GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW

God vs. the Gavel: Religion and the Rule of Law challenges the pervasive assumption that all religious conduct deserves constitutional protection. While religious conduct provides many benefits to society, it is not always benign. The thesis of the book is that anyone who harms another person should be governed by the laws that govern everyone else – and truth be told, religion is capable of great harm.

This may not sound like a radical proposition, but it has been under assault since the 1960s. The majority of academics and many religious organizations would construct a fortress around religious conduct that would make it extremely difficult to prosecute child abuse by clergy, medical neglect of children by faith healers, and other socially intolerable behaviors. This book intends to change the course of the public debate over religion by bringing to the public’s attention the tactics of religious entities to avoid the law and therefore harm others. God vs. the Gavel will bring much-needed balance to the contemporary, heated debate about religion and its role in society.

Marci A. Hamilton is an internationally recognized constitutional authority specializing in church/state relations. She is a leading national expert on the Religious Freedom Restoration Act, which she successfully challenged before the U.S. Supreme Court, and is involved in cutting-edge First Amendment litigation involving clergy abuse (on behalf of victims) and religious land use (Religious Land Use and Institutionalized Persons Act).
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This book is dedicated to

my beloved Peter, Will, and Alexandra,
whose loving encouragement has been a godsend.
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The role of religion in a free society, once a subject of benign and lofty discourse, has become a raging controversy in both the private and public arenas. While few in America challenge the multifarious benefits of religion to the individual believer and to society as a whole, there are sharply divergent views as to the extent to which notions of religious liberty immunize religious conduct from sanction when it interferes with public health, safety, and welfare.

In recent years, religious entities, often with the assistance of legislatures and courts, have advocated a presumptive constitutional right to avoid the law pursuant to the federal and state free exercise of religion guarantees, arguing that the First Amendment, the Due Process Clause, and separation of powers render them immune from some legal requirements and precepts. Opponents of these initiatives have responded that this approach is at odds with American culture and legal tradition.

In this volume, Professor Marci Hamilton, one of the nation’s leading legal scholars and one of the premier authorities on the Constitution’s Religion Clauses, tackles these issues in depth and with gusto. Her dominant theme is that the temptation to treat religion as an unalloyed good is a belief one can embrace only at one’s peril. Building upon her already prolific body of work, she proceeds from the baseline of the “no-harm principle” – that no person or entity can act in ways that harm others without consequence – which she demonstrates was widely shared by the Framers’ generation. After establishing, with impressive documentation,
that, despite their generally beneficent effect, religious entities can be responsible for many harms, e.g., lethal medical neglect of children, childhood sexual abuse, the takeover of neighboring property owners’ rights under the zoning laws, and the undermining of laws against discrimination, she forcefully argues that the burden rests on the religious believers demanding exemption from a law to prove that the conduct sought to be immunized is not harmful to the society and individuals within it. Referencing the precept of Employment Division v. Smith that “the [correct] reading [of the Free Exercise Clause] is . . . an individual’s religious beliefs do not excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate,” Professor Hamilton engages the scholarship of Professor Laycock and Professor (now Judge) McConnell and that of others who have criticized this holding. She argues that these scholars have misconstrued the jurisprudence of the Religion Clauses and that their defense of the Religious Freedom Restoration Act (overruled by City of Boerne v. Flores) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) is flawed.

Whatever the reader’s take on these issues may be, he or she will be edified by Professor Hamilton’s exegesis of the history, jurisprudence, and policy considerations that inform the debate. This is a truly important, if provocative work, which is essential reading for anyone who wishes to delve beneath the surface of the contemporary battle over religion and values.

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