on the Court. I also suspect, although Whittington is more circumspect about this matter, that limitations of vision or imagination on the part of certain presidents may account for their diffidence toward the Court.

Whittington's typology is illuminating. But it leaves many questions unanswered. Why have there been so few reconstructive presidents in American history? Why do affiliated presidents and oppositional presidents end up behaving in ways that are virtually indistinguishable? Most fundamentally, what accounts for the slow accretion of power to the Court, if different politicians have different reasons for deferring to the Court? One can understand why a few presidents (Lincoln, Roosevelt, Reagan) would want to take back the power ceded to the Court. And one can understand why many more presidents would be only too happy to cede authority to the Court or to quibble around the margins without directly confronting the Court's claim to supremacy. But why, over time, has power slowly but steadily flowed in the direction of the Court, and away from the political branches?

A number of possibilities suggest themselves. One might be that the Court is in fact more majoritarian than either the Office of the President or the Congress. The President and Congress are beholden to the coalitions of interest groups that put them in power and sustain them thereafter—what we have come to call the "base" of each political party. The Justices, who need not stand for election, and are nearly impossible to remove from office, are not burdened with such obligations. Some justices no doubt decide cases in accordance with their ideological predispositions. But this is difficult to sustain over a long career, especially as issues change in unanticipated ways. The more typical decisional strategy—especially on the part of the median justices who tend to control outcomes in close cases—may be to decide in accordance with what the Justice intuits a majority of Americans would want the result to be. Perhaps this majoritarianism, replicated over a sustained period of time, is what has given the Court enormous authority in the eyes of the public. Hence occasional lapses of overreaching are quickly forgiven, and the Court continues to rule without serious opposition.

Another possibility is that the Court enjoys certain advantages by reason of its continuity as an institution. The average tenure of justices is now over twenty-six years. This means that turnover is low, and the collective level of experience high. Presidential tenure cannot exceed eight years and is often less. Congressional tenure, especially in the Senate, is becoming more transient. As a result, the Court may have certain built-in advantages in the perennial struggle for political power. It may be more capable of acting purposefully over a sustained period of time. As anyone who has worked in a complex organization knows, authority tends to flow towards those who are most competent to get the job done. The Justices may also share a stronger loyalty to their institution and its prerogatives than some presidents or members of Congress do toward their institutions. This loyalty may translate into tacit agreement to temper temporary individual advantage in order to promote the interests of the institution, which are implicitly understood to mean aggrandizement of its power relative to other institutions.

All this is, of course, speculation. Whittington prefers instead to make judgments grounded in the careful gathering of historical facts. And I am sure that this fine scholar, and through him Princeton University (with or without a law school), will continue for some time to be an important contributor to our understanding of the Supreme Court and its outsized role in American society.

Under God: George Washington and the Question of Church and State

By Tara Ross & Joseph C. Smith, Jr.

*Reviewed by John J. DiIulio, Jr.**

Contrary to the arguments of some, James Madison, like most other Framers, envisioned America neither as a Christian or secular state, but rather a godly republic, a constitutional regime that acknowledged the God of Abraham and permitted religion to be both seen and heard in the public square, while promoting religious pluralism and forbidding religious tests for citizenship and office-holding. In 1952, in *Zorach v. Clauson*, U.S. Supreme Court Justice William O. Douglas, even while upholding the hideous, Catholic-baiting, no-aid separation doctrine invented a half-decade earlier by his ex-Klansman colleague, U.S. Supreme Court Justice Hugo Black (*Everson v. Board of Education*), nonetheless wrote that America's political system "presupposes a Supreme Being," and warned church-state separation extremists against trying to outlaw and eradicate even indirect government ties to religion.

Of course, neither Madison nor the other Founders envisioned America developing into a federal republic wherein the national government spent over a trillion dollars each year, or in which it implemented its public laws and policies largely by sending much of that money, with or without strings attached, to state and local governments, or doing so via grants, contracts, and vouchers to for-profit corporations and nonprofit organizations, both religious and secular. Indeed, neither "nonprofit organizations," nor, for that matter, the Internal Revenue Service (IRS) and the IRS code that decides on tax-exempt status, were anywhere in their capacious intellects or imaginations.

But only what Madison would have denounced as "theoretic politicians" and "factious minds" could fail in our day to understand that their wise strictures against "establishment" (as in taxing all to support a preferred state church, or giving public money to sectarian groups for sectarian purposes) do not apply as such to government support for religious congregations or faith-based organizations that use the funds for social services, not worship services, refrain from proselytizing, and contribute their own time and money to the civic-minded cause.

