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Of Historiography and Constitutional Principle: Jefferson's Reply to the Danbury Baptists

Ian Bartrum

*Before I built a wall I'd ask to know,
What I was walling in or walling out,
And to whom I was like to give offence,
Something there is that doesn't love a wall.*

—Robert Frost¹

In June of 1998 the Library of Congress opened *Religion and the Founding of the American Republic*, a retrospective that assembled a diverse array of historical materials and attempted to impose some narrative order on the complex strands of theology, persecution, and politics that entwined during our nation's formative years.² As centerpiece of the display stood the restored first draft of a letter Thomas Jefferson wrote in reply to a committee of Baptists in Danbury, Connecticut, in which he invoked the now-canonical metaphor of a “wall of separation between church and state.”³ With the help of an FBI forensics team, Manuscript Division

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1. Robert Frost, “Mending Wall,” in *The Poetry of Robert Frost*, ed. Edward C. Latham (New York: Holt, Rinehart, and Winston, 1979), 33.
 2. “Faith of our Forefathers: Religion and the Founding of the American Republic,” *Library of Congress Information Bulletin* 56 (May 1998), 112.
 3. Thomas Jefferson to Messrs. Nehemiah Dodge, Ephram Robbins, and Stephen S. Nelson, a Committee of the Danbury Baptist Association in the State of Connecticut (January 1, 1802); reprinted in *Jefferson: Political Writings*,

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Chief James Hutson was able to reveal, for the first time, several lines of text that Jefferson had blacked out of his original draft. Hutson also provided a short commentary on the relevance of the new material to our understanding of Jefferson's disestablishment principles and motivations. Rather than support the conventional treatment of the document as a statement of enduring constitutional meaning, Hutson suggested that the redacted lines—which evince careful consideration of the letter's political implications⁴—expose Jefferson's intent to deliver “a partisan counterpunch, aimed below the belt at enemies who were tormenting him more than a decade after the First Amendment was composed.”⁵

While he acknowledged that Jefferson viewed the letter partially as an opportunity to reemphasize the commitment to religious liberty he had demonstrated fifteen years earlier when he drafted Virginia's *Statute Establishing Religious Freedom*, Hutson maintained that the letter's “principal purpose” was political, and pointed out that Jefferson actually attended religious services conducted in the House of Representatives just two days after composing it.⁶ More provocatively, he suggested that some of Jefferson's revisions—such as striking out the word “eternal” before “wall of separation,” and omitting a characterization of his office as “merely temporal”—might reflect an increasingly sympathetic view of public religion:

It seems likely that . . . Jefferson was motivated not merely by political considerations but by a realization that these words, written in haste to make a political statement, did not accurately reflect the conviction he had reached by the beginning of 1802 on the role of government in religion. . . . [H]e seems to have come around to something close to the views of New England Baptist leaders such as Isaac Backus and Caleb Blood, who believed that, provided that the state kept within its well-appointed limits, it could provide “friendly aids” to churches, including putting at their disposal public property.⁷

ed. Joyce Appelby & Terence Ball (Cambridge University Press, 1999), 396–97 [hereinafter “Danbury Letter”].

4. James Hutson, “A ‘Wall of Separation’: FBI Helps Restore Jefferson's Obliterated Draft,” *Library of Congress Information Bulletin* 57 (June 1998): 136, 138. On the advice of Attorney General Levi Lincoln (of Massachusetts), Jefferson omitted inflammatory language directed at New England Federalist opponents who had used his unwillingness to recognize official days of thanksgiving and prayer to smear him as an Atheist. In the redacted text Jefferson implicitly linked such practices with the hated English monarchy: “[As] Congress [is] inhibited from acts respecting religion, and the Executive authorized only to execute their acts, I have refrained from prescribing even those occasional performances of devotion, practiced by the Executive of another nation as the legal head of its church.” *Ibid.*, 139.

5. *Ibid.*, 139.

6. *Ibid.*, 163.

In short, Hutson suggested that the restorations expose a wall of separation that is more a figure of political rhetoric than a statement of constitutional principle, and reveal a Jefferson who was ultimately more open and less ruthlessly enlightened than the traditional narrative supposes.

The exhibition and commentary provoked an immediate academic backlash, which seemed to catch Hutson somewhat by surprise.⁸ At the urging of a church-state watchdog group, Professors Robert O'Neill and Robert Alley—with twenty-two other academics signatories—sent a response letter to the Library of Congress complaining that Hutson had presented “an unbalanced treatment of [Jefferson’s letter] on the basis of questionable analysis that has not, as far as is known, been subjected to independent scholarly review.”⁹ Hutson elaborated on his conclusions in a book published shortly thereafter, but his essential message remained the same: we should understand Jefferson’s “wall of separation” primarily as political rhetoric, and “there is no evidence that Jefferson considered the metaphor the quintessential symbolic expression of his church-state views.”¹⁰ Hutson’s critics remained unpersuaded, however, and the controversy generated enough academic interest that the

7. *Ibid.*, 139, 163.

8. See Laurie Goodstein, “Fresh Debate on 1802 Jefferson Letter,” *New York Times*, September 10, 1998, A20, c.1.

9. *The Library of Congress Misinterprets Thomas Jefferson: A Letter of Concern from the Scholars Listed Below* (July 28, 1998), available online at: <http://librimagni.com/~blaine/jeff2.html>. Other notable signatories included: William Van Alstyne, Robert Drinan, Norman Dorsen, Ronald Flowers, Edwin Gaustad, Peter Irons, Isaac Kramnick, and R. Laurence Moore. Apparently, the activist group “Americans United for the Separation of Church and State” orchestrated the letter and issued a simultaneous press release. See *Leading Church-State Scholars Refute Library of Congress’ Views On Thomas Jefferson and Church-State Separation*, Americans United Press Release (July 1998) available online at: http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=6127&news_iv_ctrl=1507.

10. James H. Hutson, *Religion and the Founding of the American Republic* (Washington, DC: Library of Congress, 1998), 84. In one notable elaboration, Hutson suggested that, to the extent Jefferson thought that his metaphor encapsulated a constitutional principle, it was most likely a “jurisdictional” or federalist one: that the federal Congress must not interfere with state or local religious institutions. *Ibid.* This “federalist” interpretation finds support in what appears to be Jefferson’s deliberate mark of emphasis within the phrase “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion.” See Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptists Association in the State of Connecticut, January 1, 1802, (handwritten draft); reprinted in James H. Hutson, “Thomas Jefferson’s Letter to the Danbury Baptists: A Controversy Rejoined,” *William & Mary Quarterly* 56 (October 1999): 775, 778 (underline in original).

