

## BLUSHING OUR WAY PAST HISTORY

*Seth Barrett Tillman\**

Legal academics and the public are fascinated by both constitutional text and the processes by which it is interpreted. The precise role for legal academics in the interpretation of such charters is controverted. Doctrine and case law as established by the courts remain the core of academic legal discourse. Case law is, after all, the object about which doctrine is based, built, and extended. But the interpretation of constitutional text through case law comes with costs—it seems to lack democratic legitimacy, and where unconnected to text and history, it has a tendency to fence out (even the well-educated) public. On the other hand, when legal academics shift to text and history, their work gains populist credentials, but, at that point, the legal academic risks his privileged position. For the legal academic has no monopoly, or even highly developed expertise, with regard to textual exegesis or the best use of historical materials. In light of those attendant risks, I want to praise Professor Geoffrey R. Stone for taking on the role of exegete and historian in his recent publication appearing in the *UCLA Law Review*.<sup>1</sup> But that said, I find some of his specific textual and historical claims troubling. I respond to his textual and historical claims in detail below. This paper, however, has *no* grand normative claim of its own; it is merely an effort on my part to correct the record, and thereby to further the object pursued first by Professor Stone: “to know the truth about the Framers, about what they believed, and about what they

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\* Seth Barrett Tillman is a career federal law clerk. The views expressed are solely my own. While this version has been shortened, an unabridged version will appear at: 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. 1 (forthcoming 2009) (unabridged version), available at <http://ssrn.com/abstract=1333576>.

<sup>1</sup> Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1 (2008).

aspired to when they created this nation.”<sup>2</sup>

## I AN ANALYSIS OF PROFESSOR STONE’S TEXTUAL CLAIMS

In his *The World of the Framers: A Christian Nation?*, Professor Stone wrote:

Indeed, it is quite striking, and certainly no accident, that unlike the Fundamental Orders of Connecticut, the U.S. Constitution made no reference whatsoever to God and cited as its primary source of authority not “the word of God,” but “We the People.” The stated purpose of the Constitution was not to create a “Government established to God,” not to establish a “Christian nation,” but rather to create a secular state. The *only* reference to religion in the original Constitution prohibited the use of any religious test for holding office, and the First Amendment made clear that there “would be no Church of the United States.”<sup>3</sup>

Are these claims sound? Is it “striking” that the Constitution of 1787 stylistically veered from the Fundamental Orders of Connecticut—an instrument 150 years older than the Constitution at the time of ratification? Is it true that the text makes “no reference whatsoever to God”? Is it true that the “*only* reference to religion” in the original unamended text was the Religious Test Clause? To me at least, these seem to be an unusually strong set of (textual) claims for a law review article: claims lacking recognition of ambiguity and contrary points of view.

*The Attestation Clause.* Every copy of the Constitution I have seen since childhood ends with:

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth . . . .<sup>4</sup>

Is not that a direct textual reference to God, even if not your God or mine, or even if you do not believe in any God at all? I am certainly not suggesting that the presence of this clause makes ours a Christian nation, nor am I suggesting that even any one Framer or Ratifier thought that this clause had a justiciable meaning that could control a live case or

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<sup>2</sup> *Id.* at 26.

<sup>3</sup> *Id.* at 5 (footnotes omitted) (emphasis added).

<sup>4</sup> U.S. CONST. art. VII, cl. 2 (Attestation Clause). *But see id.* art. V (referring, without more, to “the Year One thousand eight hundred and eight”).

controversy. But in making his argument that the United States Constitution created a “secular” nation, that the text makes “no reference whatsoever to God,” Professor Stone has simply ignored the actual text of the Constitution he seeks to explain.

*The Oaths and Affirmations Clause.* Nor is this the only such clause in the Constitution that makes some (albeit indirect) reference to God. The Article VI Oaths or Affirmations Clause mandated that all future federal and state legislators and certain officers take an oath or affirmation to support the Constitution.<sup>5</sup> What is the difference between an oath and affirmation? The consensus view—and as far as I know the universal view—is that the former is taken in God’s name, but the latter is not.<sup>6</sup> The purpose of the clause—according to the standard narrative—was to permit Quakers and others having “a religious or other conscientious objection to oath-taking” to also hold public office. The purpose is one of “inclusiveness and tolerance,”<sup>7</sup> but it is also a textual reference to God in our public charter—albeit an indirect one.

*The Sundays Excepted Clause.* Another clause that might interest us is the Sundays Excepted Clause, which provides: “If any Bill shall not be returned by the President within ten Days (*Sundays excepted*) after it shall have been presented to him, the Same shall be a Law . . . .”<sup>8</sup> Does this clause establish any specific or named religion? No. Does it establish a particular church? No. But if the intent of the Founders or Ratifiers had been “to create” no more and no less than “a secular state,”<sup>9</sup> then ought not Professor Stone tell us why this clause was included in the Constitution, and thereby entrenched against mundane democratic action? One wonders what purpose or purposes Professor Stone believes this clause was meant to serve.

