Introduction

The Supreme Court has unanimously held that Jackson Pollock’s paintings, Arnold Schoenberg’s music, and Lewis Carroll’s poem *Jabberwocky* are “unquestionably shielded” by the First Amendment.\(^1\) Nonrepresentational art, instrumental music, and nonsense: all receive constitutional coverage under an amendment protecting “the freedom of *speech*,” even though none involves what we typically think of as speech—the use of words to convey meaning.

As a legal matter, the Court’s conclusion is clearly correct; but its premises are murky, and they raise difficult questions about the possibilities and limitations of law and expression. Nonrepresentational art, instrumental music, and nonsense do not employ language in any traditional sense and sometimes do not even involve the transmission of articulable ideas. How, then, can they be treated as “speech” for constitutional purposes? What does the difficulty of that question suggest for First Amendment law and theory? And can law resolve such inquiries without relying on aesthetics, ethics, and philosophy?

These are serious challenges for the freedom of speech as it is generally conceived. If the First Amendment is the lodestar of our free speech culture, then it must be able to account for those forms of wordless expression, because they constitute an important type of human communication, both in everyday interaction and in the images, sounds, and actions that make up our cultural and artistic heritage. We express and understand each other through tone and silence, color and structure, rhyme and absurdity.

This book represents a sustained effort to account, constitutionally, for these modes of “speech.” We each address one of the categories that the Court confidently declares to be protected: Alan Chen focuses on instrumental music in chapter 1, Mark Tushnet on nonrepresentational art in chapter 2, and Joseph Blocher on nonsense in chapter 3. We employ varying methodologies—Tushnet primarily relies on existing doc-
trine; Chen and Blocher draw more heavily on aesthetics and analytic philosophy, respectively—and find different justifications for constitutional coverage. But our diverse inquiries reveal and engage overlapping themes and challenges.

I. First Amendment Coverage

As a legal matter, the threshold constitutional question is why the First Amendment should apply at all to forms of expression like nonrepresentational art, instrumental music, and nonsense, none of which involve speech in the typical sense. After all, the First Amendment does not even reach all language, let alone all expressive conduct.

Answering the threshold question means charting the boundaries of the First Amendment—a fundamentally different task than exploring its established terrain. The distinction between the two is well captured by what Frederick Schauer has called the coverage/protection distinction. Coverage distinguishes those matters to which First Amendment analysis is relevant—handing out a political pamphlet—and those to which it is not, such as discharging polluted water from a factory. Protection distinguishes covered material that the government cannot ban or regulate from that which it can. Political speech in a public park, for example, is presumptively covered by the First Amendment but can still be banned under particular conditions and therefore might lack protection in certain circumstances.

As a doctrinal and scholarly matter, the threshold issue of coverage has traditionally not received nearly as much attention as the intricacies of protection. As Schauer puts it, “the question whether the First Amendment shows up at all is rarely addressed, and the answer is too often simply assumed.” Those assumptions dictate results in “easy” cases in both directions, as when we assume without discussion that music, art, and nonsense are covered or that criminal threats and securities offerings are not. This is a serious omission precisely because “questions about the involvement of the . . . Amendment in the first instance are often far more consequential than are the issues surrounding the strength of protection that the . . . Amendment affords the [activities] to which it applies.”

The need to understand First Amendment coverage has become all the more acute in recent years because the Supreme Court has dem-
ondrasted a sustained interest in the boundaries of free speech. It has decided cases addressing the First Amendment coverage of many unconventional forms of expression, including videos of animal torture, transfers of patient data, and violent video games. In doing so, the justices have also shown an appetite for bright-line rules instead of multifactor balancing tests—when the First Amendment applies, it does so with near-absolute force. This doctrinal development makes the threshold question of coverage even more pressing, because rules tend to collapse the distinction between coverage and protection by extending near-total protection to any speech that receives coverage.

The chapters here offer a new way to look at the question of coverage. Rather than exploring borderline cases, where one might plausibly wonder whether the subject being examined is covered or not, we test the distinction against cases where coverage is intuitively obvious but difficult to justify. Doing so makes it possible to reveal and evaluate not just the limits of First Amendment coverage but the possible reasons for it: extensions of existing doctrine, normative visions of free speech, nominalism, conventionalism, or something else entirely. This, in turn, can help make sense of the free speech law we have now and also—as chapter 4 suggests—help answer other questions of the same type.

