Michigan Law Review

Volume 105 | Issue 6

2007

# A Syllabus of Errors

Douglas Laycock
*University of Michigan Law School*

# A SYLLABUS OF ERRORS

*Douglas Laycock**

GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW. By *Marci A. Hamilton*. New York: Cambridge University Press. 2005. Pp. xii, 414. $28.

## INTRODUCTION

Modern American society is pervasively regulated. It is also religiously diverse to a degree that is probably unprecedented in the history of the world. It is inevitable that some of these diverse religious practices will violate some of these pervasive regulations, and equally inevitable that if we ask whether all these regulations are really necessary, sometimes the answer will be no.

If we take free exercise of religion seriously, sometimes it will make sense to exempt sincere religious practices from generally applicable laws—but only some laws, and only some applications. Hardly anyone thinks that human sacrifice should be exempted from the murder laws. And hardly anyone thinks that government should compel Catholics to ordain female priests, or forbid children to take a sip of communion wine. Other cases provoke more disagreement. Who should decide, and on what criteria?

The legal claim in *God vs. the Gavel* is that only legislatures may decide, and that judges may not. The legislature must enact specific rules for religious exemptions; it may not enact religious exemptions under a generally applicable standard to be interpreted by judges. Professor Marci Hamilton[1] briefly argues for this claim in Chapter Ten.

The rest of the book is a poorly executed rant—disorganized, self-contradictory, and riddled with errors. Chapters One through Nine make a much broader legal claim that is quietly abandoned in Chapter Ten. Chapter Ten suggests that her position may not be as extreme as it often sounds, but this appearance of moderation is too little, too late, to save a dreadful book. Elsewhere I have praised Hamilton's judgment,[2] but this time there is nothing good to say.

---

* Yale Kamisar Collegiate Professor of Law, University of Michigan. I am grateful to David Sack for research assistance.

1. Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law, Yeshiva University.

2. *See* Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 743 (1998).

## I. An Overview

Part One catalogs abuses and alleged abuses by religious organizations and individuals. Chapter One asserts that Americans hold an unrealistic belief that religion is always good. But in fact, Hamilton says, religion does much harm, and therefore must be regulated. Chapters Two through Seven give examples: children (physical and sexual abuse, withholding medical care); marriage (principally polygamy); churches in residential neighborhoods, which sometimes cause parking, traffic, or other problems; miscellaneous issues in public schools, prisons, and the military; and discrimination in church employment and by religious landlords.

Chapter Three has a long digression on same-sex marriage, which appears to be simply an occasion to bash conservative believers. The ban on same-sex marriage is unrelated to exemptions or to regulating churches; Hamilton's feeble effort to link the issues is to say that religious entities want their own way on both marriage and exemptions (pp. 55–56). She is notably more sympathetic to court decisions protecting gays than to court decisions protecting the exercise of religion (pp. 62–65), but she never explains why courts are more competent to override legislative judgments in one of these doctrinal areas than the other.

Part Two addresses history and doctrine. Chapter Eight is a tendentious account of the Supreme Court's decisions on regulatory exemptions for religious conduct. Chapter Nine is the historical version of Part One, equating modern claims to exemptions with abuses by established churches from the twelfth century forward. Chapter Ten finally argues for the claim that only legislatures may grant exemptions.

The abuses catalogued in Part One have little relevance to her ultimate legal claim. Of course some religious behavior must be regulated, but that tells us very little about whether judges, legislators, or both should decide when to regulate and when to exempt. To the extent that Part One is relevant, it cuts against her argument for legislative exclusivity, because her most troubling examples are exemptions granted by legislatures, not judges. She complains that legislators serve religious lobbyists and ignore the public interest. So why does she insist that these irresponsible legislators should be the only persons trusted with questions of exemption?

She has no plausible answer to that question. But her criticism of legislators does make sense of the chapters on religious abuses. These chapters are aimed at voters and legislators. "The purpose of this book is to persuade Americans to take off the rose-colored glasses and to come to terms with the necessity of making religious individuals and institutions accountable to the law so that they do not harm others" (p. 3). Only legislators can exempt religious practices from regulation, but when they consider legislation that affects religion, legislators should be highly suspicious of churches.

## II. Appearing and Disappearing Theses

### A. *No-Harm*

Hamilton's ultimate claim in Chapter Ten is very different from her initial claim in Chapter One. Chapter One argues that religious organizations should be subject to all the regulations that restrict other organizations—"unless they can prove that exempting them will cause no harm to others" (p. 5). She repeatedly elaborates on what she calls "the no-harm principle" (pp. 5, 7–8, 11, 205–10, 227, 260–63, 275, 288).

The no-harm principle sounds plausible on first reading, but it cannot withstand analysis. Of course religious believers have no constitutional right to inflict significant harm on nonconsenting others. But we live in a crowded society, where routine activities both inconvenience those around us and impose significant risks. Every first-year law student has to confront the fact that if we want to eliminate wrongful deaths, we must do without cars and bridges. We also have an expansive capacity to define as harmful anything we don't like. A rule that no religious group could do anything the political process defined as harmful would leave all religions at the mercy of any interest group that could persuade some regulatory body to act.

