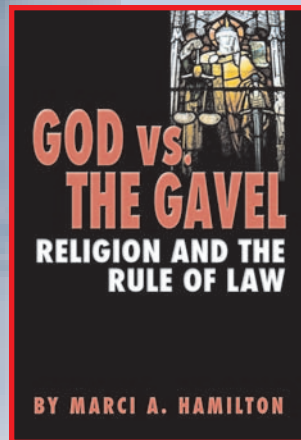


God vs. The Gavel

RELIGION AND THE RULE OF LAW

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In June, Cambridge University Press released Marci Hamilton's *God vs. The Gavel: Religion and the Rule of Law*. In the excerpt here, Professor Hamilton lays out her reasons for writing this comprehensive look at how laws providing religious freedom are being used by religious entities to shield them from legal liability in cases of clergy abuse, medical neglect, even murder.

THE PATH TO THE PUBLIC GOOD

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ere all religious institutions and individuals always beneficial to the public, this book would not be needed. The rule would be plain: religious liberty is absolute. Religious entities would not need to be deterred from criminal or tortious behavior. The purpose of this book has been to explain why even religious individuals and institutions must be governed by duly enacted laws.

The logistics of the landmark *Boerne v. Flores** case brought me into contact with the many groups in this society that lobby against damaging religious conduct, like the American Academy of Pediatrics, Children's Healthcare Is a Legal Duty (CHILD), district attorneys, and state regulatory agencies. Getting to know them educated me in two ways. First, I learned that my original theory of free exercise that would have excused religious entities from the vast majority of laws was patently absurd. It was a product of the ivory tower—a theory based on ignorance of religious conduct. As I soon came to recognize, I (like many Americans) was a Pollyanna when it came to religion. Second, I came to see what I could not see before. Religious conduct in the United States (and around the world) had an underbelly few knew about, fewer discussed, and even fewer discussed publicly. It was Aristotle who said [in *Ethica Nicomachea*]: “We have to learn before we can do ... we learn by doing.” My experience with RFRA [Religious Freedom Restoration Act]—which covered every law in the United States and therefore affected every possible victim of religious entities—forced my eyes open and led me to comprehend that the widespread cultural presupposition that religion is inherently and always good for society is baseless. The “religion” that should be freed from legal constraints was a chimera: beautiful and comforting, but distinct from reality. In the final analysis, a theory of religious liberty cannot sustain itself unless it factors in the possibility of heinous harms by religious individuals and institutions.

It is a simple fact that religious entities are not invariably

beneficial. Religious entities can be responsible for lethal medical neglect of children, childhood sexual abuse, the takeover of neighboring property owners' rights under the zoning laws, and the undermining of civil rights laws, among other conduct. Unfortunately, religion is often used (or misused) to harm others. These behaviors are intolerable in a civil and civilized society, and the state must have the power to deter and punish them. The proper default rule subjects the religious to general constraints on harmful behavior. In essence, I am arguing for the application of the rule of law to religious entities as it is applied to all others. The governing law should not be one that any one individual decides according to his or her own perspective, but rather a set of laws created by duly enacted legislatures charged with consideration of the public good. It is a simple and a profound principle, but in this context it has been muddled by legal battles and special interests.

The hard question that has been at the heart of the religious debate since the 1960s is when, if ever, a religious individual or institution should be given freedom from the general law. The typical rule at the Supreme Court has been that neutral, general laws apply to everyone, religious or not. And that is the right default rule.

Many, however, have argued that the law should not encumber religious conduct unless it is an extremely important law. For them, *Wisconsin v. Yoder*** was rightly decided, and the courts should scrutinize the legislature's enactments to determine whether they are important enough to trump religious conduct. The net result is unacceptable: religious entities have broad sway to violate the vast majority of laws and the courts determine which legislation is important and which is not, according to their own lights. For those who understand the capacity of religious individuals and institutions to hurt others, the notion that religious entities ought to trump all but the most necessary laws is unacceptable. Moreover, the courts are not equipped to make relative determinations about social policy regulating conduct.

Even so, it is the rare individual who would jettison religious liberty altogether. Some modern scholars have tried, by reducing religious liberty to equality. Nonetheless, that approach fails to take into account the potent and distinctive drive of religious belief in every human society and its distinctive value for society. While the courts should not have the power to pick and choose between the laws that affect religious conduct, there should be some mechanism where the government can take into account the inherent value of religious liberty and weigh that value against the impact on the public good of letting the religious entity avoid the law. If an exemption will not harm others, it should be provided—by a legislature. ■

* Marci Hamilton, lead counsel for the City of Boerne, Texas, successfully argued this US Supreme Court case that found the Religious Freedom Restoration Act (RFRA) unconstitutional.

** In 1972, the US Supreme Court held that a generally applicable compulsory school attendance law was subject to strict scrutiny by the courts and that it was less valuable than the Amish's interest in removing their children from school after eighth grade.