

## **NONSENSE AND THE FREEDOM OF SPEECH: WHAT MEANING MEANS FOR THE FIRST AMENDMENT**

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### ABSTRACT

*A surprising amount of everyday expression is, strictly speaking, nonsense. But courts and scholars have done little to consider whether or why such meaningless speech falls within “the freedom of speech.” If, as many suggest, meaning is what separates speech from sound and expression from conduct, then the constitutional case for nonsense is complicated. And because nonsense is widespread, the case is also important—artists like Lewis Carroll and Jackson Pollock are not the only putative “speakers” who should be concerned about the outcome.*

*This Article is the first to explore thoroughly the relationship between nonsense and the freedom of speech; in doing so, it suggests ways to determine what “meaning” means for First Amendment purposes. The Article begins by demonstrating the scope and constitutional salience of meaningless speech, showing that nonsense is multifarious, widespread, and sometimes intertwined with traditional First Amendment values like the marketplace of ideas, autonomy, and democracy. The second part of the Article argues that exploring nonsense can illuminate the meaning of meaning itself.*

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*This, too, is an important task, for although free speech discourse often relies on the concept of meaning to chart the Amendment's scope, courts and scholars have done relatively little to establish what it entails. Analytic philosophers, meanwhile, have spent much of the past century doing little else. Their efforts—echoes of which can already be heard in First Amendment doctrine—suggest that free speech doctrine is best served by finding meaning in the way words are used, rather than in the degree to which they represent extralinguistic concepts.*

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#### INTRODUCTION

Ludwig Wittgenstein, whose approach to meaning and language changed the course of modern philosophy,<sup>1</sup> once wrote: “Don’t *for heavens sake*, be afraid of talking nonsense! But you must pay attention to your nonsense.”<sup>2</sup> His exhortation is especially salient for

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1. See Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 938 (1990) (“It is the thought of Ludwig Wittgenstein which is central to modern philosophy’s turn to language. For Wittgenstein, all philosophical problems are ultimately problems of language.”).

2. LUDWIG WITTGENSTEIN, *CULTURE AND VALUE* 56e (G.H. von Wright ed., Peter Winch trans., Univ. of Chi. Press 1980) (1977); see also Guy Kahane, Edward Kanterian & Oskari Kuusela, *Introduction to WITTGENSTEIN AND HIS INTERPRETERS* 32 n.23 (Guy Kahane, Edward Kanterian & Oskari Kuusela eds., 2007) (“Saul Liberman . . . reportedly once

those interested in the scope of the First Amendment, because courts and scholars have often suggested that the Amendment's terrain is defined by meaning,<sup>3</sup> without doing much to show what meaning (or its absence, nonsense) actually *means*. As a result, the concept of meaning operates like a rogue boundary surveyor, erratically charting the First Amendment's territory without judicial or scholarly accountability.

This raises a variety of interesting and difficult questions. If meaning establishes the boundaries of the First Amendment, then what are we to make of nonsense—"words or language having no meaning or conveying no intelligible ideas"?<sup>4</sup> If the Supreme Court is right that the Amendment's "constitutional safeguard . . . 'was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people,'"<sup>5</sup> then speech lacking such ideas—assuming that it is actually "speech"<sup>6</sup>—would not seem to merit constitutional coverage at all.<sup>7</sup> That would be

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introduced a 1940s lecture by the famous Kabbalah scholar Gershom Scholem with the words 'Nonsense is nonsense—but the history of nonsense is scholarship.'").

3. See, e.g., John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1347 (2008) ("Frequently, behavior is said to be covered by the First Amendment if it conveys 'ideas' or 'information.'"); Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 61 (1973) ("The crucial question under the first amendment is simply whether meaningful symbols of any type are being employed by one who wishes to communicate to others."); Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech"*, 1993 WIS. L. REV. 1525, 1559 ("[T]he first requirement for communication by conduct is that the conduct be meaningful, most often as a matter of convention. This is simply an extension of a basic principle of language: a speaker normally cannot use sounds to communicate unless the sounds have some meaning attached to them.").

4. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 791 (10th ed. 1996); see also William Charlton, *Nonsense*, 17 BRIT. J. AESTHETICS 346, 346 (1977) ("The notion of nonsense has been freely used by philosophers of this century, but no full or satisfactory account has been given of it. . . . The English word 'nonsense' seems to apply most appropriately to something which purports to have a sense or meaning, but does not in fact have one.").

5. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (emphasis added) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); see also *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("[O]ur people are guaranteed the right to express any thought, free from government censorship.").

6. See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 273 (1981) ("[T]he constitutional definition of the word 'speech' carves out a category that is not coextensive with the ordinary language meaning of the word 'speech.'"). I revisit this assumption below at notes 275–76 and accompanying text.

7. Cf. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 606 ("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."). My goal is to investigate whether nonsense falls within the First Amendment—a question of coverage—not to establish the level of protection it should receive. See Frederick

a jarring conclusion indeed, which might explain why even those who treat meaning as an essential ingredient of speech tend to avoid it. This is perhaps most noticeable in the context of nonrepresentational art such as Jackson Pollock's drip paintings and Lewis Carroll's nonsense verse. The Supreme Court has reassuringly declared these to be "unquestionably shielded" by the First Amendment.<sup>8</sup> But far from being *unquestionable*, their shielding in fact raises questions that are, as Mark Tushnet generously puts it, "quite difficult to answer satisfactorily."<sup>9</sup>

Part I of this Article demonstrates that the difficulty of these questions is not the only cause for concern, and that artists—though they seem to have a special relationship with nonsense<sup>10</sup>—are not the only would-be speakers who should be keenly interested in the answers. This is true even if we focus exclusively on linguistic communication, which by many accounts is presumptively entitled to First Amendment coverage.<sup>11</sup> Sometimes we speak without intending

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Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 (2004) ("[Q]uestions about the involvement of the First Amendment in the first instance are often far more consequential than are the issues surrounding the strength of protection that the First Amendment affords the speech to which it applies.").

8. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995) ("As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." (citation omitted) (quoting *Spence v. Washington*, 418 U.S. 405, 411 (1974) (per curiam))).

9. Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 170 (2012).

10. See *id.* at 169 (providing examples of artists denying the necessity of traditional meaning in their work, including Archibald MacLeish's claim that "[a] poem should not mean but be," ARCHIBALD MACLEISH, *Ars Poetica*, in COLLECTED POEMS 1917–1982, at 106, 107 (1985), and William Carlos Williams's refrain, "No ideas but in things," 2 WILLIAM CARLOS WILLIAMS, *A Sort of Song*, in THE COLLECTED POEMS OF WILLIAM CARLOS WILLIAMS 55 (Christopher MacGowan ed., New Directions Books 2001)); see also Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1364 (1990) (noting that postmodern art "not only rejected the Modernist demand that art be 'serious,' it rejected the idea that art must have any traditional 'value' at all"); *id.* at 1367 ("[T]he 80's has been the decade in which art that denies the value of art has become the most valuable art around." (alteration in original) (quoting Elizabeth Frank, *Art's Off-the-Wall Critic*, N.Y. TIMES MAG., Nov. 19, 1989, at 47, 78)).

11. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) ("[P]ure speech' . . . , we have repeatedly held, is entitled to comprehensive protection under the First Amendment."); Tushnet, *supra* note 9, at 192–99 (describing the attractions and perils of "nominalism," which would focus on "words and word equivalents" as the starting point of First Amendment analysis). This Article focuses primarily on nonsensical language, rather than nonsensical conduct, because it seems to be well-accepted that conduct can be nonsensical,

to “mean” anything at all—exclamations, jokes, doggerel verse, and even philosophical illustrations may all be nonsensical.<sup>12</sup> As Wittgenstein himself wrote in the *Tractatus Logico-Philosophicus*: “My propositions are elucidatory in this way: he who understands me finally recognizes them as senseless, when he has climbed out through them, on them, over them.”<sup>13</sup> Other times, we are unaware of our own nonsense, either because we wrongly believe our propositions to be meaningful or because we are simply misunderstood.<sup>14</sup> If meaning is a prerequisite for constitutional coverage, and much of what we say is meaningless without our ever knowing it, then the boundaries of the First Amendment are not only narrow but also unknown.

Consider *Morse v. Frederick*,<sup>15</sup> in which the Supreme Court upheld the suspension of a high school student who had unfurled a banner reading “BONG HiTS 4 JESUS” at an off-campus school function.<sup>16</sup> The Court conceded that the banner’s purported message “is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all,”<sup>17</sup> but concluded that the student’s suspension was “consistent with the First Amendment” because the banner “was reasonably viewed as promoting illegal drug use.”<sup>18</sup> The student himself said, quite plausibly, that “the words were just nonsense meant to attract television cameras.”<sup>19</sup> In dissent, Justice Stevens similarly concluded

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whereas the connection between language and nonsense has been largely unexplored. As noted in the Conclusion, the use-meaning approach would not extend First Amendment coverage to all linguistic communication.

12. See Charlton, *supra* note 4, at 346 (“It would normally be thought fairly damning to say of an utterance or a piece of writing ‘That is nonsense.’ Yet men of undoubted intelligence, like Edward Lear and Lewis Carroll, have devoted time and pains to writing what they admit is nonsense, and talking nonsense has been regarded as a conversational art.”). For a discussion of overt nonsense, see *infra* Part I.A.1.

13. LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* § 6.54, at 189 (C.K. Ogden ed. & trans., 1922). Whether this is really what he intended (and whether he succeeded) is of course another matter. The “meaning” of the *Tractatus*’s avowed lack of sense has been an elusive and perhaps ephemeral grail for analytic philosophers. For a description of the debate over “ineffable” and “resolute” readings, see Leo K.C. Cheung, *The Disenchantment of Nonsense: Understanding Wittgenstein’s Tractatus*, 31 *PHIL. INVESTIGATIONS* 197, 201–03 (2008), and *infra* notes 103–17.

14. For a discussion of covert nonsense, see *infra* Part I.A.2.

15. *Morse v. Frederick*, 551 U.S. 393 (2007).

16. *Id.* at 396–97.

17. *Id.* at 401.

18. *Id.* at 403, 409.

19. See *id.* at 401 (quoting *Frederick v. Morse*, 439 F.3d 1114, 1117–18 (9th Cir. 2006), *rev’d*, 551 U.S. 393 (2007)).

that “[t]his is a nonsense message, not advocacy.”<sup>20</sup> What if Stevens had commanded the majority? Would the student’s comments be unpunishable, or would they not count as speech at all?

Simply to describe the broad scope of nonsense both demonstrates its importance and suggests that meaning is an unreliable guide to the First Amendment’s hinterlands.<sup>21</sup> Moreover, meaning’s guidance would not necessarily be welcome even if it were accurate, because much nonsensical speech rests solidly on the normative foundations of the First Amendment—the values that the doctrine is created to protect.<sup>22</sup> Primary among these are the marketplace of ideas, individual autonomy, and democratic participation. Nonsense can and often does further each of them.<sup>23</sup>

Part I thus sketches the terrain of nonsensical speech, and makes a preliminary case for its protection. In doing so, it uncovers a uniquely convenient entrance to the very depths of the First Amendment, shining light on the idea of meaning itself. Spelunking in this area is hazardous business, and Part II proceeds with caution. Despite the difficulties, the exploration is worthwhile, for First Amendment theory and doctrine often suggest that meaning is an essential element of constitutionally salient speech without defining

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20. *Id.* at 444 (Stevens, J., dissenting); *see also id.* at 435 (referring to the “nonsense banner”).

21. I follow Robert Post’s lead by attempting to tell a story in which doctrine and normative commitments are interdependent. *See* ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM* 5 (2012) [hereinafter *POST, DEMOCRACY*] (“To determine the purposes of the First Amendment, therefore, we must consult the actual shape of entrenched First Amendment jurisprudence.”); Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 618 (2011) [hereinafter *Post, Reply*] (“Because law typically acquires authority from the commitments and principles of those whom it seeks to govern, I have sought to identify this fundamental purpose by inquiring into our historical commitments and principles.” (footnote omitted) (citing Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1474 (2007))).

22. *See* Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What “The Freedom of Speech” Encompasses*, 60 DUKE L.J. 1673, 1676 (2011) (“[T]he answer to the question of what constitutes the freedom of speech depends on the conception one adopts, and one’s choice of conception is more analogous to a purely subjective preference than to a conclusion reached by a series of falsifiable steps.”).

23. For a discussion of the constitutional value of nonsense, see *infra* Part I.B. “Expression that is not intended to communicate anything may clearly promote the four values identified by [Thomas] Emerson as underlying the first amendment.” Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 722 (1983). Emerson’s fourth value focuses on “[w]hether, although the conduct may not in itself qualify for special protection, such protection is necessary in order to safeguard other, qualified conduct.” *Id.* I discuss this argument below at notes 163–69 and accompanying text.

what meaning is or where it comes from. In other words, courts and free speech scholars have not explained what meaning *means*.

Analytic philosophers, meanwhile, have made meaning a primary target.<sup>24</sup> Throughout the past century (paralleling almost exactly the lifespan of the modern First Amendment)<sup>25</sup> they have developed two general methods for charting the boundaries of what can meaningfully be said. Their goal in doing so has been to find the limits of language, thought, and the world,<sup>26</sup> not to generate constitutional doctrine. And yet the tools they have created—which with egregious but necessary oversimplification can be called “representational” meaning and “use” meaning—have been wielded, sometimes awkwardly and perhaps unknowingly, by the Justices themselves.<sup>27</sup>

The representational approach finds meaning in the relationship between expression and underlying concepts.<sup>28</sup> Some version of this basic idea underlies the logical positivism associated with thinkers like Bertrand Russell and Wittgenstein in his early writings, among many others. Under the representational approach, speech that fails to represent extralinguistic ideas is simply nonsense and, if meaning is an essential ingredient of constitutionally salient speech, therefore falls outside the realm of the First Amendment. As Russell once put it, “Absorption in language sometimes leads to a neglect of the connexion of language with non-linguistic facts, although it is this connexion that gives meaning to words and significance to sentences.”<sup>29</sup>

24. See B.R. Tilghman, *Literature, Philosophy and Nonsense*, 30 BRIT. J. AESTHETICS 256, 256 (1990) (“[A] good case can be made that the notion of meaning and all it implies for the distinction between sense and nonsense has been the primary concern of twentieth-century philosophy, at least Anglo-American philosophy . . .”).

25. See Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1278 n.97 (2005) (suggesting that the popular, albeit “crude,” view is that “the First Amendment started in 1919,” which was when Justice Holmes wrote his dissent in *Abrams v. United States*, 250 U.S. 616 (1919)).

26. See WITTGENSTEIN, *supra* note 13, § 5.6, at 149 (“*The limits of my language mean the limits of my world.*”).

27. Borrowing philosophers’ tools, with or without acknowledgement, would itself be nothing new for First Amendment doctrine. See David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 875–78 (1986) (tracing the First Amendment doctrine’s “philosophical origins” to John Milton, John Locke, John Stuart Mill, and others).

28. See *infra* Part II.A.

29. HERBERT HOCHBERG, *Preface to INTRODUCING ANALYTIC PHILOSOPHY: ITS SENSE AND ITS NONSENSE, 1879–2002* (2003) (quoting Russell).

A representational approach to meaning apparently animates many of the Supreme Court's efforts to chart the boundaries of the freedom of speech, from the oft-repeated aphorism that "[t]he First Amendment . . . embodies '[o]ur profound national commitment to the free exchange of ideas'"<sup>30</sup> to the *Spence* test, which asks whether "[a]n intent to convey a particularized message was present," and whether "the likelihood was great that the message would be understood by those who viewed it."<sup>31</sup> The representational approach is also implicitly employed by those who fret about the constitutional protection of nonrepresentational art.<sup>32</sup> Nonrepresentationalism, after all, is only problematic for the First Amendment if representativeness itself is constitutionally relevant.

Despite its intuitive appeal, the representational approach is defective as a constitutional principle. Requiring speech acts to represent ideas would exclude nearly all of the potentially valuable nonsense described in Part I, including vast stretches of discourse regarding ethics, aesthetics, and religion.<sup>33</sup> On the representational account, they simply "cannot be expressed,"<sup>34</sup> and thus "the tendency of all men who ever tried to write or talk Ethics or Religion was to run against the boundaries of language. This running against the walls of our cage is perfectly, absolutely hopeless."<sup>35</sup> Fortunately, the First Amendment is not so limited; the boundaries of the freedom of speech are not coextensive with the "walls of our cage."

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30. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (second alteration in original) (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989)); see also *Miller v. California*, 413 U.S. 15, 20 (1973) ("All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties . . ." (alteration in original) (quoting *Roth v. United States* 354 U.S. 476, 484 (1957))).

31. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam). In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), the Court suggested that the message must be "created by the conduct itself," not "by the speech that accompanies it." *Id.* at 66.

32. See, e.g., *Nimmer*, *supra* note 3, at 35 ("It would be shocking to conclude that symphonic compositions or nonrepresentational art could be the subject of governmental censorship. Both are fully within the ambit of the first amendment notwithstanding their lack of both verbal and cognitive content.").

