

Three Concepts of Church Autonomy

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In their thought-provoking papers, Professor Marci Hamilton opposes church autonomy¹ and Professor Brett Scharffs supports it.² But it is not clear that what Professor Hamilton rejects is precisely what Professor Scharffs endorses. In fact, it is by no means easy to settle on an idea of church autonomy for the purpose of sorting out whether it is a good idea or a bad one. To clarify lines of agreement and disagreement about church autonomy, I think it useful to work with what I will call “the composite idea of church autonomy.” The elements of that composite I shall describe as “three concepts of church autonomy”: formal, normative, and doctrinal.

Conceived formally, church autonomy is a certain set of jural relations between faith communities and other rival interests such as disaffected individual members, outsiders, or government. Conceived normatively, church autonomy is a proposal about how the worth or good of autonomy justifies such formal jural relations. Conceived doctrinally, church autonomy proposes a standard of review that specifies the content of the formal jural relations by setting out an order of priority between, or a rule for adjusting, the worth or good of autonomy and other goods or principles when these are rival.

It should be clear that each of the component concepts can be worked out in a range of proposals. The content of what I shall call a “conception of church autonomy” is given by the content of these proposals. Thus there exists a domain of “conceptions of church autonomy,” such that each conception in the domain answers three questions. What are jural relations of church autonomy? On what

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1. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099.

2. Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217.

understanding of the meaning and worth of autonomy are such relations justified? How are the jural relations to be worked out when there are conflicting exercises or expressions of autonomy, or when the worth of autonomy is pitted against other goods? Answers to these questions are proposals about the formal, normative, and doctrinal concepts of church autonomy.

Such questions identify points where understandings diverge. We might agree on a formal description of jural relations between faith communities and other interests but disagree about whether such relations are desirable. We might agree that they are desirable but disagree about whether the moral worth of autonomy is what makes them desirable (or we might embrace quite different understandings of the moral worth of autonomy). And even if we share a common description of jural relations of church autonomy and a common autonomy-based justification for these relations, we might support different outcomes in cases if we hold different estimates of the worth of autonomy in relation to other goods at stake.

Now, Professor Scharffs offers a “conception of church autonomy” in the sense defined above. The heart of his conception is a proposal about normative autonomy, a proposal he calls “inter-independence.”³ This proposal, offered as a philosophical anthropology or interpretation of the structure of personality and sociality in relation to one another, governs Professor Scharffs’s presentation of the jural relations and doctrinal forms of church autonomy. By contrast, Professor Hamilton’s arguments against church autonomy are not addressed to any particular conception of church autonomy. Instead, her thesis is the strong one that there can be no acceptable conception of church autonomy. Her thesis is strong because it rules out all proposals about formal jural church autonomy—regardless of the content of those proposals, and regardless of whether moral backing for them is sought in the worth of autonomy or in some other idea.

At the end of the day, however, I conclude that Professor Hamilton’s arguments do not make out a convincing case that formal jural relations of church autonomy are per se undesirable. Moreover, I find much to like in Professor Scharffs’s philosophical anthropology, the ground of his normative concept of church

3. *Id.* at 1251–53.

autonomy. But I am not convinced that any conception of church autonomy—any set of proposals about the three concepts of church autonomy—supplies the best constitutional policy toward the life of faith communities. Unlike Professor Hamilton, however, I will not attempt to make out a strong “impossibility” thesis—a claim that would, if it goes through, rule out not just one conception or a few conceptions of church autonomy, but any set of proposals that fill out the composite idea of church autonomy. Instead, I will merely suggest some reservations about whether proposals about the moral worth of autonomy really supply or should supply the normative heart of constitutional policies regarding the life of faith communities. Ultimately, I can say in all candor that I have learned much from both Professor Scharffs’s and Professor Hamilton’s papers, though I agree completely with neither of them.

Part I introduces some reservations about church autonomy—both Professor Hamilton’s concern that church autonomy is contrary to the rule of law and my own concerns that in debating church autonomy we should be clear about what concepts or proposals we are evaluating—and argues that proposals that reify the concepts of “church” and “state” ought to be rejected. Part II elaborates the three concepts of church autonomy and draws upon them to frame lines of disagreement between Professors Hamilton and Scharffs. In Part III, I engage Professor Scharffs’s normative proposals about autonomy, both on their merits and as justifications for constitutional policies. I urge Professor Scharffs to clarify the definition of “inter-independence” that he proffers with his suggestion that church and state are best understood, not as independent or interdependent, but as “inter-independent.”⁴ In this Part, I also acknowledge that Professor Scharffs’s autonomy-based constitutional theory, like my own communality-based theory, violates a familiar (Rawlsian) stricture on public reason. Part IV offers my critique of Professor Hamilton’s four arguments against church autonomy. And finally, in Part V, I briefly outline the argument that an appreciation for communality (an interpretation of the worth of groupness) provides a better foundation than the moral

4. *Id.* at 1253–58.

worth of autonomy on which to rest constitutional protections for faith communities.

I. WHAT IS MEANT BY “CHURCH AUTONOMY”?

Professor Hamilton observes that “autonomy, or immunity, of any institution—including religious institutions—from the rule of law [is] intolerable. ‘Church autonomy’ is not and should not be a doctrine recognized in the United States.”⁵ I agree that church autonomy should be rejected if it means that religious institutions are not subject to the rule of law, but it is not clear what church autonomy is. Having read Professor Hamilton’s interesting paper, anyone favorably inclined toward church autonomy should ask: If church autonomy *does not* mean independence from the rule of law, what *does* it mean? Another way to put the question is: What conception of church autonomy, if any, brings into sharper focus the choices we face about constitutional policy toward faith communities?

