March 12, 2009

Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time

Jessie Hill, Case Western Reserve University

Available at: https://works.bepress.com/jessie_hill/3/
OF CHRISTMAS TREES AND CORPUS CHRISTI: CEREMONIAL DEISM AND CHANGE IN MEANING OVER TIME

B. JESSIE HILL

I. INTRODUCTION

II. CEREMONIAL DEISM AND THE “SECULARIZATION” THESIS
   A. The “Secularization” Thesis
   B. Criticisms of the “Secularization” Thesis
   C. Ceremonial Deism in the Context of Establishment Clause Doctrine

III. SPEECH ACT THEORY, ITERABILITY, AND CHANGE IN MEANING OVER TIME
   A. Meaning and Force
   B. Conventionality
   C. Iterability and Change
   D. Vulnerable Phrases and Sovereign Speech Acts
   E. Uptake

IV. CEREMONIAL DEISM, SPEECH ACT THEORY, AND ESTABLISHMENT CLAUSE DOCTRINE
   A. Speech Act Theory and Establishment Clause Doctrine
   B. Doctrinal Implications
      1. Illocutionary Force
      2. Social History
      3. The Illocutionary Act of Describing and the Dangers of Government Speech

V. CONCLUSION

* Associate Professor, Case Western Reserve University School of Law. Drafts of this Article have been presented at the Northeast Ohio Faculty Colloquium and the Ohio Legal Scholarship Workshop. The author would like to thank the participants of those workshops for their helpful comments and suggestions. The author would also like to thank Jonathan Adler, Jonathan Entin, Jacqueline Lipton, and Richard Pildes. Jessica Mate provided excellent research assistance. All illocutionary infelicities are mine.
OF CHRISTMAS TREES AND CORPUS CHRISTI:
CEREMONIAL DEISM AND CHANGE IN MEANING OVER TIME

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 are not going 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 is likely to 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 therefore 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 such phrases have lost their religious meaning through passage of time or rote repetition. To examine this claim, 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 analysis of social meaning, I argue that some insights about the problem of ceremonial deism may be found there, lending depth to a problem that has gone almost entirely untheorized by those who have espoused it so far. Finally, I consider the implications of this analysis for the constitutionality of such official religious references. Ultimately, while recognizing that meaning can change over time in some instances, I argue 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.
OF CHRISTMAS TREES AND CORPUS CHRISTI:  
CEREMONIAL DEISM AND CHANGE IN MEANING OVER TIME

The past is never dead. It’s not even past.  
William Faulkner, *Requiem for a Nun*

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.  


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

1 Discussion of the history of the National Motto and its inscription on currency may also 
be found in Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 
*COLUM. L. REV* 2083, 2122-24 (1996), and Anson Phelps Stokes and Leo Pfeffer, 
*Church and State in the United States* 568-71 (2d Ed. 1964).
beyond reconstruction,” but it appears that the error is attributable to the website, not the 
original letter. *Id.* (emphasis added).
3 *Id.*
all coins upon which it had previously appeared."\textsuperscript{4} Finally, the website notes that the phrase “In God We Trust” became our national motto in 1956.\textsuperscript{5}

The website does not explain that the brief suspension of the motto’s inscription between 1907 and 1909 was due to President Theodore Roosevelt’s commissioning a new design for the coins that did not include the motto.\textsuperscript{6} The President defended his decision on the ground that the use of such a solemn motto on coins “comes dangerously close to sacrilege,” tending to cheapen it and open it up to “jest and ridicule,” as in phrases like “‘In God we trust for the [other] 8 cents.’”\textsuperscript{7} The historical evidence suggests, however, that the decision was aesthetic rather than religious or constitutional in motive.\textsuperscript{8} In response to the ensuing popular uproar, Congress passed a bill requiring that the motto appear on coins again, and Roosevelt signed the bill.\textsuperscript{9} But it was not until much later, in a frenzy of religious piety mixed with patriotism not unlike that accompanying the motto’s initial appearance in the Civil War era, that “In God We Trust” was finally adopted as the National Motto.\textsuperscript{10} Around the same time, the Pledge of Allegiance was amended to include the words “under God.”\textsuperscript{11}

Today, the American Family Association (AFA) sponsors a

\textsuperscript{4} Id.
\textsuperscript{5} Id.
\textsuperscript{7} Roosevelt’s statement defending the motto-less coins appeared in the New York \textit{Times} on November 14, 1907. \textit{N.Y. Times}, November 14, 1907, at 1. In addition to making the argument about sacrilege, Roosevelt insisted that there was no “legal warrant” for placing the motto on the coins. \textit{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, \textit{STOKES \& PFEFFER, supra} note 1, at 568, or because the legislation was inadvertently omitted from the Revised Statutes of 1874, Gatewood, \textit{supra} note 6, at 40 & n.20.
\textsuperscript{8} Gatewood, \textit{supra} note 6, at 37, 41.
\textsuperscript{9} \textit{Id}. at 50.
\textsuperscript{10} \textit{STOKES \& PFEFFER, supra} note 1, 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 then than at the Founding); William Van Alstyne, \textit{Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall-A Comment on Lynch v. Donnelly}, 1984 DUKE L.J. 770, 786 (describing how “the Union cause in the Civil War” was “mingled with the assimilation of Christian symbolism” and drawing an analogy to the “[j]ingoistic desires to paint a vivid contrast in the Cold War, separating ourselves, claiming ‘God’ within ‘our’ government, for sanctimonious contrast with ‘Godless atheistic’ Communism,” when the motto was officially adopted and the words “under God” were added to the Pledge).
\textsuperscript{11} The Pledge was amended in 1954. \textit{STOKES \& PFEFFER, supra} note 1, at 570-71; Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249.
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.”\footnote{www.afa.net/igwt/ (last visited June 12, 2008). I am grateful to Cassandra Robertson for bringing this website to my attention.}

For a time, the AFA offered to provide a prototype poster, containing the motto in large capital letters on an American flag background. Seventeen state legislatures have required such postings.\footnote{Id. Those states are Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, North Carolina, Oklahoma, Tennessee, Texas, Utah, Virginia, and West Virginia.} And in 2000, the U.S. House of Representatives overwhelmingly passed a resolution encouraging display of the national motto in public buildings.\footnote{H.R. 548 (106th Cong., 2d Sess.).}

The history of the motto demonstrates in many ways the dynamic concerning such brief official references to religion – commonly known as “ceremonial deism” – that is central to the argument of this Article. It is a story about conflating the patriotic and the religious as a means of consolidating a national identity and, simultaneously, suppressing dissent. The introduction of the motto on our coinage and its official adoption by the national Government both 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-sacred 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, 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 reality as it is an attempt by a political or religious faction to install or shore up that reality.

Viewed in light of this long, colorful, and ongoing history, then, can the national motto be said to be a religious expression? Is it an endorsement of religion or a proselytizing statement that may be said to violate the Establishment Clause of the First Amendment?\footnote{U.S. CONST. AMEND. I (“Congress shall make no law…respecting an establishment of religion….”).} 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
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. 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 re-inject religion into the public school classroom demonstrates that the meaning of the motto is still flexible and open-ended: if the motto has lost its religious force through time and repetition, the AFA, at least, must believe that that force can be revived.

In the United States, our public culture is replete with brief official acknowledgements of religion, sometimes referred to as “ceremonial deism,” that initially appear innocuous but pose thorny Establishment Clause problems. Examples range from the motto and the words “under

---

17 Gaylor, 74 F.3d at 216.
18 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 1, at 2091). Epstein mis-attributes the phrase to Walter Rostow.

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

In Elk Grove Unified Sch. Dist. v. Newdow, Justice O’Connor created her own test for determining when a practice amounts to an instance of ceremonial deism that does not violate the Establishment Clause, considering the factors of “history and
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. (which stands for anno domini, Latin for “in the year of the Lord”) on public documents. One might include in the list as well certain practices, such as the Christmas holiday or Sunday liquor laws. Such examples may appear constitutionally problematic to a greater or lesser degree, but they are typically justified on the ground that, while religious in origin, they no longer carry any religious impact.19 Less common, but also relevant, are symbols or practices that have secular origins but have taken on religious meaning over time: one might argue that this is the case with Christmas trees or the entire symbology surrounding the Easter holiday.20 As discussed below in Part II, 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 these sorts of practices have been addressed by courts and commentators, Part II briefly places the problem of ceremonial deism into the larger context of Establishment Clause doctrine, much of which is in flux or disarray. Nonetheless, legal challenges to ceremonial desism are likely to arise in the near future – and indeed, a second-round challenge to the Pledge of Allegiance is currently percolating – needing resolution by the Supreme Court.21 Regardless of

19 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 civil context.” Andrew Rotstein, Note, Good Faith? Religious-Secular Parallelism and the Establishment Clause, 93 COLUM. L. REV. 1763, 1772 (1993).

20 See, e.g., PENNE L. RESTAD, CHRISTMAS IN AMERICA: A HISTORY 57 (1995) (“In pre-Christian times, Romans used evergreens, symbols of fertility and regeneration, to trim their houses at the Kalends [i.e., the first days] of January. Eventually, Christians appropriated the use of evergreens for their Christmas celebration. To remove the taint of paganism, they associated it with new beginnings and man’s second chance with God. The tree became for pious folk a representation of Jesus as the Light of the World, Tree of Life, and second Adam born to right the sins of the first.”).

21 Newdow v. Congress of the United States, 383 F. Supp. 2d 1229 (2005) (holding that the Ninth Circuit’s prior opinion holding the recitation of the Pledge in schools unconstitutional is still binding, because the Supreme Court reversed that decision on standing grounds but did not vacate it). This newest Pledge challenge is currently pending on appeal in the Ninth Circuit; oral argument was heard on December 4, 2007. The same plaintiff, Michael Newdow, has recently brought suit in the Eastern District of California, challenging the constitutionality of the national motto. Newdow v. Congress of the United States, No. 05-cv-2339 (June 12, 2006) (slip op.). Given that there was binding
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 III 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. Part IV 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 presents several principles that courts should look to when deciding the permissibility of an instance of ceremonial deism under the Establishment Clause. Based on these principles, 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.