33. See *infra* Part I.B.

34. See WITTGENSTEIN, *supra* note 13, § 6.421, at 183.

35. LUDWIG WITTGENSTEIN, *Ethics, Life and Faith*, in THE WITTGENSTEIN READER 251, 258 (Anthony Kenny ed., 2d ed. 2006); see also James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 519 (1999) (discussing this passage).



In part to escape that cage, much of analytic philosophy took what is known as the “linguistic turn.”<sup>36</sup> That development, which is closely associated with Wittgenstein’s later work, speech-act theory, and ordinary-language philosophy, generally holds that “[t]he bounds of sense, as it were, are all within language, and meaning is nowhere other than in the many activities in which human beings use their various languages.”<sup>37</sup> As Wittgenstein explained, “For a *large* class of cases—though not for all—in which we employ the word ‘meaning’ it can be defined thus: the meaning of a word is its use in the language.”<sup>38</sup> Finding the boundaries of meaning, then, depends on identifying the “language-games” that “consist[] of language and the actions into which it is woven.”<sup>39</sup>

Echoes of a use-meaning approach can already be found in First Amendment discourse and doctrine. The use-meaning approach explains the Court’s conclusion that constitutional coverage extends to practices that form a “significant medium for the communication of ideas,”<sup>40</sup> and is not “confined to expressions conveying a ‘particularized message.’”<sup>41</sup> One can also find the influence of such an approach in First Amendment scholarship, perhaps most prominently and thoughtfully in Robert Post’s argument that First Amendment values “do not attach to abstract acts of communication as such, but rather to the social contexts that envelop and give constitutional significance to acts of communication.”<sup>42</sup>

36. See Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837, 1854–55 (1994) (“The legacy of philosophy from the middle of this century to the present has been the systematic replacement of foundationalist epistemology with holism, the substitution of referential theories of language with an emphasis on speech as action, and a general movement away from the individual as the foundation of empirical, linguistic, and moral judgment.” (footnotes omitted)).

37. Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 303–04 (1993) (book review); see also Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177, 177 (1985) (“Conventionalism is a viewpoint, most closely associated with the later writings of Wittgenstein, that emphasizes practice and context. It holds, for example, that we understand a concept not when we grasp some fact, but when we can successfully use that concept within a language game or a defined context, and that truth is a function of the agreement of those participating within a practice rather than the other way around.” (footnote omitted)).

38. LUDWIG WITGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 43 (G.E.M. Anscombe trans., 3d ed. 1969) (1953).

39. *Id.* § 7.

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

41. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995) (quoting *Spence v. Washington*, 418 U.S. 405, 411 (1974) (per curiam)).

42. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255 (1995); see also *id.* at 1276–77 (“Instead of aspiring to articulate abstract characteristics of

The use-meaning approach improves on the representational approach both descriptively and normatively. It accounts for the constitutional value in various forms of nonsense, captures the contextual and socially embedded nature of language, and provides better answers to thorny problems like the constitutional status of art. Under the use-meaning approach, “Jabberwocky” is protected by the First Amendment not because its words represent concepts, but because it is recognizable as a poem. By contrast, those acts and utterances that violate the rules of our language games simply do not count as meaningful speech, even if they represent facts or concepts and would therefore be meaningful under the representational approach.<sup>43</sup>

The Article thus concludes by endorsing the First Amendment’s linguistic turn and its effort to find meaning in *use*, rather than in the relationship of language to concepts. Making the most of such an approach, however, is no simple task.<sup>44</sup> As Professors Jack Balkin and Sandy Levinson put it, language games “refuse clear-cut boundaries, they borrow and steal from other sources, they overlap with other language games, and their governing rules are always in a state of flux and disputation. Lived language games are unruly and unkempt, untamed and untidy, much as life itself is.”<sup>45</sup> But if the First Amendment’s boundaries depend on them, then such games *must* be tamed. Doctrine must provide guidance; it must be able to identify the First Amendment language games that create the kind of meaning the Constitution requires. The use-meaning approach does not provide easy answers to these problems, but it does provide a better set of questions with which to address them.

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speech, doctrine ought to identify discrete forms of social order that are imbued with constitutional value, and it ought to clarify and safeguard the ways in which speech facilitates that constitutional value.”). My goal here is, in part, to show that one potential “abstract characteristic[] of speech”—meaning—is in fact derived from “discrete forms of social order.” *See id.* at 1276–77.

43. Cf. Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 771–75 (2001) (considering the hypothetical First Amendment claims of a person who protests speed limits by violating them).

44. *See infra* Part II.C.

45. J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1802 (1994); *see also* WITTGENSTEIN, *supra* note 38, § 65 (“Instead of producing something common to all that we call language, I am saying that [language games] have no one thing in common which makes us use the same word for all,—but that they are *related* to one another in many different ways.”).

## I. STUFF AND NONSENSE

Making sense of nonsense for First Amendment purposes involves at least two tasks: establishing what nonsense is and determining whether it has constitutional value.<sup>46</sup> This Part attempts to accomplish both, first sketching the landscape of meaningless speech and then showing how that nonsense relates to the basic values traditionally associated with the First Amendment. The discussion therefore not only describes the scope and value of nonsense, but also delivers a preliminary case for its constitutional protection and opens the door for Part II's exploration of the concept of meaning itself.

Part I.A begins by describing nonsense's broad domain. Traditionally, it has been thought that boundary disputes between meaning and nonsense are primarily relevant to the First Amendment in the context of artistic expression, and that a capacious view of art can more or less solve the problem. But nonsense contains multitudes, and not all of its forms are easily recognizable as such. The very breadth of nonsense demonstrates the importance of explaining it, and also suggests that, unless the First Amendment has been radically misunderstood, the Constitution covers at least some of this meaningless speech.

As a matter of doctrine, however, it is not particularly satisfying to say that nonsense must be protected by the Constitution because there is so much of it. To merit coverage, nonsense must presumably further the values traditionally associated with the First Amendment,<sup>47</sup> such as the marketplace of ideas, autonomy, and democracy. Part I.B argues that nonsense does exactly that, advancing the autonomous search for unsayable truths, contributing to cognitive advancement despite lacking "meaning" of its own, and even providing valuable outlets for political dissent. It follows that the First Amendment must make room for nonsense, as Part II argues in more detail.

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46. One might also ask whether nonsense can be "speech," but I will assume an affirmative answer for now and return to that issue below. *See infra* notes 272–76 and accompanying text.

47. *See* POST, DEMOCRACY, *supra* note 21, at 4 ("The actual contours of First Amendment doctrine cannot be explained merely by facts in the world; they must instead reflect the law's efforts to achieve constitutional values.").

A. *The Definition and Scope of Nonsense*

Whatever else it suggests, Wittgenstein's admonition to "pay attention to your nonsense"<sup>48</sup> was a call to recognize nonsense when it arises. That is a difficult but rewarding task, for nonsense takes many forms.<sup>49</sup> Because the goal of this discussion is to have constitutional reasoning drive conceptual analysis rather than the other way around, this Section evaluates the scope and constitutional value of nonsense in general terms before elaborating a more rigorous definition of meaning in Part II. The downside of this approach is that it is, as an initial matter, overexpansive: Pollock's paintings, for example, are usually seen as nonrepresentational and therefore qualify as a certain kind of nonsense, despite their undoubted value and First Amendment protection. Indeed, the *point* of the following discussion is to develop an appropriate definition of meaning based on an understanding of what it would exclude. And at least as an initial matter, it is not enough to simply posit that meaning is different from propositional content, for much First Amendment scholarship and doctrine makes precisely that connection.<sup>50</sup>

In an effort to impose some order, the following discussion divides nonsense—"[w]ords or language having no meaning or intelligible ideas"<sup>51</sup>—into two major categories: overt and covert.<sup>52</sup>

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48. WITGENSTEIN, *supra* note 2, at 56e.

49. See Charlton, *supra* note 4, at 346 ("In general philosophers have gone wrong in supposing that whatever is nonsensical is nonsensical in the same way.").

50. See *infra* notes 170–72, 205–17 and accompanying text.

51. See *supra* note 4 and accompanying text; see also *Nonsense*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/nonsense> (last visited Feb. 25, 2014) (defining "nonsense" as "spoken or written words that have no meaning or make no sense").

52. It would be perfectly plausible to slice nonsense in other ways, however—between purposeful and accidental, substantial and mere, illuminating and misleading, and so on. Oskari Kuusela, *Nonsense and Clarification in the Tractatus—Resolute and Ineffability Readings and the Tractatus' Failure*, 80 ACTA PHILOSOPHICA FENNICA 35, 37 (2006) (distinguishing "between misleading and illuminating nonsense" by noting that "[t]he former is unself-conscious nonsense attempting to say what can only be shown," whereas "[t]he latter is self-conscious nonsense intended to reveal its own nonsensicalness").

The two approaches to meaning discussed in Part II also suggest their own definitions of nonsense; indeed, the Article concludes by arguing that "representational" nonsense is constitutionally protected, whereas "use" nonsense is not. Because that argument is dependent in part on the fact that the former would include—and therefore exclude from constitutional coverage—so much everyday nonsense, it is better to start with a more general definition of nonsense.

1. *Overt Nonsense*. At almost the same time that Russell and Wittgenstein were busy in Cambridge trying to pin down nonsense, Carroll was busy in Oxford generating more of it. “Jabberwocky,” perhaps his most famous piece of nonsense verse (and a cameo performer in First Amendment doctrine<sup>53</sup>), begins: “’Twas brillig, and the slithy toves / Did gyre and gimble in the wade; / All mimsy were the borogoves, / And the mome raths outgrabe.”<sup>54</sup> As far as the average reader can tell,<sup>55</sup> these are symbols with no references; “sound and fury, [s]ignifying nothing.”<sup>56</sup> As such, they are *overt* nonsense.<sup>57</sup>

Neither the speaker nor the hearer of overt nonsense believes it to have meaning. Its lack of meaning is thus both intentional and apparent.<sup>58</sup> Some overt nonsense is fanciful, in that it does not purport to convey meaning, but rather is designed to create a sense of amusement or delight in the listener. People seem to enjoy such nonsense for the same reasons that babies gurgle at a novel stimulus—it provides a sense of wonder, possibility, and absurdity. But overt nonsense need not have some instrumental reason for existence; it can simply be nonsense for nonsense’s sake.<sup>59</sup>

Much artistic expression is overtly and sometimes avowedly nonsensical. In his thoughtful analysis of nonrepresentational art, Tushnet points out that many artists—from Archibald MacLeish to

53. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995). “Jabberwocky” is perhaps the most famous of Carroll’s nonsense, but it is by no means the only example. See, e.g., LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* 134 (Boston, Lee & Shepard 1869) (1865) (“Never imagine yourself not to be otherwise than what it might appear to others that what you were or might have been was not otherwise than what you had been would have appeared to them to be otherwise.”).

54. LEWIS CARROLL, *THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE* 21 (London, Macmillan & Co. 1872).

55. Carroll and Humpty Dumpty—his avatar of nonsense—later provided a glossary of terms. See *infra* notes 287–89 and accompanying text.

56. WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 5.

57. See Kuusela, *supra* note 52, at 37 (describing Peter Hacker’s view of overt nonsense); see also P.M.S. HACKER, *INSIGHT AND ILLUSION: THEMES IN THE PHILOSOPHY OF WITTGENSTEIN* 18–19 (rev. ed. 1986) (distinguishing overt and covert nonsense).

58. William Charlton refers to something like this when he discusses “factual” nonsense: “An utterance is factual nonsense if a person uttering it cannot mean what he says without ignoring plain facts, or what are taken to be plain facts.” See Charlton, *supra* note 4, at 352 (distinguishing “factual” from “grammatical” and “logical” nonsense).

59. See *id.* at 355 (“A man could not, of course, compose what he knows is nonsense without having a purpose of some sort. But he need have no ulterior purpose, no reason for writing what he writes except that it is nonsense. Lear and Carroll, at least, seem to have written nonsense for its own sake in this way.”).

William Carlos Williams—have denied the need for, or the desirability of, a direct connection between art and traditional meaning.<sup>60</sup> As Williams put it, “A poem should not mean but be.”<sup>61</sup> Charles Rosen makes a similar point in the context of literary style:

We should recall here the extraordinary sixteenth-century controversy about style between the admirers of Cicero and of Erasmus, the former, led by Étienne Dolet, believing that style had a beauty independent of the matter of the literary work, and the latter insisting that the beauty of style was wholly dependent on its consonance with meaning.<sup>62</sup>

Of course, one need not look that far to find examples of art that overtly lacks representational meaning. Consider the lyrics of popular songs, from “I Am the Walrus”<sup>63</sup> to “Who Put the Bomp”<sup>64</sup> to “Louie Louie”<sup>65</sup> to those consisting entirely of gibberish.<sup>66</sup>

The relationship between overt nonsense and art is not monogamous, however. Philosophers and linguists frequently rely on overt nonsense as an analytic instrument.<sup>67</sup> The *Tractatus*, for example, openly proclaims itself to lack meaning.<sup>68</sup> Philosophers A.W.

60. See Tushnet, *supra* note 9, at 169.

61. WILLIAMS, *supra* note 10, at 55.

62. CHARLES ROSEN, *Freedom and Art*, in FREEDOM AND THE ARTS: ESSAYS ON MUSIC AND LITERATURE 8–9 (2012).

63. See THE BEATLES, *I Am the Walrus*, on MAGICAL MYSTERY TOUR (Capitol Records 1967) (“Semolina pilchards climbing up the Eiffel Tower / Elementary penguin singing Hare Krishna / Man you should have seen them / Kicking Edgar Allen Poe”); see also THE BEATLES, *Come Together*, on ABBEY ROAD (Capitol Records 1969) (“He bag production / He got walrus gumboot / He got Ono sideboard / He one spinal cracker”).

64. Barry Mann & Gerry Goffin, *Who Put the Bomp*, on BARRY MANN, WHO PUT THE BOMP (ABC-Paramount 1961) (“When my baby heard / ‘Bomp bah bah bomp’ / ‘Bah bomp bah bomp bah’ / Every word went right into her heart.”).

65. THE KINGSMEN, *Louie, Louie*, on THE KINGSMEN IN PERSON (Wand Records 1963); see also Eric Predoehl, *A Short History of Louie Louie*, LOUIELOUIE.NET (1999), <http://www.louielouie.net/06-history.htm> (noting that the inscrutable song has “been called everything from a musical joke, pure garbage, the dumbest song ever written, to the quintessential pop single,” and that the FBI actually investigated the lyrics to determine whether they are obscene).

66. ADRIANO CELENTANO, *Prisencolinensinainciusol*, on NOSTALROCK (Italdisc 1973) (consisting of “lyrics” that mimic what American English sounds like to an Italian-speaking listener).

67. Cf. Charlton, *supra* note 4, at 347 (“Unless they wish to illustrate a philosophic point people seldom compose total nonsense on purpose.”).

68. See WITTGENSTEIN, *supra* note 13, § 6.54, at 189 (“My propositions are elucidatory in this way: he who understands me finally recognizes them as senseless . . .”). Wittgenstein’s use of the word “senseless” rather than “nonsense” is significant, because he posited a difference

Moore and Peter Sullivan explain that Wittgenstein had no choice but to use nonsense to demonstrate the boundaries of meaning itself:

The *Tractatus* consists mostly of nonsense because what Wittgenstein is trying to convey, about language and its limits, is, by its own lights, ineffable. The only way in which he can convey it—the only way in which he can get the reader to ‘see the world aright’—is by dint of a special kind of nonsense: what we might call ‘illuminating’ nonsense.<sup>69</sup>

Unsurprisingly, many linguists have taken a similar approach. In his dissertation, for example, Noam Chomsky set out to demonstrate among other things that a sentence can be grammatically correct and yet lack semantic meaning. His famous example was the phrase “[c]olorless green ideas sleep furiously.”<sup>70</sup>

2. *Covert Nonsense.* Whereas the meaninglessness of overt nonsense is self-conscious<sup>71</sup> and apparent to speaker and hearer alike, *covert* nonsense is potentially more insidious. It arises when speakers or hearers (or both) incorrectly believe that they are successfully exchanging meaningful ideas.

Perhaps the most common type of covert nonsense is the straightforward misunderstanding, in which speaker and hearer disagree about the specific meaning of a particular speech act, or even about whether the purported speech act has meaning at all. This Section does not attempt to fully address the relationship between misunderstandings and the freedom of speech—an interesting issue in

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between the two. For the purposes of the present discussion, however, there is no need to make such a fine distinction: both “senseless” and “nonsense” involve a lack of meaning. See Anat Biletzki & Anat Matar, *Ludwig Wittgenstein*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 23, 2009), <http://plato.stanford.edu/entries/Wittgenstein> (“The characteristic of being senseless applies not only to the propositions of logic but also to other things that cannot be represented, such as mathematics or the pictorial form itself of the pictures that do represent. These are, like tautologies and contradictions, literally sense-less, they have no sense. Beyond, or aside from, senseless propositions Wittgenstein identifies another group of statements which cannot carry sense: the nonsensical (*unsinnig*) propositions. Nonsense, as opposed to senselessness, is encountered when a proposition is even more radically devoid of meaning, when it transcends the bounds of sense.”).

