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OF CHRISTMAS TREES AND CORPUS CHRISTI: CEREMONIAL DEISM AND CHANGE IN MEANING OVER TIME

B. JESSIE HILL†

ABSTRACT

Although the Supreme Court turned away an Establishment Clause challenge to the words “under God” in the Pledge of Allegiance in Elk Grove Unified School District v. Newdow, the issues raised by that case will not go away anytime soon. Legal controversies over facially religious government speech have become one of the most regular and prominent features of Establishment Clause jurisprudence—and indeed, a second-round challenge to the Pledge of Allegiance is currently percolating, which will likely result in resolution by the Supreme Court. That resolution will depend on an understanding of the social meaning of the practice at issue.

This Article addresses the constitutional analysis of “ceremonial deism”—brief official religious references such as the words “under God” in the Pledge of Allegiance, the national motto “In God We Trust,” and the city names Corpus Christi and St. Louis. Courts have generally stated in holdings and dicta that ceremonial deism is constitutional because these phrases have lost their religious meaning through the passage of time or rote repetition. To examine this

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claim—the “secularization” thesis—this Article 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 the analysis of social meaning, this Article contends that some insights about the problem of ceremonial deism may be found there, lending depth to an argument that has gone almost entirely untheorized by those who have espoused it. Finally, this Article considers the implications of this analysis for the constitutionality of these official religious references. Ultimately, while recognizing that meaning can change over time in some instances, this Article concludes that courts should be skeptical of this claim and should instead adopt a rebuttable presumption of enduring religious meaning when confronted with constitutional challenges to instances of ceremonial deism.

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The past is never dead. It’s not even past.

– William Faulkner, REQUIEM FOR A NUN¹

QUESTION: [I]s it the Government’s position that the words, under God, have the same meaning today as when they were first inserted in the pledge?

MR. OLSON: Yes and no

QUESTION: Because it’s a terribly important question.

Oral argument, *Elk Grove Unified School District v. Newdow*²

INTRODUCTION

The history of America’s national motto is in part a history of wars, both real and cultural. “In God We Trust” first came to be imprinted on coins in response to pleas like that from Reverend M.R. Watkinson to the Secretary of the Treasury, Salmon P. Chase.³ Writing in 1861, in the midst of the Civil War, Reverend Watkinson exhorted: “What if our Republic were now shattered beyond reconstruction. Would not the antiquaries of succeeding centuries rightly reason from our past that we were a heathen nation.”⁴ What was needed, he continued, was an inscription on American currency that “would relieve us from the ignominy of heathenism” and “place

1. WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951).
 2. Transcript of Oral Argument at 19, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (No. 02-1624).
 3. U.S. Dep’t of the Treasury, Fact Sheet on the History of “In God We Trust,” <http://www.treas.gov/education/fact-sheets/currency/in-god-we-trust.shtml> (last visited Nov. 1, 2009). Discussion of the history of the national motto and its inscription on currency may also be found in ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 568–71 (2d ed. 1964), and Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2122–24 (1996).
 4. The Coin Library, In God We Trust on U.S. Coinage, <http://www.coinlibrary.com/info/ingodwetrust.html#Rev.%20Watkinson's%20Letter> (last visited Nov. 1, 2009). The U.S. Treasury website misquotes this letter. U.S. Dep’t of the Treasury, *supra* note 3 (“What if our Republic were not shattered beyond reconstruction?”).

us openly under the Divine protection we have personally claimed.”⁵ 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 Act of May 18, 1908, made it mandatory on all coins upon which it had previously appeared.”⁶ The phrase “In God We Trust” became the national motto in 1956.⁷

The brief suspension of the motto’s inscription between 1907 and 1909 occurred because President Theodore Roosevelt commissioned a new design for the coins that did not include the motto.⁸ 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 God we trust for the [other] 8 cents.”⁹ The historical evidence suggests, however, that the decision was aesthetic rather than religious or constitutional in motive.¹⁰ In response to the ensuing popular uproar, Congress passed a bill requiring that the motto appear on coins again, and Roosevelt signed the bill.¹¹ 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

5. U.S. Dep’t of the Treasury, *supra* note 3.

6. *Id.*

7. *Id.*

8. Willard B. Gatewood, *Theodore Roosevelt and the Coinage Controversy*, 18 AM. Q. 35, 37 (1966).

9. President Roosevelt’s statement defending the motto-less coins appeared in the *New York Times* on November 14, 1907. *Roosevelt Dropped ‘In God We Trust,’* N.Y. TIMES, Nov. 14, 1907, at A1. 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 3, at 568, or because the legislation was inadvertently omitted from the Revised Statutes of 1874, Gatewood, *supra* note 8, at 40 & n.20.

10. Gatewood, *supra* note 8, at 37, 41.

11. *Id.* at 50.

national motto.¹² Around the same time, the Pledge of Allegiance was amended to include the words “under God.”¹³

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.”¹⁴ For a time, the AFA offered to provide a prototype poster, free of charge, that contained the motto in large capital letters on an American flag background.¹⁵ Seventeen state legislatures have required such postings.¹⁶ And in 2000, the U.S. House of Representatives overwhelmingly passed a resolution encouraging display of the national motto in public buildings.¹⁷

The history of the motto demonstrates in many ways the dynamic concerning brief official references to religion—commonly known as “ceremonial deism”—that is central to this Article’s argument. It is a story about conflating the patriotic and the religious as a means of consolidating a national identity and, simultaneously, suppressing dissent. Both the introduction of the motto on coins and its official adoption by the national government occurred in contexts of religion-infused hypernationalism. Yet, it is also a story about the historicity of language—its ability to convey different messages in different historical contexts, from quasi-sacrilegious humor to a sincere assertion of the supremacy of God over human affairs. Finally, it is a story about the ability of language not only to describe

12. STOKES & PFEFFER, *supra* note 3, 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 it was at the Founding); William Van Alstyne, Comment, *Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall — A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 786 (describing the combined religious and patriotic fervor that prevailed both during the Civil War era and in the 1950s, when the motto was officially adopted and the words “under God” were added to the Pledge).

13. The Pledge was amended in 1954. Act of June 14, 1954, ch. 297, Pub. L. No. 83-396, 68 Stat. 249; *see also* STOKES & PFEFFER, *supra* note 3, at 570–71 (describing how a sermon attended by President Eisenhower in February 1954 spurred the Act’s speedy passage, with the president signing it into law in May 1954).

14. Am. Family Ass’n, ‘In God We Trust’ Poster Campaign, <http://www.afa.net/igwt/> (last visited Nov. 1, 2009). I am grateful to Cassandra Robertson for bringing this website to my attention.

15. *Id.* (describing the poster campaign and displaying an image of the poster).

16. *Id.* (follow “Click here to see if your state already has a law” hyperlink). Those states are Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, North Carolina, Oklahoma, Tennessee, Texas, Utah, Virginia, and West Virginia. *Id.*

17. H.R. Res. 548, 106th Cong. (2000).

but also to create a certain reality. Indeed, one cannot help but suspect that the act of instituting the national motto, or of requiring its posting in schools, is not so much an act of describing a universal truth as an attempt by a political or religious faction to install or shore up that reality.

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 violates the Establishment Clause of the First Amendment?¹⁸ 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.¹⁹ 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.²⁰

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. Nonetheless, the AFA’s campaign to reinject God into the public school classroom demonstrates that the

18. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

19. *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir. 1996); *Aronow v. United States*, 432 F.2d 242, 243–44 (9th Cir. 1970); *Newdow v. Cong. of the U.S.*, 435 F. Supp. 2d 1066, 1075–76 (E.D. Cal. 2006); *O’Hair v. Blumenthal*, 462 F. Supp. 19, 19–20 (W.D. Tex. 1978); cf. *Lambeth v. Bd. of Comm’rs*, 407 F.3d 266, 270–72 (4th Cir. 2005) (rejecting a challenge to a particular county’s decision to inscribe the national motto on the façade of a government building, largely based on the view that the motto is secular). One challenge was rejected on procedural grounds. *Schmidt v. Cline*, 127 F. Supp. 2d 1169, 1172–79 (D. Kan. 2000) (rejecting on standing and mootness grounds the plaintiffs’ challenge to the county treasurer’s display of a particular poster bearing the national motto but also noting that the plaintiffs’ challenge to the motto fails on the merits based on the Tenth Circuit’s opinion in *Gaylor*). Other challenges, not constituting direct Establishment Clause attacks on the motto itself, have also been raised and rejected. See *Keplinger v. United States*, No. 4:CV-06-946, 2006 WL 1455747 *passim* (M.D. Pa. May 23, 2006) (turning away a pro se challenge by a prisoner seeking to replace the word “God” with the word “Yahweh” in the Pledge, the national motto, and the song “America the Beautiful”); *Myers v. Loudoun County Sch. Bd.*, 251 F. Supp. 2d 1262, 1273–75 (E.D. Va. 2003) (rejecting an as-applied challenge to a public school’s display of a particular poster, which was donated by a religious group, bearing the national motto).

20. *Gaylor*, 74 F.3d at 216.

motto's meaning is still flexible and open-ended: if the motto has lost its religious force through time and repetition, the AFA, at least, must believe that that force can be revived.

In the United States, the public culture is replete with brief official acknowledgements of religion that initially appear innocuous but pose thorny Establishment Clause problems. Examples range from the national motto, to 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.²¹ These brief religious references are often labeled ceremonial deism, although that term in many ways obscures more than it illuminates with respect to the broader set of phenomena discussed here.²² Some brief religious references—such as city names—are not accurately described as ceremonial, in that they do not have a ritualistic or solemnizing quality. Nor are all instances of so-called ceremonial deism in fact deistic—that is, they do not reflect a point of view that embraces belief in God but is nonsectarian. The phrase "in the year of our Lord" is a clear reference to Jesus Christ, and the use of saints' names for city names is associated primarily with Roman Catholicism, which is unique in its recognition and

21. A.D. stands for *anno domini*, Latin for "in the year of the Lord."

22. The phrase "ceremonial deism" was coined in 1962 by Eugene Rostow, former dean of the Yale Law School, 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 3, at 2091. Epstein misattributes the phrase to Walter Rostow. Epstein, *supra* note 3, at 2091. Epstein defines ceremonial deism as

all practices involving: 1) actual, symbolic, or ritualistic; 2) prayer, invocation, benediction, supplication, appeal, reverent 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.

Id. at 2095. 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 their regulation may raise free speech or free exercise concerns. *Id.* at 2142–43. I therefore do not address them further here.

In *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), 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 "[h]istory and [u]biquity," "[a]bsence of worship or prayer," "[a]bsence of reference to [a] particular religion," and "[m]inimal religious content." *Id.* at 37–44 (O'Connor, J., concurring in the judgment).

eneration of particular saints. This Article nonetheless retains the term “ceremonial deism” as convenient shorthand, although the Article’s scope is both broader and narrower than that phenomenon—broader because it includes practices and brief linguistic references that are neither ceremonial nor merely deistic, but narrower because it focuses only on one justification for retaining those practices, namely, the “secularization” thesis.

The focus of this Article is thus the wide range of practices, phrases, and other brief or passing religious references espoused by the government that have generally flown under the Establishment Clause radar, particularly on the theory that they somehow have lost their religious meaning. One might include in this list certain practices, such as the public celebration of the Christmas holiday or Sunday liquor laws. These examples may appear constitutionally problematic to a greater or lesser degree, but they are typically justified on the ground that, though religious in origin, they no longer carry any religious impact.²³ As discussed below in Part I, both courts and commentators have dealt with such phrases, symbols, and practices in largely unsatisfactory ways, but the primary argument for their constitutionality is that they have lost their religious meaning through history or rote repetition.

After describing how courts and commentators have addressed these sorts of practices, Part I of this Article briefly places the problem of ceremonial deism into the larger context of Establishment Clause doctrine, much of which is in flux or disarray. Despite this state of disorder, legal challenges to ceremonial deism are likely to arise in the near future—and indeed, a second-round challenge to the Pledge of Allegiance is currently percolating—requiring resolution by

23. Indeed, one commentator has defined ceremonial deism as “acts that have largely or totally lost their religious significance because of their passive character or their long-standing repetition in a civic context.” Andrew Rotstein, Note, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763, 1772 (1993). Less common, but also relevant to the phenomenon of changed social meaning over time, are symbols or practices that have secular origins but have taken on religious meaning. One might argue that this is the case with Christmas trees or the entire symbology surrounding the Easter holiday. 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 day] 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.”).

the Supreme Court.²⁴ Regardless of the particular doctrinal framework the Court adopts, resolution of future challenges will depend on an understanding of the social meaning of the practice at issue, and particularly on whether a phrase or practice may be understood to convey a religious message or to have lost that religious meaning.

Part II then outlines one particular branch of linguistic theory, known as speech act theory, and sets forth several important elements of that theory as they apply to the problem of ceremonial deism and change in meaning over time.²⁵ Speech act theory is a particularly useful instrument for analyzing ceremonial deism because, as explained in Part III, it is uniquely helpful for interpreting social meaning.²⁶ With its emphasis on illocutionary force over propositional content, speech act theory emphasizes the *effects* of utterances over their literal meaning, much like the Supreme Court's current Establishment Clause tests for determining the constitutionality of symbolic religious references. But unlike most court opinions on ceremonial deism, speech act theory has grappled carefully and thoroughly with the difficult problem of how those effects may be discerned, and with the effects on meaning of repetition and shifting political and historical contexts. Speech act theory does not change

24. *Newdow v. Cong. of the U.S.*, 383 F. Supp. 2d 1229, 1241 (E.D. Cal. 2005) (holding that the Ninth Circuit's prior opinion, which held 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. *Newdow v. Rio Linda Union Sch. Dist.*, No. 05-17344 (9th Cir. argued Dec. 4, 2007). The same plaintiff, Michael Newdow, has also brought suit in the Eastern District of California, challenging the constitutionality of the national motto. *Newdow*, 435 F. Supp. 2d at 1075-76. Given that there was binding Ninth Circuit precedent holding the motto constitutional, *Aronow*, 432 F.2d at 244, the claim was dismissed, but an appeal of that case is also pending in the Ninth Circuit. *Newdow v. Cong. of the U.S.*, No. 06-16344 (9th Cir. argued Dec. 4, 2007). Oral argument was heard on the same date as the argument in the Pledge case. Similarly, in December 2008, Newdow filed a complaint challenging the use of the phrase "So help me God" in the presidential inauguration. Newdow's request for a preliminary injunction was denied on January 16, 2009, *Newdow v. Roberts*, No. 08-02248, slip op. at 2 (D.D.C. Jan. 16, 2009), and an appeal is pending, *Newdow v. Roberts*, No. 09-5126 (D.C. Cir. appeal docketed Apr. 9, 2009).

25. In drawing on theories of language, and in particular on a branch of the philosophy of language known as speech act theory, I am continuing a project I began with an earlier 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 *passim* (2005).

