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Instrumental Music and the First Amendment

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Articles

Instrumental Music and the First Amendment

ALAN K. CHEN*

This Article critically examines what would seem to be, but is not, an easy free speech question: whether instrumental music falls within the scope of the First Amendment. The Supreme Court has long recognized that musical expression is “speech,” but has never analyzed why this is the case. Similarly, scholarly literature is surprisingly bereft of any comprehensive examination of whether there are sound theoretical or doctrinal foundations for treating purely instrumental music as a form of constitutionally protected expression. This Article engages this question comprehensively, and argues that there are two strong claims for the coverage of instrumental music under the First Amendment. First, instrumental music can be understood as speech because of its central role in expressing cultural, religious, nationalist, and other social values that might otherwise be at risk of government control and orthodoxy. Second, music serves a unique communicative function as a facilitator of emotional expression, experience, and autonomy.

In examining these claims, the Article first surveys existing judicial and scholarly treatments of music as speech to illustrate how our understanding of the expressive value of instrumental music has been undertheorized. It then briefly catalogues historical and contemporary instances of instrumental music censorship by governments and other powerful institutions both within the United States and in other nations. First Amendment theory does not offer an obvious explanation for why instrumental music should be protected. Thus, the Article next considers the three

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dominant theoretical justifications for protection of expression—promotion of democratic self-governance; facilitation of the search for truth; and protection of autonomy through self-realization—and explores the possibilities for and limits of employing any of these three theories to justify protection of instrumental music.

To truly understand how these speech theories might apply, however, one must first comprehend the nature of instrumental musical expression. Accordingly, this Article next discusses exactly what it is that instrumental music expresses and how it does so, and examines how those conceptualizations fit within the frameworks of the three dominant speech theories. This Part concludes with an elaboration of the claim that music is like speech because of its unique power to convey cultural and other social values and promote emotional expression and experience in its composers, performers, and listeners. Music, then, falls within both the truth-seeking and self-realization justifications for the First Amendment. In contrast, theoretical explanations for free speech grounded in democracy do not map well onto non-lyrical musical expression.

Finally, this Article argues that a better understanding of the relationship between instrumental music and the First Amendment may illuminate free speech theory more broadly. First, it moves the recent discourse on First Amendment “coverage” forward by examining a context that requires consideration of nonrepresentational expression in its purest form. Second, clarification about the valid justifications for coverage of instrumental music has important ramifications for how we think about the regulation of other artistic expression as well as other types of nonverbal expression, such as non-obscene pornography and subliminal advertising.

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INTRODUCTION

“After silence, that which comes nearest to expressing the inexpressible is music.”

—ALDOUS HUXLEY, *The Rest is Silence, in MUSIC AT NIGHT* 19, 19 (1931).

If a picture is worth a thousand words, what about a C#? Or the flatted third, fifth, or seventh note in a blues scale? Or a glissando, or other run of musical notes strung together in a particular sequence and rhythm, such as a Gregorian chant, the first four notes of Beethoven's Fifth Symphony, the syncopated piano introduction to Dave Brubeck's "Blue Rondo A La Turk," or the trademark guitar riff at the opening of Jimi Hendrix's "Purple Haze"? The Supreme Court and lower courts have long accepted that musical expression falls within the category of "speech" safeguarded by the First Amendment.¹ But no court has ever explained in any meaningful way why the musical, as opposed to lyrical, component of such expression is independently covered by the Constitution. There has been no comprehensive examination of the reasons justifying the constitutional coverage and protection of the tonal and rhythmic elements that define what we recognize as instrumental music.

The scholarly literature is also surprisingly bereft of comprehensive discussions of the theoretical or doctrinal foundations for treating purely instrumental music as expression under the Constitution. Typically, music² is treated as an aside or is lumped in for discussion with other forms of nonverbal artistic expression, such as painting and sculpture.³ Commentators have paid far less attention to the unique elements of pure musical expression.⁴ In this Article, I attempt to fill that gap by examining, challenging, and defending the conclusion that instrumental music is speech and is worthy of robust First Amendment protection

1. See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Nurre v. Whitehead*, 580 F.3d 1087, 1093 (9th Cir. 2009).

2. For the most part, when I refer to "music" throughout this Article, I mean instrumental music.

3. A number of scholars have done excellent work engaging the broader topic of art and freedom of expression. See, e.g., RANDALL P. BEZANSON, *ART AND FREEDOM OF SPEECH* (2009) [hereinafter BEZANSON, *ART AND FREEDOM*]; Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CALIF. L. REV. 1499 (1996); Randall P. Bezanson, *Art and the Constitution*, 93 IOWA L. REV. 1593 (2008) [hereinafter Bezanson, *Art and the Constitution*]; Edward J. Eberle, *Art as Speech*, 11 U. PA. J.L. & SOC. CHANGE 1 (2007); Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996); Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221; Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169 (2012).

4. A recent, but valuable exception is a student note. See David Munkittrick, Note, *Music as Speech: A First Amendment Category Unto Itself*, 62 FED. COMM. L.J. 665 (2010); see also Tushnet, *supra* note 3, at 203 n.117 (describing Munkittrick's note as "one of the few efforts to analyze music's First Amendment coverage"). Music has been discussed in other legal literature as a model for legal interpretation, but that work is not directly relevant to the issues I consider in this Article. See generally Jack M. Balkin, *Verdi's High C*, 91 TEX. L. REV. 1687 (2013); Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991) (comparing legal interpretation to musicians' interpretation of scores with strict or liberal construction of the composers' intent); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1989)).

comparable to the safeguards that are commonplace for most verbal expression. In doing so, I offer what I hope to be the first full theoretical account supporting the idea that instrumental musical expression is constitutionally equivalent to speech.

Instrumental music is a somewhat curious free speech topic. Perhaps it has not received serious attention in First Amendment doctrine and theory because it is inaccurately perceived to be an easy question. It is likely, for example, that most professional and lay observers instinctively believe instrumental music is constitutionally protected. It is difficult to imagine a functioning democracy in which the state could control the communication of musical notes and rhythms any more than we would tolerate, in most cases, the regulation of pure speech. Moreover, we also cannot imagine circumstances in which such censorship would occur. It seems implausible that the government or other institutional powers would restrict instrumental music or that they would ever have a reason to do so.

Yet, they have. In just the past few years, two federal appellate courts upheld the actions of local school districts that had banned exclusively instrumental music from performance by students during public school programs because of the music's religious content.⁵ In both cases, the school districts successfully defeated the students' free speech claims by arguing that the Establishment Clause required them to avoid endorsing religious speech, and in one case, on the ground that the state had the authority to control musical content because of the limited nature of schools as a public forum.⁶

Federally licensed broadcasters and private businesses influenced by the Recording Industry Association of America ("RIAA") have prohibited or regulated purely instrumental music.⁷ In Israel, there was, until relatively recently, an informal, though widely implemented ban on the performance of works composed by Richard Wagner.⁸ And while censorship of music in democratic states has been relatively rare, totalitarian regimes throughout history have wielded state power to censor instrumental music they viewed with suspicion. Instrumental music bans were commonplace in Nazi Germany and the former Soviet

5. *See Stratechuk v. Bd. of Educ.*, 587 F.3d 597, 610 (3d Cir. 2009); *Nurre v. Whitehead*, 580 F.3d 1087, 1090 (9th Cir. 2009).

6. *See Stratechuk*, 587 F.3d at 610; *Nurre*, 580 F.3d at 1090.

7. *See* ERIC NUZUM, PARENTAL ADVISORY: MUSIC CENSORSHIP IN AMERICA 254–55 (2001); Adam Bernstein, *Guitarist Link Wray Dies; Influenced Punk, Grunge*, WASH. POST, Nov. 22, 2005, at B5; Martin Horsfield, *This Record Must Not Be Broadcast*, GUARDIAN, Sept. 20, 2008, at 25. Of course, instances of censorship of music because of its lyrics have also occurred. *See, e.g.*, *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 135 (11th Cir. 1992).

8. *See* Munkittrick, *supra* note 4, at 673–74.

Republic.⁹ More contemporary examples of censorship can be found in other cultures, particularly those with sectarian-dominated government regimes, such as Iran and the Taliban-controlled Afghanistan.¹⁰ As a basis for the later discussion of First Amendment theory, Part I of this Article surveys the slim judicial and scholarly treatments of music as speech to illustrate how our understanding of the expressive value of instrumental music has been undertheorized, and then briefly catalogues these historical and contemporary instances of the censorship of instrumental music.

Though instrumental music is probably widely understood as a form of expression, current theory and doctrine do not offer an easy explanation for why it should fall within the scope of the First Amendment. Thus, Part II of this Article surveys the three dominant theoretical justifications for protection of free expression—promotion of democratic self-governance; facilitation of the search for truth; and protection of autonomy through self-realization—and explores the possibilities for and limits of employing any of these three theories to justify protection of instrumental music. Theoretical explanations for free speech grounded in the promotion of democratic self-governance¹¹ do not map well onto non-lyrical musical expression. Nor is it self-evident that protection of instrumental music is necessary to protect the marketplace of ideas in order to facilitate the search for truth, at least without embracing an unbounded definition of truth. Autonomy-based justifications for protection of expression provide what is probably the most intuitive basis for understanding instrumental music as speech. But as we will see, autonomy arguments for speech are also vulnerable to boundary claims, and a full exploration of the issue at hand must address those claims and precisely articulate what autonomy means in the context of the right to compose, perform, and listen to instrumental music.

The most fundamental challenge of harmonizing instrumental music with the dominant free speech theories is discerning exactly what it is

9. See JONATHAN GREEN, *ENCYCLOPEDIA OF CENSORSHIP* 590 (Nicholas J. Karolides ed., 2d ed. 2005); MICHAEL HAAS, *FORBIDDEN MUSIC: THE JEWISH COMPOSERS BANNED BY THE NAZIS* 226, 231–35 (2013); ERIK LEVI, *MUSIC IN THE THIRD REICH* 86 (1994); Allan Kozinn, *Mendelssohn, This Is Your Moment*, *N.Y. TIMES*, Feb. 22, 2009, at AR29; Mansur Mirovalev, *Once-Banned Shostakovich Ballet Triumphs*, *WASH. POST* (June 15, 2007, 3:27 PM), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061501128_pf.html.

10. Stephen Moss, *The Hills Are Alive*, *GUARDIAN*, Nov. 15, 2001, at A2. *But see* Umar F. Abd-Allah, *Living Islam with Purpose*, 7 *UCLA J. ISLAMIC & NEAR E. L.* 17, 24, 30–31 (2008) (observing that the Islamic view on instrumental music is not “immutably fixed” and that some minority viewpoints would permit music to be performed in some contexts); Robert Tait, *Iran’s “Culturally Inappropriate” Rock Hopefuls Struggle To Be Heard*, *GUARDIAN*, Aug. 23, 2005, at 13.

11. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

that such music expresses and how it does so. Thus, Part III explores five possible ways of viewing instrumental music as speech and examines how those conceptualizations might fit within the frameworks of the three dominant speech theories. First, I explore whether the First Amendment might cover instrumental music because of the music's appeal to the cognitive. Instrumental music may evoke or be associated with specific thoughts, ideas, or concepts that provoke cognitive responses or functions in listeners. Music may also be expressive to the degree that it enhances or colors other communicative vehicles in ways that make their messages more effective. A third possibility is that instrumental music does, in fact, have a direct cognitive component that thus far has been unstudied and unappreciated. Ultimately, however, I conclude that none of the cognitive theories are sufficient to support the claim that music is speech.

Next, I examine two different, but compelling, conceptions of instrumental music's communicative value. First, throughout history, the composition, performance, and auditory consumption of musical expression has played an essential role in forming, shaping, maintaining, and distinguishing values of culture, religion, and nationalism through a stunning variety of indigenous music forms and traditions. Second, simultaneously (and perhaps coextensively), music has long been understood as a unique form of emotional expression and experience for its composers, performers, and listeners.

After canvassing the possible ways of understanding how instrumental music communicates, the discussion circles back to examine the implications of each of these communicative possibilities for First Amendment theory. Ultimately, I argue that the strongest claim for the coverage of instrumental music under the First Amendment can be derived from its dual role in expressing cultural and other social values that might otherwise be at risk of government control and orthodoxy and from its function as a facilitator of emotional expression, experience, and autonomy. These latter two understandings accept the premise that instrumental musical expression is nonrepresentational,¹² yet provide compelling support for the claim that in serving these functions, music advances both the truth-seeking and self-realization objectives of free speech theory.

A greater understanding of instrumental music as speech also has substantial value in thinking about other important First Amendment

12. See generally Tushnet, *supra* note 3. First Amendment scholars use various terms to describe this characteristic of speech. In addition to nonrepresentational, speech that does not convey a particular message has been labeled "nonpropositional," see, e.g., Bezanson, *Art and the Constitution*, *supra* note 3, at 1596, and "non-ideational," see, e.g., James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 499 n.45 (2011). Throughout this Article, I use the terms interchangeably.

questions. Thus, in Part IV, I briefly explore some of the implications of a more thorough account of music as speech. First, the close examination of instrumental music follows a broader trend in constitutional law scholarship that focuses on the important foundational question of the scope of the First Amendment's coverage, as opposed to the level of its constitutional protection.¹³ If instrumental music is not speech, then we never reach the subsequent question of whether it is protected. As Frederick Schauer has observed, the answer to the question of "whether the First Amendment shows up at all is rarely addressed, and the answer is too often simply assumed."¹⁴ Those assumptions dictate results in "easy" cases in both directions, as when we assume without discussion that criminal threats and securities offerings are not covered by the First Amendment, or that art and music are. A better understanding of music as speech can meaningfully contribute to this conversation. Second, Part IV closes with a brief discussion of how acceptance of one or more of my arguments for the coverage of instrumental music may affect the way we think about the regulation of other types of nonverbal expression that might also claim First Amendment protection, such as non-obscene pornography and subliminal or image advertising. It also reflects on the necessity of limiting principles that define the boundaries of what instrumental music expression ought to be covered by the First Amendment and why.

I. THE UNDERTHEORIZING OF INSTRUMENTAL MUSIC AS SPEECH

Although music plays a central role in the social, political, and cultural life of most societies, and has been at the center of several important judicial disputes, neither the courts nor the academy have carefully studied its foundations as a type of speech that triggers constitutional protection.¹⁵ As the following Subparts suggest, attention to this issue has been sparse, incomplete, and unsatisfying.

13. See generally Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004); see also KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 54 (1989); John Greenman, *On Communication*, 106 MICH. L. REV. 1337 (2008); Tushnet, *supra* note 3 at 174–92; R. George Wright, *What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217 (2010).

14. Schauer, *supra* note 13, at 1767.

15. First Amendment law is by no means the only area in which music and law uncomfortably coexist. See JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 122 (2008) ("Music is hard for copyright law to handle."); Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1407 (2004).

A. THE COURTS

I. *Coverage of Nonverbal Expression in General*

It has long been understood that notwithstanding its text privileging the “freedom of speech,” the First Amendment’s protection is not limited to, and indeed is not defined by, written or oral verbal expression. Some nonverbal communication is covered by the First Amendment; much verbal expression is not.¹⁶ The Supreme Court has found the following nonverbal, communicative acts to be covered by the free speech clause: flag burning,¹⁷ cross burning,¹⁸ participating in a parade,¹⁹ picketing,²⁰ nude dancing,²¹ and wearing a black armband.²² As discussed in detail below, instrumental music and other nonverbal artistic expression have also been deemed to be covered, though with very little analysis.

The Court has not been particularly precise about defining when nonverbal communication falls within the First Amendment’s coverage. Among the tests that it (sometimes) uses to discern between communicative acts and uncovered conduct is the one from *Spence v. Washington*.²³ Spence challenged his state law conviction for “improper use” of a flag when he displayed an upside down American flag on which he had placed large peace symbols made of black tape.²⁴ The Court underscored that, because Spence did not use “printed or spoken words,” it was necessary to evaluate the context in which he acted “to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First Amendment.”²⁵ *Spence* held that nonverbal conduct is speech when the speaker has both “[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”²⁶ The Court concluded that Spence’s conduct was covered by the First Amendment because he testified that he displayed the flag to express his disagreement with the

16. Schauer, *supra* note 13, at 1773.

17. *United States v. Eichman*, 496 U.S. 310, 312 (1990); *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

18. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992). *But see* *Virginia v. Black*, 538 U.S. 343, 347–48 (2003) (finding that cross burning, while expressive, may be prohibited when accompanied by intent to intimidate).

19. *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 559 (1995).

20. *Carey v. Brown*, 447 U.S. 455, 460 (1980).

21. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 285 (2000).

22. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

23. 418 U.S. 405 (1974).

24. *Id.* at 406–07.

25. *Id.* at 409.

26. *Id.* at 410–11.

U.S. military's invasion of Cambodia and his dismay about the shootings of student protestors at Kent State University.²⁷

One might infer from *Spence* that the intent and understanding elements of the Court's analysis determine whether instrumental musical expression and other forms of nonverbal conduct are covered by the First Amendment.²⁸ But the Court has not rigidly adhered to the *Spence* test. For example, in the first flag burning case, *Texas v. Johnson*,²⁹ the Court recognized the burning of an American flag as speech, even though neither the flag burner's intent nor the audience's understanding of his message could be said to be particularized.³⁰ The protestor's conduct could have conveyed a broad dissatisfaction with the United States as a general matter, or any manner of narrower disagreements with the nation's myriad actions and policies. In *National Endowment for the Arts v. Finley*,³¹ in which several artists challenged denial of federal funding for their work,³² the Court assumed the artwork was expressive without even discussing whether such art would convey a specific message that would "be understood by those who viewed it."³³ Thus, it is not entirely clear that the particularized message requirement is essential, a point that becomes important when analyzing instrumental music.