69. A.W. Moore & Peter Sullivan, *Ineffability and Nonsense*, 77 PROC. ARISTOTELIAN SOC’Y (SUPP.) 169, 179 (2003). As Wittgenstein explained, the aim of the *Tractatus* was to “draw a limit to thinking,” which “can . . . only be drawn in language and what lies on the other side of the limit will be simply nonsense.” WITTGENSTEIN, *supra* note 13, at 27.

70. NOAM CHOMSKY, SYNTACTIC STRUCTURES 15 (1957). I am indebted to David Blocher for the example.

71. Kuusela, *supra* note 52, at 37.

its own right—but rather tries to identify the particular problems that misunderstandings pose for meaning-dependent approaches to the First Amendment.

*Simple* misunderstandings occur when the speaker intends one meaning and the listener hears another. Such situations are, of course, extremely common, but some approaches to the definition of speech—taken at face value—might exclude them.<sup>72</sup> Carroll’s poetry and Pollock’s paintings are “unquestionably shielded” by the First Amendment,<sup>73</sup> but one might reasonably ask whether many people “understand” them. For that matter, one could ask the same of *Finnegan’s Wake*, Matthew Barney’s movies, or any number of other impenetrable artistic works. So, too, are few listeners able to understand the specific meanings of most scientific, scholarly, or even legal speech. And it would be troubling, to say the least, if discussions of the Rule Against Perpetuities or the Higgs boson—or professors’ efforts to teach them—lack First Amendment protection simply because so few people comprehend them.

But misunderstandings can be more complicated. In addition to disagreeing about what meaning is conveyed by a purported speech act, people sometimes disagree about whether the act is meaningful at all. Such *deep* misunderstandings arise in at least two ways, which can with some oversimplification be called “lost meaning” and “found meaning.” The former occurs when a speaker intends to convey meaning and the listener fails to recognize not only the specific meaning, but also the nature of the act as meaningful. In other words, the listener does not even perceive the purported speech act as an effort to communicate meaning. Consider a computer programmer who expresses herself in code. A nonprogrammer might not only fail

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72. *Cf., e.g.,* United States v. O’Brien, 391 U.S. 367, 376 (1968) (“[The Court] cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”); Nimmer, *supra* note 3, at 37 (concluding that “symbolic speech requires not merely that given conduct results in a meaning effect, but that the actor causing such conduct must intend such a meaning effect by his conduct”). To be clear, I do not mean to suggest that these authorities would *actually* exclude misunderstandings from the First Amendment, only that their approaches seem to do so, as stated. Nimmer, for example, not only posited that a “meaning effect” was necessary for symbolic speech, but also that the Amendment covered speech lacking “both verbal and cognitive content.” *Id.* at 35–36.

73. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995).



to understand the code's specific meaning, but also fail to understand that it contains meaning at all.<sup>74</sup>

Found meaning, by contrast, arises when a listener imputes meaning to an act when the putative speaker never meant to convey any. First Amendment theory and doctrine have not focused extensively on the possibility of found meaning, but interesting hypotheticals easily come to mind. Imagine, for example, that a person sees a famous pianist sitting on a bench at her piano. The performer is simply taking a break, thinking about a recent vacation. The starstruck and credulous viewer, however, imagines that she is trying out a new performance of John Cage's *4'33"*, which consists of four and a half minutes of not playing.<sup>75</sup> The viewer has discovered meaning and imputed it to the daydreaming pianist, but no volitional speech has occurred. One could even stipulate that the person on the bench is not a pianist at all, but a janitor resting after her shift. Or imagine a traveler strolling in a foreign country, singing the supposedly nonsensical words of his favorite Beatles song. Little does he know that in the country he is visiting, "semolina pilchards"<sup>76</sup> is a grievous and actionable insult. Is the janitor or the tourist "speaking" for First Amendment purposes, notwithstanding the fact that neither intends to communicate any meaning?

First Amendment theory and doctrine do not provide satisfying answers as to whether such unintentional speech is constitutionally covered.<sup>77</sup> Denying constitutional coverage to unintended speech could leave out a wide range of speakers who cannot control their speech acts—those who are coerced or asleep, for example. A person

74. Cf. *Universal City Studios, Inc., v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001) ("Communication does not lose constitutional protection as 'speech' simply because it is expressed in the language of computer code. Mathematical formulae and musical scores are written in 'code,' *i.e.*, symbolic notations not comprehensible to the uninitiated, and yet both are covered by the First Amendment.").

75. JOHN CAGE, *4'33"* (1952); see MICHAEL NYMAN, *EXPERIMENTAL MUSIC: CAGE AND BEYOND* 11 (2d ed. 1999) ("[The piece's] first and most famous performance was given by a pianist (David Tudor) . . . Tudor, seated in the normal fashion on a stool in front of the piano, did nothing more nor less than silently close the keyboard lid at the beginning of, and raise it at the end of each time period.").

76. See THE BEATLES, *I Am the Walrus*, on *MAGICAL MYSTERY TOUR* (Capitol Records 1967).

77. Most likely, neither the pianist, janitor, nor tourist could raise First Amendment claims, given the requirement in *Spence v. Washington*, 418 U.S. 405 (1974), of "intent to convey a particularized message." *Id.* at 410–11. In *Mental States and Constitutional Rights* (work in progress), I consider in some detail whether constitutional rights do or should have act and mental state requirements analogous to those found in tort and criminal law.

with Tourette Syndrome may have involuntary verbal tics that can include a wide variety of “vocalizations,” from “grunting, throat clearing, shouting and barking” to “socially inappropriate words and phrases.”<sup>78</sup> If such a person were to involuntarily utter an actionable threat or libel, shouldn’t she be able to raise the First Amendment as a defense? On the one hand, Tushnet persuasively suggests that a “‘reasonable’ imputation of meaning to otherwise meaningless words—or symbols—is sufficient to trigger First Amendment coverage.”<sup>79</sup> On the other hand, treating involuntary acts as meaningful speech implies that the people who “spoke” them can be held responsible for meaning they never intended to convey. Transforming their nonsense into speech will not always work to their advantage, as the student in *Morse v. Frederick* learned.<sup>80</sup>

Finally, covert nonsense can arise when both speaker and hearer incorrectly believe that they have communicated meaningful ideas. Even though the parties think they are engaged in communication, their words actually lack meaning.<sup>81</sup> This sounds far-fetched, but according to some accounts of meaning it happens more often than we might like to think. To a representationalist, for example, language is meaningful only when it refers to some extralinguistic fact,<sup>82</sup> and a great deal of everyday speech fails this test. Wittgenstein himself believed, at least in his early writing, that aesthetics, ethics, and theology “cannot be expressed,”<sup>83</sup> and are therefore nonsensical.

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78. *What Is Tourette Syndrome?*, NAT’L TOURETTE SYNDROME ASS’N, <http://www.tsa-usa.org/aMedical/whatists.html> (last visited Feb. 25, 2014).

79. Tushnet, *supra* note 9, at 198; *see also id.* at 215 (“Taken together with *Hurley and Cohen*, *Humanitarian Law Project* implies that any activity that enough people regard as having some meaning, noncognitive as well as cognitive, must survive the highest level of scrutiny . . . .” (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995); *Cohen v. California*, 403 U.S. 15 (1971))).

80. *See supra* notes 15–20 and accompanying text.

81. *Cf.* Kuusela, *supra* note 52, at 37 (“[W]e can draw a . . . distinction between misleading and illuminating nonsense. The former is unself-conscious nonsense attempting to say what can only be shown. The latter is self-conscious nonsense intended to reveal its own nonsensicalness.”).

82. For a description of the representational approach, see *infra* Part II.A.

83. *See* WITTGENSTEIN, *supra* note 13, §§ 6.42–6.421, at 183 (“Hence also there can be no ethical propositions. . . . [E]thics cannot be expressed.”); *see also id.* § 4.003, at 63 (“Most propositions and questions, that have been written about philosophical matters, are not false, but senseless.”); Gregory S. Kavka, *Wittgensteinian Political Theory*, 26 STAN. L. REV. 1455, 1458 n.7 (1974) (reviewing HANNA FENICHEL PITKIN, *WITTGENSTEIN AND JUSTICE: ON THE SIGNIFICANCE OF LUDWIG WITTGENSTEIN FOR SOCIAL AND POLITICAL THOUGHT* (1972)) (“Since . . . Wittgenstein holds that propositions of ethics, aesthetics, and religion are not

But of course they are also enormously significant—many people regard such matters as the very lifeblood of public discourse.

The idea of covert nonsense is somewhat unsettling; its apparent scope is downright disturbing. If much of what we say is nonsensical without our even realizing it, then the boundaries of the First Amendment are not only narrow but unknown. Any time we fail to give meaning to our propositions, despite our best efforts and despite believing that we have done so, we are operating outside of constitutional coverage.

### *B. The Constitutional Value of Nonsense*

Simply describing the broad scope of nonsense demonstrates that the representational-meaning approach provides a poor map of the First Amendment's actual boundaries. That is, the Constitution undoubtedly *does* cover much of the nonsensical speech discussed in the previous Section, notwithstanding its lack of representational content. And there must be some reason for this; it is unsatisfying to say that nonsense should be protected by the First Amendment simply because it is plentiful. Appealing as that conclusion might be, it is normatively defensible only if nonsense serves relevant *constitutional* values such as the marketplace of ideas, individual autonomy, and democracy.<sup>84</sup> The following discussion attempts to show that nonsense is in fact an important means of furthering each of those values.

#### 1. *The Marketplace of Ideas.* The model of the marketplace of ideas—the first<sup>85</sup> and perhaps still most prominent<sup>86</sup> First Amendment

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amenable to such analysis, he concludes that such propositions lack cognitive significance. This does not mean that Wittgenstein regards the propositions of aesthetics, ethics, and religion as worthless—such propositions are strictly speaking nonsensical, yet they possess a kind of mystical significance for they try to express that which is important but linguistically inexpressible.” (citation omitted)).

84. I do not mean to suggest that these are the only free speech principles, nor that we must choose only one of them. Cf. Post, *supra* note 42, at 1271 (“There is in fact no general free speech principle . . .”).

85. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2356 (2000).

86. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 73 (1960) (arguing that establishing truth through a marketplace of ideas “is not merely the ‘best’ test” but that “[t]here is no other”); see also Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–25 (2008) (“This [marketplace of ideas] theory provided the first justification for a broad freedom of expression commensurate with the sweeping language of the First Amendment itself.”); William P. Marshall, *In Defense of the Search for Truth as a First Amendment*

theory—rests on the notion that, if left unregulated, good ideas will eventually win out over bad ones. In American law, the theory is traced to Justice Holmes’s argument that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>87</sup> Importantly, the truths that the marketplace can supposedly uncover are not narrowly defined, and can include political and ethical insights as well as empirical facts.<sup>88</sup> As Justice Brandeis put it in his own statement of the marketplace rationale, “[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”<sup>89</sup>

Inasmuch as nonsense represents a disconnect between words and ideas,<sup>90</sup> it seems out of place in a marketplace devoted exclusively to the latter—especially when ideas are valuable only as handmaidens to truth.<sup>91</sup> This is particularly apparent under some conceptions of “truth” itself. Just as some analytic approaches find meaning in the relationship between language and extralinguistic facts,<sup>92</sup> so too does the correspondence theory of truth hold that statements are true when they represent “actual” extralinguistic facts.<sup>93</sup> As Russell

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*Justification*, 30 GA. L. REV. 1, 1 (1995) (“In Speech Clause jurisprudence, for example, the oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized.”).

87. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING* 45 (H.B. Cotterill ed., MacMillan & Co. 1959) (1644) (“Let her and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?”).

88. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2674 (2011) (Breyer, J., dissenting) (“These test-related distinctions reflect the constitutional importance of maintaining a free marketplace of ideas, a marketplace that provides access to ‘social, political, esthetic, moral, and other ideas and experiences.’” (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969))).

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

90. *See* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 4, at 791 (defining “nonsense” as “words or language having no meaning or conveying no intelligible ideas”).

91. *See* Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 241 (“The [marketplace] theory’s emphasis on *ideas*, however, is troubling, and has the potential for making the first amendment value of art derivative. To the extent that the concept of ideas refers to intellectual and cognitive processes, it does not take account of the noncognitive and emotional aspects of communication which often accompany artistic expression, especially of the nonrepresentational kind.”); Tushnet, *supra* note 9, at 205 (“What ‘idea’ does Jackson Pollock’s *Blue Poles: No.11* convey? Even more, what idea does *Ulysses* convey?”); *cf.* Brandt v. Bd. of Educ., 480 F.3d 460, 465 (7th Cir. 2007) (“Self expression is not to be equated to the expression of ideas or opinions and thus to participation in the intellectual marketplace.”).

92. *See infra* Part II.A.

93. *See* BERTRAND RUSSELL, *THE PROBLEMS OF PHILOSOPHY* 84 (Arc Manor 2008) (1912).

explained, “[A] belief is true when there is a corresponding fact, and is false when there is no corresponding fact.”<sup>94</sup> A statement that does not correspond to a fact therefore seems meaningless under a formal approach to meaning, and false under a correspondence theory of truth. If meaningless statements do not even refer to extralinguistic facts, how can they possibly promote the intellectual search for those facts?

But such an argument unfairly oversimplifies both the normative vision of the marketplace model and the potential cognitive value of nonsense. As to the former, even the harshest critics of the marketplace model do not envision it being animated *solely* by a correspondence theory of truth. Under the marketplace approach, the value of free speech extends beyond the accurate identification of facts. Instead, the vision seems to be of what is called a “coherence” theory of truth, one that identifies as true that which people, through open discussion, come to regard as such.<sup>95</sup> The First Amendment generally shies away from legally enforceable determinations about what is “really” true, at least with regard to speech in public discourse.<sup>96</sup>

Even if one thinks that the First Amendment is concerned only with the conveyance of true facts, it is apparent that doctrine embodies a kind of “epistemological humility” on the part of government.<sup>97</sup> The reasons for this are easy enough to perceive, and they suggest that nonsense may be entitled to protection under a marketplace theory. One such reason is a general distrust of

94. *Id.* at 85.

95. See Paul G. Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157, 167 (1980) (noting that, under the modern analytic approach, “there is no simple or certain way to know the meanings of words and sentences; even their ‘truth’ depends on the game in which they are used”). There is of course a danger of tautology here, one that reemerges in efforts to define as “speech” that which people recognize as such. *Cf.* Post, *supra* note 85, at 2366 (“In the absence of such a morality [of public debate], it is merely tautological to presume that truth is what most people come to believe after open discussion.”).

96. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (“The First Amendment recognizes no such thing as a ‘false’ idea.” (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974))). As Post notes, the Court has *also* said that “there is no constitutional value in false statements of fact.” POST, DEMOCRACY, *supra* note 21, at 29 (quoting *Gertz*, 418 U.S. at 340); see *id.* at 29–31, 43–47 (suggesting that the distinction can be explained based on whether the purportedly false statements are part of public discourse); see *also* *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (striking down the Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266 (2006), which criminalized lies about certain military medals).

97. Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CALIF. L. REV. 267, 271 (1991).

government officials determining the meaning of private speech.<sup>98</sup> That is, if the marketplace model requires judges to be agnostic as to truthfulness, it seems that they should also be agnostic as to meaningfulness.

Some version of this concern has arisen in the context of art, with many judges and scholars arguing that judges are not well-suited to determine art's meaning, value, or even existence. As Justice Holmes once put it, judging the value of art is a "dangerous undertaking for persons trained only to the law."<sup>99</sup> If we do not trust judges to identify which of many possible meanings a work of art conveys, why would we trust them to identify whether it conveys meaning at all? Imbuing meaning where none is intended can distort speech just as much as other forms of misunderstanding. Consider again Carroll's verse. Some believe "Jabberwocky" to be overtly nonsensical, as suggested above.<sup>100</sup> Others suggest, to the contrary, that the poem represents not

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98. See Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 2 (1989) ("Not only the first amendment, but also the very idea of a principle of freedom of speech, is an embodiment of a risk-averse distrust of decisionmakers."); see also Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985) (theorizing that in interpreting the First Amendment courts' "overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically").

99. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903); see also *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1100 (7th Cir. 1990) (en banc) (Posner, J., concurring) ("[A First Amendment claim regarding nude dancing] strikes judges as ridiculous in part because most of us are either middle-aged or elderly men, in part because we tend to be snooty about popular culture, in part because as public officials we have a natural tendency to think political expression more important than artistic expression, in part because we are Americans—which means that we have been raised in a culture in which puritanism, philistinism, and promiscuity are complexly and often incongruously interwoven—and in part because like all lawyers we are formalists who believe deep down that the words in statutes and the Constitution mean what they say, and a striptease is not speech."), *rev'd sub nom.* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

The question has also proven difficult for persons *not* "trained only to the law," as Jeremy Waldron points out: "What [art critics] find is that they cannot agree about the definition of 'art.'" Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 530–31 (1994).

