

Music as Speech: A First Amendment Category unto Itself

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*“Strictly speaking you cannot write about music; music expresses what it has to say in its own terms, and you cannot translate these into language”*¹

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I. MUSIC SPEAKS

November 9, 1989: the fall of the Berlin Wall—one of the most significant political events of the twentieth century—was accompanied by music. Cellist Mstislav Rostropovich was moved by television images of

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1. Macdonald Critchley, *Ecstatic and Synaesthetic Experiences During Musical Perception*, in *MUSIC AND THE BRAIN: STUDIES IN THE NEUROLOGY OF MUSIC* 217, 217 (Macdonald Critchley & R.A. Henson, eds., 1977) (quoting Sir Jack Westrup).

East Berliners crossing the Wall and flew to Berlin to give an impromptu solo recital at the Wall's base.² For his program, Rostropovich chose works nearly 300 years old: the Bach³ cello suites.⁴ Despite the lack of language or text, the music carried a powerful contemporary message. It was a consummate statement for freedom and political support, broadcast around the world.

August 2008: Russia and Georgia clashed in a military conflict that drew the concerned eyes of the world.⁵ Again, the event was immediately followed by music. With distant smoke from burning villages in the background, conductor Valery Gergiev led a concert in the blacked-out capital of South Ossetia.⁶ Gergiev explicitly denounced Georgia's "huge act of aggression" and praised Russian actions,⁷ but the concert's assertion of Russian nationalism was manifest in the music itself.⁸ The program included Dmitri Shostakovich's⁹ poignant Seventh Symphony, written amidst the German siege of Leningrad during the Second World War.¹⁰ In a subsequent interview, Gergiev stated "Shostakovich 'was writing against evil.'"¹¹ Here again, music, imbued with both historical and contemporary relevance, delivered an unmistakable message.

In the United States as well, where art music¹² has lost most of its "cultural capital,"¹³ music permeates major political events. Musical responses to 9/11 included a new work, *On the Transmigration of Souls*, by the U.S. composer John Adams, as well as a reading of victims' names at

2. Elizabeth Janik, *The Symphony of a Capital City: Controversies of Reunification in the Berlin Music Community*, in BERLIN, THE SYMPHONY CONTINUES: ORCHESTRATING ARCHITECTURAL, SOCIAL, AND ARTISTIC CHANGE IN GERMANY'S NEW CAPITAL 143, 145 (Carol Anne Costabile-Heming et al. eds., 2004).

3. Johann Sebastian Bach, 1685–1750.

4. Janik, *supra* note 2; *see also* ERIC SIBLIN, THE CELLO SUITES: J.S. BACH, PABLO CASALS, AND THE SEARCH FOR THE BAROQUE 6 (2009).

5. Michael Schwartz et al., *Russia and Georgia Clash Over Separatist Region*, N.Y. TIMES, Aug. 8, 2008, at A1.

6. *See* Daniel J. Wakin, *Conductor Defends Russia, to Strains of Prokofiev*, N.Y. TIMES, Nov. 8, 2008, at C1.

7. *Id.* (internal quotation omitted).

8. *See id.*

9. Russian composer, 1906–1975.

10. *See* Wakin, *supra* note 6.

11. *Id.*

12. I will use the term "art music" in this Note as an umbrella term to describe what is often dubbed the "classical" music tradition. Of course, this description is acutely simplified. *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 102 (4th ed. 2006).

13. Peter Tregear, *For Alle Menschen?: Classical Music and Remembrance After 9/11*, in MUSIC IN THE POST-9/11 WORLD 155, 155 (Jonathan Ritter & J. Martin Daughtry eds., 2007).

Ground Zero accompanied by Bach's Cello Suite in C Minor.¹⁴ Samuel Barber's¹⁵ *Adagio for Strings*, composed in 1936 and initially criticized for not being identifiably American, was also performed at Ground Zero, as it was at the funerals of Presidents Franklin Delano Roosevelt and John F. Kennedy.¹⁶ More recently, Barack Obama's presidency was ushered in by the strains of a new chamber work by the American film composer John Williams.¹⁷

Such events exemplify the essential role art music plays in the political world. Music has an unrivaled ability to solemnize events and to express political sentiment without direct confrontation. This perhaps begins to explain the U.S. judiciary's assumption that music is a fully protected mode of expression under the First Amendment. Indeed, the few judicial opinions that address music in light of free speech have asserted as much without explanation.¹⁸ Yet it is far from apparent why music, particularly music without lyrics, should always be treated akin to political speech under First Amendment doctrine and theory. After all, without lyrical content, music is, on its face, devoid of objective meaning.¹⁹ While the Supreme Court has yet to develop a thorough rationale for protecting art as speech,²⁰ many commentators have provided excellent theories of First Amendment protection for visual art.²¹ Such a task is yet to be

14. *Id.* at 155-56.

15. American composer, 1910-1981.

16. Tregear, *supra* note 13, at 160. The *Adagio for Strings* was also prominently featured in the soundtrack to Oliver Stone's 1986 film, *Platoon*. *Adagio for Strings*, on PLATOON: THE ORIGINAL MOTION PICTURE SOUNDTRACK (Atlantic Records 1987).

17. Posting of Anthony Tommasini to The Caucus: The Politics and Government Blog of The Times, <http://thecaucus.blogs.nytimes.com/2009/01/20/a-new-williams-work-for-a-momentous-occasion/> (Jan. 20, 2009, 15:03 EST).

18. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 251 (D.C. Cir. 1973) ("Important First Amendment rights are at stake when music formats are regulated."); McCollum v. CBS, 249 Cal. Rptr. 187, 192 (Cal. Ct. App. 1988) ("First Amendment guaranties of freedom of speech and expression extend to all artistic and literary expression, whether in music, concerts, plays, pictures or books."); Skywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990) (finding music generally protected under the First Amendment, but a song by 2 Live Crew legally obscene, low-value speech, and thus not protected), *rev'd sub nom.* Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992).

19. *See* Kendall L. Walton, *What is Abstract About the Art of Music?*, 46 J. AESTHETICS & ART CRITICISM 351, 351 (1988).

20. Edward J. Eberle, *Art as Speech*, 11 U. PA. J. L. & SOC. CHANGE 1, 3 (2008).

21. *See, e.g., id.* (pointing out the uniqueness of art as speech and concluding it should constitute presumptively protected expression); Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 76 (1996) (positing that art performs an essential democratic function of challenging government); Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of Rust v. Sullivan*, 45 AM. U. L. REV. 353, 412 (1995) (concluding that the arts

undertaken specifically for music. As the Supreme Court declared, “[e]ach medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”²²

This Note assesses music under the First Amendment by providing a framework for explaining music’s protection as speech. To do so, the discussion moves from the cultural status of music in society, to current governmental and judicial approaches to music. Part II surveys multidisciplinary thought on music to illustrate many of the ways music functions in society and in individuals. In particular, aesthetic theory is used to establish the powerful role of music as speech. This power of music is also witnessed in historical episodes of music censorship from Plato to Stalin.²³ With this background, Part III discusses music in terms of traditional First Amendment theories and doctrine as a way to concretely place music within First Amendment jurisprudence. Though theories of truth value, self-fulfillment, and democracy can explain protection for music in some respects, no single First Amendment theory fully explains protection of music as speech. Once the full import of music as speech is realized, Part IV discusses two cases with implications for music as speech: *National Endowment for the Arts v. Finley*²⁴ and *Skywalker Records, Inc. v. Navarro*.²⁵ These cases demonstrate how music as speech both informs the government’s role in music as well as bolsters judicial discussion of music in First Amendment theory.

Music is everywhere. It pervades daily life, and it has accompanied major political events throughout history. With calls to establish a “culture czar” in the United States,²⁶ the unique function of music in society and First Amendment jurisprudence will be a crucial consideration in any governmental foray into the world of music. Preexisting free-speech theories may provide insight, but none fully encompass music’s

are a traditional sphere of public discourse subject to the protection of the First Amendment); Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 221 (1987) (“argu[ing] that artistic expression should be granted independent status as constitutionally protected speech”).

22. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

23. *See infra*, Part II.

