

Bette Novit Evans. *Interpreting the Free Exercise of Religion: The Constitution and American Pluralism.* Chapel Hill: University of North Carolina Press, 1998. 294 pp. \$45.00, cloth, ISBN 978-0-8078-2399-6.



Reviewed by Keith E. Whittington

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This book very much fulfills the expectations created by its title. Evans has provided an exhaustive, clear and well organized account of how the free exercise clause of the First Amendment to the U.S. Constitution has been interpreted by the Supreme Court over the past few decades. The book is not primarily historical in its conception or scope, but rather is focused on the myriad developments in the Court's free exercise jurisprudence in the thirty-five years since Justice William Brennan's pathbreaking majority opinion in *Sherbert v. Verner*. Evans spends very little time analyzing earlier free exercise cases or their precursors and has little interest in the origins of either religious freedom in America or its constitutional protection. She does provide a very helpful and skilled overview of recent doctrinal developments, clarifying what has been at stake, what conceptual problems have been faced by the Court, and what normative and empirical resources are available for evaluating the Court's work.

The book ultimately builds a normative argument about how the Court should interpret and

apply the free exercise clause, but the bulk of the book is primarily descriptive, and the normative components are largely confined to chapter endings and the final short chapters. Evans' discussion is detailed, extensive, and largely successful in her primary goal of elaborating "comprehensively and systematically what the 'Free Exercise of Religion' has come to mean in contemporary practice," at least if we understand "contemporary practice" to refer to the activities of the Supreme Court (p. 2). Unfortunately for the reader, Evans' focus is narrowly doctrinal, and she does not extensively incorporate the activities of state or lower federal courts, litigants, elected officials or private actors into her analysis of what free exercise has come to mean in lived practice. Likewise, her approach is analytical rather than empirical, and she has little to say about how these doctrines came about. The absence does not seriously weaken her own analysis, but it does limit the scope of the book.

The first chapter provides a nice mapping of the issues. Evans employs a kind of Dworkinian notion of integrity in order to interpret the free

exercise clause. Ultimately, the best interpretation of the clause is one that makes sense out of existing precedents and the whole of the constitutional text. She rejects at the outset the possibility of religious neutrality, a once prominent approach to understanding the clause. Some religious practices are simply inconsistent with our constitutional values, and Evans argues that the Court must expressly disfavor those practices. Finally, she outlines five understandings of the nature of religion and the purpose of the free exercise clause. The five theories identified by Evans include voluntarism, in which the clause protects religious choice; conscience, in which the clause protects the sanctity of individual religious beliefs; separation, in which the state is protected from religious conflict; constraint, in which religion provides a limit on state power; and pluralism, in which the clause fosters the development of multiple overlapping *nomoi*. These five approaches are carried through the book, and she concludes each chapter with a brief explication of how the issues in that chapter would be understood under each of these competing theories. These accounts are loosely derived from historical arguments, contemporary theorists, and judicial opinions, but Evans favors pluralism and regards the others as useful but ultimately partial accounts of the value of religious liberty.

The core chapters of the book take up different components of the judicial application of free exercise principles. Chapter Two examines threshold issues, the problem of defining and recognizing genuine religions. The First Amendment has singled out the free exercise of *religion* for special protection, and so the Court has been forced to determine whether new organizations constitute constitutionally recognizable religions, whether individual ethical commitments are "religious" in nature, and whether unorthodox or idiosyncratic practices are covered by the clause. Employing theological and sociological research, Evans favors a fairly broad understanding of religion, but she usefully surveys the range of defini-

tions that have been offered and links them to different accounts of the purpose of the free exercise clause.

Chapter Three focuses on burdens to religious beliefs and the effort to distinguish beliefs from actions and conflicts between state and religious efforts to shape individual beliefs. Chapter Four examines the definition of a religious practice, and Evans persuasively indicates the complications raised not only by relatively unorthodox religions but also by reformist religions that invest a range of social activities with religious significance. Against efforts to define the centrality of a practice for a given religion ("Is polygamy really central to Mormonism?"), Evans suggests that the Court focus on concentric circles of religious activities. Circles ranging from rituals to personal care to "diffuse" activities bring the religious practitioner into progressively greater contact with the larger society and are entitled to increasingly less protection as a consequence, regardless of their theological significance to the believer. Although interesting, I was not convinced that this approach is any more compelling or easier to apply than the alternatives. The definition and protection of identity symbols, rituals, and the preconditions of religious practice seem no less controversial than protecting practices that are "central" to a given religion.

