RECOILING FROM RELIGION

God vs. The Gavel: Religion and the Rule of Law: By Marci A. Hamilton. Cambridge. Cambridge University Press. 2005.

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I. Introduction

Professor Marci Hamilton has written a forceful and obviously heart-felt book that should give pause to committed champions of religious free exercise.[2] She argues convincingly thatreligious freedom is too often invoked to shield opprobrious and socially harmful activity, and she describes numerous examples of such abuses that make any civilized person's blood run cold. Her avowed aim is to debunk the "hazardous myth"[3] that religion is "inherently and always good for society"[4] and to increase public awareness (just as her eyes were "forced open")[5] of the dark side of religion in contemporary American public life. She advocates a restrictive constitutional test for government accommodation of religious practices and supports vesting sole decisionmaking responsibility for administering that test in the legislature. To this end, she proposes a principle that measures the social harm that protection of religious belief would entail. "The right free exercise doctrine[,]" Hamilton says, "gives a wide berth to religious belief, but follows the rule that no American may act in ways that harm others

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[2] MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005).

[3] *Id.* at 1.

[4] *Id.* at 274.

[5] *Id.* Hamilton presents herself as a religious person who "like many Americans" was once a "Pollyanna when it came to religion," but who has, through the crucible of her extensive experiences as a litigator against religious accommodation in a variety of contexts, realized the error and naiveté of her earlier views.

without consequence."[6] Hamilton also repeatedly invokes the concept of the "public good" (or "common good" or "public interest," as she variously calls it)[7] to justify her restrained views of religious accommodation.

This review offers a critical appraisal of *God vs. The Gavel*, in particular of Professor Hamilton's discussion of the complicated idea of the public good and how it intersects with the proper consideration of religious free exercise interests. In Part II, the review explains the structure of the book and the framework for Hamilton's conclusions about religious accommodation. It emphasizes several instances of Hamilton's use and explanation of the concept of the public good. Part IIIarticulate s Hamilton's general theory of the public good, breaking the concept down into several distinct categories suggested by the book itself. The review critiques the book's explanation and application of the public good principle and suggests thatit is an ambiguous and unstable concept, and one that often substitutes for either particular interests or the author's policy preferences on a variety of issues.[8] Part IV offers some observations about the principal virtue of *God vs. The Gavel*: Professor Hamilton's bracing and illuminating exposition of the range of recent and ongoing abuses justified in the name of the free exercise of religion. The review concludes by considering whether religious interests can ever play a role in the determination ofHamilton's public good , and if so in what way.

II. God vs. The Gavel

[6] *Id.*at 272. As Hamilton recognizes, the "no harm principle" has deep roots in the political philosophies of John Locke and John Stuart Mill (as well as many others, particularly those of utilitarian persuasion) and influenced the views and attitudes of the founding era. *Id.* at 260-63.
[7] Since Hamilton uses these phrases interchangeably, I will do so as well.
[8] I make this claim only with reference to Hamilton's arguments about the public good, not as a general statement of skepticism about public good conceptions.

The book is divided into two parts. The first discusses six contexts in which religions or religious devotees have used their constitutionally privileged status to protect themselves unjustifiably or improperly advance their interests. The second sets forth the state of constitutional free exercise doctrine, with particular positive emphasis on *Employment Division v. Smith*[9] and *City of Boerne v. Flores.*[10] It defends the principles underlying those cases by tracing the historic decline of the idea of religious accommodation. In the final chapter, Hamilton posits "three necessary conditions for legitimate religious accommodation,"[11] the last of which focuses on Hamilton's key concept of the public good.

a. God

Despite occasional reference to the beneficent power of religion and religious belief,[12] this book is about religion as a force of evil. It is also driven primarily by the six real-life, self-consciously concretized contexts that Hamilton examines, each one chock full of actual cases and specifics. Some of the cases are ongoing and Hamilton herself has participated as an advocate in several of them. This fact-intensive approach befits Hamilton's own educative mission for the book. She is none too keen on the insulated blindness of the ivory tower; experience with actual cases, in her view, is a much needed antidote to what she believes is the commonly shared, "rose colored," idealized conception of the role of religion in American culture.[13] Hamilton's highly

[9] 494 U.S. 872 (1990).
[10] 521 U.S. 507 (1997). Hamilton represented the City of Boerne, Texas, which prevailed.
[11] HAMILTON, supra note 1, at 275.
[12] *See, e.g.*, *id.* at 4-5, 7, 306. "Were all religious institutions and individuals always beneficial to the public, this book would not be needed." *Id.* at 273.
[13] *Id.* at 7-8. Her preference for the experiential over the theoretical (or at least her belief that they often can be profoundly opposed ways of looking at the world) appears in other of her work and is a relevant theme for this review. *See, e.g.*, Marci A. Hamilton, *What Does Religion Mean in the Public Square?*, 89 MINN. L. REV. 1153, 1157-58 (2005) (reviewing JEFFREY STOUT, DEMOCRACY AND TRADITION (2004)

contextualized approach informs approximately two thirds of the book; she explores the harmful role that religious institutions have played in the life of children and the active debates about marriage, land use, schools, prisons and the military, and discrimination.

The sexual and physical abuse of children by persons either operating under religious auspices or motivated by religious belief launches Hamilton's first section. She provides several examples of misused religious authority that have led to the tragic and horrifying abuse of children, offering newspaper-style summaries of the facts and litigation history of past and ongoing cases. She also excoriates religious institutions for "actively aid[ing] and abet[ing] the abuse,"[14] though what she generally means is that the institutions' reaction to evidence of abuse was often enough to suppress the evidence and insist on silence in an effort to protect their finances and public image.[15] Hamilton bristles with indignation both at the abuses and the cover-ups, and it is at this point that the building blocks of her general theory of religious accommodation begin to appear:

> A church does have the right to believe at will, but it has no right to use those beliefs to justify illegal conduct. In effect, this reading [the one she opposes] of the First Amendment immunizes actions that display callous disregard for society's most important norms.[16]

("[Stout] is an ethicist who has resolutely refused to lock himself into the ivory tower to construct the theory that "explains it all," and instead, by walking among his fellow citizens, has identified a complex discourse, incapable of being captured by an either/or formula.")). There is more than an element of self-effacement as well as irony in her position on this issue. Hamilton is herself a prominent legal academic whose own views on religious accommodation have changed dramatically over the years. *See* Marci A. Hamilton, *Religion and the Law in the Clinton Era: An Anti-Madisonian Legacy*, 63 LAW & CONTEMP. PROBS. 359 n.89 (2000) (attributing her old views to "the musings of a young and ill-informed scholar, too much at home in the ivory tower").

[14] HAMILTON, *supra* note 1, at 14; *see also id.* at 30.

[15] *Id.* at 14-15. Though Hamilton does not discuss it in her examples, a stronger case for "actively aiding and abetting" might be made where an institution reassigns a cleric, knowing of his past abuse of children, to a different community without warning the new community.

[16] *Id.* at 26.

Hamilton moves from sexual abuse to a discussion of medical neglect,[17] child abandonment,[18] physical abuse,[19] and failure to provide a safe environment for children,[20] peppering her treatment of each with highly disturbing accounts of child exploitation in the name of religious freedom.

How is it that U.S. law and society have failed to protect these children? The answer, Hamilton claims, lies in the historic misuse of the First Amendment to shield religious organizations from liability for the harm they do. According to Hamilton, this "false understanding of free exercise" was rectified in the Supreme Court's *Smith* decision, which "explained that neutral, generally applicable laws certainly can be applied to religious conduct."[21]

The fault, too, lies in twin fallacies of the popular imagination: the American love affair with religion already mentioned and the belief that contemporary society is hostile to religion and religious values. She blames certain academic voices for feeding into these misapprehensions. Her bête noire on this score is Professor Stephen Carter's *The Culture of Disbelief*,[22] which she claims misrepresents the realities that most people in the country are religious believers,[23] that religious viewpoints "fill the public square,"[24] that religion is not "always moral . . . [or] as innocuous as apple pie,"[25] and that religious

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[17] *Id.* at 31-39.
[18] *Id.* at 39.
[19] *Id.* at 40-44.
[20] *Id.* at 44-46.
[21] *Id.* at 47. *Smith* held that the Free Exercise Clause was not offended by Oregon's criminalization of the use of religiously inspired peyote by certain Native Americans. 494 U.S. 872. After the plaintiffs were fired from their jobs, the state denied them unemployment benefits. *Id.*
[22] STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).
[23] HAMILTON, supra note 1, at 7.
[24] *Id.*
[25] *Id.* at 48.

interests are not "politically powerless."[26] Hamilton contends that the perpetuation of these myths by Carter and others has enabled religious organizations to stage a kind of socio-legal power-grab, all the while maintaining the appearance of weakness.[27]

All of this is rather hasty. Nowhere in his book does Carter claim that most people in the country are not religious or that religion does not affect the public views of many Americans or that religious interests are politically powerless:

> [R]eligion matters to people, and matters a lot. Surveys indicate thatAmericans are far more likely to believe in God and to attend worship services regularly than any other people in the Western world. True, nobody prays on prime-time television unless religion is a part of the plot, but strong majorities of citizens tell pollsters that their religious beliefs are of great importance to them in their daily lives. And today, to the frustration of many opinion leaders in both the legal and political cultures, religion as a moral force and perhaps a political one too, is surging.[28]

Likewise, though Carter certainly does discuss at length the moral dimensions of religious belief and its important role in American public life, he does not claim that religion everywhere and always has been benign or that it is to be unthinkingly embraced:

> The religions enjoy no special immunity from the tendency of power to corrupt – and of absolute power to corrupt absolutely. As I write these words, people are being slaughtered for their religious beliefs in India, in Bosnia, and in various parts of the Middle East. Closer to home, . . . the African slave trade and the post-Civil War oppression of the freed slaves and their progeny were often justified by a variety of Scriptural passages and Christian doctrines. Indeed, there is virtually no evil that one can name that has not been done, at some time and at some place and to some real person, in the name of religion.[29]

It is true that Carter advocates for a prominent place for religious thought and belief in the public square, but he also says:

> Yet one who argues, as I do, for a strong public role for the religions as bulwarks against state authority must always be on guard against the possibility – no, let us

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[26] *Id.* at 291.
[27] *Id.*
[28] CARTER, *supra* note __, at 4.
[29] *Id.* at 83 (footnote omitted).

> say the likelihood – that some religions will try to use the privileged societal position that the First Amendment grants them as an instrument of oppression.[30]

The point of this seeming petulance is certainly not to engage Hamilton in a game of "gotcha" with respect to what may (generously) be called an incidental point in her argument (and, after all, she knows what Carter said). It is instead to note a leitmotiv in her presentation of ideas, and one which will resurface at the climactic point when she must defend her own crucial concept of the public good. It is this: Hamilton frequently sounds very much like an advocate (and perhaps intends to). This is understandable given her profound involvement in a long-running, "fundamental difference of opinion"[31] between Congress and the Supreme Court that began in 1990, and her sincere belief in the rightness of *Smith* and *Boerne*. Her passionate voice makes for stimulating reading, particularly when it comes to the specifics of the gripping cases and legislative histories with which she has developed such mastery. But it is less effective when she presents and analyzes concepts relevant (either because she opposes or espouses them) to her philosophical and constitutional views.