24. 524 U.S. 569 (1998).

25. 739 F. Supp. 578 (S.D. Fla. 1990), *rev’d sub nom.* *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

26. Interview by Elizabeth Blair with Quincy Jones, Jr., Composer/Producer; Robert L. Lynch, President and CEO, Americans for the Arts; and David Smith, Professor, Baylor University, in Washington, D.C. for NPR News (Jan. 16, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=99450228>; *see also* William R. Ferris, Op-Ed., *Put Culture in the Cabinet*, N.Y. TIMES, Dec. 27, 2008, at A25.

multifarious functions.²⁷ Even the doctrine of symbolic speech,²⁸ the most intuitive candidate for protection of music, does little to protect the full value of music as speech. Rather, music is a unique mode of expression that touches upon many different aspects of the First Amendment. As a protected mode of expression, music must be understood on its own terms.²⁹

II. BETWEEN SOUND AND MIND

How does music work? For the most part, it remains a mystery. Yet the importance of music in society is evidenced by its pervasiveness: “[t]here is no human culture known in modern times that did not, or does not, engage in recognizably musical activities.”³⁰ Indeed, there is concrete evidence for the antiquity of music—it could be 250,000 years old.³¹ Today, music imbues nearly every moment of life. We wake up to it, work out to it, and shop to it. It is in our homes, our cars, and, with the advent of MP3s and the iPod, we take it everywhere. This Section draws on work in philosophy, sociology, and psychology to illustrate the indispensable ways music functions in individuals and communities. With this background, theories of free speech can then be explored to fully accommodate music as speech.

What is it about music that grabs our attention and makes it such a ubiquitous force in society? One theory is that music binds groups of people together, a useful attribute in the early days of human evolution.³² Throughout history, music has principally been considered a tool for collective social purposes.³³ For example, it is “often . . . connected with religious and . . . primitive magical practices.”³⁴ In contrast, only “very few cultures, and almost exclusively within the confines of the Western world, have appreciated music for its inherent aesthetic value.”³⁵ Still, even a

27. The portions of this Note dealing with music in First Amendment theory focus on instrumental art music in order to derive a pure theory of music under the First Amendment and to avoid conflation with more traditional modes of speech, such as lyrics. Musical composition, however, necessarily encompasses a wide variety of expression, including visual art, text, and lyrics. As discussed in Part IV, *infra*, the theories and discussions here apply equally to all styles and genres.

28. *See infra*, Part III.

29. Critchley, *supra* note 1, at 217.

30. David Huron, *Is Music an Evolutionary Adaptation?*, in *THE COGNITIVE NEUROSCIENCE OF MUSIC* 57, 63 (Isabelle Peretz & Robert J. Zatorre eds., 2003).

31. *Id.* (speculating from the 1995 discovery of a flute 43,000 to 82,000 years old that music could be up to 250,000 years old).

32. *Id.*

33. PAUL HONIGSHEIM, *SOCIOLOGISTS AND MUSIC: AN INTRODUCTION TO THE STUDY OF MUSIC AND SOCIETY* 57 (K. Peter Etzkorn ed., 2d ed. 1989).

34. *Id.*

35. *Id.* at 59.

symphony concert can be seen as a ritual: “a celebration, undertaken not fully aware, of the shared mythology and values of a certain group within our deeply fragmented society.”³⁶ By tapping into a common consciousness (or subconsciousness), music acts as an identifier and a marker. It identifies a group and marks an individual as a part of that group.

Musical idioms quickly identify a culture. For instance, Western music is characterized by a focus on harmony, melody, and form, and, much like spoken language, it is an idiom learned from birth. Thus, the uninitiated ear will hear the pentatonic scales of Chinese folk music as “other.” Understanding music is largely based on anticipation, and a person can only anticipate what is already known.³⁷ This same concept operates between music styles within a single culture. Jazz cannot be listened to as if it were country. Music is extremely effective in separating “us” from “them,” and in creating a sense of solidarity and shared understanding—even if unconscious—among “us.” Like language, these sensitivities appear to be learned and developed through exposure and function as cultural markers.

At the same time, there are crucial distinctions between language and music. Both language and music can be viewed as sound imbued with meaning, but language holds obvious evolutionary import while some theorists describe music as mere surplusage, akin to cheesecake.³⁸ Accordingly, “[a] brain devoted to turning sound into meaning is tickled by an oversupply of tone, melody and rhythm. Singing is auditory masturbation to satisfy this craving. Playing musical instruments is auditory pornography.”³⁹ Even if this theory has some truth, the pervasive presence and function of music in today’s society cannot be ignored.

Most commentators agree on one thing: music manipulates emotions.⁴⁰ While no one yet understands why or how music elicits emotional response,⁴¹ aesthetic theory provides some insight into the ramifications of this phenomenon:

Art changes the emotional content of man’s consciousness so that he can react more subtly and deeply to the world. This penetration of inner reality, because it is achieved by men in association and has a complexity beyond the power of one man to achieve, also exposes the

36. Christopher Small, *The Social Character of Music; Performance as ritual: sketch for an enquiry into the true nature of a symphony concert*, in *LOST IN MUSIC: CULTURE, STYLE AND THE MUSICAL EVENT* 6, 6 (Avron Levine White ed., 1987).

37. See ROBERT JOURDAIN, *MUSIC, THE BRAIN, AND ECSTASY: HOW MUSIC CAPTURES OUR IMAGINATION* 246 (1997).

38. See *Why Music?*, *THE ECONOMIST*, Dec. 20, 2008, at 41, 44.

39. *Id.*

40. See, e.g., *HANDBOOK OF MUSIC AND EMOTION: THEORY, RESEARCH, AND APPLICATIONS* (Patrik N. Juslin & John A. Sloboda eds., 2010).

41. *Why Music?*, *supra* note 38, at 43.

hearts of his fellow men and raises the whole communal feeling of society to a new plane of complexity. It makes possible new levels of conscious sympathy, understanding and affection between men⁴²

This passage illustrates how manipulation of emotion not only manufactures solidarity but also influences perception of the outside world, introducing a dual function of music: communal and individual.

Aesthetic theory, as applied to music, must take into account music's unique characteristics. As the conductor Leon Botstein put it, "[m]usic is unique in that the acts of listening and playing together preserve the secrecy of emotion characteristic of privacy and intimacy yet at the same time deepen a sense of human connectedness, even though most concertgoers are strangers to one another."⁴³ While fostering shared experiences among a group, musical experiences remain quintessentially individual and private.

Additionally, music is an auditory experience rather than a visual one. In this way, music is the abstract art par excellence,⁴⁴ and, thus, the ideological art par excellence.⁴⁵ Visual art, even abstract visual art, must imitate visual reality to a degree.⁴⁶ Music, on the other hand, functions completely on its own terms.⁴⁷ It is susceptible to a myriad of individual interpretations and meanings. As musicologist Peter Tregear argues, "[m]usic above all the other arts is by its very nature radically removed from the events it might be chosen to accompany."⁴⁸ Yet as demonstrated by the musical performances at the Berlin Wall and after 9/11, music can also be irrevocably intertwined with real-world events. Finally, nonmusical arts are far less social than their musical counterparts in that, to be communicated, nonmusical arts do not always require as many people.⁴⁹ Only one person is needed to create a painting, but a symphony requires an army of musicians. One cannot experience a symphony by looking at the score—a performance of some kind is required.⁵⁰

42. George Thomson, *Improvisation and Inspiration*, in *MARXISM AND ART: ESSAYS CLASSIC AND CONTEMPORARY* 347, 353 (Maynard Solomon ed., 1973).

43. Leon Botstein, *Why Music in a Time of War?*, *N.Y. TIMES*, Mar. 3, 1991, at 23, 31.

44. Theodor W. Adorno & Hanns Eisler, *Eye, Ear, and the Function of Music*, in *MARXISM AND ART: ESSAYS CLASSIC AND CONTEMPORARY* 378, 378 (Maynard Solomon ed., 1973); see also Walton, *supra* note 19, at 351.

45. Marcello Sorce Keller, *Why Is Music So Ideological, and Why Do Totalitarian States Take It So Seriously? A Personal View From History and the Social Sciences*, 26 *J. MUSICOLOGICAL RES.* 91, 99 (2007).

