

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

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ABSTRACT

A great deal of everyday expression is, strictly speaking, nonsense. But courts and scholars have done little to consider whether or why such meaningless speech, like nonrepresentational art, 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 so common, 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 autonomy, the marketplace of ideas, and democracy. The second part of the Article argues that exploring nonsense can illuminate the meaning of meaning itself. 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 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 their relationship to extra-linguistic concepts.

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INTRODUCTION

Ludwig Wittgenstein, whose approach to meaning and language changed the course of modern philosophy,¹ once wrote: “Don’t, for heavens sake, be afraid of talking nonsense! But you must pay attention to your nonsense.”² His exhortation is especially salient for 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,³ 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”⁴? 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,’”⁵ then speech lacking such ideas—assuming that it

¹ See Dennis M. Patterson, *Law’s Pragmatism: Law As Practice & Narrative*, 76 VA. L. REV. 937, 938 (1990) (hereinafter *Law’s Pragmatism*) (“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* 56 (1980); see also WITTGENSTEIN AND HIS INTERPRETERS 32 n.22 (Guy Kahan et al. eds., 2007) (“Saul Liberman . . . reportedly once introduced a 1940s lecture by the famous Kabbalah scholar Gershom Scholem with the words ‘Nonsense is nonsense—but the history of nonsense is scholarship.’” (internal citations omitted)).

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 Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 UCLA L. REV. 29, 61 (1973) [hereinafter Nimmer, *Symbolic Speech*] (“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 WISC. 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 *Nonsense Definition*, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/nonsense> (last visited July 4, 2012). See also William Charlton, *Nonsense*, 17(4) BRITISH J. OF 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 of meaning, but does not in fact have one.”)

⁵ *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (citing *Roth v. United States*,

is actually “speech”⁶—would not seem to merit constitutional coverage at all.⁷ That would be a jarring conclusion indeed, which might explain why even those who treat meaning as an essential ingredient of speech tend to avoid or assume it away. 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.⁸ But far from being *unquestionable*, their shielding in fact raises questions that are, as Mark Tushnet generously puts it, “quite difficult to answer satisfactorily.”⁹

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 nonsense¹⁰—are not the only would-be speakers who should be keenly interested in the answer. A large portion of everyday

354 U.S. 476, 484 (1957)) (emphasis added); *see also* *Mosley v. Police Dep’t*, 408 U.S. 92, 95–96 (1972) (“[O]ur people are guaranteed the right to express any thought, free from government censorship.” (quoting *Sullivan*, 376 U.S. at 270) (citations omitted)).

⁶ Frederick Schauer, *Categories and The First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 273 (1981) [hereinafter Schauer, *Categories*] (“[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 264–272 and accompanying text.

⁷ 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. Frederick 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 *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 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 Schönberg, or Jabberwocky verse of Lewis Carroll.” (internal citation omitted)).

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

¹⁰ *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,” “*Ars Poetica*” (1926), and William Carlos Williams’s refrain, “No ideas but in things,” “*A Sort of a Song*”, in *The Wedge* (1944)). *See also* Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1364 (1990) (stating that post-modern 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.” (quoting Elizabeth Frank, *Art’s Off-the-Wall Critic*, N.Y. TIMES, Nov. 19, 1989, § 6 (Magazine), at 78)).

speech is, strictly speaking, nonsense.¹¹ Sometimes we speak without intending to “mean” anything at all—exclamations, jokes, doggerel verse, and even philosophical illustrations may all be nonsensical.¹² 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.”¹³ 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.¹⁴ 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 unknown.

Simply to describe the broad scope of nonsense both demonstrates its importance and suggests that meaning is at best an unreliable guide to the First Amendment’s hinterlands.¹⁵ Moreover, its 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 doctrine is created to protect.¹⁶ Primary

¹¹ See generally Section I.A.

¹² See *infra* Section I.A.1. (discussing covert nonsense). See also 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.”).

¹³ LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* § 6.54 (C.K. Ogden trans) [hereinafter WITTGENSTEIN, *TRACTATUS*]. Whether this is really what he intended (and whether he succeeded) is of course another matter. The “meaning” of the *Tractatus*’ avowed lack of sense has been an elusive and perhaps ephemeral grail for analytic philosophers. See generally *infra* notes 93-108 (describing debate over “ineffable” and “resolute” readings); see also Leo K.C. Cheung, *The Disenchantments of Nonsense: Understanding Wittgenstein’s Tractatus*, 31(3) *PHILOSOPHICAL INVESTIGATIONS* 197, 201–03 (July 2008).

¹⁴ See *infra* Section I.A.2. (discussing covert nonsense).

¹⁵ I follow Robert Post’s lead by attempting to tell a story in which doctrine and normative commitments are mutually interdependent. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM* (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) (“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.”) (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)).

¹⁶ See Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What “The Freedom of Speech” Encompasses*, 60 *DUKE L.J.* 1673, 1676

among these are the marketplace of ideas, individual autonomy, and democratic participation. Nonsense can and often does further each of them.¹⁷

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 difficult and hazardous business, and Part II proceeds with caution. But the exploration is increasingly unavoidable, for First Amendment theory and doctrine often suggest that meaning is an essential part of constitutionally salient speech without defining 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 been doing little else.¹⁸ Throughout the past century (paralleling almost exactly the lifespan of the modern First Amendment)¹⁹ they have developed two primary methods for charting the boundaries of what can meaningfully be said. Of course, their goal in doing so has been to find the limits of language, thought, and the world,²⁰ not to generate constitutional doctrine. And yet the tools they have created—which with egregious but necessary oversimplification can be called conceptual meaning and use meaning—have been wielded, sometimes awkwardly and perhaps unknowingly, by the Justices themselves.

The “conceptual” approach finds meaning in the relationship between expression and underlying concepts.²¹ Some version of this basic idea

(2011) (“The 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.”).

¹⁷ *Infra* Section I.B. See also Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 671 UCLA L. REV. 671, 722 (1983) (“Expression that is not intended to communicate anything may clearly promote the four values identified by Emerson as underlying the first amendment.”). Emerson’s fourth value focuses on “whether, although the conduct may not in itself qualify for protection, such protection is necessary to safeguard other, qualified conduct.” *Id.* at 722. I discuss this argument below at notes 154-159 and accompanying text.

¹⁸ See B.R. Tilghman, *Literature, Philosophy, and Nonsense*, 30(3) BRITISH J. OF AESTHETICS 256, 256 (July 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.”).

¹⁹ 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” when Justice Holmes wrote his dissent in *Abrams v. United States*, 250 U.S. 616 (1919)).

²⁰ WITTGENSTEIN, TRACTATUS, *supra* note 13, § 5.6 (“The limits of my language mean the limits of my world.”).

²¹ See *infra* II.A. The label itself is a necessary but regrettable simplification. See *infra*

underlies the logical-positivist approach associated with Bertrand Russell and the early Wittgenstein, among many others. As Russell once put it, “[a]bsorption 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.”²² Under the conceptual approach, speech that fails to represent extra-linguistic ideas is simply nonsense and, if meaning is an essential ingredient of constitutionally salient speech, therefore falls outside the realm of the First Amendment.

A conceptual 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 our profound national commitment to the free exchange of ideas”²³ to the *Spence* test, which asks whether “an 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.”²⁴ The conceptual approach is also implicitly employed by those who fret about the constitutional protection of nonrepresentational art.²⁵ Nonrepresentationalism, after all, is only problematic for the First Amendment if representativeness itself is constitutionally relevant.

Despite its intuitive appeal, the conceptual 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. Indeed, the conceptual approach would effectively deny constitutional coverage to vast stretches of discourse, including ethics, aesthetics, and religion, all of which—according to the conceptualist philosophers—lie beyond language’s power to represent. On the conceptual account, they simply “cannot be expressed,”²⁶ 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.”²⁷ Fortunately, the First Amendment is not so limited; the

note 164.

²² HERBERT HOCHBERG, INTRODUCING ANALYTIC PHILOSOPHY, Preface (2003).

²³ *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal citation omitted). *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’s] guarantees.”) (internal citation omitted).

²⁴ *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

²⁵ *See, e.g., Nimmer, Symbolic Speech, 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.”).

²⁶ WITTGENSTEIN, TRACTATUS, *supra* note 13, § 6.421.

²⁷ LUDWIG WITTGENSTEIN, THE WITTGENSTEIN READER 296 (Anthony Kenny ed.,

boundaries of the freedom of speech are not coextensive with the “walls of our cage.”

In part to escape that cage, analytic philosophy long ago took what is known as the linguistic turn.²⁸ 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.”²⁹ As Wittgenstein explained, “[f]or 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.”³⁰ Finding the boundaries of meaning, then, depends on identifying the “language games” that “consist[] of language and the actions into which it is woven.”³¹

Echoes of a use meaning approach can already be found in First Amendment discourse and doctrine. It explains the Court’s conclusion that constitutional coverage extends to practices that form a “significant medium for the communication of ideas,”³² and is not “confined to expressions conveying a ‘particularized message.’”³³ 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

1994) (quoted in James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 519 (1999)).

²⁸ 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.”).

²⁹ Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 303–04 (1993) (internal citation omitted); 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.”) (internal citation omitted).

³⁰ LUDWIG WITGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 43 (G.E.M. Anscombe trans., 3d ed 1958) [hereinafter WITGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*].

³¹ *Id.* at 7.