*The Religious Test Clause.* Additionally, I note that Professor Stone wrote that the Religious Test Clause prohibits “the use of any religious test for holding office.” I do not mean to quibble, but his position is not quite right—or, at the very least, his position is not the only possible understanding of the

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<sup>5</sup> See U.S. CONST. art. VI, cl. 3 (“Oath or Affirmation”); see also *id.* art. I, § 3, cl. 6 (mandating that Senators adjudicate impeachments “on Oath or Affirmation”); *cf. id.* art. II, § 1, cl. 8 (mandating that the President “swear (or affirm)” to his “Oath or Affirmation”).

<sup>6</sup> See, e.g., 67 C.J.S. *Oaths and Affirmations* §§ 1–3 (2008).

<sup>7</sup> AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 301 (2006).

<sup>8</sup> U.S. CONST. art. I, § 7, cl. 2 (emphasis added).

<sup>9</sup> Stone, *supra* note 1, at 5.

clause. Its meaning may have been more limited than Professor Stone suggests.

The Religious Test Clause prohibits the use of any religious test as a “Qualification to any Office or public Trust under the United States.”<sup>10</sup> In other words, textually, the clause precludes any religious test used to *qualify* a person for office—i.e., a test implemented at the time a person is elected or appointed to office, or at the start of the term for which the officer was elected or appointed, or at the time the officer accepts office or takes office by removing his outgoing predecessor. “The question with reference to *the point of time* at which [a] required qualification for office [must] exist is a complex judicial question.”<sup>11</sup> If, as I suggest, qualifications only apply at some discrete moment or point of time, then, contra Professor Stone, once qualified, once in office, once a person begins to hold office and thereafter, the Religious Test Clause has no further application (as a textual matter). Now, post-1791, such religious tests going to office-holders and office-holding, are precluded under the aegis of the more general First Amendment. But in 1789, in the (non-wholly Christian, non-wholly secular) world of the Framers and Ratifiers, under the Constitution unamended by the Bill of Rights, it very well may have been a different story.

Does my textual critique vanquish Stone’s central point—that the American Constitution’s “stated purpose [was] to create a secular state”? No, not entirely—and it is not really my purpose to do so. In fact, it is certainly true that the Founders’ design lacked a national establishment. Nevertheless, our national government continued to coexist (comfortably) for many years with its component states, many of which had established churches in 1787 and continued to have them for many decades to come. Indeed, many scholars have argued that the very purpose of the Establishment Clause of the First Amendment was to prevent disestablishment of state churches by the newly constituted federal authorities.<sup>12</sup> So if what we mean by a Christian state is a government comparable to then-contemporaneous England and Scotland, which each had their own established churches, then the government of the early Republic was not a Christian state. But if what we mean by a secular state is a government comparable to that created by the French

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<sup>10</sup> U.S. CONST. art. VI, cl. 3 (prohibiting religious tests as a requirement to “Qual[ify] to any Office or public Trust under the United States”).

<sup>11</sup> 67 C.J.S. *Officers and Public Employees* § 24 (2008) (emphasis added).

<sup>12</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS* 32 (1998).

Revolution—a government that dated its instruments exclusively in term of the revolutionary calendar and which made no accommodations to its religious elements, then our government did not take that shape either.

To me at least it seems less than fully forthcoming to describe the government of the early Republic as Christian or secular. It was just more complex than that. History usually works that way. Indeed, my own experience is that text, structure, and history rarely all line up the same way, and if they do, it usually means that we have simply missed something of consequence or (even worse) have drunk the hemlock of our own ideas so deeply that we fail to see the value in other people<sup>13</sup> and in other peoples' points of view.

Which takes me to my second point.

Nowhere in Professor Stone's article is there any discussion of the arguments or any acknowledgment, by name, of the persons he is opposing. He asserts that someone somewhere has made the argument that America is a "Christian nation." He cites, but does not quote, a single article in *The New York Times*<sup>14</sup> (ostensibly, not by one of his intellectual opponents, but merely by a reporter reporting on events) and two books,<sup>15</sup> the more recent of which dates from 1987—over twenty years ago. In no place does he discuss precisely who is making the arguments he has opposed, when and in what forums they have made those arguments, and what arguments or evidence (if any) they have marshaled on behalf of their position. Nor does Stone discuss how *their* positions might differ among one another—including different conceptions of what it might mean to describe the United States as a secular or Christian nation. This aspect of Professor Stone's presentation—one lacking acknowledgment (much less substantial development) of opposing viewpoints—is troubling.

