SEPARATION OF CHURCH AND STATE RECONSIDERED

Church, State, and Original Intent by Donald L. Drakeman. Cambridge University Press, 2010.

Donald L. Drakeman's *Church, State, and Original Intent* is certainly one of the most exhaustive studies of the First Amendment's establishment clause in print. Drakeman is well qualified to undertake this study. He is a prominent church-state attorney, lecturer in Princeton University's Department of Politics, and Chairman of the Advisory Council of the James Madison Program in American Ideals and Institutions at Princeton (which is headed by the eminent Catholic scholar Robert P. George). The book joins the substantial amount of scholarly literature of the last several decades showing that the U.S. Supreme Court's strict separationist interpretation of the establishment clause is a gross historical error. Unlike much of that critical writing, however, it convincingly argues that we cannot reasonably turn to the original intent of the Founding Fathers and the framers of the First Amendment and their era to discern the clause's meaning because they did not make it clear and, in fact, did not even devote a lot of discussion to it. All that we can say conclusively is that they understood that it forbade Congress's establishing of a national church.

He says that the historical evidence does not even justify the conclusion that the establishment clause mandated religious nonpreferentialism—i.e., that if government aided one religious sect it would have to be willing to aid others as well—and there was certainly no effort by the federal government in this regard "to be inclusive of other religions [besides Protestantism] or of the nonreligious." Similarly, "there is no reason to believe that anyone imagined" the establishment clause "would ever affect church-state relations

in the various states," some of which still had established churches at the time of its enactment. By the same token, unlike what some critics of the Court in recent years have said, there is also no evidence that the clause was actually *intended* to protect those state establishments (what has been called the "enhanced federalism" interpretation of the clause). Indeed, the term "religious establishment" was probably used in multiple ways at the time the First Amendment went into force—although none of them pertained to the necessity of a strictly secular state as advocated by contemporary separationists.

Drakeman affirms that there is certainly no question at all that the enactment of the First Amendment signaled that the American people of that time had changed their view—so well expressed in President George Washington's Farewell Address—that religion and morality were crucial for good government.

If all one can say about the intended constraints of the establishment clause was that it precluded a national church—that it did not even mandate nonpreferentialism—it makes the Court's post-World War II embracing of strict separationism appear even more preposterous than previous critics thought.

Drakeman catalogues, as other writers have, the ways in which government in the U.S.—at all levels—for much of our history gave aid to religion. If government was supposed to be neutral as between belief and unbelief—which the Supreme Court has said is constitutionally mandated—it certainly did not act that way. In fact, Drakeman says, until the late 1940s there was not a single instance where the establishment clause was invoked to stop the federal government—to say nothing of the states—from getting involved in the realm of religion. He makes the astute observation that such forays were typically seen as satisfying government needs in some way, as when it financially supported Christian missions to Indian tribes in

the hopes that it would stop the wars with them that were costly to carry out. Even where arguments were made against government aiding religion—as in the century-long controversy about U.S. Mail delivery on Sundays—it was not on constitutional grounds, but due to clashing views among different Christian denominations about the proper relationship between church and state and whether state involvement would hurt religion. The concern in these debates, then, was what stance of government would best insure that religion would thrive. This underscored how much earlier America was a Christian culture.

So, while Drakeman says that the contemporary division of separationists and nonpreferentialists was foreshadowed in these earlier debates these initial separationist claims were not at all grounded in a secular perspective until the short-lived secularist National Liberal Party in the late 19th century. That was the time when the first stirrings of secularism in the American public arena were seen.

Drakeman contends that an increasingly secular, liberal intelligentsia was the force behind the Supreme Court's post-World War II jurisprudence that constitutionally mandated a secular state. This was first seen with the Court's uncritical acceptance of the historical writing about the First Amendment. The groundwork was laid in the late nineteenth century when in the Mormon polygamy case (*Reynolds v. U.S.*) it was influenced by Harvard's George Bancroft, who also gained prominence as a Secretary of the Navy and diplomat, to believe that Thomas Jefferson was the key source to turn to on American church-state relations. Later, when deciding the 1947 *Everson v. Board of Education* case and inaugurating its new strict separationist jurisprudence, the Court's thinking was shaped by journalist Irving Brant's noted multi-volume biography of James Madison. Brant characterized Madison as a strict separationist and the ultimate authority on the meaning of the First Amendment religion clauses. As a result, the

Court came to view Jefferson and Madison as the only sources to turn to in understanding the establishment clause and paid attention only to the side of them that suggested they were separationists.