Madison and company would have been doubly dumbfounded by the disingenuousness manifested in our day by legal minds that breeze past studies demonstrating that, in places like Philadelphia, just blocks from where the Constitution was signed, religious non-profits lead in supplying scores of

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social services to neighbors in need without regard to their neighbors' religions, but are often discriminated against when it comes to getting government support to sustain or expand their services.

Memo to Justice Souter, Professor Feldman, the ACLU, and like-minded others: Read *all* your Madison and Jefferson; get out more to inner-city communities that rely heavily on these faith-based organizations; explore the "faith factor" research by scholars at Harvard and other places that show how religion builds "social capital," spurs volunteer mobilization, and cost-effectively begets other pro-social consequences for individuals and communities alike; and start by studying Tara Ross and Joseph C. Smith, *Under God: George Washington and the Question of Church and State*.

Among my favorite recent books on Washington and religion are Peter Lillback, *George Washington's Sacred Fire* (2006), Peter Henriques, *Realistic Visionary: A Portrait of George Washington* (2006), and Michael Novak and Jana Novak, *Washington's God: Religion, Liberty, and the Father of Our Country* (2006). In sum, Lillback argues that Washington was mostly a committed Christian who lived his faith; Henriques concedes that Washington was no Deist, but emphasizes how little he invoked Christ's divinity; and the Novaks (father and daughter) steer a middle path that, in the end, lands them closer to Lillback than to Henriques.

Under God is now another favorite on the subject. In a way that is academically grounded yet accessible, pointed without being polemical, Ross and Smith answer, or at least begin to address, several important but hitherto unresolved questions about Washington's faith-related civic sensibilities and views. The book's part two also reprints many of Washington's writings (letters, speeches, military orders, and more) on religion, letting him speak for himself. The writings that are reprinted are a small sample, but not, so far as I can judge, a biased sample.

In their opening arguments, Ross and Smith note how bizarre it is that Jefferson's "wall of separation" metaphor, which he penned in passing in a letter to Danbury Baptists, has so dominated discourse on the nation's intended church-state cast and character. Washington, like many other Founders, had far more to say about the matter than Jefferson ever did. Washington was a believer, but, like Madison's, his was a church-state civic sensibility tutored by experience. As Ross and Joseph write:

> *Particularly following his years at the head of a diverse American army, Washington knew the importance of protecting the religious liberty of all—even those in minority religious groups. Indeed, this attitude sometimes prompted Washington to exempt religious dissenters from laws of general applicability… This practical approach endeared him to minority religious groups of the time, such as Jews, Baptists, and Quakers.*

My, how refreshing it would be if the ACLU or other groups that falsely invoke Jefferson's wall metaphor as historical authority for their church-state extremism imitated Washington's "practical approach" long enough to understand how, today, the minority religious groups that are adversely affected by anti-religious discrimination by government are mostly led by urban, community-serving African-American and Latino clergy. (Some hoped-for miracles, of course, never happen.)

Ross and Smith add evidence to the case that, while Washington was supremely circumspect in all matters including religion (nobody slapped his back, and he preached to no one), he was, if anything, more prone to express his "specifically Christian commitments" in public than he was in private.

This finding has present-day significance. In the 1960s and 1970s, the "God bless America" or "God bless you" statements with which politicians in both parties today often close their speeches had actually fallen from favor. Even some leaders who were committed Christians rarely breathed a word about either their faith or any faith in public. That began to change with President Ronald Reagan. President Bill Clinton publicly referenced Jesus often during his second term, probably more than President George W. Bush, "faith-based initiative" and all, did during his first term.

As Ross and Smith reason, if in fact Washington was not a Christian, or was a Deist, or was, beneath it all, irreligious (a position that only a few quack historians now favor, but which had its moments in the 1960s and 1970s), then his public expressions about God are all the more, not less, validating for those who believe in the nation's faith-friendly constitutional foundations ,and wish to see them respected, not reviled or renounced, in our own day. As they write, "Washington was always extremely conscious that his actions would set precedents for those who followed him. His official uses of religion are thus particularly relevant in indicating that he believed such uses to be proper and (later) constitutional."

Amen, and *Under God* is remarkably faithful, so to speak, to Washington's legacy from his days as commander of the Virginia Regiment to his days in the Virginia House of Burgesses, from his place at the head of the Continental Army to the years when he served as first president of the United States, which, from 1792 to 1797, included his service as the first president to interpret the First Amendment's two religion clauses.

For instance, Ross and Smith unearth Washington's letter to John Jay concerning "the appropriateness of a public-private partnership for the purpose of converting the Indians to Christianity." He did not "allude to any potential impropriety in giving public assistance to a project" involving religious institutions, because the project had (in Washington's own words) "humanity and charity for its object" and could, with due care, "be made subservient to valuable political purposes." Of course, that is hardly the so-called charitable choice, non-discrimination provision on church-state partnerships signed into law by Clinton in 1996, but Washington's reasoning anticipates that law's sacred places for civic purposes logic.