William and Mary Quarterly invited several of the principal players to participate in a topical forum in the fourth issue of its 1999 volume.

Hutson opened the forum with a longer explanation of his views, this time equipped with the full complement of an “appropriate scholarly apparatus.”¹¹ He reiterated in greater detail his thoughts on the letter’s political purpose, and then went into more depth regarding his claims about Jefferson’s evolving acceptance of religious activities on or within federal properties.¹² The other forum participants then took turns challenging or supporting Hutson’s conclusions. The first challenge came from Robert O’Neill, co-drafter of the original response letter, who downplayed Jefferson’s “seeming softness on sectarian use of government buildings” as uncharacteristic of his broader views on disestablishment, and claimed that Hutson’s restorations “alter the meaning or import of the letter in no substantial way.”¹³ Thomas Buckley, however, argued that the restorations make up part of a fuller picture of Jefferson as a political, and a religious, man. Buckley urged an understanding of the letter and its author consistent with the time and circumstance, suggesting that “to treat Jefferson as a herald of twentieth-century secularism is to read him dogmatically and falsely.”¹⁴ He concluded with a biting observation: “Toward the end of his presidency, reflecting on the ‘slander’ he had suffered in the 1800 campaign, Jefferson vigorously denied that he had ever intended to foster a ‘government without religion. . . . How ironic that scholars today who claim Jefferson’s mantle should embrace his political foes’ perspective.”¹⁵ Edwin Gaustad and Daniel Dreisbach then took turns on either side of the issue—the former opining that “[r]einforcing the wall between church and state remained [Jefferson’s] lifelong objective,”¹⁶ and the

11. James H. Hutson, “Thomas Jefferson’s Letter to the Danbury Baptists: A Controversy Rejoined,” *William & Mary Quarterly* 56 (1999): 775, 777.

12. *Ibid.*, 787–90. In support of the latter contention, Hutson pointed to Jefferson’s repeated attendance at religious services held in the House of Representatives—including the service just two days after the letter—as evidence that the President believed that the government “might serve as a passive, impartial venue for voluntary religious activities.” *Ibid.*, 789.

13. Robert M. O’Neill, “The ‘Wall’ of Separation,” and Thomas Jefferson’s Views on Religious Liberty,” *William & Mary Quarterly* 56 (October 1999): 791, 793.

14. Thomas E. Buckley, “Reflections on a Wall,” *William & Mary Quarterly* 56 (October 1999): 795, 800.

15. *Ibid.*

16. Edwin Gaustad, “Thomas Jefferson, Danbury Baptists, and ‘Eternal Hostility,’” *William & Mary Quarterly* 56 (October 1999): 801, 804.

latter decrying ideologically motivated efforts to “muzzle historical research by a government archivist”¹⁷—before Isaac Kraminick and R. Laurence Moore delivered the final opposing commentary.¹⁸

Ten years later the specific controversy over Hutson’s restorations and commentary has died down,¹⁹ but the relationship between constitutional historiography and constitutional principle—particularly in matters of church and state—remains problematic and polarizing. In this regard, the debate over Hutson’s work provides an excellent entry point into the following case study. This essay explores the historiographical use of Jefferson’s letter—both in Supreme Court doctrine and scholarly literature—in an attempt to understand what made the 1998 restorations so controversial and threatening, and as a means of exploring the sometimes corrosive relationship between academic historiography and constitutional law. The first section examines the Court’s opinions and locates Jefferson’s metaphor at the center of an ongoing clash between what I term “exclusive” and “inclusive” theories of state neutrality towards religion; a debate that has set the stage for academic historical inquiry along particular ideological lines.²⁰ The second section turns to the letter’s appearance in scholarship and, unsurprisingly, finds both the “exclusive” and “inclusive” ideological approaches vigorously, if not persuasively, defended.

I conclude that this constitutional dispute—and, in truth, many others—admits no clear historical answer, and we must therefore be willing to bring other interpretative tools to bear. Without such flexibility there is a real danger that the relationship between constitutional historiography and constitutional principle will become increasingly incestuous as we preselect an ever-narrower field of ideologized focal points for scholarship and adjudication. Further, there is a larger point to be made about the different structures and goals of legal and historical argumentation. Legal argument is essentially binary—there is always a winning and a losing side—and the lawyer and judge thus seek simplicity and finality. Historical argument, on the other hand, aims largely to reveal

17. Daniel L. Dreisbach, “Thomas Jefferson and the Danbury Baptists Revisited,” *William & Mary Quarterly* 56 (1999): 805, 814.

18. Isaac Kraminick and R. Laurence Moore, “The Baptists, the Bureau, and the Case of the Missing Lines,” 56 *William & Mary Quarterly* 56 (1999): 817.

19. Although Hutson did edit a volume dedicated largely to a defense of his thesis—featuring many of the same scholars—a few years later. See *Religion and the New Republic: Faith and the Founding of America*, ed. James H. Hutson (Lanham: Rowman and Littlefield, 2000).

20. For a broader history of these two theories of state neutrality in the public school context see, Ian Bartrum, “The Political Origins of Secular Public Schools: The New York School Controversy 1840-42,” *NYU Journal of Law & Liberty* 3 (2008): 267.

greater nuance, complexity, and depth; ultimately it seeks to expose new and unanswered questions for future scholarship. These structures are in some ways fundamentally incompatible, and thus we often distort one discipline to make it fit within the confines of the other. Ironically, this sometimes means that “bad” historical arguments lend themselves most easily to legal arguments.²¹ It is this problematic relationship that I intend to expose and explore here, and, in so doing, I hope to at least raise some important questions about the utility (or even possibility) of “originalism” as a neutral interpretive principle.²²

Jefferson’s Wall in the Supreme Court

Content from Jefferson’s letter first appeared in a Supreme Court opinion in 1878, when a Mormon from the Utah territory challenged his federal polygamy conviction on Free Exercise grounds.²³ In *Reynolds v. United States*, the Court acknowledged that the Constitution offered no precise definition of either “religion” or “religious freedom” and Chief Justice Morrison Waite thus decided to look beyond the text “to the history of the times in the midst of which the [First Amendment] was adopted.”²⁴ After reviewing what are now the canonical disestablishment texts—Jefferson’s *Virginia Statute Establishing Religious Freedom* and James Madison’s *Memorial and Remonstrance Against Religious Assessments*—Waite quoted the entire central paragraph of the Danbury Baptist letter,²⁵ whose pedigree made it, he believed, “an authoritative declaration of the

21. I do not mean here to take a decisive position on “good” versus “bad” history; eventually there are simply histories undertaken for different purposes. I do mean to suggest, however, that legal-historical arguments tend to aim at very different goals than purely historical arguments, and that the former are thus more likely to be tailored to particular ideological outcomes. While any human endeavor is inevitably grounded in individual experience, beliefs, and understanding, we certainly have a shared conception of the term “biased” (and thus some idea of what “unbiased” would be) and should, I believe, at least intend our intellectual endeavors toward objectivity—no matter how elusive that may ultimately be. In the end, however, even “good” or “objective” historical arguments cannot, by their very nature as historical arguments, dissolve social normative disagreements in the way that some “originalists” seem to believe.

