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THE CONTINENTAL CONGRESS: POLITICIANS OR PREACHERS?

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Derek H. Davis – director of the J.M. Dawson Institute of Church-State Relations at Baylor University and editor of the *Journal of Church and State* – fills a void in the study of church-state relations by examining the proceedings and acts of the Continental Congress regarding religion, a subject that has been neglected or dismissed as irrelevant.

Davis seeks to discover Congress's original intent respecting church-state relations to determine if it might help resolve "the modern debate over the original intent of the constitutional framers regarding the interplay of government and religion" (p. 199). He links his study to his interest in present-day church-state relations.[1]

Davis makes four claims. (1) Because original intent, when ascertainable, is critical, it "is a valid starting place in constitutional interpretation" (p. xi) and the U.S. Supreme Court should employ original intent when deciding cases involving constitutional issues. (2) Conflicting ideas and inadequate sources, however, often make original intent unclear, so that judges must also consider political and social developments since the founding. (Davis thus embraces the concept of the "living constitution.") (3) The proceedings and official acts of Congress and its records "elucidate" its original intent in the area of church-state relations. And (4) the framers' and founders' original intent "was to break with history and inaugurate a framework of church-state 'separation' in the new nation, although there are vital reasons today to be sensitive to 'accommodationist' claims and practices" (p. xiv).

In chapter 1, Davis declares that by understanding the framers' and founders' original intent regarding religion's role we take a "necessary first step" (p. 9) in understanding the Constitution's religion clauses. Both groups were close to the age of religious despotism, so that whatever they said, wrote, or did about guaranteeing religious liberty is crucial. Even though the records of the Federal Convention, the state ratifying conventions, and the First Federal Congress do not provide sufficient information "to determine with precision the intended meaning of the religion clauses" (p. 21), both groups did indeed write suggestively about religion and the state. Because original intent is "permanently relevant" to the debate over religion's role, scholars should continue to study the subject, beginning with colonial times and ending with present-day practices and theories.

In Chapters 2 through 4, Davis reviews the historical and religious background of the American Revolution. Chapter 2 shows that some states began to disestablish their churches in the early years of the Revolution; by 1787, seven did not support religion. Religious tests also disappeared in a few states. America's first constitution, the Articles of Confederation, was silent about both developments, which were in the province of the states. On the other hand, the U.S. Constitution – in a revolutionary step –prohibited religious tests for federal office holding, thereby advancing the cause of religious liberty. The clauses of some later state constitutions were patterned on the Constitution's religious tests clause.

Chapter 3 demonstrates how the Great Awakening's pietism and the Enlightenment's rationalism joined in supporting the revolt against Britain. Deeply religious, Americans believed that, as God's agents for creating His kingdom on earth, they had to rid America of George III, the Antichrist. As Davis observes, "Without this religious sanction, the American colonies probably would never have gone to war with Britain" (p. 51). This religious impulse> drove the Continental Congress. To Enlightenment rationalists, the Revolution was a part of an

optimistic vision of a larger revolution that would establish universal peace, freedom, and morality and promote human progress.

Chapter 4 reveals that both the pietist and rationalist movements in eighteenth-century American religion favored independence, and believed that God favored independence as well. The first movement stressed the "inner workings of the Holy Spirit in the believer's life"; the second "assigned to reason a primacy over revelation in apprehending religious truth" (p. 40). They also supported republican government, giving it a biblical, deisitic, and agnostic basis; and they recognized the interdependence of political liberty and religious freedom.

Drawing on both pietism and rationalism, Congress engaged in religious acts and legislated on religious matters. It justified these actions because religion was essential to a well-ordered state. Moreover, since Congress had no legal authority to justify its existence, it was obliged to appeal to a higher authority. Lastly, perilous times also called for reliance on a higher authority.