II. 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, for reasons that I explain below, none of the analyses gets to the heart of the problem. In the next Part I argue that by looking at theories of language – and particularly theories about how meaning can change – we might arrive at some new insight into the problem of ceremonial deism. But first, this section expands on the case

9th Circuit precedent holding the motto constitutional, Aronow v. United States, 432 F.2d 242 (9th Cir. 1970), the claim was dismissed, but an appeal of that case is also pending in the Ninth Circuit. Oral argument was also heard on December 4, 2007. Similarly, in December of 2008, he 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, but the case remains pending. Newdow v. Roberts, No. 1:08-cv-02248-RBW (D.D.C. Jan. 16, 2009) (slip op.).

22 In drawing on theories of language, and in particular a branch of philosophy of language known as “speech act theory,” I am continuing a project I began with my article on religious symbolism and the problem of context, which is to apply the insights of
law upholding or suggesting the constitutionality of several different instances of ceremonial deism and elucidates the “secularization” theory behind those cases.

A. The “Secularization” Thesis

The Supreme Court case that is most relied upon for the analysis of ceremonial deism is *Marsh v. Chambers*,\(^{23}\) in which the Court considered the constitutionality of Nebraska's practice of starting legislative sessions each day with a prayer by a chaplain paid by the state. In upholding the practice of legislative prayer, the Court did not apply any of the usual tests that it applies in other Establishment Clause cases, but rather took something of a departure, reasoning that “history and tradition” support the constitutionality of the practice.\(^{24}\) In an opinion that even Justice Brennan’s dissenting opinion characterized as “narrow and, on the whole, careful,”\(^{25}\) 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.\(^{26}\) This “unique history” led the Court to decide that the practice was constitutional, while implying that the analysis was one that was not likely to have much application beyond the specific practice of legislative prayer.\(^{27}\) The Court also suggested that the practice was a mere “acknowledgement” of the importance of religion in our society and has become part of the “fabric of our society.”\(^{28}\)

As one commentator noted, despite *Marsh’s* narrow drafting, *Marsh* has been read in a number of ways: “as grandfathering long-established customs”; as “a standard for what the Establishment Clause must be thought to allow,” based on “historical practices and understandings”; and as “an illustration of how repetition can secularize

\(^{24}\) Id. at 786.
\(^{25}\) Id. at 795 (Brennan, J., dissenting).
\(^{26}\) Id. at 787-91.
\(^{27}\) 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 Christopher C. Lund, *The Congressional Chaplaincies*, Wm. & Mary Bill of Rts. J. ___ (forthcoming 2009).
\(^{28}\) Id. at 792.
what might otherwise be considered religious.”

The Third Circuit recently echoed the last of those interpretations when it argued that Marsh stood for “the proposition that history can transform the effect of a religious practice.”

Just one year after Marsh, the Court espoused a similar theory 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, then-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.” 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.”

A conceptual predecessor to Marsh and Lynch is McGowan v. Maryland, decided twenty-two years earlier. In McGowan, the Supreme Court had held that Sunday closing laws did not violate the Establishment Clause because, although their original purpose was primarily to facilitate Sunday Sabbath worship (which was often enforced by law) their purpose had become simply permitting a universal day of rest. Thus, the Court held that the laws, which appeared under the title, “Sabbath Breaking” and forbade “profan[ing] the Lord’s day,” did not constitute an establishment of religion, although they were “undeniably religious in origin.” The Court’s analysis, which relied in part on the history of Sunday closing laws, was supplemented by a lengthier historical exegesis by Justice

30 Freethought Society v. Chester County, 334 F.3d 247, 266 (3d Cir. 2003).
32 Id. at 674.
33 Id. at 675-78, 680, 683.
35 Id.
36 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.
37 Id. at 431-40.
Frankfurter, who acknowledged in a concurring opinion that the laws have been “the vehicle of mixed and complicated aspirations,” but agreed that they were constitutional despite their facially religious language and original intent. The religious language notwithstanding, Justice Frankfurter pointed out that “[c]ultural history establishes not a few practices and prohibitions religious in origin which are retained as secular institutions and ways long after their religious sanctions and justifications are gone.” Although McGowan’s language focused on the point in time at which the purpose of a statute is relevant – holding that the Court would consider the current purpose for keeping the statute rather than the original purpose for adopting it – its analysis invokes, and is used by the Justices to support, the notion that religious meaning may be lost over time.

The Court, of course, famously dodged a question involving ceremonial deism in *Elk Grove Unified School District v. Newdow* by turning away a constitutional challenge to the words “under God” in the Pledge of Allegiance on standing grounds. Nonetheless, three Justices in concurring opinions expressed their view that the Pledge was constitutional. Those opinions considered such factors as the lack of coercion, the long history of official acknowledgements of religion, and the brief, nondenominational quality of the reference to God. A recurring theme in the Newdow concurrences, however, was that the pledge was a patriotic rather than religious exercise. For example, Justice Rehnquist, after cataloguing the multiple references to God in various historic national documents, concluded 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.” 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,

---

38 Id. at 459-95 (Frankfurter, J., concurring).
39 Id. at 503-04.
41 542 U.S. 1 (2004); cf. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 224 (2004) (noting that “[i]n Newdow, it may have been politically impossible to affirm [the Ninth Circuit’s holding that the pledge was unconstitutional] and legally impossible to reverse”).
42 Id. at 43-44 (O’Connor, J., concurring); id. at 46-49 (Thomas, J. concurring).
43 Id. at 30 (Rehnquist, C.J., concurring).
44 Id. at 42-44 (O’Connor, J., concurring).
45 Id. at 31 (Rehnquist, C.J., concurring).
“participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.”

Similarly, Justice O’Connor characterized the words “under God” as “merely descriptive” and patriotic rather than devotional. Indeed, citing McGowan, 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.”

The remaining Supreme Court discussions of the constitutionality of brief official religious references have been in passing dicta. Thus, for instance, Justices have referred to instances of ceremonial deism such as the national motto, presidential Thanksgiving proclamations, the Pledge, and invocations such as “so help me God” (in the Presidential oath) and “God save the United States and this Honorable Court” as apparently constitutional examples of official religious acknowledgements, to support their view that other, usually more novel instances of official religious speech are constitutional, or to contrast with other instances of official religious speech that they view as unconstitutional. In so doing, the Justices have invoked the history and ubiquity of such references, or they have opined that the references have lost their religious meaning over time through rote repetition. Typical is Justice O’Connor suggestion in

---

46 Id. (Rehnquist, C.J., concurring) (internal quotation marks omitted).
47 Id. at 40-41 (O’Connor, J., concurring).
48 Id. at 41.
50 Van Orden v. Perry, 545 U.S. 677, 716 (Stevens, J. dissenting); Allegheny, 492 U.S. at 602-03; Lynch, 465 U.S. at 713-17 (Brennan, J., dissenting); Marsh, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., dissenting); Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962); Wallace, 472 U.S. at 78 n.5 (O’Connor concurring). Justice Brennan claimed, beginning in Marsh to be “uncertain” about the constitutionality of ceremonial deism and insisted in Marsh that legislative prayer was unconstitutional.
51 Allegheny, 492 U.S. at 624-25 (O’Connor, J., concurring).
52 Schempp, 374 U.S. at 303-04 (Brennan, J., concurring); Brennan dissenting in Lynch, 463 U.S. at 713-17 (Brennan, J., dissenting); Marsh, 463 U.S. at 818 (Brennan, J., dissenting); Allegheny, 492 U.S. at 631 (O’Connor, J., concurring).
Of Christmas Trees and Corpus Christi

County of Allegheny v. ACLU, 53 a challenge to public displays of a crèche and a menorah, that the Thanksgiving holiday, “despite its religious origins, is now generally understood as a celebration of patriotic values rather than particular religious beliefs.”54 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.55 Finally, concurring in School District of Abington Township v. Schempp,56 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.”57 According to Justice Brennan, they simply constitute recognition of “the historical fact that our Nation was believed to have been founded ‘under God.’”58

Lower courts have had more occasions to address the constitutionality of various forms of ceremonial deism head-on. Yet very little sustained reasoning has supported those holdings, either. Some courts apply the Lemon test or a variant thereof to determine the constitutionality of a challenged practice, while others, like the Supreme Court, do not apply any particular test. Despite its narrow drafting, moreover, Marsh is often invoked to support the notion that a long history may remove any otherwise constitutionally problematic association with religion.59

Challenges to the national motto have fallen largely on the grounds

---

54 Allegheny, 492 U.S. at 631 (1989). 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 1, 53-60, 504-06; Van Alstyne, supra note 10, at 775-76.
55 Lynch, 465 U.S. at 616 (Blackmun, J.); id. at 634 (O’Connor, J., concurring); id. at 641 (Brennan, J., concurring) (joined by Justices Marshall and Stevens) (allowing that “the tree alone may be deemed predominantly secular,” even if it is not secular when placed next to a menorah).
57 Id. at 303-04.
58 Id. at 304.
that the motto has secular purposes and effects, in that it is best considered to be a patriotic or solemnizing phrase rather than a religious one. Often, such declarations are accompanied by the suggestion that the religious origins of the phrase have been lost through “historical usage and ubiquity.”60 Turning away one such challenge, the Ninth Circuit court of appeals pointed out that “[i]t is not easy to discern any religious significance attendant on the payment of a bill with coin or currency on which has been imprinted ‘In God We Trust’ or the study of a government publication or document bearing that slogan. In fact, such secular use of the motto was viewed as sacrilegious and irreverent by President Theodore Roosevelt.”61 In ACLU v. City of St. Charles, in the course of addressing a challenge to a Christmastime nativity scene that included a large lighted Latin cross, the court of appeals for the Seventh Circuit described an extensive catalog of symbols and terms that have “lost [their] religious connotations for most people,” including Christmas trees and wreaths, the five-pointed star of Bethlehem, and the city names Santa Cruz and even St. Charles itself.62 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.63

Some have taken a somewhat more nuanced approach to the problem of change in meaning over time, suggesting that the passage of time is simply one factor that the court must take into account when determining whether a government action unconstitutionally advances religion. In Freethought Society v. Chester County,64 the court considered, and ultimately turned away, an Establishment Clause challenge to a display of the Ten Commandments that had been placed on the exterior of a county courthouse 82 years earlier, and neither removed nor maintained since then, beside an entrance that had become defunct.65 While rejecting

61 Aronow v. United States, 432 F.2d 242, 243 (9th Cir. 1970).
63 Camack v. Waihee, 932 F.2d 765, 782 n.19 (9th Cir. 1991). The court did allow that the holiday had not become “‘secularized’ in the same manner as Thanksgiving and Christmas,” by which it apparently meant that it had not been secularized to the same extent. Id.
64 334 F.3d 247 (3d Cir. 2003).
65 Id. at 251-54.
the notion that the display’s age alone could immunize it from constitutional infirmity, the court insisted that the historical context was one consideration in determining whether the display had an impermissible purpose or effect under the “endorsement test.”