46. See Walton, *supra* note 19, at 351.

47. VERA L. ZOLBERG, *CONSTRUCTING A SOCIOLOGY OF THE ARTS* 19-20 (1990).

48. Tregear, *supra* note 13, at 156.

49. Keller, *supra* note 45, at 99.

50. The advent of recording technology has, of course, radically changed this paradigm, but an army of musicians is still required to record a symphony.

The powers of music may be summarized as threefold: music bolsters individuality, promotes community (to the exclusion of others), and fosters transcendence from the mundane. These aspects of music give it its power, and, consequently, regimes unhampered by the freedom of speech have sought to recruit music for ideological propagation.⁵¹ Inevitably, these campaigns lead to censorship, and such episodes in history demonstrate music's function and power beyond the theoretical.

The inclination to censor music has existed since the dawn of modern society. In *The Republic*, Socrates asks Adeimantus to determine the musical modes⁵² that imitate bravery and peace in order to mold the perfect citizen.⁵³ Indeed, Socrates would purge his city of all music deemed harmful to character.⁵⁴ Socrates believed there was an intrinsic connection between psychological states and music,⁵⁵ and, as we have seen, he was not far from the mark.⁵⁶ Socrates recognized the inherent power of music.

To censor music is to recognize music's transformative abilities and its capacity to define a culture: "[c]ultural artifacts carry with them the power to influence the minds and motivations of the masses, and with it, the power to divert people from an awareness of and compliance with the normative behaviors of a society"⁵⁷ Because music forms part of cultural identity, censorship can be seen as a form of cultural protection.⁵⁸

Music can be utilized in education and social indoctrination. Ancient China, some ancient Greek states, Nazi Germany, and Soviet Russia "all considered music an indispensable part of political education."⁵⁹ In Soviet Russia, music was seen as a cultural tool "capable of communicating an aesthetic of solidarity and universality."⁶⁰ In part, this stemmed from

51. See, e.g., MUSIC AND MANIPULATION: ON THE SOCIAL USES AND SOCIAL CONTROL OF MUSIC (Steven Brown & Ulrik Volgsten eds., 2006).

52. Musical modes are classifications of musical scale systems, such as major and minor. HARVARD DICTIONARY OF MUSIC 535 (Willi Apel, ed., 2d ed. 2000) (1944). The subtle distinctions in musical modes are no longer apparent to the modern ear because the original eight basic harmonic modes have since been reduced to two: major and minor, commonly associated with comparative cheerfulness and sadness. KENNETH DORTER, THE TRANSFORMATION OF PLATO'S *REPUBLIC* 84 (2006).

53. PLATO, *THE REPUBLIC* 77 (A. D. Lindsay trans., Everyman's Libr. 1992).

54. *Id.* at 77-79.

55. See *id.*

56. See *supra* note 42; HANDBOOK OF MUSIC AND EMOTION: THEORY, RESEARCH, AND APPLICATIONS (Patrik N. Juslin & John A. Sloboda eds., 2010).

57. Marie Korpe et al., *Music Censorship from Plato to the Present*, in MUSIC AND MANIPULATION: ON THE SOCIAL USES AND SOCIAL CONTROL OF MUSIC 240 (Steven Brown & Ulrik Volgsten eds., 2006).

58. *Id.*

59. HONIGSHEIM, *supra* note 33, at 58.

60. Leon Botstein, *Music and Freedom: A Polemical History*, in THE PARADOXES OF UNINTENDED CONSEQUENCES 43, 43 (Lord Dahrendorf et al. eds., 2000).

music's character as a performance art that possesses neither language nor imagery. Stalin elevated the social and moral aspects of music above aesthetic considerations.⁶¹ Stalinism marked "the first time in any society, [that] music was drawn into the direct service of government policy."⁶² The government's policy was that "musical works should have a socialist content, and should be expressed in a readily understood language addressed to the people at large."⁶³ Such treatment exemplified mass cultural identification through music on a national scale.

Similarly, Nazi Germany employed music in "the construction of a racially pure Aryan identity."⁶⁴ Nazi leaders elevated musical patronage to a matter of national priority, though music was conceived not in terms of aesthetic enjoyment but rather as expression of a national enthusiasm and pride for the Aryan race.⁶⁵ Indeed, Joseph Goebbels laid out ten rules for German music, first and foremost of which was "the battle against Jewishness in German music."⁶⁶ Under Goebbels's rules, "Germans were expected to surround themselves with Aryan music, and were encouraged to learn to play instruments in order to further glorify the Fatherland and the Führer."⁶⁷ Musical activity was not confined to concerts but was promoted as "an integral part of daily living."⁶⁸

Music was also employed in the concentration camps. Goebbels's cultural policy included a concerted campaign against modernism in music, labeled *Entartete Musik* (degenerate music).⁶⁹ Many "degenerate" composers were placed in Theresienstadt, a propaganda piece used to disclaim the final solution.⁷⁰ In reality, however, Theresienstadt was a transfer station for death camps in Poland.⁷¹ Music was encouraged in Theresienstadt "as a source of hope and fortitude for the doomed inmates [there]."⁷² Music, however, was put to a much more sinister use at the death camps. It became a tool for "humiliation, deception, and torture."⁷³

Hitler's favorite composer was Richard Wagner,⁷⁴ and Wagner's

61. Korpe et al., *supra* note 57, at 254.

62. *Russian Art Music*, in THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 380, 384 (Stanley Sadie ed., 1980).

63. *Id.* at 385.

64. Korpe et al., *supra* note 57, at 252.

65. HONIGSHEIM, *supra* note 33, at 201.

66. Korpe, *supra* note 57, at 253 (internal quotations omitted).

67. HONIGSHEIM, *supra* note 33, at 201.

68. *Id.* at 202.

69. Korpe et al., *supra* note 57, at 252.

70. *Id.* at 253.

71. *Id.*

72. *Id.*

73. *Id.* at 254.

74. German composer (1813–1883) whose work, *The Ride of the Valkyries*, was

music was played so often in concentration camps that, for many, it became irrevocably associated with the experience of the Holocaust.⁷⁵ The sentiment was so strong that Israel instituted an informal ban on Wagner's music.⁷⁶ His music was not played in Israel from its founding in 1948 until conductor Zubin Mehta broke the ban at a Tel Aviv concert in 1981.⁷⁷ At the concert, a stagehand ran on stage, tore off his shirt revealing Nazi-inflicted scars, and screamed the performance would proceed "over my body."⁷⁸

Justice Kennedy referenced these historical examples of music censorship in a case upholding New York City band shell guidelines requiring the use of sound equipment and independent sound technicians provided by the city: "rulers have known [music's] capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state."⁷⁹ Nearly every totalitarian regime has tried to control music in some form, from Hitler and Mussolini to Stalin and Mao.⁸⁰ These motivations, without fail, derive from the shared belief that music influences behavior and identity.⁸¹ From the example of Wagner in Israel, it is clear that music also has an uncanny ability to assume strong symbolic power and, consequently, the ability to offend, insult, and injure.

These historical examples evidence the natural desire for governments to control music. Music has power, yet it is far from clear how this power fits within the confines of the First Amendment guarantee to freedom of speech. Justice Kennedy reasoned simply that the Constitution prohibits anything akin to Nazi Germany or Soviet Russia,⁸² but those are merely examples illustrating the power of music. While they are examples to be avoided, current First Amendment jurisprudence does not so easily embrace music within its folds.

III. MUSIC IN FREE-SPEECH JURISPRUDENCE

This Note calls for a reasoned basis for protecting music under the

famously put to use by Francis Ford Coppola in the 1979 film *Apocalypse Now*. See DAVID P. SCHROEDER, *CINEMA'S ILLUSIONS, OPERA'S ALLURE: THE OPERATIC IMPULSE IN FILM* 189-191 (2002).

75. Tracy Wilkinson, *Lawmakers Want No Wagner in Israel*, L.A. TIMES, May 3, 2001, at A8; Hanan Bruen, *Wagner in Israel: A Conflict Among Aesthetic, Historical, Psychological, and Social Considerations*, 27 J. AESTHETIC EDUC. 99, 99 (2003).

