

EQUAL BILLING: ON RELIGION, WASHINGTON’S VIEWS  
SHOULD BE CONSIDERED, TOO

UNDER GOD: GEORGE WASHINGTON AND THE QUESTION OF CHURCH  
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## I. INTRODUCTION

“Washington’s opinions deserve at least as much attention as those of Jefferson.”<sup>1</sup> That is the final sentence, and *raison d’être*, of *Under God: George Washington and the Question of Church and State*, by Tara Ross and Joseph Smith. Ostensibly a compendium of Washington’s views on the proper relationship between church and state, *Under God* aims also to correct a perceived historical wrong in the relative weight given by the modern Supreme Court to the views of Washington and Thomas Jefferson in interpreting the Religion Clauses of the United States Constitution.<sup>2</sup> Although they stop short of developing a systematic analysis of how Washington might resolve some of the modern church-state controversies that have resulted in litigation before the Supreme Court, Mrs. Ross and Mr. Smith take pains to demonstrate that Washington did not share Jefferson’s absolutist views concerning the support that religion should receive from the state and make clear their conviction that the Supreme Court ought to give Washington’s views greater weight.

Jefferson, of course, coined the phrase “separation between church and state” in his oft-quoted 1802 Letter to the Danbury Baptists.<sup>3</sup> This phrase has seared itself into the public consciousness as the dominant metaphor for the meaning of the Religion Clauses of the First Amendment, in no small part because the Supreme Court has so frequently employed it in rendering Religion Clause decisions.<sup>4</sup> In the

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1. TARA ROSS & JOSEPH C. SMITH, JR., *UNDER GOD: GEORGE WASHINGTON AND THE QUESTION OF CHURCH AND STATE* 126 (2008).

2. U.S. CONST. art. VI, § 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”); *id.* amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

3. ROSS & SMITH, *supra* note 1 at 122–24.

4. *See, e.g.*, *Lynch v. Donnelly*, 403 U.S. 602, 614 (1971) (“The Court has sometimes described the Religion Clauses as erecting a ‘wall’ between church and state. The concept of a ‘wall’ of separation is a useful figure of speech probably deriving from views of Thomas Jefferson.”) (citation and footnote omitted); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (“There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment.”); *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 18 (1947) (“The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”); *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (“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.”) (quoting Jefferson’s Letter to the Danbury Baptists).

body of their book, Mrs. Ross and Mr. Smith show that Washington would have rejected this metaphor. To the contrary, he believed it important “for government to accommodate and even to encourage the practice of religion, albeit in ways that were typically non-denominational and tolerant of religious minorities.”<sup>5</sup> The authors further suggest that Washington’s views were closer to the American mainstream than were Jefferson’s—before, during, and after the framing of the Constitution and the enactment of the Bill of Rights—and thus are a better guide to ascertaining the original meaning of the First Amendment.

*Under God* is a valuable contribution to the available literature on the interpretation of the Religion Clauses, if for no other reason than that the latter half of the book, actually a great deal more than half, is devoted to compiling Washington’s original writings on the relationship of church to state. This compilation will be an excellent desktop resource for jurists and scholars and practicing lawyers. The narrative in the body of the book is brisk and lucid; organized chronologically, it describes each major event in Washington’s life that gave him occasion to opine on the proper place of religion in public life. As noted, the authors most certainly have an axe to grind; they believe that the Supreme Court’s Religion Clause doctrine is unduly skewed toward the views of Thomas Jefferson. Their presentation is sufficiently transparent and well-sourced, however, to permit the skeptical reader to validate the authors’ characterization of Washington’s views and reach his or her own conclusions about the relevance of those views to modern cases. I will offer some conclusions of my own below.