26. *See id.* at 512-14.

the doctrinal analysis to be applied to religious references, but rather provides a methodology for answering the questions that courts already ask in such cases.

Thus, Part II begins by introducing the concept of illocutionary effect, which is perhaps the central contribution of speech act theory. It then describes some of the central characteristics of speech acts, including their conventionality and the requirement of uptake. It also explains the inherent tension that arises from the conventionality of speech acts, by which meaning is both vulnerable and surprisingly persistent.

Part III considers the doctrinal implications of this theory. First, it explains why speech act theory is particularly relevant to the problem of ceremonial deism, and second, it outlines a basic doctrinal test, drawing on the principles of speech act theory, that courts should use when deciding the permissibility of an instance of ceremonial deism under the Establishment Clause. In particular, this Article argues that courts should be skeptical of the “secularization” claim and, to reflect this skepticism, should adopt a rebuttable presumption of enduring religious meaning when confronted with constitutional challenges to instances of ceremonial deism. After describing how this rebuttable presumption might work in practice, Part III concludes with some examples.

I. CEREMONIAL DEISM AND THE SECULARIZATION THESIS

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.

Scholarly commentators have discussed the problem at somewhat greater length. Nonetheless, as discussed below, none of the analyses get to the heart of the problem. In the next Part, I argue that theories of language—and particularly theories about how meaning can change—might provide some new insight into the problem of ceremonial deism. But first, this Part expands on the case law upholding or suggesting the constitutionality of several different

instances of ceremonial deism and elucidates the secularization theory behind those cases.²⁷

A. *The Secularization Thesis*

The origins of the secularization thesis—the notion that some phrases or practices may be constitutional because they have lost their religious meaning over time—are not entirely clear. The thesis has made an appearance in a number of Supreme Court cases, but most of those did not directly adjudicate challenges to brief official religious references. In addition, the secularization thesis has usually appeared in those cases without explanation and alongside other more compelling rationales. Lower courts have nonetheless seized on the thesis in disposing of challenges to ceremonial deism.

Somewhat inexplicably, courts analyzing ceremonial deism often rely on the *sui generis* case *Marsh v. Chambers*,²⁸ in which the Court considered the constitutionality of Nebraska's practice of starting legislative sessions each day with a prayer led by a chaplain paid by the state. In upholding the practice of legislative prayer in *Marsh*, the Court did not apply any of the usual tests that it applies in other Establishment Clause cases, but rather somewhat departed from its precedent in reasoning that "history and tradition" support the constitutionality of the practice.²⁹ In an opinion that even Justice Brennan's dissent characterized as "narrow and, on the whole, careful,"³⁰ 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 other states have also engaged in the practice for an extended period of time.³¹ This "unique history" led the Court to decide that the practice was constitutional, while implying that the analysis was not likely to have much application beyond the specific practice of legislative

27. For another description (and criticism) of the secularization thesis, see generally Alexandra D. Furth, Comment, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis*, 146 U. PA. L. REV. 579 (1998). Furth defines secularization as "the Supreme Court's determination that practices and symbols which were once religious have lost their religious significance, through either temporal or contextual erosion." *Id.* at 584.

28. *Marsh v. Chambers*, 463 U.S. 783 (1983).

29. *Id.* at 786.

30. *Id.* at 795 (Brennan, J., dissenting).

31. *Id.* at 787–91 (majority opinion).

prayer.³² The Court also suggested that the practice was a mere “acknowledgement” of the importance of religion in American society and has become part of the “fabric of our society.”³³

As one commentator noted, despite its narrow drafting, *Marsh* has been read in a number of ways: “as grandfathering long-established customs”;³⁴ as “a standard for what the Establishment Clause must be thought to allow,”³⁵ based on “historical practices and understandings”;³⁶ and as “an illustration of how repetition can secularize what might otherwise be considered religious.”³⁷ 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.”³⁸

A conceptual predecessor to *Marsh* is *McGowan v. Maryland*,³⁹ decided twenty-two years earlier. In *McGowan*, the Supreme Court 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),

32. *Id.* at 791. For an excellent critique of the Court’s reasoning in *Marsh*, and particularly its claim that legislative prayer, at least on the congressional level, was uncontroversial throughout its long history, see generally Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171 (2009).

33. *Marsh*, 463 U.S. at 792.

34. Mark Strasser, *Establishing the Pledge: On Coercion, Endorsement, and the Marsh Wild Card*, 40 IND. L. REV. 529, 574 (2007).

35. *Id.* at 575.

36. *Id.* (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

37. Strasser, *supra* note 34, at 574–75.

38. *Freethought Soc’y v. Chester County*, 334 F.3d 247, 266 (3d Cir. 2003). Just one year after *Marsh*, the Court cited *Marsh* but applied a slightly different approach to uphold the constitutionality of a Christmas display in a public park that was maintained by the city of Pawtucket, Rhode Island. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), Chief Justice Burger stated, “There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” *Id.* at 674. Then, after cataloging the abundance of “official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders,” the Chief Justice’s majority opinion concluded that the crèche display merely “depict[ed] the historical origins of this traditional event long recognized as a National Holiday” and was therefore “no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as ‘Christ’s Mass,’ or the exhibition of literally hundreds of religious paintings in governmentally supported museums.” *Id.* at 675–78, 680, 683. In *Lynch*, the Court purported to apply the so-called *Lemon* test, in which a court considers whether the purpose and effect of the government’s actions are religious or secular, as well as whether there is excess administrative entanglement of religion and state. *Id.* at 680–85.

39. *McGowan v. Maryland*, 366 U.S. 420 (1961).

their purpose had become simply to permit a universal day of rest.⁴⁰ 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 even though they were “undeniably religious in origin.”⁴¹ The Court’s analysis relied in part on the history of Sunday closing laws, including the numerous changes in the language and structure of those laws that suggested they had evolved.⁴²

This analysis 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,”⁴³ but agreed that they were constitutional despite their facially religious language and original intent.⁴⁴ 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.”⁴⁵ 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 original purpose for adopting it—its analysis invokes, and is sometimes used to support, the notion that religious meaning may be lost over time.⁴⁶

On the whole, though, the Supreme Court has shown no great appetite for addressing the constitutionality of ceremonial deism. In *Elk Grove Unified School District v. Newdow*,⁴⁷ it famously dodged a squarely presented question regarding the constitutionality of the words “under God” in the Pledge of Allegiance by turning the case

40. *Id.*

41. *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.

42. *Id.* at 431–40, 448–49.

43. *Id.* at 460 (Frankfurter, J., concurring).

44. *Id.* at 459–95.

45. *Id.* at 503–04.

46. *E.g.*, *Van Orden v. Perry*, 545 U.S. 677, 742 n.5 (2005) (Souter, J., dissenting); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 41 (2004) (O’Connor, J., concurring in the judgment).

47. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

away on standing grounds.⁴⁸ Nonetheless, three Justices in concurring opinions expressed their view that the Pledge was constitutional.⁴⁹ These opinions considered such factors as the lack of coercion,⁵⁰ the long history of official acknowledgements of religion,⁵¹ and the brief, nondenominational nature of the reference to God.⁵²

A recurring theme in the *Newdow* concurrences, however, was that the Pledge was a patriotic rather than religious exercise. For example, Chief Justice Rehnquist concluded, after cataloging the multiple references to God in various historic national documents, not only that "our national culture allows public recognition of our Nation's religious history and character" but also that the Pledge "is a patriotic exercise, not a religious one."⁵³ Because "[t]he phrase 'under God' is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact . . . that our Nation was founded on a fundamental belief in God," he continued, "participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church."⁵⁴ Similarly, Justice O'Connor characterized the words "under God" as "merely descriptive" and patriotic rather than devotional.⁵⁵ Indeed, citing *McGowan*, Justice O'Connor asserted that "[w]hatever the sectarian ends its authors may have had in mind, our continued repetition of the reference . . . in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost."⁵⁶

The remaining Supreme Court discussions of the constitutionality of brief official religious references have appeared in passing dicta. For instance, Justices have referred to the national motto, presidential Thanksgiving proclamations, the Pledge, and

48. *Id.* at 4; 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) ("In *Newdow*, it may have been politically impossible to affirm [the Ninth Circuit's holding that the pledge was unconstitutional] and legally impossible to reverse.").

49. *Newdow*, 542 U.S. at 18 (Rehnquist, C.J., concurring in the judgment); *id.* at 33 (O'Connor, J., concurring in the judgment); *id.* at 54 (Thomas, J., concurring in the judgment).

50. *Id.* at 43-44 (O'Connor, J., concurring in the judgment); *id.* at 46-49 (Thomas, J., concurring in the judgment).

51. *Id.* at 30 (Rehnquist, C.J., concurring in the judgment).

52. *Id.* at 42-44 (O'Connor, J., concurring in the judgment).

53. *Id.* at 30-31 (Rehnquist, C.J., concurring in the judgment).

54. *Id.* at 31 (internal quotation marks omitted).

55. *Id.* at 40-41 (O'Connor, J., concurring in the judgment).

56. *Id.* at 41.

invocations like “so help me God” in the presidential oath and “God save the United States and this Honorable Court,” among others, as apparently constitutional examples of official religious acknowledgements, either to support their view that other, usually more novel instances of official religious speech are constitutional,⁵⁷ or to contrast these examples with other instances of official religious speech that they view as unconstitutional.⁵⁸ In so doing, the Justices have invoked the history and ubiquity of these references,⁵⁹ or have opined that the references have lost their religious meaning over time through rote repetition.⁶⁰ For example, in *County of Allegheny v. ACLU*, which involved a challenge to public displays of a crèche and a menorah, Justice O’Connor suggested that the Thanksgiving holiday, “despite its religious origins, is now generally understood as a celebration of patriotic values rather than particular religious beliefs.”⁶¹ 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.⁶² Finally, concurring in *School District of*

57. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 887–93 (2005) (Scalia, J., dissenting); *Newdow*, 542 U.S. at 29–30 (Rehnquist, C.J., concurring in the judgment); *id.* at 35–37, 36 n.* (O’Connor, J., concurring in the judgment); *County of Allegheny v. ACLU*, 492 U.S. 573, 624–25 (1989) (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 670–74 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Wallace v. Jaffree*, 472 U.S. 38, 88 (1985) (Rehnquist, J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 676–77 (1984); *id.* at 692–93 (O’Connor, J., concurring); *Zorach v. Clauson*, 343 U.S. 306, 312–13 (1952).

58. *Van Orden v. Perry*, 545 U.S. 677, 716 (2005) (Stevens, J., dissenting); *Allegheny*, 492 U.S. at 602–03; *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 303–04 (1963) (Brennan, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962); *Wallace*, 472 U.S. at 78 n.5 (O’Connor, J., concurring in the judgment). Justice Brennan claimed, beginning in *Marsh*, to be uncertain about the constitutionality of ceremonial deism but insisted in *Marsh* that legislative prayer was unconstitutional. *Marsh v. Chambers*, 463 U.S. 783, 813, 818 (1983) (Brennan, J., dissenting); see also *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting) (comparing the crèche to more acceptable references to God in the national motto and the Pledge of Allegiance).

59. *Allegheny*, 492 U.S. at 624–25 (O’Connor, J., concurring in part and concurring in the judgment).

60. *Id.* at 631; *Lynch*, 465 U.S. at 713–17 (Brennan, J., dissenting); *Marsh*, 463 U.S. at 818 (Brennan, J., dissenting); *Schempp*, 374 U.S. at 303–04 (Brennan, J., concurring).

61. *Allegheny*, 492 U.S. at 631. That the origins of the holiday are religious may be shown by the fact that both Thomas Jefferson and Andrew Jackson resisted issuing Thanksgiving proclamations, and James Madison expressed regret that he had done so, all on constitutional grounds. STOKES & PFEFFER, *supra* note 3, at 53–60, 504–06; Van Alstyne, *supra* note 12, at 775–76.

62. *Allegheny*, 492 U.S. at 616; *id.* at 634 (O’Connor, J., concurring in part and concurring in the judgment); *id.* at 641 (Brennan, J., concurring in part and dissenting in part) (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).

Abington Township v. Schempp,⁶³ Justice Brennan cited *McGowan v. Maryland* to suggest that some apparently innocuous religious references might be justified as “activities which, though religious in origin, have ceased to have religious meaning.”⁶⁴ According to Justice Brennan, they simply constitute recognition of “the historical fact that our Nation was believed to have been founded ‘under God.’”⁶⁵

Lower courts have had more occasions to address the constitutionality of various forms of ceremonial deism head-on. Again, however, very little sustained reasoning has supported these holdings. Some courts apply one of the standard doctrinal tests to determine the constitutionality of a challenged practice, whereas others, like the Supreme Court, do not apply any particular test.⁶⁶ Moreover, despite its narrow drafting, *Marsh* is often invoked to support the notion that a long history may remove any otherwise constitutionally problematic association with religion.⁶⁷

Challenges to the national motto have failed largely on the ground that the motto has secular purposes and effects, in that it is considered to be a patriotic or solemnizing phrase rather than a religious one. This reasoning is often accompanied by the suggestion that the phrase’s religious origins have been lost through “historical usage and ubiquity.”⁶⁸ Turning away one such challenge, the Ninth

63. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

64. *Id.* at 303–04 (Brennan, J., concurring).

65. *Id.* at 304.

66. The test derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), or a variant thereof, is usually applied by courts in such cases. According to that test, “the statute must have a secular legislative purpose; . . . its principal or primary effect must be one that neither advances nor inhibits religion . . . [and] the statute must not foster an excessive government entanglement with religion.” *Id.* at 612–13 (citations and internal quotation marks omitted).

67. *Myers v. Loudoun County Sch. Bd.*, 418 F.3d 395, 403–04 (4th Cir. 2005) (citing *Marsh* in rejecting a challenge to the recitation of the Pledge of Allegiance in the public schools); *Doe v. La. Supreme Court*, 1992 U.S. Dist. LEXIS 18803, at *18–19 (E.D. La. Dec. 7, 1992) (citing *Marsh* in rejecting a challenge to the words “in the year of our Lord” on Louisiana law licenses and notarial commissions); *cf. Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970) (noting, in a constitutional challenge to the property tax exemption for churches, that “no one acquires a vested or protected right in violation of the Constitution by long use,” but that an “unbroken practice . . . is not something to be lightly cast aside”); Jeremy G. Mallory, Comment, *An Officer of the House Which Chooses Him, and Nothing More: How Should Marsh v. Chambers Apply to Rotating Chaplains*, 73 U. CHI. L. REV. 1421, 1431 (2006) (noting that many of the cases citing or discussing *Marsh* do not involve legislative chaplains).