But Hamilton refuses to draw any distinctions, insisting that "a harm is a harm is a harm" (p. 206)—a reductionism she uses four times (with minor variations) (pp. 11, 116, 206, 212). One of her examples is a neighborhood that objects to a synagogue taking over a monastery on a ten-acre parcel with ample off-street parking. But "[t]raffic studies indicated that the synagogue's proposed use would increase the number of cars daily from fewer than 10 to over 100," thus causing "a seismic change that would affect basic aspects of the homeowners' lifestyles" (p. 101). A hundred cars a day is one car every ten minutes during sixteen waking hours, or more likely, occasional clusters of cars between long intervals in which the traffic flow is basically unaffected. If this be "seismic," it is hard to imagine what could count as "no harm." Hamilton would effectively permit the residential owners to define as harmful any productive use of the ten acres and the existing building, because any productive use would generate additional traffic. The right to worship cannot exist without a space to worship in, and if any increase in traffic counts as harm, the no-harm rule would make it impossible to create new places of worship.

This example appears in a land use chapter that is entirely devoted to residential neighborhoods. She never discloses that many church zoning disputes involve commercial properties.[3] Churches seeking to locate in commercial neighborhoods face different claims of harm: that they won't generate *enough* traffic, or that they won't generate tax revenue.[4] Loss of tax revenue is a universally applicable harm that would justify eliminating every

3. Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 760–62, 777–78 (1999).

4. *Id.* at 762, 774–75.

place of worship anywhere in the country, until and unless legislatures begin taxing churches. If worship could be excluded on any ground a neighbor, a zoning board, or a taxing authority characterized as harm, the right to worship would be subject to the standardless discretion of local officials. Despite its surface plausibility, a literal no-harm standard is untenable.

So Hamilton abandons her no-harm standard. She briefly suggests that "de minimis harm to the public" is acceptable (pp. 275, 280). Then she moves to a third standard:

> The legislator's task is one of balancing the value of religious liberty over and against the harm to others if a religious individual or institution is permitted to act contrary to the law. . . . [T]he legislature should weigh, on the one hand, the importance of respect and tolerance for a wide panoply of religious faiths, and on the other hand, whether the harm that the law was intended to prevent can be tolerated in a just society. (p. 297)

The no-harm and de minimis standards disappear without a mention. She never acknowledges that her position has changed, but it has changed fundamentally. Churches and religious individuals may harm their neighbors after all if the harm "can be tolerated" and if prohibiting the harmful religious activity would inflict a greater harm to religious liberty. Preventing intolerable harm to others is a compelling interest that justifies regulation of religion on even the most protective theory of free exercise. The disagreement is over how to strike the balance. Hamilton would place a much lower value on religious liberty and a much higher value on every passing car. But she and I can apparently agree that the essence of the problem is to balance competing harms.

Sometimes she strikes the balance more sensibly. She approves the exemption from military service and the exemptions for religious use of peyote, for communion wine during Prohibition, for "neat and conservative" religious apparel in the military, and for religious discrimination in hiring clergy (pp. 280–83). She seems to approve the exemption that allows some faiths to maintain an exclusively male clergy (p. 190). Some passages in Chapter Ten actually sound quite reasonable. But she can appear reasonable only because she has abandoned her no-harm principle.

### B. *Institutional Competence*

There remains her claim about institutional competence: for purposes of striking the balance between religious liberty and the risk of harm to others, "the only legitimate branch is the legislature" (p. 297). She admires neutral and generally applicable laws but not neutral and generally applicable standards for exemptions. She vigorously condemns the Religious Land Use and Institutionalized Persons Act[5] (RLUIPA) and the state and federal Religious

5. 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

Freedom Restoration Acts[6] (RFRAs) (pp. 9–11, 175–77, 288, 299–302). The implication is that the legislature must strike the balance itself and enact specific rules for every category of conflict between religious practice and secular law.

Her faith in legislatures is incomprehensible, because she has little good to say about them. Legislators have exempted harmful religious behavior that no judge would ever exempt under a generally applicable standard—most notably, parents refusing to provide medical care for their children. According to Hamilton, legislatures in thirty-two states have enacted "a defense for felonious child neglect, manslaughter, or murder, where the child's life was sacrificed for religious reasons" (p. 32). She appears to have missed some,[7] but she exaggerates nonetheless. As her footnote implicitly confesses (pp. 321–22 n.84), these exemptions generally apply only to neglect laws, not to homicide. Even so, this is a remarkable body of legislation. Preserving the life and health of children is clearly a compelling interest, because a child may suffer irreparable harm before it is old enough to decide for itself. Not even Hamilton suggests that any court has had trouble with that issue. But she says that legislatures have repeatedly gotten it wrong—even after highly publicized tragedies (pp. 38, 300–01).

Her treatment of licensing religious child-care centers is similar. She approves six court decisions upholding licensing requirements, with no cases going the other way, and she complains bitterly of twelve statutes that exempt religious facilities in whole or in part (pp. 45, 327 nn.148–150). She is very skeptical of home schooling, but nearly all exceptions for home schooling were won in legislatures or by political pressure on state education agencies, and not in courts.[8] She is outraged by Sikh children carrying ceremonial knives to school, but she reports that the California legislature voted an exemption for Sikh knives (p. 117). "[C]ommon sense prevailed" when the governor vetoed the bill (p. 117).

She complains of legislative process: "Too often, the determination is made in the back halls" (p. 300), or by riders in unrelated bills (p. 9). She complains of bills passed without hearings (p. 302), and of hearings where opponents are not allowed to testify (p. 87). Legislators are "constitutionally ill-informed" (p. 301), "confused" by lobbyists (p. 301), "predisposed to follow the requests of religious organizations" (p. 301), often "muddle-headed about religion" (p. 165), and often "captured by special interests and incapable of acting in the public's interest" (p. 298). Legislators are more responsive to cohesive minorities than to the broad public (pp. 285–86).

---

6. The federal RFRA is codified at 42 U.S.C. §§ 2000bb–2000bb-4 (2000). Citations to state RFRAs are collected in Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 211 nn.368–369 (2004).