100. See Susan Stuart, *Shibboleths and Ceballos: Eroding Constitutional Rights Through Pseudocommunication*, 2008 B.Y.U. L. REV. 1545, 1546 ("Jabberwocky has no meaning, at least that an adult audience could discern."). Indeed, the word "Jabberwocky" has come to be used as a synonym for mere nonsense. See, e.g., Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1478 (2010) ("The artistic solution, in effect, is the expression, or vehicle, for the themes, meaning, and emotion essential to the found artistic problem. Without it, artistic expression becomes nothing more than *Jabberwocky*.").

nonsense, but a purposeful and illustrative distortion of sense.<sup>101</sup> Who are judges to determine which of these is the better interpretation of Carroll?

Nonsense—overt and otherwise—can also be a useful, perhaps even essential, tool in illuminating certain kinds of truth.<sup>102</sup> Consider again (and again and again) the *Tractatus*. What is the truth value of a book that proclaims itself to be nonsensical? That question has bedeviled and divided philosophers for the better part of a century,<sup>103</sup> and although no clear victor has emerged, their efforts demonstrate that nonsense can play a unique and important role in the intellectual marketplace.

The battle lines of the Tractarian debate are currently drawn between what have been called the “ineffable” and the “resolute” readings. The former, represented prominently by Russell and Peter Hacker, holds that “there are, according to the author of the *Tractatus*, ineffable truths that can be apprehended.”<sup>104</sup> As Russell put it in his introduction to the *Tractatus*, “[A]fter all, Mr [sic] Wittgenstein manages to say a good deal about what cannot be said, thus suggesting to the skeptical reader that possibly there may be some loophole through a hierarchy of languages, or by some other exit.”<sup>105</sup> And as Hacker points out, “That there are things that cannot be put into words, but which make themselves manifest is a leitmotif

101. See generally, e.g., Peter J. Lucas, *From Jabberwocky Back to Old English: Nonsense, Anglo-Saxon and Oxford*, in 1 LANGUAGE HISTORY AND LINGUISTIC MODELLING 503 (Raymond Hickey & Stanslaw Puppel eds., 1997).

102. See Kuusela, *supra* note 52, at 37.

103. See Biletzki & Matar, *supra* note 68 (“‘Nonsense’ has become the hinge of Wittgensteinian interpretative discussion during the last decade of the 20th century. Beyond the bounds of language lies nonsense—propositions which cannot picture *anything*—and Wittgenstein bans traditional metaphysics to that area. The quandary arises concerning the question of what it is that inhabits that realm of nonsense, since Wittgenstein does seem to be saying that there is something there to be shown (rather than said) and does, indeed, characterize it as the ‘mystical.’”).

104. P.M.S. Hacker, *Was He Trying To Whistle It?*, in THE NEW WITTGENSTEIN 353, 368 (Alice Crary & Rupert Read eds., 2000). The reference in Hacker’s title is to a remark by Wittgenstein’s friend, the Cambridge mathematician Frank Ramsey, who wrote that if Wittgenstein was right, “we must then take seriously that [philosophy] is nonsense, and not pretend, as Wittgenstein does, that it is important nonsense!” FRANK PLUMPTON RAMSEY, THE FOUNDATIONS OF MATHEMATICS 263 (R.B. Braithwaite ed., 1931). Connecting the famous final line of the *Tractatus* to Wittgenstein’s well-known habit, Ramsey wrote, “But what we can’t say we can’t say, and we can’t whistle it either.” *Id.* at 238.

105. See Bertrand Russell, *Introduction* to WITTGENSTEIN, *supra* note 13, at 7, 22 (referencing the seventh and final section of the *Tractatus*).

running through the whole of the *Tractatus*.”<sup>106</sup> According to the ineffable reading, Wittgenstein’s goal was to help us see these things “aright,” and then to discard the apparatus that helped us to do so.<sup>107</sup> The book itself is overt nonsense (or at least aims to be, for those who understand it) but still manages to convey meaning.

The “resolute,” or “austere,” reading, most closely associated with James Conant and Cora Diamond,<sup>108</sup> rejects the notion that there are unsayable truths, or different kinds of nonsense.<sup>109</sup> According to this reading, “[I]t is a mistake to think that there is anything informative about nonsense. Nonsense is nonsense and to think of the *Tractatus* as showing some ‘essential feature of reality, which reality has all right, but which we cannot say or think it has,’ is to make Wittgenstein ‘chicken out.’”<sup>110</sup> The purpose of the *Tractatus* is therefore therapeutic, rather than demonstrative.<sup>111</sup> It seeks to cure us

106. Hacker, *supra* note 104, at 353 (emphasis omitted) (citation omitted) (citing WITTGENSTEIN, *supra* note 13, § 6.522, at 187); *see also* G.E.M. ANSCOMBE, AN INTRODUCTION TO WITTGENSTEIN’S TRACTATUS 162 (4th ed. 1971) (drawing this same conclusion); Roy Brand, *Making Sense Speaking Nonsense*, 35 PHIL. F. 311, 313 (2004) (same). The ineffable reading appears to be a matter of precedent in the Second Circuit. *See* Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996) (“The ideas and concepts embodied in visual art have the power to transcend . . . language limitations and reach beyond a particular language group to both the educated and the illiterate.”).

107. *Cf.* WITTGENSTEIN, *supra* note 13, § 6.54, at 189 (“My propositions are elucidatory in this way: he who understands me finally recognizes them as senseless, when he has climbed out through them, on them, over them. (He must so to speak throw away the ladder, after he has climbed up on it.)”).

108. *See generally, e.g.*, James Conant, *Elucidation and Nonsense in Frege and Early Wittgenstein*, in THE NEW WITTGENSTEIN, *supra* note 104, at 174 [hereinafter Conant, *Elucidation and Nonsense*]; James Conant, *Must We Show What We Cannot Say?*, in THE SENSES OF STANLEY CAVELL 242 (Richard Fleming & Michael Payne eds., 1989); James Conant, *Two Conceptions of Die Überwindung der Metaphysik: Carnap and Early Wittgenstein*, in WITTGENSTEIN IN AMERICA 13 (Timothy McCarthy and Sean C. Stidd eds., 2001); CORA DIAMOND, *Throwing Away the Ladder: How To Read the Tractatus*, reprinted in THE REALISTIC SPIRIT: WITTGENSTEIN, PHILOSOPHY, AND THE MIND 179 (1991) [hereinafter DIAMOND, *Throwing Away the Ladder*]; Cora Diamond, *Logical Syntax in Wittgenstein’s Tractatus*, 55 PHIL. Q. 78 (2005).

109. Edmund Dain, *Contextualism and Nonsense in Wittgenstein’s Tractatus*, 25 S. AFR. J. PHIL. 91, 92 (2006) (“[T]here are, for austerity, no logically distinct kinds of nonsense; all nonsense, logically speaking, is on a par.”).

110. Brand, *supra* note 106, at 332 (quoting DIAMOND, *Throwing Away the Ladder*, *supra* note 108, at 181). It was Diamond who first wrote that the ineffable interpretation of Wittgenstein read the philosopher as “chickening out.” DIAMOND, *Throwing Away the Ladder*, *supra* note 108, at 181.

111. Marie McGinn, *Between Metaphysics and Nonsense: Elucidation in Wittgenstein’s Tractatus*, 49 PHIL. Q. 491, 491–92 (1999); *see also* Brand, *supra* note 106, at 326 (“The say/show distinction is meant to liberate us from the mental torture of a mind obsessively occupied with itself, chasing after itself in a movement that is increasingly vacuous, isolated, and cold.”);



of the pointless and potentially harmful effort of trying to find meaning in nonsense.<sup>112</sup> On this reading, “the whole talk of the limits of language is confused; there is nothing that language cannot say. Language can represent every possible fact in the world and there are no other-worldly facts.”<sup>113</sup> After all, Wittgenstein himself said that “[t]he limits of my language mean the limits of my world.”<sup>114</sup> And although Russell’s introduction to the book seems to support the ineffability reading, Wittgenstein thought that Russell had not “got hold of my main contention.”<sup>115</sup>

In an effort to avoid joining a debate it wishes merely to describe, this brief description of the ineffable and resolute readings inevitably simplifies and flattens them. Subtleties abound; variations are common.<sup>116</sup> The goal here is simply to suggest that on either view nonsense can be cognitively illuminating—meaningless speech, in other words, can have value *as a means to truth*. For adherents of the ineffable view, nonsense can demonstrate the existence of important

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Moore & Sullivan, *supra* note 69, at 179 (“There is nothing ineffable. There is only the temptation to see sense where it is lacking. Wittgenstein’s aim is therapeutic.”).

112. See Conant, *Elucidation and Nonsense*, *supra* note 108, at 196 (“[T]he aim for the Tractarian elucidation is to reveal (through the employment of mere nonsense) that what appears to be substantial nonsense is mere nonsense.”); see also Cheung, *supra* note 13, at 200 (concluding that, according to Diamond and Conant, “the *Tractatus* is not trying to help anyone see any unsayable insights,” but that “the aim of the *Tractatus* is merely to liberate nonsense utterers from nonsense, and that this is to be achieved by the non-frame sentences serving as elucidations”).

113. Brand, *supra* note 106, at 330.

114. WITTGENSTEIN, *supra* note 13, § 5.6, at 149 (emphasis omitted).

115. As Wittgenstein wrote to Russell:

I’m afraid you haven’t really got hold of my main contention, to which the whole business of logical prop[osition]s is only a corollary. The main point is the theory of what can be expressed [*gesagt*] by prop[osition]s—i.e. by language—(and, which comes to the same, what can be *thought*) and what can not be expressed by prop[osition]s, but only shown [*gezeigt*]; which, I believe, is the cardinal problem of philosophy.

Letter from Ludwig Wittgenstein to Bertrand Russell (Aug. 19, 1919), in LUDWIG WITTGENSTEIN: LETTERS TO RUSSELL, KEYNES AND MOORE 71, 71 (G.H. von Wright ed., 1974) (alterations in original).

116. See, e.g., Brand, *supra* note 106, at 312, 330 (defending an “existential-performative” reading of Wittgenstein, which would hold that “[t]here is a showing that is not a saying but what is shown is nothing beyond language; rather it is the very existence of language—its ability to perform sense”); Cheung, *supra* note 13, at 199 n.13 (noting that “[t]he resolute reading allows numerous variants,” which have been classified “into ‘strong’ and ‘weak’ versions based on their different views on the nature of the frame”).

but perhaps unsayable truths. A great deal of art might do just that.<sup>117</sup> And for adherents of the resolute view, nonsense can be a tool to save us from useless and potentially misleading efforts to establish meaning when none can be found. It is therapeutic—intellectually and not just emotionally so.

But high-level epistemological debates are not the only contexts in which nonsense can contribute to the marketplace of ideas. Much as falsehood can demonstrate truth,<sup>118</sup> nonsense can illuminate meaning by demonstrating its boundaries. The *Tractatus* is not unique in that regard. It has been said that Carroll created his nonsense verse “not to put anything in doubt or to entertain any new conceptual possibilities, but . . . to remind us where sense is to be found.”<sup>119</sup> So, too, can engaging with nonsense enable individuals to better comprehend truth and meaning. This is certainly the case with regard to art, which as discussed above is often overtly nonsensical. Art can, as the Supreme Court has recognized, “affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression,”<sup>120</sup> even when it lacks meaning. As William Charlton puts it, “[W]hereas we outgrow play with spoons and handkerchiefs, our intellectual faculties will always benefit from the quickening effect of good nonsense.”<sup>121</sup>

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117. Hegel, for one, believed that art was useful—albeit not as much as philosophy—as a guide to truth. See Nahmod, *supra* note 91, at 232 (citing 1 G.W.F. HEGEL, THE PHILOSOPHY OF FINE ART 15–16 (F.P.B. Osmaston trans., 1920)).

118. See *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (“Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’” (quoting JOHN STUART MILL, ON LIBERTY (1859), reprinted in ON LIBERTY AND OTHER WRITINGS 1, 20 (Stefan Collini ed., 1989))); MILL, *supra*, at 20 (concluding that silencing speech “rob[s] the human race” because even when an opinion is false, its contrast with the truth will more clearly illuminate the latter); Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RIGHTS J. 1203, 1203 (2008) (“False statements often have value in themselves, and we should protect them even in some situations where we are not concerned with chilling truthful speech. . . . False speech, therefore, is valuable because it is an essential part of a larger system that works to increase society’s knowledge.”).

119. Tilghman, *supra* note 24, at 262.

120. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (referring to motion pictures); see also Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 77 (1996) (“Art can carry ideas and information, but it also goes beyond logical, rational and discursive communication. It provides a risk-free opportunity to live in other worlds, enlarging individual perspective and strengthening individual judgment.”).

121. Charlton, *supra* note 4, at 360.

2. *Autonomy.* The most potentially expansive theory of the First Amendment is that speech deserves constitutional protection because and to the degree that it furthers individual autonomy.<sup>122</sup> Professor Martin Redish, perhaps the most prominent defender of this view, has argued that “all forms of expression that further the self-realization value, which justifies the democratic system as well as free speech’s role in it, are deserving of full constitutional protection.”<sup>123</sup> Professor Ed Baker similarly argued that speech “should receive constitutional protection . . . because and to the extent that it is a manifestation of individual autonomy.”<sup>124</sup> The expansiveness of the autonomy conception leaves its defenders with a vast territory to patrol, because nearly any act can be described as a manifestation of individual autonomy.

The very breadth of the autonomy view comfortably encompasses many forms of meaningless speech, for nonsense can surely manifest autonomy whether or not it “develop[s] the rational faculties.”<sup>125</sup> After all, much of what we think and feel is impossible to express in words.<sup>126</sup> This may be a result of deficiencies in our shared language, our limited individual vocabularies, or “practical, social, or psychological impediments to our using even the linguistic resources available to us.”<sup>127</sup> Whatever the reason for these limits, or whether

122. There are potentially important distinctions within what I have called the autonomy view—some scholars trumpet the values of self-realization or self-fulfillment instead. For simplicity’s sake, I have grouped them together here.

123. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982) (footnote omitted). Tom Scanlon once defended a similar viewpoint, *see generally, e.g.*, Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972) [hereinafter Scanlon, *A Theory of Freedom of Expression*], but has since done his best to repudiate it, *see* T.M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 VA. L. REV. 541, 546 (2011) (“As someone who once made a mistaken appeal to autonomy as the centerpiece of a theory of freedom of expression, my position in the Dantean Inferno of free speech debates seems to be repeatedly assailed with misuses of this notion, no matter how I criticize them.” (footnote omitted)).

124. C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 981 (1997); *see also* C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 6–7 (1976) (arguing that the First Amendment protects a speaker’s self-realization).

125. Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 80 (1989) (“[E]xpression may promote human flourishing in ways other than developing the rational faculties. Freedom of speech may allow the expression of powerful emotions and provide an outlet for the creative impulse in a variety of forms, including literature, drama, and the visual arts.”).

126. *See, e.g.*, Moore & Sullivan, *supra* note 69, at 173 (“Most of us have at one time or another found that we cannot express how we feel about something.”).

127. *Id.*

we recognize when they are transgressed, our efforts to express what lies beyond them create a kind of nonsense—statements that are unverifiable, fail to describe any possible state of affairs, or attempt to say what can only be shown.<sup>128</sup>

And yet from the perspective of individual autonomy and self-fulfillment, we may have very good reason not to pass over such things in silence. Though arguably nonsensical, beyond those limits may lie our chaotic, contradictory, and even “ineffable” selves.<sup>129</sup> Efforts to represent them may lack meaning according to some definitions, but they are also a very important part of individual and social human development.<sup>130</sup> Even Wittgenstein recognized that there was a kind of mystical value in some kinds of nonsense.<sup>131</sup>

As a First Amendment matter, these issues—and the autonomy value of nonsense—are most salient with regard to artistic speech, the constitutional status of which has been a perennial problem for the First Amendment.<sup>132</sup> Some courts and scholars simply take it for granted that the Amendment *must* cover art, and do little to explain why.<sup>133</sup> Perhaps equally common are efforts to suggest that art does in fact have constitutionally salient meaning. As Professor Marci Hamilton notes, “Mirroring the commentators’ approach, the Court tends to protect art only to the extent that it is a vehicle for ideas,

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128. For a description of the representational approach, under which these would be considered nonsensical, see *infra* Part II.A.

129. Cf. ROSEN, *supra* note 62, at 13 (“By the beginning of the twentieth century, when Hugo von Hofmannsthal, in the ‘Chandos Letter,’ asserted the inadequacy of language to express anything profoundly individual and subjective, one of the first words to have completely lost its meaning for him was ‘freedom.’”).

130. See Hamilton, *supra* note 120, at 79 (“Self-preservation cannot be achieved merely by following principles; it depends on the realization of human potentials, and these can only be brought to light by literature, not by systematic discourse.” (quoting WOLFGANG ISER, *THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE* 76 (1978))).

131. See generally JAMES R. ATKINSON, *THE MYSTICAL IN WITTGENSTEIN’S EARLY WRITINGS* (2009).

132. See Edward J. Eberle, *Art as Speech*, 11 U. PA. J.L. & SOC. CHANGE 1, 3 (2007) (“The Supreme Court has ruled that particular instances of art speech are protected expression, but has not supplied a satisfactory rationale for protecting art. . . . Major First Amendment theorists likewise have not devoted substantial attention to art speech.”).

