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Extract from Woody R. Clermont & Kionne L. McGhee, Hitting the Reset Button on the Religion Clauses: A Call for a Return to Textual Exegesis (2011) (unpublished manuscript), citing Tillman & Tillman's A Fragment on Shall and May

Seth Barrett Tillman

HITTING THE RESET BUTTON: SHOULD PROFESSOR JOHN F. MANNING'S *SEPARATION OF POWERS AS ORDINARY INTERPRETATION* LEAD TO THE FINAL DEMISE OF THE SO-CALLED SEPARATION BETWEEN CHURCH AND STATE?

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the Religion Clauses have instead read: "Congress shall make no law respecting [a state's] establishment of religion, [nor shall any national religion be established,] [n]or [shall it make law] prohibiting the free exercise [of religion.]~~thereof~~."⁴²

It is possible that the use of the word "establishment" could have meant a "settled regulation", or a "form"⁴³ but does this truly make sense in the use given here? It makes more sense to think of establishment as a "model of government or family"⁴⁴ in which case the evil to be combated would be disenfranchisement of those citizens who do not follow the national religion;⁴⁵ yet how could that be then extended to a removal of "God" from every aspect of the public sphere?⁴⁶ If history tells us anything about what the prototypical drafter was worried of, it was about the establishment of one sect of Christianity over another, not the endorsement of Christianity altogether.⁴⁷ Despite two-bit attempts to portray all of the Founders as Deists and

functions of law execution and adjudication, agencies and courts must expound the meaning of the texts they implement, leaving more or less room for the exercise of discretion. Neither Madison, nor the major political theorists upon whose traditions the founders built, appear to have assumed otherwise.").

⁴² "Shall" has been preferred over "will", but one author has argued this may be an issue of presentism. Seth Barrett Tillman, *A Fragment of Shall and May*, 50 AM. J. LEGAL HIST. 453 (2008-2010).

⁴³ Manning, *supra* note 38, at 721.

⁴⁴ *Id.*

⁴⁵ *But see* *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding the dismissal of a lawsuit filed to stop an appropriation of money from the District of Columbia "pursuant to an agreement with a religious corporation" as "invalid, as resulting indirectly in the passage of an act respecting an establishment of religion."); *see also* *Cummings v. Missouri*, 4 U.S. (Wall.) 277, 325 (1867) ("The Constitution deals with substance, not shadows.").

⁴⁶ Library of Congress, *Religion and the Federal Government: Part 1*, <http://www.loc.gov/exhibits/religion/rel06.html> (last updated July 23, 2010) ("That religion was not otherwise addressed in the Constitution did not make it an 'irreligious' document any more than the Articles of Confederation was an 'irreligious' document. The Constitution dealt with the church precisely as the Articles had, thereby maintaining, at the national level, the religious status quo. In neither document did the people yield any explicit power to act in the field of religion. But the absence of expressed powers did not prevent either the Continental-Confederation Congress or the Congress under the Constitution from sponsoring a program to support general, nonsectarian religion.").

⁴⁷ LOCKE, *supra* note 1, at 60 ("This only I say — that however clearly we may think this or the other doctrine to be deduced from Scripture, we ought not therefore to impose it upon others as a necessary article of faith because we believe it to be agreeable to the rule of faith, unless we would be content also that other doctrines should be imposed upon us in the same manner, and that we should be compelled to receive and profess all the different and contradictory opinions of Lutherans, Calvinists, Remonstrants, Anabaptists, and other sects which the contrivers of symbols, systems, and confessions are accustomed to deliver to their followers as genuine and necessary deductions from the Holy Scripture."). One can easily look to Delaware's "no establishment of any religious sect ... in preference to another." DEL. CONST. of 1779, art. 29. Likewise the Maryland Constitution of 1776 stated that "all persons professing the Christian religion, are equally entitled to protection in their religious liberty". MD. CONST. of