7. James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1354 (1996) (reporting forty-six states).

8. Neal Devins, *Fundamentalist Christian Educators v. State: An Inevitable Compromise*, 60 GEO. WASH. L. REV. 818, 819 (1992).

They "often pass laws that are nonsensical, unnecessary, and just plain political" (p. 279) and "ill-conceived" (p. 280). Yet these are the only people she trusts to decide when to exempt religious practice from regulation.

She invokes the Founders' view that "every institution holding power was likely to abuse that power" (p. 276), and the nation's experience with early state legislatures that did indeed abuse their unchecked powers (p. 276). Yet she proposes that legislative decisions to regulate without religious exemptions should never be subject to judicial review. This is largely unchecked power; judicial review, and not the veto, is the check designed to protect minority groups.

She would overcome these problems largely by wishing it so. She announces "three necessary conditions for legitimate" religious exemptions: "Exempting religious conduct from neutral, general laws must be (1) duly enacted by a legislature, not decreed by a court; (2) must be debated under the harsh glare of public scrutiny; and (3) must be consistent with the larger public good."[9]

Her discussion of her public-scrutiny requirement consists entirely of examples where legislatures allegedly acted without publicity (pp. 300–02). She offers not a word about how to make legislators generate publicity for discussions they prefer to have in private. Nor does she explain how legislators could ensure public scrutiny if they tried. Legislators compete fiercely for public attention, and they have limited capacity to influence what the media choose to cover.

Nor does she suggest a way to enforce her requirement that legislative exemptions be consistent with the public good. It cannot be that judges will review that question. She emphasizes that courts are "incompetent" (not just "somewhat less qualified") to decide questions about the public good (p. 297). This public-good requirement may just be an odd way of restating her insistence that statutes granting exemptions enact narrow rules rather than broad standards.[10]

Her principal argument for legislative supremacy is a romantic faith in the investigative power of legislatures. Legislators "have at their disposal the power to subpoena witnesses, to hold extensive hearings, to commission studies, and to elicit the views of any expert" (p. 297). In contrast, judges are confined to the issues raised by the parties (p. 296). "A judge is required to be open-minded, to be evenhanded, and to read the law as the legislator intended" (p. 296). She appears to think that these requirements are defects! By contrast, legislators can "reject the facts and theories presented to them" (p. 297).

This view of legislative hearings is divorced from reality. Legislators *can* do serious investigations, but they rarely do. The typical Congressional hearing consists of witnesses reading prepared five-minute statements in panels of three or four. Many committee members do not attend and those who do

---

9. P. 275. These conditions are elaborated at pp. 295–302.

10. *Compare* pp. 9–10 (defining "blind exemptions" as exemptions that are broad rather than specific), *with* p. 300 (defining "blind exemptions" as exemptions not based on the public good).

often wander in and out. Each member gets to make an opening statement and to ask five minutes of questions to each panel, that is, one to two minutes of questions and answers per witness. Most members read questions prepared by staff, and hardly any member is prepared to ask probing follow-up questions.

Legislators are not stupid, but they are spread far too thin. They face constant fundraising, constituent service, importuning by lobbyists, political posturing and spin control, and thousands of bills in every session on every conceivable topic. They cannot possibly become expert on more than a few of those bills. Yet Hamilton would have them separately investigate every conflict between any religious practice and any law, enacting specific solutions to every one. Congress already explained, in the committee reports on RFRA, that "[i]t is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute."[11]

The party in the minority often gets fewer than half the witnesses and only one week's notice of the hearing. No interest group is guaranteed the right to testify. But anyone with enough time or money can lobby. Most of the real discussions in which legislators "find" facts occur ex parte and off the record. The laws they enact are legitimate because they are responsible to voters and because this is apparently the best we can do, not because anything about legislative investigations inspires confidence.

All of this assumes that legislators are free to investigate the public good and to vote their consciences. Sometimes they are. But often they are locked into positions by ideology or political pressure before the hearing ever begins. Then the hearing is a charade.

Despite these problems, broad policy questions are better left to legislators than to courts, and it is common to explain this preference by praising the legislature's ability to find facts. It would be more accurate to say that with respect to broad, multi-polar questions about how complex economic and social systems will respond to proposed changes in policy, no one finds facts very well because the facts are simply too complicated. But such questions are particularly ill-suited to the judicial process, which is designed for two-sided disputes that can be focused on one or a few specific questions. And the national experience with judges deciding economic questions as a matter of constitutional law was not good. In the legislative process, many of the competing interests with a stake in such questions are represented, and all are free to lobby. So we leave those questions to legislatures, even though a vast literature suggests that much economic regulation is ineffective or counterproductive.

Judicial decision-making is also highly imperfect. But when a question of fact can be stated with some specificity in an adversarial format, I have no doubt that judicial fact finding is more reliable than legislative fact finding. A claim to religious exemption addresses a specific religious practice,

---

11. H.R. REP. NO. 103–88, at 6 (1993); for a somewhat similar statement, see S. REP. NO. 103–111, at 8 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1897.

to be performed under specific circumstances, recognizing that any exemption will extend to all similar practices and circumstances that cannot be honestly distinguished. The question whether such an exemption will do any harm, and how much, is reasonably focused and well suited to adversary presentations.