## II. SUPREME COURT’S TREATMENT OF WASHINGTON’S VIEWS

In the introduction of *Under God*, Mrs. Ross and Mr. Smith cite some of the familiar issues that have emerged in recent First Amendment litigation—whether the national pledge of allegiance should include the phrase “Under God”; whether religious symbols may be displayed on public property; whether the government may provide funds to “faith-based organizations”—and rue the extent to which Jefferson’s Letter to the Danbury Baptists, written more than a decade after the effective date of the Bill of Rights, has seemingly become the primary source text for resolving these issues. While Washington presided over the Constitutional Convention in 1787 and

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5. *Id.* at xx.

of course was President of the United States in 1789, when Congress transmitted the proposed First Amendment to the States, Jefferson was ambassador to France from 1785 to 1789 and was not even a member of the first Congress.<sup>6</sup> If Jefferson's views nevertheless can guide a modern court on the meaning of the First Amendment, "[c]ertainly the views of the Father of the Country should be taken into consideration."<sup>7</sup>

This latter proposition is difficult to contest. The Supreme Court has not completely ignored Washington, however. Especially in recent years, the Supreme Court has made frequent mention of speeches and letters by Washington evincing his generous view of the role of religion in public life: his 1789 inaugural address, in which he made "fervent supplications to that Almighty Being who rules over the universe, . . . that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes";<sup>8</sup> his Thanksgiving Day proclamation in 1789, in which he exhorted the American people to devote November 26 "to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be";<sup>9</sup> his 1789 letter to the Quakers,<sup>10</sup> in which he declared that "[t]he liberty enjoyed by the People of these States, of worshipping Almighty God agreeable to their Consciences, is not only among the choicest of their Blessings, but also of their Rights";<sup>11</sup> his 1790 letter to the Hebrew Congregation in Newport,

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6. ROSS & SMITH, *supra* note 1, at xviii.

7. *Id.* at xix.

8. *See, e.g.,* Lee v. Weisman, 505 U.S. 577, 633 (1992) (Scalia, J., dissenting) (quoting Washington as evidence that "from our nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations"); Engel v. Vitale, 370 U.S. 421, 446 n.3 (1962) (indicating "each of our Presidents, from George Washington to John F. Kennedy, has upon assuming his office asked [for] the protection and help of God").

9. *See, e.g.,* Van Orden v. Perry, 545 U.S. 677, 686–87 (2005) (stating Washington's Thanksgiving Proclamation "directly attributed to the Supreme Being the foundations and successes of our young Nation"); County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 671 (1989) (Kennedy, J., concurring in part and dissenting in part) (quoting Washington as evidence that "since the Founding of our Republic, American Presidents have issued Thanksgiving Proclamations establishing a national day of celebration and prayer"); Wallace v. Jaffree, 472 U.S. 38, 102 (1985) (Rehnquist, J., dissenting) (summarizing the history of the 179 House Resolution asking President Washington to issue a Thanksgiving Day Proclamation).

10. *See, e.g.,* City of Boerne v. Flores, 521 U.S. 507, 542 (1997) (Scalia, J., concurring) (stating Washington's letter to the Quakers "by its own terms refers to Washington's 'wish and desire' that religion be accommodated, not his belief that existing constitutional provisions required accommodation"); *id.* at 562 (O'Connor, J., dissenting) (quoting Washington's letter to the Quakers as evidence that "Washington expressly stated that he believed that government should do its utmost to accommodate religious scruples").

11. ROSS & SMITH, *supra* note 1, at 81.

Rhode Island,<sup>12</sup> in which he declared that “[a]ll possess alike liberty of conscience and immunities of citizenship”;<sup>13</sup> and his 1796 farewell address,<sup>14</sup> in which he urged that “[o]f all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports.”<sup>15</sup>

In truth, the image of Washington that emerges from *Under God* is not much different from the image of Washington that one acquires from the references to his speeches and writings in Supreme Court cases. He was “pragmatic, not doctrinaire”<sup>16</sup> and “would have been the first to recognize that the balance between officially fostered religion and individual religious liberty may vary as public needs change.”<sup>17</sup> Nevertheless, perhaps because this practicality is vulnerable to the charge that it elevates political expediency over legal principle, Mrs. Ross and Mr. Smith do seem to be correct that the Supreme Court has treated the views of Jefferson (and of James Madison) on religion more seriously than it has the views of Washington. Even a casual glance at the citations above, which nearly exhaust the references to Washington in the United States Reports, reveals that he is cited more often in dissents and in concurrences than in majority opinions.<sup>18</sup> The search term “‘Thomas Jefferson’ & ‘First Amendment’” yields approximately four times as many hits as the search term “‘George Washington’ & ‘First Amendment’” in the Supreme Court library on Westlaw.<sup>19</sup> So does the search term “‘James Madison’ & ‘First Amendment.’”<sup>20</sup> And the discussions of Jefferson’s and Madison’s views in the major Supreme Court Religion Clause opinions are considerably more thorough and deferential.