The relevance of the passage of time, for the Freethought court, was not that it destroyed the religious significance originally carried by the Ten Commandments themselves, but rather that the maintenance of the historic Ten Commandments plaque does not send the same message that a recently erected Ten Commandments plaque would send. The court drew an analogy to both the national motto and the expression “God save the United States and this Honorable Court,” which, while containing religious language, have been “tempered by the secular meaning that has emerged over the passage of time” and by their use for secular purposes, such that “the reasonable person would not perceive in these phrases a government endorsement of religion.”

To summarize, courts often rely reflexively on the secularization thesis, along with an assertion that the challenged phrase does no more than acknowledge or describe the role of religion in our national history, to uphold instances of ceremonial deism against constitutional challenge. Courts make such arguments whether they are applying one of the standard Establishment Clause tests or simply analogizing to McGowan,

---

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

67 Id. at 265.

68 Id. at 264; see also Brookman, supra note 60, at 216-24 (arguing that the concept “might be better understood as an argument that the ... endorsing value has been lost over time”); Elliott M. Berman, Endorsing the Supreme Court’s Decision to Endorse Endorsement, 24 COLUM. J.L. & SOC. PROBS. 1, 17-18 (1990) (“[W]hen a reasonable observer judges a government action, the tradition or novelty of the act is central to his or her analysis. . . . To be sure, history lacks the power to turn a blatant message of endorsement into thin air. . . . However, when the Court enters a difficult area and considers statutes that are on the borderline of constitutionality, it is quite understandable why, under the endorsement test, the history of the statute and of the public’s perception of government regulation in the area at issue become significant elements of the Court’s establishment clause analysis.”). I have made a similar suggestion elsewhere. Hill, supra note 22, 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).
Marsh, or Lynch. Thus, given the frequency with which the concept of change in meaning over time is invoked, it is surprising that there is very little theoretical content given to the claim.

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 he, like others, has questioned the accuracy of the claim. “Religious icons have remained powerful symbols for centuries despite their familiarity,” he argues; moreover, other types of symbols are not generally alleged to lose their meaning over time.69 Judge Manion of the Seventh Circuit has similarly criticized the concept of ceremonial deism. He, like Professor Brownstein, questioned why “only religious phrases” may “lose[e] their significance through rote repetition”: “Why only ‘under God’? Why not ‘indivisible’, ‘liberty and justice for all’? Do not these equally repeated phrases lose their meaning under the logic of ‘ceremonial deism’?”70 Similarly, Professor Douglas Laycock and others have forcefully argued that the words “under God” in the Pledge of Allegiance have “obvious religious meaning,” as evidenced by the fact that believers and nonbelievers alike find religious content in the phrase.71

70 Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring); cf. Van Orden v. Perry, 545 U.S. 677, 696 (Thomas, J., concurring) (“[R]epetition does not deprive religious words or symbols of their traditional meaning. Words like ‘God’ are not vulgarities for which the shock value diminishes with each successive utterance.”).
71 Laycock, supra note 41, at 224-27 (2004); see also Daniel O. Conkle, Religious Expression and Symbolism in the American Constitutional Tradition: Governmental Neutrality, But Not Indifference, 13 Ind. J. Global Legal Stud. 417, 433 (2006) (“By all indications, the governmental expression in question does promote and endorse religion, and it does so deliberately.”); Thomas C. Berg, The Pledge of Allegiance and the Limited State, 8 Tex. Rev. L. & Pol. 41, 48 (2003) (“[I]t is simply untrue for many people that ‘under God’ has lost its religious meaning. If the phrase had lost its meaning, it is unlikely that so many people would be so angry about taking it out of the Pledge.”); Epstein, supra note 1, at 2165 (“[U]nder any honest appraisal of modern American society, the practices constituting ceremonial deism have not lost their religious significance. For instance, it would probably come as a great surprise to most Christians that religion is no longer a significant component of the Christmas holiday. . . . And
In addition to questioning the factual accuracy of the claim that religious meaning disappears over time, commentators have emphasized the conceptual and theoretical difficulties that arise from such an approach. One prevalent argument is that it is denigrating to religion and insulting to religious believers to say that the Christmas holiday, the national motto, and the like have no religious content.\footnote{E.g., Lynch v. Donnelly, 465 U.S. 668, 711-712 (1984) (Brennan, J., dissenting) (arguing that the suggestion that a crèche is “merely ‘traditional’ and therefore no different from Santa’s house or reindeer is not only offensive to those for whom the creche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of ‘history’ nor an unavoidable element of our national ‘heritage’”); Laycock, \textit{supra} note 41, at 224-25, 233; Shiffрин, \textit{supra} note 71, at 68-69 (describing the argument as “ironic”); Steven D. Smith, \textit{How is America “Divided by God”?}, 27 \textit{Miss. C. L. Rev.} 141, 155 (2007-2008) (arguing that “[s]uch explanations . . . demean the expressions and insult the intelligence . . .” (footnote omitted)); Robert A. Schapiro, \textit{The Consequences of Human Rights Foundationalism}, 54 \textit{Emory L.J.} 171, 179 (2005); cf. Camack v. Waihee, 932 F.2d 765, 789 (1991) (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).}

Another prominent critique views the approach that the Court has taken to ceremonial deism as carving out a sort of de minimis exception to Establishment Clause jurisprudence.\footnote{E.g., Kenneth Karst, \textit{The First Amendment, the Politics of Religion, and the Symbols of Government}, 27 \textit{Harv. C.R.-C.L. L. Rev.} 503, 521(1992), Laycock, \textit{supra} note 41, at 227, 231, Epstein, \textit{supra} note 1, at 2166-69.} Professor Douglas Laycock, for example, has critiqued that exception on the grounds that it is standardless: while it appears to exempt a small class of practices from traditional Establishment Clause standards, the Court has given no guidance as to what, if any, other practices or symbols may join the “short list” of acceptable Establishment Clause violations; at least as currently formulated, the de minimis exception for ceremonial deism is a “standardless rule” that is “subject to manipulation.”\footnote{Laycock, \textit{supra} note 41, at 232, 240. \textit{But see} Conkle, \textit{supra} note 71, 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”).} Similarly, Professor
William Van Alstyne has noted that the logic -- and the standardless nature -- of the de minimis exception lead courts to apply a new Establishment Clause test – an “any more than” test.\textsuperscript{75} According to that “test,” courts simply consider whether a challenged practice advances religion any more than practices that the government has constitutionally engaged in previously; of course, the answer to that question is largely “in the eye of the beholder.”\textsuperscript{76} Thus, in evaluating the constitutionality of the Ohio state motto, “With God All Things Are Possible,” which is a direct quote from the New Testament, the Sixth Circuit court of appeals reviewed the wide variety of religious sentiments that have been expressed in official fora and apparently viewed as constitutionally acceptable, then simply concluded that “[j]udged by historical standards, adoption of the motto \textit{no more} represents a step toward an establishment of religion \textit{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.’”\textsuperscript{77} Such arguments are obviously not easy to refute, largely because of rather than despite the lack of logical reasoning supporting them.\textsuperscript{78}

This Article acknowledges and accepts those criticisms, while at the same time attempting to take seriously the notion that meaning can change over time. In particular, it draws on the intuition that some instances of ceremonial deism – such as the city names of San Francisco, Corpus Christi, and St. Louis, or the use of the letters “A.D.” on public documents – can fairly be said to have lost their religious impact over time, whereas other phrases or symbols – such as “under God” in the Pledge, “In God We Trust,” and Christmas trees – are more controversial. The goal of this Article is thus to consider whether and how a line may be

\textsuperscript{75} William Van Alstyne, \textit{supra} note 10, at 782-83; \textit{see also} Epstein, \textit{supra} note 1, at 2166-69 (discussing Van Alstyne’s “any more than” test and noting its problematic appearance in a case upholding the constitutionality of the Good Friday holiday as similar to the Thanksgiving and Christmas) (citing Camack v. Waihee, 673 F. Supp. 1524, 1539 (D. Haw. 1987), \textit{aff’d}, 932 F.2d 765 (9\textsuperscript{th} Cir. 1991)).

\textsuperscript{76} Epstein, \textit{supra} note 1, at 2168 n.475.

\textsuperscript{77} American Civil Liberties Union v. Capitol Square Rev. & Adv. Bd., 243 F.3d 289, 300 (6\textsuperscript{th} Cir. 2001) (emphasis added).

\textsuperscript{78} Finally, some 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,” although they may be constitutional now. Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7\textsuperscript{th} Cir. 1992) (Manion, J., concurring); \textit{see also} Myers v. Loudon County Pub. Sch., 418 F.3d 395, 405 & n.11 (4\textsuperscript{th} Cir. 2005).
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 a fundamental misunderstanding of how language works. My hope is that linguistic theory can lead to a more nuanced understanding of the secularization claim and the circumstances in which it may or may not apply. In particular, this more nuanced understanding, which allows us to understand how and why meaning may change over time, will provide some theory to support a heretofore untheorized shibboleth 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 IV, there is reason to doubt the validity of the secularization claim as it is made by many courts.

C. Ceremonial Deism in the Context of Establishment Clause Doctrine

The preceding sections have described the secularization thesis, along with the views of some of its detractors. This section will attempt 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 Supreme Court has embraced and applied a 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 applied, between them, no less than four different Establishment Clause tests in arguing for the constitutionality or unconstitutionality of the words “under God” in the Pledge of Allegiance.79 Given this state of disarray, it is difficult to reason

about the constitutionality of ceremonial deism within any fixed doctrinal framework.

The confusion is deepened by the fact that there are actually two levels of disagreement among the Justices of the Supreme Court, which is reflected in the various tests. First, there is disagreement over whether a religious message is conveyed at all by a particular instance of governmental speech, and the various tests have different ways of answering that question. Second, there is disagreement over the question of how much, if any, official religious expression is permissible under the Establishment Clause.