Each side is guaranteed a fair and equal opportunity to present its evidence and arguments. Litigants may invoke the judicial process as of right; unlike legislators, judges cannot simply ignore questions presented to them. Because each side has an advocate to marshal its case, it is far more likely that a judge will hear the most important evidence than that a Congressional committee will. Witnesses can be effectively cross-examined, which is rare in legislative hearings. Judges are overworked just as legislators are, but in an important case presenting a serious constitutional question, judges can usually commit substantial blocks of time. Judges do not wander on and off the bench while hearings continue in their absence. All judicial proceedings are on the record, and ex parte contacts are forbidden. When a judge makes up her mind because a campaign contributor talks to her before the hearing begins, it is corruption; when a legislator does the same thing, it is business as usual.

Hamilton fears that religious advocates will select test cases with unusually attractive facts, or that the first government litigant may not present its best case (p. 296), and that all other governments will then be bound (p. 298). But subsequent litigants can distinguish the unrepresentative first case on the basis of more and different evidence, and even in the rare event where the first case goes to the Supreme Court, cases can be distinguished or overruled. Statutes can be amended without regard to precedent, but with serious problems of congested calendars and legislative inertia, it is not at all clear that mistaken precedents are harder to change than mistaken statutes. It *is* clear that judicial precedents under statutes such as RFRA and RLUIPA can be changed by ordinary legislation, with the same ease or difficulty as the possible legislative corrections on which Hamilton relies (p. 298).

Hamilton emphasizes relative competence at fact finding; Justice Scalia's more traditional objection was that courts should not balance competing interests after the facts were found.[12] But here the judiciary's obligation to state reasons and do equal justice to all is a real advantage over the legislature's openness to lobbyists and political pressure. As I said in an earlier discussion of these issues, "the reality of the legislative process is totally unsuited to principled decisions about whether one faction's desire to suppress an annoying religious practice is really the least restrictive means of serving a compelling government interest."[13] That sentence would be equally true under any standard of review greater than absolute deference to the strongest interest group.

---

12. Employment Div. v. Smith, 494 U.S. 872, 889–90 & n.5 (1990).

13. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 221 (1994).

Hamilton finds it "inconceivable" that the Supreme Court would create a constitutional exception to the drug laws for religious use of peyote (p. 220). And she condemns the courts for interpreting RFRA to create an exception for religious use of *hoasca*,[14] a drug that is similar to peyote in its chemistry and religious use, "without hearings or studies" (p. 309). (A two-week preliminary injunction hearing after ten months to prepare[15]—far more attention than Congress could devote to such a narrow issue—apparently does not count as a hearing.) But she praises the *legislative* exception for religious use of peyote (pp. 226, 280–81), apparently unaware that Congress took nearly all its findings about peyote from Justice Blackmun's dissent in *Employment Division v. Smith*.[16] Congress had limited capacity to investigate, but the facts had been developed to its satisfaction in a judicial proceeding.

I do not claim that over the long run judges will do a better job than legislators of protecting religious minorities. I do claim that the judicial process is better at finding facts in cases that are judicially manageable. And Hamilton's examples show that judges are less likely to grant foolish exemptions that result in serious harm. Judges *sometimes* are willing to protect unpopular minorities, but legislators hardly ever; legislators cannot afford to protect any group that is seriously unpopular with voters.[17]

The legislative and judicial processes have different strengths and weaknesses, and the principal benefit of judicial review is that it gives constitutional claims a chance to be heard in each forum. Part of the genius of separation of powers is that suppression of liberty requires at least the acquiescence of all three branches. The legislature must enact the bill and refuse an exemption; the executive must sign the bill and enforce the law even against religious practices; and the courts must uphold the law as applied to religious practices. Hamilton's assertions about the inherent superiority of legislatures do nothing to justify removing the final link in that chain of protections.

## III. Errors and Falsehoods

Hamilton's tale of harms inflicted by churches is anecdotal, which is the way to reach an intended audience of voters and legislators. There is no dispute over the larger point: churches and religious believers have done things that should be regulated. But her specific claims are so error ridden that one cannot believe anything she says without confirming it. Some of these errors are simply sloppy, but many flow from her exaggerated rhetorical style. She

---

14. *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211 (2006).

15. *See* O Centro Espirita Beneficiente [sic] Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1240 (D.N.M. 2002).

16. *See* H.R. Rep. No. 103-675, at 7–8 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 2404, 2409–10.

17. *See* Laycock, *supra* note 2, at 775–77 (1998) (showing that legislators are least likely to help those religious minorities who are treated the worst).

characterizes every example in the worst possible terms, and she does not allow mere facts to get in the way of good rhetoric.

### A. *Sexual Abuse*

Hamilton leads with graphic stories of sexual abuse of children and adolescents. One might suppose that here, if anywhere, she could work with the horrific facts she has, without exaggeration or misrepresentation. But one would be wrong.

She tries to create the impression that the issue is a claim of a First Amendment right to sex with minors. Thus she says that "religious entities" "have attempted to use the First Amendment as a shield in prosecutions involving child rape and murder" (p. 10). Perhaps she could defend this statement as technically true in a dispute over a prosecutor's subpoena for confidential documents. But it is not true in any sense in which it is likely to be read by her intended audience of voters and legislators. No one claims a First Amendment right to rape or molest. The "murder" cases turn out to be prosecutions of parents for withholding medical care, in which religious entities are not defendants, the charge is rarely murder, and the defense under a specific statutory exemption is far more plausible than any defense under the First Amendment. A leading example is *Walker v. Superior Court*,[18] in which a Christian Scientist mother was prosecuted for involuntary manslaughter and child endangerment, and the court devoted thirteen pages to the statutory defenses but less than two to the First Amendment.