12. See, e.g., *Van Orden*, 545 U.S. at 734 (Stevens, J., dissenting) (citing Washington’s letter to the Hebrew Congregation as evidence of Washington’s cognizance of neutrality issues).

13. ROSS & SMITH, *supra* note 1, at 82.

14. See, e.g., *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 280 n.56 (1963) (Brennan, J., concurring) (reinforcing the idea that religion is needed for morality).

15. ROSS & SMITH, *supra* note 1, at 92.

16. *Id.* at 113.

17. *Id.*

18. See *supra* notes 8–10, 12, 14.

19. Compare Westlaw, <http://www.westlaw.com> (follow “U.S. Supreme Court Cases” hyperlink; then search “‘Thomas Jefferson’ & ‘First Amendment’”) (last visited Dec. 16, 2007), with Westlaw, <http://www.westlaw.com> (follow “U.S. Supreme Court Cases” hyperlink; then search “‘George Washington’ & ‘First Amendment’”) (last visited Dec. 16, 2007).

20. Compare Westlaw, <http://www.westlaw.com> (follow “U.S. Supreme Court Cases” hyperlink; then search “‘James Madison’ & ‘First Amendment’”) (last visited Dec. 16, 2007), with Westlaw, <http://www.westlaw.com> (follow “U.S. Supreme Court Cases” hyperlink; then search “‘George Washington’ & ‘First Amendment’”) (last visited Dec. 16, 2007).

A classic case in point is *Everson v. Board of Education*,<sup>21</sup> perhaps the seminal modern Establishment Clause decision. Writing for the Court, Justice Black famously declared in *Everson* that “[t]he First Amendment has erected a wall between church and state,” which “must be kept high and impregnable.”<sup>22</sup> Justice Black spent pages discussing Jefferson’s and Madison’s opposition to a proposed Virginia statute that would have extended an existing tax for the support of the established Anglican Church.<sup>23</sup> Furthermore, he included the entirety of Madison’s “Memorial and Remonstrance Against Religious Assessments” in an appendix to the majority opinion.<sup>24</sup> Justice Black’s only reference to Washington is a citation to his papers, which happened to contain a copy of the bill.<sup>25</sup> It turns out that Washington held a different view of the proposed religious assessment, which at least merited mention alongside the views of Jefferson and Madison. Washington regarded the bill as imprudent but declined an invitation to sign on to Madison’s Memorial and Remonstrance, making clear he did not oppose the bill in principle; “I must confess,” he said in a letter to George Mason, “that I am not amongst the number of those who are so much alarmed at the thoughts of making people pay towards the support of that which they profess.”<sup>26</sup>

The Court’s failure to note the views of Washington was both unfortunate and ironic, given that the Supreme Court ultimately ruled in *Everson* that a Pennsylvania statute permitting local school boards to reimburse the costs of busing children to any private school, religious or nonreligious, did not violate the Establishment Clause.<sup>27</sup> The Court’s actual ruling was thus much closer to the views of Washington, who seemed to favor distributing the proceeds of the assessment among the various religious denominations that were representative of the taxpayers,<sup>28</sup> than to the views of Jefferson and Madison, who seemed to leave no room for any public financial support of religion.<sup>29</sup> Justice Jackson was led to remark in dissent that “the undertones of the [majority] opinion, advocating complete and

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21. 330 U.S. 1 (1947).

22. *Id.* at 18.

23. *Id.* at 11–13.

24. *Id.* at 63–72.

25. *Id.* at 37 n.17.

26. ROSS & SMITH, *supra* note 1, at 198.

27. *Everson*, 330 U.S. at 17–18.

