

Cambridge University Press

0521853044 - God vs. the Gavel: Religion and the Rule of Law

Marci A. Hamilton

Frontmatter

[More information](#)

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).

Cambridge University Press

0521853044 - God vs. the Gavel: Religion and the Rule of Law

Marci A. Hamilton

Frontmatter

[More information](#)



GOD vs. THE GAVEL

**RELIGION AND THE
RULE OF LAW**

MARCI A. HAMILTON

FOREWORD BY THE HON. EDWARD R.
BECKER



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
0521853044 - God vs. the Gavel: Religion and the Rule of Law
Marci A. Hamilton
Frontmatter
[More information](#)

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
40 West 20th Street, New York, NY 10011-4211, USA
www.cambridge.org
Information on this title: www.cambridge.org/9780521853040

© Marci A. Hamilton 2005

This book is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2005

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Hamilton, Marci.
God vs. the gavel : religion and the rule of law / Marci A. Hamilton.
p. cm.

Includes bibliographical references and index.

ISBN 0-521-85304-4 (hardcover)

1. Corporations, Religious – Law and legislation – United States – Criminal provisions.
2. Tort liability of religious corporations – United States.
3. Clergy – Malpractice – United States.
4. Rule of law – United States. I. Title: God versus the gavel. II. Title.

KF9434.H36 2005

342.7308'52 – dc22

2005003344

ISBN-13 978-0-521-85304-0 hardback

ISBN-10 0-521-85304-4 hardback

Cambridge University Press has no responsibility for
the persistence or accuracy of URLs for external or
third-party Internet Web sites referred to in this book
and does not guarantee that any content on such
Web sites is, or will remain, accurate or appropriate.

Cambridge University Press

0521853044 - God vs. the Gavel: Religion and the Rule of Law

Marci A. Hamilton

Frontmatter

[More information](#)

This book is dedicated to

my beloved Peter, Will, and Alexandra,

whose loving encouragement has been a godsend.

Cambridge University Press
0521853044 - God vs. the Gavel: Religion and the Rule of Law
Marci A. Hamilton
Frontmatter
[More information](#)

CONTENTS

Acknowledgments / ix
Foreword, by the Hon. Edward R. Becker / xi

PART ONE. WHY THE LAW MUST GOVERN RELIGIOUS ENTITIES

- 1 The Problem / 3
- 2 Children / 12
- 3 Marriage / 50
- 4 Religious Land Use and Residential Neighborhoods / 78
- 5 Schools / 111
- 6 The Prisons and the Military / 141
- 7 Discrimination / 173

PART TWO. THE HISTORY AND DOCTRINE BEHIND THE RULE THAT
SUBJECTS RELIGIOUS ENTITIES TO DULY ENACTED LAWS

- 8 *Boerne v. Flores*: The Case That Fully Restored the Rule of
Law for Religious Entities / 203
- 9 The Decline of the Special Treatment of Religious Entities
and the Rise of the No-Harm Rule / 238
- 10 The Path to the Public Good / 273
- Epilogue / 306
- Notes* / 313
- Index* / 399

Cambridge University Press

0521853044 - God vs. the Gavel: Religion and the Rule of Law

Marci A. Hamilton

Frontmatter

[More information](#)

ACKNOWLEDGMENTS

This book could not have been written without the assistance of my chief research assistant and third-year law student at Benjamin N. Cardozo School of Law, Rachel Steamer. She did a tremendous job, and I will be forever indebted to her for her extraordinary research skills, work ethic, and excellent judgment. I also thank Research Assistants Jodi Erickson, Rachel Lavery, Andrew Kopelman, Leo Mikityanskiy, and Philip Wellner, for their hard work and research assistance. My good friend, Kerry Ledbetter, provided invaluable line editing.

I am also indebted to John Berger, who is a brilliant editor at Cambridge University Press, and who helped me immeasurably to marshal ten years of scholarly work and practical experience into a single coherent project for a more general audience. I am very grateful to my agent, Karen Zahler, who helped me tremendously to refine my thesis and then to find the right niche for it. Sr. Karol Jackowski, who is the most spiritual person I know, was a much-needed source of inspiration and friend through it all.

Significant portions of Chapter 9 were previously published as part of the Foundations of Church Autonomy Symposium at the Brigham Young University School of Law. See Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. Rev. 1099 (2004). I am grateful to the participants of the symposium for their comments and for the excellent editorial work of BYU student editor Brigham Cannon and others.

Cambridge University Press

0521853044 - God vs. the Gavel: Religion and the Rule of Law

Marci A. Hamilton

Frontmatter

[More information](#)

x / ACKNOWLEDGMENTS

Thanks are also due to the Benjamin N. Cardozo School of Law, Yeshiva University, for a summer grant and sabbatical in 2004, which made it possible for me to write *God vs. the Gavel*, and especially to Deans Paul Verkuil and David Rudenstine for their unflagging support for my admittedly unorthodox scholarship. Gratitude is also due to Tom Lee for his generous philanthropy that supports my chair at Cardozo School of Law, the Paul R. Verkuil Chair in Public Law. In addition, the Princeton Theological Seminary, where I was a visiting scholar during the fall of 2004, provided important research resources as well as a welcome atmosphere of open inquiry about religion and theology.

Judge Edward R. Becker, who provided the foreword, deserves lifelong gratitude. He has been the sort of mentor many people never know. He is in every sense of the term a mensch and a blessing on all those who know him.

The list of people who have taught me what I needed to know to write this book is endless, but I must express my gratitude to Jeffrey Anderson, who was helping clergy abuse victims long before the rest of us knew it was a problem, for his wisdom about clergy abuse; Ellen Mugmon and Rita Swan, for opening my eyes to the plight of children at the hands of some religious believers; Barbara Blaine and David Clohessy, of the Survivors Network of those Abused by Priests (SNAP), for their tireless dedication to the victims of childhood sexual abuse by clergy; Len Hill, who started the League of Residential Neighborhood Advocates, for his courage and dedication in standing up for residential neighborhoods negatively affected by ambitious religious building projects; Sarah Hart, Pam Sargent, and Todd Marti, who educated me about the abuses of religious privileges in the prisons; and the Mayor of Boerne, Texas, the Rev. Patrick Heath, whose courage as a Methodist minister in fighting the Religious Freedom Restoration Act all the way up to the Supreme Court inspires me still.

But no one deserves more credit than my husband, Peter Kuzma. He has read chapters when he needed to sleep, provided the right criticism when it was needed most (and even when I did not want to hear it), and set an example of a believer who will not tolerate the status quo if a religious entity has overstepped its bounds. He is a devoted Roman Catholic who is determined to do everything he can to make the church safe for children. His integrity, his belief in the truth, and his loving support for this book literally made it happen.

Cambridge University Press

0521853044 - God vs. the Gavel: Religion and the Rule of Law

Marci A. Hamilton

Frontmatter

[More information](#)

FOREWORD

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,

Cambridge University Press

0521853044 - God vs. the Gavel: Religion and the Rule of Law

Marci A. Hamilton

Frontmatter

[More information](#)

xii / FOREWORD

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.

The Hon. Edward R. Becker
United States Court of Appeals
for the Third Circuit

Cambridge University Press

0521853044 - God vs. the Gavel: Religion and the Rule of Law

Marci A. Hamilton

Frontmatter

[More information](#)

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