldstein v. Town of Nantucket*, 477 F. Supp. 606, 608 (D. Mass. 1979) ("[The] plaintiff's public performance of Nantucket's traditional folk music is clearly within the scope of protected first amendment expression."); *People of State of New York v. Remeny*, 359 N.Y.S.2d 504, 506, 79 Misc. 2d 160 (Crim. Ct. 1974), *aff'd*, 367 N.Y.S.2d 146 (App. Div. 1975) *rev'd*, 40 N.Y.2d 527, 387 N.Y.S.2d 415, 355 N.E.2d 146 (1976) (jazz concert is protected expression); *State ex rel. Pizza v. Tom S. A., Inc.*, 428 N.E.2d 878, 880, 68 Ohio Misc. 19, 22 Ohio Ops. 3d 309 (Ohio Com. Pl. 1981) (rejecting argument that rock concert loses its constitutional protection because staged for profit). *See also Davenport v. City of Alexandria*, 710 F.2d 148 (4th Cir. 1982) (live musical entertainment is protected speech).

88. *Southeastern Promotions, Ltd. v. City of Mobile, Alabama*, 457 F.2d 340, 340-41 (5th Cir. 1972) (musical production "Hair" is speech and entitled to first amendment protection); *Southeastern Promotions, Ltd. v. City of West Palm Beach*, 457 F.2d 1016, 1018 (5th Cir. 1972); *Southeastern Promotions, Ltd. v. City of Atlanta, Georgia*, 334 F. Supp. 634, 638-39 (N.D. Ga. 1971); *P.B.I.C., Inc. v. Byrne*, 313 F. Supp. 757, 761-62 (D. Mass. 1970), *vacated*, 401 U.S. 987 (1971), *vacated*, 413 U.S. 905 (1973). One other court upheld 'Hair's' claim of access to a local civic auditorium, but on equal protection grounds. *Southeastern Promotions, Ltd. v. Oklahoma City, Oklahoma*, 459 F.2d 282, 283 (10th Cir. 1972).

89. *Goldstein v. Town of Nantucket*, 477 F. Supp. at 608. *See also People v. Adais*, 114 Misc. 2d 773, 452 N.Y.S.2d 543, 546 (Crim. Ct. 1982) ("Live performances, however, are no less a mode of expression or speech than books or film; live performances are entitled, no less than books or film, to the same protection of the First and Fourteenth amendments against unlawful censorship.").

90. *State ex rel. Pizza v. Tom S. A., Inc.*, 428 N.E.2d at 880.

91. *Stepping Stone Enterprises, Ltd. v. Andrews*, 531 F.2d 1, 3 (1st Cir.), *cert. denied*, 429 U.S. 823 (1976) (town has broad powers to protect health and safety or citizens); *Planning & Zoning Comm'n v. Zemel Brothers, Inc.*, 29 Conn. Supp. 45, 58, 270 A.2d 562, 569 (Conn. Super. Ct. 1970) (rock festival would "interfere substantially with the rights of the general public"); *Preble v. Song Mountain*, 62 Misc. 2d 353, 308 N.Y.S.2d 1001 (N.Y. Sup. Ct. 1970) ("the proposed open-air concert . . . would, if conducted, interfere substantially with the rights of the general public"); *County of Sullivan v. Filippo*, 64 Misc. 2d 533, 544, 315 N.Y.S.2d 519, 539 (N.Y. Sup. Ct. 1970) (rock festival would have "imposed an unreasonable and excessive burden" on residents); *Drew v. Town-Mac, Inc.*, 61 Misc. 2d 55, 304 N.Y.S.2d 1003, (N.Y. Sup. Ct. 1969) (noting adverse effects on public and municipality).

In addition to . . . traffic congestion, . . . problems concerning sanitary facilities, living accommodations and fresh water and food for the anticipated crowd. . . . [t]here is a very clear potential of danger to the public health, safety and general welfare. . . . The potential for harm to the community far outweighs any good which might be derived from such an event.⁹³

None of these cases concerning concerts decides whether the songs standing alone are protected speech. Nevertheless, by applying first amendment standards to live musical performances, the courts are assuming that the underlying songs themselves are protected. The concert is merely the means of dissemination. To limit these cases to providing that the constitutional guarantee of free speech applies only to the live performance, and not the music itself, makes little sense. A court is unlikely to protect distribution of material that is itself not covered by the first amendment.⁹⁴ The rock festival cases can be distinguished as upholding the state's right to regulate the speech's time, place, and manner, rather than as placing music outside the first amendment.

2. ROCK AS THE EXPRESSION OF IDEAS

Despite these cases indicating that music is protected, one commentator has argued that rock songs should not be held within the constitutional free expression guarantee because they are not speech.⁹⁵ This contention is largely based on the distinction between the music and the lyric, the song's two separate components. While the latter qualifies as speech,⁹⁶ it is asserted that music can-

92. A Connecticut court rejected a promoter's first amendment freedom of association claim as "wholly without merit." *Zemel Brothers, Inc.*, 29 Conn. Supp. at 63, 270 A.2d at 571. A New York court ruled that a town's injunction against a rock festival resulted in "no unreasonable or discriminatory proscription of any of the First Amendment rights" *County of Sullivan v. Filippo*, 64 Misc. 2d at 557, 315 N.Y.S.2d at 542.

93. *Drew v. Town-Mac, Inc.*, 61 Misc. 2d at 58, 61, 304 N.Y.S.2d at 1008, 1009. One court recently upheld a town's revocation of a promoter's permit to use its concert facility for fear of disruption. See *Contemporary Music Group, Inc. v. Chicago Park District*, 57 Ill. App. 182, 372 N.E.2d 982 (Ill. App. Ct. 1978).

94. See, e.g., *Goldstein v. Town of Nantucket*, 477 F. Supp. at 608, holding that "[t]he substance [folk music] and not merely a method of expression is protected by the First Amendment"

95. "Whether musical expression is protected by the first amendment depends upon whether music is considered to be speech. If music is not speech, then it follows that it is subject to no first amendment protection." Comment, *Music The Universal Healer: First Amendment Protection—Real or Illusory?*, 7 N.C. CENT. L.J. 329, 346 (1976).

96. Note, *Musical Expression and First Amendment Considerations*, 24 DE PAUL L. REV. 143, 159 (1974) ("[T]he lyric portion of a song is clearly speech within any conception of the word").

not. As one student-author noted, citing Plato and Aristotle for authority, music communicates nothing⁹⁷ and thus, because the first amendment applies only to ideas, songs must fall outside its scope.⁹⁸

These arguments are based on the perception that the music alters the constitutionally protected lyrical content. "[W]hen words are interwoven into a piece of music, the 'speech' of the music takes on a special definition."⁹⁹ Langer has suggested that "when words and music came together in song, music swallows words."¹⁰⁰

Such assertions are, however, misplaced. Music cannot be rationally distinguished from other forms of protected entertainment.¹⁰¹ Music is a "significant medium for the communication of ideas," similar to motion pictures that the Supreme Court has found "affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."¹⁰²

Music satisfies the same criteria. It is a vibrant medium for the expression of ideas. Rock speaks for the younger generations, a group that has often found itself without the means to articulate

97. Note, *Drug Songs and the Federal Communications Commission*, 5 U. MICH. J.L. REF. 334, 345 n.72 (1971) ("[T]here is no plausibility in arguing that music advocates anything at all."). Advanced in the Note is the theory that people respond to music's aesthetic and not its lyrical content.

98. *Id.* (citing *Kingsley International Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684 (1959)). The author, however, reads this case's contention that "the first amendment's basic guarantee is of freedom to advocate ideas," 260 U.S. at 688, too broadly. The Supreme Court has never held that only pure speech is protected. See *Spence v. Washington*, 418 U.S. 405 (1974) (placing a peace symbol on American flag); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (marching); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (protest demonstrations).

99. Comment, *supra* note 95 at 345.

100. S. LANGER, *FEELING AND FORM* 152 (1953). This author has also asserted that "in a well-wrought song the text is swallowed, hide and hair." S. LANGER, *PROBLEMS OF ART* 84 (1957).

101. Although outside the scope of this article, it could be asserted that the music even standing alone deserves constitutional protection. As the Supreme Court held in *Cohen v. California*, some speech:

serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

403 U.S. 15, 26 (1971).

102. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

its values and beliefs.¹⁰³ Since its development, the music has conveyed its attitudes and outlook, serving as messenger for its vision. Even politicians have taken to studying it to attract young voters.¹⁰⁴ Those who argue that songs are devoid of expressed ideas have not bothered to explore or examine American history since the 1950's. A short review is therefore in order.

Rock's creation during the 1950's mirrored the adolescent's uneasiness with America, as it became "a visible retreat from conformity . . . the music became the focus of a counterculture."¹⁰⁵ Popular music revealed the young's desire to shake up American society and inject vitality into an otherwise sedate nation, content on enjoying post-war prosperity and calm.¹⁰⁶

The 1960's were rock's heyday as the new generation's great communicator. Music was the "language" for the rebellion that spread across college campuses and onto the streets.¹⁰⁷ As one observer wrote:

[R]ock 'n' roll turned out to be much more than just the latest sound, indeed much more than just the music. From it emerged new ideas of style, a new sense of beauty, new attitudes toward things in general, new values It was rock 'n' roll . . . that defined the rebellion of the late sixties and was its essential spirit and vitality, its very heart. More than anything else, rock 'n' roll defined the rebellious generation, that plurality of Americans who began as the baby boom and wound up as Woodstock Nation and who in turn, more than anything else, have defined

103. Children have often had trouble making their elders listen. This is closely related to the lack of respect granted rock's audience. One national news magazine described heavy metal adherents, for example, as "a crowd of tuned-out working-class white adolescent males who drink too much beer and whoop it up for the thunderous guitar licks and outrageous stage antics. The major social impact of a heavy-metal concert is belching." Cocks, *Rock is a Four-Letter Word*, TIME, Sept. 30, 1985, at 71, 71. The following discussion merely singles out some of the more widely-known messages. It would be impossible, and quite unnecessary, to track down each message.

104. See Dowd, *Why are all the Politicians Watching Rock Video?*, N.Y. Times, Apr. 19, 1985, at A19, col. 2.

105. H. LONDON, *supra* note 2, at 30. Elvis Presley's "sneer, his whole attitude, exemplified the scornful indifference of James Dean His was the style of playful irreverence, a style that appealed to the young who were dissatisfied with conformity, yet not sure of how to express nonconformity." *Id.* at 20.

106. Famous disc jockey Murray the K stated: "'Rock was just a new expression which reflected a belief that younger people did not accept society as it was laying down the laws of what you can do and what you can't do.'" *Id.* at 38.

107. *Id.* at 179. One commentator added that "[f]or the reality of what's happening today in America, we must go to rock 'n' roll, to popular music." Gleason, *Like A Rolling Stone*, in *THE AGE OF ROCK* 61 (J. Eisen ed. 1969).

contemporary America.¹⁰⁸

Like the folk songs of the 1920's that spurred the labor movement,¹⁰⁹ and the sing-alongs of the 1950's that comforted the civil rights workers,¹¹⁰ rock was both the anti-war campaign's inspiration and its loudspeaker.¹¹¹ The music¹¹² provided the young access to the public and enabled them to articulate their desires for the nation's future.¹¹³ Rock was the vehicle through which their anger and frustration with society was distilled into productive commentary.¹¹⁴ Concerts assumed a particular importance, offering a meeting place where the young could gather to make their statement.¹¹⁵

The next decade, considerably less turbulent, was marked by a decline in social consciousness, an increased desire for material goods, and reduced interest in politics.¹¹⁶ The music changed with society. "Glitter rock," with its emphasis on showmanship and its

108. R. DUNCAN, *supra* note 2, at 14.

109. Music played an integral role in the development of organized labor. The Industrial Workers of the World campaign was "a singing movement in which all the members knew, loved and sang the songs." J. DUNSON, *supra* note 2, at 16. The Congress of Industrial Organizations "used song in organizing campaigns." *Id.* at 16-17.

110. Dunson wrote that "[w]hen police clubs, snarling dogs and hoses start to attack the line of march, praying to one's self gives some courage, but when hundreds sing their hopes together the songs provide the shield and identification necessary to withstand even the fury of a hostile mob." *Id.* at 66-67.

111. Most of the discussion on rock's influence and expression in the 1960's centers on the end of the decade, when the impact was much more visible. But rock also spoke for the young in the early 1960's, when the revolution was in its infancy. In fact, it bridged the gap between the decades. Bob Dylan is generally credited with being the key figure. "His success forced other large commercial companies to listen to the audience tapes of topical singers . . . 'Freewheelin'.'" ["The Freewheelin' Bob Dylan" album] spread more radical ideas to more people in a few short months than all the northern protest meetings and marches since 1960." J. DUNSON, *supra* note 2, at 74-75.

112. The songs reflected the "social conscience of the nation" and its young people. *Id.* at 11.

113. These concerns were primarily stopping the war in Vietnam, the creation of a more open and free society, unemployment and continuing the civil rights progress of the late 1950's and early 1960's. *Id.* at 60, 114-15.

114. Robert Palmer, the N.Y. Times' influential rock critic, commented that: [R]ock was rebel music. Stars like Bob Dylan and the Rolling Stones wrote and recorded outspoken lyrics that urged sweeping social change and an end to war and flirted with the rhetoric of revolution. They sang openly about sex and drugs. The music was the voice of a new generation and a constant reminder of the generation gap. The battle lines were drawn.

Palmer, *What Pop Lyrics Say To Us Today*, N.Y. Times, Feb. 24, 1985, § 2, at 1, col. 3.

115. San Francisco Promoter Bill Graham's concert hall was a popular home for these gatherings. He later said that the "'people who came to the place where I worked were in our church, our meeting place, and while they were there they expressed themselves in a special way, mentally and spiritually. We were involved in a common cause.'" H. LONDON, *supra* note 2, at 143.

116. C. LASCH, *THE CULTURE OF NARCISSISM* (1978).

diminished concern for lyrical content, mirrored this new direction.¹¹⁷ The modern "me generation" found expression in escapist disco music and fantasy techno-pop that matched its new and less serious values;¹¹⁸ music was often said to reflect the country's general malaise.¹¹⁹

During the 1980's two disparate trends emerged in music, mirroring a tension in American society between the spirit of the 1960's and the more relaxed mood of the 1970's. On one side are strongly sexually-oriented songs, which express the desires of a hedonistic culture.¹²⁰ Competing with this current, however, are musicians writing songs with overtly political content, rather than simple vehicles for escaping reality.¹²¹

This brief history of the messages rock has carried for American youth to their elders is compelling evidence that music does indeed convey ideas. Arguments that songs are not speech because the music has subsumed their lyrical content belie this rich tradition and ignore modern music's role in society. It cannot provide a serious rationale for excluding rock music from constitutional protection.

117. "The mainstream rock of the 1970's produced little in the way of socially relevant lyrics." Palmer, *supra* note 114, at 28, col. 4.

118. One critic charged that "the music had become particularly stagnant, pretentious, boring, a commodity rather than a force. Audiences weren't moved, they were anesthetized, assailed not by ideas but postures Concerts reinforced the distance between performers and fans, who were perceived simply as consumers." Harrington, *Punk Mortem, The Music's Faded, But Its Influence Lingers On*, Wash. Post, Mar. 30, 1986, at H5, col. 1. This blasé attitude captured by the music meshed with the times. President Carter felt so concerned that he sought to reinvigorate the country with a nationwide address discussing this malaise.

119. Many, however, felt repressed by the money-oriented nature of both music and society. They turned to punk, whose violent anti-establishment stance and nihilistic politics represented a throwback to rock's traditional posture as an agent for social change. "[P]unk was all opposition against the old . . . [it] was created not by media but by teen-age musicians desperate to make rock 'n' roll exciting and worthwhile again, to keep a promise made 30 years ago." *Id.* at col. 2, 6. It was angry music for those who resented the new values.

120. It is music for the "yuppie," concerned more with glamor, than with content. See Gelman & Wang, *They Live to Buy*, NEWSWEEK, Dec. 31, 1984 (detailing the rise of a new generation more concerned with material goods). Madonna is perhaps the best example. Her hit single "Material Girl" captured the essence of this thinking: "Only boys that save their pennies Make my rainy day . . . We're living in a material world, And I'm a material girl." Her "carefully calculated image has struck a chord among many of today's more affluent young listeners" Palmer, *supra* note 114, at 28, col. 1.

121. See *infra* notes 150-68 and accompanying text.

3. TOO OFFENSIVE AND OBNOXIOUS FOR FIRST AMENDMENT PROTECTION?

The real opposition to first amendment protection for rock music seems to stem from the nature of the ideas themselves and the manner in which the artists have chosen to express them. The primary objection to applying constitutional safeguards appears rooted in the offensiveness of the songs and their graphic representation in videos.¹²² A review of any listing of popular songs since the 1950's reveals the basis for this revulsion. Heavy metal, which has a particularly strong following among adolescent males, allegedly draws some of its lyrical inspiration from satanic rituals and devil worship.¹²³ Black leather is the accepted dress code and the songs often contain exhortations to violence.¹²⁴ Dance music, with a pulsating rhythm and throbbing beat, employs strongly suggestive sounds and lacy lingerie to communicate its message.¹²⁵ Sev-

122. Video has intensified the reaction. As one critic wrote:

Music video clips have made rock performers widely visible as they brandish their guitars and, sometimes, wear as little clothing as a Ziegfeld Follies chorus girl. Studded leather outfits, spiky haircuts and the kind of hip-wiggling that got Elvis Presley censored on the Ed Sullivan show in the 1950's are accessible to every television watcher. The esthetics of current rock performance clearly offend some observers.

Pareles, *Should Rock Lyrics Be Sanitized?*, N.Y. Times, Oct. 13, 1985, § 2, at 1, 5, col. 1. A National Council of Churches report concluded that "[h]eavy viewing of music videos may significantly increase violence in our society because it closely links erotic relationships with violence performed not by villains but by teenage idols." Powell, *What Entertainers Are Doing To Your Kids*, U.S. NEWS & WORLD REPORT, Oct. 28, 1985, at 46, 46.