In Chapters 5 through 9, Davis demonstrates that Congress rarely hesitated to deal with religion. It resembled "a group of priests laboring on behalf of a new national church" so that its sessions were "sometimes imbued with a profoundly religious spirit" (pp. 65, 66). It engaged in prayer, heard sermons and attended funerals as a group, and legislated on such matters as "sin, repentance, humiliation, divine service, fasting, morality, prayer, mourning, public worship, funerals, chaplains, and 'true' religion" (p. 65).

Few American politicians had fixed ideas about separation of church and state. Consequently, many of the Continental Congress's religious practices – based largely on "expedience" – were revived by the first congresses under the U.S. Constitution. In the early post-Constitution years, many Representatives and Senators believed that these practices "were neither reserved to the states nor proscribed to Congress" under the Constitution's religion provisions (p. 135). The actions of the Continental and early federal congresses have been seized upon by present-day "accommodationists" who insist that the founders intended that government promote religion. But Davis invariably insists that such was not the case.

To seek God's aid in fighting the war, the Continental Congress appointed thanksgiving and fast days, which were then proclaimed by state executives. Without the war, Congress might not have appointed such days. The First Federal Congress continued thanksgiving days. Another practice resumed by this Congress was the Continental Congress's custom of beginning its sessions with a prayer offered by its chaplain. This resumption, Davis states, was generated by "tradition, not principle" (p. 80). A few federal Representatives, especially James Madison, charged that these actions violated the principle of separation of church and state. As a wartime president, however, Madison proclaimed thanksgiving days. President Madison also accepted, against his separationist principles, the system of military chaplains initiated by the Continental Congress and continued by the First Federal Congress.

Congress also invoked God in official documents. Most important, the Declaration of Independence advanced the notion that government and law must conform with a higher law – the "Laws of nature and Nature's God" (p. 201). When George III violated natural law and rights, the American people, whom God endowed with natural and unalienable rights, had a God-given duty to revolt. As Davis writes, the Articles of Confederation's "provisions were aligned with the pleasure and consent of 'the Great Governor of the World"' (p. 201). The eye of Providence on the verso of the Great Seal adopted by Congress attested the delegates' view that God oversaw the creation of the American republic.

When legislating on religious matters, the Continental Congress sometimes advanced the principle of religious freedom, which, in turn, tended to further church-state separation – a fact pleasing to present-day "separationists." But Davis admits that "separationists" are far from satisfied. Because war made Bibles scarce, Congress endorsed the publication of an American Bible, although it refused to fund the project for two reasons – first, it lacked funds; second, the Bible might not appeal to all religious groups. To enlist Quebec Roman Catholics in the cause of independence, the Articles of Confederation granted them the right to maintain any religious worship, without losing their civil rights. Congress granted foreign mercenary soldiers civil and religious freedom if they settled in the new nation. It allowed conscientious objectors to perform alternative services to military service. Postwar treaties with The Netherlands, Sweden, and Prussia granted their citizens freedom of conscience while residing in or visiting the United States. The Northwest Ordinance of 1787 prohibited a citizen's arrest on account of his mode of worship.

The Continental Congress, however, did not interfere with religious matters in the states, especially with respect to their religious establishments. The Articles of Confederation gave the states superior sovereignty

and Congress deferred to that sovereignty. When Massachusetts's dissenting Baptists petitioned Congress, complaining that they were forced to pay religious taxes, Congress refused to consider their petition. Congress rejected an article in John Dickinson's draft of the Articles that attempted to protect religious minorities by prohibiting states from requiring dissenters to support established churches, from imposing religious tests, and from compelling oath-taking. Congress also transferred the funding of an American Bible from itself to the states.

The U.S. Constitution did not alter this federal deference to the states on religious matters. The framers did not want such explosive religious issues to disrupt government operations. The Constitution, however, did prohibit religious tests, but only for federal office holding.