³² *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

³³ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (internal citations omitted).

significance to acts of communication.”³⁴

The use meaning approach improves on the conceptual 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 conceptual approach.³⁵

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.³⁶ As 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.”³⁷ 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.

I. STUFF AND NONSENSE

Making sense of nonsense for First Amendment purposes involves at

³⁴ Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255 (1995) [hereinafter Post, *Recuperating*]; see also *id.* at 1276–77 (“Instead of aspiring to articulate abstract characteristics of speech, doctrine out 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.”

³⁵ Cf. Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 771–75 (2001) (considering the First Amendment claims of a person who protests speed limits by violating them).

³⁶ See *infra* Section III.C.

³⁷ Jack Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1802 (1994) [hereinafter Balkin & Levinson, *Grammar*]; see also WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 30, at 65.

least two tasks: establishing what nonsense is, and determining whether it has constitutional value.³⁸ 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.

Because the goal is to have constitutional reasoning drive conceptual analysis rather than the other way around, the discussion here evaluates the scope and constitutional value of nonsense in somewhat general terms—as the absence of meaning³⁹—before elaborating a more rigorous definition of meaning in Part II. The downside of this approach is that it is, as an initial matter, over-expansive: Jackson Pollock’s work, for example, lacks a certain kind of meaning (propositional content), and therefore qualifies as a certain kind of nonsense, despite its undoubted value and First Amendment protection. Indeed, that is precisely the *point* of the following discussion—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 not to be equated with propositional content, for much First Amendment scholarship and doctrine makes precisely that connection.⁴⁰

Section I.A begins by describing nonsense’s broad domain. Traditionally, it has been thought that boundary disputes between meaning and nonsense are only really relevant to the First Amendment in the context of art, and that a capacious view of that category can more or less solve the problem. But nonsense contains multitudes, and not all of its forms are easily recognizable as such. The very scope 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. In order to merit coverage, nonsense must presumably further the values traditionally associated with the First Amendment,⁴¹ such as

³⁸ 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* 268-272 and accompanying text.

³⁹ *See supra* note 4 and sources cited therein.

⁴⁰ *See infra* notes 160-162 and 195-206 and accompanying text.

⁴¹ POST, DEMOCRACY, *supra* note 15, 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.”).

autonomy, the marketplace of ideas, and democracy. Section 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.

A. *The Scope of Nonsense*

Whatever else it suggests, Wittgenstein’s admonition to “pay attention to your nonsense” was at the very least a call to recognize nonsense where it arises. As this Section shows, that is a difficult but rewarding task, for nonsense takes many forms.⁴² In an effort to impose some order, the following discussion divides nonsense—“[w]ords or signs having no intelligible meaning”⁴³—into two major categories: overt and covert.⁴⁴

1. Overt Nonsense

At almost the same time as Russell and Wittgenstein were busy in Cambridge trying to pin down nonsense, Lewis Carroll was busy in Oxford releasing more of it. “Jabberwocky,” perhaps his most famous piece of nonsense verse (and a cameo performer in First Amendment doctrine),⁴⁵

⁴² Charlton, *supra* note 4, at 346 (“In general philosophers have gone wrong in supposing that whatever is nonsensical is nonsensical in the same way.”).

⁴³ “Nonsense,” The Free Dictionary, <http://www.thefreedictionary.com/nonsense> (last visited July 11, 2012); *see also* “Nonsense,” The Oxford Dictionary, <http://oxforddictionaries.com/definition/english/nonsense> (last visited July 11, 2012) (“spoken or written words that have no meaning or make no sense”).

⁴⁴ 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*, in WITTGENSTEIN AND THE METHOD OF PHILOSOPHY: ACTA PHILOSOPHICA FENNICA, 35, 37 (Sami Pihlström ed., 2006), *available at* [http://philosophy.uchicago.edu/faculty/files/conant/Readings%20of%20TLP%20and%20its%20failure\[1\].pdf](http://philosophy.uchicago.edu/faculty/files/conant/Readings%20of%20TLP%20and%20its%20failure[1].pdf) (distinguishing “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.”).

The two approaches to meaning discussed in Part II also suggest their own definitions of nonsense; indeed, the Article concludes by arguing that “conceptual” nonsense is constitutionally protected, while “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.

⁴⁵ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S.

begins: “’Twas brillig, and the slithy toves / Did gyre and gimble in the wabe; / All mimsy were the borogroves, / and the mome raths outgrabe.”⁴⁶ As far as the reader can tell,⁴⁷ these are symbols with no references; “sound and fury, signifying nothing.”⁴⁸ As such, they are *overt* nonsense.⁴⁹

Neither the speaker nor the hearer of overt nonsense believes it to have meaning. Its lack of meaning is thus both intentional and apparent.⁵⁰ 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 novel stimuli—it provides a sense of wonder, possibility, and absurdity. But overt nonsense need not have such an ulterior purpose; it can simply be nonsense for nonsense’s sake.⁵¹

Much artistic expression is overtly and sometimes avowedly nonsensical. In his thoughtful analysis of nonrepresentational art, Mark Tushnet points out that many artists—from Archibald MacLeish to William Carlos Williams—have denied the need for, or desirability of, a direct connection between art and traditional meaning.⁵² As Williams put it, “A poem should not mean but be.”⁵³ In a recent essay, Charles Rosen makes a similar point:

We should recall here the extraordinary sixteenth-century

557, 569 (1995). The 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 IN WONDERLAND (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 would have appeared to be otherwise.”).

⁴⁶ LEWIS CARROLL, THROUGH THE LOOKING GLASS, AND WHAT ALICE FOUND THERE 12 (1872).

⁴⁷ Carroll and Humpty Dumpty—his avatar of nonsense—later provided a glossary of terms, but the poem itself nonetheless operates like a nonsensical “private language.” *See infra* 234-235 and accompanying text (discussing Humpty Dumpty’s private language).

⁴⁸ WILLIAM SHAKESPEARE, MACBETH, act 5, sc. 5.

⁴⁹ *See* Kuusela, *supra* note 44, at 37 (describing Peter Hacker’s view of overt nonsense). *Cf.* P.M.S. HACKER, INSIGHT AND ILLUSION: THEMES IN THE PHILOSOPHY OF WITTGENSTEIN 18–19 (1987) [hereinafter HACKER, INSIGHT AND ILLUSION](distinguishing overt and covert nonsense).

⁵⁰ 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.” Charlton, *supra* note 4, at 352 (distinguishing factual from “grammatical” and “logical” nonsense).

⁵¹ *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.”).

⁵² Tushnet, *supra* note 9, at 169.

⁵³ *Id.* (quoting William Carlos Williams, “A Sort of a Song,” in THE WEDGE (1944)).

controversy about style between the admirers of Cicero and Erasmus, the former, led by Etienne 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 of meaning.⁵⁴

Of course, one need not look that far (nor that high) to find examples of art that overtly lacks conceptual meaning. Consider the lyrics of popular songs, from “I Am the Walrus”⁵⁵ to “Who Put the Bomp”⁵⁶ to those consisting entirely of gibberish.⁵⁷

The relationship between overt nonsense and art is not monogamous, however. Philosophers and linguists frequently rely on overt nonsense as an analytic instrument.⁵⁸ The *Tractatus*, for example, openly proclaims itself to lack meaning.⁵⁹ A.W. 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

⁵⁴ Charles Rosen, *Freedom and Art*, THE NEW YORK REVIEW OF BOOKS (May 10, 2012), available at <http://www.nybooks.com/articles/archives/2012/may/10/freedom-and-art>.

⁵⁵ 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).

⁵⁶ BARRY MILLS, WHO PUT THE BOMP (ABC-Paramount 1961) (“When my baby heard / ‘Bomp bah bah bomp’ / ‘Bah bomp bah bomp bah bomp bomp’ / Every word went right into her heart.”)

⁵⁷ ADRIANO CELENTANO, *Prisencolinensinainciusol*, on NOSTALROCK (Clan Celentano 1973) (consisting of “lyrics” that mimic what American English sounds like to an Italian-speaking listener).

⁵⁸ Cf. Charlton, *supra* note 4, at 347 (“Unless they wish to illustrate a philosophic point people seldom compose total nonsense on purpose.”).

⁵⁹ WITTGENSTEIN, TRACTATUS, *supra* note 13, § 6.54 (“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, for he posited a difference between the two. For the purposes of the present discussion, however, those weeds can hopefully be avoided, for both involve a lack of meaning. LUDWIG WITTGENSTEIN, STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2.2 (2010), available at <http://plato.stanford.edu/entries/Wittgenstein/> [hereinafter STANFORD ENCYCLOPEDIA] (“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.”).

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.”⁶⁰ 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.”⁶¹

2. Covert Nonsense

Whereas the meaninglessness of overt nonsense is self-conscious⁶² and apparent to speaker and hearer alike, *covert* nonsense is potentially more insidious. It arises where a speaker or hearer (or both) incorrectly believes 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 whether the purported speech act has meaning at all. This Section cannot and will not attempt to fully address the relationship between misunderstandings and the freedom of speech—an interesting issue in 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—taken at face value—some approaches to the definition of speech might exclude them.⁶³ Carroll’s poetry and Pollock’s

⁶⁰ A.W. Moore & Peter Sullivan, *Ineffability and Nonsense*, 77 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPP. VOL. 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, *TRACTATUS*, *supra* note 13, at Preface.

⁶¹ NOAM CHOMSKY, *SYNTACTIC STRUCTURES* 15 (1957).