Explaining the First Amendment’s coverage is as difficult as it is fundamental. Consider two appealing and commonly invoked approaches to the matter. One could say that the boundaries of the First Amendment are coterminous with language itself and that “speech” for constitutional purposes consists of words. But as Chen and Tushnet demonstrate in detail in chapters 1 and 2, this kind of “nominalism” is impossible to square with existing (and clearly justified) protection for expressive conduct like flag burning and nude dancing, let alone the Pollocks and Schoenbergs of the world.

One might try to avoid the problem of underinclusion by saying instead that the boundaries of the First Amendment are coextensive not with words per se but with the expression of ideas. In Miller v. California, for example, the Court held that “[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment’s] guaranties.” Applying the same logic to the other end of the spectrum, the Court has also indicated that
putative speech acts such as fighting words and obscenity fall outside the boundaries of the First Amendment in part because they “are no essential part of any exposition of ideas.”

But the focus on ideas is also unsatisfactory. Art and music express a great deal, but it would distort them tremendously to say that they must convey “ideas” in order to qualify for constitutional protection. As Chen and Tushnet demonstrate in chapters 1 and 2, art and music can convey a lot, but their power is not tied to the transmission of ideas as such. Blocher shows in chapter 3 that the same can be true even for words that convey no discernible meanings or ideas—such “nonsense” might nonetheless have a strong claim to constitutional coverage. It follows that ideas, like words, are not a reliable guide to the First Amendment’s reach.

Given such complications, it is tempting to avoid the question of coverage by transforming it into one of protection. One might simply assume that art, music, and nonsense are covered by the First Amendment but that, in appropriate cases, the government can regulate or ban them—that they are covered but not always protected, in other words. But this, too, is unsatisfactory, as Tushnet points out in chapter 2, because it takes “too much work to solve what should be a fairly easy problem.” The whole point of treating the First Amendment as having boundaries is to avoid in-depth analysis of cases involving uncovered conduct. If there is no way to have a threshold, then the coverage/protection distinction simply breaks down. This, in turn, illuminates a second theme common to the chapters: the difficulty of providing satisfactory answers to supposedly easy questions.

II. Hard Answers to “Easy” Questions

Ordinarily, constitutional scholars examine hard questions—for example, whether hate speech regulation, pornography bans, or campaign finance rules are consistent with the First Amendment—and, by trying to develop answers, explore and gain a better understanding of the theory and practice of free speech. Here, by contrast, the questions seem easy. It must be right that art, music, and nonsense fall within the First Amendment’s sphere of coverage.

The very obviousness of these answers probably has led scholars to think that they are easy and that exploring the reasons for those answers
is not worth the effort. Those judgments are mistaken. Getting to the conclusion about First Amendment coverage is fraught with doctrinal and conceptual difficulties. Those difficulties are worth engaging precisely because they yield interesting and potentially important insights about law and speech.

Asking the easy questions can be surprisingly disturbing, because it reveals that the First Amendment’s foundations are less settled than we might suppose or want. The fact that art, music, and nonsense are so hard to justify as objects of the First Amendment demonstrates that some of the results we take for granted are precisely the things that need the most explanation. If First Amendment doctrine and theory cannot explain these results well because these tools were developed in order to address “hard” cases, not easy ones, then their shortcomings must be recognized, and perhaps they must be refashioned. Nowhere is this clearer than with regard to existing First Amendment doctrine.

III. The Limits of Legal Doctrine

Attempts to answer basic questions about art, music, and nonsense using the standard tools of First Amendment doctrine quickly run into problems. Those tools, and their limits, are simple enough to describe.

Consider the fundamental distinction—among the most foundational in all of free speech law—between content-based and content-neutral regulations. Under existing doctrine, a law is content based if it, on its face, regulates speech on the basis of its “content” or if it is justified by reference to the “content” of the regulated speech. Chief Justice John Roberts recently suggested that a regulation is content based “when the conduct triggering coverage . . . consists of communicating a message.” Content-based regulations are subject to strict scrutiny, which is frequently fatal. Content-neutral laws, by contrast, are subject to less demanding tests, which the government can usually satisfy. In many First Amendment cases, then, the classification of the challenged regulation as content based or content neutral is outcome dispositive. If it is content neutral, it is constitutional; if it is content based, it is not.

