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Seth Barrett Tillman



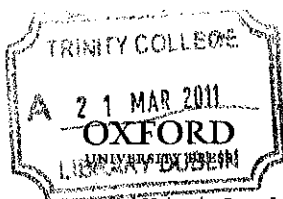
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THE AGNOSTIC AGE

LAW, RELIGION, AND THE
CONSTITUTION

PAUL HORWITZ

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on a partisan view of religious question of religious truth altogether view that favors non-establishment because of concerns that on with the state, because one look out issues of conscience and ate, because one is afraid that the . But all of these positions begin from an atheist or secularist perspective is the best rule for a secular more rigorously atheist or religious truth-claims—in this case, he secularist) that religious truth

drawing any conclusions about ent is the best way of avoiding cult to sustain this position in a questions of religious truth. If state support for religious belief, ishment should act as a trump.⁷⁵ establishment, and one relies on hen the question has not been ossible to support non-establish- t there is a religious truth. But it out either addressing or denying icitly. As we saw in Part One, any purely neutral grounds, without ithout a strong foundation. The the basis of pluralism, or keep- be hard pressed to support this e position about religious truth. n current Establishment Clause nment may not declare religious an important starting point for t has done in the Establishment o succeed, it must be properly

107 Harv. L. Rev. 1765, 1777 (1994).
Richard W. Garnett, *Assimilation,
Religious Doctrine*, 51 UCLA L. Rev.
7 accepted rule" that "appear[s] over
use decisions").

understood as a position *about* religious truth: one that squarely confronts it rather than attempting to avoid it.

That is, of course, the position of constitutional agnosticism. Constitutional agnosticism *begins* with the question of religious truth. It imagines, first and foremost, the possibility that there *is* a religious truth, a fact of the matter—whatever that fact might be. It is "agnostic about religion," but in "an interested and sympathetic" way.⁷⁷ It is emphatically not indifferent to the question of religious truth, and does not pretend otherwise.

But constitutional agnosticism, like the new agnosticism we examined in Chapter Three, is provisional and uncommitted on the question of religious truth. It imagines that there *is* a fact of the matter, but it does not presume to know what it is. Although it tries to envision all the possible answers to this question, it cannot or does not settle on a single answer. It remains in a state of suspension of ontological commitment. In this position, we may find the answers we seek to the puzzle of the Establishment Clause.

WHAT THE CONSTITUTIONALLY AGNOSTIC ESTABLISHMENT CLAUSE IS NOT

First, however, it is necessary to consider a competing account of what agnosticism might entail for the Establishment Clause. That account comes from Steven D. Smith, one of the most thoughtful modern theorists of law and religion. In an article titled *Our Agnostic Constitution*, Smith makes a number of interesting arguments about what the striking absence of God from the constitutional text might mean for the Religion Clauses, especially the Establishment Clause.⁷⁸

77. Koppelman, *supra* note 73, at 1907.

78. Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. Rev. 120 (2008). Seth Barrett Tillman has argued that the Constitution is not quite as barren of references to God as the popular understanding suggests. He points to the use of the phrase "the Year of our Lord" in the Attestation Clause, U.S. Const., art. VII, cl. 2; the fact that the Oath and Affirmation Clause allows both *oaths* and affirmations, *see id.*, art. VI, cl. 3; the prohibition in the same article of religious tests for public office, *see id.*; and the Sundays Excepted Clause of article I of the Constitution, which excludes Sundays from the ten days allotted to the President to sign or veto a bill passed by Congress before it automatically becomes law, *see id.*, art. I, § 7, cl. 2. *See* Seth Barrett Tillman, *Blushing Our Way Past Historical Fact and Fiction: A Response to Professor Geoffrey R. Stone's Melville B. Nimmer Memorial Lecture and Essay*, 114 Penn. St. L. Rev. 391, 393–98 (2009); *see also id.* at 396 n.12 (citing articles making some of the same observations). Tillman is clear that he draws no strong conclusions from these textual references. *See id.* at 398. He is right to be cautious. Of these examples, the last three could all be read as accommodations to existing religious belief rather than as a statement of belief about religion stemming from the Constitution itself; and both the Oath and Affirmation Clause and the Religious Test Clause explicitly suggest

Smith argues that the Constitution's "discreet silence on the subject of God," which is all the more remarkable for having occurred in a relatively religious age, can best be treated as a form of agnosticism, rather than, as some would have it, a more stringent brand of godlessness.⁷⁹ The Constitution "does not affirm theism, but neither does it say anything that could be construed as an affirmation of atheism."⁸⁰ "On epistemological grounds, or perhaps for more pragmatic reasons," the Constitution takes the agnostic position that "the preferred course is to suspend judgment—to take no position one way or the other on the existence of God."⁸¹

Smith emphasizes the "layered" nature of agnosticism: the notion that "the agnostic's mental life is complex, operating on more than one level."⁸² The agnostic can live as if God exists, or as if God does not exist; or, as with our empathetic brand of agnosticism, she can cycle imaginatively through a series of beliefs, all the while suspending any final judgment on those questions. But Smith takes an important step beyond the individual picture of agnosticism as layered belief, arguing that "a layering response may be as valuable for communities as it is for individuals."⁸³ He argues that "the Constitution seems almost ideally designed to facilitate such a strategy."⁸⁴

How so? Smith's argument proceeds both negatively and positively. Negatively, he rejects the idea that the best response to the layered beliefs of communities is "simply to forgo public reliance on or expression of the controversial [religious] beliefs" that some members of a community might share, in favor of other, more widely shared interests—democracy, the rule of law, and so on—that could provide common ground for the community.⁸⁵ This approach is insufficient, both because those other values will be too thin or too unsettled to "support a secure and robust community,"⁸⁶ and because insisting that communities give up any

that one may honor the Constitution without having a particular belief or disbelief in God. As for the reference to "the Year of Our Lord" in the Attestation Clause, even if it is more than just a use of the "conventional dating method of the era," Smith, *supra* note 78, at 125 n.19, it is still rather a slender reed on which to hang any arguments about the godly nature of the Constitution. For our purposes, little turns on whether God is completely absent from the constitutional text, or only mostly absent.

79. Smith, *supra* note 78, at 128; compare Isaac Kramnick & R. Laurence Moore, *The Godless Constitution: A Moral Defense of the Secular State* (2005).

80. Smith, *supra* note 78, at 129.

81. *Id.* at 128–29.

82. *Id.* at 134.

83. *Id.* at 140.

84. *Id.* at 141.

85. *Id.* at 144.

86. *Id.*; see also *id.* at 149 ("tenets such as democracy, equality, and so forth are too few and too thin . . . to actually allow the community to act on the myriad concrete issues that confront it").

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89. *Id.* a

90. *Id.*

91. *Id.* a

92. *Id.* a

93. *Id.*

94. *Id.* at

95. *Id.* at