Of Christmas Trees and Corpus Christi: The Establishment Clause and Change in Meaning over Time

Jessie Hill, Case Western Reserve University
OF CHRISTMAS TREES AND CORPUS CHRISTI:
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B. JESSIE HILL*

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* Associate Professor, Case Western Reserve University School of Law. B.A. 1992,
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ABSTRACT

Our public culture is replete with brief official acknowledgements of religion, sometimes referred to as “ceremonial deism,” that initially appear innocuous but pose thorny Establishment Clause problems. Such acknowledgements range from the national motto and the words “under God” in the Pledge of Allegiance, to the cities of Corpus Christi and St. Louis, to the phrase “in the Year of our Lord” on public documents. One might include in the list as well certain practices, such as the Christmas holiday or Sunday liquor laws. Courts and commentators have discussed such phrases, symbols, and practices in largely unsatisfactory ways, but one recurring argument is that they are constitutional because they have lost their religious meaning through history or rote repetition.

Legal challenges are likely to arise in the near future – and indeed, a second-round challenge to the Pledge of Allegiance is currently percolating – needing resolution by the Supreme Court. That resolution will likely depend, at least in part, on an understanding of the social meaning of the practice at issue. This Article therefore draws on one particular branch of linguistic theory, known as speech act theory, as it applies to the problem of change in meaning over time. Because speech act theory is particularly useful for analysis of social meaning, I argue that some insights about the problem of ceremonial deism may be found there, lending depth to a position that has gone almost entirely untheorized by those who have espoused it so far. Finally, I consider the implications of this analysis for the constitutionality of such official religious references. While I ultimately doubt the feasibility or usefulness of a hard-and-fast rule for resolving such cases, my hope is to provide some nuance to an area of Establishment Clause doctrine that is often treated as simply an “exception,” thereby deforming the doctrine and shedding doubt on its ability to support well-reasoned decisionmaking in difficult cases.
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I. INTRODUCTION: CEREMONIAL DEISM AND CHANGE IN MEANING OVER TIME

According to the website of the U.S. Treasury, the motto “In God We Trust” first came to be imprinted on coins in response to pleas like the one from Reverend M.R. Watkinson to the Secretary of the Treasury, Salmon P. Chase.¹ Writing in 1861, in the midst of the Civil War, Reverend Watkinson exhorted: “What if our Republic were not [sic] shattered beyond reconstruction? Would not the antiquaries of succeeding centuries rightly reason from our past that we were a heathen nation?”² What was needed, he continued, was an inscription on our currency that “would relieve us from the ignominy of heathenism” and “place us openly under the Divine protection we have personally claimed.”³ After first appearing in 1864, “the motto was found missing from” certain gold coins in 1907 but, “[i]n response to a general demand, Congress ordered it restored, and,” the site informs us, “the Act of May 18, 1908, made it mandatory on all coins upon which it had previously appeared.”⁴ Finally, the website notes that the phrase “In God We Trust” became our national motto in 1956.⁵

The brief suspension of the motto’s inscription between 1907 and 1909 was due to President Theodore Roosevelt’s commissioning a new design for the coins that did not include the motto.⁶ The President defended his decision on the ground that the use of such a solemn motto on coins “comes dangerously close to sacrilege,” tending to cheapen it and open it up to “jest and ridicule,” as in phrases like “In

¹ Discussion of the history of the National Motto and its inscription on currency may also be found in Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 COLUM. L. REV 2083, 2122-24 (1996), and ANSON PHELPS STOKES AND LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 568-71 (2d Ed. 1964).
² http://www.treas.gov/education/fact-sheets/currency/in-god-we-trust.html (last visited June 10, 2008). It appears that the error is attributable to the website, not the original letter.
³ Id.
⁴ Id.
⁵ Id.
God we trust for the [other] 8 cents.’”

The historical evidence suggests, however, that the decision was aesthetic rather than religious or constitutional in its origins. In response to the ensuing popular uproar, Congress passed a bill requiring that the motto appear on coins again, and Roosevelt signed the bill. But it was not until much later, in a frenzy of religious piety mixed with patriotism not unlike that accompanying the motto’s initial appearance in the Civil War era, that “In God We Trust” was finally adopted as the National Motto.

Around the same time, the Pledge of Allegiance was amended to include the words “under God.”

Today, the American Family Association (AFA) sponsors a campaign to put copies of the National Motto in the public schools as “a reminder of the historical centrality of God in the life of our republic.”

For a time, the AFA offered to provide a prototype poster, containing the motto in large capital letters on an American flag background. Seventeen state legislatures have required such postings. And in 2000, the U.S. House of Representatives

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7 Roosevelt’s statement defending the motto-less coins appeared in the New York Times on November 14, 1907. N.Y. TIMES, November 14, 1907, at 1. In addition to making the argument about sacrilege, Roosevelt insisted that there was no “legal warrant” for placing the motto on the coins. Id. It is unclear whether this was because the legislation first providing for the motto’s inscription on currency authorized but did not require it, STOKES & PFEFFER, supra note __, at 568, or because the legislation was inadvertently omitted from the Revised Statutes of 1874, Gatewood, supra note __, at 40 & n.20.

8 Gatewood, supra note __, at 37, 41.

9 Id. at 50.

10 STOKES & PFEFFER, supra note __, at 570; cf. ACLU v. City of St. Charles, 794 F.2d 265, 279 (7th Cir. 1985) (citing sources and noting that abolitionism and the Civil War stirred religious sentiments, suggesting that the nation was more religious than at the Founding); William Van Alstyne, Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall—A Comment on Lynch v. Donnelly, 1984 DUKE L.J. 770, 786 (describing how “the Union cause in the Civil War” was “mingled with the assimilation of Christian symbolism” and drawing an analogy to the “[j]ingoistic desires to paint a vivid contrast in the Cold War, separating ourselves, claiming ‘God’ within ‘our’ government, for sanctimonious contrast with ‘Godless atheistic’ Communism,” when the motto was officially adopted and the words “under God” were added to the Pledge).


12 www.afa.net/pgwt (last visited June 12, 2008). I am grateful to Cassandra Robertson for bringing this website to my attention.

13 Id. Those states are Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, North Carolina, Oklahoma, Tennessee, Texas, Utah, Virginia, and West Virginia.
overwhelmingly passed a resolution encouraging display of the national motto in public buildings.\textsuperscript{14}

Viewed in light of this long, colorful, and ongoing history, can the national motto be said to be a religious expression? Is it an endorsement of religion or a proselytizing statement that may be said to violate the Establishment Clause of the First Amendment?\textsuperscript{15} The national motto and its use on currency have been challenged in lower federal courts as unconstitutional establishments of religion. All such challenges have been turned away, primarily on the ground that the motto lacks any true religious or ritualistic force.\textsuperscript{16} Despite the obviously religious origins of the phrase, courts typically suggest that “through historical usage and ubiquity” the phrase has lost any and all force as an endorsement of belief in God.\textsuperscript{17} Yet, from the brief narrative just set forth, it seems that the reality is much more complicated. From its beginning, the motto has combined notions of patriotism and religiosity. It is certainly capable of nonreligious use – witness Teddy Roosevelt’s citation of jokes about the motto with a decidedly secular bent – and it would probably be difficult to find anyone today for whom the inscription on currency carries deep spiritual meaning. Yet the AFA’s campaign to re-inject religion into the public school classroom demonstrates that the meaning of the motto is still flexible and open-ended: if the motto has lost its religious force through time and repetition, the AFA, at least, believes that that force can be revived.

The problem of change in meaning over time in Establishment Clause cases, illustrated by this extremely brief history of the national motto, is the subject of this Article. In the United States, our public culture is replete with brief official acknowledgements of religion, sometimes referred to as “ceremonial deism,” that initially appear innocuous but pose thorny Establishment Clause problems.\textsuperscript{18}

\textsuperscript{14} H.R. 548 (106\textsuperscript{th} Cong., 2d Sess.).
\textsuperscript{15} U.S. CONST. AMEND. I (“Congress shall make no law…respecting an establishment of religion…..”).
\textsuperscript{16} Gaylor v. United States, 74 F.3d 214, 216 (10\textsuperscript{th} Cir. 1996); Aronow v. United States, 432 F.2d 242, 243-44 (9\textsuperscript{th} Cir. 1970); O’Hair v. Blumenthal, 462 F. Supp. 19, 19-20 (W.D. Tex. 1978).
\textsuperscript{17} Gaylor, 74 F.3d at 216.
\textsuperscript{18} The phrase “ceremonial deism” was coined by Eugene Rostow, former dean of the Yale Law School in 1962 and has been used occasionally by the Supreme Court. Arthur E. Sutherland, Book Review, 40 IND. L.J. 83, 86 (1964) (reviewing WILBER G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1963)) (cited in Epstein, supra note __, at 2091). Epstein mis-attributes the phrase to Walter Rostow.
Examples range from the motto and the words “under God” in the Pledge of Allegiance, to the cities of Corpus Christi and St. Louis, to the phrase “in the Year of our Lord” or the abbreviation A.D. on public documents. One might include in the list as well certain practices, such as the Christmas holiday or Sunday liquor laws. Such examples may strike us as problematic to a greater or lesser degree, but there is at least a plausible argument that some of them, while religious in origin, no longer carry any religious impact. Less common, but also relevant, are symbols or practices that have secular origins but have taken on religious meaning over time: one might argue that this is the case with Christmas trees or the entire symbology surrounding the Easter holiday.\footnote{See, e.g., PENNE L. RESTAD, CHRISTMAS IN AMERICA: A HISTORY 57 (1995) (“In pre-Christian times, Romans used evergreens, symbols of fertility and regeneration, to trim their houses at the Kalends \[i.e., the first days\] of January. Eventually, Christians appropriated the use of evergreens for their Christmas celebration. To remove the taint of paganism, they associated it with new beginnings and man’s second chance with God. The tree became for pious folk a representation of Jesus as the Light of the World, Tree of Life, and second Adam born to right the sins of the first.”).} As discussed below in Part II, both courts and commentators have dealt with such phrases, symbols, and practices in largely unsatisfactory ways, but one recurring argument is that they are constitutional because they have lost their religious meaning through history or rote repetition.

After describing how these sorts of practices have been addressed by courts and commentators, Part II briefly explains why

Epstein defines ceremonial deism as “all practices involving: 1) actual, symbolic, or ritualistic; 2) prayer, invocation, benediction, supplication, appeal, revert reference to, or embrace of, a general or particular deity; 3) created, delivered, sponsored, or encouraged by government officials; 4) during governmental functions or ceremonies, in the form of patriotic expressions, or associated with holiday observances; 5) which, in and of themselves, are unlikely to indoctrinate or proselytize their audience; 6) which are not specifically designed to accommodate the free religious exercise of a particular group of citizens; and 7) which, as of this date, are deeply rooted in the nation’s history and traditions.” Epstein includes in this definition such arguably “private” speech as presidential addresses invoking God. Id. at 2109. I agree with his ultimate conclusion that such instances of quasi-private speech by public officials are not unconstitutional and that its regulation may raise free speech or free exercise concerns; I therefore do not further address it here. Id. at 2142-43.

In Elk Grove Unified Sch. Dist. v. Newdow, Justice O’Connor created her own test for determining when a practice amounts to an instance of ceremonial deism that does not violate the Establishment Clause, considering the factors of “history and ubiquity,” “absence of worship or prayer,” “absence of reference to [a] particular religion,” and “minimal religious content.” 542 U.S. 1, 37-44 (2004).
this issue still matters today. Despite recent personnel changes on the Supreme Court, legal challenges are likely to arise in the near future – and indeed, a second-round challenge to the Pledge of Allegiance is currently percolating – needing resolution by the Supreme Court. That resolution will likely depend, at least in part, on an understanding of the social meaning of the practice at issue. Part III then outlines one particular branch of linguistic theory, known as speech act theory, as it applies to the problem of change in meaning over time. Because speech act theory is particularly useful for analysis of social meaning, this Article argues that some insights about the problem of ceremonial deism may be found there, lending depth to a position that has gone almost entirely untheorized by those who have espoused it so far. Finally, Part IV considers the implications of this analysis for the constitutionality of such brief or passing symbolic or linguistic references to religion. While I ultimately doubt the feasibility or usefulness of a hard-and-fast rule for resolving such cases, my hope is to provide some nuance to an area of Establishment Clause doctrine that is often treated simply as an exception, thereby deforming the doctrine and shedding doubt on its ability to support well-reasoned decisionmaking in difficult cases.

II. CEREMONIAL DEISM: THEORY AND CRITICISM

The case law dealing with the constitutionality of ceremonial deism has been less than satisfying from a doctrinal standpoint. Although the Supreme Court has rarely addressed the issue head-on, it has suggested in dicta that various forms of ceremonial deism are constitutional. The Court’s reasoning has been notably sparse, however, and the lower courts have largely followed suit in that regard.

Newdow v. Congress of the United States, 383 F. Supp. 2d 1229 (2005) (holding that the Ninth Circuit’s prior opinion holding the recitation of the Pledge in schools unconstitutional is still binding, because the Supreme Court reversed that decision on standing grounds but did not vacate it). This newest Pledge challenge is currently pending on appeal in the Ninth Circuit; oral argument was heard on December 4, 2007. The same plaintiff, Michael Newdow, has recently brought suit in the Eastern District of California, challenging the constitutionality of the national motto. Newdow v. Congress of the United States, No. 05-cv-2339 (June 12, 2006) (slip op.). Given that there was binding Ninth Circuit precedent holding the motto constitutional, Aronow v. United States, 432 F.2d 242 (9th Cir. 1970), the claim was dismissed, but an appeal of that case is also pending in the Ninth Circuit. Oral argument was also heard on December 4, 2007.
Scholarly commentators have discussed the problem at somewhat greater length. Nonetheless, for reasons that I explain below, none of the analyses gets to the heart of the problem. In the next Part I argue that by looking at theories of language – and particularly theories about how meaning can change over time – we might arrive at some new insight into the problem of ceremonial deism.\(^{21}\)

**A. The “Changed-Meaning” Claim**

Perhaps the most important Supreme Court case for the analysis of ceremonial deism is *Marsh v. Chambers*,\(^ {22}\) in which the Court considered the constitutionality of Nebraska’s practice of starting legislative sessions each day with a prayer by a chaplain paid by the state. In upholding the practice of legislative prayer, the Court did not apply any of the usual tests that it applies in other Establishment Clause cases, but rather took something of a departure, reasoning that “history and tradition” support the constitutionality of the practice.\(^ {23}\) In an opinion that even Justice Brennan’s dissenting opinion characterized as “narrow and, on the whole, careful,”\(^ {24}\) Chief Justice Burger pointed out various unique characteristics of legislative prayer: that the practice dates back to colonial times; that the First Congress engaged in the practice; that it has continued without interruption ever since; and that most states have also engaged in the practice for an extended period of time.\(^ {25}\) This “unique history” led the Court to decide that the practice was constitutional, while implying that the analysis was one that was not likely to have much application beyond the specific practice of legislative prayer.\(^ {26}\) The Court also suggested that the practice was a mere “acknowledgement” of the importance of religion in our society and has become part of the “fabric of our society.”\(^ {27}\)

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\(^{21}\) In drawing on theories of language, and in particular a branch of philosophy of language known as “speech act theory,” I am continuing a project I began with my article on religious symbolism and the problem of context, which is to apply the insights of speech act theory to problems of social meaning in constitutional law. B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491 (2005).

