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Church-State Constitutional Issues: Making Sense of the Establishment Clause and That Godless Court?: Supreme Court Decision on Church-State Relationships (book reviews)

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CHURCH-STATE CONSTITUTIONAL ISSUES: MAKING SENSE OF THE ESTABLISHMENT CLAUSE. By Donald L. Drakeman. Westport, Conn.: Greenwood Press 1991. Pp. 143, ix. \$55.00. ISBN: 0-313-27663-3.

THAT GODLESS COURT?: SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS. By Ronald B. Flowers. Louisville, Ky.: Westminster: John Knox Press 1994. Pp. 192, xi. Paper. \$18.95. ISBN: 0-664-25562-0.

In the beginning (that is, 1947), there was the word. And the word was "separation." And all the prophets agreed to promulgate the word. But this did not ease men's souls, for some of the prophets were heretics, promulgating false doctrines. And the scribes wrote mightily to assist the prophets, but the word was cast out, at least in some quarters (and instances). And though many scribes continued to write mightily to promote the word, false doctrines multiplied, and the heretics drew succor from the testimony of their own scribes, and the prophets became discouraged. And much time passed, and the schism grew. And darkness settled upon the land.

For those of us who toil in the garden of religious liberty scholarship, the Court's musings and commands concerning religious liberty offer a lifetime's worth of writing and ruminating. The tangled mess that is religious liberty jurisprudence can be pruned, reshaped or hacked to pieces. Scholars of the Religion Clause(s) get to play their favorite role, that of pedant, or, more generously, constructive critic. When a majority of the Court explicitly rejected the touchstone of separation for the multipart *Lemon*¹ test, the opportunity for the scholar to teach (or lecture) grew apace. By mid-1990, the Court had all but rejected the "compelling interest" standard enunciated in *Sherbert v. Verner*² and found itself badly divided on the appropriate standard by which to review Establishment Clause claims.³ If the Chinese character for crisis and opportunity is the same, then the Court's crisis provided the scholar's opportunity. The sharp disagreement by members of the

1. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

2. 374 U.S. 398, 402-403 (1963). The *Sherbert* standard was rejected as a general rule and made applicable to a minimal number of instances in *Empl. Div. v. Smith*, 494 U.S. 872, 884 (1990).

3. In both *Texas Mithy. v. Bullock*, 489 U.S. 1 (1989) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court was unable to muster a majority opinion.

Court concerning the contours of religious liberty during the 1980s and 1990s predictably generated a tremendous number of books and law review symposia dedicated to the subject.

Two books published during this time period are the subject of this review. Both Donald L. Drakeman and Ronald B. Flowers cover much of the same material, in much the same fashion. As good teachers, both see the goal of their books as providing clarification to those befuddled by the Court's varied and opaque pronouncements. Their goals are the classically instrumental goals of the scholar. For Drakeman, "my goal is to complete the circle in church-state studies by drawing together all of the rich resources developed over the centuries in several scholarly fields." (Drakeman, viii-ix) Flowers states that "[t]he goal of this book is to try to help people . . . to better understand the Court and its church-state opinions." (Flowers, ix) The people he is trying to help are "clergy and laypeople within religious communities," (Flowers, ix) and I infer from his Introduction that Flowers is specifically referring to Protestant clergy and church members.

Both Drakeman and Flowers initially take a path well worn by earlier religious liberty scholars. The authors are guides in the Museum of American Religious Liberty, offering the many first-time visitors some pertinent background on the major moments of the history of the law of religious liberty, and giving us those tidbits of information that only the experienced guide will have at the ready. Our guides, however, take us on this tour for different purposes. Drakeman organizes his tour as a prologue to his suggested revision of the interpretation of the Establishment Clause, at which point the beginner may be left behind. Because Flowers is writing almost exclusively for those first-time visitors, he is a font of information. However, because he wants to convince his nonspecialist readers that the Supreme Court was not "godless" in the 1960s, but was (as of 1994) placing religious freedom in great peril, our tour guide is also a missionary, looking to convert his readers.

Drakeman's book is the more effective of the two. He completes his task in four relatively short chapters. Drakeman begins with a chronological summary of the Court's Establishment Clause cases, and then spends the next two chapters analyzing the debate about the historical meaning of the Clause and its interpretation to 1947. Like many scholars before him, Drakeman then uses this rather elaborate introduction to get to what interests him most: "a complete revamping of the approach we use to make decisions in establishment clause cases." (Drakeman, 109) Drakeman first notes the extraordinary difficulty of

locating the appropriate interpretive framework for interpretation. Although he occasionally uses a straw man argument (for example, when discussing a “totally textual approach” to interpretation) to nudge the reader to his conclusion, Drakeman effectively reminds the reader that both the “separationist” and the “nonpreferentialist” largely agree on originalism as the touchstone of interpretation. They merely disagree about who constitutes a “framer” and what constitutes proper evidence of the original intent of those framers. He is also convincing that the task of finding interpretive frameworks is not for the faint-hearted.