133. See, e.g., *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (Souter, J., dissenting) (“It goes without saying that artistic expression lies within . . . First Amendment protection.”); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“A rule cannot be laid down that would excommunicate the paintings of Degas.”); Tushnet, *supra* note 9, at 170 n.4 (“Much of the secondary literature on art and the First Amendment assumes art’s coverage and derives First Amendment rules to deal with specific problems . . .”).

especially political ideas.”<sup>134</sup> For many works of art, this approach is perfectly adequate,<sup>135</sup> particularly given the extremely expansive definitions of “meaning” that courts and scholars apply to art.<sup>136</sup> But not all art can fit into the meaning-dependent model, no matter how far the concept of meaning is stretched, which raises what Hamilton describes as “the difficulty of explaining how a first amendment theory valuing speech for its rationally comprehensible ideas can comfortably accommodate the phenomenon of art.”<sup>137</sup>

Perhaps instead we should take seriously the notion that some art is nonsensical.<sup>138</sup> Indeed, if works of art contained articulable ideas, one suspects that they would be said and not sung.<sup>139</sup> Tushnet puts the point powerfully, and with apt illustrations:

To begin, many modern sculptors would deny that they “intend” to express anything in their work. Rather, they seek to explore the relation between shape and space, nothing more (or less). Nor . . . is the abjuration of any intent to express limited to sculptors. . . . Art as form—*being* rather than *meaning*—is not intended to communicate, even though it may sometimes do so. A related point is that sometimes artworks are engagements with a tradition. As such, it is not clear that they “mean” anything.<sup>140</sup>

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134. Hamilton, *supra* note 120, at 105.

135. *See id.* at 108 (“Because a significant number of artworks can be construed to have discursive content, existing theories of art’s first amendment content undeniably provide protection to a degree.”); *see also* Fromer, *supra* note 100, at 1478 n.253 (“[T]he more meaningful something is, the better people like it. At least for artistically naïve observers, meaning is by far the most important determinant of preference.” (alteration in original) (quoting COLIN MARTINDALE, *THE CLOCKWORK MUSE: THE PREDICTABILITY OF ARTISTIC CHANGE* 42–43 (1990))).

136. *See, e.g.,* *Bery v. City of New York*, 97 F.3d 689, 696 (1996) (“[P]aintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view [them], and as such are entitled to full First Amendment protection.”); Eberle, *supra* note 132, at 7 (“[A]rt speech is the autonomous use of the artist’s creative process to make and fashion form, color, symbol, image, movement or other communication of meaning that is made manifest in a tangible medium.”).

137. Hamilton, *supra* note 120, at 104.

138. *See generally, e.g.,* HERBERT READ, *ICON AND IDEA* (1955) (arguing that art is not always the product of cognitive activity and that the icon sometimes precedes the idea).

139. *See* Hamilton, *supra* note 120, at 74 (quoting Isadora Duncan as saying, “If I could say it, I wouldn’t have to dance it.”); *see also* JOHN DEWEY, *ART AS EXPERIENCE* 74 (1934) (“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.”).

140. Tushnet, *supra* note 9, at 188–89 (footnotes omitted).

Rather than trying to impute meaning to such artistic speech, we could instead ask whether nonsense for nonsense's sake—like art for art's sake<sup>141</sup>—serves important First Amendment values.

Among those values, autonomy is the most natural candidate. Surely one of the fundamental goals of artistic expression, after all, is to try to say or represent the inexpressible.<sup>142</sup> To do so is to speak nonsense, and yet no one could doubt the importance of such nonsense to the autonomy and self-development of those speaking it.<sup>143</sup> It can serve the autonomy interests of viewers as well. Aesthetic judgments are part of the “pleasure of freedom itself,” and are in that way “disinterested and ruleless, unconstrained by . . . appetite” or “a master concept to which they must conform.”<sup>144</sup> Art is therefore sometimes important for individual autonomy precisely *because* its lack of meaning removes it from the realm of knowledge.<sup>145</sup>

This is not to say that the autonomy principle provides an unmitigated case for protecting nonsense. Misleading covert nonsense, for example, can further the autonomy of the person speaking it while simultaneously interfering with the autonomy of those tricked by it.<sup>146</sup> Moreover, if autonomy is intertwined with rational cognition, covert nonsense might be a threat to autonomy instead of a means to advance it. Many leading proponents of the

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141. *See* *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 628 (7th Cir. 1985) (concluding that the First Amendment protects “purely artistic” expression—“art for art’s sake”).

142. *Cf.* Adler, *supra* note 10, at 1366 (quoting postmodern painter David Salle as saying that his paintings are about “all the paintings I won’t make or can’t make”).

143. Leo Tolstoy—whom Wittgenstein “admired and read constantly,” Brand, *supra* note 106, at 311—suggested that creating nonsense was perhaps the only thing that humans could do that their own creator could not. *See id.* (“God can do everything, it is true, but there is one thing he cannot do, and that is speak nonsense.” (quoting LEO TOLSTOY, *THE GOSPEL ACCORDING TO TOLSTOY* 11 (David Patterson ed. & trans., 1992))).

144. Anthony T. Kronman, *Is Poetry Undemocratic?*, 16 GA. ST. U. L. REV. 311, 324 (1999).

145. *See id.* (“Judgments of beauty are thus free in a twofold sense. They are neither driven by desire nor determined by a rule.”); *see also* Charlton, *supra* note 4, at 356–59 (evaluating nonsense in terms of Kant’s three types of aesthetic effect—the beautiful, the sublime, and the funny—and concluding that the first provides the best “clue”); Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 16 (“[B]eauty has constitutional status too, and . . . the life of the imagination is as important to the human adult as the life of the intellect.”); Nahmod, *supra* note 91, at 231 (“Because art is removed from knowledge and desire, it follows for Kant that art and the beautiful cannot express ideas or take positions.”).

146. *Cf.* Allen Blair, *A Matter of Trust: Should No-Reliance Clauses Bar Claims for Fraudulent Inducement of Contract?*, 92 MARQ. L. REV. 423, 456 (2009) (“Neo-Kantians tend to agree that lying is an affront to autonomy. Lies interfere with the victim’s rational deliberation and rob the victim of her prospects for making at least some sensible choices about a course of action or belief.”).

autonomy approach seem to hold this view. Redish, for example, refers to “the instrumental value in developing individuals’ mental faculties so that they may reach their full *intellectual* potential.”<sup>147</sup> Professor Fred Schauer has similarly described the self-realization view of the Amendment as being based on the human potential for “personal growth, self-fulfillment, and development of the rational faculties.”<sup>148</sup> If these views are correct, then autonomy is limited by rationality, and nonsense might lack constitutional salience precisely because it is not subject to analysis on the basis of its rationality.

3. *Democracy.* The final major First Amendment value is democracy. As with the autonomy and marketplace approaches, democratic theories of the First Amendment come in many forms. Perhaps most famously, Alexander Meiklejohn argued that the Amendment categorically protects political speech (and only political speech) against government interference.<sup>149</sup> Robert Bork took a similar, albeit narrower, view.<sup>150</sup> More recently, Post has argued that the primary value animating the First Amendment is that of “democratic legitimation”: the notion that “First Amendment coverage should extend to all efforts deemed normatively necessary for influencing public opinion.”<sup>151</sup>

Because democratic approaches to the First Amendment seem to be based on the content of speech acts,<sup>152</sup> it might not be immediately

147. MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 30 (1984) (emphasis added). In his original defense of the autonomy position, Scanlon argued that, on a Millian approach, “the powers of a state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents.” Scanlon, *A Theory of Freedom of Expression*, *supra* note 123, at 215.

148. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 49 (1982).

149. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 94 (1948) (“The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest.”).

150. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 29 (1971) (arguing that the First Amendment protects only “criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country”).

151. POST, *DEMOCRACY*, *supra* note 21, at 18; see also James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 *VA. L. REV.* 491, 491 (2011) (defending “the view that contemporary American free speech doctrine is best explained as assuring the opportunity for individuals to participate in the speech by which we govern ourselves”).

152. See, e.g., MEIKLEJOHN, *supra* note 149, at 26–27 (“[T]he vital point, as stated negatively, is that no suggestion of policy shall be denied a hearing because it is on one side of

apparent how nonsense—which lacks cognitive content of any kind—can be entitled to protection. After all, nonsense does not directly convey information about voting. And yet totalitarian states often ban nonrepresentational and nonsensical art.<sup>153</sup> Sheldon Nahmod points to the Soviet Union, whose leaders believed that “art should serve only to reinforce socialist ideals and thereby inculcate appropriate behavior; nonrepresentational art [was] considered decadent, bourgeois and dangerous.”<sup>154</sup> Whether or not that fear is well-founded, it certainly is not unique to the former Soviet Union, nor even to totalitarian states. As Hamilton notes, “Conventional readings of Plato, for example, indicate that he believed that art should be censored because it threatens order and stability.”<sup>155</sup>

But these odd outliers are surely just that, and their pathologies are not necessarily the ones with which First Amendment doctrine need be concerned. Moreover, this only explains why some states might seek to suppress nonsense, not why democracies should protect it. What positive democratic value does overt nonsense serve? Perhaps, like art, nonsense can help cultivate the kind of citizen on whom a well-functioning democracy depends. Meiklejohn, for example, argued that “[l]iterature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.”<sup>156</sup> This may be a bit of a stretch even on its own terms, but it does suggest a possible connection between nonsense and democracy. Just as engaging with nonsense can help people perceive cognitive truths in the

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the issue rather than another.”). Because he focuses on *media* of communication, this is not necessarily true of Post’s approach, though elsewhere I have questioned whether his theory can really avoid an inquiry into speech’s content. See Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 U. WASH. L. REV. 409, 417–23 (2012).

153. See Hamilton, *supra* note 120, at 98–100 (discussing examples from post-Cultural Revolution China, communist Eastern Europe, Nazi Germany, and elsewhere); see also Eberle, *supra* note 132, at 12–13 (discussing examples from Nazi Germany, the Soviet Union, and the Modernist Movement); cf. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“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.”).

154. Nahmod, *supra* note 91, at 225; see also Tushnet, *supra* note 9, at 172 (noting “Nazi Germany’s suppression of ‘degenerate’ art and Soviet Russia’s promotion of socialist realist art at the expense of abstraction”).

155. Hamilton, *supra* note 120, at 76.

156. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257.



marketplace for ideas,<sup>157</sup> perhaps it can also inform their understanding and appreciation of what Brandeis referred to as “political truth.”<sup>158</sup>

A second possibility is that overt nonsense serves as a kind of “safety-valve”—a way to release what might otherwise become dangerous dissent.<sup>159</sup> On this reading, speech “is an essential mechanism for maintaining the balance between stability and change.”<sup>160</sup> The Merry Pranksters, whose escapades in their brightly decorated bus were catalogued in *The Electric Kool-Aid Acid Test*,<sup>161</sup> often “tootl[ed] the multitudes,” which referred “to the way a Prankster would stand with a flute on the bus’s roof and play sounds to imitate people’s various reactions to the bus.”<sup>162</sup> Such activity probably did not convey any particularized message or “idea.” But without that outlet, perhaps the Pranksters’ basically nonsensical hijinks would have devolved into something more destructive.

A related argument for extending constitutional protection to nonsense draws on institutional considerations that are especially salient for, but not unique to, democracy conceptions of the First Amendment: that the Amendment must protect nonsense to fully insulate valuable and meaningful speech. The Supreme Court has long recognized that “First Amendment freedoms need breathing space to survive.”<sup>163</sup> This proposition is based on the belief that speech is “delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter [its] exercise almost as potently as the actual application of sanctions.”<sup>164</sup> Doctrine has been significantly shaped by that belief, perhaps most prominently in the context of First Amendment standing doctrine, which permits people to attack on free speech grounds a law that would concededly be

157. See *supra* 118–121 and accompanying text.

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

159. See, e.g., Stephen G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 10–11 (2008) (describing safety-valve theory).

160. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

161. TOM WOLFE, *THE ELECTRIC KOOL-AID ACID TEST* (1968).

162. Christopher Lehmann-Haupt, *Ken Kesey, Author of ‘Cuckoo’s Nest,’ Who Defined the Psychedelic Era, Dies at 66*, N.Y. TIMES, Nov. 11, 2001, A47; see WOLFE, *supra* note 161, at 100 (“Tootling the Multitudes”).

163. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

164. *Id.*

constitutional as applied to them,<sup>165</sup> so long as the law reaches a substantial amount of protected speech.<sup>166</sup>

The nothingness of nonsense might be exactly the kind of breathing space that sense needs to thrive. After all, the Court has recognized that, if only truthful speech were protected, people would “tend to make only statements which ‘steer far wider of the unlawful zone.’”<sup>167</sup> Perhaps if only meaningful speech were protected, people would shy away from pushing the boundaries of logic and language for fear of speaking unprotected nonsense. As the Court reasoned in *Cohen v. California*,<sup>168</sup> “[F]orbid[ding] particular words . . . also run[s] a substantial risk of suppressing ideas in the process.”<sup>169</sup> Nonsense might merit protection precisely because of its instrumental value in protecting meaningful speech.

## II. THE MEANING OF MEANING FOR THE FIRST AMENDMENT

The discussion up until this point has described an important but underexplored category of speech—nonsense—and made a preliminary case for its constitutional protection. In the process, it has flanked another target: the very concept of meaning itself. This is dangerous quarry, particularly when wounded by the apparent threat to its claim on the First Amendment’s territory. With due concern for the hazards, though, it is difficult to imagine a better way to consider meaning than by, as the preceding discussion has, exploring its absence. The goal of this Part is to use that analysis to confront the meaning of “meaning” for First Amendment purposes.

It would be easier, perhaps, to avoid the issue by simply saying that meaning does not matter for the First Amendment. But a wide range of doctrine and scholarship suggests that the easy road is foreclosed, and that meaning—generally equated with ideas, viewpoints, or content—is a necessary ingredient of constitutionally salient speech. As Professor John Greenman notes, “Frequently, behavior is said to be covered by the First Amendment if it conveys

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165. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

166. *Id.* at 615.

167. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

168. *Cohen v. California*, 403 U.S. 15 (1971).

169. *Id.* at 26.

‘ideas’ or ‘information.’”<sup>170</sup> This meaning-dependent approach is embedded in constitutional doctrine in various ways, and has been buttressed by thoughtful scholarship. Peter Tiersma, for example, proposes that “the first requirement for communication by conduct is that the conduct be meaningful, most often as a matter of convention. This is simply an extension of a basic principle of language: a speaker normally cannot use sounds to communicate unless the sounds have some meaning attached to them.”<sup>171</sup> Likewise, Melville Nimmer’s influential account of symbolic speech holds that “symbolic speech requires not merely that given conduct results in a meaning effect, but that the actor causing such conduct must intend such a meaning effect by his conduct.”<sup>172</sup>

But the meaning-dependent approach also raises difficult problems, for the reasons suggested in Part I: nonsense is pervasive, and much of it has a strong relationship to the First Amendment’s core values. Moreover, despite their apparent insistence on the importance of meaning, courts and scholars have done very little to establish what meaning means.<sup>173</sup> That imprecision, in turn, provides space to craft a doctrinal and theoretical apparatus that allows meaning to play a central role in First Amendment discourse without completely denying constitutional coverage to nonsense. This is no easy task, however, for the necessary tools are scarce and scattered throughout the First Amendment’s messy workshop.

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170. Greenman, *supra* note 3, at 1347; *see also* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Unchartered Zones*, 90 CORNELL L. REV. 1277, 1304 (2005) (“Under nearly every theory of free speech, the right to free speech is at its core the right to communicate—to persuade and to inform people through the *content* of one’s message.” (emphasis added)).

171. Tiersma, *supra* note 3, at 1559. Tiersma creates a two-part test for determining whether nonverbal communication falls within the freedom of speech: “First, action must have meaning, either by way of convention or in some other manner. Second, the actor must intend to communicate by means of the action.” *Id.* at 1526; *see also id.* at 1561 (“An intent to communicate obviously requires an intent to convey information.”).

172. Nimmer, *supra* note 3, at 37. Nimmer also explains that “[t]he meaning effect is a signal that registers in the mind of at least one observer. The nonmeaning effect is not dependent upon the reaction of other minds.” *Id.* at 36. As noted above, despite its reliance on meaning, Nimmer considered his approach broad enough to reach artistic speech lacking verbal and cognitive content. *See id.* at 35.

173. *Cf.* Greenman, *supra* note 3, at 1338–39 (“Everybody knows that communication is important, but nobody knows how to define it. The best scholars refer to it. Free-speech law protects it. Smart people tell us that the Internet should be structured to promote it. But no one—no scholar or judge—has successfully captured it. Few have even tried.” (footnotes omitted)).

Fortunately, craftsmen in adjacent workshops can provide useful guidance. The relationship between meaning and language has been the central obsession of analytic philosophy for the better part of a century. Of course, analytic philosophers are primarily concerned with determining what can meaningfully be said, not what kinds of speech are or should be protected from government sanction. But with regard to the specific issue of meaning, their hard-won advances are directly relevant to the questions that constitutional law has set for itself. Moreover, as the following discussion shows, echoes of their efforts can already be heard in First Amendment discourse.