\(^{22}\) 463 U.S. 783 (1983).

\(^{23}\) *Id.* at 786.

\(^{24}\) *Id.* at 795 (Brennan, J., dissenting).

\(^ {25}\) *Id.* at 787-91.

\(^ {26}\) *Id.* at 791.

\(^ {27}\) *Id.* at 792.
As one commentator noted, despite Marsh’s narrow drafting, Marsh has been read in a number of ways: “as grandfathering long-established customs;” as “a standard for what the Establishment Clause must be thought to allow,” based on “historical practices and understandings;” and as “an illustration of how repetition can secularize what might otherwise be considered religious.” The Third Circuit recently echoed the last of those interpretations when it argued that Marsh stood for “the proposition that history can transform the effect of a religious practice.”

A conceptual predecessor to Marsh is McGowan v. Maryland, decided twenty-two years earlier. In McGowan, the Supreme Court had held that Sunday closing laws did not violate the Establishment Clause because, although their original purpose was primarily to facilitate Sunday Sabbath worship (which was often enforced by law) their purpose had become simply permitting a universal day of rest. Thus, the Court held that the laws, which appeared under the title, “Sabbath Breaking” and forbade “profan[ing] the Lord’s day,” did not constitute an establishment of religion, although they were “undeniably religious in origin.” The Court’s analysis, which relied in part on the history of Sunday closing laws, was supplemented by a lengthier historical exegesis by Justice Frankfurter, who acknowledged in a concurring opinion that the laws have been “the vehicle of mixed and complicated aspirations,” but agreed that they were constitutional despite their facially religious language and original intent. The religious language notwithstanding, Justice Frankfurter pointed out that “[c]ultural history establishes not a few practices and prohibitions religious in origin which are retained as secular institutions and ways long after their religious sanctions and justifications are gone.” Although McGowan’s language focused on the point in time at which the purpose of a statute is relevant – holding that the Court would consider the current purpose for keeping the statute rather than the

29 Freethought Society v. Chester County, 334 F.3d 247, 266 (3d Cir. 2003).
31 Id.
32 Id. at 445-46. McGowan also stands for the proposition that the Establishment Clause is not implicated by the mere fact that a rule of law “happens to coincide or harmonize with the tenets of some or all religions.” Id. at 442.
33 Id. at 431-40.
34 Id. at 459-95 (Frankfurter, J., concurring).
35 Id. at 503-04.
original purpose for adopting it – its analysis invokes, and is used by courts to support, notions of change in meaning over time.

Other than Marsh and McGowan, there have been very few Supreme Court pronouncements on the subject of ceremonial deism. The Court, of course, famously dodged a question involving ceremonial deism in Elk Grove Unified School District v. Newdow by turning away a constitutional challenge to the words “under God” in the Pledge of Allegiance on standing grounds.\(^{36}\) In concurring opinions, three Justices expressed their opinions that the Pledge was constitutional. Those opinions considered such factors as the lack of coercion,\(^{37}\) the long history of official acknowledgements of religion,\(^{38}\) the patriotic rather than religious character of the Pledge,\(^{39}\) and the brief, nondenominational quality of the reference to God.\(^{40}\) The remaining Supreme Court discussions of the constitutionality of brief official religious references have been in passing dicta. Thus, for instance, Justices have referred to instances of ceremonial deism such as the national motto, presidential Thanksgiving proclamations, the Pledge, and invocations such as “so help me God” (in the Presidential oath) and “God save the United States and this Honorable Court” as apparently constitutional examples of official religious acknowledgements, to support their view that other, usually more novel instances of official religious speech are constitutional,\(^{41}\) or to contrast with other instances of official religious speech that they view as unconstitutional.\(^{42}\) In so doing, the Justices have often invoked the

\(^{36}\) 542 U.S. 1 (2004); cf. Douglas Laycock, Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty, 118 HARV. L. REV. 155, 224 (2004) (noting that “[i]n Newdow, it may have been politically impossible to affirm [the Ninth Circuit’s holding that the pledge was unconstitutional] and legally impossible to reverse”).

\(^{37}\) Id. at 43-44 (O’Connor, J., concurring); id. at 46-49 (Thomas, J. concurring).

\(^{38}\) Id. at 30 (Rehnquist, C.J., concurring).

\(^{39}\) Id. at 30-31 (Rehnquist, C.J., concurring); id. at 38-40 (O’Connor, J., concurring).

\(^{40}\) Id. at 42-44 (O’Connor, J., concurring).


\(^{42}\) Van Orden v. Perry, 545 U.S. 677, 716 (Stevens, J. dissenting); Allegheny, 492 U.S. at 602-03; Lynch, 465 U.S. at 713-17 (Brennan, J., dissenting); Marsh, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring); Engel v. Vitale, 370 U.S. 421, 435
history and ubiquity of such references, or they have opined that the references have lost their religious meaning over time through rote repetition. Typical is Justice O’Connor suggestion in County of Allegheny v. ACLU, a challenge to public displays of a crèche and a menorah, that the Thanksgiving holiday, “despite its religious origins, is now generally understood as a celebration of patriotic values rather than particular religious beliefs.” And in the same case, a majority of the Justices assumed, largely without explanation, that a Christmas tree is at least sometimes a secular symbol. Perhaps the most extended instance of dicta on this topic is contained in Justice Brennan’s concurrence in School District of Abington Township v. Schempp. Referring to McGowan v. Maryland, Justice Brennan suggested that some apparently innocuous religious references might be justified as “activities which, though religious in origin, have ceased to have religious meaning.” According to Justice Brennan, they simply constitute recognition of “the historical fact that our Nation was believed to have been founded ‘under God.’”

Lower courts have had more occasions to address the constitutionality of various forms of ceremonial deism head-on. Yet very little sustained reasoning has supported those holdings, either. Some courts apply the Lemon test or a variant thereof to determine the constitutionality of the practice, while others, like the Supreme Court, do not apply any particular test. Despite its narrow drafting, moreover, Marsh is often invoked to support the notion that a long history may

n.21 (1962); Wallace, 472 U.S. at 78 n.5 (O’Connor concurring). Justice Brennan claimed, beginning in Marsh to be “uncertain” about the constitutionality of ceremonial deism and insisted in Marsh that legislative prayer was unconstitutional.

43 Allegheny, 492 U.S. at 624-25 (O’Connor, J., concurring).
44 Schempp, 374 U.S. at 303-04 (Brennan, J., concurring); Brennan dissenting in Lynch, 463 U.S. at 713-17 (Brennan, J., dissenting); Marsh, 463 U.S. at 818 (Brennan, J., dissenting); Allegheny, 492 U.S. at 631 (O’Connor, J., concurring).
46 Allegheny, 492 U.S. at 631 (1989). Thomas Jefferson and Andrew Jackson both resisted issuing Thanksgiving proclamations, and James Madison expressed regret that he had done so, all on constitutional grounds. STOKES & PFIFER, supra note __, 53-60, 504-06; Van Alstyne, supra note __, at 775-76.
47 Lynch, 465 U.S. at 616 (Blackmun, J.); id. at 634 (O’Connor, J., concurring); id. at 641 (Brennan, J., concurring) (joined by Justices Marshall and Stevens) (allowing that “the tree alone may be deemed predominantly secular,” even if it is not secular when placed next to a menorah).
49 Id. at 303-04.
50 Id. at 304.
remove any otherwise constitutionally problematic association with religion. Challenges to the national motto have fallen largely on the grounds that the motto has secular purposes and effects, in that it is best considered to be a patriotic or solemnizing phrase rather than a religious one. Often, such declarations are accompanied by the suggestion that the religious origins of the phrase have been lost through “historical usage and ubiquity.” Turning away one such challenge, the Ninth Circuit court of appeals pointed out that “[i]t is not easy to discern any religious significance attendant the payment of a bill with coin or currency on which has been imprinted ‘In God We Trust’ or the study of a government publication or document bearing that slogan. In fact, such secular use of the motto was viewed as sacrilegious and irreverent by President Theodore Roosevelt.”

In ACLU v. City of St. Charles, in the course of addressing a challenge to a Christmastime nativity scene that included a large lighted Latin cross, the court of appeals for the Seventh Circuit described an extensive catalog of symbols and terms that have “lost [their] religious connotations for most people,” including Christmas trees and wreaths, the five-pointed star of Bethlehem, and the city names Santa Cruz and even St. Charles itself. And in what might be considered the high-water mark of changed-meaning claims, the Ninth Circuit declared that Hawaii’s Good Friday holiday passed constitutional muster, in part


52 Gaylor v. United States, 74 F.3d 214, 216 (10th Cir. 1996); O’Hair v. Blumenthal, 462 F. Supp. 19, 20 (W.D. Tex. 1978); see also Justin Brookman, Note, The Constitutionality of the Good Friday Holiday, 73 N.Y.U. L. Rev. 193, 217-24 (1998) (discussing the phenomenon of “secularization” in the context of the Good Friday holiday, and attempting to set out factors for determining whether that has occurred); Andrew Rotstein, Note, Good Faith? Religious-Secular Parallelism and the Establishment Clause, 93 Colum. L. Rev. 1763, 1772 (1993) (noting that instances of ceremonial deism are “usually identified as acts that have largely or totally lost their religious significance because of their passive character or their long-standing repetition in a civil context”).

53 Aronow v. United States, 432 F.2d 242, 243 (9th Cir. 1970).

54 ACLU of Illinois v. City of St. Charles, 794 F.2d 265, 271-72 (7th Cir. 1986).
because it had partly lost its religious effect during the fifty years that it had been recognized.  

Some have taken a slightly more nuanced approach to change in meaning over time, suggesting that the passage of time is simply one factor that the court must take into account when determining whether a government action unconstitutionally advances religion. In *Freethought Society v. Chester County*, the court considered, and ultimately turned away, an Establishment Clause challenge to a display of the Ten Commandments that had been placed on the exterior of a county courthouse 82 years earlier, and neither removed nor maintained since then, beside an entrance that had become defunct. While rejecting the notion that the display’s age alone could immunize it from constitutional infirmity, the court insisted that the historical context was one consideration in determining whether the display had an impermissible purpose or effect under the “endorsement test.” The relevance of the passage of time, for the *Freethought* court, was not “that the Ten Commandments themselves have lost their primarily religious significance,” but rather that the maintenance of the historic Ten Commandments plaque “sends a very different message about the religious views of the County than would a recently erected display of the Ten Commandments.” The court analogized to the national motto and the expression “God save the United States and this Honorable Court,” which, while containing religious language, have been “tempered by the secular meaning that has emerged over the passage of time” and by their use for secular purposes, such that “the reasonable person would not perceive in these phrases a government

55 Camack v. Waihee, 932 F.2d 765, 782 n.19 (9th Cir. 1991). The court did allow that the holiday had not become “‘secularized' in the same manner as Thanksgiving and Christmas,” by which it apparently meant that it had not been secularized to the same extent. *Id.*

56 334 F.3d 247 (3d Cir. 2003).

57 *Id.* at 251-54.

58 *Id.* at 260 & n.10. The “endorsement test” is the test under which courts consider “whether ‘a reasonable observer would view [the government action] ... as a disapproval of his or her particular religious choices.’” *Id.* at 257 (quoting County of Allegheny v. ACLU, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring)). Although the endorsement test has been the dominant mode of evaluating Establishment Clause challenges to symbolic and other primarily communicative government actions, the Court has strayed from this test recently, *Van Orden v. Perry*, and well may abandon it altogether soon. *See infra* Part II.C.

59 *Id.* at 265.
endorsement of religion.”

To summarize, courts often rely reflexively on the “changed-meaning” claim to uphold instances of ceremonial deism against constitutional challenge, whether in the course of applying one of its standard Establishment Clause tests or simply analogizing to *McGowan* or *Marsh*. Given the frequency with which the concept of change in meaning over time is invoked, it is surprising that there is very little theoretical content given to the claim. As the next section demonstrates, this lack of explanation has not gone unnoticed by commentators.

### B. Critiques of the “Changed-Meaning” Claim

By and large, commentators have been critical of the notion that phrases or practices that are originally or facially religious can simply lose their religious meaning over time. Speaking specifically of Justice O’Connor’s espousal of this notion in the context of religious symbols, Professor Alan Brownstein has pointed out that the theory has been largely unexplained, and he, like others, has questioned the accuracy of the claim. “Religious icons have remained powerful symbols for centuries despite their familiarity,” he argues; moreover, other types of symbols are not generally alleged to lose their meaning over time. Judge Manion of the Seventh Circuit has similarly criticized the concept of ceremonial deism. He, like Professor Brownstein, questioned why “only religious phrases” may “los[e] their significance through rote repetition”: “Why only ‘under God,’? Why

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60 *Id.* at 264; see also Brookman, *supra* note ___, at 216-24 (arguing that the concept “might be better understood as an argument that the … endorsing value has been lost over time”); see also Elliott M. Berman, *Endorsing the Supreme Court’s Decision to Endorse Endorsement*, 24 COLUM. J.L. & SOC. PROBS. 1, 17-18 (1990) (“[W]hen a reasonable observer judges a government action, the tradition or novelty of the act is central to his or her analysis. . . . To be sure, history lacks the power to turn a *blatant* message of endorsement into thin air. . . . However, when the Court enters a difficult area and considers statutes that are on the borderline of constitutionality, it is quite understandable why, under the endorsement test, the history of the statute and of the public’s perception of government regulation in the area at issue become significant elements of the Court’s establishment clause analysis.”). I have made a similar suggestion elsewhere. Hill, *supra* note ___, at 524-26 (discussing “historical context” as one aspect of the context courts take into account when determining whether a religious display violates the Establishment Clause).

not ‘indivisible,’ ‘liberty and justice for all’? Do not these equally repeated phrases lose their meaning under the logic of ‘ceremonial deism’?"  