76. Terry Teachout, *Why Israel Still Shuts Wagner Out*, WALL ST. J., Jan. 31, 2009, at W1.

77. Wilkinson, *supra* note 75.

78. *Id.* (internal quotations omitted).

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

80. Keller, *supra* note 45, at 110.

81. *See id.* at 104.

82. *Ward v. Rock Against Racism*, 491 U.S. at 790.

First Amendment. However, First Amendment theory has developed with a focus on political speech, and it is consequently difficult to establish a unified theory that adequately protects the multiple roles of music in society. Instead, several aspects of First Amendment theory must be employed to ensure music is fully protected as speech.

A. *Truth Through Music*

One thing on which the propounders of First Amendment jurisprudence perhaps agree is the influence of truth theory derived from the writings of John Milton and John Stuart Mill.⁸³ Milton and Mill posited absolute freedom of the press as necessary to further the search for truth.⁸⁴ Mill argued that expression of opinion should never be suppressed because “[w]e can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.”⁸⁵ Suppressing speech assumes infallibility,⁸⁶ and if history teaches anything, it is that humans are inherently fallible. For Mill, progress lies in the conflict between falsity and truth.⁸⁷ Even if an opinion is false, it prevents truth from going stale and keeps truth meaningful.⁸⁸

In applying this theory, courts look to the character of the speech and identify its truth-value. For instance, obscene speech is seen to have little truth-value because it does not further a significant truth interest, whether it is an objective, societal, cultural, political, or aesthetic interest.⁸⁹ Rather, obscene speech is deemed to cause more harm than good in the unceasing search for truth. To have truth-value, however, is to have identifiable meaning, and, as the abstract art par excellence, music is inherently difficult to imbue with objective meaning. For instance, Patrick Garry argues that protected speech “must be an expression of ideas.”⁹⁰

The slippery nature of meaning in music, particularly any attempt at objective political meaning, is illustrated by music adopted by the Nazi

83. See, e.g., *Cent. Hudson Gas v. Pub. Serv. Comm’n*, 447 U.S. 557, 592 (1980) (citing Mill and Milton); *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 189 (1973) (Brennan, J., dissenting); *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 n.13 (1964).

84. See JOHN MILTON, *AREOPAGITICA* 26-27 (Arc Manor 2008) (1644); JOHN STUART MILL, *ON LIBERTY* 33-35, 57 (Ticknor and Fields, 2d ed. 1863) (1859). This position, of course, assumes the existence of an absolute truth and the ability to recognize truth.

85. MILL, *supra* note 84, at 36.

86. *Id.*

87. *Id.* at 88-89.

88. *Id.* at 102.

89. See *Miller v. California*, 413 U.S. 15, 20-21 (1973) (quoting *Roth v. United States*, 354 U.S. 476, 484-85 (1957)).

90. PATRICK M. GARRY, *REDISCOVERING A LOST FREEDOM: THE FIRST AMENDMENT RIGHT TO CENSOR UNWANTED SPEECH* 115 (2006).

regime:

The adoption of the Beethoven Ninth by the Nazis, grotesque as it was, did not damage that work's power to function in the future as a celebration of human solidarity. Ironically, the power of Richard Strauss's music has transcended the mean-spirited and petty character of his politics. Because of its special attributes, music, even in the case of as warlike and unattractive a character as Wagner, reminds us of the potential for good that resides in each individual.⁹¹

Still, Zubin Mehta's experience in Israel illustrates the lasting import musical association and memory can have. The ability of a single piece of music, such as Beethoven's⁹² Ninth, to function as a rallying cry for the Nazi racial prerogative as well as a universal call to brotherhood⁹³ demonstrates music's ability to portray real meaning and manifests a fertile battleground for Mill's necessary struggle between truth and falsity.

Many theorists have conceptualized meaning in music as symbolic, which can be assessed under the Supreme Court's doctrine of symbolic speech.⁹⁴ At first glance, it seems First Amendment protection for music would be found here, but this prospect soon breaks down on both fronts. Under what is known as the *Spence* test, symbolic speech occurs when the speaker intends to convey a particularized message and the surrounding circumstances provide a strong likelihood that the message would be understood by those who viewed it.⁹⁵ In *Spence v. Washington*, the Court found symbolic speech in a display of a U.S. flag with a large peace symbol taped on each side because it was intended to protest the then-recent invasion of Cambodia and the killings of Kent State University students.⁹⁶ Additionally, the Court made clear in *United States v. O'Brien* that intent to express an idea alone does not constitute symbolic speech.⁹⁷

The *Spence* test consequently covers only a small subset of musical performance as symbolic speech, if any at all. Except for unique circumstances like Rostropovich's performance at the Berlin Wall, it is unlikely a musician has a particularized message in mind when performing a piece and even more unlikely that a listener will experience that particular

91. Botstein, *supra* note 43, at 31.

92. Ludwig van Beethoven, 1770–1827.

93. Botstein, *supra* note 43, at 31. Leonard Bernstein performed Beethoven's Ninth in Berlin shortly after the fall of the Wall, and the symphony was immediately enlisted in commemorative concerts after 9/11. See Tregear, *supra* note 13, at 163; John Russell, *Tyrants Fall: Art Endures*, N.Y. TIMES, Feb. 18, 1990, at H1 ("At that moment a whole population looked to the arts and said, 'Speak for us!,' and the arts did not let them down.").

94. *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (per curiam).

95. *Id.*

96. *Id.* at 415 (noting that "[H]is message was direct, likely to be understood, and within the contours of the First Amendment.>").

97. 391 U.S. 367, 376 (1968).

idea.⁹⁸ To relegate musical performance to symbolic speech strips it of its inherent meaning and power. Music does work on a symbolic level and often incorporates meaning from extramusical elements, as demonstrated by Wagner's music in the Holocaust,⁹⁹ but this "is seriously at odds with the phenomenology of listeners' experiences of music's expressiveness. . . . [W]e experience the sadness of music as present within it."¹⁰⁰

Meaning in music lies in the individual experience of it. Sidney Finkelstein's proclamations on art apply equally well, if perhaps more so, to music:

A work of art may embrace any kind of ideology or doctrine. Its real content, or artistic content, however, is its discovered truth, or in other words the illumination it brings to reality; its disclosure of something new born out of the old; its crystallization of a stage of growth of the human being in response to the surrounding world. This truth is affirmed by the heightened possibilities of life it brings to those who make it their own.¹⁰¹

Music embraces the objective outer reality of nature and human activity as well as the "inner, subjective, [and] psychological world of thought" and emotion.¹⁰² To experience music expands the senses and enlarges the scope of individual life in the world.¹⁰³ Finkelstein notes that, "[t]he history of the arts is a record of the successive stages in the humanization of reality."¹⁰⁴

However, there is a serious argument that this idea of meaning and truth in music is an archaic notion from a bygone era of musical understanding. Today, people rarely seek out music simply to soak in its aesthetic qualities. Instead, our "media-saturated world"¹⁰⁵ is awash in

98. While this is the case in the vast majority of scenarios, "many studies have confirmed that professional music performers are able to communicate particular emotions to listeners," though these emotions are limited to general categories such as sad or joyful. Patrik N. Juslin, *Communicating Emotion in Music Performance: A Review and Theoretical Framework*, in *MUSIC AND EMOTION: THEORY AND RESEARCH* 313 (Patrik N. Juslin & John A. Sloboda eds., 2001).

99. Associative meanings are premised on relationships between music and any number of non-musical factors. Because such meanings are derived from individual life histories, they are completely idiosyncratic. However, symbolic meaning derived from shared cultural experiences can sometimes lead to shared understanding. See John A. Sloboda & Patrik N. Juslin, *Psychological Perspectives on Music and Emotion*, in *MUSIC AND EMOTION: THEORY AND RESEARCH*, 94-95 (Patrik N. Juslin & John A. Sloboda eds., 2001).

100. Stephen Davies, *Philosophical Perspectives on Music's Expressiveness*, in *MUSIC AND EMOTION: THEORY AND RESEARCH* 30 (Patrik N. Juslin & John A. Sloboda eds., 2001).

