A Lay Person's Guide to Church-State Law (Review of That Godless Court?, by Ronald B. Flowers)

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Book Review

A Lay Person’s Guide to Church-State Law

That Godless Court? Supreme Court Decisions
on Church-State Relationships
by Ronald B. Flowers

I. INTRODUCTION

That Godless Court?, by Ronald B. Flowers, presents the history of church-state relations in the United States through the use of Supreme Court decisions. Defending his position as a strict separationist in the area he refers to as the “relationships between religion and civil authority,” Flowers is quick to point out that “[s]trict separation is not hostile to religion . . . but will provide the best conditions for religions to flourish . . . and [will] maximize the free exercise of religion.”¹ Flowers asserts that the church-state debate should not focus on whether the government can or should interfere with individual religious actions, but rather on what level of governmental interference is justified in preventing or limiting religious freedom.²

This Book Review examines, in particular, Flowers’s advocacy of the use of the compelling state interest test and the Religious Freedom Restoration Act to reconcile church-state relationships and concludes that his discussion fails to consider several key arguments which show that these concepts lack constitutional foundation. This Review also concludes that, while Flowers's book provides a practical and helpful overview of church-state issues prior to 1993, its lack of substantive analysis may misguide those readers who rely on its simplicity.

¹. RONALD B. FLOWERS, THAT GODLESS COURT? SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS at x (1994). Flowers is a professor of religion and chair of the Department of Religion at Texas Christian University in Fort Worth, Texas.
². See id. at 129.
Part I of this Review provides an overview of Flowers’s approach to the church-state debate and the foundation for his views as a strict separationist. Part II then examines Flowers’s advocacy of the twice-defunct compelling state interest test\(^3\) and questions his support of the Religious Freedom Restoration Act\(^4\) with some of the key criticisms that have been made against it. Part III briefly examines the current status of the church-state debate in light of the Supreme Court’s decision in City of Boerne v. Flores.\(^5\)

II. APPROACHING THE CHURCH-STATE DEBATE

In his introduction, Flowers establishes that his goal in That Godless Court? is to educate the clergy and lay people on church-state issues through the Supreme Court’s work in this area.\(^6\) His approach in achieving this goal is quite simple; he devotes the majority of his book to succinctly presenting the extensive historical background of the church-state debate. Keeping in mind that his intended audience is not legally trained, Flowers explains the structure of the federal court system as well as the process by which the Supreme Court determines the cases that it will review in the first chapter.\(^7\) He then explains the formation of the religion clauses in the First Amendment by reflecting on the development of religion in colonial America.\(^8\)

At this point in his book, Flowers provides a chronological overview of numerous Supreme Court cases and decisions that have proven to be pertinent and have contributed to the current status of church-state issues in the United States.\(^9\) Flowers objectively provides this historical information and conscientiously distinguishes between the cases and decisions regarding the First Amendment’s Free Exercise Clause and those regarding its Establishment Clause. Not until the last chapter of his book does Flowers present his own perspectives.

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6. See FLOWERS, supra note 1, at ix.
7. See id. at 1-8.
8. See id. at 9-19.
9. See id. at 19-125.
regarding the ongoing church-state debate and provide any insight into the basis for his opinions.\textsuperscript{10} Perhaps because Flowers's work is geared toward the clergy and lay people, he falls short on substantive analysis and discussion of his position and rather long on historical narrative.

In the final chapter of the book, entitled “Flash Points and the Future,” Flowers clearly establishes his position that “the maximum amount of religious liberty is consistent with the Constitution and best for religious groups and American life in general.”\textsuperscript{11} His analysis encompasses four separate and very brief discussions.

First, he discusses the role that the Christian Right movement has played in the church-state debate and the impact that this group has had on that debate and in politics in general. Flowers supports much of what the Christian Right has done to address the “moral decline of the nation . . . [and] moral corruption in every stratum of society,”\textsuperscript{12} on the belief that “[t]he First Amendment was designed to separate church from state, not religion from government.”\textsuperscript{13} Flowers suggests that the Christian Right significantly influenced the elections of Presidents Ronald Reagan and George Bush as well as these presidents’ subsequent efforts to create and maintain a conservative Supreme Court.\textsuperscript{14} However, Flowers argues that the political efforts of the Christian Right essentially defeat the spirit of separation, since they are attempting to “remake the country in [their] own [moral and religious] image”\textsuperscript{15} in violation of Article VI of the Constitution.\textsuperscript{16}