Let me put it another way: when one of Professor Stone's purported intellectual opponents asserts that the United States was founded as a "Christian nation," what does that

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<sup>13</sup> See, e.g., Stone, *supra* note 1, at 6 ("Indeed, as we shall see, many of the leaders of the Revolutionary generation were not Christians in any traditional sense. They were [by contrast?] broad-minded intellectuals . . .").

<sup>14</sup> See *id.* at 2 n.7 (citing Neela Banerjee, *Clashing Over Church Ritual and Flag Protocol at the Naval Academy*, N.Y. TIMES, Mar. 8, 2008, at A9).

<sup>15</sup> See *id.* at 3 n.13 (citing JERRY FALWELL, LISTEN AMERICA! 25 (1980) and TIM LAHAYE, FAITH OF OUR FOUNDING FATHERS 29 (1987)). LaHaye's publication is over twenty years old. One wonders if LaHaye or Professor Stone remains wed to everything they wrote more than twenty years ago. Of course, we cannot ask this of Falwell; he is dead.

person mean? Is that a claim about what an American circa 1787 expected about post-1787 demographic development? Is it a claim about the intellectual culture circa 1787? Or, is it an interpretive claim about the original understanding of our founding legal and political documents (and if so, which documents)? Stone never tells us what his opponents mean, only that they are wrong.

## II AN ANALYSIS OF PROFESSOR STONE'S CLAIMS RELATING TO EIGHTEENTH CENTURY AMERICAN RELIGIOUS LIFE AND UNIVERSITY CULTURE

I quote Professor Stone in full.

The Christian establishment responded with a vengeance [to the spread of Deism]. As early as 1759, Ezra Stiles warned that "Deism has got such [a] Head" that it is necessary to "conquer and demolish it." Thirty years later, Timothy Dwight, the president of Yale, published a biting antideist work, *The Triumph of Infidelity*, and Edward Gibbon's *Decline and Fall of the Roman Empire* was literally put to the torch at Harvard because of "its uncomplimentary interpretation of early Christianity." In 1784, Ethan Allen, the leader of the Green Mountain Boys and the hero of the Battle of Ticonderoga, published a book-length argument for deism. This work, *Reason the Only Oracle of Man*, was furiously condemned by clergy. Timothy Dwight accused Allen of championing "Satan's cause," Ezra Stiles charged that Allen was "profane and impious," and the Reverend Nathan Perkins called him "one of the wickedest men that ever walked this guilty globe."<sup>16</sup>

Stone's consistent use of terms like "with a vengeance," "warn[]," "biting," "accused," and "charged" is puzzling. Is it really true the clergy not only "condemned" Allen's *Reason the Only Oracle of Man*, but that they did so "furiously"? How does one fairly distinguish a furious condemnation from a plain condemnation from a mere emphatic disagreement or an honest debate over strongly held beliefs and principles? The choice of such terms is, in most (albeit, not in all) cases, indicative of a lack balance, of a lack of perspective. Much of what Stone describes above was nothing more than writings and speeches in private letters, sermons, and books. In law review articles, traditionally, such speech is usually

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<sup>16</sup> *Id.* at 21 (footnotes omitted).

characterized in less judgmental and more neutral terms, i.e., as core First Amendment protected activity (although there was, of course, no First Amendment at this time).

Indeed, if such speech is fairly characterized as “respond[ing] with a vengeance,” merely because it opposes other speech and comes next-in-time, then this Article and every other academic disagreement will fall under the orbit of that expression. At that point the phrase itself ceases to be meaningful. Admittedly, not all of the statements quoted by Stone were vanilla, even-handed, and unthreatening: Stile’s “conquer and demolish” statement does seem a touch strong. But Stiles looks much better in fuller context.

It is true with this Liberty [of accepting deistical books into religiously-affiliated university libraries] Error may be introduced; but turn the Tables [and see that] the propagation of Truth may be extinguished [if you do otherwise]. Deism has got such [a] Head in this Age of Licentious Liberty, that it would be in vain to try to stop it by hiding the Deistical Writings: and the only Way left to conquer & demolish it, is to come forth into the open Field & Dispute this matter on even Footing—the Evidences of Revelation in my opinion are nearly as demonstrative as Newton’s Principia, & these are the Weapons to be used. . . . *Truth* & this alone being *our* Aim in fact, open, frank & generous we shall avoid the very appearance of Evil.<sup>17</sup>

How is this an example of the “establishment respond[ing] with a vengeance” to the spread of Deism? If anything Stiles overflows with a *very boring almost trite* excess of Brandeisian toleration, although he clearly is attached to his own parochial theological views. To me at least, Stone’s “conquer and demolish” snippet misses much more than it explains.