The concepts of “church” and “state,” and of autonomy of the former in relation to the latter, lend themselves to reification. We reify “church” when we imagine that all of the threads of spirituality, faith, and religious observance are woven into a single institutional fabric. Religion and spirituality are not confined to *churches*—not descriptively, and certainly not as a matter of constitutional law. Instead, spiritually inflected choices, themes, expressions, and behaviors arise in almost every scene of social life. Each of us may find our dispositions to faith, hope, and love tested at a wedding or a funeral, in the challenges of friendship, in a political debate, or in our response to music or film.

Moreover, as the relevance of the transcendent and the calling to fullness of being cannot be compressed into a space or frame called “church,” so the norms of law and the reasons relevant to civic deliberation and citizenship cannot readily be compressed into a structure or function called “state.” Especially in an age in which many people understand themselves to be “spiritual” but not necessarily religiously affiliated—and in which law and legal concepts touch upon (and, in a nonpositivist view, spring from) almost every aspect of life, identity, and aspiration—we should be reluctant to

5. Hamilton, *supra* note 1, at 1112.

adopt any balance of power between church and state as a paradigm of free exercise and nonestablishment principles. Any idea of church autonomy that further entrenches the image of two spheres, doctrinally separated or eclipsing one another like the circles in a Venn diagram, is precisely not what we need at this stage in the development of our faiths, cultures, and republic.

It is a great strength of Professor Scharffs's paper that he elevates the idea of autonomy to a level at which it constitutes our personal, communal, and social being; it does not content itself with adjusting relations between exogenously given entities. Autonomy is at stake not only when obligations incurred in particular faith communities (church) conflict with obligations undertaken through membership in the general political community (state). It is also at stake whenever each of us asks ourselves how far our own fate is implicated by the fate of others. Am I most fully realized, most free of contingency, most restored to myself, when I am *independent* of the will and the gaze of others? In what ways, if any, do my dependencies upon others, and theirs upon me, show me the deeper truth about selfhood? Viewed one way, these are the very questions that faith addresses. Viewed another way, they are the stakes hazarded whenever constitutional law confronts hard cases.⁶ Professor Scharffs

6. The question of how far, or in what way, a terminally ill patient ought to be free to direct the manner of his or her own death presents a hard case in just this way. If we as human persons are fully realized just to the extent that we (rather than physicians, family members, or community authorities) govern our bodies, then that interest in self-direction or self-government supplies a reason (perhaps a strong reason) for a terminally ill patient's right to choose interventions intended to hasten death. But individual self-direction may be inconsistent with, and destructive of, a different conception of selfhood—one in which our very selves mutually implicate one another. Justice Stevens described this interrelatedness:

History and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide. . . . There is truth in John Donne's observation that 'No man is an island.' . . . The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life.

Washington v. Glucksberg, 521 U.S. 702, 740–41 (1997) (Stevens, J., concurring) (footnote omitted). Stevens continued, further quoting Donne, "'No man is an island, entire of itself; every man is a piece of the continent, a part of the main. . . . [A]ny man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.'" *Id.* at 741 n.8 (quoting John Donne, *Meditation Number 17*, in *DEVOTIONS UPON EMERGENT OCCASIONS* 86, 87 (A. Raspa ed., 1987) (1623)).

has shown us how these viewpoints are related to one another and to choices about institutional arrangements.

Those choices can be exceptionally difficult ones, and as Professor Hamilton urges, we have good reasons to reject an institutional autonomy arrangement between church and state that abrogates the rule of law. But the question remains: What does count as an autonomy arrangement, and must all such arrangements be fundamentally lawless?

II. AUTONOMY AS JURAL RELATION, AS JUSTIFICATION, AND AS STANDARD OF REVIEW

A. Autonomy as a Jural Relation: The Formal Concept of Church Autonomy

“Church autonomy” is ambiguous in much the same way that “group rights” is ambiguous. Like “group rights,” “church autonomy” may designate a class of legal interests sharing certain formal features: e.g., the interest belongs to a collectivity, not an individual. Again like “group rights,” “church autonomy” may refer to a particular (and contested) political-moral proposal, such as reparative affirmative action (in the former case) and constitutionally mandated Free Exercise exemptions from neutral laws of general applicability (in the latter case). Though Professor Hamilton’s immediate target is church autonomy as a political-moral proposal,⁷ her argument may reach further, in much the same way that some criticisms of reparative affirmative action extend logically to any claim that a group can be a right-holder⁸ or that corrective justice can properly consider groups as remedial units. So her critique invites the question: What legal relations *count* as church autonomy relations?

As a rough starting place, and subject to the concern about reification, we can suppose that church autonomy relations in the formal sense are relations between a faith community and some other public or private party, such that the faith community has what

7. Hamilton, *supra* note 1, at 1103–05 (arguing that the Free Exercise Clause does not authorize judges to carve out exemptions from neutral laws of general applicability).

8. See, e.g., Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 861 (1995) (acknowledging that viewing affirmative action in terms of group rights “renders affirmative action and other group-based policies constitutionally problematic”).

Hohfeld called an “immunity” and the other party has a Hohfeldian “disability.”⁹ The immunity and the disability, as Hohfeldian correlatives, are the same legal relation seen from the viewpoints of the two parties. So, a faith community’s immunity from suit on the one hand, and a party’s want of power to sue the church or a court’s want of jurisdiction over the church on the other hand, identify the same legal relation from two different viewpoints. Of course, to count as church autonomy, the immunity need not be complete protection from suit, and the correlative disability would not need to be total. The decisive thing is the absence of liability or vulnerability on the one side and the absence of power on the other and, especially, the *correlation* of the two sides in one legal relation.