⁶² Kuusela, *supra* note 44, at 37.

⁶³ *See, 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, *Symbolic Speech*, *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, posited that a “meaning effect” was necessary for symbolic speech, but also that the Amendment covered speech lacking “both verbal and cognitive content.” *Id.*

paintings are “unquestionably shielded” by the First Amendment,⁶⁴ 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 ERISA or the Higgs Boson—or professors’ efforts to teach them—lack First Amendment protection simply because so few people comprehend them at first.

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 where a speaker intends to convey meaning and the listener fails to recognize not only the specific meaning, but 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.⁶⁵ A non-programmer might not only fail understand the code’s specific meaning, but that it contains meaning at all.

Found meaning, by contrast, arises where 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 silence.⁶⁶ 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 song. Little does he know that in the country he is visiting,

⁶⁴ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

⁶⁵ *See 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.”).

⁶⁶ JOHN CAGE, *4’33”* (1952).

“semolina pilchards” 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 clear answers as to whether such unintentional speech is constitutionally covered.⁶⁷ On the one hand, denying constitutional coverage to unintended speech could leave out a wide range of speakers who cannot control their speech acts—those who are under coercion or asleep, for example. A person 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.”⁶⁸ 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 suggests that a “‘reasonable’ imputation of meaning to otherwise meaningless words—or symbols—is sufficient to trigger First Amendment coverage.”⁶⁹ On the other hand, treating involuntary acts as meaningful speech also suggests 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.⁷⁰

Finally, covert nonsense can arise where 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.⁷¹ This sounds farfetched, but probably happens more often than we would like to think. On some accounts, language is meaningful only when it refers to some extra-linguistic fact,⁷² and a great deal of everyday speech fails this test. Normative statements such as “you

⁶⁷ In “Mental States and Constitutional Rights” (work in progress), I consider in some detail whether constitutional rights have act and mental state requirements analogous to those found in tort and criminal law.

⁶⁸ *What is Tourette Syndrome?*, NAT’L TOURETTE SYNDROME ASS’N, <http://www.tsa-usa.org/aMedical/whatists.html> (last visited June 19, 2012).

⁶⁹ Tushnet, *supra* note 9 at 198; *see also id.* at 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 . . .”).

⁷⁰ 551 U.S. 393, 401–02 (2007) (upholding punishment of student who displayed banner reading “BONG HiTS 4 JESUS” notwithstanding student’s belief that the banner was “nonsense meant to attract television cameras”).

⁷¹ *Cf.* Kuusela, *supra* note 44, at 37 (distinguishing “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.”).

⁷² *See infra* Section II.A (describing conceptual approach).

should X,” for example, are effectively nonsensical under this approach, except as corruptions of the statement “I want you to X.” Wittgenstein himself believed, at least in his early phase, that aesthetics, ethics, and theology “cannot be expressed,”⁷³ and are therefore nonsensical. But of course they are also enormously significant—many people regard such matters as the very lifeblood of public discourse.

The very 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 protections.

B. The Constitutional Value of Nonsense

Simply describing the broad scope of nonsense suggests that the meaning-dependent approach provides a poor map of the First Amendment’s actual boundaries, for much of the nonsensical speech discussed in the previous Section is undoubtedly covered by the constitution. But 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.⁷⁴ 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

⁷³ WITTGENSTEIN, TRACTATUS, *supra* note 13, §§ 6.42, .421 (“Hence also there can be no ethical propositions. . . . [E]thics cannot be expressed.”). *See also* WITTGENSTEIN, TRACTATUS, *supra* note 13, § 4.003 (“[M]ost 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) (“Since . . . Wittgenstein holds that propositions of ethics, aesthetics, and religion are not 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.”).

⁷⁴ I do not mean to suggest that these are the only free speech principles, nor that we must choose only one of them. Post, *Recuperating*, *supra* note 34, at 1271 (“There is in fact no general free speech principle . . .”).

The marketplace of ideas—the first⁷⁵ and perhaps still most prominent⁷⁶ effort to justify the freedom of speech—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’ argument that “the best test of truth is the power of the thought to get itself accepted in the competition of the marketplace.”⁷⁷ 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.⁷⁸ As Justice Brandeis put it in his own statement of the marketplace rationale, “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”⁷⁹

Inasmuch as nonsense represents a disconnect between words and ideas,⁸⁰ it seems out of place in a marketplace devoted to the latter, particularly when ideas are valuable only as handmaidens to truth.⁸¹ This is particularly so under some conceptions of “truth” itself. Just as some

⁷⁵ Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2356 (2000) [hereinafter Post, *Reconciling*].

⁷⁶ See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 73 (1960) (arguing that establishing truth through a marketplace of ideas “is not merely the ‘best’ test. There is no other.”); see also William P. Marshall, *In Defense of the Search for Truth as a First Amendment 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.”).

⁷⁷ *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?”).

⁷⁸ 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))).

⁷⁹ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

⁸⁰ “Nonsense,” Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/nonsense> (last visited July 4, 2012) (defining nonsense as “words or language having no meaning or conveying no intelligible ideas”).

⁸¹ See Tushnet, *supra* note 9, at 205 (“What ‘idea’ does Jackson Pollock’s *Blue Poles: No.11* convey? Even more, what idea does *Ulysses* convey?”). Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime, and the First Amendment*, 1987 WISC. L. REV. 221, 231. (“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.”). Cf. *Brandt v. Bd. of Educ. Of City of Chicago*, 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.”).

analytic approaches find meaning in the relationship between language and extra-linguistic facts,⁸² the correspondence theory of truth holds that statements are true when they represent “actual” extra-linguistic facts.⁸³ As Russell explained, “a belief is true when there is a corresponding fact, and is false when there is no corresponding fact.”⁸⁴ 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 extra-linguistic 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.⁸⁵ The First Amendment generally shies away from legally enforceable determinations about what is “really” true, at least with regard to speech in public discourse.⁸⁶

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.⁸⁷ The reasons for this

⁸² See *infra* Section II.A.

⁸³ See BERTRAND RUSSELL, *THE PROBLEMS OF PHILOSOPHY* 84 (1912).

⁸⁴ *Id.* at 85.

⁸⁵ 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, *Reconciling*, *supra* note 75, 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.”).

⁸⁶ See *Hustler Magazine 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.” *Gertz*, 418 U.S. at 340; POST, *DEMOCRACY*, *supra* note 15, 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*, --- S.Ct. ---- (June 28, 2012) (striking down Stolen Valor Act, which criminalized lies about certain military medals).

⁸⁷ 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).

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 for government officials determining the meaning of private speech.⁸⁸ And perhaps if the marketplace model requires judges to be agnostic as to truthfulness, then 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 in the law.”⁸⁹ 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? After 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.⁹⁰ Others suggest to the contrary that the poem represents not nonsense, but a

⁸⁸ Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 2 (1989) [hereinafter Schauer, *Second-Best*] (“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 generally Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

⁸⁹ *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) (Posner, J., concurring) (“[A First Amendment claim regarding nude dancing] strikes judges as ridiculous in part because we 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 speech 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 in 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 CAL. L. REV. 509, 530–31 (1994).

⁹⁰ 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.”). The word “Jabberwocky,” after all, is often 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.”).

purposeful and illustrative distortion of sense.⁹¹ 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.⁹² 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,⁹³ 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 “resolute” readings. The former, represented prominently by Bertrand Russell, Peter Hacker, and others,⁹⁴ holds that “there are, according to the author of the *Tractatus*, ineffable truths that can be apprehended.”⁹⁵ As Russell put it in his introduction to the *Tractatus*, “after all, Mr. 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.”⁹⁶ And as Hacker points out, “that there are things that cannot be put into words, but which make themselves manifest (*Tractatus* 6.522) is a leitmotif running through the whole of the *Tractatus*.”⁹⁷ According to the

⁹¹ Peter J. Lucas, *Jabberwocky back to Old English: Nonsense, Anglo-Saxon and Oxford*, in LANGUAGE HISTORY AND LINGUISTIC MODELLING 503 (1997).

⁹² Kuusela, *supra* note 44, at 37.

⁹³ STANFORD ENCYCLOPEDIA, *supra* note 59, § 2.4 (“‘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.’”).

⁹⁴ See, e.g., G.E.M. ANSCOMBE, AN INTRODUCTION TO WITTGENSTEIN’S TRACTATUS 162 (1971); HACKER, INSIGHT AND ILLUSION, *supra* note 49; ANTHONY KENNY, WITTGENSTEIN (2006); NORMAN MALCOLM, NOTHING IS HIDDEN, WITTGENSTEIN’S CRITICISM OF HIS EARLY THOUGHT (1986).

⁹⁵ Peter M.S. Hacker, *Was He Trying to Whistle It?*, in THE NEW WITTGENSTEIN 353, 368 (Alice Marguerite Crary & Rupert J. Read eds., 2000) [hereinafter Hacker, *Trying to Whistle It*]. 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, then “we must take seriously that [philosophy] is nonsense, and not pretend, as Wittgenstein does, that it is an important nonsense.” FRANK 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, “[b]ut what we can’t say, we can’t say, and we can’t whistle it either.” *Id.* at 238.

⁹⁶ WITTGENSTEIN, TRACTATUS, *supra* note 13, at xxviii (referencing § 7).