Finley also exposes the Court's inconsistent application of *Spence*'s intent requirement. The artists in that case specifically argued that art is often ambiguous in its meaning and not always intended to convey a message.³⁴ Nonetheless, the Court did not dispute the expressive value of art in rendering its decision.

2. Coverage of Instrumental Musical Expression in Particular

Although the Supreme Court has addressed and embraced the constitutional status of musical expression on a handful of occasions, not once has it closely examined the premises of its own conclusions. Rather than engaging in a careful or thoughtful consideration of music as speech,

27. *Id.* at 408, 415.

28. Another possibility is that the Court intended the *Spence* test to apply only to conduct that is not self-evidently communicative, and not to forms of nonverbal artistic expression. See *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1125 (7th Cir. 1990) (Easterbrook, J., dissenting) (suggesting that music is not conduct, but is closer to pure speech), *rev'd sub nom.* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). If this is the case, then the Court's failure to invoke *Spence* in artistic expression cases is more understandable, though it has been far from clear in drawing this distinction if that was its intent.

29. 491 U.S. 397 (1989).

30. *Id.* at 399, 404-06.

31. 524 U.S. 569 (1998).

32. *Id.* at 573.

33. *Spence*, 418 U.S. at 411.

34. See Brief for Respondents at 36-37, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (No. 97-371).

the Court has instead made superficial assumptions and conveyed lofty, unquestioning platitudes.³⁵ Perhaps more to the point, it has never broken musical expression down into its essential components—tonal, rhythmic, and lyrical—and independently addressed whether each of them is covered by the First Amendment. Indeed, the phrase “instrumental music” has never appeared in a Supreme Court opinion. Any thoughtful analysis of this question requires the disaggregation of the distinct components of musical expression to help establish a better foundation for understanding why and in what circumstances it ought to be constitutionally protected.

In *Ward v. Rock Against Racism*,³⁶ the Court examined the First Amendment claims of a nonprofit organization that sponsored an annual event consisting of speeches and the performance of rock music at a band shell in Central Park.³⁷ Responding to complaints of nearby residents and park users, New York City adopted new regulations that required the organization to use sound equipment and a sound technician provided by the city. The organization’s free speech claim was that the city’s imposition of these requirements interfered with the performers’ expression because the electronic amplification through the equipment affected not only the music’s volume, but also the way the sounds were mixed.³⁸ The regulation thus altered the content of the musical performances by dictating the outcome and quality of the sound.

While the Court upheld the city’s regulations on the ground that they were reasonable restrictions on the manner of speech in a public forum, it deemed the predicate claim that music is speech under the First Amendment to be self-evident:

Music is one of the oldest forms of human expression. From Plato’s discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment. In the case before us . . . the constitutional challenge is to the city’s regulation of the musical aspects

35. As Mark Tushnet observes about the Court’s treatment of the coverage of art in general under the First Amendment, it has been “remarkably casual.” Tushnet, *supra* note 3, at 207.

36. 491 U.S. 781 (1989).

37. *Id.* at 784–85.

38. The city argued that the plaintiff’s sound technicians might not be as familiar with outdoor sound mixing and with the band shell’s acoustics or other surroundings, and that musicians would respond to the poor mixing by turning up the volume, thus exacerbating the sound problems the city was trying to address. *Id.* at 786; *cf.* *Cooley v. Bd. of Wardens*, 53 U.S. 299, 311 (1851) (examining the constitutionality of a statute requiring shipping companies to hire local pilots to navigate their ships into port to enhance safety because of the local pilots’ familiarity with the shallow local waters).

of the concert; and, based on the principle we have stated, the city's guideline must meet the demands of the First Amendment.³⁹

Nor did the parties even seriously dispute this proposition.⁴⁰ However, the Court never specified whether the rock performances at issue were vocal or instrumental, and therefore did not unpack the different components of musical expression and engage in that analysis. Sound mixing is necessarily about the construction of sound, but it could affect not only the quality of the instrumental components of the performances, but also the sound and understandability of lyrics. To the extent that the status of instrumental music as speech is in question, *Ward* did not provide the answer.⁴¹

In two other cases, *Southeastern Promotions v. Conrad*⁴² and *City of Newport v. Fact Concerts, Inc.*,⁴³ the Court assumed that music was covered by the First Amendment, but did not independently consider whether the musical component of the performances was itself expressive. And in neither decision did the Court discuss or distinguish *Spence's* particularized message standard.

The closest the Court has come to specifically recognizing instrumental music as speech is in its consideration of whether parades are constitutionally protected forms of expression in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.⁴⁴ *Hurley* involved a successful challenge by organizers of a St. Patrick's Day parade to a state public accommodations law that had been held to require them to permit a group of gay, lesbian, and bisexual persons of

39. *Ward*, 491 U.S. at 790 (citations omitted).

40. *Id.* Notably, the *Ward* Court did not even cite the *Spence* test.

41. *But see* *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1096 (7th Cir. 1990) (Posner, J., concurring) (inferring that the *Ward* Court did not mean to limit its holding to music with lyrics), *rev'd sub nom.* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

42. 420 U.S. 546, 547 (1975). In *Southeastern Promotions*, the Court addressed a prior restraint challenge by a theater company whose application to perform the musical *Hair* at a municipal theater was rejected by city officials on the ground that the play would not be "in the best interest of the community." *Id.* at 548. Although the Court found the city's actions to be an unconstitutional prior restraint, its discussion of live musical drama as speech did not disaggregate the musical components from the lyrics sung by the actors in the play. Rather, as it observed, "[b]y its nature, theater usually is the acting out—or singing out—of the written word, and frequently mixes speech with live action or conduct." *Id.* at 557–58 (emphasis added). Thus, the Court's reference to musical expression was limited to its lyrical components. *See* *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.").

43. 453 U.S. 247, 271 (1981). In *Fact Concerts*, the Court also assumed without discussion that music is covered by the First Amendment. Although presented to the Court on the issue of punitive damages, the case essentially involved a concert promoter's challenge to a city's cancellation of a permit for a performance at a jazz festival on the grounds that the musical group Blood, Sweat and Tears was a "rock" group rather than a jazz group. *Id.* at 250–51.

44. 515 U.S. 557, 568–70 (1995).

Irish descent to participate in the organizers' parade.⁴⁵ The Court's unanimous opinion in support of the parade organizers' First Amendment rights to exclude the gay, lesbian, and bisexual group from their parade began with a discussion of the speech value of parades.⁴⁶ In its analysis, the Court rejected the idea that speech must convey a "particularized message" to be protected by the First Amendment.⁴⁷ Such a restrictive interpretation would have meant, the Court observed, that the First Amendment would not "reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll."⁴⁸ Schönberg, a modern classical composer, created only instrumental musical works.⁴⁹ Again, however, this part of the Court's decision is a conclusion, not an analysis.

The lower courts have been equally unedifying. In a recent case, *Nurre v. Whitehead*,⁵⁰ the Ninth Circuit Court of Appeals rejected high school students' claims that school administrators' actions forbidding them from playing an instrumental version of "Ave Maria" violated their First Amendment speech rights.⁵¹ In cursory fashion, the court declared, "It is clear to us that purely instrumental music—i.e., music with no lyrics—is speech."⁵² In *Stratechuk v. Board of Education*,⁵³ the Third Circuit rejected a similar claim that a public school's restriction on both vocal and instrumental religious musical performances at school-sponsored programs violated students' right to receive information and ideas and to learn, as well as their right to academic freedom.⁵⁴ *Stratechuk* also failed to specifically address whether the instrumental musical performances were covered by the First Amendment.⁵⁵

The most thoughtful lower court discussion of music actually emerges from a decision about the regulation of nude dancing. In *Miller v. Civil City of South Bend*,⁵⁶ later reversed by the Supreme Court in

45. *Id.* at 561–64.

46. *Id.* at 568–70.

47. *Id.* at 569.

48. *Id.*

49. See Rovi Staff, *Biography of Arnold Schönberg*, ALLMUSIC, <http://www.allmusic.com/artist/arnold-schoenberg-mn0000691043/biography> (last visited Feb. 2, 2015).

50. 580 F.3d 1087 (9th Cir. 2009). The unsuccessful plaintiffs petitioned the Supreme Court for a writ of certiorari, which was denied. *Id.*, cert. denied, 559 U.S. 1025 (2010). But see 559 U.S. 1025 (2010) (Alito, J., dissenting from denial of certiorari).

51. *Nurre*, 580 F.3d at 1090.

52. *Id.* at 1093. The entirety of *Nurre*'s analysis involved a citation to the Supreme Court's decisions in *Ward* and *Hurley*, as well as a quote from a parenthetical reference to another Ninth Circuit case that did nothing but cite *Ward* as well. *Id.*

53. 587 F.3d 597 (3d Cir. 2009). The plaintiffs also challenged the school's policies as violating the First Amendment's Establishment Clause. *Id.* at 599.

54. *Id.* at 599, 610.

55. *Id.* at 609–10. In addition, none of the previous decisions in the case, by either the district court or court of appeals, addressed this issue.

56. 904 F.2d 1081, 1089 (7th Cir. 1990), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

Barnes v. Glen Theatre, Inc.,⁵⁷ several of the circuit judges' opinions commented in dicta on whether music was speech under the First Amendment. Sitting en banc, the Seventh Circuit invalidated a city ordinance banning public nudity as applied to a commercial establishment where concededly non-obscene nude dancing was performed for entertainment.⁵⁸ In doing so, the court rejected the state and the dissenters' arguments distinguishing art from "entertainment," noting, among other things, "not all music appeals to the *intellect*."⁵⁹

Concurring in the court's decision, Judge Posner observed that the argument that nude dancing is not speech because it does not express ideas or opinions could also support the claim that "non-vocal" (that is, instrumental) music is not speech.⁶⁰ Music, he suggested, is covered by the First Amendment even when it does not convey a particular message:

[E]ven if "thought," "concept," "idea," and "opinion" are broadly defined, these are not what most music conveys; and even if music is regarded as a language, it is not a language for encoding ideas and opinions. Insofar as it is more than beautiful sound patterns, music, like striptease, organizes, conveys, and arouses emotion, though not sexual emotion primarily. If the striptease dancing at the Kitty Kat Lounge is not expression, Mozart's piano concertos and Balanchine's most famous ballets are not expression.⁶¹

He went on to argue that if music must be propositional to count as speech, it would mean that most instrumental music would receive less protection than nude dancing, and that "Beethoven's string quartets are entitled to less protection than *Peter and the Wolf*."⁶²

In his dissent, Judge Easterbrook agreed that music is a form of art that is protected, but that it is completely distinguishable from nude dancing in a barroom.⁶³ In his view, music and other art forms are pure communication, not conduct that is expressive, like flag burning or a strip tease.⁶⁴ As he observed:

57. 501 U.S. 560, 565 (1991).

58. *Miller*, 904 F.2d at 1089.

59. *Id.* at 1086 (emphasis added).

60. *Id.* at 1094 (Posner, J., concurring). Judge Posner had made a similar observation, also in dicta, in an earlier case. See *Reed v. Vill. of Shorewood*, 704 F.2d 943, 949-50 (7th Cir. 1983) ("Although the authors of the First Amendment were concerned with protecting political rather than cultural expression . . . and therefore might not have thought it a violation of the First Amendment for Congress to pass a law forbidding the playing of Haydn's string quartets on federal government lands, the modern view is different. If the defendants passed an ordinance forbidding the playing of rock and roll music in the Village of Shorewood, they would be infringing a First Amendment right . . . even if the music had no political message—even if it had no words—and the defendants would have to produce a strong justification for thus repressing a form of 'speech.'" (emphasis added)).

61. *Miller*, 904 F.2d at 1093 (Posner, J., concurring).

62. *Id.* at 1094.

63. *Id.* at 1125 (Easterbrook, J., dissenting).

64. *Id.*

People may fairly dispute whether absolute music, such as LaMonte Young's *Well-Tuned Piano*, communicates thoughts, but surely it embodies them (the right place for the major third, etc.); all that we call music is the product of rational human thought and appeals at least in part to the same faculties in others. It has the "capacity to appeal to the intellect," . . . is not "conduct," and is closer to speech (even an emotional harangue is speech) than to smashing a Ming vase or kicking a cat, two other ways to express emotion.⁶⁵

Notwithstanding their fundamental disagreement about the merits of the case, Judges Posner and Easterbrook elaborated more carefully about the conception of music as speech than any other judicial actors before or since.⁶⁶

B. THE SCHOLARLY LITERATURE

Academics have also paid surprisingly little attention to the question of instrumental music as speech.⁶⁷ Several excellent scholarly works have tried to define the more general boundaries of art as speech, but for the most part, they have done so without identifying music as a unique form of expression.⁶⁸ Nonetheless, these commentaries provide an indispensable starting point, for there is a degree of overlap between the speech value of other art forms and instrumental music. A common thread with this work, and one that connects this Article with its predecessors, is the agreement that free speech theory and doctrine have not adequately addressed the complex issues associated with artistic expression.⁶⁹

Marci Hamilton and Sheldon Nahmod presented earlier treatments of art and speech that provide useful foundations for thinking about music. Hamilton argues that art ought to be acknowledged as speech specifically because of its subversive possibilities, offering its "singular capacity to offer the experience of new worlds and therefore new perspectives on the status quo."⁷⁰ Thus, art is speech because of its unique ability to be subversive, to "defamiliarize" conventionality, and to promote what she calls its "instrumental, liberty-reinforcing role in a representative democracy."⁷¹

In contrast, Nahmod argues that it is not fruitful to attempt to derive artistic expression's value through the lens of political speech. Rather, he

65. *Id.*

66. The Supreme Court's decision in *Barnes*, reversing *Miller*, does not even discuss music. The word music appears only once in the entire decision, in a footnote in Justice White's dissent referring to the definition of dancing. *Barnes*, 501 U.S. 560, 587 n.1 (White, J., dissenting).

67. See *supra* note 3 and accompanying text.

68. See *supra* note 3 and accompanying text.

69. See, e.g., Hamilton, *supra* note 3, at 75-76; Nahmod, *supra* note 3, at 235.

70. Hamilton, *supra* note 3, at 121.

71. *Id.* at 75.

claims that art should be acknowledged as valuable independent of its role in political discourse (however broadly defined). Drawing on aesthetic theory, and in particular on Plato and Kant, Nahmod suggests that art should be independently valued for its ability to promote the beautiful and the sublime.⁷² From his perspective, the flaw in most thinking about art and free speech is the notion that art must convey a specific message or meaning to fall within the three predominant justifications for constitutional protection of expression.⁷³

An important recent contribution to the discourse on art and the First Amendment comes from Mark Tushnet.⁷⁴ Like me, Tushnet views questions about art's coverage as much more complicated than courts and commentators are inclined to recognize. Though art, like music, seems like an easy case, there are no easy answers.

Tushnet makes a number of interesting observations, a couple of which I highlight here. First, he rejects, as do I, what he calls the "rationality challenge," which suggests that the question of the First Amendment's coverage of art is not an important one because there will rarely be legitimate governmental reasons to suppress art.⁷⁵ On this view, any state regulation of artistic expression would likely be invalidated by a substantive due process challenge because the state's action would not be rational.⁷⁶ As Tushnet points out, however, there sometimes may be "legitimate" (though not necessarily compelling) government interests in regulating art work, such as when highly offensive artwork is displayed publicly.⁷⁷

72. Nahmod, *supra* note 3, at 226–35.

73. *Id.*

74. *See generally* Tushnet, *supra* note 3.

75. *Id.* at 182–83.

76. *Id.* For a variation on this argument suggesting that art can be classified as speech because of the illegitimacy of government motivations for regulating artistic expression, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 111 (1982) (suggesting that the proper characterization of artistic expression is a "false problem" because free speech concerns are implicated any time a regulation is "designed to limit the extent to which people will be *influenced* by a work of art"); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREEDOM OF SPEECH* 158 (1993) (claiming that "an effort to regulate music because it stirs up passionate feeling would run afoul of the free speech clause, simply because the justification for regulation is constitutionally off-limits").

77. Tushnet, *supra* note 3, at 203. Another possibility would be a situation when the government claims the work is so disturbing that it might incite an immediate riot or other unlawful action. *See Nelson v. Streeter*, 16 F.3d 145, 150 (7th Cir. 1994). Government regulation of art is more likely to be upheld under a due process challenge, but would be subject to a heightened level of scrutiny if art is covered by the First Amendment. In any event, if there is a choice between considering music as speech under the First Amendment or a liberty under the Fourteenth Amendment, there is also a doctrinal reason to focus on speech. The Supreme Court has articulated a preference for analyzing rights under the narrower, more specific provision of the Constitution that might apply rather than under due process. *See Graham v. Connor*, 490 U.S. 386, 394–95 (1989). For cases addressing musical expression and some form of due process claim, see *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451, 454 (1952) (rejecting passengers' first amendment and substantive due process claims against public utilities commission for playing music in streetcars and buses); *id.* at 468–69 (Douglas, J., dissenting)

To Tushnet's point, I would add that the rationality challenge is a bit of an analytical dodge. It is a sort of legal reverse engineering, working backwards from the lack of governmental interest to define something as speech, while offering no independent understanding of why speech is covered by the First Amendment or bears any value at all. There are many government regulations that might lack a plausible justification, but that does not make the conduct they regulate speech. Such laws may still be unconstitutional because they are arbitrary, but not necessarily because the regulated activity is important or valuable.