28. ROSS & SMITH, *supra* note 1, at 198.

29. *Everson*, 330 U.S. at 11–13.

uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.”<sup>30</sup>

There is a lesson in here somewhere. Washington may not have said as much as Jefferson and Madison concerning the theoretical relationship of church and state, but he spent his career, as a military leader, a colonial legislator, and of course as President of the United States, resolving actual church-state issues on a regular basis. If it is true that “[t]he life of the law has not been logic: it has been experience,”<sup>31</sup> then Mrs. Ross and Mr. Smith are correct that the life of Washington ought to be a significant part of the life of the Religion Clauses of the First Amendment.

### III. PUBLIC SUPPORT OF RELIGION

In the course of narrating George Washington’s encounters with various religious issues during his public life, Mrs. Ross and Mr. Smith are able to show that Washington was much more than a deft politician who found a way to bridge and defuse regional and ideological divisions at the time of the framing. He held considered views on a variety of issues that continue to arise in modern First Amendment litigation. These views challenge several aspects of current Supreme Court Establishment Clause doctrine.

#### A. *Religion as a Public Good*

First, Washington repeatedly emphasized that religion was a public good and thus was to be encouraged by the government—a radical proposition to the modern ear. ““Of all the dispositions and habits which lead to political prosperity,” Washington declared in his Farewell Address, ““Religion and morality are indispensable supports.””<sup>32</sup> Washington thus did not flinch from official acknowledgments of God and from official proclamations of prayer and thanksgiving. As noted, this is the one area of First Amendment jurisprudence—public religious symbols, official religious acknowledgments and prayers—where the Supreme Court has at least

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30. *Id.* at 19 (Jackson, J., dissenting).

31. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1923).

32. ROSS & SMITH, *supra* note 1, at xx (quoting Farewell Address (Sept. 19, 1796), in 35 *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1749* at 214, 229 (John C. Fitzpatrick ed. 1940)).

acknowledged the precedents set by Washington and occasionally, but by no means consistently, followed them.<sup>33</sup>

Washington's public religious acknowledgments were generally nonsectarian. "Indeed," Mrs. Ross and Mr. Smith observe, "on a few occasions, he pointedly declined to use language that could have been misconstrued as support for a particular denomination."<sup>34</sup> Nevertheless, in at least one instance, while President, he professed a willingness to provide financial assistance and a tract of land to Catholic missionaries in the Western territories.<sup>35</sup> He also signed into law an "Act Regulating the Grants of Land Appropriated for Military Services, and for the Society of the United Brethren, for Propagating the Gospel Among the Heathen," which ensured that Moravian missionaries would receive clear title to certain tracts of land from the federal government.<sup>36</sup> It is thus open to question whether he avoided explicitly Christian, or explicitly Protestant, terms out of a sense of public obligation or out of a sense of political expediency.

In all events, it is doubtful that Washington would have seen any constitutional difficulty with the public religious symbols and public religious acknowledgments that have come under fire in recent decades.<sup>37</sup> He appeared at least to assume the existence of a monotheistic civil religion that merited official recognition. His avoidance of sectarian language did not appear to require absolute

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33. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 626 (1992) (Souter, J., concurring) ("To be sure, the leaders of the young Republic engaged in some of the practices that separationists like Jefferson and Madison criticized. The First Congress did hire institutional chaplains and Presidents Washington and Adams unapologetically marked days of "public thanksgiving and prayer." Yet in the face of the separationist dissent, those practices prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next.") (citations omitted); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 670–71 (1989) (Kennedy, J., concurring in part and dissenting in part) ("Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of [the endorsement test proposed by Justice O'Connor]. Some examples suffice to make plain my concerns. Since the Founding of our Republic, American Presidents have issued Thanksgiving Proclamations establishing a national day of celebration and prayer. The first such proclamation was issued by President Washington at the request of the First Congress . . .").

34. ROSS & SMITH, *supra* note 1, at 84.

35. *Id.* at 99–100.

36. *Id.* at 102.

37. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (striking down display of Ten Commandments in county courthouse); *Lee v. Weisman*, 505 U.S. 577, 581 (1992) (striking down nonsectarian prayer delivered by Jewish Rabbi at middle school graduation, giving thanks to "God of the Free, Hope of the Brave"); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down mandatory moment of silence during school days); *Engel v. Vitale*, 370 U.S. 421, 422 (1962) (striking down the following prayer delivered by teachers at the beginning of each school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country").

neutrality between belief and unbelief, or between monotheistic and pagan or primitive religions. His views thus contrast with those of the modern Supreme Court, which has declared that “[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”<sup>38</sup>

### *B. Accommodation of Religious Minorities*

A second feature of Washington’s approach to church-state issues was his willing accommodation of minority religious beliefs. Both as a military leader and as President, he expressed a belief that rules of general applicability should give way to sincere claims of conflicting religious conscience, except when exempting the individual would threaten public safety. This view stands in contrast to the interpretation of the Free Exercise Clause by the modern Supreme Court.

The foremost example of Washington’s accommodationist philosophy was his treatment of Quakers who objected to participation in the military. Early in his military career, while Washington was serving as a commander during the French and Indian War, the Virginia Assembly passed a statute requiring all able-bodied men to serve in the militia (or pay a fee or find a suitable replacement).<sup>39</sup> Six Quakers were drafted but refused to fight or even assist others who were fighting.<sup>40</sup> Washington ordered them imprisoned but not whipped for the remainder of their terms of conscription, a relatively light punishment for the times.<sup>41</sup>

When he later served as Commander in Chief of the Continental Army, Washington exempted Quakers altogether from the requirement of military service, as long as their objections were “really conscientiously scrupulous.”<sup>42</sup> He did so despite strong personal aversions to many of the Quaker faith, whom he believed were actively undermining the war effort.<sup>43</sup> Washington thus set a precedent for exempting conscientious objectors from generally applicable laws, even laws of grave public import, in the decades immediately preceding the framing of the Constitution and the enactment of the Bill of Rights. Washington later memorialized this

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38. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

39. ROSS & SMITH, *supra* note 1, at 11.

40. *Id.*

41. *Id.* at 12–14.

42. *Id.* at 47.

43. *Id.* at 48–49.

precedent in his 1789 Letter to the Society of Quakers, in which he professed his opinion that “the Conscientious scruples of all men should be treated with great delicacy & tenderness” and his “wish and desire, that the Laws may always be as extensively accommodated to them, as a due regard to the Protection and essential interests of the Nation may Justify, and permit.”<sup>44</sup>

The Supreme Court first confronted a claim of a similar nature in the 1879 case of *Reynolds v. United States*.<sup>45</sup> The petitioner in *Reynolds* was a Utah Mormon who had been convicted of polygamy under the territorial statute then in effect.<sup>46</sup> He argued that he should be exempt from this prohibition because of Mormon teaching “that it was the duty of male members of said church, circumstances permitting, to practise polygamy.”<sup>47</sup> Far from mentioning Washington or his experience with the Quakers, the Court cited James Madison’s Memorial and Remonstrance<sup>48</sup> and Thomas Jefferson’s 1802 Letter to the Danbury Baptists,<sup>49</sup> neither of which were addressed to the issue at hand. The Court essentially interpreted the Free Exercise Clause as protecting belief but not action, declaring that “Congress was deprived [by the Clause] of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”<sup>50</sup>

For a period of time, from the Warren Court through the Burger Court, the Supreme Court retrenched its ruling in *Reynolds* and interpreted the Free Exercise Clause to exempt individuals from generally applicable laws that burdened their exercise of religion unless those laws were tailored to a compelling state interest.<sup>51</sup> However, in a 1989 opinion authored by Justice Scalia,<sup>52</sup> the Supreme Court reversed ground again and reverted to the no-exemption

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44. *Id.* at 221.

45. 98 U.S. 145 (1879).

46. *Id.* at 161.

47. *Id.*

48. *Id.* at 163 (noting that religion was not within the cognizance of civil government).

49. *Id.* at 164 (referring to Jefferson’s call for a “wall of separation between church and State”).

50. *Id.*

51. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (affirming invalidation of convictions under Wisconsin’s compulsory school attendance law, where the respondents were members of the Amish religion); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that the disqualification of unemployment benefits imposed a burden on the free exercise of the claimant’s religion because the ruling put pressure on her to forego her practice in order to accept work, or to forfeit benefits by following her religion).