22. For a revealing discussion of this view, see Clarence Thomas, “How to Read the Constitution,” *Wall Street Journal*, Opinion, October 20, 2008, (“at least originalism has the advantage of being legitimate and, I might add, impartial.”).

23. *Reynolds v. United States*, 98 U.S. 145 (1878) at 164. There were, of course, very few cases addressing the religion clauses before 1940 because the First Amendment applied only to federal, and not state, actions.

24. *Ibid.*, 162.

25. The final text of that paragraph is as follows:

scope and effect of the [First Amendment].”²⁶ It was not the wall of separation, however, but rather Jefferson’s distinction between “actions” and “opinions” that interested Waite, who concluded that the Constitution did not preclude statutory prohibition of “acts” of polygamy.²⁷

The Danbury letter resurfaced twenty years later in a Court of Appeals decision upholding the federal incorporation of a Catholic hospital in the District of Columbia.²⁸ The appeals court again reproduced the letter’s central paragraph and quoted Chief Justice Waite’s opinion of its import, but then went on to offer its own opinion on the meaning of the wall metaphor: “[T]he declaration was intended to secure . . . complete religious liberty to all persons, and the absolute separation of the Church from the State, *by the prohibition of any preference*, by law, in favor of any one religious persuasion or mode of worship.”²⁹ This interpretation—which has sometimes been termed a “nonpreferentialist” reading³⁰—corresponds to what I call an “inclusive” theory of state neutrality, which holds that the state remains religiously neutral by *including* all religious viewpoints equally. This construction remained largely undeveloped, however, as the federal courts did not have occasion to contemplate Jefferson’s letter again for many years; and by the time the Supreme Court did come back to the wall of separation, the interpretive culture had changed dramatically.

Believing with you that religion is a matter which lies solely between a man and his God; that he owes account to none other for his faith or his

worship; that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should “make no law respecting an establishment of religion or prohibiting the free exercise thereof,” *thus building a wall of separation between Church and State*. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

Danbury Letter quoted in *ibid.*, 164 (underline in original, italics added).

26. *Ibid.*, 164.

27. *Ibid.*, 167.

28. *Roberts v. Bradfield*, 12 App.DC 453, 466 (1898). The Supreme Court would eventually review, and uphold, this decision; but it did not invoke Jefferson’s wall. See *Bradfield v. Roberts*, 175 U.S. 291 (1899).

29. *Roberts*, 12 App.DC at 467 (emphasis added).

30. See, e.g., Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan, 1986), 91.

By 1947, the Court had weathered the difficult early years of the New Deal and emerged—after the critical “switch in time that saved nine”³¹—with a profoundly enlarged conception of federal authority. At the urging of Justice Hugo Black, it had begun to “incorporate” the protections of the Bill of Rights into the substantive liberties that the Fourteenth Amendment guards from state encroachment. In *Everson v. Board of Education*, the Court took the opportunity to incorporate the Establishment Clause while considering a New Jersey program that provided school busing to Catholic school students.³² Writing for the majority, Justice Black invoked Jefferson’s letter at the end of a paragraph that would become a cornerstone of establishment doctrine:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess belief or disbelief in any religion. . . . In the words of Jefferson, the clause was intended to erect a “wall of separation between Church and State.”³³

The “strict separationist” interpretation Black offered in *Everson* is a paradigmatic statement of what I call the “exclusive” theory of state neutrality, which holds that the state remains religiously neutral only by *excluding* all religious groups from state aid programs. Somewhat surprisingly, the *Everson* majority upheld the New Jersey busing program as providing merely an “incidental” benefit to religion; a decision which provoked lengthy dissents from Justices Robert Jackson and Wiley Rutledge, the latter of whom preferred even stricter separation.³⁴ Rutledge lamented that “[n]either so high nor so impregnable today as yesterday is the wall raised between church and state by . . . the First Amendment” before offering the standard theoretical justification of exclusive neutrality (and an explicit rebuke of inclusivism):

The problem . . . cannot be cast in terms of legal discrimination or its absence. This would be true, even though the state in giving aid should treat all religious instruction alike. Thus, if the present statute and its

31. The phrase is Thomas Reed Powell’s sardonic description of Justice Owen Roberts’s doctrinal about face in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which defused President Roosevelt’s court packing plan. See Owen Fiss, *The Troubled Beginnings of the Modern State: 1888-1910* (New York: Macmillan, 2006), 8 at n. 30.

32. *Everson v. Bd. of Education of Ewing Township*, 330 U.S. 1 (1947) at 8.

33. *Ibid.*, 15–16 (emphasis added).

34. *Ibid.*, 17.

application were shown to apply equally to all religious schools of whatever faith, yet in the light of our tradition it could not stand. . . . [I]t was the furnishing of “contributions of money for the propagations of faith which he disbelieves” that the fathers outlawed. That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted. The Constitution requires, not comprehensive identification of state with religion, but *complete separation*.³⁵

Just a year later the *Everson* dissenters would have their day in *McCullum v. Board of Education*, a case which tested the constitutionality of an Illinois program that brought private teachers into public schools to conduct optional weekly religion classes.³⁶ *McCullum* inspired two concurrences and a dissent by Justice Reed and thus, perhaps more than any other case, it best outlines the contours of the inclusive–exclusive debate and its relationship to Jefferson’s figurative wall. Writing for the majority, Justice Black recited the foundational paragraph from *Everson* quoted above, adding by way of explanation that “the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”³⁷ He concluded with a rhetorical return to Jefferson—the “wall between Church and State . . . must be kept high and impregnable”—and then struck down the Illinois program in a flurry of exclusivist rhetoric.³⁸

Black’s short opinion was not enough for the *Everson* dissenters, however. These justices concurred in *McCullum* and sought to vindicate the strict separationism that had failed to carry the Court a year earlier. Justice Felix Frankfurter began his defense of exclusivism by suggesting that the Constitution must prohibit more than just the establishment of an official state church, and he proceeded to flesh out Jefferson’s metaphor:

We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an “established church.” But agreement, in the abstract, that the First Amendment was designed to erect a “wall of separation between Church and State,” does not preclude a clash of views as to

35. *Ibid.*, 52, 59–60 (Rutledge, J., concurring). In contrast, the inclusivist contends that exclusion preferences a secular or nonreligious worldview, which is far from neutral on metaphysical questions.

