Regulating Religion, by Catharine Cookson

reviewed by Marci A. Hamilton in the September 25, 2002 issue

Catharine Cookson, the director of the Center for the Study of Religious Freedom at Virginia Wesleyan College, has added a new approach to the range of criticisms of the U.S. Supreme Court's 1990 decision in *Employment Division v. Smith*. In *Smith*, the court held that two state-funded drug counselors who took peyote during Native American Church services could be denied unemployment compensation because their actions violated the generally applicable narcotics laws. Cookson argues that *Smith* was wrongly decided, and that the courts in free exercise cases should follow a casuistry-based method.

Casuistry, as she describes it, is a means of reasoning that employs paradigms in light of which particular cases are to be judged through analogy, rules and close examination of the full set of facts. In other words, she advocates a case-by-case method that focuses closely on the facts of any particular case. She acknowledges that such decision-making has the capacity to appear ad hoc, but argues that it has long been in place in common law courts.

Cookson devotes a significant portion of *Regulating Religion* to developing and applying four possible "typologies," or paradigms, against which to compare free exercise disputes: the two kingdoms type, the enlightenment type, the levitical type and the duly ordered authority type. That the book here sags under the weight of its own too-detailed analysis is unfortunate, since the choice of governing paradigms is central to the casuist project. Ultimately, Cookson argues that the two kingdoms type is the most appropriate in free exercise cases because it simultaneously takes into account both the demands of religious doctrine and the demands of the state, leading decision-makers to compare the relevant weight of the two demands in order to reach the most "just" solution.

Cookson argues for a more common-sense approach to free exercise cases than that prescribed by the high court, which ruled that generally applicable laws can bind

religious believers even in the face of a free exercise challenge. Her casuist, common-sense approach is intended to show the formalism of the *Smith* court's rule, which she characterizes as "the elimination of free exercise exemptions." Instead, she advocates that a judge needs an "open mind, an eye for complexity, an active and empathetic imagination, and the skill to approach a situation from numerous viewpoints." Had the court used these skills, she says, it would have reached the opposite conclusion in *Smith*.

There are three problems with Cookson's thesis, but they may be silver linings rather than fatal flaws. First, the *Smith* court did not eliminate free exercise exemptions, but rather held that the legislature is the better institutional entity to consider exemptions. Second, the description of the good casuist sounds much more like the good legislator than it does the good jurist. Third, the *Smith* decision was certainly not the social disaster she assumes it was.

The *Smith* court went out of its way to announce that not only did it hold that generally applicable laws that incidentally burden religious conduct were not unconstitutional, but also that legislatures could consider requests for religious exemption. In other words, the courts would not be in the business of crafting exemptions party by party, but the legislatures could consider requests for exemption. Cookson does not stand alone in her narrow focus and disapproval of the court's ruling, but enough time has passed for all discussants to foreswear exaggeration and to analyze the decision for what it says in toto.

Had Cookson paid closer attention to the court's statement about legislative accommodation, she might have been led to inquire whether casuistical reasoning is best left to the courts or to legislatures considering requests for exemptions. Legislatures can investigate the facts in the deep way suggested by Cookson, whereas courts are limited by the facts produced by the parties in a particular litigation. Legislators also have the tools to consider all of the possible means of accommodating a religious claimant through investigating facts as well as examining the proposals considered or enacted in other states--powers the courts do not have to the same degree.

What struck me as I read Cookson's description of casuistry is that it offers a pathway for thinking for legislators trying to determine whether a particular exemption from a particular law should be enacted. Ironically, it is a modality of reasoning that may well serve the model for free exercise accommodation laid out in

Smith. There are passages toward the end of the book--especially where Cookson addresses the question of exemptions for medical neglect of children motivated by religious belief--in which legislatures could easily be substituted for courts in her argument.

Indeed, following *Smith*, a number of jurisdictions, including the federal government, created exemptions for the religious use of peyote. They appear to have employed the kind of casuist thinking Cookson advocates: making their decision by finding that religious peyote use is not intended to be addictive and that it is not the kind of drug likely to be abused in general anyway. If Cookson disagreed with the result in *Smith*, she needs to explain why the succeeding permissive legislative accommodation was inadequate. But despite its shortcomings, this is a book worth reading, as it brings to the debate over religious exemptions an approach little explored.