52. *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause did not exempt Native Americans who consumed peyote for sacramental purposes from generally applicable criminal statutes criminalizing drug use).

doctrine of *Reynolds*. The Court again made no mention of Washington's views on religious exemptions (or, for that matter, a variety of other historical materials that tended to support the interpretation that the Free Exercise Clause allowed for religious exemptions from generally applicable legislation).<sup>53</sup> Only later, in the course of striking down a portion of the Religious Freedom Restoration Act (the attempt by Congress to revive the possibility of religious exemptions from generally applicable laws), did certain members of the Court attempt to take account of Washington's experience with the Quakers.<sup>54</sup>

### C. Public Funds for Religious Activities

Perhaps most significantly, as already seen in connection with the controversy over the proposed Virginia religious assessment, Washington believed it permissible for the government to provide financial support for the practice of religion. As a British officer during the French and Indian War and later as Commander in Chief of the Continental Army, Washington repeatedly sought government funding for military chaplains, without a trace of concern for whether taxpayers might find it odious to be compelled to pay for religious services of which they disapproved.<sup>55</sup>

Mrs. Ross and Mr. Smith postulate that Washington's predominant concern in this regard was the moral fitness of his troops. In other words, he favored religious observance not just because his soldiers desired that freedom but mainly because he saw it as an objectively useful endeavor.<sup>56</sup> He believed that regular religious observance was necessary to forestall corruption and moral dissolution among the

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53. See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (arguing that the Constitution has granted religious "profession and worship" to all denominations "without discrimination or preference," but it has not granted exemption from previous legal duties).

54. *City of Boerne v. Flores*, 521 U.S. 507, 542 (1997) (Scalia, J., concurring) ("Likewise, the letter from George Washington to the Quakers by its own terms refers to Washington's 'wish and desire' that religion be accommodated, not his belief that existing constitutional provisions required accommodation." (citations omitted)); *id.* at 562 (O'Connor, J., dissenting) ("George Washington expressly stated that he believed that government should do its utmost to accommodate religious scruples, writing in a letter to a group of Quakers: '[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.'" (quoting Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in *GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING* 11 (E. Humphrey ed. 1932))).

55. ROSS & SMITH, *supra* note 1, at 39.

56. *Id.*

troops.<sup>57</sup> On multiple occasions, he ordered his soldiers to attend prayer and worship services, although it appears he meant simply to compel soldiers to attend services that were within their respective faiths.<sup>58</sup> Again, he showed no self-consciousness about whether this official endorsement of religion was appropriate. He would continue this practice of requiring religious observance when he was Commander in Chief of the Continental Army, and he backed these orders with frequent public declarations of his own, in which he expressed a firm conviction that Providence (from a monotheistic divinity acceptable to both Jews and Christians) had kept him alive during many close fights and was abetting the American cause.<sup>59</sup>

On numerous other occasions, Washington expressed similar support for the public funding of religious practice. In 1783, he supported a proposal in the Continental Congress to fund the printing of a Bible for each of the American soldiers.<sup>60</sup> In 1785, he supported an English countess's request for public financing of a college to serve as a Christian mission to the Indians.<sup>61</sup> During the First Congress after ratification of the Constitution, he supported a proposal to build a nondenominational national church with federal funds in an area of modern-day Washington, D.C.<sup>62</sup> Finally, as previously noted, Washington signed into law a statute giving land to Christian missionaries to the Indians.<sup>63</sup>

Notwithstanding Washington's apparent and consistent willingness to provide public financial support for the inculcation and practice of religion, the Supreme Court has not once mentioned Washington in its numerous post-*Lemon* cases involving the propriety of particular forms of government aid to religion. This omission is particularly glaring in light of the volume and close nature of these cases. Since its 1971 decision in *Lemon v. Kurtzman*,<sup>64</sup> in which the Court struck down a Rhode Island statute that made funds available to supplement the salaries of public school teachers who taught secular subjects in private schools, whether religious or nonreligious,<sup>65</sup> the Supreme Court has decided more than twenty cases on the constitutionality of

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57. *Id.* at 29.

58. *Id.* at 39–40.

59. *Id.* at xxii, 3, 5, 10, 16, 27–31, 41–42.