After the First Amendment was enacted, Washington became even more cautious about paving any federal path to religious establishment or favoring one religion over others. But he saw no reason to behave as if government interface with religious individuals or institutions was constitutionally impermissible, or anything of the sort. Among other bills he signed and actively supported after 1792 were several that made land grants to religious bodies. One grant was to the Moravian Society for Propagating the Gospel. Its name bespoke what today we would term its "pervasively sectarian" character, but Washington applauded the government's partnership with its

work, and supported government-funded religious aid to the Indians without fail.

Ross and Smith conclude their outstanding treatise by contrasting what Washington, like most Founders, believed about the godly republic with how their ideas and ideals have been caricatured or twisted by many since the mid-twentieth century:

> *Washington's approach to church-state relations differs from Jefferson's "wall-of-separation" and the line of modern-day legal decisions it has spawned. Washington's perspective on the First Amendment would permit a much more religion-friendly government, even as it emphasized the importance of religious freedom.*

If I have a criticism, it is that Ross and Smith at times wring the record to make Washington come off like an angelic staff lawyer for the contemporary Christian Right or one of its favorite legal beagle think tanks or advocacy groups. They do that rarely. The book, on the whole, is outstanding and well worth reading and heeding.

Still, let me conclude by reminding, should we need reminding, that Washington, like Jefferson, held slaves. Washington was less moved by Christian convictions than many among his contemporaries (both North and South) were to recognize and witness to slavery's immorality. He was better toward the Indians, but far from just to them. And his religious pluralism often had a distinctly or denominationally southern Protestant accent. It took successive religious movements, including the one led by Dr. Martin Luther King, Jr., to begin to right racial historic wrongs that had long had public law, and otherwise great leaders like Washington, behind them.

Secular liberals played a role in those curative religion-led movements too. The sad irony, however, is that today, aided and abetted by their opposite numbers—namely, some politically conservative Christians who would rather wage culture wars than serve the poor or solve social ills—it is they who distort history and deny to sacred places the public support with which they could freely, fairly, and constitutionally serve civic purposes. Neither Washington nor Jefferson, were they with us today, would join or bless either extreme church-state faction in this one nation under God.

Mass Torts in a World of Settlement

By Richard A. Nagareda

*Reviewed by Mark A. Behrens**

Vanderbilt Law Professor Richard Nagareda's recent book, *Mass Torts in a World of Settlement*, explores the evolution of tort law from individual cases involving idiosyncratic events to the modern era of "mass torts" affecting large numbers of broadly dispersed persons. The book thoroughly analyzes the role of lawyers in many important mass torts including asbestos, Agent Orange, silicone gel-filled breast implants, the fen-phen diet drug combination, the state attorneys general tobacco litigation, lawyer-manufactured silicosis claims, and Vioxx.

The evolving response of the legal system to mass torts, as Professor Nagareda explains, has been to shift from tort to administration: "The sheer numbers of claims, their geographic breadth, their reach across time to unidentified future claimants, and their factual patterns, together, demand the kind of systematized treatment characteristic of administrative processes." Management of mass torts, he argues, has come to resemble the gridlike schemes set up to settle workers' compensation claims, except that mass tort settlements have primarily come through *ad hoc* experimentation by lawyers rather than through public legislation.

Professor Nagareda argues that mass settlements have transformed the tort system so acutely that rival teams of lawyers now operate as sophisticated governing powers rather than mere litigators. He explains: "The real story of mass torts today is the story of how these lawyers have come to function as a rival regime of legal reform, one that wields the power to replace the legal rights of affected persons with a new set of rights spelled out in some manner of settlement agreement." The agents who design the transactions to resolve mass torts, he concludes, have become endowed with the power of governance. Former Clinton Administration Labor Secretary Robert Reich called this phenomenon "regulation through litigation" in the context of the state attorneys general tobacco lawsuits.

Professor Nagareda's controversial and provocative solution to the administration of mass torts is the replacement of the existing tort system with a private administrative framework to address both current and future claims. His solution is pioneering and offers a path that avoids the inability of the court system to resolve such claims through the class action device post-*Amchem* as well as the failure of Congress to overcome political hurdles that have prevented the enactment of comprehensive legislative solutions to mass torts such as asbestos. As Yale Law Peter Schuck explained: "[Nagareda] offers an ingenious and attractive public law solution to what he sees as a public law problem—and shows us how to achieve it."

Professor Nagareda's book is a must-read for concerned citizens, policymakers, practicing lawyers, investors, academics, and executives that must grapple with the changing face of tort litigation in a mass action world.

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