The importance of seeing the legal relation as two-sided, as comprising a pair of jural correlatives, consists (for our purposes) in defining “church autonomy” in a way that is neutral as to the principles or policies that might be thought to justify the relation. To have the form of a church-autonomy relation, it is no more essential for the disability to derive from the right (the immunity) than for the immunity to derive from the disability. Thus, a rule barring courts from settling church property disputes by asking which faction has departed from the teachings of the church is a church autonomy doctrine in the formal (Hohfeldian) sense, whether one seeks to justify the rule from the disability side—as, say, an Establishment Clause limit on jurisdictional entanglement—or from the immunity side—as, say, a Free Exercise interest in ecclesiastical self-determination. Notice that if the church could waive its immunity but a court could not suspend its disability, the two sides would no longer mirror one another, and there would no longer be a single formal jural relation that is neutral as to its justification. If a church has an immunity against judicial interpretation of church doctrine, along with a power to waive that immunity, and a court has a correlative jurisdictional disability, coupled with an ability to take jurisdiction on the church’s waiver of its immunity, then the aggregate legal relation would seem to be justified by respect for

9. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, AS APPLIED IN JUDICIAL REASONING 8–9, 36, 60–63 (Walter Wheeler Cook ed., 1923).

ecclesiastical self-determination rather than by limits inherent in the judicial role.

I will show in Part IV that church autonomy in this first (formal, jural) sense need not abrogate the rule of law, or threaten any credible version of the other first principles of republican government that Professor Hamilton is concerned to protect.¹⁰ But normative justifications of jural relations of church autonomy by reference to conceptions of moral autonomy are controversial and merit close scrutiny.

*B. Autonomy as a Moral-Political Justification for a Jural Relation:
The Normative Concept of Church Autonomy*

In the composite idea of church autonomy, “autonomy” as a principle of practical reasonableness or as an interpretation of human flourishing (or of the conditions for flourishing) is advanced as a reason for jural “autonomy” relations. Churches *ought to* enjoy immunities from certain forms of regulation—and government *ought to* be disabled from regulating or inquiring into certain forms of religious life or religiously motivated conduct—because such arrangements promote moral or political-moral autonomy or some conception of it.

In setting forth proposals about what he calls “institutional autonomy,” as he does in Part IV of his paper, Professor Scharffs relies implicitly upon a notion of autonomy as a correlative relation of disability and immunity—autonomy as a set of jural relations. Autonomy in this sense answers the question: “What are relations of ‘autonomy’ within the meaning of the phrase ‘institutional autonomy’?” But when he justifies these proposals by grounding them in a vision of human flourishing in and through interdependence, Professor Scharffs relies upon autonomy as an ethical norm. Autonomy in this sense answers the question: “Why should the law encourage or support these relations of ‘institutional autonomy’?”

In Part III of my paper, below, I will raise some questions specifically addressed to Professor Scharffs’s normative account, as well as other questions for any theory (whether of autonomy or of some other element) of the good or full life.

10. See *infra* Part IV.A.

*C. Autonomy as a Standard of Review: The Doctrinal
Concept of Church Autonomy*

Isaiah Berlin wrote a very famous essay called *Two Concepts of Liberty*.¹¹ In that same spirit, I offer you *three* concepts of autonomy. (This is a clear indication that less is more.) I have already given you two: autonomy as a set of jural relations and autonomy as a grounding norm (a conception of the human good that supports those jural relations). But when we speak of “church autonomy,” we may have in mind not only the formal character of the jural relations and some normative idea of autonomy put forward to justify those relations, but also a rank-ordering, a presumption or a mode of balancing, that sets out the priority of the autonomy reasons in relation to all of the other reasons that bear on a decision. This is “church autonomy” in its third sense: as a standard of review that governs administration of the jural relations.

To say that a church is “autonomous” in this third sense is to affirm not only that considerations of moral autonomy supply reasons for a two-sided relation of church immunity and governmental disability, but also that these moral autonomy reasons take priority over some other reasons, at least under specified circumstances. A church’s immunity is qualified, or governmental disability is lifted, when these other reasons, appropriately considered, outweigh the moral reasons for the immunity/disability. So Professor Scharffs observes that

[o]ne of the strategies that will often be adopted under a conception of inter-independence is heightened scrutiny, where under the autonomy interests of individuals (Is there a substantial burden placed upon religious observance?) will be weighed against the autonomy interests of the state (Is there a compelling state interest and is the policy narrowly tailored to accomplish that interest?).¹²

I think, though, that the point is somewhat stronger. Unless doctrine instructs judges that only certain reasons of a very high order of magnitude take priority over the moral reasons for

11. Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

12. Scharffs, *supra* note 2, at 1311 (emphasis omitted).

institutional (or individual) autonomy, there is no relation of immunity and disability worthy of being called “church autonomy” (or “personal autonomy”).

When Professor Hamilton charges church autonomy with being fundamentally contrary to the rule of law, she has (particularly) in mind doctrines that elevate institutional autonomy reasons over other regulatory reasons, namely, doctrines that fail to give regulatory reasons the weight they merit in a republican form of government in which law serves the public good. I will return to those objections in Part IV, below. But even if, as I think, those objections are not persuasive, Professor Scharffs’s particular version of church autonomy raises other questions which I now pursue.