60. *Id.* at 43.

61. *Id.* at 59–62.

62. *Id.* at 78–80.

63. *Id.* at 101–03.

64. 403 U.S. 602 (1971).

65. *Id.* at 606.

making public funds or public facilities available for religion.<sup>66</sup> Many of these have been 5-4 decisions.<sup>67</sup> Jefferson and Madison are

66. *See, e.g.*, *Locke v. Davey*, 540 U.S. 712 (2004) (allowing Washington to deny general scholarship to otherwise qualified student who wished to study theology); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding Cleveland school voucher program); *Agostini v. Felton*, 521 U.S. 203 (1997) (upholding New York program to send public school teachers into religious schools to teach disadvantaged children); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (ruling that University of Virginia could not refuse to reimburse printing costs of religious magazine out of fund made available for printing costs of other student-edited magazines); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (ruling that deaf student was entitled to federal funding for interpreter even though he attended Catholic high school); *Lamb's Chapel v. Center Moriches Union Free Sch.*, 508 U.S. 384 (1993) (ruling that public school could not refuse church's request to use public school facilities for religious oriented film series on family and child-rearing); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding grant of federal funds to faith-based organizations for counseling on teenage sexuality); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (reversing Washington's denial of vocational rehabilitation assistance to blind person studying to become pastor); *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232 (1985) (striking down New York program to send public school teachers into religious schools to provide remedial instruction and clinical and guidance services), *overruled by Agostini*, 521 U.S. 203; *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (striking down Michigan program to fund supplementary "core curriculum" classes at religious schools), *overruled by Agostini*, 521 U.S. 203; *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding Minnesota tax deduction for expenses incurred by parents in sending children to religious schools); *Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down university policy of excluding religious groups from university facilities that were generally available to registered student groups); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (upholding New York program to reimburse religious schools for cost of state-mandated testing and reporting services); *Wolman v. Walter*, 433 U.S. 229 (1977) (striking down parts of Ohio program to fund instructional materials and field trips at religious schools), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000); *Byrne v. Pub. Funds for Pub. Sch. of N.J.*, 442 U.S. 907 (1979) (striking down New Jersey tax deduction for any parent with child in religious school); *New York v. Cathedral Acad.*, 434 U.S. 125 (1977) (striking down New York program to reimburse religious schools for cost of state-mandated record-keeping and testing services); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736 (1976) (upholding Maryland program to provide annual fiscal year subsidies to private universities, including religious universities that were not pervasively sectarian); *Meek v. Pittenger*, 421 U.S. 349 (1975) (striking down Pennsylvania program to pay for textbooks and instructional materials at religious schools), *overruled by Mitchell*, 530 U.S. 793; *Marburger v. Pub. Funds for Pub. Sch. of N.J.*, 417 U.S. 961 (1974) (striking down New Jersey program to pay for textbooks and other classroom supplies at religious schools); *Sloan v. Lemon*, 413 U.S. 825 (1973) (Pennsylvania program to reimburse tuition paid by parents of children in religious schools); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (striking down New York program to provide maintenance and repair grants to religious schools); *Grit v. Wolman*, 413 U.S. 901 (1973) (striking down Ohio tax credit for parents with children in religious schools); *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (upholding South Carolina bond program to finance construction of buildings on college campuses, including religious); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 93 S.Ct. 2814 (1973) (striking down New York program to reimburse religious schools for testing expenses); *Tilton v. Richardson*, 403 U.S. 672 (1971) (upholding federal program to fund construction of buildings on college campuses, including religious).

67. *See, e.g.*, *Agostini*, 521 U.S. 203 (upholding New York program to send public school teachers into religious schools to teach disadvantaged children); *Kendrick*, 487 U.S. 589 (upholding grant of federal funds to faith-based organizations for counseling on teenage sexuality); *Roemer*, 426 U.S. 736 (upholding Maryland program to provide annual fiscal year subsidies to private universities, including religious universities that were not pervasively

featured prominently and favorably in these cases, usually in regard to their opposition to the Virginia religious assessment.<sup>68</sup> One would certainly have thought that Washington's views on this very same assessment, not to mention his views on public support for religion generally, were at least worth mentioning.