As to Stone’s specific claim that circa 1789 Gibbon’s *Decline and Fall* was “literally put to the torch at Harvard,” I see no evidence that any such event ever happened. To make his case, Stone wholly relies on Professor Kerry Walters’ 1992 publication: *Rational Infidels: The American Deists*.<sup>18</sup> Walters does not actually say “torched,” he says “burned.”<sup>19</sup> Walters, in turn, relies on William Henry Channing’s *The Life of William Ellery Channing, D.D.* and G. Adolf Koch’s

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<sup>17</sup> Letter from Ezra Stiles to Rector Thomas Clap (Aug. 6, 1759), in I. WOODBRIDGE RILEY, *AMERICAN PHILOSOPHY: THE EARLY SCHOOLS* 217 (Dodd, Mead & Co. 1907) (cited by Stone, *supra* note 1, at 21 n.155).

<sup>18</sup> See Stone, *supra* note 1, at 21 & n.156 (citing KERRY WALTERS, *RATIONAL INFIDELS: THE AMERICAN DEISTS* 8–9 (1992)).

<sup>19</sup> KERRY WALTERS, *RATIONAL INFIDELS: THE AMERICAN DEISTS* 9 (1992).

*Republican Religion*.<sup>20</sup> But neither work supports Walters' position. Channing merely records that "[t]he patrons and governors of the college made efforts to counteract the effect of the[] [principles of the French Revolution] by exhortation, and preaching, and prayer, as well as by the publication and distribution of good books and pamphlets."<sup>21</sup> I see no indication of any book-burning. By contrast, Koch writes that in 1791 "Gibbon's famous work was publicly banned . . . by the President of Harvard College from that institution."<sup>22</sup> Again, no book-burning, no torching, no auto-da-fé.

Nevertheless book-banning at a university is pretty terrible behavior (or, at least, it is when adjudged under contemporary standards). But it seems there was no book banning either! Koch's only source is John Quincy Adams' *Life in a New England Town: 1787, 1788*.<sup>23</sup> Adams does not indicate that Gibbon was banned; rather, Adams indicates that in setting the curriculum the President preferred Millot's *Elements of History*<sup>24</sup> to Gibbon's *Decline and Fall*.<sup>25</sup> To sum up, in 1791 Harvard made a mundane curriculum decision; it was recorded in a 1903 publication; in 1933 it became a book-banning; in 1992 it became a book-burning, and in 2008 Professor Stone tells us Gibbon was "literally put to the torch" at Harvard. *Literally*.

The constellation of facts, misunderstandings, misstatements, exaggeration, and error hardly seems believable. Still, there is no reason to judge Stone harshly: such mistakes do happen. His mistake, such as it was, was to rely on a single source, Walters, who, apparently misquoted Koch, who expanded on Adams' initial statement.

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*Here we come to an awkward and difficult point. Leave aside Professors Stone, and Walters, and Koch—what about you, the reasonable and well-informed reader. When you read*

<sup>20</sup> See *id.* at 9 & nn.8, 9 (citing G. ADOLF KOCH, *REPUBLICAN RELIGION: THE AMERICAN REVOLUTION AND THE CULT OF REASON* 242 (H. Holt & Co. 1933) and W.H. CHANNING, *LIFE OF WILLIAM ELLERY CHANNING*, D.D. 30 (Boston, American Unitarian Association 1880)).

<sup>21</sup> W.H. CHANNING, *THE LIFE OF WILLIAM ELLERY CHANNING*, D.D. 30–31 (Boston, American Unitarian Association 1880).

<sup>22</sup> G. ADOLF KOCH, *REPUBLICAN RELIGION: THE AMERICAN REVOLUTION AND THE CULT OF REASON* 290 n.6 (H. Holt & Co. 1933).

<sup>23</sup> See *id.* (citing JOHN QUINCY ADAMS, *LIFE IN A NEW ENGLAND TOWN: 1787, 1788—DIARY OF JOHN QUINCY ADAMS* 113 n.1 (Little, Brown, and Co. 1903)).

<sup>24</sup> ABBÉ CLAUDE FRANÇOIS XAVIER MILLOT, *ELEMENTS OF ANCIENT HISTORY* (New York, Mott & Lyon 1797).

<sup>25</sup> JOHN QUINCY ADAMS, *LIFE IN A NEW ENGLAND TOWN: 1787, 1788—DIARY OF JOHN QUINCY ADAMS* 113 n.1 (Little, Brown, and Co. 1903).

*Stone's claim in regard to a book burning at Harvard, circa 1789, did you believe it? Try to remember your reaction, if any. Did it seem shockingly wrong, or did you just read past his claim as a matter of no real consequence, or did it seem reasonably tenable to you? And if you thought the latter, what other historical fictions (or unsupported factual claims) might you believe in error (or absent sufficient evidence), and what does that say about the prejudices you may harbor in relation to people different from yourself?*

*Did you blush when you read Stone's claim, or are you blushing now?*

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