III. PROFESSOR SCHARFFS’S THEORY

Professor Scharffs’s theory presents a conception of church autonomy. Professor Scharffs offers a normative idea of autonomy, an interpretation of the worth of autonomy in the fullness of life, as his motivation for jural relations of church autonomy. In this Part of my paper, I will begin by exploring an ambiguity in Professor Scharffs’s interpretation of the worth of autonomy. Resolving this ambiguity, I suggest, is of some importance in analyzing and deciding constitutional questions. But even if the ambiguity is resolved, the very idea of resting constitutional proposals on contested conceptions of moral autonomy raises familiar and serious questions of legitimacy in constitutional argument. In particular, Professor Scharffs presents moral autonomy as an interpretation of the human condition. And grounding constitutional proposals on a philosophical anthropology may offend important principles of justice and republican government. But if Professor Scharffs’s interpretation of moral autonomy is problematic when turned to account in political argument, so is my own interpretation of communality or groupness, and for just the same reasons. I conclude this Part by sketching very briefly why these reasons are not conclusive.

In Professor Scharffs’s hands, moral autonomy as a reason for legal policy is an interpretation of the good or worthy life for humankind. Professor Scharffs contrasts three such interpretations or

conceptions of the autonomy principle or autonomy good— independence, interdependence, and inter-independence¹³—each of which could support a distinctive composite theory of church autonomy. Among these conceptions, Professor Scharffs favors inter-independence,¹⁴ a view of autonomy that emphasizes mutual respect. In this view, people are to engage one another in respectful and inclusive ways. This is a vision of human flourishing in which we realize our personal lives through mutual respect and mutual engagement.

Now, Professor Scharffs is not always consistent in this respect. Some of the time, when he talks about inter-independence, he really means it as a conception of autonomy.¹⁵ But at other times, it slips into being a set of social conditions for the realization of that conception.¹⁶ These are two different things. I invite Professor Scharffs to sort out more clearly inter-independence as a real concept of human flourishing and inter-independence as a prescription for the social conditions within which that concept is actualized.

The *Newdow* case¹⁷ illustrates the difference. Does a school district's policy that directs teachers to lead students in affirming "one nation under God" violate the Establishment Clause? Consider, in this respect, the autonomy of the schoolchild. Is that autonomy to be understood as some set of capacities that are distinctively hers? If so, we could measure how well any proposed educational policy (like the district's Pledge recitation policy), any constitutional policy (such as an interpretation of the Establishment Clause), or any assignment of custody rights and obligations between her parents would advance (or undermine) these capacities. On this view, the educational, constitutional, and custodial policies are evaluated by how well they supply social conditions for the promotion of the girl's autonomy.

But the child's autonomy might be understood differently: not as her capacities (or not exclusively so), but as her relations. Her

13. *Id.* at 1246–58.

14. *Id.* at 1253–58.

15. *Id.*

16. *Id.*

17. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2305 (2004) (refusing to reach the merits of the case, the Court held that the father lacked standing to bring the suit).

relations with her mother and father are constituents of her selfhood, and if we assume no special family pathology, we can say that these constituents are worthy of respect in their own right (whether viewed from the child's standpoint or from those of either parent). But it is equally plausible that her relations with her country and its fundamental law might be viewed as constituents of her selfhood and hence of her self-direction. On this view, what she means when she says "my mommy," "my daddy," and "my country" are all equally at stake in any decision about the decisional issue itself—the issue of who decides whether she is to be exposed each day to a collective pledging of allegiance to "one nation under God."

The distinction I have been drawing and illustrating, between a conception of autonomy and a view about the social conditions that favor or advance autonomy so conceived, belongs to the second of the three senses of autonomy. Is "inter-independence" a set of social conditions that favor development of the child's (independently measurable) capacities for self-direction, or is it an interpretation of the child's selfhood? But it is clear that Professor Scharffs is also talking about autonomy in the third sense: autonomy as a standard of review that implements autonomy in the second sense and governs or regulates autonomy in the first sense. Professor Scharffs's proposal about church autonomy in the third sense presents a standard of review with two features. First, Professor Scharffs stresses that it is contextualized.¹⁸ So, we pay close attention to the context in which individual autonomy—the autonomy of the church and of the state—are at stake. Are we talking about public schools? Are we talking about monuments? What's the context?

The second dimension of the standard of review is balancing. To decide the issue before it a court must strike a balance between state autonomy, individual autonomy, and church autonomy.¹⁹ *Wisconsin v. Yoder*²⁰ may serve as an example. In *Yoder*, the Court had to decide whether Amish and Mennonite communities were

18. Scharffs, *supra* note 2, at 1292.

19. *Id.* at 1258–1328.

20. 406 U.S. 205 (1972). For a further discussion of *Yoder* in terms of personhood (compare individual autonomy), communality (compare church autonomy), and sociality (compare state autonomy), see Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1006–18, 1029–35 (1983).

constitutionally entitled to a partial exemption from state compulsory schooling laws.²¹

Viewed from the standpoint of inter-independence, the autonomy of the state in *Yoder* would be the state's undertaking to foster the conditions within which republican discourse and deliberation are possible. People are socialized into the common good. Respectful of law, they are cognizant of the concepts within which the republic operates. In church autonomy, we have the ability of the Amish and Mennonite communities to maintain their traditional way of life. But individual autonomy is also at stake, and in different ways. Healthy communities, including communities centrally organized around faith traditions, empower and enable individual lives. But as Justice Douglas worried in his *Yoder* dissent, withdrawing children too soon from schooling might indoctrinate them into the faith tradition and not enhance their autonomy.²² So it seems fair enough to see the decision in *Yoder* as requiring a balance between state autonomy, church autonomy, and individual autonomy.