36. *McCullum v. Bd. of Education*, 333 U.S. 203 (1948). The program brought in privately funded instructors to teach Protestant, Catholic, and Jewish classes one day a week to the children of requesting parents. Students who elected not to participate received secular instruction in another classroom. *Ibid.*, 207–09.

37. *Ibid.*, 212.

38. *Ibid.*

what the wall separates. . . . We cannot illuminatingly apply the “wall of separation” metaphor until we have considered the relevant history of religious education in America.³⁹

And the dubious history Frankfurter then presented—centered on the supposed battle to secularize public education against “fierce sectarian opposition”⁴⁰—made clear that exclusive neutrality was the only acceptable solution, as did his concluding words: “Separation means separation, not something less. Jefferson’s metaphor in describing the relation between Church and State speaks of a ‘wall of separation,’ not a fine line easily overstepped. It is the Court’s duty to enforce this principle in its full integrity.”⁴¹

Justice Jackson, however, did not find the metaphoric wall so easy to discern or apply, and he expressed doubts about the simplistic brand of exclusivism Frankfurter’s historicized appeal to Jefferson seemed to imply:

It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we find no law but our own prepossessions. If with no surer legal guidance we are to take up and decide every variation of this controversy . . . we are likely to make the legal “wall of separation between Church and State” as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.⁴²

Justice Stanley Reed, the lone dissenter, articulated even greater reservations about the exclusivist position and, in particular, its grounding in Jefferson’s Danbury letter: “A reading of the general statements of eminent statesmen of former days . . . will show that circumstances such as those in this case were far from the minds of the authors. The words and spirit of those statements may be wholeheartedly accepted without in the least impugning [the Illinois program].”⁴³ Reed went on to present a different historical account; using other Jefferson writings he demonstrated that Jefferson envisaged a significant role for religion in the classrooms of the University of Virginia.⁴⁴ “Thus,” he concluded:

39. *Ibid.*, 213 (Frankfurter, J., concurring).

40. *Ibid.*, 214. This battle was actually an effort to exclude Catholic teaching from what were universally acknowledged to be Protestant public schools—in which the King James Bible and Book of Common Prayer were central texts. See Bartrum, “The Political Origins,” 286–313.

41. *Ibid.*, 231. It is perhaps ironic that Frankfurter finished by reciting a line from the Robert Frost poem quoted at this paper’s head—“good fences make good neighbors.” Frost, of course, meant to express a contrary sentiment.

42. *Ibid.*, 237–38 (Jackson, J., concurring).

43. *Ibid.*, 244 (Reed, J., dissenting).

the “wall of separation between Church and State” that Mr. Jefferson built at the University which he founded did not exclude religious education from that school. The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.⁴⁵

But Reed’s inclusivist instincts ran against the generally exclusivist tide of the day (with the notable exceptions discussed below), and over the next forty years Jefferson’s wall became the rhetorical centerpiece of the exclusive neutrality doctrine. During that time, the Danbury letter made an appearance in exclusivist majority opinions that struck down school prayer,⁴⁶ moments of silence,⁴⁷ nonsectarian graduation prayers,⁴⁸ public funding for Catholic school field trips,⁴⁹ a church’s veto power over neighboring liquor licenses,⁵⁰ and tax benefits to parochial school parents⁵¹—and in exclusivist dissents against decisions that upheld the loan of textbooks to Catholic schools,⁵² prayer at the opening of a state legislature,⁵³ and a private party’s display of a cross on state capitol grounds.⁵⁴

Exclusive neutrality never entirely controlled the interpretive field, however—even in the mid-twentieth century—and in recent years inclusivism has found increasing support on the Court. In fact, the Court issued its seminal inclusivist decision in 1952, just a few years after *McCullum*. In *Zorach v. Clauson*, five justices upheld a New York City “released time” program that permitted the children of requesting parents to leave school to receive weekly instruction at private religious centers.⁵⁵ Writing for the majority, Justice William Douglas acknowledged the impressive

44. *Ibid.*, 245–48.

45. *Ibid.*, 247.

46. *Engel v. Vitale*, 370 U.S. 421 (1962) at 426.

47. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

48. *Lee v. Weisman*, 505 U.S. 577 (1992) at 601 (Blackmun, J., concurring).

49. *Wolman v. Walter*, 423 U.S. 229 (1977) at 235.

50. *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982) at 123.

51. *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) at 761.

52. *Board of Education v. Allen*, 392 U.S. 236 (Black, J., dissenting) at 251.

53. *Marsh v. Chambers*, 463 U.S. 783 (1983) at 802 (Brennan, J., dissenting). Brennan outlined four purposes of the exclusive neutrality doctrine: (1) to prevent compelled support for another religion; (2) to prevent state interference with religious autonomy; (3) to protect religion from the degradation of state association; and (4) to prevent political divisiveness. *Ibid.*, 803–06.

54. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) at 797 (Stevens, J., dissenting).

55. *Zorach v. Clauson*, 343 U.S. 306 (1952) at 308. The challenged program was similar to the one struck down in *McCullum*, except in *Zorach* the religious instruction did not occur in the public school building.

shadow of Jefferson's wall, but began to pick at a few cracks in the mortar: "The First Amendment, however, does not say that in every and all respects there shall be a separation of church and state. . . . This is the common sense of the matter. Otherwise the Church and State would be aliens to each other—hostile, suspicious, and even unfriendly."⁵⁶ He then gave what has become the paradigmatic justification of inclusive neutrality:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of the government that shows no partiality to any group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.⁵⁷

Douglas's vision was a powerful challenge to the exclusionary imagery of the wall of separation—was it really Jefferson's desire to banish all religion from government, or is it more likely that he objected to state preference of one religion over another? Was the wall to be erected between the state and *religion* or between the state and *sectarianism*? For Douglas and other inclusivists, the logic of exclusive neutrality was internally contradictory: exclusivism could not claim to be truly neutral while forthrightly promoting a secular worldview.

While it did not often command a majority of the Court, the inclusive theory of neutrality simmered just below the surface over the next several decades. Justice Potter Stewart kept it alive in two scathing dissents in the school prayer decisions of the 1960s. In the second case, *Abington School District v. Schempp*, he offered a cogent summary of the inclusivist objection in the school prayer context:

[A] compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. . . . [The] refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism.⁵⁸

56. *Ibid.*, 312.