On to Drakeman’s proposal. Like Gaul, religious liberty is divided into three parts. There are, according to Drakeman, “pure establishment cases,” “pure free exercise cases,” and “mixed First Amendment cases.” (Drakeman, 113) The first category requires two inquiries: Is the activity religious, and, if so, is the activity an act respecting an establishment of religion? Drakeman understands that answering the first question will often be quite difficult. His solution, which strikes me as rather facile, is to look at a combination of elite and popular consensus to determine whether the activity is a religious activity. Because the Court is an elite body, and because it doesn’t take opinion polls, it seems likely that an appeal to consensus will result in the members of the Court consulting themselves.

Drakeman then discusses his proposed answer to the second, or “harder question.” His solution is Justice O’Connor’s “endorsement” standard. From our standpoint a decade later, this seems like no solution at all. Because Justice O’Connor’s vote is critical to create any majority in religious liberty cases, the endorsement test has been used regularly by the Court since Drakeman’s book was published, but the test has not produced jurisprudential clarity. For example, in *Capitol Square Review and Advisory Board v. Pinette*,⁴ Justice O’Connor concluded that permitting a cross to be placed on state-owned land was not unconstitutional because the reasonable observer would not view the display, in context, as endorsing religion.⁵ On the other hand, Justice Stevens concluded that because *some* reasonable observers would attribute to the state a religious message, it was unconstitutional to permit the cross to be displayed on government land.⁶ Justice Stevens’ apparent misapplication of the endorsement standard required Justice O’Connor to elaborate on the knowledge available to the hypothetical

4. 515 U.S. 753 (1995).

5. *Id.* at 782 (O’Connor, Souter & Breyer, JJ., concurring in part and concurring in the judgment).

6. *Id.* at 807 (Stevens, J. dissenting).

reasonable observer, an elaboration that obviously failed to persuade Justice Stevens.⁷

Two considerations work in Drakeman's defense. First, when Drakeman wrote, the endorsement approach was quite popular among academics. Second, Drakeman chooses to operate in a restricted environment. His proposal is offered in light of "the establishment clause where it is and [is] not [an] attempt to erase the many decisions that make up its checkered history." (Drakeman, 109) As for "mixed" cases, Drakeman suggests that "the free exercise claim should prevail unless the problem under the establishment clause is compelling." (Drakeman, 117) Drakeman then proposes results for his approach in a number of different types of cases. In general, he is more "accommodating" than the Court has been, but acknowledges that he has met his match concerning the issue of "parochial school aid." He suggests the Court "will have to use its best judgment," not the clearest standard available, but also states, "I would tend to defer to the legislature's judgment." (Drakeman, 126)

Flowers begins his introduction by noting that those opposed to the school prayer decisions claimed the Court was "godless." He asks, "Is that a fair representation of the Court?" (Flowers, ix) *That Godless Court?* is an extended brief by a "rather strict separationist" (Flowers, x) answering this question in the negative, at least if "godless" is defined as anti-religious. For Flowers, strict separation "will provide the best conditions for religion to flourish." (Flowers, x) The school prayer decisions themselves were mischaracterized as hostile to religion, (Flowers, 89) and the Court's policy of "strict separation" was used by demagogues to proclaim falsely that the Court was "godless." But Flowers' tale is not about a monolithic and misunderstood Court, but of two Courts. The first Court protected religious liberty by following a policy of strict separation. The second Court, one whose members included "the justices appointed by Presidents Reagan and Bush," followed a path of majoritarianism and accommodationism and "put religious freedom in the greatest peril!" (Flowers, 129)

After introducing the reader to the Supreme Court, Flowers takes us on a seven chapter tour of the history of religious liberty. The tour includes a brief history of religious liberty in America during the seventeenth and eighteenth centuries. It then continues with a short description of religious liberty cases before 1963, a discussion of the Free Exercise Clause, church property, employment discrimination and

7. *Id.* at 810.

conscientious objection cases, and examination of Establishment Clause issues, most predominantly religion and education.

Flowers begins his final chapter with the statement, "In the preceding chapters the decisions of the Court have been described . . . with little commentary." (Flowers, 126) Thus, he suggests the tour was descriptive, and now our guide will offer his prescriptions. But Flowers is not merely a descriptive guide. His commendations and criticisms in his tale of the religious liberty jurisprudence of the two Courts (and the historical materials used by those two Courts) pepper Chapters 2-8. For example, Flowers concludes that "[a]pparently the majority of Americans were satisfied with the Constitution's virtual silence on the question of religion, for it was ratified in 1789." (Flowers, 16) "[T]he final language of the First Amendment . . . took the 'separationist,' or 'no aid,' approach The government was not to establish one religion, neither was it to establish multiple religions." (Flowers, 17) Flowers praises Justice Jackson's dictum in *West Virginia Board of Education v. Barnette*⁸ as "*dictum* at its finest, by which all Americans should be instructed!" (Flowers, 27) The compelling interest test of *Sherbert v. Verner*⁹ is defended on the grounds that "[t]he existence of the Free Exercise Clause in the Constitution demands that it be so!" (Flowers, 32) *Employment Division v. Smith*¹⁰ is a "disastrous decision," (Flowers, 36) which served as a "virtually devastating blow" to religious liberty. (Flowers, 44) The Supreme Court was not showing hostility to parochial schools when it rejected attempts by states to provide aid to those schools; it was merely doing its duty as required by the Establishment Clause. (Flowers, 75) *Marsh v. Chambers*¹¹ is criticized as "an erosion of a strict (and correct) interpretation of the Establishment Clause." (Flowers, 109) Our guide is an advocate, not merely in Chapter 9, but throughout *That Godless Court?*