⁹⁷ Hacker, *Trying to Whistle It*, *supra* note 95, at 353; see also Roy Brand, *Making Sense Speaking Nonsense*, 35(3) PHILOSOPHICAL FORUM 311, 323 (2004) (“According to

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.⁹⁸ The book itself is overt nonsense (or at least aims to be, for those who understand it), but with a purpose.

The resolute or “austere” reading, most closely associated with James Conant and Cora Diamond,⁹⁹ rejects the notion that there are unsayable truths, or different kinds of nonsense.¹⁰⁰ According to this reading, “it 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.”¹⁰¹ The purpose of the *Tractatus* is therefore therapeutic, rather than demonstrative.¹⁰² It seeks to cure us of the pointless and potentially harmful effort of trying to find meaning in nonsense.¹⁰³ On this reading, “the whole talk of limits of

the ineffable reading, what cannot be said is not a position within language but some extra-linguistic truths.”). The ineffable reading appears to be a matter of precedent in the Second Circuit. Cf. *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.”).

⁹⁸ WITTGENSTEIN, *TRACTATUS*, *supra* note 13, § 6.54 (“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.)”).

⁹⁹ See, e.g., James Conant, *Two Conceptions of Die Überwindung der Metaphysik: Carnap and Early Wittgenstein*, in WITTGENSTEIN IN AMERICA 13 (T. McCarthy and S. C. Stidd eds. 2001); James Conant, *Elucidation and Nonsense in Frege and Early Wittgenstein*, in THE NEW WITTGENSTEIN 149 (A. Crary & R. Read eds. 2000); James Conant, *Must We Show What We Cannot Say?*, in THE SENSES OF STANLEY CAVELL 242 (R. Fleming & M. Payne eds. 1989); Cora Diamond, *Throwing Away the Ladder: How to Read the Tractatus*, in THE REALIST SPIRIT 179 (Cora Diamond, ed. 1991) [hereinafter Diamond, *Throwing Away the Ladder*]; Cora Diamond, *Logical Syntax in Wittgenstein’s Tractatus*, 55 PHIL. QUARTERLY 55 78 (2005).

¹⁰⁰ Edmund Dain, *Contextualism and Nonsense in Wittgenstein’s Tractatus*, 25(2) S. AFR. J. PHILOS. 91, 92 (2006) (“There are, for austerity, no logically distinct kinds of nonsense; all nonsense, logically speaking, is on a par.”).

¹⁰¹ Brand, *supra* note 97, at 332 (internal quotation marks and citation omitted). 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 99, at 181.

¹⁰² Marie McGinn, *Between Metaphysics and Nonsense: Elucidation in Wittgenstein’s Tractatus*, 49 PHIL. QUARTERLY 491 (1999); see also Brand, *supra* note 97, 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.”); Moore & Sullivan, *supra* note 60, at 179 (“There is nothing ineffable. There is only the temptation to see sense where it is lacking. Wittgenstein’s aim is therapeutic.”).

¹⁰³ Cheung, *supra* note 13, at 200 (concluding that, according to Diamond and Conant,

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.”¹⁰⁴ After all, Wittgenstein himself said that “[t]he limits of my language mean the limits of my world.”¹⁰⁵ 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.”¹⁰⁶

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.¹⁰⁷ The goal here is simply to suggest that nonsense can be cognitively illuminating—meaningless speech, in other words, can have value *as a means to truth*. For adherents to the ineffable view, nonsense can demonstrate the existence of important but perhaps unsayable truths. Many artists describe their work as an effort to do just that.¹⁰⁸ And for adherents to the resolute view, nonsense can be a tool to save us from useless and potentially misleading efforts to establish meaning where 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

“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”). Conant, *Elucidation and Nonsense*, *supra* note 99, 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.”).

¹⁰⁴ Brand, *supra* note 97, at 330.

¹⁰⁵ WITTGENSTEIN, *TRACTATUS*, *supra* note 13, § 5.6.

¹⁰⁶ As Wittgenstein wrote to Russell: “I’m afraid you haven’t got hold of my main contention to which the whole business of logical propositions is only a corollary. The main point is the theory of what can be expressed by a proposition—i.e., by language—(and which comes to the same thing what can be thought) and what cannot be expressed by proposition, but only shown; which I believe, is the cardinal problem of philosophy.” LUDWIG WITTGENSTEIN, *LETTERS TO RUSSELL, KEYNES, AND MOORE* 37 (G.H. von Wright ed., 1974).

¹⁰⁷ See, e.g., Brand, *supra* note 97, at 312 (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 (“The resolute reading allows numerous variants,” which have been classified “into ‘strong’ and ‘weak’ versions based on their different views of the nature of the frame.”).

¹⁰⁸ Hegel, for one, believed that art was useful—albeit not as much as philosophy—as a guide to truth. See Nahmod, *supra* note 81, at 232 (citing GEORG FRIEDRICH HEGEL, *PHILOSOPHY OF FINE ART* 15–16 (Osmaston trans. 1920)).

falsehood can demonstrate truth,¹⁰⁹ 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.”¹¹⁰ 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. Even where it lacks meaning, such 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.”¹¹¹ As William Charlton puts it, “whereas we outgrow play with spoons and handkerchiefs, our intellectual faculties will always benefit from the quickening effect of good nonsense.”¹¹²

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.¹¹³ Martin Redish, perhaps the most prominent defender of this view, has argued that “[a]ll forms of expression that further the self-realization value, which justifies the democratic system as well as

¹⁰⁹ See *New York 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*, in *ON LIBERTY AND OTHER WRITINGS* 5, 20 (Stefan Collini ed. 1989))); Mill, *supra*, at 23 (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.”).

¹¹⁰ Tilghman, *supra* note 18, at 262

¹¹¹ *Burstyn v. Wilson*, 343 U.S. 495, 501 (1952) (referring to motion pictures); see 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.”).

¹¹² Charlton, *supra* note 4, at 360.

¹¹³ 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.

free speech’s role in it, are deserving of full constitutional protection.”¹¹⁴ Ed Baker similarly argued that speech “should receive constitutional protection . . . because and to the extent that it is a manifestation of individual autonomy.”¹¹⁵ The expansiveness of the autonomy conception leaves its defenders with a vast territory to patrol, since 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.”¹¹⁶ After all, much of what we think and feel is impossible to express in words.¹¹⁷ 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.”¹¹⁸ Whatever the reason for these limits, or whether 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 states of affairs, or attempt to say what can only be shown.¹¹⁹

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.¹²⁰ Efforts to represent

¹¹⁴ Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982). Tim Scanlon once defended a similar viewpoint, see e.g., Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972), but has since done his best to repudiate it. 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.”).

¹¹⁵ 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, 8 (1976) (arguing that the First Amendment protects speaker’s self-realization).

¹¹⁶ Lawrence B. Solum, *Freedom of Communicative Action*, 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 creative arts.”).

¹¹⁷ Moore & Sullivan, *supra* note 60, at 173 (“Most of us have at one time or another found that we cannot express how we feel about something.”).

¹¹⁸ *Id.*

¹¹⁹ See *infra* Section II.A (describing conceptual approach, under which these would be considered nonsensical).

¹²⁰ Cf. Rosen, *supra* note 54 (“By the beginning of the twentieth century, when Hugo von Hofmannstahl, in the ‘Chandos Letter,’ asserted the inadequacy to express anything

them may lack meaning according to some definitions, but they are also a very important part of individual and social human development.¹²¹ Even Wittgenstein recognized that there was a kind of mystical value in some kinds of nonsense.¹²²

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.¹²³ Some courts and scholars simply take it for granted that the Amendment *must* cover art, and do little to explain why.¹²⁴ Perhaps equally common are efforts to suggest that art does in fact have constitutionally salient meaning. As Marci Hamilton notes, “[m]irroring the commentators’ approach, the Court tends to protect art only to the extent that it is a vehicle for ideas, especially political ideas.”¹²⁵ For many works of art, this approach is perfectly adequate,¹²⁶ particularly given the extremely expansive definitions of “meaning” that courts and scholars apply to art.¹²⁷ But not all art can fit

profoundly individual and subjective, one of the first words to have completely lost its meaning for him was ‘freedom.’”).

¹²¹ Hamilton, *supra* note 111, 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))).

¹²² See generally JAMES ROBERT ATKINSON, *THE MYSTICAL IN WITTGENSTEIN’S EARLY WRITINGS* (2009).

¹²³ 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.”).

¹²⁴ 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.”); see, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“A rule cannot be laid down that would excommunicate the paintings of Degas.”); *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.”).

¹²⁵ Hamilton, *supra* note 111, at 105.

¹²⁶ *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 COLIN MARTINDALE, *THE CLOCKWORK MUSE: THE PREDICTABILITY OF ARTISTIC CHANGE* 42–43 (1990) (“[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.” (cited in Fromer, *supra* note 90, at 1478 n.253)).

¹²⁷ See, e.g., *Bery v. City of New York*, 97 F.3d 689, 696 (“[P]aintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.”); Eberle, *supra* note 123, 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.”).

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.”¹²⁸

Perhaps instead we should take seriously the notion that some art is nonsensical.¹²⁹ Indeed, if works of art contained articulable ideas, one suspects that they would be said and not sung.¹³⁰ 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.¹³¹

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 sake¹³²—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.¹³³ 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.¹³⁴ It can serve the autonomy interests of viewers as well. Aesthetic judgments are part of the “pleasure of freedom

¹²⁸ Hamilton, *supra* note 111, at 103–04.