She says that "[t]he criminal clergy and the religious institutions that knew about the pedophiles in their midst routinely invoke both the First Amendment and religious liberty legislation to avoid liability for the harm" (p. 18). As to the "criminal clergy," this statement is false. Their religious liberty argument would have to be that religious liberty provisions protect sexual crimes. Their lawyers do not "routinely" make such a foolish argument, and if some have made it on occasion, no court has taken it seriously.

The religious institutions do argue that they should not be liable, and some of their arguments are based in religious liberty, but these arguments have nothing to do with a right to molest children. This litigation is about issues of church governance and theories for imposing liability on the employers of molesters and on parishes who never employed a molester but were in the same diocese with one. Reasonable people can disagree about those issues, but Hamilton's readers never learn what the issues are.

No one has a right to sexually abuse children. But when the question is whether people who did not sexually abuse children should be held responsible for the torts of those who did, the issues get harder—for religious and secular institutions alike. No employer is vicariously liable for every employee who molests a child, even at the work site. Sexual contact with a child so obviously serves only the personal interests of the molester that

18. 763 P.2d 852 (Cal. 1988).

courts have held it not within the course and scope of employment.[19] An employer is liable in such cases only for its own torts in negligently hiring, training, retaining, or failing to supervise an employee after learning of the employee's propensity to sexual misconduct.[20]

Now we come to the first serious religious liberty question: government does not get to tell churches who can preach or administer the sacraments and who cannot, or how those who do should be selected and trained. Religious liberty could hardly exist if appointment of clergy were controlled by the government. But lawsuits alleging that it was wrongful to let Father Jones work in a parish, or wrongful to ordain him in the first place, give judges and juries the effective power to review the appointment of clergy. Some plaintiffs have filed much broader claims, alleging that the whole system of selecting and training clergy, and even the allocation of authority within the church, should have been structured differently.[21] These claims would put the system for selecting all future clergy in the control of juries.

Narrow versions of some of these claims may be justified. There may well be a compelling interest in requiring churches to remove known child molesters from positions where they have continuing access to children, or even in requiring some financially responsible entity to accept legal responsibility for the safety of children. But to explain the religious liberty interest on one side, and the arguments for overriding that interest on the other side, would complicate the simple narrative of evil churches hiding behind the First Amendment.

Hamilton describes only one court decision that addresses such questions, and she grossly misrepresents the decision. She says that in *Gibson v. Brewer*,[22] the plaintiffs "cited nine neutral principles of law that would have been invoked and applied to the defendants were they a teacher who fondled a child and a school that knowingly placed children in the reach of a pedophile" (p. 27). But "the Missouri Supreme Court held that the First Amendment immunized the defendants from the law" (p. 27). "Thus, a pedophile and a religious institution covering for him were relieved of any civil liability for their actions on the basis of supposed First Amendment principles" (p. 27).

The claim that the court relieved "a pedophile" of liability is simply false. The claims against the accused priest were still pending in the trial

---

19. *See* Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1113–14 (2003).

20. *See id.* at 1114–19.

21. *See* Patrick J. Schiltz, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. REV. 947, 960–69 (2003) (reviewing claims that would exclude from the priesthood men with any history of almost any imaginable kind of emotional problem); Petition for Writ of Mandamus and Brief in Support 20–24, United States Catholic Conference, Inc. v. Ashby (Tex. No. 95-0250) at 20-23 (summarizing claims alleging that Conference of Bishops should have issued different "guidelines for priestly selection, formation, and education," *id.* at 21 (quoting Petition of John Doe IV, Count VII, ¶ 3), and should have "petition[ed] the Pope for the authority to implement policy," *id.* at 23 (quoting argument of plaintiffs' counsel, Transcript of Hearing, Jan. 5, 1995 at 74)).

22. 952 S.W.2d 239 (Mo. 1997).

court.[23] He had neither been found guilty nor "relieved of liability." If he were guilty, no argument made by the diocese would have protected him.

Nor were there nine "neutral principles of law" that would have been applied to a school but not the diocese. There were nine theories in plaintiffs' somewhat scattershot complaint. On four of those theories (breach of fiduciary duty, conspiracy, respondeat superior, intentional infliction of emotional distress), the court held, on state-law grounds having nothing to do with religious liberty, that plaintiffs failed to state a claim.[24] These claims would have been equally barred on the same allegations against a secular employer. Four claims were barred by religious liberty considerations (negligent hiring/ordination/retention of clergy, negligent failure to supervise clergy, negligent infliction of emotional distress, and independent negligence of the diocese[25]) on plausible grounds that Hamilton does not explain.

A final claim was *not* barred.[26] Plaintiffs were allowed to proceed on their claim that the priest's supervisors "knew that harm was certain or substantially certain to result from [their] failure to supervise."[27] This claim required only that responsible church officials knew of the priest's propensities and the consequences that would result, and that they did nothing. If the diocese knew anything like as much as what Hamilton repeatedly alleges about churches in this chapter, liability would follow under this standard. Her comparison of the church in this case to "a school that *knowingly* placed children in the reach of a pedophile" (p. 27; emphasis added) is thus deeply misleading; the church was held responsible for anything it actually knew. She claims that the court dismissed all nine counts, and that all nine were dismissed on grounds uniquely available to churches; each of these claims is false.

Nor is it true that if the abuser were a teacher and the employer were a school, defendants would have greater liability. If the employer were a public school, it would have sovereign immunity from state-law claims. Missouri has waived sovereign immunity for negligence only for the operation of motor vehicles,[28] for dangerous conditions in government-owned property,[29] and for proprietary functions.[30] A Missouri school district and its administrators have been held immune where plaintiffs alleged that a driver repeatedly beat and sexually abused handicapped children on his bus and that the school failed to investigate complaints.[31]

---

23. *Id.* at 244–45.