Two major schools of thought have emerged, which, with regrettably necessary simplification, can be called the “representational” and “use” approaches to meaning. The former, associated with Wittgenstein in his early writings, Bertrand Russell, and logical positivism, finds meaning in the connection between language and extralinguistic concepts.<sup>174</sup> Language that fails to represent such concepts is nonsensical. Some First Amendment discourse implicitly utilizes such an approach. The authorities cited above, for example, generally employ a more-or-less representational approach to meaning by searching for “ideas”<sup>175</sup> or “content.”<sup>176</sup> The frequent scholarly explorations of nonrepresentational art also seem motivated by a representational approach, for nonrepresentation is only relevant to the degree that representationalism itself is constitutionally salient.

The lessons of analytic philosophy suggest that these are the wrong questions to ask. As Paul Chevigny explains:

Having abandoned the view of language as a “copy” of the “real world,” a set of names for objects, and assertions that have meaning only to the extent that they faithfully represent reality, philosophers increasingly think of language as a system of discourse in which assertions can have “meaning” and be “true” not as representations

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174. “Representational” is used here as a rough and imperfect label for many related schools of thought, from foundationalism to logical positivism. Paying the inevitable costs of oversimplification nevertheless seems worthwhile, since my purpose here is not to illuminate anything specific to those philosophies, but simply to show how, generally speaking, they might inform the First Amendment.

175. See, e.g., Greenman, *supra* note 3, at 1347 (surveying various First Amendment arguments, including one that holds “that communication is the conveyance of ‘ideas’”).

176. See Volokh, *supra* note 170, at 1304 (“Under nearly every theory of free speech, the right to free speech is at its core the right to communicate—to persuade and to inform people through the content of one’s message.”).

of “reality” but as ideas for which good reasons can be found in other parts of the system of discourse.<sup>177</sup>

That is, if meaning is relevant for First Amendment purposes, it must be found in the way language is *used*, not in what it represents. The following discussion attempts to show what that entails as a constitutional matter and why it represents an improvement over the representational approach. And yet bringing use meaning to the forefront of First Amendment doctrine drags with it a new set of problems, including the inherent difficulty of identifying the language games that imbue speech with meaning.

The goal of this Part is to suggest how First Amendment discourse and doctrine can fruitfully utilize the concept of meaning, not to fully define speech, say anything new about analytic philosophy, or—perish the thought—provide an original or comprehensive reading of Wittgenstein.<sup>178</sup> The following accounts of analytic philosophy will be familiar, if simplified, to philosophers; the First Amendment theory and doctrine will be familiar to legal scholars. Indeed, this is far from the first article to suggest connections between them. But its angle of approach—through the region of nonsense—is novel for First Amendment scholarship, and it aims to provide a fresh and useful, if complicated and imperfect, way to think about meaning for First Amendment purposes.

### A. *Representational Meaning*

In 1899, Oliver Wendell Holmes, Jr., wrote: “We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.”<sup>179</sup> For a man whose contribution to American jurisprudence

177. Chevigny, *supra* note 95, at 162 (footnote omitted).

178. Wittgenstein’s influence is so magnetic that the very act of citing him has become a language game of its own. See Steven L. Winter, *For What It’s Worth*, 26 LAW & SOC’Y REV. 789, 796–97 (1992) (noting the signaling value of citations to Wittgenstein “[i]n some legal academic circles”); see also Dennis W. Arrow, “Rich,” “Textured,” and “Nuanced”: Constitutional “Scholarship” and Constitutional Messianism at the Millenium, 78 TEX. L. REV. 149, 149 n.\* (1999) (positing the same phenomenon with regard to law review editors).

179. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899); see also Letter from Oliver Wendell Holmes to Harold J. Laski (May 9, 1925), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 737, 738 (Mark DeWolfe Howe ed., 1953) (noting how difficult it is to “think accurately—and think things not words”).

can largely be measured by his mastery of language,<sup>180</sup> this might come as something of a surprise. The remark suggests that the meaning of words lies in “the facts for which they stand.” In that way, it is emblematic of the representational approach to meaning—one that locates meaning in the relationship between language and extralinguistic concepts.<sup>181</sup> Words that do not denote such concepts are nonsensical and, if the doctrinal descriptions set out above are accurate, fall outside the boundaries of the First Amendment. But as the remainder of this Section shows, such a representational approach has serious defects as a guide for constitutional law.

Holmes is often classified as a pragmatist,<sup>182</sup> and though his circle of scientifically and philosophically inclined friends was broad and deep,<sup>183</sup> it apparently did not include those in Vienna and Cambridge who were concurrently exploring the relationship between “things” and “words.” Even as Holmes was penning his monumentally influential free speech opinions, and essentially giving the First Amendment its first normative theory,<sup>184</sup> those thinkers—Russell and Wittgenstein prominent but not alone among them—were probing the meaning of meaning itself.<sup>185</sup>

In the early 1900s, Russell was perhaps the world’s preeminent logician and mathematician. His *Principia Mathematica* was published in the 1910s, just as Holmes was laying the normative foundations of

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180. See Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. xvii (Richard A. Posner ed., 1992).

181. This does not mean, of course, that each word has only one thing to which it is connected. As Holmes noted elsewhere, “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” *Towne v. Eisner*, 245 U.S. 418, 425 (1918). Conversely, the same “thing” may be connected to multiple words, as in Gottlob Frege’s famous example of the “Morning Star” and “Evening Star,” both of which refer to Venus.

182. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788 (1989) (“Holmes as legal pragmatist is hardly a new idea. His associations with Charles Sanders Peirce and William James, as well as his admiration for John Dewey, have led a number of intellectual historians to count him as an adherent and even a founder of the pragmatist movement.”).

183. See generally LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001) (describing the social and intellectual “club” that included such luminaries as Holmes, William James, and Charles Peirce).

184. See Post, *supra* note 85, at 2356.

185. Starting with Russell and Cambridge means omitting any number of important thinkers, including Gottlob Frege and the Austrian logical positivists, who arguably deserve credit for the very creation of analytic philosophy. However costly, such omissions are necessary for the sake of brevity and clarity. Fuller accounts can be found in *THE LINGUISTIC TURN: ESSAYS IN PHILOSOPHICAL METHOD* (Richard M. Rorty ed., 1992).

the First Amendment. As part of his wide-ranging intellectual explorations, Russell contemplated what it means for a statement to have meaning. He eventually came to believe that statements are meaningful, even if not verifiable, so long as they express a possible state of affairs: “[A] sentence ‘*p*’ is significant if ‘I believe that *p*’ or ‘I doubt that *p*’ or etc., can describe a perceived fact . . . .”<sup>186</sup> Thus a statement like “The King of France is bald” can be meaningful because it denotes a concept, even though the thing it denotes (the King of France) does not exist.<sup>187</sup> Statements that fail to denote are nonsensical. Russell’s famous example of such nonsense was the statement “[Q]uadruplicity drinks procrastination.”<sup>188</sup>

At around the same time as he was developing this approach to meaning, Russell took on a new pupil, whom he at first referred to as “[m]y ferocious German . . . armour-plated against all assaults of reasoning.”<sup>189</sup> Within one academic term, Russell learned that his German was Austrian and quite capable of his own assaultive reasoning. Russell was intellectually smitten: “I love him & feel he will solve the problems I am too old to solve.”<sup>190</sup> The ferocious Austrian was, of course, Wittgenstein. For him, as Professor Dennis Patterson says, “all philosophical problems [were] ultimately problems of language.”<sup>191</sup> Although the focus on problems of language was consistent throughout Wittgenstein’s career, his approach to them can be divided into two basically distinct phases, only the first of which fits the representational mold described here. For the “early” Wittgenstein, author of the spectacularly impenetrable *Tractatus Logico Philosophicus*, sense consisted in “a determinate relation between a proposition and an independent state of affairs.”<sup>192</sup>

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186. BERTRAND RUSSELL, AN INQUIRY INTO MEANING AND TRUTH 181 (1940).

187. See generally Bertrand Russell, *On Denoting*, 14 MIND 479 (1905) (propounding a “theory of denoting” that holds that “denoting phrases never have any meaning in themselves, but that every proposition in whose verbal expression they occur has a meaning”).

188. RUSSELL, *supra* note 186, at 166.

189. RAY MONK, LUDWIG WITGENSTEIN: THE DUTY OF GENIUS 40 (1990).

190. *Id.* at 41.

191. Patterson, *supra* note 1, at 938.

192. Brand, *supra* note 106, at 314; see also Kavka, *supra* note 83, at 1457 (concluding that the *Tractatus* is based on the belief that “the function of language is to model or picture the world”).

To explore their “relation,” Wittgenstein focused on the relationship between thought and expression. As the preface or “frame” of the *Tractatus* explained:

The book will, therefore, draw a limit to thinking, or rather—not to thinking, but to the expression of thoughts; for, in order to draw a limit to thinking we should have to be able to think both sides of this limit (we should therefore have to be able to think what cannot be thought).

The limit can, therefore, only be drawn in language and what lies on the other side of the limit will be simply nonsense.<sup>193</sup>

That limit represents the boundary of both meaning and of reality. As Wittgenstein explained in the koan-like propositions of the book itself: “The proposition is a picture of reality. The proposition is a model of the reality as we think it is.”<sup>194</sup> Anything that is not a proposition is, strictly speaking, nonsense, for anything that is not a proposition fails to present a picture of reality: “Only the proposition has sense; only in the context of a proposition has a name meaning.”<sup>195</sup> It follows that there is no way to comprehend or create reality *but* through language, and thus “[t]he limits of my language mean the limits of my world.”<sup>196</sup>

This does not necessarily mean, however, that all concepts are reducible to language.<sup>197</sup> Wittgenstein was obsessed with the notion that some things “can not be expressed by prop[osition]s, but only shown . . . ; which, I believe, is the cardinal problem of philosophy.”<sup>198</sup> As Elizabeth Anscombe, a distinguished philosopher and former student of Wittgenstein’s, later explained:

[A]n important part is played in the *Tractatus* by the things which, though they cannot be ‘said’, are yet ‘shewn’ or ‘displayed’. That is to say: it would be right to call them ‘true’ if, *per impossible*, they

193. WITTGENSTEIN, *supra* note 13, at 27.

194. *Id.* § 4.01, at 63.

195. *Id.* § 3.3, at 51.

196. *Id.* § 5.6, at 149 (emphasis omitted); *see id.* § 3.032, at 43, 45 (“To present in language anything which ‘contradicts logic’ is as impossible as in geometry to present by its co-ordinates a figure which contradicts the laws of space; or to give the co-ordinates of a point which does not exist.”).

197. For a description of the debate between “ineffable” and “resolute” readings of Wittgenstein, *see supra* notes 103–17 and accompanying text.

198. *See* Letter from Ludwig Wittgenstein to Bertrand Russell, *supra* note 115, at 71 (first alteration in original).



could be said; in fact they cannot be called true, since they cannot be said, but ‘can be shewn’, or ‘are exhibited’, in the propositions saying the various things that can be said.<sup>199</sup>

Whatever their importance, attempts to *say* these things inevitably result in nonsense. Holmes seemed to have something similar in mind when he suggested the difference between thinking things and thinking words.<sup>200</sup>

Though Wittgenstein himself would apparently later abandon it,<sup>201</sup> the effort to find meaning in the relationship between words and things certainly did not end with the *Tractatus*. The influence of the representational approach is palpable in the work of A.J. Ayer, the great English logical positivist, whose *Language, Truth, and Logic* defends among other things the “verification principle.”<sup>202</sup> That principle holds that statements are nonsensical when they are not analytically or empirically verifiable.<sup>203</sup> A similar focus on verifiability seems to underlie popular intuitions about the relationship between meaning and truth. For example, Wikipedia’s rules provide that “[a]ll material in Wikipedia mainspace, including everything in articles, lists and captions, must be verifiable.”<sup>204</sup>

The influence of the representational approach extends, albeit uncredited, to First Amendment doctrine itself. This is perhaps most apparent in what John Greenman calls the Supreme Court’s “ideaism”—the principle that “behavior is . . . covered by the First Amendment if it conveys ‘ideas’ or ‘information.’”<sup>205</sup> The notion that ideas—cognitive meanings—are the focus of the First Amendment is

199. ANSCOMBE, *supra* note 106, at 162.

200. *See supra* note 179 and accompanying text.

201. *See infra* notes 226–27 and accompanying text.

202. ALFRED JULES AYER, *LANGUAGE, TRUTH AND LOGIC* 31 (Dover Publ’ns 1952) (1936).

203. *See id.* at 41 (“[E]very empirical hypothesis must be relevant to some actual, or possible, experience, so that a statement which is not relevant to any experience is not an empirical hypothesis, and accordingly has no factual content. . . . [T]his is precisely what the principle of verifiability asserts.”); Chevigny, *supra* note 95, at 163 (“If a proposition was not true or false by definition or did not give rise to an empirical prediction that could, in principle, be verified, the proposition was meaningless.”).

204. *Wikipedia:Verifiability*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Wikipedia:Verifiability> (last visited Feb. 25, 2014). Robert Post quotes an earlier version of the rule: “[T]he threshold for inclusion in Wikipedia is verifiability, not truth—that is, whether readers are able to check that material added to Wikipedia has already been published by a reliable source, not whether we think it is true.” POST, *DEMOCRACY*, *supra* note 21, at 8 (emphasis omitted).

205. Greenman, *supra* note 3, at 1347–48.

so often repeated that it might sometimes pass unnoticed. In *New York Times Co. v. Sullivan*,<sup>206</sup> the Supreme Court explained that the Amendment's "constitutional safeguard . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"<sup>207</sup> Since then, the Court has often invoked the principle that "[t]he First Amendment . . . embodies '[o]ur profound national commitment to the free exchange of ideas.'"<sup>208</sup> In *Miller v. California*,<sup>209</sup> for example, the Court seemed to suggest that ideas are so important that the existence of one is sufficient for constitutional coverage: "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment's] guaranties . . . ." <sup>210</sup> By the same logic, the Court has also indicated that putative speech acts such as fighting words and obscenity fall outside the boundaries of the First Amendment in part because they "are no essential part of any exposition of ideas."<sup>211</sup>

A representational approach to meaning similarly seems to animate some of the Court's efforts to define what kinds of nonverbal conduct qualify for First Amendment coverage. By now "[i]t is well settled that the First Amendment's protections extend to nonverbal 'expressive conduct' or 'symbolic speech.'" <sup>212</sup> And meaning seems to be the ingredient that makes that extension possible. In *West Virginia State Board of Education v. Barnette*,<sup>213</sup> for example, the Court

206. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

207. *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); see also *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972) ("[O]ur people are guaranteed the right to express any thought, free from government censorship.").

208. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (first alteration in original) (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989)); see *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008) ("The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference."); *Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas' . . . ." (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))).

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

210. *Id.* at 20 (alteration in original) (quoting *Roth*, 354 U.S. at 484).

211. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). It also matters that such speech acts "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572.

212. Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1114 n.18 (2005).

213. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

indicated that expressive conduct (in that case, saluting a flag) is “speech” for constitutional purposes because it conveys “ideas.”<sup>214</sup> A similar premise seems to animate *Spence v. Washington*,<sup>215</sup> the Court’s most direct effort to define the essential elements that transform conduct into speech. In that case, the Court set out to evaluate whether conduct is “sufficiently imbued with elements of communication to fall within the scope” of the First Amendment.<sup>216</sup> The test it created asks whether “[a]n intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.”<sup>217</sup> Conduct that satisfies both prongs of this test is considered to be expressive. *Spence* therefore effectively doubles down on the importance of representational meaning, requiring both that the speaker intend to convey it (in “particularized” form, no less) and also that there be a “great” likelihood that the audience understand it.

Despite its frequent appearances in First Amendment doctrine, the representational approach to meaning is a poor guide to what speech the First Amendment actually does or should protect. Indeed, the representational approach to meaning, combined with the meaning-dependent approach to the First Amendment discussed above,<sup>218</sup> leads to the problems of underinclusion suggested by Part I.

214. See *id.* at 632 (“Symbolism is a primitive but effective way of communicating ideas.”).

215. *Spence v. Washington*, 418 U.S. 405 (1974); see Tiersma, *supra* note 3, at 1537 (referring to *Spence* as “the only real test that the Court has articulated to identify ‘speech’ in the First Amendment sphere”). Tiersma’s use of “only” was probably accurate at the time, but it now needs some qualification, given that *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), and other cases seem to have replaced or at the very least altered *Spence*’s test. For example, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), rather than applying (or even citing) *Spence*, the Court asked whether the activity at issue was “inherently expressive,” such that a viewer could understand its meaning without further explanation. See *id.* at 66. Excluding military recruiters from campus to express disagreement with the military’s policies did not meet this test, the Court found, because such exclusion might well be the result of room scarcity. *Id.*

216. *Spence*, 418 U.S. at 409; see also *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (“Johnson’s burning of the flag was conduct ‘sufficiently imbued with elements of communication’ to implicate the First Amendment.” (quoting *Spence*, 418 U.S. at 409)). But see *Johnson*, 491 U.S. at 432 (Rehnquist, C.J., dissenting) (“[F]lag burning is the equivalent of an inarticulate grunt or roar . . .”).