123. The group AC/DC has been a popular target of scorn. A national magazine reported, "Richard Ramirez charged with 16 'Night Stalker' murders on the West Coast, is said by friends to have been obsessed by satanic themes in the music of the heavy-metal band AC-DC and its album 'Highway to Hell.'" Powell, *supra* note 122, at 46. The magazine linked another murder to heavy-metal. AC/DC has denied the connection between Satan and its music. Harrington, *Bedeveling Rumors*, Wash. Post, Nov. 20, 1985, at B2, col. 3. See also Wildmon, *Industry Won't Act; Outlaw the Sick Lyrics*, USA Today, Oct. 11, 1985, at 10A, col. 7 (heavy metal "legitimizes rape, murder, forced sex, sado-masochism, adultery, etc.").

124. From the rock group Metallica, "Bang your head against the stage like you never have before. Make it rain, make it bleed, make it really sore . . . We are gathered here to maim and kill, for this is what we choose." From Twisted Sister, "They think we are fools who want to make their own rules. It only gets us madder . . . If they don't want to play, then let's make them pay. Shoot them down with a fucking gun." *Music and the Lyrics of Records: Hearings Before the Senate Committee on Commerce, Science and Transportation*, 99th Cong., 1st Sess. 14-5 (1985) [hereinafter cited as *Rock Hearings*].

125. Prince, the most popularly acclaimed performer, has traditionally been singled out. One lyric from his hit single "Darling Nikki" has been oft-cited: "I met a girl named Nikki. I guess you could say she was a sex fiend. I met her in a hotel lobby masturbating with magazines." *Id.* at 16. From Vanity, "Come on and stroke me, strap this thing tight, if you want to glide down my hallway, it's open." From Morris Day, "I wanna get you off baby. You can straddle my brass. As we dance in the land of hard and soft, if the kid can't make

eral groups, including the Rolling Stones, have frequently drawn the wrath of feminists for depictions of sexual violence directed at women.¹²⁶

But no matter how disgusting these subjects may be to some in the community, this repugnance does not justify holding music outside the first amendment.¹²⁷ The Supreme Court has consistently held that expressions do not lose their constitutional protection "merely because the ideas are themselves offensive to some of their hearers."¹²⁸ Speakers are free to advance even the most obnoxious statements,¹²⁹ so long as their communications are not ob-

you come, nobody can." Other acts under attack include Sheena Easton for her single "Sugar Walls" ("I can tell you want me; you can't hide; your body's on fire; come inside"); Cyndi Lauper, for "She Bop" ("I can't stop messing with the danger zone," a thinly veiled reference to masturbation); Vanity for "Nasty Girl" ("I can't take it . . . I want seven inches or more tonight"); Shalamar for "Dancin in the Sheets" ("So wrap around me baby . . . let's dance in the sheets . . ."); Bruce Springsteen for "I'm on Fire" ("Hey little girl, is your daddy home, did he go away and leave you all alone, I got a bad desire. Oh, I'm on fire.").

126. At the Senate hearings, the Parents' Music Resource Center ("PRMC"), an organization comprised primarily of wives of congressmen, cited several examples. From the Rolling Stones, in their song "Tie You Up": "The pain of love, you dream of it, passion it. You even get the rise from it. Feel the hot come dripping on your thigh from it. Why so divine, the pain of love." From AC/DC, in "Squealer": "She said she had never been balled before, and I don't think she'll ball no more. Fixed her good." From Judas Priest, in "Eat Me Alive": "Squealing in passion as the rod of steel injects. Gut wrenching frenzy that enrages every joint. I am going to force you at gunpoint to eat me alive." *Rock Hearings, supra* note 124, at 14-17. Although there has been a shift away from rock lyrics that demeaned women, "many of today's pop lyrics continue to celebrate male dominance. Aggressively macho rock has been making a comeback." Palmer, *supra* note 114, at 28, col. 3.

127. As a leading first amendment scholar wrote,

[T]he fact that given speech is thought by many to be highly offensive, either because it espouses political, religious, racial or other doctrines which to many are most abhorrent, or because of its use of 'indecent' words, does not, absent a showing of likely and imminent antisocial conduct arising from such speech, constitute a ground for abridging speech. Offensiveness per se is an anti-speech interest, which does not outweigh the countervailing speech interest.

M. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE 1ST AMENDMENT*, § 2.05[B] (1984).

128. *Street v. New York*, 394 U.S. 576, 592 (1969). *See also* *Waters v. Chaffin*, 684 F.2d 833, 837 (11th Cir. 1982) (that plaintiff "chose to express his ideas in language some might find offensive is not, in and of itself, enough to override his interest in speaking freely"); *Beckerman v. City of Tupelo, Mississippi*, 664 F.2d 502, 509 (5th Cir. 1981) ("In almost every instance it is not acceptable for the state to prevent a speaker from exercising his constitutional rights because of the reaction to him by others."); *Russo v. Central School District No. 1*, 469 F.2d 623, 633-34 (2nd Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) ("[B]ecause the First Amendment ranks among the most important of our constitutional rights we must recognize that the precious right of free speech requires protection even when the speech is personally obnoxious.").

129. Courts have upheld individuals' right to advocate several offensive theories. *See Spence v. Washington*, 418 U.S. 405 (1974) (flag desecration); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (Nazi march through predominantly Jewish

scene or within one of the other classes of unprotected speech.¹³⁰

The recent "Washington Wives" campaign has demonstrated that many Americans disagree with rock's message. The unpopularity of some musical ideas does not offer a basis for denying them first amendment protection. Although many forms of speech are "provocative and challenging," and thrive on the conflict between ideas, the Supreme Court has held the first amendment protects them all.¹³¹ Dispute, disagreement, and controversy are all encompassed within the first amendment's protection and "a controversial and minority point of view is not the less protected because it is disliked."¹³²

Another often cited basis for excluding music from first amendment protection is its alleged lack of redeeming social value.¹³³ The argument runs that because rock's contribution to the public discourse is so limited, it does not deserve a constitutional license to be free of regulation. The Constitution, however, does not tolerate such an evaluation of the worth of ideas.¹³⁴ The first amendment exists to protect the dissemination of ideas, and to prevent the government from passing judgment on their content and value.¹³⁵ This reasoning offers no support for exempting music

neighborhood); *Invisible Empire Knights of the Ku Klux Klan v. City of West Haven*, 600 F. Supp. 1427 (D. Conn. 1985) (expressions by KKK);. *See also* *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F. Supp. 632, 642 (D. R.I. 1976) ("No ideas are so far beyond the pale of the wider community's values that they are beyond the boundaries of the First Amendment."). "[T]he First Amendment requires that we tolerate a certain amount of speech in forms that are not soothing to the ear or pleasing to the eye." *Southern New Jersey Newspapers v. New Jersey*, 542 F. Supp. 173, 187 (D. N.J. 1982). Nor are its protections "exclusively reserved for polite and tactful utterances . . ." *Clary v. Irvin*, 501 F. Supp. 706, 709 n.9 (E.D. Tex. 1980).

130. *See supra* notes 53-76 and accompanying text. *See also* *Glasson v. City of Louisville*, 518 F.2d 899, 904 (6th Cir. 1975) ("No state may agreeably to the Constitution intercept a message and remove it from the channels of communication or punish its dissemination solely because of its content unless it is obscene . . .").

131. *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949) (The "function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

132. *Wiegard v. Seaver*, 504 F.2d 303, 306-07 (5th Cir. 1974), *cert. denied*, 421 U.S. 924 (1975).

133. Senator Ernest Hollins reported that "the redeeming social value that I find is inaudible . . . it is outrageous filth." *Rock Hearings*, *supra* note 124, at 2.

134. *Waters v. Chaffin*, 684 F.2d 833, 837 (11th Cir. 1982) ("[T]he first amendment's protections do not turn on the social worth of the statements . . ."). *See also* *Perry v. Columbia Broadcasting System, Inc.*, 499 F.2d 797, 802 (7th Cir.), *cert. denied*, 419 U.S. 883 (1974) ("Freedom of expression does not extend only to approved ideas, it means freedom to express any idea."); *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 490 (D.C. Cir. 1968) ("The First Amendment protects ideas regardless of their merit . . .").

135. "The Constitution protects expression . . . without regard to the race, creed, or

from the free speech guarantee.

The final rationale for not extending constitutional protection to rock music is that it threatens to erode American moral standards.¹³⁶ A community's efforts to uphold these values by enacting reasonable regulations directed at rock should not be frustrated by the strict analysis demanded by the first amendment.¹³⁷

This thesis amounts to an improper attempt to impose a moral orthodoxy on American society¹³⁸ and cannot justify holding music beyond the first amendment's reach.¹³⁹ Members of one group may not halt the dissemination to others in society of mate-

political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. at 444-45 (1963). The court is not to act as a judge of the value of the speech. The Tenth Circuit, nevertheless found a magazine article a "gross, unpleasant, crude, distorted attempt to ridicule." *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983). The court conceded, however, that the story was still protected by the first amendment, which "is not limited to ideas, statements, or positions which are accepted . . . [N]o matter how great its divergence may seem from prevailing standards, this does not prevent application of the First Amendment. The First Amendment standards are not adjusted to a particular type of publication . . ." *Id.*

136. Millie Waterman, a PTA official, remarked that "There are many songs which include lyrics . . . that send messages that may be dangerous to individuals or society." *Harrington, The Capitol Hill Rock War*, *Wash. Post*, Sept. 20, 1985, at B6, col. 4.

137. The proponents of regulations contend that the music has desensitized individuals to immoral conduct. As one commentator explained, "[t]he concern is less that children will emulate the frenzied behavior described in porn rock than they will succumb to the lassitude of the demoralized—literally the de-moralized . . . porn rock [can make] even the vilest things somehow banal." Will, *No One Blushes Anymore*, *Wash. Post*, Sept. 15, 1985, at D7, col. 2. Senator Paul Trible (R-Va.) stated at the Senate Hearings that "when we are constantly confronted by that which is coarse, we become coarsened. Repeated exposure to song lyrics describing rape, incest, sexual violence, and perversion is like sandpaper to the soul . . . One becomes literally demoralized." *Rock Hearings*, *supra* note 124, at 3.

138. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ."). *See also* *Board of Educ. v. Pico*, 457 U.S. 853, 872 (1982) (efforts to prescribe what will be orthodox in politics, nationalism, religion, or other matters of opinion are invalid); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) ("[A] State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (The Constitution forbids forcing children to be taught in such a way as to "foster a homogeneous people.").

139. Justice Douglas illustrated the dangers of upholding such regulations:

Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment . . . I can understand (and at times even sympathize) with programs of civic groups and church groups to protect and defend the existing moral standards of the community . . . [I]f the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community.

Roth v. United States, 354 U.S. 476, 512-13 (1957).

rial the group finds offensive.¹⁴⁰ As the Ninth Circuit held in *Cinevision*,

City Council members expressed desire to inculcate the "proper" community values in its youth cannot justify Burbank's efforts to ban "hard rock" music. . . . The first amendment limits governmental efforts to inculcate values, at least when such efforts serve to suppress or stifle other forms of protected expression.¹⁴¹

This last rationale is similar to the other reasons articulated in support of excluding music from the first amendment's guarantee of free speech. They all share the same basic theory—rock is somehow less worthy of protection than other forms of entertainment. All fail for essentially the same reason. They ignore the Supreme Court's dictate that none "of the great liberties insured by the First [amendment] can be given higher place than the others."¹⁴² The Constitution is not a music critic.¹⁴³ The state cannot bar entertainment that merely "falls far short of anyone's idea of 'art'".¹⁴⁴ Attempts to hold rock outside the Constitution because of its obnoxious and unpopular message offend the first amendment's basic principles.¹⁴⁵

4. ROCK MUSIC AS POLITICAL SPEECH

The need for rock music to be accorded complete first amendment protection is demonstrated by the political nature of many of

140. *Dworkin v. Hustler Magazine, Inc.*, 611 F. Supp. 781, 787 (D. Wyo. 1985) ("All citizens must live with the realization that every other citizen also has protected rights.").

141. *Cinevision v. City of Burbank*, 745 F.2d 560, 573. *See also* *Paris Adult Theaters I v. Slaton*, 413 U.S. 49, 110 (1973) ("[I]f a State, to maintain or create a particular moral tone, may prescribe what its citizens cannot read or cannot see, then it would . . . follow that in pursuit of that same objective a State could decree that its citizens must read certain books or must view certain films.").

142. *Prince v. Massachusetts*, 321 U.S. at 164 (1944). *See also* *Robinson v. Price*, 615 F.2d 1097, 1099 (5th Cir. 1980). *But cf.* *Young v. American Mini Theaters*, 427 U.S. 50 (1976) (suggesting all speech may not be equal); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

143. *Norma Kristie, Inc. v. City of Oklahoma City*, 572 F. Supp. 88, 91 (W.D. Okla. 1983).

144. *Piarowski v. Illinois Community College*, 759 F.2d 625, 628 (7th Cir.), *cert. denied*, 106 S. Ct. 528 (1985). The issue of obscenity will be discussed *infra* notes 293-325 and accompanying text.

145. The remedy for those who are offended by the exhibition or public display of rock music is to personally ignore it. "[T]he burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting eyes.'" *Erznoznik*, 422 U.S. at 210-11. *But cf.* *Redrup v. New York*, 386 U.S. 767 (1967) (display of obscene materials can be limited).

the lyrics.¹⁴⁶ Throughout its history, rock music has advanced political messages.¹⁴⁷ Rock's most powerful expression occurred during the 1960's, when it served as a rallying cry for the anti-war and civil rights movements.¹⁴⁸ Although the music of the Seventies was relatively neutral, rock has experienced a political reawakening in the 1980's. Popular musicians are again "addressing issues, and challenging their listeners to actively confront the world around them. There have probably been more angry protest lyrics written and recorded in the last three or four years than in any comparable period of the 60's."¹⁴⁹ A sample of these viewpoints is necessary to document the political character of the music and the pressing necessity for first amendment protection.

During the past two years, all-star collections of the music industry's biggest attractions have united on behalf of several different worldwide causes. Spurred by the international community's apathy towards starvation in Africa, an unheralded British rock performer launched a fund-raising crusade that raised millions of dollars,¹⁵⁰ and, more importantly, focused the world's attention on the hunger problem.¹⁵¹ A similar frustration with the federal government's inaction to rescue the failing American agricultural economy spawned "Farm Aid," a movement dedicated to helping

146. This is not to suggest that all rock music is political. Much of it is not. But this is immaterial for constitutional purposes because "[e]ntertainment as well as political and ideological speech is protected." *Schad*, 452 U.S. at 65. See also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religion or cultural matter"); *Tacyne*, 687 F.2d at 799. The fact that some lyrics are political means that rock needs first amendment protection so that the political content is not suppressed under the guise of halting the obscene.

147. See *supra* notes 103-121 and accompanying text.

148. See *supra* notes 107-15 and accompanying text.

149. Palmer, *What Pop Lyrics Say to Us Today*, N.Y. Times, Feb. 24, 1985, § 2, at 1, col. 3.

150. The effort began after Irish rocker Bob Geldof observed television news reports of the suffering in Ethiopia. Appalled, he collected several colleagues to record "Do They Know It's Christmas." The song raised almost \$10 million and became the largest selling single in British history. Goldberg, *USA for Africa*, ROLLING STONE, Mar. 14, 1985, at 11. Versions of similar all-star collections sprouted throughout the world. In America, 45 performers gathered in a Los Angeles studio to record "We Are The World," which raised \$44.5 million on its own. ROLLING STONE, May 8, 1986, at 21. The entire effort has netted almost \$100 million, culminating with "Live Aid," a worldwide concert. See Wash. Post, Jan. 31, 1985, at B2, col. 1.

151. The impact of "We Are the World" was enormous. It garnered tremendous national interest, appearing on the cover of most major magazines and dominating the broadcast media. The song simply forced otherwise uninterested American politicians to become concerned with the Ethiopian people's plight. See Gold, *Rock's Finest Hour*, PEOPLE, Feb. 25, 1985, at 28 (describing recording session).

the nation's beleaguered farmers.¹⁵² Another group of musicians, unhappy with the direction of American policy toward minority rule in South Africa, recorded "Sun City," a stinging and biting rebuke to apartheid.¹⁵³

Although these efforts have garnered tremendous publicity, other political currents have found expression in rock music. The successful Irish group U2 has been a strong proponent of pacifism, naming one of their albums for a series of paintings by the Japanese survivors of one of the the World War II nuclear attacks.¹⁵⁴ Rap music, adopting the language of the ghetto, has argued for national attention to the black community's difficulties and mounting anger.¹⁵⁵ Songs are written to oppose American involvement in Central America¹⁵⁶ and with nuclear power,¹⁵⁷ while musicians reg-

152. Farm Aid developed from Bob Dylan's remark at Live Aid that American farmers needed a similar benefit. Harrington, *Bob Dylan, Ready to Roll*, Wash. Post, Apr. 16, 1986, at D7, col. 4. Unlike "We Are The World," its sole emphasis was on individual concerts by a variety of country and rock stars. Its first show was less successful than its sister fund-raising effort, but still raised almost \$1 million on behalf of farmers. ROLLING STONE, May 8, 1986, at 21.

153. The video "Sun City," featuring a diverse array of musicians, was the most blatantly political of these movements. Its album and video had difficulty garnering airplay, because of "commercial radio's antipathy and conservatism . . ." Harrington, *Going for A Knockout*, Wash. Post, Feb. 26, 1986, at C7, col. 5.

154. A critic described a U2 album as employing "the sounds of militarism—rat-a-tat-tat drums, savage guitar work, defiant vocals—in the service of pacifism, albeit a pacifism ready to wage moral battle with its enemies." Connelly, *Keeping the Faith*, ROLLING STONE, Mar. 14, 1985, at 25.