Chapter Five considers the institutional rights of religious organizations, in contrast to the rights of individual religious believers. Evans makes a strong case for the communal element of religion, and thus the need to provide security for the institutional context of religious exercise. Chapter Six examines the importance of religious identity to the "free exercise" of religion, again emphasizing the communal dimension of the religious experience that cannot be readily reduced to a matter of abstract church doctrine or individual duties of conscience. Chapter Seven surveys a variety of direct and indirect "burdens" on religious practices that do not coerce belief but may render the free

exercise of religion more difficult. The final two chapters enter into the recently enlivened debate over religious accommodation and defend Evans' vision of value pluralism.

Beyond her careful survey of the free exercise cases and categorization of the issues involved in them, Evans' real contribution to the debate is the introduction of a primarily sociological literature investigating the definition and purposes of religion in human society. In doing so, Evans introduces a greater sensitivity to the variety of religious experiences and to the significance of religion as a *social* practice. Evans' concern is not merely that legislators might be hostile to minority religions, but that they might not understand them. As a consequence, even well-intentioned politicians and judges may accidentally burden religions by not recognizing the importance of sacred lands to Native Americans, yarmulkes to Orthodox Jews, or employee faith to Mormons. The concluding applications of the various approaches to religious liberty are usually brief and rarely very enlightening, however. The book is occasionally repetitive as similar conflicts reemerge in different contexts and sometimes takes odd detours, such as a fairly lengthy consideration of the coerciveness of "cults."

The pluralist approach advocated by Evans is interesting but insufficiently developed. The book is not intended as a contribution in political theory, but the normative framework seems a bit patched together and largely undefended. Partly as a consequence, Evans' arguments often seem directed at the wrong institution. There is a broader political vision at work here, but Evans carefully channels it into an analysis of judicial rulings rather than giving it free rein over the broader structural and policy landscape of American politics. In keeping with her judicial orientation, she takes current political structures for granted even where her pluralist theory would seem to call for a broader critique. For example, she finds establishment/free exercise conflicts in

public education, but then winds up trivializing the free exercise claims in order to escape the conflict. Whether the concerns of fundamentalist parents over the curriculum of public schools look like an imposition on the larger society depends a great deal on where you enter the debate. Evans seems aghast that "the parents' argument brings into question the entire educative function of the state" (p. 85). Well, yes. Rather than seriously considering that question, however, Evans shifts into an attack on "neutrality" which was not the point at all. This limited perspective also raises problems with the judicial role. Not only does Evans involve the judiciary in quite a bit of second-guessing of legislative judgment, but her approach also invites ad hoc solutions. Her normative theory and sociological analysis of religion seem to call for a serious questioning of how free we can be under the modern state, with its extensive regulatory and educative activities. Instead of making a broader examination of the structural trade-offs we have made between religious liberty and democracy, however, Evans is content to re-examine the narrow and marginal disputes that shape constitutional law.

The above concern is partly related to the persuasiveness of Evans' pluralist theory more broadly. Her pluralism is not only normative but also extends to her analysis of how American politics works. When considering the legislative process, she generally paints a fairly majoritarian picture in which only the largest and most popular religions are represented and considered. When considering the judiciary, however, she emphasizes the coalitional nature of American politics. In that context, she places little normative significance on the products of elections and legislatures. Pluralism, not "democracy," is the primary normative value. Thus, judicial intervention is readily justified, for the courts are just "more institutions involved in a decision," providing "more persons and interests" with "access" (p. 212). The patchwork that emerges from this process is somehow to be taken as a positive good. Perhaps

more puzzling is Evans' rather minimal defense of her overlapping pluralism against an alternative of diverse pluralism. Although sympathetic to Robert Cover's defense of insular normative communities, Evans ultimately prefers that the state aggressively penetrate communities and force individuals to embrace conflicting values and commitments. Rather than letting a thousand flowers bloom, Evans would prefer one big multi-colored flower. Thus, she has little sympathy with parents who would prefer to isolate their children from the "corruption" of the larger world or religious communities that minimize contact with non-believers. Her model is Air Force Captain Simcha Goldman who literally wore two hats, defining himself by both his Jewish and his American identities. There may be reasons to prefer such a version of pluralism, but Evans spends little time developing the argument.

Evans provides a very nice introduction to modern free exercise doctrine. Although her coverage and analysis are probably more extensive and in-depth than most undergraduates need, her writing is clear, the issues are well organized, and the analysis of cases is reliable. As a result, the book could be readily used in courses on civil liberties or the First Amendment in particular. Although specialists are unlikely to be persuaded by Evans' somewhat skimpy, though occasionally provocative, normative argument, that argument is not intrusive and the descriptive component of the book is quite useful. I found her categorization and examination of the issues surrounding the free exercise clause to be helpful in making sense of the Court's massive and tangled output in this area and a good introduction to the field. Although of less interest to historians, the book will likely be welcomed by political scientists and constitutional lawyers teaching or researching free exercise doctrine.

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