24. *Id.* at 245–46, 249.

25. *See id.* at 246–50.

26. *Id.* at 248.

27. *Id.*

28. MO. REV. STAT. § 537.600 (2000).

29. *Id.*

30. *See* State *ex rel.* Allen v. Barker, 581 S.W.2d 818, 825 (Mo. 1979).

31. Doe v. Special Sch. Dist., 637 F. Supp. 1138, 1141–42, 1146–49 (E.D. Mo. 1986).

School districts have federal liability under Title IX,[32] but only if an official with authority "to institute corrective measures" has "actual knowledge" of the abuse and makes "an official decision . . . not to remedy the violation."[33] This standard is not greatly different from the standard the Missouri courts applied to churches.

Both the religious liberty protections for churches and the immunity of school districts vary from state to state. The point is not that no state protects churches more than public schools (I haven't investigated both bodies of law in all fifty states) or that any particular jurisdiction gets the balance just right. The point is that Hamilton's description of *Gibson v. Brewer* is false in multiple and obvious ways, and that these misrepresentations serve her larger claim that churches get special treatment because no one imagines they would do anything wrong.

### B. *Employment Discrimination*

Religious institutions have two kinds of exemptions from the federal employment discrimination laws (and most similar state laws). First, by express statutory exception in the Civil Rights Act of 1964, a religious organization (section 702[34]) or a religious school (section 703[35]) may prefer employees "of a particular religion." These exceptions permit religious discrimination; they do not permit any other kind of discrimination. They apply to any employee of the religious organization or school, even if his duties are not " 'even tangentially related to any conceivable religious belief or ritual.' "[36] These exceptions permit a religious organization to maintain a critical mass of its own believers in the workforce that executes its mission.

Second, by judicial interpretation, religious organizations may hire and fire their clergy and similar religious leaders on any criteria they choose; courts will not entertain lawsuits alleging discrimination of any kind.[37] This rule is commonly known as "the ministerial exception."[38] Hamilton emphasizes that this rule permits religious qualifications that would be illegal in a secular context, such as the requirement that Catholic priests and Orthodox rabbis be male (p. 190). But that purpose would be served by a much narrower exception. The primary purpose is to prevent judges and juries from second-guessing the church's "choice as to who will perform particular spiritual functions."[39] If a pastor is dismissed for reasons of race or sex, that

---

32. 20 U.S.C. § 1681 (2000).

33. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

34. 42 U.S.C. § 2000e-1(a) (2000).

35. 42 U.S.C. § 2000e-2(e)(2) (2000).

36. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 332 (1987) (quoting district court).

37. *See* Petruska v. Gannon Univ., 462 F.3d 294, 303-04 & nn.5–7 (3d Cir. 2006) (collecting cases).

38. *Id.* at 299.

39. *See id.* at 304.

is unfortunate, but it would be worse if a judge erroneously found discrimination where the pastor had really been dismissed because his performance was unsatisfactory, or if the judge imposed an unwanted spiritual leader on a church—no matter why that leader had lost the confidence of his flock. Reasonable people could disagree about the balance of costs and benefits, but Hamilton never admits that there are competing interests to balance.

The two kinds of exception are fundamentally distinct. The section 702 and section 703 exceptions are narrow (religious discrimination only) with broad application (any employee of a religious organization or school). The ministerial exception is broad (any kind of discrimination) with narrow application (only the clergy). Hamilton cannot keep them straight. She cannot even keep straight what an exception is: she cites contractual promises not to discriminate as an "exception" to the discrimination laws (p. 189). Of course that is backwards; an enforceable contract can impose liability where statutes would not.[40]

With respect to the real exceptions, she says that the section 702 exception raises issues of whether the employee "works in a religious or secular capacity" and whether "the employment action was based on a religious belief" (p. 189). The first of these issues is plainly irrelevant under the clear text of section 702, which was amended to eliminate any restriction to employees doing "religious" work.[41] The second is more subtly misstated. The employment action must be based on the *employee's* religion; usually it will also be based on a religious belief of the employer, but that fact is legally irrelevant. She cites eleven cases for the relevance of these two issues (p. 357 nn.38–39). Nearly all are ministerial exception cases, and thus irrelevant to her point about section 702. A few of these cases mentioned section 702 in passing, en route to a holding based on the ministerial exception or some broader claim of constitutional immunity. Of the one case unambiguously based on section 702, she says that the Court "interpreted the idea of 'religious employee' broadly" to include a janitor, citing *Corporation of the Presiding Bishop v. Amos*.[42] But the Court did no such thing. It was common ground in the Supreme Court that section 702 applies to janitors,[43] and the Court upheld that broad exception against the claim that it established religion. And although Hamilton puts "religious employee" in quotation marks and implies that this is a statutory phrase to be "interpreted," no such phrase appears in the statute.

Her discussion of the ministerial exception is equally garbled. She can't decide whether to use extreme examples to show that the ministerial excep-

40. *See, e.g., id.* at 310 (refusing to dismiss contract claim).

41. *Compare* Civil Rights Act of 1964, § 702, 78 Stat. 253, 255 (permitting church to prefer believers for work in "its religious activities"), *with* Equal Employment Opportunity Act of 1972, § 3, 86 Stat. 103, 103–04 (deleting "religious").

42. P. 357 n.38; Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

43. The district court rejected the argument that § 702 could be construed to apply only to "employment involving religious activities," 483 U.S at 332 n.8, and the Court did not review that issue. *See also id.* n.9 (noting strong support in legislative history for district court's interpretation).

tion is a terrible rule, or to push her theory of how it could be reinterpreted to a much narrower scope that she would find less objectionable. Spinning in both directions at the same time, she can't keep her story straight.

