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Books in Review

Original Intent: Chief Justice Rehnquist And The Course Of American Church/State Relations

Church-State Conundrums

Original Intent: Chief Justice Rehnquist And The Course Of American Church/State Relations. By Derek Davis. *Prometheus Books. 202 pp. $24.95.*

Reviewed by Keith J. Pavlischek

IN THE FIELD of church-state jurisprudence, as is well known, legal scholars are generally divided between "strict separationists" and "accommodationists." The former place a "broad interpretation" on the First Amendment's prohibition of establishment, insisting on an absolute separation of church and state, thus forbidding all forms of government assistance to religion or to religiously inspired activity. Accommodationists, on the other hand, argue for a "narrow" reading, one that insists that the founders intended simply to remove religious tests for public office, prevent the creation of a national church, and protect freedom of religion. Thus, governmental support for religion is not unconstitutional if it is nondiscriminatory and has a reasonably legitimate public purpose.

Derek Davis, associate director of the J. M. Dawson Institute of Church-State Studies at Baylor University and associate editor of the *Journal of Church and State*, has written an introduction to church-state jurisprudence for the non-specialist from the perspective of a strict separationist. The book's primary focus is on the judicial philosophy of Chief Justice Rehnquist, but it also includes an historical development of church-state relations in America. Although he deeply disagrees with Rehnquist's constitutional hermeneutics ("difficult to reconcile with what can be determined of the original intent of the framers but also unprotective of fundamental principles of religious liberty"), and finds disturbing the Rehnquist Court's "serious departures from the Court's traditional [read: strict separationist] stances," Davis nevertheless attempts to present an "objective, fair, and dispassionate treatment of Chief Justice Rehnquist's views and how they may be influential in reshaping church-state relations in America."

THOSE WHO are sympathetic toward a more "accommodationist" understanding of the religion clauses ought not dismiss Davis' criticism of the Chief Justice too lightly, given Rehnquist's concurring vote in the landmark case of *Employment Division v. Smith* (1990), the now infamous "peyote" decision in which the Court departed from the doctrine that citizens could claim exemption from laws that violated their religious freedom unless the state could show a "compelling state interest" in overriding their claim. Davis argues that the Court, in rejecting the "compelling state interest" test, acted in a way entirely consistent with the judicial philosophy of the Chief Justice. He, quite correctly, finds this alarming.

Davis observes that prior to *Smith* many had assumed that Rehnquist and other Supreme Court conservatives were "pro-religion" because they were less likely to strike down nondiscriminatory government aid to religion as a violation of the Establishment Clause. *Smith* proved this assumption to be unwarranted. In short, the understanding of religious liberty as a fundamental freedom requiring "heightened judicial scrutiny" gives way to a more fundamental judicial philosophy of states rights. For Rehnquist, majoritarianism (as reflected in the state legislatures) trumps appeals to religious liberty.

As his title might suggest, Davis takes the notion of "original intent" quite seriously. Without denying that there are considerable tensions between text and intent, and while recognizing that the notion of a "living constitution" is valid, he insists that "where intent can be investigated so as to illuminate the text, it is an altogether proper inquiry." Because the founding fathers were "closer to the problem of religious despotism," their "aspirations of providing guarantees for religious liberty in a constitutional government are instructive to a contemporary America that retains those aspirations."

Many "accommodationists" are likely to agree with Davis on the importance of coming to some understanding of the founders' intentions. Which leads us to ask, Why might accommodationists and strict separationists agree on the importance of "original intention" and yet disagree so radically on what the prohibition of establishment and the guarantee of religious liberty require? Here we touch upon a matter of fundamental disagreement in constitutional interpretation.

According to Davis, in setting its separationist course, the Supreme Court has, with only few exceptions, "relied heavily upon the ideas concerning religious liberty advanced by such notables as Roger Williams, James Madison, and Thomas Jefferson." Believing that their views were "instrumental, if not primary" in the final wording of the religion clauses, the Supreme Court has "looked behind the words of the First Amendment" to discover their "purest expressions" in the views of Williams, Madison, and Jefferson.

Rehnquist, on the other hand, given as he is to "strict constructivism," focuses primarily on the meaning of the religion clauses "as elucidated by the proceedings of the First Congress and certain events thereafter." He is thus less willing "to go behind the words of the First Amendment to figures like Jefferson and Madison and their views on religious liberty." While the views of Madison and Jefferson on religious liberty may have been revolutionary and may even lend credence to the strict separationist position, they were fully implemented only in Virginia and not, according to Rehnquist, at the First Congress. Their views ought not, therefore, be read into the First Amendment without significant modification.