68. *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

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 uses of the motto was [*sic*] viewed as sacrilegious and irreverent by President Theodore Roosevelt.”⁶⁹ The Seventh Circuit Court of Appeals, addressing a challenge to a Christmastime nativity scene that included a large lighted Latin cross in *ACLU of Illinois v. City of St. Charles*,⁷⁰ 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 of Santa Cruz and even St. Charles itself.⁷¹ And in what might be considered the high-water mark of secularization claims, the Ninth Circuit declared that Hawaii’s Good Friday holiday passed constitutional muster, in part because it had partly lost its religious effect during the fifty years that it had been recognized.⁷²

Some opinions evidence a more nuanced approach to the problem of change in meaning over time, suggesting that the passage of time is simply one factor that a court must take into account when determining whether a government action unconstitutionally advances religion. In *Freethought Society v. Chester County*,⁷³ the court considered and ultimately turned away an Establishment Clause challenge to a Ten Commandments display that had been placed on the exterior of a county courthouse eighty-two years earlier.⁷⁴ The display, which had never been removed or maintained since its erection, was situated beside an entrance that had become defunct.⁷⁵ While rejecting the notion that the display’s age alone could immunize it from constitutional infirmity, the court insisted that historical context was one consideration in determining whether the

secularization in the context of the Good Friday holiday, and attempting to set out factors for determining whether secularization has occurred).

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

70. *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986).

71. *Id.* at 271–72.

72. *Cammack 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 the court apparently meant that the holiday had not been secularized to the same extent. *Id.*

73. *Freethought Soc’y v. Chester County*, 334 F.3d 247 (3d Cir. 2003).

74. *Id.* at 249–51.

75. *Id.* at 253–54.

display had an impermissible purpose or effect under the “endorsement test.”⁷⁶ For the *Freethought* court, the relevance of the passage of time was not that it destroyed the religious significance originally carried by the Ten Commandments, but rather that the maintenance of the historic Ten Commandments plaque did not send the same message as a recently erected Ten Commandments plaque.⁷⁷ The court drew an analogy to both the national motto and the expression “God save the United States and this Honorable Court,” which—though they contain 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 endorsement of religion.”⁷⁸ In other words, while acknowledging the religious content of the plaque itself, the court found that the passage of time dulled any endorsement effect.⁷⁹

Thus, despite its questionable pedigree and analytical backing, courts often rely reflexively on the secularization thesis in dealing with challenges to official religious references. When upholding such a reference against constitutional challenge, a court’s reliance on the

76. *Id.* at 260 & n.10 (internal quotation marks omitted). Under the endorsement test, 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 in part and concurring in the judgment)). 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*, 545 U.S. 677, 686 (2005) (plurality opinion) (declining to apply the *Lemon*/endorsement test in favor of a consideration of “the nature of the monument and . . . our Nation’s history”), and well may abandon it altogether soon, *see infra* Part II.C.

77. *Freethought Soc’y*, 334 F.3d at 265.

78. *Id.* at 264; *see also* Elliott M. Berman, Note, *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.”); Brookman, *supra* note 68, at 216–24 (arguing that the concept that religious symbols, holidays, and phrases have been secularized over time “might be better understood as an argument that the . . . endorsing value has been lost over time”). I have made a similar suggestion elsewhere. Hill, *supra* note 25, 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).

79. *Freethought Soc’y*, 334 F.3d at 262–70.

secularization thesis often accompanies an assertion that the challenged phrase does no more than acknowledge or describe the role of religion in the nation's history.⁸⁰ Courts make such arguments whether or not they are applying one of the standard Establishment Clause tests.⁸¹ Given the frequency with which the concept of change in meaning over time is invoked, it is surprising that so little theoretical content is supplied to support the claim.⁸²

B. Criticisms of the Secularization Thesis

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 like others, he 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.⁸³ Judge Manion of the Seventh Circuit has similarly criticized the concept of ceremonial deism. Like Professor Brownstein, he questions why "only religious phrases" may "los[e] their significance through rote repetition": "Why only 'under God'? Why not 'indivisible', 'liberty and justice for all'? Do not these equally repeated phrases also lose their meaning under the logic of 'ceremonial deism'?"⁸⁴ Similarly, Professor Douglas Laycock and

80. The secularization thesis also implies that certain phrases or practices may have been Establishment Clause violations at the time their usage commenced but, left unchallenged, become constitutional over time.

81. Compare, e.g., *Cammack v. Waihee*, 932 F.2d 765, 778–80 (9th Cir. 1991) (deploying the secularization thesis while applying the *Lemon* test), with *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970) (claiming, in rejecting a challenge to the national motto, that the motto is secular or patriotic rather than religious, without applying any particular test).

82. One commentator traces the secularization phenomenon to the concept of "civil religion," first described by Robert Bellah. Furth, *supra* note 27, at 596–600.

83. Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 853 (2001).

84. *Sherman v. Cmty. 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 (2005) (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."). It is possible, of course, that "indivisible" and "liberty and justice for all" have, in

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.⁸⁵

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 this approach. One prevalent argument is that it is denigrating to religion and insulting to religious believers and nonbelievers alike to say that the Christmas holiday, the national motto, and the like have no religious content. Justice Brennan, for example, has forcefully asserted 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 crèche 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.”⁸⁶

fact, lost their meaning and force through this same logic, but if so, that fact would have little relevance to the Establishment Clause analysis.

85. Laycock, *supra* note 48, at 224–27; *see also* 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.”); 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.”); Epstein, *supra* note 3, at 2165–66 (“[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.”).

86. *Lynch v. Donnelly*, 465 U.S. 668, 712 (1984) (Brennan, J., dissenting); *see also* Laycock, *supra* note 48, at 224–27, 233 (noting that the secularization of “under God” in the Pledge of Allegiance is unacceptable to believers and nonbelievers alike); Robert A. Schapiro, *The Consequences of Human Rights Foundationalism*, 54 EMORY L.J. 171, 179 (2005) (noting that including “under God” in the Pledge of Allegiance requires one to “affirm a deity in which one does not actually believe” and that to treat the reference to God as meaningless “would be insulting to those who take references to God quite seriously”); Shiffrin, *supra* note 85, 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) (arguing that “[s]uch explanations . . . demean the expressions

Another prominent critique challenges the Court's approach of carving out a sort of de minimis exception to Establishment Clause jurisprudence for ceremonial deism.⁸⁷ Professor Laycock, for example, has critiqued that exception on the grounds that it is standardless: although 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."⁸⁸ Similarly, Professor William Van Alstyne has noted that the logic and standardless nature of the de minimis exception lead courts to apply a new Establishment Clause test: an "any more than" test.⁸⁹ According to this "test," courts simply consider whether a challenged practice advances religion any more than practices that the government has constitutionally engaged in previously.⁹⁰ Of course, the answer to that question is largely "in the eye of the beholder."⁹¹ Such amorphous and

and insult the intelligence"); Furth, *supra* note 27, at 600–04 (describing how secularization of religious symbols and language denigrates religion, offends both believers and nonbelievers, and creates schisms within society); *cf.* Cammack, 932 F.2d at 790 (Nelson, J., dissenting) (stating that it is "distasteful to practicing Christians" to compare the serious occasion of Good Friday with the "mirth and levity" of Christmas and Thanksgiving).

87. *E.g.*, Epstein, *supra* note 3, at 2166–69; Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 521 (1992); Laycock, *supra* note 48, at 227–29, 231.

88. Laycock, *supra* note 48, at 232, 239–40. *But see* Conkle, *supra* note 85, 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").

89. Van Alstyne, *supra* note 12, at 782–83; *see also* Epstein, *supra* note 3, at 2167–68 (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 holidays).

90. *See* Van Alstyne, *supra* note 12, at 782–83 (describing the "any more than" test).

91. Epstein, *supra* note 3, at 2167, 2168 n.474. The Sixth Circuit's opinion in *ACLU of Ohio v. Capitol Square Review & Advisory Board*, 243 F.3d 289 (6th Cir. 2001), presents a salient example of this "any more than" logic. In evaluating the constitutionality of the Ohio state motto, "With God, All Things Are Possible," *id.* at 291, which is a direct quote from the New Testament, the court reviewed the wide variety of religious sentiments that had been expressed in official fora and that apparently had been viewed as constitutionally acceptable, *id.* at 293–300, before simply concluding that "[j]udged by historical standards, adoption of the motto *no more* represents a step toward an establishment of religion *than* 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,'" *id.* at 300.

manipulable arguments are not easy to refute, largely because of—not despite—the lack of logical reasoning supporting them.⁹²

This Article acknowledges and accepts those criticisms, and at the same time attempts to take seriously the notion that meaning can change over time. In particular, it draws on the intuition that some religious references—such as the city names of San Francisco, Corpus Christi, and St. Louis—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. 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 secularization claim and many of the ways in which commentators have critiqued it rely on an incomplete understanding of how language works. Linguistic theory can lead to a more nuanced evaluation of the secularization claim and the circumstances in which it may or may not apply. In particular, this more nuanced understanding will provide some theory with which to both support and critique a heretofore untheorized shibboleth underlying 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 out an exception to Establishment Clause jurisprudence for certain forms of ceremonial deism, thus distorting the doctrine and opening the way for standardless application. But perhaps more importantly, as explained further in Part III, linguistic theory provides much reason to doubt the validity of the secularization claim as it is made in many cases.

92. Finally, some critics have pointed out that 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,” though they may be constitutional now. *Sherman v. Cmty. Consol. Sch. Dist.* 21, 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring); *see also* *Myers v. Loudoun County Sch. Bd.*, 418 F.3d 395, 405 & n.11 (4th Cir. 2005) (noting that many Justices have followed changed-meaning arguments in acknowledging ceremonial deism, but that ceremonial deism, as a theory, is internally inconsistent).

C. *Ceremonial Deism in the Context of Establishment Clause Doctrine*

The Supreme Court has embraced numerous tests in the Establishment Clause area, and it is often a guessing game to determine which test will apply to a particular controversy. In the *Newdow* case, for example, the two principal merits briefs combined used no fewer than four different Establishment Clause tests in arguing for the constitutionality or unconstitutionality of the words “under God” in the Pledge of Allegiance.⁹³ Given this state of disarray, it is difficult to reason about the constitutionality of ceremonial deism within any fixed line of doctrine. This Section therefore attempts to place ceremonial deism into a clearer doctrinal framework—both briefly describing the various analytic tests that could be, and occasionally are, applied to ceremonial deism and explaining the relevance of this Article’s project to the overall doctrinal question of ceremonial deism’s constitutionality.

The various tests actually reflect two levels of disagreement among the Justices of the Supreme Court. First, there is disagreement over the method for determining *whether* a religious message is conveyed at all by a particular instance of governmental speech. Various tests have different ways of answering that question, which I term the *methodological* question. Second, there is disagreement over the question of *how much*, if any, official religious expression is permissible under the Establishment Clause. I call this the *substantive* question.

Courts have applied the *Lemon*/endorsement test, the coercion test, and the so-called *Marsh* test—along with some variations of those tests—to determine whether an instance of ceremonial deism is constitutional. According to the *Lemon*/endorsement test, the court must determine whether the government conduct is intended to convey, or has the effect of conveying, a message of religious endorsement—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,

93. Petitioners’ Brief on the Merits at 24–45, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (No. 02-1624); Respondent’s Brief on the Merits at 8–38, *Newdow*, 542 U.S. 1 (No. 02-1624). Petitioner Elk Grove’s brief applied the coercion test, the *Marsh* test, and the *Lemon*/endorsement test, and also noted the Supreme Court’s dicta on the topic. Respondent *Newdow* applied the neutrality test, the *Lemon* test, and the coercion test. The Court, however, officially adopted none of these tests, as it decided the case on prudential standing grounds.

avored members of the political community.”⁹⁴ The court makes this determination by asking whether a reasonable observer, familiar with the history and context of the government practice at issue, would perceive such endorsement.⁹⁵

The coercion test, by contrast, asks only whether the challenged practice coerces participation in a religious exercise. The coercion test differs from the endorsement test in terms of the *substantive* issue of how much religious speech each is prepared to permit. The coercion test is ultimately somewhat more permissive than the endorsement test. At the same time, it is not clear that the two tests differ in their *methodology*—that is, in how they determine the meaning of government speech.⁹⁶

Finally, the poorly defined *Marsh* test appears to be methodologically and perhaps substantively distinct from both the *Lemon*/endorsement and coercion tests. The *Marsh* test looks to the history and ubiquity of a practice, sometimes together with the context of the particular challenged practice, to decide whether the practice violates the Establishment Clause. At the heart of *Marsh* is the view that a practice that has been engaged in without controversy, sufficiently often and for a sufficiently long time, is ipso facto inoffensive to the Establishment Clause. That view is often

94. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

95. *E.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308–10 (2000). Maddeningly, though, the Court declined to apply this test explicitly in *Van Orden v. Perry*, 545 U.S. 677 (2005), which was a challenge to a Ten Commandments display. Indeed, Chief Justice Rehnquist's plurality opinion explicitly departed from the *Lemon* test and instead looked to history and tradition, applying something more akin to the *Marsh* test. *Id.* at 686–92 (plurality opinion). Justice Breyer's concurring opinion, which provided the necessary fifth vote, eschewed all tests and instead simply applied what he called “legal judgment.” *Id.* at 699–700 (Breyer, J., concurring in the judgment). Justice Breyer's “legal judgment” appeared to be the functional equivalent of the endorsement test, however. *See generally* Hill, *supra* note 25, at 496–502 (discussing Justice Breyer's opinion in *Van Orden* in relation to other cases applying the endorsement test and concluding that Justice Breyer's approach in *Van Orden* was similar to the Court's approach in those other cases).

96. Given the retirement of Justice Sandra Day O'Connor—the creator and leading proponent of the endorsement test—in 2006, and her replacement by Justice Samuel Alito, most commentators agree that there are currently five votes on the Supreme Court to abandon the endorsement test and replace it with a “coercion” or “proselytizing” test. *E.g.*, Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 379–80 (2006); *see also* Erwin Chemerinsky, *The Future of Constitutional Law*, 34 CAP. U. L. REV. 647, 665–66 (2006) (noting that a majority of the Justices would now likely abandon the endorsement test); Adam M. 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).

accompanied by the assertion that the religious reference does no more than *acknowledge* or *describe* the beliefs of the Founders or the historic role of religion in the history of the nation.⁹⁷ *Marsh's* approach, especially to the extent that it implies that longstanding and ubiquitous practices have become secularized, is present in the way most courts deal with ceremonial deism.⁹⁸ The concurring opinions in *Newdow*, for example, repeatedly used the words “describe,” “acknowledge,” and their synonyms in connection with the Pledge’s religious phrase.⁹⁹

The *Marsh* test thus may differ from the *Lemon*/endorsement and coercion tests primarily in its methodology—in how it determines whether a particular government practice is religious or secular¹⁰⁰—or

97. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 786–92 (1983).