Chapter 10 considers the founders' views on virtue's value to a republic. Liberty could not exist without virtue; loss of virtue doomed a nation. Although recommending various means to cultivate virtue, the Continental Congress, unlike some state governments, refused to foster virtue through religion, except through proclaiming thanksgiving and fast days and appointing military chaplains. It did not compel virtue, nor did the U.S. Constitution attempt to improve people through government. The Constitution was made for a moral people; it was not made to produce such a people. In time, the cultivation of virtue gave way to Madisonian pragmatism; political power was to be so arranged that stable, secure government could exist even without political virtue.

Davis states that, on the continental level, the notion of church-state separation was virtually non-existent. The Continental Congress legislated on religious matters, except when such concerns were in the realm of the states. Although Congress acted within this "accommodationist paradigm," the founding era was a transitional period in which historical evidence "supports separationism as the paradigm of church-state thought that best captures the progressively evolving intention of the founding fathers" (p. 227). That intention included religious liberty, which, as it developed incrementally, further separated church and state. The First Amendment's religion clauses were drafted as the republic moved toward a separationist paradigm. But "a complete separation was probably never in view – nor should it be" (p. 202).

The founders were intent on breaking with history, believing that government operated best when it left religion alone. They sought to keep politics and religion in separate spheres, but God was not forgotten – even though the U.S. Constitution does not mention Him. "With the spread of Enlightenment rationalism," affirms Davis, "the pervading theological metaphor for God's method of controlling the universe was a constitutional paradigm" (p. 208). God would govern the universe through the Constitution, whose drafting He oversaw.

"Separationism," Davis concludes, "provided it remains sensitive to longstanding accommodationist practices, is indeed the best course for the future of America" (p. 229). He favors the retention of some accommodationist practices initiated by the Continental Congress or the early federal congresses and executives because they signify that government is not hostile to religious faith. But he warns accommodationists that these early practices do not form the basis of the framers' original intent because their original intent was moving toward separation. The prevention of a coalition between government and religion was fundamental to the nation's political happiness.

Davis has amply demonstrated that the strong religious sentiments of most members of the Continental Congress suffused many of their pronouncements and legislative actions and that the framers and founders moved toward church-state separation, while remaining sensitive to the intense religious feelings of Americans. Davis recognizes and tries to ameliorate the demand of some present-day religious groups for further accommodation of religion, a condition that makes these threatening times in the area of church-state relations in our pluralist, democratic society.[3] Optimistic that a consensus is attainable, *Religion and the Continental Congress* is an eloquent, civilized, and conciliatory plea for better understanding between accommodationists and separationists.

Although Davis shows conclusively that the Continental Congress's records "elucidate" original intent in the area of church-state relations, he recommends, somewhat paradoxically, that, since the founding era was a transitional period in these relations, "original intent, in terms of its implementation, is sometimes better located in the post-founding era" (p. 135), which, of course, is open-ended. Consequently, the interpretative task of overburdened Supreme Court Justices becomes even more complicated and overwhelming. They must concern themselves with the more numerous implementers of the Constitution. In part, Davis recommends this approach because the records left by the framers and ratifiers are so often judged inadequate. He also urges the study of the colonial period and the use of natural-rights and natural-law theories to discover original in-

tent. These wide-ranging and free-wheeling approaches, so favored by many protagonists of the concept of the "living constitution," are constitutionally and philosophically anathema to many, though not all, practitioners of constitutional law. (Paradoxically, some originalists, such as Justice Clarence Thomas, also advocate constitutional interpretation's recourse to natural law, which they seek out in the course of their originalist inquiries.)

Davis sometimes warns the Justices against the approaches of some scholars of church-state relations in determining original intent, but he does not provide the Justices with precise ideas about the proper bounds for accommodating religion. Then again, perhaps he believes that it is not his place to establish or even to recommend guidelines. That role belongs to the justices.