Tushnet also makes the case that basing coverage determinations on the speaker's intent (as in *Spence*) is both over-inclusive—violent conduct intended to convey displeasure with the government is not covered—and under-inclusive—many artists produce work that is not intended to convey a specific message.⁷⁸ He also suggests that focusing on expression that uses words to define First Amendment coverage is not particularly helpful because there are clearly ways of communicating an identifiable message, even an overt political message, that do not use words, and words do not always even convey meaning.⁷⁹ This insight is, of course, essential to thinking about instrumental music, which by definition is wordless.

Ultimately, after identifying many of the difficulties in justifying the First Amendment's coverage of art, Tushnet relies on a type of pragmatic reasoning to support the claim. First, he says, we might find art to be covered because it bears a “family resemblance” to political speech.⁸⁰ Art may not fulfill all of the conditions we typically associate with speech, but many types of art meet many of the conditions.⁸¹ Second, given that much art fits “enough” of these criteria, he embraces a “rules versus standards” argument, suggesting that a categorical conclusion that all art is covered by the First Amendment is probably superior to a case-by-case analysis of how each art work might constitute speech, a decision that “may well be beyond the capacity of ordinary legal decision makers to do . . . reliably across the range of problems they may encounter.”⁸²

In addition to the general scholarship on art and the First Amendment, there has been some academic discussion of government

(arguing that the government's playing of music was a due process violation because the audience was captive and could not change the station); *Jenkins v. Rumsfeld*, 412 F. Supp. 1177, 1179 (E.D. Va. 1976) (rejecting claim by military band members that a law prohibiting them from competing with local musicians for paid music gigs violated their due process rights).

78. Tushnet, *supra* note 3, at 187–92.

79. *Id.* at 192–99; see also Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423 (2014).

80. Tushnet, *supra* note 3, at 219.

81. *Id.*

82. *Id.*

ensorship of music because of its *lyrical* content.⁸³ For example, there was considerable deliberation over government attempts in the early 1990s to forbid the sale of 2 Live Crew's album, "As Nasty As They Wanna Be," on the ground that it was legally obscene.⁸⁴ But in that case, the court noted that the case appeared to be the first time an appellate court had been asked to apply the legal standard for obscenity "to a musical composition, which contains both instrumental music *and lyrics*."⁸⁵ The lyrical components were clearly the sole basis of the obscenity claim.⁸⁶ Accordingly, the scholarly commentary addressed only that question.⁸⁷ But legal analysis of government censorship of lyrics, completely disaggregated from the musical content, ought to be no different from evaluating censorship of a book, speech, or leaflet. This is not to say that there are not important social concerns about government efforts to censor songs, just that they don't raise interesting conceptual questions. Although, to the extent the dispute in this case implicates concerns over the racial component of the band's musical genre, it may have some bearing on thinking about music as an expression of cultural values, which I discuss below.⁸⁸

With regard to analyzing how First Amendment doctrine and theory apply to purely instrumental music, the only serious effort of any kind thus far has been a student note.⁸⁹ David Munkittrick's Note shares my concerns about the lack of recognition, from the courts or the academy, that instrumental music has not been independently analyzed as a species of expression.⁹⁰ Like me, he draws on some aesthetic theory and

83. Though sometimes, the distinction between musical and lyrical content may be difficult to draw, even for censors. In 1968, an El Paso radio station refused to play Bob Dylan songs because its management found it too difficult to understand the lyrics, and were reportedly concerned that the songs might include "politically objectionable or lewd messages." See Meredith E. Rutledge-Borger, *Rock and Roll vs. Censorship*, ROCK & ROLL HALL OF FAME, (Aug. 23, 2013, 9:00 AM), https://rockhall.com/blog/post/8840_censorship-in-rock-and-roll-history.

84. See, e.g., *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 136 (11th Cir. 1992).

85. *Id.* at 135 (emphasis added).

86. *Id.* Interestingly, however, the lower court judge in that case specifically suggested the possibility that music without lyrics could be deemed obscene. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 591 (S.D. Fla. 1990) ("[I]t would be difficult, albeit *not impossible*, to find that mere sound without lyrics is obscene." (emphasis added)), *rev'd sub nom. Luke Records*, 960 F.2d 134.

87. The majority of commentary on the 2 Live Crew case appears to come from student notes and comments. See, e.g., Alexis A. Lury, Note, *Time to Surrender: A Call for Understanding and the Re-Evaluation of Heavy Metal Music Within the Contexts of Legal Liability and Women*, 9 S. CAL. REV. L. & WOMEN'S STUD. 155, 178-82 (1999); Kirk A. Olson, Note, *Constitutional Law: Can Music Be Considered Obscene?* *Skywalker Records, Inc. v. Navarro—The 2 Live Crew, Obscene or Oppressed?*, 44 OKLA. L. REV. 513 (1991).

88. See *infra* notes 227-257 and accompanying text. For observations about the role of race in a different controversy surrounding 2 Live Crew, see BEANSON, ART AND FREEDOM, *supra* note 3, at 184-213 (discussing the copyright dispute regarding the band's parody of the Roy Orbison song, "Oh, Pretty Woman").

89. See generally Munkittrick, *supra* note 4.

90. *Id.* at 667.

approaches from other disciplines and discusses the basic free speech theories that might apply.⁹¹ As with the scholarly work on artistic expression, his piece provides insight and a valuable starting point. This Article, however, departs from his in important ways. First, while Munkittrick acknowledges that “no single First Amendment theory fully explains protection of music as speech,”⁹² his work places a stronger emphasis on the role of music in the democratic order than is warranted. Second, this Article more specifically distinguishes and identifies the different expressive possibilities of instrumental music, which is a necessary predicate to understanding how free speech theory can be mapped onto instrumental music.

This summary is necessarily abbreviated and does not touch on every aspect of the prior scholarship. To the extent that past work is helpful in thinking about instrumental music, I have integrated it further into the discussions in Parts II and III. While I draw on this scholarship to the extent that examining coverage of the visual arts indisputably raises concerns that overlap with music, this Article argues that the consideration of instrumental music as speech has some very different implications as well, and that these are worthy of independent analysis.

C. INSTRUMENTAL MUSIC CENSORSHIP

A logical, initial reaction to the lack of either serious judicial or academic treatment of the question of instrumental music as speech might be that it simply doesn't matter. Beyond a few rare examples, music censorship has occurred relatively infrequently in American society. To the extent that it has arisen, it has focused on the lyrical, rather than musical, component of the expression.⁹³ The need to examine the grounds for its protection may therefore not be perceived as urgent.

But calls for control and regulation of instrumental music have spanned millennia and have emerged from all parts of the world, from both government entities and other powerful institutions. Plato associated certain forms of music with licentiousness and warned about the negative impact of music on character.⁹⁴ In medieval Europe, for many years the Catholic Church banned a note known as the tritone, an augmented fourth or diminished fifth note in the Western musical scale, because its dissonant sound evoked evil.⁹⁵ The Church even labeled it the

91. *Id.* at 674–85.

92. *Id.* at 668.

93. *See, e.g.*, *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 135–36 (11th Cir. 1992).

94. *See* I PLATO, *THE REPUBLIC* bk. IV, at 424 (Benjamin Jowett trans., Oxford University Press 3d ed. 1908) (c. 380 B.C.E.).

95. Finlo Rohrer, *The Devil's Music*, *BBC NEWS MAG.* (Apr. 28, 2006, 3:19 PM), <http://news.bbc.co.uk/2/hi/4952646.stm>.

Devil's Interval.⁹⁶ In 1322, Pope John XXII “issued a decree that banned the usage of descant (improvised high melodic lines) in church services.”⁹⁷ And in a widely known, though perhaps not completely understood, example of “populist censorship” of instrumental work, the 1913 debut of Stravinsky’s “The Rite of Spring” was met with a hostile audience reaction that resulted in a major public disturbance.⁹⁸ As described by one account, “[t]he altercation, which escalated into a riot that spilled out into the streets (and featured the rare sight of baton-wielding gendarmes thumping the heads of uptown arts patrons), was reportedly sparked by an audience shocked by the musical piece’s then unheard of, and therefore extremely *unsettling, rhythms*.”⁹⁹

In Nazi Germany, Hitler’s regime banned the publication, sale, performance, and broadcast of “Entartete Musik” (degenerate music).¹⁰⁰ Through its Reichsmusikkammer (Reich Chamber of Musical Affairs), the government systematically excluded Jewish performers and composers from nearly all aspects of German musical life.¹⁰¹ Among the notable composers whose work was banned by the Nazis as degenerate were Stravinsky, Mahler, and Gershwin. Jewish composers, such as Mendelssohn, were specifically targeted for censorship as well, as was jazz music, quite probably because of its association with African Americans.¹⁰² The Nazis also engaged in a form of cultural apartheid, forbidding the performance of works by Jewish composers, except in the context of events sponsored by the Kulturbund (Jewish Cultural League), while at the same time forbidding Jews to perform the work of non-Jewish German composers.¹⁰³ Similarly, a long history of music censorship marks several periods of the Soviet regime in the twentieth century, including, most notably, the regulation of the work of Shostakovich.¹⁰⁴ The Soviet government censored instrumental music for religious, nationalist, and political reasons. It kept close tabs on music for fear that it would be decadently bourgeois, class hostile, or religious.¹⁰⁵

Moreover, in contemporary cultures, particularly those with sectarian-dominated government regimes, censorship of instrumental music is common. Though there is wide disagreement about the role of

96. *Id.*

97. PETER BLECHA, TABOO TUNES: A HISTORY OF BANNED BANDS AND CENSORED SONGS 15–16 (2004).

98. *Id.* at 16.

99. *Id.* (emphasis added). As some have observed, however, it is not entirely clear whether the audience’s reaction was because they were upset about what the music communicated or because they did not understand it at all. See Wright, *supra* note 13, at 1247 n.169.

100. LEVI, *supra* note 9, at 86.

101. HAAS, *supra* note 9, at 226.

102. LEVI, *supra* note 9, at 120; Kozinn, *supra* note 9.

103. HAAS, *supra* note 9, at 231–35.

104. GREEN, *supra* note 9, at 590; Mirovalev, *supra* note 9.

105. GREEN, *supra* note 9, at 590.

music in Islam, the previously Taliban-controlled Afghanistan¹⁰⁶ and the current Iranian government¹⁰⁷ banned instrumental music because of its association with non-puritanical values and lifestyles and alcohol or drug use. Similar sectarian-driven animosity from an Islamist rebel group in northern Mali led to the cancellation in 2013 of the Festival au Désert, a world famous music celebration.¹⁰⁸ As reported by those involved with past Festivals, the rebels targeted what they viewed as “Satan’s music” including not only Western music but also “local music styles deemed offensive to the standards of Shariah, or Islamic law, that were being imposed on a traditionally tolerant and multicultural society.”¹⁰⁹ Among the local genres of music that were censored was music produced by tindé drums, usually performed by female ensembles.¹¹⁰ Rebels threatened musicians’ lives if they performed and destroyed their instruments and equipment.¹¹¹

An informal ban on the performance of Wagner’s work persisted for decades in Israel as well.¹¹² The ban was widely embraced based on claims of Wagner’s anti-Semitism and his association with the Nazi regime, though that regime arose well after his death.¹¹³ For many Israeli Jews, Wagner’s compositions bore strong associations with the Holocaust.¹¹⁴

While less widespread or frequent, several examples of governmental or other institutional restrictions on the musical component of expression exist even in the United States. In just the past few years, two public school districts have been sued, albeit unsuccessfully, for restricting purely instrumental musical performances at school programs and ceremonies because of the music’s religious affiliations.¹¹⁵ In *Nurre*¹¹⁶ student musicians claimed, among other things, that the school’s ban on their selected performance violated their free speech rights.¹¹⁷ They had chosen to play an instrumental version of Franz Biebl’s “Ave Maria” because “they believed [it] showcased their talent and the culmination of their instrumental work.”¹¹⁸ Nonetheless,

106. See *supra* note 10 and accompanying text.

107. Tait, *supra* note 10.

108. Larry Rohter, *Musical Nomads, Escaping Political Upheaval*, N.Y. TIMES, July 30, 2013, at C1.

109. *Id.*

110. *Id.*

111. *Id.*

112. Munkittrick, *supra* note 4, at 673–74.

113. *Id.*

114. *Id.*

115. *Stratechuk v. Bd. of Educ.*, 587 F.3d 597, 610 (3d Cir. 2009); *Nurre v. Whitehead*, 580 F.3d 1087, 1090 (9th Cir. 2009).

116. *Nurre*, 580 F.3d 1087.

117. *Id.* at 1091.

118. *Id.*

fearing that the school district would receive complaints about the religious content of the music, and wanting to appear neutral toward religion for both Establishment Clause and political purposes, officials banned the performance, an action upheld by the Ninth Circuit.¹¹⁹ In a similar case, *Stratechuk*,¹²⁰ the Third Circuit upheld a ban on the performance of holiday music with religious themes, including instrumental works, at school programs.¹²¹

Other examples dot the constitutional landscape as well. A successful federal obscenity prosecution in the 1960s targeted two phonograph records, one of which, according to one Supreme Court Justice, contained material that was made up “almost entirely of the sounds of percussion instruments”¹²² (perhaps the first documented historical ban on aural sex).

Nongovernmental institutions that control forums for musical expression have also played a censoring role. For example, in 1959, federally licensed American radio stations refused to broadcast the purely instrumental Link Wray song, “Rumble,” based on its title’s association with street violence.¹²³ The BBC banned the broadcast of the instrumental theme song from the Frank Sinatra movie, *The Man with the Golden Arm*, because of its connection to a film about drug abuse.¹²⁴ And a major retail chain in the Pacific Northwest affixed an “explicit lyrics” warning label similar to the type sponsored by the RIAA to all copies of the Frank Zappa album, *Jazz from Hell*, even though the album was comprised entirely of instrumental music.¹²⁵

These instances of instrumental music censorship naturally lead to important questions about what exactly is being censored. This inquiry, in turn, leads to a critical examination about the communicative meaning of instrumental music, which is addressed in Part III.

II. THE UNEASY FIT BETWEEN INSTRUMENTAL MUSIC AND FREE SPEECH DOCTRINE AND THEORY

Despite the general assumption that instrumental music is constitutionally protected speech, important and unanswered questions

119. *Id.*

120. 587 F.3d 597 (3d Cir. 2009).

121. *Id.* at 610. The plaintiffs challenged the school’s policies as violating both the free speech clause and Establishment Clause of the First Amendment.

122. *United States v. Davis*, 353 F.2d 614 (2d Cir. 1965), *cert. denied*, 384 U.S. 953 (1966) (Stewart, J., dissenting from denial of certiorari). Apparently, Justice Stewart knew it when he heard it (or didn’t). *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (articulating Justice Stewart’s well known struggle to define hard-core pornography by the subjective factor “I know it when I see it”).

123. Bernstein, *supra* note 7.

124. Horsfield, *supra* note 7.

125. NUZUM, *supra* note 7, at 254–55.

remain. As this Part will discuss, the dominant utilitarian theories of free speech, which justify protection based on the goal of promoting democratic self-governance and facilitating the search for “truth” by ensuring a free marketplace of all ideas (not just political ones), do not adequately explain constitutional protection for music, except at the broadest levels of abstraction. A partial explanation may emerge under the truth-seeking theory, however, if music is understood as advancing non-ideational aspects of truth. Free speech theory based on promoting dignitary interests, such as individual self-realization and autonomy, offer a much better match, but make it difficult to distinguish music from other forms of human liberty protected by the Constitution.

As a quick disclaimer, I should say that my aim here is not to embrace one free speech theory over another or argue that one is superior as a unifying principle than the others. Rather, my less ambitious goal, accepting that each of these theories provides a plausible theoretical foundation for protecting speech,¹²⁶ is to examine how well any of these justifications support the conclusion that instrumental music is and ought to be constitutionally protected.¹²⁷

A. PROMOTING DEMOCRATIC SELF-GOVERNANCE

Perhaps the most widely discussed and accepted theory underlying the constitutional protection of speech identifies freedom of expression as a means of promoting a healthy, transparent, and effective democratic system of governance. Earlier scholarly proponents of this theory include Alexander Meiklejohn, whose work argued that the First Amendment is designed,

to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal . . . The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life.¹²⁸

In its original iteration, consistent with his emphasis on promoting democracy, Meiklejohn’s speech theory distinguished between public discourse, which he viewed as protected by the First Amendment, and private communication, which he deemed as governed by the Due Process Clause.¹²⁹ Meiklejohn’s narrow focus on democratic self-rule was

126. These are not the only theories of free speech, but they are the most commonly invoked by both legal scholars and the courts. For a brief discussion of some other speech theories, see GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1026–27 (6th ed. 2009).

127. Not all legal theorists agree that utilitarian, “constructivist,” or consequentialist approaches are useful to understanding free speech. *See, e.g.*, LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* 127–34 (2005); Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 *Nw. U. L. Rev.* 647 (2013).

128. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 88–89 (1948).