Similarly, Professor Douglas Laycock and others have forcefully argued that the words “under God” in the Pledge of Allegiance have “obvious religious meaning,” as evidenced by the fact that believers and nonbelievers alike find religious content in the phrase.

In addition to questioning the factual accuracy of the claim that religious meaning disappears over time, commentators have emphasized the conceptual and theoretical difficulties that arise from such an approach. One prevalent argument is that it is denigrating to religion and insulting to religious believers to say that the Christmas holiday, the national motto, and the like have no religious content.

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62 Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring); cf. Van Orden v. Perry, 545 U.S. 677, 696 (Thomas, J., concurring) ("[R]epetition does not deprive religious words or symbols of their traditional meaning. Words like ‘God’ are not vulgarities for which the shock value diminishes with each successive utterance.").

63 Laycock, supra note __, at 224-27 (2004); see also Daniel O. Conkle, Religious Expression and Symbolism in the American Constitutional Tradition: Governmental Neutrality, But Not Indifference, 13 IND. J. GLOBAL LEGAL STUD. 417, 433 (2006) ("By all indications, the governmental expression in question does promote and endorse religion, and it does so deliberately."); Thomas C. Berg, The Pledge of Allegiance and the Limited State, 8 TEX. REV. L. & POL. 41, 48 (2003) ("[I]t is simply untrue for many people that ‘under God’ has lost its religious meaning. If the phrase had lost its meaning, it is unlikely that so many people would be so angry about taking it out of the Pledge."); Epstein, supra note __, at 2165 ("[U]nder any honest appraisal of modern American society, the practices constituting ceremonial deism have not lost their religious significance. For instance, it would probably come as a great surprise to most Christians that religion is no longer a significant component of the Christmas holiday. . . . And although oaths, the judicial invocation, “under God” in the Pledge of Allegiance, and the national motto seem fairly innocuous at first blush, they pack a powerful religious punch to both the most and the least devout members of the American population."); Steven H. Shiffrin, The Pluralistic Foundations of the Religion Clauses, 90 CORNELL L. REV. 9, 69 (2004) ("Citizens may have forgotten that the City of Los Angeles has a religious meaning, but any English speaker knows that ‘under God’ and ‘In God We Trust’ carry theological meaning").

64 E.g., Lynch v. Donnelly, 465 U.S. 668, 711-712 (1984) (Brennan, J., dissenting) (arguing that the suggestion that a crèche is “merely ‘traditional’ and therefore no different from Santa’s house or reindeer is not only offensive to those for whom the creche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of ‘history’ nor an unavoidable element of our national ‘heritage’"); Laycock, supra note __, at 224-25, 233; Shiffrin, supra note __, at 68-69 (describing the argument as “ironic”); Steven D. Smith, How is America “Divided by God”?., 27 MISS. C. L. REV. 141, 155 (2007-
Another prominent critique views the approach that the Court has taken to ceremonial deism as carving out a sort of de minimis exception to Establishment Clause jurisprudence. Professor Laycock has critiqued that exception on the grounds that it is standardless: while it appears to exempt a small class of practices from traditional Establishment Clause standards, the Court has given no guidance as to what, if any, other practices or symbols may join the “short list” of acceptable Establishment Clause violations; at least as currently formulated, the de minimis exception for ceremonial deism is a “standardless rule” that is “subject to manipulation.” Similarly to Professor Laycock, Professor William Van Alstyne has noted that the logic -- and the standardless nature -- of the de minimis exception lead courts to apply a new Establishment Clause test – an “any more than” test. According to that “test,” courts simply consider whether a challenged practice advances religion any more than practices that the government has constitutionally engaged in previously; of course, the answer to that question is largely “in the eye of the beholder.” Thus, in evaluating the constitutionality of the Ohio state motto, “With God All Things Are Possible,” which is a direct quote from the New Testament, the Sixth Circuit court of appeals reviewed the wide variety of religious sentiments that have been expressed in official fora and apparently viewed as constitutionally acceptable, then simply concluded that “[i]n judged by historical standards, adoption of the motto no more represents a step toward an establishment of religion than

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66 Laycock, supra note __, at 232, 240. But see Conkle, supra note __, at 435 (arguing that “there is an implicit exception to the Supreme Court’s customary Establishment Clause doctrine” but that it is “limited to a select group of governmental practices that are historical, symbolic, and nonsectarian in nature; and that the exception is the product of a distinctive blend of constitutional values”).

67 William Van Alstyne, supra note __, at 782-83; see also Epstein, supra note __, at 2166-69 (discussing Van Alstyne’s “any more than” test and noting its problematic appearance in a case upholding the constitutionality of the Good Friday holiday as similar to the Thanksgiving and Christmas) (citing Camack v. Waihee, 673 F. Supp. 1524, 1539 (D. Haw. 1987), aff’d, 932 F.2d 765 (9th Cir. 1991)).

68 Epstein, supra note __, at 2168 n.475.
does our own practice of opening each session of court with a crier's recitation of the set piece that concludes—in words also called out in the United States Supreme Court each day that Court sits—'God save the United States and this Honorable Court.'\textsuperscript{69} Such arguments are obviously not easy to refute, largely because of rather than despite the lack of logical reasoning supporting them.\textsuperscript{70}

This Article acknowledges and accepts those criticisms, while at the same time attempting to take seriously the notion that meaning can change over time. In particular, it draws on the intuition that some instances of ceremonial deism—such as the city names of San Francisco, Corpus Christi, and St. Louis, or the use of the letters “A.D.” on public documents—can fairly be said to have lost their religious impact over time, whereas other phrases or symbols—such as “under God” in the Pledge, “In God We Trust,” and Christmas trees—are more controversial. Contrary to the way courts and commentators have largely treated them, this Article contends that different instances of ceremonial deism may be treated differently—they need not all be constitutional or unconstitutional. The goal of this Article is thus to consider whether and how a line may be drawn among various instances of ceremonial deism on the ground that some facially religious terms or practices have lost religious meaning.

In particular, this Article argues that both the way courts have used the changed-meaning claim and many of the ways in which commentators have critiqued it rely on a fundamental misunderstanding of how language works. My hope is that linguistic theory can lead us to a more nuanced understanding of the changed-meanings claim and the circumstances in which it may or may not apply. In particular, this more nuanced understanding, which allows us to understand how and why meaning may change over time, will provide some theory to support a heretofore untheorized shibboleth used to support a largely subjective determination. At a minimum, a theoretical framework for understanding change in meaning over time can obviate or minimize the criticism that courts have simply carved


\textsuperscript{70} Finally, there is an internal inconsistency in changed-meaning arguments, as “[s]uch an approach implies that phrases like ‘In God we trust’ or ‘under God,’ when initially used on American coinage or in the Pledge of Allegiance, violated the Establishment Clause because they had not yet been rendered meaningless by repetitive use,” although they may be constitutional now. Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring); see also Myers v. Loudon County Pub. Sch., 418 F.3d 395, 405 & n.11 (4th Cir. 2005).
out an exception to Establishment Clause jurisprudence for certain forms of ceremonial deism, thus distorting the doctrine and opening the way for standardless application. If some explanation and structure can be given to the notion that religious meaning may be lost over time, the changed-meaning claim may be made in a more principled manner.

Before moving on to an examination of linguistic theory and its possible applications to the problem of change in meaning over time, however, one more important argument concerning the constitutionality of ceremonial deism should be considered: the acknowledgement or accommodation argument. That argument holds that invocations of God as in the pledge and the motto are constitutional because the Establishment Clause permits such acknowledgements or accommodations of religious belief. Because the Framers were themselves religious and often invoked God, they could not have meant for those practices to be unconstitutional. After all, those who wrote the First Amendment surely would not have preached religious freedom with one breath while violating that freedom in the next.

71 Although the term “accommodation” is often used in connection with this argument, see, e.g., County of Allegheny v. ACLU, 492 U.S. 573, 659, 663, 679 (1989) (Kennedy, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 673 (1984); Marsh v. Chambers, 463 U.S. 783, 792 (1983), the more correct term is probably “acknowledgement,” since there is only a very weak argument that official mentions of God are accommodations in the narrow sense permitted by Establishment Clause doctrine. In that narrow sense, “accommodations” refer to governmental acts that remove a government-imposed burden on religious exercise, such as an exemption from the criminal drug laws for the sacramental use of peyote. See Ira C. Lupu & Robert W. Tuttle, The Cross at College: Accommodation and Acknowledgement of Religion at Public Universities, 16 WM. & MARY BILL RTS. J. 939, 980 (2008) (distinguishing accommodation, which lifts a government-imposed burden on religious exercise, from acknowledgement). Lupu and Tuttle further distinguish three different types of acknowledgement: historical, reverential, and cultural, arguing that only reverential acknowledgement is constitutionally problematic. Id. at 980-993.

72 See, e.g., Lynch v. Donnelly, 465 U.S. 668, 674-78 (1984); ACLU of Ohio v. Capitol Square Rev. & Adv. Bd., 243 F.3d 289, 296 (6th Cir. 2001) (“If the Establishment Clause of the First Amendment had been understood by its authors to prohibit the government from expressing sentiments of the sort in the Ohio motto [‘With God All Things Are Possible’] … some of the behavior of the First Congress would have been utterly inexplicable.”); Laura S. Underkuffler, Religion in the Public Schools: Through a Glass Darkly: Van Orden, McCreary, and the Dangers of Transparency in Establishment Clause Jurisprudence, 5 FIRST AMEND. L. REV. 59, 71-72 (2006) (describing “Scalia, Rehnquist, Thomas, and to some extent Kennedy” as subscribers to the view that “[g]overnment can purposely engage in the acknowledgement, preference, accommodation, even assistance of monism);
In Van Orden v. Perry, for example, which upheld a Ten Commandments display on public property, the four-Justice plurality consisting of then-Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas, insisted that government need not remain neutral between religion and non-religion, relying in part on the long history of government acknowledgements of religion dating back to the founding. Similarly, in McCreary County v. ACLU, which was decided on the same day as Van Orden but struck down the challenged Decalogue displays in county courthouses, Justice Scalia dissented partly on the ground that the beliefs of the Founding period did not require neutrality between religion and nonreligion but rather made room for official speech acknowledging religion. The acknowledgement argument is an originalist argument, which considers the Establishment Clause in light of practices that were acceptable at or near the founding. It is different from the changed-meanings claim, in that it accepts the religiosity of practices such as

Steven G. Gey, Religion in the Public Schools: Vestiges of the Establishment Clause, 5 FIRST AMEND. L. REV. 1, 12-21 (2006) (describing and critiquing this argument); cf. Michael J. Perry, Freedom of Religion in the United States: Fin de Siècle Sketches, 75 IND. L.J. 295, 309-11 (2000) (arguing that affirmation of certain monotheistic religious tenets is consistent with the American version of nonestablishment of religion). But see Kyle Duncan, Bringing Scalia’s Decalogue Dissent Down from the Mountain, 2007 UTAH L. REV. 287, 288 (arguing that “[a] better reading [of Scalia’s views] is that the government’s persistent acknowledgment of a generalized monotheism … provides merely a baseline against which to interpret the Establishment Clause…. [which] does not freeze a preference for monotheism into the Establishment Clause itself, but rather defers to representative bodies the development of our traditions to include specific monotheistic religions, non-monotheistic religions, or atheism--or to end the tradition by opting for no government acknowledgment of religion at all”).


74 McCreary County v. American Civil Liberties Union of Ky., 545 U.S. 844, 885-94 (2005) (Scalia, J., dissenting)
the pledge and the motto, while insisting that the Establishment Clause must be understood to permit such practices despite their religious content.\footnote{Steven Smith has espoused what may be considered a variation on this theme, arguing that although our Constitution is agnostic with respect to God, this agnosticism is intended to leave room for some acknowledgements of God or religion at different levels of government, especially in ways that are not legally binding. Steven D. Smith, \textit{Our Agnostic Constitution}, 83 N.Y.U. L. REV. 120, 155-64 (2008). Likewise, Thomas Berg has proposed an understanding of the words “under God” Pledge of Allegiance as acknowledging that our country is accountable to some power greater than itself, and subject to criticism if it fails to live up to the standards of morality required by that higher power. In Professor Berg’s view, this is a constitutionally acceptable sentiment for the government to express. Berg, supra note __, at 52-58, 68.}

The acknowledgement or accommodation argument is subject to criticism on a number of fronts, including almost all of those that face other forms of originalism. It would go beyond the scope of this Article to lay out all of the critiques of this originalist-historical approach focusing on accommodation in any depth.\footnote{To give just a few examples, Professor Steven Shiffrin has argued that “it is not clear that the original intent of the Framers was for us to follow their intent;” that “the Framers themselves did not agree upon the appropriate relationship between religion and government;” and of course that “it is not clear that a legal theory requiring us to be bound in the twenty-first century by the will of a group of eighteenth century white male agrarian slaveholders would have a lot to recommend it.” Shiffrin, supra note __, at 14. Moreover, Professor Steven Green has astutely demonstrated that such claims about the Framers’ mindset and its relevance to the meaning of the Establishment Clause often rely on faulty historical analysis. Steven K. Green, \textit{“Bad History”: The Lure of History in Establishment Clause Adjudication}, 81 NOTRE DAME L. REV. 1717, 1725 (2006) (describing the Court’s opinions in \textit{Marsh v. Chambers} and \textit{Lynch v. Donnelly} as “egregious examples of bad history”). See also Thomas B. Colby, \textit{A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause}, 100 NW. U. L. REV. 1097 (2006) (critiquing the acknowledgement argument for “giv[ing] the appearance of a historical consensus that did not exist,” and noting that it would logically permit endorsements of Christianity over all other religions, since such Christian endorsements could be found in practices common at the time of the founding).} In any case, this Article does not respond directly to the acknowledgement argument. The focus of this Article is on the validity of the changed-meaning claim and on the possibility of determining when the religiosity of a particular practice, symbol, or phrase has faded. The acknowledgement argument assumes religiosity and proceeds from there to determine whether that religious expression is appropriate. As of now, however, the acknowledgement argument does not have
majority support in the Supreme Court, and it is not the dominant approach to official religious expression.\textsuperscript{77} It is therefore still important to evaluate the validity of the changed-meaning claim, as it will likely play a role in future cases.\textsuperscript{78}

\textit{C. The Future of Establishment Clause Doctrine}

Even if the changed-meaning claim remains relevant to the consideration of ceremonial deism under the Establishment Clause for the time being, it is hard to ignore the fact that the Supreme Court’s jurisprudence in this area is in a state of flux, and more than likely is about to undergo some significant changes.\textsuperscript{79} In particular, the writing on the wall appears to point toward the adoption of a test that focuses on whether government actions are coercive or proselytizing.\textsuperscript{80} This would be a change from the current state of the law, which considers

\textsuperscript{77} Lupu & Tuttle, supra note ___, at 987; cf. Daniel O. Conkle, \textit{The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard}, 110 W. VA. L. REV. 315, 316 (2007) (noting that “for now, the Court’s general approach continues to preclude government from promoting religious expression,” but with some apparent exceptions).