Davis has read widely but not deeply, deliberately avoiding historiographic snares; absent are lengthy, learned notes discussing conflicting historical interpretations. This was a wise approach because his study's comprehensiveness would have made his task even more difficult. Nevertheless, his choices of some secondary accounts are questionable; he also omits some important secondary works and inadequately uses certain primary sources. For example, he lists what he describes as several of the best accommodationist works, choosing such shallow works as those by Robert L. Cord and Michael J. Malbin over the more substantial books and articles of Arlin J. Adams and Charles J. Emmerich (joint authors), Gerard V. Bradley, Daniel L. Driesbach, and Michael McConnell, which are well known to him.[4] Jack N. Rakove's *Original Meanings* is singled out as the most comprehensive work on original intent, but Davis does not adequately engage Rakove's complex and nuanced analysis. Nor does he cite a fine anthology of seminal articles on original intent edited by Rakove.[5] Davis's analysis of the heated debate in New England over Congress's courting of Quebec's Roman Catholics would have been enhanced by the work of Charles P. Hanson, who discusses the Revolution's disruptive effects on New England Protestantism.[6]

Missing from his chapter on the Declaration of Independence are valuable works by Allen Jayne and Pauline Maier. Jayne believes that the Declaration is a basic text in the movement for religious freedom; while Maier skilfully recounts the complex story of the declaration's origins and writing as a collective political process.[7] Davis's account of religion in Revolutionary America also would have profited from a volume in the splendid sixteen-volume series, "Perspectives on the American Revolution," done under the auspices of the United States Capitol Historical Society.[8]

Davis does not exploit sufficiently two documentary editions that speak volumes about original intent in the founding era – namely, the documentary histories of the Constitution's ratification and the First Federal Congress.[9] The former is useful in determining the ratifiers' original intent on church-state relations and the state of their thinking and knowledge concerning religion's role in history and American life. The latter contains the most authoritative texts of the debates and proceedings of Congress on the adoption of the Bill of Rights.

Other questions arise. Davis asserts that the colonies "probably" would not have revolted had they not believed that they were God's agents. Political, constitutional, and economic grievances were enough to continue Americans on a revolutionary course begun long before 1775. Were founders and framers as aware of how their deeds advanced the cause of religious freedom as Davis believes? Did they have a plan? Nor are their voices sufficiently evident on the question of religious despotism, although Davis's contention about this despotism's impact on them is well-founded. He is among the few historians who have tried to explain why Britain's attempt to establish an Episcopal bishop in America is not listed among the grievances in the Declaration of Independence. His answer – that religious liberty was not at stake because the colonies controlled religion locally (pp. 110-112) – is not entirely persuasive in light of the intense hostility aroused by that attempt.[10] Perhaps, Congress believed that the issue of religion was best left alone. Moreover, 34 of the 56 signers of the Declaration were Episcopalians, while 45 of the 68 delegates in Congress on 4 July 1776 were Episcopalians.[11]

These criticisms aside, Derek H. Davis throws open a long-neglected area that contains relevant and useful information on the framers' and founders' original intent respecting church-state relations. Historians and constitutional lawyers can expand his findings, while jurists can draw upon a significant "reservoir of material" (p. 23). Most important, Davis shows that the founders and framers neither intended to entrench religion in the federal state nor to establish a secular state.

Notes

[1]. Because, this linkage (though interesting and relevant), as Davis admits, makes his study "considerably more complex" (p. x), this reviewer has elected to focus on the founding era. Davis's book is based upon his 1993 doctoral dissertation, completed at the University of

Texas at Dallas.

[2]. Davis might have made another point more strongly – that the framers of the Bill of Rights and the state declarations of rights "were vague if not careless draftsmen" – a point stressed by constitutional historian Leonard W. Levy. *See especially* Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment*, 2nd ed. (Chapel Hill: University of North Carolina Press, 1994); and Leonard W. Levy, *Origins of the Bill of Rights* (New Haven and London: Yale University Press, 1999). In October 1999 I reviewed for H-LAW the latter book, which is especially harsh on the framers' drafting abilities.