98. See, e.g., Ashley M. Bell, Comment, “*God Save This Honorable Court*”: How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions, 50 AM. U. L. REV. 1273, 1293 (2001) (“‘Secularization’ remains the Court’s justification for upholding the legitimacy of historical religious expressions and other overtly religious practices.” (footnote omitted)); Furth, *supra* note 27, at 585–93 (discussing the secularization approach taken by courts in a variety of cases).

99. E.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring in the judgment) (“[T]he Pledge itself is a patriotic observance focused . . . on . . . the description of the Nation. . . [and] seems, as a historical matter, to sum up the attitude of the Nation’s leaders.”); *id.* at 30 (“[O]ur national culture allows public recognition of our Nation’s religious history and character.”); *id.* at 31 (“[T]he phrase ‘under God’ in the Pledge . . . is . . . a simple recognition of the fact . . . ‘that our Nation was founded on a fundamental belief in God.’” (quoting H.R. REP. 83-1693, at 2340 (1954))); *id.* at 33 (stating that “under God” is a “descriptive phrase”); *id.* at 35 (O’Connor, J., concurring in the judgment) (stating that the Pledge serves “to commemorate the role of religion in our history”); *id.* at 40 (“Even if taken literally, the phrase [‘under God’] is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority.”); see also Joan DeFattore, *What Is Past Is Prelude: Newdow and the Evolution of Thought on Religious Affirmations in Public Schools*, 8 U. PA. J. CONST. L. 641, 649–50 (2006) (describing how Chief Justice Rehnquist and Justice O’Connor characterized the phrase “under God” in the Pledge of Allegiance as merely descriptive); cf. 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, 980–93 (2008) (distinguishing three different types of acknowledgement—historical, reverential, and cultural—and arguing that only reverential acknowledgement is constitutionally problematic).

100. After a challenged practice is determined to be secular, the Establishment Clause inquiry is over. If a practice is determined under *Marsh* to be religious, the next question would presumably be whether it is nonetheless permissible under one of the other Establishment Clause tests. Because it is rare that the *Marsh* test leads a court to conclude that a challenged practice is, in fact, religious, it is not clear how courts are to determine the answer to that next question, however. Perhaps they must then apply the endorsement or coercion tests. That appears to be the view of two concurring Justices in *Newdow*. *Newdow*, 542 U.S. at 31 n.4 (Rehnquist, C.J., concurring in the judgment) (combining the coercion test and *Marsh* factors); *id.* at 34–45 (O’Connor, J., concurring in the judgment) (combining the endorsement test and *Marsh* factors).

in its approach to the substantive question of how much religious speech is acceptable, suggesting that invocations of God, as in the Pledge and the motto, are constitutional because the Establishment Clause permits such expressions of religious belief.¹⁰¹ 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.¹⁰² In other words, rather than asserting that “[u]nder God’ [i]s [n]ot an [a]ffirmation of [r]eligious [b]elief,” it says, “[u]nder God’ [i]s an [a]ffirmation of [r]eligious [b]elief, and [t]hat’s [o]kay.”¹⁰³ It is often unclear whether the *Marsh* approach differs from other tests methodologically or substantively or both, because courts may collapse the two questions when applying *Marsh* to ceremonial deism.¹⁰⁴

101. In this latter incarnation, *Marsh*'s approach is sometimes referred to as the acknowledgement or accommodation argument, but it is different from the argument that mere acknowledgement of the role of religion in the nation's history is not unconstitutional because it is not a religious message conveyed by the government. See Lupu & Tuttle, *supra* note 99, at 980–82 (distinguishing among types of acknowledgement).

102. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 673–74 (1984) (noting that the First Congress and the Congress of 1789 employed chaplains, but saw no constitutional violation in doing so); *ACLU of Ohio v. Capitol Square Review & Advisory 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 contained 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, *Through a Glass Darkly: Van Orden, McCreary, and the Dangers of Transparency in Establishment Clause Jurisprudence*, 5 FIRST AMENDMENT 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” monotheism); cf. Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMENDMENT L. REV. 1, 12–21 (2006) (describing and critiquing this argument); 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”).

103. DelFattore, *supra* note 99, at 648, 653.

104. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 687–92 (2005) (plurality opinion) (applying a “history and tradition” test similar to the *Marsh* test to determine that a Ten Commandments display either did not convey a religious message or was religious but not unconstitutional);

In essence, this Article assumes that “for now, the Court’s general approach continues to preclude the government from promoting religious expression” and therefore that any religious speech by the government will at least raise substantial Establishment Clause questions.¹⁰⁵ The focus of this Article is thus on the methodological question, and specifically on how one is to determine whether the religiosity of a particular practice, symbol, or phrase has faded. This Article’s argument is thus relevant to either the endorsement test or the coercion test, which vary only in the substantive matter of the extent of government expression that is permissible. It could also function as a replacement for the *Marsh* test, which considers whether, in light of the ubiquity and long use of a practice, an instance of religious speech has become a mere recognition or description of the role of religion in the nation’s history.

II. SPEECH ACT THEORY, ITERABILITY, AND CHANGE IN MEANING OVER TIME

So far, this Article has established that courts have not analyzed the constitutionality of brief official religious references, often referred to as ceremonial deism, in a thorough or nuanced way. Although courts and commentators sometimes 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. 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.

This Article now turns to the branch of the philosophy of language known as speech act theory to consider the problem of change in meaning over time from a new perspective.¹⁰⁶ This new

Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445–48 (7th Cir. 1992) (conflating the methodological and substantive questions in determining whether the phrase “under God” in the Pledge of Allegiance violated the Establishment Clause).

105. Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 316 (2007).

106. 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. See, e.g., David Gorman, *The*

perspective will hopefully present a new way of thinking about a very old problem and particularly of attacking the thorny methodological problem of determining the “effect” or “social meaning” of brief official religious references, which courts—by simply declaring that some words may lose their religious meaning over time—have not done in a satisfactory way so far. This Part therefore briefly outlines the premises of speech act theory, some of its central characteristics, and its relevance to the problem of ceremonial deism.

First, Part II.A elucidates the concept of illocutionary force, which is perhaps the central contribution of speech act theory. The idea of illocutionary force shifts the emphasis in interpretation from the propositional content of language to the actions it accomplishes—in other words, its effects. It is thus particularly relevant to an Establishment Clause analysis of religious speech, because Establishment Clause doctrine is similarly concerned with the endorsing, coercing, or proselytizing effects of such speech. Part II.B then discusses the conventionality of speech acts, which is perhaps their most important characteristic. Part II.B.1 explains what it means to say that speech acts are conventional. Parts II.B.2 through II.B.4 delineate some important consequences that flow from this conventionality. Finally, Part II.C discusses a final important characteristic of successful speech acts—the necessity of uptake. This Article does not pretend to give a comprehensive overview of speech act theory as a whole, of course; such an undertaking would be well beyond its scope. Rather, the Article’s goal is to give the reader a working familiarity with the most basic premises of that theory and to highlight those aspects of it that are most relevant to an understanding of ceremonial deism—namely, speech act theory’s emphasis on *illocutionary force*, its insight regarding 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. Other legal scholars have also discussed J.L. Austin and speech act theory, perhaps most notably in connection with free speech doctrine. See generally CATHERINE MACKINNON, *ONLY WORDS* 21, 121 n.31 (1993) (discussing speech act theory in connection with sexual speech); John Greenman, *On Communication*, 106 *MICH. L. REV.* 1337, 1351–54 (2008) (discussing and critiquing the use of speech act theory in free speech scholarship). In addition, Professor Heidi Hurd has explicated the theory masterfully and at length in connection with statutory interpretation. Heidi M. Hurd, *Sovereignty in Silence*, 99 *YALE L.J.* 945 *passim* (1990).

conventionality of speech acts, and its elucidation of the requirement of *uptake*.¹⁰⁷

A. *Meaning and Illocutionary Force*

Speech act theory is a branch of the philosophy of language that considers how language actually works—and how and why it fails. Rather than considering language as an abstract means of conveying truth, speech act theory looks at language as it is used in everyday life, perceiving language primarily as doing rather than as describing—as bringing about states of affairs, with greater or lesser degrees of success, rather than simply referring to them.¹⁰⁸ The founding father of speech act theory, J.L. Austin, was the first to identify and describe linguistic utterances in these terms.¹⁰⁹ 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.”¹¹⁰ As Austin explains, “it seems clear that to utter the sentence (in, of course, the appropriate circumstances) is not to *describe* my doing [something] . . . or to state that I am doing it: it is to do it.”¹¹¹ By speaking, one effects the act of marrying, christening a ship, bequeathing, and betting.

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

107. Indeed, not all scholars would agree with my understanding of speech act theory. As is true of any substantial scholarly field, there is a large literature on the philosophy of language and no small amount of disagreement within that literature.

108. Hill, *supra* note 25, at 511–12.

109. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson ed., 1962). Austin’s theory of speech acts owes much to Ludwig Wittgenstein’s later work, in particular his *Philosophical Investigations*. Austin’s work, however, 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. See Barry Smith, *Towards a History of Speech Act Theory*, in *SPEECH ACTS, MEANING AND INTENTIONS: CRITICAL APPROACHES TO THE PHILOSOPHY OF JOHN R. SEARLE* 29, 29–30 (Armin Burkhardt ed., 1990).

110. AUSTIN, *supra* note 109, at 5 (internal quotation marks omitted).

111. *Id.* at 6 (footnote omitted); see also LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 154–55 (1993) (describing speech acts).

a legally binding contract are also obvious performatives.¹¹² Such performatives were to be contrasted in Austin's theory with "constatives," which merely report, state, or describe a state of affairs.¹¹³

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.¹¹⁴ After all, Austin explains, *describing* a state of affairs is doing something with words, just as much as christening and marrying and bequeathing and betting. "Surely to state is every bit as much to perform [a speech] act as, say, to warn or to pronounce," and indeed, Austin admits that 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.¹¹⁵ Over the course of the series of lectures that came to be published as *How to Do Things with Words*, Austin's analysis therefore shifted from distinguishing performatives from constatives to establishing that performative force, or what he referred to as illocutionary force, is a property of all utterances, to be distinguished from what he called locutionary force.¹¹⁶

112. Evidence scholars may be familiar with the concept of performatives, which are related to the "verbal acts doctrine," involving statements that "affect[] the legal rights of the parties," *United States v. Stover*, 329 F.3d 859, 870 (D.C. Cir. 2003) (quoting FED. R. EVID. 801 advisory committee's note), and "have independent legal significance, such as contractual offers or inter vivos gifts," *id.* (citing 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 801.11[3] (2d ed. 1997)); *see also* *Twin City Fire Ins. Co. v. Country Mut. Ins. Co.*, 23 F.3d 1175, 1182 (7th Cir. 1994) (distinguishing between a *statement* that a party is willing to settle a case and an *offer* to settle a case, characterizing the latter as "what philosophers of language call a performative utterance, to which truth is irrelevant").

113. AUSTIN, *supra* note 109, at 6 n.2.

114. *Id.* at 147–48 ("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: THEORY AND CRITICISM AFTER STRUCTURALISM 112–13 (1982) (discussing Austin's analysis as leading to the conclusion that the constative is a special case of the performative).

115. AUSTIN, *supra* note 109, at 133–39; *see also* Deirdre Wilson, Book Review, 88 MIND 461, 461 (1979) ("Austin claimed that there could be no purely syntactic basis for the performative-constative distinction.").

116. AUSTIN, *supra* note 109, at 149; *see also* David Gorman, *supra* note 106, at 97 ("Austin expressly *refutes* the hypothesis of a constative/performative distinction The way in which he starts over is to introduce quite a different distinction, between locutionary and illocutionary acts."); John R. Searle, *Austin on Locutionary and Illocutionary Acts*, 77 PHILOSOPHICAL REV.

Indeed, the constative speech acts of stating, asserting, and describing may be considered acts in several senses. They are acts in the sense that they accomplish something specific and distinct that can be performed through the use of words. They share all of the qualities of speech acts, such as conventionality, iterability, and the necessity of uptake, described further below. And they are often also acts in the sense that they do more than passively observe or describe: they may also help to construct the reality that they describe or purport to describe. Descriptions and statements may have the effect not only of telling someone a truth, or explaining a reality to someone who is unfamiliar with that reality; they may also tend to reinforce those truths or realities by presenting them as fact rather than as one contested viewpoint among many. Indeed, this is precisely one objection of feminist scholars such as Andrea Dworkin and Catherine MacKinnon to pornography—it not only fantasizes but in some sense perpetuates women’s subjugation.¹¹⁷ Moreover, when the state—the voice of sovereign authority—engages in such speech acts, those speech acts may have a particularly strong tendency to create the reality they purport only to describe.¹¹⁸

What one commonly thinks of as “meaning” therefore may be thought to include two different concepts: locutionary force and illocutionary force.¹¹⁹ The locutionary act may be roughly defined as “uttering a certain sentence with a certain sense and reference”; locutionary force, therefore, “is roughly equivalent to ‘meaning’ in the traditional sense.”¹²⁰ One might also describe the locutionary force as the utterance itself, the literal or surface meaning of a particular combination of words. Illocutionary force, on the other hand, is the act (describing, sentencing, marrying, and so on) that is performed by

405, 405 (1968) (“The main theme of Austin’s *How to Do Things with Words* is the replacement of the original distinction between performatives and constatives by a general theory of speech acts.”); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 869–70 (2002) (discussing Austin’s shift from the constative-performative distinction to a new approach).

117. MACKINNON, *supra* note 106, at 11–31; *see also* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 946–47 (1995) (describing how government can construct social orthodoxy by adoption of specific stances on issues).

118. *See infra* Part IV.B.1.

119. AUSTIN, *supra* note 109, at 147. Austin also identified a third aspect of speech acts, perlocutionary force, *id.* at 108, which has garnered less attention than the other two.

120. *Id.* at 108; *see also* Hurd, *supra* note 106, at 955 (“When one invokes a sentence as one’s means of performing an illocutionary act, one performs what has come to be termed a ‘locutionary act.’ One performs such a locutionary act whenever one utters a meaningful proposition about anything.” (footnote omitted)).

and in speaking. Every meaningful locutionary act is also an illocutionary act; locution and illocution are different aspects of the same speech act.¹²¹

“One 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.”¹²² 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.¹²³ Although the literal, 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. On appeal to the Ninth Circuit, the case largely centered on whether antiabortion posters identifying certain abortion providers and giving their home addresses, together with an antiabortion website, constituted a “true threat” that was unprotected by the First Amendment.¹²⁴ The website listed names of abortion providers, which were struck through if the provider had been killed or grayed out if the provider had been wounded.¹²⁵ Although the locutionary acts performed by the posters and websites may have been entirely clear, the nature of the illocutionary acts performed by the posters—whether they were acts of threatening, protesting, or informing—was hotly disputed, resulting in an en banc Ninth Circuit opinion that divided the judges six to five.¹²⁶

121. AUSTIN, *supra* note 109, at 98. John Searle has pointed out that, although locutionary and illocutionary are meaningfully different concepts, they are not mutually exclusive classes because 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 (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 116, at 407–08.