101. Sidney Finkelstein, *Art as Humanization*, in *MARXISM AND ART: ESSAYS CLASSIC AND CONTEMPORARY* 278 (Maynard Solomon ed., 1973).

102. *Id.*

103. *Id.* at 279.

104. *Id.* at 276 (quoting Finkelstein).

105. See GARRY, *supra* note 90, at 19.

background music, or utilitarian music.¹⁰⁶ The great violinist Yehudi Menuhin cited this fact in an appeal *for* censoring music in “zones of silence.”¹⁰⁷ Sounding much like Socrates, he wrote that

(a) [i]n an ideal world it should be possible to protect people from ‘music’ injurious to the ear, soul and sensibility.

(b) Such music, or *muzak*, is the deadening refrain piped into lifts, arcades, restaurants and aircraft to a captive audience who must be abused in this fashion without consultation.¹⁰⁸

Unlike the visual arts, music, once emitted, creates a captive audience of everyone within hearing range.¹⁰⁹ There is no way to close one’s ears or turn away. Immanuel Kant described it this way:

Music has a certain lack of urbanity about it. For owing chiefly to the character of its instruments, it scatters its influence abroad to an uncalled-for extent (through the neighbourhood), and thus, as it were, becomes obtrusive and deprives others, outside the musical circle, of their freedom.¹¹⁰

It would seem some musical censorship is required to protect freedom and privacy, and it has been done to an extent through time, place, and manner restrictions.¹¹¹ Complete protection of music as speech is not a foregone conclusion. While music certainly can carry objective political meaning, as with Rostropovich’s recital at the Berlin Wall, such incidences are restricted to particular circumstances. Bach’s cello suites were not written to express universal freedom, and they do not bear such meaning with every performance today. Each performance and each listener’s experience is inherently individual. Consequently, content, whether or not based in truth, cannot be the sole determinant in First Amendment protection for music. Strict censorship of particular music, as advocated by Socrates and

106. See Daniel J. Wakin, *While in Surgery, Do You Prefer Abba or Verdi?*, N.Y. TIMES, June 10, 2006, at A1.

107. Yehudi Menuhin, *Why should music be censorable?*, in AN EMBARRASSMENT OF TYRANNIES: TWENTY-FIVE YEARS OF *INDEX ON CENSORSHIP* 110, 110 (W.L. Webb & Rose Bell eds., 1998) (internal quotation marks omitted).

108. *Id.*

109. The Supreme Court has also developed a captive audience doctrine. See *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (“The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”). Still, content-based restrictions to protect unwilling listeners from offensive speech are allowed only where “the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure” and “substantial privacy interests are being invaded in an essentially intolerable manner.” *Erznoznik v. City of Jacksonville*, 422 U.S. 209, 209-10 (1975). Under these restrictions, Menuhin’s “zones of silence” would not qualify.

110. IMMANUEL KANT, *THE CRITIQUE OF JUDGMENT* 149 (James Creed Meredith, trans., Forgotten Books 2008) (1790).

111. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 782 (1989) (holding New York City’s sound-amplification guideline a valid place and manner regulation under the First Amendment).

Menuhin, though not sufficiently protected against by Millsian truth theory in today's media-saturated world, countervails self-fulfillment principles of First Amendment theory.

B. You Are What You Listen to

Music is an important tool in defining oneself as part of or outside of a particular group. A person's musical tastes constitute "who one is" on many levels: culturally,¹¹² nationally,¹¹³ and individually. Music gives the individual the power to be whatever he or she wishes.¹¹⁴ It nourishes the "private domain of the mind."¹¹⁵ Music can at once foster a sense of community and maintain inner emotional privacy.¹¹⁶ Indeed, it is precisely this dual characteristic that underpinned the strict control of music in totalitarian states and must underpin music's protection under the First Amendment. If such individual self-fulfillment is accepted as a value protected by the First Amendment, then *all* art and music must be protected under freedom of speech. Yet foundational First Amendment theorists of self-fulfillment theory have not fully addressed the role of music as self-realization.

C. Edwin Baker, for example, advocates self-fulfillment and participation in culture as core First Amendment values, yet the closest he comes to incorporating music is in mentioning "[s]elf-expressive and creative uses of speech."¹¹⁷ Of course, it is a relatively easy task to include musical expression in "self-expressive" and "creative" speech, but this would reveal nothing of music's relevance to First Amendment principles.

Martin Redish gets much closer in *The Value of Free Speech* by

112. In very general terms, cultural identification means Western or Eastern, but cultural identification through music can also be much more specific, such as musical idioms particular to certain regions or countries.

113. There are national idioms in music and even overt movements to develop a particularly national musical language. For instance, France experienced a particularly heated internal debate about true "Frenchness" in music during World War I. *See, e.g.,* JANE F. FULCHER, *THE COMPOSER AS INTELLECTUAL MUSIC AND IDEOLOGY IN FRANCE 1914–1940* 33, 58 (2005); JANE F. FULCHER, *FRENCH CULTURAL POLITICS & MUSIC: FROM THE DREYFUS AFFAIR TO THE FIRST WORLD WAR* 26, 31 (1999); Carlo Caballero, *Patriotism or Nationalism? Fauré and the Great War*, 52 *J. AM. MUSICOLOGICAL SOC'Y* 593 (1999).

114. *See* Peter J. Martin, *Music Censorship From Plato to the Present*, in *MUSIC AND MANIPULATION: ON THE SOCIAL USES AND SOCIAL CONTROL OF MUSIC* 57, 65 (Steven Brown & Ulrik Volgsten eds., 2006).

115. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 68 (1982); *see also* Botstein, *supra* note 60, at 53 ("In the romantic era, music created a dream world, a medium of escape from the terrifyingly rapid industrialization, mechanization, and rationalization of economic and social life. Music became the vehicle of private subjectivity.")

116. Botstein, *supra* note 43, at 31 ("Each individual derives a personal pleasure that is opaque but mirrors the joy of others in the hall.")

117. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 995 (1978).

recognizing that freedom of speech should protect more than simple communication.¹¹⁸ Redish's theory of self-realization requires full First Amendment protection for two aspects of speech: speech relating to private self-government and speech relating to the development of human faculties. Redish places art and music in the latter category, yet this only recognizes and protects one aspect of music's function as speech.¹¹⁹ As discussed below, music also has an important role in the political order. While Redish's self-realization is crucial to First Amendment protection of music, it does not alone support full protection of musical expression. Rather, it is necessary to discuss music on its own terms.¹²⁰

Music is an independent form of expression that functions on many levels. Music is, not only a crucial tool in maintaining and developing individual autonomy, but also a force in societal and cultural change. Marxists tend to view music only as an indicator of underlying change,¹²¹ but music can also be an agent of change. In fact, Plato "maintained that any change in musical tastes must bring a corresponding change in regime."¹²² In any case, music is a platform from which to challenge normative cultural standards as well as a platform for individuals to sample and choose various musical expressions in pursuit of self-realization. In a way, the ability of music to foster individual privacy and community participation simultaneously makes it a particularly democratic mode of speech.

C. *Music in a Democratic Order*

Democracy theory in First Amendment jurisprudence has also been widely accepted by the courts,¹²³ though how music is seen in a democracy depends on which theory of democracy is adopted. In the classical republican tradition, government's purpose is the pursuit of the common good, which is possible only if people are virtuous.¹²⁴ Such civic virtue is

118. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

119. *Id.* at 627.

120. A similar argument has been made regarding visual art. See Eberle, *supra* note 20.

121. See, e.g., Ernst Bloch, *On the Threepenny Opera*, in *MARXISM AND ART: ESSAYS CLASSIC AND CONTEMPORARY* 577 (Maynard Solomon ed., 1973); Finkelstein, *supra* note 101, at 278 (arguing that "[T]he discoveries of the individual artist fix and bring into social consciousness a changed view of reality that has already been prepared for by the collective operations of society.").