For example, 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, favored members of the political community.”\(^80\) 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.\(^81\)

The coercion test, by contrast, asks only whether the challenged practice coerces participation in a religious exercise. Justice Kennedy, who is now the likely swing vote on most Establishment Clause issues, has advocated a “softer” version of the coercion test than that advocated by others such as Justices Scalia and Thomas,\(^82\) taking into account the

---


\(^{81}\) 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, 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. 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). Justice Breyer’s “legal judgment” appeared to be the functional equivalent of the endorsement test, however. See generally Hill, *supra* note 22, at 496-502.

\(^{82}\) County of Allegheny v. ACLU, 492 U.S. 573, 659-62 (1989) (Kennedy, J., concurring in part and dissenting in part) (expressing the view that only coercive or proselytizing actions by the government violate the Establishment Clause); compare *Lee v. Weisman*,
possibility of psychological coercion and peer pressure, for example, in the absence of strict legal coercion. Nonetheless, both versions of the coercion test differ from the endorsement test in terms of how much religious speech they are 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 whether government speech is religious or not. The disagreement between the two tests is substantive rather than methodological.

Finally, the poorly-defined Marsh test appears to be both methodologically and, in some instances, substantively distinct from both the Lemon/endorsement and coercion tests. In some of its incarnations—including most of those discussed above in Part II—the Marsh test looks to the history and ubiquity of a practice, sometimes together with the context of the particular challenged practice, to decide that the practice is or is not actually religious in content. Marsh’s theory that a practice that is sufficiently longstanding and used sufficiently often for nonreligious purposes or in nonreligious contexts is at the core of most courts’ approach to ceremonial deism. That theory is often 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 our nation. The concurring opinions in Newdow, for example, repeatedly used the words “describe,” “acknowledge,” and their

505 U.S. 577, 592-97 (1992) (majority opinion of Kennedy, J.) (taking “public pressure” and “peer pressure” into account in finding that high school students were coerced to participate in a graduation prayer, although attendance was not strictly mandatory) with id. at 637-44 (Scalia, J., dissenting) (arguing that coercion should be understood as coercion “of religious orthodoxy [or] of financial support by force of law [or] threat of penalty”).

83 Lee, 505 U.S. at 592-97. Justice Kennedy sometimes refers instead to a proselytization inquiry in the context of symbolic government speech. County of Allegheny, 492 U.S. at 607-08 & n.56 (Kennedy, J., dissenting) (noting similarities between the endorsement and proselytization inquiries and assuming that proselytization could occur even when the governmental speech is brief, as in an 1844 governor’s Thanksgiving Proclamation that exhorted citizens of all denominations to pray to Jesus Christ). Given the retirement of Justice Sandra Day O’Connor—the creator and leading proponent of the endorsement test—in 2006, and her replacement with Justice Samuel Alito, most commentators agree that there are currently five votes on the Supreme Court to abandon the endorsement test and to replace it with a “coercion” or “proselytizing” test. See, e.g., Erwin Chemerinsky, The Future of Constitutional Law, 34 CAP. U. L. REV. 647, 665-66 (2006); Adam Samaha, Endorsement Retires: From Religious Symbols to Anti-Sorting Principles, 2005 SUP. CT. REV. 135, 149 (describing the endorsement test as being “in a precarious state” after the 2005 decalogue cases); Gary J. Simson, Beyond Interstate Recognition in the Same-Sex Marriage Debate, 40 U.C. DAVIS L. REV. 313, 379-80 (2006).
synonyms, in connection with the Pledge’s religious phrase. In this incarnation, it differs from the Lemon/endorsement and coercion tests primarily in its methodology – in how it determines whether a particular government practice is religious or secular.

In its second, stronger incarnation, the Marsh test determines the answer to the question how much religious expression is acceptable, rather than the question whether a government practice is religious, and it holds that invocations of God, as in the pledge and the motto, are constitutional because the Establishment Clause permits such expressions of religious belief. Because the Framers were themselves religious and often invoked God, they could not have meant for those practices to be unconstitutional. After all, those who wrote the First Amendment surely would not have preached religious freedom with one breath while violating that freedom in the next.

84 E.g., Newdow, 542 U.S. at 26 (“the 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”), 30 (“our national culture allows public recognition of our Nation’s religious history and character”); 31 (“recognition of the fact” that our nation was founded on belief in God); 32 (“under God” is a “descriptive phrase”); 33 (same); 35 (pledge serves “to commemorate the role of religion in our history”); 40 (“under God” is “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, arguing that only “reverential” acknowledgement is constitutionally problematic); Joan DelFattore, 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).

85 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); 34-45 (O’Connor, J., concurring) (combining endorsement test and Marsh factors).

86 In this incarnation, it is sometimes referred to as the accommodation argument, but it is different from the argument that mere acknowledgement of the role of religion in our nation’s history is not unconstitutional because it is not a religious message being conveyed by the government. See generally Lupu & Tuttle, supra note 84, at 980-83 (distinguishing among types of acknowledgement).

87 See, e.g., Lynch v. Donnelly, 465 U.S. 668, 674-78 (1984); ACLU of Ohio v. Capitol Square Rev. & Adv. Bd., 243 F.3d 289, 296 (6th Cir. 2001) (“If the Establishment Clause of the First Amendment had been understood by its authors to prohibit the government from expressing sentiments of the sort in the Ohio motto [‘With God All Things Are Possible’] . . . some of the behavior of the First Congress would have been utterly
In *Van Orden v. Perry*, for example, which upheld a Ten Commandments display on public property, the four-Justice plurality consisting of then-Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas, insisted that government need not remain neutral between religion and non-religion, relying in part on the long history of government acknowledgements of religion dating back to the founding. 88 Similarly, in *McCreary County v. ACLU*, which was decided on the same day as *Van Orden* but struck down the challenged Decalogue displays in county courthouses, Justice Scalia dissented partly on the ground that the beliefs of the Founding period did not require neutrality between religion and nonreligion but rather made room for official speech acknowledging religion. 89 This argument is an originalist argument, which considers the Establishment Clause in light of practices that were acceptable at or near the founding. 88

---


89 *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 885-94 (2005) (Scalia, J., dissenting)
Rather than asserting that “‘under God’ is not an affirmation of religious belief,” it says, “‘under God’ is an affirmation of religious belief, and that’s okay.”

As of now, however, the strong version of the Marsh test does not have majority support in the Supreme Court, and it is not the dominant approach to official religious expression. The focus of this Article is thus on the question whether a government practice expresses a religious sentiment on whether the religiosity of a particular practice, symbol, or phrase has faded, and it assumes that some level of religious expression by the government is at least constitutionally questionable. It is thus

90 Steven Smith has espoused what may be considered a variation on this theme, arguing that although our Constitution is agnostic with respect to God, this agnosticism is intended to leave room for some acknowledgements of God or religion at different levels of government, especially in ways that are not legally binding. Steven D. Smith, Our Agnostic Constitution, 83 N.Y.U. L. Rev. 120, 155-64 (2008). Likewise, Thomas Berg has proposed an understanding of the words “under God” Pledge of Allegiance as acknowledging that our country is accountable to some power greater than itself, and subject to criticism if it fails to live up to the standards of morality required by that higher power. In Professor Berg’s view, this is a constitutionally acceptable sentiment for the government to express. Berg, supra note 71, at 52-58, 68. The acknowledgement argument has also been subject to extensive criticism. See, e.g., Steven K. Green, “Bad History”: The Lure of History in Establishment Clause Adjudication, 81 NOTRE DAME L. REV. 1717, 1725 (2006) (describing the Court’s opinions in Marsh v. Chambers and Lynch v. Donnelly as “egregious examples of bad history”). See also Thomas B. Colby, A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause, 100 N. W. U. L. REV. 1097 (2006) (critiquing the acknowledgement argument for “giv[ing] the appearance of a historical consensus that did not exist,” and noting that it would logically permit endorsements of Christianity over all other religions, since such Christian endorsements could be found in practices common at the time of the founding).

91 DelFattore, supra note 84, at 647, 653.

92 Lupu & Tuttle, supra note 84, at 987.

93 More troubling is the possibility that the recent decision in Hein v. Freedom from Religion Foundation, ---U.S.---, 127 S. Ct. 2553 (2007), will affect future claimants’ ability to get through the courthouse doors with challenges to the constitutionality of religious government expression. Although the Hein decision concerned taxpayer standing under the Establishment Clause – which is not the usual basis for challenges to government religious acknowledgements – Ira Lupu and Robert Tuttle have raised the possibility that lower courts may interpret the case to apply broadly to such government speech cases as well. Ira C. Lupu & Robert W. Tuttle, Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication, 2008 B.Y.U. L. REV. 115, 158-64. Noting the spirit of “anti-exceptionalism” with respect to the Establishment Clause that permeated Hein – that is, the sentiment that Establishment Clause cases should be treated just like any other federal case, with all of the Article III standing requirements of concrete and particularized injury in full force – the decision may be read broadly to preclude standing by plaintiffs in challenges to
adaptable, and relevant, to either the endorsement test or the coercion test, which vary only in the extent of government expression that is permissible, as well as to the weaker version of the Marsh test, which considers whether, in light of the ubiquity and long use of a practice, it has become a mere recognition or description of the role of religion in our nation’s history. In essence, this Article assumes that “for now, the Court’s general approach continues to preclude government from promoting religious expression.”

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

So far, this Article has established that the constitutionality of brief official religious references, often referred to as ceremonial deism, has not been handled in a thorough or nuanced way by courts. While 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. The Article proceeds from the intuition that at least some instances of ceremonial deism – like the city name of St. Louis, for example – are in fact both

---

various forms of religious speech by the government, in which mere “observer” status has in the past usually been enough to ground the federal courts’ jurisdiction. Lupu & Tuttle, supra, at 158; Note, Expressive Harms and Standing, 112 Harv. L. Rev. 1313, 1320 (1999). It seems distinctly unlikely, however, that Hein will be extended by the Supreme Court to preclude standing in virtually all cases challenging official religious acknowledgements. Such a major change in the Court’s approach to Establishment Clause cases would render irrelevant a large number of landmark Supreme Court cases. Moreover, even those Justices who were aligned with the majority in Hein have suggested relatively recently that various forms of government speech could be unconstitutional. See, e.g., Allegheny, 492 U.S. 661 (Kennedy, J., concurring in part and dissenting in part) (stating that “speech may coerce in some circumstances” and giving the example of “permanent erection of a large Latin cross on the roof of city hall” as coercive government religious speech); ACLU-NJ v. Township of Wall, 246 F.3d 258, 265-66 (3d Cir. 2001) (Alito, J.) (noting the likelihood that “personal contact” with an offensive religious holiday display is enough to confer standing).

largely secularized and constitutionally innocuous, although other instances may be less so. It therefore draws on theories of language to see whether they might provide some insight into how that change takes place, as well as guidance some as to how to draw principled lines among different cases, so that the secularization claim might be supported with analytical rigor instead of bald assertion.