122. Gordon Bearn, *Derrida Dry: Iterating Iterability Analytically*, DIACRITICS, Fall 1995, at 3, 5 (citing AUSTIN, *supra* note 109, at 114 n.1).

123. CULLER, *supra* note 114, at 113.

124. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1062–63 (9th Cir. 2002) (en banc).

125. *Id.* at 1063.

126. *Id.* (holding that the posters constituted a true threat).

B. *Conventionality*

Speech act theory's emphasis on illocutionary force has led theorists to ask what, exactly, determines the illocutionary force of a given utterance. The result has been the insight that speech acts are inherently conventional.¹²⁷ This Section first explains how speech acts are conventional. It then extrapolates from that conventionality some consequences that are relevant to an analysis of ceremonial deism.

1. *The Conventionality of Speech Acts.* To be effective as a speech act, any meaningful statement must be uttered under the appropriate conditions. To take a straightforward example, the speech act of bequeathing possessions to an heir cannot be performed successfully unless certain conventions are met. Those conventions include the numerous formalities pertaining to wills under state law, such as signature and witness requirements; the requirement that the person doing the bequeathing have the legal authority to dispose of that property; and the requirement that the individual not be incompetent, under duress, performing in a play, or giving an example of performative utterances in a law review article when the words are uttered. But the words themselves—the locutionary act—are also part of the conventionality of the speech act: although many different combinations of words may be used to bequeath one's possessions, those words must still be recognizable to the relevant readers as words of bequest.¹²⁸ The requirement that speech acts, to be successful, must be executed in the appropriate conventional circumstances applies not only to obviously performative acts such as sentencing, marrying, or christening but also to speech acts such as describing: to take an example, one cannot describe something successfully if one cannot observe it.¹²⁹

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

127. AUSTIN, *supra* note 109, at 120 (“Illocutionary acts are conventional acts . . .”). I have discussed the conventionality of speech acts elsewhere. Hill, *supra* note 25, at 512–15.

128. AUSTIN, *supra* note 109, at 14–15 (“There 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 . . . [t]he procedure must be executed by all participants both correctly and . . . completely.”).

129. See *id.* at 138. Austin describes other ways in which constative speech acts may be unsuccessful as well. *Id.* at 135–36.

particular speech acts.¹³⁰ Yet as described below in Part II.B.2, this conventionality is also precisely what allows words to mean different things when used in different contexts. The conventionality of language is both what allows it to produce meaning and what creates the potential for instability in that meaning.¹³¹

2. *Iterability, Speaker's Intent, and the Vulnerability of Language.* The iterability of language is one important consequence that flows from its inherent conventionality. 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,”¹³² also means that any linguistic utterance is capable of being cut off from both its original context and its speaker's intent to be reproduced in a context that may change or undermine its prior meaning. Indeed, no speech act could function at all if this were not the case—that is, if it were not both 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 they also ensure that language can be used in ways that may not have been originally intended.¹³³ The inability of the original speaker's intent to control the meaning of the speech act in the future makes it vulnerable to subversion. There are thus two consequences of the quality of iterability that inheres in all speech

130. See, e.g., JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 25 (1997) (discussing the importance of convention to meaning); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 54–55 (1969) (describing such a project).

131. I have discussed in depth the problems caused by the dependence of meaning on context—another aspect of the conventionality that affects the success or failure of speech acts. Hill, *supra* note 25. I therefore do not cover that ground again here.

132. 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 (Gerald Graff ed., Samuel Weber & Jeffrey Mehlman trans., 1988) [hereinafter Derrida, *Signature Event Context*]. Derrida's argument about iterability, which is briefly described above, was the subject of a dispute between Derrida and John Searle, the essence of which is encapsulated in Derrida's essay, *id.*, Searle's essay, John R. Searle, *Reiterating the Differences: A Reply to Derrida*, 1 *GLYPH* 198 (1977), and Derrida's rather lengthy and emphatic response to Searle's reply, Jacques Derrida, *Limited Inc a b c . . .*, in *LIMITED INC*, *supra*, at 29, 29–107 [hereinafter Derrida, *Limited Inc*].

133. See generally CULLER, *supra* note 114, at 118–20 (“[A]n utterance can be meaningful only if it is iterable, only if it can be repeated in various serious and nonserious contexts, cited and parodied. Imitation is not an accident that befalls an original [utterance] but its condition of possibility.”).

acts: first, it makes successful speech acts possible, and second, it makes unsuccessful speech acts possible.¹³⁴

Jonathan Culler gives the example of the employer's signature on a paycheck.¹³⁵ A signature signifies the intention of the signer to endorse—that is, validate and stand behind—the document. To function as such, however, the signature must be repeatable and recognizable: it must be able to be copied, even by a machine. Thus, the 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.¹³⁶ Indeed, the conventionality and thus reproducibility of the signature is precisely what opens it up to forgery—to being used not only in the absence of, but directly contrary to, the purported signatory's intent.¹³⁷

Whatever the merits of this view for various other speech situations, its relevance for the sort of government speech involved in ceremonial deism seems inescapable.¹³⁸ The fundamental quality of iterability is that it allows utterances to be meaningful when the speaker or the hearer, or both, are absent.¹³⁹ Thus, the utterance must

134. Bearn, *supra* note 122, 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 the 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 this Article does not rely on that stronger thesis.

135. CULLER, *supra* note 114, at 125–26.

136. *See id.* at 125–26 ("[I]terability, an essential feature of the structure of the signature, introduces as part of its structure an independence from any signifying intention. If the signature on a check corresponds to the model, the check can be cashed whatever my intentions at the moment of signature. . . . We can, fortunately, cash checks signed by a machine and receive a salary even though the signatory never saw the check nor entertained a specific intention to pay us the sum in question."). 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. *Id.* at 127.

137. Likewise, Judith Butler notes that the term "queer" has been appropriated by the gay rights movement to the extent that it no longer has its original negative connotations. JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* 223 (1993).

138. This view is also arguably relevant to the interpretation of statutes. *See Hurd, supra* note 106, at 951, 990. Professor Hurd argues that statutes are not "communicative" speech acts, in that they are not "communications by a sovereign speaker to an audience, the understanding of which depends upon the audience's success at deciphering authorial intentions." *Id.* at 951.

139. Bearn, *supra* note 122, 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").

function “in the . . . absence of the receiver or of any empirically determinable collectivity of receivers,” and at the same time, “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.”¹⁴⁰ As Judith Butler puts it, “The Austinian subject speaks *conventionally*, that is, it 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.’”¹⁴¹

The conventional, plural, inherited nature of this speech thus greatly minimizes the importance of the intent or purpose behind it.¹⁴² Indeed, Justice Samuel Alito recently made a similar observation in *Pleasant Grove City v. Summum*,¹⁴³ in which the Court unanimously decided that the religious group Summum did not have a right to erect its monument in a public park alongside other monuments, including a Ten Commandments monument donated by the Fraternal Order of Eagles, because the permanent monuments in the park constituted government speech.¹⁴⁴ While acknowledging that the government can usually be said to endorse the message contained in the monument, Justice Alito pointed out that monuments do not always express the original intent of their donors.¹⁴⁵ Referring to a statue of Francisco “Pancho” Villa donated by the Government of Mexico to the city of Tucson, Arizona, for example, Justice Alito questioned whether it “commemorate[d] a ‘revolutionary leader who advocated for agrarian reform and the poor’ or ‘a violent bandit.’”¹⁴⁶ By accepting a monument, he noted, “a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument.”¹⁴⁷ Moreover, Justice Alito explained, “people

140. *Id.* at 6 (quoting Derrida, *Signature Event Context*, *supra* note 132, at 7–8).

141. BUTLER, *supra* note 130, at 25.

142. *Cf.* Hill, *supra* note 25, at 514–15 (noting the relative lack of importance ascribed to subjective intent by speech act theory).

143. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

144. *Id.* at 1129.

145. *Id.* at 1135–36.

146. *Id.*

147. *Id.* at 1136.

reinterpret the meaning of these memorials as historical interpretations and the society around them change[.]"¹⁴⁸

Like the employer's signature on a paycheck, many examples of ceremonial deism—city names, the national motto, the language of the Pledge, and even Christmas trees—function by means of this iterability; they function in the absence of any particular speaker or any particular intended hearer.¹⁴⁹ The national motto on coins, for example, would be identifiable in general as government speech, but it is not identified with any individual speaker or any particular government in American history. Readers cannot honestly attribute those words to Abraham Lincoln, or Teddy Roosevelt, or the Sixtieth U.S. Congress. It is an "inherited set of voices" that speaks, echoing throughout history, which is strictly attributable only to a machine at the U.S. Mint.¹⁵⁰

Indeed, the motto itself demonstrates the importance of iterability as well as the role of iterability in making meaning vulnerable. The motto is recognizable as such because of the repetition of its exact phrasing and its placement on the coins. But at the same time, its repeatability, and thus its recognizability, is exactly what opens it up to new, and possibly ironic, use in other contexts—such as the joke "In God we trust for the other eight cents." The joke draws its humor from the way it trivializes the religious component of the motto, as well as the way in which it associates God and Mammon—an association that is latent but unexplored in the motto's use on currency itself. It is legible, or comprehensible, only in terms of "the past from which it breaks"—that is, in terms of its religious origins.¹⁵¹

Yet the possibility of resignification need not have application only when a phrase or term is used facetiously; other contexts that undermine or change the prior meaning of a term will function in the same way. Thus, for example, the Court in *Lynch v. Donnelly*,¹⁵² arguing that the City of Pawtucket's crèche display simply "depict[ed]

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

149. *Cf.* Hurd, *supra* note 106, at 968–81 (noting that statutes—another form of government speech—do not have intentional speakers or intended audiences in the usual, communicative sense).

150. BUTLER, *supra* note 130, at 25.

151. *See id.* at 14. Butler is speaking about hate speech and its reappropriation by subordinated groups, but there is no reason that this mechanism must be limited to hate speech.

152. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

the historical origins"¹⁵³ of the Christmas holiday, analogized to the religious paintings, primarily Christian in their orientation, that hang in the National Gallery.¹⁵⁴ 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. In other words, even if the artwork itself has deep religious meaning, 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.¹⁵⁵

3. *The Persistence of Meaning.* Despite this vulnerability, illocutionary force at the same time possesses a surprising persistence. Judith Butler has argued that both past and future uses are, in a sense, contained within any single usage of a term, because iterability—which permits a vast variety of actual and possible usages of a given term, both "serious" and "nonserious"—is a necessary condition of successful speech acts.¹⁵⁶ Thus, "[t]he illocutionary speech act" possesses a kind of "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."¹⁵⁷ 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;¹⁵⁸ but at the same time, each time a term is used, it invokes its past usages and thus "reconsolidates" them, reminding the reader or listener of its historical meanings.

For example, one might consider the word "Amen." Translated and transliterated from 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

153. *Id.* at 680.

154. *Id.* at 676–77.

155. *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.").

156. 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.

157. BUTLER, *supra* note 130, at 3.

158. *Id.* at 13–15.

the word is iterable, however, it can be used in a variety of ways. Although not necessarily inherently religious, the 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 nonreligious 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.¹⁵⁹ 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 produce its meaning.

To take an example that presents the opposite dynamic, one might consider the case of *State Board of Education v. Board of Education of Netcong*,¹⁶⁰ in which the New Jersey Superior Court upheld a constitutional challenge to one school district’s practice of beginning each school day with a reading of a portion of the *Congressional Record* containing one of the daily prayers delivered by the congressional chaplain.¹⁶¹ This case, which arose several years before the U.S. Supreme Court’s decision in *Marsh v. Chambers*, illustrates how the repetition of identical language in a new context may change its meaning. Indeed, one of the school board’s defenses in the case was that the readings were secular and therefore not subject to an Establishment Clause challenge.¹⁶² Yet in the school setting, the court found that the readings were indistinguishable from the sort of prayer that had recently been outlawed in *Engel v. Vitale*¹⁶³ and *School District of Abington Township v. Schempp*.¹⁶⁴ Even if the court had espoused *Marsh*’s view that legislative prayer was of such long standing as to lose its religious force, it seems that reading the

159. For example, it would not be similarly comprehensible if the speaker instead had replied, “I amen disagree with you.”

160. *State Bd. of Educ. v. Bd. of Educ. of Netcong*, 262 A.2d 21 (N.J. Super. Ct. 1970).

161. *Id.* at 23.

162. *Id.* at 27.

163. *Engel v. Vitale*, 370 U.S. 421 (1962).

164. *Netcong*, 262 A.2d at 30–31.

identical prayers in schools, given the captive audience and the recent history of the Supreme Court's decisions outlawing school prayer, would have an entirely different meaning. The repetition of the prayers in a new context thus revived any religious force that may have been minimized or eliminated in the congressional setting.

On the one hand, then, each usage of a term (such as the word "Amen" or the national motto) 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. Meaning is at once both vulnerable and surprisingly persistent.

4. *How Speech Acts Succeed Despite Their Vulnerability.* The preceding explanation illustrates that there is a certain tension in the citation or repetition of phrases or speech acts. Insofar as language sometimes both names and enforces certain norms—for example, the words "In God We Trust" purport to describe a fact about American society—the repetition and reoption of those words in various contexts reinforces the original strength of those norms. Yet at the same time, language is vulnerable; it cannot be completely efficacious in its enforcement of norms. Thus, "[s]uch norms are continually haunted by their own inefficacy."¹⁶⁵ This inefficacy leads to "the anxiously repeated effort to install and augment their jurisdiction."¹⁶⁶ Indeed, because language is iterable and therefore partially open to change, any phrase—no matter how solemn—is always capable of being appropriated into a context that changes or subverts it.¹⁶⁷ Repetition of a phrase may accordingly be an effort to install or shore up the reality of which it appears to be merely a descriptive

165. BUTLER, *supra* note 137, at 237.

166. *Id.* at 237. Butler's fascinating explanation for this phenomenon is that, because the sovereign power of the state is now "[d]iffused throughout disparate and competing domains of the state apparatus," rather than consolidated in a single sovereign as it once was, "the historical loss of the sovereign organization of power appears to occasion the fantasy of its return . . . in the figure of" the sovereign—and hence always efficacious—performative. Thus, language is established "as a displaced site of politics . . . driven by a wish to return to a simpler and more reassuring map of power, one in which the assumption of sovereignty remains secure." BUTLER, *supra* note 130, at 78.