155. "The Message" by Grandmaster Flash and the Furious Five is illustrative:

A child is born with no state of mind, blind to the ways of mankind
 God is smiling on you but He's frowning too
 Because only God knows what you'll go through
 You'll grow in the ghetto living second rate
 And your eyes will sing a song of deep hate
 The places you play and where you stay
 Looks like one great big alleyway
 It was plain to see that your life was lost
 You was cold and your body swung back and forth
 But now your eyes sing the sad song
 Of how you lived so fast and died so young
 So don't push me 'cause I'm close to the edge
 I'm trying not to lose my head
 It's like a jungle
 Sometimes it makes me wonder how I keep from going under.

156. The British group The Clash, for example, entitled an album "Sandinista!" and included songs attacking the military draft, superpower politics, and American imperialism in the region. See Hall, *The Year of the Clash*, ROLLING STONE, Aug. 19, 1982, at 28 (describing group's politics).

157. Musicians United for Safe Energy ("MUSE") organized in 1978 to warn the country of the dangers of increased reliance on nuclear power. MUSE conducted several concerts in New York City, and released both an album and a movie netting \$600,000 for the anti-

ularly conduct live performances for a variety of causes including a recent concert tour for political prisoners.¹⁵⁸

Perhaps the most significant political trend in American music today is the populism inherent in the work of several major recording artists,¹⁵⁹ particularly Bruce Springsteen.¹⁶⁰ His recent album documents the plight of the common man, struggling to withstand the complexities of the modern age. Its heroes are the industrial workers, embittered and confused by the decline of smokestack America, the Vietnam veteran, returned from the war "with no place to go" and the private citizen, helplessly observing the decay of his hometown.¹⁶¹ Springsteen and other musicians have articulated the frustrations of these people while assailing present administration policies.¹⁶² These artists have subtly reminded audi-

nuclear power cause. *Some Concerts that Worked, and Some that Didn't*, PEOPLE, Feb. 25, 1985, at 33.

158. Several artists formed a two-week, six-city tour to benefit Amnesty International's efforts to aid political prisoners. Pareles, *Amnesty Concert in Jersey*, N.Y. Times, June 16, 1986, at C14, col. 3. See also Harrington, *Going for a Knockout*, Wash. Post, Feb. 26, 1986, at 7, col. 5 (noting plans for an antidrug concert and other performances aimed at helping veterans, Transafrica, and the Americans for Peace in the Americas Committee); Harrington, *Concert Season Blooms*, Wash. Post, Mar. 26, 1986, at D7, col. 6 (noting music fund-raisers).

159. This movement started with the so-called "recession-rockers" who began in the early 1980's arguing that "times are tough, but faith and hope are still possible" despite the economic decline of the nation. Palmer, *Rock Singers Are Trying To Tell Us Something*, N.Y. Times, July 10, 1981, at C22, col. 1. They are now known as the "Blue Collar Brigade." SPIN, Nov. 1985, at 45. Their message has been described as a broad-based working-class consciousness." Harrington, *supra* note 118, at H5, col. 6.

160. Springsteen is not the only such musician, but he above the others has "made a populist message genuinely popular." Pareles, *Bruce Springsteen—Rock's Popular Populist*, N.Y. Times, Aug. 18, 1985, at H1, col. 2, H7, col. 6. Others in this vanguard include John Cougar Mellencamp (focusing on small town life and farmers), Billy Joel (the unemployed), Bob Seger (Detroit auto workers), Tom Petty (Southern youth), and Bryan Adams (Canadian youth).

161. See Miller, *Return of the Rock Heros*, NEWSWEEK, June 18, 1984 at 100, 100. ("he evokes the American dream running on empty"); Holden, *What the Charts Say About the Health of Pop Music*, N.Y. Times, May 5, 1985, at H23, col. 1 ("His songs, mostly despairing dramatic monologues by blue collar workers who have lost touch with the American dream, portray the dissolution of hope and community experienced by working-class America in a post industrial age."); Pareles, *supra* note 160, at H7, col. 1. ("Springsteen takes an old-fashioned populist approach—he speaks, and sings, for the inarticulate and disenfranchised."); Barol, Uehling, Greenberg & Doherty, *He's On Fire*, NEWSWEEK, Aug. 5, 1985, at 48, 54 [hereinafter cited as Barol] ("Springsteen and his fans share above all a conviction that music means something—that properly applied, rock and roll can heal broken hearts, mend shattered lives, light the way through hard times or at least ease the pain for one thrilling moment.").

162. Springsteen had largely avoided politics until this tour. In Tacoma, he remarked that, "[t]his is a song about blind faith. Like when the President talks about arms control." Barol, *supra* note 161, at 50. In Washington, he told the audience, "[n]ext time there's a war, they're gonna ask you to go. And in order to find out about the situation,

ences of their responsibility to these people.¹⁶³ Politicians sought to claim the Springsteen message for their own, only to meet with reproach.¹⁶⁴ One cultural critic wrote that Springsteen's songs are

unmistakably radical in their defiance of authority, their empathy for the common man, and their burning class resentments. Springsteen is now doing something more difficult and more valuable than Bob Dylan did during the early 1960s . . . [he] is singing against the whole national drift toward Reaganism, materialism, narcissism, union-baiting, media timidity, and cultural conformity.¹⁶⁵

It is not difficult to identify the political viewpoints expressed by Springsteen and other musicians. The messages are easily discerned and generally contrary to the mainstream political ideology or countervailing government policies.¹⁶⁶ They often urge the listener to oppose those positions. As such, they are particularly vulnerable to censorship.

Without first amendment constraints on their discretion, state and local officials would have broad authority to suppress songs that advocate unpopular ideas or offer opinions with which they disagree. Regulations, enacted under the pretense of shielding chil-

you're gonna need to know a lot more than you hear on the 6 o'clock news. Where we're going now is pretty scary.' " Peisch, *Bruce Springsteen Scores Big in USA Stadium Debut*, USA Today, Aug. 6, 1985, at D1, col. 1. In New Jersey, he warned that "'big chemical companies are poisoning our state" and noted that the audience had a "responsibility to . . . the homeless and hungry. A lot of people are falling through the bottom. They ain't getting caught in any safety net.'" VILLAGE VOICE, Sept. 24, 1985, at 28.

163. During the 1984-85 concert tour, Springsteen urged the audience to contribute to local food banks and personally donated \$10,000 to several. Barol, *supra* note 161, at 50.

164. The Republicans tried first. President Reagan told a campaign crowd, "'America's future rests in a thousand dreams inside your hearts. It rests in the message of hope in songs of a man so many young Americans admire—New Jersey's own Bruce Springsteen.'" Flippo, *Bruce Springsteen*, PEOPLE, Dec. 24-31, 1984, at 29, 29. The artist responded, "'I kinda got to wondering what his favorite album must've been . . . I don't think he's been listening to this one,'" before launching into one of his angriest songs about an unemployed worker eventually driven to murder. Cocks, *'Round the World, A Boss Boom*, TIME, Aug. 26, 1985, at 68, 71.

The Democrats were next. Presidential candidate Walter Mondale remarked that "'Bruce may have been 'born to run' but he wasn't born yesterday.'" Flippo, *supra* at 29. New Jersey Senator Bill Bradley claimed the Springsteen message in a lengthy newspaper article and on television talk shows. Yet Springsteen declined to accept this banner, noting in an interview, "'I want to try and just work more directly with people; try to find some way that my band can tie into the communities that we come into. I guess that's a political action . . . Human politics.'" Loder, *Bruce Springsteen*, ROLLING STONE, Dec. 6, 1984, at 21. He has continued to look for ways to "bypass" the electoral process. *Id.*

165. VILLAGE VOICE, Sept. 24, 1985, at 28, 28.

166. ROLLING STONE, Nov. 7, 1985, at 10. ("As a vital and often raw form of expression, rock tends to dance on the outer edge of what society finds acceptable. It always has.")

dren from offensive lyrics, could be applied to prevent political commentary by rock artists. If the constitutional guarantee of free expression has any meaning, it is that government officials must be denied this kind of discretion over political speech.¹⁶⁷

Some in the rock industry already suspect that the political songs are the next, if not the real, target.¹⁶⁸ They noted that the movement against "porn rock" arrived shortly after popular musicians rediscovered politics. One asserted that "music is getting political again, and some political forces want to put music back in its place," while others refer to the affiliation of the "Washington Wives" and their prominent husbands as proof of this connection.¹⁶⁹ To ensure that rock's political content is not altered or determined by government officials, first amendment protection is essential.¹⁷⁰

167. *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978). *See also* *Cohen v. California*, 403 U.S. 15, 24 (1971) ("It [the first amendment] is designed and intended to remove governmental restraints from the arena of public discussion . . ."); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) ("The freedom of speech . . . embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.").

168. Singer John Cougar Mellencamp has been a leader of the movement to oppose the "porn rock" campaign. He stated:

"It's easy to be passive. But all of a sudden these forces sneak up on you and it's too late. Right now, it's sex and violence; before long it'll be, 'That's just too political.' This is the way it all started in the 1950's, with the blacklisting of actors and actresses. We are under some kind of right-wing attack . . . I've got a song about the farmers . . . That song might get censored, because I've got a line about 'blood on the plow.' But it's not just myself; there are a lot of artists with politically-overtone songs, and they're going to suffer because of sex and violence."

Pareles, *Debate Spurs Hearings On Rating Rock Lyrics*, N.Y. Times, Sept. 18, 1985, at C21, col. 2, 4.

169. Cocks, *supra* note 103, at 71, col. 2. The PMRC has been the primary group seeking restraints on rock lyrics. Its letter to the president of the Recording Industry Association of America initiated the campaign. Of its seventeen initial signers, nine were wives of Republican politicians, many of whom are closely aligned to, or members of, the present administration. Molutsky, *On the Uses of Power by Marriage*, N.Y. Times, Sept. 29, 1985, at 60, col 4.

170. It is "[a] fundamental purpose of the First Amendment . . . to foreclose governmental control or manipulation of the sentiments uttered to the public." *Main Road v. Aytch*, 522 F.2d 1080, 1087 (3rd Cir. 1975). *See also* *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) ("It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not . . ."); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual is free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.").

III. REGULATING ROCK: APPLYING FIRST AMENDMENT STANDARDS

This article now turns to an examination of the specific first amendment problems raised by particular modes of regulations affecting rock music.¹⁷¹

A. *Placing Warning Labels on Rock Album Covers*

1. FROM PTA TO PMRC TO POLITICAL ACTION

The primary goal of the national effort to restrain "porn rock" has been the creation of a standardized rating system for music, similar to the motion picture code. The issue first appeared in October 1984 at the National Conference of Parents and Teachers Association ("PTA") annual meeting.¹⁷² The group, concerned with the growth of sexually explicit lyrics, contacted the major record companies and suggested the formation of a panel to consider labeling rock albums.¹⁷³ Despite its broad membership, the PTA's

171. One form of regulation—beyond the scope of this article, but nonetheless significant—is the denial of immigration visas to foreign rock performers. The U.S. Immigration and Naturalization Service has recently denied several applications for work permits by British bands. The groups' rejection notices asserted that the bands would not be paid enough for their performances at less than prestigious facilities to satisfy the requirements and that they had "no artistic merit." Harrington, *Let Me In, Immigration Man*, Wash. Post, Nov. 20, 1985, at B7, col. 4. The paper reported that "British music newspapers had speculated that the denials were related to the recent controversy over sexually explicit rock lyrics" *Id.* One of the groups, New Model Army, is known for its political and social songs. *Id.*

The Supreme Court held that Congress has broad authority to exclude aliens from the country, largely free of first amendment restrictions. *Kleindeinst v. Mandel*, 408 U.S. 753 (1972). The McCarran-Walter Act of 1952 gives the government the power to exclude aliens who hold certain positions or espouse specific opinions. 8 U.S.C. § 1182 (1982). Several authors have been denied admission to the country recently because of their political beliefs. See Hentoff, *George Shultz and the Writers*, Wash. Post, Jan. 18, 1986, at A23, col. 1 (noting Reagan administration policy concerning visas); *Writers and Visas*, Wash. Post, Jan. 18, 1986, at A22, col. 1 (urging reform of McCarran-Walter Act). See also *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) (limiting government's power to exclude aliens for national security purposes); Note, *The Ideological Exclusion of Invited Aliens: Should the United States Require a Higher Level of Tolerance by its Citizens than It Must Demonstrate Itself?*, 1 GEOR. IMMIG. L.J. 61 (1985) (reviewing recent case law).

172. Harrington, *Discord On Record Warning*, Wash. Post, Aug. 29, 1985, at G1, col. 1. The PTA has been critical of the PMRC although the two have worked closely together. A PTA official stated that the PMRC is "getting involved in what radio stations play on the air and asking labels to reconsider signing artists [with explicit material] and we don't agree with that. . . . [W]e're not affiliating with groups attacking a particular performer or pushing a censorship point of view." *Id.* at G14, col. 4.

173. The PTA's June 1984 resolution urged recording companies "to consider the explicit contents of some songs and their responsibility to an unsuspecting public" and label rock records, according to National PTA Vice President Millie Waterman. *Rock Hearings*,

solicitation was ignored.¹⁷⁴

But everyone paid attention¹⁷⁵ when the wives of several prominent Washington politicians formed the PMRC in May 1985.¹⁷⁶ They sought to require the Recording Industry Association of America ("RIAA") to implement a uniform rating system and to make printed lyrics available to parents.¹⁷⁷ The RIAA responded by rejecting the PMRC proposals as "totally impractical."¹⁷⁸ Instead the RIAA offered a compromise,¹⁷⁹ suggesting an industry-wide "printed inscription" on records identifying "blatant, explicit lyric content" to inform those concerned parents and children to

supra note 124, at 89.

174. Recording Industry president Stanley Gortikov responded with a letter rejecting the PTA proposal on grounds that "[t]here are wide variations, company to company, within our industry in respect to artists, contractual relationships, marketing considerations and product services.' With such different practices among companies, different standards might be applied to labeling records which would only confuse the consumers and therefore provide minimal benefit." Only three of the 62 recording companies contacted by the PTA accepted its invitation to meet with the national organization. *Id.* at 90.

175. Molotsky, *supra* note 169, at 60, col. 1. The PMRC ascribed the PTA's failure and its success to the positions of their husbands. Tipper Gore, wife of Tennessee Senator Albert Gore, Jr., stated, "'Access . . . I think that's all we have—access . . . The PTA, which has 5.6 million members, tried for a year and a half to get people to pay attention and got nowhere . . . Because Susan Baker and I were involved, we were able to get doors opened. The record industry answered our phone calls.'" *Id.* The wives signed the initial letter to the Recording Industry Association of America (hereinafter cited as "RIAA") over the typed names of their husbands. *Id.*

176. The campaign began after several of the founding members became concerned about the effect on their children of lyrics broadcast. After some informal discussion, the wives called a meeting of friends from a roster culled from their Christmas card lists. Several Senators attended the event, which featured a slide show of some of the more offensive groups and lyrics. Galvanized, they appeared on television and granted numerous interviews, criticizing the music. This publicity generated contributions, the wives organized the PMRC, and the movement snowballed into a Senate hearing. Zucchini, *Big Brother Meets Twisted Sister*, ROLLING STONE, Nov. 7, 1985, at 9, 17.

177. The PMRC's first rating system proposed these standards:

- X = profane or sexually explicit lyrics;
- O = reference to the occult;
- V = glorification of violence; and
- D/A = advocate drug or alcohol use.

Love, *supra* note 18, at 13. The PTA proposed that the letter "R" be used to "designate recordings containing explicit sexual language, violence, profanity, the occult, and glorification of drugs and alcohol." *Rock Hearings*, *supra* note 124, at 90.

178. Love, *supra* note 18, at 14. RIAA President Stanley Gortikov wrote that the proposals "'involve complications that would make compliance impossible'" because publishers control the lyrics and the performer determines the design of the album cover. *Id.*

179. Gortikov later conceded that he could not ignore the Washington Wives, writing to RIAA members "'I cannot escape continuing dialogue with the PMRC group, particularly in view of its Washington links.'" Zucchini, *supra* note 176, at 64. He noted that one of the industry's legislative priorities, protection from home taping of albums, would be "jeopardized" without cooperation. *Id.*

read: "Parental Guidance: Explicit Lyrics."¹⁸⁰

The PMRC initially rejected this counter-offer. It contended that the PG rating, determined by the record companies, did not provide adequate warning to parents.¹⁸¹ As public pressure mounted, 24 record companies, representing 80 percent of the music industry, agreed to place the PG label on some albums.¹⁸² This, however, did not satisfy the PMRC and the dispute shifted to Capitol Hill, where on September 19, 1985 the Senate Committee on Commerce, Science and Transportation conducted an open hearing on "porn rock."¹⁸³ The session enabled both sides of the controversy to air their positions.

As it did throughout the campaign, the PMRC steadfastly denied that its motive was anything more than informing parents about the offensive lyrics.¹⁸⁴ It argued that, while rock lyrics have always been sexually-oriented and somewhat rebellious, recent songs have simply gone too far.¹⁸⁵ As one Senator asserted, "[s]ubleties, suggestions, and innuendo have given way to overt ex-

180. *Id.*

181. Tipper Gore argued that "I don't think that addresses the problem We want an industry-wide standard created by the industry. If you're going to leave it up to the individual record companies, just leave the mess the way it is." Love, *supra* note 177, at 15.