217. *Spence*, 418 U.S. at 410–11; see R. George Wright, *What Counts as “Speech” in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1238 (2010) (“In the absence of the speaker’s intent to promote some more or less determinate understanding, we may be skeptical that speech in the constitutional sense is present.”).

218. See *supra* notes 170–72 and accompanying text.

As Greenman points out, idealism “fails to predict what the First Amendment actually covers.”<sup>219</sup> In *United States v. O’Brien*,<sup>220</sup> the Court clarified that the mere intent to convey meaning is not sufficient for First Amendment coverage: “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”<sup>221</sup>

Nor is a connection between language and concept necessary for the Amendment’s protections to attach. Music, for example, is clearly protected by the First Amendment,<sup>222</sup> even though a great deal of it does not convey meaning in any standard sense. As Richard Posner writes, “[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.”<sup>223</sup> In other ways, too, the Constitution protects efforts to say the unsayable. Justice Harlan explained in *Cohen v. California* that “much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise *inexpressible* emotions as well.”<sup>224</sup>

Under the representational approach to meaning, expression of the “inexpressible” is by definition nonsensical.<sup>225</sup> But as Justice

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219. Greenman, *supra* note 3, at 1348; *see also* Post, *supra* note 42, at 1252 (showing that the *Spence* test is overinclusive); Rubinfeld, *supra* note 43, at 773 (showing that the *Spence* test is underinclusive).

220. *United States v. O’Brien*, 391 U.S. 367 (1968).

221. *Id.* at 376.

222. *See 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.”); *see also Reed v. Vill. of Shorewood*, 704 F.2d 943, 950 (7th Cir. 1983) (“If the defendants passed an ordinance forbidding the playing of rock and roll music . . . , they would be infringing a First Amendment right, even if the music had no political message—even if it had no words . . . .” (citation omitted)).

223. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1093 (7th Cir. 1990) (Posner, J., concurring), *rev’d sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *see also* David Munkittrick, Note, *Music as Speech: A First Amendment Category unto Itself*, 62 FED. COMM. L.J. 665, 668 (2010) (“[N]o single First Amendment theory fully explains protection of music as speech.”). *But see* ROSEN, *supra* note 62, at 11 (“Felix Mendelssohn found the meaning of music more precise, not less, than language, but that is because music means what it is, not what it says.”).

224. *Cohen v. California*, 403 U.S. 15, 26 (1971) (emphasis added).

225. *See AYER, supra* note 202, at 118 (“If a mystic admits that the object of his vision is something which cannot be described, then he must also admit that he is bound to talk nonsense when he describes it.”).

Harlan suggests, and as Part I argues, it is also properly covered by the First Amendment. It follows that the representational approach, whatever its intuitive appeal, is a poor guide to the boundaries of the First Amendment. If it is to matter, “meaning” must lie elsewhere than in the relationship between speech and concepts.

### B. Use Meaning

The best place to find an alternative to the representational approach associated with Russell and Wittgenstein is in the work of Wittgenstein himself. His later thought—especially the enormously influential concept of language games—reshaped the whole of analytic philosophy, putting it on the “linguistic turn” that led to speech-act theory, ordinary-language philosophy, and a host of other important developments. From these developments emerges a new way of thinking about language and meaning that is ultimately a better guide for the First Amendment.

After leaving philosophical work behind for nearly a decade, Wittgenstein returned to Cambridge in 1929 and took a new approach to the relationship between language, meaning, and the world. This work culminated in the posthumous publication of *Philosophical Investigations*. It was here that Wittgenstein “reject[ed] the search for a unified account of language’s internal logic, which had occupied the bulk of . . . the *Tractatus*.”<sup>226</sup> Indeed, he described the *Philosophical Investigations* as a rejoinder to “what logicians have said about the structure of language. (Including the author of the *Tractatus Logico-Philosophicus*.)”<sup>227</sup>

Instead of the picture theory of meaning that animated his earlier work, Wittgenstein now focused on “language games” as defining the limits of meaning and, therefore, the world: “I shall also call the whole, consisting of language and the actions into which it is woven, the ‘language-game’.”<sup>228</sup> The term, he said, was “meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.”<sup>229</sup> The nature of these games became

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226. Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of Federalist 10*, 27 CONST. COMMENT. 9, 11 (2010).

227. WITGENSTEIN, *supra* note 38, § 23.

228. *Id.* § 7.

229. *Id.* § 23; see also Thomas P. Crocker, *Displacing Dissent: The Role of “Place” in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2613 (2007) (“‘Form of life’ is a technical term meant to convey the multiplicity of both possible ways of living and possible ways

Wittgenstein's focus for the rest of his life. As Patterson explains, "The central tenet of Wittgenstein's writing after 1929 is that knowledge is not achieved by the individual subject's grasp of a connection between word and object. Rather, knowledge turns out to be the grasp of the topography of a word's uses in activities into which language is woven."<sup>230</sup>

The language-games approach locates meaning in language's *use*, not in its representation of the world. As Wittgenstein put it in the *Philosophical Investigations*, "For a large class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language."<sup>231</sup> The way to identify meaning, therefore, is not necessarily to ask whether a putative speaker has given content to signs in his propositions, but rather whether he has followed the rules of the relevant language game. Jack Balkin and Sandy Levinson explain: "As a tradition now identified with Wittgenstein and his successors insists, there are only 'practices,' each constituted by inchoate and unformalizable standards that establish one's statements . . . as 'legitimately assertable' by persons within the interpretive community that constitutes the practice in question."<sup>232</sup>

The tradition to which Balkin and Levinson refer has now spread throughout analytic philosophy.<sup>233</sup> The later Wittgenstein is therefore important not only on his own terms, but also because he shaped so many other philosophical developments throughout the past century.<sup>234</sup> The branches on that tree are too numerous to count and

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of seeing and responding to the world. The ability to speak a language is the ability to engage in practices within a form of life in which that language has meaning.").

230. Patterson, *supra* note 37, at 303–04; *see also* Fiss, *supra* note 37, at 177 (describing Wittgenstein's view that "we understand a concept not when we grasp some fact, but when we can successfully use that concept within a language game or a defined context").

231. WITTGENSTEIN, *supra* note 38, § 43; *see also* Jonathan Yovel, *What Is Contract Law "About"? Speech Act Theory and a Critique of "Skeletal Promises,"* 94 NW. U. L. REV. 937, 939 (2000) (noting that Wittgenstein and the theories of performative language that owe him a debt "all share a basic insight: that language is not primarily about meaning in the traditional, semantical sense associated with representationalism" but rather that "language is primarily about action—speech and texts are *acts*, and they *perform* things in the social world and bring about different kinds of effects").

232. Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1604 (1991) (footnote omitted).

233. Of course, I do not mean to suggest that Wittgenstein's influence is universal, nor that the developments discussed here are the only important ones in analytic philosophy.

234. *See* Chevigny, *supra* note 95, at 163–72.

too complex to describe, but include the work of Paul Grice,<sup>235</sup> the speech-act theory associated most closely with J.L. Austin and John R. Searle,<sup>236</sup> and ordinary-language philosophy.<sup>237</sup>

Most importantly for present purposes, the use-meaning approach has gained traction in First Amendment doctrine and scholarship. Post, for example, argues that Marcel Duchamp's *The Fountain*—a urinal turned on its side—is properly recognized as artistic speech precisely because of the shared norms of the artistic community.<sup>238</sup> This is because it is a “form[] of communication that sociologically we recognize as art.”<sup>239</sup> Taking a similar approach, Amy Adler points to the example of Annie Sprinkle, a performance artist who also works in the pornography industry: “When asked if anything made Sprinkle’s performance at the Kitchen [Center for the Performing Arts] ‘art’ and her performance for *Screw* [magazine]

235. Grice’s basic argument—vastly oversimplified—was that for A to mean something by *X*, *X* must be uttered with an intention of producing some belief or effect in the listener, B, by means of B’s recognition of A’s intent. See generally H.P. Grice, *Meaning*, 66 PHIL. REV. 377 (1957). Later, Grice would further develop the idea of speaker meaning via analyzing sentences as units of meaning and differentiating between indicative and imperative meaning. See generally H.P. Grice, *Utterer’s Meaning, Sentence-Meaning, and Word-Meaning*, 4 FOUND. LANGUAGE 225 (1968).

236. See generally J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962); JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* (1979); JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF THE MIND* (1983); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969).

As suggested by the title of Austin’s seminal *How To Do Things with Words*, the central insight of speech-act theory is that speech can *do* things, as for example when a person says, “I am sorry.” Uttering those words does not merely report meaning by describing a situation or a state of mind, but actually *performs* the act of apologizing. The same can be said of promises, AUSTIN, *supra*, at 10; the words “I do” in the context of a wedding ceremony, *id.* at 6; or—as Akhil Amar has suggested, channeling Austin—the phrase “We the People . . . do ordain and establish” in the Preamble of the United States Constitution, AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 5 (2005).

237. Toril Moi, “*They Practice Their Trades in Different Worlds*”: *Concepts in Poststructuralism and Ordinary Language Philosophy*, 40 NEW LITERARY HIST. 801, 802 (2009) (defining ordinary-language philosophy as “the philosophical tradition after Wittgenstein and J. L. Austin as established . . . in [Stanley] Cavell’s work”). See generally STANLEY CAVELL, *MUST WE MEAN WHAT WE SAY?* (updated ed. 2002).

238. Post, *supra* note 42, at 1253–54; cf. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 4 (2004) (“A democratic culture is democratic in the sense that everyone—not just political, economic, or cultural elites—has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and subcommunities to which they belong. . . . Freedom of expression protects the ability of individuals to participate in the culture in which they live . . .”).

239. Post, *Reply*, *supra* note 21, at 621.

‘pornography,’ a spokesman for the Kitchen said, ‘Here it was performed in an art context.’”<sup>240</sup> These are arguments rooted in use, not in representation.

Such examples raise the question of whether the use approach provides any boundaries whatsoever between meaning and nonsense. Indeed, if not applied rigorously, the fuzziness inherent in evaluating language games and social practices can be made to shield nearly any act or utterance.<sup>241</sup> But although use meaning is potentially more capacious with regard to meaning than the representational approach, it is not all-encompassing. By establishing a new approach to meaning, the linguistic turn in analytic philosophy simply creates a new and potentially richer approach to nonsense and language.<sup>242</sup> Rather than arising from a disjunction between language and extralinguistic facts, speech is nonsensical when it fails to adhere to the rules of the relevant language game. Professor Jonathan Yovel explains that “one plays a language-game by the act of following its rules; deviation from the rules is ‘not playing the game,’ which produces nonsense in relation to the language-game in question.”<sup>243</sup> Identifying and evaluating meaning, then, requires focus on how language is actually *used*.

In a variety of ways, the Supreme Court has implicitly endorsed this view, suggesting that the First Amendment has at least partially taken its own linguistic turn with regard to meaning. This is a welcome development both descriptively and normatively, for the use-meaning approach better captures both the actual contours of existing First Amendment coverage and the constitutional value of what would otherwise seem to be meaningless speech.

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240. Adler, *supra* note 10, at 1370.

241. Cf. Lee Tien, *Publishing Software as a Speech Act*, 15 BERKELEY TECH L.J. 629, 648 (2000) (“[T]he Court seems to believe that every human act has ‘meaning,’ and thus may convey a ‘message.’”). Tien goes on to discuss *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), in which the Court concluded that social dancing is not speech, even though “some kernel of expression” can be found in almost all human activity. Tien, *supra*, at 648–49 (quoting *Stanglin*, 490 U.S. at 25).

242. See Tilghman, *supra* note 24, at 256 (“Wittgenstein went on to provide a still richer exploration of nonsense in the *Philosophical Investigations* where he locates a craving for nonsense in certain deep aspects of our language and our life. It is this craving that he believes is responsible for much of traditional philosophy which, on his view, turns out to be grounded in conceptual confusion and therefore a kind of nonsense.”).

243. Yovel, *supra* note 231, at 941; see also Bartrum, *supra* note 226, at 11 (“[A] word’s meaning often does not derive from some foundational referent in the world, but, rather, is determined by the use to which it is properly put within a particular language-game.”).



The First Amendment's linguistic turn manifests itself in many areas of doctrine, perhaps most prominently in cases that tinker with *Spence's* representationalist machinery. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,<sup>244</sup> for example, the Court assessed the constitutional salience of a Hibernian pride parade. The Justices conceded that it was difficult to locate a "narrow, succinctly articulable message" in the parade,<sup>245</sup> but concluded that no such showing was required. A unanimous Court held that the parade qualified for protection, and that "if confined to expressions conveying a 'particularized message,' [the First Amendment] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."<sup>246</sup> This is effectively a rejection of the representational approach and an endorsement of the idea that meaning lies in form and use.

The distinction between the representational and use approaches animates many other cases as well. Recall *Morse v. Frederick*. On a strictly representational approach, the phrase "BONG HiTS 4 JESUS"<sup>247</sup> seems just as nonsensical as Chomsky's "[c]olorless green ideas sleep furiously"<sup>248</sup>—each idea might represent a concept, but strung together they convey nothing sensible.<sup>249</sup> (Conversely, if a group of students displayed the latter on a banner, it might also reasonably be viewed as promoting—or perhaps demonstrating—illegal drug use!) Indeed, the student's declaration that the banner was designed to be nonsense, if accepted, should have taken him outside the realm of *Spence v. Washington*, because no "intent to convey a particularized message was present."<sup>250</sup> To the representationalist, then, the act involved only nonsense. If the First

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244. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995).

245. *Id.* at 569.

246. *Id.* at 568–69 (citation omitted).

247. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

248. CHOMSKY, *supra* note 70, at 15.

249. See Bill Poser, *The Supreme Court Fails Semantics*, LANGUAGE LOG (July 7, 2007, 5:09 AM), <http://itre.cis.upenn.edu/~myl/language-log/archives/004696.html> ("[T]he Court has invalidly inferred a particular proposition. The slogan is in fact meaningless in the sense that it expresses no proposition, and Frederick gave a perfectly plausible explanation for the use of a meaningless slogan. The Court was therefore wrong in finding that the banner advocates the use of marijuana.").

250. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

Amendment requires the presence of meaning,<sup>251</sup> then there was no constitutional issue to begin with.

Under a use-meaning approach, by contrast, the fact that the banner's words conveyed no semantic content does not preclude them from having meaning, which derives from use, not representation. That use, the majority concluded, imbued them with drug-promoting meaning, not simply television-attracting meaning. In other words, the use-meaning approach can account for the existence of meaning in the banner, therefore bringing the case within the boundaries of the First Amendment and enabling the more substantive and useful debate over whether the majority identified the *correct* meaning, and whether the government had sufficient reason to regulate it.<sup>252</sup>

This is the same basic insight reflected in the First Amendment's attention to context as a component of meaning. The representational approach is relatively, if not entirely, acontextual. Whether a word "really" corresponds to an underlying concept is generally not dependent on the context in which that word is deployed. But First Amendment doctrine itself is deeply attuned to the fact that context can create or change meaning.<sup>253</sup> Even *Spence* recognized that "context may give meaning to [a] symbol."<sup>254</sup> The Court there noted that hanging a flag upside down with peace symbols attached to it

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251. See *supra* notes 170–72 and accompanying text.

252. The meaning (or lack thereof) of the banner would of course be relevant to that inquiry. Indeed, some scholars have suggested that nonsense should be free from government regulation precisely *because* it lacks meaning. See Chevigny, *supra* note 95, at 164 (arguing that under the early Wittgenstein's view of ethics as nonsense, the "most appropriate argument for freedom of speech would be that people ought to be allowed to say what they please, at least about questions of norms and values, because what they say is meaningless," and that "[t]he government could have no reason to restrain debate that might continue endlessly without hope of a fruitful result"); see also Catherine L. Amspacher & Randel Steven Springer, Note, *Humor, Defamation and Intentional Infliction of Emotional Distress: The Potential Predicament for Private Figure Plaintiffs*, 31 WM. & MARY L. REV. 701, 726 (1990) ("[E]xpressions . . . that courts classify as 'nonsense' or 'fantasy' are protected from defamation suits because, by definition, no one will believe them to be literally true."); Tushnet, *supra* note 9, at 182 (describing the "rationality" challenge to regulations of art as "assert[ing] that the grounds for such regulations are typically so weak that the artworks would be protected by a substantive due process requirement that exercises of government power must be minimally rational").

253. See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 676 (1990) ("[T]he judgment that speech is being communicated in a 'public' manner ultimately depends upon the particular context of a specific communicative act . . .").

254. *Spence*, 418 U.S. at 410.

related to a “contemporaneous issue of intense public concern,”<sup>255</sup> and that observers were likely to recognize Spence’s point “at the time that he made it,”<sup>256</sup> even though in a different context it “might be interpreted as nothing more than bizarre behavior.”<sup>257</sup> A similar principle seems to be on display (so to speak) in the Court’s nude dancing cases, in which the Justices have taken pains to distinguish between “bacchanalian revelries” in barrooms and “a performance by a scantily clad ballet troupe in a theater.”<sup>258</sup>

Further hints of the use-meaning approach can be found in the Supreme Court’s conclusion that First Amendment coverage extends to practices that form a “significant medium for the communication of ideas,”<sup>259</sup> even if the specific communication at issue does not successfully convey a particularized message.<sup>260</sup> Post has provided the strongest normative justification for this approach, arguing that “First Amendment coverage presumptively extends to media for the communication of ideas, like newspapers, magazines, the Internet, or cinema, which are the primary vehicles for the circulation of the texts that define and sustain the public sphere.”<sup>261</sup> It follows that, “[i]n the absence of strong countervailing reasons, whatever is said within such media is covered by the First Amendment.”<sup>262</sup> On this approach, “Jabberwocky” is covered by the First Amendment not because its words represent concepts, but because it is recognizable as a poem.