¹²⁹ See, 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).

¹³⁰ Hamilton, *supra* note 111, at 74 (quoting Isadora Duncan: “If I could say it, I wouldn’t have to dance it.”).

¹³¹ Tushnet, *supra* note 9, at 188–189 (internal citations omitted).

¹³² *Piarowski v. Illinois Community College District* 515, 759 F.2d 625, 628 (7th Cir. 1985) (concluding that Amendment protects “purely artistic” expression—“art for art’s sake”).

¹³³ Cf. Adler, *supra* note 10, at 1366 (internal citation omitted) (quoting post-modern painter David Salle as saying that his paintings are about “all the paintings I won’t make or can’t make.”).

¹³⁴ Tolstoy—whom Wittgenstein “admired and read constantly,” Brand, *supra* note 97, at 311—suggested that creating nonsense was perhaps the only thing that humans could do that their own creator could not. *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* (1992)).

itself,” and are in that way “disinterested and ruleless, unconstrained by . . . appetite” or “a master concept to which they must conform.”¹³⁵ Art is therefore important for individual autonomy precisely *because* its lack of meaning removes it from the realm of knowledge.¹³⁶

This is not to say that the autonomy principle provides an unmitigated case for protecting nonsense. Some forms of covert nonsense can arguably interfere with individual autonomy, rather than advancing it. 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.¹³⁷ 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 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.”¹³⁸ 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 the development of rational faculties.”¹³⁹ 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

¹³⁵ Anthony T. Kronman, *Is Poetry Undemocratic?*, 16 GA. ST. U.L. REV. 311, 324 (1999).

¹³⁶ *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 former provides the best “clue”); Harry Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 16 (1960) (“[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 81, 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.”).

¹³⁷ 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.”).

¹³⁸ MARTIN 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 114, at 215.

¹³⁹ FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 49 (1982).

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.¹⁴⁰ Robert Bork took a similar, albeit narrower, view.¹⁴¹ More recently, Robert 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.”¹⁴²

Because democratic approaches to the First Amendment seem to be based on the content of speech acts,¹⁴³ it might not be immediately 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 many people with strong incentive to think about the issue seem to believe that nonsense and democracy are connected. The leaders of totalitarian states, for example, often ban nonrepresentational and nonsensical art.¹⁴⁴ Sheldon Nahmod points to the Soviet Union, whose leaders believed that “art should only serve to reinforce socialist ideals and thereby inculcate appropriate behavior; nonrepresentational art was

¹⁴⁰ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 94 (1948) [hereinafter MEIKLEJOHN, *FREE SPEECH*] (“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.”); *see also id.* at 255–57 (arguing that the First Amendment encompasses all “public” speech that enables citizens to participate in democratic governance). As noted above, Meiklejohn considered this approach broad enough to include “novels and dramas and paintings and poems.” *Id.* at 263.

¹⁴¹ 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”).

¹⁴² POST, *DEMOCRACY*, *supra* note 15, at 18.

¹⁴³ *See, e.g.*, MEIKLEJOHN, *FREE SPEECH*, *supra* note 140, at 26–27. Because Post 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. Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 *U. WASH. L. REV.* 409, 417–23 (2012).

¹⁴⁴ *See* Hamilton, *supra* note 111, at 98–100 (discussing examples from China, Eastern Europe, Nazi Germany, and elsewhere); *see also* Eberle, *supra* note 123, at 12–13; *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, rules 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.”).

considered decadent, bourgeois and dangerous.”¹⁴⁵ Whether or not that fear is well-founded, it certainly is not unique to Russia, nor even to totalitarian states. As Hamilton notes, “[c]onventional readings of Plato, for example, indicate that he believed that art should be censored because it threatens order and stability.”¹⁴⁶ Speech, including art, need not be meaningful in order to destabilize.

But 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.”¹⁴⁷ 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 marketplace for ideas,¹⁴⁸ perhaps it can also inform their understanding and appreciation of what Brandeis referred to as “political truth.”¹⁴⁹

A second possibility is that overt nonsense serves as a kind of “safety valve”—a way to release what might otherwise become dangerous dissent.¹⁵⁰ On this reading, speech “is an essential mechanism for maintaining the balance between stability and change.”¹⁵¹ The Merry Pranksters, whose escapades in their brightly-decorated bus were catalogued in *The Electric Kool Aid Acid Test*,¹⁵² often “tootled 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.”¹⁵³ 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

¹⁴⁵ Nahmod, *supra* note 81, 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”).

¹⁴⁶ Hamilton, *supra* note 111, at 76.

¹⁴⁷ *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256–57.

¹⁴⁸ *See supra* 109-112 and accompanying text.

¹⁴⁹ *Whitney v. California*, 274 U.S. 357, 375 (Brandeis, J., concurring).

¹⁵⁰ *See, e.g.*, Stephen G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 10 (2008) (describing safety valve theory).

¹⁵¹ THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

¹⁵² TOM WOLFE, *THE ELECTRIC KOOL AID ACID TEST* (1968).

¹⁵³ Christopher Lehmann-Haupt, *Ken Kesey, Author of ‘Cuckoo’s Nest,’ Who Defined the Psychedelic Era, Dies at 66*, N.Y. TIMES, Nov. 11, 2001. *See* WOLFE, *supra* note 152, at Chapter 8 (“Tootling the Multitudes”).

destructive.

A related argument for extending constitutional protection to nonsense draws on institutional considerations that are especially salient for, but not specific to, democracy conceptions of the First Amendment: that the Amendment must protect nonsense in order to fully insulate valuable and meaningful speech. The Supreme Court has long recognized that “First Amendment freedoms need breathing space to survive.”¹⁵⁴ 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 their exercise almost as potently as the actual application of sanctions.”¹⁵⁵ 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 laws that would concededly be constitutional as applied to them,¹⁵⁶ so long as the law reaches a substantial amount of protected speech.¹⁵⁷

The nothingness of nonsense could be exactly the kind of breathing space that sense needs in order 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.’”¹⁵⁸ 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 held in *Cohen*, “forbid[ding] particular words . . . also run[s] a substantial risk of suppressing ideas in the process.”¹⁵⁹ 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 under-explored category of speech—nonsense—and made a preliminary case for its constitutional protection. In the course of doing so, 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, and is not to be approached incautiously. With due concern for the hazards, though, it is difficult to imagine a better way to

¹⁵⁴ *NAACP v. Button*, 371 U.S. 415, 433 (1963).

¹⁵⁵ *Id.*

¹⁵⁶ *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

¹⁵⁷ *Id.* at 615.

¹⁵⁸ *New York Times v. Sullivan*, 376 U.S. 254, 271–72 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

¹⁵⁹ *Cohen*, 403 U.S. at 26.

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 suggest 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 John Greenman notes, “[f]requently, behavior is said to be covered by the First Amendment if it conveys ‘ideas’ or ‘information.’”¹⁶⁰ 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.”¹⁶¹ 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.”¹⁶²

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.¹⁶³ That imprecision,

¹⁶⁰ 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.”).

¹⁶¹ Tiersma, *supra* note 3, at 1559. Under Tiersma’s 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. “An intent to communicate obviously requires an intent to convey information.” *Id.* at 1561.

¹⁶² Nimmer, *Symbolic Speech*, *supra* note 3, at 37. Nimmer explained elsewhere that “[t]he meaning effect is a signal that registers in the mind of at least one observer. The nonmeaning effect is the physical effect of the act and is not dependent upon the reaction of other minds.” MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 3.06[C], at 3–45 (1989). As noted above, despite its reliance on meaning Nimmer considered his approach broad enough to reach artistic speech lacking verbal and cognitive content. Nimmer, *Symbolic Speech*, *supra* note 3, at 35.

¹⁶³ 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

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. Even so, this is no easy task, for the necessary tools are scarce and scattered throughout the First Amendment’s messy workshop.

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 “conceptual” and “use” approaches to meaning. The former, associated with early Wittgenstein, Russell, and logical positivism, finds meaning in the connection between language and extra-linguistic concepts.¹⁶⁴ 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 conceptual approach to meaning by searching for “ideas”¹⁶⁵ or “content.”¹⁶⁶ The frequent scholarly explorations of nonrepresentational art also seem motivated by a conceptual approach, for their issue is only distinct 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 of ‘reality’ but

no one—no scholar or judge—has successfully captured it. Few have even tried.”)

¹⁶⁴ “Conceptual” 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.

¹⁶⁵ Greenman, *supra* note 3, at 1347.

¹⁶⁶ Volokh, *supra* note 160, at 1304.

as ideas for which good reasons can be found in other parts of the system of discourse.¹⁶⁷

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 conceptual 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—heaven forbid—provide an original or comprehensive reading of Wittgenstein.¹⁶⁸ The following accounts of analytic philosophy will feel 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. Conceptual 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.”¹⁶⁹ For a man whose contribution to American jurisprudence can largely be measured by his total mastery of words,¹⁷⁰ this might come as something of a surprise.

¹⁶⁷ Chevigny, *supra* note 85, at 162.

¹⁶⁸ 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 signaling value of citations to Wittgenstein “in 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.1a (1999) (positing same phenomenon with regard to law review editors).

¹⁶⁹ Oliver W. Holmes, Jr., *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 738 (Mark DeWolfe Howe ed., 1953) (noting how difficult it is to “think accurately—and think things not words”) (quoted in Post, *Recuperating*, *supra* note 34, at 1250 (“Our First Amendment jurisprudence has become increasingly a doctrine of words merely, not of things.”)).