57. *Ibid.*, 313.

And, beginning the mid-1980s, inclusivists began to mount a more direct attack on the language of the Danbury letter. Writing for the majority in *Lynch v. Donnelly*—a decision upholding a nativity scene on city property—Chief Justice Warren Burger offered the following thoughts: “The concept of a ‘wall’ of separation is a useful figure of speech probably deriving from the views of Thomas Jefferson. . . . But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.”⁵⁹ He then reached a straightforward inclusivist conclusion: “the Constitution [does not] require complete separation of church and state; it affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility towards any.”⁶⁰

Soon-to-be-Chief Justice William Rehnquist continued the inclusivist attack on Jefferson’s wall in dissent in *Wallace v. Jaffree*, a case in which the majority struck down moments of silence at public schools. From the outset, he peevishly chided the Court for its misplaced reliance on the Danbury letter:

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly forty years. Thomas Jefferson was of course in France at the time the constitutional amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written fourteen years after the amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.⁶¹

After doing his own bit of historicizing—focused selectively on some of James Madison’s writings and contemporary dictionary definitions of “establishment”—Rehnquist struck a decidedly inclusivist chord: “The Establishment Clause did not require government neutrality between religion and nonreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the . . . ‘wall of separation’ that was constitutionalized in *Everson*.”⁶²

58. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) at 313 (Stewart, J., dissenting).

59. *Lynch v. Donnelly*, 465 U.S. 668 (1983) at 673.

60. *Ibid.* (emphasis added).

61. *Wallace*, 472 U.S. 38 (1985) at 92 (Rehnquist, J., dissenting).

62. *Ibid.*, 106.

By the turn of the century the Court's ideological composition had shifted towards Rehnquist, and inclusivism began to seek new passages through the wall. In *Mitchell v. Helms*, the Court upheld a Louisiana program that provided educational materials to religious and secular schools on an equal basis—despite a sharp dissent quoting the seminal exclusivist language from *Everson*.⁶³ In *Good News Club v. Milford Central School*, the Court required a New York school that opened its facilities to community groups after hours to include religious groups on an equal basis.⁶⁴ Justice Clarence Thomas's majority opinion recast the issue in terms of free speech, but he enthusiastically endorsed an inclusive conception of religious neutrality: "Because allowing [religious groups] to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude [these groups]."⁶⁵ As a result of this change on the Court—part of which is a calculated shift towards free speech analysis⁶⁶—exclusivists have found themselves increasingly on the defensive. So much so that in 2005, in the case *Van Orden v. Perry* that upheld a monument of the Ten Commandments on the Texas state capitol grounds, dissenting Justice John Paul Stevens was left stridently guarding the remnants of a weatherworn exclusivism: "If any fragment of Jefferson's metaphorical 'wall of separation between church and State' is to be preserved—if there remains any meaning to the wholesome 'neutrality' of which this Court's Establishment Clause cases speak—the Texas display must come down."⁶⁷

Over the last sixty years, then, Jefferson's wall of separation has occupied a place of prominence in the ongoing debate over how best to ensure state neutrality in religious matters. The metaphor has become a powerful rhetorical showpiece for advocates of an exclusive theory of neutrality, and, as an enduring image of established secularism, it has been the target of prolonged attacks from inclusivists. It is thus little wonder that James Hutson's restoration and commentary on Jefferson's original draft provoked such sharp scholarly disagreement in 1998; after all, this is a field in which disputed historical meanings can have real and profound modern consequences. As an easily accessible symbol, Jefferson's metaphor has provided a convenient, if overly simplistic, focal

63. *Mitchell v. Helms*, 530 U.S. 793 (1999) at 873 (Souter, J., dissenting).

64. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) at 102.

65. *Ibid.*, 114.

66. See Ian Bartrum, "Paradise Lost: *Good News Club*, Charitable Choice, and the State of Religious Freedom," *Vermont Law Review* 27 (2002): 177.

67. *Van Orden v. Perry*, 545 U.S. 677 (2005) at 708 (Stevens, J., dissenting) (internal quotations and citations omitted).

point for law office historians. But the story is not much better for academic historians. As might be expected, scholars have debated Jefferson's letter with remarkable prolixity since its constitutional canonization in *Everson*. And, as evidenced below, many professional historians have found some way or another to throw their learned weight entirely behind one side of the Supreme Court's internal debate or the other—a circumstance that cannot help but raise the skeptical scholar's eyebrow.

Jefferson's Wall in Historical Scholarship

I have implied that the academy's interest in Jefferson's Danbury letter is largely a reaction to the Supreme Court's rhetorical use of the metaphorical wall of separation. In what follows I flesh out this claim as I track the letter's appearance in six scholarly books, though it certainly has turned up in many more. I have chosen these books because they are among the most widely read and respected texts in the field, and because I believe they illustrate that academic historiography has generally adopted, and thus perpetuated, the exclusive-inclusive structure that the Court has framed. It is this intersection of political ideologies and historiographical agendas that I hope to emphasize and examine. I have chosen to limit my focus to books that appeared after *Everson* and before the 1998 restoration controversy, though I will have a little to say about more recent scholarship in concluding.

The first book is Leo Pfeffer's influential *Church, State, and Freedom*, first published in 1953.⁶⁸ Before entering academia, Pfeffer was a distinguished attorney who appeared frequently before the Supreme Court, and his antagonistic literary style recalls his courtroom experience. He begins by summarizing the western traditions regarding law and religion before turning in earnest to the colonial American innovations, which he argues were intended, from the outset, to set up an exclusivist neutrality that "barred nonpreferential aid to religion [because] such aid constituted an establishment of religion."⁶⁹ Along the way, he vigorously defends the Court's use of the Danbury letter against "valiant attempts" to minimize its importance—which he uncharitably dismisses as "facile disposals" and "historically inaccurate."⁷⁰ Pfeffer offers a spirited and tightly argued defense of the exclusivist position that the Court adopted in *Everson* and *McCullum*, to which

68. Leo Pfeffer, *Church, State, and Freedom* (Boston, MA: Beacon Press, 1953).

69. *Ibid.*, 161 (internal quotations omitted).

70. *Ibid.*, 133, 134.

he repeatedly refers. He is deeply troubled by the then-recent *Zorach* decision, which he characterizes as the result of an ill-informed and destructive “four-year verbal barrage” against Jefferson’s letter.⁷¹ Thus, the heart of the book is a detailed, if not terribly persuasive, historical argument against the inclusivist (or nonpreferentialist) threat that *Zorach* presented, and as such Pfeffer seems to have inaugurated a tradition of disestablishment history consciously tailored to the defense of a particular constitutional theory.