167. One might think, for example, of Andres Serrano's famous (and famously controversial) photograph *Piss Christ*, which depicts a crucifix submerged in urine. No matter how sacred the symbol or speech, it is always capable of appropriation.

statement¹⁶⁸—hence the struggle to keep the motto on the coins and require its posting in schools. 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 act.¹⁶⁹

Yet the illocutionary act succeeds only “to the extent that *it draws on and covers over*” its origins.¹⁷⁰ 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 calls upon its historical usage—for example, as a unifying sentiment in the Civil War era¹⁷¹—while covering over both its original religiosity and the spirit of exclusion that motivated the motto’s adoption in the 1950s.¹⁷² In so doing, the motto gives the illusion of a universal belief that can claim the support of virtually all citizens.¹⁷³ It is only in this way that

168. It is interesting to note in this connection how many of the recent legal and political controversies in the Establishment Clause domain center precisely around the sort of symbolic struggle Butler describes, in the form of linguistic or nonlinguistic religious government expression. Since 2005, for example, all of the Supreme Court’s Establishment Clause opinions have been about the constitutionality of some form of religious expression, and the Court’s most recent decision, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), similarly dealt with religious expression, but in a free speech context. One suspects that a sort of displacement is taking place—a displacement of struggles over political power and the government fisc to struggles over symbolic power.

169. Indeed, the *Netcong* case, discussed above, may also be read as an instance in which repetition is an attempt to reinforce certain norms in the face of recent threats to them. In *Netcong*, 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. *Netcong*, 262 A.2d at 32. Although the case was decided before *Marsh*, 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 seemed to be an attempt to shore up the religious message of those legislative prayers by repeating them in a context that enhanced their religious force. The context of that action was the Supreme Court’s recent decisions in the 1960s striking down school prayers. 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 draws special attention to their content.

170. Or, in Judith Butler’s terms, the speech act succeeds “to the extent that it draws on and covers over the constitutive conventions by which it is mobilized”—that is, the sociohistorical context or contexts that give it its force. BUTLER, *supra* note 130, at 51 (emphasis omitted); BUTLER, *supra* note 137, at 227.

171. See *supra* note 3.

172. See *supra* note 3.

173. The solemnizing use of the phrase also denies the motto’s historicity and the multiplicity of potential and actual usages contained within that history—as in the “sacrilegious” jokes.

courts can claim that such invocations are purely patriotic rather than religious sayings. They must deny the origins of the phrase and the political dynamic that informed its adoption to install it as a generic sentiment of national pride.

*American Civil Liberties Union of Ohio v. Capitol Square Review & Advisory Board*¹⁷⁴ neatly illustrates this dynamic of covering. This Sixth Circuit case turned away a constitutional challenge to the Ohio state motto, “With God All Things Are Possible,” which had been adopted in 1959 and was proposed to be inscribed in large letters in front of the statehouse.¹⁷⁵ 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.¹⁷⁶ The phrase thus having been stripped of its origins, the appeals court asserted that “[t]here is . . . nothing uniquely Christian about the thought that all things are possible with God.”¹⁷⁷ 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’s original statement in the New Testament “was simply using a proverbial phrase that was commonly known and accepted as true.”¹⁷⁸ Indeed, the court even quoted expert testimony claiming that the phrase was functionally equivalent to Yogi Berra’s saying, “[i]t’s never [*sic*] over until it’s over.”¹⁷⁹

Ironically, however, the history cited by the court both “draws on and covers over”¹⁸⁰ the social and historical context that is both present and buried within the motto. Having papered over the

174. *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001) (en banc).

175. *Id.* at 291–92.

176. *Id.* at 293.

177. *Id.* at 303.

178. *Id.* at 303–05 (emphasis omitted) (quoting an expert witness for the defendant).

179. *Id.* at 305 (internal quotation marks omitted). In fact, Berra said “It ain’t over ‘til it’s over.” YOGI BERRA, *THE YOGI BOOK: “I REALLY DIDN’T SAY EVERYTHING I SAID!”* 121 (1998). Apparently, the Sixth Circuit preceded Chief Justice Roberts in correcting an icon’s grammar when 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 Chief Justice Roberts quoted Bob Dylan in *Sprint Communications Co. v. APCC Services, Inc.*, 128 S. Ct. 2531 (2008), but corrected his grammar, “proving that [Roberts] is neither an originalist nor a strict constructionist”).

180. BUTLER, *supra* note 130, at 51 (emphasis omitted).

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 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), “[t]o the gods all things are possible,”¹⁸¹ or, as does Yogi Berra, “[i]t's never [*sic*] over until it's over.”¹⁸² 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's unique meaning is dependent upon its religious and Christian origins; yet the court covers over those origins in suggesting that the phrase is nothing other than an uncontroversial and universally shared sentiment.¹⁸³ The motto's effectiveness as a religious statement arises from its ability to draw upon and cover over its original context.

As this account makes clear, speech acts often appear to deny or conceal their original context—particularly when they are repeated throughout history and in varying new contexts—but at the same time, the original context continues to give the speech act its force. In addition, the original context that must be concealed is often a context of political or social subordination or strife.¹⁸⁴ Such contexts are ignored so that the speech act can appear to possess a singular, unifying, and uncontroversial meaning. But in reality, the past meaning persists, if only as the original context that gives the speech act its force and authority. Past social context therefore may play a

181. *ACLU of Ohio*, 243 F.3d at 303.

182. *Id.* at 305.

183. Cf. Robert Post, *Theories of Constitutional Interpretation*, in *LAW AND THE ORDER OF CULTURE* 13, 13 (Robert Post ed., 1991) (describing the testimony of the legislative chaplain in *Marsh*, who occasionally prayed in the name of Jesus but claimed to strive to represent “just civil religion in America” and “the Judeo-Christian tradition . . . that [is] common to the vast, overwhelming majority of most all Americans” (quoting testimony of Robert E. Palmer, *Marsh v. Chambers*, 463 U.S. 783 (1983), joint appendix)); see also Brief of Baptist Joint Committee and The Interfaith Alliance Foundation as Amici Curiae in Support of Petitioner, *Van Orden v. Peery*, 545 U.S. 677 (2005) (No. 03-1500), 2004 WL 2899175, at *7–8 (noting that courts dealing with challenges to Ten Commandments displays tend to “rip[] from context” and emphasize “the Commandments with secular equivalents”); cf. Christopher Lund, *Keeping the Government's Religion Pure: Pleasant Grove City v. Sumnum*, 104 NW. U. L. REV. COLLOQUY 46, 51 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/28/LRColl2009n28Lund.pdf> (describing how the Solicitor General's brief in *Pleasant Grove* subtly connected the Sumnum religion to al-Qaeda to portray it as “false, dangerous, and un-American”).

184. Lund, *supra* note 183, at 51–52 (arguing that endorsement of one religion always entails exclusion of another, though that exclusion is rarely acknowledged or made explicit).

role in interpreting such speech acts. An understanding of any history of subordination or strife will be relevant to discerning the present force of a particular instance of ceremonial deism for Establishment Clause purposes.

To summarize, there is support for the theory that repetition and long use may mitigate the religious force of a facially religious reference. At the same time, repetition invokes and often reinforces the prior meanings and origins on which new meanings depend. Meaning is thus capable of changing, but it more often displays a surprising persistence. Moreover, the effectiveness of speech acts often depends precisely on their ability to cover over their origins; as such, it is particularly important to be attentive to the social context that gave rise to a particular statement or phrase. As discussed further in Part III, moreover, there is great reason to doubt, in many instances at least, the claim that a religious phrase has lost its religious significance over time.

C. *Uptake*

A final, critical aspect of illocutionary acts is that of uptake. For an utterance to constitute an actual promise, endorsement, or any other speech act, it must “secur[e] . . . uptake.”¹⁸⁵ 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 private¹⁸⁶

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

185. AUSTIN, *supra* note 109, at 116; *see also* Hurd, *supra* note 106, at 958 (“One must intend to produce a ‘certain response’ in one’s audience . . . described by J.L. Austin as ‘uptake.’”).

186. Searle, *supra* note 116, at 409.

problematic. Such challenges generally assume any number of possible hearers or readers;¹⁸⁷ the court is concerned not just with the speech's effect on the individual plaintiff or plaintiffs but with its effect, in a sense, on all citizens.¹⁸⁸ This opens up the problem that different speech acts may evoke different kinds of responses from different hearers; the speech act of endorsement or proselytization may be successful or unsuccessful, depending on how it is received by a given speaker.

Ultimately, the problems evoked by the uptake requirement for illocutionary acts 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 immediately arises. This problem inheres in all of the jurisprudence concerning official references to religion, and the literature about government religious speech has already covered that ground extensively.¹⁸⁹ I have discussed this problem elsewhere as well, acknowledging the thorny problems posed by the reception of the speech among different hearers but doubting that it can be solved in an entirely satisfactory way.¹⁹⁰

187. Cf. Hurd, *supra* note 106, at 980–81 (noting the lack of a specific “audience” for most legislative utterances).

188. Indeed, the problem may be exacerbated by the fact that most Establishment Clause challenges to religious speech are facial challenges.

189. See, e.g., William P. Marshall, “We Know It when We See It”: *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 533–37 (1986) (“[A] symbol has no natural meaning independent of its ‘interpretive community’ [Yet] the interpretation of symbols, and perhaps religion itself, is inherently irrational.” (footnote omitted) (quoting Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 84 (1985))); Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1073–75 (2005) (“[G]iven the nature of religious objects, there may be no possible ‘reasonable person’ to try to rely upon in analyzing a religious object.” (quoting Neil R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 83–93 (1990))); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 322–25 (1987) (discussing “the problem of divergent perspectives” under the endorsement test).

190. Hill, *supra* note 25, at 530–33, 539–44. Justice Thomas’s brief concurring opinion in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), represents an interesting example of a symbol whose meaning has arguably changed over time, but whose meaning is complicated by the problem of uptake. *Id.* at 770–72 (Thomas, J., concurring). In *Pinette*, which revolved around the question of 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

To some extent, however, speech act theory aims precisely to avoid the problem of differing perspectives. As explained in Part II.B.2, speech act theory assumes that utterances can have meaning without reference to the intentions of any particular speaker and without assuming any particular hearer.¹⁹¹ This kind of meaning is often called “sentence meaning”—that is, the meaning that a sentence has to someone familiar with the conventions of the language, regardless of the speaker’s subjective intentions.¹⁹² Some theorists also refer to this concept of meaning as “public meaning.”¹⁹³ The concept of sentence meaning does not deny that a particular utterance may have different meanings for different hearers, but rather attempts to bracket those meanings and instead focus on the meaning that the “conventions of language” dictate for that utterance.¹⁹⁴

At the same time, I acknowledge that the meaning dictated by linguistic conventions is not always determinate, particularly when the subject of the utterance is a religious one, thus tending to evoke differing viewpoints from different audiences. Nonetheless, I believe that a presumption that facially religious phrases continue to have

on free speech grounds—but disagreed with the majority’s basic premise that the cross was a religious symbol. *Id.* 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.” *Id.* at 771. 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 nonreligious contexts. *Id.* This viewpoint has a certain intuitive force, no doubt in part because it focuses specifically on the Klan cross itself. At the same time, it demonstrates how the Klan’s use of the cross to intimidate and harass both draws upon and covers over the cross’s religious meaning, which waxed and waned over time and perhaps reached its peak through the Klan’s association with southern clergy in the 1920s. *Id.* But in any case, it appears to be the sort of symbol that has different meanings to different audiences, depending not only on their race but on their familiarity with the history of the United States and the Ku Klux Klan.

191. See Hurd, *supra* note 106, at 965 (noting that the “conventions of language are what provide for the illocutionary acts which may be performed by the use of a particular sentence,” and therefore that “[w]e need not look to the intentions of a speaker to determine the meaning of a particular sentence uttered by the speaker”); Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 124, 145–46 (2007) (citing PAUL GRICE, *STUDIES IN THE WAYS OF WORDS* (1989)) (distinguishing “speaker’s meaning” from “sentence meaning”).

192. PAUL GRICE, *Utterer’s Meaning, Sentence-Meaning, and Word-Meaning*, in *STUDIES IN THE WAY OF WORDS* 117, 124 (1989) (distinguishing “timeless meaning” from “occasion meaning”); Hurd, *supra* note 106, at 962–67.

193. Solum, *supra* note 191, at 135 (quoting GRICE, *supra* note 192, at 117–37).

194. Hurd, *supra* note 106, at 965.

religious meaning, which I discuss further in Part III.B, combined with a focus on issues such as past social context and past divisiveness, might make inroads toward minimizing the problem of differing perspectives among different hearers. At a minimum, I believe that it is a superior solution to other existing proposals, such as encouraging courts to adopt the position of the “reasonable nonadherent.”¹⁹⁵ A presumption against certain kinds of speech will give courts a baseline from which to determine the meaning and force of such speech—a baseline that may well conflict with a judge’s inherent biases but will likely align with the viewpoint of religious outsiders. Simply asking a judge to step into the shoes of someone unlike herself, on the other hand, appears to require an ill-defined act of empathy and is therefore less likely to be effective. Law, by and large, works by means of technical rules like burdens of proof and presumptions, rather than acts of sympathetic imagination. A presumption that pushes judges in one particular direction when they are in doubt about the social meaning of religious government speech gives at least some guidance in a highly contested case.

III. CEREMONIAL DEISM, SPEECH ACT THEORY, AND ESTABLISHMENT CLAUSE DOCTRINE

A. *Speech Act Theory and Establishment Clause Doctrine*

My contention here is that when courts evaluate religious references under the Establishment Clause, they are largely concerned with the illocutionary force or effect of these references. Likewise, speech act theory is geared primarily toward questions about what people *do*—what effects they bring about—when they speak.¹⁹⁶ This particular orientation explains both the title of Austin’s book and the almost exclusive focus of speech act theory on

195. *Leading Cases: Government Sponsored Religious Displays*, 103 HARV. L. REV. 228, 234 & n.46 (1989); see also Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court’s Approach*, 72 CORNELL L. REV. 905, 915–16 (1987) (arguing that courts should “focus[] on the reasonable perception of persons who would feel pressured and alienated by the allegedly sponsored message”); *Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1648–49 (1987) (“[A]pplication must turn on the message received by the minority or nonadherent.”).

196. Gorman, *supra* note 106, 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 question: what do we *do* with it?” *Id.* at 103 (quoting G.J. WARNOCK, J.L. AUSTIN 151 (1989)).

understanding illocutionary force.¹⁹⁷ 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.¹⁹⁸

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 sense and reference of certain phrases, terms, symbols, or even practices, 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 the nation’s history? These are questions about illocutionary force, and they are the questions that are relevant to the constitutional analysis. And indeed, the same is true for symbols (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.¹⁹⁹ Thus, although the Supreme Court’s jurisprudence regarding religious speech may ask the right questions, it does not point to any clear methodology for answering

197. *Id.* at 103 (noting that speech act theorists have understood “[t]he notion of illocutionary force” to be Austin’s “most significant theoretical contribution”).