This Article therefore turns to the branch of philosophy of language known as speech act theory to consider the problem of change in meaning over time from a new perspective.\(^95\) This section therefore briefly outlines the premises of speech act theory and its central characteristics. Part IV of this Article then applies those insights to the problem of official speech containing religious references.

**A. Meaning and Force**

Speech act theory is a branch of philosophy of language which considers language primarily as doing rather than describing – as bringing about states of affairs, with greater or lesser degrees of success, rather than simply referring to them.\(^96\) The founding father of speech-act theory, J.L. Austin, was the first to identify and describe linguistic utterances in these terms.\(^97\) Initially, he considered speech acts, or “performatives,” as a class of utterances that bring about an effect by the mere fact of their utterance,

---

\(^95\) 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 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 John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 11351-54 (2008) (discussing and critiquing the use of speech-act theory in free-speech scholarship). Perhaps most famously, Austin’s theory has been used by Catherine MacKinnon in her scholarship advocating legal prohibitions on pornography. See generally CATHERINE MACKINNON, *ONLY WORDS* (1993).

\(^96\) *Id.* at 511-12.

\(^97\) J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962). Austin’s theory of speech acts owes much to Ludwig Wittgenstein’s later work, in particular his *Philosophical Investigations*. Of course, Austin’s work is situated within a long history of preoccupation with the relationship between language and action in analytic philosophy. This preoccupation arguably can (like virtually every other intellectual endeavor) be traced back to Aristotle. BARRY SMITH, *Toward a History of Speech Act Theory, in SPEECH ACTS, MEANINGS AND INTENTIONS. CRITICAL APPROACHES TO THE PHILOSOPHY OF JOHN R. SEARLE* 29 (A. Burkhardt, ed. 1990).
such as “I do (...take this woman to be my lawful wedded wife)”; “I name this ship the Queen Elizabeth”; “I give and bequeath my watch to my brother”; and “I bet you sixpence it will rain tomorrow.” As Austin explains, “it seems clear that to utter the sentence (in, of course, the appropriate circumstances) is not to describe my doing . . . or to state that I am doing it: it is to do it.” By speaking, one effects the act of marrying, christening a ship, bequeathing, and betting.

Of course, law works by means of such performative utterances in many cases, and it is easy to come up with other legal examples: imposing a prison sentence, enjoining a party from taking an action, and forming a legally binding contract are also obvious performatives. Such performatives were to be contrasted in Austin’s theory with “constatives,” which do merely report, state, or describe a state of affairs.

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

98 AUSTIN, supra note 97, at 5.
99 Id. at 6; see also generally LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 154-55 (1993) (describing speech acts).
100 Evidence scholars may be familiar with the concept of performatives, which are related to the “verbal act doctrine,” involving statements that “affect[] the legal rights of the parties” and “have independent legal significance, such as contractual offers or inter vivos gifts.” U.S. v. Stover 329 F.3d 859, 870 (D.C. Cir. 2003) (citing FED. R. EVID. 801 advisory committee’s note and 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 801.11[3] (2d ed.1997)); see also Twin City Fire Ins. Co. v. Country Mutual 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 would call a performative utterance, to which truth is irrelevant”).
101 AUSTIN, supra note 97, at 148-49 (“Stating, describing, &c., are just two names among a very great many others for illocutionary acts; they have no unique position.”); see also, e.g., JONATHAN CULLER, ON DECONSTRUCTION 112-13 (1982).
102 AUSTIN, supra note 97, at 134-39; see also Deirdre Wilson, Review of Propositional Structure and Illocutionary Force: A Study of the Contribution of Sentence Meaning to Speech Acts by Jerrold Katz, 88 MIND 461, 461 (1979) (“Austin claimed that there could be no purely syntactic basis for the performative-constative distinction.”).
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.”

Indeed, the constative speech acts of stating, asserting, and describing may be considered an “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 go beyond mere description or statement: they may help to construct the reality that they describe or purport to describe. Descriptions and statements may have the effect not only of telling someone of 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. And when the state – the voice of sovereign authority – engages in such speech acts, they may have a particularly strong tendency to create the reality they purport only to describe.

What we commonly think of as “meaning” may therefore be thought to include two different concepts: locutionary force and illocutionary force. 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.” Illocutionary force is the act (describing, sentencing, marrying, and so on) that is performed by and in speaking. Every locutionary act is also an illocutionary act (“To perform a locutionary act

---


105 See infra Part IV.B.3.

106 *AUSTIN, supra* note 97, at 147. Austin also identified a third aspect of speech acts, perlocutionary force, which has garnered less attention than the other two.

107 *Id.* at 109.
is in general, we may say, also and eo ipso to perform an illocutionary act,” in Austin’s words); they are different aspects of the same speech act.\textsuperscript{108} As Gordon Bearn explains, “[o]ne sign of there being a difference between locutionary and illocutionary acts is that it is possible to know what words were uttered with which senses and references but still to remain in doubt whether the illocutionary act was one of threat or advice or warning.”\textsuperscript{109} 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.\textsuperscript{110} While the locutionary meaning of the sentence may be clear to the hearer, the illocutionary force of it may or may not.

The so-called “Nuremberg files” litigation presents an example of the locution-illocution distinction in the legal context. On appeal to the Ninth Circuit, the case largely centered on whether anti-abortion posters identifying certain abortion providers and giving their home addresses, together with an anti-abortion website, constituted a “true threat” that was unprotected by the First Amendment.\textsuperscript{111} The website listed names of abortion providers, which were struck through if the provider had been killed or grayed out if that provider had been wounded.\textsuperscript{112} While 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, of protesting, or of informing – was hotly disputed, resulting in an en banc Ninth Circuit opinion that divided the judges six to five.\textsuperscript{113}

\textbf{B. Conventionality}

At the heart of linguistic theory is the longstanding insight that

\textsuperscript{108} Id. at 98. John Searle has pointed out that, while locutionary and illocutionary are meaningfully different concepts, they are not mutually exclusive classes, since sometimes the locutionary act is the same as the illocutionary act – as in the sentence, truthfully and correctly uttered, “I promise to do it.” The sense and reference of the sentence (that I promise to do it) is the same as the sentence’s force (I have accomplished the act of promising to do it). Searle, supra note 103, at 407-08.


\textsuperscript{110} CULLER, supra note 101, at 113.

\textsuperscript{111} Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058, 1062-63 (9\textsuperscript{th} Cir. 2002) (en banc).

\textsuperscript{112} Id.

\textsuperscript{113} Id. (holding that the posters constituted a true threat).
language is inherently conventional.\textsuperscript{114} The speech act of bequeathing possessions to an heir, for example, 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; they also include the requirement that the person doing the bequeathing has the legal authority to dispose of that property; and that the individual is not 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 – is also part of the conventionality of the speech act, for although many different combinations of words may be used to bequeath one’s possessions, those words must be recognizable to the relevant readers as words of bequest. In Austin’s words, “[t]here must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances, and further, … [and the] procedure must be executed by all participants both correctly and . . . completely.”\textsuperscript{115} The requirement that speech acts, in order to be successful, must be executed in the appropriate conventional circumstances applies not only to obviously performative acts such as sentencing, or marrying, or christening, but also to speech acts such as describing: to take one example, one cannot describe something successfully if one cannot observe it.\textsuperscript{116}

The conventionality of speech acts is one of its central features, and much of speech act theory is preoccupied with the task of isolating the conventions that are necessary for the success of particular speech acts.\textsuperscript{117} At the same time, as explained more fully in the next section, this conventionality is 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

\textsuperscript{114} \textit{Austin}, supra note 97, at 121 (“Illocutionary acts are conventional acts….”). I have discussed the conventionality of speech acts elsewhere. \textit{Hill}, supra note 22, at 512-13, 514-15.

\textsuperscript{115} \textit{Austin}, supra note 97, at 14-15.

\textsuperscript{116} \textit{See id.} at 138; Austin describes other ways in which constative speech acts may be unsuccessful as well. \textit{Id.} at 136-37.

Of Christmas Trees and Corpus Christi

instability in that meaning. ¹¹⁸

C. Iterability and Change

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,”¹¹⁹ also means that any linguistic utterance is capable of being cut off from both its original context and its speaker’s intent and reproduced in a context that may change or undermine its prior meaning. Indeed, no speech act could function at all if this were not the case – that is, if it were not conventional and iterable. The conventionality and iterability of speech acts ensure that the speech act can be recognized, understood, and reproduced by different speakers and listeners, but they also ensure that language can be used in ways that may not have been originally intended.¹²⁰ There are thus two consequences of the quality of iterability that inheres in all speech acts: first, it makes successful speech acts possible; and second, it makes unsuccessful speech acts possible.¹²¹

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

¹¹⁸ 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 22. I therefore do not cover that ground again here.
¹¹⁹ The notion of iterability, and its role in producing or changing meaning, belongs originally to the French philosopher Jacques Derrida. JACQUES DERRIDA, Signature Event Context, in LIMITED INC. 1, 18-19 (Samuel Weber & Jeffrey Mehlman trans., Gerald Graff ed., 1988). Derrida’s argument about iterability, which is briefly described above, was the subject of a dispute between Derrida and John Searle, the essence of which is encapsulated in Derrida’s essay “Signature-Event-Context,” supra, Searle’s essay, “Reiterating the Differences: A Reply to Derrida,” 2 GLYPH 198 (1977), and Derrida’s rather lengthy and emphatic response to Searle’s reply, Limited Inc., DERRIDA, supra, at 29-107.
¹²⁰ See generally CULLER, supra note 101, at 118-20.
¹²¹ Bearn, supra note 109, 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.
electronically produced signature on the thousands of paychecks issued by large corporations can perform their function in the absence of any present intention on the part of any particular signor or any particular recipient.\textsuperscript{122} 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.\textsuperscript{123}

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. The fundamental quality of iterability is that it allows utterances to be meaningful when the speaker or the hearer, or both, are absent.\textsuperscript{124} Thus, the utterance must function “in the …absence of the receiver or of any empirically determinable collectivity of receivers…..” and at the same time, “[f]or writing to be a writing it must continue to ‘act’ and to be readable even when … the author of the writing no longer answers for what he has written, because he is dead or, more generally, because he has not employed his … present intention or attention … [to] what seems to be written in his name.”\textsuperscript{125} As Judith Butler puts it, “The Austinian subject speaks conventionally, that is, is speaks in a voice that is never fully singular. . . . Who speaks when convention speaks? In what time does convention speak? In some sense, it is an inherited set of voices, an echo of others who speak as the ‘I.’”\textsuperscript{126}

Like the employer’s signature on a paycheck, the national motto on coins, along with many other examples of ceremonial deism – city names, the language of the Pledge, and even Christmas trees – function by means of this iterability; they must and often do function in the absence of any particular speaker or any particular intended hearer. The national motto on coins, for example, would of course be identifiable in general as government speech, but it is not identified with any individual speaker, or any particular government in our history. When we see those words on our currency, we cannot honestly attribute them to Abraham Lincoln, or

\textsuperscript{122} CULLER at 125-26. Derrida nonetheless accepts the possibility of a “structural intentionality which is never anywhere present and which includes implications that never” entered the mind of any one individual. \textit{Id.} at 127.