First she says that the exception applies "*where the discrimination is religiously motivated*" (p. 189; emphasis added). But the alleged discrimination need not have been religiously motivated, as some of her own examples show (pp. 191–92, 195). Then she says there is a "broad reading" that gives "carte blanche" to discriminate, and a "narrower" reading that makes churches liable where their employment decision "is unrelated to the religious belief" (p. 192).

Then she says there is "incremental" movement toward holding churches liable "in most circumstances" (p. 196). Two pages later, this "incremental" movement has become "a marked trend" (p. 198). This "trend" consists of sexual harassment cases; she cites no successful claim by a minister not subjected to sexual harassment. She could argue that this narrow exception for sexual harassment cases should unravel the whole principle and lead to her preferred rule that the alleged discrimination must be motivated by religious doctrine. But she cannot make that argument, because she is never candid about the limited nature of the cases that support her claim.

Again she miscites the cases. Her initial example of a ministerial exception case is in fact a section 703 case; the plaintiff was not a minister but a school librarian.[44] She cites *EEOC v. Pacific Press Publishing Ass'n*[45] for the proposition that "sec. 702 applies only to employees whose duties 'go to the heart of the church's function;' "[46] in fact, the court was discussing the ministerial exception.[47] She cites *EEOC v. Mississippi College*[48] as holding that a religious college cannot claim the section 702 exception (p. 358 n.51); the case actually held that the college *can* claim the section 702 exception[49] but cannot claim the ministerial exception "[b]ecause the College is not a church and its faculty members are not ministers."[50] These are well known cases in the field, but she appears not to understand them.

### C. *The Law of Free Exercise (and Some Miscellany)*

Word limits preclude even a listing of many other errors, exaggerations, and misleading innuendos. I can give only a few more examples.

---

44. Pp. 189, 358 n.41; Vigars v. Valley Christian Ctr., 805 F. Supp. 802, 804 (N.D. Cal. 1992).

45. 676 F.2d 1272 (9th Cir. 1982).

46. P. 358 n.50 (citing *Pacific Press*, 676 F.2d at 1278).

47. *See Pacific Press*, 676 F.2d at 1278 (discussing what it calls "the *McClure* exception"). *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), was the original leading case announcing the ministerial exception.

48. 626 F.2d 477 (5th Cir. 1980).

49. *Id.* at 484–85.

50. *Id.* at 485.

She claims that the Free Exercise Clause requires strict scrutiny only where the claimant proves governmental "'hostility' or 'animus' toward religion" (p. 216). Her attempt to read this theory into the Court's cases ranges from misleading to false. Her account (pp. 214–15) of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[51] which struck down a ban on animal sacrifice, is merely misleading. That case *could* have been decided on grounds of animus, but when Justice Kennedy tried to decide it that way, he got only two votes.[52]

She claims that "the Court found animus" (p. 215) in *McDaniel v. Paty*,[53] which invalidated a Tennessee provision excluding clergy from the legislature. This is simply false; the Court found that when the provision was adopted in 1796, it was thought necessary to protect the disestablishment of religion.[54] Only Justice Brennan's concurrence—which is not the opinion she cites[55]—even mentions hostility, and it is clear that he is not making a finding of actual hostility but simply inferring hostility from the face of the law.[56] Hamilton cannot infer hostility from facial discrimination alone, because she rejects that inference in *Locke v. Davey*.[57]

She claims that *Davey*, which upheld Washington's refusal to fund scholarships for theology students, "went on to explain, repeatedly," that free exercise claims require "'hostility' or 'animus' toward religion" (pp. 215-16). This remarkable sentence has no citation or supporting quotations. The Court *does* say there was no bad motive in *Davey*,[58] and that the state was just trying to enforce its view of the Establishment Clause.[59] (Hamilton calls this motive "animus" in *McDaniel v. Paty*; she apparently thinks it is not animus in *Davey*.) But *Davey*'s facts control the scope of *Davey*'s holding: *Davey* is a funding case. The *holding* in *Davey* is that the "mere failure to fund" religious education imposes no substantial burden on the exercise of religion. Close textual analysis of the opinion confirms this understanding and clarifies the references to motive: even a failure to fund can become constitutionally suspect if the failure to fund is motivated by religious hostility.[60] If Professor Hamilton has an argument to the contrary, she does not offer it.

---

51. 508 U.S. 520 (1993).

52. *See id.* at 540–42 (opinion of Kennedy, J.).

53. 435 U.S. 618 (1978).

54. *See id.* at 622–25.

55. P. 362 n.44; she cites the plurality opinion, 435 U.S. at 628–29, pages that reject Tennessee's claim of compelling interest and say nothing about motive.

56. *See id.* at 636 (Brennan, J., concurring).

57. 540 U.S. 712 (2004).

58. *Id.* at 721, 724–25.

59. *Id.* at 721–25.

60. *See* Laycock, *supra* note 6, at 213-18 (providing a close textual analysis).

Discussing *Wisconsin v. Yoder*,[61] the case exempting Amish children from secondary education, she says that "every other citizen is required to complete 12th grade," and "the last four compulsory years" (p. 131). In fact, it was essential to the Court's reasoning that the state required children to attend school only to their sixteenth birthday, so that the dispute was not over four years of school but over one to two years.[62]

Twice she says that in *Reynolds v. United States*,[63] the first of the Mormon polygamy cases, the Court said that "religious belief is absolutely protected."[64] But judicial talk of absolute protection for belief is a twentieth-century development.[65] *Reynolds* said nothing about absolute protection, and the Court was not ready to provide it; the Court soon upheld punishment of membership, teaching, and belief.[66] She also has the federal antipolygamy law governing "the Northwest Territory" (p. 211), which no longer existed; of course the target was the Utah Territory.