\textsuperscript{78} See, e.g., Berg, supra note __, at 48 (fearing “that if the Court upholds the inclusion of ‘under God’ in the Pledge, it will do so by entrenching further the idea that such phrases have no religious meaning”).

\textsuperscript{79} E.g., Conkle (WVA), supra note __, at 315-16 (noting that in the context of governmental religious expression, “[t]he Lemon and endorsement tests survive…, but they hang by a thread, and the Supreme Court’s changing membership adds to the uncertainty’); Gary J. Simson, \textit{Beyond Interstate Recognition in the Same-Sex Marriage Debate}, 40 U.C. DAVIS L. REV. 313, 379 (2006); Steven G. Gey, supra note __, at 1 (asserting that “[w]ith the confirmation of Chief Justice John Roberts and Samuel Alito to the Supreme Court…[w]e may be on the cusp of a root-and-branch change in Establishment Clause jurisprudence, which will fundamentally alter the landscape of church/state relations…..); Erwin Chemerinsky, \textit{The Rookie Year of the Roberts Court & A Look Ahead: Civil Rights}, 33 PEPP. L. REV. 535, 552 (2007) (speculating that “the place in religion [clause jurisprudence] where we are going to see the change is the Establishment Clause”).

\textsuperscript{80} See, e.g., Vincent Phillip Muñoz, \textit{Thou Shalt Not Post the Ten Commandments? McCreary, Van Orden, and the Future of Religious Display Cases}, 10 TEX. REV. L. & POL’Y 357, 396-97 (2006) (arguing that the Court is likely to move to a coercion standard). The word “proselytizing” appears to be used interchangeably with the word “coercion” by Justices Scalia and Kennedy. Van Orden v. Perry, 545 U.S. 677, 692 (Scalia, J., concurring) (“[T]here is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgement, or, in a nonproselytizing manner, venerating the Ten Commandments.”); County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part and dissenting in part).
whether the government action has the purpose or effect of endorsing religion – that is, whether it “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”

The concern with social meaning, and its potential for change, is nonetheless likely to remain central to the Court’s consideration of ceremonial deism, however. Of course, whether a particular phrase or practice constitutes an innocuous form of ceremonial deism or an unconstitutional establishment of religion will depend in part on the underlying substantive principles applied by court – namely, for our purposes, whether the court is charged with deciding whether a particular phrase is an “endorsement” of religion, a “proselytizing” phrase, or simply an exception to existing doctrine, like that recognized in *Marsh*. But whether the Court applies a new coercion standard to government expression in future cases or continues to treat ceremonial deism as a sort of exception to the Establishment Clause, the analysis that this Article proposes will be relevant. If the Court decides in the future to consider only whether speech is proselytizing or religiously coercive, it will still need to decide at some point in the analysis whether the facially religious speech is still religious and

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81 Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring); see generally Hill, supra note __, at 496-502 (discussing the Court’s application of the endorsement test in religious symbolism cases, and noting that the Court applied the functional equivalent of the endorsement test as recently as 2005, in *Van Orden v. Perry*). Given the retirement of Justice Sandra Day O’Connor – the creator and leading proponent of the endorsement test – in 2006, and her replacement with Justice Samuel Alito, most commentators agree that there are now five votes to abandon the endorsement test and to replace it with a “coercion” or “proselytizing” test. See, e.g., Simson, supra note __, at 379-80; Chemerinsky, supra note __ (Cap U LR) at 665-66; Adam Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 149 (describing the endorsement test as being “in a precarious state” after the 2005 decalogue cases). Importantly, Justice Kennedy, who is now the likely swing vote on most Establishment Clause issues, has advocated a coercion approach – albeit, at least in some contexts, a “softer” version of the coercion test than that advocated by Justice Scalia. County of Allegheny v. ACLU, 492 U.S. 573, 659- 62 (1989) (Kennedy, J., concurring in part and dissenting in part) (expressing the view that only coercive or proselytizing actions by the government violate the Establishment Clause); Gey, supra note __, at 25-28 (describing the Court’s likely move to a coercion standard, and noting that Justice Kennedy’s “soft” version of the coercion standard, which recognizes subtle psychological coercion as well as legal coercion, most likely will apply when public school children are the recipients of the government speech).
therefore capable of proselytizing. Such a question may be particularly important if the Supreme Court decides to hear the renewed challenge to the recitation of the Pledge of Allegiance in the wake of Elk Grove Unified School District v. Newdow that is pending in the Ninth Circuit. If it accepts another Pledge case, the Court will have to decide whether the words “under God” in the Pledge constitute religious speech, either as a means to holding that they are an innocuous, quasi-secular instance of ceremonial deism, or in the process of deciding whether the school district has coerced a religious exercise by providing for recitation of the Pledge of Allegiance in a public school, which has all the marks of the sort of coercion Justice Kennedy has found troubling in the past. Moreover, if the Pledge is merely a secular exercise, then children have only a right to opt out of its recitation, as the Court long ago held in West Virginia v. Barnette; but if it is a religious exercise, the plaintiffs in the current Pledge challenges instead have a right to an injunction against the entire practice of recitation in the schools.

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82 Cf. County of Allegheny, 492 U.S. at 607-08 & n.56 (noting similarities between the endorsement and proselytization inquiries and assuming that proselytization could occur even when the governmental speech is brief, as in an 1844 governor’s Thanksgiving Proclamation that exhorted citizens of all denominations to pray to Jesus Christ).
83 See supra note __.
84 Lee v. Weisman.
85 Berg, supra note __, at 49-52. Even more troubling is the possibility that the recent decision in Hein v. Freedom from Religion Foundation, ---U.S.---, 127 S. Ct. 2553 (2007), will affect future claimants’ ability to get through the courthouse doors with challenges to the constitutionality of religious government expression. Although the Hein decision concerned taxpayer standing under the Establishment Clause – which is not the usual basis for challenges to government religious acknowledgements – Ira Lupu and Robert Tuttle have raised the possibility that lower courts may interpret the case to apply broadly to such government speech cases as well. Ira C. Lupu & Robert W. Tuttle, Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication, 2008 B.Y.U. L. REV. 115, 158-64. Noting the spirit of “anti-exceptionalism” with respect to the Establishment Clause that permeated Hein – that is, the sentiment that Establishment Clause cases should be treated just like any other federal case, with all of the Article III standing requirements of concrete and particularized injury in full force – the decision may be read broadly to preclude standing by plaintiffs in challenges to various forms of religious speech by the government, in which mere “observer” status has in the past usually been enough to ground the federal courts’ jurisdiction. Lupu & Tuttle, supra note __, at 158; Note, Expressive Harms and Standing, 112 HARV. L. REV. 1313, 1320 (1999). It seems distinctly unlikely, however, that Hein will be extended by the Supreme Court to preclude standing in virtually all cases challenging official religious acknowledgements. Such a major change in the Court’s approach to
III. SPEECH ACT THEORY, ITERABILITY, AND CHANGE IN MEANING OVER TIME

So far, this Article has established that the constitutionality of brief official religious references, often referred to as ceremonial deism, has not been dealt with in a thorough or nuanced way by courts. While courts, and some commentators, often assert that such references are unproblematic because they have lost their religious meaning over time or through repetition, these assertions are largely unsupported and undertheorized. Moreover, the notion that religious meaning can be lost over time has been criticized as factually inaccurate, logically incoherent, and overly subjective. Yet this obviously problematic and much-maligned proposition – that meaning can change over time in ways that are relevant to Establishment Clause analysis – is the focus of this Article. The Article proceeds from the intuition that at least some instances of ceremonial deism – like the city name of St. Louis, for example – are in fact both largely secularized and constitutionally innocuous, although other instances may be less so. It therefore draws on theories of language to see whether they might provide some insight into how that change takes place, as well as guidance as to how to draw principled lines among different cases, so that the changed-meanings claim might be supported with analytical rigor instead of bald assertion.

This Article therefore turns to the branch of philosophy of language known as speech act theory to consider the problem of Establishment Clause cases would render irrelevant a large number of landmark Supreme Court cases. Moreover, even those Justices who were aligned with the majority in Hein have suggested relatively recently that various forms of government speech could be unconstitutional. See, e.g., Allegheny, 492 U.S. 661 (Kennedy, J., concurring in part and dissenting in part) (stating that “speech may coerce in some circumstances” and giving the example of “permanent erection of a large Latin cross on the roof of city hall” as coercive government religious speech); ACLU-NJ v. Township of Wall, 246 F.3d 258, 265-66 (3d Cir. 2001) (Alito, J.) (noting the likelihood that “personal contact” with an offensive religious holiday display is enough to confer standing). Allegheny, 492 U.S. 661 (Kennedy, J., concurring in part and dissenting in part) (stating that “speech may coerce in some circumstances” and giving the example of “permanent erection of a large Latin cross on the roof of city hall” as coercive government religious speech). Moreover, the Court made in clear in Newdow that prudential, not constitutional, standing concerns drove its opinion. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17-18 (2004).
change in meaning over time from a new perspective.\textsuperscript{86} In so doing, it is extending a project I began in an earlier article – namely, applying the insights of speech act theory and its progeny to problems of social meaning in the Establishment Clause context.\textsuperscript{87} This section therefore begins by briefly outlining the premises of speech act theory and explaining why that theory is particularly suited to analyzing the problem of ceremonial deism. It then introduces the theory of Judith Butler, who has drawn on speech act theory in discussing the concept of “resignification,” by which meaning can change over time. Part IV of this Article then applies those insights to the problem of official speech containing religious references.

A. \textit{Meaning and Force}

1. Locutionary and Illocutionary Force

I have written elsewhere of the applicability of what is commonly known as “speech act theory” to the problem of determining social meaning under the Establishment Clause.\textsuperscript{88} Speech act theory is a branch of philosophy of language which considers language primarily as doing rather than describing – as bringing about states of affairs, with greater or lesser degrees of success, rather than simply referring to them.\textsuperscript{89} The founding father of speech-act theory, J.L. Austin, was the first to identify and describe linguistic utterances

\textsuperscript{86} Although this Article occasionally refers to speech act theory as a branch of linguistic theory, the main theorists of speech acts, such as J.L. Austin and John Searle, situate themselves primarily in the field of analytic philosophy rather than linguistics. \textit{See}, e.g., David Gorman, \textit{The Use and Abuse of Speech-Act Theory in Criticism}, 20 POETICS TODAY 93, 108-09 (1999). The theory has been influential in a number of fields, however – including linguistics – and a version of it has found a particularly strong foothold in literary theory. Judith Butler, whose theories are discussed in depth \textit{infra} \textsuperscript{87}, is most closely associated with this last discipline.

\textsuperscript{87} Hill, \textit{supra} note \textsuperscript{86}. Other legal scholars have discussed J.L. Austin and speech act theory, perhaps most notably in connection with free speech doctrine. \textit{See generally} John Greenman, \textit{On Communication}, 106 Mich. L. Rev. 1337, 11351-54 (2008) (discussing and critiquing the use of speech-act theory in free speech scholarship). Perhaps most famously, Austin’s theory has been used by Catherine MacKinnon in her scholarship advocating legal prohibitions on pornography – scholarship of which Judith Butler, discussed below, has been highly critical. \textit{JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE} 17-21, 71-102 (1997) (discussing \textit{CATHERINE MACKINNON, ONLY WORDS} (1993)).

\textsuperscript{88} Hill, \textit{supra} note \textsuperscript{86}.

\textsuperscript{89} \textit{Id.} at 511-12.
Initially, he considered speech acts, or “performatives,” as a class of utterances that bring about an effect by the mere fact of their utterance, such as “I do (…take this woman to be my lawful wedded wife)”; “I name this ship the Queen Elizabeth”; “I give and bequeath my watch to my brother”; and “I bet you sixpence it will rain tomorrow.” As Austin explains, “it seems clear that to utter the sentence (in, of course, the appropriate circumstances) is not to describe my doing . . . or to state that I am doing it: it is to do it.” By speaking, one effects the act of marrying, christening a ship, bequeathing, and betting. Of course, law works by means of such performative utterances in many cases, and it is easy to come up with other legal examples: imposing a prison sentence, enjoining a party from taking an action, and forming a legally binding contract are also obvious performatives. Such performatives were to be contrasted in these terms.

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90 J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962). Austin’s theory of speech acts owes much to Ludwig Wittgenstein’s later work, in particular his Philosophical Investigations. Of course, Austin’s work is situated within a long history of preoccupation with the relationship between language and action in analytic philosophy. This preoccupation arguably can (like virtually every other intellectual endeavor) be traced back to Aristotle, and at least one scholar has pointed out that the phrase “theory of speech acts” most likely was first used by Karl Bühler in 1934. BARRY SMITH, TOWARD A HISTORY OF SPEECH ACT THEORY, IN SPEECH ACTS, MEANINGS AND INTENTIONS. CRITICAL APPROACHES TO THE PHILOSOPHY OF JOHN R. SEARLE 29 (A. Burkhardt, ed. 1990).

91 AUSTIN, supra note __, at 5.

92 Id. at 6; see also generally LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 154-55 (1993) (describing speech acts).