\textsuperscript{123} Likewise, Judith Butler notes that the term “queer” has been appropriated by the gay rights movement to the extent that it no longer has the negative connotations it originally had. \textit{JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”} 223 (1993).

\textsuperscript{124} Bearn, \textit{supra} note 109, 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”).

\textsuperscript{125} \textit{Id.} at 6 (quoting Derrida, \textit{SEC, supra} note 119, at 7-8).

\textsuperscript{126} \textit{BUTLER, supra} note 117, at 25.
Teddy Roosevelt, or the 60th U.S. Congress. It is an “inherited set of voices” that speaks, echoing throughout our history, which is strictly attributable only to a machine at the U.S. Mint.\textsuperscript{127}

Moreover, 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 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.

Drawing on this paradigm, Judith Butler argues that the necessary iterability of language produces a certain “vulnerability” of meaning.\textsuperscript{128} Because this repeatable conventionality – this vast variety of actual and possible usages of a given term, both “serious” and “nonserious,” “successful” and “unsuccessful” – is a necessary condition of successful speech acts, she suggests that both past and future uses are, in a sense, contained within any single usage of a term. Thus, “[t]he illocutionary speech act” 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.”\textsuperscript{129} This linguistic vulnerability thus opens up the possibility of “resignification,” by which language at least in part breaks with its prior contexts and prior usages by being used in new ways and new contexts.\textsuperscript{130} Yet at the same time, each

\textsuperscript{127} Justice Samuel Alito recently made a similar observation in \textit{Pleasant Grove City v. Summum}, 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. 555 U.S. -- (2009). While acknowledging that the government can usually be said to endorse the message contained in the monument, monuments do not always express the original intent of their donors. He pointed to a statue of Pancho Villa in Tucson, Arizona and questioned whether it “commemorate[s] a ‘revolutionary leader who advocated for agrarian reform and the poor’ or ‘a violent bandit.’” \textit{Id.}, slip op. at 13. By accepting a monument, he noted, “a government entity does not necessarily endorse the specific meaning that any specific donor sees in the monument.” \textit{Id.}, slip op. at 14. Moreover, Justice Alito explained, “people reinterpret the meaning of these memorials as historical interpretations and the society around them changes.” \textit{Id.} (internal quotation marks omitted).

\textsuperscript{128} Again, one need not accept Butler’s general critique or theory of language to accept its application to bureaucratic invocations of God and other instances of “speakerless” ceremonial deism discussed here.

\textsuperscript{129} BUTLER, supra note 117, at 3.

\textsuperscript{130} \textit{Id.} at 13-15.
time a term is used, in invokes its past usages and thus “reconsolidates” them, reminding the reader or listener of its historical meanings.

To take one example, we might consider the word “Amen.” Translated and transliterated from the Hebrew, the word “Amen” roughly means “so be it,” and is often used in or after prayers to express agreement or affirmation, with the implication that God has so willed. Because the word is iterable, however, it can be used in a variety of ways. Although not necessarily inherently religious, the word is recognizable as a religious affirmation when said in the context of a religious service. At the same time, it can be used in non-religious contexts and lose its religious meaning --- or even have the opposite meaning, perhaps when used ironically. One can imagine a conversation, for instance, in which a speaker, having proven the nonexistence of God, says, “And that is why God does not exist,” to which the sympathetic listener replies, “Amen.” It is because the second speaker has used the term “Amen” in a recognizable way, as an affirmation, following certain conversational conventions, that the usage is recognizable as such. Yet the word “Amen” is not being used in a religious way; in fact, it is used in precisely the opposite way. At the same time, the ironic impact of this usage can only arise because the speaker and listener are aware of the religious use to which the term is commonly put: the religious usages of the term inform the nonreligious usage and help to produce its meaning.

The joke “In God We Trust for the other eight cents,” works in a similar way. The joke is legible, or comprehensible, only in terms of “the past from which it breaks” – that is, in terms of its religious origins. Yet the concept 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, in Lynch v. Donnelly, the Court, arguing that the City of Pawtucket’s crèche display simply “depict[ed] the historical origins” of the Christmas holiday, analogized to the religious paintings, primarily Christian in their orientation, that hang in the National Gallery. The museum context invoked by the Court shows that the changed context can, in a sense, remove any religious meaning from the work of art. Even if the artwork itself has deep religious meaning, in other words, its placement in

---

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

132 BUTLER, supra note 117, 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.

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.134

To take an example that presents the opposite dynamic, one might consider the case of State Board of Education v. Netcong,135 in which the New Jersey Superior Court considered 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. That case, which arose several years before the U.S. Supreme Court’s decision in Marsh v. Chambers, nonetheless illustrates how the repetition of identical language in a new context may change its meaning. Indeed, one of the school board’s defenses in that case was that the readings were secular and therefore not subject to Establishment Clause challenge.136 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 and School District of Abington Township v. Schempp.137 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 clear that reading the 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.

There is thus a certain tension in the citation, or repetition, of phrases or speech acts. On the one hand, 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 thus at once both vulnerable and surprisingly persistent.

D. Vulnerable Phrases and Sovereign Speech Acts

134 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.”).
136 Id. at 23.
137 Id. at 30-31 (citing Engel v. Vitale, 370 U.S. 421 (1962), and Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963)).
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 – their repetition and readoption in various contexts reinforces the strength of that fact. Yet at the same time, language cannot be completely efficacious in its enforcement of norms. Thus, “[s]uch norms are continually haunted by their own inefficacy;” and this inefficacy leads to “the anxiously repeated effort to install and augment their jurisdiction.”

Indeed, because language is iterable and therefore partially open to change, any phrase – no matter how solemn – is always capable of being appropriated, for example, into the context of a joke about being eight cents short of payment in full. 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 statement. Hence the struggle to keep the motto on the coins, to require its posting in schools, and so on. Repetition may be a technique for undermining a particular illocutionary force, but it may also be an attempt to counteract the inherent vulnerability of language and reinforce a particular illocutionary force.

Butler, supra note 123, at 237. Butler’s fascinating explanation for this phenomenon is that because the sovereign power of the state is now diffused 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, 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 117, at 78.

It is interesting to note in this connection how many of the recent legal and political controversies in the Establishment Clause domain 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 Establishment Clause opinions issued by the Supreme Court have been about the constitutionality of some form of religious expression, and the Supreme Court’s most recent decision, Pleasant Grove City v. Summum, 555 U.S. --- (2009), similarly dealt with religious expression, but in a free speech context. [Check this.] 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.

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 State Bd. of Educ. v. Board of Educ. of Netcong, New Jersey, 262 A.2d 21 (N.J. Super. Ct. 1970), the New Jersey Superior Court enjoined a local school district’s practice of reading the legislative prayer out of the Congressional Record to those students who wished to listen. Although the case was decided before Marsh v. Chambers, it is interesting to note that the court did not appear to believe the congressional practice of legislative prayer to be unconstitutional but found that the repetition of those prayers in a different context was an imposition of religion on the schoolchildren. Id. at 29-32. Like the
Moreover, the illocutionary act succeeds only “to the extent that it draws on and covers over” its origins.\textsuperscript{141} The motto “In God We Trust,” for example, succeeds in describing or imposing a view about American religious values to the extent that, in context, it both calls upon its historical usage – for example, its use as a unifying sentiment in the Civil War era, combining patriotism and religiosity – while denying its historicity and the multiplicity of potential and actual usages contained within that history – as in the “sacrilegious” jokes.

\textit{American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board}\textsuperscript{142} uniquely illustrates this last point. That Sixth Circuit case turned away a constitutional challenge to the Ohio state motto, “With God All Things Are Possible,” which was adopted in 1959 and proposed to be inscribed in large letters in front of the statehouse.\textsuperscript{143} 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.\textsuperscript{144} 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.”\textsuperscript{145} It then proceeded to catalog, based on expert testimony, various appearances of the sentiment throughout a panoply of religious and philosophical traditions, including Greek philosophy, Judaism, Islam, and Hinduism; ultimately, the court agreed with the defendants’ expert that Jesus’ original statement in the New Testament “was simply using a proverbial phrase that was commonly known and accepted as true.”\textsuperscript{146} Indeed, the court even quoted expert testimony claiming that the phrase was functionally equivalent to Yogi Berra’s

\begin{footnotesize}
\begin{itemize}
\item AFA’s efforts to install the national motto in schools, the school district’s practice seems to be an attempt to shore up the religious message of those legislative prayers by repeating them in a context that enhances their religious force. The context of that action, of course, 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 may draw special attention to their content.
\item 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” – \textit{i.e.}, the socio-historical context or contexts that give it its force.; \textit{Butler, supra} note 117, at 51;
\item \textit{Butler}, supra note 123, at 227.
\item 243 F.3d 289 (6th Cir. 2001) (en banc).
\item \textit{Id.}
\item \textit{Id.} at 293.
\item \textit{Id.} at 303.
\item \textit{Id.} at 303-05.
\end{itemize}
\end{footnotesize}
Ironically, however, the history cited by the court both “draws on and covers over” the social and historical context that are both present and buried within the motto. Having papered over the motto’s origin in the New Testament, the court attempted to demonstrate the multiplicity of religious and philosophical traditions that embrace the motto’s sentiment. Yet 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,” or, with Yogi Berra, “It’s never [sic] over until it’s over.” Rather, it is a phrase with specifically Christian origins, chosen from a sacred Christian text; it is nearly impossible to imagine that the state would have accepted a suggestion to modify the motto to read “to the gods all things are possible.” The motto’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. The motto’s effectiveness as a religious statement arises from its ability to draw on and cover over its original context.