DAVIS DOES acknowledge that the actions of the First Congress and of the early Presidents are powerful counterevidence to his strict separationist interpretation. But he rather casually dismisses what he calls these "early violations of the doctrine of separation of church and state" as due merely to a "time of transition," a "moving away from church-state union to church-state separation" and to "the inevitable overlapping concerns of church and state." The "principles of separation" took some time to reach "full actualization." The heroes in Davis' drama are those modern jurists who overlooked these early evidences against their position and thus defended separationist principles by "rebuffing legislatures that seek to support religious expressions, especially in the public schools, or to render financial support to churches or parochial schools."

While Davis' tone throughout the book is dispassionate and his attempt to be fair laudable, his determination in prosecuting the accommodationist position leads to caricature. For example:

> Accommodationism is mistaken in its belief that religion should be nurtured, patronized, or promoted by government. The issue is really whether religion needs the state to "prop it up," or whether religion thrives when left alone. Accommodationism prefers government sponsorship and subsidy of religion rather than allowing it to compete on its merits against indifference and irreligion.

Davis simply fails to see that a fundamental claim for justice lies behind the accommodationist position. Accommodationists tend to be more perceptive of the way in which the advocates of religious "indifference and irreligion" start off at a competitive advantage in the America public square, particularly in public education, an area in which so many church-state issues are fought.

For example, economically disadvantaged parents who would send their children to a Christian day school if they could afford it, but are forced instead to send them to a public school where, by separationist dogma, indifference toward religion is *required*, would be hard-pressed to see this as fair competition between the advocates of religion and the advocates of religious "indifference and irreligion." The same can be said for those parents of parochial school students who are denied public funds for remedial instruction because it presumably violates the prohibition of church establishment. The complaints of these parents cannot fairly be dismissed as attempts at "propping up" religion. Many who would defend funds for remedial aid, tuition tax credits, or vouchers for parents of parochial school children (which strict separationists oppose) have no problem competing with "indifference and irreligion." Their plea is not for "subsidy" or for "sponsorship" but for justice-to make the playing field level, as it were.

Davis is right to acknowledge the danger to religious freedom that stems from an over-willingness of some jurists to defer to state legislatures in matters of free exercise. But he does not see the corresponding threat to free exercise that stems from an absolutist reading of the Establishment Clause. And that, in turn, is because he does not seem to appreciate the conceptual difficulties with reading the particular religious or theological views of Williams, Jefferson, and Madison into the First Amendment. On this, Rehnquist is right.

LET'S SUPPOSE that Davis is correct in assuming that Williams, Madison, and Jefferson understood religion to be an entirely personal, private, interior matter of the individual conscience-a view that he erroneously attributes also to John Courtney Murray-and that this particular view of religion was incorporated into the First Amendment by the founders. What might that imply?

In 1949 Murray took up exactly this question in an article critical of the strict separationist course set forth in the landmark *Everson* (1947) and *McCollum* (1948) decisions. Murray insisted that the belief that "religion is of its nature a personal, private interior matter of the individual conscience, having no relevance to the public concerns of the state" is *itself* a theological premise, "an irredeemable piece of sectarian dogmatism." Let's call this particular tenet, one that is held by Davis, the Strict Separationist Dogma (SSD).

Now, this may be Davis' understanding of religion but it was not Murray's, it isn't mine, and I suspect it is not held by many readers of this journal. In that sense SSD is surely sectarian. But, as Murray insisted, "if there is one thing that the First Amendment forbids with resounding force it is the intrusion of a sectarian philosophy of religion into the fundamental law of the land." By insisting that SSD be read into the religion clauses, any religion (or secular ideology?) that holds SSD would thereby seem to become "established." Thus, seeking to avoid an establishment of religion, the strict separationist thereby establishes one-his own.

The most reasonable way to avoid this result is to understand the stricture against establishment, in Murray's words, "as instrumental to freedom, therefore as a *relative*, not an *absolute* in its own right." Since, as Murray observed, "one cannot balance an absolute against anything," the strict separationist is committed to a view in which the "no establishment" provision has primacy over the "free exercise" provision. An absolutist understanding of establishment logically entails that free exercise be subordinate to it. That's how the First Amendment, originally intended to guarantee religious freedom, gets turned on its head. "Free exercise" becomes subordinate to "no establishment," understood absolutely. For that reason, the free exercise provision should have priority and "compelling state interest" should be required to override claims that religious freedom has been violated. It may also be wise to consider Richard John Neuhaus' claim that we are not dealing with two religion clauses at all, but one clause intended to promote religious freedom through disestablishment.

In any case, if Davis is right, and religious freedom is compromised in the hands of those, such as Chief Justice Rehnquist, who would defer free exercise claims to state legislatures without demanding "compelling state interest" to override those claims, it is also compromised by those who understand the prohibition of establishment in an absolutist sense. Davis does well by warning us of the threat from the former, but he is of no assistance in seeing us through the danger posed by the latter.

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