The same basic intuition might be animating the appealing but problematic effort to draw a line between “pure speech” and expressive conduct. The Supreme Court has suggested that pure speech—apparently conceived as the spoken or written word, with no

255. *Id.* That context included “the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to [Spence’s] arrest.” *Id.* at 408.

256. *Id.* at 410.

257. *Id.*

258. *California v. LaRue*, 409 U.S. 109, 118 (1972); see Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1873 (1997) (“The Supreme Court’s nude-dancing cases establish the proposition that constitutional significance may be ascribed to the context in which the dancing takes place.”).

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

260. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995) (holding that “a narrow, succinctly articulable message is not a condition of constitutional protection”).

261. POST, *DEMOCRACY*, *supra* note 21, at 20.

262. *Id.*

accompanying nonverbal action<sup>263</sup>—should receive complete constitutional coverage,<sup>264</sup> apparently without any further inquiry into its meaningfulness. Expressive conduct, by contrast, is covered only when it is sufficiently imbued with “communicative element[s]” as to bring it within the boundaries of the Amendment.<sup>265</sup> In other words, it must, at least according to some accounts, convey ideas or meaning.<sup>266</sup> The pure speech/expressive conduct dichotomy is deeply difficult,<sup>267</sup> largely inaccurate,<sup>268</sup> and probably unworkable. But the effort itself demonstrates that meaning may lie in form and use, rather than in representation.<sup>269</sup>

### C. *Making the Most of the First Amendment’s Linguistic Turn*

Endorsing use meaning as an alternative to representational meaning is relatively easy; implementing it is not. It should by now be apparent that the boundaries of the First Amendment cannot be explained on the basis of the relationship between language and extralinguistic facts, as the representational-meaning approach would suggest. But to say that those boundaries do or should depend instead

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263. See Susan Jill Rice, Note, *The Search for Valid Governmental Regulations: A Review of the Judicial Response to Municipal Policies Regarding First Amendment Activities*, 63 NOTRE DAME L. REV. 561, 563 (1988) (“Pure speech may be defined as expression in its pristine state, completely isolated from activity.”); Carney R. Shegerian, *A Sign of the Times: The United States Supreme Court Effectively Abolishes the Narrowly Tailored Requirement for Time, Place and Manner Restrictions*, 25 LOY. L.A. L. REV. 453, 471 (1992) (“Pure speech has been generally defined as communicative expression in a pure state without physical activity.”).

264. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (noting that wearing armbands is “closely akin to ‘pure speech’ which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment”).

265. *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

266. See, e.g., Nimmer, *supra* note 3, at 37 (“[S]ymbolic speech requires not merely that given conduct results in a meaning effect, but that the actor causing such conduct must intend such a meaning effect by his conduct.”).

267. See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493–96 (1975) (arguing that the burning of a draft card is “100% action and 100% expression”); see also Tushnet, *supra* note 9, at 192–99 (describing the “[a]ttractions and [p]erils of [n]ominalism,” the idea that “[t]he First Amendment is about speech and the press—about words”).

268. Certain kinds of speech, including obscenity, are thought to fall outside the scope of the First Amendment, even when they are pure speech. See *supra* notes 210–11 and accompanying text.

269. See Post, *supra* note 42, at 1257 (“The very concept of a medium presupposes that constitutionally protected expression does not inhere in abstract and disembodied acts of communication of the kind envisioned by *Spence*, but is instead always conveyed through social and material forms of interaction.”).

on language games raises a new, albeit more useful, set of questions. This final section explores a few of them.

First, by focusing on language games rather than on the connection between words and ideas, the approach here would exclude from First Amendment coverage acts that, despite being “communicative” in some sense, are not traditionally recognized as “speech.” This could explain why many prominent First Amendment scholars have rejected a generalist account of the constitutional value of form,<sup>270</sup> focusing instead on the transmission of ideas.<sup>271</sup>

This objection is difficult and deceptively complex, as is the best answer to it: that such activities, whatever relationships they might have with the First Amendment’s values, simply are not *speech*. Consider Jed Rubenfeld’s example of a person who speeds to express disapproval of speed limits,<sup>272</sup> or Tushnet’s example of ticket scalping.<sup>273</sup> These activities arguably further First Amendment values by advancing the autonomy interests of those engaged in them, and perhaps even communicate ideas. But so do innumerable other activities, from terrorist attacks to rape. Prohibition of those activities is perfectly constitutional under the First Amendment not because the government interest in doing so is sufficiently strong, but because they are not thought to implicate the First Amendment at all. To borrow Schauer’s terminology, they are uncovered, not merely unprotected.<sup>274</sup>

270. See Louis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79–80 (1968) (“The meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct. If it is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is ‘speech.’”); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1189 (1970) (exploring the argument that the First Amendment protects ideas rather than particular forms of expression).

271. See Nimmer, *supra* note 3, at 34 (“It is the *ideas* expressed, and not just a particular form of expression, that must be protected if the underlying first amendment values are to be realized.”).

272. See Rubenfeld, *supra* note 43, at 772 (“But suppose A says that his conduct *was* expressive. Suppose he says that driving fast is how he ‘expresses himself.’ Or that he was ‘expressing disagreement’ with the federally mandated speed limit. Or that his speeding was ‘performance art.’”).

273. See Tushnet, *supra* note 9, at 194 (explaining why “ticket scalping is outside the First Amendment’s coverage”). *But see id.* (criticizing the argument that “a reasonably widespread imputation of roughly the same meaning” can implicate First Amendment coverage).

274. See Schauer, *supra* note 6, at 267 (defining the question of “coverage” as “[w]hat marks off the category covered by the first amendment from those other categories of conduct that do not implicate free speech analysis”).

The question of what constitutes “speech” is, in turn, an old one for First Amendment theory and doctrine, and the difficulty of articulating anything like a precise definition is familiar. This Article has focused on one possible component of speech—meaning—not the concept of speech as a whole. The two inquiries might be distinct; perhaps meaning must be accompanied by a volitional act or utterance to constitute speech. To the degree that the discussion here provides lessons for the quest to define speech itself, it is that the answers probably lie in social practices rather than in formal logic.<sup>275</sup> In the end, as Schauer explains, “the very idea of free speech is a crude implement, to the core, protecting acts that its background justifications would not protect, and failing to protect acts that its background justifications would protect.”<sup>276</sup>

But the crudeness of the implement raises another and perhaps equally foundational challenge for the use-meaning approach: negotiating the tension between the First Amendment’s desire for clear boundaries and language games’ resistance to them. As to the former, the importance of clarity in First Amendment doctrine is recognized as valuable in its own right.<sup>277</sup> Language games, however, are a poor guide for establishing clear boundaries. Both in their definition and in their behavior, language games “lack purity.”<sup>278</sup> Post, whose First Amendment theory depends on identifying those boundaries, concludes that although we do not “have a very clear or hard-edged account” of the boundaries of public discourse, “it is anthropologically apparent that they do exist and are reflected in constitutional doctrine.”<sup>279</sup> Ordinary-language philosophers, too, embrace this as not merely a necessary drawback, but a positive feature of their approach. As Toril Moi explains, “Often the blurred

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275. This is the quest in which Post has long been engaged. *See, e.g.*, Post, *supra* note 42, at 1250.

276. Schauer, *supra* note 98, at 13.

277. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (holding a statute void for vagueness under a First Amendment analysis because of its chilling effect on protected speech); *Dombrowski v. Pfister*, 380 U.S. 479, 497 (1965) (upholding a federal injunction against state court prosecutions under vague state statutes, on the basis of the prosecutions’ “chilling” effect).

278. Balkin & Levinson, *supra* note 45, at 1802; *see also* Chevigny, *supra* note 95, at 167 (“Wittgenstein’s ‘language-game’ concept has been criticized for a lack of precision.”); Biletzki & Matar, *supra* note 68 (noting that Wittgenstein “never explicitly defines” the concept of language game).

279. Post, *Reply, supra* note 21, at 622–23.

concept is exactly what we want . . . . In many cases . . . , it is useless to spend time and energy trying to produce a sharp concept.”<sup>280</sup>

The problem is not simply that language games have fuzzy boundaries, but that it is difficult to know at what level of generality they should be defined. After all, “use” can refer to an individual speech act or to a broader category of speech acts bearing a family resemblance;<sup>281</sup> language games can involve two people, a group, or an entire community. Ordinary-language philosophy typically takes the former route, focusing on the meaning of *particular* speech acts. The inevitable result is a kind of case-by-case analysis that requires careful consideration of individual speech acts.

But whatever its merits as a philosophical approach to language, the case-by-case approach does not necessarily make for good free speech law. Case-by-case *ex post* analysis is ill-suited to provide the kind of articulable *ex ante* rules that law—and especially First Amendment doctrine—is generally thought to require.<sup>282</sup> First Amendment language games must be defined with sufficient breadth that individuals can tailor their conduct accordingly. A use-meaning approach to the Amendment’s boundaries must therefore focus to some degree on form and use, rather than act and use.

The cost of that breadth, however, is inaccuracy. The more broadly a First Amendment language game is defined, the less likely it is to capture the values that justify its protection, and the more likely it is to be overinclusive with regard to speech. But that is a cost that the First Amendment encourages us to pay.<sup>283</sup> Defining speech at

280. *Moi, supra* note 237, at 814.

281. *See* WITTGENSTEIN, *supra* note 13, § 3.311, at 51 (“An expression presupposes the forms of all propositions in which it can occur. It is the common characteristic mark of a class of propositions.”).

282. *See* *Kolender v. Lawson*, 461 U.S. 352, 370 (1983) (White, J., dissenting) (“The Court has held that in such circumstances ‘more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression,’ a ‘greater degree of specificity’ is demanded than in other contexts.” (citation omitted) (quoting *Parker v. Levy*, 417 U.S. 733, 756 (1974); *Smith v. Goguen*, 415 U.S. 566, 573 (1974))); *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (“[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . [W]here a vague statute ‘abut[s] upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of [those] freedoms.’” (fourth and fifth alterations in original) (footnote omitted) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961))).

283. *See* *Schauer, supra* note 98, at 22 (“[T]he idea of free speech, as contrasted with the justifications it is thought to serve, is itself an exercise in distrust, in suboptimality, and in the recognition of the frequent virtues of second-best solutions.”).

the level of form rather than that of individual speech acts may be imperfect, but it does help check the government's power to regulate speech by defining its boundaries.

The malleability of the language game approach also suggests ways to account for new social practices and language games—video games, for example.<sup>284</sup> Defining these as “speech” based on the ideas they convey seems unsatisfying, to say the least. The answer seems to lie instead with the fact that over time they have simply become recognized as such. Admittedly, the power to make that determination is itself a form of speech regulation.<sup>285</sup> But such line drawing is inevitably a part of First Amendment doctrine. Better that the lines be drawn on the basis of such social practices than on the basis of supposed relationships between words and concepts.

There are no straightforward and simple solutions to these problems.<sup>286</sup> First Amendment doctrine has proven slithy<sup>287</sup> enough to cover the Jabberwocky and other nonsensical speech, but perhaps the Justices will see fit to gimble<sup>288</sup> exceptions for other kinds of nonsense, leaving even nonartists mimsy.<sup>289</sup> First Amendment doctrine and the language games on which it is based are messy and ongoing projects—an experiment, “as all life is an experiment.”<sup>290</sup> The Amendment's “linguistic turn” would yield no more clear answers than the linguistic turn in analytic philosophy. But it would, at the very least, better capture what we mean by meaning, and why we think it matters for the First Amendment.

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284. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742 (2011) (striking down, on First Amendment grounds, restrictions on sales of violent video games to minors); see also *United States v. Stevens*, 559 U.S. 460, 482 (2010) (striking down restrictions on depictions of animal cruelty).

285. See Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1343 (2009) (“Whether through its political or its judicial branches, governmental definition of the scope of public discourse is itself a *regulation* of public discourse . . .” (emphasis added)).

286. See Post, *supra* note 253, at 683 (“In the end . . . there can be no final account of the boundaries of the domain of public discourse.”).

287. See LEWIS CARROLL, *THE ANNOTATED ALICE: THE DEFINITIVE EDITION* 149 (Martin Gardner ed., 2000) (defining “slythy” as a “compound[] of SLIMY and LITHE,” meaning “[s]mooth and active”).

288. CARROLL, *supra* note 54, at 21; see CARROLL, *supra* note 287, at 149 (defining “gymble” as “[t]o screw out holes”).

289. CARROLL, *supra* note 287, at 149 (defining “mimsy” as “MISERABLE” or “[u]nhappy”).

290. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).



## CONCLUSION

What is the doctrinal or “practical” significance of this inquiry? At a basic level, the argument is simply that the First Amendment should be—and to a large extent already is—interested in use meaning, rather than representational meaning. It follows that some “nonsense” is entitled to constitutional protection. This conclusion is neither dependent on any conclusion about analytic philosophy, nor does it require judges, lawyers, or scholars to be philosophers. And yet the philosophical inquiries of the past century are so similar in substance to those needed in the First Amendment context that the former provide useful guidance for the latter.

This Article also indicates a different approach to establishing whether nonrepresentational art—including instrumental music and nonsensical poetry—should be entitled to constitutional protection. The frequency with which scholars focus specifically on nonrepresentational art suggests that they believe representationalism to be an essential part of defining the First Amendment’s scope. The argument here suggests that it is not, and that a more useful inquiry would focus on social understandings of art in various contexts.

Relatedly, the search for meaning in social usages rather than in representationalism could extend not just to *whether* a speech act is meaningful, but also *which* of many possible meanings it should have. This raises difficult questions when considered in light of the putative speaker’s mental state. On the one hand, that seems perfectly straightforward: surely “Fuck the Draft” had a particular meaning precisely because of the broader social context in which it was used.<sup>291</sup> But if speech is fully defined by what a viewer (subjective or objective) would understand, then even “innocent” speakers—including those who intend no offense—might be found liable for meanings they never meant to convey.

Finally, focusing on the social embeddedness of speech has implications for the degree to which speakers can actually control the meaning of their own speech—whether it has any at all, and, if so, what meaning it has. The use-meaning approach described here

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291. See *Cohen v. California*, 403 U.S. 15, 16 (1971); see also *Spence v. Washington*, 418 U.S. 405, 409–10 (1974) (concluding that when the flag was hung from a window with a peace sign taped to it, “the nature of [the] activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that [Spence] engaged in a form of protected expression”).

would effectively deny constitutional coverage to putative speech acts which, though perhaps meaningful to the speaker, do not respect the rules of our shared language games.<sup>292</sup> Our old friend Lewis Carroll provides the perfect illustration:

“And only *one* for birthday presents, you know. There’s glory for you!”

“I don’t know what you mean by ‘glory,’” Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t—till I tell you. I meant ‘there’s a nice knock-down argument for you!’”

“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.

“When *I* use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”<sup>293</sup>

Humpty Dumpty is violating the rules of a language game, and thus speaking nonsense, but the question he identifies is essentially the same one asked by analytic philosophers. The use-meaning approach denies that the speaker is inevitably master of meaning, which has a variety of potentially troubling implications—consider again the student in *Morse*, who claimed to be speaking nonsense—that deserve further exploration.

Given that Ludwig Wittgenstein has served as a guide and occasional stalking horse throughout this Article, it seems appropriate to conclude where the *Tractatus* does. The seventh and final section famously reads, in full: “Whereof one cannot speak, thereof one must be silent.”<sup>294</sup> If the boundaries of the First Amendment depend on the presence of representational meaning,

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292. Cf. 1 CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS 234 (1985) (“Men speak together, to each other. Language is fashioned and grows not principally in monologue, but in dialogue, or better, in the life of the speech community.”); WITTGENSTEIN, *supra* note 38, § 243 (arguing that a private language—one whose “individual words . . . are to refer to what can only be known to the person speaking; to his immediate private sensations”—cannot have meaning).

293. CARROLL, *supra* note 54, at 123–24.

294. WITTGENSTEIN, *supra* note 13, § 7, at 189.

then Congress could codify Wittgenstein's admonition without violating the Constitution, because saying what cannot be said is, by definition, nonsense. This Article has argued that this cannot be the case, and that the meaning of speech lies not in its connection to extralinguistic facts, but in its use. This road is bumpier, but its imperfection offers better footing than the smooth alternatives. "Back to the rough ground!"<sup>295</sup>

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295. Cf. WITTGENSTEIN, *supra* note 38, § 107 ("We have got on to slippery ice where there is no friction and so in a certain sense the conditions are ideal, but also, just because of that, we are unable to walk. We want to walk: so we need *friction*. Back to the rough ground!").