122. Arthur M. Melzer et al., *Introduction to DEMOCRACY AND THE ARTS* 1 (Arthur M. Melzer et al., eds., 1999).

123. See, e.g., *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 530, 534 (1980); *Herbert v. Lando*, 441 U.S. 153, 184-85 (1979); *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

124. James Bohman & William Rehg, *Introduction to DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* ix, xiv (1997).

learned through participation in social institutions.¹²⁵ Fostering virtue through education is thus a primary goal, and the core of such education includes music and the arts.¹²⁶ Indeed, “[a]rt is the essential vehicle for moral education partly because, reaching beyond rational precepts and principles, it is able to appeal to the imagination and emotions and to present concrete models for imitation. Furthermore, art is concerned with beauty, and morality or nobility is largely an aesthetic phenomenon.”¹²⁷ The same can be said of music.

Music influences the emotional palette of an individual and thus influences perception of reality. Yet because republican theory recognizes the power of music to mold and define society, there is also a strong tendency to censor music.¹²⁸ Indeed, Socrates’ musical censorship dovetails with republican democracy theory. Music can take listeners away from political reality and virtue, particularly in the case of music concerts that listeners attend to escape from the outside world. If the First Amendment is seen as a tool to ensure a republican theory of democracy, music may have, not only a central political position, but also a circumscribed one.

In the alternative model of democracy, the liberal tradition, the purpose of government is to provide all citizens with equal liberty to pursue their individual values.¹²⁹ This model emphasizes liberty, autonomy, and individual rights.¹³⁰ Though “more suspicious of . . . regimentation and censorship,” the liberal tradition has tended to deny music any “official, political role.”¹³¹ Still, music is often touted as a “countercultural agent” in liberal democracies, specifically as “one of the few elements of civil society capable of combating . . . the tyranny of the majority.”¹³² Many modernist aesthetic movements see music not as part of an established societal structure but as social criticism and revolt, usually accomplished through provocation rather than contemplation.¹³³ This, in turn, has led to the widely held view that art and music are, by definition, criticism and social protest.¹³⁴ Still, while a liberal democracy theory recognizes the power of music, it does not afford it specific protection.

Democracy theory also has particular treatment in First Amendment

125. See ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 86-87, 116 (1993).

126. Melzer et al., *supra* note 122, at 3.

127. *Id.*

128. See *id.* at 171.

129. Putnam, *supra* note 125, at 86-87.

130. *Id.*

131. Melzer et al., *supra* note 122, at 4.

132. *Id.*

133. See HERMAN RAPAPORT, IS THERE TRUTH IN ART? 9-10 (1997).

134. See *id.* at 10.

jurisprudence. Essentially, democracy theory fashions a free-speech rationale from the practical requirements of democracy itself. For example, Alexander Meiklejohn begins with the premise that society is made free by the power to vote.¹³⁵ In order to ensure freedom of voting, speech is needed for gathering information and effectively participating in self-government.¹³⁶ The First Amendment thus only protects speech in the “political realm,” which Meiklejohn broadly defines.¹³⁷ He maintains that art and literature are necessary to develop the ability to judge because they shape personality, values, and attitudes.¹³⁸ Meiklejohn also supports a strong right to free speech in that, once it applies, there are no exceptions.¹³⁹ Thus, Meiklejohn’s theory would likely afford music complete protection, but current First Amendment practice is riddled with exceptions, such as the time, place, and manner regulations seen in *Ward*.¹⁴⁰

Cass Sunstein’s democracy theory is more in line with today’s treatment of music in that it adopts the view that individual preferences are shaped by political process.¹⁴¹ Sunstein argues for a free-speech system that draws its parameters from the constitutional goal of a deliberative democracy—a society defined by broad attention to public issues, public exposure to a diversity of viewpoints, and the search for political truth.¹⁴² Protected speech, then, includes “new information and perspectives [that] influence social judgments” and behavior.¹⁴³ Because a free-market system does not adequately promote these goals in its dissemination of information, government regulation must help create the necessary preconditions for a deliberative democracy.¹⁴⁴

Art music’s diminishing capital in today’s cultural climate requires government intervention to maintain at least a minimum level of diversity in the aesthetic, creative, and emotional decision making that music

135. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 116 (1960).

136. *Id.* at 116-117.

137. *Id.* at 117-18, 122.

138. MEIKLEJOHN, *supra* note 135, at 117.

139. *Id.* at 122.

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

141. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 18-19 (1993) (“Politics is not supposed merely to protect preexisting private rights Instead it is designed to have an important deliberative feather, in which new information and perspectives influence social judgments about possible courses of action.”). As discussed below, this idea holds a significant place in the structure of the National Endowment for the Arts. See *infra* IV; see also 20 U.S.C. § 954(c) (2006).

142. See SUNSTEIN, *supra* note 141.

143. *Id.* at 19.

144. See *id.* at 21.

enables. Without such diversity, the self-fulfillment and democratic functions of music would be severely impaired. Indeed, capitalist production is hostile to certain “spiritual production” such as art, poetry, and music.¹⁴⁵ Still, it is far from clear whether music would be afforded such a privileged status in Sunstein’s system of free expression, focused, as it is, on “public issues” and “political truth.”¹⁴⁶

Yet there is a place for music even within a narrow definition of political speech. Socrates saw music as integral to political well-being, and some Marxists (though not Marx himself) have included culture and art as an integral aspect of society’s superstructure.¹⁴⁷ For example, Hanns Eisler stated, “all music is as much the reflection of political life as of social relations, even if this has not been the musician’s intention at all. Music is the product of society, and, in a manner of speaking, the musician acts as the executive organ of society.”¹⁴⁸

Indeed, music can often function as a surrogate to direct political speech, particularly when direct speech or diplomacy is ineffectual. The New York Philharmonic completed a historic tour of North Korea in early 2007, forming the largest group of Americans to be in North Korea since the Korean War.¹⁴⁹ While there is no indication that the visit made headway on particular political issues such as nuclear proliferation, and Kim Jong-il did not attend the performance, there were many high-ranking officials in attendance.¹⁵⁰ Song Sok-hwan, the vice minister of culture, called the concert “an important occasion to open a chapter of mutual understanding between the two countries.”¹⁵¹ In 1958, when political relations with Soviet Russia were similarly chilled, the young American pianist Van Cliburn traveled to Moscow to compete in the first Tchaikovsky International Piano Competition.¹⁵² Van Cliburn walked away with the first prize, dubbed “the real American Sputnik” by Soviet cultural officials.¹⁵³

145. See Karl Marx, *The Immanence of Artistic Development, II*, in *MARXISM AND ART: ESSAYS CLASSIC AND CONTEMPORARY* 63 (Maynard Solomon ed., 1973).

146. SUNSTEIN, *supra* note 141, at 19.

147. See ZOLBERG, *supra* note 47, at 12-13.

148. HENRI ARVON, *MARXIST ESTHETICS* 19 (Helen R. Lane trans., 1973) (internal quotation marks omitted). *But see* HONIGSHEIM, *supra* note 33, at 21-22 (“[Theodor Adorno] argues that under capitalism the dominant goal in life is the achievement of success through work. From this total dedication of man to his work resulted a social evaluation of free time that is not conducive to the cultivation of the arts. The fate of contemporary serious music is directly attributed to this phenomenon.”).

149. Daniel J. Wakin, *North Koreans Welcome Symphonic Diplomacy*, *N.Y. TIMES*, Feb. 27, 2008, at A10.

150. *Id.*

151. *Id.*

152. Anthony Tommasini, *Cold War, Hot Pianist. Now Add 50 Years*, *N.Y. TIMES*, Mar. 9, 2008, available at <http://www.nytimes.com/2008/03/09/arts/music/09tomm.html>.

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

However, limiting protection of musical expression to a strict definition of political speech would in itself be a form of censorship. Indeed, as occurred in the Soviet Union, authorities could “tighten the screws even more and say that apolitical works are not topical and of no benefit to anybody, or claim that they have no more funds available to purchase them.”¹⁵⁴ Particularly for forms of musical expression that do not enjoy independent market viability, the ability to limit government funding on such grounds would leave individuals with little choice in aesthetic and emotional perspective. New works of music that either implicitly or explicitly challenge aesthetic norms would retreat further underground. Additionally, because of music’s ready ability to adopt and shed objective meanings, music would slip in and out of political categories, making such protection of music temporary at best.