182. Zucchini, *supra* note 176, at 9.

183. The PMRC denied using its spousal connections to schedule the session. Spokesman Tipper Gore, claiming the PMRC did not request the Senate hearing, said "Heavens, no That's not the way things work." *Id.* at 64. The PMRC claimed that Missouri Republican John Danforth made the decision to conduct the hearing on his own. It conceded Danforth's wife had previously discussed the problem of explicit lyrics with him. *Id.* Danforth press secretary Steve Hilton, however, later admitted that "The impetus came from [the] PMRC, which asked for an informed presentation to the committee,' which was granted." *Id.*

184. Tipper Gore, one of the founding members, testified that the PMRC does "not want legislation to remedy this problem We would like them [the music industry] to do this voluntarily. We propose no legislative solution whatsoever." *Rock Hearings, supra* note 124, at 49. Susan Baker, another original member, commented before the meeting:

"Kids will still be able to buy albums with 'Rs' or 'Xs' or whatever they come up with. It's like a warning label on a medicine bottle, just telling what the content is. It's a tool. We're not saying that artists can't write this trash. I wish they wouldn't, but we're not saying they can't. As parents, we feel we have a right to know the content before we have a right to know the content before we purchase something and that would be a great help to us, just like the movie ratings are a help."

Harrington, *Discord on Record Warning*, Wash. Post, Aug. 29, 1985, at G1, col. 1, G14. See also Love, *supra* note 177, at 14 (Tipper Gore stated, "We're not censors We want a tool from the industry that is peddling this stuff to children, a consumer tool with which parents can make an informed decision on what to buy")

185. Susan Baker stated, "Parents have been yelling about rock-and-roll forever . . . but they don't know that the lyrics have changed and a line has been crossed." Pareles, *supra* note 168, at C21, col. 2. Tipper Gore remarked, "I'm a fairly with-it person, but this stuff is curling my hair." Wolmuth, *Parents vs. Rock*, PEOPLE, Sept. 16, 1985, at 46.

pressions and descriptions of often violent sexual acts, drug taking, and flirtations with the occult."¹⁸⁶ The PMRC's evidence largely consisted of the music itself.¹⁸⁷

Where popular music once concerned courtship and romance, new topics include "kinky sex, torture and even killing."¹⁸⁸ What was once music that urged youthful independence, now spins tales of sadomasochism, sexual perversion, anti-authoritarianism, and other hedonistic behavior.¹⁸⁹ Musicians, who once sang about chasing girls, now tell of forcing women to perform oral sex at gunpoint.¹⁹⁰ And where rock once encouraged students to celebrate school's conclusion, its videos now illustrate "elementary school-age children lusting for their bikini-clad teacher."¹⁹¹ PMRC spokesmen termed the lyrics a contributing factor to the increased societal problems of teen-age pregnancy, suicide, and rape, while the PTA noted the messages they send children "may be dangerous to individuals or society."¹⁹²

The industry's response, featuring the testimony of several artists, sounded the same themes it had employed throughout the PMRC campaign. One of its primary arguments has been that the most heavily criticized songs have received far less attention from the record-buying public and radio stations than they have from the PMRC.¹⁹³ They noted that many of these songs are by obscure groups, which have had only limited commercial success;¹⁹⁴ some have not even been released in the United States.¹⁹⁵ They con-

186. *Rock Hearings*, *supra* note 124, at 6 (statement of Sen. Paula Hawkins (R-Fla.)).

187. As one witness explained, "[t]oday's heavy metal music is categorically different from previous forms of popular music. It contains the element of hatred, a meanness of spirit . . . I know personally of no form of popular music before which has had as one of its central elements the element of hatred." *Rock Hearings*, *supra* note 124, at 117 (statement of Dr. Joe Stuessy, University of Texas at San Antonio).

188. Raspberry, *Filth on the Air*, Wash. Post, June 19, 1985, at A21, col. 2.

189. Harrington, *Rock With a Capital R and a PG-13*, Wash. Post, Sept. 15, 1985, at H1.

190. Powell, *What Entertainers Are Doing to Your Kids*, U.S. NEWS & WORLD REPORT, Oct. 28, 1985, at 46, 46.

191. Harrington, *The Capitol Hill Rock War*, Wash. Post, Sept. 20, 1985, at B1, col. 6, B6.

192. *Id.*

193. Cocks, *supra* note 103, at 71. A CBS Records spokesman asserted that the PMRC has "been documenting a minuscule number of offensive lyrics; it's the same songs over and over again." Love, *supra* note 18, at 83. The PMRC concedes that only 8 percent of all lyrics are objectionable, even by their own definition. N.Y. Times, Oct. 31, 1985, § 2, at 5, col. 1.

194. Zucchini, *supra* note 176, at 16. John Denver stated that the number of offensive songs is so insignificant that "it's not going to affect our children to a degree that we need to be fearful of." Harrington, *supra* note 197, at B6, col. 3.

195. Cocks, *supra* note 103, at 71.

tended that the ratings would only spur sales of these otherwise ignored songs.¹⁹⁶

The industry also stressed the practical problems of labeling the approximately 25,000 songs publicly released each year.¹⁹⁷ It noted the inherent difficulty of rating each song on an album and then condensing the disparate symbols into a single rating for the entire work.¹⁹⁸

Finally, the industry argued that the labeling efforts interfered with its first amendment rights¹⁹⁹ and those of adults whose views differ from the PMRC's.²⁰⁰ The industry widely believes the labeling efforts to be the first step towards censorship of unpopular and offensive lyrics by the government.²⁰¹

The Senate hearings produced no affirmative action by the Committee, consistent with the PMRC's assertions that its goals were strictly informational. Nevertheless, the threat of legislation was present. Although Committee Chairman Danforth stated that there was "zero chance" of formal regulations,²⁰² other senators were not as definitive.²⁰³ Nebraska's James Exon stated "he was 'one senator who might be interested in regulation or legislation . . . unless the industry cleans up its act.'"²⁰⁴

Throughout the hearing and immediately after, the PMRC²⁰⁵

196. The music industry noted that an explicit rating would likely encourage children to purchase the albums. As Los Angeles Mayor Tom Bradley asserted in his statement to the Senate Committee, "Placing warning labels on record albums will do nothing but attract children to the 'forbidden fruit,' to precisely those songs the censors have decided are objectionable." *Rock Hearings*, *supra* note 124, at 153.

197. *Id.* at 60 (testimony of musician Frank Zappa).

198. *Id.*

199. Frank Zappa began his testimony by reading the first amendment. *Id.* at 52.

200. *Id.* at 97 (RIAA president Stanley Gortikov stated: "We must not trample the rights of parents and other adults whose standards do not coincide with those of the PMRC or any other group.").

201. Pareles, *supra* note 168, at C21. The American Civil Liberties Union (hereinafter cited as "ACLU") argued that the session was an attempt "'try and create self-censorship in the music industry.'" *Id.* (statement of Ira Glasser, ACLU executive director).

202. Zucchini, *supra* note 176, at 65.

203. *Id.*

204. *Id.* South Carolina Senator Hollings warned, "'I don't think the American public will go along with just a nice hearing up in Washington.'" *Id.* Michigan Senator Don Riegle added, "'You ought to do it [rate albums] before somebody else tries to do it for you.'" *Id.*

205. The PMRC did not act alone. In addition to the PTA, it received help from several other sources, including some from within the industry itself. The National Association of Broadcasters warned the industry to "voluntarily respond" to the efforts. Love, *supra* note 18, at 15. Beach Boy Mike Love donated \$5,000 to the PMRC, Motown vice president and former recording star Smokey Robinson condemned "'porn rock,'" and Songwriters' Guild president George David Weiss urged "the industry . . . [to] exercise 'self-restraint' and 'tone down' lyrics for the 'moral health of children in America.'" Zucchini, *supra* note

continued to reject the PG rating.²⁰⁶ It also expanded its efforts to encompass rating rock concerts for content, wrapping albums with offensive covers in brown paper, and having music videos rated and restricted to certain viewing times.²⁰⁷ During this period of additional public disagreement, several record companies defected from the voluntary PG warning.²⁰⁸ Finally, the RIAA and the PMRC-PTA announced a settlement.²⁰⁹ Record companies would be allowed to print either the PG warning on a record or display the potentially offensive lyrics on the album jacket.²¹⁰ Under the compromise, the PMRC and PTA consented not to seek legislative support or a more formal system,²¹¹ while the record companies retained the right to decide which albums required the labels.²¹²

2. LABELING THE CONSTITUTION: THE THREAT REMAINS

The accord has not lessened the controversy. Only two albums have carried the stickers and none have contained lyric sheets.²¹³ The PMRC has expressed disappointment with the number of albums containing labels,²¹⁴ and stated it intends to continue its efforts.²¹⁵ Furthermore, a poll conducted after the settlement revealed that a majority of the public believes that rock records should be rated by a system similar to motion pictures.²¹⁶ Absent some change, this environment could produce a more structured

176, at 15.

206. *Id.* at 9.

207. *Id.*

208. In early October, MCA, A&M, Geffen, Gold Mountain and I.R.S. Records all announced they would refuse to carry the warning labels. Pareles, *N.Y. Times*, Oct. 8, 1985, at C10, col. 5.

209. Harrington, *Accord on Lyrics Labeling*, Nov. 2, 1985, at H1, col. 1.

210. The stickers would be placed on albums containing lyrics involving sex, violence or substance abuse. *Id.*

211. *Id.*

212. *Id.*

213. An industry newsletter reported that the Sigue Sigue Sputnik album "Flaunt It" became the "first big deal rock act to allow its LP to be released" with the warning sticker. *ROCK & ROLL CONFIDENTIAL*, Sept. 1986, at 3. The albums with warning stickers "have been pretty much tongue in cheek." Harrington, *A Porn Lyric Survey*, *Wash. Post*, Jan. 22, 1986, at C7, col. 4.

214. *ROCK & ROLL CONFIDENTIAL*, Aug. 1986, at 2. The PMRC has collected information on new albums, while expressing its unhappiness that no records have been labeled. *Dirty Work*, *ROCK & ROLL CONFIDENTIAL*, May 1986, at 2.

215. *ROCK & ROLL CONFIDENTIAL*, Aug. 1986, at 2.

216. The poll reported that 75 percent of adults supported a ratings system, while 80 percent favored printing lyrics on the albums. Seventy-eight percent believe, however, that "the record industry should take steps to regulate itself." DeCurtis, *ROLLING STONE*, Aug. 28, 1986, at 26. The poll was conducted by Media General/Associated Press. Harrington, *supra* note 213, at C7, col. 4.

rating system similar to the Motion Picture of America ("MPAA") Code.²¹⁷ Such an arrangement implicates first amendment concerns.

a. Improperly Discouraging Protected Speech

The initial first amendment problem is that the likely effect of any rating or labeling system would be to improperly restrict the public's access to constitutionally protected material. The movie industry's involvement with film ratings and the publishing industry's recent experience with pornography watchdogs illustrate the chilling effects of these systems.

When a motion picture is assigned an "X" rating under the MPAA code, the general public perception is that the picture is obscene.²¹⁸ This characterization causes several injurious consequences. First, theater owners who display X-rated films become the target of community disapprobation.²¹⁹ This hostility may decrease future attendance because patrons might even boycott future showings of films not rated "X", believing that theater to be an X-rated establishment. Second, many newspapers will not print advertisements for these films or even review them, thereby rendering the films commercially untenable.²²⁰ Finally, network and pay television, which are lucrative sources of revenue for producers and studios, often refuse to replay these movies.²²¹ Therefore, the "X" rating reduces the marketability of the films. These economic concerns discourage the motion picture industry from making movies which could be rated "X"—even if the movies are not obscene under the appropriate Supreme Court standards.²²² Thus,

217. A more formal rating system would likely take one of two forms. The first would be a government-created body to establish the standards for the records. The other would be a voluntary committee composed of community members, rock industry representatives and possibly members of the PMRC or a similar organization that would determine the labels. The following discussion assumes that the ratings are binding on the companies and the artists, most likely through contractual obligations.

218. Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation By the Film Industry*, 73 COLUM. L. REV. 185, 202 (1973). This perception occurs regardless of the movie's merit or social value. *Id.*

219. *Id.* at 205.

220. One major Hollywood studio recently altered the name of a movie because television stations and newspapers would not run its advertisements due to the title's sexual tone. The producers stated they thought that the "title would have stopped some people from seeing [the movie]." Harmetz, *Film 'Sexual Perversity' is Getting a New Name*, N.Y. Times, Apr. 16, 1986, at C19, col. 5. The producers felt that the movie would be successful regardless of the title, so they acceded to the change in name.

221. Friedman, *supra* note 218, at 202-03.

222. As a film critic noted, "[n]obody wants an X, since it puts the movie off limits to

the freedom of speech of the industry's members is effectively restricted.

The publishing industry has also experienced the effect of having material labeled as pornographic. In May 1984, President Ronald Reagan called for the creation of a commission to examine the effects of pornography on American society.²²³ This resulted in the Attorney General's Commission on Pornography. Before completing its final report, the Attorney General's Commission on Pornography contacted several large companies by letter asserting that because these companies sold Penthouse, Playboy and similar magazines, they were "involved in the 'sale and distribution of pornography.'" ²²⁴ These letters charged that testimony before the Commission linked the targeted companies to pornography. The letters also offered the companies an opportunity to rebut the charges.²²⁵

Several of the targeted companies responded by discontinuing the sale of magazines. The *New York Times* reported that "[m]ore than 8,000 convenience stores around the country have removed 'adult' magazines from their shelves since the beginning of [1986]." ²²⁶ The reasons given for the removal of the magazines were the findings of the Attorney General's Commission on Pornography as well as changing mores.²²⁷ Widespread boycotts and

a very large part of the moviegoing market. Nor is a G popular; teen-agers may interpret it as a signal that the movie is a milk-and-water concoction, suitable only for infants." Goodman, *Grading Hollywood's Ratings System*, N.Y. Times, July 27, 1986, at H19, col. 1.

223. President's Remarks on Signing H.R. 3635 Into Law, 20 WEEKLY COMP. PRES. DOC. 743 (May 21, 1984).

224. Wald, 'Adult' Magazines Lose Sales as 8,000 Stores Forbid Them, N.Y. Times, June 16, 1986, at A1, col. 5. The targeted companies included 7-Eleven convenience stores, Dart Drug, K-mart and Rite Aid. *Id.* at A14, col. 1.

225. N.Y. Times, May 20, 1986, at A24, col. 1. Although the letter did not identify whose testimony was taken, the testimony reportedly consisted solely of the Rev. Donald Wildmon's statements to the Commission. Wildmon is executive director of the National Federation of Decency, a group which "holds that birth control, sex education, nudity and sex between consenting adults are equally indefensible." Green, *The Shame of America*, PEOPLE, June 30, 1986, at 32. The letter also warned that "[f]ailure to respond [to the letter] will necessarily be accepted as an indication of no objection" to the charges. N.Y. Times, *supra*, at A24, col. 1.

226. Wald, *supra* note 224, at A1, col. 1. Wildmon's group estimated that 20,000 outlets ceased selling such materials since 1983. Others have estimated that the total is 16,000 stores. Blodgett, *Porno Blacklist?* A.B.A. J., July, 1986, at 28.

227. See Wald, *supra* note 224, at A1, col. 1. A 7-Eleven spokesman stated, "[the Commission's] letter was secondary to the decision" claiming instead that "[a] recent survey showed a change in customer attitude to those magazines." Green, *supra* note 225, at 32. To the contrary, another chain conducted its own survey and found that most of its customers had no objection to the chain's sale of the magazines. Wald, *supra* note 224, at A14, col. 4.

picketing have accompanied the Commission's letters,²²⁸ providing additional pressures on those retailers to cease sales. This pressure has caused several of the magazines to seek redress in the courts.²²⁹

The seeds of this same cycle can be observed in the record industry, even though a formal rating system has yet to be established. The *Washington Post* reported that "some mall record stores have already been informed that if they carry records with an 'explicit' sticker warning, their leases may be canceled."²³⁰ Record company executives report that some retailers have refused to stock records with the PG labels because of pressure from various interest groups, particularly religious organizations.²³¹ Other retailers have returned albums with questionable covers, anticipating the wrath of local groups.²³² As one critic of labeling noted, "[o]ne can easily imagine how energetic picketing by right-wing, 'family value' groups outside record stores could swiftly reduce the musical diet of the young . . . and place most of America's 20th Century musical heritage under plain wrapper."²³³ The proposed labels arguably would provide these interested groups with an effective mechanism to eliminate records which do not meet with the groups' approval.²³⁴

Still another retailer cited a changing national mood for its decision to stop selling the material: "We believe the social mores in the communities in which we do business have evolved from the free thinking 1970's to a social structure with greater respect for fundamental traditions and values." *Wash. Post*, Feb. 22, 1986, at B8, col. 1.

228. Stengel, *Sex Busters*, *TIME*, July 21, 1986, at 18.

229. Citing the effect of the stores' decisions, *Penthouse* and *Playboy* have brought suit to prevent the Commission from "issuing a 'blacklist' of 'identified distributors of pornography.'" Blodgett, *supra* note 226, at 28. See *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986) (granting a preliminary injunction enjoining the Commission from printing the names of the distributors of the alleged pornography in the Commission's final report. See also *Penthouse Int'l Ltd. v. Meese*, No. 86-1515 (D.D.C. filed May 21, 1986).

230. Harrington, *Rock With a Capital R and a PG-13*, *Wash. Post*, Sept. 15, 1985, at H1, col. 2.

231. *Wash. Post*, Oct. 3, 1985, at D1, col. 1.

232. Cockburn, *Mrs. Grundys Give Record Ratings A Spin*, *Wall St. J.*, Aug. 22, 1983, at 23, col. 3.

233. *Id.* An executive of a large retail firm reported that:

[i]f an "X" rating were established for records, his stores would not carry them. "We have some real concerns about carrying "R" records as well. We're mall-oriented retailers, and what happens if these groups start picketing our stores, and mall developers tell us we cannot carry certain records?"

N.Y. Times, Sept. 18, 1985, at C21, col. 1.