She says that the enactment of the Religious Land Use and Institutionalized Persons Act (RLUIPA) shows "the political clout of organized religions" (p. 94). But what the legislative process leading to RLUIPA showed was that religious organizations could not pass a bill on their own in the face of any significant opposition. As even Hamilton eventually recognizes, RFRA and RLUIPA passed with the support of a broad coalition that included secular civil liberties organizations and the Department of Justice (pp. 97, 178–80). When that coalition broke down in disagreement over the proposed Religious Liberty Protection Act, Congress deadlocked and the bill died (p. 184).

She says that I was "the architect" of RFRA (p. 288) and that RFRA was drafted "following [my] advice" (p. 225). In fact, I was little known in Washington at the time and had almost no role in the drafting. I was not asked to testify at the first hearing; I wrote a post-hearing letter to the committee chair.[67]

She quotes the French law that prohibits wearing in public schools any clothing or symbols that "conspicuously manifest a religious [or political]

---

61. 406 U.S. 205 (1972).

62. *See id.* at 207, 222, 224.

63. 98 U.S. 145 (1879).

64. P. 207. For a similar statement in different words, see p. 67.

65. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

66. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890) (upholding penalties on church because it "perseveres, in defiance of law, in preaching, upholding, promoting and defending" polygamy); Davis v. Beason, 133 U.S. 333, 334, 347 (1890) (upholding test oath that denied the right to vote to any "member" of any organization that "teaches" any person "to commit the crime of bigamy or polygamy" or that "practices" "celestial marriage as a doctrinal rite," or to any person who does not "regard" the secular laws as supreme, "the teachings of any order, organization or association to the contrary notwithstanding").

67. *Religious Freedom Restoration Act of 1990*: Hearing Before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary, 101st Cong. 72 (1991) (letter to Chairman Don Edwards from Douglas Laycock, Alice McKean Young Regents Chair in Law, School of Law, University of Texas at Austin).

affiliation" (pp. 128–29). But her bracketed insertion misrepresents the French text, which says nothing about political (*politique*) symbols.[68] Then she says this law would be constitutional in the United States because it is "neutral and generally applicable" (p. 129). This claim implies a fundamental misunderstanding of the U.S. rule. The French law applies to all religions, but the relevant point for U.S. law would be that it applies *only* to religions.[69] A French school girl can wear a head scarf to make a fashion statement but not to make a religious statement. If Hamilton means to claim that the statute bars religious symbols, and that a much older regulation (which apparently had not been enforced) can be read as banning *all* conspicuous symbols,[70] and that that combination is generally applicable—an argument she never actually makes—she is still wrong. That prohibition would also be unconstitutional in the United States under *Tinker v. Des Moines Independent Community School District*.[71]

She says that "[r]ace-based housing discrimination was given a judicial imprimatur in 1948, and was not declared unconstitutional for nearly two decades" (p. 285; citation omitted). This has little to do with her topic, but it misrepresents famous cases. The Court invalidated state-mandated housing segregation in 1917.[72] Her 1948 case is *Shelley v. Kraemer*,[73] which invalidated judicial enforcement of racially restrictive covenants; she gets the holding backwards. She misses the point of both *Shelley* and her 1967 case, *Reitman v. Mulkey*;[74] the issue in both cases was not discrimination, but state action.

I could go on—and these are just the claims that were immediately suspicious on first reading. I have to infer that if I investigated each of her footnotes, I would find many more such errors.

Occasional errors are inevitable, but here the extraordinary number of errors, often with reference to famous cases and basic doctrines, implies a reckless disregard for truth. I document these errors for a reason. No one should cite this book. No one should rely on it for any purpose. You might

---

68. Law No. 2004-228 of March 15, 2004, Journal Officiel de La République Français [J.O.][Official Gazette of France], Mar. 17, 2004, p. 5190, *available at* www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L (last visited Jan. 23, 2007) ("Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit."). Roughly translated, the law provides that "[i]n the public schools, colleges, and high schools, the wearing of signs or behaviors by which the pupils conspicuously manifest a religious affiliation is prohibited." This quotation was translated with the help of my French-speaking student, David Sack.

69. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 n.14 (1992) ("[A] law specifically directed at religious practice [does not] acquire immunity by prohibiting all religions.").

70. *See* ROBERT O'BRIEN, THE STASI REPORT: THE REPORT OF THE COMMITTEE OF REFLECTION ON THE APPLICATION OF THE PRINCIPLE OF SECULARITY IN THE REPUBLIC 1–5 (2005) (reprinting French and English versions of the regulation). If this regulation had been enforced, the more recent law would not have been thought necessary.

71. 393 U.S. 503 (1969).

72. Buchanan v. Warley, 245 U.S. 60 (1917).

73. 334 U.S. 1 (1948).

74. 387 U.S. 369 (1967).

use its footnotes as leads to other sources, but take nothing from this book without independent verification.

## IV. CONCLUSION

Legal scholars may be advocates, and they may reach out to non-scholarly audiences, but every scholar has a minimum obligation of factual accuracy and intellectual honesty. *God vs. the Gavel* does not come close to meeting either standard. Nor does it offer a sustained argument for its legal claim about the institutional competence of courts and legislatures. Its many footnotes offer the patina of scholarship, but there is no substance of scholarship. This book is unworthy of the Cambridge University Press and the Benjamin N. Cardozo School of Law.