129. *Id.* at 94.

criticized by, among others, Zechariah Chafee, who pointed out that Meiklejohn's theory meant that the First Amendment did not protect "art and literature."¹³⁰ Chafee found it "shocking to deprive these vital matters" of protection under the speech clause.¹³¹

Meiklejohn's rejoinder to this criticism required him to rethink his original position on artistic expression under the First Amendment. In later work, he took the view that literature and "the arts" fell within the First Amendment's protection because they were included within the forms of communication "from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express."¹³² Elaborating on this, he observed that literature and the arts "are protected because they have a 'social importance' which [he] called a 'governing' importance."¹³³ But Meiklejohn does not mention music in particular, and it is unclear from his conclusions about the arts whether he would view nonverbal artistic expression, such as instrumental music, as advancing these same values. Indeed, the examples he gave involve verbal media, such as novels, which can be much more directly connected to democracy.¹³⁴

In later work, Robert Bork took a much narrower view of speech and democracy more in line with Meiklejohn's earlier work. He concluded that "[c]onstitutional protection should be accorded only to speech that is explicitly political."¹³⁵ "There is no basis," he explained, "for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."¹³⁶ For Bork, this boundary was essential to ensuring that First Amendment law advances the principal objective of "the discovery and spread of political truth."¹³⁷ But he rejected the idea that artistic expression facilitated democratic goals.

I agree that there is an analogy between criticism of official behavior and the publication of a novel like *Ulysses*, for the latter may form attitudes that ultimately affect politics. But it is an analogy, not an identity. Other human activities and experiences also form personality, teach and create attitudes just as much as does the novel, but no one

130. Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 900 (1949).

131. *Id.*

132. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256; see also Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221.

133. Meiklejohn, *supra* note 132, at 262.

134. Professor Hamilton's work adheres to the notion that art is expression because, in its own way, it promotes democracy, and in this way, importantly elaborates on Meiklejohn's arguably boundless extension of his democracy-facilitating theory. See generally Hamilton, *supra* note 3.

135. Bork, *supra* note 11, at 20.

136. *Id.*

137. *Id.* at 24 (citing *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

would on that account, I take it, suggest that the [F]irst [A]mendment strikes down regulations of economic activity, control of entry into a trade, laws about sexual behavior, marriage and the like. Yet these activities, in their capacity to create attitudes that ultimately impinge upon the political process, are more like literature and science than literature and science are like political speech.¹³⁸

Even more advanced forms of democratic theory arguably do not do the work necessary to support a strong claim for protecting instrumental music. Contemporary theorists embrace the self-governance promoting foundations of the First Amendment, but like Meiklejohn struggle with the dilemma that this theory presents for artistic expression. Robert Post argues for a broader understanding of the democratic self-governance theory that ensures not simply informed decisionmaking about candidates and issues, but also protects the process of forming public opinion, “which is understood as a form of communicative action.”¹³⁹ His theory calls for the protection not of speech per se, but of “those speech acts and media of communication that are socially regarded as necessary and proper means of participating in the formation of public opinion,” which Post calls “public discourse.”¹⁴⁰ “The function of public discourse is to enable persons to experience the value of self-government.”¹⁴¹ According to Post, self-governance theory is properly understood in relation to its protection of individual autonomy and self-determination in the formation of opinion related to the democratic process.¹⁴²

Post claims that his theory is capacious enough to include protection for artistic expression. He writes:

Public discourse includes all communicative processes deemed necessary for the formation of public opinion. Art and other forms of noncognitive, nonpolitical speech fit comfortably within the scope of public discourse. Public discourse depends upon the maintenance of a public sphere, which is a sociological structure that is a prerequisite to the formation of public opinion.¹⁴³

Even with his broad understanding of public opinion, however, it is not obvious how instrumental musical expression is “necessary” to its understanding. Said differently, Post suggests that to be subject to the First Amendment’s coverage, artistic expression “need not concern potential policy decisions; it need only contribute to what people think when they communicate to each other in public.”¹⁴⁴ Perhaps what he is

138. *Id.* at 27.

139. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 483 (2011).

140. *Id.* (internal quotation marks omitted).

141. *Id.*

142. *Id.*

143. *Id.* at 486.

144. Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 621 (2011).

suggesting is that art must be protected because to fail to do so would undermine the very legitimacy of democratic governance; but that would seem to be true of many other forms of communication, not all of which are protected. And it is not at all clear why music or other forms of nonpropositional expression would contribute to what people “think” when they communicate to each other in public, or how that contributes to the public discourse, even broadly defined.¹⁴⁵

James Weinstein, who also argues for a democracy-promoting First Amendment theory, is more skeptical about the conceptual connection between purely instrumental music and promotion of self-governance. As he observes, “[p]erhaps its greatest explanatory shortcoming is that a theory based in participatory democracy cannot easily explain the rigorous protection that current doctrine affords non-ideational art such as abstract paintings or symphonic music.”¹⁴⁶ Though Weinstein acknowledges the “plausible” democracy-based explanation that “art in general can be a particularly effective means of political persuasion,”¹⁴⁷ that is not always the case, or even the intention, of musical expression, and I share his doubt that this adequately explains the rigorous First Amendment protection that artistic speech presumptively enjoys.

Similarly, as Seana Shiffrin aptly observes:

Although a case *could* be made that the freedom to compose and to listen to Stravinsky is important to developing the sort of open personal and cultural character necessary for democracy to flourish or that it feeds the “sociological structure that is prerequisite for the formation of public opinion,” that justification is strained and bizarrely indirect. In any case, the right of Stravinsky to compose and of audiences to listen (or to cringe in non-comprehension) should not depend upon whether *The Rite of Spring* breeds democrats or fascists, or whether it supports, detracts from, or is superfluous to a democratic culture.¹⁴⁸

As suggested earlier, Munkittrick’s commentary on music and speech relies heavily, though not exclusively, on a democracy-based rationale. On this ground, he argues that the government actually plays a necessary role in promoting musical expression to sustain “a minimum level of diversity in the aesthetic, creative, and emotional decision making that music enables.”¹⁴⁹ He goes on to argue that such diversity is

145. See Koppelman, *supra* note 127, at 679 (“Democratic legitimation . . . cannot explain the protection of instrumental music.”); see also Wright, *supra* note 13, at 1222 (observing that not all instrumental music expresses an opinion or has a subject).

146. Weinstein, *supra* note 12, at 499 n.45.

147. *Id.*

148. Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 285–86 (2011) (emphasis added) (citation omitted); See C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 271 (2011) (“[C]ompositional music . . . require[s] a stretch to justify as political speech.”).

149. Munkittrick, *supra* note 4, at 682–83.

essential to ensuring that the democratic functions of music are not impaired.¹⁵⁰ In advancing this view, he suggests that instrumental music is central to political life.¹⁵¹ But the examples he draws on to illustrate that music can act as “direct political speech” do not involve pure musical expression, but the appropriation of music for its performers’ specific goals.¹⁵² That is, his arguments are premised more on the association of music with particular events or historical contexts, not on the inherent expressive function of the music itself. As I argue below, however, associative claims are not really about the music; they are derivative of the contexts in which the music is placed, and therefore do not support a democratic justification for counting music as speech.¹⁵³

Democratic self-governance theory is typically operationalized, however imperfectly, through doctrinal devices, primarily the Court’s articulation of a heavy presumption against regulations that discriminate based on the viewpoint or content of speech.¹⁵⁴ Even if we are to accept the democracy-promoting value of musical expression, it is difficult to imagine how this doctrine would be implemented to evaluate the constitutionality of music regulation. What would the application of viewpoint or content discrimination look like? It is doubtful whether instrumental music, unlike music with lyrics, can ever be said to have a specific viewpoint.¹⁵⁵ Even if it could, it would not likely be a *political* viewpoint or one that would contribute, directly or indirectly, to the flourishing of democracy. This is why Meiklejohn and others have struggled to defend artistic expression under the democratic theory. That is not to say that governments have not attempted to censor instrumental music because of its political associations, or rather because of their perceptions of its political meaning. But it would be an odd application of First Amendment doctrine, though perhaps not an entirely inappropriate one, if courts applied strict scrutiny to government suppression of music because of its perceived political content or viewpoint where the composer or performer had no such intent.

An easier case can be made that different types of instrumental music bear different content, and that the government might discriminate based on that content. Content discrimination might come in the form of discrimination against particular genres of music (classical music is ok, rap and hip-hop are not) or matters of taste (allowing performance of only “good” or “artistic” music, but not bad music). Indeed, the *Fact Concerts*

150. *Id.* at 683.

151. *Id.*

152. *Id.* at 683–84.

153. See *infra* notes 195–209 and accompanying text.

154. But see Baker, *supra* note 148, at 278–80 (arguing that the content discrimination doctrine actually reflects the Court’s invocation of an autonomy-based rationale).

155. Greenman, *supra* note 13, at 1348; Munkittrick, *supra* note 4, at 676–77.

case is an example of precisely that type of genre discrimination.¹⁵⁶ But again, the implications for democratic self-rule in protecting speech from such restrictions are unclear. The hypothetical regulations here might be viewed as matters of taste, but participation in public discourse has never turned on whether one's musical taste is elegant or tacky. Without taking a broad view of democracy that encompasses all forms of thought or feeling about all subjects, it is difficult to justify protection of instrumental music under this theory.

In the end, democratic self-governance is at best an incomplete theory for protecting instrumental music, and at worst simply unhelpful. That is not to say that democracy-based speech theory is not one of the justifications for constitutional protection of speech. But this Article argues that promoting democracy is a conditionally sufficient,¹⁵⁷ but not necessary, reason for protecting different forms of expression.

B. FACILITATING THE SEARCH FOR TRUTH

A second dominant theory for protecting speech is the idea that expressive freedom promotes the search for more general truths beyond the world of politics and governing. Derived from the writings of John Milton and John Stuart Mill, this justification is premised on the conception of a broader understanding of truth than is democratic self-governance theory. Most important, their conceptions of truth are about the truth of ideas, not historical or factual truth. Thus, Milton argued that freedom in the communication of ideas was essential to promote "discovery" of ideas that might be developed in "religious and civil wisdom."¹⁵⁸ Similarly, Mill claimed that protection of opinion was crucial to liberty because whether the ideas expressed in an opinion are "true" or "false," widely held or marginal, society can only understand truth by a full consideration of all opinions.¹⁵⁹ Neither Milton nor Mill, however, limited the consideration of ideas and opinions to those directly grounded in democracy.

Facilitation of the search for truth is most frequently associated with Justice Holmes's dissent in *Abrams v. United States*, in which the Court upheld the defendants' convictions under the Espionage Act for conspiring to "unlawfully utter, print, write and publish," among other things, "disloyal, scurrilous and abusive language about the form of government of the United States" and language intended to bring that

156. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 250–51 (1981) (examining city's cancellation of permit to perform because the scheduled band was a rock group rather than a jazz group).

157. What I mean by "conditionally sufficient" is that expression ought to be protected because it facilitates self-governance, but that not all expression is protected because it is political, for example politically motivated property destruction or violence.

158. JOHN MILTON, *AREOPAGITICA* 4 (1644).

159. JOHN STUART MILL, *ON LIBERTY* 82–83 (2d ed. 1859).

form of government into “contempt, scorn, contumely, and disrepute.”¹⁶⁰ As he wrote, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”¹⁶¹ Of course, the search for truth substantially overlaps with the promotion of self-governance.¹⁶² However, it has been widely conceived as understanding truth in a more general sense of social enlightenment that is not limited to opinions about government or public policy.

What types of truths might be generated by free speech that are not at least somewhat linked to self-governance, or at least are not inherently linked to democracy? Certainly religious or spiritual truths, to the extent they inform personal and collective understandings of the universe, might fall within this category. In addition, matters of science or morality may fall within a broad understanding of areas in which unregulated discourse is important to produce a better truth through the evolution of ideas. And, as I argue later, cultural truths ought to be included as well.

The logical progression to conclude that instrumental music is a part of this discourse, however, is still somewhat difficult to navigate. Even these nonpolitical, non-democracy-facilitating areas of inquiry are typically engaged in through propositional verbal expression that appeals to cognitive reasoning. Governmental interference with nonverbal musical expression distorts the marketplace of ideas only if instrumental music conveys or is understood as an idea. But others observe, convincingly, that musical expressions are not part of “ideational” or ideaist way of communicating. Under truth-based theories, the First Amendment might not apply to forms of expression that do not serve to protect the communication and reception of information and ideas. As John Greenman observes:

[W]e can say that “information” is used to refer to things like sentences, mathematical formulas, musical scores, computer code, and DNA strings. But it is not used to refer to things *like the sound of music* or the way a picture looks. “Idea,” on the other hand, refers to mostly the same things—sentences, formulas, scores, and so forth—with the added requirement that “idea” usually connotes a mental phenomenon.¹⁶³

Edwin Baker similarly suggests that:

[A]ll aesthetic experiences, like all experiences generally, can affect who a person is, how she sees the world, and thereby affect her values, politics, and notions of truth. Such explanations for their relevance to the political sphere or to a marketplace of ideas do not, however,

160. 250 U.S. 616, 616–17 (1919).

161. *Id.* at 630 (Holmes, J., dissenting).

162. See Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595, 595 (2011).

163. Greenman, *supra* note 13, at 1348 (emphasis added); see also Weinstein, *supra* note 12, at 499 n.45 (describing symphonic music as non-ideational art).

distinguish them from, say, hiking in a wilderness area, cooperation in a barn raising, or engaging in a criminal enterprise.¹⁶⁴

As with the democratic self-governance theory, the search for truth is implemented through general doctrinal rules forbidding viewpoint and other content discrimination. The rationale for prohibiting such discrimination is the prevention of government distortion of the marketplace. Because truth finding is a function of complete and open discourse, any state interference with the landscape of opinion jeopardizes the search for truth.¹⁶⁵ To the extent that the market is one of ideas, information, opinion, or other appeals to cognitive reasoning (even if the objective is not factual truth or political truth, but something moral, scientific, literary, and even spiritual), government regulation of instrumental music would not appear to affect the search for truth in any meaningful way. If that is the case, the truth rationale, without more, is not an adequate explanation for the protection of music as speech. A more complete understanding of how instrumental music may advance certain kinds of truths, however, may cause us to reevaluate this skepticism.

C. PROMOTING INDIVIDUAL AUTONOMY AND SELF-FULFILLMENT

A third compelling claim for protecting speech is grounded in promoting individual autonomy. Many scholars have articulated the autonomy justifications for freedom of expression, though with varied approaches to defining autonomy. Scanlon examines the notion of autonomy in terms of the individual's freedom to engage in self-determination.¹⁶⁶ State interference with the ability to experience the universe of competing ideas seriously compromises such autonomy. As he famously wrote:

An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do. He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment likely to be correct, and to weigh the evidential value of their opinion against contrary evidence.¹⁶⁷

A regime under which the government could regulate the free conveyance of such opinions or judgments, therefore, is inconsistent with each person's autonomy to form beliefs about her course of thought or

164. Baker, *supra* note 148, at 271-72.

165. This is, of course, setting aside the many legitimate concerns about whether the speech marketplace, any more than the economic marketplace, is completely competitive and that all participants have equal resources and information. See generally SUNSTEIN, *supra* note 76.

166. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 216 (1972) [hereinafter Scanlon, *Theory*]. In later work, Scanlon modified his views about speech and autonomy. See generally T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979).

167. Scanlon, *Theory*, *supra* note 166, at 216.

action. An important distinction of this version of the autonomy theory, then, is that it emphasizes the value of speech to the individual as much as to the collective interest in a functioning democracy or the societal achievement of truth.

Martin Redish argues for a broader, refined version of this theory, suggesting that the free speech clause serves the value of “individual self-realization.”¹⁶⁸ In elaborating on this idea, he explains that self-realization,

can be interpreted to refer either to development of the individual’s powers and abilities—an individual ‘realizes’ his or her full potential—or to the individual’s control of his or her own destiny through making life-affecting decisions—an individual ‘realizes’ the goals in life that he or she has set.¹⁶⁹

Redish claims that his theory constitutes a stronger approach to speech protection in part because the objectives of other theories (promoting democracy, the search for truth) are largely subsumed within the promotion of self-realization.

Baker spent much of his life examining and refining autonomy-based theories of free speech.¹⁷⁰ In his later work, he grounded his autonomy theory in the concept of legitimacy. He argues that “a legitimate legal order must fully respect (among other things, e.g. equality) both individual and collective autonomy—both non-political and political speech.”¹⁷¹ He elaborates:

If the moral value of democracy lies (in part) in its contribution to people’s political autonomy in pursuit of their democratically chosen projects—with its implicit premise that it values these people as autonomous—democracy’s authority should be limited by this same value. Given this value, democracy (or law) should not, therefore, be authorized to enact laws that disrespect, that are premised on the propriety of denying, a person’s autonomy (or, though less relevant here, her equality and maybe her dignity). This conclusion should then guide interpretation of the constitutional guarantee of free speech. It gives equal status to protecting speech as a part of personal, individual self-government and as an aspect of her participation in collective self-government.¹⁷²

Critics of Baker and other autonomy theorists have made several claims. Among them is the concern that autonomy is a justification not only for expressive freedom but also for myriad other types of individual liberty that are clearly not constitutionally protected. As Bork observed,

[D]evelopment of individual faculties and the achievement of pleasure . . . do not distinguish speech from any other human activity.

168. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (internal quotation marks omitted).

169. *Id.*

170. See generally C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1992).

171. Baker, *supra* note 148, at 266.

172. *Id.* at 266–67.