What would Washington's views entail, if considered? For starters, it is difficult to believe he would ever have opposed a religion-neutral government funding program, on the ground that the program included "pervasively sectarian" entities among its beneficiaries.<sup>69</sup> He favored many forms of support for religion that were not even denominationally neutral and explicitly benefited pervasively sectarian institutions, like the Moravian missionaries in western Pennsylvania.<sup>70</sup> It is also difficult to believe that Washington would have deemed "an intimate and continuing relationship" with religious institutions to be a disqualifying feature of a public aid program.<sup>71</sup> Washington regularly dealt with religious figures in his capacity as a military and political leader, at one point inviting Quaker and Moravian missionaries to participate in a sensitive treaty negotiation with an Indian tribe in the Northwest Territories.<sup>72</sup>

In conclusion, Washington makes his appearance almost exclusively in Supreme Court cases involving school prayer and public religious symbols, but he expressed pertinent views on an array of other church-state issues that remain very much alive today. Perhaps the Supreme Court has confined its consideration of Washington's views to religious acknowledgment cases because his pragmatic, statesman-like approach to sensitive questions of public policy most suitably fits that area of law, where the normal juridical presumption in favor of bright line rules would seem to be reversed. Perhaps it has done so because, as Mrs. Ross and Mr. Smith suggest, the Supreme Court is generally inclined to Jefferson's separationist views and prefers to cite Washington where his views are the least

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sectarian); *Tilton*, 403 U.S. 672 (upholding federal program to fund construction of buildings on college campuses, including religious).

68. See, e.g., *Davey*, 540 U.S. at 722–23 & n.6; *Nyquist*, 413 U.S. at 760–61 & nn.1–2.

69. Cf. *Hunt*, 413 U.S. at 744 (holding that "[o]n the record in this case there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education" so as to disqualify them from public revenue bond program).

70. ROSS & SMITH, *supra* note 1, at 97.

71. Cf. *Lemon*, 403 U.S. at 621 (striking down Pennsylvania statute reimbursing private schools for teacher salaries, textbooks, and instructional materials used to teach secular subjects, on ground that state's power to audit schools' financial records and determine which expenditures were religious and which were secular created "an intimate and continuing relationship between church and state").

72. ROSS & SMITH, *supra* note 1, at 100–01.

challenging. Whatever the case may be, if one went by Supreme Court opinions alone, one would be left with the impression that Washington had little to say about other difficult church-state issues, like the circumstances in which conscientious objectors may be exempt from generally applicable laws, or the extent to which the government may give aid to religious activity. As Mrs. Ross and Mr. Smith ably demonstrate, this inference would be incorrect.

After reading *Under God*, one cannot dispute that the views of Washington deserve greater consideration than they have heretofore received in Religion Clause litigation and legal scholarship. Do the views of Washington deserve greater consideration than the views of Jefferson, as Mrs. Ross and Mr. Smith suggest, or of Madison, who at times appeared to be as ardent a separationist as Jefferson? That, of course, depends: first, on the extent to which one embraces originalism as an interpretive philosophy; second, on the extent to which Washington was representative of the views of the rest of the framers, or of the common understanding of what the Religion Clauses meant in 1789. On the latter question, Mrs. Ross and Mr. Smith offer reasons to believe that Washington was closer to the American center than was Jefferson, but the former question is beyond the scope of their project and a matter of sharp disagreement among current members of the Supreme Court.<sup>73</sup> Suffice it to say, the life of Washington presents an alternative vision to that of a “high and impregnable”<sup>74</sup> wall of separation between church and state. It evinces a more religion-friendly approach, one that seeks both to accommodate the heterodox practices of religious minorities and to facilitate the public expression of majoritarian religious sentiment.

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73. Compare *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring) (“I would prefer to . . . adopt[] an Establishment Clause jurisprudence that is in accord with our Nation’s past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”), with *id.* at 731 (Stevens, J., dissenting) (“It is our duty, therefore, to interpret the First Amendment’s command that ‘Congress shall make no law respecting an establishment of religion’ not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause’s text and history the broad principles that remain valid today.”).

74. *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 18 (1947).