Now, *Yoder* is a good case for us to think about in this connection because the Amish and Mennonite communities that sought exemption from the state compulsory schooling laws do not share Professor Scharffs's commitment to the inter-independent concept of autonomy. Their faith tradition teaches a much more insular or sectarian ideal. How then is it legitimate within a constitutional system to build an interpretation of the Religion Clauses on a controversial conception of the human good that the Amish and the Mennonites do not share? Would it not be paradoxical to rest their exemption on a theology of the human condition which they reject? So, scholars like John Rawls have urged us to build our constitutional principles on some foundation other than metaphysical or theological conceptions of autonomy because such conceptions are the wrong place to look for political argument in a liberal republic under modern conditions of reasonable pluralism.²³

21. *Yoder*, 406 U.S. at 207.

22. *Id.* at 245-46 (Douglas, J., dissenting in part).

23. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

In Part V, I will suggest that an appreciation for communality or supportive union (an interpretation of the worth of groupness) provides a better foundation than autonomy on which to rest constitutional protections for faith communities. But Professor Scharffs's normative view of autonomy as inter-independence is so thoroughly relational that the difference between us may not be very great.²⁴ Whether, at their margins, conceptions of autonomy and of communality begin to converge (on the ground of mutuality or mutual commitment), or whether at the end of the day they remain distinct ideas naming distinct (even rival) human goods, the fact remains that both Professor Scharffs's proposals and my own are equally metaphysical, and so equally fall under the interdict of Rawlsian public reason.

I think that the two of us can say that, in support of our theories and in reply to Rawls, constitutional issues such as those presented in *Yoder* are hard because they expose fractures or faultlines in the most basic structures of our social life. The relevant constitutional doctrines are inconclusive not because they are ill-considered or superficial but because they are sensitive to the tragic possibilities of human existence. When the state, through its compulsory schooling laws, acts on its most generous hope that all are (or will become) equal members of civil society, it paradoxically gives some insular groups less than equal regard for their life commitments.²⁵ When the insular group acts to preserve the truth entrusted to it, the group paradoxically enforces that truth upon itself in such a way that some of the children will receive it not as a truth but as an enforced regime that cuts off the free acceptance without which one cannot be a trustee of a truth. The drama of *Yoder* is a tragedy. Goodness and fault are inextricable from one another. There is no solution other than that supplied by the tragic sense of life, fully admitting the claims of the rival gods. This is the burden of what we call the

24. The features of Professor Scharffs's understanding of autonomy that I find most attractive are the features most remote from "autonomy" in the sense of *auto-nomos* (self-rule, self-legislation). See Scharffs, *supra* note 2, Part III. But when a word like "autonomy" slips its moorings and begins to mean almost everything, it risks meaning almost nothing. This has been the fate of "privacy" as a substantive due process concept, and it could easily be the fate of "autonomy" as a First Amendment concept.

25. On this paradox, see the important essay by my colleague, Nomi Maya Stolzenberg, "He Drew a Circle That Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

“standard of review” in such a case. We confess the metaphysical roots of our suffering because these roots are real, our suffering is real, and honor compels us to face these realities, whether we choose as Creon (whose convictions carried the force of state power) or as Antigone (whose convictions, though apparently not backed by state power, nonetheless articulated “law” in some significant sense).

Perhaps Professor Scharffs has a better answer to the Rawlsian objection. He may feel that with an ally like me, he would be better off with an enemy. But now aware of—though perhaps not discouraged by—this difficult and pressing problem about the legitimacy of metaphysical reasoning in constitutional argument, let us return to Professor Hamilton’s criticism of church autonomy.

IV. FOUR ARGUMENTS AGAINST CHURCH AUTONOMY

Professor Hamilton advances four arguments against church autonomy. I will call these, first, the argument from the rule of law; second, the argument from the republic as oriented to a public good and not to a private good; third, the argument from the no-harm principle; and fourth, (somewhat facetiously, I admit) the “argument from Torquemada” (which tells you that if you do not like the Inquisition, you should not like *Sherbert v. Verner*²⁶). I do not think that any of these arguments are tenable, and I will try to briefly explain why. For the sake of clarity and brevity, I will treat each of these arguments as considerations of political morality that either stand or fall on their own merits. Professor Hamilton, though, presents them as interpretations of our constitutional history. I will assume for the purpose of analysis that Professor Hamilton is correct in all of her historical claims. But I also assume that an argument of political morality that fails on its own terms carries little additional weight just because of history.

As I have said, the idea of church autonomy is ambiguous, so some work is needed to tease out which sense of such autonomy—either the formal sense (correlative jural relations of immunity and disability), the normative sense (jural relations justified by a

26. 374 U.S. 398 (1963) (holding that the denial of unemployment compensation benefits to an Adventist employee, who declined to work on her Saturday Sabbath, violated her Free Exercise rights).

conception of moral or moral-political autonomy), or the standard-of-review sense—is vulnerable to the four arguments. Professor Hamilton’s arguments have least traction against formal jural relations of church autonomy. While she shows that some reasons that might be offered to support and specify such relations are poor justifications for autonomy (such as a claim to be above the law), Professor Hamilton does not consider other reasons (such as the moral autonomy account offered by Professor Scharffs). At the end of the day, Professor Hamilton has not shown that no conception of church autonomy is or could be consistent with first principles of the rule of law, of republican government, or of the liberal state.