“Buffer zones” around health care facilities provide a particularly salient example of the issue and its importance. In 2000, the Supreme Court considered the constitutionality of a Colorado statute that estab-
lished a one-hundred-foot radius around the entrances to health care facilities and prohibited persons from coming within eight feet of an unwilling listener for purposes of “oral protest, education, or counseling.” Abortion protestors argued that this was a content-based restriction on their speech, but the Court found that the law was content neutral and upheld it. In 2014, the Court was faced with a First Amendment challenge to a somewhat more restrictive buffer zone and again found the law content neutral, although constitutionally defective on other grounds.

Now imagine that, instead of attempting to engage in “oral protest, education, or counseling,” the abortion protestors display disturbing nonrepresentational art outside the clinics or play harsh atonal music or shout gibberish. Colorado amends its law to prohibit those actions as well, and the protestors challenge the new law on First Amendment grounds. Are they exercising their right to free speech? Is the revised law content neutral as applied to them?

The standard tools of doctrine described earlier do not provide clear answers. As chapters 1 and 2 suggest, many musicians and artists argue that the form of their work is its content. To demand that it have a “message” is to demand that it be something else. It therefore takes some work to say that in this situation “the conduct triggering coverage”—nonrepresentational art, instrumental music, and nonsense—“consists of communicating a message,” to take the chief justice’s articulation. Consider, too, the standard test that the Supreme Court has articulated for distinguishing communicative acts from uncovered conduct. In Spence v. Washington, the Court held that nonverbal conduct is speech when the actor has “an intent to convey a particularized message” and “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.” Instrumental music, nonrepresentational art, and nonsense are unlikely to satisfy either prong of the Spence test, let alone both—they might convey no message at all, let alone a “particularized” one, and are very frequently misunderstood in any event. Perhaps that helps explain why the Spence test has occasionally been quietly deemphasized and sometimes ignored altogether. Like the content-neutrality inquiry, the questions it asks are ill suited to the job. Nonrepresentational art, instrumental music, and nonsense do not have standard propositional
content, and so it is extremely difficult to get even the most basic doctrinal analysis up and running.

IV. The Poverty of First Amendment Theory

When existing doctrinal tools are not up to the task, one option is to go directly to the forge and to craft new ones. For free speech scholars, this typically means turning to the various normative theories that have been proposed to justify and explain the First Amendment itself.

It would take—has taken—many books to canvass the normative theories of the First Amendment that have been proposed over the years. The leading candidates tend to be grouped into three main categories. First are marketplace-of-ideas theories, which suggest that speech must be free so that truth can emerge from open discussion of ideas and competition among them. Second are democratic theories, which hold that speech must be protected to facilitate democratic government. Third are autonomy theories, which connect speech protections to the autonomy of individual speakers. Each of these theories (and their respective values of knowledge, democracy, and autonomy) has implications for what types of speech are entitled to First Amendment coverage. Those who subscribe to a democracy-based theory, for example, tend to accord primary (and sometimes exclusive) protection to political speech.

How do these theories help answer specific questions of First Amendment coverage? One common method of approach is simply to say that acts furthering the relevant value are constitutionally protected. Indeed, it is standard form in scholarly articles—including chapters 1 and 3 here—to canvass the leading theories for this purpose. Thus, for example, if campaign donations help enrich the marketplace of ideas by adding more thoughts to the political milieu or advance the democratic ideal by empowering candidates to challenge incumbents, then they should be considered a form of constitutionally covered free speech (and presumptively protected).

Despite the simplicity and appeal of this theory-based approach, it is not sufficient, as noted in chapters 1 and 3. Chapter 2 likewise demonstrates that scalping tickets is expressive and undoubtedly furthers the autonomy of the scalper (and, perhaps, the marketplace of ideas), and yet no one supposes that it is a freedom protected by the First
Amendment. Perhaps, then, the fact that an act furthers the relevant First Amendment value is a necessary but not sufficient condition for its constitutional protection. Maybe only “speech” acts that further the relevant value can or should be protected. But if that is the case, it simply raises again the question of what acts count as “speech” and why.