Next, Flowers addresses what he views as the appropriate response to the issue presented in the Introduction, specifically, the ideal level of interference the government should have in religious action and when that interference is warranted. Flowers proposes that the compelling state interest test that resulted from the Supreme Court’s decision in \textit{Sherbert v. Verner}\textsuperscript{17} is the best approach to resolving this issue. In support-

\begin{footnotesize}
\begin{enumerate}
\item See id. at 126-45
\item Id. at 126.
\item Id. at 127.
\item Id.
\item See id. at 128.
\item Id. at 127.
\item See id. at 127-28.
\item 374 U.S. 398 (1963). The Sherbert test essentially balances the government’s
ing this approach, he attacks the merits of the Court’s decision in Employment Division, Department of Human Resources of Oregon v. Smith, which subsequently abolished the compelling state interest test. Flowers views the demise of this test as having a detrimental effect on an individual’s right to be free from governmental restraints on religious exercise. Finally, he touches on the merits of the Religious Freedom Restoration Act as a legislative response to the Smith decision and touts it as the law that makes “[r]eligious liberty . . . presumably secure again.”

Flowers then discusses what he views as the appropriate interpretation of the Establishment Clause in the church-state debate. He rejects the “original intent” approach taken by accommodationists and favors a position that presupposes a limited government. Flowers asserts that “the attempt to discern the intent of the authors of the First Amendment . . . is flawed” and suggests that “the principle behind the Establishment Clause that must be applied . . . is that the government should refrain from extending itself into religion, neither hindering it nor aiding it, even if that aid can be given in a nondiscriminatory, evenhanded way.”

Flowers concludes with a review of recent cases and discusses the problems that can arise when government aids religion. First, he asserts that when government gets involved with religious institutions by giving them money, the inevitable result is that the government will also control or supervise that institution. Second, he suggests that when religious groups ask for government assistance, they trivialize their beliefs by formulating secular reasons to justify receiving assistance. Third, Flowers states that

interest for abolishing the religious activity at issue against the religious individual’s interest in maintaining the activity through a series of questions. Flowers outlines this test in chapter four of his book. See id. at 30-32.
  19. See id.
  20. See FLOWERS, supra note 1, at 130-33.
  21. Id. at 133.
  22. See id. at 133-38.
  23. Id. at 134.
  24. Id. at 135.
  25. See id. at 138.
accreditationists ignore the fact that “every taxpayer is consequently required to pay for what he or she does not believe” when the government funds religious activities with public money. Finally, Flowers again asserts that strict separation is not hostile to religion, but that it is necessary to allow religions to grow based on their respective principles and beliefs, without being dependent on the whims of the government.

III. THE RELIGIOUS FREEDOM RESTORATION ACT: A HASTY RESPONSE TO SMITH

In Smith, the Supreme Court essentially abolished the compelling state interest test when it held that Oregon’s law, which prohibited the use of peyote in religious ceremonies of the Native American Church, did not violate the Free Exercise Clause. The Court held that the Free Exercise Clause does not exempt individuals from complying with “a valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or proscribes).” According to Flowers, the Smith decision disregarded the burden that certain individuals may encounter when carrying out their religious beliefs and, therefore, had

27. FLOWERS, supra note 1, at 141.
28. See id. at 143.
29. The compelling state interest, or “Sherbert,” test was set forth in Sherbert v. Verner, 374 U.S. 398 (1963). Sherbert involved an employee who sued for unemployment compensation benefits after being discharged by her employer for refusing to work Saturdays based on her beliefs as a Seventh-Day Adventist. The Court held that the state “may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest.” Sherbert, 374 U.S. at 410. The Court stated that to “withstand [the employee’s] constitutional challenge,” the state had to show that:

[ Sherbert’s] disqualification as a beneficiary represent[ed] no infringement by the State of her constitutional rights of free exercise, or any incidental burden on the free exercise of [the employee’s] religion [was] justified by a “compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.”

Id. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

The Court further articulated that the “compelling state interest” must not just be a mere showing “of a rational relationship to some colorable state interest [but that] in this highly sensitive constitutional area, ‘only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.”” Id. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

31. Smith, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).
highly “disastrous effects on religious freedom.” From the perspectives of Flowers and other strict separationists, Smith might as well have denounced the Free Exercise Clause itself.