In fairness, Drakeman says that the Court looked to the only historical writing—even though there were reasons to question its objectivity—that then existed about the establishment clause in coming to its conclusion. The Court did not have at its disposal the later writing that gave a far different picture of both the meaning of establishment, the validity of relying just on Jefferson and Madison, and the mixed and complex views and actions of these two Founders about church-state relations.

Lest one be too indulgent of the Court, however, Drakeman also argues that it allowed itself to be influenced by the general church-state outlook of liberal post-World War II intellectuals. They saw a secular state as an imperative for freedom and were driven by a fear of the Catholic Church, which they saw as antagonistic to the democratic way of life. (I give an even more precise focus to this in one chapter of my book, *The Public Order and the Sacred Order*, where I suggested that the influence of the organized secularist humanist movement is seen in many of the Court's establishment clause opinions from the 1940s until the 1980s.) Drakeman also notes how predisposed certain of the justices on the Court were to believing the claim that the Church was a threat. He discusses the well-known anti-Catholic Church attitudes of Justice Hugo Black, who authored the Everson opinion. He also mentions how Justice Wiley Rutledge, who also figured prominently in the Everson case, grew up in a strikingly anti-Catholic family in the mid-South.

It should not be surprising that anti-Catholicism was likely an element in the background of the Court's new establishment clause jurisprudence. Drakeman notes that many of the post-Civil War American church-state controversies were Catholic-

Protestant struggles or were motivated by concerns about checking the supposed enhancement of Catholic power (he could have added the pre-Civil War conflicts as well, such as the New York Public School Controversy and Kensington Riots in Philadelphia in the 1840s). In sum, Drakeman contends that "much of the modern doctrine of separation of church and state grew out of Protestant-Catholic conflict."

He also discusses the unsuccessful effort in the 1870s to enact the separationist-oriented Blaine Amendment to the Constitution as a prominent part of this. The very attempt to do this was further evidence of the falsity of the claim that the First Amendment mandated a strict separationism.

Church, State, and Original Intent is not the kind of book most people would pick up for bedtime reading or a relaxing Sunday afternoon. It is a scholarly book, chock full of carefully researched facts, arguments, and conclusions. Like many other critiques of the Court's establishment clause jurisprudence over the last sixty years, it contains much valuable historical information and is a very good reference source on this topic. It makes an important contribution by focusing squarely on the problem of making the "original intent" of the framers of the clause the grounds to determine what it means and how we should understand it. While it is clear that the Court and the separationists have had it wrong, this book makes it doubtful that continuing to pursue original intent is a worthwhile way to deal with establishment questions. Drakeman's failure to explicitly provide any other approach for courts to use in these matters seems to be a troubling omission. His argument perhaps suggests that it does not make any difference, however. His emphasizing that church-state questions were dealt with by the political branches and not even considered by courts for most of our history—and were not even viewed as constitutional issues—perhaps implicitly points to his alternative approach. The kinds of issues that the Court has wrestled with since its entry into this thicket

in the post-World War II era literally cry out for compromise and accommodation.

The rigidity, unreasonableness, and even unreality of the strict separation doctrine have created constitutional turmoil. It is a prime example of how our "Platonic guardians" on the High Court have tried to remove from the realm of politics an essentially political problem. An assumption motivating them has been that any governmental support for religion inevitably breeds divisiveness. So, they have taken it upon themselves to fashion a secular state—a "naked public square," to use the term of the late Fr. Richard Neuhaus—and have created divisiveness anyway. Moreover, they have tried to justify themselves by promulgating the fantasy that the establishment clause requires it. One wonders how long the Court will keep up the charade.

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