

**Mere Creatures of the State? Education, Religion and the Courts:
A View from the Courtroom**

William Bentley Ball

Notre Dame, Ind.: Crisis Books, 1994, 132 pp.

In *Mere Creatures of the State*, William Bentley Ball shows a keen understanding of the impact of abstruse legal doctrines concerning religion and education on individual students and families across America. Unlike so many other commentators, however, Ball developed his understanding of those issues while playing a special role in the making of those doctrines. In fact, he has argued some of the most famous (and infamous) Supreme Court educational religious liberty cases we have, including *Lemon v. Kurtzman* (1970), *Wisconsin v. Yoder* (1972), and *Zobrest v. Catalina Foothills School District* (1993).

This book tells the stories behind those cases, giving us a “view from below,” as Ball puts it, of the individuals and families whose names are immortalized in the reports of Supreme Court decisions. We learn about Ball’s carefully built relationship with the Amish defendants in *Wisconsin v. Yoder*, for instance, and the struggles faced by the parents of Jim Zobrest, who wanted to use federal funds under the Education of the Handicapped Act to pay for an interpreter for their deaf son who attended a Catholic school. Ball lays out those and other emotionally trying stories in his sincere and mostly successful effort to demonstrate the need to protect religious liberty in education.

Although *Mere Creatures* is a compelling collection of Ball’s personal experiences as a defender of religious liberty in the educational sphere, it is also a book about constitutional interpretation. The interpretive models Ball advocates are not new, but are parallel to the constitutional views of the bulk of “religious libertists” on the left and right. (“Religious libertists,” who essentially advocate unfettered religious freedom accompanied by frequent governmental accommodation, should not be confused with the separation-of-church-and-state crowd, of which Ball is definitely not a part.) However, Ball’s book provides a valuable service to the lay reader by explaining the religious libertists’ narrow interpretation of the First Amendment’s establishment clause (“Congress shall make no law respecting an establishment of religion”) and broad reading of the free exercise clause (“or prohibiting the free exercise thereof”).

Ball is at his best when he is criticizing the Court’s establishment clause jurisprudence. With an informative history of Pennsylvania’s extensive legislative battles over state financial assistance in various forms to private (primarily Catholic) education, he introduces the reader to the justly maligned establishment clause test set forth in *Lemon v. Kurtzman* that prohibits “excessive entanglements” between church and state. Ball’s historical background helps the reader better understand the effrontery and audacity of the Supreme Court’s central conclusion in *Lemon* (based, apparently, entirely on an article in the *Harvard Law Review* and not on the Constitution or its history) that even allowing *political debate* over

public aid to parochial schools is somehow unconstitutional. Ball explains the perverse lesson of the *Lemon* rule, which allowed a Catholic college to receive government construction aid in *Tilton v. Richardson* in 1971 only because there was no evidence that anything "religious" would go on in any of the buildings constructed with government funds.

Unfortunately, Ball's clear thinking and emphasis on the historical meaning of the First Amendment in the establishment clause context finds no parallel in the case of the free exercise clause. Ball (and religious libertarians generally) enthusiastically support the broad free exercise rule established in Ball's 1972 victory in *Wisconsin v. Yoder*, where the Court held that the state of Wisconsin had violated the free exercise clause by mandating that all high-school-age children, including the Amish defendants' children, attend a formally organized school. The Court faulted Wisconsin for interfering with the Amish's religious beliefs without a "compelling interest." Faced with the argument from Judge Robert Bork and others that this test gives religious people an exemption from laws to which they object, Ball simply answers that this "is, in fact, vintage left-liberal doctrine: that if government accommodates religious exercise, it thereby violates the Establishment Clause." That response, however, misses the point of the accommodation argument, which is that the legislature is free to accommodate (or not to accommodate) as it sees fit, without interference from the courts and without running afoul of the Constitution. The accommodation argument is an establishment clause argument, not a free exercise argument. When the judiciary orders accommodation under the free exercise clause, it is not "allowing" accommodation, it is mandating it, thereby creating for someone an unwarranted exemption from a generally applicable law.

Ball does not shirk from finishing the story on free exercise, at least as it existed at the time of his book's publication. He discusses *Employment Division v. Smith*, the 1991 case in which the Supreme Court all but overruled *Yoder* and held that as long as a challenged law is a neutral law of general applicability that is not used to single out people of certain religious practices, there is no constitutional problem. Not surprisingly, Ball disagrees with the *Smith* opinion, but he is shrill and unconvincing when he complains that "[i]ts virtual insouciance in overriding its own prior opinions was really a stunning repudiation of the 'judicial conservatism' which the media had attributed especially to Justice [Antonin] Scalia and Chief Justice [William] Rehnquist." Again, Ball completely misses the point of the constitutional "originalists," which is that the Constitution should be interpreted according to what it meant when it was ratified, not according to what might or might not be a good policy position on religious liberty. And the history behind the First Amendment does not even hint at anything so strict as a "compelling interest" test. Ball stresses, however, that although the religious libertarians suffered a severe setback with *Smith*, they regained much lost ground through the recently overturned "Religious Freedom Restoration Act" of 1993, which attempted

to reinstate the *Yoder* compelling interest test in free exercise cases. (The Supreme Court overruled this attempt in *City of Boerne v. Flores* [1997] on separation-of-powers grounds).

In sum, *Mere Creatures* presents an interesting puzzle. Ball's passion for religious liberty is understandable, admirable, and backed by solid reasoning, but his constitutional analysis varies considerably in quality and in adherence to the First Amendment's original meaning. But even with those weaknesses, this book provides the reader with a good picture of what is wrong with constitutional theory and educational religious liberty in the United States.

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