In November of 1993, partly in response to the great dissatisfaction with the Court’s holding in Smith, Congress enacted the Religious Freedom Restoration Act (RFRA). Essentially, RFRA legislatively reinstated the compelling state interest test that the Court eliminated in Smith. The purpose of RFRA was (1) to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.33

When RFRA was introduced in Congress, Flowers thought it was ironic that “the American people would have to petition Congress to restore what the founders of the country thought they had guaranteed through the Free Exercise Clause.” Although it is clear from Flowers’s book that he supports RFRA wholeheartedly, he fails to discuss at any length the motivation behind his support. The only basis that he offers as to why he believes RFRA is good for religion is that RFRA will allow governments at all levels to interfere with individuals’ religious practices only when there is “a legitimate public-good interest of great importance that could be accomplished in no other way.”35

Although Flowers published his book several years prior to the RFRA’s demise in City of Boerne v. Flores,36 he should have still considered in greater depth the criticisms of RFRA in his discussion. In weighing the potential benefits of RFRA, Flowers should have weighed the potential drawbacks and problems that such legislation could impose as well. By failing to do so, Flowers’s brief support of RFRA proves to be problematic and flawed in the end. Contrary to the separationists’ belief that RFRA would make religious liberty secure again, RFRA ultimately proved to

32. FLOWERS, supra note 1, at 130, 133.
34. FLOWERS, supra note 1, at 133.
35. Id.
be a hasty response that created new problems. Since RFRA was directed at putting bite back into the Free Exercise Clause by restricting state interference with individuals’ actions under the clause, supporters of RFRA mistakenly believed that it was constitutionally mandated. However, when the Supreme Court decided Smith, it mentioned that although the legislature can make exceptions in generally applicable laws for certain religious practices, such exceptions are not required by the Free Exercise Clause.37 Further, critics of RFRA have asserted that it is unconstitutional on three separate grounds: first, RFRA gives religious groups more constitutional latitude than was intended by the Constitution; second, RFRA poses federalism problems; and third, Congress overstepped its constitutional bounds by enacting RFRA, thereby undermining the judgment and credibility of the Court.38

Christopher L. Eisgruber and Lawrence G. Sager illustrate the first problem with the RFRA by pointing out that accommodating religions under the Constitution does not require “the state to confer privileges upon religious believers indiscriminately.”39 To allow religious individuals exemption from all laws of general applicability that may interfere with their religious activities would favor these individuals above non-religious individuals. Such favoritism seems to defeat the spirit of the Constitution. Kevin F. O’Shea likewise suggests that “[n]eutral treatment should be the goal, even if religious expression is incidentally burdened in the process.”40

The second problem raised by RFRA is that of federalism. When the Supreme Court decided Smith, it provided that states could protect certain religious practices affected by laws of general applicability through state exceptions. However, when Congress enacted RFRA, it essentially precluded states from deciding how best to accommodate, if at all, the religious

40. O’Shea, supra note 38, at 1148.
practices of its citizens. As a result, RFRA removes accountability from the federal level and places it squarely upon the state governments to take responsibility for a federal statute that fails to take into consideration the interests and needs of their citizens. In addition, critics argue that Congress exceeded the scope of power granted by the Fourteenth Amendment when it enacted RFRA.

Finally, and perhaps most importantly, RFRA questions the integrity of the Supreme Court as well as judicial authority under the Constitution. It has been recognized and oft repeated that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” When Congress enacted RFRA to reinstate the compelling state interest test, it attempted to overturn the Court’s decision in Smith with one fell legislative swoop. “By demanding that the Court use constitutional concepts according to statutory instruction, Congress interferes with the judiciary’s authority and obligation to develop an autonomous jurisprudence.” This action by Congress defeated the ideal of separation of power among the three branches of the government as created by the Constitution and tips the power significantly toward Congress. The Court specifically stated that its refusal to broaden the application of the compelling state interest test was based on its unworkable structure outside of its original scope. It is the Court’s responsibility to interpret the Constitution and clarify constitutional rights to which individuals are entitled. Through this judicial process, the Court provides the guidance necessary for lower courts to reach consistent and predictable results in similar cases. In enacting RFRA, Congress showed an extreme lack of deference to the Court and the Constitution and “impermissibly attempted to specify a ‘rule of decision’ for the courts.”