234. "The establishment of a rating system, voluntary or otherwise opens the door to an endless parade of moral quality control programs based on things certain Christians do not like." *Rock Hearings*, *supra* note 124, at 54 (testimony of musical artist Frank Zappa). Influence of these groups is particularly widespread. There is no evidence to support the theory that the American public supports these efforts. To the contrary, voters in Maine rejected a proposal that would have criminalized the sale of pornography by more than a

These developments, coupled with the movie and publishing industries' experiences, forecast that the impact of record ratings may extend beyond simply informing parents about the nature of the songs.²³⁵ The real effect might be to discourage vendors from stocking certain records. Such discouragement would frustrate the creation of certain music just because a segment of society disliked it.

If a derogatory label is attached to an author's work, he will be unable to sell his work in the marketplace²³⁶ and will thus be encouraged to censor himself. The disparagement of a rating system provides a strong incentive to not write lyrics that may invite a negative label, even though the lyrics would not be obscene. If record stores respond to a ratings system as retail outlets have to the national pornography panel, rock artists will find their access to the public greatly restricted.²³⁷ This would occur even though no court has determined that the lyrics lack first amendment protection.

The deterrent effect of a warning label can be viewed as violating the Constitution.²³⁸ Although the labeled music is not directly prohibited, a rating system constitutes an informal abridgment of expression that cannot withstand first amendment scrutiny.²³⁹ Restrictions need not be directly applied to offend the

two to one margin. N.Y. Times, June 12, 1986, at A27, col. 1.

235. It has been noted that movie ratings are not informative and "merely impart a general feeling about a rated film." Note, *Private Ratings of Motion Pictures as a Basis for State Regulation*, 59 GEO. L.J. 1205, 1216 (1971). It may be inferred from this that labels could never be informational, unless they provide greater detail about the lyrical content of the song.

236. It is not enough to argue that an author has lost his constitutional freedom of speech just because the lyrics of his songs have been found to be obscene by some people. Constitutional protection is lost only when the material is found to be obscene under the Supreme Court's standards. See *Miller v. California*, 413 U.S. 15 (1973) (establishing definition for obscenity); see also *Freedman v. Maryland*, 380 U.S. 51 (1965) (adopting procedural safeguards for obscenity determination). If the rating system does not meet the required standards and safeguards then the affected speech should be constitutionally protected.

237. For example, one record company has cited "the possibility of difficulties at the retail level to pressure" an artist into "dropping one song and altering the lyrics of another." DeCurtis, *Record Companies Finesse PMRC*, ROLLING STONE, May 18, 1986, at 16. See also Krauthammer, *X Ratings for Rock?* Wash. Post, Sept. 20, 1985, at A27, col. 1.

238. Not only does a warning label violate the speaker's rights under the Constitution, it also prevents willing listeners from exercising their constitutional right to receive information. The Supreme Court has held that the public has a "right to receive information and ideas, regardless of their social worth." *Stanley v. Georgia*, 394 U.S. 557, 564 (1968) (citation omitted); see also *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 756 (1976) (recipients of information possess first amendment protection); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Thomas v. Collins*, 323 U.S. 516 (1945).

239. First amendment freedoms "are protected not only against heavy-handed frontal

Constitution.²⁴⁰ Accordingly, the Supreme Court held as unconstitutional government actions that discourage,²⁴¹ restrict,²⁴² inhibit,²⁴³ or limit²⁴⁴ free speech as impinging first amendment freedoms. This doctrine also applies to regulations that provide a "basic incentive"²⁴⁵ not to speak. A state cannot "increase the cost" of distributing protected speech by making it difficult for the speaker by encouraging suppression of his speech.²⁴⁶ It is immaterial that the government did not intend to stifle free expression.²⁴⁷ Although the state purports to act with the lawful purpose of providing information to parents, incidental infringements on first amendment rights that occur "as an unintended but direct result of the government's conduct," as opposed to direct content-based regulations, remain unconstitutional.²⁴⁸

Of course, not all abridgements of speech are unconstitutional. But if expressions are not obscene, then a state may regulate them only if necessary to serve a compelling state interest and if the reg-

attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (citations omitted).

240. Restrictions are not made less offensive because they are indirectly applied. The Supreme Court stated that "[w]e are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Bantam Books v. Sullivan*, 372 U.S. 58, 67 (1963) (footnote omitted); see also *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 688 (1968) (Invasions of first amendment freedoms "are not rendered less objectionable because the regulation of expression is one of classification, rather than direct suppression."); *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1360 (5th Cir. 1980) ("Courts must look through the form to the substance when examining whether a system of informal prior restraint has been created.") (citations omitted), cert. dismissed, 447 U.S. 931 (1980); *Greenberg v. Bolger*, 497 F. Supp. 756, 775 (E.D.N.Y. 1980) (citation omitted) ("It does not matter whether the impediment to free speech works its evil overtly or covertly.").

241. *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950) ("Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes.").

242. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

243. *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring) ("inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government").

244. *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980).

245. *Williams v. Rhodes*, 393 U.S. 23, 41 (Harlan, J., concurring) (1968).

246. Cf. *Erznoznik*, 422 U.S. at 211 n.7 (discussing how an ordinance effectively increased the cost of showing films containing nudity).

247. *NAACP v. Alabama*, 357 U.S. 449, 461 (1958).

248. *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (per curiam). See also *Spencer v. Herdesty*, 571 F. Supp. 444, 451 (S.D. Ohio 1983) ("It is well-established however, that encroachments on First Amendment rights that arise 'not through direct Government action, but indirectly are an unintended but inevitable result of the Government's conduct' are just as constitutionally infirm as overt content-based discrimination.") (quoting *Buckley*, 424 U.S. at 65).

ulations are "narrowly tailored to achieve that end."²⁴⁹ The reasons offered in support of the enactment of regulations affecting rock music—the offensiveness of the lyrics, their threat to the moral character of American youth and their lack of redeeming value²⁵⁰—cannot serve as the requisite state interest sufficient to justify abridging free speech.²⁵¹ An "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."²⁵²

In *Bantam Books v. Sullivan*,²⁵³ the Supreme Court held that a Rhode Island state commission's mailing of letters to retailers describing certain publications as "objectionable" was unconstitutional.²⁵⁴ The Court found this activity to constitute a "scheme of state censorship effectuated by extralegal sanctions"²⁵⁵ because the commission had "deliberately set about to achieve the suppression" of constitutionally protected materials.²⁵⁶ For purposes of constitutional analysis, the activities of the Rhode Island commission are indistinguishable from those of a ratings board constituted to label rock records.²⁵⁷

b. Ratings and the Overbreadth Doctrine

The ratings systems face a second constitutional barrier in the overbreadth doctrine. Under the overbreadth doctrine, legislation will be declared void if its permissible regulation of speech also invades expression protected by the first amendment.²⁵⁸ A court

249. *Wildomon*, 454 U.S. at 27.

250. See *supra* notes 185-92 and accompanying text.

251. See *infra* notes 331-34 and accompanying text.

252. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 508 (1969).

253. 372 U.S. 58 (1963).

254. *Id.* at 62. See also *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) (classification scheme of suitable and not suitable held unconstitutional).

255. *Bantam Books*, 372 U.S. at 72.

256. *Id.* at 67.

257. One court recently employed similar reasoning to hold that a statute, which provided for the labeling of certain foreign films as "political" propaganda, violated the constitution. *Keene v. Meese*, 619 F. Supp. 1111, 1124 (E.D. Cal. 1985), *prob. juris. noted*, 106 S. Ct. 1632 (1986). The plaintiff alleged that the application of the label "so denigrates the materials that they are made unavailable to [him]." *Keene*, 619 F. Supp. at 1114. Finding that the labeling infringed on the plaintiff's first amendment rights notwithstanding that the government action was not overt, the court held that an abridgement occurs whenever there is a "substantial interference with speech, regardless of the *modus operandi*." *Id.* at 1124 (emphasis in original). But cf. *Block v. Smith*, 583 F. Supp. 1288 (D.D.C. 1984), *aff'd* 793 F.2d 1303 (D.C. Cir. 1986) (holding that similarly situated plaintiffs lacked standing to assert first amendment claim).

258. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

analyzing an overbreadth challenge to a music rating system would likely examine whether the regulations sweep beyond the permissible restraints on obscenity, thereby impinging on non-obscene musical expression.²⁵⁹

Regardless of the standards created by a ratings board attempting to prevent obscene lyrics, any regulation is likely to include protected speech within its ambit. Thus, such regulations raise two distinct overbreadth problems. First, the interpretation of rock music, more so than motion pictures, is a highly subjective process. As stated in the *New York Times*, "song lyrics don't necessarily deliver the same message to everyone who hears them."²⁶⁰ Because the commercial radio format encourages shorter songs, most songwriters limit their number of written words, which results in ambiguous meanings.²⁶¹

A ratings board, however, will make its own interpretations in assigning a label to an album. The PMRC's campaign has already illustrated the difficulty in developing a single interpretation of lyrics for many rock songs. For example, the PMRC asserted that Twisted Sister's "Under the Blade" concerned violent perversions. The song's author, however, contended it involved a friend's fear of surgery.²⁶² "As the creator . . . I can state categorically that the only sadomasochism, bondage, and rape in this song is in the mind of Ms. Gore."²⁶³ Although a song about the fear of surgery might not implicate constitutional concern,²⁶⁴ had the PMRC's interpretation been adopted by the ratings board, the song would have received an X rating, subjecting it to the informal censorship accompanying that label. This would seem to be the result even though the songs were not held to be obscene by any court.²⁶⁵

259. *Erznoznik v. Jacksonville*, 422 U.S. 205, 208 (1975). An individual has standing to challenge the entire statute even if engaged only in non-protected speech. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633-34 (1980).

260. Pareles, *supra* note 122, at 5, col. 1.

261. *Id.*

262. Zucchini, *supra* note 176, at 66, col. 3.

263. *USA Today*, Oct. 11, 1985, at 10A, col. 1 (quoting the testimony of Dee Snider, the song's author, before Congress).

264. Country musician John Denver endured a similar experience. His song "Rocky Mountain High" was banned by many radio stations who interpreted it as encouraging drug use. Yet, as Denver told the Senate, this was a "clear case of misinterpretation." *Rock Hearings*, *supra* note 124, at 65. He explained that the lyrics concerned the "elation, celebration of life, or the joy in living that one feels" while experiencing nature. *Id.*

265. See Pareles, *supra* note 122, at 5, col. 2 (questioning whether the Jacksons' "Torture" is "a brief for sadomasochism or . . . a metaphor for unrequited love?"); see also Cocks, *supra* note 103, at 71, col. 2 (noting different interpretations of "Looking Out My Back Door" by Creedence Clearwater Revival).

The proposed rating system for rock music employs terms that rely exclusively on the subjective beliefs of a few about the meaning of the rated lyrics. This proposed rating invariably assigns the most explicit interpretation possible²⁶⁶ because of the traditional antipathy towards rock music.²⁶⁷ The result of this overly broad interpretation is to deter musicians from writing songs that are not legally obscene, yet are likely to be labeled as such. Protected speech will be infringed—the precise result the overbreadth doctrine was intended to prevent.²⁶⁸ The possibility of this overly broad misinterpretation is too great to be tolerated under the first amendment.

A second issue under the overbreadth doctrine arises from the nature of the industry itself. The rock songs assailed by the PMRC are usually distributed to the public packaged in albums, accompanied by other music whose lyrics often concern completely divergent subjects. While one song on an album might arguably be labeled as obscene, the remainder of that record might be protected speech and as such would be an improper subject for regulation.

The PMRC, however, proposes to rate the entire album. In doing so, the label's stigma attaches to the entire album, effectively preventing the distribution of the non-obscene protected songs.²⁶⁹ Thus, through their regulation of unprotected speech, states transgress the first amendment liberties of artists to disseminate non-obscene music. This violates the overbreadth doctrine.²⁷⁰ The Supreme Court has plainly refused to allow states to regulate unprotected speech through methods "which sweep unnecessarily

266. The experience of Frank Zappa in 1967 is illustrative. A record company reworded his song entitled "Let's Make the Water Turn Black," eliminating these lyrics: "[a]nd I still remember mama with her apron and pad / Feeding all the boys at Ed's cafe." As Zappa stated, "[a] person at the record company was convinced that the pad in question was a sanitary napkin. That's the kind of thing that you can be subjected to when you let somebody decide what is dirty, what is occult, what is violent and the rest." Wolmuth, *supra* note 185, at 50.

267. As one classical music critic noted, in urging his readers to listen to rock artists such as Stevie Wonder, Linda Ronstadt and Little Richard, "[i]f the music at first seems vulgar to the touch, remember that this is a vulgarity measured against standards of taste borrowed from someone else." Holland, *Just How Much Reality Can Music Bear?*, N.Y. Times, Apr. 17, 1986 at C25, col. 2.

268. The Supreme Court stated that "where statutes have an overbroad sweep . . . 'the hazard of loss or substantial impairment of those precious rights may be critical' . . . since those covered by the statute are bound to limit their behavior to that which is unquestionably safe." *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967).

269. See *supra* notes 218-257 and accompanying text (noting violation of first amendment).

270. Simply identifying one song on an album as obscene does not alleviate the problem because the label's effect is the same—store owners will still not carry the album.

broadly and thereby invade the area of protected freedoms."²⁷¹

c. Private Labels as State Action

The preceding discussion assumes governmental involvement with the ratings board.²⁷² If the industry and consumer groups, however, agreed to establish a committee for this purpose, there would be no violation of amendment rights unless the labeling system could be considered a state action because the Constitution does not apply to purely private conduct.²⁷³ The state action requirement for a private system, however, is satisfied under traditional constitutional analysis.²⁷⁴

Classification of entertainment into acceptable and unsuitable categories has traditionally been a government function.²⁷⁵ The state has long considered shielding children from dangerous materials its duty,²⁷⁶ and has long sought to suppress obscene entertainment even from adults.²⁷⁷ A private ratings system, by assigning labels to records after judging their content, assumes the responsibility for determining what songs should be available for purchase by children. The ratings board, however, acts as an agent of the government; its decisions therefore constitute state action under the public function doctrine.²⁷⁸

271. *Zwickler v. Koota*, 389 U.S. at 250. See also *United States v. Grace*, 461 U.S. 171, 187 (1983) ("[A] statute which sweeps within its ambit a broad range of expression protected by the first amendment should be struck down on its face.").

272. Were the Senate hearing to ripen into a full-scale investigation of rock lyrics, it would provide a basis for objection under the Constitution, even in the absence of legislation. As the Court held in *Watkins v. United States*, 354 U.S. 178, 197 (1957),

[c]learly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech. . . . While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking.

273. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

274. Although the motion picture industry's system has not yet been held unconstitutional, several commentators have concluded it is. See e.g., Friedman, *supra* note 218, at 185; Note, *supra* note 235, at 1205.

275. See Friedman, *supra* note 218, at 225 (noting that film classification has long been province of government).

276. The Supreme Court recognizes that the state possesses a responsibility, independent of parents, to ensure that harmful materials are kept from children's reach. *Prince*, 321 U.S. at 169-70.

277. See *supra* note 49.

278. The public function doctrine recognizes that private actors can often assume the mantle of government officials and impinge on individual liberties by engaging in activities traditionally performed by government. See *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town as state actor); *Terry v. Adams*, 345 U.S. 461 (1953) (pre-primary elections by

In addition,²⁷⁹ the government has encouraged the industry and consumers to create a private rating system.²⁸⁰ The Supreme Court has held that similar encouragement can taint the private organization's operation with state action.²⁸¹ Finally, the state benefits from the private enforcement of a labeling system;²⁸² such symbiosis between the government and the private entity may also constitute state action.²⁸³ Therefore, because a ratings board would be equivalent to a "mini-sovereign," its actions are "subject to the strictures" of the first amendment.²⁸⁴

Regardless of the outcome of this state action analysis, the government's ability to employ a private ratings system would be

county political organization as state actor); *Smith v. Allwright*, 321 U.S. 649 (1944) (control over primary elections by political party as state actor).

279. Although recent court decisions have narrowed the breadth of the public forum doctrine, they do not alter this conclusion. The Burger Court, in reducing the scope of the state action doctrine, indicated that two new tests may now be required. The first is that the traditional state function must have been exclusively the government's. *See Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) (warehousing not exclusive state function); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (utility not exclusive state function). This, however, does not exempt a private music ratings board from being a state actor. With the exception of some relatively informal internal industry standards, entertainment, when regulated, has almost always been regulated by the state.

Second, the Burger Court appears to require some statutory or constitutional provision that mandates the private action. *See Blum v. Yaretsky*, 457 U.S. 991 (1982) (nursing homes not public function); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1981) (private school not public function). This requirement is met by the clear warnings the federal government has provided the industry about the need for self-regulation as a means to avoid government action. *See supra* notes 203-04 and accompanying text. But for the threat of government interference, it is unlikely the industry would have acted.

280. The Senate hearing is illustrative. Although conceding that it could not constitutionally regulate the lyrics, government officials stated that they would like to see regulation enacted by the industry. *Cocks, supra* note 103, at 70-71. *See also supra* notes 202-04. Even President Reagan has spoken against the lyrics, thereby subtly inviting regulation: "I don't believe that our Founding Fathers ever intended . . . the right of pornographers [to] take precedence over the rights of parents, and the violent and malevolent to be given free rein to prey upon our children." *USA Today*, Oct. 11, 1985, at 10A, col. 1.

281. In *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), the Court found state action in the refusal of a restaurant located in a public building to serve minorities because it benefited the state. The government overtly encouraged such a system. *See supra* note 280 and accompanying text.

282. The primary benefit is the performance of a state function that would be complicated, expensive, time consuming, and controversial. By having industry and consumers face these hurdles, the government is able to accomplish its goal of regulating children's access to offensive rock records at minimal expense.

283. Any additional requirements created by the Court's decision in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), would not be a bar to a finding of state action. In *Lugar*, the Court held that the private actor must perform his duty under a right or privilege created by the state to be considered a state action.