Her chapter on marriage provides a useful example of this phenomenon. The first sub-part treats gay marriage and addresses the well-known decision of the Massachusetts Supreme Judicial Court[32] and the critical response of the federal legislature in 2004.[33] Hamilton makes plain that she sides with the SJC and the right of gay people to marry. She believes that those opposed to gay marriage are interposing their religious beliefs

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[30] *Id.* at 85. *See also id.* at 207 where in considering the problematics of teaching about religion in public school, Carter suggests that students should study the negative as well as the positive role of religion in American history. Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159, 1257 (2002).

[31] Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997).

[32] Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003).

[33] HAMILTON, *supra* note 1, at 51-53.

where they have no business, and thereby subverting the public good: "Once the debate cannot be framed by one religious tradition, the door has been opened to a more appropriate public debate over the common good."[34] Hamilton roundly criticizes the views of Professor Robert P. George, a natural law theorist who opposes gay marriage. Relying on George's comments in a *Wall Street Journal* op-ed, this is how Hamilton characterizes the natural law position on gay marriage:

> Apparently, [according to natural law] the physical characteristics of males and females predetermines the law of marriage. [George's] circular reasoning implies that no legislature should consider the issue other than to reach his religiously based conclusion, a conclusion once again that is an argument from theocracy, not public policy. Accordingly, he promoted the idea of a federal constitutional amendment to ban all marriages other than those between a man and a woman, without entering into the debate over what forms of marriage are best for children, the economy, or the public good. His is a revealed legal regime, not a reasoned one.[35]

One need not be a natural law expert or adherent to sense that much is missing in this assessment. Hamilton's spare statements about the bases for opposition to gay marriage from a natural law perspective[36] – that its position is "revealed" rather than "reasoned" and that it prescinds from the debate over the common good – are, respectively, incomplete and flatly incorrect. It is true that the *Summa Theologiae* was intended by Aquinas primarily as a teaching tool for those sharing his religious beliefs,[37] and that natural law theory historically has been associated with Roman Catholic

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[34] *Id.* at 57.
[35] *Id.* at 53-54.
[36] I use the term with reservations, as there is great variety within the modern tradition alone (to say nothing of the tradition dating from Aquinas). The natural law theory of John Finnis, Robert George, and Germain Grisez is not that of Lloyd Weinreb, or Michael Moore, or Mark Murphy, and so on. Moreover, the phrase "natural law" is itself commonly used in widely divergent meta-ethical senses. *See* Michael S. Moore, *Law as a Functional Kind*, in NATURAL LAW THEORY 190-92 (Robert P. George, ed. 1992) (listing four different such usages, only one of which is tied directly to the idea that "the nature of moral qualities like goodness is given by their having been commanded by God").
[37] Mark C. Murphy, *Natural Law Theory*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 17 (Martin P. Golding & William A. Edmonson eds., 2005).

teaching.[38] But to say that a position based in natural law is not "reasoned" but "revealed" is to ignore the highly rational, practical impetus that its adherents claim drives the tradition. In elaborating his understanding of natural law, John Finnis (to take one natural law theorist who also opposes homosexual marriage)[39] is emphatic that "practical reason," not revealed truth, is the guiding principle by which people may decide what it is moral.[40] Of marriage, Finnis says:

> The good of marriage is one of the basic human goods to which human choice and action are directed by the first principles of practical reason . . . . [T]he good of marriage [is] the way of life made intelligible and choiceworthy by its twin orientation towards the procreation, support and education of children and the mutual support and amicitia [friendship] of spouses who, at all levels of their being, are sexually complementary.[41]

In criticizing this position, it is possible that Hamilton means to say that the natural law view of gay marriage (accepting for the sake of this point thatFinnis's and George's position is representative) is not accessible (as opposed to either irrational or unintelligible) to people who do not share certain religious convictions, and so should not be relied upon in political decisionmaking. This argument would be reminiscent of Professor Kent Greenawalt's reflections about whether nonaccessible grounds should be excluded as bases for political decisions.[42] Greenawalt also discusses the difficulties in

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[38] *See* Kent Greenawalt, *Natural Law and Public Reasons*, 47 VILL. L. REV. 531, 541 (2002).
[39] *See generally* John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97 (1997).
[40] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 100-101 (1981). For a different, highly persuasive perspective, but one that also emphasizes the connection between religion and rationality, see Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449, 464 (2001) (arguing that because of the strong bond between "revelation" and "reason," contemporary Christians should be leery of banning or disfavoring conduct if "(a) the belief is the subject of increasingly widespread intradenominational disagreement among Christians themselves and (b) no persuasive argument grounded on contemporary human experience supports the belief").
[41] Finnis, *supra* note __, at 97, 118 (Finnis here is arguing for an interpretation of Aquinas). For George's substantial agreement about the "intrinsic human good" of marriage, see George, *What's Sex Got To Do With It? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 70-72 (2004).
[42] KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 39-40, 85-95 (1995) ("What I mean by "not generally accessible" . . . [is that] the believer lacks bases to show others the truth of what he

disentangling the religious and non-religious reasons thatmay jointly inform a particular political judgment.[43] Hamilton might be arguing for the exclusion of any political judgment whose basis cannot be entirely disentangled from religious belief because religious beliefs are not accessible, and therefore any judgment that implicates religious belief is not accessible. But if Hamilton intended to proceed along this line of inquiry – that is, with an eye toward arguing for the total exclusion of the influence of religious belief from public political judgment (or debate) – then it is odd that she unequivocally rejects the plausibility of such an approach.[44]

It could also be that Hamilton means that though the Finnis/George view of gay marriage is at some (remote) level accessible, it is not persuasive on grounds of reason *alone*. For example, Hamilton might claim that she, like many others, cannot reconcile

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believes . . . . This does not mean that reason plays no part in the development of religious convictions. Possible religious understandings may be measured against various tests of reasonableness. But something more is involved: a choice or judgment based on personal experience that goes beyond what reason can establish."). A belief based on revelation would in most circumstances not be accessible, unless the believer can point to a historical, evidentiary record to support it. *Id.* at 41. A belief would be "unintelligible" if the believer could not render his belief comprehensible to others. Thus, a belief based on revelation might often be intelligible though not accessible.

[43] *See, e.g., id.* at 88-89. Taking as his point de départ the natural law view that "virtually all[] ethical and political truths are accessible to common human reason, [and] that understanding these truths does not require an understanding of religious truth," he dissects the problem of intertwining bases of belief: "In my discussion of what constitutes reliance on religious grounds in chapter 6, I mentioned how religious premises may intertwine with naturalist reasoning . . . . I also mentioned a second problem, that people may believe natural arguments are sound because of religious authority, not because they perceive the intrinsic force of the arguments. A third problem is a variation on the second; someone might find the natural arguments *somewhat persuasive* by themselves, but be *much more certain* of their truth because of religious belief."

[44] HAMILTON, *supra* note 1, at 293; *see also* Marci A. Hamilton, *What Does "Religion" Mean in the Public Square*, 89 MINN. L. REV. 1153, 1158 (2005) ("No matter how finely spun the theories that require reason and reason alone to ground public policy are, there has never been a time in the United States when religion has not been a driving force behind social policy, let alone excluded.").

Hamilton contends that Greenawalt endorses the exclusive position, HAMILTON, *supra* note 1, at 292-93, but this is a misreading. *See* Kent Greenawalt, *Religion and American Political Judgments*, 36 WAKE FOREST L. REV. 401, 404 (2001) ("My own answer to the place of religious grounds is an intermediate one . . . . I believe legislators [Professor Greenawalt distinguishes between officials and citizens, and then again among officials between legislators and judges] should give greater weight to reasons that are generally available than to reasons they understand are not generally available. But some reliance on religious reasons is appropriate, especially since the generally available reasons are radically indecisive about some crucial social problems.").

the Finnis/George position by reference to pure reason, and that she therefore suspects that religious convictions are lurking in the background. Hamilton might say that though the natural law proponent starts with a principle that most people would accept as rational (e.g., "one of the primary goods of marriage is procreation"), he reaches, by a step-by-step process of what he claims is "reasoning," conclusions that are highly controversial and not commonly shared (e.g., "homosexual marriage is morally wrong"). To this, the natural lawyer might reply that his beliefs *are* rationally discoverable by all persons, but that the measure of their objective truth is not taken by reference to what most people happen to believe.[45] It therefore still remains for Hamilton to explain why the Finnis/George position on homosexual marriage cannot be explained by reason alone. She might claim that the kind of reasoning deployed to justify the Finnis/George view is altogether too categorical and abstract, that it draws arbitrary and implausible distinctions – ones not based on reason at all – and that itdoes not give enough wei ght to real-world experience.[46]

In the argument I have constructed, it is at this point that Hamilton's second criticism of the Finnis/George position on gay marriage could resurface. Hamilton might say that it is in the consideration of real-world experience that one is most rational about the common good;[47] or as Professor Greenawalt has said in the context of assessing the rationality of natural law's claims about the wrongfulness of homosexuality and its

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[45] FINNIS [NLNR], supra note __, at 30.

[46] *See* Kent Greenawalt, *How Persuasive Is Natural Law Theory?*, 75 NOTRE DAME L. REV. 1647, 1667-71 (2000) ("No doubt, the vast majority of the population could be under an illusion, and a plausible theory of why that might be so [e.g., that advanced by natural law] should make us more likely to think that most people suffer in this way than if no such theory were available. But it is also true that coherent theories that have seemed convincing at one time appear to be shot with error, even ridiculous, at a later time. As moral agents, we must choose between the weight to give to theory and the weight to give to experience when the two conflict.").

[47] Indeed, such a position would be consistent with her generally practical-minded, experience-based approach throughout the book.

implications for same sex marriage,[48] "we have sounder and less sound ways to reason about moral matters, and . . . an approach in which experience receives greater weight is sounder than highly abstract, categorical analysis."[49] Yet the "common good" is a concept of vital importance in the natural law views of George and Finnis; it relates to the rational pursuit of self-evident human goods, which itself implies some kind of appeal to tangible and accessible evidence.[50] Consideration of the "good of marriage" by reference to "what forms of marriage are best for children," either from a theoretical or an experiential point of view, is precisely what the natural law has in mind.[51] Nevertheless,

[48] Greenawalt is primarily addressing the natural law position that consenting homosexual acts are morally defective, rather than any resulting implications of that position for criminal penalties or same sex marriage. *Id.* at 1666. Nevertheless, his treatment of this issue often spills into a discussion of the good of marriage, particularly of the good of sexual intercourse within marriage.

