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Seth Barrett Tillman

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HITTING THE RESET BUTTON ON FREEDOM OF CONSCIENCE: READING THE WRITING ON THE WALL

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disestablish, churches established by state and local governments.\textsuperscript{196} How can one not admit, that the earlier versions convey that interpretation in a "pellucid" fashion?\textsuperscript{197} Should 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.] the rest.\textsuperscript{198} If there was a reason why the word "national" was stricken, it seemed less because the Founders intended that the clause would apply to the states, but because the term "national religion" itself was confusing, and had not been well defined by Madison, and that some probably feared it could actually be used to strike down state religion as well.\textsuperscript{199}

It is possible that the use of the word "establishment" could have meant a "settled regulation" or a "form"?\textsuperscript{200} It makes more sense to think of establishment as a "model of government or family"\textsuperscript{201} in which case the evil to be combated would be disenfranchisement of those citizens who do not follow the national religion;\textsuperscript{202} yet how could that be then extended to a removal of "God" from every aspect of the public sphere?\textsuperscript{203} If history tells us anything about

\textsuperscript{196} Akil Reed Amar, \textit{The Bill of Rights as a Constitution}, 100 YALE L.J. 1131, 1157 (1991).

\textsuperscript{197} \textit{See}, e.g., John F. Manning, \textit{Textualism as a Nondelegation Doctrine}, 97 COLUM. L. REV. 673 (1997) ("No legislator, however prescient, can predict all the twists and turns that lie ahead for his or her handiwork. The path of a law depends on diverse and unknowable factors, and no one seriously argues the regulation of social problems can be reduced to a pellucid and all-encompassing code. Incidental to discharging their respective constitutional 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.").

\textsuperscript{198} "Shall" has been preferred over "will", but one author has argued this may be an issue of presentism. Seth Barrett Tillman and Nora Rotter Tillman, \textit{A Fragment of Shall and May}, 50 AM. J. LEGAL HIST. 453 (2008-2010).

\textsuperscript{199} \textit{See} WALDMAN, supra note 151, at 145-146.

\textsuperscript{200} Manning, supra note 38, at 721.

\textsuperscript{201} Id.

\textsuperscript{202} 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. (Ull. 227, 325 (1867) ("The Constitution deals with substance, not shadows.").