284. *Friedman, supra* note 218, at 239.

limited.²⁸⁵ A state could not use the labels to ban the lyrics. The courts have struck down attempts to enact the motion picture industry rating symbols into law as a basis for regulating films.²⁸⁶ Several decisions found such regulations unconstitutional as applied because they failed to employ the *Miller* obscenity test²⁸⁷ or utilized vague and unascertainable standards.²⁸⁸ A record labeling system would offend the same constitutional principles.

B. *Banning the Sale of Rock Lyrics*

For some communities and interest groups, simply rating the albums is insufficient. They have advocated legislation that would ban the sale of obscene records to minors. At least twelve states have already introduced bills to this effect²⁸⁹ and others will probably follow suit.²⁹⁰ Legislative intervention is particularly likely because of the PMRC's success in focusing national attention on the damages of "porn rock."²⁹¹ Unless a music industry-PMRC compromise alleviates this newly fostered national concern over explicit lyrics, the public may demand more stringent statutory remedies, such as a complete prohibition on the sale of records. Any such solutions, which would most likely be directed at obscene music, must satisfy the Supreme Court's requirements for the restric-

285. Note, *Film Is a Four Letter Word*, 5 MEM. ST. U.L. REV. 41, 47 (1974).

286. Friedman, *supra* note 218, at 230.

287. See *Swope v. Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983) ("[I]t is well-established that the Motion Picture ratings may not be used as a standard for determination of constitutional status."); *Engdahl v. City of Kenosha, Wisc.*, 317 F. Supp. 1133, 1136 (E.D. Wisc. 1970) (procedures do not meet the constitutional requirements of government regulation of obscenity).

288. *Motion Picture Ass'n of America v. Specter*, 315 F. Supp. 824, 826 (E.D. Pa. 1970).

289. According to one survey, Alabama, Arizona, Florida, Hawaii, Maine, Massachusetts, New Jersey, New York, South Carolina, South Dakota, West Virginia, and Wisconsin are all considering legislation to restrict the sale of rock music. Seligman, *ROLLING STONE*, June 19, 1986, at 29. In Maryland, the House of Delegates approved such legislation, but the Senate's Judicial Proceedings Committee rejected the legislation. Its sponsor has promised to reintroduce the measure. "We need a statement and we'll be making that statement over and over again until somebody in a responsible position says, 'It's enough. We've got to do something to pull back,'" Maryland Delegate Judith Toth asserted. "What you're seeing is the beginning of a movement, not the end." *Id.*

290. Toth predicted that "at least ten, fifteen states" will have approved such legislation by next year. *Id.*

291. As Zappa asserted, the Senate hearing was "like mass advertising to make it happen on the state level." *ROLLING STONE*, June 19, 1986, at 19. The issue is alluring to politicians as well. Colorado Senator William Armstrong reported that if he runs for President in 1988 he will make rock lyrics a campaign issue because of its "aberrant sex practices." *Rock and Roll Confidential*, June 1986, at 3.

tion of this category of speech.²⁹²

1. REGULATIONS AIMED AT OBSCENE SONGS

a. Are They Really Obscene: Obscenity for Adult Purposes

As protected expression, music can be banned if it is adjudged obscene or belongs to another class of unprotected speech.²⁹³ Statutes that purport to regulate obscene materials, however, “must be carefully limited” because they implicate free speech concerns²⁹⁴ and will fail unless they comply with the Supreme Court’s definition of obscenity outlined in *Miller*.²⁹⁵

Although it would be impossible to evaluate many of the songs specifically, a general review demonstrates that few rock lyrics would be adjudged obscene under *Miller*, even though many of them frankly discuss sexual relations.²⁹⁶ Popular music is by its very nature strongly tinged with sexuality:

[I]t is sex that is the basic high for rock ‘n’ roll . . . with its irreducibly emphatic backbeat, rock ‘n’ roll is fundamentally physical music, music that makes you move, sway, gyrate, hump, dance . . . Rock ‘n’ roll is drenched with sex. Rock ‘n’ roll—the name means it; even the ‘n’ means it: *unh!* Rock ‘n’ Roll is the sexual revolution.²⁹⁷

But this alone does not make the lyrics obscene.

In *Miller*, the Supreme Court established a three-part standard that must be satisfied before material can be considered legally obscene. To be considered obscene, a work must appeal to the “prurient interest,” as determined by the “average person, applying contemporary community standards,” depict “in a patently offensive way, sexual conduct,” and “taken as a whole, lack[] serious literary, artistic, political, or scientific value.”²⁹⁸

Under this standard, few rock lyrics can be considered obscene, because they merely portray sex, and do not “excite lustful thoughts”²⁹⁹ or deal with sex in a “shameful or morbid” manner,

292. The same overbreadth problems previously discussed, concerning a ratings system, are relevant here. See *supra* notes 258-70 and accompanying text.

293. See *supra* notes 53-76 and accompanying text.

294. *Miller*, 413 U.S. at 23-24.

295. See *supra* notes 54-55 and accompanying text.

296. R. DUNCAN, *supra* note 2, at 83-84 (discussing sexual content of music).

297. *Id.*

298. *Miller*, 413 U.S. at 24.

299. *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957) (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY (unabridged, 2d ed. 1949)).

employing particularly graphic language, which is required under *Miller*.³⁰⁰

Most of the lyrics the PMRC has called obscene involve short statements that sexual activities are occurring, rather than a lurid description of the act itself.³⁰¹ These lyrics do little more than concern a sexual topic. Rock songs generally offer the listener only short snippets of sex, simply employing its terminology, but without merging the language into a graphic description of hardcore sexual activity. The difference is constitutionally significant. The mere representation of sexual activity³⁰² or the use of profane³⁰³ and vulgar³⁰⁴ language does not by itself constitute obscenity. The Supreme Court's test mandates something more; cases finding material obscene since *Miller* have required a finding of explicit, hardcore sexual activity containing insignificant non-erotic content.³⁰⁵ Rock songs do not approach this level of specificity. They merely depict sexual activity, which alone does not constitute obscenity.³⁰⁶ Rock songs are similar to "displays [of] the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the first amendment."³⁰⁷ Prince's songs may be erotic, but that "does not lessen the protection to which their dissemination is entitled."³⁰⁸

b. Regulating Minors' Access to Obscenity

The *Miller* test would, however, have only limited application if the states banned the distribution of obscene recordings only to

300. *Id.*, (quoting A.L.I. MODEL PENAL CODE, § 207.10(2) (Tent. Draft No. 6, 1957)).

301. Prince's "Darling Nikki" is illustrative. It merely states that a woman was masturbating. It does not describe the act or offer any graphic explanation. This does not meet the *Miller* test for obscenity, yet the PMRC has saved its greatest condemnation for the song. Many of the other examples cited by the PMRC are similar. See *supra* note 125.

302. *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 490-92 (9th Cir. 1984) *rev'd on other grounds*, 105 S. Ct. 2794 (1985).

303. *Hess v. Indiana*, 414 U.S. 105 (1973). See also *State v. Yoakum*, 30 Wash. App. 874, 876, 638 P.2d 1264, 1265 (1982) (mere vulgarity not unprotected).

304. *Manual Enter. v. Day*, 370 U.S. 478, 490 (1962) ("The most that can be said of them is that they are dismally unpleasant, uncouth and tawdry. But this is not enough to make them obscene."); *Huffman v. United States*, 470 F.2d 386, 396 (D.C. Cir. 1971) (first amendment "extends to trash, if it stops short of obscenity").

305. See Annotation, *Modern Concept of Obscenity*, 5 ALR 3d 1158.

306. See *Jenkins v. Georgia*, 418 U.S. 153 (1974) (obscenity ruling overturned because depicts only naked woman).

307. *Schad*, 452 U.S. at 66; *Jenkins v. Georgia*, 418 U.S. at 161.

308. *Wall Distrib., Inc. v. The City of Newport News, Va.*, 782 F.2d 1165, 1168 (4th Cir. 1986); *Fantasy Book Shop v. City of Boston*, 652 F.2d 1115, 1126 (1st Cir. 1981) ("sexually explicit, but non-obscene materials, however distasteful, are entitled to no less protection than other forms of expression").

children.³⁰⁹ The Supreme Court ruled in *Ginsberg v. New York* that the obscenity standard can vary with age;³¹⁰ states therefore have broad authority³¹¹ to bar minors from sexually-oriented materials which might not be obscene for adults.³¹²

The state's power, however, is not unlimited. First, *Ginsberg* does not permit the proscription of all sexually-oriented material from children. Because minors possess a "significant measure" of first amendment protection, a state may not shield them from obtaining expressions that merely concern sexual topics.³¹³ "Rather, to be obscene 'such expression must be, in some significant way, erotic.'"³¹⁴ The statute upheld in *Ginsberg* contained the patently offensive test for determining whether the materials were obscene,³¹⁵ suggesting that despite the state's definitional leeway, it may not deviate completely from the traditional standards for judging obscenity.³¹⁶

Thus, rock records will have to do more than merely employ racy words or state sexual activities; they must contain some erotic, if not hardcore, sexual material before they can be prohibited.³¹⁷ Those seeking to regulate "porn rock" must demonstrate such extreme subject matter because lyrics "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."³¹⁸ Without such a showing, reg-

309. The Maryland statute would have made it a misdemeanor to sell or distribute obscene music materials to anyone under 18. Harrington, *X-Rated Lyrics Bill on Maryland Slate*, Wash. Post, Feb. 8, 1986, at C1, col. 6.

310. *Ginsberg v. New York*, 390 U.S. 629 (1968).

311. See e.g., Krislov, *From Ginzberg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation*, 1968 SUP. CT. REV. 153 (discussing contents of *Ginsberg* decision).

312. In *Ginsberg*, the Court upheld a statute that defined obscenity in terms of prurient appeal to minors. 390 U.S. at 631-33.

313. *Erznoznik*, 422 U.S. at 212-13. As the Seventh Circuit stated, children do not stand outside the protections of the Constitution. . . . Although society is free to express its special concern for its children in a variety of regulatory schemes, it may not excise a child's constitutional prerogatives under the guise of protecting his interest. . . . [A] child's freedom of speech is too important to be overridden by an ordinance expressing the community's view of what it considers as material harmful to its youth.

Cinecom Theatres Midwest St., Inc. v. City of Fort Wayne, 473 F.2d 1297, 1302 (7th Cir. 1973).

314. *Erznoznik*, 422 U.S. at 213, n.10.

315. *Ginsberg*, 390 U.S. at 646. But cf. *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography need not be patently offensive to be regulated).

316. See Annotation, *Validity, Construction, and Effect of Statutes or Ordinances Prohibiting the Sale of Obscene Materials to Minors*, 93 A.L.R. 3d 297.

317. They must be obscene as to minors. *Id.* See also *American Booksellers Ass'n, Inc. v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981).

318. *Erznoznik*, 422 U.S. at 213-14.

ulations will fail despite the liberalized obscenity standard for minors.³¹⁹

Second, statutes regulating obscenity for children must be narrowly crafted to ensure that protected adult speech is not infringed.³²⁰ Statutes may not, in the Supreme Court's language, "burn the house to roast the pig" by preventing adults from obtaining non-obscene materials.³²¹ A state may not "reduce the adult population to reading only what is fit for children."³²² Presumably, this applies to listening as well. Traditionally, regulations that effectively prevent adults from having access to materials which are not obscene as to them have been struck down.³²³ A state cannot "effectively stifle an adult's access to communications he or she is entitled to receive"³²⁴ even if the statute intends only to ban minors' access to albums containing songs barred for children.

A state's banning of the sale of obscene records to minors would likely have the same effect as a complete ban on the records. Adults legally entitled to purchase the records would have difficulty doing so because vendors are unlikely to stock the albums at all. Store owners would have little incentive to carry obscene-for-minors records, because the largest pool of potential buyers, minors, would be eliminated. In addition, widespread community pressure could cause retailers to fear being branded distributors of pornography. Boycotts and other pressure tactics might further discourage retailers who sell these materials. Regulatory efforts to date have run afoul of the Supreme Court's dictate that statutes "be carefully drawn . . . and not be susceptible of application to protected expression."³²⁵

319. *Id.*

320. *M.S. News Co. v. Casado*, 721 F.2d 1281, 1288 (10th Cir. 1983).

321. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

322. *Id. But cf. Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1395 (8th Cir. 1985) (refusing to extend *Butler* to display regulations).

323. See *Rushia v. Town of Ashburnham*, 582 F. Supp. 900, 904 (D. Mass. 1983) (public display prohibition unconstitutional); *American Bookseller Ass'n v. McAuliffe*, 533 F. Supp. 50, 56 (N.D. Ga. 1981); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 784-85 (Colo. 1985).

324. *American Booksellers Ass'n v. Strobel*, 617 F. Supp. 699, 704-05 (E.D. Va. 1985).

325. *Gooding v. Wilson*, 405 U.S. 518, 522 (1972); see also *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("government may regulate in the area [of first amendment] only with narrow specificity"); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) ("the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom").

The Supreme Court's more recent decision in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) does not compel a different conclusion. In *Pacifica*, the Court held that regulations

2. REGULATING NON-OBSCENE SPEECH

The effort to restrict "porn rock" has been aimed solely at the sexual content of the songs.³²⁶ The PMRC is concerned that the music is encouraging children to engage in violence,³²⁷ experiment with drugs and alcohol,³²⁸ become pregnant,³²⁹ and commit suicide.³³⁰ The expansion of states' efforts from regulating obscenity to regulation of these other concerns would likely violate the first amendment under the following analysis.

Presumably, states would likely justify their further regulation of rock songs on grounds that such songs advocate illegal conduct and induce antisocial behavior. In doing so, the states would rely on the Supreme Court's decisions under the "clear and present danger doctrine,"³³¹ recognizing that speech which incites individuals to break the law is outside the constitutional guarantee of free expression.³³² In *Brandenburg v. Ohio*, the Court struck down an

aimed at limiting minors' access to indecent speech were not unconstitutional. *Pacifica*, however, is distinguishable from the proposed music regulations. *Pacifica* concerned a restriction on the manner of dissemination. The speech was not completely banned. To the contrary, under the regulations discussed in the text, the state would effectively eliminate material from the marketplace, leaving the adult without the opportunity to purchase the records.

326. The very first mailing sent by the PMRC, for example, "revealed that 'some rock groups advocate satanic rituals, others sing of open rebellion against parental and other authority, others sing of killing babies.'" Zucchini, *supra* note 176, at 17, col. 1.

327. A New Jersey county district attorney has blamed certain incidents of cemetery vandalism on kids listening to rock bands. ROCK & ROLL CONFIDENTIAL, July 1986, at 3.

328. PMRC's Susan Baker testified that "the growing trend in music toward lyrics that . . . glorify the use of drugs and alcohol." *Rock Hearings*, *supra* note 124, at 11.

329. During her testimony, Baker cited the country's growing teen pregnancy rate and asserted that "pervasive messages aimed at children which promote and glorify suicide, rape, sadomasochism, and so on, have to be numbered among the contributing factors." *Id.* at 11-12.

330. Baker further testified that "[s]ome rock artists actually seem to encourage teen suicide," citing as examples Ozzy Osbourne's "Suicide Solution," Blue Oyster Cult's "Don't Fear the Reaper," and AC/DC's "Shoot to Thrill." *Id.* at 12. Another witness testified on the suicide of Steve Bacher, who shot himself while listening to AC/DC's "Shoot to Kill." *Id.* at 13.

331. This doctrine has had a complex history in the Supreme Court, and has often been misapplied. Justice Frankfurter noted that the doctrine was not designed to "express a technical legal doctrine or to convey a formula for adjudicating cases." *Pennekamp v. Florida*, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring.) As Chief Justice Burger stated, the doctrine "requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

332. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Furthermore, it is doubtful that a state could justify its regulation because violent rock songs constitute nonprotected "fighting words." This is because listening to music, like watching movies, "involves no face-to-face confrontation or personal insults [sic]". Note, *The Censorship of Violent Motion Pic-*

Ohio statute criminalizing the advocacy of violence to achieving political reform and established the modern test for prohibiting speech.³³³ The Court held that a state may forbid advocacy of use of force or illegal conduct only where "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."³³⁴

While some rock songs arguably may advocate illegal activity such as drug use, it is done in a manner that does not rise to the level of incitement required by the Supreme Court. This alleged advocacy to commit illegal acts, however, is largely the general and abstract expression of opposition to societal norms. These expressions cannot be penalized because they fall short of clear and certain calls for unlawful conduct.³³⁵ The *Brandenburg* test would not be met where a statement of opposition containing threatening language is found to have been intended as a true threat.³³⁶

Realistically, the majority of musicians do not actually encourage lawbreaking, and where such controversial music is used, it is often as hyperbole.³³⁷ Even where rock lyrics are viewed as encouraging illegal action, they certainly are not intended to produce imminent disorder. At most, such lyrics advocate illegal action at some indefinite future time and therefore cannot be prosecuted under *Brandenburg*.³³⁸ The alleged link between violent behavior and music is simply too tenuous to support the suppression of lyrics.³³⁹

tures: *A Constitutional Analysis*, 53 IND. L.J. 381, 383 (1977-78) (footnote omitted).

333. *Brandenburg*, 395 U.S. at 449.

334. *Id.* at 447 (footnote omitted). Mere teaching or advocacy of a theory is insufficient to meet this standard. *Id.* at 447-49.

335. See *Bond v. Floyd*, 385 U.S. 116 (1966) (statement expressing general opposition to war held to be protected under the first amendment).

336. See *Watts v. United States*, 394 U.S. 705 (1969) (crude statement of opposition to President held not to be equivalent to threatening his life). Although *Watts* was decided prior to *Brandenburg*, the underlying first amendment concerns appear to be the same.

337. "Strong and effective extemporaneous rhetoric cannot be nicely channeled into purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982).

338. *Hess v. Indiana*, 414 U.S. 105, 107 (1973) ("We'll take the fucking street" held not to be punishable as intended and likely to produce imminent disorder); see also *Craig v. Harney*, 331 U.S. 367, 376 (1947) ("danger must not be remote or even probable; it must immediately imperil"); *Gay Students Org. of the University of New Hampshire v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974) ("speculation that individuals might at some time engage in illegal activity is insufficient to justify regulation by the state" under the first amendment).