A. The Argument from the Rule of Law

Is church autonomy, just as a set of jural relations (immunities on the one side, disabilities on the other), contrary to the idea (or ideal) of the rule of law? If so, this would be a curious and provocative state of affairs, since we have systems of immunities throughout constitutional law. Take Tenth Amendment immunities as an example. In some quarters such immunities are celebrated as instruments of federalism,²⁷ while in others they are scorned as rearguard actions vainly defending an outdated regime of states’ rights.²⁸ But these are substantive political assessments. Opponents of Tenth Amendment immunities, or of a robust set of such immunities, do not suppose that institutional immunities for states are ruled out preemptively by the ideal of the rule of law.

As an example of a Tenth Amendment immunity, let us take the conception in *National League of Cities v. Usery*.²⁹ Ultimately the Tenth Amendment immunity was rejected. But suppose that federal regulations violate the Tenth Amendment if they displace integral operations in areas of traditional state government functions. Now,

27. See, e.g., Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato’s Cave*, 23 HARV. J.L. & PUB. POL’Y 551, 554 (2000) (“The fact that we even have a Tenth Amendment demonstrates the reality behind it and imposes on the Court a duty to define the enumerated powers in such a way that the states are not relegated to irrelevance and, ultimately, extinction.”).

28. See, e.g., Sotirios A. Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161.

29. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

such a standard may be good or bad constitutional policy, but it surely does not violate the idea or ideal of the rule of law. Although its key concepts are somewhat vague, they are not vaguer than many other constitutional concepts and certainly not so vague as to cause the standard to fail to meet law's minimum standards of intelligibility.³⁰ Since the concepts protect the operations of state government as such, they are appropriately general in their form, as they would not be if they protected only selected favored states. Generality is not defeated simply because a zone of state immunity is shielded from what would otherwise be the valid operations of federal law. True, under the *National League of Cities* test,³¹ some federal laws would apply less generally (widely) than they otherwise might, but this is acceptable because public goals supporting that wider application are made to give way to public goals supporting the zone of immunity.

If church autonomy operated as a set of immunities analogous to the immunities in *National League of Cities*, such autonomy would no more violate the rule of law than would state autonomy. It is true, however, that some versions of immunities for churches are strongly disanalogous. The version of immunities rejected in *Employment Division v. Smith*³² was disanalogous because, unlike the *National League of Cities* test, it was controlled by no common standard to pick out the zone of institutional decision to be shielded from otherwise valid law. The *Smith* Court disclaimed any authority to ascertain what is (and what is not) a "traditional religious function" and what is (and what is not) an "integral operation" of churches performing that function. It assumed, according to Professor Hamilton, that to let each religious community decide for

30. LON FULLER, *THE MORALITY OF LAW* 33–94 (rev. ed. 1969). Here I follow Fuller's account of eight rule-of-law virtues, including intelligibility and generality. For present purposes, it does not matter whether these virtues are understood as moral properties that confer legitimate authority or as merely functional values. See Andrei Marmor, *The Rule of Law and Its Limits*, 23 *LAW & PHIL.* 1, 38–43 (2004).

31. 426 U.S. at 855 ("Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral government functions are to be made.").

32. 494 U.S. 872 (1990) (holding that the Free Exercise clause does not require government to exempt religiously motivated conduct from the operation of generally applicable regulations).

itself when (and for what reason) it opts out of an otherwise valid regulatory framework is to defeat the rule of law.³³

But notice that there are only two logical possibilities here, and neither of them supports a strong claim that church autonomy, just as a set of jural correlatives (immunities and disabilities), violates the rule of law. The first possibility is that the Court in *Smith* was wrong to be so squeamish about determining just what a traditional religious function is and just what choices are integral to those functions. If the Establishment Clause does not require a court to be so fastidious, then a *National League of Cities* approach to church autonomy is legitimate and no more violates the rule of law as a church-autonomy (First Amendment) doctrine than as a state autonomy (Tenth Amendment) doctrine. The second possibility is that the Court in *Smith* was correct, and the Establishment Clause does require courts to refrain from making the judgments about churches that the *National League of Cities* standard asks courts to make about states. But this is just an example of a constitutionally required governmental disability, whose jural correlative is a religious immunity; in other words, it is an example of a church-autonomy doctrine in the Hohfeldian sense.³⁴ If such doctrine violates the rule of law, then we have the paradoxical result that the rule of law is violated either way. Since that cannot be correct, it seems that church autonomy in the formal sense does not violate the rule of law.

If the best understanding of the Establishment Clause rules out a church autonomy doctrine that would be to churches what *National League of Cities* was to the states, it remains to consider whether the rule of law bars states from discretionarily enacting certain regulatory exemptions, even though these exemptions are not compelled by the Free Exercise Clause (as they were, or were thought to be, in

33. Hamilton, *supra* note 1, at 146. See, in addition, Perry Dane, "Omalous" Autonomy, 2004 BYU L. REV. 1715, for a discussion of the anomalous character of constitutionally mandated exemptions for religiously motivated conduct. Although Professors Hamilton and Dane helpfully integrate Justice Scalia's arguments for the Court in *Smith* with widely shared general principles of American constitutionalism, I am not convinced that the peculiar features of the exemptions regime that *Smith* rejected are really that extraordinary. For example, the privilege against self-incrimination, like the Free Exercise immunities protected in *Yoder* and *Sherbert*, is exercisable at the option of the party protected by the immunity and, if exercised, may frustrate legitimate social goals.