[49] *Id.* at 1673.

[50] *See, e.g.*, FINNIS, *supra* note __, at 134-60; Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 19 (2000). I mean "self-evident" in the way Finnis uses that term. A proposition is self-evident if it is not rationally derivable from some other proposition. FINNIS, *supra* note __, at 70. Self-evidence in this sense does not necessarily entail universal acceptance because people may be deceived for a variety of reasons.

[51] It is not clear whether Hamilton would include the "good" of procreation on her list, but in American law, historically, it has certainly been counted important as a *public* good (it has been deemed a fundamental private good as well, but that is not relevant for this discussion). *See, e.g.*, Baker v. Baker, 13 Cal. 87, 103 (1859) ("[T]he first purpose of matrimony, by the laws of nature and society, is procreation."); Davis v. Davis, 106 A. 644, 645 (N.J. Ch. Div. 1919) ("The great end of matrimony is . . . the procreation of a progeny having a legal title to maintenance by the father."); Poe v. Gerstein, 517 F.2d 787, 796 (5th Cir. 1975) ("[P]rocreation of offspring could be considered one of the major purposes of marriage. . . ."); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. App. 1974) ("[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race."); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."); Heup v. Heup, 172 N.W.2d 334, 336 (Wis. 1969) ("Having children is a primary purpose of marriage."); Zoglio v. Zoglio, 157 A.2d 627, 628 (D.C. App. 1960) ("One of the primary purposes of matrimony is procreation."); Frost v. Frost, 181 N.Y.S.2d 562, 563 (Supr. Ct. New York Co. 1958) (discussing "one of the primary purposes of marriage, to wit, the procreation of the human species."); Ramon v. Ramon, 34 N.Y.S. 2d 100, 108 (Fam. Ct. Div. Richmond Co. 1942) ("The procreation of off-spring under the natural law being the object of marriage, its permanency is the foundation of the social order."); Stegienko v. Stegienko, 295 N.W. 252, 254 (Mich. 1940) (stating that "procreation of children is one of the important ends of matrimony"); Lyon v. Barney, 132 Ill. App. 45, 50 (1907) ("[T]he procreating of the human species is regarded, at least theoretically, as the primary purpose of marriage . . ."); Grover v. Zook, 87 P.638, 639 (Wash. 1906) ("One of the most important functions of wedlock is the procreation of children."); Adams v. Howerton, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), aff'd 673 F.2d 1036 (9th Cir. 1982) (observing that a "state has a compelling interest in encouraging and fostering procreation of the race").

if Hamilton had wanted to take on the Finnis/George position as I have suggested, she might have found an inquiry into the theoretical/experiential bases of reason and the public good a fruitful one.

This is not the place for full assessments of these difficult views and Professor Hamilton is, of course, at liberty to disagree with George's rejection of gay marriage as inconsistent with the common good. But Hamilton's critique of natural law theory as sub- or supra-rational requires greater elaboration and her claim that such an approach does not account for the common good makes one wonder exactly what she means by invoking the concept. Again, these may appear to be quibbles about non-essential matters, but theyare germane to Hamilton's explanation and defense of her own public good concept.

Hamilton concludes Chapter Three with a discussion of polygamous marriage.[52] After presenting the arguments of Mormons for the legal protection of polygamy, and noting that there is no constitutional right to polygamous marriage, Hamilton poses the following tests for measuring whether polygamy should be accommodated: "The question is not whether polygamists may trump the law, but rather whether polygamy can coincide with the public good[]"[53]; "The question for public policy is whether the practice of polygamy is consistent with what is best for society, period[]"[54]; and "[Legislators] must also always ask whether the conduct in question comports with the public good, and that means they must examine with some care how the conduct impacts

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None of this, of course, necessarily speaks to whether homosexual marriage threatens the public procreative aim of marriage (the advent of reproductive technologies, such as in vitro fertilization, may be relevant in assessing this issue), or whether the public good of marriage has in some way changed so as to render procreation less vital.

[52] HAMILTON, *supra* note 1, at 66-77.

[53] *Id.* at 68.

[54] *Id.* at 72-73.

others."[55] Hamilton appears to have answered these questions for herself. She believes that polygamy perpetuates inequalities between the sexes and may be inconsistent "with the rule of law and democracy."[56] Other topics relevant to assessing the "public good" of polygamy, according to Hamilton, should include its unclear impact on issues of child custody, inheritance, and even the spread AIDS in Africa.[57]

Hamilton's own legal expertise is showcased in Chapter Four, which describes the conflicts that arise when religiously inclined land owners seek to use their property in ways that threaten the character of residential communities. She has considerable experience litigating these cases, most often representing the party opposing the religious accommodation (i.e., the locality or the neighbors).[58] She describes vividly the acrimony generated by these disputes: a religious person who wishes to expand his home to accommodate greater numbers of worshippers; the often enormous increase in traffic and commerce such plans mean for a residential neighborhood ("generating a traffic pattern more evocative of a grocery store than a home")[59]; the transformation of a once-a-week house of worship into a "multiple-use service center[]"[60]; the arrival of the homeless, seeking food, shelter, and spiritual guidance, into the residential areas, and the resulting deterioration of the neighborhood[61]; and the inevitable legal entanglements and concomitant ill will among neighbors, including charges of discrimination.[62]

Hamilton places the blame for these problems (and many others for what she believes is over-zealous religious accommodation) on two federal statutes, the Religious

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[55] *Id.* at 77.
[56] *Id.* at 74.
[57] *Id.* at 76.
[58] *Id.* at 84, 106. *See also* City of Boerne, 521 U.S. at 509.
[59] *Id.* at 80.
[60] *Id.*
[61] *Id.* at 100-01.
[62] *Id.* at 97-98.

Freedom Restoration Act ("RFRA") of 1993,[63] which was partially struck down in *City of Boerne v. Flores*,[64] and the Religious Land Use and Institutionalized Persons Act ("RLUIPA") of 2000.[65] RLUIPA requires that if the state passes a land use law that imposes a "substantial burden" on the religious use of property, it must demonstrate that the law serves a compelling state interest and is the least restrictive means of furthering that interest.[66] With more than a hint of bitterness,[67] Hamilton argues that Congress abdicated its responsibilities to the common good because it failed properly to explore the likely effects of RLUIPA on the rights of homeowners and the relationships among neighbors: "RLUIPA has turned neighbor against neighbor and is one of the most religiously divisive laws ever enacted in the United States."[68]

It bears reflection whether the antagonisms that Hamilton identifies were simmering all the while. RLUIPA may have changed the legal landscape, but it seems doubtful (or at least, Hamilton has not made a strong case for the position) that RLUIPA (and RFRA before it) created or even significantly exacerbated the hostilities between these competing interests. "[D]ivisive religious discord"[69] about the proper use of land is

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[63] 42 U.S.C. § 2000bb, *et seq*. (2005).
[64] 521 U.S. at 536. RFRA was invalidated as exceeding Congress's power under section 5 of the Fourteenth Amendment over the states; it may remain applicable as to the federal government. Cutter v. Wilkinson, 125 S. Ct. 2113, 2118 n.2 (2005) (noting that several Courts of Appeals have so held, but expressing no view on that question).
[65] 42 U.S.C. § 2000cc, *et seq*. (2005).
[66] 42 U.S.C. § 2000cc(a)(1).
[67] HAMILTON, *supra* note 1, at 96 ("In 2000, President Bill Clinton (who never met a religious cause he would not support as president), signed RLUIPA, saying: "Today I am pleased to sign [RLUIPA] into law . . . which will provide important protections for religious exercise in America." Then he praised the usual suspects behind such legislation, Senators [Orrin] Hatch and [Edward] Kennedy. (It has not been done yet, but one could write a book about their partnership benefiting religious entities). Not skipping a beat, he then thanked the religious groups . . . and the civil rights communities for "crafting this legislation." . . . . To state his point a little more clearly, this was special interest legislation, drafted outside Congress and then passed because the members and the president believed the right people were behind it, not because they had determined independently that it was a good law for the people.").
[68] *Id.* at 97.
[69] *Id.* at 103.

a product of conflicting private interests and beliefs about the good life. As Hamilton suggests, that strife may well be driven by the evolving nature of religious practice in America and its incompatibility with other, competing, interests (such as traditional notions of home ownership, the desire for a certain kind of neighborhood character, or the efforts of a municipality to control expansion). Still, Hamilton's criticisms of RLUIPA as a potentially aggravating force in this process ring at least partially true; by imposing a heavier burden on localities to justify land use laws affecting religious institutions, RLUIPA *could* give the religious institutions an advantage, or at least a standing, that they previously may not have enjoyed.[70] Yet this is hardly the same as contending that such an advantage demonstrates that the public good has been disserved, let alone ignored; it simply demonstrates that Congress has made a choice about where the public good lies. Providing an attractive haven for the homeless or encouraging the establishment of institutions that will see to their spiritual and physical needs may well displease neighboring landowners. They will be disturbed and their property values probably will suffer. But it would not be unreasonable, let alone an obvious capitulation to special interests, for a legislator to conclude that these measures would nevertheless advance the public good. Similarly, though Hamilton dismisses the idea that landowners and townships may have discriminatory reasons for opposing religious land usages in

[70] The weight of the additional burden will depend on an individual state's religious accommodation laws. Many states have zoning laws favorable to religious interests. *See generally* Donald A. Giannella, Religious Liberty, *Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 539 (1968) ("The greatest number of zoning ordinances grant special exemptions for churches in residential areas provided they do not cause traffic hazards, congestion, or excessive and untimely noise."). Furthermore, Hamilton points out that various states have passed their own RFRAs, and though some provide for various exemptions, several others do not. HAMILTON, *supra* note 1, at 182-84. For those states with their own RFRAs, particularly for those with no or few exemptions (or for exemptions other than for prisons and land uses), RLUIPA imposes no additional burden.

their neighborhood,[71] the RLUIPA legislative record "contained statistical, anecdotal and testimonial evidence suggesting that [religious] discrimination is widespread and typically results in the exclusion of churches and synagogues even in places where theatres, meeting halls, and other secular assemblies are permitted."[72] Hamilton disagrees with this characterization of the record, argues that allegations of discrimination were fabricated or inflated for political advantage, and believes that relevant voices were not consulted.[73] But these are not very interesting arguments – evidentiary points that a lawyer might make in a summary judgment brief – and unworthy of her theoretical claims about what is best for American society. More interesting is to assume that the evidence is as Congress believed it to be, and to discern precisely what Hamilton means by invoking the concept of the public good to support her claim that Congress ignored it.[74]

Hamilton's discussion of RFRA's and RLUIPA's effect on the prison system is at once fascinating and slightly irritating. She begins the chapter by detailing the despicable activities and recruiting tactics of white supremacist organizations and gangs in prison.[75] Other than a lonelyquote from a member of the Aryan Brotherhood that the act of killing is rewarding because "it's a holy cause,"[76] the connection between these groups' activities and their religious motivation is not readily apparent from Hamilton's