It was more than a decade later—soon after the school prayer decisions—that Mark DeWolfe Howe published his widely acclaimed *The Garden and the Wilderness*, which offers an elegant and nuanced counterweight to Pfeffer’s book.⁷² Howe laments what he perceives as a growing gap between social reality and constitutional principle on church and state issues; a gap he blames primarily on the Court’s “superficial and purposive” efforts to prove that “the only theory of separation known in constitutional history is Jeffersonian or rationalistic.”⁷³ As an alternative, Howe posits an “evangelical” disestablishment, which he traces back to the source from which Jefferson borrowed his famous wall metaphor: Roger Williams.⁷⁴ Williams’s wall of separation appeared in a 1644 meditation on the separation of the earthly from the divine:

[W]hen [the Christians] have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the Candlestick, etc., and made His Garden a wilderness as it is this day. And that therefore if He will ever please to restore His garden and Paradise again, it must of necessity be walled in peculiarly unto Himself from the world, and all that be saved out of the world are to be transplanted out of the wilderness of the World.⁷⁵

Howe sees in Williams’s wall a “theological” effort to protect the church from “the dread of worldly corruptions,” while he characterizes Jefferson’s wall as a “political” protection of individual liberties.⁷⁶ He argues that the Court has wrongly chosen to enforce Jefferson’s exclusionary wall to the detriment of Williams’s

71. *Ibid.*, 135.

72. Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: University of Chicago Press, 1965).

73. *Ibid.*, 11.

74. *Ibid.*, 5–7.

75. Roger Williams, “Mr. Cotton’s Letter Lately Printed, Examined and Answered” (1644), reprinted in *The Complete Writings of Roger Williams 1*, ed. Perry Miller (New York: Russell & Russell, 1963), 108.

76. Howe, *The Garden and the Wilderness*, 6–7.

evangelical division. Moreover, Howe suggests that exclusive neutrality is hostile to the rich “de facto establishment” of religion that characterizes American life, whose advancement is “among the most important purposes of the First Amendment.”⁷⁷ Given these misgivings, Howe concludes that the Court’s then-recent approach “may be admirable law, but it is . . . distorted history.”⁷⁸ Howe’s valuable response is to demand that the Court consider an additional strand of historical meaning—the evangelical strand—in constructing its narrative; but in this effort he ultimately presses too far and seems to suggest that we must emphasize the evangelical wall to the expense of the rational conception. The final result is a historical argument that, while more sophisticated and less transparently political than Pfeiffer’s, still seems tied to a particular constitutional ideology; one that deeply regrets the exclusivist decisions handed down just a few years before.

The Reagan appointments, and particularly Justice Rehnquist’s historically grounded dissent in *Wallace v. Jaffree*, sparked a renewed wave of scholarly interest in First Amendment history in the mid-1980s.⁷⁹ In 1986, Leonard Levy published *The Establishment Clause*, which quickly became a leading text in the field.⁸⁰ To many readers, Levy’s argument comes across as a direct and unapologetic attack on inclusivism. In a telling, though sympathetic, review, Robert Michaelson characterizes the book as a “thoroughly researched defense of Mr. Jefferson’s ‘wall of separation’ . . . aimed primarily at ‘nonpreferentialists’ like Chief Justice Rehnquist.”⁸¹ Indeed, Levy aggressively challenges competing accounts of the Danbury letter:

The usual interpretation of Jefferson’s Danbury Baptist letter by those who seek to weaken its force is either to minimize it or to argue that he

77. *Ibid.*, 31.

78. *Ibid.*

79. In addition to the works discussed herein, see, e.g., Michael W. McConnell, “The Origins and Historical Understanding of the Free Exercise of Religion,” *Harvard Law Review* 103 (1990): 1409; Robert T. Handy, “Why It Took 150 Years for the Supreme Court Church-State Cases to Escalate,” *Princeton Seminary Bulletin* 9 (1988): 32; Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986); William L. Miller, *The First Liberty: Religion and the American Republic* (New York: Paragon, 1986); James A. Reichley, *Religion In American Public Life* (Washington, DC: Brookings Institution, 1985); Thomas E. Buckley, “Church and State in Massachusetts Bay: The Case of the Baptist Dissenters,” *Journal of Church and State* 23 (1981): 309; Leo Pfeffer, “The Deity in American Constitutional History,” *Journal of Church and State* 23 (1981): 215.

80. Levy, *The Establishment Clause*.

81. Robert S. Michaelson, book review, “The Establishment Clause: Religion and the First Amendment,” *Journal of the American Academy of Religion* 59 (1991): 843.

was here concerned only with the rights of conscience, and that these would “never be endangered by treating all religions *equally* in regard to support” by the government. Neither interpretation is valid.⁸²

To counter the first contention, Levy points to the history of careful consultation and drafting that Hutson would revisit in 1998.⁸³ Against the second objection he offers the standard exclusivist justification—Jefferson’s unwillingness to compel a taxpayer to contribute to an alien faith—and curtly concludes, “Jefferson most assuredly did believe that government support of all religions violated the rights of conscience.”⁸⁴ So dismayed is Levy with the prospect of an inclusive neutrality that he devotes an entire chapter to discrediting the views of “the nonpreferentialists” as “a plausible but fundamentally defective interpretation of the establishment clause.”⁸⁵ In it he decries Attorney General Edwin Meese and, particularly Chief Justice Rehnquist (he “wrote fiction and passed it off as history”), for advancing a theory at odds with Levy’s own reading of the record.⁸⁶ Again, however, the lingering impression is one of constitutional historiography rather than exhaustive historical scholarship; or, perhaps more charitably, Levy’s seems to be scholarship undertaken in the service of a particular constitutional approach.

Daniel Dreisbach took the title of his 1987 book, *Real Threat and Mere Shadow*, from a line in Justice Arthur Goldberg’s brooding and reluctant concurrence in *Abington School District v. Schempp*, which Chief Justice Warren Burger incorporated into his thoughtful dissent in *Wallace v. Jaffree*.⁸⁷ Thus, it is probably unsurprising that the book is largely an inclusivist parry to Levy’s exclusivist

82. Levy, *The Establishment Clause*, 182 (quoting J.M. O’Neill, *Religion and Education Under the Constitution* [New York: Harper, 1949]), 81.

83. *Ibid.*

84. *Ibid.*

85. *Ibid.*, 91.