34. See *supra* Part II.A.

Yoder).³⁵ Ordinarily, the generality requirement of the rule of law³⁶ does not require a lawmaker to extend the scope of a rule (or of an exemption or exception) to the frontier defined by whatever norm or goal justifies the rule (or the exemption). Generality's minimal demands are met when the lawmaker classifies in general terms, so that members across the class enjoy the benefits or burdens of the rule or exemption. For example, the lawmaker is permitted to proceed "one step at a time," providing for a class that is general even though it is not universal (in relation to the norm or goal toward which the law "proceeds"). But if the Establishment Clause makes it impossible in principle for government to identify a class of religious actors or religious conduct that is most deserving of exemption, then there simply is no general goal toward which the lawmaker can be thought to be "proceeding" (albeit one step at a time). On that assumption, an exemption framed in terms of a general class, and which would ordinarily pose no generality problem, might fail to be adequately general because no such exemption *could* be adequately general (in that every generality would involve the government in making an illegitimate assumption about religious function or the centrality of conduct to that function).

*B. The Argument from the Republic as Oriented to a
Public Good and Not a Private Good*

It seems, then, that the ideal of the rule of law is not offended by church autonomy in the formal jural sense. If we do not like church autonomy, what we dislike is substantive, not formal; and we dislike it (as we might dislike the *National League of Cities* standard) for substantive reasons of constitutional policy, not because it is contrary to foundational norms like the idea of the rule of law. But Professor Hamilton advances a second objection: that church autonomy is inconsistent with the proposition that in a republic our laws are oriented to a public good rather than a private good. Here again we have an argument whose target is very broad and whose foundation

35. See *supra* notes 20–22 and accompanying text.

36. FULLER, *supra* note 30, at 46–49.

rests not on intermediate political or sociological premises but on first principles.

But it is not hard to identify a public good to which a *Yoder*-like regime of Free Exercise mandated exemptions could be oriented. You could call it “tolerance” or “pluralism.” You could call it “respect for different incommensurable or ultimate conceptions of meaning and value.” And even if one were not persuaded that any of these public goods justified such a regime (which is different from being unpersuaded that these goods are genuinely public), it would not follow that church autonomy (the more inclusive class of jural relations) must be unsupported by a public good. Establishment Clause justifications put forward to justify governmental disabilities, such as those discussed in Part II.A, surely sound in public-regarding rather than private-regarding reasons. Moreover, the argument from the republic as oriented to a public good and not a private good assumes the awesome burden of proving a negative—not merely that none of the familiar justifications for church autonomy is public-regarding, but that no such justification could *ever* be public-regarding. This is a very strong negative claim and proportionately difficult to prove.

C. The Argument from the No-Harm Principle

Professor Hamilton’s third argument against church autonomy rests on the premise that the exercise of rights does not extend to harming others. But almost every right covers conduct that is not purely self-regarding, including conduct whose consequences for others include injurious effects. In fact, as Joseph Singer pointed out in a seminal article on analytical jurisprudence, Hohfeld’s framework of jural correlatives (from which I take the relation of immunity and disability to be the formal structure of church autonomy) revealed precisely that “much of the legal system consisted of rules that allowed people to harm others” and enabled policymakers to see clearly that “[t]here were good reasons to allow people to act in ways that harmed the interests of others.”³⁷

37. Joseph Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 985; see also Jack Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119 (1990).

Constitutional rights, including First Amendment rights, can also be conceptualized in Hohfeldian terms. Balkin aptly expresses this idea:

[M]y right of freedom of speech is defined by my right to inflict emotional injury on you when I say things that you do not like, as well as your nonright to prevent me from doing so and the government's duty to protect me in my infliction of injury on you.³⁸

The American Nazis' plan to march in Skokie surely harmed, and was meant to harm, the Holocaust survivors who lived in that community. Invalidation of the community's attempts to stop the march vindicated rights without denying that the exercise of these rights, even the threatened exercise of these rights, would inflict harm upon others.³⁹

The analysis does not change if we think that any adjudication of the constitutionality of Skokie's countermeasures against the threatened march would require that two rival sets of rights, those of the community of Holocaust survivors in Skokie and those of the prospective marchers, be appraised and prioritized in relation to one another. Doctrinal frameworks that allow for the conflict of rights simply multiply the no-harm principle's inherent difficulties. Consider, in this respect, the problem presented in *Lyng v. Northwest Indian Cemetery Protection Association*⁴⁰ in which the United States Forest Service wanted to build a logging road through Forest Service land, which, of course, was government property. Some Native Americans regarded that land as sacred to their faith. If the government builds the logging road, it desecrates the land and disables the joy and the sacredness that comes from the sacred space. However, if the sacredness of this space is honored, the government cannot make full use of its property right. We have conflicting uses.

38. Balkin, *supra* note 37, at 1122.

39. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (Blackmun, J., dissenting from denial of certiorari).

40. 485 U.S. 439 (1988). For further discussion of *Lyng* along the lines suggested here, see Ronald R. Garet, *Dancing to Music: An Interpretation of Mutuality*, 80 KY. L.J. 893, 940-48 (1992).

By showing in a new economic light what Hohfeld's framework of jural correlatives had already disclosed to us—that “harms” (externalities) are not properties of actions or objects but reciprocal relationships—the Coase Theorem⁴¹ helps us see that such conflicting uses are not the exception but the norm. Coase also tells us that in the absence of transaction costs and inalienability rules, market transactions will transfer the use right to the party who values it more.⁴² It is hard to imagine a church autonomy rule that would enable such a transfer, at least in cases like *Lyng*. If the Forest Service is assigned the use right, the Indians cannot buy it; if the Indians are assigned the right, the Forest Service cannot buy it. As this result makes it implausible that any assignment of the right could be reconciled with the no-harm rule, it also lends some support to Professor Hamilton's worry about church autonomy and the public good (in the narrow sense that when the use right cannot be transferred to the party who values it more, the market mechanism cannot expand overall social welfare). But the worry applies symmetrically to both possible assignments of the use right. Neither assignment to the government nor to the “church” enables a welfare-expanding transfer. Neither assignment is for a “public good” in that (perhaps somewhat restrictive) sense.