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41. See Eisgruber & Sager, supra note 38, at 466.
42. See id. at 467.
43. See id. at 461 (“The fourteenth amendment’s enforcement clause is not... a blank check empowering Congress to pass any legislation connected to liberty or citizenship.”). See also Lupu, supra note 34, at 577-85 (suggesting that RFRA’s reliance on the Fourteenth Amendment was not well-substantiated).
44. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
45. Eisgruber & Sager, supra note 38, at 470.
47. Eisgruber & Sager, supra note 38, at 470.
IV. THE EFFECT OF BOERNE ON RFRA AND THE CHURCH-STATE DEBATE

City of Boerne v. Flores, 48 decided by the Supreme Court in 1997, subsequently undermined Flowers’s position regarding RFRA and illustrates his failure to address important concerns in his defense of RFRA. In Boerne, the Supreme Court held that RFRA exceeded the scope of congressional authority granted in Section 5 of the Fourteenth Amendment. 49 In Boerne, the Archbishop of St. Peter Catholic Church in Boerne, Texas, was denied a permit to enlarge the church building because of the city’s zoning ordinances regarding historical landmarks. 50 The Archbishop relied on RFRA and challenged the zoning ordinance, claiming that it was “a proper exercise of Congress’ remedial or preventive power.” 51 However, the Court held that “RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.” 52 The Court emphasized the precedent set in Marbury v. Madison 53 that it is the Court’s duty to determine whether an act of Congress has exceeded its constitutional scope, concluding that Congress had indeed exceeded the limits of its power in this situation. 54

Flowers’s position with regard to RFRA is more consistent with the analysis set forth by Justice O’Connor’s dissent in Boerne. Like Flowers, Justice O’Connor believed that the Court’s opinion in Smith was “an improper standard for deciding free exercise claims.” 55 Justice O’Connor stated that the Free Exercise Clause is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment. “Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct con-

49. See id. at 529-36.
50. See id. at 511-12.
51. Id. at 529.
52. Id. at 532.
53. 5 U.S. (1 Cranch) 137, 177 (1803).
54. See id. at 536.
55. Id. at 546 (O’Connor, J., dissenting).
flicts with a neutral, generally applicable law."^{56}

Although Flowers argues that RFRA would be an ideal preventative and remedial measure against burdensome governmental interference on an individual’s exercise of religious beliefs, he fails to admit that such an act has the potential to extend far beyond its intended reach. The Court in Boerne addressed this particular problem when it pointed out that the RFRA essentially allows individuals to challenge any law that imposes a burden on some aspect of their religious exercise, but that such claims will be difficult for states to contest.\textsuperscript{57} Based on Flowers’s arguments, one might surmise that Boerne would have been an ideal situation within which to reexamine the Court’s holding in Smith in favor of reinstating the compelling state interest test. However, the Court obviously did not believe this was necessary and upheld its decision from Smith by ruling that RFRA was unconstitutional.

V. CONCLUSION

As a result of Boerne, courts are once again left to decide Free Exercise Clause cases based on the precedents set by the Supreme Court, rather than according to legislative mandate. However, eliminating RFRA and reinstating the standard, or the lack thereof, from Smith, does not lay the church-state debate to rest for good. Although RFRA failed to achieve its goal, Smith was not faultless. In fact, Smith demands almost no scrutiny by the courts when considering challenges to laws conflicting with the exercise of certain religious activities. As a result, courts have wide discretion in making their decisions. With regard to the future of the church-state debate in light of Smith and RFRA,

  
  two bad ideas do not make a good one. Neither Smith nor the RFRA adequately addresses the significance of the constitu-

\begin{itemize}
  \item[56.] Id.
  \item[57.] See id. at 533-34. The Court also noted:
  
  RFRA’s substantial burden test, however, is not even a discriminatory effects or disparate impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulation at issue here, imposes a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.

  Id. at 535.
\end{itemize}
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Nor does either of them reflect a realistic assessment of how law actually functions and develops. . . . [E]fforts to establish a contextual meaning are bound to fail. Over time, both Smith and the RFRA will be constructed away as text, fact, and policy collide. . . .

In conclusion, That Godless Court? presents an in-depth look into the history and status of the church-state debate in the United States and establishes, at least for lay people and clergy, a practical foundation from which to delve further into the debate. Flowers provides only a cursory analysis of the key arguments surrounding church-state issues, however, and leaves out some important issues in this area. As a result, readers who seek a comprehensive overview of church-state issues may potentially be misled by the unbalanced and selective discussion Flowers provides in his final chapter.

Hyeyeong Bang-Thompson