An individual may develop his faculties or derive pleasure from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors.¹⁷³

Essentially, this critique suggests that autonomy-based justifications have no limiting principle. But as Baker and others point out, of course, one limiting principle is the First Amendment, which specifically establishes an expression-specific form of liberty, distinctive of other liberties, protected and not.¹⁷⁴ While many other acts may lead to self-realization or fulfillment, they are mostly not expressive or communicative, and are covered, if at all, by other aspects of the Constitution.¹⁷⁵

Shiffrin more recently has articulated a “thinker-based” approach to autonomy and speech. In developing her theory, she identifies eight separate, sometimes overlapping, interests in which the rational thinker should enjoy autonomy: capacity for practical and theoretical thought; apprehending the true; exercising the imagination; becoming a distinct individual; moral agency; responding authentically; living among others; and appropriate recognition and treatment.¹⁷⁶ As she notes, “[s]peech, and free speech in particular, are necessary conditions of the realization of these interests.”¹⁷⁷ Her version of an autonomy theory suggests that each of these values is appropriately advanced by a free speech doctrine, and explains how they can be used to justify speech that does not fall comfortably under the umbrella of the promotion of democracy or the search for truth:

Communication of the contents of one’s mind primarily through linguistic means, but also through pictorial or even musical representation, uniquely furthers the interest in being known by others. It thereby also makes possible complex forms of social life. Further, it helps to develop some of the capacities prerequisite to moral agency because successful communication demands having a sense of what others are in a position to know and understand. Practicing

173. Bork, *supra* note 11, at 25; *see also* Tushnet, *supra* note 3, at 205–06 (“Autonomy-related theories are . . . problematic as a way to distinguish artistic expression from essentially all other human activities, which can be ways in which people live autonomously.”).

174. Baker, *supra* note 148, at 256–57; Redish, *supra* note 168, at 600 (“[T]hat the framers deemed it necessary to create a first amendment at all, rather than merely including speech within the other forms of liberty protected by the fifth amendment, indicates that speech is to receive a constitutional status above and beyond that given to conduct.”).

175. There are easier and harder cases that fall within this group, however. Sexual conduct may be a tougher example to distinguish, since sex can have an important expressive component. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003); *cf.* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (finding, under an autonomy theory, that the private observation of legally obscene material in one’s home was protected by the First Amendment).

176. Shiffrin, *supra* note 148, at 289–90.

177. *Id.* at 291.

communication initiates the process of taking others' perspective to understand what others know and are in a position to grasp.¹⁷⁸

She adds:

Pictorial representations and music (and not merely discourse about them) should also gain foundational protection because they also represent the externalization of mental contents, contents that may not be accurately or well-captured through linguistic means; after all, not all thoughts are discursive or may be fully captured through discursive description.¹⁷⁹

The Supreme Court has forcefully, though rarely, based free speech claims on autonomy arguments. Perhaps the clearest example of this is in *Stanley v. Georgia*.¹⁸⁰ In *Stanley*, the Court overturned the conviction of a man who was charged with possession of obscene films in the privacy of his own home.¹⁸¹ The Court embraced the defendant's First Amendment claim that he had the right to determine what material he watched, even if that material could otherwise be regulated, or even prohibited.¹⁸² In his opinion for the Court, Justice Marshall wrote:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.¹⁸³

Similarly, it is possible to conceptualize a First Amendment analysis of instrumental music under an autonomy-based theory.

Indeed, like Baker, Redish, and Shiffrin, I agree that some form of autonomy justification is one of the strongest theoretical foundations for constitutional protection of instrumental music. Shiffrin, in particular, articulates a position that broadens the scope of autonomy in ways that could be used to justify protection of instrumental music, while still maintaining some limiting, if not completely defined, principles that would not result in arguments to protect everything as expression. But there are some unanswered questions that require further elaboration. First, no one has closely examined what it is about instrumental music that advances autonomy values. In Part III, this Article breaks musical expression down into its constituent parts and discusses what makes them distinctly expressive in manners that should be of concern to the First Amendment. Second, music could be said to advance all of the theories of free speech if taken at their broadest level of abstraction. If

178. *Id.* at 291–92.

179. *Id.* at 295.

180. 394 U.S. 557 (1969).

181. *Id.* at 568.

182. *Id.*

183. *Id.* at 565.

music is protected, what limiting principles exist to distinguish it from other forms of expressive liberty that might not advance those same values?

III. UNDERSTANDING INSTRUMENTAL MUSIC AS SPEECH

If instrumental music can be justified under any of the three dominant theories of free speech protection, its value to the speaker, the audience, and the collective society must be measured in relation to those theories. As with all forms of communication, music can be assessed from the perspective of the speaker (in this case, the composer and the performer) as well as from the perspective of its audience (for music, its listeners). For the composer and performer, music must be understood in terms of its expressive meaning. The value to the listener, in turn, includes how she thinks about and interprets the music and how it affects her thoughts and emotions—in short, how the listener *experiences* music. Each of these values, in turn, may be influenced by the distinct melodic and rhythmic elements of musical expression.

A. WHAT IS DISTINCTIVE ABOUT INSTRUMENTAL MUSICAL EXPRESSION?

A working definition of music is an important starting point. All musical instruments convey sound by creating vibrations that are transmitted through the air and internally processed by listeners' eardrums.¹⁸⁴ But of course all sound is processed this way, whether it is verbal language, music, or a thunder clap. It seems that every generation stereotypically views the next generation's popular music as so much noise. So, what are the distinctive factors that make something music and not noise?¹⁸⁵ The Oxford English Dictionary definition of music is “[t]he art or science of combining vocal or instrumental sounds with a view to beauty or coherence of form and expression of emotion.”¹⁸⁶ The formal definition is therefore based on some kind of intentionality to make sounds in a manner designed to do more than make noise. But it also, importantly, envisions aesthetic values of beauty and emotion.¹⁸⁷

184. See *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1125–26 (7th Cir. 1990) (Easterbrook, J., dissenting) (“All music is rhythmic pressure on the eardrum. Mozart’s string quartets, jackhammers, and humpback whales all produce rhythmic compressions.”), *rev’d sub nom.* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

185. Indeed, the freedom from sound or noise can also promote important values of autonomy. See generally TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* (2012); George Prochnik, Op-Ed., *I’m Thinking. Please. Be Quiet.*, N.Y. TIMES, Aug. 25, 2013, at 4.

186. SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1866 (William R. Trumble et al. eds., 5th ed. 2002).

187. I will set aside, for now, questions about whether there are important differences between popular music and music as a fine art because they are not germane to my main discussion.

1. *Expressing the Inexpressible*

One possible dilemma in defining the speech value of instrumental music is that it is sometimes said to be capable of conveying expression in a manner that may not be achievable through language (as the Huxley quote in the epigraph in the Introduction suggests). Indeed, as John Dewey aptly observed:

If all meanings could be adequately expressed by words, the arts of painting and music would not exist. There are values and meanings that can be expressed only by immediately visible and audible qualities, and to ask what they mean in the sense of something that can be put into words is to deny their distinctive existence.¹⁸⁸

Similarly, in his critique of the notion that only speech that conveys information or ideas ought to be protected by the First Amendment, Greenman writes “[i]f instrumental music conveys ideas, then more or less everything must.”¹⁸⁹ The challenge is whether these descriptions prove too much. That is, if music expresses something that cannot be reduced to language, then why, if at all, ought it be protected by the freedom of speech? This is one of the questions I explore below.

2. *Music Compared to Other Arts*

A different, but also reasonable, preliminary question is whether instrumental music is any different from other forms of nonverbal art, such as painting, sculpture, or dancing.¹⁹⁰ There are certainly similarities that bear mention. First, in the case of instrumental music as well as painting and sculpture, the composer, painter, or sculptor may have the intent to communicate a specific idea, emotion, or concept, or she may have no intent at all except to create something beautiful, interesting, or entertaining, and thereby worth looking at or listening to.

Another similarity is that in the case of all three arts, the expression may be open to multiple, varying, and even conflicting interpretations by the audience. This, too, presents something of a challenge for fitting them into speech theory because if there is not an objective, or at least widely understood, meaning attributable to the expression, it is hard to figure out how it can be classified as speech under the standard doctrine. For example, if there is no accepted understanding of the message or idea expressed in an artistic work, how would we know when the government was engaging in content or viewpoint discrimination?

¹⁸⁸ JOHN DEWEY, *ART AS EXPERIENCE* 74 (1934).

¹⁸⁹ Greenman, *supra* note 13, at 1348.

¹⁹⁰ I set aside verbal forms of artistic expression such as literature and poetry for the same reasons that I do not address musical lyrics.

An important factor that sets instrumental music apart from painting or sculpture, however, is that music is necessarily dynamic in two ways. All art must begin with its creation. For music, the creation is by the composer, for painting the painter, and for sculpture the sculptor. But once a painting or sculpture is completed (in most cases, setting aside certain forms of interactive or performance art), the conduct is complete. Even if different audiences view and understand the work in myriad ways, the artwork is itself static. A composer creates music, but music involves a second stage of conduct in its performance, which is dynamic. As Dewey described:

Music, having sounds as its medium, thus necessarily expresses in a concentrated way the shocks and instabilities, the conflicts and resolutions, that are the dramatic changes enacted upon the more enduring background of nature and human life. The tension and the struggle has its gatherings of energy, its discharges, its attacks and defenses, its mighty warrings and its peaceful meetings, its resistances and resolutions, and out of these things music weaves its web. It is thus at the opposite pole from the sculptural. As one expresses the enduring, the stable and universal, so the other expresses stir, agitation, movement, the particulars and contingencies of existences—which, nevertheless, are as ingrained in nature and as typical in experience as are its structural permanences.¹⁹¹

But it is not only the dynamism of the specific musical performance that distinguishes instrumental music from other forms of art. In addition, unlike other nonrepresentational art forms, instrumental music is capable of being created, performed, and reperformed and reinterpreted anew on repeated, potentially infinite, occasions.¹⁹² Each performance may convey the expression in a unique manner and be interpreted in a universe of ways. The variation in performance is important because each new performance reproduces the autonomy and cultural protection arguments potentially justifying First Amendment protection.¹⁹³

One could take these latter points to support the idea that music expresses in a different way than painting or sculpture. But dance can also be performed and interpreted by each new dancer and is equally dynamic in both senses. To be sure, while there are strong connections between dance and music (including the fact that most dance is performed to music), there are also differences worth mentioning. And

191. DEWEY, *supra* note 188, at 236.

192. For an interesting account of the multitude of interpretations of one of the most well-known pieces of classical music, see MATTHEW GUERRIERI, *THE FIRST FOUR NOTES: BEETHOVEN'S FIFTH AND THE HUMAN IMAGINATION* (2012).

193. *See infra* Part III.B.2.

there are factors that distinguish instrumental music from all other art forms. First, music is the only form of art that is communicated entirely through auditory means. There are no visual cues or associations to interpret, no images to look at, no colors, textures, or forms. Second, instrumental music is the only art form that is *always* nonrepresentational. A painting, sculpture, or dance can depict ideas and images in a literal way or an abstract way, opening the door to inquiries about whether only those art forms that convey an understandable message, as the Court suggested in *Spence*, ought to count as speech.¹⁹⁴ The composition and performance of instrumental music can never convey an idea or thought in a literal sense, and no listener can discern a literal meaning from hearing such music. Unlike other art forms, instrumental music can never be propositional, and therefore presents the purest form of artistic expression for First Amendment theory purposes. The next Subpart examines the ways in which instrumental music might be considered expressive.

B. THE SPECIFIC COMMUNICATIVE ASPECTS OF INSTRUMENTAL MUSIC

From these foundations, a theory of instrumental music as speech must build the case for why such music falls within the purposes of the First Amendment. We have already surveyed the three main theoretical justifications for music as speech—promoting democratic self-governance; advancing the search for truth; and promoting autonomy (however defined). If we were considering lyrical or vocal music, the discussion would be simpler because we could examine the lyrics for their content and discuss how the freedom to engage in those verbal expressions advanced any of these three main theories. But separating out the tonal and rhythmic components of musical expression presents significant theoretical (as well as doctrinal) complexities that neither the courts nor legal scholars have adequately addressed.

In the following Subparts, this Article discusses five different possible ways of understanding the communicative component of instrumental music. The first three are what I categorize as “cognitive claims,” each of which has power, but none of which ultimately can be squared with conventional speech theory in a way that is workable in either a theoretical or a doctrinal sense. The fourth category—music as an expression of cultural, religious, nationalist, or other social values—holds greater promise as a type of communication that the First Amendment ought to cover, even if it cannot be understood to involve particularized messages. The fifth and final category, which considers

194. See *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1125 (7th Cir. 1990) (Easterbrook, J., dissenting) (“Ballet rarely approaches absolute music in abstraction.”), *rev’d sub nom.* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

music as a powerful conveyor of emotional feeling and sensibility, also provides a more solid grounding for understanding instrumental music as speech.

I. Three Cognitive Claims

As the prior free speech theory discussion and the earlier case law survey suggest, an important justification for covering expression under the First Amendment is to promote the conveyance of specific messages, ideas, beliefs, and thoughts. In its most fundamental form, speech is about transmitting these things to others, which requires cognitive engagement. Thus, if instrumental music is “speech,” it is important to examine the degree to which it might facilitate cognitive reactions in its listeners. There are three possible ways of thinking about instrumental music and cognition.

a. Instrumental Music as Evocative/Associative of Cognitive Thought

One claim might be that instrumental music, though by definition nonverbal and nonpropositional (examined more below), nonetheless provokes meaningful cognitive responses in its listeners. Though music might not convey a particular message, it may be ultimately generative of conscious thoughts and ideas in the sense that some music is strongly associated or evocative of specific ideas or themes that are themselves defined by social context. I will call this the *associative claim*.

For example, a purely instrumental work may have a provocative or controversial title. Though the music itself is targeted by censors, it is not the musical content per se that is objectionable, but its association with the work’s title. Thus, as described briefly earlier, the song “Rumble,” recorded by Link Wray and the Wray Men, was banned by American radio stations in the late 1950s.¹⁹⁵ The explanation provided was that the song was associated with street violence, which broadcasters were presumably afraid would be inspired in those who listened to the song.¹⁹⁶ Again, although the work was itself purely instrumental, the music itself was associated with a social problem.

In another incident that may reflect this mode of thinking about instrumental music, Meyer Music Markets, a chain retailer in the Pacific Northwest, created a record labeling program modeled on the controversial efforts of the RIAA.¹⁹⁷ The retail chain then required that its outlets label copies of the Frank Zappa album, *Jazz from Hell*, with an “explicit lyrics” sticker, even though the album was comprised entirely of

195. Bernstein, *supra* note 7.

196. *Id.*

197. NUZUM, *supra* note 7, at 39.

instrumental music.¹⁹⁸ The retailer's labeling committee apparently assumed that the album must be controversial because Zappa was an outspoken critic of the RIAA and the Parents Music Resource Center, a private advocacy group whose founder, Tipper Gore, had strongly pushed for labeling standards.¹⁹⁹ It is also possible that, like the Link Wray instrumental, Zappa's album was censored because of the title of the album itself or because of the titles of some of the album's individual instrumental tracks (for example, "G-Spot Tornado"). Another example is instrumental music that is censored because of its association with a different art form, such as a motion picture. The BBC banned the broadcast of the purely instrumental theme song from the Frank Sinatra movie, *The Man with the Golden Arm*, because of the song's connection to a film about heroin addiction.²⁰⁰

In other instances, purely instrumental music may have specific communicative qualities that are intended by the performer and widely understood by the intended audience. For example, southern states banned African drumming in early American slave cultures during the late 1700s and early 1800s, because different drumming patterns communicated, and were understood to communicate, specific and concrete messages, such as signaling slave rebellions.²⁰¹

Other music has developed particular meanings within the relevant community. During World War II, anti-German resistance fighters in Belgium adopted the letter "V" as their symbol, representing both the French word for victory ("victoire") and the Flemish word for freedom ("vrijheid").²⁰² Officials at the BBC wanted to use the V symbol in their broadcasts to demonstrate support for the resistance fighters, and someone suggested using the Morse code symbol for V, which consists of three short signals and a long signal.²⁰³ BBC officials noticed that the famous opening of Beethoven's Fifth Symphony shared the same cadence as the Morse code symbol for V, and that became their signal to listeners to alert them to pro-ally broadcasts.²⁰⁴

Yet another example of music that conveys specific ideas or information is music cryptograms. Cryptograms use sequences of musical notes to convey messages by associating certain notes with letters of the alphabet, thus making it possible to hide a verbal message in a musical

198. *Id.*

199. *Id.* at 24–39.

200. Horsfield, *supra* note 7.

201. TED GIOIA, *THE HISTORY OF JAZZ* 7 (1997); ROBERT PALMER, *DEEP BLUES* 33 (1982).

202. GUERRIERI, *supra* note 192, at 211.

203. *Id.*

204. *Id.* at 212–14.

score.²⁰⁵ Many classical composers, most famously Bach, used cryptograms to embed family names and other messages into their compositions.²⁰⁶ There is even some historical evidence of the use of music cryptograms to carry out espionage or other actions the speakers hoped to hide from the government.²⁰⁷

Each of these is a possible instance of instrumental music being used to communicate in ways we might consider worthy of protection under the First Amendment. Under any of the three major theories—democracy, truth, or autonomy—one could make the case for protection of music because it is associated, directly or indirectly, with particularized messages. The problem with this understanding of music as speech is that if music is really just a code for verbal expression, then it may not actually be the musical component of the expression that is communicative. For example, if an African drum beat or pipe tune is intended by both performer and listener to convey a specific message—one that can be reduced to words, such as “help” or “warning”—then instrumental music in these contexts is really no different from Morse code. It is a series of beats or notes, rather than dots and dashes, that has specific and understood linguistic meanings. The same could be said for cryptograms.²⁰⁸ In this context, while there would be the easiest justification for categorizing instrumental music as speech, the reasons actually make music here less conceptually interesting because it is not really distinct from traditional speech. That is, the problem with this approach to considering instrumental music as speech is that the very representational associations the music has may in fact take it out of the realm of pure instrumental speech.