86. In truth, there are real problems with Levy’s own arguments in favor of exclusivism. His account is based largely on abandoned earlier versions of the Establishment Clause—which has a post hoc, ergo propter hoc quality to it—and on his contention that inclusivism “leads us to the impossible conclusion that the First Amendment added to Congress’s power.” *Ibid.*, 84. This second contention relies on Levy’s earlier demonstration that the amendment left the subject of religion “exclusively to the states”; but to suggest that the federalism aspects of the amendment somehow speak to the nature of scope of “establishment” (again, and issue left to the states) is simply a category mistake. *Ibid.*, 74.

87. Daniel Dreisbach, *Real Threat and Mere Shadow: Religious Liberty and the First Amendment* (Westchester, IL: Crossway Books, 1987). Goldberg reminded his more enthusiastically exclusivist colleagues that, “the measure of [sound] constitutional adjudication is the ability and willingness to distinguish between *real threat and mere shadow*.” *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring) (emphasis added).

thrust. Rather than focus narrowly on Jefferson's *Statute Establishing Religious Freedom* and Madison's *Memorial and Remonstrance*, Dreisbach emphasizes the willingness on both parts to support legislative chaplains and national days of prayer—as well as federal Indian missionaries—as evidence that “many of the founding fathers, including Jefferson and Madison, did not interpret the No Establishment clause to prohibit federal assistance to religion as long as it did not discriminate in favor of one religious group against another.”⁸⁸ In addressing the wall of separation more specifically, Dreisbach takes a decidedly “jurisdictional” or federalist tack: “[A] careful reading of the Danbury letter reveals that Jefferson was not addressing the broader issue of church and civil government . . . rather he was examining the narrower issue of whether a separation between the entire *federal* government and religion was required by the framers of the First Amendment.”⁸⁹ This interpretation allows Dreisbach to conclude that exclusivist decisions like *Everson* had “misplace[d] the wall,” which should be seen as existing “between the federal government and the states.”⁹⁰ While Dreisbach perhaps offers a persuasive reason not to treat Jefferson's metaphor as a broad statement of constitutional principle, he does little to support an inclusivist reading of Jefferson's larger First Amendment ideas. Indeed, his inconsistent treatment of Madison and Jefferson—on the one hand he discounts them as “decidedly more radical”⁹¹ than their contemporaries, while on the other he holds them up as worthy champions of inclusivism⁹²—tends to expose his modern constitutional motivations.

Gerard Bradley's 1987 book *Church-State Relationships in America* picks up right where Dreisbach left off.⁹³ Like Dreisbach, Bradley is a passionate inclusivist, and his book presents a scathing attack on the Court's exclusivist opinions, particularly *Everson* and *McCullum*.⁹⁴ His disgust with those decisions is palpable, particularly regarding their use of history:

Given the critical role of church-state issues in U.S. political life . . . it is tragic that a more unfortunate historical analysis than *Everson's* would be hard to find. The problem is not only that the justices there recover

88. Dreisbach, *Real Threat and Mere Shadow*, 75.

89. *Ibid.*, 126.

90. *Ibid.*, 126–27.

91. *Ibid.*, 104.

92. *Ibid.*, 75.

93. Gerard V. Bradley, *Church-State Relationships in America* (New York: Greenwood Press, 1987).

94. *Ibid.*, 1–15. Bradley correctly points out the “fatal misstep” in Justice Frankfurter's *McCullum* history, which was, as I have said above, to “equate nonsectarian with nonreligious.” *Ibid.*, 10.

inaccurate historical answers (although they do much of that), but that they ask the wrong questions.⁹⁵

For Bradley, the problem is not so much that the Court misinterpreted sources like the Danbury letter (although he thinks it did), but rather that it misused them. Even if Madison and Jefferson did hold exclusivist beliefs about religion and government, their beliefs—as individuals—are not an appropriate foundation for constitutional meaning. “Not a word of the state-by-state ratification process is spoken in *Everson*,” he laments. “In fact, one would think from the opinions that the First Amendment was rendered operative by House approval, if not by the simple act of Madison’s penmanship.”⁹⁶ Bradley’s persistent protestations in favor of inclusivism are too strident and simplistic to be persuasive, however, and as a result his book inspires less confidence in authorial objectivity than any of those yet examined. Perhaps we can forgive Bradley his transparent advocacy—he is the lone law professor discussed—but his method and approach stand out as a remarkable example of the kind of ideologically driven history that disputed constitutional principles seem to inspire.

Finally, and perhaps refreshingly, we turn to Edwin Gaustad’s *Faith of Our Fathers*, which is an understated and impressive book on the religious mind of the founding generation.⁹⁷ Less forthrightly ideological than any of the works discussed above, Gaustad’s 1998 book is a generally thoughtful and fair-minded account of the religious lives of iconic figures such as Adams, Washington, Franklin, Jefferson, and Madison. While he concedes some of the federalist ground Dreisbach had claimed—acknowledging that, to most members of the constitutional convention, “religion seemed . . . a matter best left to the states”⁹⁸—he maintains that the Danbury letter decisively supports an exclusivist theory of neutrality:

Unconsciously echoing the language of Roger Williams, Jefferson found in the religion phrases of the First Amendment no vague or fuzzy language to be bent or shaped or twisted as suited any Supreme Court justice or White House incumbent. The amendment had built a wall, with the ecclesiastical estate on one side and the civil estate on the other. Jefferson first employed the metaphor, then endeavored the rest of his life to give that metaphor as much brick and mortar as he possibly could.⁹⁹

95. *Ibid.*, 12.

96. *Ibid.*

97. Edwin S. Gaustad, *Faith of Our Fathers: Religion and the New Nation* (San Francisco: Harper and Row, 1988).

98. *Ibid.*, 43.

99. *Ibid.*, 46.

