Original Intent: Chief Justice Rehnquist and the Course of American Church-State Relations.

By Derek Davis. Prometheus Books, 202 pp., $24.95.

William Rehnquist's interpretations of the First Amendment religion clauses seem fraught with paradox. As associate justice and then chief justice of the Supreme Court, Rehnquist has supported a city's power to display a menorah, yet contested a rabbi's right to wear a yarmulke. He has supported a religious institution's right to discriminate on grounds of sex and race, yet disputed a church's right to enforce its canon law. He has upheld the right of private citizens to tax deductions for parochial school education, yet denied a religious publisher the right to exemptions from sale and use taxes.

Derek Davis of Baylor University admirably parses this paradox. Such inconsistent results, Davis argues, are the product of Rehnquist's consistent application of a conservative constitutional creed. Rehnquist believes in strict construction of the Constitution, and thus interprets both the establishment and free-exercise clauses of the First Amendment very narrowly. He believes in federalism and judicial deference, and thus rarely overturns federal or state legislation respecting religion. He believes in nonpreferential accommodation of religion and thus permits incidental government privileges and protections for religions. Faithful adherence to all three of these principles allows Rehnquist to uphold widely divergent legislative initiatives, whether they erode or extend religious liberty.

Rehnquist predicates this constitutional creed on the "original intent" of the constitutional framers, which he traces to the writings of Madison and other framers and to the earliest congressional records. His creed harbors little patience with the court's reduction of the religion clauses to mechanical balancing tests, and even less patience with the court's habitual incantation of the metaphor of a wall of separation between church and state. In his early years as associate justice, therefore, Rehnquist often dissented from the court's majority. Since becoming chief justice in 1986, he has frequently persuaded a majority of justices to join his position.

While Davis carefully constructs Rehnquist's conservative creed in the first half of his book, he cavalierly criticizes it in the second half. Davis's criticisms are narrowly focused on Rehnquist's "accommodationism," and predictably governed by his own beliefs in "separationism." Rehnquist's accommodationism, Davis insists, is based on historical "misunderstanding." The original intent of the framers must be sought in the ideas of Thomas Jefferson, not Thomas Leland; in Madison's writing of 1784 and 1817, not his writings and speeches from 1787 to 1791. The religion clauses represent "an infantile doctrine of complete separation of church and state," not a federal acceptance of state establishments. The historical "mixture" of church and state are "violations of separation doctrine," not instances of the healthy collaboration of church and state. The judicial purging of religious language, symbols and rites from the public square and public school represent benevolent protection, not belligerent privatization, of religion. Rehnquist's accommodationism, Davis further argues, is dangerous. Government support of the church will inevitably lead to government control of the church. Government use of religious services will inevitably lead to clerical control of the government. Government policies respecting religion will inevitably favor some religions and disfavor others. While "separationism guarantees religious liberty, accommodationism threatens religious liberty."

The book, though valuable and readable, has several problems. First, it reflects hasty research and writing. The discussion of "original intent" ponderously recites the familiar colloquy over Edwin Meese's views, and too casually imputes Meese's views to Rehnquist. The historical sections are drawn principally from separationist sages like Leonard Levy and Leo Pfeffer, and pay little attention to the more balanced and accurate writings of Mark Howe and Michael McConnell. The theoretical chapters repeat the old gospel of separationism, with no attempt at originality. The chapter on recent religious-liberty cases offers a commonplace summary, but ignores a dozen religion-clause cases on which Justice Rehnquist sat. Some of the cases that are discussed are mischaracterized. The 1970 *Walz* tax-exemption case is said to represent the "victory" of "free exercise claims over establishment concerns," though the court simply held that tax exemption of church property does not violate the establishment clause. The 1990 *Smith* peyote case is said to "overturn the compelling state interest test" of free exercise, though in *Smith* the court simply chose not to use that test, and distinguished earlier cases where the test had been used.

Second, the author's strong separationist beliefs sometimes color his purportedly "objective account." Davis asserts that the Supreme Court has "historically rejected accommodationism" for "separationism." But accommodationist beliefs governed the court prior to the 1940s, and have guided the court in numerous cases from *Zorach* in 1952 to *Frazee* in 1989. Davis argues that separationism is based on a "broad view" of the framers' intent, and "accommodationism" on a narrow view. But most separatists cite only the history of Virginia and the writings of Jefferson and Madison, while accommodationists use the history of all 13 states and the writings of each of their leaders. Davis asserts that the First Amendment contains "the budding expression of the doctrine of separation of church and state." But the First

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Amendment speaks of government ("Congress") and religion, not church and state. It proscribes government establishments of religion; it does not prescribe separation of government and religion. Davis characterizes the early 19th-century "mixtures of government and religion" as "violations of separation doctrine" that ended with state disestablishment of religion in 1833. But "disestablishment of religion" did not in 1833 and does not now mean the separation of church and state. "Mixtures" of political and religious institutions have persisted to this day, at both the federal and the state level.

Finally, the book's indictment of Rehnquist is based on a partial record and biased by a partial reviewer. Davis analyzes Rehnquist's opinions in *Thomas*, *Wallace* and *Bob Jones*, but he hardly mentions his opinions in *Kendrick* and *Pittinger*, and makes no mention of those in *Ansonio*, *Goldman*, *Grendel's Den*, *Milivojevich*, *Valente* and *Valley Forge*. Davis castigates Rehnquist for joining the *Smith* majority opinion that "curtailed" religious liberty. But he does not indicate that Rehnquist joined the majority opinions in *McDaniel*, *Mergens* and *Widmar* that expanded religious liberty. Davis exposes Rehnquist's strong allegiance to federalism, accommodationism and strict constructionism, but overlooks his equally strong allegiance to precedent, pluralism and pragmatism.

Rehnquist's religion-clause opinions cannot be dismissed simply as the clarion cries of an unbending conservative ideologue. They cannot be criticized simply for their departure from the tried and tired canons of separationism. Rehnquist is struggling mightily to reconstruct a paradigm that resolves the sterile dialectic of separationism and accommodationism and that replaces the court's battery of free-exercise and establishment tests. We need not agree with the chief justice, nor accept all his paradoxical opinions. But we need to stop throwing stones and start bringing bricks to help in the reconstruction.

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