Moreover, this form of musical expression arguably already might be covered within an existing doctrinal framework, the law of conduct as speech. In *United States v. O'Brien*, the Court held that one of the factors in determining whether nonverbal conduct may be speech protected by the First Amendment is whether “the governmental interest [in regulating that conduct] is unrelated to the suppression of free expression.”²⁰⁹ Thus, under *O'Brien*, musical expression is conduct that is protected only when the government’s interest in regulating it is to address its speech or cognitive component. Under this doctrine,

205. *The Musical Cryptogram*, CLASSICAL.COM, <http://www.classical.com/musical-cryptogram> (last visited Feb. 2, 2015).

206. Marcus du Sautoy, *The Magic Numbers: A Fascination with Figures Runs Through the Music of Composers from Mozart to Bach*, GUARDIAN, Apr. 5, 2013, at 14; see also Wright, *supra* note 13, at 1247 & n.170 (suggesting that coded messages, including musical scores, are speech because even though they may not be generally understandable, they have meaning for their intended audience).

207. *The Musical Cryptogram*, *supra* note 205.

208. See ALEXANDER, *supra* note 127, at 8 (suggesting that it would be difficult to see how sign language or pictographs could be excluded from the category of speech).

209. 391 U.S. 367, 377 (1968).

explaining protection of instrumental music that conveys an unambiguous message is a relatively easy task. In the examples discussed above, the governments or other power holders have attempted to regulate instrumental music not because of its musical elements, but because of its cognitive message. But *O'Brien* permits the government to regulate the *noncognitive*, nonverbal part of the conduct if it has a sufficient interest. Taking away the message-conveying aspect of the African drumming signals, the conduct is simply the beating of the drum head surface, which is content-free conduct, like draft card burning. In fact, *O'Brien's* analysis would logically lead to the conclusion that the musical component of the expression is *not* protected, or at least that the speech and conduct cases do not explain constitutional protection for all instrumental music. For similar reasons, instrumental music that is censored because it is directly associated with an idea, through its title, lyrics, or otherwise, can be viewed as more closely linked to an appeal to an idea or cognitive function, and is unhelpful for understanding the purer or harder case.

b. Instrumental Music as Enhancing Other Communicative Messages

A second conceptualization of the cognitive value of instrumental music is that the melodic and rhythmic components of musical expression may sometimes interact in meaningful ways with lyrics or other verbal messages, combining to express something that is both greater than, and distinctive from, the lyrics alone. I refer to this as the *enhancement claim*. Consider a song that is read out loud, but with no musical accompaniment. The lyrics would be communicative in their own right. But they might not convey the ideas or information or sentiments in the same way—with the same emphases and dynamic tension—that they might if they were sung with musical accompaniment. Understood in this way, music may influence the lyrical text in a manner similar to the way that visual images sometimes enhance verbal messages. As one commentator notes,

[A] number of studies have concluded that texts incorporating visual images (sometimes referred to as “visuals”) are more effective at influencing people’s beliefs than texts containing only words (e.g., a book), sounds (e.g., instrumental music), or even texts combining both words and sounds (e.g., vocal recordings). . . . Sound recordings are the most powerful conveyor of beliefs after visuals.²¹⁰

The importance of instrumental music in enhancing lyrical expression is only understood if the musical components are separated out and

210. Claire Wright, *Reconciling Cultural Diversity and Free Trade in the Digital Age: A Cultural Analysis of the International Trade in Content Items*, 41 AKRON L. REV. 399, 464–65 n.337 (2008) (citing DANIEL J. LEVITIN, *THIS IS YOUR BRAIN ON MUSIC: THE SCIENCE OF A HUMAN OBSESSION* (2006)).

determined to have a communicative impact independent of, or more accurately, supplementing, the vocal elements of a performance.

If music has an identifiable speech-enhancing component that influences verbal expression in an independent, meaningful way, then protection of instrumental music can be justified on the grounds that it promotes self-governance, the search for truth, and self-realization. We might view with skepticism the censorship of an overtly political song whose message is enhanced by its musical elements because of the resulting interference with democratic self-governance. Consider, for example, the difference in inspirational meaning derived from singing a protest song such as “We Shall Overcome,” as opposed to simply reading its lyrics out loud.²¹¹ Similarly, a song whose lyrics are directed toward the exposition of nonpolitical ideas or information with similar musical enhancement might be viewed as protected under a truth-searching or autonomy theory.

There is even doctrinal support for the enhancement claim. In *Cohen v. California*,²¹² the Supreme Court reviewed the case of a man who was convicted for disturbing the peace when he wore a jacket bearing the words “Fuck the Draft” into a public courthouse.²¹³ Although the state asserted the power to regulate speech because of its offensive nature, the Court invalidated Cohen’s conviction, finding that the profanity that he used to express his clearly political views had speech value because it conveyed the emotional force of his beliefs.²¹⁴ In other words, the specific words Cohen chose to communicate his opposition to the government’s policy enhanced his message through their emotional impact. “Fuck the Draft” transmits the passion of Cohen’s opposition to the draft more powerfully than something more muted, like “That Darned Draft.” Although the analogy to *Cohen* is useful, its analysis still focused on the linguistic aspects of the speakers’ message.

211. Singing has long played a role in protests and social movements as both a means for conveying messages and inspiring participants. From the work of American folk singers Woody Guthrie and Pete Seeger in the twentieth century to the contemporary protest music of Pussy Riot, musicians have been incorporating social justice messages into their songs in an effort to express dissatisfaction with the status quo. See Bart Barnes, *Folk Singer Wanted Everyone to be Heard*, WASH. POST, Jan. 29, 2014, at A1; Chris Kornelis, *Woody Guthrie Gave Life to Protest Songs He Wrote, Sang*, WASH. TIMES, Oct. 11, 2012, at C10; Carol Rumens, *Pussy Riot’s Punk Prayer Is Pure Protest Poetry*, GUARDIAN (Aug. 20, 2012), <http://www.theguardian.com/books/2012/aug/20/pussy-riot-punk-prayer-lyrics>; see also BUFFALO SPRINGFIELD, *For What It’s Worth*, on BUFFALO SPRINGFIELD (ATCO Records 1967). The international scope of such expression is widely noted. See Anne Schumann, *The Beat That Beat Apartheid: The Role of Music in the Resistance Against Apartheid in South Africa*, 14 VIENNA J. AFR. STUD. 17 (2008); Sebnem Arsu, *The Music Started, and the Protest Paused*, N.Y. TIMES, June 15, 2013, at C1.

212. 403 U.S. 15 (1971).

213. *Id.* at 16. For an interesting evaluation of the role of the word “fuck” in American legal culture, see Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711 (2007).

214. *Cohen*, 403 U.S. at 25–26.

The limit of the enhancement claim, however, comes from the notion that the musical elements of the speech are inherently tied to verbal expression. If the reason music is expressive is solely derivative through its enhancement of the verbal, it may have little or no independent expressive value. To some degree (though the comparison is not quite complete), it is no different from an amplification device such as a megaphone. And if it has no distinctive substance, it would necessarily be regulated only where it is attached to the verbal message, and therefore unlikely to need additional First Amendment protection that would not already be afforded to the lyrics. Greenman observes:

One might say that music is protected because it usually complements language, that rulemaking tends to be categorical, and that instrumental music is only protected by dint of its association with vocal music. This is undoubtedly true to some degree. But even so, there must be some principle determining what is communicative other than “association with language.” People talk during violence, but violence is never communication.²¹⁵

Ultimately, the enhancement claim cannot stand alone as a justification to protect instrumental music under the First Amendment.²¹⁶

c. Instrumental Music and Cognition

To this point, I have conceded that instrumental music does not directly appeal to or stimulate any sort of cognitive reasoning. Before leaving the topic, however, it is worth considering whether I have given up too easily on a direct cognitive defense. I refer to this as the *pure cognitive claim*. Most theorists would argue that instrumental music is a form of nonpropositional expression, meaning that it does not intend (or does not *always* intend) to convey, nor can it be understood to convey, a particular, identifiable message.²¹⁷ While that is undoubtedly the case, that is not tantamount to saying that instrumental music does not stimulate, inspire, suggest, or provoke cognitive processes.

Indeed, some music theorists reject the idea that instrumental music is not representational. For example, as Karol Berger observes, “‘most or even all music will likely have to be considered representational,’ for reasons analogous to those brought forward by Richard Wollheim in

²¹⁵ Greenman, *supra* note 13, at 1367 n.136.

²¹⁶ One possibility that I do not account for is that musical expression may be inextricably linked not only to its lyrics and title, but also to its social history and the context in which it is composed, performed, heard, and experienced. If this is the case, then the theoretical attempt to disaggregate music into its component parts may be misguided. If, indeed, music cannot be disentangled from its social history, this would present a strong, alternative claim for why it is covered by the First Amendment. I am grateful to Rebecca Aviel for pointing out this potential complexity. Because it is beyond the ambition of this Article, for now I set this argument aside for future discussion.

²¹⁷ Tushnet, *supra* note 3, at 203 n.117; see also BEZANSON, ART AND FREEDOM, *supra* note 3, at 280 (describing most art as nonpropositional).

support of his thesis that both figurative and abstract painting are species of representational art.”²¹⁸ If this point is valid, however, what exactly is being represented? Berger suggests that the music may be representative of a person or object:

In instrumental music, or in vocal music with independent (*obbligato* is the technical term) instrumental line(s), the instrumental line can sometimes be attributed to a source that resembles to a certain degree a human person or another object we could name, but it can also remain so abstract that we will not be tempted to attribute it to a human or any other kind of recognizable source.²¹⁹

One could object to the claimed representational value, here, because of Berger’s qualification that such attribution can be made only “sometimes.” However, spoken or written words can sometimes also be communicated in ways that do not have representational value, yet we do not dispute their protection under the First Amendment.²²⁰

Similarly, the formal reliance on language as a precondition of constitutional protection may overemphasize the belief that all language conveys unambiguous ideas or information. Language cannot always convey experiences the way that the arts are capable of doing. Berger argues:

Language’s attempt to name the particular is always frustratingly imprecise when compared with a direct experience of the particular, because the name brings the particular under a general concept, associates it with many other particulars, and thus blunts the sharp edges of its particularity. But . . . this tells us something about the nature of language, not of music.²²¹

In a widely cited letter, Felix Mendelssohn expressed a similar, though counterintuitive sentiment:

People complain usually that music is so ambiguous, that it is so doubtful what they should think with it, while words are understood by anyone. But for me it is exactly the other way around. And not just with whole speeches, also with individual words; also these seem to me so ambiguous, so indefinite, so easily misunderstood in comparison with true music What a piece of music which I love tells me are for me not thoughts that are too indefinite to be grasped in words, but ones too definite. Thus I find in all attempts to express these thoughts in language something right, but also something insufficient. . . . because a word does not mean for one what it means for another, because only a song (without words) can tell one the same thing it tells

218. KAROL BERGER, A THEORY OF ART 173–74 (2000).

219. *Id.* at 174.

220. And, of course, a single word’s meaning may vary widely depending on its usage, context, and emphasis. *See generally* Fairman, *supra* note 213.

221. BERGER, *supra* note 218, at 209.

another, can awaken in him the same feeling, a feeling, however, which does not express itself in the same words.²²²

Nietzsche similarly observed that “in relation to music, all communication by means of words is of the shameless sort.”²²³ If we are to accept Mendelssohn’s claim, however, we must be willing to embrace a paradox—that instrumental music is both a precise form of expression and, at the same time, not reducible to words. Furthermore, the meaning is apparently, and unapologetically, subjective. For Mendelssohn writes about not all works of music, but works that *he* loves, and what they tell him.

Furthermore, instrumental music could be conceived as conveying cognitive messages not about language, but about mathematical patterns, sequences, and harmonies. After all, as others have noted, in ancient Greece, music was considered to be one of the four mathematical liberal arts, or quadrivium.²²⁴

Another question is whether this cognitive understanding of instrumental music differs from its value as expressive of emotion—or even if it does differ, how it can be conceptualized as expressive in a manner with which the First Amendment ought to be concerned. The emerging interdisciplinary field of music cognition, in which scholars study the connection between musical expression and cognitive function, may lend some insights into this somewhat non-intuitive claim.²²⁵ Even if a connection between instrumental music and cognition were established, however, there may be an important expressive difference between stimulating cognitive *functioning* and communicating an identifiable *message*. In any event, we probably still know far too little about this field to suggest that a legal theory be built on its foundation.

Furthermore, it is unclear which of the predominant speech theories this definition of musical expression fits under. Even if we accept that instrumental music conveys definite thoughts in the sense that Mendelssohn described, without a common understanding of such thoughts, it is impossible to determine either why the expression is valuable or how the state would know that it needs to be suppressed (or, for that matter, how a court would know that it deserves First Amendment protection). Thus, it is difficult to see how this type of cognitive understanding could be justified under a democratic self-governance theory. Perhaps, however, the unspecified cognitive thoughts generated by instrumental music may help a listener to understand certain truths, and that this conception is actually supported by the search

222. *Id.* at 210.

223. LAWRENCE KRAMER, *EXPRESSION AND TRUTH ON THE MUSIC OF KNOWLEDGE* 98 (2012).

224. Carroll, *supra* note 15, at 1422.

225. *See, e.g.*, HANS HEINRICH EGGBRECHT, *UNDERSTANDING MUSIC: THE NATURE AND LIMITS OF MUSICAL COGNITION* (2010).

for truth rationale, or some versions of it. Just because the state cannot identify the area of inquiry or thought does not mean that its interference with musical expression does not inhibit the individual's ability to reach that truth on her own. And it does not even have to be an abstract or metaphysical truth. Music might lead one to understand truths in a philosophical or spiritual sense, if not a political (narrowly defined) one.

Finally, if music stimulates nonspecific cognitive processes in the listener, it is certainly true that autonomy is undermined by the government's prevention of the ability to hear that music. The Court's strong admonition in *Stanley* about the impropriety of the state's role in controlling what we may read or watch surely applies to what we listen to.²²⁶ If this is true for legally obscene movies, so it must be true for the experience of listening to music of one's choice, particularly if that music is understood to have a specific cognitive content. Ultimately, however, the idea of instrumental music as cognitive expression lacks sufficient support at this point to justify its coverage as speech under the First Amendment.

2. *Instrumental Music as an Expression of Culture, Religion, and Other Social Values*

Music that is not tied to a specific idea or message can nonetheless be closely associated with cultural, ethnic, religious, and social values. Here, we can identify a distinct expressive value to the instrumental aspects of music, and one that can be harmonized with specific First Amendment theories. We can call this the *cultural claim*. There are numerous examples of instrumental music censorship because of these culturally expressive values that provide a context for understanding why constitutional protection might be important.

Instrumental music expresses culture in several important ways. First, while most North Americans and Europeans are familiar with the Western twelve-note chromatic scale, music from other cultures is distinctly identifiable by its reliance on other scales that include additional notes that fall in between the tones of those twelve notes.²²⁷ This is exemplified by the Indian raga, which uses intervals smaller than those in the Western scale, creating a sound that resonates of South Asian culture. Another example involves the African influence on American roots music, particularly the blues, which uses notes, such as the so called "blue" note, a pitch that falls between a major and minor third above the chord's root. The blue note is not commonly used in American music that has been heavily influenced by its European antecedents.

226. 394 U.S. 557, 565 (1969).

227. See Munkittrick, *supra* note 4, at 670.

Some forms of singing involve no words, but instead use tones and timbres that are indigenous to and distinctive of a particular culture. One commentator observes:

Cultural preferences for particular vocal timbres are, like the entire process of vocalization, essentially intuitive. We learn how a singer's voice should sound by hearing singers, and the preferred timbres of our own musical culture are acquired early and usually taken for granted. The automatic nature of this conditioning is apparent when we hear singing from an unfamiliar culture with aesthetic values different than our own.²²⁸

A paradigmatic example of this phenomenon is Tuvan throat singing, which involves the use of the singer's vocal apparatus to produce a droning sound while simultaneously making audible melodic sounds through the production of overtones.²²⁹ Such singing "both imitates and interacts with the mountainous, riverine landscape of the Tuvan countryside, and the horse-centered lifestyle of the Tuvan people."²³⁰

Differences in meter are also important and, again, often specifically identifiable with particular cultures. Thus, rhythmic and polyrhythmic patterns may be distinctively associated with culture. The Black Codes' bans on slave drumming were, at one time, thought to have been an attempt to eliminate African polyrhythms from black music in America.²³¹ More recently, African rhythms were the source of at least one concern about the emergence of rock and roll music in the 1950s, as censors worried that the beats were highly sexualized.²³² There was a pervasive and fairly transparent racial bias embedded in these concerns about the rhythms of rock as well.²³³

In addition, adapting performances of the music of one culture to the instruments, scales, rhythms, and musicality of a very different culture can produce a completely new cross-cultural musical creation that evokes new meaning. An acute example of this is the performance of Brubeck's American jazz classic "Take Five" by Pakistan's Sachal Studios Orchestra.²³⁴ This type of musical cross-fertilization is also represented in the mutual influence of African and American music on

228. JAMES R. COWDERY & STAN SCOTT, *EXPLORING THE WORLD OF MUSIC: AN INTRODUCTION TO MUSIC FROM A WORLD MUSIC PERSPECTIVE* 163 (Dorothea E. Hast ed., 1999).

229. *Id.* The Tuvans are nomadic herders who live in the mountains of Central Asia. *Id.*

230. *Id.*

231. PALMER, *supra* note 201, at 36–37. For a discussion of the culturally unique polyrhythms of African music, see GIOIA, *supra* note 201, at 11.