[3]. A valuable work, unavailable to Davis when he was writing his book, that also recognizes that these are dangerous times for church-state relations and that calls for a heightened presence of religion in American life is Nancy L. Rosenblum, ed., *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton, N.J.: Princeton University Press, 2000), an anthology whose contributors include political theorists, philosophers, legal scholars, and social scientists. In her introduction, Rosenblum states that "religious challenges are the most pervasive and powerful" challenges facing liberal democracy today (p. 3). The anthology's contributors consider the "proper bounds" that should exist between church and state in "religiously pluralist democracies"; they oppose absolute separation of church and state; and they "share the aim of democratic accommodation of religion" (p. 4).

[4]. For a discussion of these books and articles, see Gaspare J. Saladino, "The Bill of Rights: A Bibliographic Essay," in Patrick T. Conley and John P. Kaminski, eds., *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison, Wis.: Madison House, 1992). For pithy comments on major accommodationist and separationist works, see the selected bibliography in Levy's *The Establishment Clause* (note 2, above).

[5]. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996); and Jack N. Rakove, ed., *Interpreting the Constitution: The Debate over Original Intent* (Boston: Northeastern University Press, 1990).

[6]. Charles P. Hanson, *Necessary Virtue: The Pragmatic Origins of Religious Liberty in New England* (Charlottesville and London: University Press of Virginia, 1998). See also Charles H. Metzger, *The Quebec Act: A Primary Cause of the American Revolution* (New York: The United States Catholic Historical Society, 1936); and Francis D. Cogliano, *No King, No Popery: Anti-Catholicism in Revolutionary New England* (Westport, Conn., and London: Greenwood Press, 1995).

[7]. Allen Jayne, *Jefferson's Declaration of Independence: Origins, Philosophy, and Theology* (Lexington: University Press of Kentucky, 1998); and Pauline Maier, *American Scripture: Making of the Declaration of Independence* (New York: Alfred A. Knopf, 1997).

[8]. See Ronald Hoffman and Peter J. Albert, eds., *Religion in a Revolutionary Age* (Charlottesville and London: University Press of Virginia, 1994).

[9]. Merrill Jensen, John P. Kaminski, Gaspare J. Saladino et al., eds., *The Documentary History of the Ratification of the Constitution*, 15 vols. to date (Madison, Wis.: State Historical Society of Wisconsin, 1976–); and Linda Grant De Pauw, Charlene Bangs Bickford, Kenneth R. Bowling et al., eds., *Documentary History of the First Federal Congress, 1789-1791*, 14 vols. to date (Baltimore and London: The Johns Hopkins University Press, 1972–). The latter project has also published Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Baltimore and London: The Johns Hopkins University Press, 1991). Another collection of valuable documents is Neil H. Cogan, ed., *The Complete Bill of Rights: The Drafts, Debates,Sources, and Origins* (New York and Oxford, Eng.: Oxford University Press, 1997), which briefly traces the origins of the establishment and free exercise clauses of the First Amendment, using primary sources, dating back to the American colonial charters and coming up through the First Federal Congress.

[10]. See Arthur Lyon Cross, *The Anglican Episcopate and the American Colonies* (1902; reprint ed., Hamden, Conn.: Archon Books, 1964); Carl Bridenbaugh, *Mitre and Sceptre: Transatlantic Faiths, Ideas, Personalities, and Politics, 1689-1775* (New York: Oxford University Press, 1962); and Peter M. Doll, *Revolution, Religion, and National Identity: Imperial Anglicanism in British North America, 1745-1795* (Madison and Teaneck, N.J.: Farleigh Dickinson University Press, 2000).

[11]. For these figures, see J. C. D. Clark, *The Language of Liberty, 1660-1832: Political Discourse and Social Dynamics in the Anglo-American World* (Cambridge, Eng., and New York: Cambridge University Press, 1994), 339n. Clark also notes that Episcopalians were badly split on the question of independence. The fourth section of his book considers the American Revolution as a war of religion. On this theme, see also chapter 7 of Jon Butler, *Awash in a Sea of Faith: Christianizing the American Peo-*

ple (Cambridge, Mass., and London, Eng.: Harvard University Press, 1990).

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