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[71] *Id.* at 103-04.
[72] Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1236 (11th Cir. 2004).
[73] *See, e.g.*, HAMILTON, *supra* note 1, at 150-56.
[74] It could be argued that *if* Congress's primary goal in passing RLUIPA was to eliminate religious discrimination *and* there is absolutely no evidence of any religious discrimination, RLUIPA then fails to serve the public good because it targets a problem that does not exist and possibly creates an additional source of strife. I doubt, however, that even Hamilton would argue for such a categorical view either of Congress's intentions in passing RLUIPA (the potential for discrimination is only one reason to favor religious accommodation) or of the total absence of any evidence of religious discrimination.
[75] *Id.* at 141-44.
[76] *Id.* at 143.

treatment. In fact, one has the sense that Hamilton may be overreaching in arguing for a pervasive link between the two in order lend rhetorical support to her opposition to RLUIPA and accommodation generally. To be clear: I am not suggesting that such connections do not exist; they do. Some white supremacists do derive their views from religious organizations, such as the Church of Jesus Christ Christian, Aryan Nation. I mean only to point out that the book's portrait of the activities of white supremacist gangs, in and out of prison, does not make clear whether religious convictions are, as a general matter, of crucial importance to white supremacist beliefs. Still less clear is the effect that RFRA or RLUIPA has had on the proliferation of white supremacist belief or violence. The evidence that Hamilton presents that prisons have become a breeding ground for radical Islamic organizations is much more compelling, as is the connection between the failure of moderate Muslim imam recruitment for the prison population and the consequent infiltration of extremist Muslim chaplains, who are more likely to distort Islamic belief and inflame the hatred of those already susceptible to terrorist indoctrination.[77] Against the backdrop of these two problems, Hamilton again launches into a diatribe against RLUIPA: it was a craven capitulation to special interests, its likely effects were not adequately investigated, contrary views were not sought, and the public good was ignored.[78] Hamilton is rather perfervid here, concluding with the confident prediction that the Supreme Court would in short order strike down RLUIPA.[79] The Supreme Court unanimously disagreed with her in *Cutter v. Wilkinson*,[80] holding that

[77] *Id.* at 144-49.
[78] *Id.* at 150-56.
[79] *Id.* at 155 ("The Supreme Court will decide by July 2005 whether [RLUIPA] is constitutional. (It's not.)").
[80] Cutter v. Wilkinson, 125 S. Ct. 2113, 2121 (2005). Hamilton is also in the substantial minority of scholars who believe that RLUIPA violates the Establishment Clause. Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 745-46 nn. 224 & 225 (2005).

section three of RLUIPA (governing persons confined to institutions) did not violate the Establishment Clause.

In answer to the question, "How much trouble can religious accommodation [in prison] be?",[81] Hamilton reels off an impressive and extremely amusing list of the sundry dietetic, grooming-related, literary, and sartorial requests made by prisoners on the ostensible basis of religious belief.[82] The Church of the New Song, for example, insists that its adherents be served sherry and steak every Friday at 5:00 P.M. in order to participate in the "celebration of life."[83] Hamilton cleverly uses this absurd case as a foil for her anti-accommodation arguments, but at least some of these gross abuses, as well as the cases of dangerous activity in the name of religious belief, could be dealt with by applying *Cutter's* dicta that:

> It bears repetition, however, that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area . . . . Further, prison officials may appropriately question whether a prisoners' religiosity, asserted as the basis for a requested accommodation, is authentic. Although RLUIPA bars inquiry into whether a particular practice is "central" to a prisoner's religion, . . . the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity . . . .[84]

Hamilton would likely disagree with this position. She would contend that courts are institutionally incompetent to perform these kinds of inquiries; legislative action, free from the sway of special interests, is needed if the public good is to be protected.[85] Before turning to the now long-forestalled exploration of Hamilton's concept of the public good (in which her fondness for individualized legislation is discussed), a word about the second part of the book is necessary.

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[81] HAMILTON, *supra* note 1, at 156.
[82] *Id.* at 157-61.
[83] *Id.* at 163-65.
[84] Cutter, 125 S. Ct. at 2124 n.13 (citations omitted).
[85] HAMILTON, *supra* note 1, at 212.

b. The Gavel

Part Two of the book is primarily about Supreme Court doctrine and constitutional history. Hamilton divides the Supreme Court's free exercise jurisprudence into a "dominant" and a "competing" doctrine. The dominant doctrine embodies two principles: "religious entities, just as much as any other citizen, can be forestalled and prohibited from harming others and thus can be made to obey a myriad of laws," and religious institutions must not be "subjected to laws that are hostile or motivated by animus toward religion in general or any sect in particular."[86] The dominant doctrine was first expressed in *Reynolds v. United States*,[87] a case upholding a federal antipolygamy law. Because the statute did not target Mormons in particular, Hamilton argues, but merely expressed a neutral public policy preference against polygamy, the law passed both strands of the dominant doctrine.[88] Where religious animus is "patent," as in *Church of the Lukumi Babalu Aye v. City of Hialeah*,[89] Hamilton argues that the second strand of the dominant doctrine is violated, and the courts properly intervene. The "competing" doctrine is an aberrant strain of free exercise cases that applies strict scrutiny (at least in name)[90] to generally applicable, neutral laws.[91] The competing doctrine was repudiated in *Smith*, "and the rule of law prevailed."[92]

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[86] *Id.* at 210-11.
[87] 98 U.S. 145 (1879).
[88] HAMILTON, *supra* note 1, at 211.
[89] 508 U.S. 520 (1993). In fact, the conclusion that the City of Hialeah displayed anti-religious motive only received two votes. *Id.* at 540-42 (Justices Kennedy and Stevens). The basis for the Court's holding was that the City ordinance was not of general applicability: it gave greater protection to non-religious killing of animals than to religiously motivated animal sacrifice. *Id.* at 533-40.
[90] *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1127-28 (1990) (arguing that though the courts have claimed to apply strict scrutiny in these contexts, their review is often less rigorous).
[91] The "competing doctrine" cases in which the religious interest prevailed comprise the "literal handful" listed by Hamilton: Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 835 (1989) ("[T]here may exist state interests sufficient to override a legitimate claim to the free exercise of religion. No such interest has been presented

Congress reacted rapidly to *Smith* (as *Smith* itselfobliquely suggested that it might)[93] by enacting RFRA, whose flaws by Hamilton's lights have already been discussed. The Supreme Court then invalidated RFRA as it applies to states and localities on federalism grounds in *Boerne*. Hamilton attributes Congress's "overreaching" in RFRA to a kind of swollen ego; its historic successes in enacting civil rights legislation in the sixties, and the deference accorded that legislation by the courts, grew into "dogmatic belief in the unassailability of whatever Congress attempted."[94] Yet the trend seemingly signaled by *Smith* and *Boerne*, and hailed by Hamilton as manifesting the proper exercise of judicial constitutional oversight, was dealt a blow by *Cutter v. Wilkinson*. Relying on the principle that there is "room for play in the joints between" the Establishment and Free Exercise Clauses,[95] the Court held that Congress's

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here."); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (denial of unemployment benefits to person discharged for refusal to work on the Sabbath subject to strict scrutiny); Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (applying strict scrutiny to unemployment benefits denial to person who refused to make armaments based on religious belief). There is a sixth finger in this handful. In Bowen v. Roy, 476 U.S. 693 (1986), a case that Hamilton does not list, six members of the Court found a free exercise violation in requiring plaintiffs to submit a social security number for their daughter in order to receive government benefits. The plaintiffs believed that use of the number would rob their daughter's spirit. The six who found for plaintiffs on this claim applied the strict scrutiny standard.

There is a handful more in which the Court also applied strict scrutiny but where the religious interest lost. *See, e.g.*, Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 394-97 (1990) (generally applicable sales tax used as against religious materials survived strict scrutiny); Hernandez v. Commissioner, 490 U.S. 680, 700 (strict scrutiny satisfied in denial of charitable deduction to Church of Scientology for training sessions); United States v. Lee, 455 U.S. 252, 260 (1982) (requirement to participate in social security survives strict scrutiny as applied to individual whose religious belief prohibited participation); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (denial of tax exemption to university that refused admission to anyone involved in interracial marriage survived strict scrutiny). Presumably Hamilton would be as opposed (or only slightly less opposed) to the analytical approach endorsed by these cases as she is to those in which the religious interest prevailed. *See* Smith, 494 U.S. at 896-97 (O'Connor, J. concurring) ("Moreover, in each of the other cases cited by the Court to support its categorical rule [including *Lee*], we rejected the particular claims before us only after carefully weighing the competing interests. That we rejected the free exercise claims in those cases hardly calls into question the application of First Amendment doctrine in the first place. Indeed, it is surely unusual to look at the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.").

[92] HAMILTON, *supra* note 1, at 220.

[93] Smith, 494 U.S. at 890.

[94] HAMILTON, *supra* note 1, at 229.

[95] Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970).

special solicitude for the religious interests of institutionalized persons was constitutional. It may be argued that the Court's treatment of RLUIPA in this context is unique, because the government's control over institutionalized persons is "severely disabling"[96] to religious interests. The Court's "foremost" reason for upholding RLUIPA, however – that it "alleviates exceptional government-created burdens"[97] – is perhaps a reference to the strong evidentiary basis in RLUIPA's record justifying the accommodation; this may not distinguish it from the land use context.[98]

Whatever the future holds for section 2, and for continuing congressional efforts at religious accommodation, Hamilton's view that *Boerne* represents some sort of historic fulcrum or "culmination of U.S. legal principles"[99] seems to have been considerably undercut by *Cutter*. Her highly readable, though speedy, chapter on the history of religious accommodation in England and early America, emphasizing the decline of the moral authority of religious institutions (the iniquities in the name of the "religion of the realm,"[100] from the Inquisition to the Star Chamber to the Tower of London, are briefly recounted)[101] and the rise of the common law and the "no-harm" principle[102] is all aimed

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[96] Cutter, 125 S. Ct. at 2121. On the other hand, substantial deference is traditionally accorded to the decisions of prison administrators (in many constitutional contexts including religious freedom) in light of safety concerns that are also unique. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 550 (1979) (regulation prohibiting prisoners from receiving hardcover books from any source other than a bookstore, publisher, or book club, was rationally related to penological interest); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 129 (1973) (regulation curtailing prisoner involvement with labor union likewise upheld).

[97] Cutter, 125 S. Ct. at 2121.

[98] It may, however, distinguish it from the problems of "proportionality" that led the Court to strike down RFRA in *City of Boerne*. 521 U.S. at 532-33. The *Boerne* Court was troubled that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*

On the oddity of this proportionality analysis of RFRA, see Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 754-56 (1998) (arguing that the proportionality standard has not been applied to many other civil rights statutes). Professor Laycock represented Archbishop Flores in *City of Boerne*.

[99] HAMILTON, *supra* note 1, at 237.