339. The PMRC claims of a causal link between violence and rock music is further weakened by a recent study conducted at California State University, Fullerton. Two of Cal State's researchers interviewed California high school students and found that the students

The unavailability of the "clear and present" danger doctrine as applied to rock music is apparent from the cases in which the doctrine has been successfully invoked. Courts have traditionally applied the doctrine to the most serious and important issues in American political history. The Supreme Court has literally interpreted the doctrine's name in holding that restraints on freedom of expression can be justified only when there is a grave and immediate threat to the nation's security.³⁴⁰ The "evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."³⁴¹ The Court has also interceded to prevent speech urging the overthrow of the government,³⁴² advocating political change by violent means³⁴³ and membership in an organization dedicated to upset of political order.³⁴⁴ It is unlikely that this doctrine will provide first amendment protection to music because the actions allegedly encouraged by rock and roll music do not rise to a nationally important level like treason and rebellion.

C. Regulation of Explicit Lyrics by the Federal Communications Commission

The majority of efforts aimed at solving the problem of "porn rock" thus far have urged the development and implementation of a distinct system specifically designed to restrict rock music. But those seeking to limit the dissemination of certain lyrics need only turn to the Federal Communications Commission ("FCC"), an existing federal agency which arguably has the power to regulate rock music.³⁴⁵

perceived only seven percent of the lyrics of the mentioned songs to "refer to sex, violence, drugs or satanism." The study concluded that 37 percent of the students "didn't know" what their favorite songs were about." DeCurtis, *Study Refutes PMRC Claims, Says Kids Don't Listen to Lyrics*, ROLLING STONE, Aug. 14, 1986, at 11.

340. See *Schenck v. United States*, 249 U.S. 47, 49-51 (1919). In *Schenck*, the Court held that a letter encouraging opposition to the draft, which was circulated to men called and accepted to military service during a time of war, was not protected under the first amendment. *But cf.* *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) (criticizing the *Schenck* decision).

341. *Bridges v. California*, 314 U.S. 252, 263 (1941).

342. *Frohwerk v. United States*, 249 U.S. 204 (1919) (upholding Espionage Act convictions); *Debs v. United States*, 249 U.S. 211 (1919).

343. *Whitney v. California*, 274 U.S. 357 (1927) (upholding legislature's determination that membership in an organization advocating political change through violence is dangerous). The *Whitney* decision was later overruled by *Brandenburg*. 395 U.S. at 449.

344. *Dennis v. United States*, 341 U.S. 494 (1951).

345. Senator Hollins has already noted the utility of employing the FCC to regulate in case the "American public [decides not] to go along just with a nice hearing up in Washington." *Rock Hearings*, *supra* note 124, at 69-70. See also *id.* at 76-77 (also noting possible use

1. BACKGROUND: THE FCC AND "DRUG-ROCK" LYRICS

The FCC first became involved with the issue of rock music extolling drugs when the agency received a series of complaints, most notably from then Vice President Spiro Agnew, on the matter.³⁴⁶ In response to these complaints, the FCC issued a Public Notice to its licensee radio stations regarding the stations responsibility to ascertain the meaning of the words of songs played by the stations.³⁴⁷ The FCC declared that the licensees were responsible to determine "[w]hether a particular record depicts the dangers of drug abuse, or to the contrary, promotes such illegal drug use."³⁴⁸

The issuance of the Public Notice by the FCC caused tremendous concern over censorship in the record industry.³⁴⁹ Several newspapers reported that the FCC had ordered radio stations not to play drug-oriented music.³⁵⁰ The notice had a broad chilling effect throughout the industry. "Do not play lists" were circulated, some disc jockeys were forced to sign promises not to play certain songs, and one station owner rejected all lyrics which his management could not interpret.³⁵¹

Although several commentators asserted that the notice violated the first amendment,³⁵² the Court of Appeals for the District of Columbia Circuit upheld the FCC's decision over the challenge of several radio stations.³⁵³ The broadcasters' argument was based on the Supreme Court's decision in *Smith v. California*,³⁵⁴ which held that a state cannot regulate obscenity by placing on the proprietor the procedural burden of examining all publications sold in

of the FCC as a means of regulating rock).

346. See *supra* note 14 and accompanying text.

347. 28 F.C.C.2d 409 (1971), *clarified and modified*, 31 F.C.C.2d 377 (1971), *aff'd*, Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973).

348. 28 F.C.C.2d at 409.

349. Such concern echoed the view of Commissioner Nicholas Johnson who found the notice to be

an unsuccessfully disguised effort by the Federal Communications Commission to censor song lyrics that the majority disapproves of; it is an attempt by a group of establishmentarians to determine what youth can say and hear . . . [and] it is an unconstitutional action by a Federal agency aimed clearly at controlling the content of speech.

Id. at 412 (Johnson, Comm'r, dissenting).

350. 31 F.C.C.2d at 377 (1971).

351. Comment, *Drug Lyrics, the FCC and the First Amendment*, 5 LOYOLA L.A.L. REV. 329, 348 (1972).

352. *Id.* at 359-62; Note, *Drug Songs and the Federal Communications Commission*, 5 U. MICH. J.L. REF. 334, 349 (1972).

353. Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973).

354. 361 U.S. 147, 153-54 (1959).

his store. The D.C. Circuit, however, distinguished *Smith* from the case before it by noting that a radio station's burden of examination differs from a bookstore's because a station needs to review a smaller number of songs.³⁵⁵

The court ruled that awareness of the lyrics constituted part of the licensees' responsibility to act in the public interest.³⁵⁶ The court stated that the notice simply required the stations to have knowledge of the songs it broadcast and did not censor rock music.³⁵⁷

2. THE FCC'S ABILITY TO REGULATE EXPLICIT LYRICS

The FCC has been delegated the broad power to regulate radio broadcasts under the Federal Communications Act.³⁵⁸ Pursuant to this authority, the FCC may impose sanctions on "[w]hoever utters any obscene, indecent, or profane language by means of radio communications."³⁵⁹ Therefore, the FCC can regulate music that falls within these distinct classes even if the songs are otherwise protected under the first amendment.³⁶⁰ Although this provision regulates protected first amendment speech, its constitutionality has been upheld against a variety of challenges.³⁶¹

The first category of speech regulated by the FCC is obscene material. Like other would-be regulators, the FCC's actions are not exempt from the Supreme Court standards for determining obscenity.³⁶² The mere portrayal of sex therefore cannot be forbidden on the radio; broadcasters' rights to present "provocative or unpopular programming which may offend some listeners" is also rec-

355. 478 F.2d at 598. This distinction arises because "a radio station broadcasts for a finite period of twenty-four hours each day; at any one time a bookstore may contain thousands of hours' worth of readable material." *Id.*

356. *Id.*

357. *Id.* at 598-99. The court did not address whether music was entitled to first amendment protection.

358. 47 U.S.C. § 151 (1982).

359. 18 U.S.C. § 1464 (1982). The sanction is a fine of not more than \$10,000 or imprisonment of not more than two years or both. *Id.*

360. The three categories "are written in the disjunctive, implying that each has a separate meaning." *Pacifica Found.*, 438 U.S. at 739-40. This article's discussion will be limited to obscenity and indecency because there are very few songs that contain profane speech because of marketplace considerations.

361. *Tallman v. United States*, 465 F.2d 282 (7th Cir. 1972) (rejecting argument that statute is unconstitutional because it lacks scienter requirement); *Gagliardo v. United States*, 366 F.2d 720 (9th Cir. 1966) (rejecting similar argument). See also *Pacifica Found.*, 438 U.S. at 738 (upholding FCC's authority to regulate indecent speech).

362. *Sonderling Broadcasting Corp.*, 27 Rad. Reg. 2d (P&F) 285 (1973), *aff'd sub nom.*, *Illinois Citizens Comm. v. FCC*, 169 App. D.C. 166, 515 F.2d 397 (D.C. Cir. 1974).

ognized.³⁶³ Likewise, songs that portray mayhem and violence may not be prohibited for that reason alone.³⁶⁴

While the number of songs affected by the FCC's power to regulate obscenity may be small, the FCC's power over indecent speech is more ominous. The FCC's broad power to regulate indecent speech, which may be defined as including some non-obscene matter, includes the ability to prevent that, but for being broadcast on the airwaves, would be protected by the first amendment.³⁶⁵ The Supreme Court in *FCC v. Pacifica Foundation*³⁶⁶ recognized a two-part rationale for the distinction accorded radio broadcasts.³⁶⁷ The Court first noted that:

the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.³⁶⁸

Because the radio broadcast invades this sphere, offensive, yet not obscene speech can be prohibited. Second, the Court asserted that "broadcasting is uniquely accessible to children, even those too young to read" and that the difficulty of shielding minors from indecent programming justifies special treatment of such programming.³⁶⁹

The *Pacifica* decision confers extensive authority on the FCC to regulate indecent rock lyrics.³⁷⁰ The FCC's definition of inde-

363. *Sonderling Broadcasting Corp.*, 27 Rad. Reg. 2d at 287. See also *WHUY Eastern Education Radio*, 18 Rad. Reg. 2d (P&F) 860, 865 (1970) (use of profane language not obscene).

364. *In re The Polite Society, Inc.*, 35 Rad. Reg. 2d (P&F) 39 (1975).

365. Note, *FCC May Regulate Broadcast of Non-Obscene Speech*, 53 TUL. L. REV. 273, 283 (1978); Comment, *The FCC May Constitutionally Sanction a Radio Station for Broadcasting Language which is Indecent but not Obscene*, 47 U. CIN. L. REV. 678, 684-85 (1978).

366. 438 U.S. 726 (1978).

367. Such a distinction is consistent with the Supreme Court's holding in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503 (1952), that each method of communication creates its own unique first amendment difficulties. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-90 (1969), the Supreme Court held that broadcasting is entitled to less protection under the Constitution than the print press because of the scarcity of the public airwaves. But cf. *FCC v. League of Women Voters of California*, 468 U.S. 364, 378-79 n.12 (1984) (questioning continuing viability of scarcity rationale used in *Red Lion*).

368. *Pacifica*, 438 U.S. at 748 (citation omitted). The Court noted that "prior warnings cannot completely protect the listener or viewer from unexpected program content." *Id.* at 748-49.

369. *Id.* at 749-50.

370. Several commentators have criticized *Pacifica* for its scaling back of first amend-

gency includes songs which are merely vulgar or sexual in nature, and would probably include several songs identified by the PMRC. The FCC recently increased the possibility of its regulatory effect on musicians by reformulating its indecency test, in response to a series of controversial talk show programs on rock-oriented stations.³⁷¹ This power represents a significant threat to rock music's status as protected expression. The broadcast of many songs, even though not obscene, would make radio stations vulnerable to sanctions should the Commission decide to prosecute them.

This extensive power to regulate many rock lyrics is, however, subject to several constraints. The first is the anti-censorship provision of the Communications Act, which forbids the FCC from "interfer[ing] with the right of free speech by means of radio communications."³⁷²

Second, the FCC's discretion is circumscribed by its own policy not to intrude on individual stations' programming decisions.³⁷³ The FCC has traditionally refused to employ its licensing author-

ment rights. See Note, "Filthy Words": One Man's Lyric or Broadcasting's Indecency?, 34 U. MIAMI L. REV. 147, 150 (1979) (*Pacifica* "reflects . . . a cutback in the established meaning and reach of the first amendment"); Comment, *The Federal Communications Commission May Impose Sanctions on Broadcasters for the Presentation of Indecent Language Without Violating the Statutory Prohibition of Censorship or the First Amendment*, 28 DRAKE L. REV. 745, 757 (*Pacifica* "threatens the vitality of first amendment rights"); Comment, *supra* note 365, at 683 (*Pacifica* "will have a significant chilling effect on the broadcast media").

371. *Pacifica* affirmed the FCC's earlier standard for determining whether a broadcasted matter is indecent. Under that standard, indecency is

intimately connected with the exposure of children to language that describes, in terms patently offense [sic] as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times when there is a reasonable risk that children may be in the audience. Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions and we believe such words are indecent within the meaning of the statute and have no place on radio when children are in the audience. In our view, indecent language is distinguished from obscene language in that (1) it lacks the element of appeal to the purient interest . . . and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.

In re Pacifica Found., 56 F.C.C.2d 94, 97 (1975), *rev'd sub nom.* *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978). According to the FCC, indecency is now more broadly defined. Stuart, *F.C.C. Acts to Restrict Indecent Programming*, N.Y. Times, Apr. 17, 1987, at A1, col. 3.

372. 47 U.S.C. § 326 (1982). The practical application of this provision, however, is limited. There appears to be no decision where a court has invalidated an FCC decision by invoking either section 326 or the first amendment." Note, *supra* note 352, at 339 n.31.

373. *In re Starr WNCN, Inc.*, 48 F.C.C.2d 1221 (1974).

ity to protect listeners from simply offensive programs³⁷⁴ and has prohibited stations from preventing dissemination of merely objectionable material.³⁷⁵ The Courts have long held that licensed stations have a right to select their own programming³⁷⁶ which a few extra-sensitive listeners should not inhibit.³⁷⁷ Finally, the first amendment protections for broadcasting, although not as extensive as other forms of expression, do provide some limit to regulatory power.³⁷⁸

To ensure the preservation of its first amendment rights, the rock industry must aggressively assert these limitations on the FCC's regulatory power. Failure to do so will undermine the artists' rights of free speech by allowing unchecked application of *Pacifica's* broad regulatory power.

IV. REGULATING LIVE ROCK PERFORMANCES

Although the primary focus of the PMRC campaign has been on regulating allegedly obscene album lyrics, rock concerts have not escaped scrutiny and criticism. Rock performers have been blamed by local officials and citizen groups for a variety of ills, including substance abuse, violence and the attraction of undesirable elements to the community.³⁷⁹ These concerns have led to a variety

374. *In re the Meredith Corp.*, 37 F.C.C.2d 551, 556 (1972); *see also* Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 25 Fed. Reg. 7291, 7293 (1960) (FCC "may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program.").

375. *Farmers Educational and Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 528 (1959) (prohibiting station from censoring allegedly libelous remarks by political candidate). Another example is where the FCC has declined to interfere with anti-Semitic broadcasts. *In re United Fed'n of Teachers*, 17 F.C.C.2d 204 (1969); *In re Anti-Defamation League of B'nai Brith*, 4 F.C.C.2d 190 (1966).

The FCC has renewed at least one license despite evidence of broadcasting objectionable material. *Jack Straw Memorial Found.*, 21 F.C.C. 833 (1970), *reconsideration denied*, 24 F.C.C. 2d 266 (1970).

376. *See, e.g., McIntire v. Wm. Penn. Broadcasting Co. of Philadelphia*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 87 F. Supp. 822 (D. Mass. 1949), *aff'd*, 183 F.2d 497 (1st Cir. 1950).

377. *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979).

378. *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (noting that first amendment is hostile to government regulations on speech, including those by the FCC). The first amendment affords broadcasters "a strong presumption in their favor, a presumption that extends to both entertainment and news . . . [but] there is no unbridgable first amendment right to broadcast comparable to the right of every individual to speak, write or publish." 16B C.J.S. *Constitutional Law* § 573(a) (1985).

379. In Pittsburgh, Public Safety Director John Norton asserted that rock lyrics "are provocative and pornographic. They incite violence." Norton's remarks followed a concert by the group Run DMC in which 25 people were arrested on vandalism and assault charges. *ROCK AND ROLL CONFIDENTIAL*, Aug. 1986, at 1, 2.

of responses, each of which raises distinct constitutional problems in light of the Supreme Court's holding that live performances are protected speech.³⁸⁰

The first response was to restrict certain groups from performing based on the content and manner of presentation of their speech. For example, the New York City municipal government, in establishing a new concert facility, announced that the completed structure would not be available to all performers.³⁸¹ The facility will only "present . . . recording artists geared toward a mature and safe audience. There will be no presentations which might attract a rowdy crowd."³⁸² Such efforts raise first amendment concerns because they are similar to the attempts by communities during the 1960's and 1970's to limit appearances by various performers.³⁸³ With the exception of the public rock festival cases, which are distinguishable on other grounds,³⁸⁴ the courts have uniformly held that these efforts abridge both the artists' and the public's first amendment rights.³⁸⁵

The public forum doctrine also constrains these endeavors by providing that the level of first amendment protection provided depends upon the location of the speech.³⁸⁶ If the speech occurs in a public forum,³⁸⁷ the state may regulate it only under narrow and limited circumstances.³⁸⁸ Before determining the appropriate standard for regulation aimed at rock music, however, the different

380. See *supra* notes 48, 84. There is no merit to the position that the lyrics become conduct because the performers are acting them out on stage. As Nimmer noted, "[A]ny attempt to disentangle 'speech' from conduct which is itself communicative will not withstand analysis." 1 M. NIMMER, *supra* note 127, § 3.06[C] (1984).

381. ROCK AND ROLL CONFIDENTIAL, Aug. 1986, at 1, 2. The City Department of Parks and Recreation granted \$5 million to the development project.

382. *Id.*, (citing the minutes of a meeting in the office of Queens Borough President Claire Shulman).

383. See *supra* notes 78-93 and accompanying text.

384. See *supra* notes 91-93.

385. See *supra* notes 87-90 and accompanying text.

386. *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986); *M.N.C. of Hinesville v. United States Dep't of Defense*, 791 F.2d 1466, 1472 (11th Cir. 1986).

387. There are generally considered to be two types of public forums. First are the traditional public forums that "have immemorially been held in trust for use by the public." *Hague v. CIO*, 307 U.S. 496, 515 (1939). These include streets and parks, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), as well as airports and other terminals. *Jews for Jesus, Inc. v. Board of Airport Comm'rs of City of Los Angeles*, 785 F.2d 791, 795 (9th Cir. 1986).