In the tale of two Courts, the first Court was wrongly labeled "godless" and hostile to religion when it was controlled by a devotion to religious freedom. The second Court "has put religious freedom in the greatest peril." (Flowers, 129) "From both the free-exercise and establishment sides, religious freedom is under such serious attack that it is in grave danger." (Flowers, 138) "Religious freedom in our time is in great peril." (Flowers, 43) Flowers lays the blame for this turn of events on that all-purpose villain, "the Christian Right." Because the Christian

8. 319 U.S. 624 (1943).

9. 374 U.S. 398 (1963).

10. 494 U.S. 872 (1990).

11. 463 U.S. 783 (1983).

Right (always to be capitalized) “contributed significantly” to the elections of Presidents Reagan and Bush, they decided, “[i]n part to appease the Christian Right,” to appoint “strict constructionist” judges and justices. (Flowers, 128) This led directly to *Employment Divison v. Smith*, which put religious freedom in “extreme jeopardy” and “at significant risk.” (Flowers, 133) Flowers then turns to the “flash point” of the Establishment Clause, to attack the more recent “accommodationist” Court. Accommodationists are not only guilty of bad history, they naively and wrongly believe that accommodation of religion will aid religion. Instead, Flowers argues, accommodation “will have the opposite effect.” (Flowers, 143)

Reading Flowers after reading Drakeman reminds one why the debate over the meaning and interpretation of the Religion Clauses is both contentious and banal. As noted above, Drakeman discusses a number of interpretive frameworks before offering his proposal. Like Flowers, Drakeman rejects “original intent” as a touchstone for interpreting the First Amendment, and like Flowers, Drakeman concludes that there may exist no original intent whatsoever. (Flowers, 134-135; Drakeman, 98-99) But Drakeman claims that both accommodationists and separationists have falsely worshipped the statue of original intent. Flowers offers the conclusion that “[t]he historical fact is that [the framers] were familiar with the very same kind of nonpreferential, nondiscriminatory government aid to religion that . . . accommodationists argue for,” but because they use the phrase “no law respecting an establishment,” “no aid can be given.” (Flowers, 135) Both find favor with Justice O’Connor’s endorsement test (Drakeman, 115; Flowers, 136); both appear to consider constitutional some benefits to religions if religions are benefited only to the extent other charitable entities are included (Drakeman, 116; Flowers, 113); both disagree with the legislative chaplain case (Drakeman, 113; Flowers, 109); and both equate the mandates of the Constitution with the Supreme Court’s decisions interpreting the Constitution. (Drakeman, 110; Flowers, ix)

Although Drakeman appears less likely than Flowers to hold unconstitutional certain governmental actions implicating religion, neither wishes to change radically the landscape of the law of religious liberty. The difference lies in the tone of their proposals. For Drakeman, a slight reform is necessary, for the Court has too often elevated the concerns of establishment over the equally weighty concerns of individual free exercise of religion. All that is necessary is that when cases encompass both Establishment and Free Exercise Clause concerns, the balance should tip, if ever so slightly, to the free

exercise interest. For Flowers, the sky is falling. The candle of religious liberty is about to be extinguished. (This tone may suggest a reason for Flowers' irritating use of the exclamation point throughout the book.) Despite Flowers' excoriation of the historical study of accommodationists, he wants to prove that the framers really did envision a regime of separation. Thus, "[th]e government" was not to establish "multiple religions." (Flowers, 17) At the very least, that locution misleads, for several of the New England states retained what they believed was a multiple establishment for years after the adoption of the Bill of Rights. Additionally, Drakeman notes that there was no national religious establishment issue when the First Amendment was proposed and adopted. (Drakeman, 66) Flowers' final rhetorical flourish, common to much religious liberty scholarship, is the appeal to authority, quoting James Madison and Robert Jackson in opposition to accommodationism. Drakeman more modestly, and realistically, concludes that "I could, if pressed, invoke the acts and deeds of numerous Founding Fathers and other influential people in support" of his proposal. (Drakeman, 128) "But that would be no more historically legitimate than the many appeals to the framers that we discussed earlier." (Drakeman, 128)

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