93 Evidence scholars may be familiar with performatives, which are related to the “verbal act doctrine.” “[A] ‘verbal act’ is a statement that ‘affects the legal rights of the parties.’ Such acts are limited to statements that have independent legal significance, such as contractual offers or inter vivos gifts.” U.S. v. Stover 329 F.3d 859, 870 (D.C. Cir. 2003) (citing FED. R. EVID. 801 advisory committee’s note and 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 801.11[3] (2d ed.1997)). For example, in a case dealing with the admissibility of a letter in which an attorney wrote to his client that the opposing party would settle a car accident case for $500,000, Judge Posner wrote:

There are two ways of characterizing the demand. One is merely as a statement that [the opposing party] was willing to settle the case for $500,000. . . . The other characterization of the demand is as a verbal act, what philosophers of language call a performative utterance, to which truth is irrelevant. When the groom in a marriage ceremony says “I do,” he is not making a statement that may be true or false; he is performing an act . . . that has legal consequences; and anyone who heard his words could testify that he uttered them, without running afoul of the hearsay rule. That is the case here if ‘$500,000’ was an offer that [the attorney] heard. . . .
Austin’s theory with “constatives,” which do merely report, state, or describe a state of affairs.

Importantly, however, over the course of Austin’s study he came to conclude that performatives were not in fact a unique class of utterances within language; rather, he ultimately concluded, the class of constative utterances is merely a subset of the performative.\textsuperscript{94} After all, Austin concludes, describing a state of affairs is doing something with words, just as much as christening and marrying and bequeathing and betting are. “Surely to state is every bit as much to perform [a speech] act as, say, to warn or to pronounce,” and indeed, Austin admits than any criterion he can find to define a performative – such as that it must be either successful or unsuccessful, rather than true or false – applies no more or less to so-called constatives than to performatives.\textsuperscript{95}

Over the course of the series of lectures that came to be published as \textit{How To Do Things with Words}, Austin’s analysis therefore shifts from distinguishing performatives from constatives and elucidating the unique characteristics of the former to establishing that performative force, or what he refers to as “illocutionary force” is a property of all utterances, to be distinguished from what he called “locutionary force.”\textsuperscript{96}

What we commonly think of as “meaning” may therefore be thought to include two different concepts: locutionary force and illocutionary force.\textsuperscript{97} The locutionary act may be roughly defined as “uttering a certain sentence with a certain sense and reference”;

\textsuperscript{94} AUSTIN, supra note __, at 148-49 (“Stating, describing, &c., are just two names among a very great many others for illocutionary acts; they have no unique position.”); see also, e.g., JONATHAN CULLER, ON DECONSTRUCTION 112-13 (1982).
\textsuperscript{95} AUSTIN, supra note __, at 134-39; see also Deirdre Wilson, Review of \textit{Propositional Structure and Illocutionary Force: A Study of the Contribution of Sentence Meaning to Speech Acts} by Jerrold Katz, 88 MIND 461, 461 (1979) (“Austin claimed that there could be no purely syntactic basis for the performative-constative distinction.”)
\textsuperscript{96} AUSTIN, supra note __, at 149; see also David Gorman, supra note __, at 97; John R. Searle, \textit{Austin on Locutionary and Illocutionary Acts}, 77 PHILosophical Rev. 405, 405 (1968) (“The main theme of Austin’s \textit{How to Do Things with Words} is the replacement of the original distinction between performatives and constatives by a general theory of speech acts.”). Gordon Bearn suggests that “what Austin classifies as force is just meaning.” Bearn, supra note __, at 4 n.6. As discussed below, Austin also identified a third aspect of speech acts, perlocutionary force, which has garnered less attention than the other two.
\textsuperscript{97} AUSTIN, supra note __, at 147.
locutionary force, therefore, “is roughly equivalent to ‘meaning’ in the traditional sense.” 98 Illocutionary force is the act (describing, sentencing, marrying, and so on) that is performed by and in speaking. Every locutionary act is also an illocutionary act (“To perform a locutionary act is in general, we may say, also and eo ipso to perform an illocutionary act,” in Austin’s words); they are different aspects of the same speech act. 99 As Gordon Bearn explains, “[o]ne sign of there being a difference between locutionary and illocutionary acts is that it is possible to know what words were uttered with which senses and references but still to remain in doubt whether the illocutionary act was one of threat or advice or warning;” 100 Jonathan Culler gives the example of the statement “This chair is broken,” which may be an act of warning, informing, conceding, complaining, and so on. 101 While the locutionary meaning of the sentence may be clear to the hearer, the illocutionary force of it may or may not.

The so-called “Nuremberg files” litigation presents an example of the locution-illocution distinction in the legal context. Once it was on appeal to the Ninth Circuit, that case largely centered on whether anti-abortion posters identifying certain abortion providers and giving their home addresses, together with an anti-abortion website, constituted a “true threat” that was unprotected by the First Amendment. 102 The website listed names of abortion providers, which were struck through if the provider had been killed or grayed out if that provider had been wounded. 103 While the locutionary acts performed by the posters and websites may have been entirely clear, the illocutionary act – whether it was an act of threatening, of protesting, or of informing – was hotly disputed, resulting in an en banc Ninth Circuit opinion that divided the judges six to five. 104

98 Id. at 109.
99 Id. at 98. John Searle has pointed out that, while locutionary and illocutionary are meaningfully different concepts, they are not mutually exclusive classes, since sometimes the locutionary act is the same as the illocutionary act – as in the sentence, truthfully and correctly uttered, “I promise to do it.” The sense and reference of the sentence (that I promise to do it) is the same as the sentence’s force (I have accomplished the act of promising to do it). Searle, supra note __, at 407-08.
100 Bearn, supra note __, at 5.
101 CULLER, supra note __, at 113.
102 Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058, 1062-63 (9th Cir. 2002) (en banc).
103 Id.
104 Id.
2. Illocutionary Force and Social Meaning in the Establishment Clause Context

It is my contention that, when courts evaluate religious references under the Establishment Clause, they are largely concerned with the illocutionary force or effect of those references. Speech act theory itself is geared primarily toward the questions about what we do – what effects we bring about – when we speak.\(^{105}\) This particular orientation explains both the title of Austin’s book and the almost exclusive focus of speech act theory on understanding illocutionary force.\(^{106}\) Indeed, for this reason, speech act theory is largely viewed not as a branch of linguistics but of philosophy – specifically, of the branch of philosophy known as pragmatics. It is fair to say that Austin’s book aimed to make a contribution not only to the philosophy of language, but also to the philosophy of action.\(^{107}\)

The jurisprudence dealing with religious government speech is also similarly preoccupied with linguistic effects. It is, at its core, concerned not so much with the meaning (in the sense of “sense and reference”) of certain phrases, terms, symbols, or even practices, so much as it is concerned with what they do. Thus, although the locutionary force of “In God We Trust” may be obvious, and obviously religious, the illocutionary force is not necessarily so clear. Is it an endorsement of religion, or at least of belief in God? Can it be said to be proselytizing? Or does it merely acknowledge the role of religion in our nation’s history? These are questions about illocutionary force, and they are the questions that are relevant to the constitutional analysis.\(^{108}\) And indeed, the same is true for symbols...

\(^{105}\) Gorman, supra note __, at 102-03. Gorman quotes the philosopher G.J. Warnock, who pointed out that Austin’s book “has almost nothing at all to say” about language itself; rather, Austin “was willing simply to assume that we have ‘got’ a language, with a view to getting on to the questions: what do we do with it?” Id. at 103 (quoting G.J. Warnock, J.L. Austin 151 (1991)).

\(^{106}\) Gorman, supra note __, at 103 (noting that speech act theorists have understood “[t]he notion of illocutionary force” to be Austin’s “most significant theoretical contribution”).


\(^{108}\) The possibility that the Court may shift to an analysis of whether religious government expression is coercive raises some difficulties for this analysis. The

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(such as Christmas trees or crèches) and practices (such as legislative prayer), at least to the extent that courts are concerned with their social meaning – that is, with their potential endorsing or proselytizing effect. One of the primary contentions of this Article is therefore not only that Establishment Clause doctrine is primarily concerned with the illocutionary force of religious references – and, as a consequence, that speech act theory is relevant to their analysis – but also that the cases and commentary dealing with such references come up lacking in part because they are insufficiently attentive to the distinction between locutionary and illocutionary forces of utterances. Thus, it may be true that, as several commentators have pointed out, it simply blinks reality to say that the words “under God” have no religious meaning, in the sense of “sense and reference.” Yet, it may be true to say, in a particular context or setting, that the words do not have the illocutionary force of proselytizing or endorsing religion. Indeed, much of the case law discussing the Pledge of Allegiance revolves around whether reciting the Pledge is a religious or patriotic act –

concept of coercion maps poorly onto language in general; although some speech acts (such as orders or threats) may be said to coerce, coercion is not actually an illocutionary act. It may be considered, instead, what Austin has called a perlocutionary act. The term “perlocutionary act” refers, in Austin’s terminology, to the “consequential effects upon the feelings, thoughts or actions” that the illocutionary act is intended to produce in the hearer. Austin, supra note __, at 101. Austin himself acknowledges that the perlocutionary act is not “conventional” in the way that the illocutionary act is, and that it is therefore not similarly subject to systematization. Id. at 104. As a result, perlocutionary acts have not been the subject of significant attention within speech act theory after Austin. Cf. Gorman, supra note __, at 110 n.18 (noting that the category of perlocutionary acts “has proven very controversial”). If the Court moves to a coercion standard for official religious expression, it is hard to imagine, in any case, that its analysis would focus on perlocutionary effect in this sense. A standard depending on perlocutionary effect would require the Court to look at whether a given individual was actually coerced by government speech, as opposed to whether the speech was of a sort that is generally calculated or intended to coerce. The latter inquiry – whether the speech is intended to coerce – becomes a question about illocutionary effect. Cf. SEARLE, supra note __, at 71 (1997) (noting that “[s]ome illocutionary verbs are definable in terms of the intended perlocutionary effect”). The perlocutionary effect is defined as the aim of the illocutionary act; it must be in this sense, then, that the coercion test would apply to government speech. Finally, it must be noted that the word “proselytize” has two meanings: to attempt to convert someone to a religion and to convert someone to a religion. The former would be an illocutionary act, and the latter a perlocutionary act. Again, the proselytization test would have to be understood to ask whether the official religious reference performed the former, not the latter.
again, a question about illocutionary force. Similarly, the city name Corpus Christi has a religious referent – it literally means “body of Christ” – but the illocutionary effect of the name, which is the focus of Establishment Clause analysis, may or may not be to endorse religion.

Illocutionary force is therefore the focus of the Establishment Clause inquiry in any case where symbolic government acts, and therefore social meaning, are involved. This fact is illustrated, to take one particularly clear example, in a lower court case in which the locutionary act was arguably absent. In *Saladin v. City of Milledgeville*, the Eleventh Circuit held that the plaintiffs had standing to challenge the word “Christianity” in a city seal on the city’s official stationery, although the word appeared only as an illegible smudge. Despite the failure of the smudge to perform a locutionary act, the court held that it could still perform an illocutionary act of endorsing Christianity and conveying the message to the plaintiffs that they were second-class citizens:

> [W]e reject the notion that the illegibility of the word “Christianity” on the seal as it is presently used means that these plaintiffs cannot have suffered and will not in the future suffer any injury from its use. Although the district court and the City equate the illegibility of the offensive word with the complete absence of the offensive word from the city seal, the fact is that the word is still part of the seal. . . . The fact remains that the word “Christianity” with all of its connotations is part of the official city seal, and these appellants are reminded of that fact every time they are confronted with the city seal-smudged or not smudged.

The quoted language demonstrates that the court’s concern is primarily with the effect, or force, of the word on the city seal, rather than with its meaning, in the sense of locutionary force. Indeed, it would be incoherent to speak of an illegible smudge as having any sort of sense or referent. Moreover, the notion that an illegible smudge can cause injury to the plaintiffs, sufficient to ground Article III standing, again requires a theory that focuses on illocutionary force rather than

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110 812 F.2d 687 (11th Cir. 1987).
111 *Id.* at 691-93.
112 *Id.* at 691-92.
the locutionary act giving rise to it. Moreover, this notion may be carried over to other instances where nonlinguistic government practices – such as the display of religious symbolism or the observance of religious holidays – is challenged on the ground that it endorses religion. Although there is no locutionary meaning in the typical sense, the illocutionary force – which I contend is roughly synonymous with social meaning in this context – of the practice is the true focus of the court’s analysis and the parties’ dispute.

Several other features of speech acts are relevant to the analysis of ceremonial deism and therefore bear mentioning. First, speech acts are conventional. The speech act of sentencing someone to a prison term, for example, cannot be performed successfully unless certain conventions are met. Those conventions include that the person pronouncing the sentence has legal authority to do so (such as a judge or a magistrate), and that the act is performed in a “serious” setting such as a court of law after a guilty plea or a jury trial (as opposed to being performed in a play, or spoken by a judge to her child at home). In Austin’s words, “[t]here must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances, and further, … the particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invoked. . . . [and the] procedure must be executed by all participants both correctly and . . . completely.” The requirement that speech acts, in order to be successful, must be executed in the appropriate conventional circumstances applies not only to obviously performative acts such as sentencing, or marrying, or christening, but also to speech acts such as describing: to take one example, one cannot describe something successfully if one cannot observe it.

The conventionality of speech acts is one of its central features, and much of speech act theory is preoccupied with the task of isolating the conventions that are necessary for the success of particular speech

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113 Cf. King v. Richmond County, 331 F.3d 1271, 1285-86 (11th Cir. 2003) (inferring an emphasis on legal rather than religious connotations from the fact that the Ten Commandments on a challenged city seal appeared without any text).

114 Austin, supra note __, at 121 (“Illocutionary acts are conventional acts....”). I have discussed the conventionality of speech acts elsewhere. Hill, supra note __, at 512-13, 514-15.

115 Austin, supra note __, at 14-15.

116 See Austin at 138; Austin describes other ways in which constative speech acts may be unsuccessful as well. Id. at 136-37.
acts. At the same time, this conventionality is precisely what allows words to mean different things when used in different contexts. As discussed in the next section, the conventionality of language is both what allows it to produce meaning and what creates the potential for instability of that meaning.