Employing a number of personal letters and memoranda from the period during which Jefferson founded the University of Virginia, Gaustad persuasively portrayed Jefferson as—for the most part—an ideological exclusivist; but his effort to link Jefferson's thought to the broader meaning of the First Amendment is less compelling.¹⁰⁰ Nonetheless, Gaustad's account seems a fair and honest one; and his balanced depiction of the conflicting and complex disestablishment ideas prevalent in the 1780s provides a revealing backdrop against which to discern the contours of other more ideologically motivated work. Perhaps Gaustad's most astute observation, however, is that unlike the larger body of founding thought on church and state, which is complex and often contradictory, Jefferson's letter provides a perhaps too convenient talking point for courts and historians looking for simple historical answers to increasingly complicated political problems.¹⁰¹ And thus Gaustad subtly—and rightly—recalls Justice Reed's admonition in *McCullum*: "A rule of law should not be drawn from a figure of speech."¹⁰²

Conclusion

In the years following the Hutson restoration controversy, a number of more nuanced and less ideological histories of the Establishment Clause have emerged; among them are particularly excellent books by Akhil Reed Amar, Philip Hamburger, and John Noonan.¹⁰³ The general tenor of scholarly discourse on the issue remains polemic and strained, however, particularly as a sea change appears imminent on the Supreme Court. Indeed, it has become difficult to address the history of the religion clauses in any substantive way without becoming inadvertently aligned with one or another side of the controversy. I suggest that this unfortunate circumstance is at least partly a result of the complicated and corrosive influence of constitutional law and policy on historical scholarship. It is perhaps too tempting to engage in policy-driven historiography

100. *Ibid.*, 47–50. Gaustad concedes, for example, that the state constitutions "[r]ang with religious language" and "did not accept religious neutrality or indifference as a necessary consequence [of the First Amendment]." *Ibid.*, 114.

101. See *ibid.*, 137 ("[A]s the nation became increasingly pluralistic if not secular, the courts (both state and federal) found Jefferson and Madison increasingly useful.")

102. *McCullum*, 333 U.S. at 247 (Reed, J., dissenting).

103. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998); Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002); John Thomas Noonan, *The Lustre of Our Country: The American Experience of Religious Freedom* (Berkeley, CA: University of California Press, 1998).

when the results can have a profound impact on current legal practices. After all, while most historical debates resonate only within a small circle of participants and scholars, constitutional history can initiate broad and important social change. Even for historians, then, power can corrupt.

This political seduction is made all the more problematic by the polarizing and adversarial nature of constitutional adjudication, which does not respond well to the complexity and subtlety of academic history. Rather, the system encourages an equally simplistic historiography; one tailored neatly to the doctrinal framework the Court has constructed. The result is the binary kind of analysis discussed above, with historians lining up eagerly on either side of a judicially imposed dividing line. After all, scholarship that squarely supports one side of the debate could turn up in a constitutional opinion, while more sophisticated studies rendered in delicate shades rarely have an impact on national policy. Thus, the scholar tempted by the constitutional spotlight not only must pick a side, she must also simplify her account for easy judicial access.

But this is a two-way street, and the incestuous relationship between historiography and constitutional law is as destructive of principled jurisprudence as it is of historical scholarship. As long as the Supreme Court gives exaggerated importance to constitutional history—as long as powerful judges continue to suggest that “original intentions” actually compel particular results—constitutional meaning will remain a contingent prisoner of divergent ideological histories. In two excellent books, Philip Bobbitt has advanced a theoretical conception of constitutional law that posits six legitimate modalities of argument: historical, textual, structural, doctrinal, prudential, and ethical.¹⁰⁴ The lesson of Bobbitt’s work is that no foundational piece of history (or text, or doctrine) can reveal clean and uncontroversial constitutional meanings in these kinds of cases; there are only competing and equally legitimate ways of talking about constitutional principle. The more modalities that we can bring to bear on a constitutional question, the richer and more rewarding our answers are likely to be. Conversely, the more that we imagine that history provides the only definitive solutions to our constitutional problems, the more inbred and unstable our law—and our history—become.

This is particularly true of the inclusive–exclusive neutrality debate. As we have seen, there is historical support for either view, and—to make matters even more difficult—each position is

104. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982); Philip Bobbitt, *Constitutional Interpretation* (Cambridge: B. Blackwell, 1991).

also vulnerable to debilitating objections. The exclusivists rightly point out that equal public support for all religions necessarily compels individual citizens to provide tax support for institutions and beliefs that they may find blasphemous—which certainly conflicts with at least some founding conceptions of religious freedom. Inclusivists, however, respond with the charge that exclusivism necessarily aligns the state with a secular or nonreligious viewpoint; and this too is both true and contrary to founding ideas about the place of religion in a self-governing society. Thus sound-bite history—or even more sophisticated history, as an exclusive resource—cannot provide a satisfying solution for this dilemma; indeed, the founders themselves often straddled the inclusivist-exclusivist divide. Rather, this problem requires us to engage multiple modes of argument and inquiry, asking us to bring all of our constitutional problem solving skills to the table in the hope of reaching juridical conclusions consistent with both our best traditions and the realities of modern American life. Elsewhere, I have urged the value of taking a structural approach to some of these questions,¹⁰⁵ but—whatever the right answers are—I think it is evident that history alone cannot provide them.¹⁰⁶

The broader lesson of the Danbury case study, I suggest, is that historical and legal argument are fundamentally different creatures. Where history aims at increasing complexity, depth, and scope; law seeks simplicity, clarity, and resolution. Thus, constitutional history—while an important and necessary part of constitutional interpretation—is necessarily a limited and qualified interpretative resource. The reality is that too much reliance on the historical modality—no matter how well intended—tends to simplify both the law and the discipline beyond recognizable utility. The lesson thus reflected in Jefferson's winding wall, I suggest, is that, if we are not careful, we will see in it only what we want to, and this is of little help in revealing neutral

105. Ian Bartrum, "The Constitutional Structure of Disestablishment," *NYU Journal of Law & Liberty* 2 (2007): 311.

106. I have thus far tried to avoid injecting my own views on the merits of the historical debate into this discussion, but I cannot avoid pointing out (even if only in a footnote) that the best evidence seems to suggest that the founders' views on the Establishment Clause are not terribly relevant to the modern discussion. When written, the Clause—at the very least—did not apply to the states; and it seems plausible that it was intended to further prevent federal interference with state religious establishments. See, e.g., Amar, *The Bill of Rights*, 32–45. The modern conception of disestablishment is thus best reflected in the adoption of the *Fourteenth*, not the *First*, Amendment. See *ibid.* Accordingly, efforts to link Jefferson's letter with the modern meaning of the Establishment Clause are ultimately looking under the wrong historical lamp post.

constitutional principle. And, as this interpretive danger seems unlikely to dissipate anytime soon, a mature and productive approach to the problematic relationship between historiography and constitutional principle must understand the interaction of scholar (or judge) and subject as a complex and imperfect human practice. Rather than press for simplistic, theory-friendly answers, we must recognize that the practice and its accompanying political institutions are best served by open, authentic, and fair-minded scholarship and jurisprudence—complete with the inconvenience, intricacies and contradictions that such genuine intellectual endeavors inevitably entail. In so doing, we must also acknowledge that history is not the neutral and decisive constitutional panacea we sometimes pretend it to be.