198. 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. See, e.g., L.W. Ferguson, *Austin’s Philosophy of Action*, in SYMPOSIUM ON J.L. AUSTIN 127, 127–28 (K.T. Fann ed., 1969) (“[Austin’s] contribution to the philosophy of action was of great originality and importance.”); J.O. Urmson, W.V.O. Quine & Stuart Hampshire, *A Symposium on Austin’s Method*, in SYMPOSIUM ON J.L. AUSTIN, *supra*, at 76, 81–83 (discussing Austin’s aims to add to the understanding of language within, *inter alia*, the fields of linguistics, grammatics, jurisprudence, and economics); cf. SEARLE, *supra* note 130, at 17 (“[A] theory of language is part of a theory of action, simply because speaking is a rule-governed form of behavior.”).

199. Because of its preoccupation with social meaning and the application of speech act theory to theories of social meaning, this Article is also relevant to, and in dialogue with, a line of constitutional theory known as “expressivism,” which considers the constitutional implications of the messages sent by government actions—that is, of their social meaning. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000) (“Expressivism is thus an internal account of existing normative practices, but one with sufficient critical capacity to exert leverage over those practices and to indicate when they ought to be reformed.”); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2128 n.23 (1990) (citing the authors’ “distinct concerns with the expressive dimensions of actions”).

them. Speech act theory may be able to provide some guiding principles for doing just that.

One of this Article's primary contentions 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 terms of that phrase's 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. Thus, much of the case law discussing the Pledge of Allegiance revolves around whether reciting the Pledge is a religious or patriotic act—again, a question about illocutionary force.²⁰⁰ 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 thus the focus of the Establishment Clause inquiry in any case in which 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*,²⁰¹ the Eleventh Circuit held that the plaintiffs had standing to challenge the word “Christianity” in a city seal on the city's official stationery, even though the word appeared only as an illegible smudge.²⁰² 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.

200. See, e.g., *Myers v. Loudoun County Sch. Bd.*, 418 F.3d 395, 407 (4th Cir. 2005) (“[T]he Pledge, unlike prayer, is not a religious exercise or activity, but a patriotic one.”).

201. *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987).

202. *Id.* at 691–93.

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.²⁰³

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 the locutionary act giving rise to it.²⁰⁴ Moreover, this notion may be carried over to other instances in which a nonlinguistic government practice—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.

Admittedly, this Article does not take a stand on which doctrinal test—the endorsement test, the coercion test, the ill-defined *Marsh* test, or another test altogether—is the appropriate one for resolving Establishment Clause disputes regarding ceremonial deism. Rather, it aims to assist with answering a question that lurks behind all of those tests—namely, the methodological question of how to determine whether the meaning of a challenged utterance has retained its religious significance. The following Section thus presents several guideposts for making that determination. The final Section then attempts to apply these guideposts to some concrete examples.

B. Doctrinal Implications

It would be foolish to contend that the complex body of theory I have just described can yield easy answers to constitutional

203. *Id.* at 691–92.

204. *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).

challenges. This Section nonetheless outlines a basic doctrinal test, centering on a rebuttable presumption of continuing religious meaning, that incorporates the insights of speech act theory and provides some guidance for judicial analysis of ceremonial deism. As explained below, this approach breaks in many ways with the current judicial approaches to ceremonial deism and the assumptions on which many courts and commentators rely.

1. *A Rebuttable Presumption.* The proposal that courts should adopt a rebuttable presumption of continuing religious meaning when confronted with a challenge to ceremonial deism grows out of several key principles of speech act theory. First, speech act theory's emphasis on illocutionary force over locutionary force suggests that the presence of facially religious language should not, despite the views of some commentators, *automatically* mean that the language's effect is religious. Courts therefore should attend not only to the literal language itself but to the present force of the language. Of course, most courts already take this approach when confronted with challenges to ceremonial deism, but it bears repeating that they should not be subject to criticism simply for acknowledging the possibility that facially religious language may lack religious force.

Second, speech act theory teaches that meaning, although vulnerable to change, has a tenaciousness that is often underappreciated. The capacity of meaning to persist over time both argues in favor of a presumption of religious meaning—to take account of meaning's persistence—and suggests the importance of history and social context in determining whether a speech act retains its religious force. Indeed, as described above, speech acts have a tendency to be most effective when concealing the sort of history of subordination or divisiveness that lies behind them.²⁰⁵ Utterances like the words “under God” in the Pledge of Allegiance, the national motto, and the Ohio state motto are most successful as unifying sentiments when they are presented as uncontroversial statements of uncontested fact, not as divisive religious tenets.²⁰⁶ Ten Commandments displays are most likely to garner support as broadly accepted statements of morality, and legislative prayer to appear as a mere solemnizing statement of civil religion, when the suppression of

205. *Supra* Part II.B.4.

206. *See supra* note 183 and accompanying text.

other religious messages is ignored.²⁰⁷ Moreover, it is precisely the phrase's repetition and long use that works to create this apparent effect of universal acceptability, while hiding its religious and religiously divisive origins. As such, courts should be particularly sensitive to clues regarding an utterance's history. A rebuttable presumption of persisting religious meaning thus counteracts courts' tendency to ignore or paper over the history of religious division and exclusion that continues to inform an utterance's present meaning.

Third, speech act theory teaches that the speech acts of "describing" and "acknowledging" may be far less neutral and passive than they appear. The act of describing a reality may instead have a tendency to create and enforce that reality; moreover, this danger seems particularly acute when the describing is done in the name of the state. This effect may be intensified rather than lessened by the repetition of certain phrases throughout history, as that repetition, too, may be an attempt to shore up the reality that the phrase appears merely to describe.²⁰⁸

Indeed, as noted above, describing and acknowledging are speech acts like any others. And these speech acts are the ones to which courts often recur when explaining why a particular instance of ceremonial deism is constitutional. The legislative prayer in *Marsh*, the crèche scene in *Lynch*, and the words "under God" in *Newdow*'s concurrences are all labeled as merely descriptive, or as mere acknowledgements of religion's role in American history.²⁰⁹ Yet in performing the act of describing, one is often simultaneously constructing a particular reality. This is particularly true when government speech—the voice of authority—is at issue. Indeed, "[e]ven the most strictly constative scientific description is always open to the possibility of functioning in a prescriptive way, capable of contributing to its own verification [and] . . . help[ing] to bring about

207. See *supra* note 183 and accompanying text.

208. See *supra* text accompanying notes 164–68.

209. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 32–33 (2004) (Rehnquist, C.J., concurring in the judgment) (twice labeling the words "under God" in the Pledge "descriptive"); *id.* at 40 (O'Connor, J., concurring in the judgment) (stating that the phrase "under God is merely descriptive"); *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984) ("We are unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed."); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (describing legislative prayer as "simply a tolerable acknowledgement of beliefs widely held among the people of this country").

that which it declares.”²¹⁰ Moreover, “[t]he effectiveness of the performative discourse which claims to bring about what it asserts in the very act of asserting it is directly proportional to the authority of the person doing the asserting.”²¹¹

In his extended essay on monuments and the changing social responses to them over time, Professor Sanford Levinson gives examples of how public monuments claim to represent the official meaning of historical events, sometimes evoking enormous controversy.²¹² “[M]onuments,” he asserts, “are quintessentially ‘about time’ and who shall control the meaning assigned to Proustian moments of past time.”²¹³ Indeed, Professor Levinson notes that monument inscriptions may “set[] out what might be called, in our postmodernist times, the officially privileged narrative of the events.”²¹⁴ Insightfully, he adds, “One might well believe . . . that [a particular] statement was designed more to *create* a desired state of public consciousness than to describe accurately” the reality.²¹⁵

Finally, it is a relevant consideration that courts themselves engage in official government speech and that a court’s attempt to characterize a phrase and its history may itself fall into the traps of papering over past divisiveness and attempting to construct the reality it describes. “The law,” in other words, “is the quintessential form of ‘active’ discourse, able by its own operation to produce its effects.”²¹⁶ Mark De Wolfe Howe has pointed out, speaking specifically with respect to the Supreme Court’s now much-disputed use of history in Establishment Clause cases, that Americans “tend to think that because a majority of the justices 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, like its legal assertions, often become solidified in law and cited as precedent.²¹⁷

210. PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 134 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., Harvard Univ. Press 1991) (1984).

211. *Id.* at 223.

212. SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 45–48 (1998) (discussing the controversial Liberty Monument in New Orleans).

213. *Id.* at 31.

214. *Id.* at 48.

215. *Id.* at 49.

216. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805, 839 (Richard Terdiman trans., 1987).

217. MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 5 (1965); cf. Steven K. Green, “*Bad History*”: *The Lure of History in Establishment Clause Adjudication*, 81 *NOTRE DAME L. REV.* 1717, 1733 (2006) (noting that when the Court “endeavors to write an

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.²¹⁸ 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 Nation was believed to have been founded 'under God.'"²¹⁹

The possibility that judicial language may not just describe the Founders' beliefs but attempt to create one particular dominant and official narrative of those beliefs—combined with the fact that repetition of a phrase or a norm may be an attempt to reinforce its meaning and counteract its inherent vulnerability—again gives reason to be skeptical of courts' assertions that a particular phrase constitutes mere description or acknowledgment of the nation's history rather than endorsement of religion or proselytizing. The printing of "In God We Trust" on coins or the insertion of "under God" in the Pledge may be as much attempts to create a particular religious sentiment, or to place a particular gloss on American history, as they are mere neutral statements of fact. This recognition should be particularly powerful in light of the fact that courts often gloss over the highly contested history of such phrases. A rebuttable presumption that a facially religious phrase conveys religious meaning is justifiable to counteract these tendencies.

Indeed, all of the principles of speech act theory that I have just outlined lead to the conclusion that courts should be more suspicious than they currently are of claims that a particular government practice has lost its religious meaning through repetition or the passage of time. At the same time, it is the inescapable inference of this Article—and the theory it has advanced—that meaning can

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, *supra*, at 4)).

218. *E.g.*, Myers v. Loudoun County Sch. Bd., 418 F.3d 395, 407 (4th Cir. 2005).

219. H.R. Res. 548, 106th Cong. (2000) (citing Lynch v. Donnelly, 465 U.S. 668, 676 (1984)).

change in some circumstances. I therefore argue that courts should apply a rebuttable presumption of religious meaning to all instances of ceremonial deism.

2. *Rebutting the Presumption.* The rebuttable presumption I envision would function primarily as a burden-shifting technique. A plaintiff challenging an instance of ceremonial deism would have to show only facially religious language to get the benefit of a rebuttable presumption of continuing religious meaning. At that point, the burden would shift to the government to prove that the religious meaning has been lost. The government could do so in one of two ways. It could either demonstrate the absence of religious illocutionary force, as in the case of place names or other genuinely referential or citational phrases, or it could show that the sociohistorical context contains no divisive or religiously oppressive past that continues to inform the present usage. If the government's showing is unconvincing or if the plaintiff is able to undermine the government's claims, the utterance should be considered a religious one. At that point, the court would apply the endorsement or coercion test to determine whether the religious speech is unconstitutional.²²⁰

The possibility of rebutting the presumption—through an explanation of the illocutionary force or a study of the sociohistorical context—thus recognizes that in some cases a phrase may legitimately lose its religious meaning. The jokes concerning the national motto, though they rely on its religious origins, necessarily undermine the religious sentiment to achieve their humorous effect. Similarly, a court's statement that "The phrase 'under God' in the Pledge of Allegiance is unconstitutional" would not itself be unconstitutional, though the phrase is technically an instance of facially religious government speech. Finally, as discussed below, one might doubt whether the city names of Corpus Christi and San Francisco, or perhaps even the use of "A.D." on public documents, should be unconstitutional given the apparent lack of religious impact those terms convey.

220. Under the *Marsh* test, it is less clear what a court should do when confronted with a history and tradition indicating continuing religious meaning, as the *Marsh* test appears merely to tell courts to look at history and tradition to determine whether speech is constitutionally acceptable. In essence, my proposed approach is incompatible with the *Marsh* approach.

The task of distinguishing these examples from the potentially unconstitutional examples just discussed is a delicate one, but it is possible. It seems that at least the first example could be distinguished by the fact that the motto is placed in a context that undermines its original meaning. To the extent it relies on that meaning, it does so only to break with it. As for the second example, unlike the use of the words “under God” to solemnize an occasion by drawing on the religious sentiment itself, the use of “under God” in the hypothetical holding described above does not rely on those words’ religious force to accomplish the sentence’s effect. The sentence would have the same meaning and effect if it referred to another, nonreligious phrase. Finally, the city names of Corpus Christi and San Francisco, perhaps like the term “A.D.”²²¹ seem to act not as assertions of facts or religious values but as placeholders—arbitrary referents that specify a time or place—for which another name could easily be substituted without changing its overall illocutionary force.²²² Thus, a rebuttable presumption should be sufficient to convey skepticism about claims that certain phrases are simply describing, acknowledging, or referring to historical facts, while leaving room to uphold those facially religious terms that legitimately do merely refer or otherwise lack true religious force.

Moreover, speech act theory suggests the importance of history and social context in analyzing meaning and therefore rebutting the presumption of religiosity. According to contemporary theories of language, “meaning . . . [is] historical through and through, produced in processes of contextualization, decontextualization, and recontextualization.”²²³ For the most part, however, courts have not used history in appropriate ways. Rather, as described above, they often simply have noted the frequency of a particular term or practice, or 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 is overly simplistic and fails to capture the genuine historical quality of meaning. Moreover, such history proceeds by “interpreting the supposedly less complex and

221. See *infra* Part III.C.3.

222. The referential placeholder nature of city names may be contrasted with the Sixth Circuit’s attempt to place the Ohio motto, “With God All Things Are Possible,” in the same framework in *ACLU of Ohio*. The motto could not be replaced by Yogi Berra’s aphorism “It ain’t over ‘til it’s over” and continue to have the exact same meaning and illocutionary force.

223. CULLER, *supra* note 114, at 128.

ambiguous texts of a period,” assuming a purity and clarity of motives and understandings in an earlier time, in contrast with the present day.²²⁴

Rather than engaging in what Steven Green has called “general history,” by which courts “extrapolat[e] meaning from general historical facts removed from their context and announc[e] their commanding relevance for current practices,” courts must engage in a specific historical examination that includes consideration of the sociohistorical context of the term or practice at issue.²²⁵ That is to say, 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. In this way, courts can use the history to understand the social meaning of the term itself, not just to draw a conclusion about its constitutionality by analogizing to other historical practices or by means of an “any more than” test.