¹⁷⁰ Richard A. Posner, *Introduction* to OLIVER WENDELL HOLMES, JR., THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. xvii (Richard A. Posner ed., The University

The remark suggests that the meaning of words lies in “the facts for which they stand.” In that way, it is emblematic of what might be called the “conceptual” approach to meaning—one that locates meaning in the relationship between language and extra-linguistic concepts.¹⁷¹ 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 conceptual approach has serious defects as a guide for constitutional law.

Holmes was a pragmatist,¹⁷² and though his circle of scientifically and philosophically inclined friends was broad and deep,¹⁷³ it did not necessarily 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,¹⁷⁴ those thinkers—Bertrand Russell and Ludwig Wittgenstein prominent but not alone among them—were probing the meaning of meaning itself.¹⁷⁵

In the early 1900s, Russell was perhaps the world’s preeminent logician and mathematician. His *Principia Mathematica* was published in the 1910s, just a few years before Holmes laid the normative foundations of 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’ or etc., can describe a perceived fact.”¹⁷⁶

of Chicago Press 1992).

¹⁷¹ 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 time in which it is used.” *Towne v. Eisner*, 38 S. Ct. 158, 159 (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.

¹⁷² See generally Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 799 (1989)

¹⁷³ See generally LOUIS MENAND, *THE METAPHYSICAL CLUB* (2002) (describing social and intellectual “club” that included such luminaries as Holmes, William James, and Charles Peirce).

¹⁷⁴ Post, *Reconciling*, *supra* note 75, at 2356.

¹⁷⁵ 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 Richard Rorty, *The Linguistic Turn: Essays in Philosophical Method* (1992).

¹⁷⁶ BERTRAND RUSSELL, *AN INQUIRY INTO MEANING AND TRUTH* 181 (1940) (internal quotation marks omitted).

Thus a statement like “The King of France is bald” can be meaningful because it denotes a concept, even though the thing it denotes does not exist.¹⁷⁷ Statements that fail to denote are nonsensical. Russell’s famous example of such nonsense was the statement “Quadruplicity drinks procrastination.”¹⁷⁸

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.”¹⁷⁹ Within one term, Russell learned that his German was Austrian and quite capable of his own assaultive reasoning. Russell was enraptured: “I love him & feel he will solve the problems I am too old to solve.”¹⁸⁰ The ferocious Austrian was, of course, Wittgenstein. For him, as Dennis Paterson says, “all philosophical problems [were] ultimately problems of language.”¹⁸¹ 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 conceptual 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.”¹⁸²

In order 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 the limit (we should therefore have to think what cannot be thought). The limit can, therefore, only be drawn in language and what lies on the side of the limit will be simply nonsense.¹⁸³

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

¹⁷⁷ See generally Bertrand Russell, *On Denoting*, 14 MIND 479 (1905).

¹⁷⁸ RUSSELL, AN INQUIRY, *supra* note 176, at 165.

¹⁷⁹ RAY MONK, LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS 40 (1990)

¹⁸⁰ *Id.* at 41.

¹⁸¹ Patterson, *Law’s Pragmatism*, *supra* note 1, at 938.

¹⁸² Brand, *supra* note 97, at 314. See also Kavka, *supra* note 73, at 1457 (reviewing HANNA FENICHEL PITKIN, WITTGENSTEIN AND JUSTICE (1972)) (concluding that the *Tractatus* is based on the belief that “the function of language is to model or picture the world.”).

¹⁸³ WITTGENSTEIN, TRACTATUS, *supra* note 13, at Preface.

as we think it is.”¹⁸⁴ 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.”¹⁸⁵ 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.”¹⁸⁶

This does not necessarily mean, however, that all concepts are reducible to language.¹⁸⁷ Wittgenstein was obsessed with the notion that some things “cannot be expressed by proposition, but only shown; which I believe is the cardinal problem of philosophy.”¹⁸⁸ 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 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.¹⁸⁹

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.¹⁹⁰

Though Wittgenstein himself would apparently later abandon it,¹⁹¹ the effort to find meaning in the relationship between words and things certainly did not end with the *Tractatus*. The influence of the conceptual 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 “verifiability principle.”¹⁹² That principle holds that statements are nonsensical where they are not analytically or empirically verifiable.¹⁹³ A

¹⁸⁴ *Id.* at § 4.01.

¹⁸⁵ *Id.* § 3.3.

¹⁸⁶ *Id.* § 3.032 (“It is impossible to present in language anything that ‘contradicts logic’ as it is in geometry to present by its coordinates a figure that contradicts the laws of space or to give the coordinates of a point that does not exist.”).

¹⁸⁷ See *supra* notes 93-108 and accompanying text (describing debate between “ineffable” and “resolute” readings of Wittgenstein).

¹⁸⁸ DAVID G. STERN, WITTGENSTEIN ON MIND AND LANGUAGE, 79-70 (1996).

¹⁸⁹ ANSCOMBE, *supra* note 94, at 162.

¹⁹⁰ See Holmes, *supra* note 169, at 460.

¹⁹¹ See *infra* 215-216 and accompanying text.

¹⁹² ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC (1952).

¹⁹³ *Id.* at 44. Chevigny, *supra* note 85, 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.”).

similar focus on verifiability seems to underlie popular intuitions about the relationship between meaning and truth. For example, “the 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.”¹⁹⁴

The influence of the conceptual approach extends, albeit uncredited, to First Amendment doctrine itself. This is perhaps most apparent in what John Greenman calls the Supreme Court’s “ideatism”—the principle that “behavior is . . . covered by the First Amendment if it conveys ‘ideas’ or ‘information.’”¹⁹⁵ The notion that ideas—cognitive *meaning*, in other words—are the focus of the First Amendment is so often repeated that it might sometimes pass unnoticed. In *New York Times v. Sullivan*,¹⁹⁶ 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.’”¹⁹⁷ Since then, the Court has often invoked the principle that “[t]he First Amendment . . . embodies ‘our profound national commitment to the free exchange of ideas.’”¹⁹⁸ In *Miller v. California*,¹⁹⁹ 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] guarantees.”²⁰⁰ By the same logic, the Court has also indicated that putative speech acts such as fighting words and obscenity essentially fall outside the boundaries of the First Amendment in part because they “are no essential part of any exposition of ideas.”²⁰¹

¹⁹⁴ *Wikipedia: Verifiability*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Wikipedia:Verifiability> (quoted in POST, DEMOCRACY, *supra* note 15, at 8 (2012)).

¹⁹⁵ Greenman, *supra* note 3, at 1347-48.

¹⁹⁶ 376 U.S. 254 (1964).

¹⁹⁷ *Id.* at 269 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)); *see also* *Mosley v. Police Dep’t*, 408 U.S. 92, 95-96 (1972) (“[O]ur people are guaranteed the right to express any thought, free from government censorship.” (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)) (citations omitted)).

¹⁹⁸ *New York State Bd. of Elections v. Torres*, 552 U.S. 196, 208 (2008) (“The First Amendment creates a 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’ . . .”).

¹⁹⁹ 413 U.S. 15 (1973).

²⁰⁰ *Id.* at 20 (internal citation omitted).

²⁰¹ *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.* (internal quotation marks omitted). *See also* *Illinois ex rel. Madigan v. Telemarketing*

A conceptual approach to meaning similarly seems to animate some of the Court’s efforts to define what kinds of non-verbal 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.’”²⁰² And meaning seems to be the ingredient that makes that extension possible. In *West Virginia State Board of Education v. Barnette*, for example, the Court indicated that expressive conduct (in that case, saluting a flag) is “speech” for constitutional purposes because it conveys “ideas.”²⁰³ A similar premise seems to animate *Spence v. Washington*,²⁰⁴ the Court’s most direct effort to define the essential elements that transform sound 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.²⁰⁵ The test it created asks whether “an 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.”²⁰⁶ Conduct that satisfies both prongs of this test is considered to be expression. *Spence* therefore effectively doubles down on the importance of conceptual meaning, requiring both that the speaker intend to convey it (in “particularized” form,

Associates, Inc., 538 U.S. 600, 612 (2003) (denying First Amendment protection to fraud, on the basis that “the ‘intentional lie’ is ‘no essential part of any exposition of ideas’”).

²⁰² Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1114 n.18 (2005).

²⁰³ 319 U.S. 624, 632 (1943) (“Symbolism is a primitive but effective way of communicating ideas.”).

²⁰⁴ 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 now needs some qualification, since *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 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. *Id.* at 66. Excluding military recruiters from campus in order 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.*

²⁰⁵ *Spence v. Washington*, 418 U.S. 405, 409 (1974); *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 . . .”).

²⁰⁶ *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.”).

no less), and also that there be a “great” likelihood that the audience understand it.

Despite its frequent appearances in First Amendment doctrine, the conceptual approach to meaning is a poor guide to what speech the First Amendment actually does or should protect. Indeed, the conceptual approach to meaning, combined with the meaning-dependent approach to the First Amendment discussed above,²⁰⁷ leads to all the problems of under-inclusion suggested by Part I. As Greenman points out, ideaism “fails to predict what the First Amendment actually covers.”²⁰⁸ In *O’Brien v. United States*,²⁰⁹ 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.”²¹⁰

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,²¹¹ 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.”²¹² 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.”²¹³

²⁰⁷ See *supra* 160-162 and accompanying text.