Finally, and somewhat problematically, Austin has identified another critical aspect of illocutionary acts. For an utterance to constitute an actual promise, endorsement, or any other speech act, it must “secur[e] … uptake.” As John Searle explains, the illocutionary act of ordering someone to do something might be unsuccessful in certain circumstances:

For example, I might utter the sentence to someone who does not hear me, and so I would not succeed in performing the illocutionary act of ordering him, even though I did perform a locutionary act since I uttered the sentence with its usual meaning (in Austin’s terminology in such cases I fail to secure ‘illocutionary uptake’). Or, to take a different example, I might not be in a position to issue orders to him, if, say, he is a general and I am a private.

In the context of an individual speech act by one speaker to another, the concept of “uptake” seems relatively straightforward. In the context of ceremonial deism, however, in which a constitutional challenge is brought regarding instances of government speech on coins or in classroom recitations, this concept becomes highly problematic. Since such challenges are generally facial challenges, they assume any number of possible speakers; the court is concerned not just with the effect of the speech on the individual plaintiff or plaintiffs, but rather, in a sense, on all citizens. This opens up the problem that different speech acts may evoke different kinds of responses in different hearers; the speech act of endorsement or proselytization may be successful or unsuccessful, depending on how

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117 E.g., SEARLE, supra note __, at 54-55 (describing such a project); BUTLER, ES, supra note __, at 25.
118 I have discussed in depth the problems invoked by the dependence of meaning on context – another aspect of the “conventionality” that affects the success or failure of speech acts. Hill, supra note ___. I therefore do not intend to cover that ground again here.
119 Austin, supra note __, at 117.
120 Searle, L&I, supra note __, at 409.
121 Cf. supra pp. ___ (discussing the difference between the opt-out remedy and the speech injunction remedy in Pledge of Allegiance cases).
it is received by a given speaker.

Ultimately, the problems evoked by the “uptake” requirement for illocutionary act simply reflect a problem inherent in language itself—perhaps particularly in language that is sufficiently controversial or divisive as to evoke varying responses among different individuals. Whenever a court must determine the social meaning of a phrase, symbol, or practice, the question of whose perspective is relevant will immediately arise. This problem certainly inheres in all of the jurisprudence concerning official references to religion, and the literature about government religious speech has already covered that ground extensively.122 I have discussed this problem elsewhere as well, and I have suggested, with others, that courts may use presumptions to minimize the subjectivity and majoritarian bias inherent in the social meaning inquiry.123 I therefore acknowledge the thorny problems posed by the reception of the speech among different hearers but doubt that it can be solved in an entirely satisfactory way. Nonetheless, it is partly my hope that a focus on issues such as social history and past divisiveness, discussed below in Part IV, might bring the problem of differing perspectives to the fore in a way that has previously been lacking, and it may force courts to consider the perspective of nonadherents to an extent that other proposals—such as encouraging courts to adopt the position of the “reasonable nonadherent”—are unlikely to do.124

B. Iterability and Change

Part III.A. has set forth the basic premises of speech act theory and explained their relevance to the problem of the social meaning of official religious references. But Austin’s theory does not aim specifically to account for the phenomenon of change in meaning over time or through repetition. Perhaps the theorist who has written at greatest length about the problem of change in meaning, under the general rubric of speech act theory, is Judith Butler. Drawing on

123 Hill, supra note __, at 530-33, 539-44.
Austin’s speech act theory, interpreted in a postmodern light, Butler has explored at length the ways in which the meaning of certain words and practices may change over time and through repetition. Butler has applied her insights to a number of problems not directly relevant to this Article, including gender roles, hate speech, and the military’s “don’t ask, don’t tell” policy with respect to homosexuals. This Article takes a novel approach both to Butler’s theory and to problems of social meaning in Establishment Clause cases, however, by attempting to explore the insights of speech act theory in connection with the problem of ceremonial deism.

At the heart of Butler’s theory is the longstanding insight, drawn in part from speech act theory, that language is inherently conventional. If language is conventional, it must function according to a set of learnable, and thus reproducible, rules. The functionality of language depends, in other words, on its ability to be repeated – on the ability of certain speech acts to be replicated in a variety of contexts. This ability to be repeated – or “iterability,” also means that any linguistic utterance is capable of being cut off from both its original context and its speaker’s intent and reproduced in a context that may change or undermine its prior meaning – in other words, a context that may remove or change its prior illocutionary force. Indeed, no speech act could function at all if this were not the case – that is, if it were not conventional and iterable. The conventionality and iterability of speech acts ensure that the speech act can be recognized, understood, and reproduced by different speakers and listeners, but it also means

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125 Butler’s work is influenced heavily by the French theorists Michel Foucault and Jacques Derrida. In fact, “[o]ne of the intentions of all of Butler’s work is to think further Foucault’s understanding of power and subjection, especially the way in which power is both restrictive and productive of subjectivity.” Stephen K. White, Book Review, 60 J. Politics 881, 881 (1998).


127 The notion of iterability, and its role in producing or changing meaning, belongs originally to the French philosopher Jacques Derrida. JACQUES DERRIDA, Signature Event Context, in LIMITED INC. 1, 18-19 (Samuel Weber & Jeffrey Mehlman trans., Gerald Graff ed., 1988). Derrida’s argument about iterability, which is briefly described above, was the subject of a famous (by academic standards, anyway) dispute between Derrida and John Searle, the essence of which is encapsulated in Derrida’s essay “Signature-Event-Context,” supra, Searle’s essay, “Reiterating the Differences: A Reply to Derrida,” 2 GLYPH 198 (1977), and Derrida’s rather lengthy and emphatic response to Searle’s reply, Limited Inc., DERRIDA, supra, at 29-107.
that it can be used in ways that may not have been originally intended. As Gordon Bearn explains, there are two consequences of the quality of iterability that inheres in all speech acts: first, it makes successful speech acts possible; and second, it makes unsuccessful speech acts possible.

Whatever one may consider the merits of this view for various other speech situations, its relevance for the sort of government speech involved in ceremonial deism seems inescapable. The fundamental quality of iterability is that it allows utterances to be meaningful when the speaker or the hearer, or both, are absent. Thus, the utterance must function “in the …absence of the receiver or of any empirically determinable collectivity of receivers…. A writing that is not structurally readable-- iterable--beyond the death of the addressee would not be writing;” and at the same time, “[f]or writing to be a writing it must continue to ‘act’ and to be readable even when … the author of the writing no longer answers for what he has written, because he is dead or, more generally, because he has not employed his … present intention or attention … [to] what seems to be written in his name.”

Butler echoes that point, tying it to the concept of conventionality: “The Austinian subject speaks conventionally, that is, is speaks in a voice that is never fully singular. . . . Who speaks when convention speaks? In what time does convention speak? In some sense, it is an inherited set of voices, an echo of others who speak as the ‘I.’”

Jonathan Culler gives the example of the employer’s signature on a paycheck. A signature signifies the intention of the signer to validate and stand behind the document. In order to function as such, however, the signature must be repeatable and recognizable – it must be able to be copied, and it can even be copied by a machine. Thus, the

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128 See generally CULLER, supra note __, at 118-20.
129 Bearn, supra note __, at 8. Bearn is summarizing Derrida here, and in doing so, Bearn espouses Derrida’s strong view that every speech act is not only potentially but actually “imperfect, incomplete, [and] unsuccessful.” Id. This is a version of the deconstructionist thesis regarding indeterminacy of meaning. Without going into the details of that view or Bearn’s highly articulate defense of it, I will simply note that one need not accept the premise that all speech is always indeterminate to accept the argument set forth in this Article, as the Article does not rely on that stronger thesis.
130 Bearn, supra note __, at 6 (noting that Derrida introduces the concept of iterability “to name the power of written marks to function, that is, to be readable, in the absence of the receiver and in the absence of the sender”).
131 Id. at 6 (quoting Derrida, SEC, supra note __, at 7-8).
132 BUTLER, ES, supra note __, at 25.
electronically produced signature on the thousands of paychecks issued by large corporations can perform their function in the absence of any present intention on the part of any particular signor or any particular recipient.\textsuperscript{133} Like the employer’s signature on a paycheck, the national motto on coins, along with many other examples of ceremonial deism – city names, the language of the Pledge, and even Christmas trees – function by means of this iterability; they must and often do function in the absence of any particular speaker or any particular intended hearer.

Drawing on this paradigm, Butler argues that the necessary iterability of language produces a certain “vulnerability” of meaning.\textsuperscript{134} Because this repeatable conventionality – this vast variety of actual and possible usages of a given term, both “serious” and “nonserious,” “successful” and “unsuccessful”— is a necessary condition of successful speech acts, Butler suggests that both past and future uses are, in a sense, contained within any single usage of a term. Thus, “[t]he illocutionary speech act,” according to Butler, “is never merely a single moment. The ‘moment’ . . . is a condensed historicity: it exceeds itself in past and future directions, an effect of prior and future invocations that constitute and escape the instance of utterance.”\textsuperscript{135} This linguistic vulnerability thus opens up the possibility of “resignification,” by which language at least in part breaks with its prior contexts and prior usages by being used in new ways and new contexts.\textsuperscript{136} While on the one hand each time a term is used, it invokes its past usages and thus “reconsolidates” them, reminding the reader or listener of its historical meanings, at the same time repetition allows for a break with the history of the term.

To take one example, we might consider the word “Amen.” Translated and transliterated from the Hebrew, the word “Amen” roughly means “so be it,” and is often used in or after prayers to express agreement or affirmation, with the implication that God has so willed. Because the word is iterable, however, it can be used in a variety of ways. Although not necessarily inherently religious, the

\textsuperscript{133} \textsc{Culler} at 125-26. Derrida nonetheless accepts the possibility of a “structural intentionality which is never anywhere present and which includes implications that never” entered the mind of any one individual. \textit{Id.} at 127.

\textsuperscript{134} Again, one need not accept Butler’s general critique or theory of language to accept its application to bureaucratic invocations of God and other instances of “speakerless” ceremonial deism discussed here.

\textsuperscript{135} Butler, \textsc{Es} at 3. Butler’s statement also reflects Derrida’s insight that the concept of an “event” is itself a construction. Derrida, \textsc{Sec} at __.

\textsuperscript{136} Butler, \textsc{Es} at 13-15.
word is recognizable as a religious affirmation when said in the context of a religious service. At the same time, it can be used in non-religious contexts and lose its religious meaning --- or even have the opposite meaning, perhaps when used ironically. One can imagine a conversation, for instance, in which a speaker, having proven the nonexistence of God, says, “And that is why God does not exist,” to which the sympathetic listener replies, “Amen.” It is because the second speaker has used the term “Amen” in a recognizable way, as an affirmation, following certain conversational conventions, that the usage is recognizable as such.137 Yet the word “Amen” is not being used in a religious way; in fact, it is used in precisely the opposite way. At the same time, the ironic impact of this usage can only arise because the speaker and listener are aware of the religious use to which the term is commonly put: the religious usages of the term inform the nonreligious usage and help to produce its meaning.

The jokes mentioned in the introduction to this Article, like “In God We Trust for the other eight cents,” work in a similar way. To use Butler’s terminology, the jokes are “legible [i.e., comprehensible] only in terms of the past from which [they] break[].”138 Yet the concept of resignification need not have application only when a phrase or term is used facetiously; any context that undermines or changes the prior meaning of a term will function in the same way. Thus, for example, in Lynch v. Donnelly, the Court, arguing that the City of Pawtucket’s crèche display simply “depict[ed] the historical origins” of the Christmas holiday, analogized to the religious paintings, primarily Christian in their orientation, that hang in the National Gallery.139 The museum context invoked by the Court shows that the changed context can, in a sense, remove any religious meaning from the work of art. Even if the artwork itself has deep religious meaning, in other words, its placement in the National Gallery does not suggest the illocutionary act of government endorsement of Christianity, but rather of depiction of religious events, or simply of visually “quoting” the artist’s religiously motivated expression.140

137 For example, it would not be similarly comprehensible if the speaker instead had replied, “I amen disagree with you.”
138 BUTLER, ES, supra note __, at 14. Butler is speaking about hate speech and its reappropriation by subordinated groups, but of course there is no reason that this mechanism must be limited to hate speech.
140 Cf. id. at 692 (O’Connor, J., concurring) (“[A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.”).
Butler’s theory thus suggests a certain tension in the citation, or repetition, of certain terms or speech acts. On the one hand, each usage of a term (such as the word “Amen,” or the Ohio motto “With God All Things Are Possible”) invokes the history of the terms and their various contexts and usages – religious and nonreligious. On the other hand, though, the past usages of a term cannot continue to dictate its future meanings, and the possibility of resignification – through presentation in a new context, or the willful act of the speaker, for example – always exists.\footnote{According to Butler, there is nothing automatic about the performative force of language. Each speech act requires an agent who, by citing the term, chooses to reinvoke its history. This fact has implications, therefore, for the concepts of agency and intentionality, which Butler reinterprets. Thus, Butler asks, “Does the ‘one’ who speaks the term cite the term, thereby establishing him or herself as the author while at the same time establishing the derivative status of that authorship? Is a community and history of speakers not magically invoked at the moment in which the utterance is spoken? And if and when that utterance brings injury, is it the utterance or utterer who is the cause of the injury, or does that utterance perform its injury through a transitivity that cannot be reduced to a causal or intentional process originating in a singular subject?” \textsc{Butler, ES}, supra note __, at 49. Since there is a space for agency on the part of the speaker who chooses to use the term, the speech act is not “sovereign” – it cannot automatically produce an effect or completely control the conditions under which it is used. At the same time, the speaker who uses the term is never its originator, and is in some sense simply citing others’ uses of the term – the speech of a “community and history of speakers.”} This means that “[t]he effects of performatives, understood as discursive productions, do not conclude at the terminus of a given statement or utterance, . . . . The reach of their significability cannot be controlled by the one who utters or writes, since such productions are not owned by the one who utters them. They continue to signify in spite of their authors, and sometimes against their authors’ most precious intentions.”\footnote{\textsc{Butler, BTM}, supra note __, at 241.}

The inherent vulnerability of language described by Butler has certain consequences. To the extent that language both names and enforces certain norms – to the extent, for example, that the words “In God We Trust” purport to describe a fact about American society, and thereby to reinforce the strength of that fact – it cannot be completely efficacious in its enforcement. It is always capable of being appropriated, for example, into the context of a joke about being eight cents short of payment in full. Thus, “[s]uch norms are continually haunted by their own inefficacy;” and this inefficacy leads, according to Butler, to “the anxiously repeated effort to install and augment their
Hence the struggle to keep the motto on the coins, to require its posting in schools, and so on. Repetition may be a technique for undermining a particular illocutionary force, but it may also be an attempt to counteract the inherent vulnerability of language and reinforce a particular illocutionary force. Thus, the illocutionary act succeeds only “to the extent that it draws on and covers over” the socio-historical context that give it its force -- what Butler calls “the constitutive conventions by which it is mobilized.” The motto “In God We Trust,” for example, succeeds in describing or imposing a view about American religious values to the extent that, in context, it both calls upon its historical usage – for example, its use as a unifying sentiment in the Civil War era, combining patriotism and religiosity – while denying its historicity and the multiplicity of potential and actual usages contained within that history – as in the “sacrilegious” jokes.