First Amendment protection of musical expression cannot be limited to notions of political speech, but should be equated with political speech as indispensable to the First Amendment regime. Protection must be based in the knowledge that music permeates societies, groups, and individuals on numerous levels. Once diversity in musical expression is realized as a First Amendment goal in itself, a government position of *laissez-faire* toward art music is unviable.¹⁵⁵

In the mid-nineteenth century, thinkers, such as Jacob Burckhardt, Friedrich Nietzsche, Matthew Arnold, and Honoré de Balzac, argued that modern economic and industrial progress was responsible for “cultural corruption and aesthetic . . . degradation.”¹⁵⁶ They believed that a society “driven exclusively by a free market that defined all cultural production in terms of . . . profitability” popularized the petty and vulgar in both art and music, to the exclusion of all else.¹⁵⁷

This line of thought formed a significant factor in the creation of the National Endowment of the Arts (NEA) and the First Amendment concerns of government funding that came with it.¹⁵⁸ As John D. Rockefeller said, “democratic government and the arts are, in my opinion, in league with one another, for they both center on the individual and the fullest development of his capacities and talents. To free men, the arts are not incidental to life

154. Symposium, *Censorship of Music*, in *THE SOVIET CENSORSHIP* 104 (Martin Dewhurst & Robert Farrell eds., 1973).

155. See Richard Taruskin, *Music's Dangers and the Case for Control*, *N.Y. TIMES*, Dec. 9, 2001, 36.

156. Botstein, *supra* note 60, at 45.

157. *Id.* at 45; see also JAY E. DAILY, *THE ANATOMY OF CENSORSHIP* 35 (1973) (“[G]reat works of art do not emanate a mysterious essence that attracts the untutored eye of most of us. If this were so we could end our teaching of literature, art, and music appreciation.”).

158. See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 172 (1992).

but central to it.”¹⁵⁹ The challenge, then, is ensuring government involvement while at the same time ensuring complete protection for music as speech.

IV. MUSIC, GOVERNMENT, AND THE MARKET

A. *Government Funding for Music and the Arts*

Government participation in music and the arts is a continuing issue, evidenced by the recent movement to establish a cabinet position for the arts.¹⁶⁰ While a cabinet position for the arts would give much-needed visibility to music, it also rouses concerns of excess government control in art and culture. Diversity and individuality are core values in the national artistic landscape. There is yet to be a precise description of what the role and powers of a secretary of the arts would be, but if the position is to come to fruition, the parameters of the powers involved must be carefully delineated to avoid constitutional issues. The experience of the NEA provides an illuminating example.

The NEA was established in 1965 as a response to a financial crisis in the arts,¹⁶¹ and it was a success. In 1965, there were sixty professional orchestras; by 1990, there were 210.¹⁶² The mobilizing rationale behind organized federal funding for the arts was to bolster national prestige and “command respect from other nations.”¹⁶³ This goal has been played out in events, such as Van Cliburn’s victory in the Soviet Union¹⁶⁴ and the New York Philharmonic’s tour of North Korea.¹⁶⁵ Additionally, the NEA was founded to foster national identity as well as an informed and creative citizenry.¹⁶⁶ While these sentiments mirror the censorship rationale of the Soviet Union and Nazi Germany, they also parallel the basic functions of music in society. Because censorship and protection both recognize the power in music, the NEA is structured to insulate the grant process from politics.¹⁶⁷

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

160. See Interview by Elizabeth Blair, *supra* note 26.

161. MEDIA AND THE FIRST AMENDMENT IN A FREE SOCIETY 180 (1973).

162. SMOLLA, *supra* note 158, at 174.

163. *Id.* at 172.

164. See *supra* note 150 and accompanying text.

165. See *supra* note 147 and accompanying text.

166. SMOLLA, *supra* note 158, at 172; see also 20 U.S.C. § 954(c) (2006).

167. Robert Brustein, *Restricting Art Funding Is Censorship*, in CENSORSHIP: OPPOSING VIEWPOINTS 45 (Lisa Orr ed., 1990). However in reality, the chairperson of the NEA has absolute control over what projects are given grants. See 20 U.S.C. § 954(d) (2006). The chairperson has rarely gone against the advice of the twenty-member National Council on the Arts, which includes fourteen private citizens from the artistic community. See 20 U.S.C. § 955(b)(1) (2005); Elizabeth E. DeGrazia, *In Search of Artistic Excellence:*

However, this buffer has not completely avoided controversy. Much of modern music is consciously designed to shock and disturb in order to challenge the status quo,¹⁶⁸ but music also has the capacity to seriously offend as with Wagner in Israel. Exceptions have been carved out of First Amendment protection for speech deemed to have little or no First Amendment value. The most relevant of these exceptions to art and music is obscenity, to which the Court has denied protection because its “content is so offensive to contemporary moral standards.”¹⁶⁹ Such a conflict with “contemporary moral standards” arose in the culture wars of the 1990s.¹⁷⁰

The NEA helped fund separate exhibitions of works by photographers Robert Mapplethorpe and Andres Serrano.¹⁷¹ The Mapplethorpe exhibition was designed as a “mid-career summary of work of photographer Robert Mapplethorpe,” including still lifes, portraits, and nudes.¹⁷² Among these was the “X Portfolio,” including a series of homoerotic images and photographs of nude children.¹⁷³ The Serrano exhibit included an image titled *Piss Christ*, a photograph of a plastic crucifix submerged in the artist’s own urine.¹⁷⁴

The exhibitions sparked heated controversy because of the public funding involved, and Senator Jesse Helms proposed legislation in 1990

Structural Reform of the National Endowment for the Arts, 12 CARDOZO ARTS & ENT. L.J. 133, 144 & n.38 (1994) (citing William H. Honan, *Two Who Lost Art Grants Are Up for New Ones*, N.Y. TIMES, Aug. 2, 1990, at C19 (describing NEA records showing that from 1982-89 the chairperson reversed recommendations of peer panels on only 35 out of 33,700 proposed grants)). So the buffer is only a one-person buffer, which is hardly a buffer at all, particularly because the chairperson is a political appointment. 20 U.S.C. § 954(b)(1) (2005).

168. Perhaps the most famous historical example is that of Igor Stravinsky’s ballet *Le sacre du printemps* (*The Rite of Spring*), which instigated a riot at its 1913 premiere in Paris due to the primitive, erratic dancing and the violently rhythmic score. Robert P. Morgan, TWENTIETH CENTURY MUSIC: A HISTORY OF MUSICAL STYLE IN MODERN EUROPE AND AMERICA 95-96 (1991). On May 18, 1917, Erik Satie’s *Parade* enjoyed a similar reception. Deborah Menaker Rochschild, 32 PICASSO’S PARADE (1991). In the midst of the most difficult year of World War I for France, *Parade* caused a riot in its Parisian audience and heralded the beginning of a new aesthetic in French music. See Jane Fulcher, THE COMPOSER AS INTELLECTUAL 83-84 (2005). See also Botstein, *supra* note 60, at 60; Keller, *supra* note 45, at 91.

169. *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (citing *Roth v. United States*, 354 U.S. 476 (1957)).

170. Frank Rich, *Ding, Dong, the Cultural Witch Hunt is Dead*, N.Y. TIMES MAG., Feb. 24, 2002, at 36.

171. Comment, *Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the “Mapplethorpe Controversy”?*, 39 BUFF. L. REV. 231, 234 (1991).

172. Jesse Helms, *The Government Should Restrict Funding of Objectionable Art*, in CENSORSHIP: OPPOSING VIEWPOINTS 40 (Lisa Orr ed., 1990) (internal quotation marks omitted).