²⁰⁸ Greenman, *supra* note 3, at 1348. See also Post, *Recuperating*, *supra* note 34, at 1252 (showing that *Spence* is overinclusive); Rubinfeld, *supra* note 35, at 773 (showing that *Spence* is underinclusive).

²⁰⁹ 391 U.S. 367 (1968)

²¹⁰ *Id.* at 376 (analyzing constitutional status of social dancing).

²¹¹ *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.” (internal citations omitted)).

²¹² *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, *Music as Speech: A First Amendment Category Unto Itself*, 62 FED. COMM. L.J. 665, 668 (2010). But see Rosen, *supra* note 54, (“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.”).

²¹³ *Cohen v. California*, 403 U.S. 15, 26 (1971) (emphasis added).

Under the conceptual approach to meaning, expression of the “inexpressible” is by definition nonsensical.²¹⁴ But as Justice Harlan suggests and Part I argues, it is also properly covered by the First Amendment. It follows that the conceptual approach to meaning, 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 begin constructing an alternative to the conceptual approach associated with Russell and Wittgenstein is with Wittgenstein himself. His later work—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. In them 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 more than 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 . . . the *Tractatus*.”²¹⁵ 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*.)”²¹⁶

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 call the whole, consisting of the language and the actions into which it is woven, the language-game.”²¹⁷ 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.”²¹⁸ The

²¹⁴ AYER, *supra* note 192, 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.”).

²¹⁵ Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of Federalist 10*, 27 CONST. COMMENT. 9, 11 (2010).

²¹⁶ WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 30, at 11-12.

²¹⁷ *Id.* at 7.

²¹⁸ *Id.* at 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

nature of these games became 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."²¹⁹

The language games approach locates meaning in language's *use*, not in its representation of the world. As Wittgenstein put in the *Philosophical Investigations*, "[f]or 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."²²⁰ 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."²²¹

The tradition to which Balkin and Levinson refer is now dominant, or at least ascendant, in analytic philosophy. Thus the later Wittgenstein is important not only on his own terms, but because he shaped so many other philosophical developments throughout the past century.²²² The branches on that tree are too numerous to count and too complex to describe, but include the work of Paul Grice,²²³ the speech act theory associated most closely

possible ways 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.").

²¹⁹ Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 303–04 (1993) (internal citation omitted); see also Fiss, *supra* note 29, at 177.

²²⁰ WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 30, at 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 (and much of standard structural linguistics). Rather, in this view, 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.").

²²¹ Sanford Levinson & J.M. Balkin, *Law, Music, and Performing Arts*, 139 U. PA. L. REV. 1597, 1604 (1991);

²²² Chevigny, *supra* note 85, at 162.

²²³ Grice's basic argument—vastly oversimplified—was that for A to mean something by doing *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) (describing idea of M-meaning). Later, Grice would further develop the idea of speaker meaning via analyzing sentences as units of meaning and

with J.L. Austin and John R. Searle,²²⁴ and ordinary language philosophy.²²⁵

Most importantly for present purposes, the use meaning approach has gained traction in First Amendment doctrine and scholarship. Robert 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.²²⁶ This is because it is a “form[] of communication that sociologically we recognize as art.”²²⁷ 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] ‘pornography,’ a spokesman for the Kitchen said, ‘Here it was performed in an art context.’”²²⁸ 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.²²⁹ But

differentiating between indicative and imperative meaning. H.P. Grice, *Utterer’s Meaning, Sentence Meaning, and Word-Meaning*, 4 FOUNDATIONS OF LANGUAGE 225-42 (1968).

²²⁴ See generally, J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962); JOHN R. SEARLE, EXPRESSION AND MEANING (1985); JOHN R. SEARLE, INTENTIONALITY (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, HOW TO DO THINGS WITH WORDS, *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).

²²⁵ Toril Moi, “*They Practice Their Trades in Different Worlds*”: *Concepts in Poststructuralism and Ordinary Language Philosophy*, 40(4) NEW LITERARY HISTORY 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? (2d ed 2002).

²²⁶ Post, *Recuperating*, *supra* note 34, at 1253–54; see also 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).

²²⁷ Post, *Reply*, *supra* note 15, at 621.

²²⁸ Adler, *supra* note 10, at 1370 (internal citation omitted).

²²⁹ 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.’”) (citing *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), in which the Court concluded that social dancing is not speech, even though “some kernel of expression” can be found in all human activity).

while use meaning is potentially more capacious with regard to meaning than the conceptual 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.²³⁰ Rather than arising from a disjunction between language and extra-linguistic facts, speech is nonsensical where it fails to adhere to the rules of the relevant language game.²³¹ 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.”²³² Constraints on meaning are therefore inter-subjective and socially embedded, rather than dictated by the rules of formal logic. In other words, “for an utterance to be meaningful it must be possible in principle to subject it to public standards and criteria of correctness.”²³³

This means that would-be speakers cannot simply declare their words to be meaningful, and 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”²³⁴—is nonsensical. 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

²³⁰ Tilghman, *supra* note 18, 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.”).

²³¹ WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 30, at 18 (“It is only in a language that I can mean something by something.”).

²³² Yovel, *supra* note 220, at 941; *see also* Bartrum, *supra* note 215, 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.” (internal citations omitted)).

²³³ WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 30, at 243; STANFORD ENCYCLOPEDIA, *supra* note 59, at § 3.6 (noting that in the private-language argument sections of the *Philosophical Investigations*, Wittgenstein “point[s] out that for an utterance to be meaningful it must be possible in principle to subject it to public standards and criteria of correctness”).

²³⁴ WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 30, at 243. *Cf.* CHARLES TAYLOR, *HUMAN AGENCY AND LANGUAGE* 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.”).

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.”²³⁵

Humpty Dumpty is speaking a private language, and thus speaking nonsense, but the question he identifies is essentially the same one asked by analytic philosophers. After the linguistic turn, at least, they concluded that use was the master of language, not the other way around.

In a variety of ways, the Supreme Court has indicated the same thing, 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.

The First Amendment’s linguistic turn manifests itself in many areas of doctrine, perhaps most prominently in cases that tinker with *Spence*’s conceptualist machinery. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,²³⁶ for example, where 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,²³⁷ 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.”²³⁸ This is effectively a rejection of the conceptual approach and an endorsement of the idea that meaning lies in form and use.

Hurley’s almost-cavalier approach to meaning and the First Amendment has by now received extensive scholarly attention. But the distinction between the conceptual and use approaches animates many other cases as well. In *Morse v. Frederick*,²³⁹ the Court upheld the suspension of a high school student who had unfurled a banner reading “BONG HiTS 4 JESUS”

²³⁵ CARROLL, THROUGH THE LOOKING GLASS, *supra* note 46, at 123.

²³⁶ 515 U.S. 557 (1995).

²³⁷ *Id.* at 569.

²³⁸ *Id.* at 569 (internal citations omitted).

²³⁹ 551 U.S. 393 (2007).

at an off-campus school function. 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,”²⁴⁰ but concluded that the student’s suspension was “consistent with the First Amendment” because the banner “is reasonably viewed as promoting illegal drug use.”²⁴¹ The student himself said, quite plausibly, that “the words were just nonsense meant to attract television cameras.”²⁴² In dissent, Justice Stevens similarly concluded that “[t]his is a nonsense message, not advocacy,”²⁴³ and that the school therefore had no sufficient reason to punish it.

On a strictly conceptual approach, the words “BONG HiTS 4 JESUS” are as nonsensical as Chomsky’s “colorless green ideas sleep furiously.”²⁴⁴ (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*, since no “intent to convey a particularized message was present.”²⁴⁵ To the conceptualist, then, the act involved only nonsense. If the First Amendment requires the presence of meaning,²⁴⁶ 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

²⁴⁰ *Id.* at 401.

²⁴¹ *Id.* at 403.

²⁴² *Frederick v. Morse*, 439 F.3d 1114, 1117–18 (9th Cir. 2006).

²⁴³ *Morse*, 551 U.S. at 444 (Stevens, J., dissenting); *see also id.* at 435 (referring to the “nonsense banner”).

²⁴⁴ CHOMSKY, *supra* note 61, at 15. *See* Bill Poser, “The Supreme Court Fails Semantics,” LANGUAGE LOG, <http://itre.cis.upenn.edu/~myl/languagelog/archives/004696.html> (last visited June 13, 2012) (“[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.”).

²⁴⁵ 418 U.S. 405, 410-11 (1974).

²⁴⁶ *See supra* notes 160-162 and accompanying text.

regulate it.²⁴⁷

This is the same basic insight reflected in the First Amendment’s attention to context as a component of meaning. The conceptual 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.²⁴⁸ Even *Spence* recognized that “context may give meaning to the symbol.”²⁴⁹ The Court there noted that hanging a flag upside down with peace symbols attached to it related to a “contemporaneous issue of intense public concern,”²⁵⁰ and that observers were likely to recognize *Spence*’s point “at the time that he made it,”²⁵¹ even though in a different context it “might be interpreted as nothing more than bizarre behavior.”²⁵² A similar principle seems to be on display (so to speak) in the Court’s nude dancing cases, where the Justices have taken pains to distinguish between “bacchanalian revelries” in barrooms and “a performance by a scantily clad ballet troupe in a theater.”²⁵³

²⁴⁷ 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. Chevigny, *supra* note 85, 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. The government could have no reason to restrain debates that continue endlessly without hope of a fruitful result”); *see also* Tushnet, *supra* note 9, at 182 (describing “rationality” challenge to regulations of art: “The attack asserts 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.”); 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.”).