[100] *Id.* at 253.

[101] Hamilton gives the austere Calvinism of the founding era a free pass because of its allegedly justified pessimism about human nature, *id.* at 2258-59, and its emphasis on the idea that "each person was given a

to cast the reasoning of *Boerne* and *Smith* as the apex of enlightened thought about religious accommodation. The focus of her final chapter, "The Path to the Public Good," brings us to the crux of the matter.

III. The Public Good

One of the most intractable difficulties with Hamilton's conception of the public good is that it does not account for the reality, which she herself loudly proclaims, that religion is very important to many Americans. Since that is so, isn't it likely that people for whom religion is important will feel that their religious beliefs can and should, *at some level*, shape the public good? Hamilton appears to concede this point.[103] And since religious convictions often do affect the citizenry's (including the legislature's) understanding of the public good, on what grounds does Hamilton criticize the introduction of those perspectives into the public domain?[104] Hamilton uses the concept of the public good throughout her book and, whatever else may be said about it, she is emphatic that it is vitally important and that religious belief *alone* should not establish its contours. In what follows, the review offers and explores a number of possible philosophical commitments that might undergird Hamilton's concept of the public good.

a. The Public Good as the No Harm Doctrine

Hamilton often invokes the concepts of the public good and the no harm doctrine as if they meant roughly the same thing: "[R]epresentatives must consider whether the liberty accorded is consonant with the no-harm rule. If so the public good has been

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job by God to fulfill," which for the legislator is the pursuit of the public good. Marci A. Hamilton, *Republican Democracy is Not Democracy*, 26 CARDOZO L. REV. 2529, 2533 (2005); *see also* Marci A. Hamilton, *Direct Democracy and the Protestant Ethic*, 13 J. CONTEMP. LEGAL ISSUES, 411, 438-51 (2004).

[102] *Id.* at 260.

[103] *Id.* at 293.

[104] By posing the question in this way, I do not mean to suggest that I believe there are no such reasons. I am simply interested in exploring Hamilton's reasons.

properly served. If not, the public good, and therefore the constitutional order, has been subverted"[105]; "In a republican form of democracy like this one, the laws are enacted to serve the larger public good, and no one should be permitted to harm another person without account"[106]; "[T]he duties created by a democratic government – the law – are created for the purpose of furthering the public good, which is served when bad actors are deterred from harming others and punished if they do."[107]

The overlap between the no harm doctrine and the public good is at its least controversial when one considers Hamilton's arguments about child exploitation by religiously motivated persons.[108] It seems intuitively reasonable and appealing to argue that the public good is advanced when the physical security of children is achieved at the expense of the rights of alleged child abusers to shield their misdeeds in the name of religious freedom; the same can probably be said of the interests of religious organizations to withhold documents or other information relevant to child abuse investigations and the interests of religiously motivated parents to withhold necessary medical treatment from their children. These are clear instances of substantial interests in physical security and health competing against less important interests.

Perhaps less obvious is a situation in which the safety of schoolchildren is measured against, say, the religious interest of a male Sikh student in carrying a ceremonial knife under his clothing.[109] At first glance, the potential for substantial harm

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[105] *Id.* at 279.
[106] *Id.* at 8.
[107] *Id.* at 278-79.
[108] It is therefore no surprise that in other recent work Hamilton emphasizes this particular context when analyzing the no harm doctrine. *See* Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. REV. 1099, 1204-1216 (2004) ("A Case Study of the No-Harm Doctrine: The Catholic Church's Clergy Abuse Scandal").
[109] *Id.* at 114-18 (describing the kirpan, which can range in length from a few inches to as long as three feet).

might intuitively outweigh the accommodation; but adequate precautions could be taken to limit considerably the occasions for physical harm. Naturally, the state has a compelling interest in the safety of its students and the carrying of knives does not sit easily with that interest, but Hamilton does not explain why various measures short of prohibiting the kirpan altogether could not serve the state's interest just (or nearly) as well. For example, one court has suggested that the kirpan could be "blunted or dulled," as well as sewn into a sheath, in order to protect the safety of students, and these are surely not the only possible measures to reach a religious accommodation while at the same time protecting student safety.[110] It is not clear why Hamilton claims that "[o]nly a flawed legal doctrine would lead a court out on such a weak limb. Knives are knives, and children are not safe in their presence, no matter who they are."[111] A kirpan with a dulled edge and point, sewn into a sheath, and perhaps made of something other than metal (plastic, for example) might satisfy the religious and state interests. Knives may be knives, but, to paraphrase Magritte, *this* is not a knife.[112]

The controversial edges of Hamilton's no harm doctrine come into focus in some of the other contexts she discusses, particularly where the idea of physical harm does not apply. For example, Hamilton might say that legislative opposition to gay marriage harms homosexuals, in that it prevents them from enjoying marriage, "a social construct that must be determined in light of the common good, not by the reflection of any particular group's religious beliefs."[113] One possible objection, raised earlier,[114] would

[110] Cheema v. Thompson, 1994 WL 477725, at *4 n.7 (Sept. 2, 1994).
[111] HAMILTON, *supra* note 1, at 116.
[112] It may be that a Sikh would not accept such an adulterated kirpan. The point is that there may be compromises that the Sikh would accept that would render the kirpan safe.
[113] *Id.* at 67. I set aside her question-begging assumption that marriage is a social construct.
[114] *See supra* at notes __ and accompanying text.

be that permitting homosexual marriage harms the institution of heterosexual marriage (whether viewed from the perspective of moral realism or, as Hamilton does, as a social construct) and those engaged in it. Hamilton might then reply that the objection is ill-taken because it injects religious belief into a secular debate, or because the objection inappropriately relies on religious reasons.

"Anyone who advocates the Harm Principle owes us an account of harm[.]"[115] What sort of harms count in Hamilton's calculus? In the context of religious accommodation, Professor (now Judge) Michael McConnell has written in support of the principle that "we are free to practice our religions so long as we do not injure others."[116] Likewise, Professor Douglas Laycock has recently stated that "some religious practices must be regulated or prohibited to prevent some significant temporal harm to others."[117] Both of these writers, with whom Hamilton vigorously disagrees about the scope of religious accommodation, are making arguments that harm is a necessary condition for enforcement of laws that limit religious freedom; that is, absent the causing of some serious harm, legal regulation of the free exercise of religion is improper. Hamilton seems to be making the same claim. If all three agree as to the basics of the no harm principle, how do we account for their disagreement in its application?

The answer may be that, in practice, the no harm principle is no longer a necessary condition for exercising the state's coercive power because "non-trivial harm

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[115] R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13, 16 (2001).
[116] McConnell, *supra* note __ [Revisionism], at 1128 (citing Stephen L. Pepper, *The Conundrum of the Free Exercise Clause – Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 289 (1982) ("[I]s there a real, tangible (palpable, concrete, measurable), non-speculative, nontrivial injury to a legitimate, substantial state interest?")).
[117] Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 200 (2004).

arguments are being made about practically every moral offense."[118] Focusing on the existence or non-existence of harm cannot answer the question of comparing harms. Nor can an emphasis on "conduct" as distinguished from "intentions" or "attitudes" neatly identify the type or category of harm that should concern us. As Professor R.A. Duff has explained in the context of his theory of punishment:

> The harm suffered by the victims of central *mala in se* crimes (such as murder, rape, theft, violent assault) consists not just in the physically, materially, or psychologically damaging *effects* of such crimes but in the fact that they are victims of an *attack* on their legitimate interests – on their selves. The harmfulness and wrongfulness of such attacks lie in the malicious, contemptuous, or disrespectful intentions and attitudes that they manifest, as well as their effects.[119]

If the no harm principle ever served as a useful threshold determination, it no longer does so; most allegations of moral harm now meet (or at least claim to meet) that threshold. For example, in Hamilton's land use discussion, we have already observed the clash and in some cases incompatibility of rival interests (e.g., those of residential neighbors, religious institutions and their potential adherents, and municipalities). All of these groups could plausibly claim to be harmed by political judgments antithetical to their interests.[120] No resolution to these conflicts is readily apparent by reference to the no harm principle alone, or even to "balancing the harms" if the frame of reference for measurement is the no harm principle itself. The interests at stake may not only be incompatible but also incommensurable. That is, there may be no way to decide between

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[118] Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 114 (1999).

[119] R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 128 (2001).

[120] *See* Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 B.Y.U. L. REV. 1593, 1611 (2004) ("[I]t is beside the point to argue against a doctrine of autonomy, as Professor Hamilton does . . ., on the ground that it will immunize churches from liability for direct batteries on unconsenting third parties – that is, for sexual abuse of children. These and other direct batteries have always been the paradigm case of conduct falling outside the free exercise of religion. Those who espouse the antiexemptions position must deal with the tougher cases – the plethora of modern laws that rely on the possibility of diffuse or distant harms to restrict behavior today.") (footnotes omitted).

rival positions simply by measuring "harm" (or their respective potential for "good," for that matter).[121] How does one measure interests in religious liberty against those in property rights, as gauged by their respective potential for harm? Yet Hamilton nevertheless claims to have a clear view about where the public good lies.

There are also some circumstances discussed by Hamilton in which the no harm doctrine has little apparent relevance to discerning the public good. For example, Hamilton raises the relatively recent phenomenon of what she refers to as "religious prisons" and others have called faith-based rehabilitation programs, noting that "[t]here appears to be an increasing amount of evidence that suggests that some religious programming in prisons can reduce the recidivism rate."[122] Other than the possibility that inmates would be coerced by the state to participate in such programs against their will (which would certainly be a harm, but which Hamilton does not suggest is occurring), the "harm" in these programs to the participating offender, *qua* religious[123] and as Hamilton has reported them, is difficult to locate; and, in fact, Hamilton's skepticism about the programs derives from something other than their capacity for harm.[124] Thus, I conclude that while a harm calculus is in some cases intuitively related to Hamilton's public good considerations, the no harm doctrine severely underdetermines what she means to express by the public good.

b. The Public Good as the "Rule of Law" or "Ordered Liberty"

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[121] On the incommensurability of competing visions of, e.g., justice and the good life, *see generally* ALASDAIR MACINTYRE, AFTER VIRTUE 8 (1981) ("Every one of the arguments is logically valid or can be easily expanded so as to be so. But the rival premises are such that we possess no rational way of weighing the claims of one as against the other. For each premise employs some quite different normative or evaluative concept from the others, so that the claims made upon us are of quite different kinds.").
[122] HAMILTON, *supra* note 1, at 165.
[123] I put to the side Hamilton's suggestion that the Christian emphasis of some of these programs "harms" other religious entities that might be interested in programs emphasizing their own faiths. *Id.* at 168. That is an argument for greater, not less, use of "religious prisons."
[124] *Id.* at 168-69.