American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board illustrates this last point in a uniquely stark manner. That Sixth Circuit case turned away a constitutional challenge to the Ohio state motto, “With God All Things Are Possible,” which was adopted in 1959 and proposed to be inscribed in large letters in front of the statehouse. The district court denied the plaintiffs’ claim that the motto itself was unconstitutional, but it did enjoin the state from attributing it to the New Testament, from which the words were in fact adopted. The phrase thus having been stripped of its origins, the appeals court asserted that “[t]here is …

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143 BUTLER, BTM at 237.
144 Another interesting example of this phenomenon is contained in State Bd. of Educ. v. Board of Educ. of Netcong, New Jersey, 262 A.2d 21 (N.J. Super. Ct. 1970), in which the New Jersey Superior Court enjoined a local school district’s practice of reading the legislative prayer out of the Congressional Record to those students who wished to listen. Although the case was decided before Marsh v. Chambers, it is interesting to note that the court did not appear to believe the congressional practice of legislative prayer to be unconstitutional but found that the repetition of those prayers in a different context was an imposition of religion on the schoolchildren. Id. at 29-32. Like the AFA’s efforts to install the national motto in schools, the school district’s practice seems to be an attempt to shore up the religious message of those legislative prayers by repeating them in a context that enhances their religious force. Whereas the legislative prayers may go virtually unnoticed in the halls of Congress, with legislators entering and leaving throughout, the prayers’ recitation in the school context may draw special attention to their content.
145 BUTLER, BTM, supra note __, at 227; BUTLER, ES, supra note __, at 51.
146 243 F.3d 289 (6th Cir. 2001) (en banc).
147 Id.
148 Id. at 293.
nothing uniquely Christian about the thought that all things are possible with God.” It then proceeded to catalog, based on expert testimony, various appearances of the sentiment throughout a panoply of religious and philosophical traditions, including Greek philosophy, Judaism, Islam, and Hinduism; ultimately, the court agreed with the defendants’ expert that Jesus’ original statement in the New Testament “was simply using a proverbial phrase that was commonly known and accepted as true.” Indeed, the court even quoted expert testimony claiming that the phrase was functionally equivalent to Yogi Berra’s saying, “It’s never [sic] over until it’s over.”

Ironically, however, the history cited by the court both “draws on and covers over” the social and historical context that are both present and buried within the motto. Having papered over the motto’s origin in the New Testament, the court attempted to demonstrate the multiplicity of religious and philosophical traditions that embrace the motto’s sentiment. Yet arguably the force of the phrase – an injurious force for some – draws precisely on the fact that it does not say (as does Homer, quoted by the court) “to the gods all things are possible,” or, with Yogi Berra, “It’s never [sic] over until it’s over.” Rather, it is a phrase with specifically Christian origins, chosen from a sacred Christian text; it is nearly impossible to imagine that the state would have accepted a suggestion to modify the motto to read “to the gods all things are possible.” The motto thus gains its power from its religious origins; yet the court covers over those origins in suggesting that the phrase is nothing other than an uncontroversial and universally shared sentiment. The motto’s effectiveness as a religious statement thus arguably arises from its ability to draw on and cover over its original context.

To summarize, Butler’s theory suggests that meaning is not static; rather, it is capable of change over time. Thus, there may be support for the theory that repetition and long use may mitigate the religious force of a facially religious reference. At the same time,

149 Id. at 303.
150 Id. at 303-05.
151 Id. at 305 (internal quotation marks omitted). In fact, most sources quote Berra as saying “It ain’t over ‘till it’s over.” Apparently, Chief Justice Roberts was not the first to correct an icon’s grammar in quoting from the archives of pop culture. See Adam Liptak, The Chief Justice, Dylan and the Disappearing Double Negative, N.Y. TIMES, June 29, 2008 (Week in Review) (noting that Justice Roberts quoted Bob Dylan in Sprint Communications Co. v. APCC Servs., Inc., --- S. Ct. --- (June 23, 2008), but corrected his grammar, “proving that [Roberts] is neither an originalist nor a strict constructionist”).

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Butler highlights the complexities of this possibility, noting that repetition may, in certain contexts, permit new meanings to emerge, while still invoking and reinforcing the prior meanings on which those new meanings depend. The next section takes Butler’s and Austin’s insights and considers what they may mean for the constitutional analysis of ceremonial deism. Although no easy answers emerge, my hope is to present directions for a more nuanced analysis of the problem than courts and commentators have presented so far.

IV. POSSIBILITIES

It would be foolhardy at best to contend that the complex body of theory I have just described will yield easy answers to constitutional challenges, even in the unlikely event that courts were to import it wholesale into their decisionmaking apparatus. Rather, I have attempted simply to provide a structure to support the twin intuitions that meaning can change over time and that some facially religious expressions may no longer have the sort of religious effect that would violate the Establishment Clause. In this section, I take the next step by suggesting some ways in which these insights might affect courts’ analysis without, however, pretending to provide an easy analytical framework or a catalog of correct results. Nonetheless, I suggest below in Part IV.B. some specific ways in which linguistic theory could inform courts’ analysis of official religious references. But first, in Part IV.A., I consider the problem whether Butler’s theories can have anything at all to say about how courts should go about the task of interpretation.

A. With Judith Butler, All Things Are Possible?

Admittedly, Butler’s theory is one that is more at home with the lawyerly “It depends” than with the judicial “It is so ordered.” Her theory is focused on uses of language or symbols in a subversive way; it emphasizes play and the possibility of new meanings that subvert official meanings. Her preoccupation is with power in all its incarnations – whether judicial, legislative, executive, or simply majoritarian or de facto – and the possibilities for loosening the grip of

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152 One problem with determining results is the state of flux in which Establishment Clause jurisprudence finds itself at the moment. As I note above in Part ____, the Court is likely about to move from an endorsement test to a coercion or proselytization test for the constitutionality of official religious speech.
that power on individuals and on meaning.\textsuperscript{153} Her work aims to encourage, in her words, “nonjuridical forms of opposition, ways of restaging and resignifying speech in contexts that exceed those determined by the courts.”\textsuperscript{154} It is therefore counterintuitive to use Butler to suggest a means for courts to resolve disputes about social meaning, for a number of reasons.\textsuperscript{155}

First, Butler is opposed to granting such power over meaning to political sovereigns.\textsuperscript{156} Her opposition partly arises from the recognition that once one begins down the road of enhancing the state’s power over speech, that power may be used in ways that are less desirable from the perspective of those originally seeking the state’s protection.\textsuperscript{157} But even more important for Butler, perhaps, is that giving the power to determine meaning to state apparatuses perpetuates what she considers a dangerous fantasy: the notion that meaning can be fixed once and for all by the sovereign and that particular words always have their intended illocutionary effect.\textsuperscript{158} Such a mindset creates an illusion that the state has managed to overcome the endless potential for instability and play in speech acts – an illusion that, if accepted as real, may put an end to efforts to re-appropriate and resignify.

The uneasy role of state apparatuses in fixing social meaning has been discussed by other commentators as well. In his extended essay on monuments and the changing social responses to them over time, Professor Sanford Levinson gives numerous examples of how public monuments claim to represent the official meaning of historical events, consequently evoking enormous strife.\textsuperscript{159} “[M]onuments,” he asserts, “are quintessentially about time and who shall control the meaning assigned to Proustian moments of past time.”\textsuperscript{160} Professor Levinson gives the example of the Liberty Monument in New Orleans,

\begin{itemize}
  \item \textsuperscript{153} Butler draws largely on Michel Foucault’s conception of power as decentralized and ubiquitous. While power, for Foucault, is repressive, it is also fundamentally constitutive of both discourse and subjectivity. See generally White, supra note __, at 881.
  \item \textsuperscript{154} Butler, ES, at 23.
  \item \textsuperscript{155} I am grateful to both Florence Dore and Brian Ray for suggesting this line of argument to me.
  \item \textsuperscript{156} Butler, ES at __.
  \item \textsuperscript{157} Butler, ES at 23-24.
  \item \textsuperscript{158} See generally Butler, ES at 77-79.
  \item \textsuperscript{159} Sanford Levinson, Written in Stone: Public Monuments in Changing Societies (1998).
  \item \textsuperscript{160} Id. at 31.
\end{itemize}
which commemorates the “violent overthrow of the existing Louisiana government” by a group calling itself the White League, in defeating “an alliance of Republican whites and newly enfranchised African Americans.”\textsuperscript{161} Professor Levinson then discusses the various inscriptions added to the monument, “setting out what might be called, in our postmodern times, the officially privileged narrative of the events.”\textsuperscript{162} Insightfully, he adds that “[o]ne might well believe, of course, that [a particular] statement was designed more to \textit{create} a desired state of public consciousness than to describe accurately” the reality.\textsuperscript{163} Professor Levinson’s statement, like many of Butler’s, highlights the concern that states try to create a particular reality while appearing simply to describe it.

Others have bemoaned the fact that the Supreme Court often does the same with its historical exegesis. Mark De Wolfe Howe has pointed out, speaking specifically with respect to the Supreme Court’s now much-disputed use of history in its Establishment Clause cases, that we “tend to think that because a majority of the [J]ustices have the power to bind us by their law they are also empowered to bind us by their history;” and indeed, the Court’s assertions about history often become solidified in law and cited as precedent, just like the Court’s legal assertions.\textsuperscript{164} Likewise, the Court’s assertions about the religious or nonreligious meaning or effect of certain phrases and practices embed themselves in the doctrine, to be cited by other courts in the future. Numerous courts, for example, point to the Court’s dicta to assert that the national motto has lost its religious meaning over time or that the Pledge is a patriotic rather than religious exercise.\textsuperscript{165} The Congressional resolution encouraging display of the national motto in public buildings similarly refers to Supreme Court cases for the propositions that “the motto is a reference to the Nation's religious heritage;” that “the national motto recognizes the religious beliefs and practices of the American people as an aspect of our national history and culture;” and that “the motto recognizes the historical fact that our

\textsuperscript{161} \textit{Id.} at 45.
\textsuperscript{162} \textit{Id.} at 48.
\textsuperscript{163} \textit{Id.} at 49.
\textsuperscript{164} \textsc{Mark DeWolfe Howe, The Garden and The Wilderness} 5 (1965); cf. Green, \textit{supra} note __, at 1732-33 (“[W]hen the Court endeavors to write an authoritative chapter in the intellectual history of the American people, as it does when it lays historical foundations beneath its readings of the First Amendment, then any distortion becomes a matter of consequence.” (quoting Howe, \textit{supra}, at 4)).
\textsuperscript{165} E.g., \textit{Myers v. Loudon County Pub. Sch.}, 418 F.3d 395, 407 (4th Cir. 2005).
Nation was believed to have been founded ‘under God.’"\textsuperscript{166} This is precisely the sort of attempt to exercise sovereignty over speech acts and reinforcement of norms through repetition, of which Butler is highly suspicious.

As a final complication, Butler’s account of precisely how and why resignification occurs in any particular case is notoriously vague.\textsuperscript{167} Essentially, Butler contends that by putting speech acts into new contexts – those for which they were never official authorized or intended – the term can be opened up and often reappropriated by those whom it used to oppress.\textsuperscript{168} One might think of the use of the term “queer” by homosexuals or even the satirical context that gives “In God we trust for the other eight cents” its humorous meaning. Yet, Butler’s entire theory centers around the perpetual vulnerability of language; as such, one can never say that a term has been fully appropriated or has fully lost its prior meaning.\textsuperscript{169} As Butler says, such words “are not to be seen as merely tainted goods, too bound up with the history of oppression, but neither are they to be regarded as having a pure meaning that might be distilled from their various usages in political contexts.”\textsuperscript{170}

What, then, are we to do? Butler bafflingly suggests that “[t]he task, it seems, is to compel the terms of modernity to embrace those they have traditionally excluded, and to know that such an embrace cannot be easy …. This is not a simple assimilation and accommodation of what has been excluded into existing terms, but, rather, the admission of a sense of difference and futurity into modernity that establishes for that time an unknown future, one that can only produce anxiety in those who seek to patrol its conventional boundaries.”\textsuperscript{171} What this might mean practical terms – not to mention jurisprudential ones – remains rather obscure.

Nonetheless, while legislatures can simply choose not to regulate hate speech or pornography and courts can avoid creating a


\textsuperscript{168} BUTLER, ES, supra note __, at 160. On the problematic nature of context as a basis for interpretation, see Hill, supra note __.

\textsuperscript{169} Cf. CULLER, supra note__, at 131 (“[D]econstruction is not a theory that defines meaning in order to tell you how to find it.”).

\textsuperscript{170} BUTLER, ES, supra note __, at 161.

\textsuperscript{171} Id.
category of injurious speech unprotected by the First Amendment, as Butler urges, it is difficult to see how they can avoid answering the interpretive questions posed by plaintiffs raising a constitutional challenge to religious governmental speech.\footnote{Butler’s formulation of the problem and its suggested solution might recall Robert Cover’s thesis that courts should act in a “jurisgenerative” capacity, encouraging the multiple worlds of meaning created by diverse communities and institutions within society and accepting them as equally valid to its own. Robert Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 HARV. L. REV. 4 (1983); see also, e.g., Judith Resnik, Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover, 17 YALE J.L. & HUMAN. 17, 25 (2005) (arguing that Cover “wanted the state’s actors (here, its judges and, derivatively, commentators on their work) to be … aware of the possibility that multiple meanings and divergent practices ought sometimes to be tolerated, even if painfully so”). Again, however, it is not entirely clear how courts might do this in the context of constitutional challenges to ceremonial deism.} If courts refused to consider Establishment Clause challenges to religious government speech, for example, they would be facilitating that speech; they cannot decide not to decide in this area. As such, it seems clear that Butler’s theory of speech acts and change in meaning do not map neatly onto the problem of ceremonial deism or yield easy answers for deciding cases. Still, it is my contention that speech act theory and its more contemporary iterations may yield some insights that can be useful to courts, who so far have failed to articulate a theory of change in meaning over time and instead have created a distorting and arguably unprincipled exception to Establishment Clause doctrine when confronted with such cases.