232. LINDA MARTIN & KERRY SEGRAVE, *ANTI-ROCK: THE OPPOSITION TO ROCK 'N' ROLL* 53 (1993). Of particular interest here is the announcement of a San Antonio City Councilman that "[t]he First Amendment should not apply to rock and roll." *Id.* at 271.

233. *See id.* at 41.

234. SACHAL STUDIOS ORCHESTRA, *Take Five*, on *SACHAL JAZZ: INTERPRETATIONS OF JAZZ STANDARDS & BOSSA NOVA* (Sachal Music 2011). I am grateful to Ash Bhagwat, from both a musical and analytical standpoint, for introducing me to this performance.

one another during the emergence of jazz music in the eighteenth and nineteenth centuries.²³⁵ “Anthropologists call this process ‘syncretism’—the blending together of cultural elements that previously existed separately.”²³⁶ This also reflects the notion that what probably “feels” like it belongs to a particular culture is at least in part socially constructed.²³⁷

Preservation of music has long been an essential component of maintaining culture over generations. The preeminent jazz historian Ted Gioia notes:

The concept of progress plays a modest role in most ethnic musics The griots of West Africa aim to preserve their musical tradition as it is handed down to them. This is not a mere aesthetic choice, but a cultural imperative: they are the historians of their society and must maintain the integrity of their precious musical heritage. Such an attitude defines casual experimentation.²³⁸

Consistent with the understanding that the association between music and culture is strong, the U.N. Educational, Scientific, and Cultural Organization and World Intellectual Property Organization crafted the 1982 *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*. These standards define “expressions of folklore” to include: “[p]roductions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community . . . or by individuals reflecting the traditional artistic expectations of such a community, in particular . . . (ii) musical expressions, such as folk songs and instrumental music.”²³⁹

Music can also be closely associated with religion, making it a potential target for government regulation. As discussed earlier, two recent federal cases involved challenges to public schools’ efforts to ban instrumental music because of its religious associations.²⁴⁰ In both cases, the schools chose to ban student musical performances because they believed that permitting them would raise concerns about the schools’ neutrality toward religion, generating complaints from parents and potentially violating the Establishment Clause.²⁴¹ But in neither case did the schools categorically ban the performance or study of religious

235. See GIOIA, *supra* note 201, at 5.

236. *Id.*

237. Carroll, *supra* note 15, at 1417 (“Music has no intrinsic definition. It is a cultural category consisting of any sounds that those in a society or culture designate as ‘music’ instead of ‘noise,’ along with any notation, recording, or other means of capturing or representing such sounds.”).

238. GIOIA, *supra* note 201, at 200.

239. U.N. EDUC., SCIENTIFIC, & CULTURAL ORG. & WORLD INTELLECTUAL PROP. ORG., MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS 9–10 (1985).

240. *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009); *Stratechuk v. Bd. of Educ.*, 587 F.3d 597 (3d Cir. 2009).

241. *Nurre*, 580 F.3d at 1096; *Stratechuk*, 587 F.3d at 604.

music.²⁴² In *Nurre*, the school expressly permitted performance of religious music at midyear concerts if the purpose of the performance was for the “artistic value” and was performed along with an “equal number of other non-religious works.”²⁴³ In *Stratechuk*, the school district’s policy permitted the study of religious music in the curriculum “provided that it achieve[d] specific goals of the written curriculum in various fields of study; that it [was] presented objectively; and that it neither inhibit[ed] nor advance[d] any religious point of view.”²⁴⁴ In these examples, we see government actors connecting even instrumental music with religious belief, and the understanding that its expression conveys a message or idea of religious significance that the state did not want to appear to endorse or favor. Interestingly, the schools’ policies raise the question of whether musical expression takes on a different meaning depending on the context in which it is performed. As Dewey once asked, “[i]s the same music nonrepresentative when played in a concert hall and representative when it is part of a sacramental service in a church?”²⁴⁵

Conversely, instrumental music can be associated with sacrilege, or with conduct or values that are sacrilegious. In many sectarian-dominated government regimes, censorship of instrumental music on these grounds is common. Though scholars of Islamic culture have divergent views about music’s role in Islam,²⁴⁶ the previously Taliban-controlled Afghanistan²⁴⁷ and the current Iranian government²⁴⁸ have banned instrumental music because of its association with non-puritanical values, licentious lifestyles, and alcohol or drug use. And, of course, religiously based music censorship is by no means limited to Islam, as the Catholic Church’s ban on the tritone and descant make clear.²⁴⁹

Music can not only be reflective or representative of existing or past cultures, but also may operate to construct and define cultures. The experience of banned Jewish composers and performers during the Nazi regime reflects their struggle to maintain two important strands of musical influence—they were both Germans and Jews and both were constitutive of their musical culture.²⁵⁰ The Reichsmusikkammer tried to

242. *Nurre*, 580 F.3d at 1091; *Stratechuk*, 587 F.3d at 599–600.

243. *Nurre*, 580 F.3d at 1091.

244. *Stratechuk*, 587 F.3d at 599.

245. DEWEY, *supra* note 188, at 223. Because I am concerned in this Article only with First Amendment coverage, I do not address the idea that even if instrumental music is covered, it might still be subject to some regulation depending on the context in which it is performed.

246. Abd-Allah, *supra* note 10, at 30–31.

247. Moss, *supra* note 10.

248. Tait, *supra* note 10.

249. See Rohrer, *supra* note 95; BLECHA, *supra* note 97, at 15–16.

250. HAAS, *supra* note 9, at 231–35.

reconstruct domestic culture by reimagining German music without its important Jewish influences. At the same time the Kulturbund was its attempt to isolate Jewish musical culture and distinguish and separate it from what was “truly” German.²⁵¹ More contemporary examples of music (albeit in these cases, lyrical as well as instrumental) as constitutive of culture are communities that have formed around groups such as the Grateful Dead (the “Deadheads”)²⁵² and Insane Clown Posse (the “Juggalos”).²⁵³ Each of these groups self identifies as its own distinctive subculture.

To the extent that governments might censor instrumental music to destroy or suppress cultural, ethnic, or religious values or identities or as a way of implementing moral or social regulation, they are engaged in a type of content discrimination that is familiar to traditional First Amendment doctrine. With respect to First Amendment theory, viewing instrumental music as an expression of cultural, religious, social, and moral values suggests that at the very least it should be covered under a truth-seeking and autonomy-based theory of freedom of speech. If we view the First Amendment as protecting a diversity of ideas, beliefs, and values about culture, religion, and society, protection of this aspect of musical expression advances the ability to experience cultural diversity as reflected through that music. Still, one might object to the truth-based claim on the ground that even in this context, music is not expressing particular ideas or beliefs, and its suppression does not interfere directly with the individual or the collective desire to achieve truth, assuming we are viewing the achievement of truth as some sort of rational process.

Turning to autonomy-based theories, the cultural claim might lead to the conclusion that autonomy over the formation of one’s cultural, religious, or moral identity is advanced by protection against government control over the range of musical expressions of that identity. Identity formation might not be ideational or involve the exercise of judgments, and therefore might not fall within Scanlon’s concept of autonomy. But it may be an important aspect of self-realization, as conceived of by Redish, and also mesh well with Shiffrin’s thinker-based autonomy theory,²⁵⁴ which acknowledges the value of becoming a distinct individual (cultural and religious affinity) and living among others (distinguishing oneself as well as connecting with others through culture and religion).

251. *Id.*

252. GRATEFUL DEAD: THE ILLUSTRATED TRIP 138 (Jake Woodward et al. eds., 2003).

253. Scott Mervis, *Insane Clown Posse Is Back in the Dark Carnival*, PITT. POST-GAZETTE, May 20, 2010, at W10. These cultures are much more than what might be called “fan clubs,” but are, by their nature and self-identification, subcultures of society. In an interesting twist, Insane Clown Posse and some of its fans recently sued the Federal Bureau of Investigation for labeling the Juggalos as a “gang.” Dave Itzkoff, *Rap Group Defends Fans, with Lawsuit*, N.Y. TIMES, Jan. 9, 2014, at C1.

254. Shiffrin, *supra* note 148, at 289–90.

This understanding of expression also distinguishes instrumental music from other autonomous conduct that we would agree should not be protected, such as engaging in violence,²⁵⁵ “trading on the stock market,”²⁵⁶ or “playing tennis.”²⁵⁷

I have thus far set aside the possibility that instrumental music’s expression of culture, religion, or values might support a democracy-based theory of free speech. However, there is also an argument that instrumental music might convey values of patriotism and nationalism.²⁵⁸ Instrumental music’s ability to create social cohesion may in fact enhance democracy, though not in the traditional discursive way that free speech theorists typically identify. Thus, for example, the marches of John Philip Sousa or the national anthems of other nations could be said to be strongly identified with such values. Government control of instrumental music to instill nationalism or suppress anti-nationalist values could be construed as a form of viewpoint discrimination that would justify protecting speech even under a narrow version of the democratic self-governance speech theory. However, it is unclear whether music such as Sousa’s is inherently nationalistic or patriotic, or whether it is actually just a different example of the associative claim. Sousa’s compositions, after all, bear patriotic titles and many of his songs have lyrics. Moreover, even nationalism and patriotism can be conceptualized as cultural values, which would place this example neatly within the cultural claim, along with the notion that protection of nationalistic music advances truth seeking and autonomy-based speech values.

3. *Instrumental Music as Expression of Emotion*

A common thread of argument is that instrumental music is communicative because it appeals not to reason, but to emotion. Indeed, the Supreme Court has recognized music’s capacity to appeal to emotion, albeit without a full explanation of that function.²⁵⁹ Like many forms of verbal expression, instrumental music has the capacity to inspire, sadden, excite, give joy, anger, confuse, frighten, and lead to other forms of emotional or visceral responses in the listener. I will label this the *emotional claim*.

Perhaps the most intuitive argument for music’s expressive value is its ability to evoke noncognitive responses in listeners, as well as in its composers and performers. That is, completely disassociated from titles, linguistic signals, and other forms of art, instrumental music can be

255. Greenman, *supra* note 13, at 1339.

256. Bork, *supra* note 11, at 25.

257. *Id.*

258. For a general consideration of the nationalistic elements of patriotic symbols, songs, and ceremonies, see Alan K. Chen, *Forced Patriot Acts*, 81 DENV. U. L. REV. 703 (2004).

259. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

expressive in important ways that elicit emotional and spiritual responses. The emotional claim therefore perhaps presents the cleanest analytical argument for categorizing purely instrumental music as a form of constitutionally protected expression.

This conceptualization of the power of music goes back to at least Plato, who wrote that “[m]usical training is a more potent instrument than any other, because rhythm and harmony find their way into the inward places of the soul, on which they mightily fasten, imparting grace, and making the soul of him who is rightly educated graceful, or of him who is ill-educated ungraceful.”²⁶⁰ Plato, who may have been influenced by Socrates’s views on music, believed that “specific scales, rhythms, and instruments can affect human passions in specific ways and thus form character.”²⁶¹ Aristotle, in turn, believed that “[m]usic . . . directly imitates (that is, represents) the passions or states of the soul . . . when one listens to music that imitates a certain passion, he becomes imbued with the same passion.”²⁶²

All three, however, claimed that precisely because music had the power to instill passion, it also had the potential for dangerous influences on the people. Plato was probably the most wary of the dark side of musical expression, attributing moral decline in ancient Greece to the composition of licentious musical works.²⁶³ He warned that “[a]ny musical innovation is full of danger to the whole State, and ought to be prohibited. . . . [W]hen modes of music change, the fundamental laws of the state always change with them.”²⁶⁴ Similarly, Aristotle wrote of his concern for music’s rousing of “ignoble passions.”²⁶⁵

Hegel also explored musical expression in his lectures on aesthetics, although to a lesser degree than he examined other fine arts. Interestingly, given the modern tendency (generally, and under the law) to focus on music’s lyrical elements, Hegel’s understanding of musical expression emphasized the music and observed that when words accompany music, they are peripheral to the music itself. He wrote, “the text is the servant of the music and it has no other worth than creating for our minds a better idea of what the artist has chosen as the subject of his work.”²⁶⁶ Hegel conceived of instrumental music as originating in “interjection,” which he defined as the immediate utterance of feeling or

260. PLATO, *supra* note 94, bk. III, at 401.

261. BERGER, *supra* note 218, at 120.

262. DONALD JAY GROUT & CLAUDE V. PALISCA, *A HISTORY OF WESTERN MUSIC* 7–8 (4th ed. 1988).

263. Isobel Henderson, *Ancient Greek Music*, in *I THE NEW OXFORD HISTORY OF MUSIC* 395 (Egon Wellesz ed., 1957).

264. PLATO, *supra* note 94, at 424.

265. GROUT & PALISCA, *supra* note 262, at 8.

266. 2 G. W. F. HEGEL, *AESTHETICS: LECTURES ON FINE ART* 934 (T. M. Knox trans., 1975). In drawing on aesthetic theory, I follow the lead of Sheldon Nahmod’s excellent work on visual arts. See *generally* Nahmod, *supra* note 3.

emotion.²⁶⁷ For him, rhythm, harmony, and melody free the soul to hear its inner movement and be moved by what it hears.²⁶⁸ More specifically, through its conveyance, music allows listeners to experience feelings of love, longing, joy, and grief.²⁶⁹

Schopenhauer also examined the emotional component of instrumental music, but viewed its evocation of the emotional at a more abstract level. He distinguished the feeling of specific emotions about people, things, or events from general feelings. “[M]usic does not express this or that particular and definite pleasure, this or that affliction, pain, sorrow, horror, gaiety, merriment, or peace of mind, but joy, pain, sorrow, horror, gaiety, merriment, peace of mind *themselves*.”²⁷⁰

Dewey similarly thought of music as an art that directly stirred emotional responses. “[I]n itself the ear is the emotional sense,” he wrote.²⁷¹ He elaborated, “Sounds have the power of direct emotional expression. A sound is itself threatening, whining, soothing, depressing, fierce, tender, soporific, in its own quality.”²⁷² Moreover, it was specifically the *instrumental* elements of musical expression that bore this capacity. “Through the use of instruments, sound is freed from the definiteness it has acquired through association with speech. It thus reverts to its primitive passional quality.”²⁷³ “[B]y the use of harmony and melody of tone,” he wrote, music “introduces incredibly varied complexities of question, uncertainty, and suspense wherein every tone is ordered in reference to others so that each is a summation of what precedes and a forecast of what is to come.”²⁷⁴

On this understanding, instrumental music has the capacity to inspire, sadden, excite, give joy, anger, confuse, frighten, and lead to other forms of emotional or visceral responses in the listener. While this understanding is itself intuitively accepted by many, it is not an indisputable interpretation of the expressive qualities of music. There is a complex and rich discourse in the field of philosophy of music that engages this topic as well, though a complete exposition of the competing theories is beyond the scope of this Article.²⁷⁵

267. HEGEL, *supra* note 266, at 934.

268. *Id.*

269. *Id.*

270. ARTHUR SCHOPENHAUER, I THE WORLD AS WILL AND REPRESENTATION 261 (1958).

271. DEWEY, *supra* note 188, at 237.

272. *Id.* at 238.

273. *Id.* at 239.

274. *Id.*; see BERGER, *supra* note 218, at 120 (“Music’s historical edge over painting or poetry consists only in this, that, with its inherent tendency toward abstraction, it was able to provide moods without the admixture of anything else earlier than the other arts were.”).

275. Andrew Kania, *The Philosophy of Music*, STAN. ENCYCLOPEDIA PHIL. (July 31, 2012), <http://plato.stanford.edu/entries/music/#3>.

Understanding instrumental music as communicating and evoking emotion provides arguments both for and against treating it as speech under the First Amendment. It most likely weighs against arguments from a democratic self-governance perspective, even under broad views of what contributes to democracy.²⁷⁶ Meiklejohn argued that the arts were constitutionally protected because they are a form of communication that allows voters to derive “knowledge, intelligence, [and] sensitivity to human values,”²⁷⁷ but it has never been clear in what way the arts in general, or music in particular, facilitate that process in voters. We typically view the formation of political beliefs and ideals as a deliberative and at least quasi-rational process, so it is difficult to see how the protection of a form of expression that appeals exclusively to emotional sensibilities advances the political process. Even under a more nuanced version of the democratic self-governance theory, such as Post’s,²⁷⁸ it is unclear how emotional expression contributes to public discourse.

Some theorists might suggest that communication that appeals purely to passion or emotion has at least some democracy-promoting function. For example, Weinstein acknowledges that there is some power to the argument that pornography should not be excluded from the category of expression because it appeals to passions rather than reason.²⁷⁹ But he adds that it would be odd to then rely on arguments that passion-eliciting speech should be protected under a rational thought, reason-based speech theory, which is at the core of most democracy-based arguments.²⁸⁰ Others, like Martha Nussbaum, however, suggest that the distinction between emotion and cognitive deliberation is overstated, and that emotions, such as love and grief, are “intelligent responses to the perception of value.”²⁸¹

Consideration of the value of speech that is purely or primarily emotional to either the individual or the collective search for truth is more complex. As discussed earlier, most truth-based theories, though they extend the freedom of speech realm well beyond the political, are still largely about truths in opinion or ideas, whether they be political, religious, or philosophical. Even when focused on spiritual truth, these theories tend to be about morality and religiosity (or perhaps, as I argue,

276. See, e.g., Meiklejohn, *supra* note 132.

277. *Id.*

278. See generally Post, *supra* note 139.

279. James Weinstein, *Free Speech Values, Hardcore Pornography and the First Amendment: A Reply to Professor Koppelman*, 31 N.Y.U. REV. L. & SOC. CHANGE 911, 921 (2007).