There is a kind of antagonistic symmetry in the title of the book from which one could reasonably infer that Hamilton is contrasting religious accommodation with the "rule of law": as "God" is to "The Gavel," so "Religion" must be to "The Rule of Law." Hamilton often refers to the rule of law as closely related to, if not the same as, the public good. For example: "Those who sacrifice the interests of women and children in the name of religion, or the rights of homeowners to religious landowners have imposed a system that demotes the public good to a secondary value. They have subverted the rule of law."[125]

What does Hamilton mean by the rule of law?

> The rule of law is a canopy of mutual protection reached through legitimate processes, under which all members of the society must abide by the same rules and observe the rule of no harm to others. The rule of law is diminished when individuals may use their personal beliefs to avoid the law and to harm others.[126]

Hamilton's particular inspiration for her rule-of-law ideal as applied to religious accommodation derives from the holding and reasoning of Justice Scalia's majority opinion in *Smith*; otherwise neutral laws of general applicability whose incidental effect is to inhibit religious expression do not offend the First Amendment, the alternative being an anarchic system in which "each conscience is a law unto itself."[127]

The venerable concept of the "rule of law" has been expressed in many ways. Ronald Dworkin, for one, has formulated it this way:

> Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified . . . . This characterization of the concept of law sets out, in suitably airy form, what is sometimes called the "rule"

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[125] *Id.* at 304; *see also id.* at 219 (praising scholars who opposed the "competing doctrine" of constitutional religious accommodation discussed earlier as defenders of the rule of law).
[126] *Id.* at 303.
[127] Smith, 494 U.S. at 890.

> of law. It is compatible with a great many competing claims about exactly which rights and responsibilities . . . do follow from past political decisions of the right sort and for that reason do license or require coercive enforcement.[128]

There is obviously one aspect of the rule of law, captured by Dworkin's statement (and others'),[129] that is procedural (or "instrumental")[130]; laws should be clear, they should be validly enacted, they should be applied generally and consistently, and like cases should be treated alike.[131] Along similar lines, Professor Ronald Cass has listed four traits of the rule of law: "(1) fidelity to rules, (2) of principled predictability, (3) embedded in valid authority, (4) that is external to individual government decision makers."[132] Hamilton certainly intends at least this procedural sense of the rule of law when she contends that "religious conduct must be governed by the same laws that govern the rest of us."[133]

This hardly ends the inquiry however, because adherence to the procedural sense of the rule of law does not necessarily explain why interests in religious accommodation are "like" (all) other interests, and should be treated as such for rule-of-law purposes. In fact, there is prima facie constitutional evidence that interests in religious free exercise are *not* "like" many other interests that the law might infringe upon or protect.[134] There is no constitutional limitation on lawmaking as to the rate of speed one may travel on a public road. A law that sets the speed limit surely infringes on one's freedom of movement. Few would claim, however, that an interest in traveling as fast as one wants

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[128] RONALD DWORKIN, LAW'S EMPIRE 93 (1986).
[129] *E.g.*, LON FULLER, THE MORALITY OF LAW (Chapters 2 and 5) (listing eight specific virtues of the rule of law).
[130] Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 786 (1989).
[131] *E.g.*, JOHN RAWLS, A THEORY OF JUSTICE 208 (rev. ed. 1999) ("The rule of law also implies the precept that similar cases be treated similarly.").
[132] RONALD A. CASS, THE RULE OF LAW IN AMERICA 4 (2001).
[133] HAMILTON, *supra* note 1, at 310-11.
[134] U.S. CONST. amend. I.

and an interest in practicing one's religion freely are "alike," in the sense that the government should bear the same burden to justify regulating either activity.

Is there, then, a more substantive sense of the rule of law that could explain Hamilton's reliance on it to support her anti-accommodation argument? Some would answer no.[135] Those that might answer yes do so by reference to a "point" or "reason" for the rule of law that Hamilton might dispute.[136] For example, Professor Todd Zywicki has identified "Constitutionalism" as "[t]he first value of the rule of law."[137] By this he means that "government power is constrained by "the law," an external force [by] which political decision-making must abide . . . . The rule of law enhances individual freedom by permitting individuals to choose and pursue their own ends in life, without improper influence from the state."[138] Thus, even those who subscribe to a more substantive vision of the rule of law ground their understanding of the public or common good on some concept ("constitutionalism," "liberty," "human dignity," and so on) distinct from the rule of law.[139] Hamilton cannot use the rule of law itself synonymously with her conception of the public good.

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[135] *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW 212 (1979) ("If the rule of law is the rule of the good law then to explain its nature is to expound a complete social philosophy."); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW AND PHILOSOPHY 137 (2002).

[136] *E.g.*, FINNIS, *supra* note __ [NLNR], at 270-76 ("Individuals can only be *selves* – i.e. have the dignity of being 'responsible agents' – if they are not made to live their lives for the convenience of others but are allowed and assisted to create a subsisting identity across a 'lifetime.'"). For Finnis, the rule of law is thus a mechanism, valuable on its own terms, that helps to ensure that government assists its subjects in pursuing the good life (as he envisions it). Even Finnis recognizes, however, that "the Rule of Law does not guarantee every aspect of the common good, and sometimes it does not secure even the substance of the common good." *Id.* at 274.

For Rawls, the procedural rule of law was intimately connected with the concept of liberty (itself critical to his central idea of justice as fairness), RAWLS, *supra* note __ [TOJ], at 210-13, but Rawls also felt that breaches of the rule of law would sometimes be necessary to protect against greater deprivations of liberty that would occur if the rule of law were observed. *Id.* at 213. It is possible that Hamilton would agree with this position, but not likely since her view of the rule of law seems to admit of no exception.

[137] Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 4 (2003).

[138] *Id.* at 4, 7.

[139] *See* Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 GEO. WASH. L. REV. 149, 152 (1987) ("There is no question that the rule of law is a necessary condition for a

Many of the same points may be made of Hamilton's use of the phrase "ordered liberty" in connection with the public good, in this book and elsewhere: e.g., "Judicial deference to the military in prisons is not the end of religious liberty; it's just ordered liberty."[140]; "The liberty that is consonant with the public good is ordered liberty, which takes into account both liberty and the public good."[141]

The phrase "ordered liberty" has a rich and controversial constitutional history that Hamilton oddly does not mention, including its memorable use in *Palko v. Connecticut*[142] and its progeny. Perhaps she omits such a discussion because her concept of ordered liberty has little to do with advocating for special protections for constitutional rights, and more to do with a muscular view of government power, one that is little different than the holding of *Smith*. The phrase was also used by Chief Justice Burger in his majority opinion in *Bowen v. Roy*.[143] Faced with a free exercise challenge, the Supreme Court there upheld a Pennsylvania statute that required a state agency to use a social security number in administering certain programs, notwithstanding the claim that use of the number would violate plaintiffs' Native American religious beliefs. Chief Justice Burger offered this rather uninstructive statement:

> The First Amendment's guarantee that "Congress shall make no law . . . prohibiting the free exercise" of religion holds an important place in our scheme of ordered liberty, but the Court has steadfastly maintained that claims of

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just and sane society. The fear of discretion that is shared by both [A.V.] Dicey and [Friedrich] Hayek is well grounded by the more explicit modern treatment of property rights, which shows that ill-defined property rights lead to legislative intrigue, political favoritism, and massive uncertainty, all of which tend to reduce the levels of both liberty and utility. But if the rule of law . . . is necessary for a just and sound society, it is a very different question to ask whether it is sufficient to achieve that result . . . . [T]he choice of the best, even the best achievable, form of political organization demands more than faithful adherence to the rule of law can provide.").

[140] HAMILTON, *supra* note 1, at 172.

[141] Hamilton, *supra* note __ [Religious Instits, the No-harm doctrine, …], at 1105 (footnote omitted).

[142] 302 U.S. 319, 325 (1937) (due process protects citizens against state interferences with rights, such as the free exercise of religion, that are "implicit in the concept of ordered liberty").

[143] 476 U.S. 693 (1986).

> religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government.[144]

As an explanation of the substantive principle of "ordered liberty," this statement offers little, if anything, in the way of guidance. To the extent it does, however, the principle of ordered liberty is used here as an argument in the service of greater, not less, religious freedom.[145]

On Hamilton's concept of ordered liberty and its association with the public good, the criticisms of Professor Carl Esbeck merit lengthy reproduction:

> Certainly a republic needs "ordered liberty," and no one responsible argues to the contrary. But the American republic is also about limited government. Achieving [Hamilton's] goal of the "public good" requires balance. That is, neither church nor state is absolute, and there are some matters concerning which neither can legitimately invade the space of the other. Professor Hamilton's argument assumes the very issue in debate rather than addressing it. No one is pressing for immunity for religious institutions from the rule of law to the detriment of the public good. Rather, the debate involves defining the contours and limits of the public good. Who gets to decide what is good for the public? When does a pluralistic secular society have to live without a singular rule of law in order to accommodate the multiple opinions of what the rule ought to be? Who gets to decide what it means to be a bishop, how he is to go about doing his job, how intensely must he supervise the priests in his charge? [Hamilton] obviously is outraged by the Catholic Church sex abuse cases (who isn't?), but the imposition of criminal and tort liability in that worst of all cases does not explode the idea of church autonomy. Rather, it is just a clarification of the location of the church-state boundary such that the state may impose liability in the extreme cases of abuse.[146]

Like Hamilton's invocation of the rule of law, "ordered liberty" is merely a starting point, a fixed number in the complicated equation that may or may not produce the public good;

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[144] *Id.* at 701-02.

[145] On the other hand, Chief Justice Burger spoke vaguely of "ordered liberty" as an *anti*-accommodationist principle in Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972): "Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."