B. One Doctrine Under Butler and Austin?

In this final section, I present two themes that emerge from the preceding discussion and their implications for Establishment Clause challenges to ceremonial deism. The first is that courts should keep their focus on the illocutionary force rather than the locutionary force of religious references. It is the act performed by the term or practice, and not its mere sense and reference, that are the principal concern. Second, courts should focus on the history of the term or practice in a particular way. Rather than engaging in what Steven Green has called “general history,” in which they “extrapolate[e] meaning from general historical facts removed from their context and announce[e] their commanding relevance for current practices,” courts must engage in a specific historical examination that includes...
consideration of the social history of the term or practice at issue. I explain these themes in greater depth below.

1. Illocution

At this point, it should be clear that it is no answer to the problem to say that words like God – or for that matter, “San Francisco” – have obviously religious meaning, and therefore that courts are fooling themselves when they claim they are secular. This may be true with respect to locutionary force, but not necessarily illocutionary force. As such, speech act theory suggests that it may be true that certain phrases can, in a sense, lose their religious meaning over time or through repetition. Of course, the way that courts have asserted such loss of religious meaning, largely offhand and without any serious justification or analysis, should not pass muster. Thus, this does not mean that it is a valid and supportable statement every time it has been made.

Thus, we cannot straightforwardly accept the notion that repetition alone minimizes the religious effect of invoking God, for example. This conclusion gives reason to be skeptical about certain claims by the Justices. For example, when Justice O’Connor argues that brief religious references serve “the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society,” speech act theory encourages us to ask why and how it can perform that function. Most likely it is because, to use Butler’s terms, such references invoke a prior, explicitly religious set of practices and beliefs, and thereby “accumulate[]” the force of authority through repetition or citation of those practices. The usage of those phrases relies on the religious force of prior usages to accomplish the act of solemnizing or expressing confidence, for example. In any case, the foregoing suggests that more careful attention to the distinction between the “sense and reference” of words and their force or effect is warranted.

173 Green, supra note __, at 1725, 1732.
174 As Butler has emphasized, “reiterations are never simply replicas of the same . . . If a performative provisionally succeeds . . . then it is only because that action echoes prior actions, and accumulates the force of authority through repetition or citation of a prior, authoritative set of practices.” B utler, ES, supra note __, at 51.
By contrast, city names like Corpus Christi and St. Louis are unlikely to carry the same sort of force. Although those names have obviously religious – even sectarian – content, when used as proper names to refer to long-established cities, they do not seem to carry an illocutionary force that can be described as proselytizing or endorsing religion. Indeed, the city names of San Francisco and Los Angeles may carry with them many connotations, but religiosity, sainthood, and angels are not among the most immediate that leap to the minds of most Americans. Similarly, in a careful and insightful opinion, the district court for the District of New Mexico recently turned away a challenge to a sculpture in front of the Las Cruces, New Mexico Sports Complex that included three artistically rendered Latin crosses. Given that the city name of Las Cruces means “the crosses” in Spanish and probably originally referred to groups of crosses that marked massacre sites from colonial times in the area where the city was founded, the court sensibly noted that the crosses constituted a literal representation of the “uniquely named geopolitical subdivision” – a representation that is also found on the city’s official seal – “rather than an endorsement of Christianity.”

The distinction between illocution and locution, combined with a careful look at the history of the name, may well assist in drawing a distinction between religious city names and other religious practices. Of course, the ultimate outcome will depend on the facts of each individual case, and there are undoubtedly tales of religious conquest lurking behind some city names that may or may not retain their ability to wound. This is not to suggest that determinations of social meaning or illocutionary effect are straightforward or simple; they will often require extremely fine contextual judgments. But in many cases the distinction between the city’s religious name and its

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176 Under Justice O’Connor’s test for constitutionally acceptable ceremonial deism, which considers, in part, whether the challenged phrase has sectarian content, the city name of Corpus Christi would presumably raise some difficulties, although the other factors of her test (“history and ubiquity,” “absence of worship or prayer,” and “minimal religious content”) would presumably cut in the other direction. United States v. Newdow, 542 U.S. 1, 37-44 (2004).


178 Id. at 1132-33; 1149.

179 For example, some cities with religious names are named after the Christian missions from which they developed. Cf. Harris v. City of Zion, 934 F.2d 141, 142 (7th Cir. 1991) (Cudahy, J., dissenting from denial of rehearing en banc) (noting that the City of Zion, Illinois “was founded, named and emblematized as an act of protestant evangelism” approximately 100 years ago).
nonreligious effect should be relatively easy to draw.

2. History

Most importantly, speech act theory suggests the importance of history in analyzing meaning. Postmodern theories of language “emphasize[] that discourse, meaning, and reading are historical through and through, produced in processes of contextualization, decontextualization, and recontextualization.”\(^{180}\) For the most part, however, courts have not used history in appropriate ways. As described above, courts have often simply noted the frequency of a particular term or practice, or they have noted the ubiquity of the Framers’ religious practices and religious acknowledgement in general, drawing from these facts conclusions about the constitutionality of specific practices. Yet this sort of historical approach, which “appeals to historical narratives – stories of changes in thinking and of the thoughts or beliefs appropriate to distinguishable historical periods,” is overly simplistic and fails to capture the genuine historical quality of meaning.\(^{181}\) Moreover, such history proceeds by “interpreting the supposedly less complex and ambiguous texts of a period,” assuming a purity and clarity of motives and understandings in an earlier time that no longer exist in our time.\(^{182}\)

Instead, the history used by courts to determine meaning should be both specific to the term or practice at issue, rather than drawing on sweeping historical narratives, and attentive to issues of power and social subordination. The need for specificity can be derived from the lessons of speech act theory. Speech act theory considers on the illocutionary effects produced by a particular locutionary act, and, in Butler’s version, on the history of usages of a particular term. Although the broader context in which the term is mobilized will always come into play, the focus must be on the specific term or practice at issue.\(^{183}\) In this way, the history can be

\(^{180}\) Culler, supra note __, at 128. Culler is speaking of deconstruction in general here, but the quoted language is equally true of Butler, whose theories sit comfortably in the deconstructionist tradition.

\(^{181}\) Culler, supra note __, at 129. Instead of “terms,” Culler says “works,” because he is speaking of historical approaches to literary theory.

\(^{182}\) Culler, supra note __, at 129.

\(^{183}\) Cf. Conkle, supra note (WVA) __, at 335 (discussing different levels of generality at which history and tradition may be examined in Establishment Clause inquiries and appearing to prefer the more specific approach).
used to understand the social meaning of the term itself, and not just
to draw a conclusion about its constitutionality by analogizing to
other historical practices or by means of an “any-more-than” test.

In addition, the historical approach should examine, to the
extent possible, the social history of the term, practice, or symbol,
with attention to the power relations it might imply. Since, as Butler
argues, the various usages to which a term has historically been put
inform the current illocutionary force, it seems that attention should
be paid to those past usages– including their religious or nonreligious
nature and the presence or absence of subordination of certain
religious groups. This would entail consideration of whether in the
past the phrase has been divisive, has been used as an endorsement of
a particular religious belief, and whether it has had the effect of
oppressing religious minorities. It would also be important to
consider whether there is something about the current usage of the
phrase that suggests it is being used in a way that deviates or breaks
from past usages.

Some of the Justices have suggested that the present or recent
divisiveness of a religious symbol is particularly relevant to its
constitutionality – most prominently in the recent Decalogue
decisions, *McCreary County v. ACLU* and *Van Orden v. Perry*.184
This approach has been much criticized.185 Indeed, the notion that a
lack of present divisiveness may prove that a symbol is
constitutionally unproblematic recalls Judith Butler’s suggestion that
the performative succeeds “to the extent that it draws on and covers
over the constitutive conventions by which it is mobilized.” The lack
of present divisiveness, in other words, may only indicate the success
with which the symbol, practice, or term has covered over the power
dynamics from which it arose and from which it continues to draw its
force. The focus on social history urged by this Article would not
consider (or not only consider) present divisiveness, therefore, but
rather past divisiveness and indications of religious subordination
associated with the disputed symbol.

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184 *Van Orden v. Perry*, 542 U.S. 677, 702-04 (2005) (Breyer, J., concurring); id. at
709 (Stevens, J., dissenting); *McCreary County v. ACLU* of Ky., 545 U.S. 844, 876
(2005). Of these opinions, the most remarked-upon is Justice Breyer’s concurrence
in *Van Orden*, since he there appeared to elevate divisiveness to a the level of an
actual test for determining the outcome in Establishment Clause cases.

GEO. L.J. 1667 (2006); Muñoz, *supra* note __, at 395; Erwin Chemerinsky, *Why
Justice Breyer Was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL RTS. J. 1,
3-4 (2005).
While an inquiry focusing on past divisiveness and religious subordination would not always be a clear-cut one, leading to concrete answers, at least two opinions in past Establishment Clause cases provide a model for the approach advocated here. First, Justice Thomas’s brief concurring opinion in *Capitol Square Review & Advisory Board v. Pinette* demonstrates the proper focus on both the specific symbol at issue and the history of subordination that accompanies it. In *Pinette*, which revolved around the question whether the display of an unattended Latin cross sponsored by the Ku Klux Klan in a public forum near the seat of state government would violate the Establishment Clause, Justice Thomas agreed with the result – permitting the cross on free speech grounds – but disagreed with the majority’s basic premise that the cross was a religious symbol. Examining specifically the Klan’s use of the cross throughout its history, Justice Thomas admitted that occasionally the cross took on religious connotations but primarily concluded that “[t]he Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate,” and therefore that the case really did not “involve[] the Establishment Clause.” Recognizing the symbol’s use for racial rather than religious subordination and intimidation by the Klan for the bulk of its history, Justice Thomas’s concise but subtle opinion takes the position that the cross, in this context, has lost its religious meaning through its repetitive use and appropriation in a variety of non-religious contexts. Surely this viewpoint has a certain intuitive force, no doubt in part because it focuses specifically on the Klan cross itself.

The second opinion that exemplifies the approach advocated by this Article is Justice Brennan’s dissenting opinion in *Lynch v. Donnelly*. Justice Brennan’s opinion criticizes the majority opinion in that case for drawing on the general history of religious acknowledgement by official entities in upholding a nativity scene display erected by a municipality at Christmastime. Justice Brennan’s opinion focused on both the history of public celebration of Christmas and of nativity scenes – “the special history of the practice under review” – and concluded that the public celebration of Christmas and various aspects of the holiday symbolism were a source of divisiveness among Christian sects until approximately the mid-nineteenth century. Justice Brennan’s dissent is aimed

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187 *Id.* at 771.
primarily at refuting the majority’s argument that Christmas celebrations and displays were constitutionally uncontroversial because of a historical practice of religious acknowledgement embraced by the Founders, rather than attempting to determine the illocutionary force of the symbols, so it does not necessarily answer the sort of questions that this Article advocates considering. Nonetheless, it displays the sort of attention to social history – noting, for example, the tensions between the Puritans and the Catholics that the public celebration of Christmas evoked – that is largely lacking from other opinions dealing with official religious speech.

In the case of the Pledge and the national motto, it is difficult to ignore the fact that those practices are associated with periods in our history of intermixed religious and patriotic sentiment – namely, the Civil War and the Cold War. In addition, at least one historian suggests that the consolidation of Christmas as a national holiday with both religious and secular overtones, celebrated almost universally, also dates from the Civil War era and is in no small part associated with the post-Civil War search for a unifying national identity. This recent history and the force with which it infuses those practices are both complex and highly relevant to the Establishment Clause analysis. On the one hand, they lend credibility to the notion that they are mere patriotic rather than religious exercises. On the other hand, it is precisely this intermingling of piety and patriotism – the national unification under the umbrella of religion that is both described and enforced by those practices – that is troubling to nonadherents. While linguistic theory offers no easy answers here, it does suggest that the latter aspect, which recognizes the various usages of the contested phrases, symbols, and practices as well as the political context that gave rise to them, is the more powerful source of interpretation.

V. CONCLUSION

This Article begins from the intuition that not all forms of ceremonial deism are identical and from the assumption that, contrary

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189 See, e.g., Van Alstyne, supra note __, at 786 (“Jingoistic desires to paint a vivid contrast in the Cold War, separating ourselves, claiming ‘God’ within ‘our’ government, for sanctimonious contrast with ‘Godless atheistic’ Communism, made the deliberate appropriation of a pervasive religiosity an irresistibly useful instrument of state policy.”)

190 RESTAD, supra note __, at 91-104.
to the views of some skeptics, meaning can change over time in ways that are relevant to Establishment Clause doctrine. Drawing on speech act theory, it argues that the iterability of language opens it up to a variety of possible meanings, through which even facially religious language may lose its religious force. This is not to say that mere repetition or long use always deprives a symbol, term, or practice of its force, however: the offhand way in which the assertion is often made by judges is clearly unsatisfying from a theoretical and doctrinal standpoint. This Article therefore argues that courts should consider both the illocutionary force and the social history of a term when deciding whether it retains its religious meaning. While not adding up to a perfectly determinate test for challenges to ceremonial deism, this approach is nonetheless an improvement over the current state of affairs.

This Article does not set out a clear set of answers to difficult Establishment Clause questions. Instead, it suggests general directions for an analysis of ceremonial deism that draws on the insights of linguistic theory. In addition, it attempts to lay some theoretical groundwork under a concept that has remained largely unsupported. In so doing, it also aspires to remedy the distortion in the doctrine that occurs when ceremonial deism is treated as an exception that is subject to no particular Establishment Clause test and no articulable standards. Finally, it responds to the concerns of the commentators who point out the obviously religious sense and reference of the phrases of ceremonial deism, while at the same time avoiding the pitfalls of the originalism that is the common response to those commentators.