The need for specificity can be derived from the lessons of speech act theory. Speech act theory focuses on the illocutionary effects produced by a particular locutionary act and on the history of usages of a particular term. Speech act theory demonstrates the ways in which different social or historical contexts can change the meanings of a given utterance. In addition, it emphasizes the necessary conventionality and repeatability of speech acts, such that the same speech act must be recognizable in different contexts or when used by different speakers. Thus, although the broader context in which the term is mobilized will always come into play, the focus must always be on the specific term or practice at issue.²²⁶

Thus, the historical approach should examine, to the extent possible, the sociohistorical context of the term, practice, or symbol, with attention to the power relations it might imply. Because the various usages to which a term has historically been put inform the current illocutionary force, attention should be paid to these 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

224. *Id.* at 129.

225. Green, *supra* note 217, at 1725, 1732.

226. Cf. Conkle, *supra* note 105, 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).

divisive, has been used as an endorsement of a particular religious belief, and 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. As noted above, there is a particular tendency in cases dealing with ceremonial deism to paper over a history of religious strife and oppression.

Some of the Justices have suggested—most prominently in the recent Decalogue decisions, *McCreary County v. ACLU* and *Van Orden v. Perry*²²⁷—that the *present* or *recent* divisiveness of a religious symbol is particularly relevant to its constitutionality. This approach has been much criticized.²²⁸ Indeed, the notion that a lack of present divisiveness may prove that a symbol is constitutionally unproblematic recalls the suggestion that the performative succeeds “to the extent that *it draws on and covers over* the constitutive conventions by which it is mobilized.”²²⁹ 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 sociohistorical context urged by this Article therefore would not consider (or would not only consider) present divisiveness, but rather past divisiveness and indications of religious subordination associated with the disputed symbol.

An opinion that exemplifies this approach is Justice Brennan’s dissent in *Lynch v. Donnelly*. Justice Brennan’s dissent criticized 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.²³⁰ Justice Brennan focused on the history of both public celebration of Christmas and nativity scenes—“the special history of the practice under review”—and concluded that the public celebration of

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

228. See, e.g., Erwin Chemerinsky, *Why Justice Breyer Was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL RTS. J. 1, 3–4 (2005); Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1707–08 (2006).

229. BUTLER, *supra* note 130, at 51; BUTLER, *supra* note 137, at 227.

230. *Lynch v. Donnelly*, 465 U.S. 668, 705–20 (1984) (Brennan, J., dissenting).

Christmas and various aspects of the holiday's symbology had been a source of divisiveness among Christian sects until approximately the mid-nineteenth century.²³¹ Justice Brennan's dissent is aimed 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,²³² rather than at attempting to determine the symbols' illocutionary force, so it does not necessarily answer the 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.

Similarly, a recent article by Professor Christopher Lund sheds serious doubt on the *Marsh* Court's suggestion that legislative prayer, as practiced throughout the nation's history, is and always has been innocuous and uncontroversial.²³³ Although the practice of legislative prayer at the federal congressional level is indeed one of long standing, Professor Lund demonstrates through detailed historical analysis that it has been mired in controversy from its inception.²³⁴ The sectarian divisions and power struggles surrounding the practice were acute.²³⁵ Indeed, he concludes that the congressional chaplaincies "were never tame or benign, never immune to controversy, and never entirely insulated from the political culture that surrounded them."²³⁶ Professor Lund's analysis thus gives reason to doubt whether such prayers can be considered simple acknowledgements of the nation's religious heritage.²³⁷

Indeed, the extent to which judicial opinions ignore the history of intense sectarian and political divisiveness surrounding a religious phrase or practice is extraordinary. The majority opinions in *Marsh*, *Lynch*, and numerous lower court cases tend simply to catalog the multiple uses of a phrase or practice throughout history and to assert, based on a superficial view of this history, that the practice has been

231. *Id.* at 719.

232. *Id.* at 694.

233. Lund, *supra* note 32, at 1214.

234. *Id.* at 1177–207.

235. *Id.*

236. *Id.* at 1214.

237. *Id.*; see also Post, *supra* note 183, at 16 (noting complaints about legislative prayer by legislators in Nebraska and, as early as 1907, by legislators in California).

uncontroversial and is therefore constitutional. Yet this reasoning is classically the sort of papering over of the divisive origins of a practice—drawing upon yet covering over its sociohistorical context—that does not undermine but instead reinforces the practice’s religious meaning by drawing upon that meaning for its power and authority as an expression of local or national unity or identity. At a minimum, this fact gives reason to doubt the truth of courts’ offhand assertions about the innocuousness of a practice and to instead dig deeper to consider the practice’s sociohistorical context. Only by showing either a lack of illocutionary force or a lack of historical divisiveness, then, should the government overcome the presumption of continuing religious meaning.

C. *Examples*

The final section of this Article attempts to apply the principles described above to concrete instances of ceremonial deism. Although the analysis demanded here is admittedly case and context specific, I hope to demonstrate that the insights of speech act theory may assist courts in dealing with challenges to cases of ceremonial deism and particularly in distinguishing among different kinds of cases.

1. *Place Names.* Challenges to the constitutionality of city names like Corpus Christi and St. Louis are the cases in which the presumption would most likely be rebutted. Although these names have obviously religious—even sectarian—content, they do not generally carry an illocutionary force that can be described as religious when they are used as proper names to refer to long-established cities.²³⁸ 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. Rather, those place names legitimately may be understood as referring to—almost “quoting”—the origins of those cities, which were often founded in tribute to a religious figure. Indeed, it seems that place names simply function differently from mottos or pledges: they are neither assertions of fact nor declarations

238. 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 (“[h]istory and [u]biquity,” “[a]bsence of worship or prayer,” and “[m]inimal religious content”) would presumably cut in the other direction. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37–44 (2004) (O’Connor, J., concurring in the judgment).

of beliefs but simple referents whose arbitrariness is more or less assumed by those who use them.²³⁹

Religious city names thus may be one instance in which a term has legitimately lost its religious meaning. Although they contain facially religious language, one may doubt that those names still carry religious force. And indeed, speech act theory assists in reaching this conclusion. Although a plaintiff challenging the city name of San Francisco, for example, would have the benefit of a presumption in her favor, an examination of illocutionary force, informed by sociohistorical context, should easily rebut the presumption. Although some city names may in fact recall an act of religious and political conquest, and although some names may be the subject of some contestation, in most cases it will be easy to show that the name, like most names, does no more than refer to the city's historical origins and the religious figure after whom the city was named. The presumption of religious meaning could thus be rebutted without the necessity of examining sociohistorical context.

Similarly, in a careful and insightful opinion, the United States District Court for the District of New Mexico recently turned away a challenge to a sculpture in front of a sports complex in Las Cruces, New Mexico, that included three artistically rendered Latin crosses.²⁴⁰ 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."²⁴¹

Of course, if in any given case a city name were found to have enduring religious meaning, it would still remain for the court to determine whether that religious meaning rendered it unconstitutional. A court would proceed to ask whether the religious meaning is one of endorsement or coercion.

2. *The Pledge and the Motto.* In the case of the Pledge and the national motto, it seems that the presumption of religious meaning

239. See generally SEARLE, *supra* note 130, at 72–96 (discussing the speech act of referring, as in the use of proper names).

240. *Weinbaum v. Las Cruces Pub. Sch.*, 465 F. Supp. 2d 1116, 1122–23 (D.N.M. 2006).

241. *Id.* at 1132–33, 1149.

could not be rebutted in most contexts. The government could show neither that the practices lacked true illocutionary force—when recited in schools or stamped on coins, they are not mere placeholders or referents—nor that the sociohistorical context informing those practices is free of divisiveness or religious subordination.

It is difficult to ignore the fact that both the Pledge and the motto are associated with periods in American history of intermixed religious and patriotic sentiment—namely, the Civil War and the Cold War.²⁴² These periods were moments not just of generic religious sentiment but of attempting both to assert and consolidate the supremacy of God in the nation. And at least in the case of the Pledge, the assertion of the nation's placement “under God” was accompanied by an intent to exclude and label as unpatriotic anyone who—like the godless Communists—rejected the view embodied in the phrase. As one commentator put it, “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.”²⁴³

Nor do the ubiquity and repetition of those phrases minimize their religious effect, contrary to what courts have claimed. 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 asks why and how it can perform that function.²⁴⁴ Most likely it is because such references invoke a prior, explicitly religious set of practices and beliefs, and thereby “accumulate[] the force of authority through repetition or citation” of

242. See, e.g., Van Alstyne, *supra* note 12, at 786.

243. *Id.* Similarly, 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. RESTAD, *supra* note 23, at 91–104.

244. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36 (2004) (O'Connor, J., concurring in the judgment) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692–93 (1984) (O'Connor, J., concurring)).

those practices.²⁴⁵ The usage of those phrases relies on the religious force of prior usages to accomplish the act of solemnizing or expressing confidence, for example.²⁴⁶ Like the word “Christianity” covered by a smudge in the *Saladin* case, the religious meaning of the motto persists and continues to affect its audience.

It is thus precisely the 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 from an Establishment Clause perspective. Courts’ description of the national motto or the Pledge as mere historical acknowledgements, like the *Lynch* Court’s similar description of the public celebration of Christmas, draws upon yet covers over the religious and religiously divisive history of these practices by making them synonymous with patriotism.

A presumption that both the Pledge and the national motto have enduring religious meaning should not, therefore, be able to be rebutted. They are not instances in which the illocutionary force is clearly that of simply quoting or referring to a historical event, as in the case of city names. And the courts’ treatment of these phrases shows a distinct tendency to cover over a history of religious exclusion, which is manifest. Thus, the government would be unlikely to show that there was no history of divisiveness or religious strife behind these phrases or to overcome the presumption against their characterization as merely descriptive, rather than as norm-reinforcing. Nor is there anything about the context of those phrases’ use in the usual case that undermines or otherwise minimizes their force. Nonetheless, a court would be free to decide that the religious meaning, while persisting, does not rise to the level of endorsement or coercion, depending on the relevant Establishment Clause test that is being applied.

3. *Anno Domini*. A more difficult case is presented by the use of the phrase “A.D.,” or *anno domini*, or the English-language equivalent “In the Year of the Lord” on official documents. Because the language is facially religious—indeed, it refers to the birth of the

245. BUTLER, *supra* note 130, at 51 (“If a performative provisionally succeeds . . . then it is . . . only because that action echoes prior actions, and *accumulates the force of authority through the repetition or citation of a prior, authoritative set of practices.*”).

246. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306 (2000) (“A religious message is the most obvious method of solemnizing an event.”).

Christian savior—it would invoke the rebuttable presumption of religious meaning. It seems that the government might, however, succeed in rebutting the presumption by showing that the phrase acts as a mere placeholder, a now-arbitrary way of referring to a particular historical event that marks the beginning of the current era. The phrase could be, and sometimes is, replaced by the term “C.E.”—Common (or Christian, or Current) Era.

At the same time, however, labeling time with reference to the birth of “the Lord” seems less neutral than the sort of verbal quoting or depicting that occurs when a city name references a saint or a mission that forms part of its history. The phrase appears to be asserting a reality—that a particular historical figure was the Lord and that time started anew with his birth—that is less neutral than the fact that the city of Corpus Christi was named after the Roman Catholic feast day on which a Spanish explorer first discovered the area.²⁴⁷

It is possible that the government could rebut the presumption by showing that there is no history of divisiveness or subordination concealed by the use of our common dating system. The plausibility of this argument would depend again on historical analysis, but there are reasons to doubt its validity as well. As the cultural anthropologist Carol Delaney has pointed out, “[w]e think of the calendar as a neutral kind of chronological record-keeping mechanism, but it is actually a highly political institution.”²⁴⁸ Governments have often manipulated calendars for political ends—to suggest that time begins anew with a particular, foundational political event, for example, as in the adoption of the French Revolutionary calendar.²⁴⁹ And indeed, there is some evidence that the powerful act of designating time has stirred some religious division. Jehovah’s Witnesses use only the designation C.E. in their official publications, whereas the Southern Baptist Convention has advocated retaining the traditional A.D. as “a reminder of the preeminence of Christ and His gospel in world history” and “a reminder to those in this secular age of the importance of Christ’s life and mission and emphasizes to all that

247. City of Corpus Christi, History, <http://www.cctexas.com/?fuseaction=main.view&page=109> (last visited Nov. 1, 2009).

248. CAROL DELANEY, INVESTIGATING CULTURE: AN EXPERIENTIAL INTRODUCTION TO ANTHROPOLOGY 88 (2004).

249. Indeed, the calendar adopted by the secularist French revolutionaries was intended to be “very ‘rational’ and designed to counteract the ‘irrational’ elements inherent in religion, specifically to break the hold of Christianity over the people.” *Id.*

history is ultimately His Story.²⁵⁰ There is thus a possibility that the term retains its religious significance. Nonetheless, its use in documents may or may not constitute an endorsement of religion or a coercive religious act.²⁵¹

CONCLUSION

This Article begins from the intuition that not all forms of ceremonial deism are identical and from the assumption that 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, however, that mere repetition or long use always deprives a symbol, term, or practice of its force. In fact, there is much reason to be skeptical of courts' claims that a facially religious practice has lost its religious meaning. The offhand way in which judges often make the assertion is thus unsatisfying from a theoretical and doctrinal standpoint.

This Article therefore proposes that courts' analysis should rely on a rebuttable presumption that a facially religious phrase or practice has continuing religious meaning. Moreover, courts may consider the illocutionary force and the sociohistorical context of a term when deciding whether the presumption has been rebutted. If the presumption has not been rebutted, courts should then apply one of the relevant Establishment Clause tests. Although this approach does not add up to a perfectly determinate test for challenges to

250. S. Baptist Convention, SBC Resolution: On Retaining the Traditional Method of Calendar Dating (B.C./A.D.), <http://www.sbc.net/resolutions/amResolution.asp?ID=298> (last visited Nov. 1, 2009). At the same time, Professor Delaney has argued that the use of C.E. is not particularly preferable. DELANEY, *supra* note 248, at 86. "But just *whose* common era?" she asks. "Jews preceded Christians by at least a millennium and the two religions have surely not merged despite the hyphen in Judeo-Christian. I find CE a euphemism because the common era still begins with Christ's birth and, thus, conceals the political implications." *Id.* Professor Delaney's comment reveals another instance of drawing on and covering over the origins of a phrase.

251. See, e.g., *benMiriam v. Office of Personnel Mgmt.*, 647 F. Supp. 84, 85–86 (M.D.N.C. 1986) (holding that the use of the abbreviation "A.D." on government documents is not unconstitutional because the phrase is secular and because it "does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets" (quoting *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961))).

ceremonial deism, it is nonetheless a vast improvement over the current state of affairs.

This Article does not provide a clear set of answers to difficult Establishment Clause questions. Instead, it suggests an analysis of ceremonial deism that draws on the insights of linguistic theory and proposes a presumption that may serve to counteract the tendency of courts dealing with ceremonial deism to fall back too easily on the notion that such phrases are merely descriptive or used for patriotic rather than religious purposes. 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.