[146] Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement In the Early Republic*, 2004 B.Y.U. L. REV. 1385, 1581 n.710 (2004). Esbeck is responding to Hamilton's symposium contribution, see Hamilton, *supra* note __ [Religious Instits, No Harm…], which she has said forms the basis for some of her conclusions in *God vs. The Gavel*.

it tells us nothing about the substantive content of her beliefs as to where the public good lies.

c. The Public Good as a Legislative, not Judicial, Function

In theory, Hamilton thinks that the legislature is institutionally superior to the other government branches when it comes to deciding on the proper scope of free exercise.[147] Hamilton emphasizes a few, unremarkable structural virtues of the legislative process – the ability to take voluminous testimony pertinent to the particular issue, to consider a wide variety of sources, to reverse or modify prior enactments, and "to reject facts and theories presented to them"[148] – that render it the preferred forum for public good determinations. There are many others.[149]

The difficulty for Hamilton as a practical matter is her frequent disappointment with actual legislative decisions that ostensibly aimed at the public good in the context of religious accommodation (RFRA and RLUIPA, for two), as well as her assessment of Congress's bloated delusions of grandeur in the twentieth century.[150] Still, we have at least gone a short distance in defining Hamilton's public good; we have concluded that it is exclusively a legislative consideration (or, perhaps, that it is the legislature's prerogative to assign it in its discretion). Nevertheless, though we may have descried the locus of its determination, we surely have not yet encountered a full explanation of the

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[147] *See, e.g.*, HAMILTON, *supra* note 1, at 212, 275, 285, 295-298.
[148] *Id.* at 296-98. At least the last of these is overstated as a distinction from the judiciary. Courts *do* have the power to disregard "facts" and frequently do so, for example, when they make credibility determinations or rule on the admissibility of evidence.
[149] *See, e.g.*, Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 655-59 (1995) (discussing the procedural formality of legislative rules, as well as the simple facts of the considerable size of most legislatures and the diversity of the members' backgrounds, as important institutional qualities in fulfilling their deliberative function).
[150] HAMILTON, *supra* note 1, at 227 ("From the 1930s until 1995, the Supreme Court systematically deferred to congressional exercised of power. The result was an unaccountable, headstrong Congress that sincerely believed it held plenary power over all issues, despite the plain meaning of the Constitution's structure and language limiting its powers.").

public good's content. Our next eligible interpretation builds on the legislative focus, drawing on the implications in Hamilton's statement that "[a]ll legislative judgments should include consideration of the public interest in order to achieve the ideals of a *republican* form of government."[151]

d. The Public Good as Legislative Civic Republicanism

The tradition and (not-so)[152] recent revival of civic republicanism is much concerned with the "public good" as a modelfor political decisionmaking , especially as contrasted with the view that decisions are (and, perhaps, are best) made through the "simple aggregation of private preferences resulting from "deals" among self-interested groups."[153] Much of the religious accommodation that Hamilton decries can be explained by reference to a kind of faith in an idealized legislative civic republicanism– the hope that "the elusive voice of the "public good," momentarily audible above the din of power politics, carries the day."[154] Hamilton refers positively, in passing, to legislative civic republicanism as a theory that might support her ideas about accommodation.[155] She yearns for the "right sort" of legislator: "What is desperately needed in Congress is some member who can rise above religious lobbying to secure the larger good – members

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[151] *Id.* at 300 (emphasis added).
[152] *See* Nomi Maya Stolzenberg, *A Book of Laughter and Forgetting: Kalman's "Strange Career" and the Marketing of Civic Republicanism*, 111 HARV. L. REV. 1025, 1025 (1998) (book review) ("In the mid-1980s, it was still breaking news in the legal academy that the Lockean tradition of classical liberalism and individual rights was not the only conception of politics to have shaped the ideas and actions of American political actors and lawmakers.").
[153] Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1447 (2005).
[154] *Id.*; *see also* Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 1, 18-19 (1986) (citations omitted) ("Republicanism's 'animating principle' is said to be civic virtue. Civic virtue is in turn defined as 'the willingness of citizens to subordinate their private interests to the general good.' Cultivation of this general spirit is 'government's first task.' Republicanism favors a highly participatory form of politics, involving citizens directly in dialogue and discussion, partly for the sake of nourishing civic virtue."); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548-57 (1988) (discussing the four common commitments of civic republicanism of deliberation, political equality, universalism, and citizenship).
[155] HAMILTON, *supra* note 1, at 206.

that at least ask if there is another side to an issue raised by a religious entity, without being its servant."[156]

In laying out her arguments for legislative civic republicanism, Hamilton contends that the U.S. legislature is not a majoritarian institution. Once the majority elects its representatives,

> [t]he system simultaneously frees the representatives to do what is best for the country – even if the people do not fully understand the issues or agree on the course taken – but [sic] it also imposes the difficult burden on elected representatives to make independent decisions in the larger public interest.[157]

As proof, Hamilton offers the racially prejudiced public mood of the 1960s; the sentiments then prevalent, she argues, did not prevent the federal government from enacting legislation to protect racial and other minorities. So, too, it has not prevented the agendas of "lobbyists representing the disabled, and homosexuals, and racial minorities" from faring better in Congress than those of "amorphous majorities."[158]

Hamilton's prior writings about legislative anti- majoritarianism indicate that perhaps we are on the scent of Hamilton's "public good." For Hamilton, the dangers of popular self-rule are allayed by the Constitution's "delegation of decision making" responsibility to the legislature.[159] Mob rule is averted because "[r]epresentatives are free of their constituents' instruction as they are simultaneously driven to consider the public good in a fishbowl of public scrutiny within which they operate and seek re-election."[160]

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[156] *Id.* at 155-56.
[157] *Id.* at 284. Hamilton is only interested in the model of civic republicanism with respect to the legislature. She does not argue for (and is actually opposed to) the model with respect to the populace at large, as many other proponents of civic republicanism have. *See* Hamilton, *supra* note __ [RDIND], at 2533 (arguing that public majorities should have little, if any, influence in guiding the political agenda).
[158] *Id.* at 284-85.
[159] Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View From the Clergy*, 18 J.L. & POL. 387, 419 (2002).
[160] *Id.* at 434.

Hamilton's belief in legislative civic republicanism is challengeable on many fronts, space for the development of which is not possible here. Most glaringly, her faith in the possibility of an ideal legislator, unsullied by the whispers and tugs of special interests, is confounding. Hamilton appears to have traded in one set of rose-colored glasses for another. Though she grudgingly acknowledges that legislatures often fail to perform their duties in the way that she conceives them,[161] she nevertheless insists that individualized decisions by legislatures about accommodation are best suited to serve the common good. Whither her Calvinistic pessimism,[162] so prominentwhen the topic was the abuses of religion or the oppressive instincts of the general populace?

Yet even if (1) we assume that legislators are capable of performing consistently in the ways thatHamilton suggests, and (2) we accept her point that the legislature can and should often act in anti-majoritarian fashion (a highly controversial proposition), and (3) we accept as well her somewhat contradictory statements about the value of "pluralism" in American society,[163] we are simply left with another claim about the institutional superiority of the legislature (now advocated as a matter of constitutional

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[161] HAMILTON, *supra* note 1, at 279-80. Indeed, a great part of this book provides evidence of legislative failures on just this front.

[162] *See supra* note __.

[163] Hamilton praises American "pluralism" as a laudable cultural quality, *id.* at 66, but seems not to consider that it may be precisely that pluralism that generates the multiplicity of very different views of the public good (including those held by members of the legislature), many of which are infused with some degree of religious belief. Indeed, it may fairly be said that her civic republican and pluralist impulses are in considerable tension, theoretical as well as historical. *See generally* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1706 (2005) (tracing the rise of theories of "participatory" and then "deliberative" democracy, including civic republicanism, as explicit reactions against the older theories emphasizing pluralism). Professor Sklansky has these relevant comments on the deep divisions between the two theories:

> Theories of . . . deliberative democracy reject the pluralists' reliance on leadership elites, group competition, and periodic elections. They insist on the centrality of what pluralism scorned: widespread political participation . . . . [T]he cultural patterns they emphasize are different: instead of bargaining and adherence to "rules of the game," we have . . . a commitment to reason and civility (in the case[] of civic republicanism . . .) . . . .

Id. at 1769. Again, Hamilton does not favor civic republicanism on a broad, popular scale, but she argues for something very much like it with respect to the legislature.

design) to other institutions as the voice of the public good. If the point is to justify legislative civic republicanism as a theory of the substantive public good – that is, to claim that the constitutional structure, as Hamilton argues for it, itselfadvances the publi c good – it will not do to cite a few examples where the structure may have coincided with what for Hamilton is the right result. As Hamilton herself is fully aware, there are at least as many examples where she believes that the result was wrong. If the public good is to have any substantive content, the model of legislative civic republicanism cannot provide it.

e. The Public Good as Policy Preference

The preceding sections examined four possible overarching commitments that might have supported Hamilton's concept of the public good, ones that she herself intimated were closely related to the concept. They were not successful in explaining the public good. Perhaps the problem is that Hamilton perceives the public good as a much more pragmatic affair. Under this view, each legislator is simply to choose whatever policies she prefers (free from untoward influences, of course) given any particular set of circumstances. Laws that provide categorically for religious accommodation (as any other categorical law) limit the legislator's freedom to decide as she wills.

There is no doubt that Hamilton favors certain policies over others, and favors many over those that advance religious accommodation. For example, religious accommodation is less important to her than historic preservation,[164] preventing the spread of AIDS in Africa,[165] clarity with respect to issues of child custody and

[164] HAMILTON, *supra* note 1, at 94.
[165] *Id.* at 76.

inheritance,[166] the right of homosexuals to marry,[167] and the interests of residential homeowners in maintaining their neighborhood characters.[168] She may perhaps favor religious accommodation over, for example, certain claims of educational disruption[169] and the military's interest in esprit de corps and unity.[170]

The difficulty with this theory of the public good is not that it relies on legislators' (or Professor Hamilton's) policy preferences. Indeed, we have been searching for some substantive content to give shape to Hamilton's conception of the public good; policy preferences of one kind or another are a promising candidate for this task. Furthermore, Professor Hamilton is at her most candid when she argues for her own policy preferences, perhaps indicating that it is these personal beliefs rather than any grander theory that often drives her impassioned rhetoric about the public good.

The problems with this approach are twofold. First, Hamilton has not explained why the particular policies thatshe identifies should be universalized by the name "public good." That is, if what she wants is that the legislator be free to enact her (the legislator's) policypreferences, how can Hamilton claim that a religiously inclined legislator, or one who favors religious accommodation, should instead share her (Hamilton's) view of the public good. Second, and relatedly, a theory of simple policy preferences does not account for Hamilton's particular skepticism about the value of religious belief and accommodation in the public good calculus. It is to this point that I turn next.

IV. The Public Good as the Exclusion or Devaluation of

[166] *Id.*
[167] *Id.* at 65.
[168] *Id.* at 89.
[169] *Id.* at 130.
[170] *Id.* at 171.

Certain Religious Interests

It should by now be clear that Hamilton harbors a special distrust of certain religious interests. Indeed, perhaps the principal merit of *God vs. The Gavel* is its often harrowing portrayal of the abuses of religious organizations in contemporary American culture and its clear-eyed examination of the considerable power of religious advocates and lobbyists to promote their interests before Congress. Does Hamilton believe that religious interests could play a role in her concept of the public good? Hamilton frequently gestures in the direction of acknowledging some role for religious views. But her comments on this front are resigned and somewhat depressed. She says that religion is too deeply entrenched in the American psyche to be entirely extricated from the debate over the public good.[171] For Hamilton, religion is "everywhere," "inescapable," and cannot be ignored.[172]

We are looking for a conceptual framework for understanding the type of religious beliefs and interests that Hamilton would exclude from the sphere of public judgment, and the type of religious beliefs and interests that she feels should be given no greater weight than any other beliefs or interests. Hamilton certainly favors religious liberty of a kind. She opposes laws that display patent animus toward particular religions,[173] and supports the freedom to speak and believe as one wills.[174] However, she also claims thatcertain religious interests have no legitimate place in the sphere of public debate and she opposes giving special weight to religious beliefs when those beliefs run up against other interests that government might deem legitimate– that is, when the time

[171] *Id.* at 292-93.
[172] *Id.* at 288, 292-93.
[173] *Id.* at 214-16 (discussing Church of Lukumi Babalu Aye v. City of Hialeah).
[174] *Id.* at 26.

comes for legislative decisions (and we have already concluded that Hamilton believes that it is the legislature that should be making these decisions) about the public good.