173. Comment, *supra* note 171, at 241 n.51.

174. ANDRES SERRANO, *PISS CHRIST* (1987); see also Michael Brenson, *Andres Serrano: Provocation And Spirituality*, N.Y. TIMES, Dec. 8, 1989, at C1.

that would have barred funding for “material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion, or which denigrates, debases, or reviles a person, group, or class of citizens on the basis of race, creed, sex, handicap, age, or national origin.”¹⁷⁵ The Helms proposal was ultimately rejected, but Congress did pass into law a requirement that the NEA consider “general standards of decency and respect for the diverse beliefs and values of the American public.”¹⁷⁶ Four individual artists who had received advisory recommendations of grant approval were denied after reconsideration under the new amendment.¹⁷⁷ The artists filed suit, alleging violation of their First Amendment rights to freedom of speech.¹⁷⁸

The Supreme Court held that the 1990 amendment did not expressly exclude any speech because it only introduced factors to consider, not requirements.¹⁷⁹ The Court also accepted the NEA’s implementation of the new statutory requirements by forming advisory committees with members from diverse geographic, ethnic, and aesthetic backgrounds.¹⁸⁰ So the problem still lingers: what are “general standards of decency” and how are they adequately considered in the NEA grant application process? To date, the NEA has been careful to keep its artistic freedom intact and separated from Congress while avoiding public controversy.¹⁸¹ Yet a single chairperson could change all that by imposing personal aesthetic tastes, or perhaps more troubling, by imposing politically favorable aesthetic tastes. Current statutory authority confers the power to do so, but full analysis of artistic and musical merit under First Amendment values prohibits such an outcome. If government funding for music must conform to prescribed standards, government would cease to be a countermarket force in the nation’s artistic vitality. Music’s ability to create new worlds and identities would be curtailed, as would creative progress itself.

Music, acting on both individual and community levels, is a carrier of aesthetic experience and information as well as markers of individual, community, and national identities. When considering government involvement in music, all these characteristics must be taken into account.

175. Jesse Helms, *Is It Art or Tax-Paid Obscenity? The NEA Controversy*, 2 J.L. & POL’Y 99, 103 & n.14 (1994) (citing 135 CONG. REC. S8807 (daily ed. July 26, 1989) (statement of Sen. Helms)); see also SMOLLA, *supra* note 158, at 176 (internal quotation marks omitted); Maureen Dowd, *Unruffled Helms Basks in Eye of Arts Storm*, N.Y. TIMES, July 28, 1989, at A1.

176. 20 U.S.C. § 954(d)(1) (2006).

177. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 577 (1998).

178. *Id.*

179. *Id.* at 581-83.

180. *Id.* at 577.

181. See NATIONAL ENDOWMENT FOR THE ARTS: A HISTORY 1965-2008, at 147-49, 160-162, 167-68 (Mark Bauerlein & Ellen Grantham eds., 2008).

The market alone, focused as it is on profitability, does not allow music to adequately carry out these functions. Popular taste will always be well represented by the market, and the NEA was designed as part of a countermarket strategy to enable art and music the greatest freedom possible to develop and act in the lives of citizens.¹⁸² Indeed, art music itself is a challenge to the dominance of market-driven criteria for assessment.¹⁸³ In a way, then, the NEA, when properly managed, is a vehicle for First Amendment values of truth, democracy, and self-realization.¹⁸⁴

B. As Nasty as the Market Wants to Be

The market has also garnered its fair share of controversy in promoting certain musical works. Such controversies have focused on lyrical content of popular songs, and there is only one instance of a musical work being declared obscene (which was promptly reversed).¹⁸⁵ Still, courts' discussions of music in this context provides insight into First Amendment treatment of music and an indication of its status as core protected speech.¹⁸⁶

Perhaps coincidentally, the hip-hop group 2 Live Crew released their album *As Nasty As They Wanna Be* the same year as the Mapplethorpe and Serrano exhibits, though 2 Live Crew met with quite a bit more financial success, selling 1.7 million albums within a year.¹⁸⁷ Financial success notwithstanding, the claims of obscenity were nearly identical. After citizen complaints, a sheriff in Broward County, Florida was assigned to investigate the recording.¹⁸⁸ He transcribed lyrics from six of the eighteen songs for the county court, which found probable cause that the recording was legally obscene.¹⁸⁹ Obscenity is defined by the Supreme Court as anything that (1) "the average person, applying contemporary community standards would find . . . appeals to the prurient interest"; (2) "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (3) "taken as a whole, lacks serious literary, artistic, political, or scientific value."¹⁹⁰ While the standard has most often been applied to pornography, there is nothing barring its

182. See Brustein, *supra* note 167, at 46.

183. See Botstein, *supra* note 60, at 45.

184. See OWEN M. FISS, *THE IRONY OF FREE SPEECH* 48 (1996).

185. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990), *rev'd sub nom. Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

186. See, e.g., *id.*

187. *Skywalker Records*, 739 F. Supp., at 582.

188. *Id.* at 582-83.

189. *Id.* at 583.

190. *Miller v. California*, 413 U.S. 15, 24 (1973).

application to other media.

The sheriff released a notice that store managers selling the “*Nasty* recording” would be arrested, and all retail stores in the county soon ceased carrying the album.¹⁹¹ 2 Live Crew and its record label filed suit.¹⁹² The district court applied the *Miller* test and found the recording easily met the first two prongs: the lyrics appealed to the prurient interest and were patently offensive.¹⁹³ The third prong, whether the work had “serious literary, artistic, political, or scientific value,”¹⁹⁴ at least tangentially confronted the question of First Amendment value of musical expression.

Interestingly, the plaintiffs turned to the logic of the avant-garde and argued that advances in artistic technique were of essential social value.¹⁹⁵ Indeed, expanding the range of aesthetic expression, whether accompanied by lyrics or not, can challenge the status quo as well as inspire individual imagination and conception of reality, thus furthering the free speech values of truth, democracy, and self-realization. While the district court noted that the focus of the obscenity charge was on the lyrics and not the music, the court was correct in stating that lyrics are an inseparable component of a musical composition.¹⁹⁶ One cannot strip a song of its lyrics any more than one can strip an opera of its libretto. Despite lyrical content, the First Amendment analysis was of music. The district court paid lip service to the foundational assumption that music divorced from lyrics would garner full First Amendment protection,¹⁹⁷ but such First Amendment value failed to overcome lyrical obscenity in the court’s eyes. On appeal, the Eleventh Circuit found there was no evidence to overcome expert testimony of the music’s social value, and the obscenity holding was reversed.¹⁹⁸

This case represents both the central place music holds in First Amendment protection as well as the fundamental uncertainty of the foundation for this protection. Music, whether art music or popular song, should be afforded full protection as speech. It cannot be neatly placed in a preexisting category of speech under First Amendment jurisprudence, so a theory of music as speech must take into consideration the varied roles music plays in history, culture, society, and individuals. When this is done, the correct disposition of cases like *Skywalker* is clear. To truly protect

191. *Skywalker Records*, 739 F. Supp., at 583.

192. *Id.*

193. *Id.* at 591-92.

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

195. CAROLINE LEVINE, PROVOKING DEMOCRACY: WHY WE NEED THE ARTS 135 (2007).

196. *Skywalker Records*, 739 F. Supp., at 595.

197. *Id.* at 595 (“Initially, it would appear very difficult to find a musical work obscene.”).

198. *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 138-39 (11th Cir. 1992).

music as speech, the market, like government funding, cannot be confined by predetermined strictures.

V. CONCLUSION

Music occupies an integral position in modern society and culture—both the NEA and the market attest to that. It serves First Amendment pursuits in ways inaccessible to more traditional, objective modes of communication and language. It imbues both individuals and communities with identity while presenting a continuous opportunity to challenge normative values and practices. Because of the multifaceted functions of music, no single First Amendment doctrine or theory adequately protects music as speech. Rather, music must be considered on its own terms. If courts recognize the specific values in music, there would be no question that all music contains serious artistic and political value under the third prong of the *Miller* test.

As in *Skyywalker* and *Ward*, courts have implicitly recognized the value of music but have done so without further discussion. This Note provides a foundation for that assumption. The role of art and music in society deserves close attention. Music is easy to write off as “cheesecake,”¹⁹⁹ but it plays a much deeper role. Music speaks. Works like 2 Live Crew’s *As Nasty As They Wanna Be* have social value, and if vulgar lyrics are the price of a vibrant and free musical culture protected by the First Amendment, it is a low price indeed.

199. See *supra* note 38 and accompanying text.