²⁴⁸ 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) (hereinafter Post, *Public Discourse*) (“[T]he judgment that speech is being communicated in a ‘public’ manner ultimately depends upon the particular context of a specific communicative act . . .”).

²⁴⁹ 418 U.S. at 410.

²⁵⁰ *Id.* That context included “the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to his arrest.” *Id.* at 408.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *California v. LaRue*, 409 U.S. 109, 118 (1972); *see also* 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

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,”²⁵⁴ even if the specific communication at issue does not successfully convey a particularized message.²⁵⁵ Robert 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.”²⁵⁶ It follows that, “in the absence of strong countervailing reasons, whatever is said within such media is covered by the First Amendment.”²⁵⁷ 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 intuitively appealing but deeply 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 accompanying nonverbal action²⁵⁸—should receive complete constitutional coverage,²⁵⁹ apparently without any further inquiry into its meaningfulness. Expressive conduct, by contrast, is covered only when it is sufficiently imbued with “communicative elements” as to bring it within the boundaries of the Amendment.²⁶⁰ In other words, it must, at least according to some accounts, convey ideas or meaning.²⁶¹ The pure speech/expressive conduct dichotomy is deeply problematic²⁶² and ultimately unworkable. But the effort itself

ascribed to the context in which the dancing takes place.”).

²⁵⁴ Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

²⁵⁵ Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

²⁵⁶ POST, DEMOCRACY, *supra* note 15, at 20.

²⁵⁷ *Id.*

²⁵⁸ 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.”); Susan J. 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).

²⁵⁹ See, e.g., *Tinker v. Des Moines Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²⁶⁰ *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

²⁶¹ See, e.g., Nimmer, *Symbolic Speech*, *supra* note 3, at 37.

²⁶² 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 flag-burning is 100% action and 100% expression). See also Tushnet, *supra* note 9, at 192-99 (describing the “attractions and perils of nominalism,” the idea that “[t]he First

demonstrates that meaning may lie in form and use, rather than in representation.²⁶³

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

Endorsing use meaning as an alternative to the conceptual 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 extra-linguistic facts, as the conceptual meaning approach would suggest. But to say that those boundaries do or should depend instead on “language games” raises a new, albeit more useful, set of questions. This final section explores a few of them.

First, the arguments presented above might suggest that basing the boundaries of the First Amendment on use meaning rather than conceptual meaning would still be under-inclusive with respect to various First Amendment values. After all, Section I.B argued that nonsense should be constitutionally protected in part because it can and does further the central values of the First Amendment. Most of the examples discussed there were conceptual nonsense—language or conduct lacking a connection to extra-linguistic facts. But it is not hard to imagine how “use nonsense”—private language—could also further basic First Amendment values like autonomy.²⁶⁴ And for many of the same reasons laid out in Section I.B.1, use nonsense might also further the marketplace of ideas. The use meaning approach might, for example, deny coverage to incidents of lost and found meaning,²⁶⁵ at least if the action giving rise to the meaning were not itself recognizable as a form of speech. This could explain why many prominent First Amendment scholars have rejected a generalist account of the constitutional value of form,²⁶⁶ focusing instead on the ideas they

Amendment is about speech and the press—about words.”).

²⁶³ Post, *Recuperating*, *supra* note 34, 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.”).

²⁶⁴ Rosen, *supra* note 54 (“[W]e are hemmed in, even trapped, by common usage. . . . [T]he conventions of language and of society are in principle arbitrary—that is, imposed by will. They prevent the natural development of the individual.”).

²⁶⁵ See *supra* notes 65-70 and accompanying text.

²⁶⁶ See Nimmer, *Symbolic Speech*, *supra* note 3, at 34 n. 22 (“For an exploration of the thesis that the first amendment protects ideas and not a particular form of expression, see Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1189 (1970).”); Louis Henkin, *On Drawing Lines*, 83 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

capture.²⁶⁷

This is a difficult and deceptively complex objection, as is the best answer to it: that private language, whatever relationships it might have with the First Amendment’s values, simply is not *speech*. In other words, the furtherance of autonomy, ideas, or democracy is a necessary but not sufficient condition for a particular act or utterance to qualify as “speech” for constitutional purposes. Consider Jed Rubenfeld’s example of a person who speeds to express disapproval of speed limits,²⁶⁸ or Tushnet’s example of ticket scalping.²⁶⁹ These activities undoubtedly advance 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.²⁷⁰

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.²⁷¹ In the end, as Frederick 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.”²⁷²

But the crudeness of the implement raises another and perhaps equally

common comprehensible form of expression, it is ‘speech.’”).

²⁶⁷ Nimmer, *Symbolic Speech*, *supra* note 3, at 34 (“It is the *ideas* expressed, and not just a particular form of expression, that must be the protected if the underlying first amendment values are to be realized.”).

²⁶⁸ Rubenfeld, *supra* note 35, 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.’”). .

²⁶⁹ *But see* Tushnet, *supra* note 9, at 194 (criticizing the argument that “a reasonably widespread imputation of roughly the same meaning” can indicate First Amendment coverage).

²⁷⁰ See Schauer, *Categories*, *supra* note 6, at 270-7.

²⁷¹ This is precisely the quest in which Robert Post has long been engaged. See e.g., Post, *Recuperating*, *supra* note 34, at 1250.

²⁷² Schauer, *Second-Best*, *supra* note 88, at 13.

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 an independent value in its own right.²⁷³ Language games, however, are a poor guide for establishing clear boundaries. Both in their definition and in their behavior, language games “lack purity.”²⁷⁴ 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.”²⁷⁵ Ordinary language philosophers, too, embrace this as not merely a necessary drawback, but a positive feature of their approach. As Toril Moi explains, “[o]ften the blurred concept is exactly what we want In many cases . . . , it is useless to spend time and energy trying to produce a sharp concept.”²⁷⁶

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;²⁷⁷ 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 First Amendment doctrine. 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.²⁷⁸ First Amendment

²⁷³ 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 (1965) (upholding federal injunction against state court prosecutions under vague state statutes, on the basis of “chilling” effect).

²⁷⁴ Balkin & Levinson, *Constitutional Grammar*, *supra* note 37, at 1802. STANFORD ENCYCLOPEDIA, *supra* note 59, at § 3.4 (noting that Wittgenstein “never explicitly defines” the concept of language-game); Chevigny, *supra* note 85, at 167 (“Wittgenstein’s ‘language-game’ concept has been criticized for a lack of precision.”).

²⁷⁵ Post, *Reply*, *supra* note 15, at 622-23.

²⁷⁶ Moi, *supra* note 225, at 813-14.

²⁷⁷ See WITTGENSTEIN, *TRACTATUS*, *supra* note 13, § 3.311 (“An expression presupposes the forms of all propositions in which it can occur. It is the common characteristic mark of a class of propositions.”).

²⁷⁸ See, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (“First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws

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.²⁷⁹ Defining speech at 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.²⁸⁰ 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.²⁸¹ 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.²⁸²

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.’”); *Kolender v. Lawson*, 461 U.S. 352, 370 (1983) (White, J., concurring) (“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.” (internal citations omitted)).

²⁷⁹ Schauer, *Second Best*, *supra* note 88, 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.”).

²⁸⁰ *Brown v. Ent. Merch. Ass’n*, 131 S. Ct. 2729 (2011) (striking down, on First Amendment grounds, restrictions on sales of violent video games to minors); *see also* *United States v. Stevens*, 130 S.Ct. 1577 (2010) (striking down restrictions on depictions of animal cruelty).

²⁸¹ 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 NORTHWESTERN U. L. REV. 1303, 1343 (2009) (emphasis added) (“Whether through its political or its judicial branches, governmental definition of the scope of public discourse is itself a *regulation* of public discourse[.]”).

²⁸² Post, *Public Discourse*, *supra* note 248, at 683 (“In the end . . . there can be no final account of the boundaries of the domain of public discourse.”).

First Amendment doctrine has proven slithy²⁸³ enough to cover the Jabberwocky and other nonsensical speech, but perhaps the Justices will see fit to gimble²⁸⁴ exceptions for other kinds of nonsense, leaving even non-artists mimsy.²⁸⁵ 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.”²⁸⁶ 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.

CONCLUSION

Since 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.”²⁸⁷ If the boundaries of the First Amendment depend on the presence of conceptual meaning, 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 extra-linguistic facts, but in its use. This road is more bumpy, but its imperfection offers better footing than the smooth alternatives. “Back to the rough ground!”²⁸⁸

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²⁸³ THE ANNOTATED ALICE: THE DEFINITIVE EDITION (Martin Gardner, ed. 1999) (defining “slithy” as “a combination of ‘slimy’ and ‘lithe’; smooth and active”).

²⁸⁴ *Id.* (defining “gimble” as “to bore holes”).

²⁸⁵ *Id.* (defining “mimsy” as “miserable or unhappy, contemptible”).

²⁸⁶ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²⁸⁷ WITTGENSTEIN, *TRACTATUS*, *supra* note 13, § 7. It is difficult not to imagine this as Wittgenstein’s version of resting on the seventh day. See *Exodus* 20:11 (King James) (“[I]n six days the LORD made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the LORD blessed the sabbath day, and hallowed it.”).

²⁸⁸ WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 30, at 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!”).