In order to understand better Hamilton's idea of the public good, we need to examine more closely and distinguish among the relevant kinds of religious interests that she might or might not admit to the sphere of deliberation over and judgment about the public good. A return to some of Professor Greenawalt's fine divisions is useful. Let us accept his claim (without undertaking a complete defense of the position) that a religious interest is, first, "religious," meaning that its source lies in some kind of "theistic belief or other belief about a realm of ultimate value beyond, or deeper than, ordinary human experience."[175] Second, it is an "interest"; the holder of the religiousbelief wishes to do something with it. He may simply wish to believe it silently; or he may wish to impose it as a law binding on himself and everyone else; or he may wish to do a host of other things with it.

At one extreme of the possible range of religious interests lie what Greenawalt has called the imposition of comprehensive religious beliefs. If Donna is a Christian whose political judgments are shaped entirely by her belief in the literal truth of Holy Scripture as the received will of God, Donna has a comprehensive religious belief. Suppose thatDonna is a legislator and votes for a law that would establish Christianity, as she understands it, as the supreme law of the land and would outlaw all other religious beliefs. Her interest is one of imposition.[176] I believe that Professor Hamilton[177] (like

[175] GREENAWALT, *supra* note __ [PCPR], at 39.
[176] *Id.* at 58.
[177] In what follows, I attempt to divine Professor Hamilton's position on a number of hypothetical situations on the basis of her claims in *God vs. The Gavel*, in an effort to pinpoint her public good doctrine. I have no reason to know whether Professor Hamilton would actually agree with the positions that I stake out for her.

most people) would oppose such a religious interest; she would want to exclude it from consideration of the public good.[178] If Donna, holding the same comprehensive religious views, voted to pass a law outlawing gay marriage for the single reason that homosexuality is anathema to God's will (i.e., the imposition of a particular religious belief by one who holds a comprehensive religious view),[179] Hamilton would, in all likelihood, argue not only that the putative law is unsound but also that Donna's views should be excluded from the public good calculus.[180]

Suppose, instead, that Phyllis's reasons for voting for the ban on gay marriage derive both from her religious convictions and from her views that the institution of homosexual marriage cannot be rationally defended. Her underlying grounds are partly religious; she believes that homosexual marriage is inconsistent with God's will. But by opposing homosexual marriage she does not wish to impose her religious views on anyone else because, in addition to her religious reasons, she also feels strongly that the institution and traditions of heterosexual marriage, and the secular human goods that it serves, are harmed if gay marriage is not officially prohibited. Suppose that she is able to adduce, say, statistical evidence that societies that permit homosexual marriage have higher divorce rates for heterosexual marriages than those that prohibit homosexual marriage, as well as other data that *could* support her secular belief in the harm of

[178] "Exclusion" might entail formally admitting the view but giving it very little or no weight as a practical matter.
[179] It makes no difference what Donna's publicly expressed views are (e.g., that homosexuality is irrational or harmful to some secular good, etc.) if Donna's true reasons for supporting the law stem from religious conviction.
[180] HAMILTON, *supra* note 1, at 50 ("The hard choices depend on a more broad-ranging inquiry than any one religious worldview encompasses (even when that perspective is shared by a significant number of individuals and institutions).").

homosexual marriage.[181] Hamilton, I believe, would exclude this religious interest from public good considerations as well. Even if Hamilton might agree that there are some legitimate, non-religious reasons for supporting the ban (which is doubtful),[182] she would claim that the reliance on a religious reason *in this case* is the overwhelming impetus for the law. If the law were passed, it would compel "nonbelievers to conform to a standard of conduct inspired in large measure by religious belief,"[183] which amounts to a religious imposition. Note that Hamilton's reasons for excluding or giving very little to no weight to this religious interest, as I have imagined them, would have little to do with what Phyllis believes about her (Phyllis's) position; they instead implicate what Hamilton (or the ideal legislator) believes about those views.

One further illustration: Lisa believes that animals should not be treated inhumanely. Her reasons for supporting a farming regulation governing the decent treatment of animals before they are slaughtered stem in part from her belief that the Bible demands concern for animals. However, she also is persuaded by secular arguments that animals deserve a high degree of respect from humans. She has no wish to see the law pass in order to impose her religious views on those that do not share them. She thinks the law just because she cares about animals and her reasons are mixed.[184]

Structurally, Phyllis's and Lisa's positions are identical. Both have religious interests. Neither wishes to impose her religious views on others. Each supports (or believes that she supports) the prospective law in question for both religious and secular

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[181] I assume, for the sake of this argument, that Phyillis's evidence could withstand some scrutiny, though it need not be iron-clad for her to be persuaded by it.
[182] *Id.* at 52-66.
[183] Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 184 (1991).
[184] I owe the framework for this hypothetical to Professor Greenawalt. GREENAWALT, *supra* note __ [PCPR], at 58-59.

reasons. Being religious themselves, both would find it exceedingly difficult to disentangle and cull out the religious from the secular reasons for supporting the respective laws. As Professor Steven Smith has said, "[t]he religious citizen supports not two severable propositions but rather the single, complex proposition that secular and religious influences must both play a part in public decisions."[185]

Nevertheless, I believe that Hamilton would draw a distinction between the two positions. Though she would exclude Phyllis's religious interest from the domain of the public good, she would admit Lisa's. Her reason would be that, *in this context*, the religious interest is reasonable *because* it closely aligns with legitimate secular interests. "Citizens may speak from the heart and soul, but it is up to our elected officials to contextualize the debate by adding the scope of the public good to all public consideration."[186] By "contextualize the debate," Hamilton means that the ideal legislator should analyze the religious interest from a secular standpoint to determine whether it should figure into his determination of the public good. In Lisa's case, the ideal legislator should consider her religious belief in light of the larger context of secular reasons for the humane treatment of animals, balancing these against opposed interests, in determining the public good. Hamilton would not give any *more* weight to Lisa's religious reasons than to other secular reasons, whether supporting or opposing the law. But she would include them in the calculus because they can be squarely reconciled with convincing secular arguments in favor of her position.

[185] Steven D. Smith, *Separation and the 'Secular': Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 1010 (1989).
[186] HAMILTON, *supra* note 1, at 51.

This is close to a skeptical or "prudential"[187] argument for simple, secular policy preferences. But it differs in an important way: it is a full-bodied belief in (or theory of) the ability of *the legislature* to conduct an individuated inquiry and determination of the reasonableness, by secular lights, of particular religious interests. For Hamilton, whether religious interests can play a role in the public good will depend on their compatibility with what the ideal legislator deems legitimate secular interests. If they are highly compatible, the ideal legislator can include the religious interest as one more reason in his assessment of the public good. If not, the religious interests are best given little or no weight.

All of this – indeed, the entire tone and argumentation of the book – reinforces the exquisitely particularized quality of Professor Hamilton's public good theory and her seemingly limitless faith in the powers and capabilities of legislators. It also grossly overestimates the number of difficult moral and social issues that can be resolved satisfactorily by reference to secular objectives alone. "[E]veryone must reach beyond commonly accessible reasons to decide many social issues and . . . religious bases for such decisions should not be disfavored in comparison with other possible bases." [188] "Everyone" presumably includes legislators, even idealized ones, as Professor Greenawalt cautiously acknowledges.[189]

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[187] *E.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 99-117 (1995). Professor Smith argues that, even if one accepts the dubious proposition that the religion clauses and the Constitution generally establish an avowedly secular regime, secular rationales leave the value of religious freedom to "prudential," or contextual, concerns, which are incapable of being expounded by any unifying theory.

[188] KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 113 (1988).

[189] *Id.* at 237 ("When we turn to legislators relying on their own convictions, the place of religion is more controversial. As a public representative in a state that is separated from religious organizations, perhaps the legislator should eschew reliance on religious premises insofar as he can. Everything I have said so far indicates how hard this might be to accomplish, but nonreliance might at least be held up as an ideal.").

Hamilton's generally dim view of religious interests in the numerous examples that she provides bespeaks a strong disinclination to countenance them in deciding what is good policy (an aversion so powerful that it blinds her to the considerable legislative abuses that she recounts). The accommodation of religious interests, she believes, often tends to do more harm than good. For example, Hamilton argues that expansive religious accommodation is more likely to lead to strife (interdenominational and otherwise), which is itself inconsistent with the public good, than an approach that treats religious interests no differently than any other interest.[190] This view is especially in evidence in her discussion of land use conflicts, where she claims that religious organizations have sued to enforce their rights under RLUIPA "[i]nstead of finding a middle ground" with their opponents.[191] It also appears when Hamilton claims that religious accommodation somehow injects discrimination into a dispute where it would not otherwise exist, making rational, cool-headed, and just resolutions that would "serv[e]" everyone's interest" more difficult.[192] In fact, however, Hamilton points to no evidence that religiously motivated strife in contemporary America is more rampant, noxious, or divisive than strife of any other kind.[193]

In the face of Greenawalt's arguments, I am less persuaded that *total* nonreliance is ideal. In fact, in what follows Greenawalt himself does not argue for total nonreliance, but identifies certain nuances (e.g., intensity of conviction and notions of serious wrongs, *id.* at 238) that might affect the propriety of reliance on religious belief.

[190] *See* Hamilton, *supra* note __ [RI, TND, PG], at 1216. As a practical matter, it may be that Hamilton would accept some consideration of religious interests in developing policy. But her reasons for doing so would not be the belief that decisions favoring religious interests sometimes advance the public good; instead, she might countenance religious interests because so many people find religious reasons to be important.

[191] HAMILTON, *supra* note 1, at 101.

[192] *Id.* at 94 ("The best result in every land use dispute is the win-win result."). Likely this is true of every dispute.

[193] Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217, 231 (2001) ("American history does not suggest that religiously-grounded arguments about controversial political-moral issues – racial discrimination, for example, or war – are invariably, or even usually, more divisive than secular debates about those issues.");

In the end, Hamilton's view of the public good is best characterized as one in which religious interests might shape policy, but only if they can be justified to a high degree by secular reasons. Her profound disillusionment with the moral authority of religious organizations and persons left her seeking a repository for her conviction that somebody, or some entity, should be acting in the public interest. With plausible constitutional reason, she has selected the legislature to be the bearer of her trust. But the task she has assigned to it – to decide, case-by-case, whether specific religious interests deserve government protection by reference to their secular worth – is beyond both the legislature's institutional abilities and its members' personal capacity for moral judgment.

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see also Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded From Democratic Deliberation*, 1999 UTAH L. REV. 639, 643 (1999) ("[T]he supposed divisiveness, intolerance, and absolutism of religious argument neither distinguishes it nor provides a justification for exclusion from democratic politics[.]").