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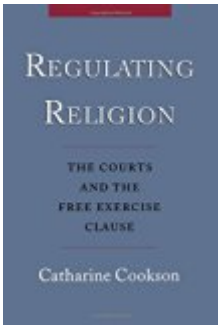
Catharine Cookson. *Regulating Religion: The Courts and the Free Exercise Clause.* New York: Oxford University Press, 2001. xiv + 269 pp. $45.00 (cloth), ISBN 978-0-19-512944-1.



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In Praise of Casuistry

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Catharine Cookson is the director of the Center for the Study of Religious Freedom at Virginia Wesleyan College. In this worthy book she makes a compelling case for a casuistical approach to church-state jurisprudence having to do with free exercise cases.

Casuistry, as used here, is a form of reasoning that takes seriously the competing goods at stake in any important judicial proceeding that pits one set of principles and circumstances against another. For example, in many free exercise cases the good of religious liberty for a minority faith stands over against the good of societal order and laws that apply consistently to everyone. With casuistry, rather than formulating a clear principle that can be used in all cases, each case must be analyzed with full consideration of the narratives involved. This especially comes into play when minority religious groups and individuals are seeking exemption from generally applicable laws in order to more freely exercise their faith. Whereas a more absolutist approach would seek the principles by which all such cases can be adjudicated, the casuist wants to analyze each particular case, paying close attention to the particular nuances of the facts involved and to the paradigms that might serve to guide the judgment of the courts.

This casuistical approach to free exercise jurisprudence can best be analyzed in its absence in the Smith decision of 1990.[1] In that case the U.S. Supreme Court laid down the principle of "general applicability" whereby religious minorities will not be granted exemption from enforcement of any law that is generally applicable even if the law as applied and enforced curtails the free exercise of religion. In the Smith case, two members of the Native American Church argued that their use of the drug peyote for sacramental purposes should be exempt from Oregon's generally applicable drug laws. The two church members had been fired from their jobs as drug rehabilitation counselors and then denied unemployment benefits by the state of Oregon. In denying their claim, the Supreme Court in the Smith decision obliterated the "compelling interest" test, which the Court had previously used whereby the state had to show a compelling interest for enforcing any law that restricted religious liberty. As a result, the state no longer need show a compelling interest for enforcing generally applicable laws even where enforcement inhibits the exercise of religion.

Church-state scholars and religious liberty advocates roundly denounced the Smith decision. From the ACLU to Pat Robertson's ACLJ, there was near unanimity that the decision would be disastrous for free exercise protection. In Smith's wake the U.S. Congress passed and President Bill Clinton signed the Religious Freedom Restoration Act (RFRA), which restored the compelling interest test. To the dismay of religious liberty advocates, the Supreme Court then struck down most of RFRA in the Boerne v. Flores case of 1997. Presently, the state of religious liberty protection in the courts is about what it was following the Reynolds v. U.S. case of 1879, which said that while the First Amendment protected religious be-

lief, it did not protect religious action. That belief/action distinction was another example of the quest for a single principle by which the courts can adjudicate free exercise cases.

The central chapter in this book seeks to show how a casuistical approach would have come to a different and better judgment in the Smith decision. For example, had the narrative of the Native American Church been introduced, the court would have taken into consideration the fact that the church has been more effective in alcohol rehabilitation than other programs and that peyote use in the church is highly regulated and anything but recreational (users often become nauseated). The casuist would look at the competing goods at stake. On one side is the good of having state anti-drug legislation to help achieve an orderly society; on the other would be the right of Native Americans to worship freely in a way they have for centuries. Moreover, in the casuistical approach there would be no presumption of criminality that accompanied the breaking of a law. Rather, the courts would consider the intent of the worshippers, rather than presuming that law breaking in and of itself carried criminal intent. By contrast to casuistry, the Supreme Court in the Smith decision considered only two things: 1) Was the Oregon law generally applicable-that is, not aimed at any particular religious group; and 2) Did the defendants break that law? The apparent fact that the Native American Church was helping to produce the kind of society that Oregon law is intended to protect was largely ignored.

Cookson not only makes a good case for why the casuistical approach is likely to achieve greater protection for religious liberty, she shows that in several Supreme Court cases and several more dissenting opinions justices in the past have used casuistry. The trend in the past two decades, however, has been toward finding one principle that will fit all free exercise cases. The beauty of this, of course, is clarity and consistency, but the cost is that religious liberty suffers. Cookson believes that cost is too high.

Cookson is not alone in lamenting the recent quest for a single-principled approach to free exercise jurisprudence. Church-State scholar John Witte at Emory University has also criticized this trend in his recent book *Religion and the American Constitutional Experiment: Essential Rights and Liberties.*[2] Where Cookson offers casuistry as a method of adjudication, Witte recommends fuller attention to all the principles inherent in the First Amendment (he finds six) instead of just one or two. Of a more radical and very different nature has been the scholarship of Steven Smith at Notre Dame who has called into question even the application of First Amendment to the states.[3] He questions the entire church-state judicial enterprise.

What these and others from a variety of perspectives share is a sense that something is presently amiss in the way the courts are dealing with church-state cases, especially on the free exercise side. Many other scholars and advocates have been greatly concerned about, and at times alarmed at, the Supreme Court's Smith decision. Those who favor wider protection for religious liberty can only hope that the efforts in the scholarly realm will percolate sufficiently to produce change in the way the courts, especially the Supreme Court, understand the free exercise of religion.

[1]. Employment Division, Department of Human Resourses of *Oregon v. Smith* 494 U.S. 872 (1990).

[2]. John Witte, *Religion and the American Constitutional Experiement: Essential Rights and Liberties* (Boulder, Colorado: Westview Press, 2000).

[3]. Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (New York: Oxford University Press, 1995); see also Smith's newest book *Getting Over Equality: A Critical Diagnosis of Religious Freedom in America* (New York: New York University Press, 2001).