D. The Argument from Torquemada

Finally, Professor Hamilton argues (perhaps I oversimplify) that if you do not like the Inquisition, you should not like church autonomy. But the Inquisition, the rack to which Professor Hamilton refers us, is not an illustration of church autonomy. The rack is an illustration of the opposite. The rack is an illustration of government and religion working together and government force being applied coercively to advance religious faith (or, more precisely, a horrible mockery of religious faith). I understand the church autonomy concepts to drive in the opposite direction. If you do not like the rack and the screw, you still have to think through the hard question of whether you like some set of governmental

41. DAVID N. HYMAN, PUBLIC FINANCE: A CONTEMPORARY APPLICATION OF THEORY TO POLICY 119–31 (3d ed. 1990); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

42. Coase, *supra* note 41, at 15–19.

disabilities whose correlative is church immunity, or some set of church immunities whose correlative is governmental disability. The burden of my argument has been that first principles—such as the idea of the rule of law, the premise that republican government is oriented to a public not a private good, the no-harm rule, and the disfavored status of torture (whether inflicted by those who purport to act for religion, government, or some combination of both)—do little to specify which disability/immunity packages (if any) are acceptable and which (if any) are not.

V. AUTONOMY, COMMUNALITY, AND RIGHTS-BASED JUSTIFICATIONS FOR CHURCH AUTONOMY

I return now to Professor Scharffs's theory. Discussing autonomy in the second of the three senses I have distinguished—that is, autonomy as a principle of practical reasonableness or as a notion of human flourishing—Professor Scharffs refers to Kant and to Sartre.⁴³ I think if they were here with us these two notable moralists would be unhappy that autonomy, which they understood in their different ways as a moral stricture pertaining to personal agents, is broadened or flattened out in its meaning so as to extend to institutions and groups. For Kant, we are autonomous agents in the sense that as persons we are members of a kingdom of ends.⁴⁴ We live in the realm of necessity and also in a realm of freedom.⁴⁵ That is our unique transcendence or opportunity as persons. I do not know that Kant thought that organizations straddle that boundary.

Professor Scharffs refers also to Sartre's concept of the "for-itself."⁴⁶ Sartre was explicit that only the individual consciousness is the for-itself. There is no *Mitsein* for Sartre, no group for-itself. Groups are Masochism or Sadism. Groups are one for-itself making another into an object.⁴⁷

43. Scharffs, *supra* note 2, at 1248–51.

44. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 100–02 (H.J. Paton trans., 1964).

45. *Id.* at 114.

46. Scharffs, *supra* note 2, at 1249 n.111.

47. For a discussion of Kant and Sartre in connection with the question of whether there is a metaphysical interpretation of or foundation for the rights of groups, see Garet, *supra* note 20, at 1065–75.

There is every possibility that I have misunderstood Kant and/or Sartre, and even if I have not—even if their conceptions of autonomy resist extension to groups or institutions—it may be that other conceptions of autonomy are not so resistant. But are we well-advised to take a concept (autonomy) that has its home in the personal life and extend it (in the form of church autonomy and state autonomy) to the group and the social levels?

Are there not other aspects of the human good that belong more centrally to group life? The joy that comes with communion, the joy of worship, the reality of being and belonging together, being a part of something that does not die in the way that the embodied human person dies—these are sustaining goods, as is the opportunity for relationships of mutuality and self-giving, in which we make and deepen commitments to love and provide for one another. These goods figure prominently in the worth of communities, including faith communities.

In an earlier essay, I wrote about the worth as well as the vulnerability of relations of supportive union and drew upon (what I called) “pastoral hymns to communality” to illustrate and affirm these relations.⁴⁸ The sublimity of the landscape that forms the natural setting for our moral efforts not only motivates and soothes us but elevates our understanding of what we share with one another. The pastoral hymn to communality enables us to say, and in saying more deeply hope, that the worth of this sharing cannot be negated or defeated by time and by our own mortality.

Dean Worthen, the words of the hymn that you read to us this morning when you opened our conference lend articulate form to these ideas. Just as you said, the beautiful mountains that we admired as we came to the law school to begin our work at the conference today direct our attention to the faith communities in which we live. If the mountains we see supply metaphors for our scholarly effort, the mountains we sing metamorphose beyond metaphor, becoming guarantors of the life we share together.

For the strength of the hills we bless thee,
Our God, our fathers' God;
Thou hast made thy children mighty

48. Garet, *supra* note 40, at 940–48.

By the touch of the mountain sod.
Thou hast led thy chosen Israel
To freedom's last abode;
For the strength of the hills we bless thee,
Our God, our fathers' God.

Thou hast led us here in safety
Where the mountain bulwark stands
As the guardian of the loved ones
Thou hast brought from many lands.
For the rock and for the river,
The valley's fertile sod,
For the strength of the hills we bless thee,
Our God, our fathers' God.⁴⁹

Thank you for beginning our day with these words. We resonate with them so powerfully because the mountains bring home to us what endures, what is stronger than we are, and what is other than us and yet is the ground of our being. That is joy and communion. It is not autonomy. It is a joy and communion that preserve us here in freedom's last abode.

49. Felicia D. Hemans (adapted by Edward L. Sloan), *For the Strength of the Hills*, in *HYMNS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 36 (1985).