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 reinforcing the prior meanings and origins on which new meanings depend. Meaning is thus capable of changing, but it also has a surprising persistence.

E. Uptake

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

For example, I might utter the sentence to someone who does not hear me, and so I would not succeed in performing the

---

147 Id. at 305 (internal quotation marks omitted). In fact, most sources quote Berra as saying “It ain’t over ‘till it’s over.” 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 Justice Roberts quoted Bob Dylan in Sprint Communications Co. v. APCC Servs., Inc., --- S. Ct. --- (June 23, 2008), but corrected his grammar, “proving that [Roberts] is neither an originalist nor a strict constructionist”).

148 AUSTIN, supra note 97, at 117.
illocutionary act of ordering him, even though I did perform a locutionary act since I uttered the sentence with its usual meaning (in Austin’s terminology in such cases I fail to secure ‘illocutionary uptake’). Or, to take a different example, I might not be in a position to issue orders to him, if, say, he is a general and I am a private….

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

Ultimately, the problems evoked by the “uptake” requirement for illocutionary act simply reflect a problem inherent in language itself – perhaps particularly in language that is sufficiently controversial or divisive as to evoke varying responses among different individuals. Whenever a court must determine the social meaning of a phrase, symbol, or practice, the question of whose perspective is relevant will immediately arise. This problem certainly inheres in all of the jurisprudence concerning official references to religion, and the literature about government religious speech has already covered that ground extensively. I have discussed this problem elsewhere as well, and I have acknowledge the thorny problems posed by the reception of the speech among different hearers but doubt that it can be solved in an entirely satisfactory way.

Nonetheless, I believe that a presumption that facially religious phrases continue to have religious meaning – which I discuss further below – combined with a focus on issues such as social history and past

149 Searle, supra note 103, at 409.
150 Cf. supra note (discussing the difference between the opt-out remedy and the speech injunction remedy in Pledge of Allegiance cases).
152 Hill, supra note 22, at 530-33, 539-44.
divisiveness, might bring the problem of differing perspectives to the fore in a way that has previously been lacking, and it may force courts to consider the perspective of nonadherents to an extent that other proposals – such as encouraging courts to adopt the position of the “reasonable nonadherent” – are unlikely to do.\footnote{See, e.g., Leading Cases—Government Sponsored Religious Displays, 103 Harv. L. Rev. 228, 234 & n.46 (1989); Developments in the Law—Religion and the State, 100 Harv. L. Rev. 1606, 1648-49 (1987). 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 symbols whose meaning has arguably changed over time, but whose meaning is complicated by the problem of uptake. In Pinette, which revolved around the question whether the display of an unattended Latin cross sponsored by the Ku Klux Klan in a public forum near the seat of state government would violate the Establishment Clause, Justice Thomas agreed with the result – permitting the cross on free speech grounds – but disagreed with the majority’s basic premise that the cross was a religious symbol. Examining specifically the Klan’s use of the cross throughout its history, Justice Thomas admitted that occasionally the cross took on religious connotations but primarily concluded that “[t]he Klan simply has appropriated one of the most sacred of religious symbols as a symbol of hate,” and therefore that the case really did not “involve[] the Establishment Clause.” 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 non-religious contexts. Surely 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 U.S. and the KKK.}  

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

A. Speech Act Theory and Establishment Clause Doctrine

It is my contention here that, when courts evaluate religious references under the Establishment Clause, they are largely concerned with the illocutionary force or effect of those references. Speech act theory itself is geared primarily toward the questions about what we do – what effects we bring about – when we speak.\footnote{Gorman, supra note 95, 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 using it.”} This particular orientation
explains both the title of Austin’s book and the almost exclusive focus of speech act theory on understanding illocutionary force. Indeed, for this reason, speech act theory is largely viewed not as a branch of linguistics but of philosophy – specifically, of the branch of philosophy known as pragmatics. It is fair to say that Austin’s book aimed to make a contribution not only to the philosophy of language, but also to the philosophy of action.

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, so much as it is concerned with what they do. Thus, although the locutionary force of “In God We Trust” may be obvious, and obviously religious, the illocutionary force is not necessarily so clear. Is it an endorsement of religion, or at least of belief in God? Can it be said to be proselytizing? Or does it merely acknowledge the role of religion in our nation’s history? These are questions about illocutionary force, and they are the questions that are relevant to the constitutional analysis. 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.

One of the primary contentions of this Article is therefore not only that Establishment Clause doctrine is primarily concerned with the illocutionary force of religious references – and, as a consequence, that speech act theory is relevant to their analysis – but also that the cases and

to getting on to the questions: what do we do with it?” Id. at 103 (quoting G.J. WARNock, J.L. Austin 151 (1991)).
155 Gorman, supra note 95, at 103 (noting that speech act theorists have understood “[t]he notion of illocutionary force” to be Austin’s “most significant theoretical contribution”).
157 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 generally Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. PA. L. REV. 1503 (2000); Richard H. Pildes & Elizabeth S. Anderson, Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 COLUM. L. REV. 2121 (1990).
commentary dealing with such references come up lacking in part because they are insufficiently attentive to the distinction between locutionary and illocutionary forces of utterances. Thus, it may be true that, as several commentators have pointed out, it simply blinks reality to say that the words “under God” have no religious meaning, in the sense of “sense and reference.” Yet, it may be true to say, in a particular context or setting, that the words do not have the illocutionary force of proselytizing or endorsing religion. 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. Similarly, the city name Corpus Christi has a religious referent—it literally means “body of Christ”—but the illocutionary effect of the name, which is the focus of Establishment Clause analysis, may or may not be to endorse religion.

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

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

---

159 812 F.2d 687 (11th Cir. 1987).
160 *Id.* at 691-93.
161 *Id.* at 691-92.
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.\footnote{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).} Moreover, this notion may be carried over to other instances where nonlinguistic government practices – such as the display of religious symbolism or the observance of religious holidays – is challenged on the ground that it endorses religion. Although there is no locutionary meaning in the typical sense, the illocutionary force – which I contend is roughly synonymous with social meaning in this context – of the practice is the true focus of the court’s analysis and the parties’ dispute.

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 challenges. I have not attempted to describe a straightforward doctrinal test for deciding constitutional challenges to ceremonial deism. Rather, the goal of this Article is to bring to bear the insights of speech act theory on a constitutional problem to which it is highly relevant and to suggest some principles for analyzing whether an instance of ceremonial deism should or should not be considered religious speech. It also aims to bring some theoretical nuance to an area in which courts’ decisions are often supported by ipse dixit and offhand nods to existing precedent.

Thus, this Article focuses primarily on the methodology for determining whether speech conveys a particular message, rather than the question of how much religious speech is permitted. It sets forth some principles for determining whether a particular instance of ceremonial deism has religious meaning, without resolving the question whether mere endorsement violates the Establishment Clause, or whether something more, like coercion, is required. Nonetheless, my conclusions have implications for the various tests the courts have applied in this context. I conclude 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 conclusion of this Article – and the theory it has advanced – that meaning can change in some circumstances. I therefore suggest in this Part that courts should apply a rebuttable presumption of religious meaning to all instances of ceremonial deism.

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

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

By contrast, city names like Corpus Christi and St. Louis may not carry the same sort of force. Although those names have obviously religious – even sectarian – content, when used as proper names to refer to long-established cities, they do not seem to carry an illocutionary force.

163 As Butler has emphasized, “reiterations are never simply replicas of the same . . . . If a performative provisionally succeeds . . . then it is only because that action echoes prior actions, and accumulates the force of authority through repetition or citation of a prior, authoritative set of practices.” BUTLER, supra note 117, at 51.

that can be described as proselytizing or endorsing religion.\textsuperscript{165} 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 may be legitimately understood as referring to – almost “quoting” – the origins of the city, which were often founded in tribute to a religious figure. Indeed, it seems that place names simply function differently from mottoes or pledges – they are neither assertions of fact nor declarations of beliefs but simple referents.\textsuperscript{166} Further, they are referents whose arbitrariness is more or less assumed by those who use them; in speaking the name of Los Angeles, an individual is unlikely to assume that the name reflects a current set of beliefs on the part of the city government, or that individuals are being asked to assume or submit to that set of beliefs by speaking the name or living in the city.

Similarly, in a careful and insightful opinion, the district court for the District of New Mexico recently turned away a challenge to a sculpture in front of the Las Cruces, New Mexico, Sports Complex that included three artistically rendered Latin crosses.\textsuperscript{167} 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.”\textsuperscript{168}

The distinction between illocution and locution, combined with a careful look at the history of the name, may well assist in drawing a distinction between religious city names and other religious practices. Of course, the ultimate outcome will depend on the facts of each individual case, and there are undoubtedly tales of religious conquest lurking behind some city names that may or may not retain their ability to wound.\textsuperscript{169} This

\textsuperscript{165} Under Justice O’Connor’s test for constitutionally acceptable ceremonial deism, which considers, in part, whether the challenged phrase has sectarian content, the city name of Corpus Christi would presumably raise some difficulties, although the other factors of her test (“history and ubiquity,” “absence of worship or prayer,” and “minimal religious content”) would presumably cut in the other direction. United States v. Newdow, 542 U.S. 1, 37-44 (2004).

\textsuperscript{166} See generally SEARLE, supra note 117, at 72-96 (discussing the speech act of referring, as in the use of proper names).

\textsuperscript{167} Weinbaum v. Las Cruces Public Sch., 465 F. Supp. 2d 1116, 1122-23 (D.N.M. 2006).

\textsuperscript{168} Id. at 1132-33; 1149.

\textsuperscript{169} See, e.g., Harris v. City of Zion, 934 F.2d 141, 142 (7th Cir. 1991) (Cudahy, J., dissenting from denial of rehearing en banc) (noting that the City of Zion, Illinois “was
is not to suggest that determinations of social meaning or illocutionary effect are straightforward or simple; they will often require extremely fine contextual judgments. But in many cases the distinction between the city’s religious name and its nonreligious effect should be relatively easy to draw.