One can respond to the awkward fit between those categories of speech and standard First Amendment theories in several different ways. The most obvious options are to finesse or reject the categories as proper objects of the Constitution or else to finesse or reject the theories as inadequate explanations of the Constitution’s reach. In this book, we unanimously reject the first option. In keeping with the Supreme Court’s confident assertion, we conclude that nonrepresentational art, instrumental music, and nonsense are all within the scope of constitutional coverage, at least sometimes.

As to the second possibility—rejecting First Amendment theory—the chapters differ in their responses to the challenge, but all three find it quite difficult to explain the constitutional coverage of music, art, and nonsense using any master theory of the First Amendment. Any effort to do so raises problems of over- and underbreadth. Consider the first and perhaps still most prominent First Amendment theory: the “marketplace of ideas,” which rests on the notion that, if left unregulated, good ideas will eventually win out over bad ones. In U.S. law, the theory is traced to Justice Oliver Wendell Holmes’s argument that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” Justice Louis Brandeis similarly argued that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”

But what “truths”—or even “ideas”—are expressed by nonrepresentational art, instrumental music, and nonsense? Scholars have long noted that the cognitive focus of the marketplace theory makes it ill suited to account for such matters. The same is true of other First Amendment theories—in chapters 1 and 2, for example, we find that democratic theories of the First Amendment cannot satisfactorily justify the coverage of nonrepresentational art or instrumental music.

For all three of us, the best explanation arises from cobbling together bits and pieces from a range of approaches to constitutional law. That this sort of theoretical eclecticism or diversity seems necessary with re-
spect to foundational questions in First Amendment law suggests that it might be an appropriate way to think about constitutional problems more generally. In some sense, then, the chapters can be read as contributing to a literature “against First Amendment theory” and even “against constitutional theory” more generally.

V. Looking outside the Law: Theory and Convention

It appears that legal doctrine and even legal theory are unable to provide fully satisfying answers to the kinds of questions with which we started. But precisely because they are legal questions, they are hard to avoid. Generally, a court cannot simply say, “It is too difficult for us to decide whether Jackson Pollock’s artwork is ‘speech’ for First Amendment purposes. It is so ordered.” If legal doctrine and theory cannot solve the puzzle, where can judges and scholars turn?

One route is to close the casebooks and go in search of other intellectual tools. The chapters vary in their reliance on these tools. Chapter 2 investigates the First Amendment status of nonrepresentational art while avoiding forays into the philosophy of language or art. The benefits of doing so are considerable, for it permits people with very different (often unarticulated or unexamined) views about deep theories of art to agree on basic constitutional principles—a kind of “overlapping consensus” approach to constitutional law. This approach also avoids reliance on the judiciary’s ability to articulate or consciously apply the kinds of intellectually sophisticated theories akin to those offered by professional philosophers, including theorists of art and music. Indeed, as Justice Holmes once put it, judging the value of art is a “dangerous undertaking for persons trained only to the law.”

Chapters 1 and 3 make heavier use of theory—aesthetics and analytic philosophy, respectively—in order to explain various legal rules, although neither Chen nor Blocher would necessarily make such theories an explicit part of legal doctrine. They do suggest that extralegal theories can nevertheless be a useful tool in exploring legal results, at least when judges and philosophers confront common questions such as how to impute meaning to images, sounds, or words. This means using philosophy for illumination, not for authority or precedent. Holmes did not need to cite John Stuart Mill and John Milton as authority for his
own theory of the “marketplace of ideas,” even though their analogous theories preceded his.

Though we take different routes, Blocher’s and Chen’s use of theory and Tushnet’s skepticism of it end up in some of the same places. Each of us endorses or employs a kind of conventionalism that would focus on art, music, and nonsense as social practices, rather than trying to pin down any easily articulable justification of their meaning or value. Whether this conventionalism is the application of a theory or a rejection of theory, it leads us to face the same basic challenge as the practices we evaluate: to say what cannot be said. And yet those practices often succeed in conveying something important—perhaps something inef- fable. Beyond the limits of our shared language—beyond words—may well lie important truths and insights. Perhaps any effort to make legal sense of the expressions of those truths must likewise acknowledge the limits of language.