280. *Id.*

281. MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS I (2001); see Andrew Koppelman, *Free Speech and Pornography: A Response to James Weinstein*, 31 N.Y.U. REV. L. & SOC. CHANGE 899, 905 n.42 (2007).

culture) rather than more abstract conceptions of the spiritual. So truth theorists tend to underscore the achievement of truth through speech's contribution to cognitive evaluation and assessment. Even a strong claim that instrumental music conveys emotion, then, would not necessarily satisfy the truth-finding justification for its protection.

Autonomy theories appear to present a stronger claim with regard to protecting instrumental music on an account that understands music as expressing the emotional. The power of that claim, however, depends on one's definition of the scope and purpose of autonomy. That is, the limits of autonomy theory to justify the protection of instrumental music as a form of emotional expression are, like other critiques, related to questions about the level of generality at which autonomy is defined. The challenge is to say something more than that protection of instrumental musical expression promotes individual self-realization, fulfillment, and autonomy.²⁸² What distinguishes instrumental music as a form of autonomous expression turns on what type of autonomy we are trying to protect.

Mill spoke about discovery of *ideas* and protection of *opinion*, both of which fail to encompass the emotional.²⁸³ Scanlon's articulation of autonomy focuses on the protection of the autonomous individual's ability to determine for himself "what he should believe or what he should do."²⁸⁴ These iterations of autonomy theory suggest that the individual must be able to evaluate and advance independent reasons, and weigh the value of others' opinions against countervailing opinions and evidence.²⁸⁵ Even divorced from democracy and truth finding, this autonomy theory seems based on protecting the individuals' ability to reason and form opinions without governmental interference or distortion, which seems cognitive, not emotional.

However, viewing concepts of autonomy from the perspectives of Redish, Baker, and Shiffrin may provide a sounder basis for claiming that emotionally expressive musical speech promotes autonomy in a particularized manner. A notion of emotional autonomy as a path to individual self-realization leads to a robust argument for First Amendment protection for instrumental music. Redish's self-realization is a little harder to link to the emotional claim, as even his broad argument for the autonomous individual seems directed at promoting the individual's ability to make "life-affecting decisions," which implies some sort of deliberative, as opposed to emotional, process.²⁸⁶ Although Baker

282. Tushnet, *supra* note 3, at 205–07. Because in the end, autonomy is promoted by lots of things that are not protected by the First Amendment.

283. MILL, *supra* note 159, at 13–14.

284. Scanlon, *Theory*, *supra* note 166, at 216.

285. *Id.*

286. Redish, *supra* note 168, at 593.

argues that an autonomy theory presents the stronger case for protecting what he calls “compositional” music, he never articulates precisely how protection of musical expression contributes to the version of autonomy he embraces.²⁸⁷ He suggests that “[a] person’s autonomy might reasonably be conceived as her capacity to pursue successfully the life she endorses—self-authored at least in the sense that, no matter how her image of a meaningful life originates, she now can endorse that life for reasons that she accepts.”²⁸⁸ If we conceive of that as including the individual’s capacity to pursue an autonomous emotional life—through the vehicle of composing, performing, or listening to music that makes her feel or not feel sad, excited, angry, exhilarated—then Baker’s form of autonomy would support protecting instrumental music on the emotional claim.

This type of autonomy claim is also supported by the increasing body of neuroscience research, which suggests that the emotions elicited by musical expression have direct biological effects on the human brain, including the release of dopamine, a chemical neurotransmitter that produces pleasurable stimulation and causes the body to desire more from the source of stimulation.²⁸⁹ One can imagine a science fiction plot in which the state is able to control—through laws, force, and medication—individuals’ emotional states in a manner that precludes them from self-realization in more than a decisionmaking autonomy sense, but from interfering with the core of their very identities. Such totalitarian control would be viewed as unacceptable, even if there were no comparable interference with traditional forms of speech and political deliberation. It is this type of loss of autonomy that Shiffrin’s thinker-based approach best addresses. Her references to “apprehending the true” and “imagination” imply protection of emotional autonomy as much as the freedom to deliberate rationally over more concrete aspects of existence.²⁹⁰ Moreover, “responding authentically”²⁹¹ may quite arguably encompass being allowed to live one’s life as the emotional person one chooses to be.

287. Baker, *supra* note 148, at 271.

288. *Id.* at 253.

289. See Robert J. Zatorre & Valorie N. Salimpoor, *Why Music Makes Our Brain Sing*, N.Y. TIMES (June 7, 2013), <http://www.nytimes.com/2013/06/09/opinion/sunday/why-music-makes-our-brain-sing.html> (“When pleasurable music is heard, dopamine is released in the striatum . . . which is known to respond to naturally rewarding stimuli like food and sex and which is artificially targeted by drugs like cocaine and amphetamine.”).

290. Shiffrin, *supra* note 148, at 289–90.

291. *Id.*

C. SPEECH THEORY AND INSTRUMENTAL MUSIC

As we have seen, one of the central challenges to treating instrumental music—which is similar to much but not all other artistic expression—as speech is that music inherently lacks a particularized message or idea. In fact, one of the reasons music can be so uniquely expressive is in this very absence of message. It may well be that speech theorists have made too much of the line between representational and nonrepresentational expression. Words can sometimes be representational (taken for their literal meaning), and can sometimes be nonrepresentational, symbolic, enhance other speech, bear hidden meaning, or even convey utter nonsense.²⁹² A painting, sculpture, or even dance, can be a direct representation or realist depiction of an event or action, or it can be an abstract or even meaningless image, structure, or movement. One solution is to suggest that all forms of art are covered by the First Amendment when they are representational, but not when they are nonrepresentational.²⁹³ But this would be normatively unsatisfactory because it would be massively under-inclusive to the extent that we find expressive value in nonrepresentational communication. And more importantly, on this view, instrumental music would never be covered because, as we have seen, isolated from its title, lyrics, and associations, it is always nonrepresentational.

As I argue above, none of the theories about how instrumental music communicates fit comfortably under a First Amendment theory based on promoting democracy. After full consideration of the possible manners in which instrumental music can be expressive, my argument comes down to a combination of theories and justifications. Instrumental music can best be understood as speech under the First Amendment both through the recognition that it advances expression of important forms of cultural, religious, nationalist, and other social values, *and* to the extent that music has important aesthetic and emotional expressive values, even if in both instances it fails to advance a precise, identifiable message. The cultural claim, as discussed in more detail above, suggests that music is an important element of constructing, expressing, or representing values. As a reflection of cultural, religious, and other social values, music serves a cohesive function in that it brings people together in important ways.

292. On the last point, one would do well to carefully read Joseph Blocher's insightful article. See generally Blocher, *supra* note 79.

293. Cf. James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865, 888–92 (2007) (considering the argument that pornography might be protected when the producer's intent is to change attitudes about sexual mores but not when the producer's intent is merely to provide sexual stimulation).

This cohesion building function is clearly illustrated by an anecdote about a performance by the Boston Symphony upon the announcement of President Kennedy's assassination. The conductor, Erich Leinsdorf, after announcing that the President had died, spontaneously changed the program to include the funeral march from the "Eroica," Beethoven's Third Symphony.²⁹⁴ Recordings of the audience reflect their shocked reaction to the news, followed by their silent contemplation of the performance, which created a cultural experience of shared grieving (though each individual no doubt experienced the moment quite personally, as well).²⁹⁵

In its expression of culture, music serves important social functions by connecting people within and between different communities, and its recognition as a form of speech ensures that government efforts to establish a cultural orthodoxy, like attempts to create a political or religious orthodoxy, are thwarted. Instrumental music is therefore covered because its protection advances what Jed Rubenfeld calls the anti-orthodoxy principle.²⁹⁶ This argument suggests that it undermines First Amendment values to allow the government to control cultural (including racial) and other values and determine which values are worthy, not in a political sense, but in a social one.

This reasoning is also consistent with a truth-seeking rationale. As discussed earlier, truth under this theory is not limited to the understanding of ideas, but can embrace religious, spiritual, or as I argue here, cultural truths. For there is no one "true" culture or understanding of culture, and the government cannot legitimately define what that represents.²⁹⁷ Moreover, this definition of truth seeking responds to boundary problems by at least limiting truth seeking to the notion of cultural and social values, not to every conceivable type of truth.

At the same time, instrumental music serves a completely individualizing function, and therefore ought to be covered by the First Amendment to the extent that it promotes highly personal expressions and experiences of emotion.²⁹⁸ Instrumental music allows people to express (through composition, performance, and feeling) and experience (through listening, interpreting, and feeling) as no other medium of communication can. Thus, while music serves a community building

294. James Inverne, *Listen to This Chilling Audio as Crowd at Boston Symphony Learns President Kennedy Is Dead*, TIME (Nov. 11, 2013), <http://nation.time.com/2013/11/11/boston-symphony-kennedy-assassination>.

295. *Id.*

296. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 817-22 (2001).

297. I do not mean to say that the government has no role in shaping or supporting different cultural values through funding and other types of official support, see Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998), but that it is important that the state not attempt to interfere with the shaping and natural evolution of various cultures in society.

298. See Munkittrick, *supra* note 4, at 671.

function in terms of cultural expression, it simultaneously advances an autonomy-promoting function in its facilitation of individualized emotional expression and experience. As developed in more detail above, music's role in expressing, evoking, and experiencing the emotional could easily be argued to promote self-realization.

The claim that instrumental music serves an important function in constructing and maintaining cultural and other social values and in expressing and experiencing emotion also leads us to another argument for its inclusion as speech under the First Amendment. Thus far, I have focused only on utilitarian or "consequentialist" speech theories, which suggest that speech is protected where it advances specific individual or social interests, such as democracy and autonomy. Another school of First Amendment theorists argues that consequentialist theories are inadequate or incomplete in explaining the right of free speech, and that a more sound analytical focus is to closely scrutinize the government's reasons for regulating speech rather than on what is being regulated.²⁹⁹ As Larry Alexander writes, "[f]reedom of expression is implicated whenever an activity is suppressed or penalized for the purpose of preventing a message from being received."³⁰⁰ Under this theory, free speech "at its core requires regulators to abstain from acting on the basis of their own assessments of a message's truth or value."³⁰¹ The idea that a "message" is involved still requires us to make an additional analytical move to include purely instrumental music because, again, such music is always nonpropositional. However, the core of Alexander's argument is essentially that speech ought to be a protected right when the government's reasons for regulating it are based on its belief that the speech is either not true or has no value. Surely, a government ban on instrumental music for the purpose of interfering with, extinguishing, or otherwise adversely affecting cultural, religious, nationalistic (or anti-nationalistic), or other social values would be illegitimate. Likewise, state regulation of music with the objective of snuffing out emotional expression or experience would fall well outside the parameters of what we would accept as valid government action. Thus, under non-consequentialist theories of speech, the cultural and emotional claims both also work as justifications for classifying instrumental music as speech under the First Amendment.

Instrumental music is enigmatic. It both brings people together as a community and sets them apart as individuals, and on this paradox its true value as speech rests. That is not to say that instrumental music has to have a particularized meaning to be covered, only that whatever

299. ALEXANDER, *supra* note 127, at 9.

300. *Id.*

301. *Id.* at 11.

meanings it conveys are not reducible to any message, but rather connect to culture and individuality in ways that are not, in fact, expressible.

IV. OTHER IMPLICATIONS FOR FREE SPEECH THEORY AND DOCTRINE

If any of these approaches to understanding musical expression provides a sound justification for protecting instrumental music as speech, it is worth considering what the implications of this conclusion are for First Amendment theory, as well as for doctrinal applications to other forms of speech that might be less widely accepted as protected.

As indicated above, a substantial segment of recent First Amendment scholarship has been devoted to the “coverage” problem—discourse about what types of expressive conduct, or even pure speech, are covered (though not necessarily protected) by the First Amendment, and which types simply do not count as speech, and are therefore not even subject to traditional First Amendment analysis.³⁰² By closely analyzing the problem of instrumental music and speech—a presumably “easy” case under First Amendment analysis—we can see, and perhaps respond to, important tension points of free speech theory. Does *Spence’s* supposed “particularized message” requirement apply to all nonverbal modes of speech, or can expression that bears some other value but cannot be reduced to a message count as speech? Can the advancement of the search for truth include the protection of forms of nonverbal expression that engender close ties to cultural values and at the same time resist adherence to government orthodoxy about those values? Does expression that evokes purely emotional, as opposed to cognitive responses, qualify as speech such that its regulation implicates concerns about government overreaching and interference with personal autonomy for both speakers and listeners?

In attempting to answer these questions, the close analysis of instrumental music suggests that perhaps these questions cannot be addressed by a completely internal legal approach. As Schauer argues, the notion of constitutional salience, which he describes as “the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not,”³⁰³ may require insights drawn from external sources. Aesthetic theory and music theory may be useful in determining the extent to which more unfamiliar types of expression might fit into the existing framework of thinking about speech.

In addition to theoretical considerations, paying closer attention to the scope of the First Amendment’s coverage and the justifications for treating instrumental music as speech may lead to greater insights into

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

303. Schauer, *supra* note 13, at 1768.

thorny doctrinal questions. First, some academic treatments of other areas of speech advocate an understanding of the First Amendment suggesting that speech that appeals to the noncognitive ought not to be covered. Schauer famously argues that pornography is not speech because its primary purpose is to produce purely physical, rather than mental, stimulation.³⁰⁴ In his view, pornography is more like a sexual aid than a form of expression.³⁰⁵ Similarly, as Cass Sunstein argues:

[A]ny attempt to distinguish among categories of speech must start with an effort to isolate what is uniquely important about speech in the first place. *Speech that is not intended to communicate a substantive message or that is directed solely to noncognitive capacities may be wholly or largely without the properties that give speech its special status.* Subliminal advertising and hypnosis, for example, are entitled to less than full first amendment protection.³⁰⁶

Like Schauer, Sunstein contends that pornography appeals solely to sexual arousal rather than cognitive reasoning.³⁰⁷

Another context that relates to music as speech is, as Sunstein mentions, the regulation of subliminal or image-based advertising. Scholars argue that images used to sell tobacco products, such as the “Joe Camel” logo, can be constitutionally regulated because image advertising does not convey a “particularized message” that appeals to reasoning or cognition, but simply communicates a “generalized aesthetic impact producing an emotional response.”³⁰⁸ Indeed, in arguing for the lack of protection, one commentator suggests that image advertising is unprotected precisely *because* it is exactly like instrumental music.³⁰⁹

Both of these examples suggest that the First Amendment does not cover expression that is designed to appeal purely to noncognitive, emotional functions. But one could extend the same argument to instrumental music. I have already argued the case for understanding music as a form of communication that is valuable because of its unique capacity to stir emotion. To the extent music has the capacity to appeal

304. Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 923 (1979).

305. *Id.*

306. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 606 (emphasis added). For a trenchant and persuasive critique of Sunstein’s arguments, see Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989).

307. Sunstein, *supra* note 306, at 606. If we accept this to be true, then it is curious how the Supreme Court could exempt sexually explicit material that has “serious . . . artistic . . . value,” *Miller v. California*, 413 U.S. 15, 24 (1973), from the definition of obscenity. Such material might not always appeal to cognitive capacities even if it is classified as art.

308. O. Lou Reed, *Should the First Amendment Protect Joe Camel? Toward an Understanding of Constitutional “Expression”*, 32 AM. BUS. L.J. 311, 349–50 (1995).

309. *Id.* at 341 n.131 (“[A] . . . piece of instrumental music is neither true nor false. It simply *is*. It may be expressive, but it is not speechlike.”).

to emotional sensibilities, or even to excite or create a “mood” that enhances the libido, it is also directed at and touches our noncognitive capacities and might, under these arguments, fall outside the bounds of the First Amendment. Conversely, if instrumental music *is* speech covered by the First Amendment, why don’t the same arguments for its inclusion mean that pornography and subliminal advertising are also speech, the regulation of which ought to be considered by courts? A partial response is that the argument for covering music under the First Amendment is not tied exclusively to its emotionally communicative value, but also to the notion of protecting cultural values and experience and distrust of government orthodoxy where cultural and other social values are concerned. Neither pornography nor subliminal advertising can be easily understood to advance a particular cultural value, at least not one recognized as culture in the common understanding of the term.

In drawing these comparisons, I do not mean to be making a claim, either way, about whether pornography and subliminal messages always ought to be viewed as speech. However, if these types of expression are not covered by the First Amendment, I would argue that it is *not* because they lack a particularized message and appeal only to emotion rather than cognition.

Finally, a richer understanding of how instrumental music communicates offers insights into free speech theory and doctrine as it applies to other artistic expression, and particularly to abstract, nonrepresentational painting, sculpture, and dance. As with music, there are no easy answers to these seemingly easy cases. But further efforts at increasing our understanding of these forms of expression should be encouraged.

CODA

In this Article, I have demonstrated the complexity involved with understanding instrumental music as a form of speech covered by the First Amendment. The value in such an enterprise is not entirely theoretical. Music continues to be suppressed around the globe by governments and other powerful institutional actors. A more complete understanding of its speech value and function is therefore critical to advancing free speech doctrine.

Instrumental music does not convey a particularized message or idea, does not appeal to reason, and does not transmit thoughts or beliefs in an objectively identifiable form. Nonetheless, instrumental music is a unique way of expressing and experiencing culture, and also can be widely understood as an expression of or appeal to the senses in that it has the capacity to convey and evoke joy, sadness, anger, melancholy, and a multitude of other emotional responses. Both of these functions connect to important values of advancing the search for truth and

promoting individual self-realization. As such, instrumental music enjoys full status as speech under the First Amendment, even if it does not advance democracy in any direct, meaningful, or understandable manner.