2. Social History. Speech act theory also suggests the importance of history in analyzing meaning. According to contemporary theories of language, “meaning … [is] historical through and through, produced in processes of contextualization, decontextualization, and recontextualization.”\(^\text{170}\) For the most part, however, courts have not used history in appropriate ways. Rather, as described above, they have often simply noted the frequency of a particular term or practice, or they have noted the ubiquity of the Framers’ religious practices and religious acknowledgement in general, drawing from these facts conclusions about the constitutionality of specific practices. Yet this sort of historical approach is overly simplistic and fails to capture the genuine historical quality of meaning. Moreover, such history proceeds by “interpreting the supposedly less complex and ambiguous texts of a period,” assuming a purity and clarity of motives and understandings in an earlier time that no longer exist in our time.\(^\text{171}\)

Rather than engaging in what Steven Green has called “general history,” by which they “extrapolate[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 social history of the term or practice at issue.\(^\text{172}\) 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.

The need for specificity can be derived from the lessons of speech act theory. Speech act theory considers on the illocutionary effects produced by a particular locutionary act, and on the history of usages of a particular term. Although the broader context in which the term is mobilized will always come into play, the focus must be on the specific founded, named and emblematized as an act of protestant evangelism” approximately 100 years ago).  
\(^{170}\) CULLER, supra note 101, at 128. Culler is speaking of deconstruction in general here, but the quoted language is equally true of Butler, whose theories sit comfortably in the deconstructionist tradition.  
\(^{171}\) Id. at 129.  
\(^{172}\) Green, supra note 90, at 1725, 1732.
term or practice at issue. In this way, the history can be used 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.

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

Some of the Justices have suggested that the present or recent
divisiveness of a religious symbol is particularly relevant to its
constitutionality – most prominently in the recent Decalogue decisions,
McCreary County v. ACLU and Van Orden v. Perry. This approach has
been much criticized. 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.” The lack of present divisiveness, in other words, may only
indicate the success with which the symbol, practice, or term has covered
over the power dynamics from which it arose and from which it continues
to draw its force. The focus on social history urged by this Article would
not consider (or not only consider) present divisiveness, therefore, but
rather past divisiveness and indications of religious subordination

---

173 Cf. Conkle, supra note 94, 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).

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

175 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
associated with the disputed symbol.

An opinion that exemplifies this approach is Justice Brennan’s dissenting opinion in *Lynch v. Donnelly*. Justice Brennan’s opinion criticizes the majority opinion in that case for drawing on the general history of religious acknowledgement by official entities in upholding a nativity scene display erected by a municipality at Christmastime. Justice Brennan’s opinion focused on both the history of public celebration of Christmas and of nativity scenes – “the special history of the practice under review” – and concluded that the public celebration of Christmas and various aspects of the holiday symbology were a source of divisiveness among Christian sects until approximately the mid-nineteenth century. 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, rather than attempting to determine the illocutionary force of the symbols, so it does not necessarily answer the sort of questions that this Article advocates considering. Nonetheless, it displays the sort of attention to social history – noting, for example, the tensions between the Puritans and the Catholics that the public celebration of Christmas evoked – that is largely lacking from other opinions dealing with official religious speech.

Similarly, a recent article by Professor Christopher Lund sheds serious doubt on the *Marsh v. Chambers* Court’s suggestion that legislative prayer, as practiced throughout the nation’s history, is and always has been innocuous and uncontroversial. 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. The sectarian divisions and power struggles surrounding the practice were acute. 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.” Professor Lund’s analysis thus gives reason to doubt whether such prayers can be considered simple acknowledgements of our nation’s religious heritage.

---

177 *Id.* at 719-20.
179 *Id.* at 11-37.
180 *Id.*
181 *Id.* at 45.
182 *Id.*
Indeed, the extent to which the history of intense sectarian and political divisiveness surrounding a religious phrase or practice is ignored in judicial opinions is extraordinary. The majority opinions in *Marsh*, *Lynch*, and numerous lower court cases tend simply to catalog the multiple uses of that phrase or practice throughout history and to assert, based on a superficial view of that history, that the practice has been uncontroversial and is therefore constitutional. Yet this reasoning is classically the sort of “papering over” of the divisive origins of the practice – drawing upon yet covering over its socio-historical context – that does not undermine but instead reinforces the religious meaning of the practice. At a minimum, it should give us reason to doubt the truth of courts’ offhand assertions about the innocuousness of a practice and instead dig deeper to consider the practice’s social history.

In the case of the Pledge and the national motto, for example, it is difficult to ignore the fact that those practices are associated with periods in our history of intermixed religious and patriotic sentiment – namely, the Civil War and the Cold War.\(^{183}\) They were moments not just of generic religious sentiment but of attempting both to assert and consolidate the supremacy of God in our nation. And at least in the case of the Pledge, the assertion and consolidation under God was accompanied by an intent to exclude and label as nonpatriotic 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.’”\(^{184}\) 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.\(^{185}\)

The force with which history infuses those practices is complex and highly relevant to the Establishment Clause analysis. On the one hand, it lends credibility to the notion that they are mere patriotic rather than religious exercises. But on the other hand, it is precisely this intermingling of piety and patriotism – the national unification under the umbrella of religion that is both described and enforced by those practices – that is troubling to nonadherents. Courts’ description of the national motto or

\(^{183}\) See, e.g., Van Alstyne, *supra* note 10, at 786.

\(^{184}\) Id.

\(^{185}\) RESTAD, *supra* note 20, at 91-104.
pledge as mere acknowledgements of our history, 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 those practices.

At a minimum, it seems that the tendency to cover over the past divisiveness of a religious practice suggests that a more careful focus on the history of the practice would be desirable. For this reason, a rebuttable presumption that a facially religious practice continues to convey a religious message would be most logical. It would force parties and courts to study the history of the practice in order to show the presence or lack of divisiveness; additionally, it would counteract the natural tendency of courts to cover over the origins of the practice, while ignoring the fact that these origins often give the phrase its practice.

3. The illocutionary act of describing and the dangers of government speech. 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 merely descriptive, or mere acknowledgements of the role of religion in our history.186 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, as Pierre Bourdieu explains, “[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 that which it declares.”187 Moreover, he continues, “[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.”188

In his extended essay on monuments and the changing social responses to them over time, Professor Sanford Levinson gives numerous examples of how public monuments claim to represent the official meaning of historical events, consequently evoking enormous strife.189 “[M]onuments,” he asserts, “are quintessentially about time and who shall

---

186 [cites].
188 Id. at 223.
189 SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998).
control the meaning assigned to Proustian moments of past time."\textsuperscript{190} Professor Levinson gives the example of the Liberty Monument in New Orleans, which commemorates the “violent overthrow of the existing Louisiana government” by a group calling itself the White League, in defeating “an alliance of Republican whites and newly enfranchised African Americans.”\textsuperscript{191} Professor Levinson then discusses the various inscriptions added to the monument, “setting out what might be called, in our postmodern times, the officially privileged narrative of the events.”\textsuperscript{192} Insightfully, he adds that “[o]ne might well believe, of course, that [a particular] statement was designed more to create a desired state of public consciousness than to describe accurately” the reality.\textsuperscript{193} Professor Levinson’s statement highlights the concern that states try to create a particular reality while appearing simply to describe it.

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. Mark De Wolfe Howe has pointed out, speaking specifically with respect to the Supreme Court’s now much-disputed use of history in its Establishment Clause cases, that we “tend to think that because a majority of the [J]ustices have the power to bind us by their law they are also empowered to bind us by their history;” and indeed, the Court’s assertions about history often become solidified in law and cited as precedent, just like the Court’s legal assertions.\textsuperscript{194} Likewise, the Court’s assertions about the religious or nonreligious meaning or effect of certain phrases and practices embed themselves in the doctrine, to be cited by other courts in the future. Numerous courts, for example, point to the Court’s dicta to assert that the national motto has lost its religious meaning over time or that the Pledge is a patriotic rather than religious exercise.\textsuperscript{195} 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

\textsuperscript{190} Id. at 31.
\textsuperscript{191} Id. at 45.
\textsuperscript{192} Id. at 48.
\textsuperscript{193} Id. at 49.
\textsuperscript{194} Mark DeWolfe Howe, The Garden and The Wilderness 5 (1965); cf. Green, supra note 90, at 1732-33 (“[W]hen the Court endeavors to write an authoritative chapter in the intellectual history of the American people, as it does when it lays historical foundations beneath its readings of the First Amendment, then any distortion becomes a matter of consequence.” (quoting Howe, supra, at 4)).
\textsuperscript{195} E.g., Myers v. Loudon County Pub. Sch., 418 F.3d 395, 407 (4th Cir. 2005).
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.’” 196

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, gives reason to be skeptical of courts’ assertions that a particular phrase constitutes merely description or acknowledgment of our 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 our pledge may be as much attempts to create a particular religious sentiment, or to place a particular gloss on our shared 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 in order to counteract these tendencies.

In some instances, of course, a phrase may legitimately lose its religious meaning in some contexts. The jokes concerning the national motto, while relying on its religious origins, necessarily undermine the religious sentiment in order 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 it is, literally speaking, an instance of government religious speech. Finally, one might doubt whether the city names of Corpus Christi and San Francisco, or even the use of “A.D.” on public documents should be unconstitutional, given the apparent lack of religious impact those terms convey.

The task of distinguishing those 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 which undermines the motto’s 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 the religious force of those words to accomplish its effect. The sentence would have the same meaning and effect if it referred to another, nonreligious phrase. Finally, the term “A.D.” and the city names of Corpus Christi and San Francisco seem to act, much like the words “under God” in the previous example, 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 losing its meaning. 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.

V. 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, however. 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 the assertion is often made by judges is thus clearly unsatisfying from a theoretical and doctrinal standpoint.

This Article therefore proposes that courts should rely upon a rebuttable presumption that a facially religious phrase or practice has continuing religious meaning when deciding whether it is constitutional. Moreover, courts may consider the illocutionary force and the social history of a term when deciding whether it retains its religious meaning. While not adding up to a perfectly determinate test for challenges to ceremonial deism, this approach is nonetheless a vast improvement over the current state of affairs.

This Article thus does not set out a clear set of answers to difficult Establishment Clause questions. Instead, it suggests general directions for an analysis of ceremonial deism that draws on the insights of linguistic theory 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.