This is a disturbing suggestion for people trained in the law. From the day lawyers start law school, they are inculcated with the view that the very legitimacy of legal decision making rests on its ability to provide reasons through words. Judges, no less than lawyers and scholars, go to great lengths not only to announce who has prevailed in a given case but to explain why. Indeed, those reasons are considered the “result” that is binding on future cases. If the Supreme Court were simply to say, “The government may not ban Jackson Pollock’s paintings, but we will not say why. It is so ordered,” lawyers would treat the decision as a form of nonrepresentational performance on par with Pollock’s own work.

And yet the obligation to decide persists, even when words fail. Consider Justice Potter Stewart’s famous—one might say infamous—statement, “I might never succeed in intelligibly” defining hard-core pornography, and yet “I know it when I see it.” Stewart faced, from a judicial perspective, the same problem faced by so many others engaged in art, music, and philosophy—how to express what cannot be said—and his solution was not necessarily much different from theirs.

We might, at least in certain circumstances, have to become comfortable with Stewart’s approach and find answers outside of the words and reasons typically thought to be the lifeblood of legal reasoning. Rather than look for a particularized message in an act of “speech,” perhaps the best solution is to identify the social practices and conventions that
constitute human expression and communication.\textsuperscript{37} Indeed, in the same passage in which the Supreme Court declared that Pollock, Schoenberg, and Carroll are “unquestionably shielded,” it rejected the notion that free speech is limited to “expressions conveying a ‘particularized message’” and went on to hold that a parade qualifies as speech.\textsuperscript{38} For First Amendment purposes, the most satisfying explanation for this holding may simply be that the justices know speech when they see it.

Attempts to make constitutional sense of “free speech beyond words” run into the same linguistic barriers as the practices themselves. But as art, music, and nonsense show (rather than say), sometimes things are worth expressing even when they cannot be put into words.

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We began this introduction by endorsing the Court’s conclusion that nonrepresentational art, instrumental music, and nonsense are all shielded by the First Amendment, but we have cast doubt on the notion that they are “unquestionably” so. It would, we think, be more accurate to say that they are unquestioningly shielded. And so, in the expectation that the inquiry will ultimately yield something interesting and useful, we take up the question in the following chapters. We approach it in different ways and do not always agree with one another about the answers or even the proper tools, but our tasks are deeply and inevitably intertwined.

Chapter 1 begins with a question: If a picture is worth a thousand words, what about a C#? This chapter critically examines what would seem to be, but is not, an easy free speech question—whether instrumental music falls within the scope of the First Amendment. It comprehensively engages the question of whether there are sound theoretical or doctrinal foundations for treating purely instrumental music as a form of constitutionally protected expression.

In examining these claims, the chapter first surveys existing judicial and scholarly treatments of music as speech to illustrate how our understanding of the expressive value of instrumental music has been undertheorized. It then briefly catalogues historical and contemporary instances of instrumental music censorship, both within the United States and in other nations, by governments and other powerful institutions. The chapter next considers the three dominant theoretical
justifications for protection of expression—promotion of democratic self-governance, facilitation of the search for truth, and protection of autonomy through self-realization—and explores the possibilities for and limits of employing any of these three theories to justify protection of instrumental music. As it turns out, these theories do not offer an obvious explanation for why instrumental music should be covered by the First Amendment.

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

Chapter 2 explores the question of the First Amendment’s coverage of nonrepresentational art. That question turns out to be quite difficult to answer in a doctrinal form that preserves other seemingly “unquestionable” results. Every approach one might take to explaining why the First Amendment covers art—that art is communicative, that it contributes to the creation of a culture of self-directed individuals, and others—generates odd anomalies. The exploration does not question the conventional conclusion that the First Amendment covers artwork but rather worries some of the often-unstated assumptions that underlie that conclusion. We will see, for example, that some things one might want to say about the question of whether the First Amendment covers nonrepresentational art lead to the suggestion that James Joyce’s *Ulysses* might not be covered, surely a peculiar result. By asking how the conclusion that nonrepresentational art is covered by the First Amendment might be justified, we will come across some unexpected facets of the First Amendment with some implications for other doctrinal areas abutting the First Amendment.
Chapter 3 examines a category of “speech” that has long puzzled philosophers of language but has yet to attract the attention of legal scholars: nonsense. 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 legal scholars 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 chapter explores 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 chapter 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 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 First 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 extralinguistic concepts.

Finally, in chapter 4, we suggest ways in which our analysis might be extended to other problems and questions involving extralinguistic communication, such as the constitutional status of dancing and data.