Second are the limited purpose public forums that the government "has opened for use by the public." *Perry*, 460 U.S. at 45. There are also nonpublic forums which are not "by tradition or designation a forum for public communication." *Id.* at 46.

388. *United States v. Grace*, 461 U.S. 171, 173 (1983). See also *Perry*, 460 U.S. at 45 (government's power is "sharply circumscribed").

types of public forums must be distinguished. For traditional public forums, the state may exclude speech in one of two ways. First, the state can enact reasonable time, place and manner restrictions, provided they are content-neutral, narrowly tailored to serve a significant interest and permit sufficient alternative channels of communication.³⁸⁹ Second, the state can adopt additional restrictions, including content-based exclusions and absolute prohibitions on speech, provided the state demonstrates that "its regulation is necessary to serve a compelling state interest . . . [and] is narrowly drawn to achieve that end."³⁹⁰ The government can ban speech in limited purpose public forums because these facilities need not be opened to the public; but once made available to some performers, efforts to restrict speech are governed by the traditional analysis.³⁹¹

Most live rock performances are held in civic auditoriums and municipal theaters, both of which are generally considered limited purpose public forums.³⁹² Once the government opens these facilities to speakers, concert promoters are accorded broad protection from being denied access based on the government's disdain for rock music. State and local officials are barred from restricting access because "they disagree with, or disapprove of, the views to be expressed;"³⁹³ nor may they "pick and choose [between] the philosophies and ideological content of programs."³⁹⁴ That the speaker may have an alternative forum is irrelevant.³⁹⁵

Promoters attempting to produce rock concerts in nonpublic forums are more vulnerable to regulation. Although first amendment protection applies,³⁹⁶ the state can limit access "based on

389. *Perry*, 460 U.S. at 45.

390. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981); *Perry*, 460 U.S. at 46.

391. *Id.* at 46-48.

392. *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 570 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2115 (1985). Whether or not a facility is a limited purpose public forum depends on the government's intent. "The court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum . . . [it] has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent." *Cornelius v. NAACP Legal Defense and Educ. Fund*, 105 S. Ct. 3439, 3449 (1985). Most rock concert facilities fall within this test for limited purpose public forums.

393. *Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Found.*, 417 F. Supp. 642, 645 (D.R.I. 1976).

394. *United States Serviceman's Fund v. Shands*, 440 F.2d 44, 46 (4th Cir. 1971).

395. *Schneider v. State*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"); *Cinevision Corp.*, 745 F.2d at 576 n.19 (city may not exclude entertainment "simply because there may be alternative forums where they could perform").

396. *Perry*, 460 U.S. at 49.

subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”³⁹⁷ The government can thus reject speakers who are not members of the class for whose benefit the facility was created or whose topic is outside the purpose of the forum.³⁹⁸

Significant restraints limit this regulatory power and provide the music industry with formidable protection from local officials. Thus, officials should not be able to prohibit only rock concerts while permitting other types of performances. Those with the power to control the events scheduled for these facilities may not deny musicians access simply because they find the band’s songs and performance offensive. Officials violate the first amendment when they deny “access to a speaker solely to suppress the point of view he espouses.”³⁹⁹ Under this analysis, the personal predilection of the local official not to provide access for a rock concert is irrelevant. Furthermore, hostility to rock concerts cannot serve as the basis for excluding them even from nonpublic forums. Therefore, attempts to deny certain “undesirable” rock artists entry to stadiums and concert halls cannot endure first amendment analysis.⁴⁰⁰

A second means employed by communities to limit concerts is to enact outright prohibitions on certain rock performances. One city has already approved an ordinance barring unaccompanied minors under the age of fourteen from attending “obscene” concerts.⁴⁰¹ Several other cities are studying the effect of this ordinance before enacting similar legislation.⁴⁰²

Under the first amendment, however, cities cannot simply ban speech because it is considered harmful to children. All legislation

397. *Cornelius*, 105 S. Ct. at 3451. The standard for public forums differs because they occupy a “special position in terms of first amendment protection.” *Grace*, 461 U.S. at 180.

398. *Cornelius*, 105 S. Ct. at 3451; *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

399. *Cornelius*, 105 S. Ct. at 3451.

400. See *Cinevision*, 745 F.2d at 571-72 (noting hostility to rock music).

401. San Antonio, Tex., Ordinance 61,850 (Nov. 14, 1985). The ordinance defines obscene material as that which, taken as a whole, appeals to the prurient interest of children under 14, violates the prevailing standards in the adult community as to the suitability of the performance for children, lacks serious artistic, literary, political or scientific merit and describes or explicitly refers to one of eight sexual acts.

402. City attorneys in Memphis, Dallas, Waco, Austin, Wichita, and Boston have contacted San Antonio requesting additional information on the ordinance. ROCK & ROLL CONFIDENTIAL, May 1986, at 3. The ACLU considers the San Antonio ordinance “to be a test case” and predicts that “[a] lot of other cities will be watching to see what the city does and whether it holds up in court.” Goldberg, *Crackdown on Obscene Shows*, ROLLING STONE, Jan. 30, 1986, at 9.

of obscene speech must comport with the procedural and substantive safeguards established by the Supreme Court.⁴⁰³

If a state's regulation is aimed at non-obscene speech, it is questionable whether the state can justify its actions.⁴⁰⁴ Even assuming that some performers' conduct at rock concerts is noncommunicative speech, and therefore subject to broader regulation, a community will be unable to impose constraints unless it can demonstrate a non-content based important governmental interest underlying its actions and prove that its specific means are narrowly tailored to serve that interest.⁴⁰⁵

A final ground available to those seeking to restrict rock concerts is the states' authority to regulate non-obscene speech under the twenty-first amendment.⁴⁰⁶ The Supreme Court has indicated that the Constitution grants the states extensive authority to control expression in conjunction with their police power to regulate the sale of alcohol.⁴⁰⁷ In *California v. LaRue*, the Supreme Court upheld regulations limiting the type of entertainment permitted in nightclubs with liquor licenses.⁴⁰⁸ The Court did so notwithstanding its determination that the regulations would proscribe some constitutionally protected speech.⁴⁰⁹ In its holding, the Court found that compliance with its obscenity test was an unnecessary limitation on state authority to regulate adult entertainment in bars.⁴¹⁰

The interpretation of the Constitution in these cases allows

403. The general analysis of the constitutionality of an attempt to restrict or ban minors from rock shows would be similar to that already discussed in reference to rock lyrics and a rating system. The same prior restraint and obscenity concerns are implicated. See *supra* notes 172-325 and accompanying text.

404. See *supra* notes 249-52 and accompanying text.

405. A city cannot rely only on vague generalizations about inciting minors to engage in illegal activity or other dangers in regulating concerts any more than it can in record labeling or restricting access to albums. See *supra* notes 331-44 and accompanying text for a discussion of this form of regulation.

406. U.S. CONST. amend. XXI, § 2 provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

407. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1025 (2d ed. 1983). Municipalities must properly delegate the authority to restrict expression at these facilities under their police power. *Grand Faloan Tavern, Inc. v. Wicker*, 670 F.2d 943, 944 (11th Cir.), cert. denied, 459 U.S. 858 (1982). Otherwise, the ordinance must satisfy the strict scrutiny test. *Krueger v. City of Pensacola*, 759 F.2d 851, 854-55 (11th Cir. 1985).

408. 409 U.S. 109 (1972). See also *New York Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981) (different standard applies in twenty-first amendment setting).

409. *LaRue*, 409 U.S. at 116.

410. *Id.* at 116-17. But cf. *id.* at 121 (Douglas, J., dissenting) ("Certainly a play which passes muster under the first amendment is not made illegal because it is performed in a beer garden.").

states to prohibit certain live performances in establishments licensed to serve liquor even though such expression would otherwise be protected. The rationale is that it is the sale of liquor, rather than the performance, that is being regulated. The government need only demonstrate that its restrictions are a reasonable exercise of its powers under the twenty-first amendment and are "rationally related to the furtherance of legitimate state interests."⁴¹¹ Provided it can satisfy this two-prong test, a state has broad authority to bar rock shows that some might consider offensive or dangerous in any establishment serving liquor.

Rock performers are particularly vulnerable to such regulation because of the important role small clubs play in the music industry. Many artists are unable to utilize the larger public forum facilities because of the artists' lack of notoriety and commercial success. Thus, these artists often begin their careers in smaller liquor-serving facilities. Legislation enacted to regulate the nature of live performances at these establishments would affect a significant number of musicians.

The states' regulatory power is not, however, entirely immune from constitutional restrictions. The cases upholding the right to bar certain types of entertainment in night clubs have concerned sexually oriented activities such as topless dancing.⁴¹² Their application to rock music, whose dominant theme is not generally sexual in nature, would appear tenuous. The Seventh Circuit in *Reed v. Village of Shorewood* recognized this principle and held that a bar owner's challenge to a city statute prohibiting rock music at his bar stated a constitutional cause of action.⁴¹³ This decision indi-

411. See 16B C.J.S. *Constitutional Law* § 572 (1985); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 407, at 1025. Municipalities, however, must have the properly delegated authority to restrict expression at these facilities pursuant to their police power. *Grand Faloona Tavern*, 670 F.2d at 944. Otherwise, they must satisfy the strict scrutiny test. *Krueger*, 759 F.2d at 854-55.

412. See *Grand Faloona Tavern*, 670 F.2d at 943; *Krueger*, 759 F.2d at 851; *Bellanca*, 452 U.S. at 714. The *LaRue* decision does not authorize widespread regulation of all sexually-oriented materials. 409 U.S. at 109. As one commentator has noted:

Lower courts have broadly misinterpreted *LaRue* to authorize the prohibition of all nudity in establishments licensed to dispose alcoholic beverages without requiring that nudity or sexually oriented performances partake more of gross sexuality than of communication and without securing a showing that the combination of such entertainment and alcohol produces certain anti-social behavior.

Note, *Using Constitutional Zoning to Neutralize Adult Entertainment—Detroit to New York*, 5 FORDHAM URBAN L.J. 455, 468 (1976).

413. 704 F.2d at 950-51. The court distinguished *LaRue* and *Bellanca* on the basis of the statutory aim to regulate sexual activity at liquor serving establishments. (The Seventh Circuit did not rule on the constitutionality of the Municipal Zoning Board's action, but remanded the case to the district court for further inquiry).

cates that a state's ability to restrict entertainment under the twenty-first amendment is not so extensive as to permit a blatant prohibition of rock music in these facilities.

V. ROCK VIDEOS

The development of rock video has spurred tremendous criticism⁴¹⁴ for its allegedly sexist and violent themes.⁴¹⁵ The PMRC, in addition to urging that ratings be assigned to each video clip, has pressured cable operators and networks not to run certain videos or limit their showings to hours when children are not in the audience.⁴¹⁶ This section will briefly discuss the FCC's ability to regulate the content of videos broadcast on television.⁴¹⁷

The FCC has the authority to regulate both indecent and obscene videos displayed on network programs because of its broad powers over the content of commercial television.⁴¹⁸ Although the networks broadcast a significant number of rock videos, it is really cable programming, particularly the Music Television channel ("MTV"), that the PMRC has targeted.⁴¹⁹ These efforts, however, are likely to fail because the FCC's dominion over cable is greatly restricted.

The recently enacted Cable Communications Act has stripped the government of much of its historic power to regulate cable.⁴²⁰ In addition, the courts have retreated from their initial position that cable is identical to broadcast television for first amendment purposes⁴²¹ with recent court decisions indicating that cable may receive the equivalent protection accorded newspapers.⁴²² There-

414. See *supra* note 122.

415. A study by the National Coalition on Television Violence found that 44 percent of all rock videos contained "violence or suggestions of violence," mostly between men and women. *Rock Hearings*, *supra* note 124, at 154-55.

416. Love, 'Washington Wives' Set Their Sights on Video, *ROLLING STONE*, Oct. 10, 1985, at 18.

417. The sale of rock videos has yet to become a large industry and a discussion of the state's authority to regulate them would be relatively unnecessary. If regulation affecting rock videos is enacted, it would most likely come from the FCC.

418. This power would be drawn from the FCC's authority to regulate television. See *supra* notes 346-78 and accompanying text for discussion of FCC's regulatory power.

419. Love, *supra* note 416, at 18.

420. 47 U.S.C. §§ 521-559 (Supp. 1986).

421. See, e.g., *Community Communications v. City of Boulder*, 660 F.2d 1370, 1379 (10th Cir. 1981), (holding cable's natural monopoly justifies regulation) *cert. dismissed*, 486 U.S. 1001 (1982).

422. The scarcity rationale is at the foundation of the FCC's authority to regulate television. *Red Lion Broadcasting Co.*, 395 U.S. at 390-92. It does not apply to the print press. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 249-50 (1974). It is an open

fore, both the FCC and local governments are generally prohibited from imposing "direct restrictions on the content of cable broadcasts" because of its status under the first amendment.⁴²³

The FCC's power to regulate indecent programming broadcast on cable is also limited. Several district courts have ruled that ordinances imposing sanctions on a cable licensee's transmission of indecent material are unconstitutional.⁴²⁴ They have held that *Pacifica*, which permits sanctions for broadcasting indecency,⁴²⁵ is "not applicable" and "is irrelevant," to cable.⁴²⁶ Instead, they have applied the *Miller* test to judge the permissible boundaries of state regulation of sexually oriented materials, including indecent speech.⁴²⁷

The rationale for these cases is that cable television is not as pervasive a medium as broadcasting because it is "invited" into the home and is available only after the viewer has made an affirmative decision to purchase the service.⁴²⁸ As a further restraint, the Cable Communications Act only empowers the FCC to sanction obscene speech; it has no authority to penalize indecent cable expression.⁴²⁹

This precedent prevents communities and the FCC from imposing penalties on videos broadcast over cable television that have not been adjudged obscene. It provides a significant measure of protection for stations like MTV that have been under increasing attack from the PMRC and other organizations. This also rep-

question whether the scarcity rationale applies to cable. See *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1404 (9th Cir.), ("the physical scarcity rationale does not apply to cable") *aff'd*, 106 S. Ct. 2034 (1986). In *Preferred*, the Supreme Court did not decide the precise issue and its language was ambiguous. It stated that cable "partakes of some of the aspects of free speech and of the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers and pamphleteers." 106 S. Ct. at 2307. The Court, however, then stated that its "activities would seem to implicate first amendment interests as do the activities of wireless broadcasters." *Id.* See also *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1449 (D.C. Cir. 1985) (overturning must carry rules, noting "'scarcity rationale' has no place in evaluating government regulations of cable television"); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982) ("frequency interference . . . does not arise with cable television"). But cf. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 44-45 (D.C. Cir.), (applying scarcity rationale) *cert. denied*, 434 U.S. 829 (1977); *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968).

423. *Preferred Communications, Inc.*, 754 F.2d at 1403 n.6.

424. *Cruz v. Ferre*, 571 F. Supp. 125, 126 (S.D. Fla. 1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

425. See *supra* notes 321-29 and accompanying text.

426. *Community Television*, 555 F. Supp. at 1169.

427. *Home Box Office, Inc.*, 531 F. Supp. at 994.

428. *Community Television*, 555 F. Supp. at 1169.

429. 47 U.S.C. § 559 (Supp. 1986).

resents a meaningful restraint on attempts to chill video producers and musicians from exercising their first amendment rights.

VI. CONCLUSION

Large segments of American society have never approved of rock 'n' roll music. The songs have offended many, disgusted others and remained unpopular with certain groups, spurring them to oppose the music's expression and dissemination. Historically, rock has always battled the censor.

Although it has been cited for everything from encouraging teen suicide to corrupting American youth, rock 'n' roll has so far been able to avoid direct censorship. The industry's good fortune, however, may be changing. The recent crusade by several national organizations to regulate "porn rock" has achieved successes that have exceeded prior censorship efforts. No campaign has been as well-organized, as well-financed or as politically well-connected as the PMRC, which has also had the fortune to appear during a period when the nation has been less tolerant of pornography.⁴³⁰

As its latest struggle to forestall suppression began, rock was forced to wage its battle without the full benefit of first amendment protection. This article has argued that the expression of rock music is as entitled to this constitutional right as any other form of entertainment. It asserts that music is a vibrant medium for the expression of ideas, both cultural and political. It submits that the arguments advanced to deny rock music recognition as constitutionally protected speech are invalid because they largely express their proponents' distaste for the songs. The Supreme Court has long held that such feelings are insufficient to deny expression a first amendment safe harbor from state regulation.

Once accorded constitutional protection, rock lyrics are entitled to the same procedural and substantive safeguards granted other speakers. This article applies these protections to prevent the actions suggested to restrict the songs. Although the first amendment does not shelter obscene lyrics, it should protect much of the music singled out by both the PMRC movement and the

430. The central manifestation of this tone is the Attorney General's Commission on Pornography, which studied the problem of pornography and found a link between anti-social behavior and sexually-oriented materials. It called for a wide range of formal and informal measures to limit the dissemination of pornography throughout the country. N.Y. Times, July 10, 1986, at B7, col. 1. Another illustration of this mood is the widespread withdrawal of sexually-oriented materials from convenience stores. See *supra* notes 17, 224-29 and accompanying text.

states and localities already implementing these criticisms into formal legislation. Many of the songs are merely offensive or unpopular expressions of minority viewpoints which are topics within the scope of the guarantee of free speech. Any legislative remedies are likely to ignore the Supreme Court's requirements for the proper regulation of expression.

It is not easy to defend some of the more recent lyrics. Before society races headlong into broad restraints on rock music, it would be wise to remember the continuing advice of Lord Devlin: "[if freedom of speech] perishes, it will not be by sudden death . . . It will be a long time dying from a debilitating disease caused by a series of erosive measures, each of which, if examined singly, would have a good deal to be said for it."⁴³¹ When the passions of the moment subside, the contribution rock has provided the American political process and cultural life will demonstrate the true dangers of attempting to restrict it.

431. Quoted in *Yale Broadcasting*, 478 F.2d at 606.